Tax Sales in Virginia â?? Part Two

Description

*Read Tax Sales in Virginia â?? Part One **here**.*

Litigation

After the pre-litigation publication and mailed notice periods have expired a complaint can be filed with the circuit court asking that the property be sold for the delinquent taxes. The complaint generally tells the story of the real estate. It should indicate whose name the taxes are assessed against, how ownership was acquired, the relationship of any heirs or assigns to the property or lienholders, the amount due, and that all statutory requirements were followed prior to filing. A description of the property that is the subject of the suit is also included with the complaint.

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The tax sale attorney may also file a memorandum of *lis pendens* with the complaint. The *lis pendens* is very important to the tax sale process since Virginia Code Â§ 58.1-3967 requires any party that acquires a lien or ownership interest in the property *after* its filing to intervene in the suit. This relieves the locality from the responsibility of having to move to add after-acquired interested parties as a party to the suit. This statutory language shifts the burden to the lienholder or new owner to protect their interest in the property by actively participating in the suit. Otherwise, the party with the after-acquired interest is not a necessary party to the suit and the property can be sold free and clear of their interest. Note that this is a common question that arises when reviewing title to a tax sale property. Comparing the *lis pendens* recordation date to the judgment or deed recordation date typically helps resolve those questions.

When reviewing the title to a property that has gone through a tax sale, the underlying Complaint can provide a great deal of information on the fundamentals of whether the tax sale was properly before the court. If there are parties that cannot be ascertained, they would be included under â??Parties Unknownâ?• and would have a guardian *ad litem* (another attorney) appointed to represent their interests in the suit. Generally, a guardian *ad litem* makes certain that all statutory requirements are met and will actively look for heirs that might have been missed in the original filing.

Before a court can authorize the sale of the property (by granting a Decree of Sale) there are certain items that must be made a part of the court record, pursuant to Virginia Code Â§ 58.1-3969. In an earlier time, courts would commonly appoint commissioners in chancery to take depositions on various aspects of the property. This step added a significant delay and cost to the tax sale process and is no longer statutorily appropriate absent good cause under the circumstances. Section 58.1-3969 in its current form allows the court to entertain a decree of sale without appointing a commissioner in chancery provided certain requirements are met. First, all parties must have been properly served with process. Second, a certificate of title must be filed with the court. Third, a determination of value must have been to provide the court with a benchmark to determine whether the price achieved at auction is sufficient for it to confirm the sale. If the property is assessed with a value of $100,000 or more, an appraisal from a licensed real estate appraiser must be submitted to record. If the property is assessed under $100,000, an affidavit from the commissioner of revenue is sufficient.

Once the court has these items as a part of the court file, it can enter a decree of sale. The decree appoints a special commissioner of sale that will conduct the auction. Unlike standard partition suits, the attorney bringing the action for a tax sale can also be appointed the special commissioner of sale. This serves two purposes: first, it minimizes the costs of the sale because the special commissioner can only get her contract rate under the localityâ??s contract *or* the statutorily allowed rate for special commissioners of sale and; second, it speeds up the overall tax sale process by not subjecting the timing to an additional attorneyâ??s calendar and efficiency. The decree of sale also usually has generic terms of sale that the special commissioner will advertise and announce at the auction.

Pre-Sale

Judicial tax sales are conducted in the same manner as general creditorâ??s sales. A bond is required (unless one is already provided under Virginia Code Â§ 58.1-3966) prior to the special commissioner advertising the sale. These bonds are recorded with the Circuit Court Clerkâ??s Office. After the bonds are filed, the special commissioner will advertise the auction in a local newspaper with general circulation listing the date and time of the auction, along with a description of the properties to be sold and the terms upon which they will be offered.

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Most attorneys handling tax sales will use an auctioneer, but this is not a requirement. The auctioneer is often beneficial from an advertising perspective in the pre-sale stage. Generally, the overall result of the bidding rests largely on the number of participants that are involved in the auction. The overall suitability of the properties being offered for sale obviously contributes to the bidding results, but getting the word out about the upcoming auction is a necessity.

