

**TAX LIENS, TAX SALES AND TAX DEEDS IN INDIANA**

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## INTRODUCTION

The objective of this article is to provide a general overview of the nature of governmental liens on real estate for delinquent real property taxes and special assessments (referred to throughout this article as “tax liens”), the statutory process by which Indiana counties sell tax liens to satisfy tax delinquencies associated with real property and the effect of tax deeds on competing interests in real property. Part I of this article examines the perpetual superpriority of tax liens under Indiana law. Part II overviews the statutory framework of the tax sale process from certification of the tax sale list through the expiration of the applicable post-sale redemption period. Part III of this article discusses tax deeds, original versus derivative theories of title and other post-tax sale legal issues. Because the tax sale process necessarily involves a local governmental entity taking action inimical to various interests in or ownership of real property, constitutional due process analysis is a recurrent issue in Indiana tax sale litigation at the trial and appellate levels. In point of fact, several Indiana and United States Supreme Court decisions have examined due process in the tax sale context. These cases invariably center on the constitutional adequacy of the notice provided to owners and interested parties regarding the pending tax sale.

### I. THE LIEN OF THE STATE FOR PROPERTY TAXES

Generally, a lien is a right conferred on certain classes of creditors to have their debts paid out of the debtor’s property, usually by means of a sale or threatened sale of it. Where real estate is concerned, the main classes of liens are contractual liens, equitable liens and statutory liens. Real property taxes are a statutory lien. A tax lien is superior to all other liens on real estate. IC 6-1.1-22-13(c). The State of Indiana acquires a lien on each parcel of real property for all property taxes levied against the real property and all subsequent penalties and costs resulting from the taxes. IC 6-1.1-22-13(a). Special real property tax levies are assessed by a variety of local

government units and are placed in the records of the county treasurer for collection along with property taxes. *See* IC 6-1.1-1-17. Examples of such special assessments include ditch or drainage assessments, Barrett Law assessments, sewer and sewage assessments, demolition liens and mowing liens. A political subdivision acquires a lien on each tract of real property for all special assessments and subsequent penalties and costs resulting from the special assessment. IC 6-1.1-22-13.5(a). These special assessments are imposed upon real property and enforced and collected in the same manner as state and county taxes.

The lien of the state for property taxes attaches on the assessment date of the year for which the taxes are assessed. IC 6-1.1-22-13(a). The lien of a political subdivision for special assessments attaches on the installment due date of the year for which the special assessments are certified to the county treasurer for collection. IC 6-1.1-22-13.5(a). Property taxes become a lien on real property during the year when the tax rate is determined and the following year's statements go out for payment of the tax so determined for the preceding year. IC 6-1.1-22-9. Because of the nature of billing property taxes in arrears, a tax lien is essentially a perpetual lien on real property. Although some property owners may find the concept disconcerting, it is entirely accurate to say that no one ever owns real estate in Indiana "free and clear" or outright. A property owner may pay off every mortgage or other lien against its property, but the State of Indiana maintains a perpetual, superpriority lien on every parcel of real estate in the jurisdiction.

A person who is liable for property taxes is personally liable for the taxes. IC 6-1.1-22-10(a). Thus, Indiana law imposes a lien upon the land itself, *in rem*, and a personal liability upon those primarily charged with the payment, *in personam*. *See generally, Schofield v. Green*, 56 N.E.2d 506 (Ind. Ct. App. 1944). The fact that someone is personally liable for the taxes does not

of itself relieve the real estate of the tax lien; that lien can be removed only by the actual payment of the taxes. *Id.*

A tax lien clouds the title; however, the owner retains ownership and the ability to alienate the property, even if it has a tax lien against it. *Williams v. City of Indianapolis*, 558 N.E.2d 884 (Ind. Ct. App. 1990).<sup>1</sup> A tax lien is not affected by any sale or transfer of the real property. *Id.* The lien of the state for taxes, penalties and costs continues for ten (10) years from May 10 of the year in which the taxes first become due. IC 6-1.1-22-13(b). The lien of the state inures to taxing units which impose the property taxes on which the lien is based. IC 6-1.1-22-13(c). The lien is superior to all other liens. *Id.* A tax lien may be discharged in one of four ways: (1) by payment; (2) by tax sale; (3) by lapse of time; or (4) by correction of error.

## II. COLLECTING PROPERTY TAXES THROUGH THE COUNTY TAX SALE PROCESS

### A. *The Tax Sale List and Tax Sale Eligibility*

The county treasurer is required to collect the taxes due on each parcel of real property in the county. *See generally*, IC 6-1.1-22. Although the county treasurer may pursue *in personam* remedies to collect delinquent property taxes against the owner of the property, the principal method used by county treasurers to collect delinquent taxes is the sale or threatened sale of tax liens through the county tax sale. Annually, the county treasurer is required to certify to the county auditor, no later than fifty-one (51) days after the spring installment tax due date, a list of real property on which any property taxes or special assessments are delinquent from the prior year's spring installment or before. IC 6-1.1-24-1(a). In practical terms, this means that the county

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<sup>1</sup> This principle has been eroded by the passage of Senate Enrolled Act No. 355, sec. 15, § 32-21-8-7 (2016). IC 32-21-8-7 provides that the county auditor must require the redemption of the subject property before he or she may endorse the transfer of the subject property. Further, IC 32-21-8-7(b) voids a conveyance if the conveyance document is not recorded before the expiration of the redemption period specified under I.C. § 6-1.1-25.

treasurer must certify the tax sale list by July 1 of each year (assuming a spring installment due date of May 10). Eligibility is based on a tax delinquency from the prior year's spring installment due date; each property is generally at least three (3) installments delinquent. *Id.* Delinquent taxes from the prior year spring installment or before must also exceed twenty-five dollars (\$25) for a property to be placed on the tax sale list. IC 6-1.1-24-1(a)(1).

Generally, a property may not be removed from the certified tax sale list prior to sale unless all delinquent taxes and special assessments due before certification, and all penalties, interest and costs directly attributable to the tax sale have been paid in full. IC 6-1.1-24-1.2(a). However, there are two very prominent exceptions to this rule: tax sale payment plans authorized under IC 6-1.1-24-1.2(d) and the operation of the automatic stay under 11 U.S.C. § 362 in bankruptcy proceedings initiated prior to the tax sale.

The county treasurer has statutory discretion to enter into payment plans with the owners of properties included in the tax sale list. Such parcels must be removed from the tax sale list if the treasurer and the owner enter into a payment arrangement in writing, signed by owner, and which requires the owner to pay the delinquent taxes in full not later than the last business day before July 1 of the year after the date the agreement is signed.<sup>2</sup> IC 6-1.1-24-1.2(d). With respect to the bankruptcy exception, the automatic stay begins the moment the bankruptcy petition is filed. The Indiana Court of Appeals has held that a tax sale conducted after a debtor filed a petition for bankruptcy was void as violative of the automatic stay. *See generally, ATFH Real Property, LLC v. Stewart*, 879 N.E.2d 1184 (Ind. Ct. App. 2008). Accordingly, and in very general terms, if the

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<sup>2</sup> Recent legislation provides that if the payment plan is not completed by the deadline, the county may offer the tax delinquent property owner an additional or subsequent payment plan. This development potentially erodes the one year payment plan rule.

owner of property on the tax sale list files a bankruptcy petition prior to the tax sale auction, the property must be removed from the tax sale list.

