
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,**

Appellant,

v.

CITY OF RICHMOND,

Appellee.

OPENING BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This is an appeal of a final judgment of the Circuit Court of the City of Richmond (the “Trial Court”) in the delinquent real estate tax sale proceeding brought by the City of Richmond regarding 3422 Keighly Road (the “Property”). At issue is the right to the surplus tax sale proceeds in excess of the amount remaining after full satisfaction of the City of Richmond’s tax lien and costs in conducting the tax sale (the “Net Tax Sale Proceeds”).

The Report of the Special Commissioner of Sale (JA 68) was approved by the Trial Court per its April 30, 2018 Order of Confirmation. (JA 69-71). That Order confirmed that a Deed of Trust was recorded in favor of the unknown heirs of the beneficiary of that Deed of Trust in the amount of \$14,000 on January 5, 2001. Further, it confirmed that the Caldwell Trust’s judgment lien in the principal amount of \$62,424.42 had been recorded against the Property on December 3, 2012 (JA 69-71). The Trial Court ordered the amount due the City of Richmond to be distributed and that the remaining Net Tax Sale Proceeds of \$21,171.10 be held by the Trial Court for the benefit of the holders of the confirmed liens of record for later distribution (JA 69-71).

The Trial Court released \$7,171.10 (plus accumulated interest) to the Caldwell Trust per an Amended Order of Confirmation (JA 86-88).

The unknown beneficiaries of the Deed of Trust did not file a claim to the

surplus \$14,000 held by the Trial Court within the two-year period required to do so under Va. Code §58.1-3967 in order to preserve its claim, if any, in the Net Tax Sale Proceeds (JA 143 and 150).

After the expiration of the two-year claim period applicable to the Deed of Trust beneficiary, the Caldwell Trust filed a Motion and memorandum of law in support with the Trial Court (JA 89-107) as supplemented (JA 122-124) requesting the Trial Court to distribute the unclaimed surplus of \$14,000 (plus accumulated interest) (the “Disputed Tax Sale Proceeds”) to the Caldwell Trust as the holder of the sole remaining Lien of Record under the Amended Order of Confirmation. The City of Richmond opposed the Caldwell Trust’s motion asserting that the City of Richmond was entitled to the surplus Disputed Tax Sale Proceeds pursuant to Va. Code §58.1-3967 (JA 125-127). The Trial Court entered its Order on this motion in favor of the City of Richmond on November 5, 2020 (JA 128).

The Caldwell Trust filed a Motion and Brief for Reconsideration and Entry of Order of Distribution (JA 129-132) (JA 133-142). The Caldwell Trust argued that the application of the pertinent language of Va. Code §58.1-3967 to distribute the Disputed Tax Sale Proceeds to the City of Richmond violates the Caldwell Trust’s private property rights in the Disputed Tax Sale Proceeds protected by the “takings clauses” of the United States and Virginia Constitutions (each a “Takings Clause” and collectively, the “Takings Clauses”).

The Trial Court denied the Caldwell Trust’s Motion for Reconsideration. The Caldwell Trust objected to the Trial Court’s ruling at the hearing of that Motion on January 19, 2021. In its written Order issued on January 20, 2021 (the “Final Order”), the Trial Court acknowledged “the Caldwell Trust’s objections for the reasons stated on the record, in brief, and in oral argument” and dispensed with the parties’ endorsement of the Final Order (JA 143-144).

The Caldwell Trust timely filed its Notice of Appeal on February 19, 2021 (JA 145-147).

The Trial Court entered the Written Statement of Facts in Lieu of Transcript on April 15, 2021 (JA 148-153).

This Court Granted the Caldwell Trust’s Appeal and the Caldwell Trust’s Assignments of Error on January 17, 2023 (JA 154).

ASSIGNMENTS OF ERROR

1. The Trial Court erroneously ruled that the Caldwell Trust’s lien claim established under Va. Code §58.1-3967 to the Net Tax Sale Proceeds to be distributed after payment in full of the City of Richmond’s statutory tax lien is not a constitutionally protected private property interest in the Disputed Tax Sale Proceeds.

