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Nebraska Supreme Court Advance Sheets
311 Nebraska Reports
CONTINENTAL RESOURCES v. FAIR
Cite as 311 Neb. 184

CONTINENTAL RESOURCES, APPELLEE, V.
KEVIN L. FAIR, DEFENDANT AND THIRD-
PARTY PLAINTIFF, APPELLANT, AND HEATHER
HAUSCHILD, SCOTTS BLUFF COUNTY
TREASURER, AND DOUG PETERSON,
ATTORNEY GENERAL FOR THE STATE OF
NEBRASKA, IN THEIR OFFICIAL CAPACITIES,
AND THE COUNTY OF SCOTTS BLUFF, THIRD-
PARTY DEFENDANTS, APPELLEES.

— N.W.2d —
Filed March 18, 2022. No. S-21-074.

1. Standing: Jurisdiction: Parties. Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.

2. Jurisdiction: Appeal and Error. The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.

3. Constitutional Law: Statutes: Judgments: Appeal and Error. The constitutionality of a statute presents a question of law upon which appellate courts have an obligation to reach an independent conclusion irrespective of the decision of the court below.

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Appeal from the District Court for Scotts Bluff County: Leo P. Dobrovolny, Judge. Affirmed.

Michael W. Meister, Jennifer Gaughan, and Mark T. Bestul, of Legal Aid of Nebraska, for appellant.

Gregory C. Scaglione and Casandra M. Langstaff, of Koley Jessen, P.C., L.L.O., for appellee Continental Resources.

Douglas J. Peterson, Attorney General, and James A. Campbell, Solicitor General, for appellee Attorney General.

Heavican, C.J., Cassel, Stacy, Funke, Papik, and Freudenberg, JJ., and Thompson, District Judge.

Papik, J.

If an owner of real property in Nebraska fails to pay property taxes, a statute allows the county in which the property is located to sell a tax certificate for the property to a private party. If, after a period of time, the owner of the real property fails to pay the taxes owed and the tax certificate purchaser complies with certain requirements, the tax certificate purchaser can obtain a deed to the property, free of any encumbrances. This appeal presents a multipronged challenge to the constitutionality of the statutes that authorize this process. The appellant contends that the statutes, both facially and as applied to him, violate the state and federal Takings Clauses; the state and federal Due Process Clauses; the federal Excessive Fines Clause; article I, § 25, of the Nebraska Constitution; and article III, § 18, of the

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Nebraska Constitution. We hold that these claims of unconstitutionality lack merit and, thus, affirm.

BACKGROUND

Nebraska Tax Sale Statutory Process.

Before reviewing the facts of this particular case, we believe it beneficial to provide an overview of Nebraska's tax certificate sale process. Because tax certificate sale proceedings are governed by the law in effect at the time the tax sale certificate is sold, see *HBI, L.L.C. v. Barnette*, 305 Neb. 457, 941 N.W.2d 158 (2020), we cite the statutes that were in effect in March 2015, when the tax certificate for the property at issue in this case was sold.

The tax sale process has been a part of Nebraska law since at least 1879. See 1879 Neb. Laws, §§ 1-184, pp. 276-349. In that year, the Legislature passed an act “[t]o provide a system of revenue” for the growing state. 1879 Neb. Laws, p. 276. Located within the revenue act of 1879 was a method of recouping unpaid property taxes—a tax sale process which allowed investors to purchase tax certificates on tax-delinquent properties, then to request a tax deed from the county treasurer after a certain amount of time had passed if the property owner had not redeemed the property. See, §§ 109-111, pp. 320-21; § 119, pp. 324-25; § 126, p. 327.

The process operates in largely the same manner today as it did in 1879. See Neb. Rev. Stat. § 77-1801 et seq. (Reissue 2018). Each county has an automatic lien on property within its boundaries for the property

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taxes that are due to the government. Neb. Rev. Stat. § 77-1901 (Reissue 2018). The county has the authority to sell its lien to a private party via a tax certificate when the taxes on the property become delinquent. See § 77-1818.

To facilitate the sale of the lien, the county treasurer creates a list of all the properties in the county that have delinquent property taxes. See § 77-1802. The list must then be published in a local newspaper once a week for 3 consecutive weeks. See § 77-1804. The tax certificate is then offered for sale. See § 77-1807(2)(b), (e), and (f). A statute sets the cost of the certificate as “the amount of taxes, interest, and cost thereon.” § 77-1808.

If a county sells a tax certificate on a property, the property owner is not without recourse. The statute provides the owner the right to redeem the property by paying the county treasurer the amount listed in the tax certificate plus all other taxes paid by the tax certificate purchaser, any interest, and other fees. See § 77-1824. Interest accrues at 14 percent per year. Neb. Rev. Stat. § 45-104.01 (Reissue 2021).

So, what happens if the property owner does not redeem the property? The tax certificate holder can eventually apply for a tax deed, but must first wait at least 3 years after purchasing the tax certificate. See § 77-1837(1). Before applying for the tax deed, the tax certificate holder must provide a period of notice to the property owner of its intention to do so. See § 77-1831. If a tax deed is issued to the tax certificate purchaser, title to the property passes free and clear of any

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encumbrances. See *SID No. 424 v. Tristar Mgmt.*, 288 Neb. 425, 850 N.W.2d 745 (2014).

With this statutory background established, we turn to the facts and procedural history of this case.

Factual and Procedural History.

Kevin L. Fair and Terry A. Fair, a married couple, owned real property in Scotts Bluff County, Nebraska. The Fairs lived in a house on the property and owned the property free of any encumbrances.

In 2014, the Fairs failed to pay the property taxes they owed. In compliance with §§ 77-1801 and 77-1804, in February 2015, the county treasurer published a list of tax-delinquent properties in an area newspaper. The list included the legal descriptions of many properties, one of which was the Fairs' home. The list was published three times: February 5, 12, and 19.

The county treasurer sold a tax certificate for the property's unpaid taxes to Continental on March 11, 2015, for \$588.21. Continental then paid the subsequent property taxes as if it were the owner of the property. Once Continental began paying the property's taxes, the County did not send any further communications or tax bills to the Fairs. Nor did the Fairs attempt to make any payments to the county treasurer for the delinquent property taxes.

Three years later, on April 13, 2018, Continental served the Fairs a "Notice of Expiration of Right of Redemption." The notice informed the Fairs that they

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had 3 months from the date the notice was served to redeem the property and that redemption would cost \$5,268—the total value of the unpaid taxes, fees, and interest. The notice also indicated that if the property was not redeemed, Continental would apply for a tax deed and the right of redemption would expire.

The Fairs did not make any payment to the county treasurer after receiving the notice from Continental. True to its word, in July 2018, Continental applied for a tax deed. The county treasurer issued the tax deed to Continental. At the time the tax deed was issued, the county assessed the value of the property at \$59,759.

Continental thereafter filed a quiet title action against the Fairs. The Fairs eventually filed an amended answer, counter-claim, and third-party complaint, which added Scotts Bluff County and the county treasurer in her official capacity as third-party defendants. Relevant to this appeal, the Fairs alleged that the tax certificate sale process violated their constitutional rights in a number of respects. Because the Fairs sought to have statutes declared unconstitutional, the Nebraska Attorney General exercised his right “to be heard” regarding the Fairs’ constitutional claims. See Neb. Rev. Stat. § 25-21,159 (Reissue 2016).

In response to a motion filed by Continental, the district court granted summary judgment against the Fairs and quieted title to the property in Continental’s favor. The district court found that the tax certificate sale statutes were not unconstitutional in the manner alleged.

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Terry Fair died while the lawsuit was pending in the district court. Kevin Fair (hereinafter Fair) filed a timely appeal.

On the same day he filed his opening brief, Fair filed a notice pursuant to Neb. Ct. R. App. § 2-109(E) (rev. 2014) that his appeal challenged the constitutionality of Nebraska statutes. We moved the case to our docket. The Attorney General filed a brief on appeal defending the constitutionality of the challenged statutes.

ASSIGNMENTS OF ERROR

Fair assigns that the district court erred in granting Continental's summary judgment motion to quiet title because the tax sale process set forth in § 77-1801 et seq. violates (1) the Takings Clauses of the U.S. and Nebraska Constitutions; (2) the Due Process Clauses of the U.S. and Nebraska Constitutions; (3) the Excessive Fines Clause of the U.S. Constitution; (4) article I, § 25, of the Nebraska Constitution; and (5) article III, § 18, of the Nebraska Constitution.

STANDARD OF REVIEW

Although this case comes to us as an appeal from an order granting summary judgment, the parties do not disagree about any of the relevant facts. The sole issues on appeal are Fair's standing to assert his various constitutional challenges and the merits of those constitutional challenges.

[1,2] Standing is a jurisdictional component of a party's case because only a party who has standing

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may invoke the jurisdiction of a court. *Adair Holdings v. Johnson*, 304 Neb. 720, 936 N.W.2d 517 (2020). The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Id.*

[3] The constitutionality of a statute also presents a question of law upon which appellate courts have an obligation to reach an independent conclusion irrespective of the decision of the court below. See *State v. Boche*, 294 Neb. 912, 885 N.W.2d 523 (2016).

ANALYSIS

Standing.

Before we can address the merits of Fair's constitutional challenges, we are confronted with a challenge to his standing. Because standing is a jurisdictional issue, we address it first. See *Egan v. County of Lancaster*, 308 Neb. 48, 952 N.W.2d 664 (2020).

The Attorney General contends that because Fair failed to comply with § 77-1844, he lacks standing to assert certain constitutional challenges. Section 77-1844 provides that “[n]o person shall be permitted to question the title acquired by a treasurer's deed without first showing that . . . all taxes due upon the property had been paid by such person” We have held that this statute sets forth conditions that must be met in order to obtain standing to challenge a tax deed. See, e.g., *Wisner v. Vandelay Investments*, 300 Neb. 825, 916 N.W.2d 698 (2018). See, also, *Griffith v. Nebraska Dept. of Corr. Servs.*, 304 Neb. 287, 297, 934

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N.W.2d 169, 177 (2019) (“just as the Legislature can provide for standing that is broader than common-law standards, so too can it provide for more specific or more restrictive standing requirements”). And while we have held that a party may comply with the requirement that all taxes due must be “paid” by merely showing that it has tendered the necessary payment to the treasurer, see *Wisner, supra*, that holding is of no consequence here because it is undisputed that Fair has neither paid nor tendered payment of the taxes due upon the property.

Fair contends that he has standing to assert his constitutional challenges despite his failure to pay or tender payment of the tax debt. He contends both that § 77-1844 does not apply in this instance and that even if it does, it is unconstitutional as applied to him. We, however, find that we may consider the merits of Fair’s constitutional challenges to the tax sale certificate process without resolving his arguments regarding § 77-1844.

