SUPREME COURT OF NEW JERSEY
DOCKET NO. 088959

257-261 20TH AVENUE REALTY, LLC,

Plaintiff/Petitioner,

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.

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DOCKET NO. A-3315-21

CIVIL ACTION

ON APPEAL FROM:
SUPERIOR COURT OF NEW JERSEY, PASSAIC COUNTY, CH. DIV., DOCKET NO. F-3349-21

SAT BELOW:
HON. THOMAS SUMNERS, PJAD
HON. MORRIS SMITH, JAD
HON. LISA PEREZ-FRISCIA JAD
HON. RANDAL CHIOCCA, JSC

PETITION AND APPENDIX OF PLAINTIFF 257-261 20TH AVENUE REALTY, LLC

GOLDENBERG, MACKLER, SAYEGH, MINTZ, PFEFFER, BONCHI & GILL
660 New Road, Suite 1-A
Northfield, New Jersey 08225
(609) 646-0222/(609) 646-0887
Attorneys for Plaintiff 257-261 20TH Avenue Realty, LLC
Email: kbonchi@gmslaw.com, ealmanza@gmslaw.com

Keith A. Bonchi, Esq.
Of counsel and on the brief
NJ Attorney ID #032321983

Elliott J. Almanza, Esq.
Of counsel and on the brief
NJ Attorney ID #017542012

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Transcript of motion to vacate final judgment (May 19, 2022) (annexed pursuant to R. 2:12-7(a)) PPa34-91

STATEMENT OF THE MATTER INVOLVED

In May 2023, the U.S. Supreme Court issued Tyler v. Hennepin County, which invalidated the tax foreclosure laws of Minnesota as causing an unconstitutional taking under Minnesota law without just compensation. In this matter, the Appellate Division applied Tyler to conclude, in a published opinion, that New Jersey's Tax Sale Law (TSL) is similarly unconstitutional. The panel extended Tyler – a case involving a public entity lienholder – to the private third-party lienholder here, believing it was a "state actor" for constitutional purposes.

The decision is fundamentally flawed in a variety of ways that merit this Court's review and reversal. *First*, the panel skipped over the first (and most important) question in any takings inquiry: whether a property right exists. For as long as tax foreclosure has existed in New Jersey, a property right to "surplus equity" has not been recognized. Tyler did not create such a right, since the U.S. Supreme Court emphatically does not create federal common-law property rights. Tyler most certainly did not do away with or erode the Erie doctrine; it simply held that a State, having once recognized a property right to surplus equity, cannot manipulate its laws to divest an owner of such right, as Minnesota did when it amended its tax foreclosure law decades ago. New Jersey stands in a starkly different position, never having recognized the property right in the first place. Tyler thus should not have applied to New Jersey's TSL. It is up to the Legislature

and not the courts to create a right to surplus equity, and to balance such right against the need to attract and retain third-party investment in New Jersey tax sales. In fact, the Legislature is presently working on just such a solution.

Second, the panel's determination that a private lienholder is a "state actor" does not apply the established test. Rather, the opinion creates a brand-new test that apparently deems a private party a state actor simply because the taxing authority conveyed its lien interest to the buyer. But if mere conveyance of a property interest is all it takes to become a state actor, there are plenty of unwitting state actors in New Jersey. Principled application of the correct test leads to the inexorable conclusion that a private lienholder – which takes no direction or assistance from the municipality – is not a state actor under any reasonable conception of the term. The decision also ignores another case, directly on point and summarily affirmed by the U.S. Supreme Court, holding there is no viable takings claim when the lienholder is a private entity.

Third, the opinion relies on a portion of the New Jersey Constitution to conclude that the takings clause extends to private entities. But the cited portion of the Constitution relates to private redevelopers and other companies who are statutorily imbued with the power of eminent domain for public use. It has nothing to do with private tax sale certificate holders foreclosing a lien using a completely distinct set of laws. And importantly, there is no "public purpose" when it comes

to tax foreclosure. Finally, the opinion under review concludes that grounds existed, independent of Tyler, to vacate the judgment. That conclusion is wrong because there was nothing "exceptional" about this case under R. 4:50-1(f).

This is the archetypal case that begs for review. Not only does the decision invalidate the sole mechanism in New Jersey to enforce tax delinquency. It also subjects every lienholder, public and private, to a raft of lawsuits alleging unconstitutional takings. The ramifications are troubling. Private lienholders now face liability simply for attending lien auctions at the behest of the taxing authority, and for following a longstanding law. The benefit of the bargain – the right to foreclose in the absence of redemption – has been upended. When a lienholder is sued, it will cross-claim or third party-in the municipality that sold it the tax lien. Municipalities will be subjected to hundreds of millions of dollars in liabilities.

