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This is a publication of MMLA and is not intended as a legal advice, which requires consultation with an attorney.

LETTER FROM THE PRESIDENT

Dear Fellow MMLA Members:

Welcome to the Winter Issue of The Municipal Law Quarterly*. As I near the mid-point of my term, I am pleased to report that the Association continues in its tradition to bring you quality CLE programs and continues to develop new benefits for our members.*

The Association's Annual Conference was a great success. The conference was again held at the Red Jacket Beach Resort in Yarmouth. The folks at the Red Jacket continue to impress and the Executive Board received many favorable comments regarding both the accommodations, and the rates. The Executive Board is hopeful that the Red Jacket will become our destination of choice for the Annual Meeting in the future. This year's conference covered a myriad of topics, including: an update of environmental law, regulations and environmental litigation; a discussion of the False Claims Act; a review of the ADA and current developments in disability law; public-private partnerships; as well as a program on the municipality as a plaintiff, among others. The annual Robert D. Smith Constitutional Law Program, and the Zoning and Land Use Update, were also well received. A detailed report of the conference is included in this issue. Again, thank you to all who helped make this program a success. Your time and effort is very much appreciated.

Finally, as previously announced, the Association has worked diligently with the Social Law Library to provide a new benefit to its "small firm" members. Under this program, MMLA members who are from law offices, firms, municipal law departments, etc. of 12 or fewer lawyers are also granted membership status with the SLL. These members now have access to many SLL benefits, including online research portals, such as substantive and administrative databases, as well as Fastcase, HeinOnline, Law Journal Press, among others. Members are also entitled to use of the SLL's facilities (including free "at Library" use of Lexis). Other membership benefits include SSL seminar discounts, reduced rate parking and research assistance from the SLL's staff of attorneys and librarians. I urge our qualified members to take advantage of this excellent benefit.

Thank you for your attention. I hope that you each have a wonderful holiday season and I look forward to seeing you at future events.

Very truly yours,

John D. Finnigan, President

Inside this Issue

MUNICIPAL SPOTLIGHT ON: Lisa Mead, Esq.

By: Peter Mello, Esq., Petrini & Associates

1. **In what city/town were you born?**
   I was born in Wooster, Ohio and grew up in Pastaskala, Ohio, a small town in central Ohio.

2. **Where did you attend college and law school?**
   I attended the University of Massachusetts, Amherst and received a BS in history. I then attended New England School of Law.

3. **What municipalities do you represent?**
   I am lead counsel for our firm in Ashland, Marblehead, Maynard, Deerfield and Berkley. Additionally, as Town Counsel, the firm represents Chatham, Bellingham, Kingston, Hanson, Rehoboth, Easton, Newbury and Grafton. We also share Town Counsel duties in Douglas, Marblehead and Southbridge and serve as Special Counsel to several dozen other communities on a variety of matters.

4. **What is your favorite discipline within your municipal practice? Why?**
   I enjoy the various disciplines associated with land use work. I enjoy the creative aspects of putting projects together or reviewing them. The give-and-take between the community and private parties allows me to use mediation and problem solving skills as well as my knowledge of the varied tools communities can deploy to bring a project to fruition in a form which best meets a community's expectations and needs.

5. **What is one of your proudest moments as a lawyer?**
   Drafting the appropriate ordinance and then permitting one of the first commercial wind turbines in the Commonwealth. Shortly thereafter permitting one of the first large-scale solar facilities, 5 mega watts, the owner of which contracted to sell its power to two municipalities and one regional school district. The part I continue to play in assisting communities with renewable energy projects which in turn, bit by bit, help the Commonwealth move away from dependence on fossil fuels is very rewarding.

6. **What is the most useful advice you could give regarding the practice of law?**
   Use the skills that you have learned while training and practicing as a lawyer to be creative in problem solving or creating opportunities. Don't limit yourself to the practice of law, but share your skills and knowledge by volunteering in your community

7. **What do you like to do outside of work?**
   Spend time with my family, cook, fish and golf.

8. **What is one of the proudest moments outside of your career?**
   Being elected and serving as Mayor of Newburyport when I was 31.

9. **If you were not a lawyer, what would you do for work?**
   I would enjoy teaching history or political science.

10. **What is your favorite book?**
    While I really enjoy "Handbook of Massachusetts Land Use and Planning Law" by my partner Mark Bobrowski, I prefer to spend time reading historical non-fiction.

NAVIGATING THE CHALLENGING WATERS OF GOODS AND SERVICES PROCUREMENT

By: Michael C. Lehane, Esq. and Bryan R. LeBlanc, Esq., Murphy, Hesse, Toomey & Lehane

The provision of goods and services to cities, towns, school districts, regional school districts, counties, and special purpose districts in the Commonwealth of Massachusetts welcomes boundless opportunities to qualified firms. Efforts to obtain contracts for public goods and services solicitations are often avoided by qualified entities because of a misconception that the public procurement process is inherently arduous and fraught with pitfalls. For cities and towns, there is also a misconception that the process is always difficult to understand. This does not need to be the case, however. With the help of a competent legal advisor, the process of public goods and services procurement is readily understandable.

