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Counties May Not Retain Excess Tax Foreclosure Proceeds, Michigan Supreme Court Holds

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On July 17, 2020, the Michigan Supreme Court in *Rafaeli, LLC v Oakland County* held that the retention of excess tax foreclosure proceeds by county treasurers from tax auctions constitutes "an unconstitutional taking without just compensation" in violation of the Michigan Constitution.

The case involved two plaintiffs whose properties were foreclosed for unpaid property taxes and sold at auction for amounts in excess of the taxes and other charges due. One party had unpaid property tax of $8.41 which grew to $285.81 with interest, penalties and fees, and the property was sold at auction for $24,500, resulting in excess proceeds of $24,200 or roughly 85 times the amount due. The other party owed roughly $6,000 and his property was sold at auction for $82,000, resulting in excess proceeds of over twelve times the amount due.

Pursuant to the General Property Tax Act, the foreclosing governmental unit, which is either the local county or the state of Michigan, has the responsibility for the collection of the preceding year's unpaid property taxes. After one year the properties are considered "forfeited" but each property owner retains the right to redeem the property until a judgment of foreclosure is entered on the following March 31. After that foreclosure judgment is entered, fee simple title is vested in the foreclosing governmental unit, and most properties are then sold at public auctions. The proceeds are used to reimburse a delinquent tax revolving fund which funds the local municipalities for the unpaid taxes and to cover other expenses of the foreclosure process, and the county or state retains the excess funds. Because auction proceeds are often insufficient to cover the taxes and fees, the properties sold for a price in excess of the taxes and fees in effect subsidize the costs for the entire tax foreclosure process.

The *Rafaeli* court found that the provisions of the General Property Tax Act conflicted with the Michigan Constitution's Takings Clause, and that the remedy for a government taking is just compensation for the value of the property taken. The court found that the property "taken" was the surplus proceeds from the tax foreclosure sales, and that therefore the taxpayers were entitled to those proceeds as just compensation.

The implications of this decision are significant because it impacts many of the thousands of foreclosure sales which occur each year in Michigan's 83 counties. Counties and the state may now be required to issue payments to property owners whose properties were previously foreclosed and sold at auction for an amount in excess of the taxes due. There is a six-year statute of limitations on takings claims, but various individual lawsuits and class action suits have been filed that date back several years. Because the General Property Tax Act does not provide a mechanism for such repayments, the Michigan legislature may address the procedures which govern such payments, including whether taxpayers are required to take affirmative steps to obtain those payments, how prior ownership will be proven, payment to lienholders, and how those payments will be administered.

Please contact the authors or your Miller Canfield attorney with further questions about the potential impact of this ruling.