2. The Trial Court erroneously failed to rule that the provisions of Va. Code §58.1-3967 granting the City of Richmond the right to the Disputed Tax Sale

Proceeds remaining after satisfaction of all obligations due the City of Richmond under its statutory tax lien was an unconstitutional taking of the Caldwell Trust’s property right in the Disputed Tax Sale Proceeds without just compensation under the United States and Virginia Constitutions.

STATEMENT OF FACTS

Following is the Trial Court’s Written Statement of Facts in Lieu of Transcript as submitted to the Court as part of the Record on Appeal (JA 148-152).

1. On June 14, 2017 the City of Richmond filed an action pursuant to Va. Code §58.1-3965 for unpaid real estate taxes owing on 3422 Keighly Road, Richmond, Virginia 23234 (the “Property”) pursuant to which the Property was subsequently sold at auction to satisfy the delinquent real estate taxes, penalties, interest, attorneys’ fees and costs owed the City of Richmond.

2. The disbursement of real estate tax sale proceeds is governed by Va. Code §58.1-3967.

3. Based on the Report of the Special Commissioner appointed to oversee the tax sale of the Property and the disbursement of the proceeds generated from the sale of the Property as submitted to the Trial Court, the Trial Court entered its Order of Confirmation confirming that the tax sale “has taken place in accordance with the Terms of the Order of Sale” and the Report of the Special Commissioner “is approved, ratified and confirmed in all respects”. The Trial Court further ordered

that “the City of Richmond Department of Finance mark the records of the above-described parcel as satisfied with respect to all taxes, penalties and interest due and owing through the date of this hearing”.

4. The Order of Confirmation directed the Special Commissioner to remit the \$21,171.10 in Net Tax Sale Proceeds to the Trial Court to be held in the Trial Court’s registry to be distributed to the holders of the two (2) Liens of Record against the Property identified on Schedule A attached to the Order of Confirmation.

5. The first Lien of Record identified on Schedule A of the Order of Confirmation is a Deed of Trust (the “Jones Deed of Trust”) recorded against the Property in the land records of the Richmond Circuit Court as Instrument Number 01-412 on January 5, 2001 for the benefit of “the unknown heirs of Dixie L. Jones” (the “Unknown Jones Beneficiaries”) in the amount of \$14,000.

6. The second Lien of Record listed on Schedule A of the Order of Confirmation secured the previous Property owner’s debt to the Caldwell Trust in the amount of \$62,424.42 plus interest at the *per annum* rate of 12% from October 26, 2012 until paid (the “Caldwell Trust Debt”) pursuant to and as evidenced by the Fairfax County Circuit Court’s Abstract of Judgment filed by the Caldwell Trust in the records of the Richmond Circuit Court as Instrument Number 12-22265 (the “Caldwell Trust’s Lien”).

7. On June 17, 2019 the Trial Court entered an Amended Order of

Confirmation releasing \$7,171.10 of the Net Tax Sale Proceeds to the Caldwell Trust in partial satisfaction of the Caldwell Trust's Debt secured by the Caldwell Trust's Lien which at the time of the Amended Order of Confirmation exceeded \$100,000.

8. The Trial Court recognized in its Amended Order of Confirmation as agreed to by the City of Richmond that the Caldwell Trust complied with all statutory procedures required of it pursuant to Virginia's creditor's rights laws and Va. Code §58.1-3967 to establish, protect, enforce and preserve its rights as the holder of an unsatisfied and valid lien "chargeable" against the Property and the proceeds of sale of the Property.

9. After the Caldwell Trust's receipt of the \$7,171.10, the Caldwell Trust's Debt and its lien claim remained unsatisfied and the balance owed the Caldwell Trust continued to exceed the \$14,000 (plus any accumulated interest) in Net Tax Sale Proceeds remaining in the Trial Court's registry.

10. The Unknown Jones Beneficiaries did not make a claim to the Net Tax Sale Proceeds for any amounts still owed it as previously secured by the Jones Deed of Trust "within two years after the date of confirmation of sale" applicable to an "unknown beneficiary of such lien" under Va. Code §58.1-3967.

STANDARD OF REVIEW

There is no dispute as to any material facts of this case. This appeal presents pure questions of constitutional law and are reviewed *de novo*. *Gallagher v. Commonwealth*, 284 Va. 444 (2012). "Whether a taking has occurred is a question of law that we review *de novo* on appeal." *Johnson v. City of Suffolk*, 851 S.E.2d 478 (2020).

