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TALK OF THE Towns & Topics

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In Rem Tax Foreclosure and its Underutilization by Towns

By Daniel Pozin, Esq., McCarthy Fingar LLP

In these times of tax caps, unfunded mandates and economic uncertainty, municipalities should be ever more vigilant about tax collection. Yet many towns in New York seem to be missing out on this low-hanging fruit. The failure to enforce tax collection is a drain on municipal resources and frankly, unfair to those who do pay their taxes. In jurisdictions where the town collects county and school taxes as well, towns are going out of pocket to make the tax levies whole.

New York State law provides a rather basic solution that many municipalities are either hesitant or loathe to pursue: in rem tax foreclosure. Real Property Tax Law, Article 11, is one of the easiest ways for towns to make their tax coffers whole. When we encounter towns that are unwilling to take this avenue, their reservation is usually two-fold. First, the procedures can be rather painstaking. Second, most towns prefer not to be in the "real estate business;" after all, the end result of such an action could be town ownership of property that town officials never intended to own. Both issues are easily addressed.

Let us begin with the more political of the two. We have found that almost without exception, the vast majority of property included in an in rem proceeding will be redeemed. In other words, the property owner will eventually pay off the tax liens, with interest and penalties, rather than simply allowing the town to take their property. Because the procedures of Article 11 require that all lien holders of record be noticed in the proceeding, more often than not, a mortgagee/lender will pay off the tax liens rather than lose its lien interest. Under the law, the failure of a lien holder to so protect their interest results in the extinguishment in their property interest.

In fact, in our experience, we have conducted proceedings with dozens of delinquent parcels, with perhaps one or two remaining unredeemed at the end of the proceedings. Typically, the town's receiver of taxes will already be familiar with particular parcels or property owners they expect will default in the proceeding. But again, that is the exception rather than the rule. In such cases, unredeemed parcels are deeded to the town by the receiver of taxes, and such parcels

may be sold at private or public sale or may be used by the town if appropriate. In one instance, a commercial site proved to be a very desirable location for a DPW substation.

The other reservation mentioned above is the process itself. Article 11 requires a compilation of all delinquent parcel identification including the owners' names on a *List of Delinquent Taxes*, which is filed with the county clerk. Various required and optional notifications follow. Title searches are obtained to identify the owner and lien holders of record, and then a formal petition, also subject to stringent notification requirements, is filed and served. Service of notice has its own particularities involving mailing, publishing and posting. Indeed, when all else fails, and parcels remain unredeemed, various affidavits are prepared and filed with the court along with a proposed judgment and decision of foreclosure seeking conveyance of title to the town, which has the effect of clearing all existing liens.

Many municipal law departments simply do not have the time or resources to maintain these proceedings. We have found this to be merely a matter of volume. Once a process is commenced, and the procedures followed, it is a matter of repeating the procedures each year. We have served numerous towns, villages and cities as special counsel for tax foreclosure and have compiled the forms and established the formats necessary to move the process forward, not only for the initial commencement of such action but for use in subsequent foreclosure proceedings. We have made it easy for municipalities to overcome the initial hesitancy while yielding annual rewards in compelling redemption. The money is out there for the taking.

Town officials should not feel bad about compelling payment. Towns may incorporate provisions for statutory installment payments for residential properties. However, some of the biggest offenders in our experiences have been commercial entities and, here in Westchester County, foreign governments.

[See: Power on Page 14](#)

From Page 13: Towns have Power to Compel Payment of Owed Taxes

We recently collected more than \$400,000 from a commercial development that failed to pay its taxes because it delayed proceeding with construction for a number of years. Notably, the construction lender was having no part of losing its own lien and promptly paid the outstanding tax arrears on behalf of the owner once the proceeding commenced.

Oddly enough, real property is not tax exempt simply because a foreign country or diplomat owns or occupies it. We have collected several hundred thousand dollars where residential property was found not to be exempt from property tax because its use was not consular in nature. Similarly, a successful proceeding was brought against property where the foreign government never filed a proper application for exemption and simply refused to pay the taxes that had accrued over time. Communications with the United Nations office of Consular Affairs and the U.S. Department of State were helpful in this regard, and a settlement to the municipality that had given up on collection was a windfall for its coffers.

The failure or refusal to pay taxes hurts

not only the town but all of its residents in terms of lost revenue. As Ben Franklin famously said, "In this world, nothing can be said to be certain, except death and taxes." Article 11 of the NYS Real Property Tax Law is there to help prove Franklin right, at least as far as taxes are concerned. □

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