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IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES ALLEN FLOYD,)	Docket No. 45421-2017
)	
Petitioner/Appellant,)	
vs.)	
)	
BOARD OF ADA COUNTY)	
COMMISSIONERS,)	
)	
Respondents.)	
_____)	

RESPONDENTS' BRIEF

Appeal from the District Court, Fourth Judicial District,
County of Ada, State of Idaho

HONORABLE RICHARD GREENWOOD, PRESIDING DISTRICT JUDGE

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Comes now the Respondent, Ada County Board of Commissioners (Board) and submits this response to Petitioner Floyd's (Floyd) brief.

**I.
INTRODUCTION**

Under Idaho law, if there is a delinquency for real property taxes, and the tax delinquency is not redeemed within three years from the date of the delinquency, the county treasurer must obtain a tax deed and sell the property to pay the taxes. I.C. §§ 63-1005; 63-1006; 31-808. In this case, the Ada County Treasurer (herein after Treasurer), as required by Idaho law, after the tax deed hearing held by the Board on March 19, 2015 at 1:30 p.m., obtained a tax deed on the property located at 9180 Yaryan Drive, Boise, Idaho 83704 due to the nonpayment of 2011 property taxes.

**II.
STATEMENT OF THE CASE**

FACTUAL BACKGROUND AND COURSE OF PROCEEDINGS.

As the 2011 taxes were delinquent, pursuant to law the Ada County Treasurer began the tax deed process in early September, 2014 by sending reminder letters that the 2011 taxes were delinquent to the 9180 Yaryan address. Agency Record¹ (hereinafter "AR") at 22; AR. at 25. Apparently, in response to the September reminder letters, the Treasurer received a letter in mid-October 2014 from Floyd which informed the Treasurer that Floyd was incarcerated in the jail, and that he intended to pay the taxes. AR. at 22. The Treasurer sent a letter on October 16, 2014

¹ The Agency Record and Supplemental Record, as well as the Transcripts of Agency hearings of March 19, 2015, March 24, 2015, June 22, 2015 and June 27, 2015 are attached as Exhibits to the Clerk's Record on Appeal. See Clerk's Record on Appeal at 000173. All cites to the Agency Records and Transcripts are to the page numbers of the Records and Transcripts themselves.

to Floyd addressed to Floyd at the jail. AR. at 25. The Treasurer's October 16 letter gave the date (March 19, 2015) that the 2011 taxes had to be paid in full. *Id.* From this exchange of correspondence Mr. Floyd had actual notice of the tax deed process as early as mid-October 2014.

On October 31, 2014, the Treasurer sent notice of the pending issue of tax deed to Floyd's address of record, 9180 Yaryan Drive, Boise, Idaho 83704 and also sent one to the Ada County Jail. AR. at 22. Only the notice sent to the Yaryan address came back as undeliverable. AR. at 22; AR. at 25. The Treasurer sent another notice of the pending issuance of the tax deed to Floyd at the Ada County Jail on December 31, 2014, which was returned as "Not Deliverable as Addressed." AR. at 22.

On January 16, 2015, the Board received a letter dated January 10, 2015 from Floyd. AR. at 28-9. In the January 10 letter to the Board, Floyd stated "I haven't received Notice of Pending Tax Deed by registered mail as required by statute from Vicki (sic) McIntyre (Treasurer) yet." The letter also stated that Floyd had, "people staying there, whom have agreed to pay the taxes by the March 15, 2015 deadline." *Id.* In the January 10 letter, Floyd also proposed a settlement. He would dismiss his filed Section 1983 lawsuit alleging inadequate medical care while incarcerated in the jail against the County in exchange for the County's payment of his delinquent taxes. *Id.*

In response to Floyd's continued representations to the Treasurer that he was not receiving correspondence from the Treasurer's Office, on February 10, 2015, notices of the pending issuance of the tax deed were hand delivered to him while he was incarcerated in the

Ada County Jail. Clerk's Record on Appeal (hereafter CRA) at 000015-16; AR. at 92-4 - Petition ¶¶19-21. The notices of pending issue of tax deed Floyd received on February 10, 2015, contained the date of the tax deed hearing for Floyd's property which was scheduled for March 19, 2015 at 1:30 p.m. AR. at 39-40.

In a letter dated February 14, 2015 addressed to the Board, Floyd contested the issuance of the tax deed letter by arguing that a deputy treasurer placed a "paid" stamp on the two Notices of Issuance of Pending Tax Deed he received. (AR. at 32-50). Floyd included exhibits with his letter. (AR. at 39 - 50). In the letter, Floyd alleged that the paid stamp indicated that the taxes were paid due to the fact that Floyd had sent letters to charitable institutions asking them to pay his taxes "in secret" on his behalf so he does not know who paid. AR. at 33, ll 4; AR. at 41.

