

Tax Title Foreclosure Overview

Presenters

Jeffery D. Ugino, Esq.

Olga Bagnol, Esq.

July 9, 2015



KOPELMAN AND PAIGE, P.C.

The Leader in Public Sector Law

Disclaimer

This information is provided as a service by Kopelman and Paige, P.C. This information is general in nature and does not, and is not intended to, constitute legal advice as to any specific issue. You are advised not to take, or to refrain from taking, any action based on this information without consulting legal counsel about the particular facts of the specific issue.

Delinquent Taxes to Tax Taking

G.L. c. 60, §37: Securing the lien

- Lien for a municipality's taxes automatically arises upon non-payment retroactive to the January 1 “lien date”, which is six months prior to the start of the relevant fiscal year
 - ex: lien date for FY 2016 is January 1, 2015
- Automatic statutory lien continues for at least 3½ years from end of fiscal year of assessment but is unsecured until Instrument of Taking is executed
- If estate is alienated after the 3½ year period has run with municipality not having secured its lien through an Instrument of Taking, lien is lost for all years which are 3½ years or older
- No alienation and no Taking? Statutory lien continues
- Following the tax taking process secures the lien!!!

Tax Taking Process

- G.L. c. 60, §37: Fourteen-day demand letter to assessed owner
- G.L. c. 60, §53: Additional notice:
 - Notice by publication in newspaper
 - Post a notice in two or more convenient public places

Notice must comply with G.L. c. 60, §40:

Substantially accurate description of the . . . land . . . , the amount of the tax assessed on each, and the names of all owners known to the collector. Such notice . . . of the sale of the undivided real estate of a deceased person . . . shall contain the names of all the heirs or devisees . . . if the probate records of the county where the land lies disclose their identities.

Instrument of Taking

- G.L. c. 60, §54
 - Executed by the Collector and notarized
 - Must be recorded/filed within 60 days of execution
 - Contents:
 - Accurate description of each parcel of land taken
 - Assessed owner – G.L. c. 59, §11
(for deceased record owners, see G.L. c.59, §12D)
 - Amount of taxes
 - Costs related to the taking

Foreclosure, Part 1

- G.L. c. 60, §64: Land Court has “exclusive jurisdiction” over Tax Title Cases
- G.L. c. 60, §65: Petition to Foreclose
 - Holder of the tax title must wait 6 months before bringing a Petition to Foreclose
 - Court is very particular about the Petition’s contents:
 - Property description
 - Reference to underlying Instrument of Taking
 - Reference to underlying deed
 - Assessed value
 - Multiple-Parcel Petitions – common ownership allows municipality to file up to five parcels under one case

Foreclosure, Part 2

- Record Notice of Petition after filing (G.L. c. 60, §66)
- Title Report (G.L. c. 60, §66)
 - Court assigned title examiner
 - Examination spans 25 to 30 years back
 - Identifies all outstanding interests – equity, mortgagees, lienholders, etc.
 - Provides starting point for court to send notice to all interested parties
 - Additional due diligence
- Interested parties may Default (G.L. c. 60, §67) or file Answer (G.L. c.60, §68) contesting case
- Judgment (G.L. c. 60, §69)

Typical Title & Due Diligence Issues

- Incorrect references in Instrument of Taking
- Incorrect assessed owner
- Multiple outstanding Instruments of Taking
- Death and poor estate planning
- FDIC ownership of mortgage
- Dissolved corporate entities

Deeds in Lieu of Foreclosure

- G.L. c. 60, §77C:
 - Grantors: All persons with an interest in the property
 - Grantee: Acceptance by legislative body of municipality

To utilize the deed in lieu of foreclosure process, the tax title property at issue cannot have any liens or encumbrances, other than those held by the municipality.

Once the deed is accepted and recorded, taxes, interest, and other charges are treated as paid.

Recoverable Fees

- G.L. c. 60, §55: Preparation of Instrument of Taking, including:
 - Written demand (up to \$30), preparing advertisement (\$10), posting notice (\$5), preparing Instrument of Taking (\$10), recording Instrument of Taking (\$75) (G.L. c. 60, §15)
 - Title research and newspaper advertising fees have no maximum amount (G.L. c. 60, §15)
- G.L. c. 60, §§61 and 65: Reasonable actual legal fees and costs related to a Land Court foreclosure case may also be included in tax title balance for redemption

Tax Title Custodian

- G.L. c.60, §77B: Mayor/Board of Selectmen is the default tax title custodian; however, Mayor/Board of Selectmen may appoint a custodian to have care, custody, management of all property acquired

Status of Property Following Foreclosure

- G.L. c.60, §77 – Following entry of Judgment in foreclosure action, property is held for general municipal purposes
- Board of Selectmen of Hanson v. Lindsay, 444 Mass. 502 (2005): 2/3 vote of Legislature pursuant to Article 97 not required to transfer property because earlier attempted transfer for conservation purposes was ineffectual as land was held for general municipal purposes following tax title foreclosure

One Year Right to Petition to Vacate

- G.L. c.60, §69A: Interested party may petition Land Court to vacate Judgment within one year of entry so long as no innocent purchaser for value has acquired an interest in the property under G.L. c.60, §69
- Often mischaracterized as a “one year right of redemption”
- In practice, Land Court will customary allow Motion to Vacate Judgment so long as interested party pays entire balance due

One Year Right to Petition to Vacate, cont'd.

