

The Honorable Harry A. Noah
Commissioner, Dept. of Natural
Resources

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Local taxes on land
reacquired by state

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Former Commissioner Olds requested our opinion on the following issue: "Does the State have an obligation to pay past due taxes owed on property which the State has recently foreclosed upon? AS 29.45.030(a)(1)(B) indicates that the State does have an obligation if the property is retained as an investment." He also asked, "If the State does have to pay taxes on land foreclosed upon, are we liable for the current year's taxes only or for delinquent taxes from prior years also?"

A review of the memorandum requesting the opinion indicates that the question arises out of a concern that the Division of Land, in terminating land sale contracts pursuant to AS 38.05.065(d), (e), (f) and (g), may bear municipal property tax liability under AS 29.45.030(a)(1)(B). Since the concerns set forth in the request relate to these contract termination actions (sometimes called "administrative foreclosures"), after consultation with Division of Land contract administration personnel, we have restated the first question as follows:

Does the Division of Land have an obligation to pay local property taxes on land reacquired by virtue of terminated sales contracts under AS 38.05.065(d), (e), (f), and (g)?

In our view, as discussed in more detail below, the Division of Land has no liability for local property taxes by virtue of AS 29.45.030(a)(1)(B) on land that it reacquires through a contract termination under AS 38.065(d), (e), (f) and (g) because such lands are not acquired "through foreclosure or deed in lieu of foreclosure" nor are they lands "retained as an investment of a state entity." Our answer to the second question is that, if taxes are owed, they are owed for every year in which the property was legally taxable; and the issue of taxability will largely turn on who the owner of record was as of January 1 of the relevant year.

I. The Statutory Scheme

Lands owned by the State of Alaska may be sold by public auction or lottery pursuant to the Alaska Lands Act, AS 38.05.005, et seq. The Division of Lands is the agency charged with conducting such sales and administering the resulting contracts. AS 38.05.035(a)(4), (6), and (b); AS 38.05.065; and AS 38.05.965(5). The Director of the Division of Lands may terminate land sale contracts under the authority in AS 38.05.065:

(d) If a contract for sale of state land has been breached, the director may issue a decision to foreclose and terminate the contract at any time 31 days after delivering by certified mail a written notice of the breach to the address of record of the purchaser. A breach caused by the failure to make payments required by the contract may be cured within 30 days after the notice of the breach has been received by the purchaser by payment of the sum in default together with the larger of a fee of \$50 or five percent of the sum in default. If there are material facts in dispute between the state and the purchaser, the purchaser may submit a written request for a public hearing for the review of the facts within 30 days after the notice of the breach has been received.

(e) On a determination that there has been a breach of the contract based on the administrative record and the evidence presented at a hearing, the director shall issue a decision foreclosing the interest of the purchaser and terminating the contract. The obligation to make payments under the contract continues through the date of the decision to foreclose by the director.

(f) The director shall deliver the decision to foreclose and terminate personally to the purchaser or send it certified mail, return receipt requested to the address of record of the purchaser. If the breach is a failure to make payments required by the contract, the decision shall include a notice to the purchaser that if within 30 days the purchaser pays to the state the full amount of the unpaid contract price including all accrued interest, and any fees assessed under (d) of this section, the department shall issue to

the purchaser a deed to the land. If full payment is not made within 30 days or the breach is for other than failure to make payment, the decision forecloses and terminates all legal and equitable rights the purchaser has in the land.

(g) The purchaser may appeal the director's decision to the commissioner within 30 days. The final decision by the department is reviewable under AS 44.62.560.

Land reacquired through a contract termination is again subject to disposal under the Alaska Lands Act. AS 38.05.045. In other words, such lands are managed by the Division of Land as are all other lands within the state's land disposal bank.

Boroughs and unified municipalities may levy property taxes. AS 29.45.010. However, certain governmental property is exempt, including:

Municipal property . . . or state property, except that
. . .

Notwithstanding any other provision of law, property acquired by an agency, corporation, or other entity of the state through foreclosure or deed in lieu of foreclosure and retained as an investment of a state entity is taxable. . . .

AS 29.45.030(a)(1)(B).

