257-261 20th AVENUE REALTY, LLC, Plaintiff/Appellant, v. ALESSANDRO ROBERTO, Defendant/Respondent, and FANNY ROBERTO, wife of ALESSANDRO ROBERTO, KELLER DEPKEN FUEL OIL COMPANY INC. a/k/a HOP ENERGY LLC, and MIDLAND FUNDING LLC, Defendants.	SUPREME COURT OF NEW JERSEY Docket No.: 088959 CIVIL ACTION On Petition for Certification from: Superior Court of New Jersey Appellate Division Docket No.: A-3315-21 Sat below: Judges Sumners, Smith and Perez Friscia

BRIEF OF *AMICUS CURIAE* INVEST NEWARK

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PRELIMINARY STATEMENT and INTEREST OF AMICUS

Invest Newark (f/k/a the Newark Community Economic Development Corp. and, before that, as the Brick City Development Corp.) is a 501(c)(3) nonprofit corporation whose mission is "to advance Newark's global competitiveness by growing a strong economy, building vibrant communities, and increasing economic prosperity for all Newarkers." Invest Newark operates the Newark Land Bank, New Jersey's *first* and (for now) *only* Land Bank created under the New Jersey Land Bank Law, P.L. 2019, c. 159, *N.J.S.A.* 40A:12A-74 *et seq.* (the "Land Bank Law"). Invest Newark was recently recognized as one of only 74 economic development organizations to be selected by The International Economic Development Council as an Accredited Economic Development Organization. Randolph Cert., ¶¶ 6-7.[1]

Land Banks nationally, and Invest Newark specifically, deal with a certain type of tax-delinquent property, namely vacant, abandoned or deteriorating properties ("VAD properties"). Land Banks are unique entities singularly focused on returning VAD properties into productive uses in an equitable, community-centered way. Randolph Cert., ¶ 12.

[1] References herein to "Randolph Cert." refer to the Certification of Marcus Randolph, the President and Chief Executive Officer of Invest Newark, which was previously submitted in support of Invest Newark's Motion for Leave to Appear as Amicus Curiae.

Invest Newark believes that the instant case presents a matter of significant public importance, not only to residents of Newark, but potentially to the State as a whole. As a result, Invest Newark seeks to lend its expertise to the Court in this matter so that the Court will have a better understanding of the statewide ramifications of the issues in the present matter.

Here, the Appellate Division's decision, relying upon the United States Supreme Court's decision in *Tyler v. Hennepin Cty.*, 598 U.S. 631 (2023), substantially overhauled the procedures that govern tax foreclosure which are set forth in the Tax Sale Law, *N.J.S.A.* 54:5-1 et seq. (the "TSL"). More specifically, if the Appellate Division's decision is not modified to address the VAD properties, which fall into a unique class of their own, then the only way to determine equity in these VAD properties going forward is through a sheriff's sale, which would be detrimental to the communities where they are located. To that end, Invest Newark contends a specific "carve-out" addressing valuation of VAD properties is necessary.

The real question left unanswered in the wake of *Tyler* and its progeny is how to value the equity in VAD properties such that the intent of the Legislature as set forth in the TSL and related foreclosure laws, such as the Abandoned Properties Rehabilitation Act, P.L. 2003, c. 210, *N.J.S.A.* 55:19-78 *et seq.* (the "APRA"), the Multifamily Housing Preservation and Receivership Act, P.L.

2003, c. 295, *N.J.S.A.* 2A:42-114, *et seq.* (the "MHPRA"), and the Land Bank Law is not eviscerated. The Court here has the opportunity to affirm the Appellate Division's decision limiting the retroactive application of *Tyler*, but also to modify the lower court's decision to specifically address the valuation of VAD properties for the reasons set forth herein.

LEGAL ARGUMENT

I. VAD PROPERTIES ARE UNIQUE AND REQUIRE PROTECTION IN THE WAKE OF *TYLER* TO PRESERVE THE LEGISLATIVE INTENT OF THE TSL AND LAND BANK LAW.