AUTHORITIES AND ARGUMENT

Relevant Statutory Language of Virginia Code §58.1-3967:

"If no claim for payment of the indebtedness secured by any lien chargeable thereon is made by an unknown beneficiary of such lien...within two years after the date of confirmation of such sale, then such amount secured by the lien of the unknown beneficiary...shall be paid by the clerk of the court in which such suit was instituted to the county, city, or town that received proceeds from the sale of the real estate."

The first effect of this sentence is to terminate any claim an unknown beneficiary may have under its lien, which will be referred to as the "claim termination clause". The second effect is to require the court to pay Net Tax Sale Proceeds in the amount of the indebtedness secured by the unclaimed lien to the taxing authority, which will be referred to as the "escheat clause".

Applicable Constitutional Law

1. The pertinent provisions of Section 11 of Article I of the Bill of Rights of the Virginia Constitution are:

“That the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof. No more private property may be taken than necessary to achieve the stated public use. Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking.”

“...a taking or damaging of private property is not for public use if the primary use is for ... increasing tax revenue.... The condemnor bears the burden of proving that the use is public, without a presumption that it is.”

2. The Fifth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment of the United States Constitution (*Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897)), provides in relevant part:

“[N]or shall private property be taken for public use, without just compensation.”

Argument

I. The Caldwell Trust has a constitutionally protected private property interest in the Disputed Tax Sale Proceeds under Virginia and Federal law.

The United States Supreme Court has held that the Takings Clause protects a diverse array of property interests from government confiscation, including homes, personal property, intangible property, money, interest on money, liens, and mortgages. *See, e.g., Horne v. Department of Agriculture*, 569 U.S. 513,

521(2015) (personal property); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 613 (2013) (money and "a right to receive money that is secured by a particular piece of property"); *Phillips v. Washington Legal Found.*, 524 U.S. 156, 168 (1998) (accrued interest); *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (liens); and *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-02 (1935) (mortgages).

The United States Supreme Court ruled in *Armstrong* that the United States' application of the doctrine of sovereign immunity to eliminate a shipbuilder's state mechanic's liens rights violated the Takings Clause of the Fifth Amendment. The liens were established under Maine law to enforce payment for work performed on ships subsequently acquired by the United States. The Supreme Court ruled that the liens were private property rights that could not be taken without just compensation:

“The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. A fair interpretation of this constitutional protection entitles these lienholders to just compensation here....Neither the boats' immunity, after being acquired by the Government, from enforcement of the liens nor the use of a contract to take title relieves the Government from its constitutional obligation to pay just compensation for the value of the liens the petitioners lost and of which loss the Government was the direct, positive beneficiary.” *Id.* at 49.

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), the United States Supreme Court held that Florida statutes requiring that interest earned

on interpleader accounts held by the registry of Seminole County be retained by Seminole County violated the Fifth Amendment's Takings Clause:

“[W]here the deposit in the court's registry is required by state statute in order for the depositor to avail itself of statutory protection from claims of creditors and others, Seminole County's taking unto itself, under § 28.33 and 1973 Fla. Laws, ch. 73-282, the interest earned on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments.” “[A] State, by *ipse dixit*, may not transform private property into public property without compensation... This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.” *Id.* at 164.

As in *Webb's Fabulous Pharmacies, Inc.*, this case involves third-party funds held in the court's registry that the governing statute converts to public property “*ipse dixit*” (“because I said so”).

Addressing a mortgage creditor's rights in *Louisville Joint Stock Land Bank*, the United States Supreme Court held that the impairment of a lender's rights and remedies under a mortgage as a result of the application of new provisions of the Bankruptcy Act enacted after the creation of the mortgage constituted a taking requiring just compensation under the Fifth Amendment. *Id.* at 601-602.

“Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to ‘existing rules or understandings that stem from an independent source such as state law’”. *Phillips, supra*, at 164 quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577

(1998). However, the state can't simply exclude from its definition of property any interest that the state wishes to take. "[A] State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Phillips, supra* at 167.