II. The Meaning of "Foreclosure"

State properties acquired through foreclosure or deed in lieu of foreclosure and held for investment may be taxed. "Foreclosure" is a legal term of art. It is not separately defined in the taxation statutes. Thus, the term is presumed to be used in its legal sense in AS 29.45.030. 2A Norman J. Singer, Sutherland Statutory Construction ' 47.30 (5th ed. 1992).

Foreclosure typically describes a process by which a mortgagor's interests in real property are terminated. The term is specific to enforcement of liens, trust deeds, or mortgages. Black's Law Dictionary 581 (5th ed. 1979). It is legally distinguishable from termination of an installment land sale contract. In fact, the installment land sale contract method of conveying real property was originally developed, at least in

part, to avoid the formalities and perceived pitfalls of mortgage foreclosure in states which are viewed as being heavily pro-mortgagor. See Grant Nelson and Dale Whitman, Real Estate Finance Law, ¶ 3.26 (2d ed. 1985). Many such states do not have nonjudicial foreclosure statutes like AS 34.20.070 et seq.

Although there are no Alaskan cases specifically dealing with the legal distinction between a land sale contract termination and a mortgage, deed of trust, or lien foreclosure, the Alaska Supreme Court has dealt with all of these legally distinct concepts. In most cases, the court's analysis and choice of language preserves the legal distinction between a land sale contract termination and a foreclosure. For example, see Curry v. Tucker, 616 P.2d 8 (Alaska 1980); McCormick v. Grove, 495 P.2d 1268 (Alaska 1972); Moran v. Holman, 501 P.2d 769 (Alaska 1972); Alaska Placer Co. v. Lee, 455 P.2d 218 (Alaska 1969); Jameson v. Wurtz, 396 P.2d 68 (Alaska 1964) and Land Development, Inc. v. Padgett, 369 P.2d 888 (Alaska 1962) (all of these cases involve questions of literal enforcement of forfeiture provisions in land sale contracts and in each, the supreme court recognized the action as a land sale contract termination or enforcement action). See also Smith v. Shortall, 732 P.2d 548 (Alaska 1987); Moening v. Alaska Mut. Bank, 751 P.2d 5 (Alaska 1988); Conrad v. Counsellors Inv. Co., 751 P.2d 10 (Alaska 1988) (each of these cases deals with options available to a creditor secured by a deed of trust upon default by the trustor, and each lists only two types of "foreclosure": judicial and nonjudicial.)

Given the precise legal definition of "foreclosure," it is our opinion that lands acquired through termination of installment land sale contracts administered by the Division of Land are not acquired through foreclosure or deed in lieu of foreclosure within the meaning of AS 29.45.030(a)(1)(B).¹

¹ We recognize that AS 39.05.065(d),(e),(f), and (g) use the term "foreclose" in describing the effect of the contract termination process. This does not change our opinion that the use of the term "foreclosure" in AS 29.45.030 is to be read in its narrow legal sense. It is not inconsistent for the legislature to recognize that a contract termination "forecloses" one's interest in state land, while limiting tax immunity exemptions to land acquired by the state through "foreclosure or deed in lieu of foreclosure" of a mortgage, deed of trust, or lien.

III. Are the Lands Retained as an Investment of a State Entity?

Any lands reacquired through contract terminations would obviously be lands that had earlier been classified for disposal. The primary public interest in making lands available for disposal is to make them available to individuals and other persons for direct use. AS 38.04.010(a). In deciding which lands to categorize for disposal and which to retain for public purposes, the Director of the Division of Land must consider a number of important public policies (for examples, see AS 38.040.005 through 910.) Also, some state lands suitable for disposal may not be sold immediately, but must be reserved to provide an opportunity for future decisions, in order to meet the requirements of future generations. AS 38.04.005(c). Even after lands have been classified for disposal, the Legislature receives annual reports on the status of lands within the state's land disposal bank, and the Commissioner of the Department of Natural Resources must annually estimate funding requirements for identification of lands within the bank that are to be proposed for disposal within the next five years. AS 38.04.020(d) and (e). Thus, the Director's and Commissioner's decisions about which lands to sell and which to retain, while discretionary, are subject to numerous statutorily-mandated public policy limitations and to scrutiny by both the Governor's Office and the Legislature.

