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December 14, 2012

*By Hand Delivery*

Land Court  
Suffolk County Courthouse  
3 Pemberton Square  
Boston, MA 02108

Re: Tax lien Cases 10 TL 141224; 10 TL 141227; 05 TL 131554; 07 TL 135158; 07 TL 136128;  
08 TL 137071; 09 TL 139258; 10 TL 139881; 10 TL 140211; 10 TL 140214 - 140220; 10 TL  
140224; 11 TL 141885; 11 TL 142487; 11 TL 142490; 11 TL 142999; 11 TL 143001; 12 TL  
143454; 12 TL 144194 - 144203; 12 TL 144238 - 144242; 12 TL 144244 - 144248; 12 TL 144263 -  
144272; 12 TL 144310 - 144316; 12 TL 144594

Dear Sir or Madam:

Enclosed for filing in the above-referenced case please find the *Amicus Curiae Brief  
Of National Consumer Law Center*.

Please acknowledge your receipt and filing of same by date stamping the enclosed  
copy of this letter and returning it to me in the enclosed self-addressed, stamped envelope.

Thank you for your attention to this matter.

Sincerely,



John Roddy

Encs.

**COMMONWEALTH OF MASSACHUSETTS  
LAND COURT  
SUFFOLK COUNTY COURTHOUSE**

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TL 144594

("Private Taking" cases by Tallage Adams LLC; Sunrise Atlantic LLC; Georgia  
Asset Resolution Group LLC; Plymouth Park Tax Services LLC; Plymouth Park Tax  
Services LLC d/b/a XSP AND; Royal Tax Lien Services LLC as Custodian for  
Massachusetts Lien Servicing LLC; US Bank as Custodian for SASS Muni VI LLC and  
Massachusetts Lien Servicing LLC; and US Bank as Custodian for Tower DBW)

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**AMICUS CURIAE BRIEF OF NATIONAL CONSUMER LAW CENTER**

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Date: December 14, 2012

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## Introduction

The Court has recognized that municipalities' increasing use of tax lien sales to generate much needed revenue holds the potential for inequitable transfers of wealth from elderly or otherwise vulnerable homeowners to commercial entities. To the extent that such homeowners may have to pay multiples of the taxes in arrears to redeem their homes, or worse yet, suffer a foreclosure and thereby forfeit hundreds of thousands of dollars of equity for failure to pay a tax bill that may be only a few thousand dollars, the operation of Chapter 60's tax collection procedures in this burgeoning third party collection marketplace could be draconian. "Tax sales are or may be inequitably penal in effect; one may forfeit an estate of great worth for delinquency in paying a tax that is a minute fraction of the property's value." *Albertson v. Leca*, 447 A.2d 383, 388 (R.I. 1982) (citations omitted).

Amicus National Consumer Law Center ("NCLC") suggests that the Court and other interested public agencies have the authority to introduce consumer protections into the process that will reduce the prospect that a tax lien "purchaser may 'obtain acres for cents,' achieving through speculation what another has lost through misfortune." *Lessee of Hughey v. Horrel & Co.*, 2 Ohio 231, 233 (1826). See 4 Tiffany, *The Law of Real Property* § 1248 at 1153 (3d ed. 1975). Providing plain English notices that describe the tax taking procedure, its economic consequences, the ramifications of not promptly responding to the notices, and the availability of help at various stages of the process will inform consumers of their rights in a way that the current, arcane procedure does not. In addition, requiring personal service of these more informative

notices, and later in the process of Land Court filings, will ensure that the operative statutes are interpreted in a manner that safeguards them from an “as applied” due process challenge. Finally, using its equitable powers, the Court can set the terms of redemption to prevent the unnecessary loss of equity in a home.

None of the measures that NCLC proposes will affect the towns’ ability to collect delinquent taxes or sell tax liens. Nor will they affect the ability of third party purchasers to acquire these tax liens or collect upon them. NCLC submits these proposals in its role as an advocate for consumers, and as such, discusses the issue solely in that context.

There are three important ways that the tax lien process can be improved:

*Enhanced Notice Prior to Litigation:* the forms used by Massachusetts towns in the Demand for Overdue Taxes, Notice of Taking, and Instrument of Taking, respectively (M.G.L. c. 60, §§ 16, 53, and 54), are formalistic and devoid of any mention of either the homeowner’s right to redeem or the real consequences of non-response. Similar uninformative notices have been deemed unconstitutional in Rhode Island, *Pontes v. Cunha*, 310 F. Supp. 2d 447, 450 (D. R.I. 2004), and may well be subject to the same challenges here. This Court has the inherent authority to interpret these notice provisions to conform them to due process standards. In addition, the Court’s authority over the foreclosure process may be used to mandate the use of redemption rights disclosures at the incipient stages of the process, and require foreclosure petitioners to prove that homeowners were timely provided these disclosures. M.G.L. c. 60 §§ 66, 68; Land Court Rule 12. Cooperation between the Department of Revenue, Massachusetts

Municipal Association and the Treasurers and Collectors Association, working in conjunction with the Land Court, could rectify the deficiencies in the existing forms and make them useful and understandable to homeowners, as well as compliant with due process principles.