This article generally explains the process by which public goods and services are procured in Massachusetts pursuant to Massachusetts General Laws Chapter 30B, the Uniform Procurement Act. While this statute carves out certain specific exemptions, including those for architectural, legal, medical, and other professional services, all non-exempt contracts must be procured according to the procedures set forth in the Uniform Procurement Act itself. The Uniform Procurement Act is, thus, wide-sweeping in its everyday application – covering routine contracts, including those for cleaning, landscaping, supplies, and furniture provision.

The Uniform Procurement Act also applies universally to contracts awarded at all levels, except for the Commonwealth and state agencies, including the various offices of the Sheriff which have been absorbed by legislative act by the Commonwealth. Thus, for all other public awarding authorities, including all counties not absorbed by the Commonwealth, districts, cities, towns, school districts, and regional school districts ("covered awarding authorities"), compliance with M.G.L. c. 30B is mandatory.[1]

The Uniform Procurement Act divides procurements into three dollar specific categories. For those procurements costing under $10,000.00, a covered awarding authority must use sound business practices. In this category, a covered awarding authority periodically solicits quotes from vendors who provide similar services to ensure that the supplies and services that they seek to procure in a particular instance meet current marketplace conditions. For those procurements costing at least $10,000.00, but less than $35,000.00, a covered awarding authority must solicit three (3) quotes to provide the service and award the contract to a responsible party offering to furnish or supply the requisite good or service at the lowest price. For procurements of supplies or services costing $35,000.00 or more, a covered awarding authority must use either sealed bids or sealed proposals, with generally the choice to use one method or the other.

The distinction between bids and proposals is critical. Lowest price, of course, is ultimately important in the context of a bid. However, there are occasions in awarding authorities may determine that they should consider qualitative criteria (such as the experience and managerial qualifications of the vendor or the particular characteristics of a given product), in addition to price. Under such circumstances, a covered awarding authority has a wide range of discretion in setting appropriate qualitative criteria. Essentially, it may use a "best value" means of assessing responses, considering not only proposers' pricing information, but also evaluations of qualitative criteria specified in the request for proposals. Thus, it is possible with a proposal process that the proposer submitting the lowest price may not be awarded a contract.

Regardless of whether a bid or a proposal process is utilized, a covered awarding authority must advertise the procurement in accordance with M.G.L. c. 30B, §5. A covered awarding authority is statutorily required to post a notice containing the time, date and place for availability of the invitation for bids, the time, date, and place for receipt of bids, and all essential contract terms. Public notice must be posted in the offices of the covered awarding authority and is required to be published for at least two (2) weeks prior to the deadline for receipt of bids in a newspaper of general circulation in the area serving the covered awarding authority.[2]

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1. Goods and services procured by the Commonwealth are procured by the Operational Services Division pursuant to M.G.L. c. 7, §§22 et *seq.*, in accordance with all regulations and directives issued by the State Purchasing Agent.
2. For procurements costing $100,000.00 or more, a covered awarding authority is required to publish a notice in the Goods and Services Bulletin, which is a published by the Secretary of the Commonwealth.

The covered awarding authority thereafter makes the invitation for bids or request for proposals available at the designated time, date, and place specified in the advertisement. The covered awarding authority then receives bids or proposals up to and including the deadline specified in the advertisement. In a bid process, bidders submit only one sealed envelope, which contains the bid form and all other forms mandated for inclusion by the covered awarding authority. Conversely, in a proposal process, proposers submit two separately sealed envelopes, appropriately marked "price proposal" and "non-price proposal." These separate submissions for proposals are specifically designed to ensure that the covered awarding authority's evaluation of non-price information is not colored by pricing information that has been submitted.

After the deadline, the covered awarding authority opens bid and proposal submissions. However, divergent rules apply to opening. In a bid process, bids are opened publicly. The covered awarding authority determines which bidders are "responsible and responsive," and awards a contract, if at all, to the "lowest responsible and responsive bidder." On the other hand, in a proposal process, non-price proposals are first opened by an evaluation committee established by the covered awarding authority. The evaluation committee rates each evaluative category based upon the designations "highly advantageous," "advantageous," and "not advantegeous." Based upon these ratings, composite scores are assembled for each proposer. Subsequently, a covered awarding authority opens price proposals, checks to see whether proposers are "responsible and responsive," and ranks all proposers. Ultimately, in a proposal process, award is made, if at all, based upon "most advantageous proposal from a responsible and responsive offeror taking into consideration price and the evaluation criteria."[3]

What do the words "responsible" and "responsive" mean, as a practical matter? The terms "responsible" and "responsive" may touch upon the capacity of business entities to submit promptly and to complete the given work; qualifications as to personnel, management, and consultants; and past performance in similar contract situations. Bidders and proposers must respond to each question fully, truthfully, and candidly. Their statements are critical; without them, they may not be considered even if they submit the lowest dollar bid or price proposal.

Awarding authorities may disqualify any bidder or proposer who fails to achieve any minimal standards for "responsibility" or "responsiveness," as established in their public solicitation documents. Awarding authorities should also pay attention to the types of forms required by the covered awarding authority in a given services procurement. Examples of the types of forms required or recommended strongly in public bids include the following: certificates of non-collusion; certificates of tax and reporting compliance; certificates of compliance with the Conflict of Interest Statute; and bid bonds, performance bonds, and payment bonds (if applicable). Some of these are required by statute, and some are locally mandated. Failure to include a given statutory form renders the bid or proposal fatal and nullifies any resulting contract.[4] Awarding authorities should also ensure that bidders or proposers are not listed on the Commonwealth of Massachusetts Debarment List. Finally, awarding authorities should ensure that any local charter, by-law, or ordinance provisions have been satisfied.

