

TAX CERTIFICATES: A REVIEW OF THE TAX SALE LAW

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Tax certificates are sold by municipal tax collectors to generate funds owed by delinquent tax payers. Municipalities depend on the collection of property taxes and other assessments to fund the many services provided to residents. Municipal governments could not operate without the consistent collection of these funds. In exchange for the payment of unpaid property taxes, an investor is issued a tax certificate which accrues interest until redeemed (paid off) by the property owner or another interested person. The certificate represents a high-priority lien on a delinquent tax payer's property. If the certificate is not redeemed within a period of time, the certificate holder may foreclose on the certificate and obtain title to the underlying property.

This article outlines New Jersey's Tax Sale Law¹ and discusses several apparent inconsistencies and unresolved issues relating to this little-known area of the law.

I. PUBLIC POLICY

Unpaid real estate taxes and other assessments automatically become liens against the taxed real estate, but they do not constitute a personal obligation of the property owner.² Municipalities may only collect the revenues by means provided by the Tax Sale Law.³ Section 19 of the Tax Sale Law provides that if a lien remains unpaid for a specific period of time, the municipality may, by resolution, sell the lien in the form of a tax sale certificate for a sum equal to the unpaid taxes or other municipal liens.⁴

The public policy underlying the Tax Sale Law is to encourage tax sale foreclosure in order to assist municipalities in collecting delinquent taxes.⁵ Section 3 of the Act specifically provides that it is a "remedial statute" and is to be "liberally construed to effectuate the remedial objects thereof."⁶ This policy is in recognition of the fact that municipalities require consistent revenues generated by

¹ N.J. STAT. ANN. §§ 54:5-1 to 54:5-104.42 (West 1986 & Supp. 1996) [hereinafter "Tax Sale Law"].

² N.J.S.A. § 54:5-6; *Newark v. Central & Lafayette Realty Co.*, 150 N.J. Super. 18, 21, 374 A.2d 504 (App. Div. 1977).

³ *Dome Realty, Inc. v. Paterson*, 150 N.J. Super. 448, 454-55, 375 A.2d 1240, 1243 (App. Div. 1977); *Sussex Woodlands, Inc. v. Mayor and Council of West Milford Twp.*, 109 N.J. Super. 432, 435, 263 A.2d 502, 503-04 (Law Div. 1970).

⁴ N.J.S.A. § 54:5-19.

⁵ *Bron v. Weintraub*, 42 N.J. 87, 91, 199 A.2d 625, 627 (1964); *Fidelity Union Trust Co. v. Newark*, 11 N.J. Super. 205, 208, 77 A.2d 820, 822 (Cty. Ct. 1951); *Lonsk v. Pennefather*, 168 N.J. Super. 178, 182, 402 A.2d 259, 261 (App. Div. 1979); *Kerr v. Trescher*, 34 N.J. Super. 437, 441, 112 A.2d 598, 600 (Ch. Div. 1955).

⁶ N.J.S.A. § 54:5-3.

real estate taxes and other assessments. This policy, however, is contrary to earlier hostility towards tax foreclosures,⁷ and to principles regarding general foreclosure which bend heavily in favor of debtors.⁸ Consistent with this policy, the Tax Sale Law is designed to attract potential purchasers of certificates by offering a secured investment with a high return and by providing for a relatively easy tax foreclosure process.

II. PURCHASING TAX CERTIFICATES

There are several methods by which tax certificates may be sold. Tax certificates are most commonly sold at auctions,⁹ but the Tax Sale Law also provides several methods by which municipalities may assign tax certificates which had been purchased by the municipality itself.¹⁰

A. Auction Process

Tax certificates are generally sold in auctions held once per year in each municipality. Public notice of the tax sale must be posted in "five of the most public places in the municipality" and must be published in a local newspaper once per week for four weeks preceding the sale.¹¹ The tax collector may adjourn the sale in his or her discretion "for any reason satisfactory" to him or her.¹² The tax collector must prepare and deliver each tax certificate within ten days following an auction or the purchaser may re-

⁷ *Bron*, 42 N.J. at 91, 199 A.2d 625, 627.

⁸ *See, e.g., Hardyston Nat'l Bank v. Tartamella*, 56 N.J. 508, 267 A.2d 495, 497 (1970) (explaining that a mortgagor's right to redeem is a favored right devised by equity to protect mortgagor from forfeiture of his title); *Heritage Bank, N.A. v. Magnefax Corp.*, 194 N.J. Super. 376, 377, 476 A.2d 1271, 1272 (Ch. Div. 1984) (stating that the post-sale right to redeem was created by equity to protect mortgagor from forfeiture of property); *Carteret Sav. & Loan Ass'n, F.A. v. Davis*, 105 N.J. 344, 521 A.2d 831 (1987) (noting the historical policy in equity of protecting debtor's interest in mortgaged property).

⁹ N.J.S.A. §§ 54:5-25 *et seq.*, and see *infra* section 2A of this article which discusses the auction process.

¹⁰ N.J.S.A. §§ 54:5-112 *et seq.* and see *infra* section 2B of this article which discusses assignments and private sales by municipalities.

¹¹ N.J.S.A. §§ 54:5-25, 54:5-26. The authors have been involved in at least one unreported action in which a tax certificate was invalidated because notice was not properly posted. A small branch of a relatively small bank in the City of Newark was held to be not one of "the most public places in the municipality." Order dated April 8, 1996 entered by The Hon. Alvin Weiss, A.J.S.C., *New Jersey Economic Development Authority, et al v. City of Newark, et al*, Superior Court of New Jersey, Law Division, Essex County, Docket No. ESX-L-7048-95.

¹² N.J.S.A. § 54:5-28.

fuse to accept it and be entitled to a refund of the purchase price.¹³

Interested purchasers must pay the outstanding property taxes and bid against each other on the interest which will be generated by the certificate.¹⁴ The maximum interest allowed is 18% and may be bid down to 0%.¹⁵ If the interest rate is bid down to 0%, "premium" bids may be made whereby the purchaser pays more than the amount of taxes and assessments which are due.¹⁶ The premium money is held by the tax collector and returned to the purchaser if redemption is made.¹⁷ If the certificate is not redeemed within five years, the premium funds are turned over to the municipality.¹⁸ There is no authority to require the property owner to reimburse this premium payment upon redemption.¹⁹ Thus a certificate holder cannot recover any premium payment if the certificate is not redeemed within five years. There are few published opinions relating to irregularities in tax sales, however, courts have held that any irregularity in a tax sale requires that the sale be deemed invalid.²⁰

There is no statutory mandate as to the form of payment made by bidders at tax sales, but Section 33 of the Tax Sale Law requires that successful bidders make full payment to the tax collector "before the conclusion of the sale." If a successful bidder cannot make immediate payment in full, the tax collector reopens the auc-

¹³ N.J.S.A. § 54:5-49.

¹⁴ N.J.S.A. § 54:5-32.

¹⁵ *Id.*

¹⁶ N.J.S.A. § 54:5-32.

¹⁷ N.J.S.A. § 54:5-33.

¹⁸ N.J.S.A. § 54:5-33.

¹⁹ Sections 54:5-58 to 54:5-63 of the Tax Sale Law specify what may be included in the cost of redemption. These sections do not, however, include the reimbursement of premium payments.

²⁰ In *Harrington Co. v. Horster*, 89 N.J.Eq. 270, 273 (Ch. 1918) the Court stated: "The due performance of every step in the proceedings, even in the most minute particulars, is a condition precedent to the validity of the sale . . ." See also *Woodbridge v. Allen*, 43 N.J.L. 262, 270 (1881). The court explained:

[t]he power to sell lands for taxes is a naked power, and the validity of a title derived from such a sale depends upon a strict compliance with the directions of the statute. The officer entrusted with the power of sale exercises a naked statutory and special authority, depending upon the letter of the law for its support. He must act in conformity with the law from which his power is derived; and a purchaser at such a sale is bound to inquire whether he has so acted. It is, therefore, a condition precedent to the passing of titles at such sales that all the proceedings of the officers who have anything to do with the assessment and the collection of taxes, or with the advertisement and sale of the property, shall be in compliance with the statute authorizing the sale.

Id. (citations omitted). See also, *supra*, note 11.

tion for the subject certificate or certificates.²¹ Advertisements for tax sales invariably provide that payment will be accepted only in cash, certified check or money order.²²

It has long been determined that wire transfers are the equivalent of cash for other types of transactions,²³ but this issue has been the source of some confusion as it relates to tax sales. The New Jersey Department of Community Affairs, Division of Local Government Services, has recently put this issue to rest by mandating that wired funds are equivalent to "cash," and that they are an accepted form of payment for tax certificates.²⁴

B. *Assignment or Private Sale by Municipality*

On occasions when no private party successfully bids on a tax certificate at auction, the certificate is struck off to the municipality itself.²⁵ When this occurs, however, the primary purpose of the statute, which is the collection of taxes, is not accomplished.²⁶ Several methods are provided for municipalities to sell or assign such tax certificates which they were forced to purchase at their own sales.

The various statutory methods by which tax certificates may be

²¹ N.J.S.A. § 54:5-33.

²² This requirement is apparently imposed in light of the "immediacy" requirement of N.J.S.A. § 54:5-33, as well as to avoid difficulties collecting from successful bidders after the sale has concluded.