### *B. Pre-Sale Notice of Judgment and Order for Sale*

#### *1. Publication of Public Notice*

The county auditor maintains a list of all real property eligible for sale. IC 6-1.1-24-1(b). In addition to the delinquency list, the auditor prepares a notice of tax sale for publication. IC 6-1.1-24-2. The notice must contain, *inter alia*, a list of the property eligible for sale by street address and key number or parcel number. IC 6-1.1-24-2(b)(5). The statute does not direct the auditor to include a legal description of the property. *Ransburg v. Kirk*, 509 N.E.2d 867 (Ind. Ct. App. 1987). The notice must state a public place at which the sale will be conducted and must state the date and time of the sale. IC 6-1.1-24-2(b)(9)-(10).

The county auditor must post a copy of the notice of tax sale at a public place of posting in the county courthouse at least twenty-one (21) days before the earliest date of application for judgment. IC 6-1.1-24-3(b). In addition, the county auditor must publish the notice of tax sale in two (2) newspapers of general circulation in the county once each week for three (3) consecutive weeks before the earliest date on which the application for judgment may be made. *Id.* This public notice is primarily for the benefit of the buyers, not the owners of the tax delinquent property. *Ransburg v. Kirk*, 509 N.E.2d 867 (Ind. Ct. App. 1987). Posting and publication are designed primarily to attract prospective purchasers to the tax sale. *Id.*

#### *2. Notice to Owners*

The statutory and constitutional adequacy of pre-sale notice to the owner of record of property scheduled for inclusion in the tax sale is the most frequently litigated issue in this area of law. The decisional law examining this topic is voluminous, nuanced and very fact sensitive; only

a cursory analysis is presented in this article. Although actual notice to the owner is not required, the county auditor's notice to the owner must be transmitted in substantial compliance with IC 6-1.1-24-4 and must also satisfy constitutional due process (notice reasonably calculated to apprise an interested party of the tax sale proceedings, *Marion County Auditor v. Sawmill Creek, LLC*, 964 N.E.2d 213, 219 (Ind. 2012) (citing *Jones v. Flowers*, 547 U.S. 220, 227 (2006))). However, the legislature has placed a duty upon the property owners to inform the auditor of their current address. *Clark v. Jones*, 519 N.E.2d 158 (Ind. Ct. App. 1988). Although tax sale noticing must be in substantial/material compliance with prescribed requirements, strict compliance is not required. *Diversified Investments, LLC v. U.S. Bank, NA*, 838 N.E.2d 536 (Ind. Ct. App. 2005).

The county auditor must transmit the pre-sale notice to the owner of record by certified mail, return receipt requested and by first class mail not less than twenty-one (21) days before the earliest date on which application for judgment may be made. IC 6-1.1-24-4. If both notices are returned, the county auditor must take an additional reasonable step to notify the property owner, if it is practicable to do so. Most Indiana counties take an additional reasonable step in the form of skip-tracing the owner through services provided Westlaw/Thomson Reuters. The constitutional adequacy of this approach was resolved favorably by the Indiana Supreme Court in the autumn of 2020 after being called into question by the Indiana Court of Appeals.<sup>3</sup>

Prior to the 2015 amendment to the pre-sale noticing statute<sup>4</sup>, IC 6-1.1-24-4, if both the certified and fist class mail notices were returned, the county auditor was required to research the county auditor's records to determine a more complete or accurate address and send notice to the

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<sup>3</sup> See generally, *Ind. Land Tr. Co. v. XL Inv. Props., LLC*, 130 N.E.3d 630 (Ind. Ct. App. 2019), reh'g denied, trans. granted and opinion reversed by *Indiana Land Trust Co. v. XL Investment Properties, LLC*, 155 N.E.3d 1177 (Ind. 2020).

<sup>4</sup> See Senate Enrolled Act No. 531, 2015 Session of the Indiana General Assembly.

owner at the additional address discovered. Recent case law indicated that the county auditor's failure to search its records for a better address, even if that effort would have been futile, alone may invalidate a tax sale. *See generally, Farmers Mutual Insurance Company of Grant and Blackford Counties v. M Jewell, LLC*, 992 N.E.2d 751 (Ind. Ct. App. 2013). The 2015 amendment sought to ameliorate this unduly burdensome requirement that the county auditor research voluminous property records and documents in order to find a different address associated with the owner of record.

Whether a particular method of notice is reasonable depends on the outcome of the balance between the interest of the government and the individual interest sought to be protected by the Fourteenth Amendment. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). In order to balance the interests, a court must have evidence to determine the burdens imposed on the government and other interested parties. *See Marion County Auditor v. Sawmill Creek, LLC*, 964 N.E.2d 213, 219 (Ind. 2012) (citing *Jones v. Flowers*, 547 U.S. 220, 227 (2006)) (holding that whether notice satisfies the Due Process Clause "is a fact-intensive process that requires consideration of every relevant fact"). Additionally, in *Jones v. Flowers*, the United States Supreme Court held that when mailed notice is returned unclaimed, the state must take an additional reasonable step to provide notice to the property owner before selling the property, if it is practicable to do so. *Id.* The 2015 amendment sought to truly codify the holding of Jones, in the effort to ensure Indiana's statutes, and by extension Indiana counties, comply with constitutional due process with respect to pre-tax sale noticing.

### *3. Notice to Mortgagees*

The county auditor must mail a copy of the tax sale publication notice under IC 6-1.1-24-2 to any mortgagee who annually requests a copy of the notice. IC 6-1.1-24-3(b). This request

notice to mortgagees must be transmitted at least twenty-one (21) days before the earliest date of application for judgment. *Id.* This procedure of notification balances the interest of the State and the interests of the mortgagees. *Elizondo v. Read*, 588 N.E.2d 501 (Ind. 1992). The procedure protects the state's interest in receiving taxes while relieving it of the sometimes tremendous administrative burden of checking all public records to ascertain whether any mortgages have been taken on the property, whether these mortgages are viable and whether the address on the mortgages is dependable. *Id.* This method is not burdensome upon the property interest holders. *Marc L. Griffin v. Munco Associates*, 589 N.E.2d 220 (Ind. 1992). The interest holder will be certain to receive notice and take whatever action deemed appropriate by simply sending a request to the auditor. *Elizondo v. Read*, 588 N.E.2d 501 (Ind. 1992). Recently, the Indiana Court of Appeals struck down the request notice provision to mortgagees as violative of due process in *M & M Investment Group, LLC vs. Ahlemeyer Farms, Inc. and Monroe Bank*, 972 N.E.2d 889 (Ind. Ct. App. 2012), but this opinion was subsequently reversed by the Indiana Supreme Court in 2013. *See generally, M & M Inv. Group, LLC v. Ahlemeyer Farms, Inc.*, 994 N.E.2d 1108 (Ind. 2013). While the owner is given notice of the impending tax sale, lienholders are not entitled to notice before a tax sale (except the request notice provision for mortgagees). The legislature may logically conclude that it is more important to notify an owner before the tax sale than a lienholder. *Anton v. Davis*, 656 N.E.2d 1180 (Ind. Ct. App. 1995). Mortgagees' due process rights are further protected by the post-sale notices to which they are legally entitled under IC 6-1.1-25-4.5.

