

FLAMM, TEIBLOOM & STANKO, LTD.

20 North Clark Street • Suite 2200 • Chicago, Illinois 60602
Telephone (312) 236-8400 • Facsimile (312) 236-7660
E-mail: fts@flamm.com • Website: www.flamm.com

Matthew A. Flamm
Joel D. Teibloom
John W. Stanko, Jr.
Emmett R. McCarthy

Of Counsel
Richard K. Orlikoff
Bruce M. Buyer

Henry W. Kenoe (1907-1998)
Arnold M. Flamm (1925-1998)

MEMORANDUM

To: Firm attorneys, clients, prospective clients, approved outside counsel

Re: Timing Is Everything With Delinquent Taxes

Below is a quick outline of the options for a property owner (or other interested party) in dealing with delinquent real estate taxes. If you have any questions, please contact one of the attorneys in our firm.

1. PAY THE DELINQUENT TAXES

Pay the delinquent taxes upon receipt of the delinquency notice.

2. REDEEM THE DELINQUENT TAXES

Redeem the delinquent taxes as soon as possible after the tax sale.

- a. In reality, many taxpayers may not discover the delinquency until the tax buyer has filed a petition for tax deed and sent take notices to interested parties.

3. REDEEM THE DELINQUENT TAXES UNDER PROTEST

If a tax deed petition has been filed, an interested party may redeem delinquent taxes under protest.

- a. The grounds for redeeming under protest are limited to those defenses that would provide a sufficient basis to deny entry of an order directing issuance of tax deed.
- b. Any grounds for objection not specified at the time of the redemption under protest shall not be considered by the court.
- c. The redeeming party must be very careful to follow the procedural requirements of redeeming under protest.

- d. The redemption under protest constitutes an appearance in the tax deed proceeding, and the a failure to appear and defend shall constitute a waiver of the protest.
- e. The redeeming party must be aware that if the defense is not sustained, the court “shall order the party redeeming to pay the petitioner reasonable expenses, actually incurred, including the cost of withheld redemption money, together with a reasonable attorneys fee.”

4. **IF GROUNDS EXIST, SEEK A SALE IN ERROR**

- a. The Property Tax Code authorizes the Court to declare a sale in error on a number of grounds.
- b. Some of the grounds may be raised by the County Collector, by the owner of the certificate of purchase or by a municipality that owns or has owned the property sold (but **not** an owner or interested party), including:
 - 1. that the property was not subject to taxation, or that all or any part of the lien of taxes sold has become null and void or unenforceable;
 - 2. that the taxes had been paid prior to the sale;
 - 3. that there is a double assessment;
 - 4. that the description of the property is void for uncertainty;
 - 5. that the assessor, board of appeals or other county official has made an error (other than an error of judgment as to the value of the property);
 - 6. that the owner of homestead property had tendered timely and full payment of the taxes that the taxpayer reasonably believed were due and owing, but the County Collector did not apply the payment to the homestead property.
 - 7. that *before* the tax sale a voluntary or involuntary bankruptcy or reorganization petition had been filed by or against the legal or beneficial owner of the property;
 - 8. that the property is owned by the State of Illinois, a municipality, or a taxing district; or
 - 9. the owner of the property is a reservist or guardsperson who is granted an extension of his or her due date under the Property Tax Code.
- c. Certain other grounds may be raised **only** by the owner of the certificate of purchase, including:
 - 1. that a bankruptcy or reorganization petition has been filed by or against the property owner *after* the date of the tax sale;

2. that the improvements upon the property have been substantially destroyed or rendered uninhabitable subsequent to the tax sale; or
 3. that there is an interest in the property held by the United States that cannot be extinguished by a tax deed.
 4. A sale in error, without interest, may be declared on petition of the tax purchaser where environmental conditions exist which impair the merchantability of title to the property.
- d. In lieu of reimbursement of money advanced by a city, village or incorporated town under the police and welfare power by reason of a demolition lien or other advancements made from public funds, the tax purchaser may elect to have the tax purchase set aside as a sale in error, without interest. This section has been interpreted to require reimbursement only of the principal amount of the demolition lien, not accrued interest.

5. OBJECT TO THE PETITION FOR TAX DEED

Prior to entry of the order directing issuance of the tax deed, an interested party may file objections in the tax deed proceeding.

- a. Unless there is a specific strategy for doing otherwise, file objections before the prove up hearing or as soon as possible after the prove up.
- b. A party objecting to issuance of a tax deed may raise as a defense any failure to comply with requirements for issuance of a tax deed. Section 22-45 directs the Court to insist on “strict compliance” with the notice requirements of Sections 22-10 through 22-25. Even small errors in those notices may result in denial of the tax deed if an interested party properly raises an objection.

6. MOVE TO VACATE THE ORDER FOR TAX DEED WITHIN 30 DAYS (“DIRECT ATTACK”)

Section 2-1203 of the Code of Civil Procedure authorizes a motion for relief from a tax deed order filed within 30 days after entry of the order. Any issue that could have been raised at the prove up hearing may be presented in a Section 2-1203 motion filed within 30 days after entry of the order. Courts are very liberal in granting relief under Section 2-1203. Keep in mind that the provisions of Section 22-80 (reimbursement to tax buyer) will apply if the order is vacated (See Section 9 below).