²³ See, e.g., *Banque Worms v. BankAmerica Int'l*, 570 N.E.2d 189 (N.Y. 1991) (stating that "national uniformity in the treatment of electronic funds transfers is an important goal Payments made by electronic fund transfers . . . are to be [the] equivalent of cash payments"). See also *Sovran Bank, N.A. v. F/V Captain Scratch*, 1992 W.L. 252271 (E.D.Va. 1992) (finding payment by wire transfer at public auction to be equivalent to cash).

Furthermore, federal banking regulations provide that wire transfers should be treated in the same manner as cash for purposes of availability. 12 C.F.R. § 229.10(b)(1) (1993). In fact, unlike a transaction with a certified check which may take days to complete the funding process, a wire transfer transaction is completed in a matter of minutes or hours. *Manufacturers Int'l, LTDA v. Manufacturers Hanover Trust Co.*, 792 F. Supp. 180, 187 (E.D.N.Y. 1992) ("The fund transfer is considered complete at the moment the receiving bank receives the credit message, not when the beneficiary acquires the funds"), *aff'd*, 47 F.3d 1159 (2d Cir. 1995), *cert. denied*, 63 USLW 3870 (June 13, 1995); see also N.J.S.A. § 12A:4A-302 (West Supp. 1995) ("If a sender's instruction states a payment date, the receiving bank is obliged to transmit its payment order at a time and by means reasonably necessary to allow payment to the beneficiary on the payment date. . . ."); 12 C.F.R. § 210.31(b) (1993).

²⁴ See N.J. DEPT. COMM. AFFAIRS, DIV. OF LOCAL GOV'T SERV., LOCAL FINANCE NOTICE (June 7, 1995) (providing that "[t]he use of wired funds . . . is acceptable as a cash payment at the close of a tax sale").

²⁵ N.J.S.A. § 54:5-34.

²⁶ *Kerr v. Trescher*, 34 N.J. Super. 437, 441-42, 112 A.2d 598, 600 (Ch. Div. 1955).

sold are designed to convert tax certificates into usable cash without the municipality having to go through the foreclosure process.²⁷ Several methods are provided, with different conditions and different rights associated with each method, in order to provide each municipality with a choice of methods to best serve its interest.²⁸

Perhaps the most significant difference between the various methods of assignment by municipalities is whether the assignment includes municipal liens imposed subsequent to the issuance of the certificate. This is a key distinction because any assignment of a tax certificate which includes subsequent municipal liens must be foreclosed by the assignee within two years from the date of the confirmation of the sale, or the certificate will revert back to the municipality.²⁹ Upon application before the expiration of the two year period, however, the governing body "on good cause shown" may extend the two year limitation period.

The various options are found within Sections 112 to 114 of the Tax Sale Law. Section 112 provides that a municipally held tax certificate may be sold by private sale for not less than the amount of municipal liens that the tax certificate represents.³⁰ An assignment under Section 113 is a private sale of a tax certificate, *together with* subsequent liens thereon, for a sum not less than the amount of the liens charged or for the assessed value of the property if the total outstanding liens exceed the assessed value of the property.³¹ By contrast, an assignment under Section 114.1 requires public notice, and the sale *does not include* any municipal liens which arose subsequent to the date of the certificate.³² Under this section the governing body may, by resolution, sell a municipally held certificate for less than the amount due on the certificate. If a certificate which was sold in this manner is redeemed, the private certificate holder is only entitled to the amount actually paid for the assignment of the certificate; the balance of the redemption sum reverts

²⁷ *Dvorkin v. Dover Twp.*, 29 N.J. 303, 309, 148 A.2d 793, 796 (1959).

²⁸ *Kerr*, 34 N.J. Super. at 444, 112 A.2d 598, 602 (explaining that "the statute vested a choice of methods in the municipality, so that it could exercise its judgment as to which method would best serve its interest and produce a purchaser in order to liquidate its delinquent taxes and obtain cash for its operating needs").

²⁹ N.J.S.A. §§ 54:5-114.4, 54:5-114.5. See *Cannici v. Scott*, 20 N.J. Super. 97, 100, 89 A.2d 103, 104 (Ch. Div. 1952).

³⁰ N.J.S.A. § 54:5-112.

³¹ N.J.S.A. § 54:5-13. See also *Parlo v. Van Horn*, 27 N.J. Super. 64, 70, 98 A.2d 721, 723-24 (Ch. Div. 1953).

³² N.J.S.A. § 54:5-114.1.

to the municipality.³³ As a fourth option, Section 114.2 provides that a municipality may sell, either at public or private sale, any tax certificate, *including* municipal liens imposed subsequent to the issuance of the tax certificate, for the value of the certificate plus subsequent liens, or, if so determined by resolution, for an amount lower than the total amount due.³⁴

C. Recording

A private purchaser of a tax certificate must record the certificate within three months of the date of sale or the certificate will be deemed void against any purchaser, lessee, or mortgagee of the property whose deed, lease or mortgage is recorded before the recording of the certificate.³⁵ The certificates are recorded in the same manner as a mortgage in the county in which the land is located.³⁶

The Tax Sale Law provides that a certificate held by a municipality may be replaced if it is lost or destroyed,³⁷ but there is no authority to compel the replacement of a certificate held by a private purchaser where the original unrecorded³⁸ tax certificate is lost or destroyed. Although there is no reported decision on this issue, it is likely that New Jersey Courts would enforce the underlying lien if proven by other means because the certificate is only evidence of the lien, not the lien itself.³⁹

The holder of a tax certificate may transfer it to another person or entity by executing and filing an Assignment.

³³ *Kerr*, 34 N.J. Super. at 443, 112 A.2d 598, 601.

³⁴ N.J.S.A. § 54:5-114.2. See also *Kerr*, 34 N.J. Super. at 443, 112 A.2d 598, 601; *Parlo*, 27 N.J. Super. at 70-71, 98 A.2d 721, 724 (discussing § 114.2 in general).

³⁵ N.J.S.A. § 54:5-51 (indicating that municipalities need not record certificates which they purchase).

³⁶ N.J.S.A. § 54:5-50.

³⁷ N.J.S.A. § 54:5-52.1 (providing that the certificate need not be recorded).

³⁸ If a lost or destroyed certificate had been recorded, the record of the certificate could be relied upon pursuant to N.J.S.A. § 2A:82-20 which provides in part:

[t]he record of any instrument or of a copy of any instrument recorded in any public office of this state pursuant to the law, or a transcript of such record, certified to be a true transcript by the officer in whose office the same is so recorded, . . . shall be received in evidence in any court or proceeding in this state and be as good, effectual and able in law as if the original instrument were then and there produced and proved.

N.J.S.A. § 2A:82-20.

³⁹ III COOLEY ON TAXATION § 1452 (4th ed. 1924). Other jurisdictions have permitted foreclosure despite the unavailability of a tax certificate. See *In re Ueck's Estate*, 260 A.D. 369 (App. Div. 1940), *rev. on other grounds*, 35 N.E. 2d 624 (NY 1941). See also *People re Rel Morgenthau v. Kady*, 11 N.E. 810, 812 (Ct. of App. 1887).

D. *Payment of Subsequent Taxes*

A certificate holder has an interest in the underlying property which entitles him or her to pay subsequent taxes on the property.⁴⁰ The cost of redemption by the property owner includes subsequent taxes actually paid by the certificate holder plus interest thereon.⁴¹

III. INVALID CERTIFICATES

When a tax certificate is deemed invalid after it has been sold, the certificate holder is entitled to reimbursement of the amount paid plus "lawful interest."⁴²

A. *Presumption of Validity*

Tax certificates contain the name of the municipality in which the property is located, the date on which the subject taxes were assessed on the property, a description of the property, the applicable interest rate, and the face value of the certificate.⁴³ The certificate becomes irrebuttable evidence of the information stated in the certificate after two years from the date of the sale. Specifically, N.J.S.A. 54:5-52 provides:

The certificate of sale shall be presumptive evidence in all courts. . . of the truth of the statements therein, of the title of the purchaser to the land therein described, and the regularity and validity of all proceedings had in reference to the sale. *After two years from the record of certificate of sale, no evidence shall be admitted in any court to rebut the presumption, unless the holder thereof shall have procured it by fraud, or had previous knowledge that it was fraudulently made or procured.*⁴⁴

In apparent contradiction to this statutory mandate, N.J.S.A. 54:5-100 provides that in an action to foreclose on a tax certificate: the validity of the tax or other municipal lien for which the sale was made and certificate issued . . . shall be conclusively pre-

⁴⁰ N.J.S.A. § 54:5-60.

⁴¹ N.J.S.A. § 54:5-60. *See also infra*, section IV (discussing redemption).

⁴² N.J.S.A. § 54:5-43. *See also infra*, section III.B. (discussing the definition of a "lawful interest").

⁴³ N.J.S.A. § 54:5-47.

⁴⁴ N.J.S.A. § 54:5-52 (emphasis added). The irrebuttable "presumption" was created by section 52 two years after the sale has been enforced by the courts. *See Community Development Co. v. Seaside Gardens, Inc.*, 7 N.J. 153, 156, 81 A.2d 14 (1951); *Bayonne v. Ferenczi*, 49 N.J. Super. 100, 102, 139 A.2d 315, 316 (App. Div. 1958); *Central Union Trust Co., v. Willat Film Corp.*, 99 N.J. Eq. 748, 755 (Ch. 1926); *Cedar Realty Co. v. Bahrs*, 97 N.J. Eq. 390, 391 (Ct. Err. & App. 1924).

sumed *unless a defendant in the action shall set up as a defense thereto the invalidity of the tax or other municipal lien . . .* All questions as to such invalidity may be tried in the action.