Advertising the auction takes the forms of traditional media, social media, direct emailing, signage on the properties and website posting. While the auctioneer may publish adverts in the local newspaper, this is not the official Special Commissionerâ??s advertisement which will, in addition to publishing the selection of properties to be offered for sale, provide the official terms of sale under which the properties will be offered.

Sale/Auction

The auction is nearly always conducted as a public auction. Since the pandemic, a number of tax sales have been conducted through hybrid or online only sales. Utilizing online auctions allows a much broader base of potential bidders, which in turn often increases the competitive bidding.

The judicial tax sales will often end with the high bidder signing a contract with no recourse and paying the deposit amount required by the terms of the sale. The sale of the property at a judicial auction is only a tentative sale since the court must confirm the sale. It is helpful for the tax sale attorney to already have a scheduled decree of confirmation date with the court at the time of the auction. Prescheduling the confirmation allows a shortening of the timeframe between the auction and the final payouts to the locality and others.

While tax sales sometimes present an opportunity for buyers to snatch bargains, the sales ultimately require court confirmation. For this reason, if the last high bid amount is egregiously low compared to the assessed or appraised value, the Special Commissioner may call a â??no-saleâ?? and then bargain with the high bidder post-bidding to increase the bid to a reasonable amount that the court might accept.

Post Sale

The Decree of Confirmation is a procedural step where the Court will make a ruling whether the auction was conducted fairly and the bid result was sufficient relative to the overall value of the property. Hybrid auctions (featuring both in-person and online bidding) typically bring more participation compared to traditional in-person only sales. This is positive from the courtâ??s perspective. The court, in determining whether to confirm the sale to the high bidder or not, will balance a number of factors. Of importance are: 1) the localityâ??s ability to collect its costs of litigation and taxes due, 2) the rights of lienholders to be paid from the proceeds of the sale, and 3) the rights of the owners or heirs to receive any excess (or at least to receive an approximated fair market price at auction). Generally, the more participation you have in an auction, the better the final results.

The decree of confirmation will order the special commissioner to receive the remaining balance from the high bidder and to prepare the deeds for recordation. The locality, as grantor, does not have to pay the recording fee or tax to the clerk, but the grantee will be required to pay the granteeâ??s portion of the tax. The tax sale attorney will receive the full bid amount and the recording fee and send the requisite payment and prepared deed to the Clerk for recordation.

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The conveying deed is a special warranty deed that is prepared in the name of the former owner(s) with the special commissioner signing on behalf of the owner(s). The deed will list the overall description of the property and will recite that it was being prepared by authority of the court. The deed may not list all possible heirs to the property and is not required to do so in order to convey title under Virginia Code Â§ 8.01-111. As a special warranty deed, it does not come with the general English warranties that are usually present in a private sale. Rather, the special warranty only warrants that the process was conducted as required by statute and conveys the title to the purchaser according to the terms of sale that were advertised and under which the auction was conducted.

After all funds have been disbursed according to the decree of confirmation and the deed recorded, a final decree may be prepared for the court and a release of *lis pendens* is filed with the clerkâ??s office releasing the property from the tax sale litigation. Note that occasionally there may be excess proceeds from the sale that the court is required to hold for two years from the confirmation date pursuant to Virginia Code Â§ 58.1-3967. Funds that are not claimed within the two-year holding period are paid to the locality. Some courts will not enter a final decree until all funds have been distributed from the case, but even in those cases, a release of the *lis pendens* will be recorded on the land records.

The Takeaway

The stability of title to a property that has been involved in a tax sale is not inherently risky. Virginia law requires judicial sales to provide free and clear title to the property in Virginia Code Â§ 58.1-3967. Non-judicial sales allow for liens to pass through the sale process if the lienholder was not notified, so those low value properties that fall into the NJS category deserve additional scrutiny, but the lower value somewhat balances the overall risk involved.

