

TITLE ISSUES

REAL ESTATE TAXES AND TITLE CLEARANCE

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Nowhere does the inevitability of taxes become more apparent than on a commitment for title insurance. In Illinois, because taxes become a lien on January 1 of the year before they are collected, every title commitment and every title policy reflects at least the lien of taxes for one year—the year of issuance.

It follows then that every real estate transaction requires the attorneys involved to consider at least one tax issue: the proration of current taxes. Generally, the seller gives a credit to the buyer for taxes which, although a lien on the land, are not yet payable. Alternatively, the parties enter into a tax re-proration agreement.

Questions regarding current taxes occasionally cause an unnecessary snag at closing. Payment of current taxes is not instantaneously reflected on county records, and even if it were, it would not be immediately accessible to the title company. As evidence of payment, a paid receipt from the County Collector (or duplicate tax bill showing payment known as Proof of Payment) together with the cancelled check is satisfactory evidence of proper payment. Whenever the return of the cancelled check is unlikely before closing, it is usually advised to pay the taxes through the closing at the title company.

Taxes for prior years and how to address the problems they raise are the subjects of the remainder of this article, but before looking at specific problems, it is necessary to examine briefly how taxes are collected in Illinois. Real estate taxes are covered by the recently reorganized Property Tax Code (35 ILCS 200) which became effective on January 1, 1994. All references herein refer to the new Code.

THE TAX COLLECTION PROCESS

After the delinquency date of the second installment of taxes, the County Collector submits a list of unpaid taxes to the Circuit Court. After determining that the appropriate steps necessary to insure due process and to comply with the Property Tax Code have been taken, the Circuit Court orders the County Clerk to "sell" the delinquent taxes.

These taxes are offered for sale at the annual tax sale which

takes place a few months after the second installment of real estate taxes is billed. The County Clerk offers for sale any parcels for which the real estate taxes have not been paid in full by the date of the sale. In form, the sale is essentially a public auction in which the winning bidder is the party who agrees to accept the lowest interest on the money he pays to the county in satisfaction of the taxes (Section 21-190 et seq. of the Property Tax Code.) After the taxes are sold, the County collects all delinquent taxes on the subject parcel from the tax purchaser in exchange for his receiving a Certificate of Purchase. This certificate entitles the tax purchaser to several rights, the most important two follow. First, he can collect penalty in the form of interest on the money he has expended in the sale if the owner of the property redeems the taxes. This right also includes the right to pay taxes which become delinquent subsequent to the sale and to obtain interest on those taxes at 12% per year. Second, if the taxes are not properly redeemed, the tax purchaser can obtain a tax deed to the parcel if he complies with the requirements of the Property Tax Code.

If no one bids on a parcel offered at the annual sale, the taxes are deemed forfeited (Section 21-225) meaning that the Clerk can still sell the taxes at any time pursuant to statute and the original court order, if a buyer presents himself. The taxes can be redeemed at anytime prior to that time by the owner who must pay principal and interest at the rate of 12% per year from the date of the attempted sale.

If a buyer purchases these taxes from the Clerk, he is then entitled to receive reimbursement of principal and payment of penalty at the fixed rate of 12% per six-month period. If no redemption is made, this tax buyer can proceed to obtain a tax deed just as if he had purchased at the annual sale.

Occasionally taxes for several years go by without being sold. Every two years, the County Clerk offers these parcels for sale at the scavenger sale (Section 21-260.) It is not necessary for the purposes of this article, to discuss the details of the scavenger sale. Suffice it to say that any tax buyer, regardless if the sale be an annual sale, scavenger sale or sale of forfeited taxes as noted above, any tax buyer has a right to redemption money or, if that is not forthcoming, the right to a tax deed if compliance is had with the Property Tax Act.

TAX CLEARANCE: SALES AND FORFEITURES

In theory, to clear either of these tax matters from title is a simple matter. All that is required is that an estimate of redemption (the "bill") be ordered and obtained from the County Clerk. It, together with a certified or cashier's check for the amount necessary should be deposited with the County Clerk.* If this can be done prior to closing, all the better. All that is required by the Title Company is that the County records be marked appropriately to reflect the redemption or that appropriate evidence of the redemption be submitted for review. Because the calculations involved in determining an estimate of redemption are complicated, it is always good practice to retain copies of any estimates returned to the County.

It is occasionally impossible to get estimates of redemption before the scheduled closing. Computerization of the tax sale records in Cook and other counties is making this problem less severe, but there will always be times when an estimate is not available at the time of closing.

In some situations, it may be inadvisable or impractical to pay the taxes because of ongoing litigation involving the taxes themselves.

In either of these cases, it may be useful to consider establishing a Title Indemnity with the title company. Generally these arrangements are offered as an accommodation to title customers who unable to clear title effectively prior to or even at closing. Title Indemnities are agreements by which a party, typically the seller, indemnifies the title insurer against loss and agrees (inter alia) to remove the title defect before a certain fixed date. To secure this agreement an amount of money is deposited and pledged for the benefit of the insurer. This agreement allows the title company to insure over the exception or, in some instances, delete the title exception altogether.