*Enhanced Notice of Tax Title Sale:* the Real Estate Settlement Procedures Act, 12 U.S.C. § 2605, *et seq.*, requires a lender to notify the homeowner of a sale or transfer or servicing rights. So, too, should a homeowner be given notice that his town has sold the right to collect the property taxes, potentially to foreclose, and how this procedure affects the homeowner's redemption rights. The Court should require this notice to provide the homeowner with the identity of the tax title purchaser and the price the purchaser paid to acquire nominal title to the home.

*Enhanced Foreclosure Notice And Flexible Redemption Terms:* The Land Court has historically exercised its authority over the foreclosure process to require petitioners to use certain forms and procedures. M.G.L. c. 60, §§ 66, 68. Given the real possibility that a homeowner may lose her home and all equity in it through "absolute title" being vested in the tax title purchaser (c. 60, § 64), the due process issues which this scenario raises call for personal service of the petition and an enhanced notice of rights and responsibilities. Such notice should clearly describe the process going forward, the homeowner's right of redemption, how that right may be exercised, and the resources available to assist the homeowner avoid the impending foreclosure. The Court also should exercise its equitable authority to set the terms of redemption to avoid harsh

results, for example, by allowing redemption through refinancing, sale, or a reverse mortgage where warranted.

NCLC's proposals are more fully described below.

## ARGUMENT

### **I. The Land Court's Broad Authority To Supervise Tax Title Proceedings Derives From Both Its General Authority As A Division Of The Superior Court And The Tax Sales Statute**

#### **A. The Land Court's General Authority**

The Land Court is a division of the Superior Court, and as such possesses all powers "in accordance with Massachusetts Rules of Civil Procedure as justice and equity may require." M.G.L. c. 185, at § 25, § 1. The Court obviously has the legal authority to interpret the statutes at issue to determine whether the notices required at each stage satisfy due process. The Land Court has exclusive jurisdiction in "all cases and matters cognizable under the general principles of equity jurisprudence where any right, title or interest in land is involved. . . ." *Id.*, at § 1(k). Thus, the Land Court's authority clearly extends to permit orders invoking equitable principles in the interest of justice.

#### **B. The Tax Sale Statute Gives The Land Court Specific Authority Over Tax Title Proceedings**

##### **1. The Land Court Has The Authority To Issue More Informative Notice Than Currently Exists In Foreclosure Proceedings**

Massachusetts statutes governing tax lien foreclosures vest in the Land Court the equitable discretion to supervise this process, including adjusting the amount, type, and style of notice to interested parties as well as the terms of redemption. As written, these

statutes specifically provide safety valves which the Land Court may use following the filing of foreclosure petitions. For instance, after a petition is filed, the Court orders a title examination to determine all interests in the land and notifies all interested persons “by registered mail” and “[s]uch other and *further* notice by publication *or otherwise shall be given as the court may at any time order.*” M.G.L. c. 60, § 66 (emphasis added).

Under a plain reading of the statute, the notice requirements - fundamental to ensuring that a property owner is informed of foreclosure before a deprivation of property - can thus be strengthened beyond the default standard of registered mail. Because property owners in tax lien cases face losing inordinate amounts of equity for much smaller tax liabilities, the interests of justice, not to mention due process concerns, call for enhanced protections mandated by the Court’s supervisory authority. For example, case 05 TL 131554 pending in this action involves a vast imbalance between liability and equity - specifically a \$407 tax lien on a property appraised for \$230,500.

## **2. The Land Court Has Broad Authority To Facilitate Redemption And Avoid Forfeiture In Foreclosure Proceedings**

Under the Massachusetts tax lien sale scheme, there are two distinct opportunities for a homeowner to redeem the property: an automatic right for the six-month period following the taking or assignment of tax title (M.G.L. c. 60, § 65), and an elective right available upon request as determined in the discretion of the Land Court upon the filing of a tax foreclosure action (M.G.L. c. 60, § 68). This authority of the Land Court to set the terms of redemption upon request plays a significant role in the statutory scheme by tempering the harshness of the brief, six-month automatic

redemption period. While many states provide much longer redemption periods of one to three years, *see* “The Other Foreclosure Crisis: Property Tax Lien Sales” National Consumer Law Center, 2012, at 35, they do not provide a similar broad grant of authority to a court to set the terms of redemption “within a time fixed by the court” and with “such other terms as justice and the circumstances warrant.” M.G.L. c. 60, § 68. By empowering the Land Court with the authority to facilitate redemption where appropriate, the Massachusetts General Court has determined that court-supervised redemption can be an effective tool in avoiding forfeiture.

