PROPERTY TAX BULLETIN

Number 140 November 2006 **Shea Riggsbee Denning, Editor**

THE CONSTITUTIONALITY OF NORTH CAROLINA'S TAX FORECLOSURE PROCEDURES AFTER *JONES V. FLOWERS*

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On April 26, 2006, the United States Supreme Court rendered its decision in *Jones v. Flowers*,[1] a case involving the constitutionality of the Arkansas tax foreclosure statute. The Court found that when notice of a tax sale is returned unclaimed the state has an obligation to take additional reasonable steps to notify the property owner of the sale. This bulletin will examine the impact of *Jones* on North Carolina's tax foreclosure procedures and the General Assembly's attempt to comply with *Jones*. Though, under *Jones*, some of North Carolina's previous in rem foreclosures may have been unconstitutional, recent changes made by the General Assembly should cure this problem for future foreclosures.

Notice Requirements Before *Jones*

In a series of cases, beginning with *Mullane v. Central Hanover Bank & Trust Co.*,[2] the Supreme Court has set out the constitutional requirements for notice of an impending deprivation of property. Under *Mullane*, the Due Process Clause of the Fourteenth Amendment requires "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."[3] The Court explained:

> [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . . .[4]

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1. 126 S. Ct. 1708 (2006).
2. 339 U.S. 306 (1950).
3. *Id.* at 314.
4. *Id.* at 315.

The Court used this standard to determine the notice due to the beneficiaries in an action to settle the accounts of a common trust. The Court concluded that notice by publication was sufficient as to "[t]hose . . . whose interests or whereabouts could not with due diligence be ascertained."[5] However, the Court found notice by publication insufficient "[w]here the names and post-office addresses of those affected by the proceeding are at hand . . . ."[6] Instead, the Court tacitly approved mailed notice as "efficient and inexpensive" and as "a serious effort" to inform the beneficiaries of the action.[7]

Subsequently, in *Mennonite Board of Missions v. Adams*, the Court applied these principles to determine the notice due to a mortgagee who held an interest in a delinquent property sold in a tax sale.[8] The Court found that "[w]hen a mortgagee is identified in a mortgage that is publicly recorded" and when "the mortgagee's address could have been ascertained by reasonably diligent efforts," notice of sale by mail or personal service is required.[9] Notably, *Mennonite* clarified an ambiguity in *Mullane*, holding that the state must exercise "reasonably diligent efforts" in determining the address of a party.[10]

Under the *Mullane* approach, a notice procedure is assessed by whether it is "reasonably calculated" to inform the interested parties of the action;[11] it does not require that the parties receive *actual* notice of the action.[12] However, the Court has found that even if a statutory scheme is reasonably calculated to inform the interested parties of the action, notice can be insufficient in an individual case where the government *knows* that it will be ineffective. In *Covey v. Town of Somers*, the town instituted an action to foreclose on a tax lien against a parcel owned by a person who was mentally incompetent.[13] Following the requirements of the state statute, the town provided notice to the property owner by publication, posting at the post office, and by mail. The Court found such notice insufficient because the town authorities knew that the property owner was incapable of handling her affairs.[14] Similarly, in *Robinson v. Hanrahan*, the taxpayer was arrested for armed robbery and the state of Illinois promptly instituted forfeiture proceedings against his automobile, mailing notice to his home instead of the jail.[15] As the state knew that Robinson could not get to his home, the Court found the mailed notice insufficient, noting that "[u]nder these circumstances, it cannot be said that the State made any effort to provide notice which was 'reasonably calculated' to apprise appellant of the pendency of the forfeiture."[16]

Covey and *Robinson* addressed the issue of whether notice is inadequate if the taxing unit knew the notice would be ineffective *before* it was mailed. They did not, however, address whether notice is inadequate if the taxing unit discovers that notice is ineffective *after* it is mailed. Before *Jones*, a number of state supreme courts and federal courts of appeals addressed this question, with the majority finding that the government must take additional reasonable steps before property can be sold in a tax sale.[17]