The indemnitor under the Title Indemnity must be clear that it is his responsibility to clear the tax matter unless the agreement specifies otherwise. The Title Company will be happy to assist in this matter and often the pledged amount can be used to satisfy the tax lien. It is easy to confuse a Title Indemnity with an escrow and this confusion can cause problems for all parties involved.

If the proceeds from the transaction are necessary to satisfy the lien of taxes, the best practice is to obtain an estimate of redemption for presentation and payment at the closing.

Sometimes, however, the estimate of redemption may be out of date. Additional fees, subsequent taxes and additional penalties make estimates quickly obsolete. It is impossible to outline a simple, general rule, but the goal should always be to have the estimate as current as possible.

If the estimates are stale or if the estimates are subject to change by payment of subsequent taxes, a Title Indemnity should be established to insure a proper redemption can be made.

For forfeitures, the risks are more manageable. Penalty amounts change every twelve months. The only unpredictable event is the potential purchase of the forfeiture "over the counter" as noted above. To protect against this risk, indemnification is requested by the insurer although no pledge of funds is required.

OPEN ITEMS

Occasionally, unpaid taxes for prior years manage to elude the County Clerk and do not get offered for sale at the annual sale. These are called colloquially "open items" and accrue interest at the rate of 1 1/2% per month in the same manner as current taxes. "Open item bills" are obtained from the County Clerk who has custody of the records, but are paid to the County Treasurer.

CERTIFICATES OF ERROR

One common tax problem remains to be addressed: the certificate of error. The certificate of error procedure is a means by which a taxpayer can challenge his assessment and bill after the final installment of taxes. In many cases, the certificate of error procedure represents the last chance the taxpayer has to reduce his taxes. Recent legislation (PA 88-225) has simplified this procedure somewhat in Cook County with respect to certificates of error sought to correct the failure of the taxpayer to file a timely homestead or senior citizen exemption.

This procedure creates a problem primarily in Cook County although the problem exists in other counties as well. The problem simply stated is this: while the procedure to obtain a reduction in taxes works its way through the administrative and judicial process, any unpaid taxes remain a lien on the land. Although the tax will be protected from being sold in the next annual sale, they are subject to being included in tax sales subsequent to that sale (Section 21-240.) Until a determination by the Circuit Court or an administrative determination under PA 83-225 and posting of that determination in the County records, the lien of taxes for that year must be included as an exception to title.

One solution is for the owner to pay the taxes fully including the contested amount. Payment does not compromise the taxpayer's position with regard to the challenged amount, but does remove the lien from the land. The County will issue a refund of principal as appropriate after a favorable determination.

Another option available includes the use of a Title Indemnity. Because determination by the Circuit Court can often take several years and because interest accrues at the rate of 1 1/2% per month the amount pledged will be significantly larger than the contested amount. Although amounts pledged in a Title Indemnity account can be invested, frequently payment of the contested amount is the most economically feasible solution to the certificate of error problem.

EXEMPTION ISSUES

Property owned by not-for-profit organizations is occasionally billed for taxes even though the organization is entitled to an exemption under Illinois law because the organization failed to maintain the exemption under Section 15-10 of the Property Tax Act. And, unfortunately, as time goes by, methods to mitigate the damages caused by the failure to maintain a tax exemption become fewer as indicated in Section 14-25. Because solutions to the problems may vary with the situation, any attorney representing a not-for-profit organization is well advised to address the tax issues early in the transaction and to consult with an underwriter to work together for a solution to any issues that may arise.

Because most non-governmental tax exemptions are based upon the use to which the particular property is put, evidence

(usually in the form of an affidavit) is requested from the not-for-profit organization to ascertain that the exempt use has not lapsed.

The above items reflect over ninety percent of the tax issues encountered on title commitments. Because tax issues are inevitable, it is important to address them early in the transaction and to engage your title professionals who can assist you in resolving problems to everyone's satisfaction.

**With regard to estimates or redemption for tax sales it is also required that the redemption be made by a person interested in that property other than an undisclosed beneficiary of an Illinois land trust (Section 21-345). The best practice is to have the record title holder of the property reflected on the estimate of redemption as the redeeming party in order to avoid any dispute. Failure to do so may result in a court determination that the redemption is invalid. Luckily, there is no such requirement for redeeming parties of tax forfeitures.*

We are soliciting ideas for possible subjects for future *TITLE ISSUES*. If you are interested in submitting ideas for subjects, complete the form below and submit to:

Chicago Title Insurance Company
171 N. Clark Street, ML 04RS
Chicago, Illinois 60601-3294
Attn: Sharon Marszalek, Chicago Metro Marketing

SOLICITATION FOR IDEAS: Subjects for future *TITLE ISSUES*

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