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STATE OF MICHIGAN

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REVENUE BOND ACT: Municipal collection of delinquent utility-service charges on tax foreclosed property

GENERAL PROPERTY TAX ACT:

A municipality cannot require purchasers of tax foreclosed property to pay delinquent utility-service charges incurred by former owners of the foreclosed property before the municipality will provide utility services to the new owners of the property. Under the General Property Tax Act, MCL 211.1 *et seq*, a judgment of foreclosure extinguishes all liens and interests related to unpaid utility-service charges against the property. MCL 211.78k. A municipality may, however, seek to recover such charges by including the delinquent charges in the cost of the property at the time it is offered for sale under the General Property Tax Act, or by instituting other lawful action against the former owners.

Opinion No. 7258

May 6, 2011

Honorable Paul E. Opsommer
State Representative
The Capitol
Lansing, MI 48909

You have asked whether a municipality may require purchasers of tax foreclosed property to pay delinquent utility-service charges incurred by former owners of the foreclosed property before the municipality will provide utility services to the new owners. In particular, you ask about water and sewage charges, as well as charges for electrical service from a municipally-owned power plant.

Information provided to this office indicates the municipality relies on 1939 PA 178 as amended, MCL 123.161 *et seq*, and section 21 of the Revenue Bond Act of 1933, MCL 141.121, as the bases for refusing to provide utility service to new owners of tax foreclosed properties that have delinquent utility charges.

The first statute, 1939 PA 178, addresses water and sewage services. Section 2, MCL 123.162, provides that a municipality supplying water or sewage services has a lien on the premises served, as security for the collection of water or sewage system rates or charges. "This lien shall become effective immediately upon the distribution of the water or provision of the sewage system service to the premises or property supplied, but shall not be enforceable for more than 3 years after it becomes effective." Section 3, MCL 123.163, provides that the lien may be enforced "in the manner prescribed in the charter of the municipality, by the general laws of the state providing for the enforcement of tax liens, or by an ordinance duly passed by the governing body of the municipality." Section 5, MCL 123.165, provides that the lien has priority over all other liens except taxes or special assessments:

The lien created by this act shall . . . have priority over all other liens *except taxes or special assessments* whether or not the other liens accrued or were recorded before the accrual of the water or sewage system lien created by this act. [Emphasis added.]

Section 6, MCL 123.166, provides that a municipality may enforce its liens by discontinuing water or sewer services:

A municipality may discontinue water service or sewage system service from the premises against which the lien created by this act has accrued if a person fails to pay the rates, assessments, charges, or rentals for the respective service, or may institute an action for the collection of the same in any court of competent

jurisdiction. However, a municipality's attempt to collect these sewage system or water rates, assessments, charges, or rentals by any process shall not invalidate or waive the lien upon the premises.

The second statute on which the municipality relies, the Revenue Bond Act of 1933, MCL 141.101 *et seq.*, includes facilities for water, sewer, and electrical services within the definition of "public improvements" covered by the Act. MCL 141.103(b). Under section 21(3), MCL 141.121(3), a municipality may assert a lien for unpaid water, sewer, and electrical service charges. This section further provides for enforcement of the lien by collection in the same manner as taxes are collected, or by discontinuing service to the premises:

Charges for services furnished to a premises may be a lien on the premises, and those charges delinquent for 6 months or more may be certified annually to the proper tax assessing officer or agency who shall enter the lien on the next tax roll against the premises to which the services shall have been rendered, and the charges *shall be collected and the lien shall be enforced in the same manner as provided for the collection of taxes assessed upon the roll and the enforcement of the lien for the taxes.* . . . In addition to any other lawful enforcement methods, the payment of charges for water service to any premises *may be enforced by discontinuing the water service* to the premises and the payment of charges for sewage disposal service or storm water disposal service to a premises may be enforced by discontinuing the water service, the sewage disposal service, or the storm water disposal service to the premises, or any combination of the services. [MCL 141.123(3) (emphasis added).]

