

Recent Changes in Tax Title Foreclosure Procedures

August 26, 2024

On July 29, 2024, the Governor signed into law the General Appropriations Act for Fiscal Year 2025, which in part amended portions of General Laws Chapter 60 relevant to the municipal tax title foreclosure process. These amendments are intended to directly address the U.S. Supreme Court's 2023 decision in Tyler v. Hennepin County, Minnesota, in which the Court found that "strict foreclosure" statutes, such as Massachusetts' tax title foreclosure statutory scheme, are unconstitutional. Our prior guidance on the Tyler case and its implications can be found [here](#). The 2024 amendments to General Laws Chapter 60 impose new requirements on municipalities in the tax title foreclosure process and make significant changes to the process to dispose of property following foreclosure, as well as the treatment of excess equity. These provisions, which generally take effect on November 1, 2024, include:

- G.L. c. 60, §65: The time period that a municipality must wait before filing a petition for foreclosure with the Land Court has been increased from 6 months to 12 months following the recording of an Instrument of Taking.
- G.L. c. 60, §62: The interest rate for balances held in the tax title account has been reduced from 16% to 8%. It is important to note, however, that the interest rate applicable to unpaid tax balances prior to being certified to the tax title account remains unchanged at 14%.
- G.L. c. 60, §62A: Payment agreements, which are currently capped at 5 years with a minimum down payment of 25%, can now be expanded to 10 years with a minimum 10% initial payment. Further, municipalities may waive any accrued interest. However, it should be noted that a municipality must adopt a bylaw or ordinance in order to implement these changes, as that requirement in G.L. c. 60, §62A was not changed by the new legislation.
- Demands and Notices for Residential Property: The amendments impose additional requirements for demands and certain notices under G.L. c. 60 for residential properties. Specifically, demands and notices must be prepared "in language understandable by a least sophisticated consumer" and in the seven (7) most commonly spoken languages in the Commonwealth. The Department of Revenue is tasked with developing standardized forms, which have not yet been released. Additionally, for residential properties, G.L. c. 60, §53 was amended to require mailing to the taxpayer at their last known residence or usual abode or place of business, posting at the property and publication on the municipal website, instead of newspaper publication. Newspaper publication now appears to only apply to non-Class One residential properties. Moreover, the notice for residential properties must also include specific information, including, but not limited to: the 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.

Most significantly, the amendments alter the procedure to dispose of or retain tax title property following entry of judgment. Specifically, following entry of judgment, a municipality will have 14 days to determine whether it wishes to dispose of the property or retain it. Given the short time frame to determine what the municipality wants to do with the property, we recommend that you carefully consider your options before judgment enters so that you are able to meet this deadline.

Selling Property After Foreclosure. If a municipality elects to sell the property following foreclosure, it will no longer proceed with an auction, at least initially. Instead, the municipality must list the property with a licensed real estate agent or broker within 180 days of the issuance of a final judgment. If after 12 months the property has not sold, the municipality must then seek to sell the property by public auction. A municipality cannot accept a bid that is less than 2/3 of the appraised value of the property. Therefore, while an appraisal is not required in order to list the property with a broker, municipalities will be required to obtain an appraisal from an independent, licensed appraiser prior to proceeding with an auction.

In conformance with Tyler, the new legislation bars municipalities from retaining any “excess equity” beyond what is owed in unpaid taxes, interest, and fees following foreclosure. “Excess equity” does not include any “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.” When a property is sold, excess equity 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, including but not limited to:
 - Attorneys’ fees
 - Real estate agent or broker fees and commissions
 - Listing fees
 - Appraisal fees
 - Cost of notifications and publication
 - Property management

Retaining Property After Foreclosure. If, instead of selling the property, a municipality elects to retain it following foreclosure, the municipality must use “reasonable best efforts” to have the property appraised within 120 days of the court’s issuance of final judgment. The appraisal must be performed by an independent, licensed real estate appraiser and must be based on the highest and best use of the property as of the date of final judgment. We understand this raises issues, as the value based on highest and best use may not be consistent with the assessed value of the property, which is typically based on the actual use of the property. Excess equity is then calculated by subtracting from the appraised value the tax title balance as of the date of foreclosure judgment and any documented post-judgment costs of the appraisal.

Treatment of Excess Equity Following Sale or Appraisal. Once the property has been sold or appraised, any excess equity must be placed in escrow in a segregated interest-bearing account. The municipality must provide a written itemized accounting of the excess equity and how it was calculated to any parties entitled to claim excess equity. If the identity and mailing address of a party entitled to claim excess equity is not known, the municipality is required to “provide a notice.” The statute does not define what form of notice is acceptable if the identity and mailing addresses of interested parties are unknown, but presumably, notice by publication would be sufficient. Parties eligible to claim excess equity have 18 months from receiving the municipality’s accounting to claim any excess equity. The amendments do not address how funds are to be paid out or what procedure should be followed if there are multiple claimants. If funds are not claimed within 19 months, the funds must be transferred to the Unclaimed Property Division of the State Office of the Treasurer and Receiver General pursuant to G.L. c.200A.

****Warning* If your municipality holds a judgment issued by the Land Court after May 25, 2021, former owners may seek the return of excess equity. Under Section 212 of the Act, a former owner or successor in interest may file a complaint in Superior Court within 12 months of the effective date of the Act. It should be noted that certain provisions of the Act are effective as of July 1, 2024, but the majority of the provisions become effective as of November 1, 2024. Therefore, it is not entirely clear whether claims must be filed in Superior Court by June 30, 2025 or October 31, 2025. What is clear, however, is that claims for excess equity based on judgments that entered on or before May 24, 2021 are time barred.***

Disputes and Challenges. The Superior Court has jurisdiction to hear any disputes that arise between any party who at the time of final judgment held an interest in the property and a right to redeem, including judgment holders, former owners, mortgagees, lienholders and heirs. These disputes and challenges may include, but are not limited to, the sale of the property, valuation, calculation of excess equity, and the distribution of excess equity. Any suit must be filed in the Superior Court within 12 months of the date of notice of the municipality’s itemized accounting of excess equity following sale or appraisal of the property. Parties bringing such suit in the Superior Court have the right to a jury trial, unless this right is waived by all parties.

If you have any questions regarding the amendments to Chapter 60, pending tax title foreclosure sales, or other tax title issues, please contact Attorney Lauren F. Goldberg (lgoldberg@k-plaw.com) Attorney Thomas W. McEnaney (tmcenaney@k-plaw.com), Chair of our Tax Title Practice Group.

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