MICHAEL J. QUINLAN
RICHARD N. BRYANT
SALLY J. DAGGETT
ROY T. PIERCE
BRENDAN P. RIELLY
NICHOLAS J. MORRILL

MARK A. BOWER
CHARLES M. KATZ-LEAVY
ALYSSA C. TIBBETTS
JEFFREY B. HERBERT
ERICA M. JOHANSON
TUDOR N. GOLDSMITH

TEN FREE STREET
P.O. BOX 4510
PORTLAND, MAINE 04112-4510
(207) 775-7271 (Phone)
(207) 775-7935 (Fax)

www.jensenbaird.com

REBECCA D. SHILAND
KEVIN J. CROSMAN
ANNA P. CLARK
BENJAMIN T. MCCALL
SHARRA L. INGLIS
PAIGE E. EGGLESTON

Of Counsel
NATALIE L. BURNS
JOSEPH G. CARLETON, JR.
LAWRENCE C. CLOUGH
KENNETH M. COLE III
PATRICIA M. DUNN
DAVID J. JONES
LESLIE E. LOWRY III
F. BRUCE SLEEPER
RICHARD H. SPENCER, JR.

March 14, 2024

Senator Nicole Grohoski, Senate Chair
Representative Joe Perry, House Chair
Joint Standing Committee on Taxation
c/o Legislative Information Office
100 State House Station
Augusta, ME 04333

Re: Statement of F. Bruce Sleeper, Esquire in Support of Passage, With Amendment, of LD 2262, An Act to Amend the Process for the Sale of Foreclosed Properties

Dear Senator Grohoski and Representative Perry:

I am a semi-retired attorney at the firm of Jensen Baird Gardner & Henry in Portland who has spent a large part of his 40+ year legal career representing creditors in various matters. In that role, I have represented municipalities in Maine who would like to protect and/or exercise their rights arising from real and personal property tax liens, as well as governmental entities who hold sewer liens upon properties in this State. I have also represented a multitude of creditors who are seeking to protect or enforce their rights under liens and mortgages that they hold upon real estate in Maine. Over the years, I have also helped the Maine Municipal Association prepare and update the bankruptcy section of its tax lien manual. I have also made presentations at several seminars held by the Maine Municipal Tax Collectors' and Treasurers' Association that have dealt with property tax liens and have helped to prepare sewer lien legislation. I provide this information merely as background and need to emphasize that that I am not representing any of these entities, any other clients, or Jensen Baird, in connection with this email or its subject matter, but, instead, am presenting this testimony in my personal capacity. Unfortunately, because of prior commitments, I will be unable to appear at today's hearings on this bill, but did want to make the Committee aware of several issues that need further attention before this bill is passed as amended to resolve those matters.

LD 2262 is the result of the efforts of the Report of the Working Group to Study Equity in the Property Tax Foreclosure Process. That Group was formed to resolve issues arising as a result of the United States Supreme Court decision in *Tyler v. Hennepin Cnty.*, 143 S. Ct. 1369 (2023). There, the Court held that a strict foreclosure (one where the party foreclosing becomes the owner of the property at the end of the foreclosure process without any sort of auction or other sale occurring) that permitted a taxing authority to acquire title to property worth far more than the amount of the tax was an unconstitutional taking of that excess value without compensation to the taxpayer. My concerns with the response provided by LD 2262 in its current form are as follows:

