Changes to Massachusetts Tax Foreclosure Law
and Some Potential Impacts on Municipalities

Steven J. Bolotin, Esq.*

Massachusetts cities and towns have the option of asserting ownership over properties which are delinquent on taxes, fees, or other municipal charges. Actions to obtain such ownership are often referred to as tax takings or tax foreclosures. These actions are similar to the manner in which a lender forecloses on an unpaid mortgage.

Until recently, the process for undertaking a tax foreclosure was relatively straightforward to allow municipalities to easily recover outstanding taxes and fees. However, as a result of a U.S. Supreme Court decision that has now changed.

Changes in the Law

In 2023, the U.S. Supreme Court addressed the issue of equity in property taken by municipal foreclosure in Tyler vs. Hennepin County, 598 U.S. _____ (2023). In that case, Geraldine Tyler owned a condominium in Hennepin County, Minnesota, that accumulated about $15,000 in unpaid real estate taxes along with interest and penalties. The County seized the condo and sold it for $40,000, keeping the $25,000 excess over Tyler's tax debt for itself. Tyler filed suit, alleging that the County had unconstitutionally retained the excess value of her home above her tax debt in violation of the Takings Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment. Overturning two lower court rulings, the U.S. Supreme Court held that when resolving tax foreclosures municipalities cannot retain equity beyond the taxes and penalties owed. Because Minnesota law recognized that a property owner is entitled to surplus revenue in excess of their debt in other situations, such as a bank foreclosure on a mortgaged property, it must also recognize that right when the state is involved. As the Court stated, "It can not extinguish a property interest that it recognizes everywhere else to avoid paying just compensation when the State does the taking."

Given the similarities between Minnesota and Massachusetts law, after the U.S. Supreme Court decision it was expected that the existing Massachusetts tax title sale process would not hold up in court if challenged. Accordingly, effective November 1, 2024, Massachusetts preemptively changed portions of Chapter 60 of Massachusetts's General Laws, significantly altering the tax title foreclosure process for all municipalities.

Initiating Tax Title Lien

Before seeking to take or sell a property for tax delinquency a municipality must first record an Instrument of Taking. This document creates a Tax Title Lien in favor of the municipality. The municipality must provide a notice of the intent to record an Instrument of Taking at least 14 days before the sale or taking of a property. The substance of these notices has been changed under the new law.

Rather than a traditional legal form, notices of the filing of an Instrument of Taking must now be written "in language understandable by a least sophisticated consumer" and issued in the 7 most commonly spoken languages in the Commonwealth. With respect to residential properties, such notices must also now include specific information, including, but not limited to:

- The amount of outstanding taxes and other municipal costs;
- That the taxpayer has a right to redeem;
- That a foreclosure complaint may be filed on or after a specific date;
- That the tax title may be sold;
- That non-response may lead to a default judgment; and
- That the property owner may be entitled to excess equity.

Additionally, for residential properties, notices must now be (a) mailed to the taxpayer at their last known residence or usual abode or place of business, (b) physically posted at the property, and (c) published on the municipal website. This means that newspaper publication is no longer an acceptable means of notice (except for certain commercial properties) and a sheriff or constable must be hired to enter onto the property at issue.

Discharging a Tax Title Lien

Once a Tax Title Lien is placed on a property the municipality may assign their rights to collect the delinquent amounts, sell their lien rights, or proceed with a Tax Foreclosure. Discharge of the Tax Title Lien can only occur by payment in full of the outstanding taxes/fees owed. This is called a Right of Redemption. There are some minor changes in the law relative to such redemptions.

Massachusetts statute allows municipalities to enter into payment plans with delinquent taxpayers at any time, subject to certain conditions. Previously, such payment agreements were capped at 5 years and required a minimum down payment of 25%. Under the new law payment plans can be expanded up to 10 years a require only a minimum 10% initial payment. Further, municipalities may now also waive any accrued interest. However, it should be noted that these are **not** requirements, merely options available to the municipality if they have enacted bylaws or ordinances giving them those options.

