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ATTORNEY GENERAL OPINION NO. 2012-28

Richard E. James  
Clay County Attorney  
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Clay Center, KS 67432

Re: Taxation—Sale of Real Estate for Taxes—Listing of Real Estate Subject to Sale; Notice of Sale; Time of Sale; County Treasurer to Bid Off in Name of County

Taxation—Redemption of Real Estate and Remission, Compromise or Respread of Real Estate Taxes—Redemption of Real Estate Bid Off by County; Period of Redemption

Taxation—Judicial Foreclosure and Sale of Real Estate by County—Action to Enforce Lien for Unredeemed Real Estate Bid In by County; Procedure for Bidding In Behalf of County

Synopsis: A county is not required to bid in the county's interest on real property at a tax foreclosure sale held pursuant to a court order. The delinquent taxpayer continues to own property for which a foreclosure judgment has been rendered until such property is sold to the successful bidder at a public auction and the successful bidder is issued a deed therefor, or when the property is sold or transferred in accordance with K.S.A. 2011 Supp. 79-2803a(b). The redemption period for delinquent property begins to run from the date the county bids off the property in the name of the county pursuant to K.S.A. 79-2306. Cited herein: K.S.A. 2011 Supp. 79-1803; 79-1945; K.S.A. 79-2001; K.S.A. 2011 Supp. 79-2004; 79-2301; K.S.A. 79-2302; 79-2303; 79-2306; K.S.A. 2011 Supp. 79-2401a; 79-2801; K.S.A. 79-2803; K.S.A. 2011 Supp. 79-2804.

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Dear Mr. James:

As County Attorney for Clay County, you ask for our opinion regarding the following:

1. Is a county required to bid in the county's interest on real property at a delinquent tax sale?
2. If the answer to question no. 1 is no, and if there are no bids on the delinquent property at a delinquent tax sale, who owns the delinquent property?
3. When does the redemption period for delinquent property begin?

We will answer each of your questions in order.

### *Background*

The board of county commissioners is "authorized and empowered to levy taxes in each year for the general fund and other county purposes."<sup>1</sup> On or before November 1 of each year, the county clerk finalizes the tax levy rate for each piece of real property and delivers the final tax roll to the county treasurer.<sup>2</sup> "Each year after receipt of the tax roll from the county clerk and before December 15, the county treasurer shall mail to each taxpayer, as shown by the rolls, a tax statement. . . ."<sup>3</sup> A taxpayer may pay his entire county tax bill by December 20 of each year, or may choose to pay half of the taxes by December 20 and the other half of the taxes by the following May 10.<sup>4</sup> If a taxpayer does not pay his county taxes in full by the following May 10, the taxes become delinquent and the real estate for which such taxes are owed may be sold by the county.<sup>5</sup>

The process of selling real estate for delinquent taxes begins in early July when the county treasurer compiles a list of properties for which taxes are delinquent.<sup>6</sup> The county treasurer is required to publish the list of delinquent properties once each week for three consecutive weeks in the official county newspaper or in a newspaper of general circulation in the county.<sup>7</sup> The county treasurer must also publish a notice stating that "the county treasurer will sell the real estate described in the list *to the county* for the amount of the delinquent taxes . . . and that the sale will be on or after the first Tuesday of September following publication of the notice. . . ."<sup>8</sup>

K.S.A. 79-2306 describes the process of this "sale" as follows:

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<sup>1</sup> K.S.A. 2011 Supp. 79-1945.

<sup>2</sup> K.S.A. 2011 Supp. 79-1803.

<sup>3</sup> K.S.A. 79-2001(b).

<sup>4</sup> K.S.A. 2011 Supp. 79-2004(a).

<sup>5</sup> K.S.A. 2011 Supp. 79-2301.

<sup>6</sup> K.S.A. 79-2302.

<sup>7</sup> K.S.A. 79-2303.

<sup>8</sup> K.S.A. 79-2302 (emphasis added).

On the day designated in the notice of sale the county treasurer shall sell the real estate on which the taxes and legal charges have not been paid, and it shall be the duty of the county treasurer of such county, to bid off in the name of the county all real estate advertised for sale for delinquent taxes for the amount of the delinquent taxes and the legal charges due thereon, including the costs of advertising and the fees for selling, and no bid shall be received by said county treasurer from any other person for the real estate so sold.