1 My greatest concern is that the effect of the *Hennepin* decision on those who hold mortgages or liens on tax acquired property is often overlooked, something that is only partially addressed by LD 2262 in its current form. Clearly, these creditors hold an interest in the property that is going to be lost through the tax lien foreclosure process just as much as the interest held by the owner of the property will be. See *Hull v. Cenlar FSB (In re Gistis)*, Nos. 18-10710, 19-1008, 2020 Bankr. LEXIS 10, at *9 (in Maine a mortgage vests legal title in property in the mortgage holder with the mortgagor retaining an equitable right of redemption and a right of possession, which redemption right can be exercised by payment of the debt secured by that mortgage) (copy attached). I realize that *Hennepin* did not deal directly with this issue, since the mortgagee was not a party to that case. Furthermore, the historical analysis used by the Supreme Court there did not deal with what rights a mortgagee or lienholders might historically have had in surplus sale proceeds. However, the retention of the surplus sale proceeds there was just as much a seizure of the mortgagee's interest in the property as it was of the owner's. The existing version of 36 M.R.S. § 943-C (which the bill seeks to modify) only protects, in a limited fashion, the rights of the property owner, but not those of creditors holding a lien or mortgage on that property. LD 2262 makes a good start on this issue by requiring that the notice of intent to pay excess sale proceeds be sent not only to the prior owner, but also to each record holder of an interest in the property, but it then falters.

2. The last sentence of proposed § 943-C(8) provides that the pre-sale notice does not limit the rights of "lienholders" to pursue any claims to excess sale proceeds. There are two problems with this. First, the term "lienholders" is often used to refer only to parties who obtain an interest in a debtor's property to secure a debt by some means other than an agreement between the lienholder and the debtor. Thus, the term may not include the interest of the holder of a mortgage on the property. Second, and far more importantly, holders of liens and mortgages upon real estate ordinarily do not have any rights to the proceeds of the sale of that property, at least

in Maine. Instead, the property merely remains subject to these liens and mortgage despite the property's conveyance to a third party. See *Hull v. Cenlar FSB* 2020 Bankr. LEXIS 10,at *11-12. This result makes logical sense, since a conveyance of a mortgagor's interest in mortgaged property transfers only what the mortgagor holds, which is a right to redeem the property from the mortgage, and does not include the rights of the mortgage holder in that real estate. The only exceptions to this proceeds rule are statutory. Thus, when property is sold as part of a mortgage foreclosure, by statute the foreclosure sale proceeds are to be paid over to those holding an interest in that property, in the order of the priority of that interest. See, e.g., 14 M.R.S. §§ 6203-A(5), 6322, 6324. A similar situation occurs when a mechanic's lien is foreclosed. See 10 M.R.S. § 3260. Additionally, as a matter of statutory interpretation, the holder of a mortgage or lien upon property that is sold by a bankruptcy estate also obtains rights in the sale proceeds. See *Hull v. Cenlar FSB*, 2020 Bankr. LEXIS 10, at *12 ("**For purposes of section 552(b)** [of the Bankruptcy Code], a mortgage on real estate in Maine extends to both the real estate and the proceeds realized from the sale until those proceeds are applied to extinguish the mortgage."). There is no similar statutory grant to holders of mortgages or liens of any right to the proceeds of a sale of tax acquired property. Accordingly, § 943-C(8) must go beyond merely preserving rights in sale proceeds, rights which these creditors simply do not now hold, and grant them those rights in order to comply with *Hennepin*.

3. Proposed § 943-C provides for municipalities to make payments to the prior owner of the property. This will be far from satisfactory to creditors secured by that property. Moreover, a municipal payment to a third party is clearly not compensating those creditors for the taking of their collateral interests, particularly where this leaves a lawsuit against that party as their sole option for recovery, creating a violating the principles enunciated in *Hennepin*. I understand that it might be difficult for a municipality to make the determination as to what party should receive a particular portion (or all) of the excess proceeds payment. This is exactly what is now required of private parties who foreclose a mortgage under the Maine power of sale statutes. *See* 14 M.R.S. § 6203-A(5). The volume of tax lien foreclosures facing a municipality at any particular time is probably substantially in excess of the volume of power of sale foreclosures facing a mortgage holder making this a greater problem for those governmental entities. This could be resolved, however, by including some sort of claim and objection procedure into the payment process. If that process results in a disagreement between various parties as to which should receive what, then the money could simply be placed into court under an interpleader or similar process to let a judge figure out the proper distribution.

