

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT DEPT.
OF THE TRIAL COURT

ASHLEY M. MILLS,

Plaintiff,

v.

CITY OF SPRINGFIELD, MASSACHUSETTS,
and STEPHEN LONERGAN, Collector-Treasurer
of the City of Springfield, Massachusetts, in his official
and individual capacities,

Defendants.

CIVIL ACTION
NO. 2379CV00545

HAMPDEN COUNTY
SUPERIOR COURT
FILED

MAR 11 2024



PLAINTIFF'S MEMORANDUM IN OPPOSITION CLERK OF COURTS
TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

In the wake of the United States Supreme Court's decision in *Tyler v. Hennepin County*, 598 U.S. 631 (2023), Massachusetts municipalities face a difficult circumstance: The state statutory scheme establishing a process for municipal foreclosures on real property is clearly unconstitutional (both facially and applied); the Legislature seems to understand this problem and has held hearings to address it; but the Legislature has not yet amended the relevant statutory sections in G.L. c. 60. Facing municipal tax foreclosure, Plaintiff Ashley Mills, a 25-year-old single mother from Springfield, sought a ruling from the Supreme Judicial Court conforming the tax collection statutes to the standards set by the United States Supreme Court in *Tyler*. The Supreme Judicial Court in turn transferred the case to this Court for disposition. A decision will

benefit not only homeowners but also municipalities, which currently face potentially catastrophic damages actions for following the process set forth in G.L. c. 60.¹

Nonetheless, Defendants the City of Springfield (the “City” or “Springfield”) and Stephen Lonergan, Collector-Treasurer (“Lonergan,” and collectively with the City, “Defendants”²) seek to avoid a ruling. They raise untenable defenses centered on the notion that this declaratory judgment case is “premature” or “not ripe.” Ms. Mills, who faces the imminent tax foreclosure of her family home in a few weeks, disagrees that this case is premature. Indeed, the very purpose of the declaratory judgment procedure is to “remove, and to afford relief from, uncertainty and insecurity” like she now faces. G.L. c. 231A, § 9. *See Merriam v. Demoulas Super Mkts., Inc.*, 464 Mass. 721, 726 (2012); *School Comm. of Cambridge v. Superintendent of Schs. of Cambridge*, 320 Mass. 516, 518 (1946). Defendants’ flawed strategy will result only in further delay in conforming state tax lien law to the requirements set forth in *Tyler* and expose the City to claims for abridging the constitutional rights of its citizens.

¹ Class action lawsuits have already been filed against municipalities for abridging the rights of property owners who have lost value in their homes in a manner found unconstitutional in *Tyler*. *See, e.g.*, article in the publication *Michigan Live* dated May 31, 2023 entitled “43 Michigan counties agree to pay millions to former owners of foreclosed properties” that is also available at: www.mlive.com/news/2023/05/43-michigan-counties-agree-to-pay-millions-to-former-owners-of-foreclosed-properties.html attached as Exhibit A to the accompanying Affidavit of Frank J. Bailey (“Bailey Aff.”).

² Unless otherwise defined herein, capitalized terms shall have the same meaning as defined in the Stipulated Facts.

ARGUMENT

A. DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS MUST BE TREATED AS A MOTION FOR SUMMARY JUDGMENT OR AS A "CASE STATED."

Defendants filed their motion for judgment on the pleadings under Mass. R. Civ. P. 12(c). Rule 12(c) provides: "If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, *the motion shall be treated as one for summary judgment* and disposed of as provided in Rule 56" (emphasis added). Thus, under the plain language of Rule 12(c), in the event the Court considers matters outside the pleadings, it is required to treat the motion as a summary judgment motion under Rule 56.

By submitting an agreed statement of facts, the parties have requested that the Court consider matters outside the pleadings. Notably, there are stipulated facts that are not in the pleadings and Ms. Mills refers to the Stipulated Facts herein. *See, e.g.*, Stipulated Facts at ¶ 18 (lack of any mortgage), ¶ 21 (regarding Home's fair market value), ¶ 23 (value of the Home), ¶ 24 (regarding Massachusetts law and its impact on Ms. Mills), ¶¶ 27-32 (regarding status and actions of Defendants with respect to title to the Home). That alone is sufficient for Defendants' motion to be converted to one under Rule 56.

What is more, Ms. Mills has supported her opposition to Defendants' motion with additional materials. *See* Bailey Aff., submitted herewith, and attached materials. The materials attached to the Bailey Affidavit are relevant to the determination of the pending motion, and they should not be stricken, as they merit consideration by the Court. These materials, too, are a sufficient basis for converting the motion to one for summary judgment.³ *See, e.g., Max Arnold*

³ In any event, even if the Court does not convert the motion to one for summary judgment, it may and should consider the materials attached to the Bailey Affidavit. *See* Def. Mem. at p. 3, citing *Haley v. City of Bos.*, 657 F.3d. 39, 46 (1st Cir. 2011) (court may take into consideration

& Sons, LLC v. W.L. Hailey & Co., Inc., 452 F.3d 494, 503 (6th Cir. 2006) (district court should have converted Rule 12(c) motion to motion for summary judgment when plaintiff presented matters outside of pleadings in response to defendant's Rule 12(c) motion and court did not exclude them).

