New Hampshire Tax Collectors' Ass'n.

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WHY WE SEND NOTICES
(Constitutional Principles of Due Process)

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Among other things, the 14th Amendment to the US Constitution provides:

> *"…..nor shall any state deprive any person of life, liberty or property, without due process of law;"*

In the context of tax collection and notice, we are talking about "procedural" due process, i.e., what steps must a "state" (i.e., governmental entity) provide before "depriving" someone of their property.

The New Hampshire Constitution has similar language with regard to providing "due process". See, NH Const. Pt. I, Art. 15. Under New Hampshire law, in determining whether procedural due process has been complied with, the Court balances three (3) factors: First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. State vs. Veale, 158 N.H. 632 (2009).

The basis for much of the analysis of the federal due process rights is grounded in the case of Mullane vs. Central Hanover Bank & Trust Co., 339 US 306 (1950). In

holding that New York law did not provide sufficient notice of certain court proceedings to settle a trust, the Court held:

> *"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. (cites omitted) The notice must be of such nature as reasonably to convey the required information… and it must afford a reasonable time for those interested to make their appearance…"*

In the context of real estate tax collections, this concept has played out in numerous cases, at both the federal and state level:

1) Mennonite Board of Missions vs. Adams, 462 US 791 (1983)

   In ruling on the constitutionality of an Indiana tax collection process, the Supreme Court held that the Indiana process failed to provide Constitutionally-required notice to mortgage holders of tax sales. While property owners received notice by certified mail, the only notice mortgage holders received was by posting in the courthouse, and a legal notice published in the newspaper. Criticizing publication notice, ("Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper"). Citing the due process principles of Mullane, the Court held:

   > *"Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale. (cite omitted) When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of Mullane."*

2) White vs. Lee, 124 NH 69 (1983)

Decided four (4) months after Mennonite Board of Missions, the New Hampshire Supreme Court held that New Hampshire tax collection procedure was deficient in failing to provide current owners with notice of taxes unpaid by a prior owner. The Plaintiffs acquired property in Barrington in the summer of 1977. The tax bill that fall was mailed to the former owner who did not pay. The subsequent notice of impending tax sale also went to the former owner. There was no record evidence that the new owners were aware of the tax delinquency.

In holding the procedure used by the community deficient, the Court stated:

> *"The current owners, as listed upon the town's tax warrants, are interested parties to an impending tax sale of their property. They stand to lose valuable rights if their property is sold, and they are, therefore, the parties who should be most willing, if given notice, to pay the delinquent taxes upon the property and thereby avoid a sale. In order to read RSA 80:21 in harmony with its purpose within the statutory scheme, it must be interpreted to require that notice of an impending sale be sent to a current owner, when that individual's name and address are listed upon the town's current tax warrant."*

The Court went on to discuss both Mullane and Mennonite Board of Missions and held that in order to ensure due process, all current tax bills must include notice of past arrearages and tax sale. Id at 77.

N.B. This was incorporated into State law by adoption of RSA 76:11-b.

3) First NH Bank vs. Town of Windham, 138 NH 319 (1994).

In another case involving notice to a mortgagee bank, the Supreme Court held that notice to a mortgage holder at the time a tax lien was imposed was insufficient for due process notice when it came time to deeding. The mortgagee

argued that it was entitled to notice of the impending deeding in the same fashion as the Taxpayer. The Court agreed.

In its decision, the Court stated:

> *"While neither Mennonite, White nor Kakris dealt with the constitutional requirement of notice to a mortgagee before tax deeding, the due process concerns articulated in those cases are equally forceful with respect to the issue presently before us. Once it is determined that there is a protected property interest, the due process inquiry, reduced to its core, is one of "fundamental fairness". A core requirement of fundamental fairness is that "prior to an action which will affect an interest in life, liberty or property,… a State must provide [actual notice to known interested parties]…. In this light, we conclude that for the same reasons that fundamental fairness requires actual notice of a tax sale to known owners and mortgagees, and actual notice of a tax deeding to known owners, it also requires actual notice of a tax deeding to known mortgagees, as in this case."*

Of particular significance in this case, the Court distinguished the effect of the imposition of the tax lien as opposed to the "finality" of the tax deeding:

> *"In sum, the end of the redemption period and the execution of a tax deed have much greater significance to interested parties than does the occurrence of a tax sale. Since we have already recognized that a known owner is entitled to actual notice of tax deeding, we cannot hold that a known mortgagee is constitutionally entitled to actual notice of a tax sale but not notice of a tax deeding. Accordingly, we hold that fundamental fairness under the New Hampshire Constitution requires notice to the mortgagee…"*

4) Jones vs. Flowers, 547 US 220 (2006).

This case reinforces that fact that as the consequence of the State action became more significant, the effort to provide notice must be greater as well.

