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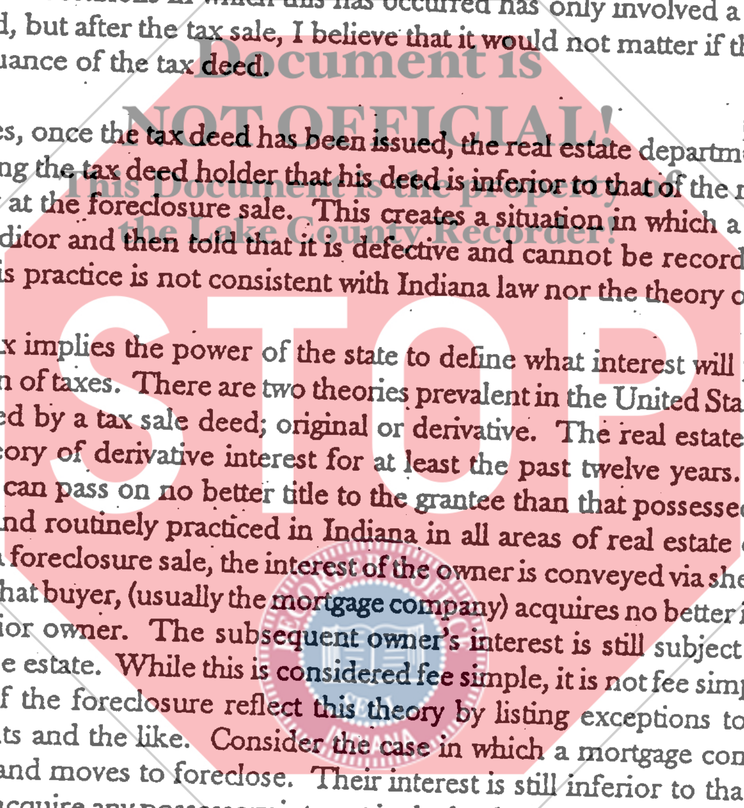
October 31, 2000

Peter L. Benjamin, Lake County Auditor
2293 North Main Street
Crown Point, IN 46307

Re: Priorities of Tax Deeds vs Sheriffs's Deeds

Dear Mr. Benjamin:

As Attorney for the Auditor's office, I have recently been asked to research the issue of which type of deed takes priority, a sheriffs deed or a tax deed. This problem has arisen in instances where after a tax sale in which a buyer obtains a tax certificate, the property goes into foreclosure and is subsequently sold at a sheriffs sale. While the occasions in which this has occurred has only involved a foreclosure prior to the issuance of the tax deed, but after the tax sale, I believe that it would not matter if the foreclosure occurred prior to or after the issuance of the tax deed.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In such instances, once the tax deed has been issued, the real estate department within the Auditor's office has been informing the tax deed holder that his deed is inferior to that of the mortgage company who purchased the property at the foreclosure sale. This creates a situation in which a tax certificate holder is given a deed by the Auditor and then told that it is defective and cannot be recorded. For reasons stated herein, I believe that this practice is not consistent with Indiana law nor the theory of tax sale deed priority.

The power to tax implies the power of the state to define what interest will pass by the sale of real property in the collection of taxes. There are two theories prevalent in the United States with respect to what title or estate is conveyed by a tax sale deed; original or derivative. The real estate department has been operating under the theory of derivative interest for at least the past twelve years. Under this theory, a conveyance in property can pass on no better title to the grantee than that possessed by the grantor. This theory is legally sound and routinely practiced in Indiana in all areas of real estate conveyance except tax deeds. For example, in a foreclosure sale, the interest of the owner is conveyed via sheriffs deed to the buyer at the foreclosure sale. That buyer, (usually the mortgage company) acquires no better interest in the property than that held by the prior owner. The subsequent owner's interest is still subject to taxes and all other proprietary liens upon the estate. While this is considered fee simple, it is not fee simple absolute. The title policies issued as part of the foreclosure reflect this theory by listing exceptions to the policy for taxes, encumbrances, easements and the like. Consider the case in which a mortgage company holds a second mortgage on a property and moves to foreclose. Their interest is still inferior to that of the first mortgage holder and they may not acquire any possessory interest in the land unless they also pay off the first mortgage. Hence, the derivative theory follows transfers of *interest in property* rather than the property itself.

