



LEGAL ISSUES  
RELATING TO COUNTY GOVERNMENT

U.S. SUPREME COURT:

# Owner Entitled to Just Compensation in Sale of Tax-Foreclosed Property

*In Tyler v. Hennepin County, the U.S. Supreme Court ruled that a county's retention of the excess proceeds of the sale of a tax-foreclosed property is a taking entitling the owner to just compensation.*

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*by Andy Phillips and Matt Thome, Attolles Law, s.c.*

It is well established that when a property owner fails to pay property taxes, the government may seize and sell the property at issue to recover the taxes owed. In Wisconsin, when a property owner fails to pay property taxes when due, the county treasurer issues a tax certificate to the county.<sup>1</sup> If the taxes and any penalties and interest remain unpaid two years after the issuance of a tax certificate, the county has a variety of mechanisms through which it can acquire ownership of the property in order to collect the delinquent taxes, including taking a tax deed under Wis. Stat. § 75.14 or pursuing an in rem foreclosure action under Wis. Stat. § 75.521. The county may either retain the property or sell it to collect the taxes, penalties and interest due.

But what happens if the property at issue is worth more than the owner's unpaid tax liability? Historically,

Wisconsin courts rejected the idea that the former property owner had an inherent right to any surplus proceeds remaining after the sale of a tax-foreclosed property and have rejected claims that a county's retention of such proceeds without compensating the former property owner violated the takings clause in the U.S. Constitution.

For example, in *Ritter v. Ross*, the county took ownership of a property for \$84.43 in unpaid property taxes, sold the property for \$17,345, and was allowed to retain the surplus proceeds.<sup>2</sup> The Wisconsin Court of Appeals held that "when a state's constitution and tax codes are silent as to the distribution of excess proceeds received in a tax sale, the municipality may constitutionally retain them as long as notice of the action meets due process requirements."<sup>3</sup> Although legislation in Wisconsin — most

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notably 2021 Wisconsin Act 216 — provides mechanisms for former property owners to recover such proceeds, the ability to do so has existed as a matter of legislative grace and not because it was required by the U.S. Constitution.

In a recent decision, however, the U.S. Supreme Court held that the takings clause in the U.S. Constitution is violated when a county retains the surplus proceeds from the sale of a tax-foreclosed property. In that case, *Tyler v. Hennepin Co.*, Minn., Geraldine Tyler accumulated about \$15,000 in unpaid property taxes, penalties and interest on her condominium. The county took ownership of the property for the unpaid tax liability and sold it for \$40,000. The county retained the \$25,000 in surplus proceeds. Tyler sued, claiming that the county's retention of the surplus proceeds was a taking of her property without just compensation, in violation of the takings clause.

Although the U.S. Supreme Court recognized the power of the government to seize and sell real property to recover unpaid taxes, the court unanimously concluded that when there is money remaining after a property is sold by the government to satisfy past due taxes, the remaining value belongs to the property owner protected from uncompensated appropriation by the government. The court held: "The County had the power to sell Tyler's home to recover the unpaid property taxes. But it could not use the toe-hold of the tax debt to confiscate more property than was due. By doing so, it effected a 'classic taking in which the government directly appropriates private property for its own use.' Tyler has stated a claim under the Takings Clause and is entitled to just compensation." The

court further explained: "A taxpayer who loses her \$40,000 house to the State to fulfill a \$15,000 tax debt has made a far greater contribution to the public fisc than she owed. The taxpayer must render unto Caesar what is Caesar's, but no more."

This case holds important implications for Wisconsin counties, especially those that collect unpaid property taxes via tax deeds or in rem foreclosure actions under which the county obtains title to the property at issue. Wisconsin law currently requires counties that obtain real property as a result of unpaid property taxes to notify the former property owner that they may be entitled to a share of the proceeds of a future sale and send any surplus proceeds from a tax-foreclosure sale to the former property owner. But the U.S. Supreme Court's decision raises a number of questions and issues with respect to Wisconsin's current law.

For example, under Wisconsin law, a former owner loses any right to surplus proceeds if they cannot be located within five years. Setting aside the threshold question of the extent of a county's duty to "locate" the former owner, there remains the question of whether this time-delineated forfeiture of the former property owner's ability to recover the surplus is constitutionally appropriate. Further, Wisconsin law currently only provides a right to surplus proceeds if a county sells the tax-foreclosed property, but counties are not required to sell the properties. Under the Tyler decision, a county that retains ownership of a tax-foreclosed property would seemingly need to compensate the former owner for any excess value in the property beyond the unpaid tax liability. This will inevitably lead

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to disputes regarding the value of such properties and introduce more costs, inefficiencies and uncertainties into the tax-foreclosure process.

In the coming weeks and months, the Wisconsin Counties Association and its legal counsel will be working with county treasurers and corporation counsel to address these and other questions arising out of the Tyler decision to determine whether and to what extent Wisconsin statutes should be amended to ensure the tax-foreclosure process in Wisconsin is constitutionally appropriate and provides for the speedy and efficient collection of taxes and return

of property to the tax rolls. In the meantime, if you have any questions surrounding the Supreme Court's decision or issues regarding the collection of unpaid property taxes via tax foreclosures of property, please do not hesitate to contact the association or the authors at [mthome@attolles.com](mailto:mthome@attolles.com) or [aphillips@attolles.com](mailto:aphillips@attolles.com) ■

*Attolles Law, s.c. works on behalf of Wisconsin counties, school districts and other public entities across the state of Wisconsin. Its president & CEO, Andy Phillips, has served as outside general counsel for the Wisconsin Counties Association for nearly 20 years.*

1. Wis. Stat. § 74.57(1)
2. Ritter v. Ross, 207 Wis. 2d 476 (1996)
3. Id., 207 Wis. 2d at 486

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