But there is another procedural issue presented by Defendants' motion. Where parties agree to all material facts, the appropriate procedure is for the Court to consider the matter as if it were fully tried as a bench trial. In *Berg v. Social Sec. Admin.*, 900 F.3d 864 (7th Cir. 2018), the Circuit Court faced this very situation. It explained:

“Although [the plaintiff] moved under Federal Rule of Civil Procedure 12(c) for judgment on the pleadings, the parties submitted a pre-trial statement of stipulated facts and the court relied on that statement in reaching its judgment. This is akin to judgment under Federal Rule of Civil Procedure 52(a). *Marantz v. Permanente Med. Group, Inc. Long Term Disability Plan*, 687 F.3d 320, 327 (7th Cir. 2012) (when parties agree to judgment based on stipulated facts, in effect, the court is asked to decide the case as if there had been a bench trial in which the evidence was the material gathered in discovery, and the standard of review is governed by Federal Rule of Civil Procedure 52(a)).”⁴

Id. at 867. Mass. R. Civ. P. 52(a) is in all material respects the same as the federal rule. Where a case is submitted on an agreed statement of facts, the court's role is to “apply the correct principles of law and decide the case. *Metro. Prop. And Cas. Ins. Co. v. Emerson Hosp.*, 99 Mass. App. Ct. 513, 514 (2022) (quoting *Langdoc v. Gevaert Co. of Am.*, 315 Mass. 8, 10 (1943)). As noted in *MBTA v. City of Somerville*, 451 Mass. 80, 84 (2008), “[w]here a statement of agreed facts contains all the material facts on which the rights of the parties are to be

“documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice”).

⁴ The defendants assert that they “accept as true the facts . . . as set forth in the Statement of Stipulated Facts jointly submitted to the Court by the Parties” “solely for the purpose of the instant motion.” Defendants' Memorandum of Law in Support of Defendants' Motion for Judgment on the Pleadings (“Def. Mem.”) at p. 2. However, the parties' stipulation is not qualified and is binding for all purposes throughout this action.

determined in accordance with law, it constitutes a “case stated.” *Caissie v. Cambridge*, 317 Mass. 346, 347 (1944). As such, “[t]he inferences drawn by the trial judge from the facts stated are not binding upon [the reviewing court], and questions of fact as well as questions of law are open for review upon . . . appeal [].” *Id.*⁵

B. MASS. R. CIV. P. 13(a) DOES NOT REQUIRE DISMISSAL OF THIS ACTION.

Regardless of how Defendants’ motion is labeled, though, their arguments fail. Curiously, Defendants say that Ms. Mills’s claims are barred because they are compulsory counterclaims that fully existed at the time Springfield commenced the Land Court action in 2019 and in the next breath state that her claims in this case are, even now, not ripe and therefore should be dismissed. Both assertions cannot be true—indeed, both are incorrect.

To start, Ms. Mills’ constitutional claims are not mandatory counterclaims under Mass. R. Civ. P. 13(a). Her counterclaims were compulsory only if three elements are established: (1) the Land Court could grant the relief sought in the counterclaims; (2) the counterclaims existed at the time of serving the answer in the Land Court; and (3) the counterclaims arose from the same transaction or occurrence that was the subject of Springfield’s claim. Def. Mem. at p. 4 (citing

⁵ Indeed, in a case cited by the Defendants in their memorandum, *Bettigole v. Assessors of Springfield*, 343 Mass. 223 (1961), the Supreme Judicial Court had before it two cases seeking a determination that certain acts taken by Springfield in executing its tax collection activities violated the Massachusetts Constitution. As is true here, the parties had submitted the facts to the Superior Court in an agreed stipulation. *Id.* at 225. The *Bettigole* Court noted that the Superior Court justice then reported the cases to the Supreme Judicial Court based on the pleadings and the agreed statement of facts without rendering a decision. *Id.* Based on the foregoing, the Court entered declarations that the actions of the City and the assessors were discriminatory, violated the Massachusetts Constitution, and were enjoined. *Id.* at 232. Like the Court in *Bettigole*, this Court should likewise find that “the agreed facts” in this case “require the intervention of a court of equity, not only (a) to protect the plaintiff [] from the violation of [her] constitutional . . . rights..., but also (b) in the public interest.” *Id.*

Classic Cabinetry, Ltd. v. DeMusis, 1992 Mass. App. Div. 175, 177 (1992)). None of these elements is satisfied here.

1. The Land Court Could Not Grant the Relief Ms. Mills Seeks.

“The Land Court is a statutory court, not of general but of strictly limited jurisdiction.” *Bevilacqua v. Rodriguez*, 460 Mass. 762, 766 (2011), quoting *Riverbank Improvement Co. v. Chapman*, 224 Mass. 424, 425 (1916). Its jurisdiction is “limited to those [powers] granted by the Constitution of the Commonwealth or by the Legislature.” *Police Comm’r of Boston v. Mun. Court of Dorchester Dist.*, 374 Mass. 640, 663 (1978). Those powers “must either be articulated expressly or be capable of being deduced by ‘necessary and inevitable’ implication.” *Id.*; see *Bask, Inc. v. Mun. Council of Taunton*, 490 Mass. 312, 318 (2022) (Land Court’s “limited equitable powers” are only those that are “necessarily tethered to the court’s specific jurisdictional grant” with respect to any particular subject matter).