The foregoing points are critical to remember. There are obvious dangers in ignoring the Uniform Procurement Act. Ignorance brings the associated risk of a ten (10) taxpayer action, a bid protest to the Office of the Inspector General, or an injunctive proceeding in the Superior Court. Contracts may be lost in such disputes, requiring costly re-bidding or re-solicitation of proposals. As the Supreme Judicial Court has pointed out, a contract made in violation of the public goods and services procurement statutes will be held null and void.[5] To ensure that goods and services contracts remain valid for both public entities and private parties alike, covered awarding authorities need to follow procurement procedures scrupulously.

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3. Chapter 30B defines "a responsible bidder or offeror" as "a person who has the capability to perform fully the contract requirements, and the integrity and reliability which assures good faith performance." Chapter 30B also defines a "responsive bidder or offeror" as "a person who has submitted a bid or proposal which conforms in all respects to the invitation for bids or request for proposals."

4. As a general proposition, a covered awarding authority may (but is not required to) waive any non-statutory bidding requirements. Generally, these will be requirements imposed at the local level. Any waiver, however, must not result in unfairness in the process.

5. Phipps Prods. Corp. v. Massachusetts Bay Transp. Authy., 387 Mass. 687 , 691-692 (1982); Majestic Radiator Enclosure Co. v. County Commrs. of Middlesex, 397 Mass. 1002, 1003 (1986).

Navigating one's way through the foregoing framework does not need to be difficult. With the right legal guidance, any entity will be well equipped to handle the public goods and services procurement process in Massachusetts.

This constitutes information of a general nature and is not legal advice. For legal advice concerning a specific situation, please consult your attorne

THE RESURGENCE OF SALES BY COLLECTOR'S DEED AND TAX LIEN ASSIGNMENTS IN THE COMMONWEALTH: AUTHORITY, MECHANICS AND CHALLENGES

By John D. Finnegan, Esq.,Tarlow, Breed, Hart & Rodgers, P.C.

Despite signs of economic recovery, many municipalities in the Commonwealth are continuing to deal with lingering effects of the collapse of housing prices, prolonged high unemployment and ensuing declines in revenue and local aid. They are confronting soaring demands for spending on public workers' pensions and retirees' health care resulting in slashed services, payroll cuts and municipal employee layoffs.

The economic strain on local governments is forcing municipalities to enhance their efforts to obtain much-needed revenue, including through increased collection of delinquent real estate taxes. Cities and towns are not only becoming more aggressive in their efforts to collect, they are also finding more creative ways to do so. Traditionally, municipalities in the Commonwealth have relied upon the tax taking and subsequent foreclosure process in order to collect delinquent real estate taxes. While tried and tested, these are not the only methods of collection available to municipalities. Recently, some communities have turned to tax sales and tax lien assignments to augment their collection efforts. Though municipalities' authority to conduct tax sales and tax lien assignments in the Commonwealth are not the result of recent statutory additions, municipalities are re-discovering these less often used provisions to supplement the collection process.

Collection Overview

As an initial matter, real and personal property taxes are due as of July 1st of the year to which the tax relates.[1] However, interest accrues only if payments are not made by payment due dates.[2] These due dates differ depending upon whether the municipality has adopted a semi-annual or quarterly billing system.[3]

When a real estate tax remains unpaid, the Collector issues a demand for the delinquent taxes and mails the demand to the last, best address of the taxpayer.[4] Note that failure of the taxpayer to receive the demand will not invalidate tax or proceedings to enforce the tax.[5] If the taxes remain unpaid fourteen days after the demand is issued, the municipality may levy the taxes by sale or taking.[6]

Two Tracks: Collector's Deeds and Tax Takings

1. Collector's Deeds

The statutory authority for the issuance of collector's deeds has been in place, in its earliest form, since 1785. Historically, the issuance of collector's deeds as part of the collection process has been little utilized, since the advent of tax takings, as discussed further, below. Municipalities' issuance of collector's deeds did experience a revival during the 1970's, however, misunderstandings as to what a collector's deed actually conveyed led to the discontinuance of the practice. In that regard, the collector's deed conveys title to the property, *subject to right of redemption by holders of an interest in the subject property*.[7] The broader availability of information and a more sophisticated investor pool have led some municipalities to reinstitute the issuance of collector's deeds.

