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January 15, 2024

Senator Nicole Grohoski, Co-Chair  
Representative Joe Perry, Co-Chair  
Joint Standing Committee on Taxation  
100 State House Station  
Augusta, ME 04333-0100

Dear Committee Co-Chairs:

In accordance with P.L. 2023, Ch. 358, attached is the final report of the Working Group to Study Equity in the Property Tax Foreclosure Process.

Please feel free to contact me if you have any questions about this report.

Sincerely,

A handwritten signature in cursive script that reads 'Peter W. Lacy'.

Peter W. Lacy  
Attorney, MRS Office of Tax Policy &  
Chair of the Working Group

Enclosure

cc: Jerome D. Gerard, State Tax Assessor

# **Report of the Working Group to Study Equity in the Property Tax Foreclosure Process**



**Report Prepared Pursuant  
To Public Law 2023, Chapter 358**

**January 15, 2024**

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## Introduction

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L.D. 101 – An Act to Return to the Former Owner Any Excess Funds Remaining After the Sale of Foreclosed Property, enacted as P.L. 2023, Ch. 358, directed Maine Revenue Services (“MRS”) to establish a working group to study equity and other issues in the property tax foreclosure process and prepare a report by January 15, 2024, that includes the findings and recommendations of the working group, including suggested legislation, for presentation to the Second Regular Session of the 131st Legislature.

The membership of the working group was to be appointed by the State Tax Assessor and was required to include, at minimum:

- A representative of the Office of the Attorney General.
- One member from an organization representing municipal tax assessors.
- One member from a statewide organization that represents the interests of municipalities.
- One member representing the Maine Association of Realtors.
- One member representing a statewide organization that represents commercial bankers.
- One member representing a statewide organization that represents attorneys working in the field of property title law.
- One member representing property title insurance agents.
- One member representing an organization of legal services providers that specializes in serving clients who are 65 years of age or older or who have low income.

L.D. 101 tasked the working group generally with studying issues associated with the process of foreclosure on property for failure of the owner to pay property taxes, including, but not limited to:

- The recent decision of the United States Supreme Court regarding municipal retention of excess revenue retained by a government entity from the sale of property acquired by the government entity following foreclosure for failure of the former owner to pay property taxes.
- The constitutional requirements of due process and the takings clause and their impact on the property tax lien foreclosure process, including notice requirements to delinquent taxpayers and related entities that hold liens or mortgages to the property to which the foreclosure is being applied and conditions under which a government entity is or should be entitled to retain excess funds acquired through sale of property that has been acquired by foreclosure.
- The role of the Maine Redevelopment Land Bank Authority, mortgage holders and other lienholders and the rights of each in the tax lien foreclosure process.

- Whether the tax lien foreclosure process is or should be the same for both residential property and commercial property or whether differences are necessary or desirable.
- The rights of former owners, commercial lenders or lienholders and government entities when property has been acquired for nonpayment of property tax and the government entity does not intend to sell the property.
- Whether a redemption period following foreclosure is necessary when the former owner has the right to reacquire the property, the statute of limitations on a former owner’s ability to reacquire property or bring action to recover excess funds obtained by a government entity through foreclosure sale and the extent of the rights of subsequent purchasers.

MRS appointed members and convened the working group, chaired by Peter Lacy, Attorney with the Office of Tax Policy at MRS. The working group included staff from the MRS Property Tax Division, the specific members required by L.D. 101, and several other stakeholders with an interest in the property tax lien foreclosure process.<sup>1</sup> The group held three remote meetings via Zoom/Teams, on October 10, October 30, and December 5, 2023. Following the meetings, MRS drafted a report along with suggested legislation based on the group discussions and the consensus of the working group. The report and legislation were circulated amongst the group members for their feedback before being finalized.

Note that this report and the conclusions and recommendations contained within represent the consensus views of the working group, and, except for the member comments section later in this report, may not reflect the personal views of individual members or their employers/organizations.

## Background

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### *The Hennepin County Case*

In May 2023, the United States Supreme Court issued a decision in the case of *Tyler v. Hennepin County*,<sup>2</sup> in which the Court found a Minnesota statute that allowed the county to retain excess sale proceeds of a tax sale above the outstanding tax debt following a tax lien foreclosure was a violation of the Takings Clause<sup>3</sup> of the Fifth Amendment of the United States Constitution. The taxpayer in that case, Geraldine Tyler, purchased a condominium in Minneapolis in 1999. In 2010, she was moved by family to a senior community. Following the move, no taxes were paid by Ms. Tyler or anyone else on the Minneapolis condo, and more than \$15,000 in delinquent tax, penalties, and interest eventually accrued. The county foreclosed and sold the condo for \$40,000 and,

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<sup>1</sup> The full list of working group members is available in the “Member List” section later in this report.