Due to Floyd's insistence that the paid stamp meant that the 2011 taxes had been paid, Floyd received a letter with a payment history attached from deputy treasurer Jeniffer Rae dated February 19, 2015, indicating that the November 2014 payment based on the "paid" stamp was payment for 2010 taxes which letter included a payment history. Floyd brief at 2; AR. at 25-26. In response to the February 19th letter, Floyd sent a letter to the Treasurer dated February 23, 2015, stating that the 2010 taxes were showing as paid and asking the Treasurer to investigate further. Supplemental Agency Record (hereinafter Supp. R.) at 0021.

On February 27, 2015, the Treasurer sent a letter to Floyd and explained that her staff had made a mistake. Supp. R. at 0013. The letter explained that her staff had been mistaken that 2010 taxes had been owed. Rather staff meant to document that 2010 was the last time a payment had been made. And in response to Floyd's continuing assertion that the 2011 taxes

had been paid in November 2014 due to the existence of the “paid” stamp on the Notices of Pending Issue of Tax Deed, the Treasurer included a tax history of payments made and credited to Floyd’s property as well as the taxes were delinquent as of February 27, 2015. (Supp. R. at 0014). The tax history shows the \$250.00 payment made by Floyd in May 2014 credited as partial payment for first half of 2011 taxes and the \$1,108.24 payment made by TitleOne Corporation in May of 2011 for the payment of 2010 second half taxes from the sale of the property to Floyd in May of 2011. *Id.* The Treasurer’s February 27 letter further included as exhibits the tax payment detail and copy of the May 2014 \$250.00 money order received from Floyd (Supp. R. at 0017-0018) and the tax payment detail and copy of the 2011 check from TitleOne (Supp. R. at 0019-0020.)

At the March 19, 2015 tax deed hearing, the Board heard from the Treasurer and also considered Floyd’s evidence. In contrast to Floyd’s unsubstantiated claim that someone paid his taxes for him, the Ada County Treasurer, explained the “paid” stamp on the notice of pending issue of tax deed documents. *See* Tr. March 19, 2015 tax deed hearing at p. 8, ll 16 – 25; p. 9, ll 1-15. The explanation was that when the Treasurer gets returned mail the office used the “paid” stamp as it is a stamp that has “clicker” date adjustment so the office can stamp the correct date on the returned mail. It was the stamp that they used “for everything.” Tr. March 19, 2015 tax deed hearing at p. 8, l 25. The Treasurer explained the “VAC” meant that the notice was returned as the property was vacant. The other notice was returned as “undeliverable, removed. See new address.” Tr. March 19, 2015 tax deed hearing at p. 9, ll 5-14. And in response to a second question from Commissioner Tibbs, “I guess the point too is the fact that it says paid, I

mean there was no -- there were no taxes that were paid?" (Tr. March 19, 2015 tax deed hearing at p. 9, ll 2-4), the Treasurer replied: "That is correct. I've double-checked the clerk that did that." Tr. March 19, 2015 tax deed hearing at p. 9 ll 5-6.

After hearing the testimony and reviewing the evidence, which included the written correspondence from Floyd, the Board tabled the matter to its open business meeting on March 24, 2015, for further consideration and final decision. Tr. March 19, 2015 tax deed hearing at p. 24, ll 4-21.

At the March 24, 2015 open business meeting, the Board reviewed the evidence and testimony in the matter and found that it supported the finding that the 2011 taxes remained unpaid, and it was proper to take the property by tax deed as required by statute. Tr. March 24, 2015 open business meeting at p.3, ll 3-25; p.4 ll 1-19; AR. at 77-82. The Board's Findings of Fact, Conclusions of Law and Final Determination that the 2011 taxes remained unpaid, was sent to Floyd c/o Ada County Jail by certified mail. AR. at 83-85.

On April 24, 2015, the Board received Floyd's Petition for Judicial Review and Initial Complaint in the mail. AR. at 86-103. Floyd's Petition for Judicial Review and Initial Complaint was filed with the Clerk of Court on August 26, 2015 along with a Summons. CRA at 000010; AR. at 129-147. Floyd later filed an Amended Petition for Judicial Review and Initial Complaint on February 16, 2016. CRA at 000027.