### *C. Application for Judgment and Order for Sale*

On or before fifteen (15) days before the county tax sale is held, the county treasurer and county auditor must jointly make application for judgment and order for sale. IC 6-1.1-24-4.6. The application for judgment must include a joint affidavit from the county auditor and treasurer

regarding the updated tax sale list, publication of public notice and the individual notices to owners of record. IC 6-1.1-24-4.7. Not later than seven (7) days before the advertised date of the tax sale (and if written objections are timely filed), the court conducts a hearing regarding objections to the tax sale. IC 6-1.1-24-4.7(b). At least seven (7) days before the date set for the hearing, the court must provide notice of the date, time and place of the hearing to any person filing a defense to the application for judgment and order of sale. *Id.* At the hearing, the court must hear any defense offered by any person interested in any of the parcels of real property to the entry of judgment against them. *Id.* Not less than three (3) days before the advertised date of the tax sale, the court enters judgment for the delinquent taxes, special assessments, penalties and costs against the parcels of real property in favor of the State of Indiana. IC 6-1.1-24-4.7(d). As the tax is assessed upon the land itself, *Schofield v. Green*, 56 N.E.2d 506 (Ind. Ct. App. 1944), the judgment is against the land itself, IC 6-1.1-24-4.7(d), and the court proceedings are summary in nature. The court that enters the tax sale judgment retains exclusive continuing supervisory jurisdiction over all matters and claims relating to the tax sale. IC 6-1.1-24-4.7(f).

#### *D. The Tax Sale Auction*

When real property is eligible for sale due to the tax delinquency, the treasurer must sell the “real property” to the highest bidder at a public auction whose bid is at least the minimum bid. IC 6-1.1-24-5. The minimum bid is comprised of the following: (1) the delinquent taxes and special assessments on each tract or item of real property; (2) the taxes and special assessments on each tract or item of real property that are due and payable in the year of the sale, regardless of whether the taxes and special assessments are delinquent; (3) all penalties which are due on the delinquencies; (4) the costs incurred by the county due to the sale; (5) any unpaid costs which are due from a prior tax sale; and (6) other reasonable expenses of collection, including title search

expenses, uniform commercial code expenses and reasonable attorney's fees incurred by the date of the sale. IC 6-1.1-24-5.

Immediately after the tax sale purchaser pays the successful bid, the county auditor must deliver a certificate of sale to the purchaser. IC 6-1.1-24-9. The tax sale certificate does not convey title to the purchaser but merely creates a lien in the purchaser for the amount of taxes paid and the right to exchange the certificate for a tax deed when the period of redemption expires. *Atkins v. Niermeier*, 671 N.E.2d 155, (Ind. Ct. App. 1996). Thus, notwithstanding the words "sell the tract or real property" in one section of the law, IC 6-1.1-24-5, a tax sale purchaser acquires the state's lien upon the subject real estate and not title, either legal or equitable, by virtue of the tax sale certificate. *Geller v. Meek*, 496 N.E.2d 103 (Ind. Ct. App. 1986).

Only upon delivery of the tax deed, pursuant to a court order following the expiration of the applicable redemption period, does the purchaser acquire title and possessory rights. In the absence of an agreement with the owner authorizing a purchaser of property sold at tax sale to have possession prior to obtaining the tax deed, the owner, and not the tax sale purchaser, is entitled to the possession and enjoyment of the real estate. If the purchaser enters without the consent of the owner, it is generally a trespass, subject to IC 34-30-26-5.<sup>5</sup>

The annual county tax sale takes place in the autumn of each year, typically within 120 days after July 1 (the tax sale list certification date). The legislature contemplated that the tax sale will be held annually, and applying for judgment each year is required by statute. IC 6-1.1-24-4.6. If a parcel of real property is offered for sale and the minimum bid is not received, the county

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<sup>5</sup> This section allows for the tax sale purchaser to take certain actions during the period of tax sale redemption, in limited circumstances, with respect to the subject property if it is considered vacant/abandoned.

executive acquires a lien in the amount of the minimum sale price. IC 6-1.1-24-6(a). This lien attaches on the day after the last date on which the tract or item was offered for sale. *Id.*

The annual county tax sale is by public auction conducted by the county treasurer. IC 6-1.1-24-5. The county auditor serves as the clerk of the sale. IC 6-1.1-24-5. Each parcel subject to tax sale must be offered for sale separately, subject to the provisions of IC 6-1.1-24-2(e). The purchaser acquires a lien against the real property for the entire amount that paid for the parcel. IC 6-1.1-24-9(b). If the purchaser was required to bid more than the amount of the minimum bid to be the highest bidder, the lien would then increase from the amount of the minimum bid to the total purchase price. Consequently, the purchaser may hold a lien that has increased in amount. The amount in excess of the minimum bid is commonly called the “overbid” or “surplus.” The lien of the purchaser is superior to all liens against the real property which exist at the time of the sale. *Id.* Thus, the superior lien priority that the State of Indiana held is passed on to the tax sale purchaser. The lien of a purchaser at a tax sale is junior to the lien of a purchaser at a subsequent tax sale. IC 6-1.1-24-12. A tax deed issued to the purchaser at the prior sale does not affect this priority. *Id.*

#### *E. Bidder Ineligibility and Payment*

The following persons may not purchase a tax lien in a county tax sale, except if the property being sold is owned by that person: (1) the holder of a fee interest, a life estate or a contract purchaser's equitable interest in an unsafe building or premises in the county in which the tax sale is held that is subject to an order issued under the Unsafe Building Law; (2) a person who is the defendant in a court action brought under certain provisions of the Unsafe Building Law in the county in which the tax sale is held that has resulted in a judgment in favor of the plaintiff, and the unsafe condition that caused the action to be brought has not been corrected; (3) a person who

is a partner, an officer or majority stockholder of a corporation, or who directs the activities or has a majority ownership in a legal entity other than a partnership or corporation, of an entity described above; (4) a person who owes delinquent taxes, special assessments, penalties, interest or costs directly attributable to a prior tax sale on a tract or item of real property on a delinquent tax list; or (5) an agent of a person described above. IC 6-1.1-24-5.3.<sup>6</sup> Each person who will be bidding at a tax sale must sign a statement acknowledging that one does not fall within these categories, and if he or she makes a successful bid in violation of these restrictions, the sale is subject to forfeiture and proceeds will be applied to the delinquent taxes, special assessments, penalties, interest, costs, judgments or civil penalties that the bidder owes. *Id.*

Not all persons are competent to take and hold a tax title. Generally, a person legally bound to pay taxes on a property cannot acquire a title thereto by purchase at a tax sale. *Willard v. Ames*, 130 Ind. 351, 30 N.E. 210 (Ind. 1892). Thus, owners should not bid on their own property. Tenants who have agreed to pay taxes on the demised premises, or who are legally bound to pay such taxes, cannot acquire a valid title to the premises by a purchase at a tax sale, made in their own name, or in the name of another person for their benefit. *Davey v. Meier*, 73 N.E.2d 56 (Ind. Ct. App. 1947); *Ketterly v. Heck*, 587 N.E.2d 1365 (Ind. Ct. App. 1992). Mortgagors of their land or their grantees remaining in possession owe a duty to the mortgagee to pay the taxes, and if they fail to do so and then either directly or indirectly purchase the land at a tax sale, they acquire no rights against the mortgagee. *Cooper v. Jackson*, 99 Ind. 566 (1884). One who occupies a position of trust and confidence with another cannot acquire a tax deed title to the property of another which is the subject matter of the relationship. This doctrine includes agents and attorneys, tenants in common,

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<sup>6</sup> These bidder eligibility rules were broadened in 2015; currently, if a bidder is ineligible to bid in County X in a given tax sale year, the bidder is also ineligible to bid in County Y or any other Indiana county tax sale in that tax sale year.

joint tenants, mortgagors and other lienors. Consequently, persons who are not competent to take and hold a tax title should not buy at a tax sale.

