In Mass., response to ‘Tyler’ on tax takings has been slow in coming

Judges take different views on stopgap solution

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Judge: legislative response needed

When the U.S. Supreme Court issued its decision in *Tyler v. Hennepin County, Minnesota* just over a year ago, many figured it would be the death knell for what has become known as “equity theft” in Massachusetts.

But while the need to reform G.L.c. 60 has long been evident, the Legislature’s response is still a work in progress.

That is due in part because lawmakers seem intent on doing more than just fashion a mechanism to return excess equity to a former property owner whose right of redemption has been foreclosed after a tax taking.

A pending proposal also seeks to strike a better balance between giving people the opportunity to retain their homes, ensuring municipalities maximize one of their primary revenue streams, and keeping at bay the private purchasers of tax liens who have come to be viewed as a scourge on what might otherwise be a workable — if arcane — system.

But things may be finally coming to a head, thanks to recent action in two state courts.

In *Mills v. City of Springfield, et al.*, a complaint related to a pending Land Court tax foreclosure action was filed directly with the Supreme Judicial Court.

Retired bankruptcy judge Frank J. Bailey said groups that have long been active on the issue — including the Pioneer Public Interest Law Center, which he serves as president, along with Greater Boston Legal Services and the National Consumer Law Center — decided to go that route after being frustrated in their previous attempts to get a ruling that tackled head on the constitutionality of G.L.c. 60, in light of *Tyler*.

Their complaint sought injunctive relief and a declaration that "the practice of retaining owners' surplus equity when real property is taken pursuant to G.L.c. 60 to satisfy debts to municipalities violates the Takings Clause of Article 10 of the Massachusetts Declaration of Rights" and of the Fifth Amendment of the U.S. Constitution.

The court transferred the case to the Hampden Superior Court, where Judge Michael K. Callan agreed that G.L.c. 60 is unconstitutional as applied in circumstances in which the tax debt is less than the value of the property.

"The statutory scheme, in its present form, is untenable and requires Legislative correction," Callan wrote in his April 18 decision.

Meanwhile, in Land Court, Judge Howard P. Speicher recently faced a slightly different scenario. The town of Tyngsborough sought to sell property promptly at fair market value, fully acknowledging that the former property owner would be due the difference between the sale price and the tax debt she owed.

The "wide latitude" that §77B of G.L.c. 60 grants municipalities in selling tax-foreclosed properties permitted the town to go through with that plan, Speicher ruled.

"There is nothing in the statute prohibiting the Town from including as one of the terms and conditions of the sale, as it proposes to do here, that it will pay

any surplus after payment of the tax debt to the foreclosed prior owner of the property, thus compensating her for her lost equity in the property," Speicher wrote in his May 21 decision in *Town of Tyngsborough v. Recco*.

The judge added that the town could reject bids or postpone the sale if the bids did not come close to the fair value of the property.

"This solution may or may not be the most efficacious solution, but it is permitted by the statute, and it works to compensate the former owner for her loss of equity," Speicher wrote.

Speicher declined to stay his judgment pending any appeal, reasoning that the delinquent taxpayer would be irreparably harmed as her equity in the property was eroding at a rate of $45 a day.

"If the tax title account is forced to continue growing at a rate of 16 percent while this case proceeds through an appeal, any victory [the taxpayer] wins is likely to be pyrrhic only," Speicher said.

But Speicher also agreed with Callan.

"Certainly, a more comprehensive legislative response to *Tyler* would be preferable," he wrote.

Now, it is just a matter of getting that legislative response across the finish line.

Difference of opinion

In *Recco*, Speicher noted that, over the last 10 years, cities and towns in Massachusetts have filed anywhere from 800 to 2,400 cases annually in the Land Court's tax session, "although generally the annual number has been steadily declining."

Over that period, only about 20 percent of those cases have resulted in a final judgment of foreclosure, as — under the court's supervision — the municipality and the delinquent taxpayer attempt to negotiate a redemption prior to foreclosure.

Unfortunately, what we're seeing a little bit is the Wild West. Courts are trying to figure it out and coming to divergent positions on what they need to do and what they have the power to do when somebody comes before them with a tax foreclosure at the end of the line.

Still, within that 20 percent are dozens of sympathetic figures — elderly people who had long ago paid off any mortgage on their property but may now be in a rehabilitation center in Florida and not receiving the notices of their tax debt, Bailey said.

To some degree, the urgency for a legislative response may depend on whether Speicher or Callan is right about another statutory provision, which may be available to provide compensation to a property owner whose right of redemption is foreclosed after a tax taking.

"In Massachusetts, G.L.c. 79, §10 has long provided the appropriate cause of action for owners seeking compensation for government takings of their property that were not initiated officially under the condemnation procedures and formalities prescribed in G.L.c. 79, §1 — so called 'takings in pais,'" Speicher wrote in *Recco*.

In Speicher's view, the "plain language of §10 is broad and covers a wide range of 'official' acts and seizures that might occur outside of a formal eminent domain condemnation."

A municipality's seizure of equity is an "injury" for which a property owner is "entitled to compensation" under §10, Speicher concluded.

The cases Callan had relied on "do not counsel a different result from this plain language reading of the statute," given that, in those cases, the Supreme Judicial Court had found that there was no compensable taking.

But to Callan, in part because the taking of absolute title to a taxpayer's property occurs only after the municipality brings a Land Court action and the Land Court forecloses the right of redemption, a tax lien forfeiture does not qualify as a taking in pais.