With respect to tax foreclosures, the Land Court’s jurisdiction is limited to “proceedings for foreclosure of and for redemption from tax titles under chapter 60.” G.L. c. 185, § 1.⁶ The Supreme Judicial Court has made clear that this jurisdictional grant may not be broadened beyond the statutory language. In *Lynnfield v. Owners Unknown*, 397 Mass. 470 (1986), the Court unanimously “h[e]ld that the discretion contemplated by the Legislature in enacting the redemption provisions of c. 60 is not absolute but is limited to determining a party’s ownership interest in the property and his or her financial capability to redeem, and to setting the terms of the redemption.” *Id.* at 473. The Supreme Judicial Court expressly relied on the Rhode Island Supreme Court’s interpretation of a similar statute determining that a Rhode Island Superior

⁶ Ms. Mills does not seek to redeem her property in this proceeding. The Complaint in this case refers to foreclosure and redemption only as a matter of background.

Court justice's discretion under a similar statute is "quite limited." *See id.* at 475, quoting *Albertson v. Leca*, 447 A.2d 383, 386 (R.I. 1992). Like in Rhode Island, the Massachusetts Land Court's powers are limited to determining whether the party seeking to redeem is ready, willing, and able to do so. *See Pratt v. Woolley*, 117 R.I. 154, 157 (R.I. 1976) (while tax foreclosure proceedings are equitable in nature, jurisdiction in equity is extremely limited in such proceedings); *Petrovics v. King Holdings, Inc.*, 56 R.I. 498, 517 (1936).

Professor Ralph Clifford of the University of Massachusetts School of Law, who has written perhaps the authoritative article on the tax lien foreclosure process in Massachusetts, similarly explains that the jurisdiction of the Land Court as it relates to that process is extremely limited. *See* Ralph D. Clifford, *Massachusetts Has a Problem: The Unconstitutionality of the Tax Deed*, 13 Univ. Mass. L. Rev. 274 (2018). As Professor Clifford notes, under G.L. c. 60 "the authority of the Land Court is . . . circumspect." *Id.* at 302 n.148. Under G.L. c. 60, "the Tax Collector, strictly on his or her own decision, takes title to the property" without the involvement of the Land Court. *Id.* at 302. The Land Court may adjudicate the amount of the redemption or enter a judgment foreclosing the right of redemption, but it "is not authorized to evaluate the legality of the taking itself." *Id.* at 302 n.148. Indeed, G.L. c. 60, § 68, which covers the rights of a taxpayer after a taking, includes no provision for the Land Court to consider any issue other than the right of the taxpayer to redeem by paying the amount due in taxes and costs. Noticeably absent from the jurisdictional scheme set up by Chapter 60, §§ 65 to 75, is any power or authority for the Land Court to consider the validity of the taking on constitutional or on any other grounds.

Consistent with the limited statutory grant of jurisdiction, in at least one pending case the Land Court has declined to determine the impact of *Tyler* on G.L. c. 60 tax taking cases. In *Town*

of *Tyngsborough v. Recco*, 18 TL 001223 (Land Court 2018), the defendant homeowner was faced with the foreclosure of her right of redemption under G.L. c. 60. She responded with a motion for summary judgment, relying on *Tyler*'s categorical holding that a tax foreclosure scheme that fails to provide for the restoration to a taxpayer of any amount more than the taxes and fees due effects an unconstitutional taking. The Land Court denied Ms. Recco's motion, finding that "although a recent U.S. Supreme Court decision brings uncertainty to the manner in which the case will proceed, contrary to [Ms. Recco's] argument, a judgment foreclosing [her] statutory right of redemption would not effect an unconstitutional taking provided that provision is made for compensation to the defendant taxpayer for any surplus value of the foreclosed property in excess of the taxes, fees and interest owed to the [Town] by [Ms. Recco]." See *Bailey Aff., Ex. B* (docket in the *Recco* case). The foregoing procedural history is recounted not to be critical of the efforts of the Land Court, but to demonstrate that taxpayers like Ms. Recco and Ms. Mills are caught "between a rock and a hard place." The considerable equity that they and their families have earned through their home ownership is very much at risk and the state court system, like the state legislature, has offered them no remedy.

This Court should not countenance Defendants' argument that Ms. Mills cannot now proceed because Rule 13(a) supposedly required her to bring her constitutional claims as compulsory counterclaims in a Land Court action that Springfield commenced and continued to prosecute even after *Tyler*. Ms. Mills had no opportunity to raise such counterclaims, and the Land Court lacks jurisdiction to provide the relief she would have been seeking. In short, Rule 13(a) provides no basis for Defendants to evade Ms. Mills's constitutional claims.

2. According to the Land Court, Ms. Mills Did Not Have a Takings Claim at the Time Springfield Brought Suit in That Court.

The second part of the test as to whether Ms. Mills's constitutional claims constitute compulsory counterclaims under Rule 13(a) is whether the claims existed at the time she served her answer in the Land Court. As noted above, the Land Court itself has ruled in at least one case raising the same issue that taxpayers do not have a constitutional takings claim under the Fifth Amendment at the time that the Land Court considers a municipality's request for a judgment foreclosing the right of redemption. *See* Section B(1), *supra* (in *Recco* the Land Court has declined to entertain such a constitutional claim when adjudicating a motion to foreclose the equity of redemption). Considering the foregoing, Defendants have failed to establish that Ms. Mills's claims in this action existed at the time she filed her answer in the Land Court Action.

3. The So-Called Compulsory Counterclaims Do Not Arise from the Same Transaction or Occurrence as Springfield's Claim in the Land Court.