Section 68 does not by its terms place any limits on this court-ordered redemption period, which is clearly distinct from the six-month redemption right available under Section 62. The Court may “in its discretion” allow redemption over any “time fixed by the court .” M.G.L. c. 60, § 68. Thus, the Land Court may permit a homeowner to pay the redemption amount in installments over a fixed period, which the Court has acknowledged it currently does in appropriate cases. For example, after considering the homeowner’s income and expenses, the Court may permit payment in monthly installments over an extended period, such as five years.

Moreover, the Land Court’s authority extends beyond merely setting terms for repayment plans. The Land Court may exercise its authority under Section 68 to set such “terms as justice and the circumstances warrant” by providing for redemption through the refinancing or sale of the property. Reverse mortgages can assist older property owners in redeeming property after a tax taking by making equity in the home available to pay the redemption amount, and in some cases even the post-redemption

ongoing property tax bills so as to avoid future problems. If residential property owners inform the Land Court that they are seeking a reverse mortgage or other financing, the Land Court may exercise its authority under Section 68 to extend the redemption period until the financing can be completed. Similarly, if owners have no ability to pay the redemption amount in installments and inform the Land Court that they wish to sell the property in order to avoid loss of equity, the Court may extend the redemption period to permit a voluntary sale of the property and enter appropriate orders to facilitate the sale and transfer of title to a new owner.

The most difficult cases are those in which substantial equity exists and no owner comes forward in the Land Court proceeding. As discussed later, NCLC is proposing enhanced notice and service requirements to help avoid this situation. However, if no response to a complaint to foreclose tax title is filed, and the Land Court determines that the property is owner-occupied and has not been abandoned, the Court should not enter a default under Section 67 and should require that the municipality or tax title purchaser notify appropriate social service or housing agencies, such as the local Councils on Aging (COAs) or the Massachusetts Executive Office of Elder Affairs. If these outreach attempts fail to resolve the matter, NCLC contends that Section 68 confers authority upon the Land Court to appoint a commissioner to sell the property. The redemption costs would then be paid by the commissioner upon sale of the property, and any surplus would be distributed to the owner and any creditors of the owner in a manner similar to that used for a surplus after a mortgage foreclosure or in a partition case.

## **II. The Land Court Should Exercise Its Authority To Ensure Informative Notice And Fair Procedures At All Stages Of The Proceedings**

### **A. The Right Of Redemption Is An Important Substantive Right Subject To Due Process Requirements**

The right of redemption is a significant property right, protected by statute in Massachusetts. A recent Rhode Island decision found that state's tax sale statute unconstitutional because it failed to provide adequate notice of a taxpayer's redemption rights prior to the filing of a foreclosure petition. *Pontes v. Cunha*, 310 F.Supp.2d at 450. The court found that the Rhode Island statute violated due process because the taxpayers were not informed of the statutory right to redeem or the procedures available to exercise the redemption right before the filing of the foreclosure petition. *Id.* at 450.

The *Pontes* court noted that the right of redemption is "part of a statutory scheme that is intended to protect property owners from the inequities that often exist in tax sales," and that the right "implicates one of 'life's basic necessities - the place where [one] lives.'" *Id.* at 454. Based on these factors the court recognized the right of redemption as "a significant property interest protected by the Due Process Clause." *Id.* See also *Orange County Comm'r of Fin. v. Helseth*, 875 N.Y.S.2d 754, 760 (N. Y. Sup. Ct. 2009) ("Notice of a right to redeem one's property from the municipality into which title vests following a tax lien foreclosure sale enjoys constitutional procedural due process protection.").

The *Pontes* court reasoned that although a taxpayer receives notice of the right of redemption after the petition to foreclose has been filed, this was insufficient. "[B]y the

time the taxpayer receives this notice the right of redemption has become burdened with interest, penalties, attorneys' fees, and court costs associated with contesting the foreclosure petition." The court recognized that "waiting to provide notice of the right of redemption until the end of the tax sale process effectively deprives the taxpayer of the right itself." *Id.* at 458.