Section 77-1844 sets forth conditions that must be met in order to “question title.” See *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 772, 733 N.W.2d 539, 547 (2007) (emphasis omitted). And while Fair did question Continental’s title in this case by seeking an order declaring the deed it was issued void, he also sought alternative relief in the event that title was quieted with Continental. In his counterclaim and third-party complaint, Fair sought both damages and an order directing that either Continental or the county pay him the value of the equity he had in the property, less the tax debt.

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We need not, for purposes of our standing analysis, determine whether Fair would actually be entitled to damages or an order directing Continental or the county to make a payment that would return some of the equity in his property to him. As we have previously explained, because standing focuses “on the party” and not “the claim itself,” when considering standing, “the legal and factual validity of the claim presented must be assumed.” *Heiden v. Norris*, 300 Neb. 171, 174, 912 N.W.2d 758, 761 (2018) (internal quotation marks omitted). And assuming that Fair’s constitutional claims have merit and that he would be entitled to the alternative relief he requested, he is the proper party to assert those claims and request such relief. Property Fair owned is at issue, and § 77-1844 imposes no conditions precedent to the alternative relief requested. Accordingly, we find that we may consider the merits of Fair’s constitutional challenges even if he lacks standing to question Continental’s title. We turn to the merits of those constitutional challenges now.

Procedural Due Process.

Fair first argues that the tax certificate sale violated his right to procedural due process guaranteed by the 14th Amendment to the U.S. Constitution and article I, § 3, of the Nebraska Constitution. The 14th Amendment to the U.S. Constitution prohibits the states from “depriv[ing] any person of life, liberty, or property, without due process of law.” The Nebraska Constitution states, “No person shall be deprived of life, liberty, or property, without due process of law . . .” Neb. Const. art. I, § 3. “We have interpreted the Nebraska

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Constitution's due process and equal protection clauses to afford protections coextensive to those of the federal Constitution." *Keller v. City of Fremont*, 280 Neb. 788, 791, 790 N.W.2d 711, 713 (2010).

The parties to this case do not appear to dispute that before a deed to the property could be conveyed to Continental pursuant to the tax certificate statutes, procedural due process principles required that an attempt be made to provide Fair with advance notice. See *Jones v. Flowers*, 547 U.S. 220, 223, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006) ("[b]efore a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner notice and opportunity for hearing appropriate to the nature of the case") (internal quotation marks omitted). See, also, *HBI, L.L.C. v. Barnette*, 305 Neb. 457, 941 N.W.2d 158 (2020). There is also no dispute in this case that Fair received actual notice in April 2018 that Continental had purchased a tax certificate for the property; that Fair had 3 months to redeem the property by paying the delinquent taxes along with interest and fees; and that if Fair failed to redeem the property, Continental intended to apply for a tax deed. The parties disagree, however, about whether this notice was constitutionally sufficient.

In many instances in which a party challenges the adequacy of notice on due process grounds, the issue is whether adequate steps were taken to attempt to provide notice that ultimately *failed* to reach its intended recipient. See *Oneida Indian Nation of New York v. Madison County*, 665 F.3d 408, 432 (2d Cir. 2011) (referring to "the much more common due-

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process challenge in which a plaintiff contests the sufficiency of a notice that failed to reach its intended recipient"). That was the issue this court addressed in *HBI, L.L.C.*, where it was held that certified mail that did not reach a property owner was nonetheless constitutionally adequate because it was "reasonably calculated" to provide actual notice. 305 Neb. at 470, 941 N.W.2d at 169 (internal quotation marks omitted). Fair's challenge is different. He concedes that in April 2018, he received actual notice his right to redeem his property would expire in 3 months, but he argues that due process required that he receive earlier notice. Specifically, Fair contends that due process required that he receive actual notice of the sale of the tax certificate to Continental in March 2015.

A party asserting that he or she was, as a matter of constitutional due process, entitled to earlier notice than that actually provided faces a difficult challenge. As a general matter, due process is a "flexible" concept, *Gilbert v. Homar*, 520 U.S. 924, 930, 117 S. Ct. 1807, 138 L. Ed. 2d 120 (1997) (internal quotation marks omitted), and thus resistant to an interpretation that "would impose a rigid requirement as to the precise timing with which notice must be given," *Oneida Indian Nation of New York*, 665 F.3d at 434. Consistent with that understanding, the U.S. Supreme Court recognized long ago that only in a "clear case" will a notice be found inadequate on due process grounds because it did not provide a party with enough time to assert its rights. See *Bellingham Bay &c. Co. v. New Whatcom*, 172 U.S. 314, 318, 19 S. Ct. 205, 43 L. Ed. 460 (1899) ("it is certain that only in a clear case will a notice authorized by the

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legislature be set aside as wholly ineffectual on account of the shortness of the time").

As we will explain, we do not believe Fair has shown that this is a "clear case" in which the notice was obviously provided too late. First, we disagree with Fair's contention that state and federal Constitutions required that he receive notice upon the sale of the tax certificate to Continental. Fair claims that a property owner is entitled to notice of the sale of a tax certificate concerning his or her property because it is then that "the property begins to be wrested from the control of the one who owns it." Brief for appellant at 26. Fair points to no authority, however, that requires that notice be provided as soon as the possibility emerges that property may be subject to forfeiture.

Fair also, in our view, overstates the significance that the sale of the tax certificate has on the property owner's interests. Prior to the sale of a tax certificate, the county already possesses a lien on the property for the unpaid taxes. See § 77-1901. A tax sale purchaser obtains only the county's lien at the time the certificate is sold. Compare § 77-1818 and § 77-1901. See, also, *HBI, L.L.C. v. Barnette*, 305 Neb. 457, 461, 941 N.W.2d 158, 164 (2020) ("[t]he tax sale purchaser acquires a lien on the property, which is represented by a tax certificate"); *John v. Connell*, 61 Neb. 267, 271, 85 N.W. 82, 84 (1901), *modified on rehearing* 64 Neb. 233, 89 N.W. 806 (1902), *on rehearing*, 71 Neb. 10, 98 N.W. 457 (1904) (quoting *Grant v. Bartholomew*, 57 Neb. 673, 78 N.W. 314 (1899)) ("if taxes were due and delinquent against the land, then the owner of a tax-sale certificate was

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declared to be the assignee and the owner of the liens which the public had against that land and for which the public had sold or attempted to sell it”).

A tax sale certificate purchaser has no immediate right to enter the property, use the property, or dispossess the owner of the property. Further, if the property is redeemed within the subsequent statutory period, the tax sale certificate purchaser never obtains the right to do those things. And if the tax certificate holder does not act on the right to request a deed within 3 years 9 months from the date of the tax certificate sale, he or she loses the opportunity to do so. See § 77-1837(1). Simply put, a property owner is not deprived of his or her property at the time the tax certificate is issued. Rather, the property owner is deprived of the property when the county treasurer issues the tax deed. Consequently, we see no basis to hold that Fair was constitutionally entitled to notice of the tax certificate sale at the time it occurred.

Neither do we see a basis to hold that Fair was constitutionally entitled to be notified more than 3 months before the redemption period expired. “[D]ue process requires the government to provide ‘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.’” *Jones v. Flowers*, 547 U.S. 220, 226, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006) (quoting *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950)). In this case, Fair received a notice by certified mail informing him of Continental’s intent to apply for a tax deed to the property in 3 months if Fair did not redeem the property. Fair was

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apprised “of the pendency of” Continental’s intentions. He was also afforded an “opportunity to” redeem the property. We see no basis to say that this is a “clear case” in which the 3 months Fair was provided to assert his rights was plainly inadequate. See *Bellingham Bay &c. Co. v. New Whatcom*, 172 U.S. 314, 318, 19 S. Ct. 205, 43 L. Ed 460 (1899). We therefore find no procedural due process violation.

Takings Clause.

Fair also contends that the issuance of a tax deed to Continental pursuant to the tax sale certificate statutes violated the Takings Clauses of the U.S. and Nebraska Constitutions. The Fifth Amendment to the U.S. Constitution states, “[N]or shall private property be taken for public use, without just compensation.” The Nebraska Constitution states, “The property of no person shall be taken or damaged for public use without just compensation therefor.” Neb. Const. art. I, § 21. We have held that because Nebraska’s constitutional right to just compensation includes just compensation where property has been “taken or damaged,” it is broader than the corresponding federal right. See *Henderson v. City of Columbus*, 285 Neb. 482, 827 N.W.2d 486 (2013). But aside from giving effect to that difference in language, we have treated the federal and state rights as “coterminous.” *Id.* at 490, 827 N.W.2d at 493. Because Fair does not allege any damage to his property, we will apply the same analysis to both his federal and state takings claims.

Fair makes two arguments regarding the Takings Clauses. He first contends that the issuance of a tax

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deed to Continental violates the Takings Clauses, because it effects a taking of his property for a private, rather than public, purpose. Alternatively, he argues that, at a minimum, the issuance of the tax deed brought about a taking of the equity in his property in excess of the tax debt and that he is entitled to compensation for that surplus equity.

Fair's first argument depends upon his contention that the State's power to impose and collect taxes is subject to the Takings Clauses. In support of this argument, Fair relies on a case from the U.S. Supreme Court, *Cole v. La Grange*, 113 U.S. 1, 5 S. Ct. 416, 28 L. Ed. 896 (1885), and a case from this court, *Bradshaw v. City of Omaha*, 1 Neb. 16 (1871). Fair argues that these cases establish that a government's power to tax is subject to the Takings Clauses. And, Fair continues, if the power to tax is subject to the Takings Clauses, the county's sale of a tax certificate and subsequent issuance of a deed to Continental, even if pursuant to an effort to collect a tax debt, is subject to a takings analysis.

Fair's argument, however, encounters a number of problems. First, the two 19th century cases upon which he relies involved challenges to the use of tax revenues. In *Cole*, the U.S. Supreme Court relied on the principles of the federal Takings Clause to conclude that a municipality could not raise revenue through taxation solely to aid a private iron and steel corporation. The focus on the government's use of tax revenue in *Cole* is reflected in its statement that "the taking of property by taxation requires no other compensation than the taxpayer receives in being protected by the government to the support of which

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he contributes.” 113 U.S. at 8. Similarly, in *Bradshaw*, this court invoked Takings Clause language in the course of holding that a city could not impose taxes on lands that were previously outside the boundaries of the city and beyond “the settled part of the town,” reasoning that the owners of that property would not benefit from the city’s use of those taxes. 1 Neb. at 27. Fair, however, does not contend that the county is using taxes he paid for some improper purpose. He is instead challenging the government’s method of tax collection. Thus, even assuming these cases remain good law, we do not read them to shed much light on this one.