Unless the Legislature (rather than the courts) is allowed to enact a balanced solution that protects an owner's right to surplus equity and also keeps investors coming to New Jersy tax sales, municipalities will see a significant loss in the tens of millions of dollars raised by tax sales. Municipalities will sell fewer liens, since those liens cannot be enforced without liability. This means municipalities' tax revenues will decrease significantly, resulting in budget shortfalls that can only be remedied by increasing taxes or cutting services. It is hard to imagine that any constitution dictates these results. For these reasons, 257-261 20th Avenue Realty,

LLC ("Petitioner") asks this Court to grant certification, reverse the entirety of the panel's decision with respect to Tyler, and reinstate the judgment.

The facts of this matter are not complicated or disputed. Alessandro Roberto ("Defendant") owned a commercial mixed-use property in Paterson. (PPa5). Though the property was income-generating, Defendant did not pay taxes for an extended time. (PPa6, PPa9). Petitioner purchased the three tax liens that issued on Defendant's property, and initiated foreclosure proceedings in June 2021. (PPa5-6). Defendant was properly served with the complaint. (PPa6). He did not file an answer or any responsive pleading, and he did not timely redeem the lien. (PPa6). In fact, Defendant ignored every single motion and order, did not contest anything, and permitted final judgment to enter in February 2022.[2] (Pa79¶¶8,9, Pa102-103, Pa104-106, Pa107-108, Pa109-111, Pa48-54).

In April 2022, Defendant filed a motion to vacate the judgment. (Pa1-2). Defendant claimed there were "truly exceptional circumstances" justifying relief under R. 4:50-1(f) because: a) he stood to forfeit the equity in his property (Pa22¶¶4-7), b) he was unable to redeem the tax lien before final judgment because his tenants failed to pay rent during the pandemic[3] (Pa24¶9), and c) he had

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[2] When judgment entered, Defendant's delinquency exceeded $30,000. (Pa49-54).

[3] This was false. One of Defendant's two residential tenants produced receipts and canceled checks showing she was up-to-date on rent throughout the pandemic. (Pa127¶7, Pa133-139). The other residential tenant was Section 8, which confirmed that it had never missed a rental payment to Defendant. (Pa127¶7). The

deposited sufficient redemption money in his attorney's trust account (Pa22¶2, Pa28). Petitioner disputed that these were "truly exceptional circumstances," and filed opposition. In May 2022, the trial court heard argument and issued an oral decision granting Defendant's motion. (PPa34-91). As relevant here, the judge determined "truly exceptional circumstances" under R. 4:50-1(f) existed because the Defendant was a 75 year-old man and he would forfeit "significant equity" if the judgment were allowed to stand. (PPa81 48:13-25).

Petitioner timely appealed in June 2022, and the matter was fully briefed by October 2022. (Pa155-159). The panel postponed oral argument several times. On May 25, 2023, the U.S. Supreme Court issued Tyler v. Hennepin Cnty., 143 S. Ct. 1369 (2023), a case involving tax foreclosure by a public entity.[4] On August 16, 2023, the Appellate Division requested supplemental briefing on the following issue: "What impact, if any, does the recent United States Supreme Court decision in Tyler v. Hennepin County have on this appeal involving a tax sale foreclosure by a private entity holding a tax sale certificate?" The panel limited briefing to seven pages. The next day, the panel invited numerous *amici* to participate.

On December 4, 2023, the Appellate Division published an opinion that, for purposes of this petition: a) invalidated the TSL pursuant to Tyler and the Eminent

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third commercial tenant also claimed to be current on rent. (Pa127¶7).

[4] Petitioner will explore Tyler in more detail within. Generally, the opinion concluded that the county's retention of "surplus equity," the value of the property in excess of the foreclosed tax debt, was an unconstitutional taking. Id. at 1375-79.

Domain Clause of the New Jersey Constitution; b) extended Tyler's holding to private third-party lienholders, concluding they are "state actors" for constitutional purposes; and c) sustained the trial judge's conclusion that "truly exceptional circumstances" existed to vacate the judgment. (PPa2-33). Petitioner seeks review of these conclusions. (PPa1).

THE QUESTIONS PRESENTED

1. Whether the Appellate Division erred in concluding that Tyler applies to New Jersey's TSL?

2. Whether the Appellate Division erred in concluding that that private third-party lienholders are "state actors" for constitutional purposes?

3. Whether the Appellate Division erred in concluding that the TSL violates the Eminent Domain Clause of the New Jersey Constitution?

4. Whether the Appellate Division erred in affirming the trial court's conclusion that, independent of Tyler, there existed "exceptional circumstances" justifying the vacation of judgment under R. 4:50-1(f)?