When real property is sold, the purchaser at the sale must *immediately* pay the amount of the successful bid to the county treasurer. IC 6-1.1-24-7(a). Most treasurers require payment by cash or cash equivalent (certified check or cashier's check). Most treasurers interpret the "immediate payment" provision of the statute to allow the purchaser to go to the bank and return with the payment that day. Some treasurers even allow payment the next day. A prospective purchaser should check with the treasurer before the sale for the payment terms that will be required by that county treasurer. If a purchaser fails to pay the amount of the successful bid, the property must again be offered for sale. IC 6-1.1-24-8. A purchaser who fails to pay the successful bid must pay a penalty of 25% of the amount of the bid. *Id.* The county prosecuting attorney is directed to initiate an action in the name of the state treasurer to recover the civil penalty. *Id.* Upon receipt of the payment of the purchase price from the tax sale purchaser, the treasurer must apply the payment in the following manner: first, to the taxes, special assessments, penalties and costs described in IC 6-1.1-24-5; second, to other delinquent property taxes of the taxpayer under IC 6-1.1-23-5; and third, to a separate "tax sale surplus fund." IC 6-1.1-24-7.

#### *F. Tax Sale Certificates and Assignments*

Immediately after a tax sale purchaser pays the successful bid, as evidenced by the receipt of the treasurer, the auditor must deliver a certificate of sale to the purchaser. IC 6-1.1-24-9(a). The certificate must be signed by the auditor and registered in the auditor's office. *Id.* The certificate must contain the following: (1) a description of real property that corresponds to the description used on the notice of sale; (2) the name of the owner of record at the time of the sale of real property; (3) the mailing address of the owner of the real property sold as indicated in the

records of the county auditor; (4) the name of the purchaser; (5) the date of sale; (6) the amount for which the real property was sold; (7) the amount of the minimum bid for which the tract or real property was offered at the time of sale; (8) the date when the period of redemption specified in IC 6-1.1-25-4 will expire; (9) the court cause number under which judgment was obtained; and (10) the street address, if any, or common description of the real property. *Id.* A scrivener's error does not render the tax sale certificate and subsequent tax title deed invalid. *Smith v. Breeding*, 586 N.E.2d 932 (Ind. Ct. App. 1992). The auditor maintains a tax sale record which contains, *inter alia*, a description of each parcel of real property which was sold and the name of the purchaser. IC 6-1.1-25-8. There is no need or requirement that the tax sale certificate be recorded in any other office.

The lien purchased at tax sale can be assigned; however, to make a valid transfer of a tax sale certificate, it is necessary that there be compliance with the statute governing the transfer. The assignment is not valid unless it is endorsed on the certificate of sale, acknowledged before an officer authorized to take acknowledgments of deeds, and registered in the office of the county auditor. IC 6-1.1-24-9(c). No notice of an assignment of a tax sale certificate is required.

A purchaser at the tax sale, who is unqualified to buy and hold a tax title, cannot make a valid assignment. A person who is unqualified to purchase at a tax sale may be equally unqualified to take a valid assignment of a tax sale certificate. Following the general rule that those who are under a duty to pay taxes cannot acquire any better title than they already have by purchasing at a tax sale for such taxes, those under such duty to pay taxes cannot strengthen their title by purchasing an assignment from the purchaser at a tax sale.

The only guarantee in the purchase of a tax lien at a county tax sale is the written one that the county treasurer must make on the tax sale certificate which warrants that the taxes and special

assessments upon the real property described in the certificate of sale are delinquent and were unpaid at the time of the sale and that the property was eligible for sale. IC 6-1.1-24-10(a). Otherwise, a purchaser at tax sale comes within the rule *caveat emptor* and no warranty is available. The county tax sale is the essence of a buyer beware situation. The doctrine of caveat emptor has long been applied to tax sales. *Vanderburgh County Auditor, et al. v. Michiana Campgrounds, LLC*, 873 N.E.2d 1051, 1053 (Ind. 2007). Prospective purchasers are urged to research available properties thoroughly before bidding. Research may include, but would not necessarily be limited to, a review of:

- zoning maps
- liens recorded with the county recorder
- judgment liens of record with the county clerk
- plat maps
- bankruptcy court files
- charges that have not been certified to the treasurer such as:
  - unpaid sewer user charges
  - solid waste collection fees
  - weed cutting charges
- Barrett Law assessments
- flood plain maps
- instruments granting access to the property
- information regarding the use or storage of hazardous waste on the site.

#### *G. Unsold Parcels and Commissioners' Certificate Sales*

As discussed previously, if a parcel is offered for sale and is not sold in the county tax sale, the county executive acquires the tax lien for the property in the amount of the minimum sale price and is issued a tax sale certificate. The county does not pay any money to acquire this lien. IC 6-1.1-24-6(c). This lien attaches on the date on which the parcel was offered for sale. *Id.* The county has the same rights as a purchaser, IC 6-1.1-24-6(b), and the same responsibilities as a purchaser, *Northern Indus. v. Board of Comm'rs*, 627 N.E.2d 1319 (Ind. Ct. App. 1994), with certain exceptions. The most notable exceptions are an expedited redemption period of one

hundred-twenty (120) days as opposed to one (1) year and a post-sale noticing deadline of ninety (90) days as opposed to six (6) months. When the county executive acquires the tax sale certificates for unsold properties, it has several options regarding their disposition. The county executive may choose to undertake the title search and noticing responsibilities necessary to pursue tax title to the real estate under IC 6-1.1-25. The county executive may assign the tax sale certificates to other political subdivisions (such as the city or town where the real estate is situated). IC 6-1.1-24-9(d). Alternatively, the county executive may offer the properties in a left-over sale, commonly referred to as the commissioners' certificate sale. IC 6-1.1-24-6.1. If the county executive makes no election as to the disposition of the tax sale certificates it is issued, the properties will roll through another tax billing and collection cycle, ultimately becoming eligible for tax sale in a subsequent year if the delinquent taxes are not paid.

The commissioners' certificate sale can be distinguished from the county tax sale in four salient aspects. First, the redemption period is one hundred-twenty (120) days after the date of the commissioners' certificate sale. IC 6-1.1-25-4(c). Second, the post-sale noticing deadline is ninety (90) days after the sale. IC 6-1.1-25-4.5(c). Third, the minimum bid must be less than the full tax delinquency on which the minimum bid in the prior county tax sale was predicated. IC 6-1.1-24-6.1(a)(3). Fourth, the county auditor is required to remove (essentially write-off) the difference between the purchase price of the certificate in the commissioners' certificate sale and the minimum bid in the immediately preceding county tax sale. IC 6-1.1-25-4(j). The commissioners' certificate sale is advertised by publication similarly to the annual county tax sale auction. IC 6-1.1-24-6.1(a)(2).

The purpose of the commissioners' certificate sale is to return properties to the tax rolls and promote productive use going forward by offering the tax liens for a substantially discounted

amount. Many of the properties in these sales have tax delinquencies in excess of their fair market value, and are thus unmarketable in the county tax sale. The reduced minimum bids and shortened redemption period are policy decisions aimed at attracting purchasers who would not otherwise bid on the property in a county tax sale. Since the vast majority of properties sold in the commissioners' certificate sales are not redeemed during the redemption period, most of the purchasers in these sales ultimately acquire ownership of the property, thus fulfilling the policy objective of returning properties to the tax rolls on a go-forward basis.

