

**Frequently Asked Questions about Tax-Acquired Property**

**TO:** Selectpersons, Councilors, Tax Collectors and Treasurers

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**RE:** TAX-ACQUIRED PROPERTY

**DATE:** May 30, 1996 (as revised through 11/2018)

**1. What is tax-acquired property?**

Real estate (land and buildings) becomes tax-acquired by the municipality when three events occur. First, the assessors must properly assess and commit the taxes to the collector. Second, the tax collector and treasurer must strictly follow the recording and notice requirements in 36 M.R.S.A. §§ 942 and 943. Third, the period of redemption outlined in §943 must expire without the total amount due having been paid. It is not necessary to take physical possession of the property, or to send a notice that foreclosure has occurred, or to record a statement in the Registry of Deeds that foreclosure has occurred--it happens by operation law.

**2. What can the town do with tax-acquired property?**

There are three general options: (a) sell the property to a new owner; (b) continue to assess and tax the person in possession and work out a lump sum payment or installment payment plan; or (c) take physical control of the property and use it for municipal purposes, such as a woodlot, park, etc.

**3. Who decides what to do with tax-acquired property?**

The legislative body of the municipality (voters or council) determines what happens with tax-acquired property. The municipal officers cannot on their own decide what to do with tax-acquired property. Effective December 13, 2018, Maine law does impose sale procedures for property tax-acquired from certain senior, low-income taxpayers. See 36 M.R.S.A. § 943-C.

**4. How do the voters authorize the municipal officers to dispose of tax-acquired property?**

This can be done by article, ordinance or charter, and may be specific or general. A commonly used article which vests broad authority in the municipal officers is:

Article \_\_\_\_ . To see if the Town will authorize the Selectboard to dispose of tax-acquired property in any manner which the Selectboard deems to be in the best interests of the Town,

except for property tax-acquired from certain senior, low-income taxpayers who qualify for the sale process required pursuant to 36 M.R.S.A. § 943-C.

The foregoing article allows the Selectboard to choose from a range of options: sell the property by auction, by sealed bid, or by some other method; make an arrangement with the former owner to repurchase it; or do nothing with it that particular year. The article does not require that any particular amount of money be received for the property, but a sound fiscal policy is to collect at least as much as is due in unpaid taxes, interest and costs for all tax years with an outstanding balance.

**5. Is the municipality required to sell the property back to the former owner within one year after foreclosure has occurred?**

No, this is a common misconception. Many municipalities traditionally allow the former owner a grace period or right of first refusal to repurchase property after foreclosure, but it is not required by State law.

**6. If we agree to sell the property back to the former owners (or even to another person) but they cannot pay it all at once, can we work out an installment payment agreement?**

Yes. Any such agreement must be in writing as required by the Statute of Frauds (see 33 M.R.S.A. §51). In addition, if the property is a residential dwelling and there will be more than 5 or more installment payments, 33 M.R.S.A. §§ 481 and 482 require that seventeen particular items be addressed in the agreement. A discussion of other legal issues related to the use of installment agreements, a sample installment agreement, and a sample "right to cure" notice are included in MMA's "Information Packet" on Tax-Acquired Property. It is possible to structure the installment payments over several years, but in view of the taxpayer's financial track record the municipality might want to limit the payment period to one year. Note that 36 M.R.S.A. § 943 now provides that mortgages and liens which were extinguished by the municipal tax lien foreclosure may be revived if the property is sold back to the former owner or his successor (see Question 31).

**7. What can we do if the purchaser fails to make timely payments according to an installment agreement?**

The penalty or remedy for a breach of an installment agreement should be outlined in the agreement itself. An installment agreement is a contract, and the parties should fully understand and agree to all the terms before signing it. If the installment plan says nothing about a breach, then the municipality may have a difficult time enforcing it. Typically, a default clause will allow termination of the contract and forfeiture of the buyer's earlier payments in the event of a breach by the buyer.

Be aware that there is an issue regarding enforcement of these agreements. It is now generally agreed that a default on an installment sales agreement must be treated like a default on a mortgage and that, if the buyer fails to cure the defect after receiving the required notice, the municipality must retain an attorney and bring a mortgage foreclosure action in court in order to terminate the buyer's rights under the agreement. For more discussion of this issue, see "Tax-Acquired Property and Installment Contracts," *Maine Townsman*, "Legal Notes," June 2004.

