

OPN 95-0004

Please respond to:

Office of General Counsel

Post Office Box 6668

Tallahassee, Florida 32314-6668

Telephone: (904) 488-0712

Feb 08, 1995

Ms. Linda L. Walker

Delinquent Tax Department

Martin County Tax Collector's Office

P.O. Box 9013

Stuart, Florida 34995-9013

Re: Tax Deed; Sale

Dear Ms. Walker:

This in response to your letter dated November 29, 1994 to the Division of Ad Valorem Tax. In your letter, you request advice concerning a tax deed sale held on October 6, 1994.

FACTS

You state in your letter that at the time you received verification from the clerk of circuit court that a tax deed on this property had been sold, you had discovered that two certificates had not been recorded on the original certification issued by the tax collector's office. I assume that the original tax certificate on which the tax deed was based was correctly sold because the taxes had not been paid.

ISSUE

You have asked for advice and if Rule 12D-13.057(6)(d), F.A.C. is not applicable in this situation.

SUMMARY ANSWER

The answer to your question is that Rule 12D-13.057(6)(d), F.A.C. is not applicable in this situation. The tax deed does appear to be void, because a lienholder was not notified. The provisions of section 197.442 are not applicable because the taxes had not been paid at the time the certificate was issued on which the tax deed was based. The clear terms of section 197.442(1), F.S. make it applicable only to situations in which the taxes have been paid on the property. It does not apply to all the situations expressed in section 197.443(1)(b) through (g), F.S., which include situations other than where the taxes have been paid.

In my opinion, because the tax deed was issued following incomplete information in the tax collector's records, as opposed to the records of another official, the tax collector would be the appropriate party to commence the procedure under rule 12D-13.057, F.A.C. That rule provides that the tax collector should initiate action by notifying the clerk of the court that the tax deed may be void. That rule references Rule 12D-13.066, F.A.C. This rule provides in pertinent part that tax deeds may only be canceled, set aside or determined to be void by a judicial decree, but that deeds may be corrected by the clerk of the court so long as no rights of the property owner are violated and the deed holder agrees. The clerk of court is the party to bring the court action. The court should order either the title or the lien vested in the county. The property would still be subject to the liens of the other certificates. Or the tax deed holder can redeem other certificates. In the hands of the tax deed holder, the property should be subject to the other liens of the other certificates.

ANALYSIS

In my opinion, if a tax deed were sold on property without the proper notice to other lienholders the tax deed would be void. Holders of tax certificates are expressly entitled to certain rights to be notified in the event a tax deed is applied for on the property in question. See rules 12D-13.060(3)(a)3. and 13.060(4)(c)8., F.A.C. (1994). A tax certificate on a property

subject to tax deed application by a private party must be redeemed. The holder of a tax certificate on a property subject to county tax deed application is entitled to notice of such application. Id.

The duties of the tax collector in issuance of a tax deed are clearly defined in Section 197.502, F.S., and AGO 74-32. These requirements are summarized in AGO 74-32:

Upon application for a tax deed by either a county or a private tax certificate holder, the tax collector must search the tax sale records for a period of twenty years prior to the date of application, noting any outstanding tax certificates on the property, any omitted taxes, and any unpaid delinquent taxes, and certify any such items discovered, plus interest thereon and the collector's costs and fees, to the clerk of the circuit court for inclusion in the statutory opening bid. The collector is required to collect the total amount of those items from a private tax deed applicant before certifying the application to the clerk....

The Florida courts have generally held that the statutory requirements of notice of a tax deed sale must be strictly followed. "Substantial," as opposed to strict, compliance may result in a void tax deed. Alper v. La Francis, 155 So.2d 405 (Fla. 2d DCA 1963); Holmes v. Kiser, 138 So.2d 782 (Fla. 1st DCA 1962). If a holder of a tax certificate is omitted from the tax deed sale process, the lien of the certificate is not adversely affected and the tax deed purchaser takes the property subject to such certificate. Burns v. Campbell, 180 So. 46 (Fla. 1938); Riviera Club v. Belle Meade Development Corp., 194 So. 783 (Fla. 1940); Lott v. Nonnarb Properties, 194 So. 211 (Fla. 1940).