Further, more recent cases cast considerable doubt on the notion that a government’s sale of its lien on tax-delinquent property, or sale of the property itself, is subject to a takings analysis. Within the last decade, the U.S. Supreme Court has said, “It is beyond dispute that [t]axes and user fees . . . are not takings.” *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 615, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013) (internal quotation marks omitted).

If taxes, as the U.S. Supreme Court has held, are not takings, we do not see how efforts to collect that tax, whether through the sale of a lien on the property or sale of the property itself, could be characterized as a taking. See, also, *Jones v. Flowers*, 547 U.S. 220, 234, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006) (“[p]eople must pay their taxes, and the government may hold citizens accountable for tax delinquency by taking their property”); *Leigh v. Green*, 64 Neb. 533, 544, 90 N.W. 255, 259 (1902) (“[t]he power of the state to levy taxes obviously carries with it the power to

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collect them, and to provide all means necessary or appropriate to insure and enforce their collection”). We are far from alone in reaching that conclusion. See, e.g., *Speed v. Mills*, 919 F. Supp. 2d 122, 129 (D.D.C. 2013) (holding that tax sale could not be considered a Fifth Amendment taking because it “took place pursuant to [the government’s] taxing power, not its power of eminent domain, its regulatory power, or any other power enabling it to take or encumber private property for a public purpose”); *Industrial Bank of Washington v. Sheve*, 307 F. Supp. 98, 99 (D.D.C. 1969) (“[a] tax sale is not a government taking for which just compensation must be paid under the Constitution”); *In re Murphy*, 331 B.R. 107, 128 (S.D.N.Y. 2005) (“[a] tax sale is not a taking for a public purpose because such sale is pursuant to the state’s taxing power and not its power of eminent domain”); *In re Golden*, 190 B.R. 52, 57 (W.D. Pa. 1995) (“[i]n a tax sale context, the takings clause is not dispositive nor the appropriate basis for starting an inquiry”); *Fitzgerald v. Neves, Inc.*, 15 Wash. App. 421, 550 P.2d 52 (1976) (holding sale of land at tax foreclosure sale was not a taking).

Our conclusion that the county’s tax collection efforts were not subject to the Takings Clauses undercuts any argument by Fair that the county could not use the tax sale certificate process to collect Fair’s undisputed tax debt. Fair’s alternative argument, however, is that even if the county could take steps to transfer his property to satisfy his tax debt, he is entitled to receive as “just compensation” the difference between the assessed value of his property and the tax debt, interest, and fees he owes, an amount he refers to as the “surplus equity” in his

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property. Brief for appellant at 34, 35. We turn to that argument now.

Continental and the Attorney General contend that we need not engage in any heavy lifting to address Fair's alternative argument. They claim that binding U.S. Supreme Court precedent stands in the way of Fair's claim that he is entitled to compensation for surplus equity. In support of their argument, both Continental and the Attorney General direct us to *Nelson v. New York City*, 352 U.S. 103, 77 S. Ct. 195, 1 L. Ed. 2d 171 (1956). In *Nelson*, a property owner failed to pay certain water bills to a municipality. After the municipality notified the property owner and the property owner failed to redeem the property by paying the amounts owed, the municipality exercised its right to sell the property. The property was sold for an amount that significantly exceeded the property owner's debt. The property owner then challenged the municipality's retention of the entire proceeds of the sale as a taking without just compensation. The U.S. Supreme Court rejected the argument. It distinguished prior cases in which statutes guaranteed the property owner the right to any proceeds in excess of the debt, and it also observed that the property owner in *Nelson* failed to make use of a mechanism that would have allowed him to recover any surplus value.

The Attorney General also claims Fair's argument is precluded by *Balthazar v. Mari Ltd.*, 396 U.S. 114, 90 S. Ct. 397, 24 L. Ed. 2d 307 (1969). In *Balthazar*, a three-judge district court panel rejected a constitutional challenge to an Illinois tax sale process much like the Nebraska statutory system at issue in

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this case. See *Balthazar v. Mari Ltd.*, 301 F. Supp. 103 (N.D. Ill. 1969). The district court found no constitutional deficiency despite the fact that the Illinois process did not guarantee that the property owner would receive compensation in the event the value of the property exceeded the tax debt. The U.S. Supreme Court summarily affirmed the district court's determination in one sentence without analysis.

Unlike Continental and the Attorney General, we have doubts about whether Fair's argument can be resolved with only a cursory citation to *Nelson* or *Balthazar*. The *Nelson* court appeared to rely, at least in part, on the fact that the property owner in that case failed to take advantage of a statutory mechanism that would have entitled him to the proceeds of the sale in excess of the tax debt. In our case, however, all appear to agree that there is no similar mechanism that would have entitled Fair to the surplus equity in his property. As for *Balthazar*, we hesitate to place too much reliance on a summary affirmance. The U.S. Supreme Court has explained that its summary affirmances are a "rather slender reed" on which to base future decisions, because the precedential effect of such a decision extends only to "the precise issues presented and necessarily decided by those actions." *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983) (internal quotation marks omitted).

Furthermore, the U.S. Supreme Court has made clear that "[b]ecause the [Takings Clause] protects rather than creates property interests, the existence of a property interest is determined by reference to

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existing rules or understandings that stem from an independent source such as state law.” *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998) (internal quotation marks omitted). So while the U.S. Supreme Court may have concluded there was no constitutional problem in *Nelson* and *Balthazar* when the respective property owners did not receive the surplus equity from their property, that conclusion would seem to partially hinge on whether the property owner had a right under state law to the value of the property in excess of the tax debt. And because Fair claims Nebraska law recognizes such a property right, we will proceed to consider whether that is the case.

Fair cannot contend that the tax certificate sale statutes he challenges create a right to receive compensation equal to the value of the property in excess of the tax debt. They make no mention of such a right. Instead, Fair relies on several other Nebraska statutes and a provision in the state constitution that he claims recognize a property interest in the equity of his property. In support of this argument, Fair cites the definition of property in Nebraska’s Uniform Property Act, Neb. Rev. Stat. § 76-101 (Reissue 2018); the definition of property for purposes of statutes governing revenue and taxation, Neb. Rev. Stat. § 77-102 (Reissue 2018); Nebraska law providing a homestead exemption, Neb. Rev. Stat. § 40-101 (Reissue 2016); and article I, § 25, of the Nebraska Constitution, which prohibits “discrimination between citizens . . . in respect to” property rights. These general provisions, however, do not recognize a property interest in the surplus equity value of property after a tax certificate has been sold, the

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redemption period has expired, and a tax deed is requested and issued.

Fair also asks us to recognize a common-law property right in the value of property in excess of the tax debt when a tax deed is issued. Here, Fair asks us to follow the lead of the Michigan Supreme Court in *Rafaeli, LLC v. Oakland County*, 505 Mich. 429, 952 N.W.2d 434 (2020) (*Rafaeli*). In *Rafaeli*, the Michigan Supreme Court held that if a tax foreclosure sale yields proceeds in excess of the tax debt, the original property owner has a property interest in the surplus proceeds under Michigan common law. The Michigan Supreme Court reached this conclusion in reliance on the writings of Sir William Blackstone and former Michigan Supreme Court Justice Thomas M. Cooley, as well as English common-law cases. But the Michigan Supreme Court also found that some of its opinions in the early days of Michigan's statehood held that when land was sold for delinquent taxes and the proceeds exceeded the tax debt, the original property owner had a right to the surplus proceeds under the common law. *Id.* at 465-66, 952 N.W.2d at 456 ("in the early years of this state, it was commonly understood that the delinquent taxpayer, not the foreclosing entity, continued to own the land at the time of the tax-foreclosure sale and would have been entitled to any surplus").

Fair asks us to follow *Rafaeli* and find that if a tax deed is issued pursuant to the tax sale certificate statutes and the value of the property for which the tax deed is issued exceeds the tax debt, the original owner has a common-law right to a payment equal to the difference between the value and the tax debt. We

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note initially that the Michigan Supreme Court recognized a former property owner's right to surplus proceeds generated in a tax foreclosure sale while Continental obtained a deed to Fair's property by another method (contrasting tax deed procedure under chapter 77, article 18, with the foreclosure process under chapter 77, article 19). See, e.g., *Neun v. Ewing*, 290 Neb. 963, 863 N.W.2d 187 (2015). Further, even if that difference could be set aside, unlike the challenger in *Rafaeli*, Fair cannot point us to any Nebraska cases recognizing such a common-law property right. In fact, this case appears to stand in stark contrast to *Rafaeli* in that regard. While *Rafaeli* relied on early Michigan cases recognizing a property owner's right to surplus proceeds from a tax foreclosure sale, the tax certificate sale process has been a part of Nebraska law since shortly after Nebraska became a state, see 1879 Neb. Laws, § 109, p. 320, yet Fair has not pointed us to any authority in our case law recognizing that the original property owner was ever entitled to receive compensation if the value of the property transferred to a tax certificate holder exceeded the tax debt. We thus find no basis to conclude that Nebraska common law recognizes the property interest that is essential for Fair's takings claim to succeed. See *Tyler v. Hennepin County*, 505 F. Supp. 3d 879 (D. Minn. 2020) (finding that Minnesota common law did not provide former owner of property forfeited to state and sold for delinquent taxes with right to surplus proceeds), *affirmed* No. 20-3730, 2022 WL 468801 (8th Cir. Feb. 16, 2022).

We have held that the Takings Clause "applies only to vested property rights" and that "[t]o be considered a vested right, the right must be fixed,

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settled, absolute, and not contingent upon anything.” *Big John’s Billiards v. State*, 288 Neb. 938, 954, 852 N.W.2d 727, 741 (2014) (internal quotation marks omitted). Fair, however, has not demonstrated that at the time the tax deed was issued, he had an absolute right to the difference between the assessed value of his property and his tax debt. Without such a right, his claims under the Takings Clauses cannot succeed.

Excessive Fines.

Fair’s third argument is under the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution. He argues that transferring title of his property to Continental is an excessive fine prohibited by the Constitution because the value of the property was more than 10 times the amount of money he owed in delinquent taxes, interest, and fees.

The Eighth Amendment provides, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The right to be free from excessive fines has been incorporated against the states through the Due Process Clause of the 14th Amendment. See *Timbs v. Indiana*, ___ U.S. ___, 139 S. Ct. 682, 203 L. Ed. 2d 11 (2019).

The U.S. Supreme Court has said, “The Excessive Fines Clause limits the government’s power to extract payments, whether in cash or in kind, ‘as punishment for some offense.’” *Austin v. United States*, 509 U.S. 602, 609-10, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993) (emphasis in original) (quoting *Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. 257, 265, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)). As we will explain,

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we find that the transfer of Fair’s title to Continental lacks essential attributes of a “fine,” as that term has been defined by the U.S. Supreme Court.