Invest Newark urges this Court to address the foreclosure of VAD properties, which was left unanswered in *Tyler* and by the Appellate Division's decision in the present case, yet raises a serious concern to the communities in which VAD properties are located. VAD properties pose significant health and safety risks to nearby residents and surrounding neighborhoods, particularly those located within urban areas or in close proximity to occupied residences and businesses. *See, e.g.*, *N.J.S.A.* 55:19-79 (explaining that these risks include "fostering criminal activity, creating public health problems," "increasing the risk of property damage through arson and vandalism," "discouraging neighborhood stability and revitalization," and "otherwise diminishing the quality of life for residents and business operators in those areas[.]").

The TSL and APRA distinguish between how VAD properties are treated for purposes of tax delinquency and foreclosure. New Jersey law requires all municipalities to sell the tax liens on tax delinquent properties to buyers at "regular" tax sales. Under the TSL, a municipality must sell the property to the highest bidder, regardless of the bidder's qualifications or intentions. When the tax lien on an abandoned property is bought by an entity that does not move to foreclose, or lacks either the intention or the ability to reuse the property responsibly, the property is likely to further deteriorate, continuing to blight its surroundings and cause harm to its neighbors. APRA, however, modified the TSL to specifically deal with VAD properties and created "special" tax sales.

Under APRA, a property is deemed abandoned if it "has not been legally occupied for a period of six months" and it meets any one of four additional criteria, including that at "least one installment of property tax remains unpaid and delinquent on that property." *N.J.S.A.* 55:19-81(c). Again, there is no procedure for determining the equity of a VAD property.

In many communities struggling with widespread VAD properties, Land Banks, such as Invest Newark, are powerful tools for advancing equitable development consistent with local priorities. Land Banks help return VAD properties to productive use. The Land Bank Law was enacted in part as a result of the Legislature's recognition that:

> It is in the best interest of this State to allow municipalities to designate single entities to act on their behalf to acquire, maintain, and convey, lease and otherwise dispose of vacant, abandoned and problem properties, in order to carry out strategies to ensure that the reuse of these properties provides the greatest long-term benefit to the physical, social and economic condition of the municipality.
>
> [*N.J.S.A.* 40A:12A-75(g).]

If the Court applies that portion of *Tyler* which found that a county foreclosing upon and selling a property and then retaining the equity beyond what was owed in fees and taxes violated the Constitution, as the Appellate Division did in the case at bar, this Court must go a step further and discuss *how* to determine the equity in a property, particularly VAD properties.

II. THIS COURT SHOULD ADOPT A REBUTTABLE PRESUMPTION OF NO EQUITY IN VAD PROPERTIES.

The Supreme Court's decision in *Tyler* requires property owners have an opportunity to claim their equity. *Tyler* does not, however, require a guarantee of the property owner's equity. The court in the present case found that the framework of the TSL, which established confiscation of a property owner's equity when said property is foreclosed, violates the Fifth Amendment's Taking Clause.

For decades, New Jersey courts have recognized that the TSL is "liberally construed as remedial legislation to encourage the barring of the right of

redemption." *Town of Phillipsburg v. Block 1508, Lot 12*, 380 N.J. Super. 159, 162 (App. Div. 2005). *Tyler* does not change this fundamental principle. Our courts have honored that the Legislature's fair and reasonable decision to bar the right to redeem by a strict foreclosure. *Bron v. Weintraub*, 42 N.J. 87, 91 (1964). *Tyler* does not change that, either. New Jersey's courts have also recognized the importance of finality by acknowledging the Legislature's expressed "intention to impose stricter limits upon the time and the grounds for vacating a judgment of foreclosure than would apply generally under Rule 4:50." *Block 1508*, 380 N.J. Super. at 166. *Tyler* certainly does not change that. What *Tyler does* change is that it requires, prospectively, an opportunity for tax delinquent property owners to have an opportunity to claim any surplus equity above and beyond what "[t]he taxpayer must render unto Caesar." *Tyler*, 598 U.S. at 647.

The *Tyler* Court reaffirmed the model set forth in *Nelson v. City of New York*, 352 U.S. 103 (1956), which other States, including with Land Banks, have adopted or are adopting. *See e.g.,* Mich. Comp. Laws Serv. § 211.78t (establishing procedure for former property owner to claim an interest in surplus proceeds); Fla. Stat. § 45.032; N.Y.C. Admin. Code § 11-424. However, the *Tyler* Court did not give guidance on how to determine the value of a tax delinquent property owner's surplus equity if claimed. So, even under the

Nelson model, States are left with the unenviable task of weighing several less-than-ideal options.