Courts have held that the statutory presumption of validity and the two year limitation period provided by N.J.S.A. 54:5-52 do not apply to tax certificates which are based on erroneous tax assessments.⁴⁵ The basis for the court's refusal to strictly enforce the irrebuttable presumption of validity created by N.J.S.A. 54:5-52 is that the remedy of foreclosure is an equitable remedy, and it would be an inequitable forfeiture to enforce a lien which is based on an invalid tax assessment. The courts have thus held that the only purpose of N.J.S.A. 54:5-52 is "to aid in the enforcement and collection of unpaid taxes and assessments validly made. It cannot give validity to a void assessment."⁴⁶

B. Lawful Interest

Where a tax certificate is found to be invalid, the certificate holder's sole recourse is to compel the municipality to buy back the tax certificate.⁴⁷ This recourse, however, provides only empty security to the buyers of tax certificates because the tax certificate holders may only seek the amount paid for the certificate plus "lawful interest."⁴⁸ The Appellate Division has interpreted "lawful interest" to be equal to the post-judgment interest rate articulated in *R. 4:42-11*.⁴⁹ Thus, the certificate holder is not entitled to the interest stated in the tax certificate itself, which is up to 18%. Nor is the certificate holder entitled to counsel fees, search fees, or the additional fees to which certificate holders are normally entitled.⁵⁰

The Appellate Division's conclusion that "lawful interest" is equal to the interest articulated in *R. 4:42-11* is contrary to other sections of the Tax Sale Law as well as the legislative intent to encourage investment in tax certificates by providing purchasers with

⁴⁵ N.J.S.A. § 54:5-100 provides an exception to the presumption of validity created by N.J.S.A. § 54:5-52. See, e.g., *Brinkley v. Western World, Inc.*, 275 N.J. Super. 605, 646 A.2d 1136 (Ch. Div. 1994); *Nordell v. Mantua Twp.*, 45 N.J. Super. 253, 256, 132 A.2d 39, 40-41 (Ch. Div. 1957).

⁴⁶ *Nordell*, 45 N.J. Super. at 257, 132 A.2d 39, 41; *Brinkley*, 275 N.J. Super. at 609, 646 A.2d 1136, 1138.

⁴⁷ *Brinkley*, 275 N.J. Super. at 611, 646 A.2d 1136, 1139 (citing *Tontodonati v. Paterson*, 229 N.J. Super. 475, 551 A.2d 907 (App. Div. 1989)).

⁴⁸ N.J.S.A. § 54:5-43. See also *Tontodonati*, 229 N.J. Super. at 480, 551 A.2d 1046.

⁴⁹ *Brinkley v. Western World, Inc.*, 292 N.J. Super. 134, 646 A.2d 1136 (App. Div. 1996). The Authors unsuccessfully argued this appeal.

⁵⁰ *Tontodonati*, 229 N.J. Super. at 484-85, 551 A.2d 1046. See *infra*, section IV.B. (discussing redemption costs and fees).

a high yielding, secured investment vehicle.⁵¹ Any interpretations of the Tax Sale Law which reduce the rights and powers of holders of tax certificates will necessarily reduce the appeal of investing in tax certificates and thus be counter to the purpose of the Tax Sale Law.

The term "lawful interest" has been interpreted in other areas of law to mean the highest interest rate permitted under the usury law.⁵² Most significantly, the *Brinkley* court's interpretation of "lawful interest" as used in N.J.S.A. 54:5-43 is directly contrary to the meaning of the term "lawful interest" as used in Section 105 of the Tax Sale Law. N.J.S.A. 54:5-105 provides that the owner of a property encumbered by a tax certificate may file an action in Superior Court to have the certificate declared cancelled. That Section provides, in part, that the court shall cancel any tax certificate of record upon the showing that "the holder of the tax sale certificate has been fully paid all monies expended by him for the tax sale certificate, including all expenses incurred by him *and lawful interest* therein according to the law."⁵³ The use of the term "lawful interest" in Section 105 must necessarily mean the interest rate stated on the certificate. Any other interpretation of "lawful interest" would enable any property owner to cancel a tax certificate without paying the interest stated on the face of the certificate by merely filing an action pursuant to Section 105 and paying the face value of the certificate plus costs and interest at the low *R. 4:42-11* "post judgment" rate rather than the interest rate stated on the certificate.

Because "lawful interest" must constitute the rate of interest stated on the face of the certificate for purposes of Section 105, it should be given the same meaning for purposes of Section 43.⁵⁴ If

⁵¹ *State v. Galloway*, 133 N.J. 631, 658, 628 A.2d 735, 749 (1993) (explaining that when statutory terms have more than one possible meaning, the court must then look to legislative intent). See also *Jacobitti v. Jacobitti*, 135 N.J. 571, 579-80, 641 A.2d 535, 539 (1994).

⁵² See *Saul v. Midlantic Nat. Bank/South*, 240 N.J. Super. 62, 70, 572 A.2d 650, 654 (App. Div.), *certif. den.*, 122 N.J. 319, 585 A.2d 338 (1990); *Stuchin v. Kasirer*, 237 N.J. Super. 604, 610, 568 A.2d 907 (App. Div.), *certif. den.*, 121 N.J. 660 (1990). See also *R. 3:26-4* (permitting any person who posts a cash bail on behalf of another to charge "lawful interest"); N.J.S.A. § 31:1-4 (usury statute which equates "lawful interest" with any interest rate that is not usurious); N.J.S.A. § 17:2A-3 (equating "lawful interest" with statutory maximum interest rate).

⁵³ N.J.S.A. § 54:5-105 (emphasis added).

⁵⁴ Statutory phrases are to be interpreted in a consistent manner. *State v. Shabazz*, 263 N.J. Super. 246, 252, 622 A.2d 914, 917 (App. Div.), *certif. den.*, 133 N.J. 144, 627 A.2d 1149 (1993) (explaining that statutory phrases must be interpreted in context of remaining portions of statute and in a manner that advances the legislative purpose).

left unaddressed, this interpretation of Section 43 could have a severe impact upon the ability of municipalities to raise funds through the sale of tax certificates.⁵⁵

IV. REDEMPTION

A. *Who May Redeem*

Generally, any person having an interest in the underlying property may redeem a tax certificate at any time before the "equity of redemption" is cut off through tax foreclosure.⁵⁶ The right to redeem is liberally construed.⁵⁷ Accordingly, it has been held that any interest in the underlying property which would be cut off by tax foreclosure is sufficient to permit the interested party to redeem the tax certificate.⁵⁸ For example, the owner of an easement or a subsequent tax certificate may not redeem because such interests would not be affected by foreclosure.⁵⁹

In addition to the property owner, the following interests have been held sufficient to permit the interested party to redeem a tax certificate: the holder of a prior tax certificate,⁶⁰ the widow and heirs of a decedent who owned the underlying property,⁶¹ the trustee of a trust holding a contingent residual interest in the un-

Tontodonati v. Paterson also involved the invalidity of a tax certificate but it did not determine the meaning of "lawful interest." 229 N.J. Super. 475, 551 A.2d 1046 (App. Div.), *certif. den.*, 177 N.J. 35, 563 A.2d 808 (1989). The Appellate Division awarded the certificate holder restitution of the purchase price plus "lawful interest," but left the issue of what constitutes "lawful interest" to be determined by the trial court. *Id.* at 485. The litigation was then settled without a final ruling on this issue. In *dicta*, the court disagreed with the plaintiff's argument that the terms of the tax certificate, *i.e.*, 18% interest, should be enforced against the municipality, but the court's holding did not include a determination as to the meaning of "lawful interest." *Id.* at 484.

⁵⁵ See *Lonsk v. Pennefather*, 168 N.J. Super. 178, 182, 402 A.2d 259, 261 (App. Div. 1979), *certif. den.*, 82 N.J. 285, 412 A.2d 792 (1980) (concluding that the public policy underlying the Tax Sale Law is to assist municipalities in collecting delinquent taxes).

⁵⁶ N.J.S.A. § 54:5-54. The 1994 amendment, L.1994, c.32, § 8 removed the open-ended phrase "or other person having an interest," and limited the right to redeem to owners, prior tax lien holders, mortgagees and occupants.

⁵⁷ *Manning v. Kasdin*, 97 N.J. Super. 406, 418, 235 A.2d 219, 225 (App. Div. 1967); *Lake Waterloo Corp. v. Kestenbaum*, 10 N.J. 525, 530, 92 A.2d 478 (1952); *Nelson v. Naumowicz*, 1 N.J. 300, 303 (1949); *Van Roden v. Manso*, 109 N.J. Eq. 148, 149, 156 A.317 (Ch. 1931); *Ruddy v. Inhabitants of Woodbridge Twp.*, 47 N.J.L. 142, 143 (1885).

⁵⁸ *Lipman v. Shriver*, 51 N.J. Super. 356, 359, 144 A.2d 37, 38 (Law Div. 1958).

⁵⁹ *Id.* at 359, 144 A.2d 37 (*citing* *Niestat v. Equitable Security Co.*, 138 N.J. Eq. 480, 48 A.2d 907 (Ch. 1946)).

⁶⁰ *Tax Investment Corp. of New Jersey v. Dilts*, 131 N.J. L. 437 (1944); *Van Roden v. Manso*, 115 N.J. Eq. 69, 169 A. 825 (1934); *Absecon Land Co. v. Keernes*, 101 N.J. Eq. 227, 137 A. 429 (Ct. Err. & App. 1927); *Realty Sales Corp. v. Payne*, 76 N.J. Super. 59, 183 A.2d 772 (App. Div. 1962), *aff'd* 78 N.J. Super. 504, 189 A.2d 458 (1963).