In summary, 1939 PA 178 and the Revenue Bond Act provide that unpaid utility-service charges become liens against the property that may be enforced by discontinuing services, instituting a collection action, or entering the lien on the tax roll against the property. These statutes, however, must be read in conjunction with the foreclosure provisions of the General Property Tax Act (GPTA), MCL 211.1 *et seq.*

Delinquent property taxes are subject to forfeiture and foreclosure under sections 78 through 78o of the GPTA, MCL 211.78 – 211.78o. On March 1 each year, taxes levied in the immediately preceding year that remain unpaid are returned delinquent to the county treasurer. MCL 211.78a(2). On March 1 of the year following delinquency, if the delinquent taxes remain unpaid, the property forfeits to the county treasurer. MCL 211.78g(1).¹ If taxes remain unpaid, a circuit court will hold a foreclosure hearing within 30 days before March 1 of the year following forfeiture, followed by a final redemption period that expires on March 31, the effective date of the foreclosure judgment. MCL 211.78h(5) and 211.78k.² For example, unpaid 2010 taxes are returned delinquent to the county treasurer on March 1, 2011, forfeited to the county treasurer on March 1, 2012, and foreclosed on March 31, 2013.

In adopting the current tax foreclosure process in 1999 PA 123, the Legislature made clear its desire to promote the return of tax-delinquent property to productive use:

The legislature finds that there exists in this state a continuing need to strengthen and revitalize the economy of this state and its municipalities by encouraging the efficient and expeditious return to productive use of property returned for delinquent taxes. Therefore, the powers granted in this act relating to the return of property for delinquent taxes constitute the performance by this state or a political subdivision of this state of essential public purposes and functions. [MCL 211.78(1) (emphasis added).]

To promote the return of tax-delinquent property to productive use, the Legislature provided in section 78k(5) of the GPTA that, with narrow exceptions not relevant here, all liens against property and other interests in property, recorded or unrecorded, are canceled when the tax-delinquent property is foreclosed:

The circuit court's [foreclosure] judgment shall specify all of the following:

* * *

(c) *That all liens against the property, including any lien for unpaid taxes or special assessments, except future installments of special assessments and liens recorded by this state or the foreclosing governmental unit pursuant to the natural resources and environmental protection act . . . , are extinguished, if all forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section*

(d) That, except as otherwise provided in subdivisions (c) and (e), *the foreclosing governmental unit has good and marketable fee simple title to the property*, if all forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section

(e) *That all existing recorded and unrecorded interests in that property are extinguished*, except a visible or recorded easement or right-of-way, private deed restrictions, interests of a lessee or an assignee of an interest of a lessee under a recorded oil or gas lease, interests in oil or gas in that property that are owned by a person other than the owner of the surface that have been preserved as provided in section 1(3) of 1963 PA 42 . . . , or restrictions or other governmental interests imposed pursuant to the natural resources and environmental protection act . . . , if all forfeited delinquent taxes, interest, penalties, and fees are not paid on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section [MCL 211.78k(5) (emphasis added).]

Liens for unpaid utility-service charges do not fall within the narrow interests excepted from extinguishment under this statute.

The Legislature reiterated its intent that utility liens on tax foreclosed properties be canceled when it added section 78m (13) to the GPTA in 2003 PA 263, cancelling certain liens that may arise during or immediately following the foreclosure process:

For property sold under this section . . . , all liens for costs of demolition, safety repairs, debris removal, or sewer or water charges due on the property as of the December 31 immediately succeeding the sale . . . of the property are canceled effective on that December 31. [MCL 211.78m(13).]