**8. Can some tax-acquired parcels be sold and others retained by the municipality?**

Yes, the municipality is not required by law to dispose of all its tax-acquired parcels in the same manner. Different properties have different attributes, and the voters and municipal officers have the discretion to determine how to treat each parcel, within the limits approved by the municipal legislative body.

**9. May the municipality establish a policy that allows residents to repurchase their property but does not allow non-residents to do so?**

We advise against this. Arbitrary discrimination between residents and nonresidents may violate the constitutional guarantee of equal protection under the law [*see Aucella v. Town of Winslow*, 583 A.2d 215 (Me. 1990)]. The voters or Selectpersons may decide to retain some properties and sell others, but each decision should be based on factors regarding the particular parcel and the town's needs, rather than on the personal attributes or residency of the former owner.

**10. What procedure should we follow to sell a tax-acquired property by sealed bid?**

A sealed bid process has three basic steps. First, post or publish a notice of the parcels to be bid and the rules of bidding (time for bidding, deposit, completion of purchase, right of inspection, town's right to reject any and all bids and other threshold matters). Second, open and review the bids at a public meeting. Third, award the bids in accordance with the bid rules.

If you do not want to list all the rules in the notice (in order to keep publication costs down), make certain that the notice states where the rules can be reviewed or obtained. The biggest source of complaints regarding sealed bids is that not all bidders get the same information.

In addition to the other rules of bidding, the notice should also state what will happen in the event that the accepted bid falls through. For example, if the high bidder fails to complete the deal, his deposit would be forfeited and the town could negotiate with unsuccessful bidders. This avoids the need of re-doing the entire bid process (see sample bid notice).

Note that after Dec. 13, 2018, certain senior, low-income taxpayers have the right to request a special sale process through a real estate broker. See 36 M.R.S.A. § 943-C. For qualifying taxpayers, this law may supercede any local requirement to sell tax-acquired property by sealed bid.

**11. Is it possible to auction the properties at a public auction, and if so how is this done?**

Selling tax-acquired property by public auction is an option. The municipality is not required to use a licensed auctioneer for the sale of tax-acquired property [32 M.R.S.A. §286(6)]. However, you may want to consider a professional auctioneer since they have knowledge of the documents and practices which should be used for a public sale of real estate.

An auction should be advertised, and that notice should indicate the terms of a sale (for example, the amount of down payment and time allowed for final payment). To reserve the right to reject all bids, specify that the auction is "with reserve." If you want the bidding to commence at a certain price, specify that price in the notice or announce it before the bidding begins.

Some arrangement should also be made for dealing with a high bid that falls through. For example, if the high bidder fails to complete the purchase in the time allotted, you may want to deal directly with the losing bidders until you find a buyer. This arrangement should also be stated in the notice or at the commencement of the auction. Otherwise, someone may argue that the town is required to hold a new public auction if a sale falls through.

Note that after Dec. 13, 2018, certain senior, low-income taxpayers have the right to request a special sale process through a real estate broker. See 36 M.R.S.A. § 943-C. For qualifying taxpayers, this law may supercede any local requirement to sell tax-acquired property by sealed bid.

**12. If we sell tax-acquired property, what type of deed or other legal document should we use?**

We recommend that the municipality sell tax-acquired property by a quitclaim deed without covenants (also called a "release deed"). A sale by warranty deed or by quitclaim with covenants may saddle the town with the responsibility of resolving title problems.

The safest practice and the practice which is recommended by MMA is to require payment of all outstanding taxes, interest and costs before issuing a quitclaim deed to anyone. However, some communities allow a taxpayer who resides on the property to "pay off" an old lien even though later tax obligations remain unpaid. If you want to issue a quitclaim deed without

requiring full payment of all outstanding taxes, it is advised that specific language be included in the deed to avoid extinguishing subsequent tax liens.

