

Opinion No. 58-57

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BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr.,
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TO: Mr. F. Wayne Laws, Chief Tax Commissioner, N.M. State Tax Commission, Santa Fe, New Mexico

QUESTION

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1. Under the provisions of Chapter 160, Laws of 1953, may the State Tax Commission grant easements across property acquired by the State under tax deeds to the State Highway Department or to other departments and institutions of the State?
2. May the State Tax Commission grant to the State Highway Commission privileges of using and taking sands, gravels, stone, and other construction materials from tax deeded land held by the State?
3. What is the present status of easements granted prior to effective date of Chapter 160, Laws of 1953?

CONCLUSIONS

1. No, where the right of repurchase remains outstanding.
2. No, where the right of repurchase remains outstanding.
3. Valid, subject to the reversionary interest provided therein.

OPINION

ANALYSIS

The questions above put involve fundamentally a determination of the status of realty which has been sold to the State for the purpose of realizing collection of delinquent taxes as provided by law.

Reviewing generally the provisions of Art. 8, Ch. 72, NMSA, 1953, real property for which taxes are six months in arrears shall be sold, by the several county treasurers, to the State "for the amount of the taxes, penalties, interest and costs due thereon, . . ." Notice of this sale shall be given thirty (30) days prior to said sale, in accordance with Sec. 72-8-2, And by Sec. 72-8-5 (PS):

"The tax sale shall vest in the state of New Mexico and its grantees and assigns, as the case may be, subject to the right of redemption as provided in this act, the right to a complete title to the property sold, subject, however, to the easements of any telephone, telegraph, transmission, or pipeline company or any irrigation or drainage ditch or road to which such land may be subject; Provided, that the state and its grantees and assigns shall not be entitled to the possession of said property until the period of redemption has expired and a deed has been executed therefore."

Although the State has acquired a vested interest in the fee, it is limited in proprietary powers over the property to administering the same under a trust relationship for the benefit of the owners or their successors who have a right of redemption as specified. There is a complete reversion of the delinquent taxpayer's title upon exercising the preferential privileges granted by Sec. 72-8-9, NMSA, 1953 Comp. A summation of this theory is found at 51 Am. Jur. 941, as follows:

". . . The holder of such certificate has, prior to the issuance of the tax deed, merely an inchoate right or lien which can ripen into title only upon compliance with the statutory requisites and procedure, and no greater right or title may be created thereby than is authorized by statute. . ."

And at p. 953:

"Generally, the tax statutes of the several states in imposing the system of collection of delinquent taxes by sale of the land against which such taxes are assessed, or which is made liable therefor, do not make the tax sale itself operate as a final and irrevocable divestiture of the title of the owner. Under practically all such statutes an opportunity is provided, by means of a procedure known as 'redemption', whereby the former owner and his successors in interest or anyone having substantial interest in the premises may, notwithstanding that the proceedings upon the tax sale are valid and regular in every respect, defeat the sale and re-vest himself with title **as complete and as unqualified** as he had before the tax was assessed, by repaying the amount which the purchaser paid for the property with interest and costs. . ."

Ninety days prior to the running of the two (2) year redemption period, further notice must be given the delinquent owners of their right to reacquire and informing further of the required execution of a deed to the State subsequent to the running of the aforesaid two years.

By Sec. 72-8-15, there is provided, that:

"Upon expiration of the redemption period the county treasurer shall immediately execute tax deeds to the state for all unredeemed property sold to the state. The title so acquired shall be in all respects the same as any title acquired by the state by purchase; **Provided, however, that the properties described in such deeds shall be considered as being held by the state in lieu of tax money and shall be administered by the state tax commission for the benefit of the state, and the**

several counties, municipalities, school districts and other taxing districts which had an interest in the taxes paid by the acquisition of such property." (Emphasis supplied)

At this point, the State has acquired possessory rights in addition to the earlier vested fee, and is empowered to sell the property for the benefit of the State as restricted by the interests provided in Sec. 72-8-15, supra. There is however, an additional restriction applicable to the State, which further evidences the trust nature of the State's title.

Sec. 72-8-31 provides in effect, that the divested owner or any lien holder may come in during the period of one (1) year from the date of recording the State's **deed** and exclusively repurchase the property. And further, the privilege to repurchase continues for an indefinite period, being withdrawn only by a sale at public auction or private sale as provided.

Thus, while the State becomes vested with a legal but defeasible title to delinquent tax property at the time of sale by the county treasurer, such title and interest three (3) years later remains subject to preferential redemption or repurchase and upon the exercise, by the past owner or lien holder, of such right, reversion must be complete and unconditioned, with the claimant enjoying the same value and use as had been known prior to the sale of taxes.

Finally, Sec. 72-8-33 (PS) provides for selling tax deed property as follows:

"The tax commission may, at such times as it may designate, during each year hold public auctions of property acquired by the state under tax deed. All sales shall be held at the court-house in the county in which the property to be sold is located. The tax commission with the approval of the board of county commissioners shall specify a minimum price at which the property described in any tax deed to the state shall be sold."

There is no provision in the entire tax deed code, present or past, which may be construed as authorizing the State Tax Commission to dispose of the herein considered property except by the means and in the manner discussed.

It may be suggested that since the State acquires a legal fee simple interest upon recordation of the tax deed executed, that such interest then becomes subject to administration in keeping with the provisions found under the public lands law. Specifically, Sec. 7-8-61, in authorizing the Commissioner of Public Lands to grant easements, provides as follows:

"The commissioner may grant rights-of-way and easements over, upon or across state lands for public highways, railroads, tramways, telegraph, telephone and power lines, irrigation works, mining, logging and for other purposes, upon payment by grantee or grantees of the price fixed by the commissioner, which shall not be less than the minimum price for the lands, used, as fixed by law."