- Town of Lynnfield v. Owners Unknown, 397 Mass. 470 (1986): only interest municipalities have in tax title proceedings is the collection of taxes and related charges; purpose is not to provide means to acquire property for municipal purposes without paying owner fair compensation
- Municipality may file petition to vacate Judgment to vacate at any time (G.L. c.60, §69)

Low Value Foreclosures

- For properties assessed at \$20,920 or less in 2015, Collectors may apply for permission to foreclose through DOR's Gateway online portal
- G.L. c.60, §79 governs entire process
- Upon DOR approval to foreclose, Commissioner issues Affidavit which is recorded at Registry of Deeds and which permits auction to go forward
- Property auctioned after statutory notice is given
- Treasurer's Deed to purchaser completes foreclosure process

Post-Judgment Considerations

- Security
- Insurance
- Liability
- Compensation for use and occupancy
- All other landlord considerations

Assignment of Tax Titles

- G.L c.60, §§2C and 52
- Sold after municipality has done the work of executing and recording valid Instrument of Taking
- Makes Treasurer whole, but consider:
 - (1) Municipality loses ability to gain from a sale at auction-private assignee takes the gain at the expense of taxpayers
 - (2) Municipality cedes control over the ability to work with financially challenged taxpayers to allow them an opportunity to keep their property
 - (3) Municipality cedes control over who may next own the property after foreclosure
 - (4) Result of assignment auction may be to leave municipality with the most problematic properties

Chapter 21E Liability

- Imposes strict, joint and several liability on owners or operators of hazardous waste sites

- G.L. c.21E, §2 – Definitions: Municipality shall not be deemed an “owner or operator” if all of the following requirements are met:

(1) Municipality has taken the site for nonpayment of taxes

(2) No act of the municipality or of its employees or agents causes or contributes to the release or threat of release or causes the release or threat of release to become worse than it otherwise would have been

Chapter 21E Liability, cont'd

- (3) After acquiring title, the municipality satisfies all of the following conditions:
- (A) Notifies the DEP immediately upon obtaining knowledge of a release or threat of release
 - (B) Provides reasonable access to DEP to conduct response actions
 - (C) Undertakes reasonable steps to (i) prevent the exposure of persons to oil or hazardous materials by erecting physical barriers and (ii) contain the further release or threat of release of oil or hazardous materials from a structure or container;
 - (D) Where there is an imminent hazard to public health, safety, welfare, or the environment, takes action to control the harms through appropriate short term measures;
 - (E) Conducts all voluntary response actions in compliance with Chapter 21E and the Massachusetts contingency plan; and
 - (F) Acts diligently to sell or otherwise divest itself of ownership

Chapter 21E Liability, cont'd

- Bottom Line: municipality is excluded from the definition of owner/operator only with respect to releases and threats of release that first begin to occur before it acquires ownership/possession
- Municipality shall be deemed owner/operator with respect to any release/threat of release that first begins to occur at or from the site during the time in which it has ownership/possession
- Taygeta Corp. v. Varian Associates, Inc., 436 Mass. 217 (2002): plaintiff could sue for continuing trespass based on continuing seepage of hazardous material dumped by landowner's predecessor

Bankruptcy

- **11 USC 362(a):** Automatic Stay – violation of stay to create, perfect, or enforce any lien against property of the estate
- **G.L. c.60, §37A:** Statement of Continuing Lien – operates to extend the time within which a Taking may lawfully be made; all assessments, rates and charges continue to accrue; must then execute Taking within six months after receiving notice Bankruptcy case is closed
- Regular tax bills may continue to be sent out following filing of Bankruptcy petition

Bankruptcy Cont'd

- Treasurer should File Statement of Claim upon notification of Bankruptcy filing unless instructed not to do so (Chapter 7 “no asset” cases)
- Municipality’s claims are secured by an Instrument of Taking
- Bankruptcy discharge only operates as to personal liability of debtor, i.e., the lien will remain attached to property unless specifically addressed by Bankruptcy Court

Questions?



Jeffery Ugino Olga Bagnel

Kopelman and Paige, P.C.
101 Arch St., 12th Floor
Boston, MA 02110
(617) 557-0007

jugino@k-plaw.com
obagnel@k-plaw.com



KOPELMAN AND PAIGE, P.C.
The Leader in Public Sector Law