<sup>2</sup> 143 S. Ct. 1369.

<sup>3</sup> The Takings Clause states that “private property [shall not] be taken for public use, without just compensation.” U.S. Const. amend. V.

consistent with Minnesota law, retained the \$25,000 excess above Ms. Tyler’s outstanding tax debt.

The Supreme Court found that while the county had the power to seize and sell Ms. Tyler’s property to satisfy her delinquent tax debt, it was only entitled to the amount owed. The retention by the county of amounts above the delinquent tax debt constituted an unconstitutional taking whereby the government is directly appropriating private property for its own use. The Court noted that the large majority, thirty-six states and the Federal government, required the government to return any excess sale proceeds to the taxpayer, which was also consistent with the historical practice and treatment of excess sale proceeds from tax sales.

The Court rejected the argument made by the county that Ms. Tyler did not have standing because state law did not recognize any property interest for her in the condo, stating that state law property interest definitions cannot be used to circumvent constitutional requirements such as the Takings Clause. In particular, the Court noted the state recognized the taxpayer had an interest in the property and was entitled to excess sale proceeds in all other contexts, such as foreclosure by a private creditor. The Court therefore found the Minnesota law resulted in an unconstitutional taking, and Ms. Tyler was entitled to the excess sale proceeds from the sale of her condo by the county following the tax lien foreclosure.

When the Supreme Court issued its decision in the *Hennepin County* case, Maine law around the sale of properties acquired through the tax lien foreclosure process was similar to the Minnesota law at issue. When a tax lien foreclosed under Maine law, the municipality took title to the property<sup>4</sup> and could, in most cases,<sup>5</sup> sell the property and retain the proceeds from the tax sale, regardless of how much tax was owed on the property.

## Maine Tax Lien Mortgage Foreclosure & Sale Process Pre-LD 101

The timeline for the assessment of property tax in Maine begins on April 1—the date on which the status of all property is set.<sup>6</sup> The municipal assessor values all the taxable property in the municipality based on its status on April 1.<sup>7</sup> At some point during the year, the legislative body<sup>8</sup> of the municipality votes to approve its municipal budget, while also setting the date on which taxes will be due and the interest rate for past due taxes.<sup>9</sup> The assessor then calculates a mill rate, or tax rate, based on the approved municipal budget and the values established by the assessor,

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<sup>4</sup> 36 M.R.S. § 943.

<sup>5</sup> Pre-LD 101 there were exceptions to the general rule, first for the sale of homesteads formerly owned by certain persons 65 years of age or older. *See* 36 M.R.S. § 943-C (2019), *amended by* P.L. 2019, c. 401 (effective Sep. 19, 2019). In addition, the law allowed a municipality the option of passing an ordinance by which excess sale proceeds would be distributed to the former owner after a tax sale. *See* 36 M.R.S. § 949. These exceptions are discussed in more depth later in the report.

<sup>6</sup> 36 M.R.S. §§ 503, 708.

<sup>7</sup> *Id.*

<sup>8</sup> Depending on the municipality, this vote may be made by the Town/City Council or by the voters at a Town meeting.

<sup>9</sup> 36 M.R.S. § 505.

along with a list of all taxable property and the corresponding tax due.<sup>10</sup> This list must be committed by the assessor to the tax collector on what is known as the commitment date, and the tax collector is then tasked with collecting the tax.<sup>11</sup>

If a taxpayer fails to pay the assessed tax by the due date, the tax collector will deliver, or send to the taxpayer's last known address a 30-day demand notice to the taxpayer by certified mail after the end of 8 and within 12 months from the commitment date.<sup>12</sup> The notice must include a description of the property, the amount of tax assessed, inform the taxpayer that the municipality holds a lien on the property, and demand payment of the tax within 30 days.<sup>13</sup> If the tax is not paid, the tax collector will file a tax lien certificate in the county registry where the property is located within 10 days of the expiration of the 30-day period.<sup>14</sup> At the time of filing, the tax collector must also send or deliver a copy of the certificate to the municipal treasurer, any unassessed owners of record and to each record holder of a mortgage<sup>15</sup> on the property.<sup>16</sup>

The filing of the tax lien certificate creates a tax lien mortgage on the property, which has priority over virtually all other mortgages, liens, or attachments.<sup>17</sup> The taxpayer may redeem the property by paying all outstanding taxes, interest, and costs during the redemption period, which is 18 months from the filing of the tax lien certificate.<sup>18</sup> Between 30 and 45 days from the expiration of the redemption period, the municipal treasurer must send notice by certified mail to the taxpayer and any record holder of a mortgage on the property, informing them of the impending automatic foreclosure and the date of said foreclosure.<sup>19</sup> If the tax remains unpaid at the expiration of the 18-month period, the tax lien mortgage automatically forecloses and the municipality takes title to the property.<sup>20</sup> Once the automatic foreclosure occurs, the municipality may retain, sell,<sup>21</sup> or otherwise dispose of the property as it deems appropriate, with a couple of exceptions.