4. I know that the Working Group was given the task only of dealing with tax lien foreclosures, but foreclosures of sewer, water, and storm water liens present the same issues. *See*, *e.g.*, 30-A M.R.S. § 3406; 35-A M.R.S. § 6111-A; 38 M.R.S. § 1208. Identical issues would also arise under any other strict foreclosure process that municipalities or other public entities can use to acquire title to property (I'm not sure that there are any other circumstances where strict foreclosure is allowed). Thus, the current bill is the start, but not the finish, of the corrective process.

5 The Bill contains no deadlines for complying with proposed § 943-C. How long can a municipality wait until it sends out a notice of intent to pay excess proceeds without impermissibly interfering with the rights of parties with an interest in the proeprty? A municipality should have some interest in getting the notices out fairly quickly, since constitutionally mandated interest will accrue on the excess proceeds amount during the time between the taking of the property which occurs upon foreclosure of the tax lien and the date on which excess proceeds are actually paid. See *Fullerton v. Knox Cty. Comm'rs*, 672 A.2d 592, 594 (Me. 1996).

6. It is also possible that the process for providing the pre-payment notice to the former owner in proposed § 943-C(8) and (9) does not satisfy procedural due process requirements. In one case, the Law Court stated that when a " court has information regarding other potential methods for service of an order or a complaint, the better practice is for the court to augment its order for service by alternate means with any reasonably available and inexpensive methods of contacting a defendant, including service on the defendant's attorney." *Schulz v. Doeppe*, 2018 ME 49, ¶ 22, 182 A.3d 1246. Later on in the same paragraph of that case, the Court indicated that email would also be a method that could have been used. The Court used a balancing test to determine whether publication of an order in a newspaper was sufficient "weighing the interests of both parties and the benefit to be gained from more substantial measures". 2018 ME 49, ¶ 21. It is unclear how much of this analysis applies outside of the courtroom setting, but it does indicate the possibility that something more than merely publishing a notice in a newspaper will be sufficient, at least where a municipality has other contact information (such as an email address) for the former owner of the property.

7. Proposed § 943-C(9) contains no provision for notice by publication where the municipality cannot locate a lienholder or mortgage holder, something that almost certainly is a violation of their due process rights. From personal experience with mortgage foreclosures, I can tell you that it is often much, much harder to find the location (or continuing existence) of a non-owner that holds an interest in property

than it is to find the location of the owner. Also, my comments in item 6 above would apply to notices provided to holders of mortgages or liens as well.

8. Proposed § 943-C(10) provides that the municipality may retain the surplus proceeds if the former owner does not claim them within 30 days of the final published notice. This should be changed to ensure that lienholders and mortgage holders can also file their own claims within the 30 day period. Additionally, I assume that the argument that this forfeiture is constitutionally sound is based upon a conclusion that whoever may have had rights in the excess proceeds has abandoned them and, therefore, the retention of the funds and the property by the municipality is no longer a taking. Whether 30 days is sufficient time to respond, particularly if notice was by publication, may be a problematical issue. If it is sufficient time, then the argument may work; if not, then there has been a taking of the money (or value if the municipality retains the property for its own use) by the municipality. It would probably be far better to require that these funds be turned over to the State Treasurer as unclaimed property under the Revised Unclaimed Property Act, 33 M.R.S. §§ 2051-2223. See §§ 2052(23) (defining "person" subject to the Revised Act to include a "government or governmental subdivision, agency or instrumentality"), 2061(10) (providing that property held by a government or governmental subdivision, agency or instrumentality presumed abandoned within one year after it became distributable). This would be similar to what would occur if a mortgage holder was unable to find a party in interest to pay over any surplus resulting from a power of sale foreclosure.