Defendants have also failed to show that Ms. Mills's constitutional claims arose from the same transaction or occurrence that gave rise to Defendants' claim seeking to foreclose her right of redemption. The Court should ask these questions in determining whether a counterclaim is compulsory: "Does the same evidence underlie both claims? Are the factual and legal issues substantially similar? Are the two claims 'logically related?'" Smith & Zobel, 6 Mass. Prac. Series § 13.15 (Oct. 2023 Update). "For purposes of determining whether a counterclaim is compulsory or permissive, the word 'transaction' 'should not be construed narrowly or technically, but should be construed in a sense to effectuate the settlement in one proceeding of controversies *so closely connected* as appropriately to be combined in one trial in order to prevent duplication of testimony, to avoid unnecessary expense to the parties and to the public, and to expedite the adjudication of suits." *Volpe Constr. Co. v. Trustees of Tufts College*, 1 Mass.

App. Ct. 38, 40 (1973), quoting *Potier v. A.W. Perry, Inc.*, 286 Mass. 602, 608 (1934); *see also Nat'l Lumber Co. v. Canton Inst. For Savings*, 56 Mass. App. Ct. 186, 190 (2002).

Here, the constitutional claims do not arise from the Defendants' seeking to foreclose Ms. Mills's right of redemption. Rather, they arise from Defendants' ability to take all her equity over and above what is needed to cure the past due taxes and associated fees and interest. Thus, the factual and legal issues in this constitutional case are not remotely the same as those in the Land Court case. The evidence required in the Land Court action is exceedingly simple: Are there past due taxes and fees that have not been paid? The evidence required in the constitutional case involves, at a minimum, a determination of the fair market value of the Home, which is entirely irrelevant in the Land Court case. Further, there is no "logical" relationship between the Land Court tax foreclosure and the constitutional challenge before this Court. Applying the well-worn rule from *Volpe*, the word "transaction" should be construed in a manner to avoid duplication of judicial effort. There will be no such duplication here.

**C. MASS. R. CIV. P. 12(b)(9) DOES NOT APPLY BECAUSE THE CLAIMS
RAISED IN THIS ACTION WERE NOT, AND COULD NOT HAVE BEEN,
RAISED IN THE LAND COURT ACTION.**

Mass. R. Civ. P. 12(b)(9) provides that a court may dismiss an action due to the "[p]endency of a prior action in a court of the Commonwealth." Courts have used this rule to prevent parties from getting a second bite at the apple on a claim already rejected in an earlier case, *see, e.g., Keen v. Western New England College*, 23 Mass. App. Ct. 24 (1986), and from raising a claim or defense in a new case that the party had failed to assert in an earlier case involving identical facts, *see, e.g., Yentile v. Howland*, 26 Mass. App. Ct. 214 (1988).

Even where the parties and underlying facts are the same, Massachusetts courts have consistently declined to dismiss cases under Rule 12(b)(9) where the later action involves a

separate legal issue. To determine whether a separate issue exists in a second action involving identical facts and parties, courts closely examine the following factors: (1) whether the court in the prior pending action *could* grant the remedy sought in the second action; (2) whether the claims in the second action have a separate legal basis from that of the pending action; (3) whether resolution of the second action requires analysis beyond a determination of which party should prevail (or should have prevailed) in the prior pending action; and (4) whether there is a rational basis for asserting two separate actions. *See, e.g., Thaddeus v. Sec'y of Executive Office of Health and Human Servs.*, 101 Mass. App. Ct. 413, 419-20 (2022); *M.J. Flaherty Co. v. United States Fid. & Guar. Co.*, 61 Mass. App. Ct. 337, 339 (2004). Here, not one of these considerations favors dismissal.

In *Thaddeus*, the Appeals Court affirmed the denial of a 12(b)(9) motion. The initial action, in the Juvenile Court, sought only to reinstate in-person visitation to the parties. The second action, in the Superior Court, sought a broad declaration that the “department’s practices restricting in-person visitation were unlawful as a matter of both statutory and constitutional law.” 101 Mass. App. Ct. at 419-20. The Appeals Court upheld the Superior Court’s denial of a motion to dismiss because the relief sought and the claims raised in the Superior Court action were of a different character than those sought and raised in the Juvenile Court.⁷ Notably, like

⁷ Justice Englander, writing for the Court, also noted “[w]e need not decide whether the plaintiffs could have raised some of their Superior Court claims in the care and protection proceedings (indeed, we assume they could have), as they could not have raised all of them. *See Gold Star Homes, LLC v. Darbouze*, 89 Mass. App. Ct. 374, 377-78 (2016) (permitting second action in Housing Court because summary process counterclaim not available in Land Court); *Conant v. Sherwin L. Kantrovitz, P.C.*, 29 Mass. App. Ct. 998, 999 (1990) (permitting second action in Boston Municipal Court because Probate and Family Court had no jurisdiction over contract claim). As one example, the Juvenile Court does not have jurisdiction to grant the declaratory judgment that the plaintiffs now seek.” 101 Mass. App. Ct. at 419-20.

this case, the second case in the Superior Court raised constitutional claims that were not raised in the initial case between the parties. *Id.*

In *M.J. Flaherty Co.*, the Appeals Court reversed a Superior Court judge's grant of dismissal under Rule 12(b)(9) in a dispute that involved the same parties and facts, but a different legal basis for the claims. 61 Mass. App. Ct. at 340. The Appeals Court ruled that Rule 12(b)(9) did not apply even though the plaintiff "technically" could have brought the claim in the first action, as "[t]he filing of two separate actions [was] not an irrational alternative." *Id.*