THE ERRORS COMPLAINED OF

I: THE APPELLATE DIVISION SKIPPED THE FIRST STEP OF THE TAKINGS INQUIRY: WHETHER A PROPERTY RIGHT EXISTS. NO RIGHT TO "SURPLUS EQUITY" IN A TAX FORECLOSURE HAS EVER EXISTED IN NEW JERSEY. TYLER DOES NOT CREATE SUCH A RIGHT BECAUSE, PURSUANT TO THE ERIE DOCTRINE, THE SUPREME COURT DOES NOT CREATE FEDERAL GENERAL COMMON-LAW PROPERTY RIGHTS. (Raised Below But Not Addressed).

The first question in any takings inquiry is whether a protected property right exists. See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1000 (1984);

Webb's Fabulous Pharms. v. Beckwith, 449 U.S. 155, 160-61 (1980); Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 729-30 (2010). If and only if a property right exists does a court move to the second question: whether expropriation of that interest constitutes a "taking" within the meaning of the Fifth Amendment. See, e.g., Ward v. Ryan, 623 F.3d 807, 810 (9th Cir. 2010). But if there is no property right in the first place, "[t]here is no taking[.]" Stop the Beach at 730. The Appellate Division erred because it skipped the first step of this two-part inquiry. The panel either assumed that a defendant's right to "surplus equity" in a tax foreclosure exists, or else concluded that Tyler established such a right. For reasons that follow, either conclusion is erroneous.[5]

First, is its beyond reasonable dispute that New Jersey – unlike Minnesota – never has recognized a defendant's property right to "surplus equity" in a tax foreclosure. For as long as tax foreclosure has existed in this State, occurrence of a specified event has vested fee title in the lienholder, and divested the former owner of any and all property rights inclusive of equity.[6] Strict foreclosure of tax liens traces back at least to 1886, when the Legislature implemented the Martin Act. Pamph. L. 1886, p. 161. The purchaser at a tax sale auction could obtain fee title

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[5] It is up to the New Jersey Legislature to create this right – something it is actively pursuing. See, e.g., S4121 (Introduced Nov. 30, 2023), which revises the Tax Sale Law to create and protect an owner's right to "surplus equity."

[6] Vesting of title in the absence of a sheriff's sale is referred to as "strict foreclosure." See Landa v. Adams, 162 N.J. Super. 318, 323 (App. Div. 1978).

to a property if he "has served notice of sale upon the owners and mortgagees, and . . . after the expiration of one year from the time of sale he has received a deed. When these things have been efficiently done . . . the purchaser at the tax sale takes a fee simple absolute free of all encumbrances." Burgin v. Rutherford, 56 N.J. Eq. 666, 669 (Ch. 1898). Later, the Legislature passed the Tax Act of 1903. While there were a variety of methods a tax certificate holder could employ to obtain title, all of them resulted in complete divestiture of the former owner's rights to and interest in the property. L. 1903, c. 208, §56,59. A contemporaneous case rejected the proposition that a property owner was entitled to a "foreclosure sale" in satisfaction of his tax debt, with surplus left over for him, as would have been the case in a mortgage foreclosure. Mitsch v. Owens, 82 N.J. Eq. 404 (Ch. 1913). Instead, the Chancery court determined the Tax Act of 1903 called for strict foreclosure of real property tax debt. Id. at 408-10. The strict nature of tax foreclosure continued when the Legislature enacted the TSL in 1918, which is the foundation of our present system. L. 1918, c. 237. The TSL provided three methods for obtaining fee simple title, only one of which survives today: "a bill in equity to foreclose the right of redemption," which right continued to exist "until barred by a decree" of the Chancery Court. Id. at §49. Regardless of the method employed, "it is the foreclosure of the right to redeem by which the owner's estate is cut off and extinguished and the purchaser's lien becomes an indefeasible estate

in him." Atl. City v. Gardner, 124 N.J. Eq. 110, 112 (Ch. 1938). The more modern incarnation of the relevant statute, N.J.S.A. 54:5-87, is not meaningfully different: the final judgment vests in the plaintiff an "absolute and indefeasible estate of inheritance in fee simple," and fully divests the former owner of any and all property rights. This is true "even if the property's value exceeds the amounts owed." Varsolona v. Breen Capital Servs. Corp., 180 N.J. 605, 619 (2004). The strict nature of the TSL has even received the imprimatur of this Court, which held: "It is . . . understandable that the Legislature found it fair to bar the right of redemption by a strict foreclosure, i.e. by a judgment that payment be made by a fixed date, in default of which the right to redeem shall end, rather than by a sale as in the case of the foreclosure of a mortgage." Bron v. Weintraub, 42 N.J. 87, 91-92 (1964). The point Petitioner stresses is that at no time in the history of tax foreclosure in New Jersey has it ever been recognized that an owner has a property right to "surplus equity." The panel's opinion does not address any of this.

