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NO.
STATE OF NEBRASKA
OFFICIAL
JUN 5 1995
DEPT. OF JUSTICE

DATE: June 1, 1995

SUBJECT: Award of Attorney Fees in Tax Foreclosure Actions Under Neb. Rev. Stat. §§ 77-1909 or 77-1918 (Cum. Supp. 1994) When Payment of Delinquent Taxes, Interest, and Costs is Made Prior to Decree.

REQUESTED BY: C. Matthew Samuelson, Thurston County Attorney

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion regarding the availability of an award of attorney fees in tax foreclosure actions under Neb. Rev. Stat. §§ 77-1909 or 77-1918 (Cum. Supp. 1994) in cases where payment of delinquent taxes, interest, and costs is made prior to the entry of a decree of foreclosure. Your question arises as a result of tax foreclosure proceedings instituted by Thurston County pursuant to Neb. Rev. Stat. §§ 77-1901 to -1941 (1990 and Cum. Supp. 1994). Prior to entry of a decree of foreclosure, the taxpayer made payment of the delinquent taxes, interest, and costs. You ask whether, under this scenario, either the "ten percent" attorney fee award provided under § 77-1909 or the fifty dollar fee provided the county attorney under § 77-1918 may be assessed. For the reasons set forth below, we conclude that neither fee award is available under these circumstances.

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**I. "Ten Percent" Fee Award Under Neb. Rev. Stat. § 77-1909 (Cum. Supp. 1994).**

In Nebraska, two separate and distinct methods are provided for the collection of delinquent real estate taxes. Neb. Rev. Stat. §§ 77-1801 to -1863 (1990 and Cum. Supp. 1994?) and §§ 77-1901 to -1941 (Cum. Supp. 1994); *see Brown v. Gliebe*, 213 Neb. 318, 328 N.W.2d 786 (1983). The procedure set forth in Chapter 77, article 18, does not involve judicial proceedings or a judicial sale, and permits an owner to redeem property that has been sold for taxes at any time before the county treasurer delivers a "tax deed". *See* Neb. Rev. Stat. § 77-1824 (Cum. Supp. 1994). The method provided under Chapter 77, article 19, provides for judicial foreclosure proceedings. Section 77-1909 provides:

> In its decree, the court shall ascertain and determine the amount of taxes, special assessments, and other liens, interest, and costs chargeable to each particular item of real property and award the plaintiff an attorney's fee, unless waived by the plaintiff, in an amount equal to ten percent of the amount due which shall be taxed as part of the costs in the action and apportioned equitably as other costs.

Neb. Rev. Stat. § 77-1909 (Cum. Supp. 1994) (emphasis added).

Section 77-1917, with regard to the right of "redemption", provides, in pertinent part:

> Any person entitled to redeem property may do so at any time after the decree of foreclosure and before the final confirmation of the sale by paying to the clerk of the district court the amount found due against the property, with interest and costs to the date of redemption,. . . .

With respect to your question concerning the availability of the "ten percent" attorney fee award under § 77-1909, the recent Nebraska Court of Appeals decision in *KLH Retirement Planning, Ltd. v. Cejka*, 3 Neb. App. 687, ___ N.W.2d ___ (1995) ["*KLH*"], is dispositive.[1] KLH, the holder of a tax sale certificate on certain real property, instituted a foreclosure action under Neb. Rev. Stat. § 77-1902. After KLH filed its petition for foreclosure, the taxpayers tendered payment of the tax due with interest to Lancaster County, which issued a certificate of redemption and

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[1] No petition seeking further review of the Court of Appeals decision in *KLH* was filed, and the time for filing such a petition has expired.

tendered the proceeds to KLH. KLH, however, rejected the tender, asserting that the taxpayers' attempted redemption was invalid and not allowed by law while the foreclosure proceeding was pending. The district court entered summary judgment in favor of KLH, finding that the taxpayers' could not redeem the tax sale certificate while the foreclosure action was pending. The district court entered a decree for the amount of tax, interest, and attorney fees under § 77-1909. *Id.* at 688-89, ___ N.W.2d at ___.

On appeal, the Court of Appeals reversed. The Court stated the "central issue" was "whether a delinquent taxpayer may redeem a tax sale certificate after the holder of the certificate has filed a foreclosure action under § 77-1902." *Id.* at 690. KLH argued that, once a petition for foreclosure was filed, the redemption provisions under § 77-1824 were inapplicable. It further argued that, under § 77-1917, redemption was allowed only after foreclosure and before confirmation, thus precluding the taxpayers from redeeming while the foreclosure action was pending. *Id.* at 691, ___ N.W.2d at ___.