First, the Maine Legislature in 2015 passed a bill permitting municipalities the option of passing an ordinance which would allow disbursement of the excess sale proceeds from a tax sale to the former owner, after deducting the past due taxes, interest, and costs.<sup>22</sup> While some municipalities

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<sup>10</sup> 36 M.R.S. § 709.

<sup>11</sup> *Id.*

<sup>12</sup> 36 M.R.S. § 942.

<sup>13</sup> *Id.*; 36 M.R.S. § 943-A requires the notice relating to a primary residence to inform the taxpayer that they may apply for a poverty abatement. If the property received a homestead exemption, 36 M.R.S. § 942 requires a similar poverty abatement notification and contact information for the Maine Bureau of Consumer Credit Protection.

<sup>14</sup> 36 M.R.S. § 942.

<sup>15</sup> While not technically required by statute, tax collectors in practice send a copy of the tax lien certificates to all entities with a recorded interest, not just mortgage holders.

<sup>16</sup> *Id.*

<sup>17</sup> 36 M.R.S. § 943.

<sup>18</sup> *Id.* If the taxpayer redeems the property, the municipal treasurer must record a discharge of the tax lien mortgage.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* While the foreclosure occurs automatically, the municipal treasurer may waive the foreclosure with authorization from the municipal legislative body. 36 M.R.S. § 944(1).

<sup>21</sup> The sale of tax-acquired properties, when it occurs, is often accomplished via a sealed bid process.

<sup>22</sup> P.L. 2015, c. 53; 36 M.R.S. § 949.



did take the opportunity to pass an ordinance for the disbursement of excess funds,<sup>23</sup> it is not clear that the provision gained widespread acceptance with the municipalities.

Then, in 2018, the Legislature passed L.D. 1629, enacted as P.L. 2017, c. 478. The bill created a new section of statute, 36 M.R.S. § 943-C,<sup>24</sup> which detailed an alternative process a municipality must follow when selling certain tax-acquired properties formerly owned by persons 65 years of age or older. Under the new process, if the property was receiving a homestead exemption prior to foreclosure, the municipality was required to send a notice to the former owner at least 90 days prior to the sale informing the former owner of their right to require an alternative sale process, along with an application.<sup>25</sup> To be eligible for the alternative sale process, the former owner needed to document all the following requirements:

1. At least one of the former owners was 65 or older at the time the tax lien certificate was recorded and was occupying the property as their homestead (as defined in the Homestead Exemption statute).
2. The former owner(s) had income of less than \$40,000 in the calendar year preceding the foreclosure.
3. The former owner(s) had liquid assets of less than \$50,000 (\$75,000 if more than one former owner).<sup>26</sup>

If the former owner was able to document their eligibility to the municipal officers, the municipality was required to list the property with a licensed real estate broker, sell the property at fair market value, and pay the former owner any excess sale proceeds of the sale after subtracting the taxes that were owed, interest, fees, and expenses.<sup>27</sup> If the municipality was either unable to contract with a licensed broker after contacting at least three brokers, or the broker could not sell the property within six months after listing, the municipality could keep, sell, or otherwise dispose of the property as it deemed fit.<sup>28</sup>

The statute also contains provisions that limit the ability of someone to challenge the validity of a taking of property by a municipality via the tax lien foreclosure process; presumably, as a means of protecting both the municipality and any prospective buyers of tax-acquired property. First, 36 M.R.S. § 946-B, which has been amended a number of times over the years, currently limits any challenge to the taking of property by a municipality to a 5-year period from the end of the

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<sup>23</sup> See, e.g., Town of Winthrop, “Disbursement of Excess Funds Received from the Sale of Tax Acquired Property Ordinance,” enacted May 2, 2016; Town of York, “Disbursement of Excess Funds from the Sale of Tax Acquired Property Ordinance,” enacted May 20, 2023.

<sup>24</sup> Note that descriptions and references to 36 M.R.S. § 943-C in this paragraph and the next refer to the statutory section as it existed before the enactment of L.D. 101, which, as discussed later in the report, substantially amended that portion of the law.

