

**STATE OF TENNESSEE**

OFFICE OF THE  
**ATTORNEY GENERAL**  
PO BOX 20207  
NASHVILLE, TENNESSEE 37202

April 7, 2008

Opinion No. 08-86

Effect of a Delinquent Property Tax Sale on an Easement Burdening the Real Property Sold

**QUESTION**

Does a tax sale held for non-payment of delinquent property taxes extinguish a prior recorded easement running with the land that burdens the real property sold?

**OPINION**

No. A Tennessee court applying the majority rule would determine that a tax sale of the burdened property does not terminate an easement running with the land.

**ANALYSIS**

Liens for property taxes are a first lien upon the property regardless of the time the taxes accrued. Tenn. Code Ann. § 67-5-2101(a) (2007) provides that

[t]he taxes assessed by the state of Tennessee, a county, or municipality, taxing district, or other local governmental entity, upon any property of whatever kind, and all penalties, interest, and costs accruing thereon, shall become and remain a first lien upon such property from January 1 of the year for which such taxes are assessed.

*See also Willingham v. Gallatin Group, Inc.*, 2001 WL 134599, \*5-\*6 (Tenn. Ct. App. Feb. 16, 2001) (discussing priorities as applicable to property taxes but not business taxes). These tax liens are “a lien upon the fee in the property, and . . . any and all other interests in the property . . . of any nature whatever.” Tenn. Code Ann. § 67-5-2102(b) (2007).

Tenn. Code Ann. § 67-5-2501(a)(1) (2007) provides that a court may order a sale of the property for delinquent real property taxes. This statute specifically states that a tax sale is “subject to the equity of redemption” and does not list any other items to which the sale is subject. Additionally, the tax deed constitutes “an assurance of perfect title to the purchaser of the land[.]” Tenn. Code Ann. § 67-5-2504(b) (2007). Thus, the effect of a tax sale is that it extinguishes junior liens. *See Obion County ex rel. N. Fork Drainage Dist. v. Massengill*, 177 Tenn. 477, 151 S.W. 2d 156, 157-58 (1941) (termination of lien for special assessment upon tax sale).

If a property tax lien has first priority regardless of the time the taxes accrued, the lien is a lien on all interests in the property, and a tax sale is specifically subject to the equity of redemption and nothing else, it might follow that all liens or encumbrances upon the property, including easements, are extinguished when the property is sold at a tax sale. However, while Tennessee courts have not considered whether a tax sale extinguishes an easement burdening the property sold, most courts in other jurisdictions have held that the easement survives. *See* 7 A.L.R.5th 187, § 2[a]. Courts adopting the majority rule focus on the interests that have been assessed for property taxes. *Id.* *See also* *District of Columbia v. Capital Mortgage & Title Co., Inc.*, 84 F. Supp. 788 (D.D.C. 1949); *Hearn v. Autumn Woods Office Park Property Owners Association*, 757 So.2d 155 (Miss. 1999); *Lipman v. Shriver*, 144 A.2d 37 (N.J. Super. 1958); *Ross v. Franko*, 40 N.E.2d 664 (Ohio 1942). These courts reason that if the value of the easement is considered when assessing the property, the assessed value of the dominant estate (the estate benefitting from the easement) is increased and the assessed value of the servient, or burdened, estate is decreased. *Ross*, 40 N.E. 2d at 665. Consequently, the easement is a part of the dominant estate, not the servient estate, and the assessment and tax lien on the servient estate do not attach to the easement. *Id.*; *Lipman*, 144 A.2d at 39 (quoting *Niestat v. Equitable Security Co.*, 48 A.2d 907 (N.J. Ch. 1946)). Therefore, a tax sale of the servient estate cannot extinguish the easement because the easement is a part of the “undisturbed” dominant estate. *Ross*, 40 N.E. 2d at 665.

In Tennessee, the existence of easements is considered when assessing the value of real property for tax purposes. Tenn. Code Ann. § 67-5-602 (2007) provides as follows:

(a) [I]n determining the value of all property of every kind, the assessor shall be guided by, and follow the instructions of, the appropriate assessment manuals issued by the division of property assessments and approved by the state board of equalization. \* \* \*

(b) For determining the value of real property, such manuals shall provide for consideration of the following factors:

(1) \* \* \*

(5) Legal restrictions on use[.]

“[L]egal restrictions on use” include easements and other “restrictions that run with the land, rather than those that are personal to the parties in possession.” *Hoover v. State Bd. of Equalization*, 579 S.W.2d 192, 194-96 (Tenn. Ct. App. 1978) (analyzing Tenn. Code Ann. § 67-606, a previous version of Tenn. Code Ann. § 67-5-602). The Tennessee statutes that give tax liens priority over other liens do not mention easements. An easement is not a lien, and to eliminate it in a tax sale would denigrate the worth and dignity of an easement. As the court observed in *Capital Mortgage & Title Co.*, 84 F. Supp. at 790,

[t]o hold that the right-of-way is destroyed through no act or neglect of [the owners of the dominant estate], but merely because the owner of the servient estate has failed to pay his taxes, would be to deprive them of a vested property right because of a circumstance beyond their control. Surely it can hardly be expected that the [owners

of the dominant estate] should come in and pay taxes on the adjoining property merely in order to preserve their rights-of-way over it.

Accordingly, it is the opinion of this Office that Tennessee courts would apply the majority rule and determine that a tax sale of the servient estate does not terminate an easement running with the land.

ROBERT E. COOPER, JR.  
Attorney General and Reporter

BARRY TURNER  
Deputy Attorney General

NICHOLAS G. BARCA  
Assistant Attorney General

Requested by:

The Honorable Brian Kelsey  
State Representative  
203 War Memorial Building  
Nashville, TN 37243