Under Virginia law, a judgment becomes a lien "on all the real estate of or to which the defendant in the judgment is or becomes possessed or entitled, from the time such judgment is recorded on the judgment lien docket of the clerk's office of the county or city where such land is situated." Va. Code §8.01-458. Judgments "...attach to his real estate, and be payable thereout **in the order of the priority of the lien of such judgments, respectively.**" (emphasis added) Va. Code §8.01-459. In enforcing the judgment lien creditor's rights "...the court may decree such real estate, or any part thereof, to be sold, and the proceeds applied to the discharge of the judgment." Va. Code §8.01-462.

"The lien of the judgment is a vested property right..." *McClanahan's Adm'r v. Norfolk & W. Ry. Co.*, 122 Va. 705, 96 S.E. 453 at 458 (1918). It is "... well established, that an equity of redemption in real property is an estate in the land." *Id.* at 460. "The judgment lien is in equity but a charge on the equity held by the defendant, where the lien attaches." *Id.* at 466. "That a judgment is a lien on the equity of redemption is settled law." *Neff's Administrator v. Newman*, 150 Va. 203, 209, 142 S.E. 389 (1928).

Virginia's delinquent real estate tax sale statute acknowledges and appropriately incorporates the priority of the rights of the holder of liens that the Commissioner of Sale and the Trial Court determined had attached to the equity in the Property: "[t]he former owner, his heirs or assigns of any real estate sold under this article shall be entitled to the surplus received from such sale in excess of the taxes, penalties, interest, reasonable attorneys' fees, costs and any liens chargeable thereon." Va. Code §58.1-3967. The "surplus" is the owner's equity after the payment of sale proceeds to satisfy the superior lien rights of the taxing authority and the holders of "liens chargeable thereon".

Both the Trial Court and the City of Richmond agreed that the Caldwell Trust's Lien created and perfected a property right under Virginia law in and to at least \$7,171.10 of the Net Tax Sale Proceeds (JA 47, 71, 86-88 and 150). Furthermore, the City of Richmond and the Trial Court confirmed that, after the Trial Court's release of the \$7,171.10 to the Caldwell Trust, the Caldwell Trust's Lien remained unsatisfied in an amount in excess of the Disputed Tax Sale Proceeds remaining in the Trial Court's registry (JA 150).

The Caldwell Trust's Lien claim extends to the entirety of the Net Tax Sales Proceeds including the Disputed Tax Sale Proceeds. The Caldwell Trust's Lien is only limited when it has been fully satisfied or when the Net Tax Sale Proceeds have been exhausted in satisfaction of valid claims superior to it in priority. There are no

valid claims superior in priority to the Caldwell Trust's Lien in the Disputed Tax Sales Proceeds per Argument II, *infra*.

II. The escheat clause of Va. Code §58.1-3967 as applied to eliminate the Caldwell Trust's property right in favor of the City of Richmond results in an unconstitutional taking of the Caldwell Trust's property right without just compensation under the United States and Virginia Constitutions.

No question concerning the constitutional legitimacy of Va. Code §58.1-3967's claim termination clause is raised on this appeal.

The United States Supreme Court has addressed the Takings Clause as it applies to the property owner's rights to surplus tax sale proceeds. *See United States v Lawton*, 110 US 146 (1884) and *Nelson v City of New York*, 352 US 103 (1956). *Lawton* made clear that a Takings Clause violation arises when a tax-sale statute grants a former owner an independent property interest in surplus tax sale proceeds and the government fails to return the surplus tax sale proceeds to the former owner. *Nelson*, on the other hand, informs us that no federal Takings Clause claim will exist when there is a statutory path affording the property owner the right to recover the surplus tax sale proceeds but the property owner fails to avail itself of that procedure.

Creditors secured by property sold pursuant to delinquent tax sale proceedings have rights in the real estate and the tax sale proceeds superior to the property owner's equity claim. The same due process parameters established in *Lawton* and *Nelson* that apply to a prior owner's equity necessarily apply to the holders of

property rights created by superior security interests in the equity. *Lawton* and *Nelson* read together assure citizens that once a property right is established and recognized by the sovereign it cannot be modified, eliminated, ignored, subordinated or forfeited by operation of the sovereign's delinquent tax sale laws without due process. Procedures must provide the holder of the property right the opportunity to protect its property interest in the tax sale proceeding sufficient to satisfy due process. Without those due process safeguards, the government's retention of surplus tax sale proceeds by operation of the tax sale statutes would violate the federal Takings Clause as to the holders of rights in surplus tax sale proceeds.