There is specific authority for the tax collector to act where taxes have been paid. Section 197.442(1), F.S. provides in part

(1) If a tax collector sells tax certificates on land upon which the taxes have been paid, upon written demand by the aggrieved taxpayer alleging the circumstances, the tax collector shall initiate action to cancel any improperly

issued tax certificate or deed in accordance with the provisions of s. 197.443. If the tax collector fails to act within a reasonable time, his office shall be liable for all legitimate expenses which the aggrieved taxpayer may spend in clearing his title, including a reasonable attorney's fee.

The clear terms of section 197.442(1), F.S. make it applicable only to situations in which the taxes have been paid on the property. It does not apply to all the situations expressed in section 197.443(1)(b) through (g), F.S., which include situations other than where the taxes have been paid.

Rule 12D-13.057 implements the former statutory provision. Therefore, the rule is an interpretation of the statute which provides for cancellation of tax deeds when taxes had been paid prior to issuance of the certificate on which the tax deed was based. Both the statute and the rule provide for expenses if the tax collector fails to act. These should be limited to situations under section 197.442, Florida Statutes where the tax deed was void because taxes had been paid.

Rule subsections 12D-13.057(1),(2),(3), and (5) specifically speak to tax deeds when an error is brought to the tax collector's attention. Rule 12D-13.057(5) provides the collector is obligated to act in a reasonable time when notified in writing. The rule in subsection (2) contemplates that the tax collector will notify the clerk of the circuit court. Rule subsection 12D-13.057(1) provides, consistently with Section 197.442(1), F.S., cited above, that the duty of the tax collector is only to "initiate action to cancel" the tax deed.

Rule subsection 12D-13.057(3) provides:

(3) It shall be the duty of the clerk of the court to inform the Department and proceed pursuant to the guideline established in Rule 12D-13.066, F.A.C.

Rule 12D-13.066, F.A.C. provides in pertinent part:

(1) Tax deeds may be corrected at any time by the clerk of the court so long as no rights of the property owner are

violated.

(2) Tax deeds that have been issued may only be cancelled,
set aside or determined to be void by a judicial decree.

When it shall appear to the clerk of the court that the tax
deed is void, the clerk shall notify the tax deed holder
that the tax deed may be void.

The remaining subsections of the rule go on to discuss the procedure to follow after a court decree invalidates a tax deed.

The law applicable to the situation in which the court declares the tax deed void is contained in section 197.602, F.S., which provides in pertinent part:

If, in an action at law or in equity involving the validity
of any tax deed, the court holds that the tax deed was
invalid at the time of its issuance and that title to the
land therein described did not vest in the tax deed holder,
then... the party in whose favor the judgment or decree in the suit is entered shall pay to the party against whom the judgment or decree is entered the amount paid for the tax deed and all taxes paid upon the land, together with 12-percent interest thereon per year from the date of the issuance of the tax deed and all legal expenses in obtaining the tax deed, including publication of notice and clerk's fees for issuing and recording the tax deed, and also the fair cash value of all permanent improvements made upon the land by the holders under the tax deed.

The court should order title vested in a particular person or entity. In my opinion, there would be some uncertainty in not giving title to the county. Where the court order awards title to the clerk of the court or is otherwise silent as to whom the title is given, unless the uncertainty is resolved, the county and not the taxing authorities pro rata should be regarded as succeeding to the rights of the tax deed holder. It makes more sense for the court to give the deed to the county and let the county apply for a tax deed or sell the property under procedures for the disposal of surplus property. The rules apparently do not contemplate a situation in which the court's order is silent as to whether the taxing authorities take or the

county. See rule 12D-13.066, F.A.C. which contemplates the tax deed holder would quit claim to the county.

The only rules which permit the clerk of court to proceed without court action with regard to void tax deeds contemplate that the tax deed holder will voluntarily surrender the tax deed.