"Investment" involves the placing of capital or laying out of money in a way intended to secure income or profit from its employment. Black's Law Dictionary 741 (5th ed. 1979). Lands classified for disposal and placed within the state's land disposal bank are there because various public policy concerns have been addressed by the Department of Natural Resources and presumably a decision has been reached that provides for maximum use of state land consistent with the public interest. AS 38.04.005(a). Although the state is generally required to obtain, at minimum, fair market value for lands sold, and is obligated to attempt to secure, as consideration for disposal, the maximum benefits for the citizens of the state as a whole, 1985 Inf. Op. Att'y Gen. at 315-16 (Apr. 25; 566-230-85), lands within the land disposal bank are not managed primarily in a way intended to secure income or profit. Thus, they are not retained as an investment as that term is commonly understood. Therefore, it is our opinion that lands reacquired through contract terminations are not retained as an investment of a state entity.

This opinion is buttressed by the legislative history for AS 29.45.030(a)(1)(B). Testimony offered in favor of the bill and comments by legislators focused largely on problems faced by

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municipalities when privately owned properties are taken off municipal tax rolls through foreclosure by entities such as AIDEA, PERS, and TERS, yet the municipalities must still provide services. Comments by Senator Drue Pearce, the bill's sponsor, are typical:

The bill which was originally requested by the Alaskan Municipal League, would allow taxation of real property acquired by State and Federal agencies through foreclosure or deed in lieu of foreclosure and retained for investment purposes. Some state agencies (Alaska Industrial Development and Export Authority, Public Employees Retirement System, Teachers Retirement System) are exempt from taxation by statute, while others (Alaska Housing Finance Corporation) pay local property taxes. Inequities have been created because exempt properties bear no tax burden but receive the same services as when they were in private ownership.

Hearing on SB 70, S. Fin. Comm., doc.25, p. 1, comments of bill sponsor Drue Pearce, March 22, 1991. This focus on municipal properties requiring services (i.e. residential and commercial properties) coupled with the lack of reference to the Division of Land or the state's land disposal bank in the legislative history indicates that the Legislature probably did not intend for lands managed by the Division under the Alaska Lands Act to fall within the penumbra of lands "retained for investment purposes."

IV. If Taxes Are Owed, Are Back Taxes Also Owed?

As of January 1, 1992, properties that are acquired by a state agency through foreclosure or deed in lieu of foreclosure and retained as an investment are taxable. AS 29.45.030(a)(1)(B). In a previous opinion, we have advised that taxable or tax-exempt status should be determined as of January 1 of each relevant year. Inf. Op. Att'y Gen. at 306-09 (May 5; 663-86-0528). The ownership of land for taxation purposes is determined by identifying the owner of record of the property as shown in the records of the district recorder. AS 29.71.800(15). If property was state-owned prior to 1992, it was exempt from taxation during previous years, so no back taxes would be owed. However, with regard to privately owned property against which taxes were properly assessed, which later is acquired by a state agency through foreclosure or deed-in-lieu of foreclosure and retained as an investment, it is our opinion that the state probably would be liable for delinquent taxes dating from the years of private ownership. It should be noted that municipalities may not collect

delinquent taxes due from a governmental entity by virtue of AS 29.45.030(a)(1)(B) through the normal tax lien distraint and sale process of AS 29.45.300 -- AS 29.45.490. Instead, the Legislature has authorized municipalities to file suit in superior court to compel payment if such taxes are not paid within six months of when due. AS 29.45.295.

V. Conclusion

Because lands reacquired by the Division of Lands through contract terminations under AS 38.05.065 are neither acquired through foreclosure or deed in lieu of foreclosure, nor retained as an investment of a state entity, it is our conclusion that they are not taxable under AS 29.45.030(a)(1)(B). However, if lands acquired by agencies are taxable, it is our opinion that the state's tax liability extends to every year for which the properties were legally taxable, subject to any valid defenses including, but not limited to, expiration of the statute of limitations.

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