

# **WHAT DO YOU MEAN I STILL OWN IT?**

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## **When Property Becomes a Burden**

The rise and fall of land speculation over the past decade left real estate investors owing more on their real estate than the real estate was worth. Many sought relief in bankruptcy court and expected mortgage holders to pursue foreclosure. Others tried to issue deeds in lieu of foreclosure, or work with their lenders to transfer title to their properties. Mortgage holders also realized the low value of the properties and either did not pursue foreclosure or initiated and stopped foreclosure proceedings. They do not want to maintain the properties, but they usually do not want to abandon their mortgage interests.

Property owners and their counsel often do not understand that even if their debt is discharged in bankruptcy, and even if they have filed an intention to abandon real estate in bankruptcy court, they still own the real estate until there is a transfer of title. With the mortgage lien still affecting the property, the owners are unlikely to transfer clear title.

This does not change the fact that the City must issue its notices to property owners. The City has to send orders to repair or maintain property to the owners of record as well as others with a substantial interest in the property. The City may only seek enforcement of orders and collection of civil penalties against owners and may not pursue collection or seek injunctive relief directly against mortgage holders.

## **How Does Code Enforcement Affect Properties and Owners?**

Before a Code Enforcement measure can affect a property or its owner, the Department of Code Enforcement must first issue an order concerning a property. Most orders issued are set for an administrative hearing. IC 36-7-9-5(a) The order must give the owner a date certain by which the action ordered is to be completed. The hearing date is usually the deadline for the ordered action.

At the administrative hearing, the hearing authority may: affirm the order; rescind the order; or modify the order. The modification of the order must generally be less stringent than the original order. Repair orders are commonly modified to give the owner additional time to complete repairs, and demolition orders are often modified to repair orders if the owner presents a reasonable plan and meets certain conditions.

### **Civil Penalties**

Where an owner willfully fails to comply with the order, the hearing authority may impose a civil penalty up to \$5,000. Civil penalties may be imposed immediately at hearings or at the end of a period established at the hearing.

The hearing authority may postpone imposition of a civil penalty for a reasonable time and then reduce or strike the penalty if the work necessary to comply with the order has been done.

The hearing authority may retain jurisdiction to impose an additional civil penalty if: the owner does not make significant progress on the action ordered; **and** the premises have a negative effect of property values and quality of life in the area, **or** the property requires local government services in excess of what ordinary properties require.

The civil penalty may be automatically imposed at a later date if the owner fails to comply with the order as modified by the hearing authority. The conditions placed on avoiding a penalty may include keeping the property secure and clean, obtaining permits as required, and scheduling and passing inspection of the property by established deadlines. Conditions may also include requirements to provide information such as the name of a purchaser, record a deed, register property if an ordinance requires it, keep walks clear, install fire alarms, and pay outstanding board up invoices.

The hearing authority will usually impose condition upon modifying a demolition order to a repair order. In addition to the above conditions, the owner is generally required to post a bond which will be forfeited if the repair deadlines or other conditions are not met.

In *Freidline v. Civil City of South Bend*, 733 N.E.2d 490 (Ind. Ct. App 2000), the Court determined that the civil penalty does not violate due process or impose criminal sanctions.

## **Continuous Enforcement Orders**

If an order is affirmed or modified the hearing authority is to issue a continuous enforcement order, which is defined as an order that is issued for compliance or abatement that remains in full force and effect without further requirements to seek additional compliance or orders, that authorizes specific ongoing compliance and enforcement activities if a property requires reinspection or additional periodic abatement, can be enforced, including assessment of fees and costs, without additional notice or hearing, and authorizes the enforcement authority to assess ongoing costs from any party that is subject to the order. I.C. 36-7-9-2; 36-7-9-7. This could easily be used to collect costs to secure a property that has already been ordered secured or to clean a property without having to send additional notices to secure or clean it.

## **Judgments to Collect Civil Penalties or Costs**

The City has the option to file an action known as a record for collection of civil penalty, and seek judgment in the amount of civil penalty imposed by the hearing authority. The owner may file an objection and request a hearing. However, at the hearing the issues which could have been raised in an appeal of the administrative decision may not be entertained in an action for collection.

A judgment for a civil penalty or costs is a lien on all the real and personal property of the person named. The lien on the real property is perfected by entry of the judgments, and the lien on personal property is perfected by filing a lis pendens notice.