**B. The Municipal Tax Lien Foreclosure Process Does Not Provide Any Notice Of Taxpayers' Redemption Rights Or The Consequences Of Foreclosure At Any Stage**

The right of redemption is just as significant to Massachusetts homeowners as it is to property owners in Rhode Island, and the same protections should be available to homeowners here. The tax lien process contains six major steps, but at no point in the process are taxpayers informed of their most important right – that of redemption. Nor do the applicable statutes expressly require a description of the equity forfeiture mandated by section 64. These steps are as follows:

1. The Town issues formal demand for overdue taxes (M.G.L. c. 60, § 16). Interest at 14% begins to accrue 30 days after bill is issued (M.G.L. c. 60, § 57). This "formal demand" is typically just an updated tax bill, with interest added. See sample demand from Town of Dracut, attached as Exhibit A.
2. If the homeowner does not respond within 14 days, the Town may issue a Notice of Taking (M.G.L. c. 60, § 53). A sample form of Notice of Taking is attached as Exhibit B.
3. If the homeowner does not respond, the Town may issue an Instrument of Taking. Interest may be increased to 16% upon the taking (M.G.L. c. 60, § 62). Title then vests in the Town subject to the taxpayer's right of redemption. A sample form of this Instrument of Taking is attached as Exhibit C.
4. A six month redemption period then commences (M.G.L. c. 60, § 65).
5. When the six month redemption period expires the Town may file a Petition for Foreclosure (M.G.L. c. 60, § 65). Upon filing of petition, the Land Court appoints

a title examiner to identify the interested parties. The Land Court issues citations to those identified in the title abstract (M.G.L. c. 60, § 66).

6. The Land Court rules on the Petition. The Land Court Recorder often enters default because the taxpayer does not file a response to the petition. The Town may then file a motion for entry of judgment of foreclosure. Importantly, if the homeowner responds and requests that the court set the terms of redemption, the tax sale process affords the homeowner another opportunity to redeem the property beyond the six-month period provided under Section 65 (M.G.L. c. 60, § 68).

After the tax taking, the municipality may assign its rights to a third party under Section 2C (request for bids) or Section 52 (public auction), with the purchasers being bound by the same foreclosure process and six-month redemption period. Both provisions require publication notice of a list of the tax receivables to be assigned by the municipality through the bidding or auction process. *See id.*, § 2C(b) (requiring 60 days' notice of all receivables subject to assignment); § 52 (requiring 14 days' notice of time and place of public auction).

Importantly, however, neither provision expressly requires adequate notice of the rights or remedies available to the individual property owner, which due process requires. Under Section 2C, after the assignment, the purchaser must only give notice to the taxpayer of the name, address, telephone number and preferred method of communication of the purchaser and any service agent within twelve days of purchasing. *Id.*, § 2C(c)(9). Under Section 52, the municipality is merely required to send a notice of the intended assignment to the property owner not less than ten days prior to the assignment. *Id.*, § 52. No additional notice is required under section 52 that would

inform the homeowner whether tax title was in fact assigned or to whom it was assigned.

The practices described above provide the sum total of communications the taxpayer receives regarding the tax delinquency. Through the entirety of this process, no statutorily mandated notice sufficiently explains the severe ramifications the taxpayer faces for failure to pay a delinquent property tax. In addition, the multitude of filing deadlines, changing interest rates, and different parties claiming rights to the title merely serve to create a confusing procedural maze for property owners who have fallen behind on small tax liabilities. Even more egregious is the lack of notice a taxpayer receives of his right to redeem the property in order to prevent foreclosure. Without more, taxpayers face losing all of their equity despite being given virtually no information about how to challenge or remedy the delinquency and prevent the taking of their homes.

**C. Because A Taking Affects A Significant Property Right, This Court Should Use Its General Authority To Interpret The Demand And Notice Of Taking Provisions To Require Notice That Satisfies Due Process**

**1. Even Before A Foreclosure Is Initiated, Due Process Requires Notice That Is Sufficiently Informative To Allow A Taxpayer To Protect Her Rights**

The provisions cited above in Section II.B require a notice that taxes are overdue and a notice of taking. Yet neither states exactly what the respective notices should say, other than that a notice of sale describe the land to be sold and the amount of taxes assessed. M.G.L. c. 60, §§ 40, 53. Thus it is left to the Court to decide what notice is due, in light of constitutional principles.

Under both Massachusetts and Supreme Court jurisprudence, actual notice is required before property is sold for non-payment of taxes. In *Christian v. Mooney*, 400 Mass. 753, 761, 511 N.E.2d 587 (1987), the Supreme Judicial Court, citing *Mennonite Bd. Of Missions v. Adams*, 462 U.S. 791, 799–800 (1982), stated: “[f]ailure to give notice to a mortgagee of record, by personal service or by mail, of a proceeding to sell the mortgaged property for nonpayment of taxes is a denial of due process of law.” In 1988, the Appeals Court examined the notice necessary to comply with due process in the context of a tax foreclosure. *City of Boston v. James*, 26 Mass. App. Ct. 625, 628-29, 530 N.E.2d 1254, 1255-56 (1988). There the city failed to use sufficient diligence when sending notice to a taxpayer, using an old address and neglecting to use a more current address contained in its own records. *Id.*

In finding that the taxpayer was deprived of due process, the Appeals Court quoted *Mullane*: “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is 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.” Notice which is a “mere gesture [as here] is not due process.” *City of Boston v. James*, 26 Mass. App. Ct. at 628, 530 N.E.2d at 1256, citing and quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 315.