The Board filed a Motion to Dismiss Floyd's Petition for Judicial Review and Initial Complaint, which Motion was partially granted by the District Court by dismissing the Initial Complaint without prejudice but allowing Floyd to continue with his Petition for Judicial

Review. Order and Decree the District Court filed on August 15, 2016. CRA at 000056. The District Court filed an Amended Order and Decree on September 12 to correct the date Floyd was required to pay fees and costs in the case from March 7, 2015 to March 7, 2016. CRA at 000061.

Floyd filed his initial brief with the District Court on April 11, 2017. CRA at 000068. The Board filed its Respondent's Brief on May 9, 2017. CRA at 000104. Floyd filed his reply brief on June 12, 2017. CRA at 000127.

Floyd's Petition for Judicial Review was argued in front of the District Court on July 17, 2017 and the District Court took the matter under advisement. On August 31, 2017, the District court issued its decision, which affirmed the Board's decision to issue a tax deed for delinquent 2011 property taxes. CRA at 000142.

Floyd filed his Notice of Appeal of the District Court's decision to this Court on September 19, 2017. CRA at 000162.

III. ADDITIONAL ISSUE ON APPEAL

Whether the Respondent is entitled to an award of attorney fees on appeal.

IV. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 84 governs judicial review of administrative and local governing bodies, but limits the scope of review for a petition for judicial review to that which is provided by statute. *Chavez v. Canyon County*, 152 Idaho 297, 300, 271 P.3d 695, 698 (2012) (*Citations omitted*); I.R.C.P. 84(e)(2). Pursuant to I.C. §63-1006(4) any person aggrieved by a

county commissioners' decision to issue a tax deed can have the decision reviewed by the district court. I.C. §63-1006(4). The district court confines its review to the record from the county and can only reverse or modify the commissioner's decision if substantial rights of the appellant have been prejudiced. *Id.* Prejudice is found if the commissioners' findings, conclusions of law, or decisions are: (a) Made upon unlawful procedure; (b) Clearly erroneous in view of reliable, probative and substantial evidence on the whole record; or (c) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *Chavez*, 152 Idaho at 300, 271 P.3d at 698 (2012).

A tax deed may issue so long as the county treasurer substantially complies with the notice requirements. *Jahnke v. County of Bingham*, 115 Idaho 548, 551, 768 P.2d 811, 814 (Ct. App. 1989) (Court discussing I.C. §63-1134 – “Issuance of tax deed – Notice” prior to recodification to its current location as I.C. §63-1005.) Proof of notice can be gleaned from other sources, including evidence showing that the property owner has actually received notification of the pending tax sale. *Id.* (*Citations omitted.*)

Upon appeal, the decision reached by the district court in its appellate capacity for such a review is examined by this Court to consider whether the district court correctly decided the issues presented to it on appeal. *Chavez*, 152 Idaho at 300-301, 271 P.3d at 698-99 (2012) (*Citations omitted.*)

**V.
ARGUMENT**

A. Floyd’s Due Process Rights Were Not Violated as Floyd Had Actual Notice of the Tax Deed Proceedings and Presented His Evidence of Why the Tax Deed should not Issue.

Floyd alleges nine issues on appeal. However, Issues 1 through 5 and 8 all relate to claims that the Board deprived him of property without affording him procedural due process. His brief frames his due process arguments in various ways, such as timeliness of notice, required information, actual notice, opportunity to appear and be heard, presentation of evidence, and the ability to confront and cross examine witnesses. The arguments he raises are variations on his claim that his due process rights were violated. His brief frames this argument in state law terms by alleging that certain statutory requirements were not met, and presents federal arguments by referencing his Constitutional rights, as applied to state action via the 14th Amendment. However, because Floyd had actual notice of the pending issuance of the tax deed and was able to present his evidence of why the tax deed should not issue, his due process claims fail.

1. The District Court Correctly Found that Floyd’s Due Process Rights Were Not Violated.

a. Floyd Received Actual Notice.

Alleged governmental deprivations of property, and the requisite procedural due processes, are primarily analyzed in light of the *Mathews v. Eldridge* decision. There, the Supreme Court set forth that “some form” of hearing is required before government action deprives someone of their property interest. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct.

893, 902 (U.S. 1976). Answering the inevitable question of what form such a hearing should take, the Court cautioned that “[d]ue process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances,” accordingly, the Court concluded that due process “is flexible and calls for such procedural protections as the particular situation demands.” *Id.* at 334, 96 S. Ct. at 902. The Court further held that resolving such inquiries requires weighing the governmental and private interests in question, and consulting a three-factor test for doing so.²

With specific regard to state-government deprivations of property, the Court has provided further clarity as to the appropriate contours of proper due process. In *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652 (U.S. 1950), the Supreme Court examined judicial settlement of common trust accounts. Specifically, the Court looked at the sufficiency of notices of such settlements, and whether the Procedural Due Process clause, applied to the states via the 14th Amendment, would require more. *Id.* The *Mullane* Court noted that, generally, the state must provide “notice and opportunity for hearing appropriate to the nature of the case.” The *Mullane* Court explained its holding:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is 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. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due

² Those factors are: “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews v. Eldridge*, 424 U.S. at 335, 96 S. Ct. at 903.

regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.