Language similar to the following may be added to the quitclaim deed to protect later-recorded liens if the sale price does not also include the amount of unliened taxes and taxes for which liens have not yet matured:

"EXCEPTING AND RESERVING all Interests of the Town/City of \_\_\_\_\_ in and to the above described premises arising by virtue of undischarged tax liens for all tax years subsequent to \_\_\_\_\_ [the tax year for which the tax lien foreclosed and the quitclaim deed is being issued]."

Some of the commercially available quitclaim deed forms do not include the above language, so be certain to carefully read your quitclaim deed before issuing it.

### **13. Must the municipality clear the title to a tax-acquired parcel before selling it?**

No. In fact, it is a waste of money to clear title to a parcel which the town intends to sell by quitclaim deed, since the purpose of a quitclaim is to sell without any warranties whatsoever. The only time a town might want to clear title is (a) if it intends to keep the property and perhaps improve it, or (b) if it wants to sell the property at fair market value, which is more likely if title is clear and the sale is by warranty deed.

### **14. What price should we sell the property for?**

The amount of money which the municipality usually receives from the person buying tax-acquired property is an amount equal to all outstanding taxes, interest, and lien costs. You should also include an amount equal to estimated taxes for the current year if the sale will be by a lump sum payment and will occur after April 1, if the assessors will not be assessing the buyer as "person in possession" of the property as of April 1. If the sale will involve payments on an installment basis (see Question 6), then you may want to include estimated taxes for each year of the installment plan in the sale price if the property won't be assessed to the buyer as person in possession. However, this may be unrealistic if the buyer is the former owner who lost the property through the lien process (see Question 12 for another approach).

After Dec. 13, 2018, certain qualifying senior, low-income taxpayers have the right to request a special sale process under 36 M.R.S.A. § 943-C. This sale process requires sale through a licensed real estate broker at fair market value or at a price the broker thinks it is likely to sell within 6 months. See Chapter 3 of MMA's *Guide to Municipal Liens Manual* for detailed information.

**15. If we sell a tax-acquired property for more than the taxes owed, must we return the excess money to the former owner?**

Generally, no. The town has no legal obligation to return any excess funds to the former owner or taxpayer, with two exceptions discussed below. *City of Auburn v. Mandarelli*, 320 A.2d 22 (Me. 1974). Effective May, 2015 state law now authorizes refunds of excess proceeds provided the municipality adopts a detailed local ordinance establishing refund authority and procedures. Note that there is still no legal requirement that a municipality provide refunds of excess proceeds. "Excess" proceeds are defined to include any amount exceeding (1) all property taxes and interest owed on the property, including taxes that would have been assessed had the property not been tax-acquired; (2) the municipality's cost of the lien and foreclosure; (3) the municipality's cost of maintaining and disposing of the property; and (4) unpaid sewer, water or other charges and fees imposed by the municipality. The legislation authorizing local refunds contains several other criteria for an ordinance. See 36 M.R.S.A. § 949

Also note that effective Dec. 13, 2018, if property is sold through the special sale process required by 36 M.R.S.A. § 943-C (benefitting certain senior, low-income taxpayers), any sale proceeds in excess of all back taxes, taxes that would have been assessed between the foreclosure and sale, accrued interest, fees including real estate broker fees, and other expense listed in the statute, must be returned to the former owner. See 36 M.R.S.A. § 943-C(3).

**16. If we sell tax-acquired property and get less than is owed in back taxes (which happens sometimes with mobile homes), do we have a claim against the former owner for any deficiency?**

Probably not. The municipality elected to proceed with automatic foreclosure, and when title passed to the municipality the taxpayer's obligation was satisfied. Nothing in the law allows recovery of a deficiency, as there is in a traditional mortgage foreclosure. For this reason, municipal officials should carefully consider whether to use the automatic foreclosure process for properties which have little resale value. In those cases, you may want to consider a civil action to collect the money due.

**17. What should we do with people living on the tax-acquired property?**

This depends on what the municipality wants to do with the property. If the municipality plans to sell the property, it can leave the people there and state in the sale notice that the premises are occupied and that the buyer is responsible for dealing with the occupants. The buyer may want to evict them, or he/she may want to treat them as tenants and charge rent. In either case, the municipality has passed the matter on to the buyer.