Of significance to North Carolina is the Fourth Circuit Court of Appeals' recent decision in *Plemons v. Gale*.[18] Linda Plemons purchased a property in West Virginia, mistakenly believing that the financing bank would pay the property taxes. When the taxes went unpaid, the county sold a tax lien on the property to Advantage, a Delaware business trust. Advantage sought a tax deed to the property and, pursuant to state law, prepared a list of the interested parties who must be notified of their redemption rights. The county sent notice by certified mail to Plemons at the physical and mailing addresses of the subject property, to "occupant" at the same two addresses, and to Plemons at a third property owned by her. Notice was not, however, mailed to Plemons' current residence. The notices were promptly returned marked "undeliverable." Advantage subsequently published notice in a newspaper. Nobody responded to the ads, and the county clerk issued a deed to Advantage.[19] After Plemons learned of the sale, she brought suit to set aside the tax deed on the grounds that she had received inadequate

5. *Id.* at 317.

6. *Id.* at 318.

7. *Id.* at 318–19.

8. 462 U.S. 791 (1983). For a detailed discussion of the effects of *Mennonite* on the North Carolina in rem foreclosure procedure, see William A. Campbell, *In Rem Foreclosures: The U.S. Supreme Court Imposes Additional Notice Requirements*, PROPERTY TAX BULLETIN (Institute of Government, Chapel Hill, N.C., July 1983).

9. *Mennonite*, 462 U.S. at 798 & n.4.

10. *Id*. In her dissent, Justice O'Connor argued that this was a misreading of *Mullane*. *See id.* at 804–05 & n.3 (O'Connor, J., dissenting).

11. 339 U.S. at 314.

12. Dusenbery v. United States, 534 U.S. 161, 170 (2002).

13. 351 U.S. 141, 144 (1956).

14. *Id.* at 146–47.

15. 409 U.S. 38, 38 (1972).

16. *Id.* at 40.

17. *See* Jones v. Flowers, 126 S. Ct. 1708, 1714–15 (2006).

18. 396 F.3d 569 (4th Cir. 2005).

19. *Id.* at 571.

notice. The district court granted summary judgment to Plemons.[20]

On appeal, the Fourth Circuit agreed with much of the lower court's reasoning, although it ultimately remanded the case for additional fact-finding. Relying on *Covey* and *Robinson*, the court found that the "prompt return of mailed notice triggers a duty to make reasonable follow-up efforts . . . ."[21] It noted that this rule conforms with *Mullane*'s requirement of "notice consistent with that of 'one desirous of actually informing the absentee.'"[22] Citing *Mullane*'s "reasonable diligence" standard, the court found that Advantage had a duty to "search all publicly available county records once the prompt return of the mailings made clear that its initial examination of the title . . . had not netted Plemons' correct address."[23] The court noted, however, that this duty did not extend to "consulting the telephone directory, asking the tenants at [Plemons'] property, or making inquiries of the mortgagee bank."[24] The court vacated the lower court's judgment and remanded the case to determine what efforts Advantage had made to search public documents.[25]

Jones v. Flowers

In *Jones v. Flowers*, the Supreme Court heard a case with a fact pattern similar to that in *Plemons*. Gary Jones purchased a house in 1967, where he lived with his wife until they separated in 1993.[26] Jones moved to a new address, while his wife continued to live in the home. For thirty years, Jones' mortgage company paid his property taxes, but when Jones paid off his mortgage in 1997 the taxes went unpaid. In 2000, the Commissioner of State Lands certified Jones' property as delinquent and sent Jones notice by certified mail of his right to redeem, noting that if he failed to redeem the property it would be subject to public sale in April of 2002. Nobody signed for the letter and Jones did not retrieve the letter from the post office. The letter was subsequently returned to the commissioner marked "unclaimed." In 2002, a few weeks before the tax sale, the commissioner published a notice of the sale in the local newspaper. No buyers bid on the property, but, several months later, Linda Flowers submitted a bid. The commissioner sent a second letter to Jones, informing him that if he failed to pay his taxes the land would be sold to Flowers. Again, the notice was returned unclaimed. Flowers purchased the house. Jones learned of the sale from his daughter after Flowers posted an unlawful detainer notice on the property.[27]