The U.S. Supreme Court has drawn a distinction between a penalty or forfeiture that is purely “remedial” and one that “can only be explained as serving in part to punish.” *Id.*, 509 U.S. at 610. The latter, according to the U.S. Supreme Court, is a fine under the Eighth Amendment. A forfeiture is remedial, the U.S. Supreme Court has explained, if it, for example, removes dangerous or illegal items from society or compensates the government for a loss. *Browning-Ferris Industries, supra*.

Fair argues that the transfer of his property can only be understood as a form of punishment. In support of this contention, he points to the fact that as a result of the transfer, he stands to lose a property he previously owned free and clear of any encumbrances, the assessed value of which is more than 10 times the amount of the tax debt. Fair argues that the magnitude of his loss far exceeds remediation of his tax debt and that the transfer must be understood as punishment. We disagree for a number of reasons.

First, in *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998), the U.S. Supreme Court recognized that a penalty or forfeiture is not necessarily punitive merely because of a discrepancy between the value of the property forfeited and the government’s loss. See, also, *Tyler v. Hennepin County*, 505 F. Supp. 3d 879, 896 (2020) (relying on *Bajakajian* and concluding that “[t]he fact that the operation of Minnesota’s tax-forfeiture

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system may result in a windfall to the government therefore does not compel the conclusion that the system is punitive”), *affirmed* No. 20-3730, 2022 WL 468801 (8th Cir. Feb. 16, 2022). Second, the forfeitures the U.S. Supreme Court has found punitive in *Austin, supra*, and *Bajakajian, supra*, involved the forfeiture of property involved in criminal offenses and the U.S. Supreme Court relied heavily on their connection to criminal proceedings. Here, there is no suggestion that a property or its owner must be involved in criminal behavior in order for the property to be transferred via the tax certificate sale process.

In addition to those reasons, the notion that the State or the county intended to punish Fair for not paying his property taxes simply does not hold together. As we have noted, the statutes Fair challenges allowed him to avoid the loss of his property if he paid his tax debt more than 3 years after the tax certificate was first sold. This extended opportunity to avoid forfeiture suggests that the purpose of the tax certificate sale system is to “collect taxes, rather than to punish delinquent taxpayers.” *Tyler*, 505 F. Supp. 3d at 896.

Further, the magnitude of Fair’s loss was not dictated solely by the statute. If no party purchases a tax certificate offered for a particular property, a Nebraska statute provides that the county board shall direct the county attorney to foreclose the lien for the taxes in a tax foreclosure proceeding. See § 77-1901. Similarly, the purchaser of a tax certificate may choose to initiate a tax foreclosure proceeding rather than requesting a tax deed. See, Neb. Rev. Stat. § 77-1902 (Reissue 2018); *Neun v. Ewing*, 290 Neb. 963,

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863 N.W.2d 187 (2015). When property is sold in a tax foreclosure proceeding, however, the original owner is statutorily entitled to receive surplus proceeds. See, Neb. Rev. Stat. § 77-1916 (Reissue 2018); *County of Lancaster v. Trimble*, 34 Neb. 752, 52 N.W. 711 (1892). It is difficult to discern an intent to punish delinquent taxpayers on the part of the Legislature when the magnitude of the delinquent taxpayer's loss depends on choices made by third parties.

Not only did the magnitude of Fair's loss depend on a choice made by Continental, the tax sale certificate process resulted in the transfer of his property to Continental. This fact highlights another way in which the tax sale certificate process does not function as a fine under the Eighth Amendment. The U.S. Supreme Court has held that the Excessive Fines Clause applies only to "those fines directly imposed by, and payable to, the government." *Browning-Ferris Industries v. Kelco Disposal*, 492 U.S 257, 268, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989). Here, Fair was not ordered to pay anything to a governmental entity as a result of his failure to pay his delinquent tax debt.

Because we find that there was no fine imposed for purposes of the Eighth Amendment, Fair's Excessive Fines Clause argument lacks merit.

Article I, § 25, of Nebraska Constitution.

Next, Fair argues that the tax certificate sale process violates article I, § 25, of the Nebraska Constitution. That section states, "There shall be no discrimination between citizens of the United States in respect to the acquisition, ownership, possession,

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enjoyment or descent of property. The right of aliens in respect to the acquisition, enjoyment and descent of property may be regulated by law.” Neb. Const. art. I, § 25. While this provision regulates discrimination with regard to property rights, see, e.g., *Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989), Fair makes no argument that the tax sale certificate statutes unlawfully discriminate. He instead merely repeats the Takings Clause arguments we have already rejected. We thus find no basis to determine that the challenged statutes violate article I, § 25.

Article III, § 18, of Nebraska Constitution.

Finally, Fair briefly contends that the tax sale certificate statutes create a “special class” in violation of article III, § 18, of the Nebraska Constitution. Brief for appellant at 45. There is no indication in our record, however, that Fair raised this argument in the district court. Accordingly, we will not address its merits. See *Linda N. v. William N.*, 289 Neb. 607, 856 N.W.2d 436 (2014).

CONCLUSION

In this appeal, Fair argues that Nebraska’s tax certificate sale statutes are “harsh and unconstitutional.” Brief for appellant at 45. The sole questions before us, however, are whether the statutes are unconstitutional in the manner Fair assigns. We find that they are not and, accordingly, affirm.

Affirmed.

Miller-Lerman, J., not participating.

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IN THE DISTRICT FOR SCOTTS BLUFF COUNTY,
NEBRASKA

CONTINENTAL RESOURCES,
Plaintiff,

vs.

KEVIN FAIR and TERRY A. FAIR, et al.
Defendants,

Case No. CI 18-699 JOURNAL ENTRY

This matter has been heard on the Motion for Summary Judgment filed by the plaintiff.

This is a quiet title case based on a tax deed issued to the plaintiff. The defendants Fair answered, and amended their answer.

The amended answer contains a general denial; a counterclaim which was dismissed by the court; and a third party complaint. The summary judgment issues center around the third party complaint.

The facts, summarized, are that the Fairs failed to pay some of their taxes on real estate; the County Treasurer sold a tax certificate to the plaintiff, and the plaintiff followed the statutory procedures to obtain a tax deed, and did so. The plaintiff now makes that tax deed the basis for a quiet title action. The problem presented by the defendants is that the plaintiffs would be receiving the property by paying far less than its net worth - there was no debt on the property,

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and defendants would lose their equity if the plaintiff is allowed to acquire title using this tax deed process.

Components of the Third Party Complaint

The Third Party Complaint seeks by way of U.S.C. §1983, and §§25-21,149 and §§25-1062 of the Nebraska Statutes, a finding of unconstitutionality of the tax deed process.

A(i) asserts the process is a taking, not for a public purpose, or without just compensation.

A(ii) asserts the statutes violate due process clauses by depriving the defendants of property without adequate notice.

A(iii) asserts the statutes violate due process by not being tailored to further a compelling government interest or being rationally related to a legitimate governmental interest.

A(iv) asserts the statutory process amounts to an excessive fine.

A(v) asserts the statutory process deprives defendants of the right to own and control their property under Article I, Section 25 of the Nebraska Constitution.

The Third Party Complaint seeks the remedy of injunction to prohibit the issuance of a tax deed, and a finding that the sale of the tax sale certificate and issuance of the tax deed should be voided.

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The plaintiff has filed a motion for summary judgment.

Applicable Law

Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and the moving party is entitled to judgment as a matter of law. Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute. Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted. *Sweem v. American Fidelity Life Assurance Co.*, 274 Neb. 313 (2007).

As a procedural equivalent to a trial, a summary judgment is an extreme remedy because a summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed. *Conley v. Brazer*, 278 Neb. 508 (2009).

The party against whom summary judgment is sought is entitled to all reasonable inferences deducible from the evidence. *In re Estate of Fries*, 279 Neb. 887 (2010).

A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor

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if the evidence were uncontested at trial. After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontested at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Corona de Camargo v. Schon*, 278 Neb. 1045 (2009).

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Section 25-1334.

Analysis and Ruling

As regards the first and second listed causes of action, the Court finds that the process of selling the tax lien, and eventually issuing a tax deed, is not a “taking”. The property is not being taken by the government; it is from the start of the process subject to an enforceable lien if the taxes are not paid, but the end result is not that the government retains the property, and not for any public use. A private, not governmental, entity obtains title to the property.

Because the Court finds this process does not amount to a taking, the assertion that there is not just

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compensation also fails. While one might try and fashion a more equitable process to handle a disparity in net value versus the amounts actually paid by the certificate purchaser, that is not the job of the Court, it is a legislative task. One might just as easily argue that if the property has sufficient equity value, redemption should in some fashion be possible.

The next cause of action focuses on the length of the advance notice which sets up the redemption period. Basically it seems the argument is that three months is not sufficient time to gather funds to redeem. While that may have been the situation in this case, it is the burden of the defendant's [sic] to show that this period of time is insufficient by constitutional standards. The legislature has selected this length of time as reasonable notice, and the defendants have not shown that three months is not a reasonable time during which to redeem. Fairs are not saying they did not receive the notice, or that the manner in which was given is wrong, simply that the time period in the notice is too short. If in fact it was too short a time in this case, that does not render the time period constitutionally inadequate.

The Court finds notice was given consistent with the statute, and the defendants have failed to show the length of advance notice is unconstitutional. Further there is no showing that a hearing is required prior to issuance of the tax deed.

The next claim of the defendant is that substantive due process is violated by the tax deed process. Substantive due process is said to look to

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whether there is a sufficient substantive justification, a good enough reason for a deprivation.

The tax deed laws are obviously designed to provide a process by which taxed property can be used to satisfy a tax lien. The lien comes about because certain taxes are unpaid and delinquent. The purpose of the government is not to take all the value of a person's property when the lien is less than that value; the purpose is to ensure revenue to operate government, and see that people who own taxable property pay their share based on the value assigned to the property for assessment purposes.

The defendants have not shown the tax deed process is a violation of substantive due process.

Nor have the defendants shown the result here is a fine, much less an expensive one. There is no offense committed for which a penalty is being administered, and whatever the value of this property is beyond the taxes, interests, and costs does not pass to the government. Whatever equity might be lost to the Fairs would become the property of the plaintiff.

Because the Court finds the Fairs have not demonstrated any violation of constitutional provisions by the tax deed law, their claim for damages under § 1983 fails, as does their request for injunction.

Summary judgment is granted for the plaintiffs against all defendants as prayed for in the complaint of the plaintiff.