The analysis presented in *Thaddeus* and *M.J. Flaherty* applies with even greater force here. First, the parties in the Land Court action include Allen Pettengill, as Guardian of Ashley Mills, or the estate of Allen Pettengill, as well as Ashley Margaret Mills; thus the parties are different in the two cases. Mr. Pettengill is not a party to this action. Second, the issues in the two cases are entirely different. The Land Court action involved a single page form complaint in which Springfield sought only a determination that the "rights of all persons entitled to redeem . . . may be foreclosed," that the Land Court "enter a judgment that the title of the [City] to the [Home] . . . is absolute, and that all rights of redemption are barred." *City of Springfield v. Allen Pettengill, et al.* Land Court dkt no. 19-TL-000102, entry no. 1. *See* Bailey Aff., Ex. C (Land Court Complaint). This action involves Ms. Mills's constitutional claims.

More critically, each of the factors used to determine the merits of a Rule 12(b)(9) motion weighs decidedly against the City:

- The Land Court lacked jurisdiction to entertain a counterclaim challenging the constitutionality of chapter 60 under *Tyler* (*see* Section B(1) *supra*);
- The federal and state constitutional claims in this action for declaratory relief have a separate legal basis from the claims and issues raised in the City's Land Court complaint;

- Resolution of Ms. Mills’s claim in this Court requires factual and legal analysis well beyond who should prevail in the Land Court redemption case; and
- There is plainly a rational basis, indeed there is a statutory basis, for considering the constitutional claims in this Court rather than in the Land Court.

D. MS. MILLS’S MASSACHUSETTS CONSTITUTIONAL CLAIMS ARE PROCEDURALLY PROPER AND RIPE FOR ADJUDICATION

1. This Case Presents a Ripe, Actual Controversy.

Defendants’ assertion that Ms. Mills’s claims are not ripe for adjudication incorrectly equates the absence of foreclosure judgment in the Land Court action with the hardship prong of the ripeness doctrine as recognized in Massachusetts. Ripeness is the “time dimension [] of standing.” *McInnis–Misenor v. Maine Med. Ctr.*, 319 F.3d 63, 69 (1st Cir. 2003). It focuses on the “‘when’ of litigation, as opposed to the ‘who.’” *Id.* The ripeness doctrine’s purpose “is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” *Abbot Lab. v. Gardner*, 387 U.S. 136, 148 (1967), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977). Courts apply a two-part test to determine ripeness, looking to (i) the fitness of the issue for judicial decision and (ii) the extent to which withholding judgment will impose a hardship. *Id.* at 149; *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 89 (1st Cir. 2013). Both prongs must be met, though a weak showing on one may be compensated by a strong showing on another. *Stern v. U.S. Dist. Court for Dist. of Mass.*, 214 F.3d 4, 10 (1st Cir. 2000); *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 535 (1st Cir.1995).

The fitness determination includes consideration of “the extent to which resolution of the challenge depends on facts that may not yet be sufficiently developed.” *Stern*, 214 F.3d at 10, quoting *Ernst & Young* at 535 (“[T]he critical question ... is whether the [claims] involve[]

uncertain and contingent events that may not occur as anticipated or may not occur at all.”). The hardship prong of the ripeness inquiry focuses on the ‘direct and immediate dilemma’ for the parties that [would] result[] from withholding judicial review.” *Froio Mgmt. Grp.* at *8, quoting *Ernst & Young* at 535 (“Generally, a ‘mere possibility of future injury, unless it is the cause of some present detriment, does not constitute hardship.’”); *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 9 (1st Cir. 2012) (per curiam), quoting *Simmonds v. INS*, 326 F.3d 351, 360 (2d Cir. 2003). “If an injury is imminent, that is enough; a plaintiff need not wait for the consummation of the threatened injury to obtain preventative relief.” *Citizens for a Safe Chatham Airport, Inc. v. Town of Chatham*, 99 Mass. App. Ct. 1115, 1115 (2021). In assessing hardship, a court may conversely consider whether granting review would serve a useful purpose. *See, e.g., Riva v. Com. of Mass.*, 61 F.3d 1003, 1011 (1st Cir. 1995); *Froio Mgmt. Grp., Inc.* at *8, citing *Verizon New England, Inc. v. Int’l Bhd. of Elec. Workers, Local No. 2322*, 651 F.3d 176, 188 (1st Cir. 2011);

It is undisputed that: (a) Springfield commenced the Tax Foreclosure Action (Stipulated Fact 9); (b) Springfield filed a Motion for Judgment of Foreclosure (Stipulated Fact 19); (c) if Springfield’s Motion for Judgment of Foreclosure is allowed, Springfield will then be able to sell Ms. Mills’s Home with no notice to her and she will not have any right to challenge the sale (Stipulated Fact 20); and (d) under current Massachusetts law, if the impending foreclosure is finalized and absolute title of the Home is transferred to Springfield, Ms. Mills will be legally divested of any interest in the Home, including any equity value above the value of the Tax Lien, which is the only lien on the Home (Stipulated Fact 24). The foregoing, together with other stipulated facts, more than establish that the record in this case is sufficiently developed to allow this Court to determine whether the municipal land-foreclosure scheme in G.L. c. 60 is

unconstitutional under the United States and Massachusetts Constitutions. There is no legal requirement (and defendants fail to cite any authority) that Springfield must foreclose Ms. Mills's equity of redemption before this matter is deemed fit for judicial decision on the constitutionality of G.L. c. 60.