⁶¹ *Bron v. Weintraub*, 79 N.J. Super. 106, 190 A.2d 680 (App. Div. 1963), *rev'd. on*

derlying property;⁶² the stock holder of a defunct corporation which owned the underlying property;⁶³ judgment creditors;⁶⁴ and a co-tenant or joint tenant.⁶⁵

Redemption payments are made to the tax collector who then provides the funds to the certificate holder upon the surrender of the tax certificate.⁶⁶ A municipal certificate holder may permit redemption in monthly installments for a period not exceeding three years.⁶⁷ Many municipalities require all redemptions to be approved by the governing body. When this requirement is imposed, all interest is computed to the time when such governing body provides its approval.⁶⁸

B. *Cost of Redemption*

The amount required for redemption includes the face amount of the certificate, plus interest.⁶⁹ Additionally, all sums paid by the certificate holder for subsequent municipal liens, together with interest thereon must be paid provided, however, that the certificate holder shall have filed an affidavit with the tax collector showing the amount paid for subsequent taxes.⁷⁰

In addition to the certificate's face value and interest stated thereon, a certificate holder is also entitled to a lump sum in the amount of 2% of any certificate which exceeds the sum of \$200; 4% of any certificate which exceeds the sum of \$5,000; and 6% of any certificate which exceeds the sum of \$10,000.⁷¹ This extra "kicker" assures that a certificate holder will be adequately rewarded even if the certificate is redeemed shortly after the sale.

Once foreclosure proceedings have been initiated, certain expenses may be added to the cost of redemption. If the proper pro-

other grounds, 42 N.J. 87, 199 A.2d 625 (1964); *Manning v. Kasdin*, 97 N.J. Super. 406, 235 A.2d 219 (App. Div. 1967).

⁶² *Guyer v. Trustees of Y.M.C.A. of Trenton*, 142 N.J. Eq. 400, 405, 60 A.2d 276, 279 (1948).

⁶³ *Lasso v. Simon*, 166 N.J. Super. 134, 136, 399 A.2d 305, 306 (App. Div. 1979).

⁶⁴ *Government SEC Co. v. Waire*, 94 N.J. Super. 586, 229 A.2d 664 (App. Div. 1967). Note however, that the 1994 amendment to N.J.S.A. 54:5-54 apparently eliminates a judgment creditor's right to redeem.

⁶⁵ *Lonsk v. Pennefather*, 168 N.J. Super. 178, 402 A.2d 259 (App. Div. 1979). But note that a mere squatter or trespasser does not have the right to redeem. *Jefferson v. Davis*, 25 N.J. Super. 135, 95 A.2d 617 (Ch. Div. 1953).

⁶⁶ N.J.S.A. §§ 54:5-54, 54:5-55, 54:5-57.

⁶⁷ N.J.S.A. §§ 54:5-65 *et. seq.*

⁶⁸ N.J.S.A. § 54:5-58.

⁶⁹ *Id.*

⁷⁰ N.J.S.A. § 54:5-60.

⁷¹ N.J.S.A. § 54:5-61.

cedure is followed, the court may award attorney's fees of up to \$350.00 per tax certificate, and may award an additional fee for special cause shown by affidavit.⁷² The holder of a tax certificate may also be reimbursed for fees actually paid for recording the certificate and for all necessary advertising.⁷³

C. Cancellation by Court Order

The Tax Sale Law provides a mechanism by which a tax certificate can be cancelled of record if it has been redeemed but, through oversight, has not been cancelled. Upon a showing that the holder of a tax certificate has been fully paid the amounts due under the certificate, the Superior Court may direct that a recorded tax certificate be cancelled of record.⁷⁴ The court proceeding may be brought in a summary manner,⁷⁵ and any person with a legal or equitable interest in the property may initiate the action.⁷⁶

V. UNDERLYING PROPERTY AS SECURITY FOR CERTIFICATE

Despite the high priority afforded to tax certificates,⁷⁷ they are only secured by the value of the underlying property. Experienced bidders spend a substantial amount of time evaluating the underlying property for each certificate they intend to purchase.

For purposes of this discussion, the term security means the true value which the tax certificate holds if it is not redeemed. There are two aspects of security: (1) the value of the underlying property; and (2) the priority of the lien which the tax certificate represents. Because the redemption rate of certificates is over ninety-five percent,⁷⁸ bidders may be inclined to overlook the issue of security. This can be a fatal error, however, because an analysis of the level of security often indicates the likelihood of whether a certificate will be redeemed.

The value of the underlying property is indicative of the likelihood of redemption because if the property value is less than the

⁷² R. 4:42-9.

⁷³ N.J.S.A. § 54:5-61.

⁷⁴ N.J.S.A. § 54:5-105.

⁷⁵ *Id.*

⁷⁶ N.J.S.A. § 54:5-106.

⁷⁷ *See infra*, section VI.

⁷⁸ Annual tax assessments, and thus tax liens, are a small percentage of the value of the subject property. Common sense dictates that most property owners or mortgagees would not be likely to let the property be foreclosed upon for such a proportionately small lien. The redemption level of tax certificates has been estimated as high as ninety-nine percent in another jurisdiction. Howard C. Emmerman, *Revenue and Taxation—Collection of Delinquent Real Estate Taxes*, 19 DE PAUL L. REV. 348, 358 (1969).

redemption price of the certificate, then it is unlikely that anyone would redeem the certificate. Even after foreclosing on the certificate, the investor will be left with a property worth less than what was paid for it. The risk of this pitfall can only be eliminated through a careful appraisal of the underlying property.

The second aspect of security, the priority of the tax certificate is equally important and is discussed in Section VI below.

A. *No Right to Enter*

A tax certificate represents only a lien; no immediate possessory rights are transferred until foreclosure is completed.⁷⁹ Thus, a private certificate holder is not entitled to enter upon the underlying property to analyze, manage⁸⁰ or protect it.

One commentor has compared the process to buying "a pig in a poke."⁸¹ The Appellate Division has explained that:

Purchasers are not expected to have and are not entitled to have any intimate knowledge concerning the condition of any particular property offered at tax sale. The most they can expect to learn about properties offered for sale must be learned from curb-side inspections, an examination of public records and fortuitous facts produced by any inquiries that they happen to make.⁸²

It is clear that tax certificates do not convey an immediate right of possession or right of entry. The apparent reason for this is to allow the property owner to have full use and possession of the property while attempting to raise money during the redemption period.⁸³ A limited exception, however, would seem to be appropriate for abandoned structures. Such properties are not being

⁷⁹ *Brewer v. Porch*, 53 N.J. 167, 178-179, 249 A.2d 388, 394 (1969); *Bron v. Weintraub*, 79 N.J. Super. 106, 111-12, 190 A.2d 680, 683 (App. Div. 1963), *rev'd on other grounds*, 42 N.J. 87, 199 A.2d 625 (1964); *Newark v. Sue Corp.*, 124 N.J. Super. 5, 7, 304 A.2d 567, 578 (App. Div. 1973); *Clark v. Jersey City*, 8 N.J. Super. 33, 37, 73 A.2d 197, 199 (App. Div. 1950); *Kahn Pension Plan v. Moorestown Twp.*, 243 N.J. Super. 328, 334, 579 A.2d 366, 369 (Ch. Div. 1990). A tax certificate conveys an inchoate right subject to the property owner's right of redemption. *See infra*, note 124.

⁸⁰ *See infra*, section VII. (advancing the argument that under certain circumstances, a certificate holder should be entitled to have a rent receiver appointed through judicial proceedings).

⁸¹ Celentino, 13A N.J. PRACTICE § 35.11 (1991).

⁸² *Kahn Pension Plan v. Moorestown Twp.*, 243 N.J. Super. 328, 336, 579 A.2d 366, 370 (Ch. Div. 1990).

⁸³ N.J.S.A. § 54:5-86 provides that foreclosure proceedings may not be initiated until the expiration of six months from the date of sale when the municipality is the purchaser, and two years from the date of sale for all other purchasers. *See infra*, section VII.A. (discussing in personam foreclosure).

used by the owner during the redemption period; they present an eyesore and fire hazard to the neighborhood; and they are an attractive nuisance to children and undesirable elements. It is suggested that the legislation be changed to permit tax certificate holders to have immediate access to such buildings for the limited purpose of securing and winterizing the structure.⁸⁴

B. Conditions Affecting Value

Because those interested in bidding on tax certificates have no right to enter upon and inspect the underlying properties, diligent analyses is difficult if not impossible. Property owners and municipalities are generally under no duty to assist in this regard. Although there has been a split of authority on this issue,⁸⁵ it has been held that municipal officials may not make knowing misrepresentations about the condition of a particular property. In *Simon v. Oldman Twp.*, it was alleged that representatives of the defendant municipality made false statements to potential bidders about the environmental condition of a particular property.⁸⁶ The court ruled that if, through testimony, it could be established that the municipal representatives made knowing false representations regarding a condition of a property, the tax certificate would be rescinded.⁸⁷

Later, the appellate division addressed this issue in *Simon v. Deptford Tp.*, where the court held that in the absence of fraud, a tax certificate purchaser was not entitled to rescission based on mutual mistake.⁸⁸

⁸⁴ See *infra*, section VII.A. (advancing a similar argument that for abandoned properties the "waiting period" prior to initiating foreclosure proceedings should be shortened).