Jones brought suit in state court against the commissioner and Flowers, alleging that the tax sale was invalid because the commissioner failed to provide him with notice of the tax sale or his right to redeem. The trial court granted summary judgment to the commissioner and Flowers, and the Arkansas Supreme Court affirmed.[28]

In a five-to-three opinion, the Supreme Court reversed.[29] Writing for the Court, Justice Roberts held that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so."[30]

The first part of the majority's opinion followed the reasoning of *Plemons*. The Court noted that if a letter was returned unclaimed, someone "desirous of actually informing" the owner of the action would have taken further reasonable steps to do so.[31] To illustrate this point, the Court analogized a hypothetical situation in which the commissioner gave the letter to a mail carrier and saw the carrier drop it in a sewer grate. Under these circumstances, to a person desirous of informing the property owner of the action, "[f]ailure to follow up would be unreasonable."[32] The Court also cited *Robinson* and *Covey*, noting that even if a statutory scheme is reasonably calculated to notify the recipient in the ordinary case, "the government [must] consider unique information about an intended recipient . . . ."[33]

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20. *Id*. at 574.
21. *Id.* at 575.
22. *Id*. (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314–15 (1950)).
23. *Id.* at 577. For other cases requiring additional efforts to ascertain the recipient's correct address after a notice's return, see, for example, Akey v. Clinton, 375 F.3d 231, 236 (2d Cir. 2004); Rosenberg v. Smidt, 727 P.2d 778, 781–83 (Alaska 1986); Schmidt v. Langel, 874 P.2d 447, 450 (Colo. Ct. App. 1993); Giacobbi v. Hall, 707 P.2d 404, 408–09 (Idaho 1985); St. George Antiochian Orthodox Christian Church v. Aggarwal, 603 A.2d 484, 490 (Md. 1992); Kennedy v. Mossafa, 789 N.E.2d 607, 611 (N.Y. 2004); Good v. Kennedy, 352 S.E.2d 708, 711 (S.C. Ct. App. 1987).
24. *Plemons*, 396 F.3d at 577.
25. *Id.* at 578.
26. Jones v. Flowers, 126 S. Ct. 1708, 1712 (2006).
27. *Id*. at 1713.
28. *Id*.
29. *Id*. Justice Alito did not take part in the decision.
30. *Id*.
31. *Id.* at 1716.
32. *Jones*, 126 S. Ct. at 1716.
33. *Id*.

The Court then turned to the question of whether there were additional reasonable steps that the state could have taken to inform Jones of the pending sale. Noting that "[w]hat steps are reasonable in response to new information depends upon what the new information reveals,"[34] the Court listed three additional reasonable steps that the state could have taken. First, the state could have re-sent the letter through regular mail.[35] The Court reasoned that the return of a letter unclaimed does not necessarily mean that the address is incorrect; instead, it might indicate that the owner was not home when the mail carrier delivered it and that the owner chose not to claim it at the post office. In light of these possibilities, sending the letter through regular mail might increase the chances that the owner would receive the notice. If the owner still resided at the address but had failed to pick up the letter, regular mail would enhance his chance of receiving the letter, as the mail carrier would leave the letter at the residence. If the owner no longer lived at the address, the current resident might forward the letter to the owner. Second, the state could have posted notice at the front door.[36] The Court noted that it was through the posting of the unlawful detainer notice that Jones ultimately learned that his property had been sold.[37] Third, the state could have mailed the notice to the property addressed to "occupant."[38] The Court reasoned that a current resident who would not open a letter addressed to the owner might open a letter addressed to "occupant." The Court cited with approval a number of state statutes that employed one of the latter two measures[39] but noted that it would not "prescribe the form of service that the [government] should adopt."[40]

Though the Court required additional efforts on behalf of the state, it parted ways with *Plemons* and a number of other appellate and state supreme court decisions,[41] ruling that there was no requirement for the state to look up Jones' address in the phone book or in government records.[42] The Court reasoned that the return of a letter marked "unclaimed" did not necessarily indicate that the listed address was incorrect. Further, the Court noted that "an open-ended search for a new address . . . imposes burdens on the State significantly greater than the several relatively easy options outlined above."[43] Thus, the Court left intact the *Mullane* and *Mennonite* "due diligence" standard with respect to the initial mailing but refused to extend it to situations where the initial mailing came back unclaimed. In this respect, *Jones* can be read as a compromise: it requires more notice than the Arkansas statute allowed, but not as much as had been required by other courts.