However, whether the purchaser at a tax sale acquires a new and original title or a derivative title depends on the governing statutory provisions as this is a matter that rests wholly in the discretion of the legislature. Thus, we must examine the statutes to determine whether the title is subject to, or free from, all other titles and existing liens and encumbrances. Indiana Code 6-1.1-25-4.6(g) provides that a tax deed vests in the grantee an estate in fee simple absolute, *free and clear of ALL liens suffered before or after the tax sale* except those liens granted priority under federal law and the lien of the state or a political subdivision for taxes and special assessments that accrue subsequent to the sale. Moreover, a tax deed issued under IC 6-1.1-25-4(h) is incontestable except by appeal from the order of the Court directing the County Auditor to issue the tax deed. In other words, ca complete, full, and "new or original" title is created. Accordingly, Indiana follows the original title theory for the issuance of tax deeds.

This makes sense as the County Auditor executes the tax deed in the name of the State of Indiana, as grantor, under the county auditor's name and seal. This title is entirely disconnected from that of the former owner and is antagonistic to all other claims to the land. Thus, the title acquired by the purchaser is not derivative, but is a new, original, and independent title, like a grant from the sovereignty, which is paramount to, or extinguishes, all other titles, interests, and equities, whether of record, possessory, or adverse. Since the issuance of a tax deed is tantamount to the creation of a new and independent title, the legislature has provided that this new tax deed destroys and extinguishes all existing liens, charges, and encumbrances as inferior or subordinate to the tax deed. Thus, the purchaser acquires a clear and unencumbered title. Although a tax deed does vest the purchaser with the title held by the owner of the property, since it is the land itself which is sold rather than any particular interest in the land, the purchaser acquires not merely the title of the person who has been assessed with the taxes for which the land was sold, but actually acquires a better title, in that the title is regarded as a new title rather than a derivative one. Under this rule, since the tax deed is intended to convey the property, and not merely the interest of the delinquent, a certificate purchaser of property at tax sale whose interest goes to deed, in which there has been a subsequent conveyance by the delinquent taxpayer, acquires an absolute estate in fee simple, without regard to any title created by a conveyance from the delinquent taxpayer to his garntee and subsequent grantees taking under the delinquent taxpayer. The statute clearly delineates subsequent conveyances by stating that the tax deed vest the vests the grantee in fee simple absolute, free and clear of all liens suffered before or after the tax sale, a term of art which indicates that once issued, a tax deed creates a new and "original" chain of title, subject only to grants or conveyances that occur after the deed is issued. Accordingly, a foreclosure that occurs prior to the issuance of a tax deed is rendered moot and void for purposes of claims to title, unless as part of that foreclosure sale, the taxes are paid and the property is redeemed prior to the issuance of the tax deed.[1]

Accordingly, I would suggest that you consider a change to the current policy of the real estate department, reflecting the original chain of title theory when a tax deed is issued, but keeping the derivative theory of chain of title for all other deeds. This should actually make Sherry's job a bit easier, since all she would need to review tax deeds for is the proper legal description and the information contained on the tax certificate.[2] I believe that the current practice may expose the county to lawsuits by tax purchasers who are

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[1]This brings up another problem that I have discovered in which it seems that the sheriff is not collecting the taxes due on properties at the time of a foreclosure sale as mandated by the statute, but rather is merely selling the property for the judgment amount, leaving the responsibility of calculating and paying the taxes to the mortgage companies and their attorneys. The statutes clearly require that the sheriff calculate, and collect the taxes at the time of sale and forward them to the treasurer within ten days after the sale.

[2]I have spoken to Jim Hughs and Lee Christakus of SRI and have been informed that they would welcome such a change in policy and would be happy to provide a copy of the tax certificate along with the tax deeds for review.

told that their deeds are inferior to a mortgage company's interest by way of a foreclosure.

Additionally, by way of this letter, I would suggest that the County Attorneys for the Council and Commissioners look into the foreclosure sales as conducted by the Sheriffs department to insure that they are in compliance with the statutes. If the taxes are computed and collected at the Sheriffs sale, and then forwarded to the Treasurer within ten days as the statutes require, this problem would be greatly reduced, and the likelihood for downstream lawsuits would be diminished considerably.[3]

Thank you for the opportunity to provide this service to you and please feel free to call me if you have any questions regarding this or any other real estate or tax related matter.

Very truly yours,

EDWARD R. HALL

cc: John Dull, Commissioner's Attorney
Ray Szarmach, Council's Attorney
John Bushemi, Sherriff's Attorney
Mary Ann Sanko, Real Estate Department
Sandy Luscavich, Tax Sale Department
Peggy Katona, Lake County Treasurer

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Concurrence:

John Dull

[3]I have attached a copy of the statutes as they relate to Sheriffs sale for your review.