Second, if the Appellate Division assumed that Tyler created a right to surplus equity, that would have been wrong as well. Such a conclusion does not reckon with the fact that the U.S. Supreme Court does not create federal common law property rights. Ever since Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938), the Supreme Court has held fast to the proposition that "[t]here is no federal general common law." That principle has been restated in more recent cases, more

emphatically and more specifically with regard to property rights:

> Under our federal system, property ownership is not governed by general federal law, but rather by the laws of the several States. "The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state."
>
> [Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378 (1977) (quoting Davies Warehouse Co. v. Bowles, 321 U.S. 144, 155 (1944)).]

See also Aquilino v. U.S., 363 U.S. 509, 513 n.3 (1960) (recognizing the impropriety of defining property interests through "nebulous" federal common law "because it ignores the long-established role that the States have played in creating property interests"); Rodriguez v. FDIC, 140 S. Ct. 713, 717 (2020) (reiterating the age-old Erie principle that "there is no federal general common law."). There is nothing in Tyler, either explicit or by implication, that repudiates these longstanding principles. And certainly something as monumental as a rollback of the Erie doctrine would have merited at least a few lines in Tyler (there were none). Given that: a) New Jersey has never recognized the property right, and further that b) the U.S. Supreme Court does not create federal general common law property rights, the first question in the takings inquiry is not met. There is no protected property right, thus there is no taking.

The Appellate Division misunderstood Tyler and its reach. Tyler, like other

cases of its ilk in the Supreme Court Takings canon, involves manipulation of the law to abrogate a previously-recognized property right. Specifically, Minnesota once recognized by statute, 1859 Minn. Laws p. 58, §23, and at common-law, Farnham v. Jones, 32 Minn. 7, 11 (1884), the property owner's right to "surplus equity" following a tax foreclosure. Tyler at 1379. In 1935, the Minnesota legislature abrogated that right when it passed a new set of tax foreclosure laws calling for strict foreclosure. Id. at 1376. It was this legislative "manipulat[ion]" of property rights that effected the taking. Ibid.

That is the theme in each Takings case cited in Tyler. For example, Webb's, supra, 449 U.S. 155, involved a new statute that made interest on interpleaded funds the property of the county, disrupting the "long established general rule" in Florida that such interest belongs to "the owner of that principal." Id. at 155-60, 162-63. The Supreme Court held that a State cannot manipulate the law to "transform private property into public property without compensation[.]" Id. at 164. In the identical vein, Phillips v. Wash. Legal Foundation, 524 U.S. 156, 161 (1998) involved a change to the Texas Court Rules whereby IOLTA interest became the property of various foundations that provided legal services to low-income people. This upset the prior and longstanding Texas law that interest in trust accounts belonged to the owner of the funds. Id. at 165-66. A State is not permitted to change the law and "abrogate the traditional" and recognized right.

Id. at 167. Stated otherwise, "a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." Id. at 167. The theme continued in Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069 (2021), which involved a regulation promulgated pursuant to a California agricultural law. The regulation permitted labor unions to "take access" of an agricultural employer's property for a specified amount of time per year, for purposes of "meeting and talking with employees and soliciting their support." Id. at 2069. The Supreme Court held this was an unconstitutional taking because it effectively gave unions an easement over the employers' property without any compensation. Id. at 2073-2077. The Constitution would not permit this "manipulat[ion]" of property rights. Id. at 2076. As Stop the Beach, supra, concisely summarizes, "States effect a taking if they recharacterize as public property what was previously private property." 560 U.S. at 713.[7]

Unlike all of the foregoing cases, including Tyler, New Jersey never "manipulated" its law to abrogate a previously-recognized property right. For as long as tax foreclosure has existed in New Jersey, a property right to "surplus equity" has not been recognized. That places this case on substantially different footing than Tyler and its ilk. Petitioner reiterates: it is emphatically not the

[7] New Jersey law accords with these principles. "We recognize that a taking may occur if a judicial decision articulates a new rule of law that alters a clearly established right of private property." Investors Savs. Bank v. Keybank Nat'l Ass'n, 424 N.J. Super. 439, 447 (App. Div. 2012).

province of the U.S. Supreme Court to create federal general common-law property rights. And if the Supreme Court had intended a rollback of the Erie doctrine, it would have said so. It did not. The only way that Tyler coexists with Erie and its progeny is to conclude that the former corrected an erroneous interpretation of Minnesota law that bore on a federal constitutional right. The holding of and reasoning in Tyler do not extend to New Jersey, whose law *never* recognized the property right. Again, it is up to the Legislature – not the courts – to create the right to surplus equity, which will be accomplished soon.