There are some additional conditions associated with redemption after an Instrument of Taking has been recorded. Prior to the filing of an Instrument of Taking a municipality charges a statutory interest rate of 14% on the delinquent amounts. After the filing a different amount may be charged. Previously, the amount was 16%, but under the new law it is reduced to 8%.

Obtaining a Judgment of Foreclosure

If the Right of Redemption is not timely exercised, or if agreed payments are not made, a municipality can proceed in the Land Court to seek a judgment of foreclosure. A judgment of foreclosure transfers full ownership of the property to the municipality (or its assignee) and extinguishes all rights of both the prior property owner and the holder of any lesser interests (such as mortgagors). Previously, a municipality could seek a judgment of foreclosure 6 months after filing an Instrument of Taking. Under the new law, a municipality must now wait 12 months.

Electing a Sale or Retention of Foreclosed Property

Historically, once a municipality took title to a property through a Tax Foreclosure it had an unlimited time to decide what to do with it. Under the new law, a municipality will now have only **14 days** after the entry of a judgment of foreclosure to determine whether it intends to dispose of the property or retain it. Either way, there are a number of new procedures which must be followed.

If the municipality elects to sell the property it can no longer proceed to an immediate auction sale. Instead, it must list the property with a licensed real estate agent or broker within 180 days of the issuance of the judgment of foreclosure who must try to sell the property for fair market value.

If after 12 months of being listed by a realtor the property has not sold, then the municipality must try to sell the property by public auction. However, there are also conditions to such auctions. Under the new law, municipalities will be required to obtain an appraisal from an independent, licensed appraiser prior to proceeding with an auction. That is because they are now not permitted to accept a bid at auction that is less than 2/3 of the appraised value of the property.

If, instead of selling the property, a municipality elects to retain it following foreclosure, the municipality must now use "reasonable best efforts" to have the property appraised within 120 days of the issuance of the judgment of foreclosure. The appraisal must be performed by an independent, licensed real estate appraiser. Most significantly, it must be based on the highest and best use of the property as of the date of the judgment of foreclosure.

Obligation to Maximize and Return Excess Equity

As discussed above, the genesis of these new laws is the Supreme Court ruling barring municipalities from retaining any "excess equity" in tax foreclosure properties. There are a number of new regulations applicable to the handling of excess equity.

With respect to tax title properties that are sold, excess equity is now defined as any value above "taxes, interest, fees and charges of keeping, as reflected in the tax title account balance as of the date of the foreclosure judgment, and the fees, expenses, charges and costs actually and reasonably incurred in selling or appraising the property." It is calculated by subtracting from the gross sale proceeds:

- The tax title balance as of the date of foreclosure judgment;
- Any unpaid taxes or fees, such as water and sewer charges, insurance or condominium fees, accruing from the date of foreclosure; and
- Any documented post-judgment costs incurred (such as attorneys' fees, real estate fees and commissions, property management fees, etc.).

With respect to tax title property which a municipality elects to retain, excess equity is the appraised value less the above offsets.

Claims to recover the excess equity must be submitted directly to the municipality and are subject to strict deadlines. Any disputes arising from these excess equity claims must be filed in the Superior Court of the county where the property is located. Notably, even if there are no claimants the municipality is **not** permitted to keep the excess equity. Instead, it needs to be turned over to the state's Unclaimed Property Division.

Retroactive Date for Changes

The new law took effect November 1, 2024. However, that is not the start date for their effect. Instead, the provisions relating to return of excess equity are deemed to apply to all tax foreclosure judgments obtained after **May 25, 2021**. This means that property owners whose land was taken after that date may file a claim for lost equity. Such claims must be filed within a year of the effective date of the new statutes, meaning no later than November 1, 2025.

