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July 7, 2023

Mr. Charles Hicklin
Dane County Controller
Room 425, City-County Building
Madison, WI 53703

RE: Sale of Tax Deeded Property to Municipalities

Dear Mr. Hicklin:

DCO §26.16 authorizes the county to sell tax deeded land to the municipality in which the property is located for the amount of back taxes[1] then due plus 1% of the assessed[2] value of the property. You have requested an opinion as to whether a sale authorized by DCO §26.16 is permissible under state law. Although it seems contrary to recent amendments to state law, the sale of tax deeded property contemplated by DCO §26.16 does not appear to be expressly prohibited by state law. However, such practice is likely an unconstitutional taking of private property under the U.S. Supreme Court's recent decision in *Tyler v. Hennepin County*, 143 S.Ct. 1369 (2023). You also ask a related question as to whether the county can retain title to tax deeded property and not sell it. I can find no statutory authority for a county to simply retain ownership of tax deeded property without offering it for sale. Even if that were permissible, under *Tyler* it would be a taking unless the county paid the prior owner any surplus equity after all back taxes are deducted from the appraised value of the property.

Prior to 1987, Wisconsin law made no provision for distribution of a surplus upon sale of land to which a county had obtained a tax deed. *Oosterwyk v. County of Milwaukee*, 31 Wis.2d 513, 516 (1966); see also *Jensen v. County of Kenosha*, 2022 WL 2336123 (Unpublished, June 29, 2022). In 1987, the legislature revised Wis. Stat. Ch. 75 to provide that an owner of homestead property is entitled to the excess from sale proceeds when a county sold tax deeded property. 1987 Wis. Act 378, §§ 120, 122. At

[1] The term "back taxes" in this opinion includes taxes, penalties, interest and special assessments.
[2] DCO §26.16 refers to "assessed value," state law generally requires that tax deeded property be sold for "appraised value." Wis. Stat. §75.69(1).

that time the legislature enacted no similar provision for non-homestead property. In 2021, the legislature expanded the provisions of Wis. Stat. §75.36 to provide that the prior owner of all tax deeded property is entitled to payment of any surplus above the back taxes when the property is sold. 2021 Wis. Act 216.

Generally, the sale of tax deeded property must be for at least the appraised value. Wis. Stat. §75.69(1) provides that at the first attempt to sell the property "every bid less than the property's appraised value shall be rejected." This would prevent selling tax deeded property to a municipality for less than the appraised value. However, Wis. Stat. §75.69(2) creates an exemption to the requirements of sub (1) for the sale of tax deeded land to municipalities, "[t]his section shall not apply to…the sale or exchange of lands ***to*** or between municipalities or to the state." That provision was in effect in 1985 when DCO §26.16 was adopted. It is my assumption that Wis. Stat. §75.69(2) was the statutory authority for DCO §26.16. Since 1985 the legislature has amended Wis. Stat. §75.36 to require the payment of a surplus to any prior owner, but the amendment did not apply to the provisions under Wis. Stat.§75.69(2).. Although contrary to the legislative intent to pay surplus to any prior owner set forth in Wis. Stat. 75.36, it is my opinion that the provisions of DCO §26.16 authorizing the sale of tax deeded property to a municipality for less than the appraised value is still authorized by Wis. Stat. §75.69(2). Regardless of statutory authority, however, the Supreme Court's recent decision in *Tyler v. Hennepin County,* likely renders this practice an unconstitutional taking.

In *Tyler*, issued May 25, 2023, Hennepin County, Minnesota, "sold Geraldine Tyler's home for $40,000 to satisfy a $15,000 tax bill. Instead of returning the remaining $25,000, the County kept it for itself." *Tyler v. Hennepin County*, 143 S.Ct. 1369, 1373 (2023). Chief Justice Roberts, speaking for a unanimous Supreme Court held that "[a] taxpayer who loses her $40,000 house to the State to fulfill a $15,000 tax debt has made a far greater contribution to the public fisc than she owed. The tax payer must render unto Caesar what is Caesar's, but no more." *Id.*, at 1380. The court's decision was based upon the Takings Clause of the 5th Amendment to the U.S. Constitution that states "private property [shall not] be taken for public use, without just compensation." The court stated that "[t]he Takings Clause 'was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Id.*, at 1380, quoting, *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563 (1960). The court concluded that "[t]he County had the power to sell Tyler's home to recover the unpaid property taxes. But it could not use the toehold of the tax debt to confiscate more property than was due. By doing so, it effected a 'classic taking in which the government directly appropriates private property for its own use,'" *Id.* , at 1376, quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324, 122 S. Ct. 1465 (2002).

Tyler has changed the landscape of tax forfeiture laws nationwide. What is clear is that a prior owner of tax deeded property is entitled to the surplus equity in the property after it is sold for fair market value. In my opinion, selling the property for less than fair market value would deprive the prior owner of this equity and constitute a taking under the holding in *Tyler*. Therefore, in my opinion the practice of selling property to a municipality for the amount of the back taxes plus 1% of the appraised value as authorized by DCO §26.16 would constitute a taking if that sale price was below the appraised value of the property.

You also inquired about the county's ability to retain ownership of tax deeded property without putting it up for sale. I can find no statutory authority for this practice. The statutes only contemplate a sale of tax deeded property. Indeed, Wis. Stat. Ch. 75 which controls, is entitled "Land Sold For Taxes." Assuming for the sake of argument that retention of ownership of tax deeded property was permitted, it would be a taking under the holding in *Tyler*, unless the county paid the prior owner the difference between the back taxes and assessed value.

Please contact me if I can provide additional assistance on this matter.

Sincerely,

David R. Gault
David R. Gault
Deputy Corporation Counsel

cc: Adam Gallagher, County Treasurer