Rule 12D-13.066(4) provides:

(4) When it appears that a tax deed has been issued incorrectly and the tax deed holder agrees to transfer the tax deed to the county by quit claim or any other instrument that will effect the change of ownership, the clerk of the court shall refund to the tax deed holder the amount paid for the tax deed plus any subsequent taxes paid. If the tax deed is voluntarily surrendered, it is not necessary for the clerk of the court to obtain a judicial determination of the validity of the tax deed.

This rule implements section 197.443 provides in part:

- (1) When a tax certificate on lands has been sold for unpaid taxes and:
- (a) The tax certificate evidencing the sale is void because the taxes on the lands have been paid;
 - (b) The lands were not subject to taxation at the time of the assessment on which they were sold;
 - (c) The description of the property in the tax certificate is void or has been corrected;
 - (d) An error of commission or omission has occurred which invalidates the sale;
 - (e) The circuit court has voided the tax certificate by a suit to cancel the tax certificate by the holder;
 - (f) The tax certificate is void for any other reason; or
 - (g) An error has occurred for which the tax certificate may be corrected,

the tax collector shall forward a certificate of such error to the department and enter upon the list of certificates sold for taxes a memorandum of such error. The department,

upon receipt of such certificate, if satisfied of the correctness of the certificate of error or upon receipt of a court order, shall notify the tax collector, who shall cancel or correct the certificate.

(2) The holder of a tax certificate who pays, redeems, or causes to be corrected or to be canceled and surrendered by any other tax certificates, or pays any subsequent and omitted taxes or costs, in connection with the foreclosure of a tax certificate or tax deed, and when such other certificates or such subsequent and omitted taxes are void or corrected for any reason, the person paying, redeeming, or causing to be corrected or to be canceled and surrendered the other tax certificates or paying the other subsequent and omitted taxes is entitled to obtain the return of the amount paid therefor.

(3) When the tax certificate or a tax deed based upon the certificate is held by an individual, the collector shall at once notify the original purchaser of the certificate or tax deed or the subsequent holder thereof, if known, that upon the voluntary surrender of the certificate or deed of release of his rights under the tax deed, a refund will be made of the amount received by the governmental units for the certificate or deed, plus \$1 for the deed of release.

(4) The refund shall be made in accordance with the procedure set forth in s. 197.182, except that the 4-year time period provided for in s. 197.182(1)(c) does not apply to or bar refunds resulting from correction or cancellation of certificates and release of tax deeds as authorized herein.

(Emphasis supplied.) Note that under this statute, the refund apparently comes from the county. The statute does not say to whom the deed of release is to be given, such as either to the county or the taxing authorities, pro rata. Since under this statute the reason for cancellation of the deed is that taxes and thus the lien had already been paid, the refund by the county or the taxing authorities in exchange for a deed of release does not operate to "reopen" a tax lien.

Section 197.443(1)(d) and (2) through (4) would appear to be applicable. From your facts, not all certificate holders were

notified of the tax deed sale, and because of the error of omission or commission, the resulting deed is invalid. The tax deed applicant paid amounts for such deed in connection with the redemption of other tax certificates and in connection with the tax deed sale.

There is long standing case law in Florida that a tax sale vests in a purchaser property rights which may not be abrogated without due process and judicial determination. Otto v. Harllee, 161 So. 402 (Fla. 1935). Only the courts, and not the executive branch, possess the authority make voidable or void a tax deed. Id.; AGO 72-292; AGO 59-46. Such right to due process attaches for any person in possession of a tax deed. Id. A statute was declared void in Otto v. Harllee where the clerk of the court was authorized by the statute to declare a tax sale void. Otto v. Harllee and the AGOs are not directly applicable, since there is no executive branch determination of voidness. There is no blanket statutory authority under state law to accept quit claim deeds from tax deed holders and to refund monies paid. Statutes of refund are a matter of legislative grace and are strictly construed. Rep. Atty. Gen. 53-54, p.225.

Where the tax deed holder agrees, Otto v. Harllee and the AGOs are not directly applicable, since there is no executive branch determination that the tax deed is void. Rule 12D-13.066(2), F.A.C. allows the clerk of the court, a member of the executive branch, to advise that the tax deed "may be" void.