#### *H. Post-Sale Notice of Right of Redemption from Tax Sale*

The purpose of the post-sale notice is to inform interested parties that the tax lien on the property has been sold for delinquent taxes and to apprise them of the right to redeem and when that right expires. Notice to interested parties of the right to redeem is required as an element of due process. *Marion Cnty. Auditor v. Sawmill Creek, LLC*, 964 N.E.2d 213 (Ind. 2012). The post-sale noticing must be done in substantial compliance with the statutes governing the notice and must satisfy the due process requirements of the United States Constitution. *Id.* Although tax sale noticing must be in substantial/material compliance with prescribed requirements, strict compliance is not required. *Diversified Investments, LLC v. U.S. Bank, NA*, 838 N.E.2d 536 (Ind. Ct. App. 2005). The purchaser (or in certain counties, the auditor) must give notice of the tax sale, the date of expiration of the period of redemption and the date on or after which a petition for the tax deed will be filed. IC 6-1.1-25-4.5(e). The case law regarding post-sale noticing, like that of the county auditor's pre-sale notice, is ephemeral and esoteric. Generally, these cases address either the constitutional or statutory adequacy of the tax sale purchaser's post-sale noticing. Following the maxim that equity abhors forfeiture, decisions on tax sale noticing typically go out

of their way to find statutory or constitutional defects. One recent opinion held that an error in the listing of the date of the tax sale on the post-sale notice, alone, constituted defective notice. *See generally, Lindsey v. Neher*, 988 N.E.2d 1207 (Ind. Ct. App. 2013).

The tax lien purchaser's post-sale notice, governed by IC 6-1.1-25-4.5, must be transmitted no later than six (6) months after the date of the county tax sale.<sup>7</sup> In the case of county held certificates or commissioners' certificate sales, the deadline is ninety (90) days after the sale. IC 6-1.1-25-4.5(b), (c). If the purchaser does not comply with IC 6-1.1-25-4.5 and send the required notices to the owner of record and holders of a substantial property interest of public record on the subject parcel, within six (6) months of the date of the county tax sale, the purchaser should not be entitled to a tax deed or any sort of a refund. IC 6-1.1-25-4.6(j).

#### *1. Persons Entitled to Post-Sale Notice*

The post-sale notice must be given to the owner and any person with a substantial property interest of public record in the real property. IC 6-1.1-25-4.5. A substantial property interest of public record is defined as title to or interest in a tract possessed by a person and recorded in the office of a county recorder or available for public inspection in the office of a circuit court clerk no later than the hour and date the sale is scheduled to commence. IC 6-1.1-24-1.9. The term does not include a lien held by the state or a political subdivision. *Id.*

Where notice to redeem property from tax sale is required, it must be given to all persons specified by statute, but it need be given only to those persons, though there are other persons who are entitled to redeem (as anyone may redeem a property from a tax sale under IC 6-1.1-25-1 before the expiration of the redemption period). For example, an occupant or unrecorded land contract purchaser is entitled to redeem but is not entitled to post-sale notice. Limiting the notice

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<sup>7</sup> This deadline was shortened from nine (9) months in 2014.

to only those parties with such an interest that has been recorded or is of record by a specific time, the hour and date the sale is scheduled to commence, is constitutional. *Avco Fin. Services of Indianapolis., Inc. v. Metro Holding Co.*, 563 N.E.2d 1323 (Ind. Ct. App. 1990). In the interest of economy, the legislature wisely imposed a “cut off” date which allows the purchaser (or in certain counties, the auditor) to review and act upon any title searches conducted. *Id.* If there were no such “cut off”, it would be impracticable if not impossible to provide statutorily adequate notice, as new liens or interests may be recorded at any time during the redemption period.

## *2. Examining & Updating the Abstract of Title (Title Search)*

To comply with the statutory provisions for post-sale notice, an examination and update of the abstract of title (commonly known as a title search) must be conducted at some time after the date of the sale. Upon receipt of the title search, it is necessary for the purchaser (or in very few counties, the auditor) to determine which persons of those listed on the title search are entitled to the notice and to what address a notice should be sent. This may call for a legal conclusion and the purchaser (or in certain counties, the county auditor) should seek the advice of competent legal counsel to make these determinations. Additionally, legal counsel would be aware of general rules of law that might come into play in the post-sale notification process. For example, if the person who ordinarily would be entitled to post-sale notice is dead, a notice addressed to such person is generally regarded as insufficient. Legal counsel would be aware of the fact that notice is insufficient in such a case and would know the rules of law that would suggest who is to be substituted for the deceased person.

Extreme care should be taken in the preparation of this notice. A typographical error in the notice that does not prejudice the party with redemption rights does not render the notice defective. *Anton v. Davis*, 656 N.E.2d 1180 (Ind. Ct. App. 1995). However, if it is found that the

notice contained misleading information crucial to the party with redemption rights, the tax deed ultimately issued is invalid. *Peterson v. Warner*, 478 N.E.2d 692 (Ind. Ct. App. 1985); *Lindsey v. Neher*, 988 N.E.2d 1207 (Ind. Ct. App. 2013). County auditors who attempt to give the post-sale notice but fail to comply with the requirements cause the purchaser to fail to get a tax deed and cause the purchaser to receive substantially less interest on its investment. IC 6-1.1-25-4.6. Purchasers who provide insufficient notice may forfeit their purchase money. IC 6-1.1-25-4.6. Purchasers (or in certain counties, the auditor) will cause the tax deed to be defeated when the notice is not in substantial compliance with the manner prescribed. IC 6-1.1-25-16.

Given the consequences that result upon a purchaser's failure to provide sufficient notice, the nature of the rights and obligations set forth in the statutes, and the state's emphasis on providing legally sufficient post-sale notice, the use of competent legal counsel to examine the title search and to give the post-sale notice is a prudent idea. The costs of examining the title and giving post-sale notice may be reimbursed upon redemption of the property. IC 6-1.1-25-2(e).

The auditor may petition the court to establish a schedule of reasonable and customary fees that the purchaser may claim for reimbursement upon redemption for a title search and attorneys' fees for giving the post-sale notice. IC 6-1.1-25-2.5(a). A purchaser may petition the court for a higher rate of reimbursement and the court must grant the petition if it finds that the purchaser's claim is based on reasonable and customary fees. IC 6-1.1-25-2.5(c).

### *3. Transmitting the Post-Sale Notice*

This notice must contain the following:

- (1) a statement that a petition for a tax deed will be filed on or after a specified date;
- (2) the date on or after which the petitioner intends to petition for a tax deed to be issued;
- (3) a description of the tract or real property shown on the certificate of sale;

- (4) the date the tract or real property was sold at a tax sale;
- (5) the name of the purchaser or purchaser's assignee;
- (6) a statement that any person may redeem the tract or item of real property;
- (7) the components of the amount required to redeem the tract or item of real property;
- (8) a statement that the purchaser is entitled to reimbursement for additional taxes or special assessments on the tract or item of real property that were paid by the purchaser subsequent to the sale and before redemption, plus interest;
- (9) a statement that the tract or real property has not been redeemed;
- (10) a statement that the purchaser is entitled to receive a deed for the tract or real property if it is not redeemed before the expiration of the applicable period of redemption;
- (11) a statement that the purchaser is entitled to reimbursement for costs described in IC 6-1.1-25-2(e);
- (12) the date of expiration of the period of redemption;
- (13) a statement that if the property is not redeemed, the owner of record at the time the tax deed is issued may have a right to the tax sale surplus, if any;
- (14) the street address, if any, or a common description of the tract or item of real property; and
- (15) the key number or parcel number of the tract or real property. IC 6-1.1-25-4.5(e).

The notice may not include more than one tract or item of real property listed and sold in one description; however, when more than one tract or item of real property is owned by one person, all of the tracts or real property owned by that person may be included in one notice. IC 6-1.1-25-4.5(f).