"Further, §10 does not provide a procedure whereby a taxpayer can recover her surplus because §10 does not create a right to compensation and G.L.c. 60 provides none," Callan continued.

He noted that in the 1965 case *Kelly v. Boston*, the SJC made clear that although G.L.c. 60, §§69 and 64, authorize the retention of a taxpayer's surplus equity, they do not give a right to recover damages.

"Unfortunately, what we're seeing a little bit is the Wild West," said Todd S. Kaplan, a senior attorney at GBLS. "Courts are trying to figure it out and coming to divergent positions on what they need to do and what they have the power to do when somebody comes before them with a tax foreclosure at the end of the line."

Kaplan said Speicher's answer places too much faith in the municipality to make the homeowner whole. It is even a bigger potential problem when the party coming before the Land Court is a debt buyer who has stepped into the shoes of the municipality, he added.

Lindsey Carpenter, an attorney with the National Taxpayers Union in Washington, D.C., is also troubled by Speicher's decision — the type of usurpation of the Legislature's role that she has also seen elsewhere in

country. Judges may latch onto, say, an eminent domain statute to fill a hole that is another branch of the government's to address, she said.

"It's not the function of the court to start writing new law," Carpenter said.

Legislative response taking shape

Before the SJC ever gets a chance to resolve the disagreement between Callan and Speicher, the Legislature could render it moot.

That is at least the hope of state Sen. Mark C. Montigny, who on May 23 sent out a press release heralding the Senate's unanimous passage of his budget amendment.

The budget amendment would eliminate the ability of municipalities — or private companies that buy tax liens from cities and towns — to take a property owner's equity beyond what is owed in unpaid taxes, plus reasonable expenses.

Going beyond *Tyler*'s mandate, the legislation also seeks to ensure that homeowners behind on their tax bills receive written notice about their outstanding tax debt in easy-to-understand language.

"Currently, homeowners receive notices filled with legalese that is difficult to understand without an attorney," Montigny says in the release.

Montigny also proposes drastically reducing the current 16-percent interest rate applied to tax debts while doubling the time homeowners would have to settle their debt. Municipalities would also be allowed to waive accrued interest to make debt repayment plans easier to complete.

Montigny's proposal would further allow former homeowners who may have been deprived of the accumulated equity in their property prior to the *Tyler* decision to file a claim in Superior Court to recoup it.

Kaplan said he was pleased to see the concept of “better repayment plans” incorporated into Montigny’s proposal but would prefer it go even further, reducing or even eliminating the requirement that a delinquent taxpayer make an initial 10-percent down payment on their debt.

“Why do you need a down payment to enter in a payment plan that only creates more barriers for low-income and elder homeowners?” he asked.

Kaplan would also prefer the decision of whether to offer more flexible repayment plans not be left completely to the discretion of cities and towns.

And he would like to see the Legislature give Land Court judges what they have been asking for: the ability to fashion remedies that will allow people to stay in their homes.

For example, the judges could convert the past-due taxes into a non-interest-bearing lien on the property.

“That would help the overwhelming majority of people,” Kaplan said. “It’s the arrears that’s the problem.”

When a property is sold, there also needs to be some methodology in place to ensure that something approaching the fair market value is returned, which is what the Supreme Court in *Tyler* said the Constitution demands, Bailey noted.

A requirement that the property be listed with a real estate broker for a year or more would accomplish that goal, he said.

“The problem with having a hammer-down auction is that that can be done very quickly, with very little notice,” he said.

While noting that progress in Massachusetts has been frustratingly slow, given the obvious nature of its “*Tyler* problem,” Andrea Bopp Stark, a senior attorney at the National Consumer Law Center, called Montigny’s amendment “an amazing start.”

In addition to the provisions highlighted by Bailey and Kaplan, Stark said she believes the provision that would see the surplus proceeds from a sale go to the state's unclaimed property fund is important, so that the rightful owner or heirs can access them indefinitely.

The municipalities' perspective

Boston attorney Peter A. Brown, who with colleague Allison Finnell prepared an amicus brief in *Mills* on behalf of some 20 municipalities they represent across the state, called the pending legislative fixes "an overcomplicated solution to a very defined problem": the assignment of tax liens to private investors.

"It never should have been allowed, it never should have happened, it was wrong, and it should stop," he said.

Matthew J. Thomas, who filed an amicus brief on behalf of the Massachusetts Municipal Association in *Mills*, stressed that municipalities, too, want to avoid taking people's property, if possible.

Since 2011, Fall River has collected more than $24.5 million in past-due taxes and more than $7.5 million in interest while foreclosing on only 40 parcels, Thomas said.

"Municipalities don't want these properties," he said. "The properties don't pay for police, fire, teachers. They want the revenue."

About nine months ago, Fall River established an account to serve as a waystation for surplus equity resulting from sales of properties subject to tax title foreclosures "until somebody tells us what to do with it," he said.

Thomas acknowledged that the 16-percent statutory interest rate in G.L.c. 60 is too high but worries about the unintended consequences of lowering it too much, lest once again municipalities come to be viewed as de facto lending

institutions, with property owners improving their cash flow by simply refusing to pay their property tax bills.

Ralph D. Clifford, a professor emeritus at the University of Massachusetts School of Law, agreed that the Legislature should be the one to craft a forward-looking response to *Tyler*.

As to the "retroactive problem" — people deprived of the excess equity in their properties whose claims are not beyond the statute of limitations — that is something that the bar is going to have to resolve, Clifford said.

"That's potentially a problem of the size of the mortgage situation that we had a few years ago, where it was discovered that banks were signing mortgages with autopens rather than with human signatures," he said.

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