<sup>25</sup> 36 M.R.S. § 943-C (2019), *amended by* P.L. 2019, c. 401 (effective Sep. 19, 2019).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

redemption period.<sup>29</sup> More recently, the Legislature created a much shorter period in which someone may file a title action in circumstances where the municipality determines the property is abandoned.<sup>30</sup> In those cases, any title action must be filed within six months from the municipality's determination that the property is abandoned.<sup>31</sup> In addition, the municipality must notify the Maine Redevelopment Land Bank Authority of any properties determined to be abandoned for use in determining opportunities for redevelopment.<sup>32</sup>

## Changes in the Process as a Result of L.D. 101

L.D. 101 was first introduced in January of 2023 during the First Regular Session of the 131<sup>st</sup> Maine Legislature, with a public hearing and work session held in February before the bill was tabled. However, the issuance of the Supreme Court decision in May of 2023 created additional urgency for the Legislature to act to amend Maine's process, and the bill was amended, then passed as emergency legislation, going into effect on June 30, 2023.<sup>33</sup> The Legislature recognized the concern that Maine's law at the time was susceptible to attack similar to the Minnesota law at issue in the *Hennepin County* case, with the preamble specifically citing to the Supreme Court's decision and noting that the intent of the bill was to head off possible legal challenges to Maine's foreclosure statutes.<sup>34</sup>

The changes to the statute and the process from L.D. 101 were significant. The existing 36 M.R.S. § 943-C, which as discussed above had previously been limited to homesteads of persons aged 65 or older who met certain income and asset limitations, was broadened dramatically. The new language of L.D. 101 required a 90-day notice be sent to *all* former owners prior to selling a tax-acquired property, regardless of the type of property or the status of the owner.<sup>35</sup> The former owner then had the option of demanding the municipality use the alternative sale process, which continued the basic requirement that the municipality list and sell the property with a broker and distribute the excess sale proceeds to the former owner after deducting taxes, interest, and costs.<sup>36</sup> If the former owner did not request the alternative sale process, or the property was unable to be sold via a broker, the municipality was able to sell the property as it saw fit, provided any excess sale proceeds were calculated and distributed to the former owner.<sup>37</sup>

Apart from broadening eligibility for the alternative sale process, L.D. 101 made several other significant changes to the process. First, a provision was added allowing the municipal officers to condition disbursement of the excess sale proceeds on the former owner executing a quitclaim

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<sup>29</sup> 36 M.R.S. § 946-B(1). The 5-year limit applies to tax liens filed after October 13, 2014. Longer periods apply to older tax liens, *see* 36 M.R.S. § 946-B(2)-(3).

<sup>30</sup> 36 M.R.S. § 946-C.

<sup>31</sup> 36 M.R.S. § 946-C(3). The provision applies only to tax liens recorded after December 1, 2021.

<sup>32</sup> 36 M.R.S. § 946-C(4).

<sup>33</sup> L.D. 101 (131st Legis. 2023); P.L. 2023, c. 358.

<sup>34</sup> *Id.*

<sup>35</sup> 36 M.R.S. § 943-C(2).

<sup>36</sup> 36 M.R.S. § 943-C(3).

<sup>37</sup> *Id.*

deed conveying the former owner’s interest in the property to the municipality.<sup>38</sup> The provision also expressly stated that receipt of the proceeds by the former owner constituted a waiver of their right to file a title action and challenge the taking by the municipality.<sup>39</sup> The revised statute also added additional costs that the municipality could deduct from the sale price when calculating the excess sale proceeds, including property listing fees, the cost to the municipality of the lien and foreclosure process, unpaid utility charges imposed by the municipality, and an administrative fee equal to 10% of the property taxes owed.<sup>40</sup> Other changes included requiring the notice to the former owner be made by certified mail and first-class mail, rather than solely by first-class mail, and requiring the municipality to sell the property via quitclaim deed to the successful buyer at the highest price at which the property is able to sell.<sup>41</sup>

## Working Group Discussion & Recommendations

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The working group held three meetings, on October 10, October 30, and December 5. Topics of discussion included, but were not limited to:

- The meaning and scope of the Supreme Court’s decision in *Tyler v. Hennepin County*.
- The effect of constitutional requirements such as the Takings Clause and due process on the tax lien foreclosure and sale process.
- Current and past Maine law around tax lien foreclosures and municipal tax sales.
- The rights and responsibilities of municipalities, mortgage and other lienholders, title attorneys, and former owners and subsequent purchasers of tax-acquired properties.
- Methods for streamlining and improving the process for all stakeholders.

As required by L.D. 101, the group in addition discussed two specific issues: a possible role for the Maine Redevelopment Land Bank Authority<sup>42</sup> in the tax lien foreclosure process, and the question of whether a different process should be used for commercial and residential properties. With respect to the Authority, the working group felt that with the Authority not yet operational and its role still not clearly defined, it was premature for the group to determine what role it might play in the tax lien foreclosure process. Regarding commercial versus residential properties, the group felt that having separate processes would create additional confusion and costs for

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<sup>38</sup> 36 M.R.S. § 943-C(6).