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DATED January 4, 2021

BY THE COURT

/s/ Leo Dobrovolny
District Judge

Electronic notice to attorneys

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CLERK OF THE NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
2413 State Capitol, P.O. Box 98910
Lincoln, Nebraska 68509-8910
(402) 471-3731
FAX (402) 471-3480

April 12, 2022

Jennifer Lynn Gaughan
jgaughan@legalaidofnebraska.com

IN CASE OF: S-21-000074, Continental Resources v.
Fair

TRIAL COURT/ID: Scotts Bluff County District
Court CI18-699

The following filing: Motion Appellant for
Rehearing & Brief

Filed on 03/28/22

Filed by appellant Kevin L Fair

Has been reviewed by the court and the following
order entered:

Motion of Appellant for rehearing overruled.

Respectfully,
Clerk of the Supreme Court
and Court of Appeals

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Excerpts of the relevant statutes in effect at the time of the foreclosure.

Neb. Rev. Stat. 77-1801. Real property taxes; collection by sale; when

Except for delinquent taxes on mobile homes, cabin trailers, manufactured homes, or similar property assessed and taxed as improvements to leased land, all real estate on which the taxes shall not have been paid in full, as provided by law, on or before the first Monday of March, after they become delinquent, shall be subject to sale on or after such date.

Neb. Rev. Stat. 77-1807(2)(a)-(c),(f)(2)

(a) This subsection applies beginning January 1, 2015.

(b) If a land bank gives an automatically accepted bid for real property pursuant to section 19-5217, the land bank shall be the purchaser and no public or private auction shall be held under sections 77-1801 to 77-1863.

(c) If no land bank has given an automatically accepted bid pursuant to section 19-5217, the person who offers to pay the amount of taxes, delinquent interest, and costs due on any real property shall be the purchaser.

(f) Any property remaining unsold upon completion of the public auction shall be sold at a private sale pursuant to section 77-1814.

Neb. Rev. Stat. 77-1808. Real property taxes; delinquent tax sale; payment by purchaser; resale

The person purchasing any real property shall pay to the county treasurer the amount of taxes, interest, and cost thereon, which payment may be made in the

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same funds receivable by law in the payment of taxes. If any purchaser fails to so pay, then the real property shall at once again be offered as if no such sale had been made.

Neb. Rev. Stat. 77-1814. Real property taxes; private tax sale; issuance of certificates

After the sale is closed and the treasurer has made his or her return thereof to the county clerk as provided in section 77-1813, if any real property remains unsold for want of bidders therefor, the county treasurer is authorized and required to sell the same at private sale at his or her office to any person who will pay the amount of taxes, penalty, and costs thereof and to make out duplicate certificates of sale and deliver one to the purchaser and the other to the county clerk. Such certificate shall contain the additional statement that such real property has been offered at public sale but not sold for want of bidders and shall also contain the words "sold for taxes at private sale". The treasurer is further authorized and required to sell all real property in the county on which taxes remain unpaid and delinquent for any previous year or years.

Neb. Rev. Stat. 77-1818. Real property taxes; certificate of purchase; lien of purchaser; subsequent taxes

The purchaser of any real property sold by the county treasurer for taxes shall be entitled to a certificate in writing, describing the real property so purchased, the sum paid, and the time when the purchaser will be entitled to a deed, which certificate shall be signed by the county treasurer in his or her official capacity and shall be presumptive evidence of the regularity of all

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prior proceedings. Each tax lien shall be shown on a single certificate. The purchaser acquires a perpetual lien of the tax on the real property, and if after the taxes become delinquent he or she subsequently pays any taxes levied on the property, whether levied for any year or years previous or subsequent to such sale, he or she shall have the same lien for them and may add them to the amount paid by him or her in the purchase.

Neb. Rev. Stat. 77-1824. Real property taxes; redemption from sale; when and how made

The owner or occupant of any real property sold for taxes or any person having a lien thereupon or interest therein may redeem the same. The right of redemption expires when the purchaser files an application for tax deed with the county treasurer. A redemption shall not be accepted by the county treasurer, or considered valid, unless received prior to the close of business on the day the application for the tax deed is received by the county treasurer. Redemption shall be accomplished by paying the county treasurer for the use of such purchaser or his or her heirs or assigns the sum mentioned in his or her certificate, with interest thereon at the rate specified in section 45-104.01, as such rate may from time to time be adjusted by the Legislature, from the date of purchase to date of redemption, together with all other taxes subsequently paid, whether for any year or years previous or subsequent to the sale, and interest thereon at the same rate from date of such payment to date of redemption. The amount due for redemption shall include the issuance fee charged pursuant to section 77-1823.

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Neb. Rev. Stat. 77-1831. Real property taxes; issuance of treasurer's tax deed; notice given by purchaser; contents

Except as otherwise provided in this section, no purchaser at any sale for taxes or his or her assignees shall be entitled to a tax deed from the county treasurer for the real property so purchased unless such purchaser or assignee, at least three months before applying for the tax deed, serves or causes to be served a notice that states, after the expiration of at least three months from the date of service of such notice, the tax deed will be applied for. In the case of owner-occupied property, no purchaser at any sale for taxes or his or her assignees shall be entitled to a tax deed from the county treasurer for the real property so purchased unless such purchaser or assignee, at least three months and forty-five days before applying for the tax deed, serves or causes to be served a notice that states, after the expiration of at least three months and forty-five days from the date of service of such notice, the tax deed will be applied for.

Neb. Rev. Stat. 77-1837. Real property taxes; issuance of treasurer's tax deed; when

At any time within nine months after the expiration of three years after the date of sale of any real estate for taxes or special assessments, if such real estate has not been redeemed, the county treasurer, on application, on production of the certificate of purchase, and upon compliance with sections 77-1801 to 77-1863, shall execute and deliver a deed of conveyance for the real estate described in such certificate as provided in this section. The failure of the county treasurer to issue the deed of conveyance if requested within the timeframe provided in this

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section shall not impair the validity of such deed if there has otherwise been compliance with sections 77-1801 to 77-1863.

Neb. Rev. Stat. 77-1838. Real property taxes; issuance of treasurer's tax deed; execution, acknowledgment, and recording; effect; lien for special assessments

The deed made by the county treasurer shall be under the official seal of office and acknowledged by the county treasurer before some officer authorized to take the acknowledgment of deeds. When so executed and acknowledged, it shall be recorded in the same manner as other conveyances of real estate. When recorded it shall vest in the grantee and his or her heirs and assigns the title of the property described in the deed, subject to any lien on real estate for special assessments levied by a sanitary and improvement district which special assessments have not been previously offered for sale by the county treasurer.

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CLERK OF THE NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
2413 State Capitol, P.O. Box 98910
Lincoln, Nebraska 68509-8910
(402) 471-3731
FAX (402) 471-3480

May 4, 2022

Jennifer Lynn Gaughan
jgaughan@legalaidofnebraska.com

IN CASE OF: S-21-000074, Continental Resources v.
Fair

TRIAL COURT/ID: Scotts Bluff County District
Court CI18-699

The following filing: Motion Appellant for Stay of
Mandate

Filed on 04/12/22
Filed by appellant Kevin L Fair

Has been reviewed by the court and the following
order entered:

Appellant's motion for stay of mandate filed April 12, 2022, is overruled for failure to comply with Neb. Ct. R. App. P. § 2-114(A)(2). However, the Court concludes that some of the issues decided in this case present federal questions, and that in the interest of the orderly administration of justice, the mandate should be stayed pending any review by the United States Supreme Court. Accordingly, the Court, on its

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own motion, stays the mandate until further order of the Court. Any party seeking to have the stay lifted and the mandate issued shall file an appropriate motion setting forth the grounds therefor, including but not limited to the status or disposition of any petition for writ of certiorari.

Respectfully,

Clerk of the Supreme Court
and Court of Appeals

www.supremecourt.ne.gov

Appendix 44a

**IN THE DISTRICT COURT OF SCOTTS BLUFF
COUNTY, NEBRASKA**

Case No. C1 18-699

**ANSWER, COUNTERCLAIM
AND THIRD-PARTY COMPLAINT**

CONTIENTAL RESOURCES,

Plaintiff and Third-Party Defendant,

v.

KEVIN L. FAIR and TERRY A. FAIR,

Defendants and Third-Party Plaintiffs,

v.

PORFOLIO RECOVERY
ASSOCIATES, LLC, All persons having
or claiming any interest in the real
estate described herein,

Defendants,

v.

HEATHER HAUSCHILD, Scotts Bluff County
Treasurer, and, DOUG PETERSON, Attorney
General for the State of Nebraska, in their official
capacities, and the County of SCOTTS BLUFF.

Third-Party Defendants.

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ANSWER

COME NOW the Defendants, Kevin L. Fair and Terry A. Fair, Husband and Wife, by and through their attorneys, Legal Aid of Nebraska, and for their Answer to the Plaintiff's Complaint, state as follows: Defendants deny each and every allegation contained in Plaintiff's Complaint not expressly admitted herein.

WHEREFORE the Defendants, Kevin L. Fair and Terry A. Fair, request the Court deny Plaintiff's request to quiet title and the Court grant Defendants Kevin and Terry Fair the relief requested in their Third-Party Complaint and Counterclaim.

**COUNTERCLAIM
(UNJUST ENRICHMENT)**

1. Plaintiff purchased a tax certificate issued by the County of Scotts Bluff in the amount of \$588.21 for delinquent property taxes owed by Defendants Kevin and Terry Fair, on March 11, 2015.
2. The Scotts Bluff County Treasurer issued a tax deed transferring Defendants Kevin and Terry Fair's real property, which includes their home, to Plaintiff on July 24, 2018 and the deed was recorded on August 13, 2018.
3. The real estate transfer statement prepared pursuant to the tax deed for the Fair's property, transferring the property from the Scotts Bluff County Treasurer to the Plaintiff, indicates the

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market value of the property was \$59,759.00 and the purchase price paid by Plaintiff was \$5,965.74.

4. Defendants Kevin and Terry Fair have no mortgage on the property and will be stripped of the equity in their home, and the Plaintiff stands to gain not only title the Fair's real property, but a windfall of all the equity therein.

5. Equitable principals of unjust enrichment prevent the receipt of a benefit by one party when an inequity results because the benefit is retained by them.

6. The Plaintiffs will be unjustly enriched in the amount of at least \$50,000.00.

7. Defendants Kevin and Terry Fair suffered damages in the amount of at least \$50,000.

WHEREFORE the Defendants Kevin L. Fair and Terry A. Fair request the Court grant the relief requested below.