## **Certifying Civil Penalties or Costs as Special Assessments**

Civil penalties as well as costs for work the City must perform to correct code violations may be certified as special assessments, added to tax bill and collected ahead of the mortgage. The City has this option in addition to an action seeking judgment to collect the civil penalty or costs.

When a civil penalty is imposed at a hearing, the City may send notice pursuant to I.C. § 36-7-9-13.5, 15 days after the civil penalty is due, giving warning that the City may certify the amount due as a special assessment if it is not paid within 30 days. After 30 days, the amount due may be certified to the Auditor.

If a civil penalty under subsection (e) is unpaid for more than fifteen (15) days after payment of the civil penalty is due, the civil penalty may be collected from any person against whom the hearing officer assessed the civil penalty or fine. A civil penalty or fine may be collected under this subsection in the same manner as costs under section 13 or 13.5 of this chapter. . . .

I.C. § 36-7-9-7(j). I.C. § 36-7-9-13.5 provides for collection of costs, and, pursuant to I.C. § 36-7-9-7, civil penalties, by giving notice and by certifying the costs on the tax duplicate as a special assessment.

(b) If all or any part of the costs . . . remain unpaid for any unsafe premises . . . for more that fifteen (15) days after completion of the work, the enforcement authority may send notice . . . to each person who held a known or recorded fee interest, life estate interest, or equitable interest of a contract purchaser in the unsafe premises. If the notice is sent, the enforcement authority shall also send notice to any mortgagee with a known or recorded substantial property interest. The notice must require full payment of the amount owed within thirty (30) days.

(c) If full payment of the amount owed is not made less than thirty (30) days after the notice is delivered, the enforcement officer may certify the following information to the county auditor:

(1) the name of each person who held a known or recorded fee interest, life estate interest, or equitable interest of a contract purchaser in the unsafe premises.

(2) the description of the unsafe premises, as shown by the records of the county auditor.

(3) The amount of the delinquent payment, including all costs described in section 12 of this chapter.

(d) The county auditor shall place the total amount certified under subsection (c) on the tax duplicate for the affected property as a special assessment. The total amount, including accrued interest, shall be collected as delinquent taxes are collected.

I.C. § 36-7-9-13.5(b), (c), and (d).

Special assessments are not extinguished by transfer of property or tax sale. See I.C. §§ 36-7-9-7 and 36-7-9-13.5. In 2006 the Indiana General Assembly gave cities additional methods to address ongoing problems of substandard properties. Civil penalties imposed at Code hearings, and costs the City incurs to correct maintenance violations can become special assessments on the property tax bill if they are not paid within the statutory period. I.C. §§ 6-1.1-23 through 6-1.1-25.

### **The Foreclosure That Did Not Happen**

In many cases property owners who receive orders to maintain or demolish their properties report that the mortgage holder has possession of the

property. This may be the case even when no foreclosure action has been filed, let alone when an action was filed but no sheriff sale has been held. Owners state that the locks have been changed or they have been told not to enter the property to which they still hold title. The owners think that they no longer have title, possession or the right to enter the property and make repairs or maintain it.

These owners often want to donate the property to the City, but with the mortgage lien intact the City is not in a position to accept the offer. The owners often have attempted to work with the mortgage holder and to issue a deed in lieu of foreclosure, but they cannot get a response from the mortgage holder.

### **The Foreclosure That Happened But Made No Difference**

If a Code Enforcement order is issued and the property becomes the subject of a foreclosure action, the order remains intact and affects the right of any person taking title to the property. Under IC 36-7-9-26(b), “A person who takes an interest in unsafe premises that are the subject of a recorded order takes that interest . . . **subject to the terms of the order . . . .**”

When the City is asked to consent to default entries and agreed judgments in foreclosure actions, it often adds language to the proposed judgment, providing that any order issued under the Unsafe Building Act, IC 36-7-9, remains intact and is the responsibility of the person taking title to the property. The City also asks that the judgment provide that proceeds of the foreclosure sale be paid, first to the costs of the action, then to the taxes and any special



assessments, etc., and also to recognize any inferior interest the City may have, such as small claims or other judgments.

In other words, where title to a property is transferred in a foreclosure action, the Code Enforcement order transfers with the title. IC 36-7-9-27 requires the person who has been issued notice of an order relative to unsafe premises and have not complied with the order must give to the enforcement authority (Code) the name and address of the new owner within 5 days after transfer. The person conveying title must also give the transferee full information on the order before transferring the title.