II: THE APPELLATE DIVISION FASHIONED A NEW "STATE ACTOR" TEST THAT IS DRASTICALLY OVERBROAD AND HAS NO FIRM LOGICAL FOUNDATION. THE TEST THE PANEL SHOULD HAVE APPLIED LEADS TO THE CONCLUSION THAT A PRIVATE LIENHOLDER IS NOT A STATE ACTOR. (PPa26-27)

A. The lower court erred by failing to apply the correct state actor test, and fashioning a new one that is vastly overbroad.

The Appellate Division recognized that Tyler involved a municipal tax foreclosure, whereas the present case involves a private lienholder, and appropriately asked for briefing on whether Petitioner was a state actor. But the panel then inexplicably ignored the controlling test, and fashioned its own new test – one that is too simplistic and overbroad. A principled legal analysis, using the correct test as applied to the structure of the TSL, leads to the inexorable conclusion that a private lienholder is not a state actor.

The Constitution generally, and the Fourteenth Amendment specifically,

regulates public rather than private conduct. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-50 (1974). There are limited, defined circumstances in which a private actor is considered a state actor for constitutional purposes. In fact, the U.S. Supreme Court recently clarified the controlling test in Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019):

> Under this Court's cases, a private entity can qualify as a state actor in a few limited circumstances – including, for example, (i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity.

The Appellate Division should have applied this test, but it did not. Its application shows Petitioner (or any other private lienholder) is not a state actor. Private lienholders do not perform a "traditional, exclusive public function[.]" For as long as tax liens have existed in New Jersey, enforcement[8] has been a private function. See, e.g., Burgin, supra, 56 N.J. Eq. 666 (involving private tax lienholder); Campbell v. Dewick, 20 N.J. Eq. 186 (Ch. 1869) (same). Addressing the second circumstance, the taxing authority does not "compel" Petitioner – or any other private lienholder – "to take a particular action." Halleck at 1928. The TSL is permissive, not mandatory. N.J.S.A. 54:5-86(a) (explaining that an action to

[8] The Court should take care not to conflate tax collection and tax enforcement. The former is a traditional, exclusive public function. The latter is not; rather, it is a judicial foreclosure initiated by a private party and supervised by the courts.

foreclose a tax lien "**may** be instituted" by the private lienholder). In the context of any private lienholder foreclosure, the taxing authority does not compel any action; the private lienholder proceeds of its own accord. Addressing the third circumstance, there is no "joint action" between the government and a private lienholder. After a municipality sells a tax lien to a private party, the municipality's involvement is over. The municipality does not involve itself in the tax foreclosure, which is prosecuted exclusively by the private lienholder from start to finish. The private lienholder does not take direction or guidance from the municipality, and the municipality does not provide assistance. The tax collector acts as a neutral intermediary between the private lienholder and parties with redeemable interests. In the tax lien context, the municipal collector's sole role is to calculate the redemption amount, N.J.S.A. 54:5-54, receive and file affidavits of subsequent taxes, N.J.S.A. 54:5-60 to -62, and process redemptions, N.J.S.A. 54:5-54.1. See generally, Winberry Realty P'ship v. Borough of Rutherford, 247 N.J. 165 (2021) (explaining the role of a municipal collector in the tax foreclosure context). In short, none of the limited circumstances exist in which a private party can be considered a state actor.

The decision under review does not employ the Halleck test – or any other, for that matter. Instead, the opinion determined that a private lienholder is a state actor simply because it "proceed[s] with an interest conveyed by the taxing

authority," citing In re Princeton Office Park, L.P., 218 N.J. 52, 67 (2014). (PPa26). The sole issue Princeton Office Park was "whether, under New Jersey law, a tax sale certificate purchaser holds a tax lien." Id. at 55.[9] Princeton Office Park has nothing to do with whether a private lienholder is a state actor, and involves no analysis or holding to that effect. More significantly, if all it takes to become a state actor is purchasing a property right owned by a municipality, then there are thousands of unwitting state actors in New Jersey. Everyone who has purchased a property at a public land sale, N.J.S.A. 40A:12-13, is now a state actor under the logic and reasoning of the decision under review. The decision's "test" thus is vastly overbroad and reason alone to review and reverse this matter.

B. The decision under review relies on an inapposite part of the New Jersey Constitution.

The opinion seems to conclude that even if a private lienholder is not a state actor, it would not matter, because N.J. Const., art. I, ¶20 ("Eminent Domain Clause"), forbids both "individuals" and "private corporations" from taking private property for public use without just compensation. (PPa21). There are numerous flaws with this conclusion.