If tax deeded property were in the same classification and subject to the same purposes as public trust land, commonly called public lands, it might well be concluded that easements could be granted, subject only to payment therefor. **Highway Commission v. Walker**, 61 N.M. 374. This, however, is not the case. The New Mexico Supreme Court has specifically ruled in **Green v. Esquibel**, 58 N.M. 429, 272 P. 2d 330:

"(22, 23) As above stated we are of opinion that when the framers of the constitution used the phrase 'and all lands hereafter acquired', they had reference to additional land grants which might be made or to other lands acquired in a proprietary capacity and **not to lands acquired by the the state in tax proceedings, as here**. We are also of the opinion that lands, the title to which become vested temporarily in the state through tax proceedings were not grants to the state, or lands thereafter acquired as contemplated by the constitution, and that title thereto is now taken in the name of the state, instead of in the name of the county as was formerly the case, **only for the better and more uniform method of disposition, to the end that they may be sold and the money they represent be promptly remitted to the agencies for which the taxes were assessed and such lands restored to the tax rolls as speedily as possible. It was never intended that title thereto vest in the state in its proprietary capacity.**"
(Emphasis supplied)

And further, in the case of forfeited land, we find at 51 Am. Jur. 958 as follows:

"When the title to land is forfeited to the state for non-payment of taxes, the state holds the title solely for the payment of the taxes charged and chargeable thereon; when upon redemption the title becomes reinvested in the former owner, the effect of such redemption and reinvestment is that the former owner succeeds to the right to institute any action for trespass on the land committed while his title was vested in the state."

Accordingly, it is our opinion that the State Tax Commission has no authority to grant easements across tax deed property nor to permit the taking of construction materials, for use in highway construction and maintenance, from tax deed lands where the rights of repurchase remains outstanding.

One further aspect of the law remains to be examined, that of power of eminent domain.

Art II, Sec. 20 of the New Mexico Constitution provides:

"Private property shall not be taken or damaged for public use without just compensation."

And more specifically, Secs. 22-9-15, 22-9-24 and 55-2-7 provide respectively as follows:

"In addition to the purposes hereinbefore specifically mentioned for which property may be condemned under the provisions of this chapter, said property may also be condemned by the state, any county, municipality or school district, for the use of said

state county municipality or school district for public buildings and grounds, for canals, aqueducts, reservoirs, tunnels, fumes, ditches, conduits for conducting or storing water for drainage, the raising of banks of streams, the removing of obstructions therefrom, for roads, streets, alleys, thoroughfares, for public parks, playgrounds, for ferries, bridges, electric railroads or other thoroughfares or passways for vehicles, for canals, ditches, flumes, aqueducts and conduits for irrigation, for electric lines, for the production of sand, gravel, caliche and rock used or needed for building, surfacing and]or maintaining streets, alleys, highways and]or other public grounds or thoroughfares and for public airports or landing fields incident to the operation of aircraft, Provided, nevertheless that no land shall be condemned for the production of sand, gravel, caliche or rock, which is in the possession or ownership of a person, firm or corporation engaged at the time said proceeding is brought in the actual production of such material from such land sought to be condemned. Nor shall any land be condemned for municipal purposes which may be shown by the owner or lessee thereof to have a content of precious metal sufficient to make said land of value as mineral producing property."

"Whenever it shall be deemed necessary by the board of regents of the University of New Mexico, and of the New Mexico College of Agriculture and Mechanic Arts, the board of regents of the School of Mines, the board of directors of the New Mexico Insane Asylum, the board of penitentiary commissioners and the board of regents of the New Mexico Asylum for the Deaf and Dumb, the board of regents of the New Mexico Institute for the Blind and the Girls' Welfare Home to acquire title to any lands for the use of any such institution and the owner or owners of such lands are unable or unwilling to accept a fair and reasonable price for such lands, then, and in that event, each of the said several boards may acquire, in the name of the state of New Mexico, title to so much of said land or lands as shall be deemed necessary by any such board for the use of any such institution, in the same manner as provided by law for the condemnation of land for railroad purposes, and such land so taken shall be deemed to be taken for public use."

"In addition to the powers now conferred upon it by law, the state highway commission shall have all of the following powers and authority, to-wit:

* * *

(e) To bring and maintain in the name of the state of New Mexico all actions and proceedings deemed necessary by the said commission for the condemnation of rights-of-way for public highways or for the removal or condemnation of buildings or other improvements which encroach in whole or part upon the rights-of-way of public highways, or for the condemnation of gravel pits or other deposits of materials or supplies suitable for the construction of public highways."

In keeping with the aforequoted authorities, it is our opinion that the power of eminent domain may well be exercised by the bringing of condemnation proceedings against property held by the State under tax deeds, naming as parties defendant those persons having a right of redemption or repurchase.

It is further our opinion, with regard to easements which were granted prior to enactment of the present law, that such rights-of-way and usages are valid in view of the earlier law, Sec. 76-741a, 1941 Comp., which permitted the Tax Commission to dispose of tax deed property upon application, at a price determined by said Commission as being for the best interests of the State of New Mexico.

Depending on the nature of the title or interest actually taken by the Highway Commission or other department of the state, from the Tax Commission, there may well continue a right of repurchase, as provided, of any reversionary interests as may still be outstanding.