Even where taxes had not been paid prior to the tax certificate issuance, as opposed to tax deed issuance, the executive branch has for many years had the authority to cancel certificates. See e.g. s. 197.555, F.S. (1969) dating from laws 1901 ch. 4888 s. 12.

OTHER CONSIDERATIONS

In my opinion, therefore, although the statute is presumed to be constitutional, there are other considerations which would make it advisable for the county or recipient of the tax deed to initiate quiet title action. Where the deed is sought to be canceled and taxes had not been paid, a court action is

advisable because an administrative refund would not "reopen" the tax lien.

A tax deed is a root of title, vesting in the grantee a new, independent, and paramount title. Daniell v. Sherrill, 48 So.2d 736 (Fla. 1950); Smith v. City of Arcadia, 2 So.2d 725 (Fla. 1941); Sullivan v. Woodward, 582 So.2d 31 (Fla. 1st DCA 1991); Torreyson v. Dutton, 188 So. 805 (Fla. 1939). Therefore, a quit claim by a tax deed holder to the county apparently vests title in the county, not a tax lien in the county.

Legislation which once permitted a tax deed holder to consider the deed as a lien on the land for foreclosure purposes has been repealed. 52 Fla.Jur.2d Taxation section 21:367 (1983). In Florida a tax deed either constitutes a muniment of title, or a nullity. 52 Fla.Jur.2d Taxation section 21:368 (1983). In my opinion, the vesting of legal title in the deed holder would be a muniment of title greater than the mere legal right of redemption by the previous titleholder.

The purchaser at a tax sale at common law took only the land under the rule of caveat emptor, and by statute certain other rights of reimbursement from the owner if the tax deed was found invalid. See Graham v. Florida Land and Mortg. Co., 14 So. 796, 805 (Fla. 1894); 72 Am.Jur.2d State and Local Taxation section 948.

In the absence of statutory rights, the holder of a void tax deed is in the same position as if no deed had been issued; he can resort only to foreclosure of his tax certificate. See 52 Fla.Jur.2d Taxation section 21:368 (1983). A tax deed is entitled to a prima facie presumption of validity. See, e.g. Hempel v. Consolidated Land Co., 67 So. 915 (Fla. 1915); section 197.552, F.S. (1993). A tax deed may be declared void only by a court. AGO 72-292; AGO 59-46.

A tax certificate is evidence of a tax lien. Otto v. Harllee, 161 So. 402 (Fla. 1935); Smith v. City of Arcadia, 2 So.2d 725, 727 (Fla. 1941); section 197.102(3) F.S. defines a tax certificate as "representing" unpaid delinquent real property taxes.

The validity of a tax deed is determined by the laws in effect on the date the tax deed was issued. Heinberg v. Andreas, 45 So.2d 488 (Fla. 1950); cf. AGO 75-169, applying 1971 laws to a tax deed issued in June 1972.

Where taxes had been paid prior to the tax deed issuance, the tax lien had already been canceled and satisfied, the deed holder may "release" the deed; the tax lien would not be affected, having been satisfied prior to issuance of the tax certificate or tax deed. Section 197.442(1) and rule 12D-13.057 apply to this situation and provide for recovery expenses where the tax collector does not act promptly. This is reasonable, since the tax collector has records which should indicate cases where the taxes had been paid.

Where taxes had not been paid prior to the tax deed issuance, the tax lien had not already been canceled and satisfied, the lien would have been canceled when the deed was originally purchased; if the deed holder were to "release" the deed and the taxing authorities were to refund the funds, these actions would not operate administratively to resurrect the lien for taxes. Section 197.443 applies to this situation and other than paragraph 194.443(1)(a), requires action by some other official in addition to the tax collector. The records indicating no tax was due, invalid legal description, error of omission or commission invalidating the sale, etc. may require action by some official other than the tax collector.