By the plain language of the statute, only the county may bid at this “sale.” The purpose of this “sale” is to perfect the county’s tax lien and begin the redemption period (see below).<sup>9</sup>

After the county treasurer bids off the delinquent property in the name of the county pursuant to K.S.A. 79-2306, the county must hold the property for a specified period of time before disposing of the property by foreclosure. Abandoned property must be held for one year from the date of the sale;<sup>10</sup> property that is a homestead must be held for three years from the date of the sale;<sup>11</sup> all other real property must be held for two years from the date of the sale.<sup>12</sup>

The period of time during which the county must hold a delinquent property before selling it is the redemption period. During the redemption period, a taxpayer may “redeem” delinquent property by paying all taxes, interest and other fees owing on the property.<sup>13</sup> If the taxpayer does not redeem the property by the close of the redemption period, “the real estate shall be disposed of by foreclosure and sale in the manner provided by K.S.A. 79-2801 *et seq.*”<sup>14</sup>

When a taxpayer fails to redeem delinquent property within the redemption period, the county may petition the district court to enforce the county’s tax lien through a foreclosure action.<sup>15</sup> After the foreclosure judgment is rendered, the clerk of the district court issues an order of sale to the county sheriff, directing the sheriff to advertise and sell the delinquent property.<sup>16</sup> A taxpayer has a final opportunity to redeem the property by filing an “application to redeem” with the court no later than the day prior to the sale.<sup>17</sup> A taxpayer has no right to redeem the property after that time.<sup>18</sup>

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<sup>9</sup> Heim, Kansas Local Government Law, § 9.21, League of Kansas Municipalities (4<sup>th</sup> Ed. 2009).

<sup>10</sup> K.S.A. 2011 Supp. 79-2401a(a)(2).

<sup>11</sup> K.S.A. 2011 Supp. 79-2401a(b).

<sup>12</sup> K.S.A. 2011 Supp. 79-2401a(a)(1).

<sup>13</sup> K.S.A. 2011 Supp. 79-2401a. This statute also allows for partial redemption of homestead property. Upon payment of one or more years of delinquent taxes for a homestead, the redemption period is extended by the number of years for which delinquent taxes are paid.

<sup>14</sup> K.S.A. 2011 Supp. 79-2401a(d).

<sup>15</sup> K.S.A. 2011 Supp. 79-2801.

<sup>16</sup> *Id.*

<sup>17</sup> K.S.A. 79-2803.

<sup>18</sup> *Sumner County Comm’rs v. Avis*, 163 Kan. 388, 393 (1947).

At the tax sale, the delinquent property “shall be sold at public auction for the highest and best bid obtainable therefor.”<sup>19</sup> The sheriff, if directed by the county commissioners, “may bid at such sale in the name of the county,” but “[n]o bid in behalf of such county may be accepted in excess of the amount of the judgment lien and interest thereon, . . . plus the costs, charges and expenses of the proceedings and sale. . . .”<sup>20</sup> After the delinquent tax sale is confirmed by the court, the court directs the sheriff to issue a “good and sufficient deed” to the successful bidder.<sup>21</sup>

Under the Kansas delinquent tax sale system, property may not be sold at public auction until the redemption period passes, and the successful bidder takes fee simple title to the property.<sup>22</sup>

1. *Is a county required to bid in the county’s interest on real property at a delinquent tax sale?*

The answer to this question is no. It is important to distinguish between the “sale” that occurs pursuant to K.S.A. 79-2306 and the delinquent tax sale that occurs after the district court has rendered a judgment in the foreclosure action. By the plain language of K.S.A. 79-2306, the county treasurer must bid off the delinquent property in the name of the county, and *only* the county may “bid” on the property. Thus, at this stage of the delinquent tax sale process, the county *must* bid in the county’s interest. As previously noted, the purpose of this sale is to perfect the county’s tax lien.

After foreclosure, the sheriff auctions the delinquent property to the highest bidder pursuant to K.S.A. 2011 Supp. 79-2804. This statute is clear that the county may – but is not required to – bid on a property at the public auction: “The sheriff or such other person as may be authorized by the board of county commissioners, *if directed by the county commissioners, may bid* at such sale in the name of the county such amount as the county commissioners authorize.”<sup>23</sup>

Furthermore, K.S.A. 2011 Supp. 79-2803a(b) allows a county, without a court order, to sell or transfer delinquent property “which did not sell at the previous public auction.” This statute assumes that a delinquent property may not receive any bids at the public auction. If the county is required to bid at delinquent tax sales, there would always be a successful bidder and this statute would be unnecessary. “There is a presumption that the legislature does not intend to enact useless or meaningless legislation.”<sup>24</sup>

Some states with delinquent tax sale statutes similar to Kansas expressly require the county to bid on a property at a delinquent tax sale when there are no other bidders.<sup>25</sup> Prior to 1941, Kansas law included a similar provision, but that provision has been

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<sup>19</sup> K.S.A. 2011 Supp. 79-2804.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (emphasis added).

