

## WHEN THE POSTMAN RINGS TWICE (OR THE TALE OF THE NEGLIGENT MAILCARRIER)

The Tax Collection process depends very heavily on the United States Postal Service. Tax Bills are sent by mail; Demand Notices are sent by mail; Land Court Citations are sent by certified mail. The vast majority of mail sent by Assessors, Tax Collectors, Treasurers and the Land Court accurately reaches its intended destination. However, what happens when the intended destination is incorrect?

In 1914 a Special Commission was appointed by the Governor and General Court of Massachusetts to review and make recommendations regarding the practices and procedures followed by tax collectors and the process by which land was sold for non-payment of taxes.<sup>1</sup> The Commission held hearings across the Commonwealth.<sup>2</sup> As a result of the hearings and testimony, the Commission found that only about two out of every one hundred tax titles were valid in large part due to issues surrounding lack of actual notice and therefore lack of due process.<sup>3</sup> The Commission proposed legislation that created a process that sought to secure actual notice on real parties in interest and gave exclusive jurisdiction over the process

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<sup>1</sup>Chapter 121 of the Acts and Resolves of 1914

<sup>2</sup>The Commission held hearings in Boston, Springfield, Pittsfield, Fall River and Worcester and also heard testimony from tax collectors, the Tax Collectors Association, corporation counsel of various cities, the Association of City and Town Solicitors, assessors and individual tax title buyers. Report, House Doc.# 1600 of 1914, page 3 (January, 1915).

<sup>3</sup>Report, page 18.

to the Land Court<sup>4</sup>. It appears that the Special Commission believed that by creating a process that was substantially similar to the process by which the Land Court oversaw the registration of land that due process would be protected.<sup>5</sup> The process has remained substantially unchanged over the past 90 years.

The vast majority of challenges to the validity of tax foreclosures are based on the alleged failure of interested parties to receive notice. The Land Court's dogged determination to insure that sufficient notice has been provided has caused much frustration among municipalities, but it is this determination of the Land Court that actually protects the tax foreclosure process from attack as an inverse condemnation or regulatory taking.<sup>6</sup>

The U.S. Supreme Court decision in *Jones v. Flowers*, 547 US 220 (2006) involved a challenge to a real estate tax foreclosure in Arkansas. The decision discussed the challenges in trying to provide notice. Among these challenges was the possibility that the U.S. Mailcarrier negligently delivered the mail. For the purposes of this paper, it is assumed that there are not many negligent mailcarriers in Massachusetts.

There are certain practical steps that can be taken to reduce possible attacks on the validity of assessments, collections and takings. The first step is local adoption of the provisions of Chapter 59, Section 57D - Affidavit of Address. However, mere adoption of Section 57D is not enough. Section 57D provides that:

“Any legal notice mailed to the address listed in the affidavit, whether the address of the owner of record of his agent, shall be presumed to be good and

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<sup>4</sup>Report, page 19.

<sup>5</sup>The Special Commission discussed the importance of actual notice at page 19 of the report. The Special Commission also proposed in Section 14 of the proposed legislation that the process “shall conform as nearly as possible to the land court practice, rules, regulations and procedure in relation to matters of land registration.”

<sup>6</sup>Exhibit “A” presents a chart which sets forth the basic notice requirements as determined by the U.S. Supreme Court in their relevant decisions.

sufficient service for the purpose of instituting any legal action relating to the property”

However, the U.S. Supreme Court has stated that although mailing to the address provided in the Affidavit of Address provides strong support that the mailing was reasonably calculated to reach the taxpayer, it is not reasonable to assume that nothing further must be done when the letter is returned unclaimed.<sup>7</sup> Therefore, tax collectors and assessors should review all returned mail and through due diligence identify the correct address for the bill. Sometimes, the tax bill is being mailed to one address while the municipal water or municipal electric bill is being mailed to another address. Other sources of possible information are the voter registration system and the motor vehicle excise tax database. If all else fails, a private investigator could be retained to try and locate the taxpayer. The costs associated with such due diligence could be added to the outstanding tax and collected pursuant to Chapter 59, Section 12F.

If returned bills are not researched when they are returned to the tax collector, it is possible that a taking based on the non-payment of the tax bills could be deemed invalid resulting in a disclaimer. The likelihood of locating the taxpayer diminishes with the passage of time. Further, if a conveyance occurs before the new taking is made, the lien could be lost on some of the unpaid years.<sup>8</sup> If the lien is lost on a certain year, the liability remains a personal liability of the taxpayer and may be collected by set-off, suit, license, revocation or other remedies.<sup>9</sup>

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<sup>7</sup>*Jones v. Flowers* at 230.

<sup>8</sup>Chapter 60, Section 37

<sup>9</sup>Letter of Kathleen Colleary, Chief, Bureau of Municipal Finance Law to Christine M. Goodwin, Treasurer of Ashland (November 15, 2006).

Land Court will require the very same due diligent search before the foreclosure case can proceed.

Therefore, it is a prudent fiscal practice for the tax collector, assessors and other municipal offices to develop a collaborative process to identify the correct addresses for returned mail. Such a regular practice could then be used as evidence of due diligence.

As with any such matter, Treasurers & Collectors should discuss the issues raised by this paper with their Tax Title Attorney and Town Counsel or City Solicitor.