### **The Bankruptcy That Did Not Help**

Rental property owners seeking bankruptcy relief often file an intention to abandon the properties they own, and assume that the mortgage holders will file in rem foreclosure actions and obtain title to them. In the aftermath of the mortgage crisis, many mortgage holders do not seek foreclosure and the debtor remains the property owner in spite of the intention to abandon the property. The debtor/property owner is often surprised to learn that he or she still owns the property, especially if the debts have been discharged. In many cases their own attorneys threatened to seek bankruptcy sanctions against the City when the City sent notices of trash or tall grass and stated that the owner should take care of the property.

Unsafe Building Act orders are not affected by the bankruptcy of the property owner if they are issued pursuant to police power and do not constitute

collection of a pre-petition debt. 11 U.S.C. § 362(a), (b)(4). *In re Herrera*, 194 B.R. 178 (Bankr. N.D. Ill. 1996). The Bankruptcy Court's opinion in *Phillips v. City of South Bend*, 368 B.R. 733 (Bankr. N.D. Ind. 2007), confirms the City's position that property owners remain responsible for maintenance so long as they are the owners, notwithstanding intentions to abandon.

In *Phillips v. City of South Bend*, Judge Dees clarified that the property owner's ongoing obligation to maintain property is very distinct from the pre-petition debt that is subject to automatic stay and that can be discharged by the bankruptcy court.

The *Phillips* Court noted that the City's police power to order an owner to clean property and enforcement of its ordinances governing trash and public nuisances was not an attempt to collect a debt. Moreover, the exercise of the City's police power was not an action that should be stayed in bankruptcy. The Court cited *In re Kinnise Diversified Corp*, 34 B.R. 237, 245 (Bankr. S.D.N.Y. 1983): "The provisions of the Bankruptcy Code do not and are not intended to provide a mechanism for relieving property owners of the unpleasant effects of valid local laws embodying police and regulatory provisions."

### **Tax Sales, Orders**

A civil penalty or a cost of maintaining property that is certified to the Auditor as a special assessment will be added to the property tax bill. If the civil penalty or cost was added to the tax bill before the sale the tax sale buyer should be required to pay it to obtain title.

However, costs or civil penalties that may be assessed after the tax sale and before the tax sale buyer takes title (during the redemption period) become problematic. Code Enforcement gives notice to the tax sale buyer of any orders and hearings so that person may attend the hearing and set forth the plans to comply with the order if the buyer is able to take title after the redemption period. If the buyer brings in plans the City is unlikely to impose a civil penalty which would affect the title. The tax sale buyer is not generally interested in taking title, however, and would prefer to make a profit on redemption. If the tax sale buyer does take title the buyer usually wants to sell the property as soon as possible and does not want to repair or maintain it. For this reason, a civil penalty assessed between the time of the tax sale and the time the redemption period expires should remain with the property. Under 6-1.1-25-4.6, which provides for issuance of a tax deed, the City's special assessment remains intact.

A tax sale purchaser may petition for a tax deed if the property is not redeemed. Not later than 61 days after the petition is filed, the court is to enter an order directing the county auditor to issue a tax deed if the court finds that the redemption period has expired, the property has not been redeemed and, except for certificate sales under IC 6-1.1-24-6.1, all taxes, special assessments, penalties and costs have been paid. As the City receives notice of the petition for a deed, it should determine whether taxes and special assessments were paid. Any special assessments imposed after the tax sale should be paid.

“A tax deed executed under this section vests in the grantee fee simple absolute, free and clear of all liens and encumbrances created or suffered before or after the tax sale except those liens granted priority under federal law, and the lien of the state or a political subdivision for taxes and special assessments that accrue subsequent to the sale. . . .”

IC 6-1.1-25-4.6(g).

A separate Indiana Code provision allowing for placing a lien to collect costs and penalties is I.C. 36-1-6-2. However, under that provision, the municipal corporation is required to release a lien filed with the county recorder after the recorded date of conveyance of the property, and delinquent fees incurred by the seller upon receipt of a written demand from the purchaser or title company representative stating that the delinquent fees were not incurred by the purchaser as a user, lessee or previous owner and that the purchaser has not been paid by the seller for the delinquent fees. This provision has been the basis for many demands to release civil penalties in the tax sale context, and its application in that context is uncertain.

### **Certificate Sales and Eliminating Code Liens**

Properties not sold at the fall tax sale under are offered at the certificate sale held in the spring. IC 6-1.1-25-6.1 At that time the County exercises its option to eliminate the liens and reduce the amount owed in order to sell the property. Some parcels may sell for \$25.00. Thus, the City’s special assessments may be eliminated by the County at the certificate sale.