While these cases primarily address the *method* of giving notice, either by mail, publication, or personal service, other cases outside the tax sale process address the content necessary to satisfy due process before a deprivation occurs. Generally, to be adequate, notice must contain sufficient information to allow the recipient to protect his

or her rights. For example, before an individual may be deprived of his protected property interest in a professional license, due process requires that the notice inform him of the allegations against him, and the possible sanctions. *See, e.g., Krusling v. Ohio Bd. of Pharmacy*, 2012-Ohio-5356 (2012), citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). *See also Manchester v. Selectmen of Nantucket*, 335 Mass. 156, 158-159, 138 N.E.2d 766 (1956) (purpose of notice is to inform the license holder with reasonable particularity of the charges that he will be called upon to meet at the hearing so that he can properly prepare his defense); *Konstantopoulos v. Whately*, 384 Mass. 123, 424 N.E.2d 210 (1981) (due process violated where plaintiff given oral notice of revocation hearing only 1.5 hours before hearing, without informing him of reasons for hearing); *LaPointe v. License Bd. of Worcester*, 389 Mass. 454, 458, 451 N.E.2d 112, 116 (1983) (letter which gave no grounds for license revocation likely violated due process).

Notice must be sufficient to inform the recipient as to the action being taken. *In re Adoption of Zev*, 73 Mass. App. Ct. 905, 906, 899 N.E.2d 111, 113 (2009) (in action to terminate parental rights, where notice stated that a pretrial would be held on certain date, and on that date judge converted pretrial to a trial, mother did not receive constitutionally adequate notice of the trial). *See also Pinkowitz v. Edinburg*, 22 Mass. App. Ct. 180, 186, 492 N.E.2d 1153 (1986) (“purpose of notice is to give fair warning to a party of the nature of an opponent's claim, a reasonable opportunity to engage counsel, and the time to prepare to oppose the claim”).

The tax sale statute does not specify the content of either the demand or the notice of taking, therefore this Court can and should interpret those provisions to

require notice that comports with minimal due process, before a town is authorized to deprive taxpayers of their property rights. Due process would require that notices inform taxpayers of their redemption rights, the consequences of failing to pay their overdue taxes, the imposition of 14%-16% interest, other fees and costs, and the potential for total loss of equity.

The current notices do not appear to provide the minimal information homeowners need to protect their rights, the basic purpose of a notice. Nor is it reasonable to assume that any taxpayer would be aware of these consequences absent notice from the town. Here, given the profound interests at stake, the likelihood that a taxpayer would be unaware of the extreme consequences of the process, and the relatively slight burden a notice requirement would impose, due process requires at a minimum a plain language notice that clearly discloses the right of redemption, the costs of redemption, and the potential loss of all equity be provided before a complaint to foreclose the redemption right is filed in the Land Court.

It may be suggested that homeowners are eventually provided notice of the right of redemption when they are served with the Land Court foreclosure action. However, that notice is provided too late in the process to have any meaningful effect, as noted by the *Pontes* court. More significantly, the complaint itself may serve to deter homeowners from exercising the redemption right and from participating in the Land Court proceeding. The "Complaint To Foreclose Tax Lien," Land Court Form LCP-5, used in these proceedings asserts that "more than six months from the date of said sale/taking have elapsed and no redemption has been made." This suggests that there is no

continuing right to redeem after the six month period. In addition, there is no mention in the Complaint or in the accompanying Notice of Filing Complaint, Land Court Form LCN-2, of the statutory right of the homeowner to request that the Land Court set the terms for redemption. Without the assistance of counsel, it is unlikely that a homeowner would ascertain from these forms that any right to redeem still exists after the complaint is filed.

**2. To Be Adequate, Notices Should Contain Key Information In Plain English**

In exercising its authority over redemption foreclosure proceedings, the Land Court should require that the petitioner prove, as a condition precedent to filing a complaint to foreclose a right of redemption, that notice disclosing the following has been provided to the homeowner no later than the date of the Notice of Taking:

- A statement that a complaint to foreclose the tax title may be filed on or after a specified date;
- The date the property was taken or the tax title was purchased;
- The name, address, and contact information for the purchaser of the tax title or the purchaser's assignee;
- A statement explaining:
  - (a) why the property was taken or the tax title assigned; (b) that the owner may redeem the property and the date when the redemption period expires;
  - (b) the components of the amount required to redeem the property, and that even though the owner may request that the Land Court set terms for redemption after the redemption period expires, there are important reasons for the owner to redeem before the complaint is filed, including avoiding additional interest and costs;
  - (c) the procedure for redemption;

(d) that if a complaint to foreclose the tax title is filed and the owner does not respond by filing an answer, the Court may enter an order defaulting the owner;

(e) that if a complaint to foreclose the tax title is filed, the owner may respond by filing an answer that requests that the Court set the terms by which the owner may redeem the property;

(f) that if the property is not redeemed, the town or purchaser is entitled to receive an order from the Land Court that completes a transfer of ownership of the property to the town or purchaser and permanently eliminates any rights the owner has in the property;

(g) that if the property is not redeemed, the owner will lose all equity in the property and is not entitled to any surplus if the property is resold by the town or purchaser.