The purchaser (or in certain counties, the county auditor) must give this notice by sending a copy of the notice by certified mail, return receipt requested, to the owner of record at the time of the sale at the last known address of the owner, as indicated in the records of the county auditor, and any person with a substantial property interest of public record at the address for the person included in the public record that indicates the interest. IC 6-1.1-25-4.5(d). If the address of the person with a substantial property interest of public record is not indicated in the public record that created the interest and cannot be located by ordinary means, the purchaser may give notice by publication in accordance with IC 5-3-1-4 once each week for three (3) consecutive weeks. IC 6-1.1-25-4.5(d)(2). The statute requires only the use of ordinary means to locate the last known address of the person entitled to notice, actual notice is not required. The post-sale notice does not have to meet the requirements for service of process in accordance with the Indiana Rules of Trial Procedure. There is no requirement to undertake extraordinary efforts to discover the address of a party entitled to notice. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983).

Following the decision of *Jones v. Flowers*, 547 U.S. 220 (2006) and in the effort to satisfy due process, tax sale purchasers would be wise to take an additional reasonable step to notify interested parties of the tax sale and right of redemption beyond the requirements of IC 6-1.1-25-4.5. Although the adequacy of notice may be litigated no matter how far tax sale purchasers go to provide notice, additional reasonable steps have included such practices as conducting skip-tracing to locate parties, sending additional notices *via* first class mail, physically posting notice on the property or hiring private process servers. Because of all the foregoing concerns, legal counsel for tax sale purchasers should exercise extreme caution in transmitting post-sale notices. This is, without question, the number one area in tax sale for legal malpractice. The limitations on tax sale

refunds codified at IC 6-1.1-25-4.6 mean that when counsel for the tax sale purchaser fails to adequately transmit the post-sale notices, damages to the client may be quite severe.

### *I. Redemption*

Because the concept of redemption is so essential to the law of tax sales and is inexorably intertwined with the procedural and substantive rules governing tax sales, it is important to understand the concept in some detail. It is also necessary to emphasize the two significantly different types of redemption. The first type is called the “equity of redemption.” The second type is called “statutory redemption.” The terminology of the first type of redemption is used when referring to the delinquent taxpayer’s right, after judgment has been entered against the parcel of real property and the order of sale has been entered, to pay the delinquent property taxes and have the title to the property restored free and clear of the judgment *in rem* and order of sale. This right exists anytime until a valid tax sale of the property occurs. IC 6-1.1-24-1.2.

Statutory redemption, is, as the name implies, a creature of legislative grace. Redemption is permitted for a specific period after a valid tax sale to redeem “from the sale” by paying to the county treasurer the amount of the tax lien plus certain additional amounts that include penalties and reimbursable costs. It is a helpful oversimplification to look upon “equity of redemption” as a right that exists after judgment and order of sale until there has been a valid tax sale. Statutory redemption rights, on the other hand, ripen only *after* there has been such a valid tax sale. When a valid tax sale has taken place, the equitable right of redemption or the “right to redeem from the order of tax sale” ends. However, Indiana statutes authorize a statutory right of redemption which provides an additional period for owners and others to pay a certain sum of money to redeem the

property from the sale. The statutory period varies from one hundred-twenty (120) days to one (1) year, or longer under certain circumstances involving bankruptcy proceedings of the owner of the property.

Statutory redemption has engendered both substantial criticism and praise. It has been argued that because taxpayers know that they can regain the property after the tax sale, they will be less responsible in making their tax payments. In addition, the availability of statutory redemption means that the tax sale purchaser acquires a defeasible interest and this uncertainty may discourage bidding. Moreover, the taxpayer may regard the eventual loss of the property as inevitable and the ability to retain possession during the statutory period might encourage the taxpayer to milk the property as much as possible before surrendering it to the purchaser. On the other hand, such legislation may serve several valid purposes. These include allowing time for the taxpayer to refinance and save the property, and permitting additional use of the property by the hard-pressed taxpayer. By allowing anyone to redeem, the statutes permit mortgagees and other lienholders to protect the security they would otherwise lose.

#### *1. Expiration of the Period of Redemption*

The period of redemption from a county tax sale is generally one (1) year after the date of sale. IC 6-1.1-25-4. However, the period of redemption expires sooner for certain parcels. Although prior case law has indicated that there is no ability to judicially extend the expiration of the redemption period, a recent opinion held that the court having jurisdiction over the tax sale may equitably extend the redemption period (ostensibly in extreme circumstances) to prevent an injustice where no adequate legal remedy exists. *M Jewell, LLC v. Powell*, 954 N.E.2d 1053, 1055-56 (Ind. Ct. App. 2011).

The general purpose underlying all redemption statutes, whether related to foreclosure, execution, or tax sales, is to allow parties whose interest will be extinguished by the issuance of a deed the opportunity to protect those interests by redemption. *Geller v. Meek*, 496 N.E.2d 103 (Ind. Ct. App. 1986). Since a tax deed conveys title free and clear of all nongovernmental liens in existence before the execution of the deed, persons whose interest arise after the tax sale, but before the expiration of the period of redemption, may redeem and thereby prevent their interest from being extinguished. *Id.* The redemption statute does not deprive a delinquent taxpayer of this right to convey property after a tax sale and prior to its redemption.<sup>8</sup> A deed from the delinquent taxpayer conveys the grantor's right to redemption, which is a derivative of the right to ownership. *Atkins v. Niermeier*, 671 N.E.2d 155 (Ind. Ct. App. 1996).

For parcels with a one (1) year redemption period, if the purchaser does not give the post-sale notice within six (6) months after the date of the county tax sale, the purchaser's lien against the real property terminates. IC 6-1.1-25-7(b). The Internal Revenue Service may claim redemption rights in properties sold which are subject to federal tax liens pursuant to a right of redemption established under 26 U.S.C. § 7425 which is different from that provided under state law.

## *2. Amount Required for Redemption and Refund to Purchaser*

A person desirous of redeeming a parcel from the county tax sale should contact the county auditor to have an exact calculation of the amount required for redemption. The redemption amount is a computation based upon the minimum bid and the amounts paid by the purchaser in addition to the minimum bid and based upon the time that has elapsed since the date of the sale.

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<sup>8</sup> See Note 1, *supra*

The amount required for redemption is payable to the county treasurer, IC 6-1.1-22-8(b), and is tendered to the county auditor, who issues a quietus to the person redeeming the parcel. The amount required to redeem a parcel from a commissioners' certificate sale varies from the county tax sale and is codified at IC 6-1.1-24-6.1(b)(4). In practical terms, the total amount required to redeem a parcel from the county tax sale includes the minimum bid for the parcel in the county tax sale, interest on the minimum bid, interest on the surplus/overbid (if applicable), any subsequent taxes and special assessments that become due during the redemption period (with interest thereon if paid by the tax sale purchaser) and any reimbursable expenses for the purchaser's attorney's fees, cost of giving notice and title search costs.

When a parcel sold at tax sale has been redeemed, the auditor will notify the purchaser. The purchaser should promptly surrender the tax sale certificate to the auditor so that the purchaser may receive a refund of the purchase price, including overbid, plus interest at the rate of 10% on the minimum bid if redeemed within the period of six (6) months from the date of sale; or at the rate of 15% on the minimum bid if redeemed from six (6) months to one (1) year from the date of sale. In addition, the refund will include 5% per annum on the amount by which the purchase price exceeded the minimum bid (the overbid or surplus).<sup>9</sup> Also, in the event the purchaser paid taxes or special assessments after the tax sale, the refund will include those amounts paid along with interest at the rate of 5% per annum.<sup>10</sup> In counties where the purchaser gives the post-sale notice, the purchaser will also be reimbursed for the costs of giving notice and the costs of examining and

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<sup>9</sup> This interest rate was reduced from the previous rate of 10% per annum in 2014. The reduction in the interest rate of return on tax sale surplus has discouraged investment in Indiana county tax sales and has resulted in decreased property tax collections for local government units.