In order for a municipality to issue a collector's deed, notice of the sale must first be published[8] and posted in two (2) or more public places fourteen (14) days prior to the sale.[9] If the taxes remain unpaid, as of the date noticed, the Collector may sell, at public auction, the smallest undivided part of the land, which will bring in the balance of the outstanding taxes, interest & charges that have accrued on the property.[10] If the sale of an undivided part of the land will not satisfy the delinquency, or if there are no offers for such, the Collector may sell the entire land.[11]

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The Collector then issues a deed to the purchaser stating the cause of the sale, the purchase price, the name of person upon whom demand was made, and the places of posting and advertising.[12]

As with Instruments of Taking, title to the property that is subject to a collector's deed is held as collateral until the taxpayers' rights of redemption are foreclosed, through the judicial process outlined in Chapter 60 of the General Laws. Until that time, buyers have no right to possession of the subject property.[13] If there are no adequate bids, the municipality becomes the purchaser, via the statutory authority given to the collector.[14]

2. Tax Takings

Tax takings represent the more traditional avenue that municipalities in the Commonwealth utilize to collect delinquent real estate taxes. If taxes remain unpaid, fourteen (14) days after demand has been made, the Collector may take title to the property in the name of the municipality.[15] Notice of collector's intention to take the property must be served or published fourteen (14) days prior to the execution of an Instrument of Taking.[16] The Collector must also post notice in two (2) or more public places.[17] If the delinquency persists after date contained in the notice, the Collector may then execute an instrument of taking.

The Instrument of Taking must contain a statement of the cause of taking, a substantially accurate description of the parcel, the name of the assessed owner and the amount of taxes, interest and charges to the date of taking.[18] To be valid, the Instrument of Taking must be recorded within sixty (60) days of the date of taking.[19] Title to the property then vests in the municipality, subject to right of redemption.[20]

In those instances where the Collector executes an instrument of taking, or where the municipality becomes the purchaser under a collector's deed, taxes for subsequent fiscal years may, after demand, be certified by the Collector to the Treasurer without need for a subsequent sale or taking.[21]

Tax Lien Assignments

Once a property has been taken, through an instrument of taking, or where the municipality has become the purchaser under a collector's deed, the Treasurer of the municipality may institute proceedings to foreclose the taxpayers' rights of redemption. Alternatively, the Treasurer may assign a tax title on one or more parcels.[22] As with the other statutes governing tax collection, the statutory authority for assignment of a municipality's tax receivable is not new. Until fairly recently, however, municipalities in the Commonwealth had shied away from utilizing tax lien assignments as a collection tool. This aversion is likely the result of the fallout from the controversy surrounding Breen Capital Services Corporation's ("Breen Capital") efforts to collect certain assigned tax liens in the state of New Jersey during the 1990's.

While an in-depth analysis of the Breen Capital case is beyond the scope of this article, to provide some background, in 1992 Breen Capital had obtained over 2,500 Jersey City tax liens with a face value of over $43 million.[23] In a hybrid compensation system, the City received $25 million in cash and was to receive up to $19 million more, depending on the success of Breen Capital's collection efforts. However, between 1992 and 1995 Breen Capital was only able to collect approximately 27% of the outstanding taxes.[24] As a result, Breen Capital began to foreclose the liens in bulk, which resulted in long delays in the state office of foreclosures.[25] The delays resulted in new liens for subsequent tax years being issued, which enjoyed priority over the initial liens.[26] Overall, the city lost the additional $18 million to which it would have prospectively been entitled, had it not assigned the liens. Further, in December of 1999 a New Jersey trial court ruled that Breen Capital had violated state consumer protection laws relative to installment payment agreements Breen Capital had urged taxpayers to sign.[27] These agreements were not specifically authorized by statute and the trial court held that entry into such agreements had put the taxpayers in an unfair bargaining position.[28] Although the trial court was subsequently reversed on appeal, the award of summary judgment to the plaintiffs immediately caused a chill in the tax lien assignment industry, nationwide.[29]

In addition to events outside of the Commonwealth, there were certain internal inconsistencies within the statutory framework, which made the tax assignment process unattractive to investors. These inconsistencies were largely rectified with the enactment of Chapter 295 of the Acts of 2004. Chapter 295, which was approved on August 13, 2004, amended, *inter alia*, Sections 52, 62 and 63 of Chapter 60. Among other things, these amendments provided clarification relative to the

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redemption of assigned liens, including the interest rate to which the holder of an assigned tax lien is entitled. Under the prior version of the statute, assignees were limited to charging interest at the rate of 6.5% from the date of the assignment. Under the revised version, assignees are entitled to the same 16% interest rate available to municipalities.[30]

Notice

In order to hold a tax lien assignment auction, unlike auctions of foreclosed properties under G.L. c. 60 Section 77B, notice of a tax lien assignment auction must be both published and posted.[31] In that regard, fourteen (14) days before the auction, the Treasurer must publish notice of his or her intention to hold an assignment auction in a newspaper printed in the city or town.[32] If there are no publications within the municipality, notice must appear in a newspaper published in the county where the property lies.[33] In addition, the Treasurer must post notice of the proposed assignment in at least two (2) public places within the city or town.[34] Further, at least 10 days before auction, the Treasurer must mail notice of the intended assignment to the current owner of record at his/her last known address.[35] Note, however, that the failure of the taxpayer to receive the notice will not affect the validity of the assignment.[36]

Auction and Instrument of Assignment

On the appointed day, the Treasurer holds a public auction of the selected liens, individually, or in bulk. If any of the taxpayers have entered into a payment plan with the municipality, the liens that are the subject of those payment plans may not be assigned. However, the Treasurer may assign the lien or liens that are not the subject of a payment plan to the highest bidder. The winning bid must be for at least the amount the taxpayer would have to pay to redeem the parcel on the date of the auction.[37] While premiums – that is, amounts over and above the face value of the lien – may be bid, such premiums are "at risk" for the winning bidder, as discussed further below.