"A plaintiff's rights *need not already have been impaired* for an actual controversy within the meaning of c. 231A to exist. A pleading is sufficient if it sets forth a real dispute caused by the assertion by one party of a legal relation, status or right in which [it] has a definite interest, and the denial of such assertion by another party also having a definite interest in the subject matter, where the circumstances attending the dispute plainly indicate that unless the matter is adjusted such antagonistic claims will almost immediately and inevitably lead to litigation." *Massachusetts Port Auth. v. Turo, Inc.*, 2020 WL 2617169, at *1 (Mass. Super. Ct. April 14, 2020) (citations omitted) (emphasis added). Here, the pleading is clearly sufficient and an actual controversy exists. Considering the Supreme Court's decision in *Tyler* and the absence of any legislative changes addressing the constitutional infirmities of G.L. c. 60, Ms. Mills will suffer direct and immediate harm if the Court declines to rule on the merits of this matter. The threat of the foreclosure of Ms. Mills's equity of redemption is real and immediate and hardly a "mere possibility of future injury." The matter, moreover, is ripe for adjudication because there are no contingent events, the record in this matter is sufficiently developed to allow the Court to rule on the merits, and Ms. Mills will suffer direct and immediate harm in the absence of judicial intervention in this case. Indeed, the foreclosure on her home is now scheduled for February 9, 2024. Furthermore, the public interest will be served by this Court's ruling on the constitutionality of G.L. c. 60. Accordingly, the Court should reject the Defendants' contention that Ms. Mills's claims are not ripe for adjudication.

2. G.L. c. 79, § 10, Does Not Apply.

Equally unavailing is Springfield's claim that G.L. c. 79, § 10, somehow obviates Ms. Mills's constitutional challenge to G.L. c. 60. *See* Def. Mem. at pp. 7-9. G.L. c. 79, § 10, applies "[w]hen the real estate of any person has been taken for a public use . . . but such taking . . . was not effected by or in accordance with a formal vote or order of the board of officers of a body politic or corporate duly authorized by law. . . ." G.L. c. 79, § 10. Under G.L. c. 60, § 53, an authorized municipal official—Springfield's tax collector—has approved the taking via a tax deed. Thus, a tax deed taking is simply not the kind of unintentional taking that G.L. c. 79, § 10, was intended to address.⁸

Moreover, the taking of surplus equity in Ms. Mills's Home is unlikely to qualify as a condemnation. There is no public purpose justifying the retention of a homeowner's equity, as neither Massachusetts law nor, presumably, any order exists which states "the specific purpose to which the land appropriated to public uses is to be devoted," which is constitutionally required for eminent domain takings. *Byfield v. City of Newton*, 247 Mass. 46, 56 (1923); *see also Town of Wellfleet*, 2021 WL 717526, at *2 (Mass. Land Ct. Feb. 24, 2021); *Yarnell v. City of Lynn*, 2023 WL 266367, at *4-5 (Mass. Land Ct. Mar. 28, 2023); *Triangle Ctr., Inc. v. Dep't of Pub. Works*, 386 Mass. 858, 861 (1982) (a taking *in pais*—i.e., a taking "with no formal act other than the physical appropriation of the property"—is possible only when "authorized by statute . . . [and] [t]he act appropriating the land [purports] to be under the statute and . . . show[s] with reasonable definiteness what is taken"). Without a specific public purpose, the seizure of surplus equity fails to qualify as a permissible form of eminent domain. Any interpretation to the contrary would risk

⁸ It is telling that Springfield has not followed any of the procedural requirements of a taking under G.L. c. 79, such as the payment of a *pro tanto* amount to her.

expanding the Commonwealth's takings authority at the expense of private property rights, which itself raises obvious constitutional concerns.

Finally, Defendants' argument that they are saved by eminent domain law principles was rejected in *Tyler* itself. Chapter 79, § 10 fails to meet the United States Supreme Court's requirement in *Tyler* that there be "a *specific* procedure . . . for recovering the surplus." *Tyler*, 143 S. Ct. 1369, 1379 (2023). Using G.L. c. 79 would simply not provide the level of due process mandated by the Supreme Court in *Tyler*. Accordingly, this Court should reject Defendants' contention that "if the Plaintiff were ultimately found to be in such a situation . . ., she would be able to bring a claim pursuant to G.L. c. 79; § 10 or § 14 to challenge the compensation amount offered by the government. . . ." Def. Mem. at p. 8.⁹

E. MS. MILLS'S FEDERAL CONSTITUTIONAL CLAIMS ARE RIPE FOR ADJUDICATION.

Ms. Mills seeks, among other things, a declaration that "the practice of retaining owners' surplus equity when real property is taken pursuant to M.G.L. c. 60 to satisfy debts to municipalities violates the Takings Clause of the Fifth Amendment to the U.S. Constitution." Complaint at 13. Ms. Mills is not seeking damages from Springfield under 42 U.S.C. § 1983. Accordingly, Defendants' argument that Ms. Mills's federal constitutional challenge is not ripe until Springfield has foreclosed Ms. Mills' equity of redemption is unfounded. Both cases cited by Springfield, *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019), and *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), involve claims for damages under § 1983, and stand for the unremarkable

⁹ Ironically, despite this argument, the record shows that Springfield has made *no* offer of compensation to Ms. Mills for the excess equity in the Home. Further, as the Defendants must know, under *Kelly v. City of Boston*, 348 Mass. 385 (1965), Springfield is not permitted to pay the excess equity to Ms. Mills.

proposition that a property owner has an actionable takings claim **for damages** under § 1983 “when the government takes his property without paying for it.” *Knick*, 139 S. Ct. at 2167-68.