If the municipality plans on using the property and wants it vacant, it may bring an eviction action for this purpose. An eviction action will require the services of a lawyer. Before filing an eviction action, we recommend sending a notice to the occupants demanding that they vacate by a certain date. (See sample notice to vacate the premises linked as part of MMA's "Tax-Acquired Property Information Packet").

The municipality may simply allow the people to remain on the premises. In that event, the municipality is immune from liability for tort claims until 60 days after the former owner or occupants vacate the property (see Question 19, below).

**18. If people are living on tax-acquired property, can we charge them rent?**

This is allowed by law but it is not recommended. Once the town treats the occupants as tenants and accepts rent, the town may be deemed the landlord and could be responsible for the duties imposed by law on landlords (see 14 M.R.S.A. §6021 et seq). Most towns do not want or need this additional responsibility. If you sell the property back to the occupants by installment agreement (see Question 6), be certain to call their monthly payments "installment payments" and not "rent."

**19. What legal liability do we face regarding accidents or injuries occurring on tax-acquired property?**

The Maine Tort Claims Act provides fairly good protection in this regard. 14 M.R.S.A. § 8104-A (2)(A)(1) states that a municipality is not liable for any claim arising from the use, ownership or maintenance of unimproved land. 14 M.R.S.A. §8104-A (2)(B) states that a municipality is not liable for claims resulting from the ownership, maintenance or use of any building acquired by tax foreclosure, from the date of foreclosure until actual possession by the delinquent taxpayer (or his lessee or licensee) has ceased for a period of 60 days. After the 60 day period has run, the municipality should insure the premises or take other steps to safeguard it. Review your existing insurance policies to determine whether tax-acquired property is automatically covered or whether additional coverage is needed.

**20. What do we do with personal property which is left behind on a tax-acquired parcel?**

When the municipality forecloses on land and buildings, it does not take title to items of personal property which may be left behind. The town should ask the former owner to remove the personal property by a stated deadline. If the person fails to do so, the property will be governed by the abandoned personal property law found in 30-A M.R.S.A. § 3106 *et seq*. That law requires that specific procedures be followed, including written notice to the former owner, before the municipality may dispose or sell the property. Proceeds from any sale may be applied to unpaid taxes, assessments, storage, notice and sale costs. If proceeds remain they

must be transferred to the state Treasurer with a report of sale. For more information and sample notice form, see MMA's Tax-Acquired Property Information Packet.

**21. If the tax-acquired parcel is landlocked, can we still sell it?**

Yes. As a practical matter, the only people interested in it may be the abutters, but it can be sold to anyone.

**22. If the tax-acquired parcel is landlocked, how do town officials or others get to it?**

An abutter may be willing to allow access at will (this is known as a mere license), or may be willing to give or sell a deeded easement. If no abutter will voluntarily allow access, the town may use its eminent domain power to create an easement for access. Eminent domain should only be used where the property will be used for public purposes.

**23. May the municipal officers (Selectmen or Councilors) purchase tax-acquired property?**

Yes, but only if the purchase is by sealed bid and the municipal officer is not involved in the bid process (see 36 M.R.S.A. §946). That law does allow a municipal officer, if authorized by the municipality, to repurchase property without a bid process if the property was owned by the municipal officer or his/her spouse, children or parents immediately before the foreclosure.

**24. What should we do if we sell a parcel of tax-acquired property and, years later, hear from a mortgagee who never received notice of the foreclosure, and now wants to redeem the property?**

There is not much the municipality can do in this case. The aggrieved mortgagee can insist that it be allowed the opportunity to redeem the property. The town has no legal obligation to reimburse the purchaser as long as the sale was by quitclaim deed without covenant. Although not required by law, some towns do reimburse a purchaser in this situation, in order to maintain good public relations. 36 M.R.S.A. § 946-B sets a 15-year period (commencing at the time of foreclosure) in which the validity of a tax lien foreclosure can be contested for liens recorded between October 13, 1993 and October 13, 2014. For liens recorded after October 13, 2014, the time period is 5 years.