The winning bidder or bidders must submit payment in full to the municipality within two (2) weeks of the auction date. Full payment equates to the winning bid, plus tax title interest accruing between the auction date and instrument of assignment date, plus any premium bid.[38] The Instrument of Assignment ("IOA") must include the assignee's full legal name and address and the amount for which the property was assigned.[39] The IOA must be recorded within 60 days of execution to be valid. If so recorded, the IOA enjoys prima facie status as to all facts essential to the Assignment's validity.[40]

Redemption

The owner or other parties-in-interest may redeem the property by paying the assignee or the Treasurer the same amount they would have to pay to redeem the property, if the tax title had not been assigned.[41] As discussed above, the assignee is entitled to post-assignment tax at 16% *accruing on principal tax only*.[42] As mentioned, premiums are "at risk"; that is, the redeeming party need not pay the assignee any premium amount bid at auction. However, some municipalities, as an incentive to prospective investors, have instituted a policy to refund any premiums bid, in the event the property is redeemed.

If payment is made to the municipality's Treasurer, instead of the assignee, a $10 handling fee is required to be collected.[43] Though the statute allows the municipality's Treasurer to accept payment, in practice, many municipalities prefer to stay "out of the mix" following an assignment and redeeming parties are often directed to submit payment to the assignee. The municipality's Treasurer may not accept partial payments for an assigned instrument of taking.

Defects and Invalidity

1. Defective Collector's Deeds

In the event that a Collector's Deed is determined to be defective, the purchaser may surrender the deed to the municipality or, alternatively, may assign his/her interest to municipality.[44] Such claims must be made within six (6) months of the date of the collector's deed.[45] Upon surrender or assignment of the deed, the municipality must reimburse the purchaser for the amount paid, plus interest at eight percent (8%) per annum.[46]

2. Invalid Takings

In some instances it will subsequently be determined that an assigned instrument of taking is defective. In such instances, assignees of defective instruments of taking also are entitled to recourse against the municipality. However, in the case of assigned instruments

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of taking, the defect must be ascertained by a court of competent jurisdiction. If so ascertained, the clerk of the court is
required to issue a certificate to the assignee stating such.[47] Upon receipt of such a clerk's notice, the municipality is required to reimburse the holder of the defective taking the amount paid, plus interest at the rate of six percent (6%) for a maximum of two years from the date of assignment.[48]

Post-sale and post-assignment taxes

One concern relative to the issuance of collector's deeds and the assignment of instruments of taking is the accrual of post-sale or post-assignment taxes. Should real estate taxes go unpaid following the issuance of a collector's deed or assignment of an instrument of taking, the municipality may issue a new collector's deed, or new instrument of taking.[49] In such instances, the prior collector's deed or the assigned tax title will be subordinate to the new collector's deed or instrument of taking for the subsequent taxes and charges. Unlike purchasers of bulk tax receivables under M.G.L. c. 60, § 2C, buyers of individual collector's deeds and assignees of instruments of taking have no automatic right to purchase the new lien. Recently, some municipalities that have held such sales or assignment auctions have contractually required the purchasing party to pay such post-sale or post-assignment taxes. However, the enforceability of such arrangements has yet to be tested. Further, in the event of a breach, the municipality's remedy – other than to prohibit the offending party from participating in future sales or assignment auctions – is unclear.

If post-sale or post-assignment taxes are paid by the buyer or assignee, that party is entitled to receive a certificate from the municipality stating such.[50] However, the certificate issued by the municipality is not a lien, in and of itself, and these subsequently paid taxes do not become part of prior collector's deed or the assigned instrument of taking. There are no statutory provisions requiring a redeeming taxpayer to reimburse the party who had paid such subsequent taxes. Further, unless an overpayment occurred, the municipality would be unable to refund these subsequently paid taxes to the buyer or assignee. It remains to be seen whether a court would require that the redeeming party reimburse the certificate holder as a matter of equity, or whether the payment of such subsequent taxes is more properly categorized as a business risk undertaken by the buyer or assignee in an effort to protect its lien priority. In any event, if the buyer or assignee is entitled to reimbursement for payment of subsequently accrued taxes, there are no statutory provisions which would allow the certificate holder to collect interest on the paid amounts.

Conclusion

Clearly, non-traditional methods of collecting delinquent real estate taxes, such as the issuance of collector's deeds and the assignment of instruments of taking, are useful additions to a municipality's arsenal of collection tools. Though each method offers a quick cash infusion, municipalities must trade-off the accrual of interest under the very favorable statutory rates of 14% and 16%, in order to take advantage of such an infusion. In today's rate environment, that trade-off may be too costly. In addition, where the economy has shown signs of improving, it remains to be seen whether the use of collector's deed sales and assignments of instrument of taking will continue to trend. However, municipalities should continue to consider these methods when crafting their global collection strategies.