The City of Richmond and the Trial Court conceded that the Caldwell Trust's Lien claim to the Net Tax Sale Proceeds was preserved without further action required of the Caldwell Trust (JA 87 and 150) and that the Caldwell Trust's Lien claim exceeded the amount of Net Tax Sale Proceeds (JA 150).

However, for "unknown beneficiaries" of a "lien chargeable" on the Property, Virginia Code §58.1-3967 requires that, in order to protect a right they may have in the Net Tax Sale Proceeds, they must file a "claim for payment of the indebtedness" within two years after the entry of the Order of Confirmation. The Unknown Jones Beneficiaries did not file a "claim for payment of the indebtedness" within the two-year period (JA 143 and 150). Because the claim termination clause's procedural protection afforded those potential claimants ample time to preserve their rights, the

statute satisfies the *Lawton* and *Nelson* due process requirements. The termination of any claims they may have had by operation of the claim termination clause does not run afoul of the procedural due process requirements of the Takings Clause.

To eliminate the Caldwell Trust's Lien claim to the Disputed Tax Sale Proceeds, there must be vested property rights in the Disputed Tax Sale Proceeds superior to the Caldwell Trust's rights. The only possible party that could have superior rights in the Disputed Tax Sale Proceeds is the Unknown Jones Beneficiaries. But the Unknown Jones Beneficiaries' rights, if any, terminated for failure to file a claim leaving the Caldwell Trust's Lien as the only valid Lien of Record in the Disputed Tax Sale Proceeds.

Logically, the statute requires that an unknown lien beneficiary file a "claim for payment of the indebtedness" to verify that it is actually owed some portion of the indebtedness originally secured by its unreleased lien. A creditor's claim, including claims of lien claimants under this statute, is limited to the amount that it is actually owed. The face amount of the lien is not determinative of the actual "claim for payment of the indebtedness" to which the Unknown Jones Beneficiaries may have been entitled had they filed a claim. The amount, if any, of that debt is unknown to the Trial Court, the City of Richmond and the Caldwell Trust simply because no claim confirming that a debt is still owed was ever filed.

But, in determining the amount that escheats to the taxing authority ahead of

valid liens, the statute implicitly assumes that: (i) the indebtedness originally secured by the unreleased lien of record has not been satisfied, (ii) the unreleased lien is still enforceable, and (iii) the indebtedness owed the unknown beneficiary is the face-amount of the lien.

Logic does not permit the conclusion that because no claim of indebtedness was filed there must still be an indebtedness owed or that the indebtedness is precisely the original principal amount of the seventeen-year-old Jones Deed of Trust as the statute assumes in calculating the quantum of the escheat. Other scenarios belie the assumptions such as: the Jones Deed of Trust might not have been enforceable (e.g., *See* Va. Code §§8.01-241 and 8.01-242, statutes of limitations terminating the enforceability of deeds of trust), it may have been fraudulently recorded, or the indebtedness originally secured by the Jones Deed of Trust may have been fully satisfied but the Deed of Trust was never released of record. A common real estate title problem throughout the Commonwealth is tracking down, obtaining and recording releases for deeds of trusts and judgment liens securing debts that have been fully satisfied but never released.

Without the filing of the statutorily mandated claim, the unreleased Jones Deed of Trust is neither evidence of the existence nor the amount of a debt due the Unknown Jones Beneficiaries as of the delinquent tax sale confirmation date. Since constitutionally protected property rights are at stake under the statute, the only

result that can apply to the Unknown Jones Beneficiaries' failure to file a claim is that **the Unknown Jones Beneficiaries have no claim in the Disputed Tax Sale Proceeds**. The claim termination clause terminates the claim but the escheat clause resurrects the claim in the hands of the taxing authority. The assumptions built-in to the statute are harmless if there are no other holders of validly perfected property rights in the Net Tax Proceeds after the termination of a superior lien claim pursuant to the claim termination clause. But they are constitutionally unacceptable when employed by the escheat clause to eliminate private property rights in the Net Tax Sale Proceeds for "... which loss the Government was the direct, positive beneficiary." *Armstrong, supra* at 49.