**25. We tax-acquired a mobile home which is located in a mobile home park. The taxpayer vacated the premises. The park owner now wants the town to pay the lot rental fee. Is the town liable for this?**

Yes. The town owns the mobile home and is responsible for lot rental fees. For this reason it is important that the town take fairly quick action to either sell the mobile home or move it out of the park. When you eventually sell the mobile home, be certain to add to the asking

price all additional out-of-pocket expenses such as lot rental fees, transportation costs, sewer and water charges, and so on.

- 26. We tax-acquired a subdivision lot. The subdivision has a lot owner's association which charges each lot owner an annual fee for upkeep of roads and common areas. Is the town responsible for this fee now? Also, is the town bound by any restrictions on the use of the lot contained in the deed or on the plan?**

Yes, if the town is a lot owner when the fee is assessed. When you sell the property, be certain to add to the asking price any such fees paid by the town. As for deed restrictions or conditions shown on the plan, the town steps into the former owner's shoes and is bound by those restrictions, as is anyone who buys from the town.

- 27. We were recently told that the Town has a duty to investigate tax-acquired properties prior to sale and to remove any hazardous substances such as asbestos and lead-based paint. Is this true?**

No. The Maine Real Estate Commission has rules which require real estate brokers and agents to ask the seller about the existence of asbestos, radon, lead-based paint, underground storage tanks, insulation, and malfunctioning septic systems. Prospective buyers are entitled to this disclosure. There is no general duty on a landowner who does not use a real estate broker to investigate or disclose the existence of hazardous materials, although an owner must disclose such items if he or she actually knows of them. In most cases, tax-acquired properties are sold directly by the municipality, so there is no duty to investigate or correct these problems. However, if municipal officials know or strongly suspect that hazardous materials are on the property, this should be disclosed to ward off a possible lawsuit for fraud or misrepresentation. Likewise, if a prospective buyer asks about the existence of hazardous materials, the municipality must disclose what it knows, if anything. The municipality has no duty to inspect or investigate the property for such materials, and in most cases municipal officials know nothing about a particular property. In that case, municipal officials should indicate that they have no knowledge of the presence or absence of any hazardous materials, and make no representations of any sort about the safety, quality or habitability of the premises.

- 28. We have a tax-acquired property for sale which we know has asbestos insulation around the pipes. An interested buyer insists that the Town pay for removal of the asbestos before he buys the house. Are we required to do so?**

No. Even if asbestos is present, the law does not require the seller to remove it prior to sale. You may simply disclose the existence of the problem and tell the buyer that it is his responsibility to deal with it. This is a contract matter between buyer and seller. If no one is interested in buying the property because of the asbestos, then the municipality may have to clean it in order to sell it. If so, make certain that you add clean-up costs to your asking price.

**29. If the Town tax-acquires land which is polluted by hazardous substances, is it automatically liable for clean-up costs?**

In general, no. State and federal laws provide municipalities with some protection in this situation. The federal CERCLA, or "Superfund," law (see 42 USCS § 9601 *et seq.*) excludes from the definition of "owner or operator" a municipality that acquired the property through tax delinquency. As long as the municipality did not place the materials on the site, or cause their release or worsen the situation, the municipality is not considered the owner or operator for clean-up purposes. Likewise, the State hazardous substance clean-up law exempts the municipality from clean-up obligations for tax-acquired property (38 M.R.S.A. § 1367-B). However, in the event that the municipality sells the property, the State can take from the sale proceeds any clean-up costs it incurred (less the municipality's out-of-pocket sale costs). Also, while these statutes protect a municipality from liability for tax-acquiring property that is contaminated by hazardous wastes and substances, State and federal law do not provide protection from liability for underground oil tanks. Therefore, if a municipality is about to tax-acquire a property that contains or may contain underground oil tanks, it may wish to investigate the property prior to foreclosure or waive foreclosure.

**30. When the Town sells tax-acquired property, must we also prepare a Declaration of Value form and pay the "transfer tax"?**

The transfer tax is imposed half on the grantor and half on the buyer of property at the time the deed is recorded at the Registry of Deeds. Deeds to or from municipalities are exempt from the transfer tax but only for the municipality's half of the tax. The other party is still liable for its half, except for transfers to the Maine Department of Transportation or the Maine Turnpike Authority for transportation purposes, gifts to governmental entities, and transfers to governmental entities from a bona fide nonprofit land conservation organization.