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1. M.G.L. c. 59, § 57
2. Id.
3. M.G.L. c. 59 § 57C
4. M.G.L. c. 60 § 16
5. Id.
6. M.G.L. c. 60 § 37
7. M.G.L. c. 60 § 45
8. M.G.L. c. 60 § 40
9. M.G.L. c. 60 § 42
10. M.G.L. c. 60 § 43
11. Id.
12. M.G.L. c. 60 § 45
13. Id.
14. M.G.L. c. 60 § 48
15. M.G.L. c. 60 § 53
16. Id.
17. Id.
18. M.G.L. c. 60 § 54
19. Id.
20. Id.
21. M. G.L. c. 60 § 61
22. M.G.L. c. 60 § 52
23. Paul Beckett, *Foreclosed: A Play on Tax Liens By Wall Street Types Blows Up in Their Face*, The Wall Street Journal, November 30, 2000
24. Id.
25. Id.
26. Id.
27. Varsolona v. Breen Capital, 180 N.J. 605, 853 A. 2d 865 (N.J. 2004)

Continued on page 9

28. Id.
29. Id.; Beckett, *supra.*
30. Chapter 295 of the Acts of 2004, §§ 6-8
31. M.G.L. c. 60 § 52
32. Id.
33. Id.
34. Id.
35. Id.
36. Id.
37. Id.
38. Id.
39. Id.
40. Id.
41. M.G.L. c. 60 § 62
42. Id.
43. M.G.L. c. 60 § 63
44. M.G.L. c. 60 § 46
45. Id.
46. Id.
47. M.G.L. c. 60 § 84A
48. Id.
49. M.G.L. c. 60 § 61
50. M.G.L. c. 60 § 60

A REVIEW OF "APEX WITNESSES CLAIM THEY ARE TOO BIG TO DEPOSE"

By: Jordan L. Shapiro, Esq. Past President, CSTCA Association and former City Solicitor, Malden

In the last edition of the Quarterly I wrote about how to take depositions and reviewed a decent article about "preparation" for a deposition. The fall 2014 edition of the ABA Litigation Journal (Vol 41, No. 1, Fall 2014) covered the issue of how to take, or in some cases, avoid taking the deposition of a highly placed corporate officials. While the focus of the article was on deposing individuals in the upper echelon of private corporations related to federal court litigation, the article provided excellent, practical and useful information for the municipal lawyer, defending a board, a municipal official or a department head.

The article by Hon. Lain D. Johnston, who is a magistrate judge with the U.S. District Court for the Norther District of Illinois, Rockford, wrote the six page article entitled "Apex Witnesses Claim They Are Too Big to Depose."

The article confirms that, if a witness is a single parent with two jobs, a CEO of a $20 million corporation, or "the police chief for a mid-sized city," the most likely to be deposed is the single parent. One early paragraph stated what most litigators know and think about:

"Deposition disputes are common. Lawyers fight about attorney shenanigans during depositions, battle about the location of depositions and have cage matches about who can be physically present during a deposition. Rarely do witnesses seek and enjoy being deposed. On the contrary, for most witnesses, depositions are annoying and time-consuming and they interfere with a myriad of other matters the witness would rather be doing."

Preventing an opponent from taking a deposition can be a huge victory because avoidance will prevent possible harmful facts from being disclosed. One strategy to avoiding a deposition is to claim the deponent is "too important; namely that the deponent is at the highest echelon– the apex– of an organization." But, if the deposition relates to the deponent's personal actions, then even the president of the United States won't avoid a deposition. See *Clinton v Jones*, 520 U.S. 681 (1997).

The author states that federal courts rarely prevent a litigant from taking a deposition. The philosophy of the rules allows litigants broad discovery but he points out that "Rule 26(b)(2)(C)(iii) explicitly recognizes that discovery should be proportionate to the case."

Many federal courts recognize the apex doctrine to limit a party's ability to depose a witness. Some courts rely upon Rule 26 itself to determine whether these witnesses should be deposed. See, e.g., *Serrano v. Cintas Corp.,* 699 F. 34d. 884, 901 (6thCir. 2013). Under these rules, the court can prevent a deposition of a witness at the top of the organizational structure who has no unique, firsthand knowledge of the facts at issue, or when a party fails to exhaust "other less intrusive discovery methods." See *Powertech Tech. V. Tessera, Inc.,* 2013 U.S. Dist. LEXIS 105275, at *4 (N.D. Cal. 2013). It is unclear whether the witness's knowledge needs to be both personal and unique. See *HCP Laguna Creek CA, LP v. Sunrise Senior Living Mgmt., Inc.,* 2010 U.S. Dist. LEXIS 21400, at *13 (M.D. Tenn. 2010). The doctrine presumes that depositions of apex witnesses are intended to abuse, harass, or force settlements. See *Groupion LLC v. Groupon Inc.,* 2012 U.S. Dist. LEXIS 12684 at *6 (N.D. Cal. 2012). These witnesses are so busy that they should not be bothered with a deposition except in extraordinary circumstances. *Minter v. Wells Fargo Bank,* 258 F.R.D. 118, 126 (D. Md. 2009).