The Court's decision in *KLH* included the following discussion of the Nebraska Supreme Court's decisions in ***County of Lancaster v. Maser,*** 224 Neb. 566, 400 N.W.2d 238 (1987) and ***Merrill v. Jones,*** 39 Neb. 763, 58 N.W. 449 (1894):

> In ***County of Lancaster v. Maser,*** 224 Neb. 566, 400 N.W.2d 238 (1987), the court stated that by virtue of § 77-1824 and 77-1917, the right of redemption <u>continues</u> until either a treasurer's tax deed is issued of there is a judicial confirmation of sale. The court in ***Maser*** did not recognize any period of time after the administrative sale and before confirmation when redemption was not permitted.
>
> The Nebraska Supreme Court has also recognized, in ***Merrill v. Jones,*** 39 Neb. 763, 58 N.W. 449 (1894), that redemption is permissible while a foreclosure action is pending. In ***Merrill***, a defendant in a tax foreclosure action had tendered the plaintiff the amount of the tax sale certificate, plus interest and costs of the foreclosure action, after the foreclosure action had been filed. The plaintiff refused the tender. The action was tried, and judgment was rendered for the plaintiff for the amount of the tax sale certificate, plus interest and costs. The plaintiff appealed, claiming that he should have been awarded an attorney fee. The Nebraska Supreme Court rejected plaintiff's claim, stating, "It cannot be disputed that if a tender is made <u>in an action of foreclosure</u>. . .of the sum due, with interest and costs

> to [the] date of tender, it will be sufficient, and any further proceedings in the case by plaintiff will be at his cost. . . ." (Emphasis supplied) *Id.* at 768, 58 N.W. at 451.

3 Neb. App. at 691-92, ___ N.W.2. at ___ (emphasis in original).

Relying on these precedents, the Court of Appeals concluded that, "[w]hile the issue of whether redemption is permitted during a foreclosure action was not directly addressed in these cases, they nonetheless indicate that a landowner may redeem a tax sale certificate after a foreclosure action has been filed." *Id.* at 692, ___ N.W.2d at ___. It therefore reversed the district court's order (including, of course, its award of an attorney's fee under § 77-1909), and remanded for further proceedings. *Id.* at 694, ___ N.W.2d at ___.

While *KLH* involved a foreclosure action under § 77-1902 brought by a private holder of a tax sale certificate, this fact is irrelevant to addressing the issue of the application of § 77-1909 to the County's foreclosure proceedings. The Court in *KLH* recognized the right of a taxpayer to redeem <u>after</u> a tax foreclosure action has been filed; whether the action is instituted by a private party purchaser, or by the County, does not matter under the analysis adopted in *KLH*. Based on the decision in *KLH*, we are compelled to conclude that the "ten percent" attorney fee award provided under § 77-1909 may not be applied when a taxpayer has "redeemed" by payment of the tax, interest, and costs, prior to entry of a decree of foreclosure.

**II. The "Fifty Dollar" Fee Award Under Neb. Rev. Stat. § 77-1918 (Cum. Supp. 1994).**

Under Neb. Rev. Stat. § 77-1918 (Cum. Supp. 1994), the county board is authorized "to direct the county attorney to commence foreclosure of [tax] liens or certificates. . . ." This section further provides that, except in counties "having a population of more than one hundred thousand inhabitants", "[i]n the event the county attorney is designated to bring the action, the fee shall be fifty dollars for each cause of action in addition to his or her salary to be retained by him or her, <u>but it shall not be paid to the county attorney until the decree is entered and the property sold pursuant to such decree.</u> Neb. Rev. Stat. § 77-1918 (Cum. Supp. 1994) (emphasis added).

Based on the plain language of § 77-1918, and the decision in *KLH*, recognizing a taxpayer's right to redeem by payment of the tax, interest, and costs after institution of foreclosure proceedings, we necessarily conclude that the fifty dollar fee provided for under § 77-1918 may not be assessed under the facts

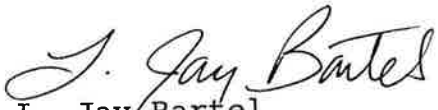
presented. The statute conditions payment of the fee on the entry of a decree of foreclosure. Absent entry of a decree, the fee provided for under § 77-1918 is not available.

**III. Conclusion.**

In sum, we conclude that neither the "ten percent" attorney fee award provided for under § 77-1909, nor the fifty dollar fee to the county attorney under § 77-1918, may be assessed when payment of delinquent taxes, interest, and costs is made prior to entry of a decree of foreclosure in proceedings instituted under Chapter 77, article 19.

Very truly yours,

DON STENBERG
Attorney General



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APPROVED BY:

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