Overall, *Jones* appears to give governments fairly straightforward guidance for how to conform with the requirements of due process. If notice sent by registered mail is returned unclaimed, it requires the government to take one of several rather simple steps, all of which could be easily incorporated into state statute. Though the Court refused to prescribe any particular fix and emphasized that notice requirements "will vary with circumstances and conditions,"[44] *Jones* strongly suggests that any one of the Court's three suggested solutions would suffice. However, *Jones* stopped short of requiring the government to engage in additional efforts to locate a taxpayer's present address.

Jones suggests that the Court will not strike down statutes similar to the Arkansas law; rather, it will only strike down individual sales where, due to the particularities of the situation, the taxing unit knew that notice would be ineffective. The Court did not find the Arkansas tax foreclosure statute itself unconstitutional. Instead it found "[t]he Commissioner's efforts to provide notice to Jones . . . given the circumstances of this case" violative of due process.[45] This response conforms with the Court's characterization of *Covey* and *Robinson*: "[I]n [these] cases, we have required the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case."[46] Nevertheless, it would still be wise for states to redraft their tax foreclosure statutes to comply with *Jones*, at the very least to provide guidance to their taxing units.

On a more general level, *Jones* appears to expand the *Covey* and *Robinson* exceptions, suggesting that when the government learns unique information about the property owner *after* it has mailed notice, it must take additional steps to notify the owner. For example, under the Court's logic, if the government learned that the property owner was

34. *Id*. at 1718.

35. *Id*. at 1718–19.

36. *Id*. at 1719.

37. *Id.*

38. *Jones*, 126 S. Ct. at 1719.

39. *Id*.

40. *Id*. at 1721 (quoting Greene v. Lindsey, 456 U.S. 444, 455 n.9 (1982)).

41. *See supra* note 23.

42. *Jones*, 126 S. Ct. at 1719.

43. *Id*.

44. *Id*. at 1714 (quoting Walker v. City of Hutchinson, 352 U.S. 112, 115 (1956)).

45. *Id*. at 1721.

46. *Id.* at 1716.

incompetent after mailing notice, the government would need to take additional steps before taking the owner's property.

Though in many instances the dictates of *Jones* will be clear, the opinion leaves several questions unanswered. First, it did not address what a government must do if the original letter is returned unclaimed and the government subsequently learns (say, through a call from a current resident) that the owner no longer lives at that address. The Court rejected the contention that the state was obligated to locate Jones' current address based in part on the premise that the state did not know whether or not Jones had moved. If, however, the state had specific knowledge that Jones no longer lived at the address, the Court might have reached a different conclusion and required the state to take further reasonable efforts to locate Jones' correct address. When faced with this scenario, a government wishing to err on the side of caution should attempt to locate the owner's current address in any available public records and in the phone book before proceeding with a tax sale.

Second, the Court did not directly address what a government's duty would be if it implemented one of the Court's three suggested follow-up steps *before*, not after, notice was returned unclaimed. In the interest of time and economy, a taxing unit might want to maximize the chance that the owner receives notice as early as possible. Accordingly, the government may wish to mail notice to the occupant of the property or post notice on the property at the same time that it mails notice to the taxpayer. If, after taking both of these steps, the registered letter is returned unclaimed, would the government have a duty to take further steps to notify the taxpayer?

The Court appears to answer this question in the negative when it cites— with seeming, though not explicit, approval— state statutes that require the state to mail notice to the occupant or post notice on the property at the outset.[47] Further, as a practical matter, these techniques would be just as effective in informing the taxpayer of the action regardless of when they are performed. Thus, it is highly likely that additional steps taken at the outset will make a tax sale comport with *Jones*, even if the notice sent by registered mail is later returned unclaimed.