High-ranking government officials may be able to avoid depositions. See *In Re Fed. Deposit Ins. Corp.,* 58 F. 3d

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1055 (5th Cir. 1995). Unless the official has first-hand knowledge, such a deposition is likely to be precluded. Otherwise, high ranking government officials would "spend a disproportionate amount of time tending to litigation," the author suggests. See *Lederman v N.Y.C. Dep't of Parks & Recreation,* 731 F. 3d 199, 203 (2nd Cir 2013). For other cases relating to the apex doctrine for high ranking government officials, see *Chevron Corp. V Donzinger,* 2013 U.S. Dist. LEXIS 65335 at *6 (S.D.N.Y. 2013); *City of Fort Lauderdale v Scott,* 2012 U.S. Dist. LEXIS 34719 at *5 n.4 (S.D. Fla 2012).

Note, however, that the apex doctrine does not apply to Rule 36 (b)(6) depositions. See *Ingersoll v Farmland Foods, Inc.,* 2011 U.S. Dist. LEXIS 31872 at *22 (W.D. Miss. 2011). That is because under Rule 36(b)(6), the responding party can choose which witnesses will appear to answer questions on matters identified in the notice. So, an apex witness is not necessary the witness that the responding party will choose to appear.

How high up the chain does the witness need to be, in order to be excused from a deposition? Sometimes, the ability to determine that a deponent is an "apex witness" is easy. For example, Steven Jobs of Apple was immune under *Affinity Labs of Texas v. Apply Inc.,* 2011 U.S. Dist. LEXIS 53649 (N.D. Cal. 2011). And Arnold Schwarzenegger was at the apex of California government in *Thomas v. Cate,* 715 F. Supp. 2d 2012, 1049 (E.D. Cal. 2010).

The author pointed to cases dealing with mayors, police chiefs and city managers, that also qualify. See *Bogan v. City of Boston,* 489 F. 3d 417, 423 (1st Cir. 2007). And courts consider job duties, tables of organization, and reporting structures, too (*Bolden v FEMA,* 2008 U.S. Dist. LEXIS 2640, at *10 (E.D. La 2008).

The article goes on to remind practitioners to file for a protective order under Rule 26(c) to prevent the deposition of high government officials. Such motions must be filed in sufficient time for the court to rule on that motion before the scheduled deposition. See *Chick-Fil-A, Inc vs CFT Dev., LLC,* 209 U.S. Dist. LEXIS 34496 at *2, n.1 (M.C. Fla 2009). Use good faith and common sense, the author said. The suggestion that the parties agree to a brief stay while they try to work out their differences or get court intervention was a good one.

The party seeking to oppose the deposition has the burden of showing good cause why the protective order should be granted. But cases were "all over the place." Some courts simply applied Rule 26(c) and required the movant to show good cause. See *Powertech Tech, Inc. V Tessera, Inc.,* 2013 U.S. Dist. LEXIS 105275 at *5 (N.D. Cal. 2013). Other courts placed the burden on the proponent of the deposition. See *Groupion LLC v Goupon Inc.,* 2012 U.S. Dist. LEXIS 1284 at *6 (N.D. Cal. 2012). Other courts used burden-shifting procedures. See *Spadaro v City of Miramar,* 2012 U.S. Dist. LEXIS 117925 at *6-7 (S.D. Fla. 2012); *Naylor Farms, Inc., v. Anadarko OGC Co.,* 2011 U.S. Dist. LEXIST 68940 at *4-8 (D. Colo 2011).

The Courts sometimes struggled with whether, in response to an interrogatory, either side identified an apex witness as a person with knowledge of facts relating to the litigation. See *Moore v. Weinstein, Co.,* 2011 U.S. Dist. LEXIS 75046 at *3 (M.D. Tenn. 2011); *Cannon v. Burge,* 2007 U.S. Dist. LEXIS 60788 at *9 -10 (N.D. Ill 2007); *WebSide Story, Inc., v NetRatings., Inc.,* 2007 U.S. Dist. LEXIS 20481 at *11-15 (S.D. Cal. 2007).

Submitting a "know-nothing" affidavit helped sometimes. *City of Fort Lauderdale v Scott,* 2012 U.S. Dist LEXIS 34719 at *5 n. 4 (S.D. Fa 2012); *Degenhart v Arthur State Bank,* 2011 U.S. Dist. LEXIS 92295 LEXIS 20017 at *3-4 (S.D.N.Y. 1999).

How busy does one have to be in order to avoid a deposition? How long does one have to be busy in order to cancel, rather than simply just delay a deposition? Can other discovery devices suffice? Perhaps additional interrogatories or written depositions will work. Courts often will allow apex depositions but impose certain restrictions. Length and scope of the deposition or the time and location convenience to the witness and organization can be helpful limitations. Often, completion of lower level employee depositions was required first. This article contained many case cites supporting the comments in this paragraph.

If you decide to try to prevent a deposition of an apex municipal employee, you have to be sure to file the motion in a timely manner. See e.g.., *Haviland v Catholic Health Initiatives– Iowa,* 692 F. Sup. 2d 1040 , 1044 (S.D. Iowa 2010); *In re Sulfuric Acid Antitrust Litig.,* 231 F. R.D. 331 , 332 (N.D. Ill. 2005).