**D. Due Process Also Requires That Notice Be Properly Served: The Land Court Should Require Personal Service Of The Notice Of Taking, Instrument Of Taking And Foreclosure Petition**

Not only must the content of the notice be sufficient to apprise the taxpayer of his or her rights, the method of service should be designed to ensure maximum likelihood that the notice is received, in light of the gravity of the interests at stake. Here, in order to overcome the putative procedural defects currently arising in the tax lien foreclosure cases and properly effectuate the public policy in favor of allowing the taxpayer to redeem their property, the Land Court should require personal service of the recommended notices. Specifically, the Court should adopt the standard of Section 53, which requires service by the same means as subpoenas of witnesses in civil cases. Service of civil process for a witness requires a qualified officer or disinterested person to exhibit and read the summons to the witness, by giving him a copy thereof or by leaving a copy at his place of abode. M.G.L. c. 233, § 2.

“Actual notice is [a] minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party.” *Mennonite Bd. Of Missions v. Adams*, 462 U.S. 791, 800 (1982). Although the Supreme Judicial Court upheld the Section 66 standard of “registered mail, return receipt requested” as a sufficient means to protect the constitutional requirements of due process in *Town of Andover v. State Fin. Servs.*, 432 Mass. 571 (2000), the court expressly noted the sophistication of the foreclosed party and its familiarity with the process. *Id.* at 841 (“Sophisticated property owners such as State Financial are aware that failure to pay property taxes will result in tax takings and foreclosure proceedings and that notice of these consequences arrives by mail.”). Clearly, many ordinary property owners facing delinquent tax burdens do not qualify as “sophisticated” parties who know that a mailed letter may be their only notice of delinquency. In *Town of Andover* the court limited its holding to the facts presented and did not announce a uniform approval of the statute, noting that it was weighing in on the constitutionality of the statute as applied to the facts before it. *Id.* In the circumstances present here, the Land Court should exercise its equitable authority to assure that the taxpayers receive personal service of the plain English notices.

### **III. Failure To Mandate Adequate Notice Properly Served May Result In A Process That Runs Afoul Of Constitutional Protections Against Grossly Excessive Punishment**

In *Kelly v. City of Boston*, the Supreme Judicial Court confirmed its view that the Legislature intended the tax lien foreclosure process to cause a forfeiture of the property owner’s equity to the municipality. “We think it is clear from the above history of the tax statutes that the Legislature intended the surplus from a sale of land taken for

nonpayment of taxes, on which the right of redemption has been foreclosed in the Land Court, to belong to the municipality." *Kelly v. City of Boston*, 348 Mass. 385, 388, 204 N.E.2d 123, 125 (1965).

But the Supreme Judicial Court never contemplated the private tax lien marketplace almost 50 years hence, where private entities stand to reap such "windfalls." *See, e.g., "The Other Foreclosure Crisis: Property Tax Lien Sales"* National Consumer Law Center, 38 (2012) (detailing how the Virginia based Mooring Tax Asset Group obtained the \$150,000.00 in equity that Betty Museus, an elderly woman in Montana had saved in her home when it purchased and foreclosed on her \$5,822.09 tax debt). As distinct from the government's recognized right to command a forfeiture, where a private party lays claim to such a windfall from a tax lien foreclosure the equity foreclosure is akin to a punitive damages award that violates substantive due process.

"The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996) (citing *TXO Productions Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993)). The delinquent taxpayers in the cases pending before the Court are homeowners. While these homeowners should be required to make their payments, the ultimate punishment for failure to do so is extreme and grossly excessive. M.G.L. c. 60 § 43 provides a harsh deterrent for failure to pay taxes by giving the municipality the right to take and sell the home in order to satisfy a past due tax bill. But allowing a private foreclosing entity to retain all of the stored value in the home after the sale can

result in a windfall to the foreclosing entity that is grossly excessive, and for that reason may violate the principles of *Gore*.