In the Arkansas case, the tax officials mailed a certified notice to the owner that the property was to be sold off to a third party if payment was not made within a certain limited period of time. The notice was returned "unclaimed". After the property was sold to a third party, the former owner sued claiming the process was constitutionally deficient. The Supreme Court agreed:

> *"It is true that this Court has deemed notice constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent. (citing Mullane) In each of these cases, the government attempted to provide notice and heard nothing back indicating that anything had gone awry, as we stated that "[t]he reasonableness and hence the constitutional validity of [the] chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." But we have never addressed whether due process entails further responsibility when the government becomes aware prior to the taking that its attempt at notice has failed."*

After noting that other state and federal Courts had required additional steps when the government learned that its notice attempt had failed, the Supreme Court concluded:

> *"We hold that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so. Under the circumstances presented here, additional reasonable steps were available to the State. We therefore reverse the judgment of the Arkansas Supreme Court."*

Note that in this context, the "tax sale" was the equivalent of the issuance of the "tax deed" at the end of the redemption period.

These cases do not necessarily mean that "actual notice" to the party is required, as noted in the following cases:

5) Kakris vs. Montbleau, 133 NH 166 (1990).

This case involved a challenge to a tax deeding based on an assessment to "owner unknown". Upon creation of a Tax Map in 1981, a parcel of land was designated as "owner unknown". Since nobody came forward to pay any taxes on it, it eventually was sold to a purchaser (Montbleau). Only after it was deeded did family members of a former owner of land "in the area" come forward to assert they were the owners, and had failed to receive adequate notice. The Supreme Court rejected the Plaintiff's challenge:

> *"Although both Mennonite and White v. Lee advocate actual notice, they do not require it in every case. The Mennonite Court did not suggest "that governmental body is required to undertake extraordinary efforts to discover the identity and whereabouts of a mortgagee whose identity is not in the public record." Mennonite, 462 U.S. at 798-99, 103 S.Ct. at 2711-12. Furthermore, this court specifically held in White vs. Lee that only those individuals "whose names and addresses are reasonably ascertainable. "124 N.H. at 75, 470 A. 2d at 852 (emphasis added), are entitled to actual notice. See Mennonite, 462 U.S. at 800, 103 S. Ct. at 2712;"*

After summarizing the efforts of the Town to find the owners, the Court concluded:

> *"We conclude that the town made reasonable efforts to determine the true owners of the subject property and that the notice sent to "owner unknown" was sufficient to satisfy due process. The town gave the best notice it could under the circumstances. "[W]hen notice is a person's due, process which is a mere gesture is not due process, "Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 315, 70 S. Ct. at 657, but "in the case of persons missing or unknown, employment of an indirect and even*

probably futile means of notification is all the situation permits and creates no constitutional bar to a final decree foreclosing their rights. (cite omitted) Therefore, we hold that due process simply required the Town to undertake reasonable efforts, not Herculean ones, to determine the identity of the owner of this property."

The Kakris case also addressed the contention that the Taxpayers should have known they weren't paying tax bills, and therefore the State's obligation was diminished. This was rejected:

"This court is not unmindful of the fact that "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation'" Mennonite, 462 U.S. at 799, 103 S.Ct. at 2712. Therefore, the fact that the Kakrises may have realized that their property was subject to an annual tax, and may have been able to inquire for themselves into the tax status of the property, did not eliminate the State's responsibility to provide notice prior to the deed transfer."

6) Appeal of City of Concord, 161 NH 169 (2010).

This case does not involve a tax taking (which may be important), but a tax assessment issue. The property owners owned land subject to Current Use Assessment (RSA 79-A). When a subdivision was completed, a Land Use Change Tax (LUCT) bill was issued by the City. The BTLA found that the bills were mailed out, were not returned, but were never received by the Taxpayers. The BTLA allowed their "late" appeal of the tax assessment, but the Supreme Court overturned the ruling.

In looking at the statute, the Supreme Court held that a statutory deadline mandated the abatement filing within two (2) months of the notice of the tax. The Taxpayer did not do so. The BTLA held that enforcing the deadline when the bills were not received would result in an unconstitutional denial of due process. The Supreme Court disagreed:

"It is settled las that while actual notice should be the goal, Mullane, 339 U.S. at 315, 70 S.Ct. 652, it is not required in every case, e.g., id. at 319, 70 S.Ct. 652 ("reasonable risks that notice might not actually reach every beneficiary are justifiable"); United States v. 51 Pieces of Real Property, Roswell, N.M., 17 F.3d 1306, 1316 (10th cir. 1994) ("Due process does not require, however, that the interested party actually receive notice. So long as the government acted reasonably in selecting means likely to inform the persons affected, then it has discharged its burden." (quotations, brackets, and citations omitted)); cf. Kakris v. Montbleau, 133 N.H. 166, 176, 575 A.2d 1293 (1990) ("[W]e hold that due process simply required the town to undertake reasonable efforts, not Herculean ones, to determine the identity of the owner of [the] property.").

We therefore hold that the BTLA erred in concluding that due process entitled the taxpayer to actual notice. The City placed the LUCT bills in the mail on August 6, 2007, and nothing in the record indicates that the mail was returned unclaimed or undeliverable. CF. Jones, 547 U.S. at 225, 126 S.Ct. 1709 ("We hold that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling the property, if it is practicable to do so."). Applying the precedents above, we conclude that the City's reliance on the United States Postal Service was "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." Mullane, 339 U.S. at 314, 70 S. Ct. 652;"

A Question for Discussion - *Would the Court reach the same result if the consequence had been a "loss" of the property; not merely the assessment of a tax?*