Ms. Mills indisputably has standing to challenge the constitutionality of G.L. c. 60. She has asserted, and the Stipulated Facts establish, harm resulting from Springfield’s enforcement of G.L. c. 60 in the Tax Foreclosure Action. *California v. Texas*, 141 S. Ct. 2104, 2114 (2021) (to establish Article III standing to challenge constitutionality of a statute, plaintiff must assert an injury that is the result of the statute’s actual or threatened enforcement, whether today or in the future, and in the absence of contemporary enforcement, plaintiffs must show that the likelihood of future enforcement is substantial); *see also Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (“The party who invokes the power [of Article III courts] must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement”). Accordingly, the Court should reject Springfield’s unfounded assertion that Ms. Mills’s federal constitutional claims are not ripe for adjudication.¹⁰

F. THE DOCTRINE OF QUALIFIED IMMUNITY DOES NOT APPLY TO THE CLAIMS AGAINST DEFENDANT STEPHEN LONERGAN.

For similar reasons, the Court should reject Defendant Lonergan’s assertion that Ms. Mills’s case against him must be dismissed because he is immune from suit. Specifically, Lonergan argues that he is protected “from suit and liability for money damages under Section 1983.” Def. Mem. at 9. In support of this argument, Lonergan relies exclusively on cases where government actors have been sued for damages under 42 U.S.C. § 1983. What Mr. Lonergan overlooks is that Ms. Mills does not seek damages in this case. Ms. Mills has sued for injunctive

¹⁰ The Court should note that Defendants have not argued that the state constitutional claims alleged in the Complaint are not ripe. See Ver. Complaint at 8-9 (alleging violation of Part One, Article 10 of the Massachusetts Constitution); Ver. Complaint at 11 (alleging violation of Part One, Article 10’s prohibition of unequal taxation). Thus, that argument is waived.

and declaratory relief pursuant to G.L. c. 214, § 1; G.L. c. 231A, § 1, and G.L. c. 211, § 3. She seeks only declaratory judgment and an order enjoining the City and Lonergan from taking absolute title to her home in a tax foreclosure proceeding under G.L. c. 60 without making appropriate provision, as required by the Federal and State Constitutions, for the payment to her of the fair excess value of the equity in her Home. None of the cases cited by the Defendants addresses such declaratory and injunctive relief.

The request to dismiss Lonergan from this case should be denied for an additional reason. Defendants argue that Lonergan enjoys a qualified, as opposed to absolute, immunity from suit for acts taken in furtherance of his official duties. They argue that this Court should apply a two-part test to determine whether Lonergan is qualifiedly immune: (1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right was “clearly established” at the time of the defendant’s alleged violation.” *Moldonado v. Fontaines*, 568 F.3d 263, 269 (1st Cir. 2009), citing *Scott v. Harris*, 550 U.S. 372, 377 (2007). Defendants argue that because *Tyler* was not decided until May 25, 2023, Lonergan is entitled to qualified immunity for his acts taken before the decision was rendered. But Ms. Mills seeks an injunction against *future* conduct that would violate her constitutional rights as established in *Tyler*. For this reason, Lonergan’s qualified immunity argument is inapplicable.

G. THE COURT SHOULD REJECT DEFENDANTS’ ARGUMENT THAT ITS TAKING OF MS. MILLS’S EQUITY UNDER THE TAX COLLECTION SCHEME IS “NOT A TAX” OR ALTERNATIVELY FIND THAT IT IS A DISPROPORTIONATE TAX UNDER ARTICLE 10 OF THE MASSACHUSETTS CONSTITUTION.

Defendants also argue that Springfield’s conduct in taking hundreds of thousands of dollars in equity from Ms. Mills is “not a tax.” Def. Memo at p. 11. Although unclear from their brief, Ms. Mills surmises that Defendants’ argument concerns Count III, which alleges a

violation of Part One, Article 10 of the Massachusetts Constitution. *See* Complaint at 11.

Defendants seem to argue that Count III should be dismissed because retention of a taxpayer's home equity by a municipality is not a "tax," at least for purposes of Article 10, so it cannot violate the state constitutional prohibition against "unequal taxation." Defendants' argument falls far from the mark.

As noted above, in *Bettigole v. Assessors of Springfield* the Supreme Judicial Court considered a challenge to certain methods employed by Springfield that resulted in one class of homeowners paying a larger share of total taxes than others similarly situated. *See* 343 Mass. at 230. Applying Article 10, the Court declared that the assessor's conduct was illegal. The Court stated: "It is well settled that the words 'his share' in art. 10 of the Declaration of Rights 'forbid the imposition upon one taxpayer of a burden relatively greater or relatively less than that imposed upon other taxpayers.'" *Id.*, citing *Opinion of the Justices*, 332 Mass. 769, 777 (1955). Similarly, "the expression 'proportional and reasonable' [in Part II, c. 1, § 1, art. 4] forbids the imposition of taxes upon one class of persons or property at a different rate from that which is applied to other classes." *Id.*, citing *Opinion of the Justices*, 341 Mass. 738, 749 (1960). This interpretation of these constitutional provisions has been unvarying "from the early days of the Commonwealth to the present time." *Id.*, citing *Opinion of the Justices*, 332 Mass. at 778 (collecting earlier decisions). Here, Defendants' retention of hundreds of thousands of dollars in excess equity results in the same unconstitutional practice: Ms. Mills pays more in taxes than all other landowners in Springfield who have not had the poor fortune of falling behind in their tax payments, and more than all other landowners in Springfield who have not had the poor fortune of being subjected to a municipal land foreclosure.