Id. at 314-315, 70 S. Ct. at 657 (citations omitted).

Finally, the Supreme Court has addressed the above questions in the specific context of tax proceedings, in *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 103 S. Ct. 2706 (U.S. 1983). There, the Court analyzed the concerns of a mortgagee who had not received notice of a pending tax sale. In spite of the importance of the interest and the impact that a tax sale of real property would have, the *Mennonite* Court concluded that only the following procedures were required by due process:

Since a mortgagee clearly has a legally protected property interest, *he is entitled to notice reasonably calculated to apprise him of a pending tax sale.* When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by *personal service*. But unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane*.

Mennonite, 462 U.S. at 798, 103 S.Ct. at 2711 (emphasis added.)

Thus, when a mortgagee receives actual notice of the pending tax sale, whether by receiving a mailing or by personal service, the mortgagee's due process rights are not violated. Further, as a matter of state law, actual notice is deemed sufficient notice under I.C. §63-1005. *See* I.C. §63-1005(6) (If a record owner . . . shall have actual notice of the pending issue of tax deed or that issuance of a tax deed is pending, it shall be deemed sufficient notice under this

section.³ *See also* I.C. §63-1006(2) (When a record owner . . . who has actual notice of such notice or its contents or appears or answers at the date specified in such notice, the county commissioners shall hear evidence and witnesses and make a final decision in writing.)

As the District Court held, Floyd plainly received adequate due process as he had actual notice of the pending tax deed as against his property. First, he had been in contact with the Ada County Treasurer's Office beginning as early as May 2014 when he contacted the Treasurer's Office regarding his delinquent taxes. CRA at 000149; *See* AR. at 25 (Property tax notes dated 05/05/2014 through 07/02/2014.)

As the District Court held Floyd knew his taxes were delinquent and made a partial payment in the amount of \$250.00 on May 5, 2014. CRA at 000149; R. at 25 (Property tax notes dated 05/05/2014); Supp. R. at 0018.

Further correspondence in Mid-October 2014 between the Treasurer and Floyd over the delinquent taxes was also determined to be evidence of Floyd having had actual notice of the tax deed process. CRA at 000148-9; R. at 25 (Tax Notes dated 10/16/15.)

Apart from the District Court finding that Floyd had received actual notice in October 2014, the record also contains further evidence that Floyd received actual notice of the pending issue of tax deed and that the property would be taken by tax deed in mid-March 2015 if the taxes remained delinquent. This actual notice is evidenced by his January 10, 2015 letter to the Board, which stated that the people living in the house would pay the taxes by March 15, 2015

³ The case of *Lawyer v. Sams*, 72 Idaho 101, 237 P.2d 606 (1951) which held that the giving of notice required by law is mandatory even if the property owner had actual knowledge was legislatively overruled when the Legislature added I.C. §63-1005(6) which mandates that actual knowledge of the issuance of a pending tax deed is sufficient notice.

even though he had yet to receive a notice of pending issue of tax deed via certified mail. R. at 28. Further in the January 10 letter he proposed dismissing his Section 1983 lawsuit in exchange for the Board paying the delinquent taxes thereby stopping the tax deed process. *Id.*

Floyd also admits receiving actual notice of the pending tax deed issuance as throughout his Petition and as the Record makes clear, Floyd admits he received the Notices of Pending Issuance of Tax Deed when they were hand-delivered on February 10, 2015 when he received three envelopes, two of which contained the Notices of Pending Issuance of Tax Deed. AR. at 32-33; CRA at 000033.

Floyd argues in his Issue Eight (Floyd Brief at 24) that since the letters he received from the Treasurer did not itemize the delinquency and all costs and fees pursuant to I.C. § 63-1005(4)(d) his due process right as to adequate notice was violated.

First, Floyd failed to raise this issue in front of the District Court. Since he failed to raise it below he is estopped from raising now. *See Borah v. McCandless*, 147 Idaho 73, 78, 205 P.3d 1209, 1214 (2009) (citations omitted.) (Generally, appellate review is limited to those issues are raised in the lower court and the Supreme Court will not decide issues presented for the first time on appeal.)