⁸⁵ Compare *Simon v. Oldmans Twp.*, 203 N.J. Super. 365, 497 A.2d 204 (Ch. Div. 1985) with *Kahn Pension Plan v. Moorestown Twp.*, 243 N.J. Super. 328, 579 A.2d 366 (Ch. Div. 1990). See also *Simon v. Deptford Twp.*, 272 N.J. Super. 21, 639 A.2d 328 (App. Div. 1994).

⁸⁶ 203 N.J. Super. 365 (Ch. Div. 1985).

⁸⁷ This holding is consistent with the principles of equitable fraud. "Where a party permits another to sign a contract knowing that he is under a misapprehension as to its terms, there is an equitable fraud which warrants reformation or rescission." *Grossman Furniture Co. v. Pierre*, 119 N.J. Super. 411, 420, 291 A.2d 858, 863 (1972) (citing *John A. Cozzone & Co. v. Redfield*, 98 N.J. Eq. 41, 129 A. 699 (Ch. 1925), *aff'd*, 103 N.J. Eq. 19, 141 A. 920 (1928); *Simpson Plumbing & Heating Co. v. Geshke*, 76 N.J. Eq. 475 (Ch. 1910), *aff'd*, 78 N.J. Eq. 306, 81 A. 1133 (Ct. Err. & App. 1911)).

⁸⁸ 272 N.J. Super. 21 (App. Div. 1993).

VI. PRIORITY

A. *General Priority Rule*

Priority is the order in which liens may be satisfied out of the underlying property. By New Jersey statute, recorded tax certificates constitute a first lien which is "paramount to all prior or subsequent alienations and descents of such lands or encumbrances thereon except subsequent municipal liens."⁸⁹ Thus, the general rule is that tax certificates are superior to all *prior or subsequent* liens and transfers except for subsequent tax certificates. There are, however, several exceptions to this general rule.

Exceptions to the priority of tax sale certificates have been carved out for certain privately held interests in land. For instance, a previously recorded easement is not affected by a subsequently issued tax certificate.⁹⁰ Additionally, administrative expenses of a decedent's estate are afforded priority over tax certificates,⁹¹ and when a property owner files a bankruptcy petition, certain of the debtor's attorneys fees and costs can be given priority over the certificates.⁹²

People have attempted, with mixed results, to use the priority of tax certificates to effectively subordinate other liens on property. A property owner who purchases a tax certificate on his or her own property cannot secure a lien with priority over a pre-existing mortgage.⁹³ If, however, a certificate is purchased on a parcel of property by someone other than the property owner, and then the certificate holder purchases the property, the interests do not merge and the certificate maintains its priority over any prior

⁸⁹ N.J.S.A. § 54:5-9.

⁹⁰ *Metropolitan Life Ins. Co. v. McGurk*, 15 N.J. Misc. 572, 574-5, 193 A. 696, 697 (Atl. Cty 1937), *aff'd*, 119 N.J.L. 517, 197 A. 47 (Ct. Err. & App. 1938); *see also* Daniel W. Galvin, Note, *The Effect of Tax Foreclosure Sales on Servitudes: Olympia v. Palzer*, 11 U. PUGET SOUND L. REV. 193 (1987) (noting that New Jersey follows the majority rule in this regard).

⁹¹ *Bowes v. United States*, 127 N.J. Eq. 132, 136, 11 A.2d 720, 722 (Ch. 1940).

⁹² *See, e.g.*, 11 U.S.C. § 506(c).

⁹³ *See Citizens Trust Co. v. Paoli*, 131 N.J. Eq. 353, 354, 25 A.2d 282, 283 (Ch. 1942). The court explained that:

It is the well recognized general rule that neither the owner nor a subsequent encumbrancer can secure a lien prior to an existing mortgage either by purchase at a tax sale or payment of taxes. This is on the theory that such payments are made to protect either the equity of the owner or the subsequent mortgage.

Id. (citing *Warranty Building & Loan Ass'n v. Cimiro Construction Co.*, 111 N.J. Eq. 8, 160 A. 847 (Ch. 1932); *Van Winkle v. Fordonski*, 114 N.J. Eq. 121, 168 A. 383 (Ct. Err. & App. 1933); *Bluestone Building & Loan Ass'n v. Glasser*, 117 N.J. Eq. 392, 176 A. 314 (Ch. 1934)). *See also* *Foley v. Kirk*, 33 N.J. Eq. 170, 178 (Ch. 1880).

mortgage.⁹⁴

B. *State Liens*

The State of New Jersey has waived its sovereign immunity with regard to tax certificate foreclosure actions where it holds a subordinate lien.⁹⁵ Liens held by the State of New Jersey are generally subordinate to tax certificates.⁹⁶ Inheritance tax liens, however, are afforded priority over tax certificates acquired *after* the imposition of the State's lien.⁹⁷ Additionally, liens imposed by the State for the remediation of environmental hazards under the Spill Compensation Fund Act are given priority over all other claims or liens "which are or have been filed against the property."⁹⁸ This "super lien" status, however, is not applied to properties consisting of six residential units or less. There is a split of authorities as to whether municipal officials must disclose a known condition which may give rise to a lien under the Spill Compensation Fund Act.⁹⁹

C. *Federal Liens*

In the absence of a federal statute, "first in time, first in right" governs priority of federal liens versus tax certificates.¹⁰⁰ Thus a mortgage held by a federal agency has priority over a subsequently issued tax certificate.¹⁰¹ Tax certificates are given priority over federal *tax* liens *regardless of when they arise*, pursuant to the Federal Tax Lien Act of 1966.¹⁰²

Properties under the control of the (now defunct) Resolution Trust Corporation ("RTC") and/or the Federal Deposit Insurance

⁹⁴ *Barry, Inc. v. Baf, Ltd.*, 3 N.J. Super. 355, 65 A.2d 761 (Ch. Div. 1949).

⁹⁵ N.J.S.A. §§ 2A:45-1 to 4. The state has not waived its immunity, however, where it holds title to the subject property. *Transcontinental Gas Pipe Line v. Dept. of Conservation*, 43 N.J. 135 (1964).

⁹⁶ *Kessler v. Tarrats*, 194 N.J. Super. 136, 143 (App. Div. 1984). *But see contra*, *Union County Utilities v. Josewitch*, 269 N.J. Super. 218, 223 (Law Div. 1993).

⁹⁷ *Irvington v. Ollemer*, 128 N.J. Eq. 402, 409, 16 A.2d 563, 567-68 (Ch. 1940), *aff'd*, 131 N.J. Eq. 189, 24 A.2d 368 (Err. & App. 1942).

⁹⁸ N.J.S.A. § 58:10-23.11(f); *see also* *Kessler v. Tarrats*, 194 N.J. Super. 136, 142-43, 476 A.2d 326, 329-30 (App. Div. 1984).

⁹⁹ *Simon v. Oldman Twp.*, 203 N.J. Super. 365, 497 A.2d 204 (Ch. Div. 1985) (rescinding certificate, principle and interest returned by the municipality); *contra*, *Kahn Pension Plan v. Moorestown Twp.*, 243 N.J. Super. 328, 579 A.2d 366 (Ch. Div. 1990) (denying rescission).

¹⁰⁰ *U.S. v. New Britain*, 74 S. Ct. 367, 370 (1954).

¹⁰¹ *U.S. v. Ringwood Iron Mines, Inc.*, 151 F. Supp. 421, 426 (D.N.J. 1957), *aff'd*, 251 F.2d 145 (3rd Cir. 1958).

¹⁰² 26 U.S.C. §§ 6323(b)(6), 6324. This statute does not apply to federal liens, except federal *tax* liens.

Corporation ("FDIC"), are afforded certain protections from foreclosure actions. Affirmative "consent" is required in order to enforce the lien of a tax certificate against property under the control of the RTC or FDIC.¹⁰³ From time to time both the RTC and the FDIC have published lists of financial institutions for which they have been appointed receiver or conservator.¹⁰⁴

The federal priority rule can sometimes present tricky scenarios. A conflict in the applicable law is created if a property is encumbered by a 1980 tax certificate, a 1985 federally held mortgage, and a 1990 tax certificate. The 1980 tax certificate has priority over the 1985 federal mortgage;¹⁰⁵ the 1985 federal mortgage has priority over the 1990 tax certificate;¹⁰⁶ and the 1990 tax certificate has priority over the 1980 tax certificate.¹⁰⁷ The authors have not come across any published opinion which addresses this circularity.

VII. FORECLOSURE

The Tax Sale Law provides three methods of barring the right to redeem a tax certificate by an interested party.¹⁰⁸ The first method can be exercised by any certificate holder. The other two methods can only be exercised by a municipal certificate holder.

A. *In Personam Foreclosure Proceedings*

Any purchaser of a tax sale certificate, and his or her heirs or assigns, may institute an action to foreclose the rights of all interested parties to redeem the certificate.¹⁰⁹ The institution of a foreclosure action does not bar the right to redeem; this right exists until barred by the judgment of the Superior Court.¹¹⁰

A municipality may initiate foreclosure proceedings after the expiration of six months from the date of the sale; other investors who purchase certificates at auction must wait two years; Investors who purchase by assignment must wait six months from the date of

¹⁰³ 28 U.S.C.A. § 1825(b)(2).

¹⁰⁴ 57 Fed. Reg. 39,715; 57 Fed. Reg. 29,494.