In *Jones*, the State mailed notice to Jones not once, but twice. A third issue unaddressed by *Jones* is whether the additional follow-up step should have been applied both times the letters were returned unclaimed. As the Court's analysis focuses on what a reasonable person would do "when a letter is returned by the post office,"[48] it would be reasonable to conclude that the duty to take additional steps attaches every time a letter is returned. In the absence of further guidance, taxing units should take additional steps each time a letter is returned unclaimed.

A fourth issue that the Court failed to address is which parties are entitled to receive the extra notice mandated by Jones. The holding in *Jones* was limited to property owners. To what extent might it be applied to other parties? As described earlier, the Court's analysis noted that a reasonable person who desired to contact the recipient would try to resend a letter that came back unclaimed, but the Court added that this is particularly the case where "the subject matter . . . concerns an important and irreversible prospect as the loss of a house."[49] The Court's analysis implies that a taxing unit's duty to follow up on unclaimed notice bears a relationship to the interest at stake. At a minimum, then, the dictates of *Jones* will apply to the current property owner who is at risk of losing title to his or her property. Inversely, it would be unnecessary to send additional notice to parties who no longer hold an interest in the property.

Between these two poles lies a gray area: parties who hold an interest in the property short of title (for example, those who hold liens against the property). *Mennonite Board of Missions v. Adams* required notice to be mailed to a mortgagee who held an interest in the delinquent property on the grounds that the mortgagee held "a substantial property interest that [was] significantly affected by a tax sale."[50] While *Mennonite* does not mandate that mortgagees receive the same treatment as titleholders, taxing units who want to err on the side of caution may wish to take follow-up measures if notice mailed to a lienholder is returned unclaimed. In practice, this should not be particularly onerous, as lienholders are often sophisticated creditors who have stable mailing addresses.

The Impact of *Jones* on North Carolina's Tax Foreclosure Procedures

North Carolina law authorizes two procedures through which taxing units can enforce property tax collection by foreclosing on tax liens: mortgage-style

47. *See id*. at 1715 n.2 & 1721.

48. *Jones*, 126 S. Ct. at 1716.

49. *Id*. at 1716.

50. 462 U.S. 791, 798 (1983).

foreclosure[51] and in rem foreclosure.[52] This section will analyze the impact of *Jones* on the notice component of each of these two procedures. Foreclosures conducted under the mortgage-style statute should easily survive *Jones*, and, while some foreclosures conducted under the old in rem statute may be unconstitutional, recent modifications to the statute should bring future foreclosures into compliance with due process.

Mortgage-Style Foreclosures

In a mortgage-style foreclosure, a taxing unit holding a tax lien on a property brings an action against the taxpayer to foreclose the lien. By a judgment in favor of the taxing unit, the court orders the sale of the property, and the proceeds are used to satisfy the tax debt.[53] As a civil action, notice must be served on the taxpayer, the current owner, all lienholders of record, and all others who "would be entitled to be made parties" in accordance with Rule 4 of the North Carolina Rules of Civil Procedure.[54] Under Rule 4(j), natural persons must be served by personal delivery, registered or certified mail, or a designated delivery service.[55] Rule 4(j1) provides that a party "that cannot with due diligence be served [by one of these methods] may be served by publication."[56] It further provides that "[i]f the party's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication."[57]

The notice requirements of the mortgage-style method should easily meet the requirements of *Jones*. If a plaintiff in a foreclosure action sent a summons through certified mail and it was returned unclaimed, the plaintiff would have to publish notice of the action. If the plaintiff mailed a copy of this published notice to the taxpayer as required by Rule 4(j1),[58] the dictates of *Jones* should be met.

In Rem Foreclosures

The in rem method was adopted as a "simple and inexpensive" alternative to the mortgage-style method[59] on the theory that, as a proceeding in rem, due process demands less stringent notice.[60] The basic contours of the in rem procedure are as follows.