Second, Floyd's argument confuses I.C. § 1005(4)(d) with I.C. § 63-1005(6). I.C. §63-1005(6) says in part when an owner has "actual notice . . . that issuance of a tax deed is pending" - such notice is "sufficient notice" under [I.C. §63-1005]. The correspondence between Floyd and the Treasurer's Office clearly put him on notice that the 2011 taxes were delinquent and needed to be paid to avoid the property being taken by tax deed. *See* AR. at 25.

Third, Floyd's argument exalts form over substance as his argument has never been over the exact amount of taxes owed. Rather his argument has been and continues to be that he owes no 2011 taxes due to the existence of the "paid" stamp on the notices of pending issue of tax deed he received. Arguments that exalt form over substance are not favored by courts. *Bone v. City of Lewiston*, 107 Idaho 844, 849, 693 P.2d 1046, 1051 (1984.)

Even if this case was about a disagreement over the amount of 2011 taxes due and owing, which it is not, Floyd did receive an itemized statement of the delinquency and all costs and fees incident to the delinquency when the Notices of Pending Issue of Tax Deed were hand delivered to him at the jail. The notices he received itemized the delinquency, and costs and fees including mailing fees and a title company's litigation guarantee fee of \$200.00. *See R.* at 39-40. As the Notices of Pending Issue of Tax deed contained the itemized costs incident to the delinquency, Floyd's due process rights were not violated.

As the record shows that Floyd had actual notice of the tax deed process including an itemization, such notice renders all the other notice violations alleged by Floyd superfluous. Therefore, the district court correctly ruled that Floyd's due process rights as to notice were not violated.

b. Floyd Was Able to Present Evidence.

The district court correctly determined that Floyd had had an adequate opportunity and time to be heard and present evidence as well as rebut the Treasurer's evidence and cross-examine witnesses. CRA at 000149-000151. The Record confirms Floyd exchanged numerous letters with the Ada County Treasurer regarding such things as: questions over the "paid"

stamps on several documents. AR. at 95 - Petition ¶27; AR. at 96 - Petition ¶28(E). In response to Mr. Floyd's continued insistence that the "paid" stamp meant that the taxes were paid, the Treasurer sent Floyd a letter dated February 27, 2015, which detailed the tax history of Floyd's property. Supp. R. at 0013-0020. The Treasurer's letter included copies of a \$250.00 payment made by Floyd on May 5, 2014 (Supp. R. at 0020) as well as copy of a check from TitleOne Corporation for \$1,108.24 that was received by the Treasurer on May 20, 2011(Supp. R. at 0018.) In the face of the evidence sent to him by the Treasurer in the February 27 letter that the 2011 taxes were delinquent, Floyd kept insisting that the paid stamp was all the proof he needed to show that the taxes were paid.

It is instructive to note that his brief presents no new evidence indicating that the taxes have been paid, other than his continued assertion that the paid stamp means that the taxes were paid. Unfortunately for Floyd, the Record contains correspondence from the Treasurer to Floyd where the Treasurer explains what tax payments were made and when they were made as well as what taxes remain unpaid and delinquent. Supp. R. at 0013-0020.

As the District Court pointed out Floyd was able to communicate directly with the Board voicing his objections to the tax deed process. CRA at 000149. Floyd sent letters dated February 14, 2015, March 9, 2015, and March 13, 2015, to the Board that contained his objections to the tax deed process and his evidence. AR. at 32-50; AR. at 52; AR. at 57-65. Again his evidence that the taxes had been paid, consisted solely of the existence of the "paid" stamp on the notices that he received at the jail and copies of the envelopes he received from the Society of St. Vincent de Paul. Not at any time did Floyd present any additional evidence to the Board that the

taxes had been paid, or even might have been paid, by one of the charitable institutions, save for his “paid” stamp arguments.

The District Court correctly held that Floyd’s arguments citing criminal law as a basis that an accused inmate has a constitutional or statutory right to confront, cross examine and defend in person did not apply in this civil tax deed matter. CRA at 000151. Idaho Code § 63-1005(4)(g) only requires Floyd have “adequate opportunity to be heard, to confront and cross examine any evidence or witness against the record owner. . . .” The fact that Floyd was incarcerated in the Ada County Jail on an unrelated criminal matter, does not transform an “adequate opportunity” into a constitutional or statutory right to be brought in front of the Board in this matter. Floyd knew the date and time of the tax deed hearing.⁴ He did nothing except to continue to claim the County had a duty to transport him to the hearing.