<sup>39</sup> *Id.*

<sup>40</sup> 36 M.R.S. § 943-C(3)(C).

<sup>41</sup> 36 M.R.S. § 943-C(3)(B). The prior version of the statute required only that the property be sold at “fair market value” and made no mention of how the property should be conveyed. *See* 36 M.R.S. § 943-C(3)(B) (2019), *amended by* P.L. 2019, c. 401 (effective Sep. 19, 2019).

<sup>42</sup> The Maine Redevelopment Land Bank Authority was created in 2022 with the purpose to “assist municipalities and other entities in this State in the redevelopment of [certain] properties . . . in order to return those properties to productive use.” 30-A M.R.S. § 5154. The Authority may acquire for redevelopment, including by eminent domain, or may provide assistance to other entities to coordinate and facilitate the redevelopment of, properties that are either blighted, abandoned, environmentally hazardous, or functionally obsolete. 30-A M.R.S. §§ 5152, 5157. This includes, but is not limited to, property obtained by a municipality through the municipal tax lien mortgage foreclosure process. 30-A M.R.S. § 5152(5).

municipalities, taxpayers, and lienholders without a clear additional benefit. The group therefore does not recommend having different tax lien foreclosure processes for commercial versus residential properties.

The working group included a diverse group of members who brought different goals and perspectives to the work of the group. As a result, the discussions, and the recommendations below, represent changes that a consensus of the group felt best balanced the competing interests at play in the tax lien foreclosure and sale process.

## Recommendations<sup>43</sup>

**Remove pre-sale notice and demand requirement:** The current version of the statute (and its predecessor), requires the municipality to send written notice to the former owner at least 90 days prior to selling a tax-acquired property, and further requires the former owner to respond to that notice with a written demand before the municipality must utilize the alternative sale process.<sup>44</sup> The group felt that this requirement added an additional layer of complexity and confusion for both former owners and municipalities, and that a better solution was to simply require the alternative sale process for all sales of tax-acquired properties, without requiring the former owner to file a written demand. This was deemed simpler for municipal officials to administer, while also being fairer and an easier process for former owners.

**Allow municipalities to deduct the costs of improving tax-acquired property:** Municipalities under current law are allowed to deduct, among other costs, any “expenses incurred by the municipality in selling or maintaining the property” when calculating the excess sale proceeds to be paid to the former owner.<sup>45</sup> There was discussion in the group that in many circumstances tax-acquired properties are in poor condition when acquired by the municipality, and municipalities may at times need to improve the property, by removing an uninhabitable mobile home for example, before the property can be sold. The group felt that these and similar costs should also be deducted before excess sale proceeds are distributed to the former owner.

**Add rules governing when a municipality is unable to contract or sell a property:** The pre-L.D. 101 version of the statute included a provision that addressed circumstances where a municipality was unable to contract with a real estate broker, or the broker listed the property but was unable to sell it in a reasonable amount of time.<sup>46</sup> The group felt that prior section of statute provided needed guidance, structure, and limits to the sale process and should be resurrected. The

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<sup>43</sup> The recommendations of the working group are not listed by order of importance but rather reflect the structure of the statute.

<sup>44</sup> 36 M.R.S. § 943-C(2).

<sup>45</sup> 36 M.R.S. § 943-C(3)(C)(5).

<sup>46</sup> See 36 M.R.S. § 943-C(4) (2019), amended by P.L. 2019, c. 401 (effective Sep. 19, 2019).

group's recommendation is to add back into the statute a similar provision that if the municipality attempts to contract with at least three licensed real estate brokers but cannot, or if the broker lists the property for at least six months and the property fails to sell, the municipality may sell the property using whatever method the municipality deems appropriate, as long as it still pays the former owner any excess sale proceeds. The group considered the provision to best balance the interests of the former owner in maximizing excess sale proceeds with the interests of the municipalities in promptly disposing of tax-acquired properties.

**Include provision governing when a municipality intends to keep a tax-acquired property:**

There are circumstances when a municipality may choose not to sell a tax-acquired property and instead retain it for municipal uses, such as for a park. The group believed the statute should directly address and provide a means and structure for this type of situation. The consensus view was that a municipality that desires to retain a tax-acquired property should be required to procure an appraisal report from an independent appraiser, then calculate and pay the "excess sale proceeds" to the former owner using the appraised value of the property in lieu of the selling price. This would provide a structure and process for the municipalities, while respecting the interests of the former owner and the constitutional requirements around the Takings Clause.