THIRD-PARTY COMPLAINT

COMES NOW THE THIRD-PARTY PLAINTIFFS, KEVIN AND TERRY FAIR, by and through their attorneys, Legal Aid of Nebraska, and ask this Court, pursuant to 42 U.S.C. §1983, Neb. Rev. Stat. §§ 25-21,149 et seq., and Neb. Rev. Stat. §§ 25-1062 et seq. to:

(A) Find and declare the taking and sale of the Fair's home for delinquent taxes, and transferring ownership and all equity in their home to a private

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third party pursuant to Neb. Rev. Stat. §§ 77-1801 et seq., violates:

- (i) the Takings Clauses of the United States and Nebraska Constitutions facially and as applied because the taking was not for a public purpose, or, in the alternative was a taking without just compensation;
- (ii) the Due Process Clauses of the United States and Nebraska Constitutions facially and as applied because it deprives the Fairs of property without providing adequate notice;
- (iii) the Due Process Clause of the Nebraska Constitution facially and as applied because it deprives the Fairs of property without being narrowly tailored to further a compelling government interest or rationally related to a legitimate government interest;
- (iv) the Eighth Amendment to the United States Constitution and Article I, § 9 of the Nebraska Constitution facially and as applied because it results in an excessive fine that is in essence a punishment for the offense of failing to pay property taxes; and,
- (v) Article I, § 25 of the Nebraska Constitution because it deprives the Fairs of their right to acquire, own, possess, enjoy and descent their property.

(B) Find the actions of Third-Party Defendants the County of Scotts Bluff and the Scotts Bluff County Treasurer, and Plaintiff Continental Resources, violated Defendants Kevin and Terry Fair's rights

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guaranteed by the United States Constitution, and the actions of those parties deprive the Fairs of Constitutional rights that are enforceable by the Fairs through 42 U.S.C. § 1983.

(C) Enter a temporary and permanent injunction prohibiting the enforcement of the tax deed issued for the Defendants Kevin and Terry Fair's home by Plaintiff and Third-Party Defendants, and prohibit the use of Neb. Rev. Stat. §§ 77-1801 et seq., to issue a tax deed.

(D) Void the sale and issuance of the tax deed to Defendant Kevin and Terry Fair's home.

In support of their action, the Third-Party Plaintiffs, Kevin and Terry Fair, state as follows:

PARTIES

8. Defendants/Third-Party Plaintiffs Kevin and Terry Fair (herein referred to as "Defendants Kevin and Terry Fair") are residents of Scotts Bluff County, Nebraska.

9. Plaintiff/Third-Party Defendant Continental Resources (hereinafter referred to as "Plaintiff Continental Resources") is a general partnership doing business in the state of Nebraska.

10. Defendant Portfolio Recovery Associates, LLC is a Delaware limited liability company that has a judgment against Kevin and Terry Fair.

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11. Third-Party Defendant the County of Scotts Bluff is a political subdivision within the State of Nebraska, the County is a body politic and corporate and may sue and be sued pursuant to Neb. Rev. Stat. § 23-101.
12. Third-Party Defendant Heather Hauschild (“Scotts Bluff County Treasurer”) is the County Treasurer for Scotts Bluff County and is named in her official capacity.
13. Third-Party Defendant Doug Peterson is the Attorney General for the State of Nebraska, with offices located in Lancaster County, Nebraska, and is named in his official capacity.

BACKGROUND ON NEBRASKA TAX SALE LAW WHEN A TAX DEED IS ISSUED AND CONSTITUTIONAL REQUIREMENTS

14. When a real property owner in Nebraska fails to pay real property taxes, Nebraska law permits the county treasurer in the county where the real property is located to sell the property at public sale for the amount of unpaid taxes, plus interest and other statutory costs, subject to the property owner's right to redeem. Neb. Rev. Stat. §§ 77-1801 et seq. After the sale, the county treasurer issues the purchaser a tax sale certificate. Neb. Rev. Stat. § 77-1818. The certificate represents a transfer of the state's lien on the property to the purchaser. Neb. Rev. Stat. § 77-1818. Certain businesses, like Plaintiff Continental Resources, specialize in purchasing tax certificates.

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15. The tax certificate issued by the county treasurer at the time the taxes are sold includes the date which the purchaser can apply for a tax deed. Neb. Rev. Stat. § 77-1818. If the property is not redeemed by the property owner within three years, the tax certificate holder can apply for a tax deed. Neb. Rev. Stat. §§ 77-1824, 77-1831.
16. The tax certificate holder is required to provide the property owner with a notice of their right to redeem three months prior to applying for the tax deed. Neb. Rev. Stat. § 77-1831. The Nebraska Constitution requires occupants be served with personal notice before the time of redemption expires. Ne. Const. Art. VIII, § 3.
17. A property owner may redeem his or her property by paying the county treasurer the amount shown on the certificate and all subsequent taxes, along with the interest accrued and statutory costs. Neb. Rev. Stat. § 77-1824. The right of redemption expires upon the delivery of the tax deed by the county treasurer. Neb. Rev. Stat. § 77-1824. If the property owner does not redeem, the tax certificate holder can apply for a tax deed, and if the statutory requirements are met, the county treasurer shall execute and deliver a deed of conveyance for the real estate described in the tax certificate. Neb. Rev. Stat. §§ 77-1831, 77-1837.
18. The property owner, by statute, is only required to receive notice of their right to redeem three months before the tax certificate holder applies for a tax deed. This means a property owner first receives notice from the tax certificate holder of their right to redeem three years after the tax sale, leaving only three months to

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come up with the funds to pay prior or subsequent taxes owed, interest which accrues at 14% per annum for three years, and other costs.

19. The Fourteenth Amendment to the United States Constitution and Article I, § 3 of the Nebraska Constitution require that citizens be given due process prior to being deprived of their property.

20. The tax certificate holder receives the deed and full title to the property of the property owner from the county treasurer. Under the law, no matter how much equity is in the property, and no matter how small the taxes owed, Nebraska law takes title to the property and all equity in the property from the property owner and transfers it upon issuance of the tax deed to the purchaser of the tax certificate. Neither the state nor the tax certificate holder is under any obligation to reimburse the property owner the amount by which the sale of the property exceeds the unpaid taxes, interest, and other statutory costs. Instead, the tax certificate holder retains the full amount of the equity, and the property owner loses both his or her home and all of the equity in the home.

21. Pursuant to Neb. Rev. Stat. §§ 77-1801 et seq., the government takes the property of the property owner and then transfers title to that property not to the government, but to a private party (purchasers of tax certificates). Upon the issuance of a tax deed, the tax certificate holder receives title to and all equity in the property, and the property owner loses their home and all its equity.

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22. The Fifth Amendment to the United States Constitution and Article I, § 21 the Nebraska Constitution limit the power of the government to take property by prohibiting such a taking in the absence of a public purpose. When the government does take property for a public purpose, the government takes title to the property and pays compensation to the property owner.
23. Neb. Rev. Stat. §§ 77-1801 et seq., allows the government to take and sell property to a private party, and transfer title and all equity in the property in excess of the amount owed for taxes, and is in essence a punishment for the offense of failing to pay property taxes.
24. The Eighth Amendment to the United States Constitution and Article I, §9 of the Nebraska Constitution prohibit the government from imposing excessive fines.
25. Pursuant to Neb. Rev. Stat. §§ 77-1801 et seq., the government facilitates the acquisition of real property, the stripping of title and all equity in the real property from the homeowner, and the transfer of ownership and equity to a private third party.
26. Article I, §25 of the Nebraska Constitution provides, "There shall be no discrimination between citizens of the United States with respect to the acquisition, ownership, possession, enjoyment or descent of property." Neb. Rev. Stat. §§ 77-1801 et seq., is inherently discriminatory against property owners.

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FACTS

27. Defendants Kevin and Terry Fair are the lawful owners of real property, including a home, that exists on Lot 4, Block 1, Third Lincoln Height's addition to the City of Scottsbluff, Scotts Bluff County, Nebraska and is commonly referred to as 2109 Avenue D, Scottsbluff Nebraska.

28. Defendants Kevin and Terry Fair currently reside in the home and have resided in the home since at least July 19 , 1995 when they took a fee simple interest in the house as joint tenants with right of survivorship. There is no deed of trust securing a mortgage on the home.

29. Plaintiff Continental Resources sought issuance of a tax deed from the Scotts Bluff County Treasurer using the procedure outlined in Nebraska Revised Statutes §77-1801 et seq. on July 13, 2018.

30. At the time Plaintiff Continental Resources applied for the tax deed, Kevin Fair was 62 years old and Terry Fair was 62 years old.

31. Defendant Terry Fair was diagnosed with multiple sclerosis in February 2013. Prior to that time, she was employed at Wal-Mart. Due to her medical condition, she became unable to work and required assistance with her care.

32. Due to Terry Fair's care needs, Kevin Fair stopped working in the year 2014 to take care of his wife and took early retirement from Social Security in 2018. This is their only source of income.

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33. Defendants Kevin and Terry Fair could not afford to pay their real estate taxes and became delinquent.
34. The Scotts Bluff County Treasurer conducted a tax sale pursuant to Neb. Rev. Stat. §§ 77-1801 et seq. as a result of the Fair's becoming delinquent in paying their real estate taxes.
35. Plaintiff Continental Resources purchased a tax certificate issued by the Scotts Bluff County Treasurer in the amount of \$588.21 for delinquent property taxes on March 11, 2015. Defendants Kevin and Terry Fair were never notified of this sale, nor notified of any subsequent payment of their taxes by the Plaintiff for three years.
36. Defendants Kevin and Terry Fair did not receive notice of their right to redeem their property until April 13, 2018, more than three years after the tax sale. The notice states the total amount of taxes plus interest to date is \$5,268.32, and interest continues to accrue at \$1.60 [per day]. The notice further states unless the Fair's redeem their property by paying all taxes, costs and fees covered by the certificate of tax sale to the Scotts Bluff County Treasurer within three months of the date of service of the notice, the Plaintiff Continental Resources will apply for a treasurer's tax deed pursuant to Neb. Rev. Stat. §§ 77-1801 et seq.
37. For three years before receiving the notice that Plaintiff Continental Resources was applying for a tax deed, interest was accruing at 14% per annum, and is included in the amount the Defendants Kevin and Terry Fair would have to pay to redeem their property.

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38. After receiving notice of the right to redeem, Defendant Kevin Fair attempted to obtain a loan to redeem the property, but was unable to obtain approval from a lender.

39. The Scotts Bluff County Treasurer issued a tax deed to Plaintiff Continental Resources on July 24, 2018 and the deed was recorded on August 13, 2018.

40. At the time the tax deed was issued, Defendants Kevin and Terry Fair's property was assessed at \$59,759.00.

41. The real estate transfer statement prepared pursuant to the tax deed for the Defendants Kevin and Terry Fair's property, transferring the property from the Scotts Bluff County Treasurer to the Plaintiff Continental Resources, indicates the market value of the property was \$59,759.00 and the purchase price paid by Plaintiff was \$5,965.74.