¹⁰⁵ First in Time First in Right. *City of New Britain, Conn.*, 74 S.Ct. at 370.

¹⁰⁶ *Ringwood Iron Mines, Inc.*, 151 F.Supp. at 426.

¹⁰⁷ N.J.S.A. § 54:5-9.

¹⁰⁸ Prior to 1994, a fourth method was available as follows:

If there shall be no redemption within the term limited by the notice provided in subsection (a) of Section 54:5-77 of this title, the right of redemption shall be barred.

N.J.S.A. § 54:5-78 (repealed by L. 1994, c32, §17, eff. May 12, 1994).

¹⁰⁹ N.J.S.A. § 54:5-86.

¹¹⁰ *Id.*

the original sale.¹¹¹ This grace period provides the property owner time to redeem the tax certificate. It is suggested that the legislation be changed to shorten the "waiting period" for abandoned structures because such properties are unlikely to be redeemed. They present an eyesore and fire hazard to the neighborhood; and they are an attractive nuisance to children and undesirable elements.

Through an *in personam* foreclosure action, the superior court may completely bar the right of redemption and foreclose all inferior encumbrances and alienations of the property.¹¹² The court has the power to vest in the purchaser of the tax sale certificate a fee simple interest in the property; a sheriff's sale is usually not necessary. A sheriff's sale is only required when the federal government or federal agency holds an interest in the property.¹¹³

A Tax Sale Law judgment of foreclosure is deemed final upon the defendants named in the foreclosure action, as well as their heirs, devisees and personal representatives. No defendant may make application to reopen the judgment more than three months from the date thereof, although courts have, on many occasions, relaxed this time period.¹¹⁴

Unknown owners or claimants of the property¹¹⁵ may be foreclosed upon by naming them as such in the foreclosure complaint.¹¹⁶ The certificate holder, however, must post notice on the property specifying the time limit, the place to redeem and the amount necessary to redeem at least twenty days before the date so fixed.¹¹⁷ Any unknown owners and claimants have five years to attack a foreclosure judgment on the ground of insufficient inquiry for the identity of any person who should have been made a defendant.¹¹⁸

The Tax Sale Law imposes several procedural requirements for *in personam* foreclosure actions. If redemption is made after foreclosure proceedings have been initiated, the certificate holder

¹¹¹ *Id.*; Township of Jefferson v. Block 447A, Lot 10, 228 N.J. Super. 1, 5, 548 A.2d 521, 522 (App. Div. 1988).

¹¹² N.J.S.A. § 54:5-87; Bloomfield Heights v. Holland Associates, 22 N.J. Misc. 61, 35 A.2d 622 (1944).

¹¹³ N.J.S.A. § 54:5-87 (amended 1996, P.L. 1994, c.32, s.11)

¹¹⁴ N.J.S.A. § 54:5-87. See Bergen-Eastern Corp. v. Koss, 178 N.J. Super 42, 427 A.2d 1132 (App. Div. 1981), *appeal dismissed*, 88 N.J. 499, 443 A.2d 713 (1981); Nordell v. Mantua Twp., 45 N.J. Super. 253, 132 A.2d 39 (Ch. Div. 1957).

¹¹⁵ Those persons are defined in N.J.S.A. § 54:5-91.

¹¹⁶ N.J.S.A. § 54:5-90.

¹¹⁷ *Id.*

¹¹⁸ *Id.* See Manning v. Kasdin, 97 N.J. Super. 406, 235 A.2d 219 (App. Div. 1967).

may be reimbursed for search fees, counsel fees or fees related to certified mailings. He or she is required, however, as a condition precedent to give thirty days written notice to all parties entitled to redeem, by certified mailing, of his intention to file the foreclosure complaint.¹¹⁹ Notice of the suit must be filed in the office of the tax collector of the municipality in which the property is located.¹²⁰ The foreclosing party must produce evidence in the foreclosure action that all subsequent municipal tax liens have been paid to the time of the commencement of the foreclosure action, or a foreclosure judgment cannot be entered by the court.¹²¹ A defendant who wishes to contest the validity of the tax sale itself or of the foreclosure proceedings must file an answer, because all questions regarding the validity of the sale are to be tried in the foreclosure action.¹²²

B. *In Rem Foreclosure Proceedings*

In rem foreclosure proceedings are available only to municipalities which are the owners of tax certificates. *In rem* proceedings are an additional remedy available to the municipality as an alternative to *in personam* proceedings, pursuant to the In Rem Tax Foreclosure Act.¹²³ The municipality may only institute an *in rem* proceeding if more than six months have expired from the date of the tax sale *and* all or any portion of the property taxes levied against the property remain unpaid for at least twenty-one months before the commencement of the *in rem* proceeding.¹²⁴

The governing body of the municipality commences the *in rem* process by adopting a resolution which lists the land against which such proceedings are to be instituted. This is known as the "tax

¹¹⁹ N.J.S.A. § 54:5-97.1. See *supra*, section IV.B. (discussing the costs of redemption).

¹²⁰ N.J.S.A. § 54:5-98.

¹²¹ N.J.S.A. § 54:5-99. It is not required, however, that such subsequent taxes be paid by the tax certificate holder. *DiBologna v. Earl*, 130 N.J. Eq. 571, 575, 23 A.2d 791, 794 (Ch. 1942).

¹²² N.J.S.A. § 54:5-100. See *Nordell*, 45 N.J. Super. at 258 (providing that landowners who were not made defendants in foreclosure action were not barred to contest foreclosure action by this statute); *Trumbower v. Park Attractions*, 121 N.J. Eq. 284 (1937) (finding that a landowner cannot collaterally attack the validity of sale if they have not complied with this statutory provision).

¹²³ N.J.S.A. § 54:5-104.31 (1948).

¹²⁴ N.J.S.A. § 54:5-104.34. An offer to pay part of the tax arrearages on a property does not prevent the municipality from instituting an *in rem* proceeding. *Atlantic City v. Block C-11, Lot 11*, 74 N.J. 34, 376 A.2d 926 (1977), *appeal dismissed*, 434 U.S. 1055 (1978).

foreclosure list."¹²⁵ A foreclosure complaint *in rem* is then prepared and filed with the Superior Court¹²⁶ and in the office of the municipal tax collector, the county recording officer and the Attorney General of the State of New Jersey.¹²⁷ The filing of the complaint in the county recording office acts as a *lis pendens* and is noted in the margin of each tax certificate referred to in the complaint.¹²⁸

The notice required in an *in rem* tax foreclosure proceeding has evolved over the last twenty years. Prior to 1977, the only notice requirements were the publication and posting on the property of the foreclosure complaint.¹²⁹ In 1977, the New Jersey Supreme Court determined, in *Township of Montville v. Block 69, Lot 10*,¹³⁰ that notice of the *in rem* proceeding was to be given to the owner of the property before his right of redemption could be foreclosed.¹³¹ Finally, the United States Supreme Court reviewed the issue of notice in *in rem* foreclosure proceedings in *Mennonite Board of Missions v. Adams*¹³² and held that it is constitutionally mandated that all interested parties, including mortgagees, be notified of the *in rem* proceeding by personal service or mailed notice.¹³³ If such notice is not effectuated, the mortgage will not be foreclosed and will survive the foreclosure judgment.¹³⁴ However,

¹²⁵ N.J.S.A. § 54:5-104.35. The Resolution is required to contain the information set forth in this statutory provision.

¹²⁶ N.J.S.A. § 54:5-104.36.

¹²⁷ N.J.S.A. § 54:5-104.41.

¹²⁸ N.J.S.A. § 54:5-104.44. The failure of a county clerk or register to index the filing of a *lis pendens* does not render an *in rem* tax foreclosure judgment invalid. *Lakewood Twp. v. Block 251, Parcel 34, Lots 3359 to 3370 Incl.*, 48 N.J. Super. 581, 138 A.2d 768 (App. Div. 1958).

¹²⁹ *Newark v. Yeskel*, 5 N.J. 313, 74 A.2d 883 (1950).

¹³⁰ 74 N.J. 1, 376 A.2d 909 (1977).

¹³¹ *Id.* at 20. The interested parties have the same right to redeem in an *in rem* proceeding as in an *in personam* proceeding. N.J.S.A. 54:5-104.60. However, if the foreclosure complaint and published and posted notices do not list the property in question, the court lacks jurisdiction to foreclose upon the tax sale certificate and the owner's right to redeem is not cut off by the *in rem* proceeding. *Long Beach Twp. v. Lot No. 3, Block No. 9*, 189 N.J. Super. 116, 122-23, 458 A.2d 1327, 1330-31 (Ch. Div. 1983).

¹³² 462 U.S. 791 (1983).

¹³³ 462 U.S. at 798-99. Practically speaking, there is no difference between the parties which must be notified for *in personam* and *in rem* proceedings after the *Mennonite* decision. N.J.S.A. § 54:5-104.48 provides that the owner, mortgagee, or any other person with a lien against or an interest in the land, may file a notice with the tax collector stating his name, post office address and residence; this notice is effective for a five year period, unless cancelled, and requires the municipality to serve the notice of foreclosure on such persons. With the decision in *Mennonite*, however, this statute has probably become superfluous.

