

Michigan Association of Land Banks

The Effects of New & Proposed Legislation on Tax Foreclosure and Land Acquisition

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Part I: Enacted Legislation

SB 1137 – effective 12/22/2020

SB 676 – effective 1/1/2021

Changes to the Foreclosure Process: MCL 211.78g (2)

- County Treasurer must record a certificate with the register of deeds indicating:
 - That Title will vest in FGU on March 31 of the succeeding year
 - *The right of interested parties to claim surplus proceeds*
- Certificate must be filed no more than 45 days after forfeiture (March 1st)
- Note that if noticing is incomplete, claimants are still entitled to proceeds

Right of First Refusal: MCL 211.78m

1. State of Michigan – min. bid or FMV, *whichever is greater*
2. City, village, twp. and/or city land bank –
 - Claim for proceeds → min. bid or FMV, *whichever is greater*
 - No claim for proceeds → min. bid

Right of First Refusal: MCL 211.78m

3. The County

- Claim for proceeds → min. bid or FMV, *whichever is greater*
- No claim for proceeds → min. bid

4. County Land Bank

- Claim for proceeds → min. bid or FMV, *whichever is greater*
- No claim for proceeds → min. bid

*Note that the public use provision no longer exists under the new legislation

Right of Refusal re Unsold Parcels: MCL 211.78m (7)

- FGU is State of Michigan → Title must vest in the Land Bank Fast Track Authority
- FGU is not the state → FGU can:
 - Transfer property to a land bank fast track authority
 - Offer the property for sale

Claims Process: MCL 211.78t

Claimant's Notice

- Claimant must file notice by the July 1 following date of foreclosure
- By Personal Service or certified mail
- Must comply with 211.78t(2)

Claims Process: MCL 211.78t

FGU's Notice to Claimant(s)

- By the January 31 following sale or transfer
- If property was *not* sold, FGU must send notice of that to claimant
- Notice must comply with MCL 211.78t(3)
- Must file proof of service with circuit court by May 15

Claims Process: MCL 211.78t

- After receiving FGU's notice, claimant may file a motion with the circuit court in which the judgment of foreclosure took place.
- The court will set a hearing to determine the relative priority and interest of each claimant and allocate the proceeds accordingly
- The court shall require payment of a sale commission to the FGU in the amount of 5% of sale price.
- FGU must pay the claimants according to court's order within 21 days

How to Determine FMV?

- No real direction in the new bills and there are several definitions in case law and statutory law
- 2X State Equalized Value ("SEV")
- FGU may get the property appraised
 - Appraisal value should align with the pre-tax assessment unless change can be justified
- The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby: ☐ Buyer and seller are typically motivated; ☐ Both parties are well informed or well advised, and acting in what they consider their own best interests; ☐ A reasonable time is allowed for exposure in the open market; ☐ Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and ☐ The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale." (Source: Code of Federal Regulations, Title 12, Chapter I, Part 34.42[g]; also Interagency Appraisal and Evaluation Guidelines, Federal Register, 75 FR 77449, December 10, 2010, page 77472)

How to Determine FMV? (continued)

- Courts have said that FMV = true cash value. See *C.A.F. Investment Co. v. State Tax Comm.*, 392, Mich. 442, 450 (1974); *Meadowlanes Limited Dividend Housing Assoc. v. City of Holland*, 437 Mich. 473, 484 (1991).
- MCL 211.27(1) defines "true cash value" as "the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale. The usual selling price may include sales at public auction held by a nongovernmental agency or person if those sales have become a common method of acquisition in the jurisdiction for the class of property being valued. The usual selling price does not include sales at public auction if the sale is part of a liquidation of the seller's assets in a bankruptcy proceeding or if the seller is unable to use common marketing techniques to obtain the usual selling price for the property. A sale or other disposition by this state or an agency or political subdivision of this state of land acquired for delinquent taxes or an appraisal made in connection with the sale or other disposition or the value attributed to the property of regulated public utilities by a governmental regulatory agency for rate-making purposes is not controlling evidence of true cash value for assessment purposes. In determining the true cash value, the assessor shall also consider the advantages and disadvantages of location; quality of soil; zoning; existing use; present economic income of structures, including farm structures; present economic income of land if the land is being farmed or otherwise put to income producing use; quantity and value of standing timber; water power and privileges; minerals, quarries, or other valuable deposits not otherwise exempt under this act known to be available in the land and their value. In determining the true cash value of personal property owned by an electric utility cooperative, the assessor shall consider the number of kilowatt hours of electricity sold per mile of distribution line compared to the average number of kilowatt hours of electricity sold per mile of distribution line for all electric utilities."

