

**BY HAND**  
RS



IN THE  
**Supreme Court of Virginia**

---

**RECORD NO. 210389**

---

**KEN McKEITHEN, Successor Trustee of the  
Craig E. Caldwell Trust U/A Dated December 28, 2006,**  
*Petitioner - Appellant,*  
v.  
**CITY OF RICHMOND,**  
*Respondent - Appellee.*

---

**BRIEF IN OPPOSITION TO PETITION FOR APPEAL**

---

Gregory A. Lukanuski  
Deputy City Attorney  
900 East Broad Street, Suite 400  
Richmond, VA 23219  
Telephone (804) 646-7949  
Greg.Lukanuski@richmondgov.com

## **I. STATEMENT OF THE CASE**

This case arises from the distribution of proceeds from a delinquent real estate tax sale by the City of Richmond. The trial court distributed unclaimed proceeds from the sale of real property pursuant to Va. Code §58.1-3967. The trial court correctly ruled that the petitioner, an unsecured lien creditor, did not have a property interest in the unclaimed proceeds from the sale at issue. (Order 1/20/21). The statutory scheme is clear. Former owners, their heirs, and unknown lienholders are entitled to surplus funds from tax auctions, and if these funds are not claimed within two years, then the funds are paid to the locality bringing the tax sale case. Va. Code §58.1-3967.

## **II. MATERIAL PROCEEDINGS BELOW**

On June 14, 2017 the City filed an action pursuant to Virginia Code § 58.1-3965 for unpaid taxes owing on 3422 Keighly Road (“the property”). At that time the petitioner had a judgment lien on the property, which was subordinate to a deed of trust (“the superior lien”). The property was auctioned, and on April 30, 2018 the trial court entered an Order of Confirmation directing payment into the Registry of the Court of surplus funds totaling \$14,000.00 for the superior lien (deed of trust) and \$7171.10 for the petitioner. On June 17, 2019 the trial court entered an Amended

Order of Confirmation for the petitioner to receive its \$7171.10. This amount did not satisfy the petitioner's judgment lien.

After the unknown heirs of the beneficiary identified in the deed of trust did not file a claim to the \$14,000.00 held by the trial court, the petitioner filed a Motion for Order of Distribution for the unclaimed amount. The trial court denied the motion and entered an order in favor of the City on November 5, 2020. The petitioner filed a motion to reconsider which was denied on January 20, 2021. The petitioner filed its notice of appeal on February 22, 2021.<sup>1</sup>

### **III. STATEMENT OF FACTS**

The City agrees with the facts asserted in the petition.

### **IV. STANDARD OF REVIEW**

This appeal presents legal questions of statutory and constitutional interpretation which are reviewed *de novo*. *Palmer v. Atl. Coast Pipeline, LLC*, 293 Va. 573, 801 S.E.2d 414 (2017)

### **V. ARGUMENT**

- I. The trial court correctly ruled that the petitioner did not have a constitutionally protected private property interest in the disputed tax sale proceeds.**

---

<sup>1</sup> The Respondent filed a Motion to Dismiss along with this Brief arguing that the Petitioner failed to timely file its Notice of Appeal pursuant to Rule 5:14(a).

The petitioner argues that it had a property right to the tax sale surplus and that the trial court erred in holding that the unsecured judgement lien did not create a property right to the tax sale surplus. In support of its argument the petitioner generally points to “a diverse array of property interests” protected by the takings clause. None of the cases cited stand for the proposition that an unsecured judgment lien creates a property right protected by the takings clause. The United States Supreme Court’s holding in *Armstrong v. United States*, 364 U.S. 40 (1960) cited by the petitioner involved materialmen’s liens for materials supplied to a prime contractor. The Court held that the contractor had title to the property when the materials were furnished. The City contends that the fact that the lien at issue in this case was not secured distinguishes this case from the holding in *Armstrong*.

The holders of the deed of trust, not the petitioner, had a property interest to the \$14,000.00 allocated to the first priority secured lien. The threshold question in analyzing a takings case is whether the petitioner had a property interest that was adversely affected by the governmental action. *Johnson v. City of Suffolk*, 851 S.E.2d 478, 481 (Va. 2020). The petitioner cannot demonstrate a property interest in the proceeds to the secured lien and the trial court correctly held that no such property right existed.

**II. Va. Code §58.1-3967 as applied did not result in an unconstitutional taking under the United States and Virginia Constitutions.**

The trial court did not rule on whether the application of Va. Code §58.1-3967 in this case constituted a taking under the United States or Virginia Constitutions because the petitioner did not establish any property interest protected by the takings clause. The petitioner claims that the escheat clause of Va. Code §58.1-3967 as applied in this case results in a taking of petitioner's private property. The petitioner equates its unsecured judgment lien against the sales proceeds due to the owner, if any, to the deed of trust lien which is secured by the property. There is no support for the petitioner's claim that it has a property interest in the funds allocated to the secured deed of trust lien. Without a property interest there is no taking under either the United States or Virginia Constitution. Because the trial court correctly concluded that the petitioner did not have a property interest in the \$14,000.00, it did not analyze or rule on whether the application of Va. Code §58.1-3967 resulted in an unconstitutional taking.

**III. Va. Code §58.1-3967's escheat clause as applied did not violate the takings clauses of the United States and Virginia Constitutions.**

The petitioner argues it suffered a Takings Clause violation when \$14,000.00 was paid to the City. Reviewing the record however shows that the \$14,000.00 was

never the petitioner's property, or any property in which the Petitioner had an interest. The Order of Confirmation directed the City to deposit \$14,000.00 into the registry of the Court for the Jones Deed of Trust, and \$7,171.10 for the petitioner's judgement lien. Order of Confirmation; Transcript page 2. The petitioner repeatedly characterizes the deed of trust holders as "the Unknown Jones Beneficiaries". This is an incorrect application of the term as used in Virginia Code § 58.1-3967. Under this statute, the title conveyed to the purchaser of a property sold for delinquent real estate taxes is "free of all claims of any creditor, person, or entity". The statute goes on to say that claims secured by a deed of trust are not barred by any failure to file a claim.

Thus while the deed of trust is no longer a lien on the property, a claim by its holders was not barred after the sale, and the \$14,000.00 deposited into court remained the property of its holders. Since the petitioner did not own the \$14,000.00, it suffered no violation of the Takings Clause. See, e.g. *Raceway Park, Inc. v. Ohio*, 956 F.3d 677, 683 (6th Cir. 2004) ("There is no taking if there is no private property in the first place."); *Johnson v. City of Suffolk*, 851 S.E. 2nd 478, 481 (Va. 2020) ("A threshold question in any takings case is...does the plaintiff have an interest that is recognized as a property interest?").

**VI. CONCLUSION**

For the reasons stated herein, this Honorable Court should deny the petition as the trial court correctly ruled that the petitioner did not have any property interest protected by the Takings Clauses of the United States and Virginia Constitutions.

Respectfully Submitted,

CITY OF RICHMOND

\_\_\_\_\_  
Gregory A. Lukanuski (VSB# 36598)

Deputy City Attorney

900 East Broad Street

City Hall, Suite 400

Richmond, Virginia 23219

Telephone: (804) 646-7949

Facsimile: (804) 646-7939

E-mail: [greg.lukanuski@richmondgov.com](mailto:greg.lukanuski@richmondgov.com)

*Counsel for the Respondent City of Richmond*