How do Defendants respond? They mix apples and oranges by arguing that their collection of Ms. Mills's equity is not actually a tax taking at all, but rather an exercise of the eminent domain power of the City of Springfield. Nothing in the Stipulated Facts supports this conclusion, and it should be rejected. Springfield gave Ms. Mills or her grandfather notice that it was exercising municipal powers under G.L. c. 60, a state statute titled "Collection of Local Taxes," to take the title to her home under G.L. c. 60, § 53, titled "Taking for Taxes." See Agreed Facts at ¶¶ 7, 16, 19 and 20. As noted by Chief Justice Gants in *Tallage Lincoln*, "[t]he first step in a *tax taking* is the notice of taking under G.L. c. 60, § 53." 485 Mass. at p. 462 (emphasis added). Chief Justice Gants did not refer to the entirely separate process for the taking of land for a public purpose under G.L. c. 79. Defendants should not be permitted the "sleight of hand" of attempting to characterize a tax taking as a taking for a public purpose. Moreover, for the reasons set forth above, the eminent domain statute, G.L. 79, § 10, is inapplicable to this case and does not satisfy the requirements of *Tyler*. Springfield's argument that its prospective theft of Ms. Mills's equity escapes judicial scrutiny because it is not a "tax" should be summarily rejected by the Court.

H. MS. MILLS IS ENTITLED TO DECLARATORY RELIEF.

For the reasons set forth above, and in particular in section D, *see supra*, Defendants' argument that Ms. Mills is not entitled to declaratory relief under G.L. c. 231A is breathtakingly myopic and wrong. This case begs for judicial intervention and declaratory relief to address the constitutional infirmities of the Massachusetts real estate tax foreclosure law under the "archaic and arcane" G.L. c. 60. Where the Land Court lacks jurisdiction to adjudicate these constitutional issues, and where G.L. c. 60 lacks any legal procedure to return Ms. Mills' equity in her Home in the event there is a foreclosure of her equity of redemption, *see Tallage Lincoln, LLC v. Williams*,

485 Mass. 449, 450 (2020), declaratory and injunctive relief are the only relief available to prevent the catastrophic loss of the equity in the Mills's family home.

Ms. Mills has alleged sufficient facts to demonstrate that an actual controversy exists and that she has legal standing to sue. "The purpose of both the actual controversy and the standing requirements is to ensure the effectuation of the statutory purpose of G.L. c. 231A, which is to enable a court 'to afford relief from . . . uncertainty and insecurity with respect to rights, duties, status and other legal relations.' . . . Such proceedings are concerned with the resolution of real, not hypothetical, controversies; the declaration issued is intended to have an immediate impact on the rights of the parties." *Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Comm'r of Ins.*, 373 Mass. 290, 292 (1977). Notably, "[a] plaintiff's rights **need not already have been impaired** for an actual controversy within the meaning of c. 231A to exist. '[A] pleading is sufficient if it sets forth a real dispute caused by the assertion by one party of a legal relation, status or right in which [it] has a definite interest, and the denial of such assertion by another party also having a definite interest in the subject matter, where the circumstances attending the dispute plainly indicate that unless the matter is adjusted such antagonistic claims will almost immediately and inevitably lead to litigation.'" *Massachusetts Port Auth. v. Turo, Inc.*, 2020 WL 2617169, at *5 (Mass. Super. Ct. April 14, 2020) (citations omitted) (emphasis added). Ms. Mills

is entitled to declaratory relief.

Respectfully submitted,

ASHLEY M. MILLS

By Her Attorneys,

/s/ Frank J. Bailey

Frank J. Bailey, BBO #026485

John C. La Liberte, BBO # 556046

PIONEER PUBLIC INTEREST LAW CENTER

185 Devonshire Street

Boston, MA 02110

(617) 877-9511

frank.bailey@pioneerlegal.org

john.laliberte@pioneerlegal.org

-and-

Todd S. Kaplan, BBO #634710

GREATER BOSTON LEGAL SERVICES

197 Friend Street

Boston, MA 02114

(617) 603-1647

tkaplan@gbls.org

-and-

Andrew J. Gallo, BBO #645739

T. Charlie Liu, BBO #693338

Julia Blackburn Otero, BBO #705140

MORGAN, LEWIS & BOCKIUS LLP

One Federal Street

Boston, MA 02110-1726

(617) 341-7700

andrew.gallo@morganlewis.com

charlie.liu@morganlewis.com

julia.blackburnotero@morganlewis.com

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CERTIFICATE OF SERVICE

I, John C. La Liberte, hereby certify that a true copy of the foregoing document was served electronically upon counsel to defendants as follows:

Thomas D. Moore, Esquire
General Counsel
Springfield Redevelopment Authority
36 Court Street, 2nd Floor
Springfield, MA 01103
Email: tmoore@springfieldcityhall.com

Devon W. Grierson, Esquire
First Associate City Solicitor
City of Springfield Law Dept.
36 Court Street, Room 210
Springfield, MA 01103
Email: dgrierson@springfieldcityhall.com

Dated: January 19, 2023

/s/ John C. La Liberte