

IN THE SUPREME COURT FOR THE STATE OF IOWA
SUPREME COURT NO. 21-1437

GARY V. KLUENDER, JR.,

Plaintiff-Appellant,

vs.

PLUM GROVE INVESTMENTS, INC.,

Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR FLOYD COUNTY THE
HONORABLE RUSTIN DAVENPORT

APPELLANT'S FINAL REPLY BRIEF

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I. REPLY TO APPELLEE'S ARGUMENT I

Appellant and Appellee appear to agree that property rights are constitutionally protected and that the issue of constitutionality of the relevant Iowa statute was properly preserved for appeal.

II. REPLY TO APPELLEE'S ARGUMENT II, III, AND IV

Appellee argues that legislative intent is instructive to the case at hand. Despite a review of legislative history of Iowa Code §447.9, legislative history cannot revive a facially unconstitutional statute such as §447.9.¹ See *Jones v. Flowers*, 547 U.S. 220 (2006). The role of the court is to invalidate legislative action that is inconsistent with the constitution. *Varnum v. Brien*, 763 N.W.2d 862, at 875 (Iowa 2009).

Appellee's assertion that the statute meets constitutional muster simply fails. Specifically, §447.9 fails to meet the demands of *Mathews* in that the process fails to protect the affected interest, account for error and the value of additional or substitute safeguards and the Government's interest. See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

As argued, the scheme of notice contemplated by Iowa Code §447.9, provides or mandates nothing that requires a good faith effort or a reasonable attempt. As was

¹ See *Jones* at 220 and at 227 as well as the #2 footnote for discussion of the fact that many states have required more to ensure service when the notice attempt has failed. Accordingly, a look at what other states have done reveals that state supreme courts have required more protection prior to a taking. See *Jones v. Flowers*, at 220.

true in the *War Eagle Case*, the “statutory scheme authorizes a process that is not reasonably calculated to give ... adequate notice...” *War Eagle Apartments v. Plummer*, 775 N.W.2d 714, 720 (Iowa 2009). Rather, the system is susceptible to fraud and deceptive practice. While the *Dusenbury* case, cited by Appellee, states that notice should be “reasonably calculated” to apprise a party of a pending action or matter, strict adherence to Iowa Code §447.9 does not give the assurance of a reasonable effort given the incentive that a party in Appellee’s position has for the delinquent taxpayer not to pay or redeem. In other words, Iowa Code §447.9 is facially unconstitutional in that it does not provide for a system that meets the *Dusenbury* demands of an “effort” that is “reasonably calculated” to apprise. *Dusenbury v. US*, 534 U.S. 161, 170-73 (2002).

Iowa Code §447.9 fails the due process demands in *Jones v. Flowers*. *Jones* maintains that adequacy of notice is assessed by balancing the state interest by taking into consideration unique information about the intended receipt. *See Jones v. Flowers*, 547 U.S. 220, 226-34 (2006).

As *Jones* goes on to discuss and ultimately hold, the “Government must consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case.” *Jones* at

221 referring to *Robinson v. Hanrahan*, 409 U.S. 38, 40 (per curiam), and *Covey v. Town of Somers*, 351 U.S. 141, 146-147.

The failure of Appellee to obtain a return receipt documenting receipt and delivery of their notice should have alerted Appellee of a failure of notice. Appellee was obviously aware of the fact that its certified letter was not signed for by Appellant. Such a fact should have alerted Appellee that additional steps were required to achieve notice and simply more than “the illusion” of service. *War Eagle Village Apartments v. Plummer*, 775 N.W.2d 714, 720 (2009).

Appellee, in assisting in the state’s interest to collect property tax revenue, must be held to the standard of a state actor. Appellee’s participation in the tax sale process meets the requirements of a state actor. Appellee's acts are in conjunction with the local county government in such a way that the activity implicates the due process clause. *Putensen v. Hawkeye Bank of Clay County*, 564 N.W.2d 404 (1997). Moreover, Appellee's activities in furtherance of tax collection constitute state action in that the state has created “an atmosphere in which private citizens can deprive others of their constitutional rights,” thus making Appellee a state actor. *Putensen v. Hawkeye Bank of Clay County*, 564 N.W.2d 404, 408 (1997) quoting *Jensen v. Schreck*, 275 N.W.2d 374 at 385 (Iowa 1979).

The District Court and Appellee's reliance on the holding of *Nicholson* is misplaced. *Nicholson v. HF05*, 778 N.W.2d 218 (Table), No. 08-1418 (Iowa Ct. App. December 17, 2009). While the facts of the *Nicholson* case are similar, the analysis used by the appeal court in *Nicholson* fails to understand the Due Process requirements beyond a simplistic analysis based on solely time. *Matthews* stands for the principle that the process must be fair, *Dusenbery* states that the notice process must be reasonably calculated, and *Jones* states that the entity giving notice must be cognizant of the peculiar circumstances of the situation. Given this precedent, it is clear that simply following the strict requirements of Iowa Code §447.9 without more effort by the entity giving notice does not meet the requirements of due process.

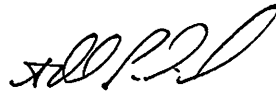
CONCLUSION

The statutory scheme of Iowa Code §447 of providing notice is unconstitutional on its face. It provides and authorizes a system of notice that does not provide for a reasonably calculated notice scheme that protects the due process rights of landowners. Given the inadequacy of Iowa Code §447.9, it should be held invalid, and this matter should be reprimanded to the District Court with instruction consistent with a holding that Iowa Code §447.9 does not meet constitutional due process requirements.

STATEMENT ON ORAL ARGUMENT

The Appellant respectfully requests the matter be submitted with oral argument.

Respectfully submitted,



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CERTIFICATE OF FILING

I, Todd P. Prichard, Attorney for the Appellant, do hereby certify that I, or a person on my behalf, filed the within Appellant’s Final Reply Brief with the Clerk of the Supreme Court, Iowa Judicial Branch Building, by using the Electronic Document Management System on the 4th day of May, 2022.

/s/ Todd P. Prichard
Todd P. Prichard

CERTIFICATE OF SERVICE

I, Todd P. Prichard, hereby certify that I, or a person acting on my behalf, served the within Appellant’s Final Reply Brief on the 4th day of May, 2022, by using the Electronic Document Management System, which will send notification of such filing to the counsel below:

James E. Nervig, Attorney for Appellee

I, Todd P. Prichard, hereby certify that I, or a person acting on my behalf, served the within Appellant’s Final Reply Brief on the 4th day of May, 2022, by placing in the U.S. mail postage prepaid to:

Gary V. Kluender, Jr., Appellant

/s/ Todd P. Prichard
Todd P. Prichard

CERTIFICATE OF COST

I hereby certify that the actual amount paid for printing of the necessary copies of Appellant's Final Reply Brief in final form was the sum of \$5.00, exclusive of service tax and postage, and that amount has been actually paid in full by me.

By: /s/ Todd P. Prichard
Todd P. Prichard

CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this Brief contains 1,483 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 font size and Times New Roman type style.

By: /s/ Todd P. Prichard Date: May 4, 2022
Todd P. Prichard