



Board Agenda Item 10

DATE: May 1, 2018

TO: Board of Supervisors

SUBMITTED BY: Oscar J. Garcia, CPA, Auditor-Controller/Treasurer-Tax Collector

SUBJECT: Hearing on Rescission of March 2014 Tax Sale of APN 487-150-26S

RECOMMENDED ACTION(S):

- 1. Conduct hearing on rescission of the County's sale of APN 487-150-26S, located at 2696 S Maple Fresno, at the County's March 7 - 10, 2014 sale of tax-delinquent properties; and**
- 2. Make the findings required by Revenue and Taxation Code section 3731 and adopt a resolution approving the rescission of the County's sale of APN 487-150-26S.**

During the County's annual sale of tax-defaulted properties on March 7 - 10, 2014, the County sold property identified by APN 487-150-26S (Property). The Property is contaminated by hazardous materials and the purchaser sued the County for the cost of cleanup (estimated to exceed \$500,000). The purchaser alleges that the County undertook an obligation to notify prospective purchasers of the contamination, but did not do so.

ALTERNATIVE ACTION(S):

The purchaser of the Property at the County's March 2014 tax sale has sued the County for damages for breach of contract in this matter, as described below. If your Board chooses not to rescind the sale, that lawsuit would proceed, also as described below.

FISCAL IMPACT:

If the Board rescinds the sale, then the County would be required to issue a refund to the purchaser, JHS, JCH, & DBH Family Limited Partnerships (Purchaser) of the amount paid as the total purchase price at the tax sale (\$460,000.00), plus interest at the greater of 3% annually or the County pool apportioned rate from the date of the purchase of the property at the tax sale until the date of the rescission. The tax sale proceeds for this property are being held in the Property Tax Collection Fund (Fund 1150, Subclass 19210). The interest due will be distributed from the Tax Loss Reserve Fund (Fund 1150 Subclass 19240). Interest due through April 30, 2018 is estimated to be \$57,271.11. If the order to rescind were to occur on a later date, the amount of interest would be higher. The Purchaser would not be entitled to any other costs or damages.

DISCUSSION:

The Property is a 14-acre parcel located at 2696 South Maple Avenue, in Fresno, and developed with a 130,000 square foot industrial building. The Property is contaminated with hazardous materials. Ordinarily, such a property would be identified as contaminated on the auction website for the County's tax sale. Due to a clerical error, the Property was not so identified.

The Purchaser bid the minimum amount of \$460,000 for the Property at the County's March 2014 tax sale, and won the auction. There were no other bidders for the Property. The minimum bid amount is the amount necessary to cover the amount of the defaulted taxes, delinquent penalties and costs, redemption penalties, a redemption fee, and costs of the sale.

A few months after the tax sale, in December 2014, the Purchaser alleges that it received a notice from the Regional Water Quality Control Board, Valley Region, stating that the Property was contaminated and that the estimated cost of cleanup exceeded \$500,000. Instead of petitioning your Board for rescission and a refund, however, the Purchaser in March 2015 presented a claim for damages.

The Purchaser based its March 2015 claim for damages on alleged breach of contract by the County. Before the tax sale, the County published a "Terms of Sale" document with information for all potential bidders. That document included information about the dates and times of the tax sale auction, where to find property maps, and procedures for deposit and purchase. The document also included various admonitions, such as:

- "Prospective purchasers are urged to examine the title, location and desirability of the properties available to their own satisfaction prior to the sale. **ALL PROPERTIES ARE SOLD AS IS.** The County of Fresno makes no guarantee, express or implied, relative to the title, location or condition of the properties for sale."
- "The sale of these properties should not, in any way, be equated to real estate sales by licensed salesmen, brokers and realtors. The Fresno County Auditor-Controller/Treasurer-Tax Collector cannot guarantee the condition of the property nor assume any responsibility for conformance to codes, permits or zoning ordinances. **You should inspect the property before investing. The burden is on the purchaser to thoroughly research, before the sale, any matters relevant to his or her decision to purchase, rather than on the county, whose sole interest is the recovery of back taxes.**"
- "No warranty is made by the County, either expressed or implied, relative to the usability, the ground location, or property lines of the properties. The exact location, desirability, and usefulness of the properties must be determined by the prospective purchaser."