Floyd’s incarceration, however, did not prevent him from presenting his objections and evidence. While Floyd may have wanted to appear in person, the County had no constitutional or statutory duty to ensure Floyd appeared at the tax deed hearing. Floyd had access to the Board as he was able to present his evidence via written form which is all the due process he is entitled to.⁵

⁴ As the District Court pointed out, Floyd apparently had someone come to the Treasurer’s Office on March 12, 2015 to enquire about the taxes. CRA at 000151; AR. at 26 (03/12/2015 Tax Notes).

⁵ See e.g. *Lewis v. Casey*, 518 U.S. 343, 355, 116 S.Ct. 2174, 2182 (1996) (“In other words, *Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and fall-claims. The tools it requires to be provided are those the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.”) (Emphasis in original.)

Accordingly, as the District Court held, the ultimate conclusions are that procedures that accord full opportunity to appear and be heard must exist. CRA at 000151. The Record supports the District Court's decision that Floyd was provided an adequate opportunity to be heard. Floyd was able to present his evidence to both the Treasurer and the Board via correspondence. Floyd's allegation that he had to "send his objections and inquires through McIntyre" (Floyd's Brief at 21) is false and is not supported by the Record as the District Court held. CRA at 000149. Floyd was able to question and challenge the evidence provided by the Treasurer's Office as well as provide his evidence of why the tax deed should not issue through his correspondence directly with the Board. Thus the due process afforded Floyd did not violate his due process rights.

The District Court also correctly held that Floyd's reliance on the U.S. Supreme Court case of *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970) was misplaced. CRA at 000150. In *Goldberg*, the New York City procedures in welfare cases did not allow for welfare recipients to appear in person. *Id.* at 268, 90 S.Ct. at 1021. In contrast, Floyd's inability to appear stemmed from his incarceration on an unrelated criminal matter and was not due to any action by the Board or the Treasurer.

Floyd further cites to *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400 (1959). Floyd's reliance on the *Greene* and the line of cases citing *Greene* is misplaced. Unlike the petitioner in *Greene*, who was denied the chance to see the evidence the government was relying upon to revoke the petitioner's security clearance, Floyd saw the evidence that the Treasurer had

indicating that the taxes were unpaid. *See e.g.* Supp. R. at 13-20. His only response to the evidence was to continue to argue the taxes were paid based on the existence of the paid stamp.

As discussed above, the U.S. Supreme Court has provided specific direction as to the parameters of the required due process for tax deed proceedings, which requires notice to apprise a person of the pendency of the action and to afford the person an opportunity to present their objections. *Mullane* and *Mennonite*, *supra*. These due process requirements were met as the District Court held in its decision affirming the Board's decision to take the property by tax deed due to nonpayment of the 2011 taxes.

In conclusion, the record and case law support the district court's decision that Floyd's due process rights were not violated. Floyd had actual notice of the tax deed. He knew when the hearing would be held. He was able to present his evidence. His failure to be present was not due to any action by the Board. Rather, his failure to appear was due to an unrelated criminal matter for which he was being held in the Ada County Jail.

B. The District Correctly Held That the "Paid" Stamp Did Not Signify a Receipt Indicating the Taxes Has Been Paid.

In Floyd's Issue No. 6, he alleges that the District Court erred in not treating the Notice of Pending Issuance of Tax Deed containing the paid stamp as an invoice. Floyd's Brief at 21.

The cases cited by Floyd, *Perry v. Schaumann*, 110 Idaho 596, 716 P.2d 1368 (1986), *McDougall v. Serval*, 50 Idaho 9, 292 P. 590 (1930), *Kegg v. State*, 10 Ohio, 75 (1840) and *Smith v. Davidson*, 23 Idaho 555, 130 P. 1071 (1913) are not on point.

As the District Court found, to the extent the “paid” stamp gave Floyd the impression that the taxes had been paid, the Treasurer corrected that mistaken impression when she sent the letter to Floyd that contained the record of the taxes due and owing along with the payments received. CRA at 000154-000155.

As the District Court pointed out in its decision (CRA at 000154) – Floyd mischaracterized the holding in *Smith v. Davidson*, 23, Idaho 555, 130 P. 1071 (1913). In *Davidson*, the defendant, Davidson, was willing to pay his taxes, but was informed that his taxes would be stricken, stands in stark contrast to Floyd who was consistently informed that the delinquent taxes remained unpaid. *See e.g.* Supp. R at 0013-0020.