First, this presupposes there was a property right in the first place – the critical first inquiry the Appellate Division did not address. As explained in point

[9] The legal import of whether a party holds a "tax lien" is not relevant for purposes of this petition, but matters for Bankruptcy Code purposes.

heading I, no such right exists, and for that reason, no "taking" occurred in the first place. Stop the Beach at 730. The Eminent Domain Clause simply does not apply.

Second, the panel's reference to "private corporations" in the Eminent Domain Clause ignores the history and purpose of this provision. It is identical to the eminent domain clause found in N.J. Const., art. IV, §7, ¶9 (1844). The reason "private corporations" must pay just compensation is because, historically, charters incorporating certain private companies imbued them with the power of eminent domain so they could build rail lines and highways for public use or benefit. See, e.g., Doughty v. Somerville & E.R. Co., 7 N.J. Eq. 51 (Ch. 1847); Morris & E.R. Co. v. Mayor & Common Council of Newark, 10 N.J. Eq. 352 (Ch. 1855); Black v. Delaware & Raritan Canal Co., 22 N.J. Eq. 130, 256 (Ch. 1871) (noting that the "private corporation" reference in the Eminent Domain Clause addresses "ordinary cases of private corporations under their charters, taking lands for highways."); Morris & E.R. Co. v. Hudson T.R. Co., 25 N.J. Eq. 384, 387-88 (Ch. 1874) ("It is settled in this state, that a railroad company authorized to acquire lands for the use of their road by condemnation . . . cannot construct their road . . . without making compensation to the owner of the soil occupied by the highway."). Wheeler v. Essex Cnty. Public Road Bd., addressing the "individuals and private corporations" clause, put it most succinctly:

> [T]he terms used appear[] to be founded on and to recognize the distinction which has been repeatedly

> adjudged to exist between the case of the state, acting for itself in the exercise of its eminent domain, and when such prerogative is delegated to be enforced by a private hand.
>
> [39 N.J.L. 291, 297 (E. & A. 1877).]

In the more modern era, other laws imbue private corporations with the power of eminent domain – namely, in the field of redevelopment law. See, e.g., Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344 (2007); N.J.S.A. 40A:12A-8(c). The TSL, on the other hand, does not. It is a statutory scheme that, after numerous safeguards including ample notice and time to redeem, permits a lienholder to foreclose the owner's right of redemption due to unpaid taxes. Simon v. Cronecker, 189 N.J. 304, 318-20 (2007).

Furthermore, there is no "public use" that would trigger the Eminent Domain Clause. "Public use" is coterminous with "sovereign police power"; it can encompass any "legitimate purpose" that might confer a public benefit. Carole Media LLC v. N.J. Transit Co., 550 F.3d 302, 309 (3d Cir. 2008). Some examples include economic revitalization, Kelo v. City of New London, 545 U.S. 469, 489-90 (2005), correction of market failures, Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 243 (1984); the elimination of blighted areas, N.J. Cost., art. VIII, §3, ¶1; Gallenthin at 356-59; or the building of roads or rail lines, Morris & E.R. Co.,

supra. Conversely, there is no public use attendant tax foreclosure.[10] Petitioner, just like every other private lienholder, acquires a property for private benefit.

The modern New Jersey Constitution was drafted in 1947. It makes little sense that less than one year later, the Legislature – fully aware of the Eminent Domain Clause – would pass the In Rem Act, N.J.S.A. 54:5-104.29 et seq., which does exactly what the Appellate Division has now concluded violates the Eminent Domain Clause. There is a well-recognized presumption that the Legislature "act[s] with existing constitutional law in mind and intend[s] the statute to function in a constitutional manner," Gallenthin at 359, which the lower court disregarded.

Invoking the Eminent Domain Clause of the New Jersey Constitution to strike down the TSL is like forcing a square peg into a round hole. It doesn't fit because it was never intended to fit. There is no protected property right in the first place, thus there is no taking. Private lienholders are not imbued with the power of eminent domain. And the purpose, structure, and effect of the TSL doesn't have the any relationship to "public use." The decision's invocation of N.J. Const., art. I, ¶20 was erroneous. It has no application here.

C. The Appellate Division ignored the case of Balthazar, in which the U.S. Supreme Court summarily affirmed a lower court's conclusion that a private-lienholder tax foreclosure is not a Taking.

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[10] As Kelo cautions, courts should not conflate the "*purpose* of a taking with its *mechanics*[.]" 545 U.S. 469, 486 n.16 (2005). The failure to pay taxes is a *mechanic*, it has nothing to do with "purpose." And Petitioner reiterates there was no "taking" in the first place, given the lack of protected property right.