The buyer, whether the former owner or another party, is liable to pay its half of the tax, but the municipality is exempt from paying its half. The buyer is also responsible for submitting the declaration of value and recording the deed. The municipality, however, should probably complete the declaration of value form not only because the seller must also sign it but to ensure its accuracy as well. Both the declaration and the deed should then be delivered to the buyer for payment of the tax and recording of the deed at the buyer's expense.

**31. When our tax lien forecloses, does it wipe out mortgages? If so, can the former owner repurchase the property free and clear of any mortgages?**

When a tax lien forecloses it will extinguish mortgages and most liens (certain federal and state liens may survive due to other laws) as long as the lien holders and mortgage holders were properly notified. (36 M.R.S.A. § 552) Usually banks will pay the taxes at the last moment to avoid this. Even if a mortgage or lien is "wiped out," however, it will be revived

if the property is conveyed to the immediate former owner or his successor (36 M.R.S.A. § 943). We recommend that all lien holders of record be treated as mortgage holders for purposes of § 942 and § 943 notice.

**32. We tax-acquired a parcel of land that includes an easement across an abutting parcel. Our quitclaim deed (issued when we sell the property) does not mention the easement. When we sell by quitclaim deed, is the easement included?**

Yes. Most easements "run with the land." This means that the easement is conveyed with the land, and is not limited to a particular owner at a particular time. An easement will continue to exist even if a deed fails to mention it. By the same token, if you tax-acquire property which is subject to an easement, the easement will continue to burden the land when you sell it, even if your quitclaim deed does not mention it.

**33. Can we list a tax-acquired property for sale through a real estate agent?**

Yes. Keep in mind that the town must pay any commission, so set your asking price accordingly.

**34. We tax-acquired a large parcel. We have not been able to sell it as one parcel, but there has been interest in portions of it. Can we split the parcel and sell it in pieces?**

Yes, if the article or ordinance authorizing the sale of tax-acquired property does not indicate otherwise. However, if you split the parcel into three or more lots within a 5-year period, it may be a subdivision for which approval is needed (if none of the subdivision exemptions apply, see 30-A M.R.S.A. § 4401), and in this case, the town would be the subdivider. Also, make certain that the lots created do not violate any local zoning or minimum lot size ordinance.

**35. We heard that we are not supposed to sell tax-acquired property if the owner is an active member of the military. What is the law on this, and how can we find out if the person is in the military (particularly if it is a nonresident taxpayer)?**

Actually, you are not supposed to foreclose on the lien in the first place in this situation. The Service Members Civil Relief Act (50 USC § 501 et seq) effectively bars the automatic foreclosure of a tax lien if the taxpayer is an active member of the military (or a reserve member called into active duty) until 6 months after the person leaves the service or active duty [*Conroy v. Aniskoff, Town of Danforth et al*, 507 US 511, 113 S. Ct. 1562 (1993)]. It is permissible to record the lien, but federal law suspends running of the redemption period. (See a memo discussing this law which is part of the MMA "Tax-Acquired Property Information Packet.") It may not be easy to find out if someone is in the military. You can ask the taxpayer directly if you can find him or her, or you can try the military "locator service." For more information about this service, go to the following website: <http://www.defense.gov/faq/pis/PC04MLTR.html>.

- 36. Our town had a tax lien against real estate which is also the subject of an IRS income tax lien. Our property tax lien has foreclosed. We gave the IRS the same notices that we give to mortgage holders under 36 M.R.S.A. § 942 and § 943. May we treat this property as tax acquired and sell it free of the IRS lien?**

The IRS lien can be extinguished only if the special "Notice of Sale" procedures outlined in IRS Publication 786 are followed by the municipality. If the town isn't interested in eliminating the IRS lien, the town may sell the property subject to the IRS lien and let the buyer take care of it. A copy of Publication 786 and the "Notice of Sale" that must be sent to the IRS are included in the appendix to MMA's *Guide to Municipal Liens Manual*.

*12/09 revision; 03/16 revision; 11/18 revision*