Bundling

- Permitted by MCL 211.78m(2)
- Minimum bid for group must equal the sum of the minimum bid for each property in the group
- Performance bonds are still allowed

Bundling Unsold Property

- Permitted by MCL 211.78m
- Proceeds must be deposited into a restricted account designated as the “delinquent tax property sales proceeds for the year _____”
- Best practice discussion: including discussing differences between first and second round bundling

Impact of Legislation on Landbank Funding

- Sources of revenue in foreclosure process – delinquency related fees, forfeiture related excess fee revenue, excess proceeds, commission on sale
- Restrictions on revenue
- Contracts for remediation: MCL 211.78m(8)(b) – minimum bid, MCL 211.87b(2) – revolving fund

Best Practices

- Email communication
- It is safer for landbanks to purchase properties for which no *Rafaeli* claim has been filed
- Bundling second auction

Unresolved Issues

- No single way of determining FMV
- No determination on tolling back – left up to Michigan Supreme Court
 - We know that any property transferred or sold under 78m after July 17, 2020 (MCL 211.78t (1)(a)) may claim surplus proceeds
- *Rafaeli* concerns properties sold at auctions, but what about other properties?
- Do the new changes to tax foreclosure (i.e., *Rafaeli*) apply to property that goes through the tax sale unsold and is then deeded to the county treasurer by default? It depends on surplus proceeds
- Properties that have been bundled and transferred to land bank or properties land banks have acquired for minimum bid and sold for more than minimum bid
 - “All property held is subject to the right of the government to regulate its use in the exercise of the police power so that it shall not be injurious to the rights of the community or so that it may promote its health, morals, safety and welfare.” *Greater Bible Way v. City of Jackson*, 478 Mich. 373, 403 (2007).

Important to Note: *Jackson v. SNRI*, 2018-162877-NZ, (Mich. Ct. App., 2019)

- The Michigan COA was concerned by the issue of elected officials wearing multiple hats by serving on the boards of the purchasing entities in *Jackson v. SNRI*:
 - The City of Southfield exercised its right of first refusal before the properties could go into auction and sold a group of properties to a non-profit, which would renovate the homes.
 - The City did so to avoid an increase in rental properties.
 - The non-profit organization provided the funds for the City to exercise its right of first refusal and costs of renovation

Jackson v. SNRI (continued)

- The Southfield city administrator was a board member and the vice president of the non-profit. The city mayor was also a board member and the president.
- The court found this troubling because the same elected officials were on both sides of the transaction.
- “[T]he fact that elected officials were using their political status for private financial gain by obtaining properties before they could go to auction following tax foreclosure is, at a minimum, troubling.”

Implications of *Jackson v. SNRI*

- County Treasurers are required to serve on boards of land bank authorities
- It is important to avoid the appearance of bypassing auctions for a more favorable outcome

Part II: Proposed Legislation

Proposed Legislation

- Adds a \$100 community impact fee to delinquent taxes
- Section 8: the fee must be used to offset costs incurred in collecting delinquent taxes
- Section 9: fee should be transferred to land bank fast track authority. If there is no need for it, the LBFTA can declare a fee revenue and return it to the treasurer

The Impact of Enacted Legislation on Proposed Legislation

- The language does not align with the enacted legislation
- Discussion of current legislative climate and likelihood of moving forward

Questions

- What is the impact on transfers to the general fund? Does it restrict transfers only from the foreclosure series or does it also restrict transfers from the DTRF? Does it make any changes to the DTRF?

The DTRF remains under the control of the County Treasurer. There are no changes to transfers. Note that excess proceeds will not be deposited into the DTRF but into restricted accounts.

Questions

- Are there any changes to the Land Bank Fast Track Act?

None yet.

Questions

- Are there any changes to the DTRF enabling act?

No

Questions

- Are there opportunities for sustainable funding for the Land Bank in these amendments? If so, how?

None in the new legislation, but it will depend on how the landbanks operate. However, the Center for Community Progress is pushing for legislation on this issue.

Questions

- Can LBs purchase at no-minimum bid auction?

Yes. The landbank can always bid.

- Concerns regarding liability protection.

Questions

- If the land bank develops the property then sells it, what amount would have to be returned to the owners (under *Rafaeli*)? Would it be the basis price, above? Would the land bank be able to retain any expenses?

For post-July 2020 foreclosures, the amount to be returned to the previous owners is the difference between FMV and the delinquent taxes + fees (including rehab costs)

For retroactive cases, the amount is still undetermined.

Best Practices Wrap Up

- Treasurers can create a process for evaluating the properties that are forfeited or foreclosed and subject to sale at the auctions for the possibility that they will result in excess proceeds
- What would the optics be of the LB actively bidding against the private market?
- Discussion about how putting the land bank “on the shelf” is more advantageous than dissolving if there are litigation concerns.

Best Practices re Funding

- Contracts with land banks for services
- Suggestions?

Additional Questions or Unresolved Issues?