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The article had many suggestions for municipal counsel opposing depositions. The author advises counsel to meet with the witness promptly to determine whether opposing the deposition is appropriate or necessary; and to initiate a Rule 26(c)(1) conference with the proponent quickly. If that fails to produce an agreement, then, assuming the judge does not have an informal discovery dispute procedure, the opponent should quickly file a motion for a protective order under Rule 26(c). Reasoned arguments are imperative. Counsel must explain why the apex deposition is unnecessary, harassing, or unduly burdensome, or is being used for an ulterior purpose and explain why it's not relevant (alto relevancy arguments are difficult, due to the expansive definition of "relevance" in deposition practice). Include affidavits and other deposition transcripts. Show the witness's time commitments and lack of knowledge. Instead of just saying the witness knows nothing, explain why the witness does not have knowledge, i.e. others were delegated to handle the particular matter. Show the judge good faith efforts to resolve the issue. Provide evidence of an proposals of alternatives to the apex deposition, such as offers to answer additional interrogatories, provide a Rule 30 (b)(6) deposition, or respond on written questions under Rule 31. These are all good reminders when faced with a difficult opponent seeking to depose a high government official.

2014 MMLA ANNUAL MEETING AND CONVENTION, RED JACKET BEACH RESORT, SOUTH YARMOUTH, MA

By: Angela D. Atchue, Esq.

MMLA's Annual Meeting and Convention was held in South Yarmouth, Massachusetts at the Red Jacket Beach Resort on October 16—18. The Meeting began Thursday afternoon with an Environmental Law Update for municipal attorneys, presented by Nancy Kaplan, General Counsel for the Department of Environmental Protection, and attorneys Gregor I. McGregor of McGregor & Associates, P.C. and Kathleen E. Connolly of Murtha Cullina. Later that evening, MMLA members enjoyed dinner at the Red Jacket Beach Resort followed by a municipal potpourri of hot topics and current legal issues. On Friday, the Massachusetts Attorney General's Office presented, "The False Claims Act" and the discussion led by Assistant Attorney General Cassandra Arriaza and Assistant Attorney General Julia Bell Andrus engaged the attendees and started the discussion for a focus group to examine the role of a municipality as an individual under the Act. Saturday afternoon followed with presentations on the Disability Law and Issues Facing Municipalities led by Patricia Correa, Associate Town Counsel, Brookline Law Dept. And, back by popular request, Suffolk University Law School Professor Robert H. Smith taught the constitutional law program, covering US Supreme Court decisions of importance to municipal counsel. Thereafter, Donald Rider, Marlborough City Solicitor, and Jonathan Sablone of Nixon Peabody, LLP updated attendees on municipal trial practice and electronically stored information (ESI). The day concluded with dinner at the Blue Water Inn and a tribute to the 100th year anniversary of the Cape Cod Canal provided by William Burbank an architect, author and historian on his recently published book entitled, "Reflections from the Cape Cod Canal." Saturday morning began with an informative and timely presentation on Public Private Partnerships for Massachusetts Communities jointly provided by Anatoly M. Darov and Matthew G. Feher of Burns & Levinson, LLP. The afternoon concluded with attorneys Jonathan D. Witten, Mark Bobrowski of Blatman, Bobrowski & Mead, LLC and Barbara J. Saint Andre of Petrini & Associates, P.C. covering the latest updates on zoning and land use.

MMLA members, also, enjoyed the sites of Cape Cod, including the 14th Annual Wellfleet Oyster Festival, and Cape Cod's Restaurant Week. The fall weather was warm and allowed members to walk and run along the beach, while others considered a swim and some ventured upon a boat ride along the nearby Bass River. If you were not able to attend this year's annual weekend, be sure to mark your calendar for next October, as MMLA will soon confirm its plans for the Annual Meeting in the new year.

UPCOMING MMLA 2015 EVENTS

January 29, 2015
Real Property Hot Topics and Procurement – Acquisitions and Dispositions Using MGL c.30B, section 16
Location: TBD

February, 2015
No meeting scheduled due to school vacation conflicts.

March 18, 2015
MCLE-MMLA 13th Annual Municipal Law Conference, MCLE Conference Center, Boston. Day-long seminar on hot topics in municipal law.

March, 2015
MMLA Program TBD
Location: Holy Cross College, Worcester

April 23, 2015
MMLA Annual Construction Law Seminar
Location: TBD

UPCOMING LEGAL SEMINARS OF INTEREST TO MUNICIPAL LAWYERS

January 8, 2015, 9 am to 4:30 pm
MCLE Basics Plus! Civil Depositions Practice, MCLE Conference Center, Boston

January 14, 2015, 9 am to 12pm
Effective Appellate Advocacy, MCLE Conference Center, Boston

January 21, 2015, 2 pm to 5 pm
Top 25 Critical Cases Every Real Estate Litigation, Title, Land Use & Environmental Lawyer Must Know MCLE Conference Center, Boston

February 9, 2015, 9:30 am to 4:30 pm
MCLE Basics Plus! School Law, MCLE Conference Center, Boston

February 25, 2015, 9 am to 12pm
Top 25 Key Cases Every Employment Litigator and Counselor Must Know, MCLE Conf. Center, Boston

March 5, 2015, 4 pm to 5:30 pm
Federal Court Judicial Forum 2015
John J. Moakley U.S. Courthouse,
1 Courthouse Way, Boston. For more info call 800-966-6253.

April 24-27, 2015
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IMLA's 2015 Mid-Year Seminar

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