In addition to the statutory changes, under the new law the state is required to issue new regulations which are intended to clarify the various obligations and responsibilities of those involved in tax takings and address some of the mechanics of compliance. For instance, it is unclear from the regulations whether municipalities that sold properties at auction for less than 2/3 of what such properties would have appraised for at the time will now have to make up the difference. It is also unclear whether properties that were retained after Tax Foreclosure are to be appraised for their value at the time of the taking or when the challenge is filed. Moreover, it is unclear whether new transfers of previously foreclosed properties may trigger new obligations on the part of municipalities. Such regulations have yet to be issued, meaning that municipalities do not yet know the full scope as to the actions which can be challenged or the potential financial exposure they may face. For this reason, most municipalities have been advised not to undertake any action with respect to either new or previously foreclosed Tax Title properties.

Effects of the New Law

The changes to the law require municipalities, rather than the delinquent taxpayer, to engage in the type of marketing and negotiations needed to ensure that maximum value is obtained for a tax foreclosure property. As a result, a municipality will have to assume the risk that these additional expenses may not be recouped even when merely selling a tax title property to recover monies actually owed (which represent the cost of services already provided to the delinquent party).

Of greater concern is the effect the new law will have on the ability of a municipality to obtain property for the public good. Municipalities have traditionally retained tax foreclosure properties for either affordable housing or recreational/open space. The new legal framework negates using these properties for such uses in all but the most extreme cases.

With respect to affordable housing, the tax title properties which are typically best suited are those already used as residencies. As discussed above, the new law first imposes additional notice procedures and time delays to these types of properties which will increase the cost to any tax foreclosure action. For properties which are vacant, municipalities will be obligated to manage them for up to a year while they are being sold, requiring ongoing oversight and maintenance. Then, the return of excess equity mandate now makes these properties more expensive. Combined, these requirements create a level of uncertainty when undertaking a tax taking that serve as a barrier to affordable redevelopment.

With respect to open space/recreational use, not only does the new law require that the excess equity be returned to the prior owner (or the state of no claim is filed) but it also obligates the municipality to actively maximize such equity by obtaining an appraisal based on highest and best use for the property. That means going beyond the value as the property is presently being used (usually as undeveloped land) and instead determining what other uses might generate a higher value. In practical terms, it means incurring the expense of hiring both a land use specialist to assess what alternate uses there could be for such property and an appraiser to determine which of those uses would be considered the highest and best. Then, based on those findings, a municipality must set aside sufficient funds to ensure that if foreclosure is successful (meaning the property is not redeemed at the last minute) there are adequate monies to fund the excess equity amount. Moreover, given the potential for dispute over what may be the highest and best use for a property, there is a greater potential for challenge in the Superior Court to the valuation, further increasing the potential costs associated with an open/recreational space tax taking. This means that the cost of tax title properties will likely make them unsuitable as open/recreational space.

Even beyond the mere fact that the new law will increase the cost of undertaking tax foreclosures, it also imposes upon municipalities budgetary constraints. Previously, if a municipality wanted to undertake a tax foreclosure the cost was relatively fixed, meaning that they would know adequate funds were available to undertake the process. Now, given the obligations imposed, before undertaking a tax foreclosure a municipality must appropriate monies to pay for excess equity, which at best would be a speculative amount. This will mean that when undertaking a Tax Foreclosure, a municipality will have to set aside additional funds, deferring their use for other municipal needs. At a time of budget constraints this may not be feasible.

Conclusion

There is a rationale for imposing some requirements for tax foreclosures so as not to overly penalize those unable to make basic payments. However, the new regulations go much further. By shifting almost all obligations and risks to the municipalities they actively discourage use of their tax taking authority.

As a result of these changes municipalities will be further burdened with the obligation of providing services for those not paying for them. At the same time, municipalities will no longer be able to offset those expenses by utilizing delinquent properties for the public benefit.

Given the up-front costs that municipalities must incur before proceeding with a tax taking, the requirement that they be the ones to undertake efforts to maximize the value of such properties, and the obligation to give the benefits of those efforts to the former property owner or the state, absent a compelling need to control a particular property it appears that the cost of a tax taking is likely to far exceed any benefits to the community.

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