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## Coates' Canons Blog: Taxes, Telephones and Traffic Cones: Do Tax Foreclosures Extinguish Easements?

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An interesting discussion from the Local Government Law listserv last week: Do tax foreclosures extinguish easements?

The answer must be no, don't you think? If public utility and transportation easements could be extinguished by tax foreclosures, then the authority of the phone company to run telecommunication lines and the Department of Transportation to maintain highways would be dependent on the willingness of thousands of individual property owners to keep current with their property taxes. That sounds like an unworkable system to me.

But the relevant statutory language suggests the answer might not be so simple. Both NCGS 105-374 and -375, the statutes governing mortgage-style and *in rem* tax foreclosures, mandate that the property being foreclosed upon shall be sold "free and clear of all claims, rights, interests, and liens" except certain tax liens. An easement is certainly an interest or right in the property, leading to the conclusion that it must be extinguished by a tax foreclosure. (Note that this problem doesn't arise in "regular" bank foreclosures, because they are governed by separate provisions that do not contain the same "free and clear" language.)

How can we get around this seemingly clear statutory mandate? I think there are at least two sources of legal authority that outweigh the "free and clear" requirement in 105-374 and -375. The first involves constitutional due process and notice requirements, the second involves the nature of the property tax lien.

Adequate notice must be provided before a property right can be terminated by state action. In *Jones v. Flowers*, 547 U.S. 220 (2006), the U.S. Supreme Court relied on that principle to overturn a tax sale conducted without notice to the property owner. It is not a huge leap of logic to conclude that this principle would also protect holders of easements, liens or other interests in the property being sold.

In practice, few if any local governments provide notice to easement holders, in large part because the tax foreclosure statutes require notice only to owners and lienholders. Constitutional notice requirements of course trump state property tax law, meaning these blissfully unaware easement holders should not be at risk of losing their interests in the property regardless of the phrasing in 105-374 and -375.

Does this mean that if notice *is* given to easement holders their interests are at risk in a tax foreclosure? I still think the answer is no, because of the nature of the property tax lien in North Carolina.

In general, a property tax assessment does not include the value of interests in the property not retained by the property owner. The tax lien covers only the property included in the assessment, and a tax foreclosure can affect only rights to the property covered by the tax lien. If the value of an easement is outside of the tax lien being foreclosed, then the easement should be outside of the tax foreclosure action. North Carolina courts have not yet opined on this issue, but across the nation a majority of courts that have confronted this question conclude that tax foreclosures do not extinguish easements and similar property interests. Here's one such [case](#); for more detailed discussions of this issue, see 7 ALR 5<sup>th</sup> 187 (1992) or Restatement (Third) of Property (Servitudes) § 7.9 (2000).

That said, it's always better to be safe than sorry, and I think the best approach is to adopt the one followed by Wake, Wilkes and several other counties: be sure to indicate in the notice of sale and property descriptions the fact that the property will be sold subject to any and all existing easements.



Many thanks to Tony Triplett, Shelley Eason, Judith Wegner, and the other wise commentators who shared their insight on this issue via the Local Government Law listserv last week. [Click here](#) to subscribe to that listerv.

## Links

- [www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_105/GS\\_105-374.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_105/GS_105-374.html)
- [www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_105/GS\\_105-375.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_105/GS_105-375.html)
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