Two examples from “The Other Foreclosure Crisis: Property Tax Lien Sales,” National Consumer Law Center, 9, 38 (2012) highlight this issue. An 81-year-old Rhode Island homeowner was evicted two weeks before Christmas from the home she had lived in for more than 40 years because she had fallen behind on a \$474 sewer bill. A corporation bought her house at a tax sale for \$836.39 and then resold it for \$85,000. *Id.* at 9. Another elderly homeowner, Frank Cummings, nearly lost his condominium in New Jersey after it was sold at a tax sale because he failed to pay a \$716.45 tax bill. If the tax sale certificate were foreclosed, Mr. Cummings would have lost approximately \$120,000 of his equity in the condominium. As fate would have it, Mr. Cummings was able to obtain assistance through the court, which eventually found that he was improperly served, giving him the opportunity to redeem his home. *Id.* at 38.

In determining whether an award is grossly excessive, the Supreme Court has developed three guideposts: degree of reprehensibility, disparity between the harm or potential harm suffered by the complainant and the punitive damages award, and the difference between this remedy and the civil penalties authorized or imposed in comparable cases. *See BMW of North America, Inc. v. Gore* 517 U.S. at 575. In *Gore*, the Court suggested that BMW’s conduct was reprehensible because it involved “trickery and deceit.” *Id.* at 576. In the cases at issue here, careful review of the owner occupied homes would likely show that the taxpayers were victims of circumstance and were

simply unable to pay their taxes as they became due. And the harm to the municipality is purely economic. There was nothing reprehensible about the homeowners' conduct.

The second factor considers the ratio of the harm suffered by the complainant (here the third party tax lien buyers) and the punitive damages award resulting from the case. In similar delinquent taxpayer cases, the harm suffered is typically a few hundred to a few thousand dollars, yet the "punitive damages" resulting from the homeowner's inability to pay the past due taxes are exponentially huge. The amount of equity lost due to a tax lien foreclosure may dwarf the underlying tax liability. The ratio between the two can exceed 500:1, as in the case of 05 TL 131554 (\$407 tax vs. \$230,500 property value). In *BMW v Gore* the Supreme Court found that such a ratio of punitive to actual damages violates due process, and suggested that single digit ratios represent the punitive damages ceiling. *BMW v. Gore*, at 560 (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460, 113 S. Ct. 2711, 2721, 125 L. Ed. 2d 366 (1993)). Where a homeowner's loss of equity represents an unconscionable punishment for the infraction of not paying taxes, and where the beneficiary of this unconscionable penalty is a commercial entity, the Land Court should interpret c. 60, §§ 64-68 to preserve their constitutionality, and to avoid unconscionable losses of homeowners' equity as measured by *Gore* and its progeny.

NCLC expects that implementation of the prophylactic disclosures and procedural steps it proposes in this amicus brief, or others the Court may devise, will enhance redemptions and preserve homes. To that end, NCLC believes that such consumer protections are likely to make the equity forfeiture issue moot.

## Conclusion

Offering supplemented, plain English disclosures properly explaining the taxpayers' redemption rights and the consequences of default will only run the cost of the paper on which the notices are printed. NCLC's expectation is that these prophylactic measures will enhance redemption rates and preserve homes.

To the extent that fellow Amici emphasize the importance of private tax lien purchases as contributing to the financial stability of municipalities, concerns of disruption in the process are misplaced. *See City of Worcester Amicus*, at 13 ("Making the collection and lien enforcement provisions of these statutes more complicated will only have a detrimental effect of Worcester's finances."). NCLC's proposals in no way diminish the benefits the municipalities receive through these tax lien sales. Municipalities remain free to assign delinquent tax liens in order to generate much needed revenue. Additionally, investors maintain the same incentives to purchase the liens because the interest and fee structure remains intact.

Fundamentally, the Land Court should be guided by the governing precept that it is "the policy of the law to favor redemption from tax sales." *See Union Trust Co. v. Reed*, 213 Mass. 199, 201 (1912). Therefore, it is appropriate for the Court to take whatever reasonable steps are necessary to protect homeowners from incurring compound interest and fees on delinquent tax liens. And in the forfeiture context, the Court should favor redemption over the prospect of having consumers lose their homes, and investors reaping equity windfalls as a result, when such outcomes can be avoided by the measures described in this brief.

Respectfully submitted,



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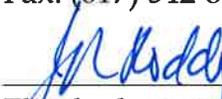
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December 14, 2012

## Certificate of Service

I, John Roddy, certify that on December 14, 2012 I caused a copy of the foregoing *Amicus Curiae Brief of National Consumer Law Center* in response to the Court's request for Amici submissions to be sent by electronic mail to the following:

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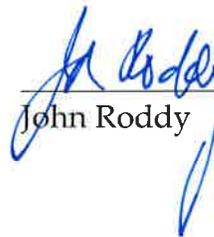
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John Roddy

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***EXHIBIT A***

Interest at a rate of 14% per annum will accrue on overdue payments until payment is made.