Likewise, the *Perry*, *McDougall* and *Kegg* cases are inapplicable. Unlike the parties in *Perry* who had settled and compromised the disputed obligations, Floyd and the Treasurer did not agree to settle the delinquent taxes. Unlike the parties in *McDougall*, where the issue was application of a payment where several debts existed, Floyd was informed what payments had been made and what delinquent taxes remained unpaid. *Id.*

Kegg is also inapplicable for the same reasons discussed with *Smith*, *Perry* and *McDougall*. Floyd’s continued reliance on the existence of the “paid” stamp was evidence that the taxes had been paid, was corrected by the Treasurer in her letters to Floyd.

It must be noted that the Board quizzed the Treasurer on the existence of the paid stamp and whether the 2011 taxes had been paid. Tr. March 19 2015 tax deed hearing at p. 8, ll 16-25, p. 9, ll 1-10.

Further, Floyd has never submitted a cancelled check, or other evidence that the 2011 taxes were paid, which would be the sole way to avoid the property being taken by tax deed and sold pursuant to Idaho law. Nor did he submit the contents of what was contained in the envelope he received from the Society of St. Vincent de Paul. If, based on the paid stamp, Floyd believed that one of the charitable institutions paid his taxes for him, it would have been a simple matter for him to have asked those institutions whether they paid his taxes. He never has; rather he continued to insist that the paid stamp is all the evidence he needs and the paid stamp is the equivalent of a receipt.

In sum, the District Court's determination that the mere existence of the "paid" stamp did not preclude the Board from rejecting it as evidence of payment based on the record as a whole was correct.

C. The District Court Correctly Held The Record Was Complete.

Floyd's Issue No. 7 alleges that the district judge abused his discretion in holding the agency record was complete by the Board ruling on Floyd's objection and filing of the Supplemental Agency record. Floyd's Brief at 24.

Floyd's argument is that since the record failed to include a list of exhibits identified at the hearing pursuant to I.R.C.P. 84(f)(1)(b)(5), renders the record deficient. As Floyd failed to raise this issue in front of the district court, he is estopped from raising it now. *See Borah v. McCandless*, 147 Idaho 73, 78, 205 P.3d 1209, 1214 (2009) (citations omitted.) (Generally, appellate review is limited to those issues are raised in the lower court and the Supreme Court will not decide issues presented for the first time on appeal.)

Even if he could raise the issue now, the Board's decision on Floyd's objection to the record pointed out no exhibits were specifically identified during the hearing. Supp. R. at 0008. A review of the March 19, 2015 tax deed hearing transcript confirms that no "exhibits" were specifically identified during the course of the hearing. The Board further determined that the Table of Contents listed the documents that were presented by the Treasurer as she spoke and reviewed by the Board. Supp. R. at 0008.

Idaho Rule of Civil Procedure Rule 1(b) states in part that the rules "should be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding." Under this standard, Idaho case law has held that dismissal of an action for merely a technical noncompliance with the Rules of Civil Procedure especially where no prejudice is shown is not favored. *See Bunn v. Bunn*, 99 Idaho 710, 712, 582 P.2d 1245, 1247 (1978) (Reversing a district court's dismissal of an appeal from magistrate court when the delay in pursuing the appeal did not prejudice the opposing party.)

Floyd does not show how the lack of an exhibit list prejudices him in this matter for the simple reason that he cannot. To the extent Floyd's argument is properly in front of this Court, as Floyd fails to show any prejudice emanating from a lack of an exhibit list, this Court should find in the Board's favor.

D. The District Court Correctly Held that the Board's Decision that the Taxes Remained Unpaid Was Not Clearly Erroneous, Was Not An Abuse of Discretion and Was Not Arbitrary and Capricious.

Floyd's final issue is that the Board's decision to take the property to tax deed were clearly erroneous, an abuse of discretion as well as arbitrary and capricious. Floyd's Brief at 24 – 27.

As the District Court found the Board's decision was not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. CRA at 000156-000157. The District Court also found that the Board's decision was not arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. *Id.*

Floyd articulates the same arguments he made to the District Court, namely; on the Notice of Pending Issue of Tax Deed the fact that his name was listed in the last, first and middle format and the notices failed to have his jail address violated his due process rights. Floyd therefore claims that several of the Board's conclusions of law were erroneous and due to the erroneous conclusions his due process rights were violated and refers to his prior arguments regarding "Notice/timeliness." Floyd Brief at 26.

As the District Court held, however, the record supported the Board's determination that Floyd had received actual notice of the tax deed process. Idaho courts have held a tax deed may issue so long as the county treasurer substantially complies with the notice requirements. *Jahnke v. County of Bingham*, 115 Idaho 548, 551, 768 P.2d 811, 814 (Ct.App. 1989) (Court discussing I.C. 63-1134 – "Issuance of Tax Deed – Notice" prior to recodification of its correct location as I.C. 63-1005.) As the *Jahnke* court held, proof of notice can be gleaned from other sources,

including evidence that the property owner has actually received notification of the pending tax sale. *Id.*; CRA at 000148.