At least thirty days after the advertisement of a tax lien, the governing board of a taxing unit may instruct the tax collector to file a certificate with the clerk of the superior court listing, inter alia, the property and the amount of the outstanding taxes.[61] The clerk then dockets and indexes the certificate, a process that holds the same effect as a judgment by the superior court directing sale of the property.[62] Three months from the indexing, the property may be sold under execution.[63]

Section 105-375 of the North Carolina General Statutes [hereinafter G.S.] requires that notice be mailed to the property owner twice during the in rem foreclosure process: (1) before the judgment is docketed[64] and (2) before the property is sold under execution.[65] The North Carolina Supreme Court has found that compliance with both notice steps is indispensable to the validity of a sale.[66]

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51. N.C. GEN. STAT. § 105-374 (2005) [hereinafter G.S.].

52. G.S. 105-375 (2005).

53. G.S. 105-374(k).

54. G.S. 105-374(c).

55. G.S. 1A-1, Rule 4(j)(1) (2005).

56. G.S. 1A-1, Rule 4(j1).

57. *Id.*

58. It is unclear whether Rule 4(j1) requires the plaintiff to mail a copy of the published notice to the property owner in *every* case. Interpreting the state's *previous* statute governing service of process, the North Carolina Supreme Court held that a copy of the published notice must be mailed to the "best address the applicant can furnish—usually the last known address." Harrison v. Hanvey, 265 N.C. 243, 255–56, 143 S.E.2d 593, 602–03 (1965). In *Snead v. Foxx*, the Court of Appeals read the new Rule 4 as not requiring such mailing "to an address where the party sought to be served no longer resides." 95 N.C. App. 723, 727, 384 S.E.2d 57, 60 (1989). On appeal, the North Carolina Supreme Court refused to rule on this question but recommended that a plaintiff always "'mail copies of the summons and notice by publication to the defendant's last known address or to any other address where the defendant might reasonably be found or from which the notice might reasonably be forwarded to the defendant,'" calling this the "better practice." Snead v. Foxx, 329 N.C. 669, 675, 406 S.E.2d 829, 832 (1991) (quoting *Snead*, 95 N.C. App. at 727, 384 S.E.2d at 60). As long as the plaintiff follows this recommendation, the sale should be constitutional under *Jones*.

59. G.S. 105-375(a).

60. *See id.*; *see also* WILLIAM A. CAMPBELL, PROPERTY TAX LIEN FORECLOSURE: FORMS AND PROCEDURES 87 (6th ed. 2003).

61. G.S. 105-375(b).

62. G.S. 105-375(d).

63. G.S. 105-375(i).

64. G.S. 105-375(c).

65. G.S. 105-375(i).

66. *See* Henderson County v. Osteen, 292 N.C. 692, 709, 235 S.E.2d 166, 176 (1977). G.S. 105-394 says that

Following *Jones*, the notice provisions in G.S. 105-375, as it was then written, might have led to some unconstitutional foreclosures, due to its failure to require adequate follow-up in the event that the taxpayer did not receive notice of the action. In response, the General Assembly in 2006 amended the notice provisions in G.S. 105-375 to address the concerns raised by *Jones*.[67] The amendments to G.S. 105-375 are applicable to foreclosures for taxes assessed for 2006–07 and subsequent years. This bulletin examines the provisions of G.S. 105-375 as they existed before and after the 2006 amendments.

G.S. 105-375 notice provisions before the 2006 amendments

Former G.S. 105-375 provides that the tax collector must mail notice of the docketing of a judgment for unpaid property taxes by registered or certified mail, return receipt requested, to "the listing taxpayer at his last known address, and to all lienholders of record who have a lien against the listing taxpayer or against any subsequent owner of the property."[68] The tax collector must also send notice by registered or certified mail

> to the current owner of the property (if different from the listing owner) if: (i) a deed or other instrument transferring title to and containing the name of the current owner was recorded in the office of the register of deeds or filed or docketed in the office of the clerk of superior court after January 1 of the first year in which the property was listed in the name of the listing owner, and (ii) the tax collector can obtain the current owner's mailing address through the exercise of due diligence.[69]

All notices must be mailed at least thirty days before the docketing.[70] If "a return receipt has not been received by the tax collector indicating receipt of the letter" within ten days of mailing, the collector must publish notice "in a newspaper of general circulation."[71]