7. PETITION TO VACATE THE ORDER FOR TAX DEED AFTER 30 DAYS (“COLLATERAL ATTACK”)

A far stricter standard applies to a petition for relief from a tax deed order under Section 2-1401 of the Code of Civil Procedure filed more than 30 days after entry of the tax deed order. Grounds for relief under Section 2-1401 are limited to: (1) that the taxes were paid prior to the sale; (2) that the property was exempt from taxation; (3) that the tax deed was procured by fraud or deception on the part of the tax purchaser; or (4) that the tax purchaser did not make a diligent inquiry and effort to serve a party holding a recorded interest in the property who was not named in the publication notice. Under very limited circumstances,

relief may be granted if an attempt to redeem was frustrated by an error made by the county clerk or county treasurer, which can result in both attorneys' fees and a redemption being paid from the Indemnity Fund.

- a. The petitioner must be diligent in presenting the petition even if it is filed within two years of the order for tax deed.
- b. The petition must be supported by affidavit as to matters not of record.
- c. Filing a petition to vacate does not stay enforcement of the order for tax deed, i.e., the tax buyer may obtain possession of the property while the litigation is pending. The petitioner will have to negotiate with the tax buyer regarding possession of the property, frequently through the payment of monthly "use and occupancy."
- d. A petition to vacate cannot affect parties with bona fide interests, such as subsequent purchasers or mortgagees, who were not parties to the tax deed proceeding and who acquired an interest in the property for value after issuance of the tax deed and before filing of a petition to set aside the tax deed, unless lack of jurisdiction affirmatively appears from the record. Section 2-1401(e).
- e. Whether lack of jurisdiction appears "of record" can produce interesting results. See, *Jojan Corp v. Brent*, 307 Ill.App.3d 496, 505-06, 718 N.E.2d 539, 547-47 (1st Dist.1999) ("the record" defined as "pleadings, process, verdict and judgment or decree.") A party having actual or constructive notice of facts that would put a prudent person on inquiry that there may be a defect in the proceeding is not a bona fide purchaser. Application of Cook County Collector (*Standard Bank v. Barnard*), 593 N.E.2d 538 (1st Dist. 1992).
- f. The petitioner's counsel must have a thorough understanding of the Property Tax Code and must act quickly to determine potential grounds to vacate the order directing issuance of the tax deed to avoid arguments about lack of diligence and the effects of bona fide interests.
- g. Petitioner's counsel must also be cognizant of standing issues for the petitioner.

8. **PETITION TO VACATE THE ORDER FOR DEED AFTER TWO YEARS**

Some grounds can be raised at almost any time (but see Section 7(d-e) above):

- a. That the taxes had been paid in full prior to issuance of the judgment and order of sale for delinquent taxes.
- b. That the property was exempt from taxation.
- c. That the tax deed violated the doctrine of sovereign immunity by defeasing an ownership interest of the State or municipality, or any interest of the United States, except by consent.

- d. That the owner of the property had filed a petition for relief in bankruptcy prior to the tax sale.
- e. Lack of jurisdiction is always a defense, subject to Section 2-1401 of the Code of Civil Procedure. However, failure to properly serve notices required by the Property Tax Code does not deprive the Court of jurisdiction. Even application of an incorrect redemption period does not deprive the Court of jurisdiction. But if the failure to give proper notice would have the effect of depriving a party of his or her interest in property without due process, application of Federal and Illinois constitutional guaranties may permit attack on tax deed at any time.

9. REIMBURSEMENT OF AMOUNTS PAID BY TAX PURCHASER

- a. If a tax deed order is set aside because the property was exempt, the taxes were paid prior to the tax sale, or if the tax sale was void for some other reason, the Court shall order a refund of the amounts paid by the tax purchaser, with interest. The refund is paid by the County Collector.
- b. If a tax deed order is set aside on any other grounds, the Court shall order that the party who successfully contested the tax deed pay to the tax purchaser all amounts paid by the tax purchaser (including taxes, subsequent years' taxes, costs and reimbursement of municipal advances), with interest at 18% per annum on taxes and costs paid by the tax purchaser.
- c. However, reimbursement is not required where more than one year has expired from expiration of the redemption period to the date of recording of the tax deed, since the certificate of purchase has become null and void. *Application of Rosewell (First State Bank & Trust Company of Hanover Park v. Wolf)*, 209 Ill.App.3d 187, 568 N.E.2d 89 (1st Dist. 1991).

10. THE INDEMNITY FUND IS A REMEDY OF LAST RESORT

If a tax deed has been issued and the former owner is barred or otherwise precluded from bringing an action to recover the property, it may still be possible to obtain relief for the property owner. *Application of County Treasurer (Apex Tax Investments v. Mary Lowe)*, 217 Ill.2d 1, 838 N.E.2d 907 (2005).

- a. If the property consists of four or fewer dwelling units and if the owner resided on the property on the last day of the redemption period, the owner must show only that he or she, “in the opinion of the Court which issued the tax deed order, is equitably entitled to just compensation.”
 - 1. Damages under this Section are limited to the fair market value of the property as of the date the tax deed was issued, less any mortgages or liens thereon, but cannot exceed \$99,000.
- b. The owner of any other property (and an owner-occupant seeking in excess of \$99,000) must show that he or she sustained loss or damage by reason of the issuance of a tax deed “without fault or negligence of his or her own.” This is a higher standard, and requires a greater degree of blamelessness.

- c. The petition for indemnity is subject to the 5-year limitations period for “civil actions not otherwise provided for.”
- d. The indemnity petitioner may have to negotiate an agreement with the mortgagee(s) in order to make the Indemnity Fund a viable economic option.
- e. The indemnity petitioner may be able to enter into an agreement with the tax buyer (commonly known as a repurchase or “flip” agreement) to reacquire the property using the proceeds of an indemnity fund judgment.