42. If Plaintiff Continental Resources receives a valid deed to the home, it stands to gain not only title to Defendants Kevin and Terry Fair's real property, but all of the equity therein, and will likely receive a profit of over \$50,000.

43. If Plaintiff Continental Resources receives a valid deed to the home, Defendants Kevin and Terry Fair will not only lose their home of more than 20 years, they will be stripped of more than \$50,000 worth of equity pursuant to the laws of the state of Nebraska.

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FIRST CAUSE OF ACTION (Violation of the Fifth Amendment to the United States Constitution and Article I, § 21 the Nebraska Constitution)

44. All facts and allegations of this Answer, Counterclaim and Third-Party Complaint are incorporated herein by reference.

45. By directing takings of private property by county treasurers and counties without a public purpose, Neb. Rev. Stat. §§ 77-1801 et seq. violate the Fifth Amendment to the United States Constitution and Article I, §21 the Nebraska Constitution.

46. Neb. Rev. Stat. §§ 77 -1801 et seq. direct the counties to conduct public auctions of “tax certificates” pertaining to private properties subject to property tax deficiencies. Through these auctions, the county sells the tax certificates to private purchasers. The certificates permit the certificate holders to apply for a tax deed subject to the property owner’s right to redeem. Upon the issuance of a tax deed, the property owner loses the right to redeem and the tax certificate purchaser receives title to the property. Upon the issuance of a tax deed, the tax certificate holder receives title to and all equity in the property, and the property owner loses their home and all its equity.

47. Nebraska law therefore allows a county to take and sell to a purchaser of a tax certificate the right to obtain a deed to the property, even if the original property owner owns equity in the property. Regardless of how much equity a property owner has in his or her property, or how small the tax deficiency

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the owner owes a county, Neb. Rev. Stat. §§ 77-1801 et seq. provide that the county will take and transfer the property and all the equity in it to a private purchaser.

48. Equity in a home is undeniably a property right that may not be taken in violation of the Fifth Amendment to the United States Constitution and Article I, § 21 the Nebraska Constitution. Equity is a partial interest in real property and is subject to distribution like other forms of property. The government may not take a citizen's home equity in violation of the United States and Nebraska Constitutions.

49. Neb. Rev. Stat. §§ 77-1801 et seq. direct the taking and public transfer of private property to other private purchasers.

50. For over 200 years, it has been recognized that it is against all reason and justice to presume that the legislature has been entrusted with the power to enact a law that takes property from A and gives it to B. *Calder v. Bull*, 3 U.S. 386 (1798).

51. The Fifth Amendment to the United States Constitution and Article I, § 21 the Nebraska Constitution limits the power of the government to take property by prohibiting such a taking in the absence of a public purpose. When the government does take property for a public purpose, the government takes title to the property and pays compensation to the property owner. When there is no public purpose, the Fifth Amendment and Nebraska Constitution prohibits such a taking.

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52. The government has no public purpose for selling the right to a tax deed on private home equity when that equity is larger in amount than the tax liens, interest, and other statutory costs at issue. Nebraska law allows for the taking and transfer of amounts of equity that are above and beyond the amount of the public debt owed, thereby eviscerating any relationship between the public purpose for these sales, namely the recovery of property tax deficiencies, and the final amounts transferred to the purchasers. The United States and Nebraska Constitutions preclude such exercises of government power.

53. Defendants Kevin and Terry Fair's home and all their equity in their home was transferred to Plaintiff Continental Resources by Third-Party Defendants the County of Scotts Bluff and the Scotts Bluff County Treasurer pursuant to Neb. Rev. Stat. §§ 77-1801 et seq.

54. Plaintiff Continental Resources received title to and all equity in Defendants Kevin and Terry Fair's home pursuant to the actions of and jointly with Third-Party Defendants the County of Scotts Bluff and the Scotts Bluff County Treasurer and Neb. Rev. Stat. §§ 77-1801 et seq.

55. For these reasons, Neb. Rev. Stat. §§ 77-1801 et seq. violate the Fifth Amendment to the United States Constitution and Article I, § 21 the Nebraska Constitution facially and as applied.

56. Because Neb. Rev. Stat. §§ 77-1801 et seq. is unconstitutional, the tax sale and deed issued to Plaintiff Continental Resources is void.

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SECOND CAUSE OF ACTION

(Claim for Just Compensation under the Fifth Amendment to the United States Constitution and Article I, § 21 the Nebraska Constitution)

57. All facts and allegations of this Answer, Counterclaim and Third-Party Complaint are incorporated herein by reference.

58. Defendants Kevin and Terry Fair state this second cause of action as an alternative claim to the first cause of action.

59. The United States and Nebraska Constitutions provide that no private property shall be taken for public use without just compensation. U.S.C.A. Const. Amend. 5, Ne. Const. Art. I, § 21. These clauses require the government to provide just compensation for the taking of private property for a public use.

60. In other contexts, the taking of an individual's property of value without permission is theft. However, if it is a tax sale under Nebraska law, the government action of taking real property of value and transferring that property and all its value to a private party without fair compensation is authorized.

61. Neb. Rev. Stat. §§ 77-1801 et seq. permit a taking of private property, including the original owners' equity in the real property, without any form of compensation.

62. Such takings without compensation, even if it could be found to have a public purpose, violate the

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Fifth Amendment and Nebraska Constitution. By permitting such seizures without requiring compensation, Neb. Rev. Stat. §§ 77-1801 et seq. authorize an unconstitutional action.

63. Third-Party Defendants the County of Scotts Bluff and the Scotts Bluff County Treasurer have taken the property of Defendants Kevin and Terry Fair without paying just compensation.

64. Plaintiff Continental Resources received title to and all equity in Defendants Kevin and Terry Fair's home pursuant to the actions of and jointly with Third-Party Defendants Scotts Bluff County Treasurer and the County of Scotts Bluff and Neb. Rev. Stat. §§ 77-1801 et seq.

65. For the reasons stated, Neb. Rev. Stat. §§ 77-1801 et seq. violate the just compensation requirement of the Fifth Amendment of the United States Constitution and Article I, § 21 the Nebraska Constitution facially and as applied.

66. Because Neb. Rev. Stat. §§ 77-1801 et seq. is unconstitutional, the tax sale and deed issued to Plaintiff Continental Resources is void.

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THIRD CAUSE OF ACTION (Violation of Procedural Due Process under the 14th Amendment to the United States Constitution and Article I, § 3 the Nebraska Constitution)

67. All facts and allegations of this Answer, Counterclaim and Third-Party Complaint are incorporated herein by reference.

68. No person shall be deprived of life, liberty or property without due process of law. U.S.C.A. Const. Amend. 14; Neb. Const. Art. I, § 3.

69. Plaintiff Continental Resources purchased tax certificates issued by Third-Party Defendants the County of Scotts Bluff and the Scotts Bluff County Treasurer for delinquent property taxes on March 11, 2015.

70. Neb. Rev. Stat. §77-1831 requires the tax certificate holder to provide notice to the property owner of their right to redeem only 3 months prior to the date the tax certificate holder applies for a tax deed.

71. Defendants Kevin and Terry Fair did not receive notice of their right to redeem their property from Plaintiff Continental Resources until April 13, 2018, more than three years after the tax sale.

72. The notice the Defendants Kevin and Terry Fair received on April, 13, 2018, states the total amount of taxes plus interest to date is \$5,268.32, and interest continues to accrue at \$1.60 [per day]. The notice

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further states unless the Fairs redeem their property by paying all taxes, costs and fees covered by the certificate of tax sale to the Scotts Bluff County Treasurer within three months of the date of service of the notice, the Plaintiff will apply for a treasurer's tax deed pursuant to Neb. Rev. Stat. §§ 77-1801 et seq.

73. Interest was accruing at 14% per annum, and subsequent taxes were included as part of the amount the Fairs' would have to pay to redeem their property.

74. Receiving notice 3 years after the tax sale of the right to redeem their property is inadequate and violates the right to due process of law before being deprived of property facially and as applied under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and Article I, Section 3 of the Nebraska Constitution.

75. By actions of the government, Defendants Kevin and Terry Fair will not only lose their home, but will be stripped of over \$50,000 of equity in their home, and a private third party will receive that equity as a windfall.

76. The notice provided by Plaintiff Continental Resources does not inform Defendants Kevin and Terry Fair that they will be losing all of the equity in their home.

77. Plaintiff Continental Resources received title to and all equity in Defendants Kevin and Terry Fair's home pursuant to the actions of and jointly with the Third-Party Defendants Scotts Bluff County

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Treasurer and the County of Scotts Bluff and Neb.
Rev. Stat. §§ 77-1801 et seq.

78. Transferring real property and all its equity to a private third party, including Defendants Kevin and Terry Fair's home pursuant to Neb. Rev. Stat. §§ 77-1801 et seq., without providing adequate notice violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and Article I, Section 3 of the Nebraska Constitution facially and as applied.

79. Because Neb. Rev. Stat. §§ 77-1801 et seq. is unconstitutional, the tax sale and deed issued to Plaintiff Continental Resources is void.

FOURTH CAUSE OF ACTION

(Violation of Substantive Due Process under Article I, § 3 the Nebraska Constitution)

80. Article I, § 25 of the Nebraska Constitution creates a right to acquire, own, possess, enjoy and descent property.

81. Article I, § 3 of the Nebraska Constitution provides that no person shall be deprived of property without due process of law.

82. Nebraska's Due Process Clause offers not only procedural protections, but a substantive component that protects persons against the arbitrary exercise of governmental power. In other words, the substantive component bars certain governmental actions

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regardless of the fairness of the procedures used to implement them.

83. The Nebraska Constitution creates a protected right to own a home.

84. Neb. Rev. Stat. §§ 77-1801 et seq. permit a county treasurer to take a home and all equity in the home, no matter how valuable the property or small the tax delinquency, and transfer ownership and equity above the amount of the delinquency, to a private third party.

85. The statutory provisions allowing the government to take Defendants Kevin and Terry Fair's home, strip them of all equity in their home, and transfer ownership and all equity to a private third party is not narrowly tailored to further a compelling government interest let alone rationally related to a legitimate government interest.

86. Defendants Kevin and Terry Fair's substantive due process rights under the Nebraska Constitution have been violated facially and as applied by Plaintiff and Third-Party Defendants.

87. Because Neb. Rev. Stat. §§ 77-1801 et seq. is unconstitutional, the tax sale and deed issued to Plaintiff Continental Resources is void.