Notice of the sale under execution ("notice of execution") must be sent by registered or certified mail to the listing owner at his or her last known address at least thirty days before the sale date. This notice must also be mailed to the current owner if the current owner was entitled to receive notice of the docketing under G.S. 105-375(c).[72] As G.S. 105-375(i) provides that the property "shall be sold by the sheriff in the same manner as other real property is sold under execution,"[73] the sheriff must also publish notice of the sale in a newspaper and post notice in an area designated by the clerk of superior court.[74]

An in rem tax proceeding that followed the procedures outlined in the former version of G.S. 105-375 would likely be declared unconstitutional should notice be returned to the taxing unit unclaimed. If the taxing unit mailed the notice of docketing and did not receive a return receipt indicating that the notice was received, the unit would not be statutorily obligated to take additional reasonable steps, as required by *Jones*. Likewise, no follow-up action would be required if the notice of execution was returned unclaimed. Though the North Carolina procedure contains two additional elements not present in *Jones*—the requirement that notice of execution be posted in "an area designated by the clerk of superior court"[75] and a declaration that taxpayers are on notice that property with an outstanding lien can be sold in a tax sale[76]—it is unlikely that either would save a tax sale from constitutional challenge if the notice is returned unclaimed. The posting requirement is not sufficiently likely to notify the taxpayer of the pending sale of his or her property to rescue the procedure.[77] Similarly, *Jones* strongly suggests that

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"[t]he failure to make or serve any notice" is an immaterial irregularity and that such an irregularity "shall not invalidate . . . any process of listing, appraisal, assessment, levy, collection, or any other proceeding under this Subchapter." G.S. 105-394. *Osteen* found this provision, insofar as it declares the failure to mail notice to the listing taxpayer an immaterial irregularity, to be unconstitutional. 292 N.C. at 710–11, 235 S.E.2d at 178.

67. Chapter 106 of the 2006 N.C. Session Laws [hereinafter S.L.].

68. G.S. 105-375(c).

69. *Id*.

70. *Id*.

71. *Id*.

72. G.S. 105-375(i)(2).

73. *Id*. Execution sales are governed by G.S. 1-339.41 through -339.71.

74. G.S. 1-339.52(a).

75. *Id*.

76. G.S. 105-375(a).

77. Since *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Supreme Court has not directly ruled on whether posting notice on "the courthouse door" is reasonably calculated to alert the targeted party of a pending action. Nevertheless, *Mullane*'s progeny strongly suggest that the additional step of posting notice at a designated location would be insufficient to bring a foreclosure into compliance with *Jones*. In *Schroeder v. New York*, the Court held that notice through publication

the language in G.S. 105-375(a) putting property owners on notice "that the tax lien on their real property may be foreclosed and the property sold for failure to pay taxes"[78] would not reduce a taxing unit's obligation to provide notice to the taxpayer.[79] Foreclosures performed under this old regime would only be constitutional if the taxing unit went above and beyond the dictates of the statute and took additional reasonable steps to notify the taxpayer of the docketing or execution after notice was returned unclaimed.

G.S. 105-375 as amended

Chapter 106 of the 2006 North Carolina Session Laws modified the in rem tax foreclosure procedures in G.S. 105-375 to mandate reasonable follow-up procedures as required by *Jones*.[80] The act also simplified the statute, eliminating the distinction, present in the earlier statute, between the current owner and listing owner. Instead, it modified the definition of *taxpayer* to include both "the owner of record on the date the taxes become delinquent and any subsequent owner of record of the real property if conveyed after that date."[81]

Section 5 of the act modified the notice provisions of G.S. 105-375(c).[82] Under this section, if "a return notice has not been received by the tax collector indicating receipt of the notice," the collector must publish notice *and* must also

> [m]ake reasonable efforts to locate and notify the taxpayer and all lienholders of record prior to the docketing of the judgment and the issuance of the execution. Reasonable efforts may include posting the notice in a conspicuous place on the property, or, if the property has an address to which mail may be delivered, mailing the notice by first-class mail to the attention of the occupant.[83]