**Require pre-payment notice before distributing excess sale proceeds:** There was a significant amount of time spent by the group discussing the best way to balance the rights of a former owner to excess sale proceeds, with the rights of mortgage and other lienholders who may have had an interest in the tax-acquired property. There was concern expressed around the municipality providing excess sale proceeds to the former owner, who is likely delinquent with a lienholder who just lost their collateral due to the foreclosure of the tax lien. There was a competing concern around the authority of a municipality to alternatively provide the excess sale proceeds to a third-party, such as the lienholder. A final consideration was whether a municipality was capable of or should be responsible for making decisions regarding disposition of the excess sale proceeds; for example, determining priority if there are competing lienholders.

The solution agreed upon by the group was to require municipalities to provide notice to both the former owner and any recorded lienholders by certified mail at least 30 days prior to paying the former owner any excess sale proceeds. This provides a potential remedy for the interests of lienholders by providing them time to intervene via the court system if they choose, while respecting the rights of the former owner to the excess sale proceeds. In addition, if the lienholder chooses to intervene, the decision-making authority around the ultimate disposition of the excess sale proceeds will lie with the court system, which is better equipped to make the determination than the municipality.

**Provide process for situations when former owner cannot be located:** The group discussed the not uncommon situation where a former owner cannot be located. Municipalities already conduct

extensive due diligence in attempting to track down former owners, to provide lien notices for example. However, there remain situations where a municipality may be unable to locate the former owner. If the municipality is unable, after reasonable diligence, to locate and provide the former owner the pre-payment notice discussed above, the group felt the municipality should be able to provide notice by publishing the information in the newspaper once a week for three consecutive weeks, similar to how notice is given for property that is being assessed to an unknown owner.<sup>47</sup> If, after notice, the former owner fails to come forward to claim the excess sale proceeds, the group felt the former owner's rights in the proceeds should be forfeited and the municipality should be allowed to retain the proceeds and expend them as the municipality deems appropriate.

**Remove provision providing for quitclaim deed from former owner:** The existing statute allows municipal officers to condition payment of any excess sale proceeds on the execution by the former owner of a quitclaim deed conveying the former owner's interest in the tax-acquired property.<sup>48</sup> However, the statute is silent on the consequences if the former owner refuses, and the statute appears to require the municipality to pay the former owner the excess sale proceeds regardless. The provision appears to have been intended to help create more marketable title for the tax-acquired property. However, the group felt both that withholding the excess sale proceeds raised potential constitutional concerns and that the execution of the quitclaim deed did not significantly improve concerns around marketable title for the property, and therefore recommends that the provision be struck.

**Clarify and strengthen waiver of former owner's rights to file title action:** The existing statute provides that receipt of excess sale proceeds by a former owner is deemed to be a waiver of any right of the former owner to file a title action and challenge the validity of the taking of the property by the municipality.<sup>49</sup> However, as drafted, the waiver language is located in the section, discussed above, dealing with conditioning disbursement of excess sale proceeds on execution of a quitclaim deed by the former owner.<sup>50</sup> Thus, while it appears to apply broadly to all receipts, the statute could be made more clear. The group felt the law should be amended to clarify that the waiver applies to *all* receipts of excess sale proceeds by a former owner. The group felt the broad waiver would be a step toward creating more marketable title for the property, thus increasing potential excess sale proceeds for the former owner, while simultaneously helping to protect the rights of potential purchasers of tax-acquired properties.

**Require recorded notice of payment of proceeds:** While the waiver discussed above is a step toward creating more marketable title in theory, a concern raised in the group's discussions was that it would be complicated and time-consuming for title attorneys and others doing title searches to determine whether a former owner has received any excess sale proceeds and therefore waived

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<sup>47</sup> See 36 M.R.S. § 557-A.

<sup>48</sup> 36 M.R.S. § 943-C(6).

<sup>49</sup> 36 M.R.S. § 943-C(6).

<sup>50</sup> *Id.*

their right to file a title action. The only effective way to determine whether a disbursement of excess sale proceeds has occurred is for the individual performing the title search to contact the municipality and request documentation of the payment. To better streamline this process, the group felt the statute should include a requirement for the municipality to record a notice with the registry of deeds after it has disbursed excess sale proceeds to a former owner. This notice would provide an official public record of the disbursement and the waiver, allow those performing title searches to more quickly and confidently determine title on the property, and, in conjunction with the waiver provision discussed above, provide for more marketable title for the tax-acquired property.