One approach is to require appraisers to determine value. However, requiring an appraisal is rife with opportunity for intentional or unintentional discriminatory impact. *See, e.g.*, FREDDIE MAC, Research Note, *Racial and Ethnic Valuation Gaps in Home Purchase Appraisals* at 2 (Sept. 20, 2021) ("Appraisers' opinions of value are more likely to fall below the contract price in Black and Latino census tracts, and the extent of the gap increases as the percentage of Black or Latino people in the tract increases."), available at https://www.freddiemac.com/research/insight/20210920-home-appraisals (last accessed on Jun. 26, 2024); *see also id.* at 4 ("Black and Latino applicants receive lower appraisal values than the contract price more often than White applicants."); ANDRE PERRY, ET AL., Metropolitan Policy Program at the Brookings Institute and Gallup, *The Devaluation of Assets in Black Neighborhoods: the Case of Residential Property* at 19 (Nov. 2018) ("The devaluation of majority-Black neighborhoods is penalizing homeowners in Black neighborhoods by an average of $48,000 per home, amounting to $156 billion in cumulative losses."), available at https://www.brookings.edu/wp-content/uploads/2018/11/2018.11_BrookingsMetro_Devaluation-Assets-Black-Neighborhoods_final.pdf (last accessed on Jun. 26, 2024). In light of these

concerns, relying on appraisers would require judicial or quasi-judicial oversight. Eventually, a majority of tax foreclosures would likely devolve into an eminent domain-type proceeding complete with its costly battle of experts. This would quickly become unmanageable for municipalities and other public entities and tax the already strained resources of the judicial system.

A second approach, which has surface appeal at first glance, is to require a sheriff's sale for every tax foreclosure, as is done for mortgage foreclosures. *N.J.S.A.* 2A:50-64. But of the many lessons to be learned from 2008-11 mortgage foreclosure crisis, an important one to not overlook is the counterintuitive relationship between foreclosure sales and "fair market value" of a parcel of real estate. The fair market value of a property may not determine its sale price at a sheriff's auction; but instead, the winning bid at a sheriff's sale (which is designed to be as low as possible) may determine the fair market of a property—and, even worse, may depress the fair market value of neighboring properties. *See, e.g.*, W. SCOTT FRAME, Federal Reserve Bank of Atlanta Economic Review, *Estimating the Effect of Mortgage Foreclosures on Nearby Property Values: A Critical Review of the Literature* (Nov. 3, 2010), available at https://www.econstor.eu/bitstream/10419/57661/1/683563785.pdf (last accessed on Jun. 26, 2024). This can have a downward spiraling effect on neighborhoods and communities, particularly in minority neighborhoods that

have already suffered from years of active disinvestment, which may be exacerbated by increased tax foreclosures. *See, e.g.*, ROBERT JOHNSON, Business Insider, *A Depressing Tour Of A New Jersey Neighborhood Destroyed By Subprime Lending* (Dec. 10, 2011), available at https://www.businessinsider.com/irvington-new-jersey-sub-prime-predatory-lending-foreclosure-2011-12 (last accessed on Jun. 26, 2024).

Because of the abandoned and/or deteriorated status of VAD properties, the Court should adopt a third approach with respect to VAD properties: a rebuttable presumption of no equity. By way of background, rebuttable presumptions with respect to value of property, including real property, are already recognized under New Jersey law. In the property tax context, New Jersey courts consistently upheld a rebuttable presumption in favor of the validity of property tax assessments, placing the burden on taxpayers to provide substantial evidence to challenge these assessments. *See, e.g.*, *Pantasote Co. v. Passaic*, 100 N.J. 408 (1985); *Byram Tp. v. Western World*, 111 N.J. 222 (1988); *VBV Realty, LLC v. Scotch Plains Tp.*, 29 N.J. Tax 548 (2017).[2]

[2] New Jersey courts have also applied rebuttable presumptions outside of the real property context. *See, e.g.*, *In re Witherspoon*, 203 N.J. 343 (2010) (adopting a rebuttable presumption for attorney discipline matters); *State v. Presley*, 436 N.J. Super. 440 (App. Div. 2014) (applying rebuttable presumption for admissibility of evidence challenged on Fourth Amendment grounds).