The establishment of lien and payment priorities and the distribution of available tax sale proceeds under Va. Code §58.1-3967 is expressly governed by the well-established procedures applied in creditor's bills in equity.

"Proceedings under this article...shall be by bill in equity..."; "Such proceedings shall be held in accordance with the requirements, statutory or arising at common law, relative to effecting the sale of real estate by a creditor's bill in equity to subject real estate to the lien of a judgment creditor..." Va. Code §58.1-3967.

The priorities and distribution procedures applicable to creditor's bills in equity are essentially the same as for foreclosures under deeds of trust in Virginia pursuant to Va. Code § 55.1-324:

"The trustee shall receive and receipt for the proceeds of sale, account

for the same to the commissioner of accounts pursuant to § 64.2-1309 and apply the same, first, to discharge the expenses of executing the trust, including a reasonable commission to the trustee; secondly, to discharge all taxes, levies, and assessments, with costs and interest if they have priority over the lien of the deed of trust, including the due pro rata thereof for the current year; thirdly, to discharge **in the order of their priority**, if any, the remaining debts and obligations secured by the deed, and any **liens of record inferior to the deed of trust** under which sale is made, with lawful interest; and, fourthly, the residue of the proceeds shall be paid to the grantor or his assigns...” (emphasis added).

There is no provision in Virginia’s creditor’s rights law that vests a fully satisfied senior lienholder with additional rights equivalent to those of a junior lienholder in surplus proceeds from the sale of collateral because the junior lienholder failed to protect its rights. Liens are paid and extinguished in the order of their priority. This applies to lien and distribution priorities governing creditor’s bills in equity and foreclosures under Deeds of Trust cited above. There is one exception; that being when the escheat clause of Virginia Code §58.1-3967 awards the fully satisfied taxing authority with rights to surplus tax sale proceeds senior in priority to a junior lienholder’s valid rights in those tax sale proceeds. The resulting elimination of the junior lienholder’s rights for the taxing authority’s benefit is precisely how the escheat clause of Va. Code §58.1-3967, by “*ipse dixit*”, violates the Takings Clauses per the U.S. Supreme Court’s holding in *Webb’s Fabulous Pharmacies, Inc., supra* at 164.

In comparison to the bare-bones “takings” language of the Fifth Amendment,

Virginia's Takings Clause anticipates and limits the government's power to encroach on private property rights in order to fill its coffers:

“... a taking or damaging of private property is not for public use if the primary use is for...increasing tax revenue...”

As to the breadth of Virginia's and its subsidiary jurisdictions' right to take private property, it enjoins the Commonwealth and its subsidiaries from taking

“[N]o more private property...than necessary to achieve the stated public use.”

The stated and obvious public purpose for delinquent tax sales proceedings is to recover delinquent taxes owed the jurisdiction including, appropriately, the penalties, interest, reasonable attorney's fees and costs cited in the statute imposed or incurred by the jurisdiction in that process.

All of the Net Tax Sale Proceeds held in the Trial Court's registry began as private property. They do not lose that protected status until all private property interests in the proceeds have been satisfied or terminated. Only if proceeds remain in the registry after satisfaction of all preserved private property interests can they be converted to a public use by escheating to the taxing authority without violating the Takings Clauses. The Unknown Jones Beneficiaries failed to comply with the claim termination clause resulting in the termination of any rights they may have had in the Disputed Tax Sale Proceeds. The Caldwell Trust's property rights in the Disputed Tax Sale Proceeds have not been terminated or forfeited by any act or

failure to act under the statute or Virginia law. As a result, the Caldwell Trust is the sole holder of any property rights in the Disputed Tax Sale Proceeds.

In contrast to the property rights established by the Caldwell Trust's Lien claim, the City of Richmond has been paid in full and its first priority tax lien rights were fully satisfied and extinguished by the Trial Court in paragraph 4 of its Order of Confirmation (JA 69). The City of Richmond does not have a lien in the Net Tax Sale Proceeds. The City of Richmond is not owed any money related to the Property or by any of the parties in this proceeding. There is no underlying obligation benefitting the City of Richmond that arises to the level of a property interest in the Net Tax Sale Proceeds. Regardless of the gross disparity of property interests, because the escheat clause disregards junior lienholder's property rights, it vests the City of Richmond with the Unknown Jones Beneficiaries' senior lien rights (despite the statute's termination of those rights) thereby eliminating the Caldwell Trust's preserved property right in the Disputed Tax Sale Proceeds.