<sup>10</sup> This interest rate was reduced from the previous rate of 10% per annum in 2014 for county tax sales. The drafters of the legislation changing the interest rate on subsequent taxes neglected to change the interest rate throughout the tax sale statutes. Thus, the interest rate on subsequent taxes for commissioners' certificate sale properties remains at 10% per annum.

updating the abstract of title for the property, IC 6-1.1-25-2(e), subject to the limitations contained in a schedule of reasonable and customary fees, if any. IC 6-1.1-25-2.5.

Upon receipt of the tax sale certificate and any requisite signed claim form, the auditor will process a refund claim and a county warrant (check) will be issued to the purchaser. The purchaser should be requested to complete an IRS Form W-9 to collect the taxpayer identification number of the purchaser. The auditor is required by federal law to issue an IRS Form 1099-INT for each person to whom payments of ten dollars (\$10) or more in interest were paid during the calendar year.

#### *J. Invalid Sales and Disposition of the Surplus*

If, before the court issues an order directing the issuance of a tax deed, the county treasurer and auditor find that the sale was invalid, the purchaser will be entitled to a refund of the purchase money plus 5% per annum interest from the county treasury. IC 6-1.1-25-10. The most frequent reasons for an invalid sale are due to pre-sale bankruptcy or inadequacy of pre-sale notice. Frequently, debtors fail to list the county treasurer as a creditor and thus treasurers receive no notice of the bankruptcy filing and automatic stay before selling the parcel. If a tax sale is discovered to be invalid after the court orders the issuance of the tax deed, the foregoing refund provisions may apply, but only if the court having jurisdiction over the tax sale makes a finding pursuant to IC 6-1.1-25-11(a). Essentially, the county auditor and treasurer have broad authority to invalidate a tax sale prior to the court entering an order for tax deed; after the court enters the order for tax deed, only the court may invalidate a tax sale.

The amount held in the tax sale surplus fund may be claimed by certain persons under certain conditions. The most frequent claimant is the tax sale purchaser upon redemption. The purchaser should, upon redemption of the property, file a verified claim for the money which was

deposited in this fund, if any. IC 6-1.1-24-7(c). The owner of record, who is divested of the property by the issuance of a tax deed to the tax sale purchaser, may file a verified claim for money which was deposited in this fund. *Id.* Any person other than the purchaser in the case of redemption, or the owner of record (subject to IC 6-1.1-24-7) divested of ownership by the issuance of a tax deed, must petition for and obtain an order from the court having jurisdiction over the tax sale to claim the tax sale surplus. IC 6-1.1-24-7(e). Absent a special exception in the case of Chapter 11 or 13 bankruptcy proceedings, if money deposited in the tax sale surplus fund is not claimed within the three (3) year period after the date of its receipt, it must be transferred by the auditor to the county general fund and may not be claimed by those persons mentioned above.

### III. TAX DEEDS

#### *A. Obtaining a Tax Deed*

##### *1. The Petition*

If the parcel is not redeemed before the expiration of the period of redemption and the purchaser wishes to obtain a tax deed, the purchaser must seek a court order for a tax deed. For sales in which the auditor gave the post-sale notices, the auditor *must* file a verified petition asking the court to direct the county auditor to issue a tax deed. IC 6-1.1-25-4.6. For sales in which the purchaser gave the post-sale notices, to obtain a tax deed, the purchaser *may* file a verified petition asking the court to direct the county auditor to issue a tax deed. *Id.* A purchaser may have a change of heart and not want a tax deed. No matter who transmitted the post-sale notices, there is no requirement that the purchaser ever take delivery of a tax deed. The petition must be filed after the expiration of the redemption period, but no later than three (3) months thereafter.<sup>11</sup> *Id.* The

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<sup>11</sup> This deadline was shortened from 6 months in 2014.

petition must be filed in the same court and under the same cause number in which the judgment and order of sale was entered. *Id.* The county auditor must be notified of the filing of this petition.

## *2. The Court's Order for Tax Deed*

Notice of the filing of this petition and the date on or after which the petitioner intends to apply for an order on the petition must be given to the owner and any person with a substantial interest of public record in the property in the same manner as required for the post-sale notice, except that, if notice by publication is required, only one publication is required. IC 6-1.1-25-4.6(a). The ordinary, statutory proceeding to obtain an order for a tax deed by petition to the court therefor, after complying with all prerequisites, is wholly *ex parte*, unless a person whose rights would be affected by the issuance of the tax deed appears in court in response to the notice of the filing of the petition.

Upon the filing of a petition for a tax deed, the court must determine if the following conditions exists:

- (1) the time of redemption has expired;
- (2) the tract or real property has not been redeemed from the sale;
- (3) all taxes and special assessments, penalties and costs have been paid;
- (4) the notices required by law have been given; and
- (5) the petitioner has complied with all the provisions of law entitling the petitioner to a deed. IC 6-1.1-25-4.6(f).

If the court finds that all these conditions exist and all conditions of IC 6-1.1-25-4.5 have been complied with, it must enter an order directing the county auditor (on the production of the certificate of sale and a certified copy of the order) to issue a tax deed. *Id.*

Complete legal descriptions of real estate are not present in the county tax records. *Echterling v. Kalvaistas*, 126 N.E.2d 573 (1955). They are usually sketchy and inaccurate. *Id.* However, real property is sufficiently described for conveying title to it when it is sold for the nonpayment of taxes if it is described by: (1) reference to the name of the subdivision and lot number, if the tract of land has been platted into lots or subdivided and a plat of the tract has been recorded in the office of the county recorder; (2) reference to its key number, if any, and the description, including the number of acres, contained in a deed, mortgage, will or other public record of the county; or (3) reference to a description prepared by the county surveyor. IC 6-1.1-22-2(b). A separate deed is not required for each parcel sold to the same purchaser at the same sale. *Anton v. Davis*, 656 N.E.2d 1180 (Ind. Ct. App. 1995).

### *3. Possession*

Upon application by the grantee of a valid tax deed in the same court and under the same cause number in which the judgment and order of sale was entered, the court must enter an order to place the grantee of a valid tax deed in possession of the real estate. IC 6-1.1-25-4.6(g). The court may enter any orders and grant any relief that is necessary or desirable to place or maintain the grantee of a valid tax deed in possession of the real estate. *Id.*

### *B. Quality of the Title Conferred by Tax Deeds*

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 with respect to what title or estate is conveyed by a tax sale: original or derivative. Whether the purchaser at a tax sale acquires a new and original title or a derivative title depends on the governing statutory provisions.

The tax is assessed upon the land itself, *Schofield v. Green*, 56 N.E.2d 506 (Ind. Ct. App. 1944), and the judgment is against the land itself, IC 6-1.1-24-4.7(d), thus, the proceedings are primarily *in rem*. 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. IC 6-1.1-25-5. This title is entirely disconnected from that of the former owner, and is antagonistic to all other claims to the subject real property. 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.