In its supplemental brief, Petitioner highlighted Balthazar v. Mari, Ltd., 301 F.Supp. 103 (N.D. Ill.), aff'd, 396 U.S. 114 (1960), which held there is no taking when a private lienholder completes a tax foreclosure under Illinois law.[11] The panel ignored the case completely.

In Balthazar, the plaintiff sued both the municipal taxing authorities and the private lien buyers. Id. at 104. Among other claims, plaintiffs asserted the tax foreclosure process effected an unconstitutional taking. Id. at 105 n.6. In the plaintiffs' view, "tax delinquent real property cannot be sold by the state to a private purchaser at a tax sale unless there is a provision for unrestricted public bidding based on the real estate's value." Id. at 105. Plaintiffs contended this would permit them to "recover[] the property's surplus value[.]". Id. at 105 n.7. A three-judge panel of the District Court disagreed, holding: "Rather than taking private property for a public purpose, Illinois is here collecting taxes which are admittedly overdue." Ibid. While the court believed that losing a property for a small percentage of the property's value was "extremely harsh," the court found no constitutional infirmity; this was a matter for the legislature to fix, not the courts. Id. at 106. The Supreme Court took the case on motion, and summarily affirmed.

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[11] Illinois tax foreclosure law is similar to that of New Jersey. Both are reverse interest-rate auctions at which bidders pay the delinquency, receive a certificate, and proceed through judicial acquisition, culminating in a strict foreclosure. Balthazar at 104 n.1; In re Smith, 811 F.3d 228, 237-38 (7th Cir. 2016).

396 U.S. 114 (1969). Balthazar received extensive attention in the briefing for Tyler, yet Tyler did not cite it once. Balthazar thus remains good law, and continues to establish that a private lienholder tax foreclosure is not a taking.

III: THE OPINION ERRED IN CONCLUDING THAT "TRULY EXCEPTIONAL CIRCUMSTANCES" EXIST, INDEPENDENT OF TYLER, TO SUSTAIN THE VACATION OF FINAL JUDGMENT. (PPa28-33).

The last portion of the panel's decision sustained the trial court's grant of relief under R. 4:50-1(f), independent of Tyler. But the circumstances in this case attend every tax sale foreclosure in which a motion to vacate has been filed. If these circumstances qualify as "truly exceptional," that phrase lacks any discernable meaning, and nearly every motion to vacate a final judgment of tax foreclosure must be granted henceforth, since the opinion under review is precedential. This would severely undermine the stability of land titles, and it directly contravenes the declared legislative purpose of the TSL: "to encourage the barring of the right of redemption by actions in the Superior Court **to the end that marketable titles may thereby be secured.**" N.J.S.A. 54:5-85 (emphasis added).

R. 4:50-1(f) permits a court to vacate a judgment, but "only when truly exceptional circumstances are present." U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 468 (2012). Relief under subsection (f) should be applied "sparingly" and only when a "grave injustice would occur" were relief not granted. Cmty. Realty Mgmt. v. Harris, 155 N.J. 212, 237 (1998). Logically speaking,

"exceptional circumstances" cannot be something commonplace or run-of-the-mill. Cf. In re Estate of Schifftner, 385 N.J. Super. 37, 42 (App. Div.) (holding that subsection (f) "contemplates exceptional, extraordinary and compelling grounds for relief[.]"), certif. denied, 188 N.J. 356 (2006).

The trial court concluded, and the Appellate Division agreed, that three things met the standard: a) Defendant would otherwise "forfeit[] . . . significant equity," b) Defendant put up the redemption monies, and c) Defendant is seventy-five years old. (PPa80-81). None of these circumstances, either individually or collectively, qualifies as "truly exceptional."

The first circumstance – that Defendant would forfeit equity – inheres in the nature of tax foreclosure. It is the direct consequence of the relevant statute, N.J.S.A. 54:5-87, which fully divests a former owner of all his interest in the property. Varsolona, supra, at 619. It makes little sense that the direct consequence of a statute is the selfsame basis upon which a court could vacate the ensuing judgment. Yet that is exactly what both lower courts concluded. The Appellate Division held: "Plaintiff's argument that the Legislature intended the TSL to divest an owner of equity at final judgment and bar redemption in favor of a lienholder securing marketable title is unpersuasive." (PPa31). It is hard to understand how the panel arrived at this conclusion, when the plain language of N.J.S.A. 54:5-85 dictates just the opposite: the Legislative intent to "encourage the

barring of the right of redemption . . . to the end that marketable titles may thereby be secured." The Appellate Division's conclusion to the contrary either ignored this statute (which Petitioner cited), or else rendered it meaningless, which is against basic canons of statutory construction. Bridgewater-Raritan Educ. Ass'n v. Bd. of Educ. of Bridgewater-Raritan Sch. Dist., 221 N.J. 349, 361 (2015).