If writing a title policy on properties that were involved in a tax sale, an underwriter should be able to look to the public court file for the necessary information to ascertain whether the sale was conducted according to Code. NJS sales may require contact with the selling attorney or treasurer to ensure that all strictures were followed. At a minimum, they should be able to provide proof of the certified mailings, research, advertisements, transmittal letter of the advertising required to posted at the courthouse and

proof of any sign posting performed.

The following checklist may be useful in reviewing a prior tax sale to better ensure that the statutory requirements were met. Just as titles vary with each individual property, the circumstances of a tax sale can vary. Pay attention to the Complaint and the court filings to help follow the facts of the case and if there are questions about how the proceedings were conducted, you should always be able to reach out to the attorney who handled the matter.

Tax Sale Checklist

NJS (Virginia Code Â§58.1-3975)

1. Certified letter to the owner(s) as shown on the records of the treasurer at least 30 days prior to the auction
2. Advertisement published in local newspaper at least 7 days prior to the auction
3. Proof of transmittal letter to the clerk for the advertisement posting
4. Signage placed on property having road frontage at least 30 days prior to the auction
5. Public auction
6. Conveying deed
7. Taxes cleared post-auction

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Judicial Sales (Virginia Code Â§Â§58.1-3965-3974)

1. Pre-litigation notices at least 30 days prior to filing suit to
    1. the owner(s)
    1. non-financial judgment creditors unless made a party to the suit
    1. trustees and beneficiaries unless otherwise made a party to the suit
    1. initial advertisement in the newspaper informing the public that certain properties will have suit instituted for delinquent taxes
2. Complaint and memorandum of *lis pendens* filed with the circuit court
3. Decree of sale entered after receiving the following:
    1. All parties served with process
        1. If parties unknown are listed â?? guardian *ad litem* appointed by the court and filed an answer in the proceedings
    1. Value of property
        1. Under $100,000 â?? affidavit of the commissioner of revenue filed with the court
        1. $100,000 or more â?? appraisal report from a licensed real estate appraiser filed with the court.
    1. Certificate of title filed with the court
4. Auction conducted as required by the court
    1. Certificate of publication filed with the court demonstrating advertisement of the auction
    1. Bond properly filed with the court
5. Decree of confirmation of the auction
6. Special warranty deed filed with the clerkâ??s office
7. Release of *lis pendens* filed with the court.
8. Final decree



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John Rife is a Partner with Taxing Authority Consulting Services, PC. A native of Southwest Virginia, John received his degree in history from Virginia Tech and graduated in the charter class of the Appalachian School of Law in 2000. He began his legal career in local government representing several counties, cities and authorities in Southwest Virginia as deputy local government attorney working on general matters of representation, condemnation and easement acquisition. John began working in government tax collection matters as soon as his legal career began at Sands Anderson. He parlayed his experience with government collections and became a Partner with the law firm Linebarger Goggan Blair & Sampson with responsibilities for their Virginia, North Carolina and South Carolina government collection operation. John joined TACS as a Partner in 2010. Today, TACS represents over 105 Virginia governments collecting a variety of delinquent accounts such as real estate, personal property, meals, transient occupancy and business license taxes, as well as utilities, parking tickets, judgment accounts, etc. John often works with the Treasurersâ?? Association in legislative matters, training and general advice as may be needed from time to time.

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Andy Neville is a Partner with Taxing Authority Consulting Services, PC (TACS). Originally from Northwest Pennsylvania, Andy received his degree in Political Science from Wake Forest University and graduated from the University of Richmond School of Law in 2013. Andy joined TACS five days after taking the Bar Exam, and over the past nine years he has gotten to see more of Virginia than he knew existed, and has enjoyed learning something new about Real Estate Law every day. Andy is licensed in Virginia and North Carolina, and presently oversees TACSâ??s Real Estate Litigation Department, which performs tax sales for 75 of its clients. He is a proud dad to two daughters, Maddie and Abby, and would not be able to do any of this without his wife, Julie.

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