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FIFTH CAUSE OF ACTION

(Violation of Excessive Fines under the 8th Amendment to the United States Constitution and Article I, § 9 of the Nebraska Constitution)

88. All facts and allegations of this Answer, Counterclaim and Third-Party Complaint are incorporated herein by reference.
89. Defendants Kevin and Terry Fair state this cause of action as an alternative to the other causes of action.
90. The Eighth Amendment to the United States Constitution and Article I, § 9 of the Nebraska Constitution prohibit the government from imposing excessive fines
91. Pursuant to Neb. Rev. Stat. §§ 77-1801 et seq. which allows the government to take and sell property to a private party, and transfer title and all equity in the property in excess of the amount owed for taxes, is in essence a punishment for the offense of failing to pay property taxes.
92. Defendants Kevin and Terry Fair have substantial value and equity in their property and forcing the Fairs to forfeit their entire property and the equity they have in it is grossly disproportional to the gravity of their tax delinquency.
93. For these reasons, from Neb. Rev. Stat. §§ 77-1801 et seq. violate Eighth Amendment to the United

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States Constitution and Article I, § 9 of the Nebraska Constitution.

94. Because Neb. Rev. Stat. §§ 77-1801 et seq. is unconstitutional, the tax sale and deed issued to Plaintiff Continental Resources is void.

SIXTH CAUSE OF ACTION

(42 U.S.C. § 1983 Claim for Damages)

95. All facts and allegations of this Answer, Counterclaim and Third-Party Complaint are incorporated herein by reference.

96. Third-Party Defendants the County of Scotts Bluff and the Scotts Bluff County Treasurer, under color of state law, have unlawfully transferred title to Defendants Kevin and Terry Fair's property, along with all the equity therein, to Plaintiff Continental Resources in violation of the Fifth, Eighth and Fourteenth Amendments of the United States Constitution.

97. Plaintiff Continental Resources obtained Defendants Kevin and Terry Fair's property through state action, which is the procedural scheme created by the Neb. Rev. Stat. §§ 77-1801 et seq.

98. Furthermore, Plaintiff Continental Resources acted under the color of state law. Plaintiff Continental Resources could not have obtained Defendants Kevin and Terry Fair's property without first obtaining a tax certificate from Defendant Scotts Bluff County Treasurer pursuant to a tax sale

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conducted by the County Treasurer, Plaintiff Continental Resources could only apply for and receive a deed from the Scotts Bluff County Treasurer. Plaintiff Continental Resources' joint participation with Scotts Bluff County and the Scottsbluff County Treasurer to take Defendants Kevin and Terry Fair's home without proper notice, without a public purpose, or in the alternative without just compensation and imposition of excessive fines, constitutes action under the color of state law.

99. Through the laws created by the State pursuant to Neb. Rev. Stat. §§ 77-1801 et seq., the Third-Party Defendants the County of Scotts Bluff and the Scotts Bluff County Treasurer, and Plaintiff Continental Resources, violated Defendants Kevin and Terry Fair's rights guaranteed by the United States Constitution.

100. These actions by Third-Party Defendants County of Scotts Bluff and Scotts Bluff County Treasurer, and Plaintiff Continental Resources, deprive Defendants Kevin and Terry Fair of Constitutional rights that are enforceable by the Fairs through 42 U.S.C. § 1983.

SEVENTH CAUSE OF ACTION

(Violation of Article I, § 25 of the Nebraska Constitution)

101. All facts and allegations of this Answer, Counterclaim and Third-Party Complaint are incorporated herein by reference.

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102. Article I, § 25 of the Nebraska Constitution provides, “There shall be no discrimination between citizens of the United States with respect to the acquisition, ownership, possession, enjoyment or descent of property.”

103. Neb. Rev. Stat. §§ 77-1801 et seq. results in an unlawful taking under the United States and Nebraska Constitutions and therefore violates Article I, § 25 of the Nebraska Constitution.

104. Often it is low-income, disabled and elderly citizens, like Defendants Kevin and Terry Fair, who are unable to pay real property taxes and upon whom entities in the business of buying tax certificates, like Plaintiff, profit. These categories of individuals are more vulnerable to losing their homes pursuant to Nebraska tax sales statutes. Additionally, these low-income citizens are also less likely to be able to afford to retain an attorney to help them understand and protect their property rights.

105. Pursuant to Neb. Rev. Stat. §§ 77-1801 et seq., the government facilitates the acquisition of real property, the stripping of all equity in the real property from the property owner, including Defendants Kevin and Terry Fair, and the government transfers that equity to a private third party, including entities in the business of buying tax certificates, including Plaintiff.

106. Defendants Kevin and Terry Fair will lose their home of over 20 years, their equity in their home, and their right under the Nebraska Constitution to own,

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possess, enjoy, and transfer their property and the equity therein.

107. The tax sale process not only discriminates between citizens with respect to the acquisition, ownership, possession, enjoyment and descent of property, it encourages businesses to prey upon and profit from Nebraska's most vulnerable, those low-income, disabled and elderly homeowners who become delinquent in paying their real estate taxes.

108. For these reasons, Neb. Rev. Stat. §§ 77-1801 et seq. violate Article I, § 25 of the Nebraska Constitution facially and as applied.

109. Because Neb. Rev. Stat. §§ 77-1801 et seq. is unconstitutional, the tax sale and deed issued to Plaintiff Continental Resources is void.

EIGHTH CAUSE OF ACTION (Injunction)

110. All facts and allegations of this Answer, Counterclaim and Third-Party Complaint are incorporated herein by reference.

111. Defendants Kevin and Terry Fair will suffer immediate and irreparable harm if Plaintiff Continental Resources and Third-Party Defendants Scotts Bluff County Treasurer and the County of Scotts Bluff are not enjoined from enforcing the tax sale of Defendants Kevin and Terry Fair's property and deed issued by the Scotts Bluff County Treasurer and recorded on August 13, 2018.

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112. Defendants Kevin and Terry Fair move this Court pursuant to Neb. Rev. Stat. §§ 25-1062 to 25-1080 for a Temporary and Permanent Injunction commanding Plaintiff Continental Resources, Third-Party Defendants Scottsbluff County and Scotts Bluff County Treasurer to refrain from enforcing the tax deed.

113. Defendants Kevin and Terry Fair seek a temporary and permanent injunction prohibiting the use of Neb. Rev. Stat. §§ 77-1801 et seq. to take and sell property, including all equity in a property owner's home, by issuing tax deeds.

WHEREFORE, Defendants Kevin and Terry Fair respectfully request that:

- a. The Court find and declare relevant portions of Neb. Rev. Stat. §§ 77-1801 et seq. that permit the taking and sale of Defendants Kevin and Terry Fairs' property, including all equity in their property, violates the Fifth Amendment to the United States Constitution, Article I, § 21 the Nebraska Constitution facially and as applied, and declare relevant portions of Neb. Rev. Stat. §§ 77-1801 et seq. causing such sale to be null and void;
- b. The Court find and declare, in the alternative, that Defendants Kevin and Terry Fair are entitled to just compensation under the Fifth Amendment to the United States Constitution and Article I, § 21 the Nebraska Constitution;
- c. The Court find and declare relevant portions of Neb. Rev. Stat. §§ 77-1801 et seq. that deprive property

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owners of their property, including all equity therein, without providing adequate notice violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and, Article I, Section 3 of the Nebraska Constitution facially and as applied and declare relevant portions of Neb. Rev. Stat. §§ 77-1801 et seq. causing such sale to be null and void;

- d. The Court find and declare relevant portions of Neb. Rev. Stat. §§ 77-1801 et seq. that deprive property owners of their property, included all equity therein, violates property owners substantive due process rights guaranteed by Article I, Section 3 of the Nebraska Constitution facially and as applied and declare relevant portions of Neb. Rev. Stat. §§ 77-1801 et seq. causing such sale to be null and void;
- e. The Court declare, in the alternative, that taking and transferring Defendant Kevin and Terry Fair's property and all equity therein for a relatively minor tax delinquency constitutes a violation of the rights against excessive punishment and fines under the Eighth Amendment to the United States Constitution and Article I, § 9 of the Nebraska Constitution and declare relevant portions of Neb. Rev. Stat. §§ 77-1801 et seq. causing such sale to be null and void;
- f. The Court find and declare that Plaintiff and Third-Party Defendants taking and sale of Defendants Kevin and Terry Fair's property, including all equity in their property, violates Article I, § 25 of the Nebraska Constitution and declare relevant portions of Neb. Rev. Stat. §§ 77-1801 et seq. causing such sale to be null and void;

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- g. The Court enter a temporary and permanent injunction enjoining Plaintiff Continental Resources and Third-Party Defendants the County of Scotts Bluff and Scotts Bluff County Treasurer from enforcing the tax sale and tax deed issued by the Scotts Bluff County Treasurer and recorded on August 13, 2018;
- h. The Court enter a permanent injunction prohibiting the use of Neb. Rev. Stat. §§ 77-1801 et seq. to take and sell property, including all equity in a property owner's home, by issuing tax deeds;
- i. The Court enter an order voiding the sale and issuance of the tax deed to Defendant Kevin and Terry Fair's home;
- j. The Court enter an order, in the alternative, on Defendants Kevin and Terry Fair's Counterclaim, finding Plaintiff Continental Resources was unjustly enriched and order Continental Resources pay the Fair's the value of equity the Fair's had in the property at the time the tax deed was issued after accounting for the amount owed pursuant to the tax certificate, or, in the alternative order that the property be placed in a constructive trust;
- k. The Court award Defendants Kevin and Terry Fair their costs, including reasonable attorney's fees, as provided by law; and,
- l. Other such relief as the Court deems necessary and proper.

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KEVIN L. FAIR and TERRY A. FAIR
Defendants,

BY: __/s/ Michael W. Meister
Michael W. Meister, #18367
Jennifer Gaughan, #21768
LEGAL AID OF NEBRASKA
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Attorneys for Defendants

STATE OF NEBRASKA)
COUNTY OF SCOTTS BLUFF) ss.

Kevin L. Fair, being upon oath first duly sworn, deposes and states that he is one of the Defendants in the above-entitled action, that he has read the foregoing Answer, Counterclaim and Third-Party Complaint, knows the contents thereof, and that the facts therein contained, are true to the best of his belief.

KEVIN L. FAIR, Defendant

SUBSCRIBED AND SWORN to before me this 14th day of January, 2019.

/s/ Caryle A. Covalt
Notary Public

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STATE OF NEBRASKA)
COUNTY OF SCOTTS BLUFF) ss:

Terry A. Fair, being upon oath first duly sworn, deposes and states that she is one of the Defendants in the above-entitled action, that she has read the foregoing Answer, Counterclaim and Third-Party Complaint, knows the contents thereof, and that the facts therein contained, are true to the best of her belief .

TERRY A. FAIR, defendant

SUBSCRIBED AND SWORN to before me this 14th
day of January, 2019.

/s/ Caryle A. Covalt
Notary Public