The escheat clause eliminated the Caldwell Trust's private property rights in the Disputed Tax Sale Proceeds and converted that private property to public property resulting in a windfall to the City of Richmond borne by and at the direct expense of the Caldwell Trust in violation of the Takings Clauses. (*See Armstrong, Webb's Fabulous Pharmacies, Inc., Phillips, and Louisville Joint Stock Land Bank, supra, cited in Argument I for the dispositive Takings Clause rulings and principles.*)

III. The validity of the claim termination clause and the escheat clause as applied under Va. Code §58.1-3967 are independent of each other and severable to the extent that the escheat clause violates the Takings Clauses.

The Caldwell Trust does not contend that the escheat clause of Va. Code §58.1-3967 violates the Takings Clauses in all circumstances but only as applied to eliminate valid claims to the tax sale proceeds by diverting those funds to the taxing authority as occurred in the present case. If there are no valid unpaid claims inferior in original priority behind the possible lien claim of an unknown beneficiary or the prior owner after the expiration of the statute's two-year claim filing period then distribution of any remaining Net Tax Sale Proceeds to the taxing authority would operate as an escheat of unclaimed property without violating the Takings Clauses. In that circumstance, there are no protected property interests in the remaining Net Tax Sale Proceeds being taken or damaged as a result of the escheat clause.

As to the severability of invalid statutory provisions as they may apply to certain, but not all, circumstances, the General Assembly enacted Virginia Code § 1-243:

“The provisions of acts of the General Assembly or the application thereof to any person or circumstances that are held invalid shall not affect the validity of other acts, provisions, or applications that can be given effect without the invalid provisions or applications. The provisions of all acts, except for the title of the act, are severable unless (i) the act specifically provides that its provisions are not severable; or (ii) it is apparent that two or more acts or provisions must operate in

accord with one another.” (emphasis added); Applied in *Appalachian Voices v. State Corp. Com’n*, 277 Va. 509 (2009).

The validity and effect of the claim termination clause was not raised or challenged at the Trial Court nor is at issue on appeal. Whether an unknown lien beneficiary’s claim is validly terminated under the statute is governed by a specific set of statutory pre-conditions that must satisfy procedural due process established under *Lawton* and *Nelson* and their progeny. Because Va. Code §58.1-3967 allows an unknown lien beneficiary up to two years after the date of confirmation of the tax sale to file a “claim for payment of the indebtedness” to preserve its right to be paid out of available Net Tax Sale Proceeds, the statute’s claim termination clause satisfies the procedural due process requirements of *Lawton* and *Nelson*.

To whom the money earmarked by the Amended Order of Confirmation is distributed after the claim is terminated is unrelated to the procedural due process concerns of the claim termination clause. The government granting to itself a priority property right in Net Tax Sale Proceeds over the property rights of a valid lien creditor requires a Takings Clause analysis distinct from the claim termination clause analysis. The constitutional validity or infirmity of the escheat clause is not dependent on whether the claim termination clause passes its separate due process scrutiny (of course, the escheat clause will not be relevant if the claim termination clause is invalid). Conversely, the claim termination clause is valid, even if the

escheat clause is not. These clauses are severable and require independent review as each applies to a given set of circumstances. The statute does not specifically provide that its provisions are not severable. Because the escheat clause of Va. Code §58.1-3967 as applied to this case violates the Takings Clauses the escheat clause is required and permitted to be severed from the balance of Va. Code §58.1-3967 in this matter.

CONCLUSION

For the reasons stated, the Caldwell Trust seeks *de novo* review of the Trial Court's Final Order and reversal of the Trial Court's Final Order and the entry of Final Judgment awarding the entire Disputed Tax Sale Proceeds (plus interest) to be paid to the Caldwell Trust as just compensation under the United States and Virginia Takings Clauses.

Respectfully submitted,

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U/A dated December 28, 2006
By Counsel

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