New Jersey already has a framework for determining if a property is VAD under APRA and the MHPRA, which the Court could apply. If a property satisfies APRA's definition of "abandoned property" as set forth in *N.J.S.A.* 55:19-81, APRA's definition of a "nuisance" as set forth in *N.J.S.A.* 55:19-82, or the MHPRA's requirements for a building eligible for receivership as set forth in *N.J.S.A.* 2A:42-117, a rebuttable presumption that the property has no equity should apply.

To overcome this presumption, the burden of claiming and proving surplus equity falls on the delinquent property owner, who must challenge that presumption within the same time period set forth under APRA for owners to challenge a public officer's determination that its property is "abandoned," which is within 30 days of the owner's receipt of notice or 40 days from the date upon which the notice was sent. *N.J.S.A.* 55:19-55(e). This would (1) be fair to property owners of VAD properties, who still have an opportunity to rebut the presumption and claim equity in the delinquent property, (2) be fair to neighbors, whose equity is negatively affected by the presence of VAD properties, (3) be fair to the community at large, which bears the increased costs caused by VAD properties, and (4) avoids waste of limited government resources by adhering to a strict foreclosure process for VAD properties.

III. THE COURT SHOULD AFFORD *TYLER* PIPELINE RETROACTIVITY.

Granting full retroactivity to *Tyler* would be unworkable. The Court should affirm the Appellate Division's decision with regarding to pipeline retroactivity. The same general public policies underlying the Tort Claims Act the New Jersey Tort Claims Act, *N.J.S.A.* § 59:8-1 *et seq.* (the "TCA") and the New Jersey Contractual Liability Act, *N.J.S.A.* § 59:13-1 *et seq.* (the "CLA") also underly the need to limit retroactivity here. The TCA and the CLA both aim to strike a balance between holding public entities accountable and protecting them from excessive litigation. The TCA achieves this balance by re-establishing sovereign immunity for public entities, making liability the exception rather than the rule. *D.D. v. University of Medicine and Dentistry of New Jersey*, 213 N.J. 130, 134 (2013) (quoting *Coyne v. State Dep't of Transp.,* 182 N.J. 481, 488 (2005) (quoting *Garrison v. Twp. of Middletown,* 154 N.J. 282, 286 (1998))). It provides for liability in cases where injuries are caused by the actions of public employees within the scope of their employment, but it also includes multiple immunities and exceptions to shield public entities from liability.

Similarly, the CLA was enacted to reestablish some sovereign immunity in contractual matters. *County of Hudson v. State, Dept. of Corrections,* 208

N.J. 1, 23-24 (2011). The CLA treats the State and other public entities similarly to private individuals or corporations in contracting, but includes specific limitations and exclusions to protect the State from excessive liability. In addition, the CLA requires timely notice of claims to allow the relevant public entity to investigate and potentially settle disputes before incurring costly litigation, because an orderly process for handling claims against the State will further help conserve governmental resources. *Hous. Auth. of Newark v. Sagner,* 142 N.J. Super. 332, 343 (App. Div. 1976).

As the Appellate Division recognized, "[t]he application of full retroactivity would be unworkable and create a substantial hardship for taxing authorities, as well as third-party purchasers." *257-261 20th Ave. Realty, LLC v. Roberto*, 477 N.J. Super. 339, 363 (App. Div. 2023). The court recognized that the law imposes a duty upon public entities to protect the public fisc. Invest Newark notes that the forfeiture of equity from homeowners who failed to comply with applicable laws and pay their taxes pre-*Tyler* does not justify the depletion of public resources post-*Tyler*—which in effect would be shouldered by the community's current tax-paying property owners. The entire point of the TSL and the tax foreclosure process is to preserve municipalities' revenue to meet their numerous day-to-day obligations in service of New Jersey's citizens.

CONCLUSION

For the forgoing reasons, we respectfully request that the Court modify the Appellate Division's decision to specifically address the valuation of VAD properties for the reasons set forth herein but otherwise affirm the lower court's decision with respect to retroactivity.

Respectfully submitted,

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