¹³⁴ *See Last v. Audobon Park Associates*, 227 N.J. Super. 602, 605, 548 A.2d 236, 238

an interested party's failure to immediately attack this procedural defect can result in the foreclosure judgment being held to be effective against that party.¹³⁵

If an interested party redeems the tax certificate in an *in rem* proceeding, the plaintiff/municipality is required to promptly file with the county recording officer a statement setting forth that redemption has been made as to a specific parcel of land. The filing of this statement will act as a discharge of the lis pendens created upon the filing of the *in rem* proceeding with the county recording officer.¹³⁶ Alternatively, the redeemer may receive a certificate of redemption which can be filed with the county recording officer and which will have the same effect as the statement of redemption.¹³⁷

The foreclosure judgment will vest in the municipality fee simple ownership in the property.¹³⁸ The municipality will obtain full and complete relief to bar the right of redemption and to foreclose all prior and subsequent alienations and all encumbrances on the property. When a certified copy of the judgment is recorded in the county recording office, the municipality is seized of an estate in fee simple.¹³⁹ The county recording officer is required to note on the margin of the recorded tax sale certificate the date on which the foreclosure judgment was recorded.¹⁴⁰

C. Hazardous Properties

A municipality also has the right to bring an action in the Superior Court to bar the right of redemption if the land or any improvement thereon is hazardous to the public health, safety and welfare or is unfit for human habitation.¹⁴¹ The owner, mortgagee, or other person with an interest in the land, has an absolute defense to the action if the condition which rendered the property

(App. Div. 1988), *certif. denied*, 114 N.J. 491 (1989). Such a procedural defect does not render the entire foreclosure judgment defective, but renders voidable that portion of the judgment applicable to the unnoticed party's interest. *Id.* at 606.

¹³⁵ *Id.* at 606-08, 548 A.2d at 238-40.

¹³⁶ N.J.S.A. § 54:5-104.61.

¹³⁷ *Id.*

¹³⁸ N.J.S.A. § 54:5-104.64(a). The State of New Jersey, however, does not waive its right of sovereign immunity to suit where it has a proprietary interest in the lands being foreclosed. Thus, a judgment obtained in an *in rem* foreclosure proceeding will not extinguish the State's paramount title to tidelands. *Transcontinental Gas Pipe Line Corp. v. Dept. of Conservation & Economic Development*, 43 N.J. 135, 202 A.2d 849 (1964).

¹³⁹ N.J.S.A. § 54:5-104.65.

¹⁴⁰ N.J.S.A. § 54:5-104.66.

¹⁴¹ N.J.S.A. § 54:5-77.

hazardous or uninhabitable has been cured. Alternatively, an interested party can deposit with the court the amount of money determined by the court to be necessary to remove or correct the conditions or a performance bond in double that amount.¹⁴² The abatement, removal or repair must be accomplished within the time prescribed by the court, and the monies deposited with the court can be used to pay for the repairs made.¹⁴³

D. Rent Receivers

Pursuant to a fifty-five year old lower court opinion, a private certificate holder may not have a rent receiver appointed during the pendency of a foreclosure action.¹⁴⁴ This ruling is contrary to the policy of the Tax Sale Law and appears to be based on flawed reasoning. No other published opinion addresses this issue.¹⁴⁵

The appointment of a rent receiver is a long-settled remedy available to a mortgagee upon the initiation of foreclosure on an income-producing property.¹⁴⁶ Such relief is granted when it appears necessary to protect the mortgagee's interest in the mortgaged property due to lack of sufficient equity or waste committed by the debtor.¹⁴⁷ Logic dictates that this same relief should be available to tax certificate holders who have initiated foreclosure proceedings where the underlying property does not provide sufficient equity to secure the tax lien, or where waste has been committed.

In *Omaha Hotel Co. v. Kountze*,¹⁴⁸ the court stated:

Courts of equity always have the power where the debtor is insolvent . . . to take charge of the property by means of a receiver, and preserve not only the corpus, but the rents and profits, for the satisfaction of the debt.¹⁴⁹

Unlike most commercial mortgage documents, tax certificates contain no contractual clause providing for the appointment of a

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Forster v. Davenport*, 128 N.J. Eq. 385, 16 A.2d 614 (Ch. 1940).

¹⁴⁵ The authors have made a successful application for the appointment of a rent receiver in a tax certificate foreclosure on at least one occasion. The opinion, however, was not reported.

¹⁴⁶ *See, e.g., Cortleyeu v. Hathaway*, 11 N.J. Eq. 39, 3 Stockton 39 (Ch. 1855).

¹⁴⁷ *Barclays Bank v. Davidson Ave. Assoc., Ltd.*, 274 N.J. Super. 519, 524, 644 A.2d 685, 687 (App. Div. 1994); *Fidelity Union Trust Co. v. Pasternack*, 123 N.J. Eq. 181, 183-84, 196 A. 469, 469-70 (E. & A. 1938); *New Jersey Nat'l Bank & Trust Co. v. Morris*, 9 N.J. Misc. 444, 445, 155 A. 782, 783 (Ch. 1931).

¹⁴⁸ 107 U.S. 378 (1883).

¹⁴⁹ 107 U.S. at 395.

rent receiver. This fact, however, should not bar the appointment of a rent receiver where the circumstances require one. New Jersey courts have historically held that such a contractual clause is not the determinative factor for the appointment of a rent receiver.¹⁵⁰ This principle is based on case law originating in the 1930's. The courts considered such contract provisions to be contrary to public policy because they infringed upon the court's equitable powers to determine when a rent receiver is warranted.¹⁵¹ Regardless of whether a rent receiver clause exists in a contract, a rent receiver may be appointed when it appears necessary to protect the mortgagee's security.¹⁵² The factors examined by the court include: whether the value of the property is greater than the debt; whether the debtor is individually liable for the debt and able to respond to a deficiency; and whether the debtor has committed any waste.¹⁵³

An argument could be made that tax certificate holders are not entitled to the appointment of a rent receiver because, unlike most commercial mortgages, tax certificates do not entitle the holder to a monthly stream of income. This argument, however, ignores the primary purpose of a rent receiver. Rent receivers are only appointed where the security is at risk due to low equity in the property or waste. The appointment of a rent receiver is not to provide the secured party with a continuous stream of income, but is to protect the secured party from the further reduction of its security. The rents are primarily used to prevent waste by paying current taxes, securing the property from vandalism, or financing needed repairs and maintenance.¹⁵⁴ Therefore, the protection of

¹⁵⁰ See *Barclays Bank*, 274 N.J. Super. at 522-23; *York Motel Assoc. v. Blum*, 78 N.J. Super. 108, 111-12, 187 A.2d 624 (Ch. Div. 1962), *certif. den.*, 44 N.J. 403, 209 A.2d 140 (1965); *Tucker v. Nabo Constr. Corp.*, 108 N.J. Eq. 449, 450, 155 A. 460 (Ch. 1931). In *Tucker*, the court explained that:

[t]his [clause] is not binding on the court and does not entitle the mortgagee to the appointment of a receiver as a matter of right and without regard to the other circumstances of the case. Receiverships, like injunctions and specific performance, are the tools whereby chancery exercises its peculiar jurisdiction and are used only when the facts warrant their employment, according to the established practice of the court.

Id.

¹⁵¹ See *Tucker*, 108 N.J. Eq. at 450; *Barclays Bank*, 274 N.J. Super. at 522.

¹⁵² See *Hoboken Bank For Sav. v. Clinton Realty Corp.*, 138 N.J. Eq. 271, 273, 48 A.2d 298, 299 (Ch. 1946), *aff'd*, 139 N.J. Eq. 587, 52 A.2d 698 (E. & A. 1947); *Barclays Bank*, 274 N.J. Super. at 524, 644 A.2d at 687; *Pasternack*, 123 N.J. Eq. at 183-84, 196 A. at 470.

¹⁵³ *Barclays Bank*, 274 N.J. Super. at 524; 30 N.J. PRACTICE § 262 (West 1975).

¹⁵⁴ Julia Patterson Forrester, *A Uniform and More Rational Approach to Rents as Security for the Mortgage Loan*, 46 RUTGERS L. REV. 349, 350 (1993) ("The borrower, facing the

equity is a factor that should be considered regardless of the origin of the lien or any contractual payment plan associated with it.

Once the collected rents are used to pay the current taxes and other current obligations, any surplus income would be credited toward the redemption of the tax certificate. In the event that the additional rents are sufficient to redeem the property, the property owner would actually be in a better position because the tax lien would be paid off and the foreclosure proceedings would be dismissed. If the additional income is not sufficient to redeem the property, the certificate holder still would not enjoy a windfall since the equity in the property would have had to have been well below the certificate value in order for a receiver to be appointed.

Legislative intent is clear that a private certificate holder does not have the right to *immediate* entry into the underlying property to manage or protect it.¹⁵⁵ A municipality, however, which has purchased and recorded a tax certificate on an income-producing property is entitled to take immediate possession of the property for the sole purpose of collecting rents and applying such income toward the redemption of the certificate.¹⁵⁶ Pursuant to N.J.S.A. 54:5-53.1, the municipality need not file an application with the court or even initiate foreclosure proceedings to obtain this relief. It has been held that this right to collect rents implies an obligation to do so as well as an obligation to undertake reasonable maintenance and repair.¹⁵⁷

Although Section 54:5-53.1 applies solely to municipalities, there is no indication that the legislature intended that private certificate holders should not be entitled to the appointment of a rent receiver under certain circumstances and upon the initiation of a foreclosure proceeding. The introductory statement to N.J.S.A. 54:5-39 provides that “[prior to foreclosure,] the purchaser has no right of entry on the property and has no right to the rents[,] is-

possibility of losing the property by foreclosure sale, may find it to his advantage to ‘milk’ the property of its rents.”).