## Draft Legislation

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### §943-C. Sale of foreclosed properties

Notwithstanding any provision of law to the contrary, after the foreclosure process under sections 942 and 943 or sections 1281 and 1282 is completed and the right of redemption has expired, if a municipality chooses to sell to someone other than the former owner, the municipal officers or their designee shall ~~notify the former owner of the right to require the municipality to~~ use the sale process under subsection 3. For the purpose of this section, "former owner" means the owner or owners of record at the time of foreclosure or, if deceased, the former owner's heirs, devisees or personal representatives. ~~The notice must be sent by United States Postal Service certified mail, return receipt requested, and first class mail to the last known address of the former owner.~~ If the municipality agrees to sell the property back to the former owner, the alternative sale process under this section does not apply. If the sale to the former owner is not completed, the requirements of this section are reinstated.

**1. Subject property.** This section governs the sale of all real property tax-acquired through the tax lien mortgage foreclosure process under sections 942 and 943 or sections 1281 and 1282.

~~**2. Notification; appeal.** At least 90 days prior to listing property for sale, the municipal officers or their designee shall send a written notice to the last known address of the former owner, by United States Postal Service certified mail, return receipt requested, and first class mail, of their right to require use the sale process described in subsection 3. The State Tax Assessor shall prepare application forms, notices and instructions that must be used by municipalities to inform former owners of their right to apply for the sale process provided under subsection 3.~~

**3. Sale process requirements.** ~~If the former owner submits a written demand within 90 days after the notification in subsection 2 that the sale process of this subsection be used~~ When selling a tax-acquired property, the municipal officers or their designee shall:

A. List the property for sale with a real estate broker licensed under Title 32, chapter 114 who does not hold an elected or appointed office in the municipality and is not employed by the municipality;

B. Sell Convey the property via quitclaim deed to the successful buyer at the highest reasonable price at which the property is able to sell, ~~or the price at which the property is anticipated by the real estate broker to sell~~ within 6 months after listing; and

C. Pay to the former owner any sale proceeds in excess of:

(1) The sum of all taxes owed on the property;

(2) ~~Property~~ The sum of all taxes that would have been assessed on the property during the period following foreclosure when the property is owned by the municipality;

(3) All accrued interest;

(4) Fees, including advertising, mailing, recording, property listing and real estate broker's fees;

(5) Any other expenses incurred by the municipality in selling, ~~or~~ maintaining, or improving the property, including, but not limited to, an administrative fee equal to 10% of the property taxes owed and reasonable attorney's fees;

(6) The cost to the municipality of the lien and foreclosure process, including, but not limited to, reasonable attorney's fees; and

(7) Unpaid sewer, water or other utility charges and fees imposed by the municipality.

~~If the municipal officers are unable to list or sell the property under the requirements of paragraphs A and B, or if the property tax payer does not request that the property be sold according to the sale process in this subsection, the municipal officers may sell the property in any manner authorized by the municipality's legislative body, if the municipal officers pay the former owner any excess sale proceeds as calculated in paragraph C.~~



**4. Effect of inability to contract or sell property.** If, after 3 attempts, a municipality is unable to contract with a real estate broker for the sale of the property as described in subsection 3 or the broker is unable to sell the property within 6 months after listing, the municipal officers may sell the property in any manner authorized by the municipality's legislative body, provided that the municipality pays the former owner any excess sale proceeds as calculated in subsection 3, paragraph C.

**4-A. Retention of tax-acquired property.** If a municipality chooses to retain a tax-acquired property for municipal use, the municipality must procure an appraisal report from an appraiser licensed to provide real estate appraisals in Maine showing the value of the tax-acquired property being retained. The appraiser may not hold an elected or appointed office in the municipality or be otherwise employed by the municipality. The municipal officers must, after providing the notice required by subsection 5-A, pay the former owner any excess sale proceeds as calculated in subsection 3, paragraph C, substituting the value of the property as shown in the appraisal report for the selling price of the property.

**5. Property in the unorganized territory.** With regard to the sale of property acquired by the State through tax lien foreclosure in the unorganized territory, the State Tax Assessor has the obligations of a municipality under this section.

**5-A. Pre-payment notice.** If after the sale of a tax-acquired property, there exist any excess sale proceeds as defined in subsection 3, paragraph C, then at least 30 days prior to disbursement of those excess sale proceeds to the former owner, the municipal officers must send written notice by certified mail, return receipt requested, to the last known address of the former owner and the last known address of each record holder of an interest in the property, of the municipality's intent to pay the former owner the excess sale proceeds. This notice does not limit the right of lienholders to pursue any claims to the excess sale proceeds against the former owner otherwise available by law.