<sup>24</sup> See, e.g., *In re M.R.*, 272 Kan. 1335, 1342 (2002).

<sup>25</sup> See, e.g., 68 Okla. Stat. § 3129; V.T.C.A., Tax Code § 34.01(p) (2003).

repealed.<sup>26</sup> Under current law, a county is not required to bid on delinquent property at the public auction. Instead, if there are no bidders on a property at a delinquent tax sale, the county may offer the property for sale again pursuant to K.S.A. 2011 Supp. 79-2803a.

2. *If a county is not required to bid in the county's interest at a delinquent tax sale, and if there are no bids on the delinquent property, who owns the delinquent property?*

This question relates to the effect of a foreclosure judgment rendered pursuant to K.S.A. 79-2801 *et seq.*, namely, whether the delinquent taxpayer loses all right, title and interest in the delinquent property upon judicial foreclosure. The answer is no.

“[T]he methods prescribed for the recovery of delinquent taxes are wholly statutory, no methods exist apart from the statute, and whatever procedures, whatever remedies are available are to be found in the tax statutes.”<sup>27</sup> The judgment of the district court in a tax foreclosure action is described in relevant part as follows:

[I]t shall be the duty of such district court . . . to investigate and to decide what taxes, charges, interest, and penalty thereon, to the date of the filing of the petition, shall have been legally assessed and charged on such tract, lot, or piece of real estate, *and to render judgment therefor . . . and including in such judgment any taxes, interest charges and penalties which became a lien on such tract, lot, or piece of real estate after the filing of the petition . . . and to charge the same as a first and prior lien on said tract, lot, or piece of real estate . . . and to order the sale of the said real estate for the payment of such taxes, charges, interest and penalty and the costs, and expense of such proceedings and sale; which sale shall be made and conducted as hereinafter provided.*<sup>28</sup>

To summarize, the court renders judgment for the county for all outstanding taxes owing at the time the county petitions for foreclosure, charges all taxes that have accrued since the county filed its petition as a first and prior lien on the property, and orders the sale of the property for payment of the taxes. K.S.A. 79-2801 *et seq.* do *not* direct the court to transfer the right, title, and interest in the delinquent property to the county at the time of judicial foreclosure.

Accordingly, we conclude that a tax foreclosure judgment does not transfer ownership of the delinquent property to the county initiating the foreclosure action. Rather, “[w]here a lienholder forecloses its lien and obtains a foreclosure judgment against the property

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<sup>26</sup> R.S. 1923, 79-2311 (“If any parcel of land cannot be sold for the amount of taxes and charges thereon, it shall be bid off by the county treasurer in the name of the county for such amount”); Repealed, L. 1941, Ch. 375, § 35.

<sup>27</sup> *Sherman County Comm’rs v. Alden*, 158 Kan. 487, 512 (1944).

<sup>28</sup> K.S.A. 79-2803 (emphasis added).

owner, the lien merges into that judgment and the lienholder becomes a judgment creditor.”<sup>29</sup>

The deed to a delinquent property does not change hands until the property is sold at a public auction or, if there are no bidders at the public auction, when the property is sold or transferred in accordance with K.S.A. 2011 Supp. 79-2803a(b).<sup>30</sup> “If a lien is enforced by a foreclosure action, the defendant's interest and title in the property that is subject to the lien can be divested only by a foreclosure sale.”<sup>31</sup> “A valid tax deed totally destroys the antecedent estate of the former owner, cuts off all the former owner's rights, and vests all the former owner's right, title, and interest in the grantee named in the deed.”<sup>32</sup>

We opine that after a tax foreclosure judgment has been rendered, the delinquent taxpayer continues to be the owner of the subject property until such property is sold to the successful bidder at a public auction or until the property is sold or transferred in accordance with K.S.A. 2011 Supp. 79-2803a(b).

3. *When does the redemption period for delinquent property begin?*

Pursuant to K.S.A. 2011 Supp. 79-2401a, the county is required to hold real estate bid off by the county for a certain number of years “*from the date of the sale.*” The “date of the sale” refers to the date on which the county treasurer bids off the delinquent property in the name of the county pursuant to K.S.A. 79-2306. Therefore, the redemption period begins when the county treasurer bids off the delinquent property in the name of the county.

Sincerely,

Derek Schmidt  
Kansas Attorney General

Sarah Fertig  
Assistant Attorney General

DS:AA:SF

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<sup>29</sup> 51 Am. Jur. 2d Liens § 93 (2012).

<sup>30</sup> K.S.A. 2011 Supp. 79-2804.

<sup>31</sup> 51 Am. Jur. 2d Liens § 94 (2012).

<sup>32</sup> 72 Am. Jur. 2d State and Local Taxation § 863 (2012).