¹⁵⁵ See *Barry L. Kahn Defined Benefit Pension Plan v. Township of Moorestown*, 243 N.J. Super. 328, 336, 579 A.2d 366, 370 (Ch. Div. 1990); see also *supra*, section V.A.

¹⁵⁶ N.J.S.A. § 54:5-53.1; *Tauber v. Newark*, 227 N.J. Super. 257, 546 A.2d 585 (Law Div. 1988). This right was originally granted to municipalities pursuant to Chapter 237, P.L. 1918, sec. 34, but was abolished by Chapter 169, P.L. 1929, sec. 34, and was reinstated under Chapter 54, P.L. 1942, the present form of the statute. See *Taylor v. Morris*, 1 N.J. Super. 410, 413-14, 61 A.2d 758, 760 (Ch. Div. 1948).

¹⁵⁷ *Tauber v. Newark*, 227 N.J. Super. 257, 261, 546 A.2d 585, 587 (Law Div. 1988) (citing *Newark v. Sue Corp.*, 121 N.J. Super. 205, 296 A.2d 362 (Ct. Ct. 1972), *aff'd*, 124 N.J. Super. 5, 8, 304 A.2d 567, 569 (App. Div. 1973); *Taylor v. Morris*, 1 N.J. Super. 410, 415, 61 A.2d 758, 760-61 (Ch. Div. 1948)).

sues and profits therefrom."¹⁵⁸ In *Brewer*, the certificate owner entered the underlying property before foreclosure proceedings had been filed and without having filed an application for the appointment of a rent receiver.¹⁵⁹ Thus, *Brewer* can stand only for the limited proposition that a private certificate holder does not have an *immediate, automatic* right to possession or rents. *Brewer* does not address whether a rent receiver could be appointed by court order after foreclosure proceedings have been initiated.

Prior to 1929, private tax certificate holders had a statutory right to all rents and profits upon recording of the certificate.¹⁶⁰ In 1929, this Section was amended to delete the certificate holder's right to immediate possession and rents.¹⁶¹ No subsequent versions of this Section have restored the immediate right to rents and profits upon a private certificate holder. The applicable sections of the Tax Sale Law have never addressed whether a rent receiver should be appointed by Court Order after foreclosure proceedings have been initiated.

One court has gone as far as to hold that tax certificate holders have absolutely no right to the appointment of a rent receiver. In *Forster v. Davenport*,¹⁶² the plaintiff initiated foreclosure proceedings and filed a motion for the appointment of a rent receiver. Vice Chancellor Stein reviewed the statutory history of N.J.S.A. 54:5-50 and denied the private certificate holder's application for a rent receiver. Vice Chancellor Stein explained that "[t]he statute does not confer the right of possession upon the petitioner and in the absence of a possessory right the court will not appoint a receiver. 'The appointment of a receiver is an equitable substitute for entry into possession at law.'"¹⁶³

¹⁵⁸ N.J.S.A. § 54:5-39 (*quoting* *Brewer v. Porph*, 53 N.J. 167, 249 A.2d 388 (1969)).

¹⁵⁹ *Brewer v. Porph*, 93 N.J. Super. 66, 68-69, 224 A.2d 697, 698-99 (Ch. Div. 1966), *aff'd*, 98 N.J. Super. 583 (App. Div. 1968), *rev'd*, 53 N.J. 167, 249 A.2d 388 (1969).

¹⁶⁰ *Id.* at 69. Section 34, P.L. 1918, Chapter 237 provided in part that:

[t]he purchaser may record the certificate of sale in the office of clerk or register of the county where the land lies as a mortgage of land, and thereupon shall be entitled to the immediate possession of the property sold and described in the certificate, and to all the rents and profits thereof from and after the date of record until redemption.

See also *Pyle v. Altshul*, 125 N.J. Eq. 143, 4 A.2d 377 (A. & E. 1938); *New Jersey Mutual Casualty Ins. Co. v. Tesed Realty Co.*, 10 N.J. Misc. 700, 160 A. 833 (Ch. 1932); *Merchant's & Trader's Realty Co. v. Stern*, 101 N.J. Eq. 629, 633 (Ch. 1927), *aff'd*, 102 N.J. Eq. 290, 140 A. 390 (E. & A. 1928).

¹⁶¹ Section 34, P.L. 1929, Chapter 169.

¹⁶² 128 N.J. Eq. 385, 387-90, 16 A.2d 614, 615-17 (Ch. 1940).

¹⁶³ *Forster*, 128 N.J. Eq. at 389, 16 A.2d at 616 (*quoting* *Continental Bank & Trust Co. of New York vs. Fulton Realty Co.*, 10 N.J. Misc. 1105, 162 A. 560 (Ch. 1932)).

The court's reasoning in *Forster* appears to be flawed. Mortgagees are entitled to the appointment of rent receivers because it has long been held that mortgagees have an inchoate right to possession upon default.¹⁶⁴ A mortgagee, of course, must foreclose to exercise this right. Vice Chancellor Stein apparently overlooked the fact that certificate holders have a similar *inchoate* right to possession, subject to the property owner's right to redeem.¹⁶⁵

Should not a certificate holder's inchoate right to possession support the appointment of a rent receiver where the equities support such an appointment?

Since the 1940 *Forster* opinion, there apparently has been no reported New Jersey decision addressing the issue as to the appointment of a rent receiver through an appropriate application to the court after foreclosure proceedings have been initiated. Other jurisdictions have determined that a rent receiver may be appointed in a tax lien foreclosure proceeding when the holder's security interests are in danger of being injured due to the actions of the property owner.¹⁶⁶

The legislative history reveals the intention for private certificate holders not to have an *immediate, automatic* right to possession and to the collection of rents from the underlying property. However, there is no basis for the *Forster* court's conclusion that a private certificate holder should not be entitled to the appointment of a rent receiver after foreclosure proceedings have been initiated if other equitable considerations support the appointment.

The presently depressed commercial real estate market has suffered an unparalleled rate of defaults. The weak market has magnified the importance of the time period between the initiation of foreclosure and the obtaining of a judgement, and has increased the appeal of rent receiverships as an additional step in the

¹⁶⁴ See *Guttenberg Sav. & Loan Ass'n v. Rivera*, 85 N.J. 617, 626, 428 A.2d 1289, 1294 (1981) ("It has long been well settled in this State that upon and after default a mortgagee is entitled to possession of the premises."); *Sheilds v. Lozear*, 34 N.J.L. 496, 501 (E. & A. 1869); *Woodside v. Adams*, 40 N.J.L. 417, 422 (Sup. Ct. 1878).

¹⁶⁵ In *Clark v. Jersey City*, 8 N.J. Super. 33, 37, 73 A.2d 197, 199 (App. Div. 1950), the court found that a tax certificate "vests the purchaser with an inchoate right or interest subject to a statutory right of redemption, exercisable within a specified time after the sale." See also *Mischiara v. Board of Adjustment of Piscataway Twp.*, 77 N.J. Super. 288, 294, 186 A.2d 141, 144 (Law Div. 1962) ("[A tax sale certificate] is a conveyance of land to the purchaser vesting in him an inchoate right or interest, subject to the statutory right of redemption by the owner.").

¹⁶⁶ See, e.g., *Jamestead Realty Corp. v. Cohen*, 192 Misc. 557, 81 N.Y.S.2d 101 (Sup. Ct. 1948); see also Note, *Tax Sale Law in New Jersey: A Re-Examination*, 26 RUTGERS L. REV. 266, 283 (1972) (stating that Virginia, Missouri and Iowa have granted the tax certificate purchaser possessory rights.)

foreclosure procedure. There is no apparent reason why a private tax certificate holder should not be entitled to the appointment of a rent receiver if foreclosure proceedings have been initiated and the equity in the underlying property is insufficient to secure the tax lien.

This issue appears to be ripe for examination by the courts. Pending such a review, certificate holders can only place themselves in a better position by attempting to negotiate payment plans, in lieu of foreclosure, providing for an assignment of rents or the appointment of a rent receiver in case of further default.

VIII. CONCLUSION

Generally, the Tax Sale Law effectively meets its purpose of creating a means by which municipalities can convert unpaid taxes and assessments into immediate funds. It provides a variety of sales methods from which the municipality can choose offering different rights and obligations. It provides relatively simple redemption and foreclosure procedures which enable interested parties to protect their interests, and through the favorable interest rate and priority of tax liens, it creates an appealing investment to attract certificate purchasers.

As with most statutory compilations, however, there are a number of aspects of the law that are inconsistent and should be addressed. The Tax Sale Law originated in the early 1900's and was repeatedly altered and added to on an "ad hoc" basis. As discussed in Section 3B above, the current definition of the phrase "lawful interest" as used in Section 43 is inconsistent with the policies of the tax sale law and does not seem to have any basis. There is a circularity problem created by the priority rules relating to certain federal liens;¹⁶⁷ and it is suggested that the legislation be amended regarding abandoned properties to permit certificate holders to have limited immediate access to the property¹⁶⁸, and a shorter waiting period before foreclosing.¹⁶⁹ Furthermore, the time appears ripe for a review as to whether a certificate holder, under certain circumstances, should be entitled to the appointment of a rent receiver after foreclosure proceedings have been initiated.¹⁷⁰

¹⁶⁷ See *supra*, section VI.C.

¹⁶⁸ See *supra*, section V.A.

¹⁶⁹ See *supra*, section VII.A.

¹⁷⁰ See *supra*, section VII.D.