9. Proposed § 943-C(11) provides that a notice of the payment of the proceeds must be recorded in the local registry of deeds, which is clearly something that is necessary to at least move in the direction of providing clear title to the property. That proposed section references payment to the owner, which, as noted above, ignores the rights of holders of mortgages and liens against the property. Additionally, the purpose of this recording is to ensure that there is some easily accessible public record showing that the municipality actually complied with the terms of the proposed statute (this is similar to what is required of mortgagees who foreclose using power of sale procedures under 33 M.R.S. § 6203-B). In order to truly fulfill that purpose the notice should also state: (a) when notices of intent to pay excess sale proceeds were sent out: (b) to what parties and at what addresses they were sent; (c) if, when, and how any notice was provided by publication; and (d) what other actions if any, were taken to provide parties in interest with the notice. If the bill is amended to set a deadline for sending out excess sale notices, then the recorded notice should also state the date on which the municipality acquired title to the property at the end of its lien foreclosure process. Additionally, the legislation

should provide that an amended notice can be field to correct errors in a prior one, pretty much as is allowed under the power of sale mortgage foreclosure procedures in 14 M.R.S. § 6203-B.

10. Proposed § 943-C(3) requires a municipality to convey property at the highest reasonable price that can be obtained during a 6 month period after it is listed with a broker. This seems to be both unduly lengthy and cumbersome. No matter how the property is sold and by whom, the market will know that it is a distressed property, and this will bring down its reasonable sale value even after a 6 month sale effort. Furthermore, this could result in the municipality facing arguments by the prior owner and other parties in interest that selling the property before the end of that period brought a sale price that is lower than what is reasonable, or, contrariwise,, that selling at the end of the period meant that a higher price offered earlier on but no longer available at the time of sale was also unreasonable. I have been happily surprised at the sale prices obtained at foreclosure auctions where a professional auction house has been hired to advertise and conduct that auction. The cost of such an auction is usually what is required to publicize the sale (usually $2-3,000), plus a commission that is ordinarily about the same, or sometimes lower than, a broker's commission. The best part about an auction: it happens at a particular time and place, rather than awaiting a brokered sale at an indeterminate time.

11. Proposed § 943-C will apply to "property" acquired through the tax lien foreclosure process. *See* proposed § 943-C(1-A). Under 36 M.R.S. § 551, this would include mobile homes and camper trailers. How does the real estate broker sale process apply to sales of such items?

12. Proposed § 943-C(7) requires a municipality to obtain a formal appraisal of the property by a licensed appraiser if the municipality decides to retain it. Depending upon the type of property involved, such appraisals can take quite some time and be expensive. A real estate broker can also provide a Broker Price Opinion (a "BPO") for less cost and, usually in less time than a formal appraisal. BPO's are widely used in the mortgage lending industry, and many courts (including the US Bankruptcy Court for the District of Maine) accept them as evidence of real estate values in court cases. Clearly, a full appraisal will provide a more complete evaluation of the property and its attributes, but that level of detail is probably not needed for these statutory purposes.

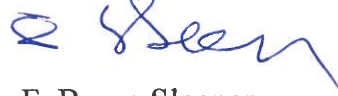
13. The bill should be amended to provide that failure to comply with § 943-C shall not affect the validity of: (a) the foreclosure of the tax lien and any resulting transfer to

the municipality of title to the property; and (b) the municipality's sale of the property to a third party. Additionally, an amendment could provide that in any civil action involving compliance with that statute, the production in evidence of an attested copy of the duly and recorded notice of payment of proceeds shall constitute prima facie evidence of the facts set forth therein, paralleling the language of 36 M.R.S. § 1083 and of the power of the corresponding power of sale mortgage foreclosure statute, 14 M.R.S. § 6203-B.

Thank you for this opportunity to present my views on this bill. Correction of Maine's real property tax foreclosure process to comply with *Hennepin* is essential to avoid litigation and ensure the smooth flow of taxes to municipalities and the State. I apologize for my inability to attend today's hearings, particularly on a matter that involves somewhat technical legal issues. Failure to amend LD 2262 to address these concerns, however, will only result in a partial resolution of the issues raised by *Hennepin*, leaving taxing authorities open to litigation until these concerns are also resolved.

Again, thank you. I would be more than happy to work with the Committee on this matter on an expedited basis.

Sincerely,



F. Bruce Sleeper,