Tax foreclosure cancels any liens against property for water or sewage services imposed under 1939 PA 178, relied on by the municipality, because: (1) section 5 of 1939 PA 178, MCL 123.165, expressly provides that liens under the act are junior to tax liens on the property; (2) the express language of the foreclosure judgment as set forth in section 78k(5) of the GPTA, MCL 211.78k(5), cancels the liens against foreclosed property; and (3) the express language of section 78m (13) of the GPTA, MCL 211.78m(13), cancels any subsequent lien due on property that may arise during the year of the foreclosure of the property. Although section 6 of 1939 PA 178, MCL 123.166, authorizes a municipality to enforce its liens by discontinuing service, once the tax liens are foreclosed no liens remain against the property that can be enforced by refusing to provide service. Accordingly, 1939 PA 178 does not authorize a municipality to refuse utility services to tax foreclosed property based on unpaid charges incurred by former owners.

Similarly, pursuant to sections 78k(5) and 78m(13) of the GPTA, MCL 211.78k(5) and 211.78m(13), tax foreclosure cancels liens against property imposed under the Revenue Bond Act of 1933, also relied on by the municipality. It is true that section 21 of the Revenue Bond Act provides for the enforcement of charges for water and sewer services in language that is not directly tied to the existence of a lien against the property:

In addition to any other lawful enforcement methods, the payment of charges for water service to any premises may be enforced by discontinuing the water service to the premises and the payment of charges for sewage disposal service or storm water disposal service to a premises may be enforced by discontinuing the water service, the sewage disposal service, or the storm water disposal service to the premises, or any combination of the services. [MCL 141.121.]

But, to the extent this enforcement mechanism is an interest in the property that runs with the land, section 78k(5)(e) of the GPTA, MCL 211.78k(5)(e), cancels that interest by extinguishing "all existing recorded and unrecorded interests in [foreclosed] property." Conversely, if the enforcement mechanism is not an interest that runs with the land, it is not enforceable against the new owner, assuming the new owner is not contractually bound to pay a prior owner's indebtedness and has not received any service for which payment is due. Accordingly, the Revenue Bond Act of 1933 does not provide a basis on which a municipality can refuse to provide utility services to tax foreclosed property based on unpaid charges incurred by former owners.

The tax foreclosure's extinguishment of liens against foreclosed property for unpaid utility services provided to former owners does not necessarily extinguish the debt, merely the enforcement mechanisms that would run with the land to new owners acquiring through or after the tax foreclosure. Thus, municipalities are free to pursue other lawful collection mechanisms against the former owners.

It should also be noted, as set out above, that both 1939 PA 178 and the Revenue Bond Act of 1933 provide that liens for service charges can be enforced in the same manner as provided for the collection of delinquent taxes. Thus, if the local ordinances authorize the collection of service charges as taxes and the municipality places delinquent utility charges on the tax roll, the delinquent charges can be included in the minimum bid at which foreclosed property is offered for sale under section 78m of the GPTA. MCL 211.78m. If this is done, and sale proceeds are sufficient, the utility charges would be recovered out of sale proceeds under section 78m(8)(a) of the GPTA. MCL 211.78m(8)(a).

It is my opinion, therefore, that a municipality cannot require purchasers of tax foreclosed property to pay delinquent utility-service charges incurred by former owners of the foreclosed property before the municipality will provide utility services to the new owners of the property. Under the General Property Tax Act, MCL 211.1 *et seq.*, a judgment of foreclosure extinguishes all liens and interests related to unpaid utility-service charges against the property. MCL 211.78k. A municipality may, however, seek to recover such charges by including the delinquent charges in the cost of the property at the time it is offered for sale under the General Property Tax Act, or by instituting other lawful action against the former owners.

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¹ "Forfeiture" means only that a foreclosing governmental unit may seek a judgment of foreclosure if property is not redeemed as provided under the Act. MCL 211.78(7)(b). Forfeiture does not affect title per se. Forfeiture does not give the county treasurer or the State (if the State is the foreclosing governmental unit), any right, title, or interest in the property. *Id.*

² Contested foreclosures may be decided at a later hearing, in which case the redemption period expires 21 days after entry of the foreclosure judgment on the contested parcel. MCL 211.78k(5).

<http://opinion/datafiles/2010s/op10337.htm>
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