Section 6 modified the notice provisions of G.S. 105-375(i), adding the requirement that the sheriff mail the notice of execution to the taxpayer and lienholders *return receipt requested*.[84] Further, if within ten days following the mailing the sheriff does not receive a return receipt confirming receipt of the notice, "the sheriff must make additional efforts to locate and notify the taxpayer and all lienholders of record of the sale under execution in accordance with [G.S. 105-375]."[85] Costs of mailing additional notices, like all costs of mailing and publication, are added to the amount of the taxes that are lien on the property.[86]

Under this new statutory scheme, the vast majority of tax foreclosures in the state should be constitutional. If the taxpayer does not receive the notice of docketing or notice of execution, the taxing unit is required to follow up with additional reasonable steps. If the taxing unit employs one of the three *Jones* steps, or goes above and beyond the constitutional minimum and researches the taxpayer's address in other government records, the foreclosure will, in most cases, meet the requirements of due process.

The General Assembly has granted taxing units some flexibility by not mandating that they employ any one particular follow-up step. At the same time, it has tried to provide some guidance to taxing units by suggesting that two of the *Jones* steps—posting notice and mailing notice to "occupant"—should be sufficient to comply with due process. Taxing units should be aware, however, that in some cases, posting notice or mailing notice to "occupant" will be insufficient. If notice mailed to a lienholder is not received, it would not be a reasonable follow-up effort to mail a letter to the property addressed to "occupant"—that would not increase the chances of informing the lienholder of the pendency of the action. Instead, the taxing unit should attempt to locate the lienholder's current address. Similarly, if a

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coupled with notice posted in the vicinity of a property did not satisfy due process. 371 U.S. 208, 214 (1962). The Court found that notice placed on trees near the property, but not on the property itself, "did not constitute the personal notice that the rule enunciated in the *Mullane* case requires." *Id*. at 213. In addition, though similar steps were used in *Covey v. Town of Somers*, 351 U.S. 141, 144 (1956) (posting at post office), and in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 792 (1983) (posting in county courthouse), the notice procedure in each of these cases was deemed inadequate.

78. G.S. 105-375(a).

79. *See* Jones v. Flowers, 126 S. Ct. 1708, 1718 (2006) ("An interested party's 'knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending.'" (quoting *Mennonite*, 462 U.S. at 800)).

80. S.L. 2006-106, sec. 5–6.

81. *Id.*, sec. 1.

82. *Id.*, sec. 5.

83. *Id.*

84. *Id.*, sec. 6. While the amended G.S. 105-375(i)(2) does not explicitly require that the sheriff mail the notice of execution to lienholders, it does require that the sheriff make "reasonable efforts to locate and notify . . . all lienholders" of the execution if the notice was not received. This latter section implies that notice of execution should be mailed to lienholders.

85. *Id.*

86. S.L. 2006-106, sec. 5–6.

taxing unit has specific knowledge that the taxpayer can no longer be reached at his or her last known address, the unit should attempt to locate the taxpayer by looking through government records, such as the voter registration file and income tax rolls, and the telephone book. If the government becomes aware of any other special circumstances that would render notice ineffective—for example, if it learns that the taxpayer is incompetent, like the taxpayer in *Covey*—it may have to take other additional steps.

Even though the amended statutory notice requirements are effective "for taxes imposed for taxable years beginning on or after July 1, 2006,"[87] taxing units would be wise to begin following the new statutory standard immediately, so as to avoid future challenges to foreclosure proceedings based on the failure to provide notice to interested parties.

Conclusion

The Supreme Court's decision in *Jones* should not make North Carolina's state and local governments nervous. Following *Jones*, the state's mortgage-style foreclosure procedure would likely withstand constitutional challenge. *Jones* does create the possibility that a small number of particular in rem foreclosures conducted under the old statutory scheme will be unconstitutional. However, if taxing units follow the General Assembly's recent amendments to the in rem statute, the vast majority of future in rem foreclosures conducted in the state should not be subject to challenge on due process grounds.

87. *Id.*, sec. 10.

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Printed in the United States of America
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