In conclusion, the District Court correctly found that the Board's Findings of Fact and Conclusions of Law were supported by substantial evidence on the whole record. The record supports the Court's determination that Floyd has received actual notice as early as May 2014, but certainly by October 16, 2014 that his taxes were delinquent. The record shows that Floyd was in constant communication with either the Treasurer's office and/or the Board over the status of the unpaid taxes. Ultimately, as the District Court held, it was Floyd's failure to provide evidence beyond his paid stamp argument that the taxes had been paid prior to the tax deed hearing that caused his property being taken to tax deed.

V.

**THE BOARD IS ENTITLED TO AN AWARD OF ATTORNEY FEES UNDER
I.C. §12-121 AND I.A.R. 41.**

The Board is entitled to an award of attorney fees under I.C. §12-121 and I.R.A. 41.

I.C. § 12-121 states in part:

In any civil action, the judge may award reasonable attorney fees to the prevailing part or parties where the judge finds the case was pursued or defended frivolously, unreasonably or without foundation.

I.C. § 12-121.

Floyd's appeal of the District Court's decision merely reargues the same issues Floyd argued to the District Court. Floyd presents no new evidence or authority that shows that the District Court's decision was incorrect in finding that Floyd's due process rights were not

violated. The District Court's determination that Floyd's due process rights were not violated is supported by the substantial evidence on the whole record. Floyd received actual notice. Floyd was able to be heard and present his evidence of why he thought the tax deed should not issue.

Floyd further invites this Court to revisit the District Court's decision that the Board's decision to take the property by tax deed was not clearly erroneous in view of the reliable probative and substantial evidence on the whole record; was not arbitrary or capricious; was not characterized by abuse of discretion; or was not a clearly unwarranted exercise of discretion. Floyd presents no new evidence or authority that provides a basis for reversing the District Court's decision, except to argue the District Court determinations were wrong.

In conclusion, Floyd's appeal merely asks this Court to second guess the findings of the District Court. His appeal provides no new argument or authority on which the District Court's decision can be reversed. *Bach v. Bagley*, 148 Idaho 784, 797, 229 P.3d 1746, 1959 (2010).⁶ As a result there is no basis in law or fact for Floyd's appeal and as such his appeal was pursued frivolously, unreasonably or without foundation.

⁶ *Regan v. Owen*, 2017 WL 3927024 at *8 (Idaho S. Ct., September 8, 2017) contains persuasive discussion of the legislative amendments to I.C. § 12-121 and references the Idaho Legislature's express purpose of reinstating the law on awarding attorney fees as the law existed prior to the Idaho Supreme Court's decision in *Hoffer v. Shappard*, 160 Idaho 868, 389 P.3d 681 (2016). However, the Idaho Supreme Court reheard the *Regan* case and issued its decision on rehearing in *Regan v. Owen*, 163 Idaho 359, 413 P.3d 759 (2018) which decision superseded the Court's September 8, 2017 *Regan* decision.

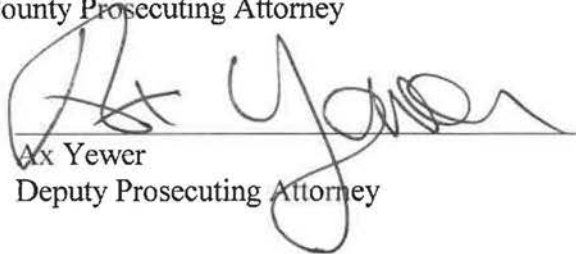
**VI.
CONCLUSION**

In conclusion, this Court should affirm the District Court's decision that Floyd's due process rights were not violated by the tax deed process followed by the Board in this matter. And further this Court should affirm the District Court's decision that Board's findings and conclusions and decision to take the Yaryan Property by tax deed due to the existence of the delinquent 2011 taxes was not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; was not arbitrary or capricious; was not an abuse of discretion; or was not a clearly unwarranted exercise in discretion.

RESPECTFULLY SUBMITTED this 6th day of June, 2018.

JAN M. BENNETTS
Ada County Prosecuting Attorney

By:


Alex Yewer
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of June 2018, I served two true and correct copies of the foregoing RESPONDENT'S BRIEF to the following person by the following method:

James Allen Floyd
P. O. Box 6952
Boise, Idaho 83707

Hand Delivery
 U.S. Mail
 Electronic Mail



Legal Assistant