The second circumstance – that Defendant "put up" the redemption money – is also unexceptional. Every defendant that comes before the court on a motion to vacate a judgment of tax foreclosure makes this identical showing. If a defendant lacked the financial capacity to redeem, the application[12] would be doomed to fail. As this Court has cautioned, it makes no sense to vacate a judgment, only to find out later that the defendant lacks a defense. Guillaume, supra, 209 N.J. at 469. "The time of the courts, counsel and litigants should not be taken up by such a futile proceeding." Ibid. Thus, proof of ability to redeem is a necessary precondition to a motion such as this. It is not an "exceptional circumstance."

The third circumstance – that Defendant is 75 years-old – is simply irrelevant. R. 4:50-1(f) does not state or imply that a party receives greater solicitude because of their age.

In short, there is no way to conclude the circumstances here are "truly exceptional" without rendering that phrase meaningless. If these circumstances fit

[12] Excepting those that implicate a void judgment under R. 4:50-1(d).

the bill, there is no principled reason why every motion to vacate a judgment of tax foreclosure should not be granted. Indeed, the opinion under review *mandates* that outcome, since it is precedential. For the reasons expressed above, that outcome runs directly contrary to N.J.S.A. 54:5-85, and it also imperils the stability of land titles. As this Court has cautioned, "absent any unusual equity," the judiciary should adhere to decisions that support, rather than undermine, the stability of land titles. Cox v. RKA Corp., 164 N.J. 487, 497 (2000).

THE REASONS WHY CERTIFICATION SHOULD BE ALLOWED

The circumstances in this case amply satisfy the standards for certification in R. 2:12-4. First, the Appellate Division has essentially invalidated the only mechanism in New Jersey for enforcement of tax liens. Taxes are the "lifeblood of government," a proposition "especially true for local governments, which are particularly dependent on tax revenue." Gourmet Dining, LLC v. Union Twp., 243 N.J. 1, 15 (2020). This will have a catastrophic downwind effect primarily at the municipal level. Why would anyone buy a tax lien, knowing they risk a civil rights lawsuit by attempting to enforce the lien? Why should lienholders, who advance the important public policy of keeping municipal coffers full, In re Princeton Office Park, supra, at 62, be punished? All they have done is attend auctions at the behest of municipalities, and follow a longstanding and duly-enacted law that has even received – in relevant part – this Court's blessing. Bron at 91-92.

The end result is that private bidders will purchase far fewer liens. Municipalities will take back far more liens than before, N.J.S.A. 54:5-34, which they cannot enforce without subjecting themselves to liability. There will be budget shortfalls due to reduced tax revenue, which could only be remedied by significantly raising taxes or else cutting municipal services. Furthermore, in the very likely event that private lienholders face civil rights lawsuits from foreclosed owners, those lienholders will undoubtedly seek to third-party in the municipalities that sold them the liens. See, e.g., Tontodonati v. City of Paterson, 229 N.J. Super. 475, 483 (App. Div. 1989) (explaining that tax sale certificates are contracts between municipalities and purchasers). The opinion also creates a flawed test to determine whether one is a "state actor." Many private parties are now "state actors" under the reasoning of the decision, far beyond the context of lienholders.

In addition, the decision *mandates* an outcome that imperils the stability of land titles. Any defendant who comes before the court and proffers an ability to redeem must be granted relief, since every such defendant is similarly-situated: all have forfeited equity in their property as a consequence of the final judgment.

COMMENTS WITH RESPECT TO THE APP. DIV. OPINION

Petitioner respectfully submits that it has fully addressed the errors in the Appellate Division decision within the "Errors Complaint Of" point heading.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges this Court to grant certification, reverse the entirety of the decision with respect to Tyler, and direct the re-entry of judgment in Petitioner's favor. Petitioner asks the Court to restrain from creating a right to surplus equity which has never existed under New Jersey law and allow the Legislture to come up with a remedy that most likely will create a right to surplus equity and continue to attract investors, without subjecting both private lienholders and municipalities to a floodgate of litigation.

CERTIFICATION

I hereby certify that the within Petition presents a substantial question and is filed in good faith and not for purposes of delay.

Respectfully submitted,
GOLDENBERG, MACKLER, SAYEGH, MINTZ, PFEFFER, BONCHI & GILL,
Attorneys for Petitioner 257-261 20th Ave. Realty

BY: _____
KEITH A. BONCHI, ESQ.

_____
ELLIOTT J. ALMANZA, ESQ.

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