**5-B. Notice by publication.** If the municipality is unable, after reasonable diligence, to locate the former owner of the property in order to send the notice required in subsection 5-A, the municipality shall place a notice, once a week for 3 consecutive weeks, in a newspaper of general circulation in the county in which the property is located. The notice must include the name of the former owner, a description of the real estate having been sold, the amount of the excess sale proceeds, and the date by which the excess sale proceeds must be claimed.

**5-C. Retention of proceeds.** If, after provision of notice under subsection 5-B, the former owner fails to claim the excess proceeds within 30 days of the final published notice, the former owner's rights to the excess sale proceeds are forfeited, and the municipality may retain

and expend the proceeds in whatever manner the legislative body of the municipality deems appropriate, provided the municipality has given notice to each record holder of an interest in the property pursuant to subsection 5-A.

**6. ~~Quitclaim deed and w~~ Waiver of former owner.** ~~As a condition of disbursement of excess sale proceeds to the former owner under subsection 3, paragraph C, the municipal officers may require the former owner to execute a quitclaim deed without covenant conveying any interest of the former owner in the property to the municipality and to deliver that deed before conveyance by the municipality to the buyer. Receipt of such excess sale proceeds by the former owner pursuant to this section is deemed to be a waiver of any right of the former owner to commence any action pursuant to section 946-B. Failure of a municipality to file the notice required by subsection 7 does not nullify or otherwise affect the validity of the waiver under this subsection.~~

**7. Notice of payment of proceeds.** A municipality, within 10 days of payment of any excess sale proceeds to the former owner under this section, must record in the registry of deeds of the county or registry district where the property is located a notice signed by the municipal officers. The notice must include the name of the former owner to whom the excess sale proceeds were paid, the amount of the excess sale proceeds, the date on which the excess sale proceeds were paid to the former owner, a description of the real estate having been sold and statement that receipt of the excess sale proceeds by the former owner is deemed to be a waiver of their right to commence any action pursuant to section 946-B.

The State Tax Assessor shall prescribe the form of the notice to be used by municipalities under this subsection.

## Member Comments

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### **John Brautigam—Public Policy Advocate, Legal Services for the Elderly:**

While we agree generally with the suggested legislation from the working group, Legal Services for the Elderly has a couple of additional changes that it believes should be made to the statute.

First, we believe the six-month market-based sale period should be extended to 12 months to give a better opportunity for a market sale. Real estate markets can fluctuate seasonally, and a 12-month period would ensure that more potential purchasers are aware of the property and have a chance to buy and generate a market-based surplus value amount. It also imposes little additional cost or burden to simply extend this period.

Second, since a seller no longer needs to make a demand for a market sale, the draft eliminates the notice that previously preceded that demand. We think it would still be good policy to

provide notice to the former owner that the municipality is putting into motion the market sale process. Finally, we believe that any excess proceeds from former owners who cannot be located should be treated as unclaimed property and sent to the State of Maine Unclaimed Property program.

**Carrie Cote—Senior Underwriting Counsel, First American Title Insurance Company:**

There is an additional change that we believe would help clarify the statute and the process beyond the consensus suggestions. The statute should require the municipality to record an affidavit certifying compliance with the statute if it is unable to locate the former owner. This will provide notice that the tax debtor could not be located and has no claim to the proceeds or property, which obviates the need for the municipality to continually field requests to verify marketability.

**Ben Lund—Attorney, Brann & Isaacson:**

An additional change I would recommend is that the new section 943-C(6) should provide for the waiver of a right to commence an action for all persons, not just the former owner. The section referenced, section 946-B, is not limited to the former owner—it refers to “a person.” Given the procedural protection for those holders provided in the statute, I would suggest the reference to the “former owner” in section 943-C(6) be deleted.

## Member List

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John Brautigam—Public Policy Advocate, Legal Services for the Elderly

Carrie Cote—Senior Underwriting Counsel, First American Title Insurance Company

Lawrence Delaney—Assistant Attorney General, Office of the Maine Attorney General

Meg Hodgkins—Director, MRS Property Tax Division

Peter Lacy (Chair)—Attorney, MRS Office of Tax Policy

David Little—Finance Director, City of Bangor

Ben Lund—Attorney, Brann & Isaacson (for Maine State Bar Association’s Real Estate & Title section)

Jessica Maloy—President, Maine Municipal Tax Collectors’ and Treasurers’ Association

Brent Martin—City Assessor, City of South Portland

Hannah McMullen—Legal and Government Affairs Counsel, Maine Association of Realtors

Elijah Munro-Ludders—Legislative Analyst, MRS Property Tax Division

Ellen Parent—Director of Compliance, Maine Credit Union League

Susanne Pilgrim—Staff Attorney, Maine Municipal Association

Travis Roy—President, Maine Association of Assessing Officers

Josh Steirman—Director of Government Relations, Maine Bankers Association

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