The "Terms of Sale" also stated the following:

- **"NOTICE OF CONTAMINATED / POSSIBLE CONTAMINATED PROPERTIES"**

When we become aware of properties on our sales list that are known or suspected to be contaminated, the Asset Page will identify these properties and the Lead Agency's name and address where all available information may be reviewed. **DO NOT** bid on these properties unless you understand the issues related to contaminated properties. Prior to bidding, you should contact your attorney regarding the possible purchase of contaminated properties."

All emphasis by capitalization, boldface, and underlining shown above is as it appeared in the original "Terms of Sale" document.

Because of the statement in the "Terms of Sale" document regarding contaminated and possibly contaminated properties, the Purchaser alleged in its claim for damages that the County became "contractually obligated to disclose known or suspected environmental contaminations of the [Property] on the 'Asset Page' related to the subject auction." (Claim for Damages, March 26, 2015.) Due to a clerical error by the County, the Property was not listed as contaminated on its "Asset Page."

Your Board denied the Purchaser's claim for damages on June 2, 2015. On June 26, 2015, the Purchaser filed a lawsuit against the County in the Fresno Superior Court, seeking damages for breach of contract. On

January 14, 2016, the court entered a judgment in favor of the County, dismissing the case. The ground for dismissal was that the Purchaser is not entitled to seek damages for breach of contract, and may only seek the statutory remedy, which is rescission of the sale and refund of the purchase price paid, with interest as limited by statute.

The Purchaser appealed that dismissal to the Fifth District Court of Appeal. On February 27, 2018, the Court of Appeal reversed the decision and held that the Purchaser's breach of contract lawsuit may proceed. The County has petitioned the California Supreme Court to review that decision.

Before petitioning the California Supreme Court, the County gave the Purchaser an opportunity for consensual rescission of the tax sale of the Property, under Revenue and Taxation Code section 3731, subdivision (a). The Purchaser declined that opportunity.

Staff now recommends that your Board rescind the sale as provided by Revenue and Taxation Code section 3731, subdivision (b). In order to do so, your Board must make the following findings, based on the testimony, documents, and arguments presented during the hearing:

1. The Property should not have been sold.
2. The Property has not been transferred or conveyed by the Purchaser to a "bona fide purchaser for value" since the deed to the Purchaser was recorded on May 5, 2014.
3. The Property has not become subject to a "bona fide encumbrance for value" since the deed to the Purchaser was recorded on May 5, 2014.
4. The Purchaser received notice of the hearing as required by Revenue and Taxation Code Section 3731, Subdivision (b)(2)

For the following reasons, Staff believes that your Board can make all four findings.

Regarding the first required finding, Staff believes that the County did not have any contractual or other obligation to disclose that the Property is contaminated. But because the "Terms of Sale" stated that "[w]hen we become aware of properties on our sales list that are known or suspected to be contaminated, the Asset Page will identify these properties and the Lead Agency's name and address where all available information may be reviewed," and due to clerical error the Asset Page did not identify this property as contaminated, staff believes that, in the interest of fairness to all potential bidders (including the Purchaser), the Property should not have been sold at the March 2014 tax sale.

Regarding the second and third required findings, based on the information available to staff, the Property has not been transferred or conveyed to a "bona fide purchaser for value," and has not become subject to a "bona fide encumbrance for value."

Finally, regarding the fourth required finding, a notice of this hearing was mailed to the Purchaser on March 15, 2018, as required by Revenue and Taxation Code Section 3731, subdivision (b). In that notice, the ACTTC informed the Purchaser that, if it has any written materials, such as evidentiary documentation, written legal arguments, presentation slides, or the like, that it wishes to present to the Board of Supervisors at the hearing, it must submit those materials to the ACTTC not less than three weeks before this hearing.

The Purchaser timely submitted its written materials on April 10, 2018. In those materials, the Purchaser argues that the Board may not rescind the sale. The Purchaser also alleges that the County, in a different context, has argued that rescission is not applicable here.

ATTACHMENTS INCLUDED AND/OR ON FILE:

On file with Clerk - Resolution Rescinding the Sale of Tax-Defaulted Property
On file with Clerk - Tax Deed to Purchaser of Tax-Defaulted Property dated 5-5-2014
On file with Clerk - Notice of Hearing to Rescind Tax Sale dated 3-15-2018
Purchaser's Response to Rescission dated 4-10-2018

CAO ANALYST:

Juan Lopez