Whether the title is subject to, or free from, existing liens and encumbrances, rests wholly in the legislative discretion. Since it is competent for the legislature to make the lien of taxes on real estate paramount to all other existing liens and encumbrances, *St. Clair v. Jones*, 108 N.E. 256 (Ind. Ct. App. 1915), and since the tax deed may be considered as creating a new and independent title, the legislature has provided that the tax title destroys and extinguishes all existing liens, charges and encumbrances as inferior or subordinate to the tax lien. *Murray v. Holland*, 27 N.E.2d 126 (Ind. Ct. App. 1940). This rule is subject to the exemption for the state's lien for taxes and special assessments accruing subsequently to the tax sale and certain liens having priority under federal law. IC 6-1.1-25-4.6. The purchaser may acquire a clear and unencumbered title without regard to the number and variety of liens and encumbrances formerly on the property. Liens held by persons who do not avail themselves of the statutory privilege of redeeming are barred by a tax sale. *Geller v. Meek*, 496 N.E.2d 103 (Ind. Ct. App. 1986).

In Indiana, a tax deed vests in the grantee an estate in fee simple absolute. *Murray v. Holland*, 27 N.E.2d 126 (Ind. Ct. App. 1940). In other words, a complete, full and perfect title is created. The title is free and clear of all liens and encumbrances created or suffered before or after

the tax sale, except those liens granted priority under federal law and the lien of the state for taxes and special assessments that accrue subsequently to the sale. IC 6-1.1-25-4. However, the estate is subject to all easements, covenants, declarations and other deed restrictions. *Id.* The estate is also subject to laws governing land use, including all zoning restrictions and liens and encumbrances created or suffered by the purchaser at the tax sale. *Id.*

Indiana's statutes provide for the sale of the land itself, IC 6-1.1-24-5(e), and they do not provide that the purchaser at a tax sale takes the title of the one assessed with the taxes, or will take the interest and title of the one whose duty it was to pay, but on the contrary, expressly provide that the purchaser will take an estate in fee simple absolute. *Schofield v. Green*, 56 N.E.2d 506 (Ind. Ct. App. 1944). Although a tax sale invests 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 is sold, but he or she acquires a better title, in that the title is regarded as a new title rather than a derivative one. *Id.* Under this rule, since the sale is intended to convey the property, and not merely the interest of the delinquent taxpayer, a purchaser of land, in which there is a life estate and an estate in remainder, acquires an absolute estate in fee simple. *Id.*

Since an exception is made for liens granted priority under federal law, IC 6-1.1-25-4, it is important to understand how the federal tax lien works with respect to tax sales. A federal tax lien is a secret lien arising at the time the assessment is made, but only enforceable when demand is made upon the taxpayer. If after demand, a person liable to pay the tax neglects or refuses to pay the same, the tax, with interest, penalty and cost, attaches to all of a taxpayer's property, both real and personal, as well as after-acquired property. I.R.C. § 6321. The duration of a federal tax lien

is ten (10) years after the assessment date, or longer if extended before expiration of the ten (10) years. I.R.C. § 6502(a).

Notice of the tax sale must be given in writing, by registered or certified mail or by personal service, not less than twenty-five (25) days before the sale. I.R.C. § 7425(c)(1). If no such notice is given to the United States, the property cannot be discharged or divested of the federal tax lien unless the United States consents to such sale free of its lien. I.R.C. §§ 7425(b)-(c).

Since the United States is not given notice of the court proceedings and tax sale, the property is sold subject to the recorded federal tax lien. I.R.C. § 7425(a). However, the Internal Revenue Service has customarily executed agreements each year with all counties in Indiana whereby the IRS has given blanket consent, pursuant to I.R.C. § 7425(c)(2), to the sale of real property for real property assessments, subject to compliance with certain conditions. One condition of the blanket consent is that IRS is given post-sale notice of the tax sale and certain information regarding the transaction. Frequently, the purchaser (or in certain counties, the auditor) has failed to give the post-sale notice and/or information required by the blanket consent to the IRS. Thus, the federal tax lien is not discharged or divested. Further, the redemption period of one hundred-twenty (120) days commencing one (1) year after the tax sale, pursuant to I.R.C. § 7425(d), never starts.

### *C. Defeating Tax Deeds*

The title to real property acquired at a tax sale depends on the validity of the tax sale proceedings. For the tax sale to be valid, there must be substantial/material compliance with each step in the process. *Diversified Investments, LLC v. U.S. Bank, NA*, 838 N.E.2d 536 (Ind. Ct. App. 2005). Statutes governing tax sales, and the steps leading up to them, must be substantially

complied with before owners can be deprived of their property. *Id.* While tax sales are subject to close judicial scrutiny, this suspicion is balanced by recognition of the salutary purposes that tax sales serve. *City of Gary v. Belovich*, 504 N.E.2d 286 (Ind. Ct. App. 1987). To a certain extent, flaws or omissions in the proceeding may be rendered innocuous by curative statutes, or by statutes making tax deeds presumptive evidence of regularity. *See* IC 6-1.1-25-4(h). A tax sale certificate is presumptive evidence of: (1) the truth of the statements contained in the certificate; (2) the interest of the purchaser in the real property described in the certificate; (3) the regularity and validity of all proceedings related to the taxes or special assessments for which the real property was sold; and (4) the regularity and validity of all proceedings related to the sale of the real property. IC 6-1.1-24-11(a). After two (2) years from the issuance of a certificate of sale, evidence may not be admitted in any court to rebut a presumption prescribed unless the certificate of sale was fraudulently procured. IC 6-1.1-24-11(b). After four (4) years from the issuance of the certificate of sale, evidence may not under any circumstances be admitted in any court to rebut such a presumption. *Id.*

A tax deed is *prima facie* evidence of: (1) the regularity of the sale of the real property described in the deed; (2) the regularity of all proper [sic] proceedings; and (3) valid title in fee simple in the grantee of the deed. IC 6-1.1-25-4.6(k). The general rule is that defects or irregularities in the proceedings which are not material or not of a nature to affect the substantial rights of the taxpayer, will not invalidate a tax title otherwise good. *Smith v. Breeding*, 586 N.E.2d 932 (Ind. Ct. App. 1992). But any illegality, jurisdictional defect or failure to substantially comply with mandates of the law which are designed for the protection of the owner of the property or a person with a substantial property interest of public record will render the tax title wholly void.

A tax deed is incontestable except by appeal from the order of the court directing the county auditor to issue the tax deed. IC 6-1.1-25-4.6(h).<sup>12</sup> A person may defeat the title conveyed by a tax deed only if:

- (1) the property described in the deed was not subject to the taxes for which it was sold;
- (2) the delinquent taxes or special assessments for which the property was sold were paid before the sale;
- (3) the property was not assessed for the taxes and special assessments for which it was sold;
- (4) the property was redeemed before the expiration of the period of redemption;
- (5) the proper county officers issued a certificate, within the time limited by law for paying taxes or for redeeming the property, which states either that no taxes were due at the time the sale was made or that the property was not subject to taxation;
- (6) the description of the property, *See* IC 6-1.1-22-2, was so imperfect as to fail to describe it with reasonable certainty; or
- (7) the required pre-sale and post-sale notices were not in substantial compliance with the manner prescribed. IC 6-1.1-25-16. A party may not defeat a tax title without proving one of these defects. *Leininger v. Green*, 596 N.E.2d 955 (Ind. Ct. App. 1992).

Indiana law has long provided for an action to quiet or determine title when there is a defect, or an apparent defect, in or cloud upon the title to real estate. The tax sale statutes also specifically authorize a quiet title action for a tax title. IC 6-1.1-25-14. While not required by law,

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<sup>12</sup> Though the statute only contemplates the prescribed method, tax deeds are often challenged through Ind. Tr. R. 60(B) motions for relief from judgment. If such a motion alleges a violation of a constitutional right, the motion must be brought within a reasonable time.

a person who holds a tax deed, or a grantee thereunder, may initiate an action in the circuit court of the county where the real property is situated to quiet the title to the property. IC 6-1.1-25-14.