The sale of a tax deed operates to extinguish many different types of liens, including:

mortgage and other liens. Dudemaine v. Shaw, 16 So.2d 114 (Fla. 1944).

other governmental liens of lesser dignity. Pinellas Co. v. S&A Land Co., 271 So.2d 230 (Fla DCA 1972)

most private and governmental interests in the property.
Section 197.552, F.S.

These liens would not be administratively revived by surrender of the tax deed.

The "release" from the tax deed holder to the local government would be effective to get around the holding in Otto v. Harllee, which held that where the holder did not consent, he could later reinstate the tax lien and in this case the tax deed.

CONCLUSION

The Department's rules require the tax collector to initiate action by notifying the clerk of the circuit court. If the tax deed holder agrees or a court declares the tax deed void, see Otto v. Harllee, 161 So. 402 (Fla. 1935); AGO 59-46; AGO 72-292, the tax collector may proceed as follows.

Rule 12D-13.066(4) supra, expressly offers the holder of a tax deed the option of exchanging a quit claim deed for a refund pursuant to an incorrectly issued tax deed, in lieu of a judicial determination of the validity of the tax deed.

However, should the tax deed purchaser elect to not so obtain a refund of his expenditures, such purchaser would likely have standing to pursue a civil action on the merits. The deed holder has the option to bring an action to quiet title to declare the title represented by the tax deed. See 20 Fla.Jur.2d Ejectment and Related Remedies section 82 et. seq.; Cremin v. Quigley, 139 So. 383 (Fla. 1932).

The tax collector should notify the holder of the tax deed that upon the voluntary surrender of the tax deed and release of his rights under the tax deed, a refund will be made by the county in the amount received by the governmental units for the tax deed, plus \$1 for the deed of release. See section 197.443(3), F.S.

Where an omitted lienholder requires cancellation of a tax deed sold on property on which the original certificate was sold where taxes had not been paid, the tax collector should initiate action to have the tax deed so canceled. Rule 12D-13.057(1), F.A.C. provides a readily available procedure, even if the provisions of section 197.442, Florida Statutes are not

applicable since taxes had not been paid at the time the certificate issued on which the tax deed application was based. The tax collector should inform the clerk of the court of such possibly void deed. Rule 12D-13.057(2), F.A.C. If the deed holder does not agree to surrender the deed, the clerk should petition the court to declare the tax deed void and is responsible for reimbursing the tax deed holder. Rules 12D-13.057(3) and 12D-13.066(3), F.A.C. Apparently the clerk is an appropriate party to initiate quiet title action on behalf of the county, since no statute or rule requires the property appraiser or tax collector to do so, and rule 12D-13.057, F.A.C. indicates it is the clerk's function. The clerk is required to forward to the Department a copy of the court's determination and the Department will review the proceedings and approve the cancellation of the tax deed. Rule 12D-13.066(3), F.A.C. The Department shall approve refunds ordered by the court. Id. If the court does not specify amounts to be refunded, the clerk shall certify all costs incurred by the tax deed holder to the Department and the Department shall approve whatever refunds are appropriate. Id. The tax deed holder should be refunded all amounts received by the governmental units for the deed, plus \$1. See section 197.443(3), Florida Statutes.

If the tax deed holder quit claims the deed to the county or other local government, the governing body may be required to accept the conveyance by resolution or ordinance. See 19 Fla. Jur. Deeds section 78 (1980). Some local governments have ordinances which prohibit acceptance of conveyances of lands which have outstanding taxes on them.

If the tax deed holder will not voluntarily relinquish the tax deed, it will in my opinion be necessary for the clerk to initiate action in court as described in rule 12D-13.066, F.A.C.

If the deed is returned to the county, the property will still have the liens of the other certificates on it. If a court order results in resurrection of a lien or title in the hands of the county, then the other tax certificate liens remain viable, too. The county will then need to be reimbursed in the event of a tax deed purchase by a later purchaser should the current holder opt to quit claim the property to the county now.

I hope this addresses the points you raise in your letter. If I may be of any further assistance, please do not hesitate to contact me.

Sincerely,

Stephen J. Keller

Chief Attorney

Property Tax Administration Program

SJK/sk 94-149