**FISCAL 2006**  
**REAL ESTATE TAX**

Collector of Taxes <b>Deborah A. Barton</b>		<i>The Commonwealth of Massachusetts</i>				ISSUE DATE: 12/31/2005		
Your actual Real Estate Tax for the fiscal year beginning July 1, 2005 and ending June 30, 2006 on the parcel of REAL ESTATE described below is as follows:		Town of Dracut 62 Arlington Street Dracut, MA 01826				BILL NUMBER: 737 MAP/BLOCK/LOT: 15-0-64		
PROPERTY DESCRIPTION		TAX SUMMARY					Total Real Estate Tax & Special Assessments	
LOCATION:		Tax Rate	Residential	OpenSpace	Comm.	Industrial	Preliminary Tax	\$2,633.27
234 PASSACONAWAY DR		PER \$1000	\$ 9.38	\$ 9.38	\$ 9.38	\$ 9.38	Preliminary Credits	\$1,063.47
ACRES: 15,000 sq ft	CLASS: 101	Sewer Lien			\$354.26		Preliminary Balance	\$0.00
BOOK/PAGE: 02478 / 0378	<b>PAID</b> <b>JAN 04 2006</b>		Total Special Assessments			\$354.26	Interest on Balance	\$1,063.47
DEED DATE			Real Estate Tax			\$2,234.32	3 <sup>RD</sup> Quarter Due	\$56.30
TOTAL VALUE \$238,200			CPA Tax			\$44.69	3 <sup>RD</sup> Quarter Lien Amount	\$607.77
234 PASSACONAWAY DR DRACUT, MA 01826-2131		FY 06 Tax		\$2,633.27		3 <sup>RD</sup> Quarter Abatement	\$177.13	
		Third Quarter Tax		\$607.77		Pay this Amount	\$0.00	
		Fourth Quarter Tax		\$607.77		Due & Payable	<b>\$1,904.67</b>	
							2/01/2006	

01 06 046799 0000190467 020106 00001904671

Interest at a rate of 14% per annum will accrue on overdue payments until payment is made.

SEE REVERSE SIDE FOR IMPORTANT INFORMATION.





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***EXHIBIT C***

**This instrument must be filed for record or registration within 60 days from its date**

State Tax Form 301A  
Issued 3/2009

**COMMONWEALTH OF MASSACHUSETTS**

G.L. c. 60, §§ 53 and 54

\_\_\_\_\_  
Name of city or town

**INSTRUMENT OF TAKING BY ASSIGNEE**

I, \_\_\_\_\_ (name, position, company and address), assignee of tax receivables under General Laws Chapter 60, Section 2C from the Collector of Taxes for the City/Town of \_\_\_\_\_ under an instrument of assignment dated \_\_\_\_\_, \_\_\_\_\_ and recorded/registered on \_\_\_\_\_, \_\_\_\_\_, with the \_\_\_\_\_ Registry of Deeds, Book \_\_\_\_\_ Page \_\_\_\_\_, Document Number \_\_\_\_\_, Certificate of Title Number \_\_\_\_\_, acting under Chapter 60, Sections 53 and 54, hereby take for the assignee the real property described below:

**DESCRIPTION OF PROPERTY**

(The description must be sufficiently accurate to identify the property and must agree with the notice of taking. In the case of registered land, the Certificate of Title Number and the Registration Volume and Page must be given.)

This land is taken because taxes, as defined in Chapter 60, Section 43, assessed on the property to \_\_\_\_\_ for the fiscal year \_\_\_\_\_ were not paid within 14 days after a demand for payment was made on \_\_\_\_\_ on \_\_\_\_\_, \_\_\_\_\_. After notice of intention to take the land was given as required by law, they remain unpaid along with interest and incidental expenses and costs to the date of taking as follows:

Fiscal Year _____ Taxes Remaining Unpaid	\$ _____
Interest to Date of Taking	\$ _____
Incidental Expenses and Costs to Date of Taking	\$ _____
<b>Total for which Land is Taken</b>	<b>\$ _____</b>

Executed as a sealed instrument on \_\_\_\_\_, \_\_\_\_\_  
\_\_\_\_\_  
Signature of Assignee  
\_\_\_\_\_  
Printed/Typed Name of Assignee

**THE COMMONWEALTH OF MASSACHUSETTS**

ss.

Date

On this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, before me, the undersigned notary public, personally appeared \_\_\_\_\_, proved to me through satisfactory evidence of identification, which were \_\_\_\_\_, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he/she signed it voluntarily for its stated purpose, as \_\_\_\_\_ (partner/title/position) for \_\_\_\_\_ (name of company), a partnership/corporation/\_\_\_\_\_, and assignee of tax receivables under Chapter 60, Section 2C from the Collector of Taxes for the City/Town of \_\_\_\_\_.

My commission expires \_\_\_\_\_  
\_\_\_\_\_  
Signature of Notary Public  
\_\_\_\_\_  
Printed/Typed Name of Notary Public