

PHIL WEISER
Attorney General

NATALIE HANLON LEH
Chief Deputy Attorney General

SHANNON STEVENSON
Solicitor General

TANJA WHEELER
Associate Chief Deputy Attorney
General



RALPH L. CARR
COLORADO JUDICIAL CENTER
1300 Broadway, 10th Floor
Denver, Colorado 80203
Phone (720) 508-6000

STATE OF COLORADO
DEPARTMENT OF LAW

Office of the Attorney General

FORMAL)	
OPINION)	No. 23-01
)	
OF)	
)	July 27, 2023
PHILIP J. WEISER)	
Attorney General)	

Philip J. Weiser, Attorney General of the State of Colorado, as chief legal representative for the State, issues this Formal Opinion *sua sponte* pursuant to his authority under § 24-31-101(1)(a), (d), C.R.S. (2023).

QUESTIONS PRESENTED AND SHORT ANSWERS

Question Presented.

(1) Are Colorado laws governing the process to recover unpaid property taxes on real property and mobile homes unconstitutional, in part or in full, following the recently decided U.S. Supreme Court decision, *Tyler v. Hennepin County*, 143 S. Ct. 1369 (2023)?

Short Answer.

(1) Yes, in part. Under Colorado law, in rare circumstances, a taxpayer may lose all rights to their real property or mobile home as a result of unpaid property tax and have no right to receive any compensation if the value of the property or mobile home exceeds the amount of the tax debt. In those rare circumstances, following *Tyler*, Colorado's statutory process for both real property and mobile homes may be found to result in deprivations of property that constitute an unconstitutional taking in violation of the Fifth Amendment Takings Clause of the U.S. Constitution.

LEGAL AND FACTUAL BACKGROUND

I. In rare circumstances, Colorado’s statutory process to recover unpaid property taxes deprives a property owner of value that exceeds the amount of the unpaid property taxes.

A. The process for real property.

In Colorado, a tax lien attaches to real property at noon on January 1 for the property tax that is due for the current year. §§ 39-1-105, 39-1-107(1), C.R.S. If the property owner fails to pay the property tax due by the delinquency date in the following year, the county is required to auction off the unpaid tax liens. §§ 39-10-102, 39-11-109, C.R.S. The winning bidder at auction is issued a tax lien certificate of purchase, which conveys no ownership interest in the underlying real property. The property owner may redeem their property by paying off the tax debt—including interest and fees—at any time until a treasurer’s deed is issued to the winning bidder. § 39-12-103(3), C.R.S. If the property owner redeems the property, the holder of the lien receives the outstanding tax debt plus interest. If the property owner does not pay the lien, at the end of three years, the lien holder can pay an additional fee and apply to the county treasurer for a treasurer’s deed.¹ § 39-11-120(1), C.R.S. After fulfilling statutory notice requirements, the county treasurer issues the deed, and all “right, title, interest, and estate” in the property transfers to the lien holder.² §§ 39-11-128, 136, C.R.S.³

Upon the issuance of the treasurer’s deed, the prior property tax obligations are extinguished, and the purchaser of the tax lien then has title to the property,

¹ The Colorado Revised Statutes use the terms “treasurer’s deed” and “tax deed” interchangeably. *See, e.g.*, § 39-11-129, C.R.S. (using both “tax deed” and “treasurer’s deed”). Other sources also use the term “tax lien deed.”

² There is additional complexity relating to liens for unpaid taxes in subsequent years. The purchaser of the first-year lien has the right to buy the second and third-year liens at the minimum bid price (explained in further detail below), and at the same rate of interest as the first-year lien. §§ 39-11-119, 39-12-103(4), C.R.S.

³ The issuance of treasurer’s deeds is extremely rare for real property in Colorado. Because the statutory scheme gives property owners three years to redeem their property and requires notice before transfer, the vast majority of property owners pay any property tax due—thus not losing their property. Of those properties that transfer ownership through this mechanism, nearly all have little to no monetary value or have been abandoned by the original owner. Examples include parcels of land that are very small or abnormally shaped, making them incompatible with commercial or residential use; land dominated by an easement which renders the land without use; and contaminated property requiring substantial investment to remediate. However, given the different process for mobile homes, constitutional concerns are more likely to arise in that context.

free and clear of any mortgage or other liens. *Moorehead v. John Deere Industrial Equip. Co.*, 572 P.2d 1207, 1209 (Colo. 1978). However, any mortgages or other liens (other than property tax) are not paid off or extinguished. Instead, the original property owner remains personally liable for those debts.

If no person bids on the lien at auction, the treasurer “strikes off” the lien to the county. § 39-11-108(3), C.R.S. If the property owner does not redeem within three years, the county board of commissioners may apply for a treasurer’s deed. § 39-11-142(1), C.R.S. After receiving a treasurer’s deed, the county may use the property for a public project, lease it, or sell it. § 39-11-143(2), C.R.S. After one year, if the county has not “retained” (i.e., used) or leased the property, the property “shall be sold” at a public sale (so long as the highest bid exceeds the assessment). § 39-11-143(4)(a), C.R.S.

Tax liens typically offer a high rate of return (between 9 and 12 percent per annum in recent years). § 39-12-103(3), C.R.S.⁴ At auction, the minimum bid is the outstanding tax, interest, and fees. § 39-11-115(1), C.R.S. The amount of the winning bid over the minimum bid is the “premium.” Any premium goes to the county general fund. § 39-11-115(1), C.R.S. Interest does not accrue on the premium. Paying a premium effectively reduces the rate of return on the lien.⁵ In Boulder County, for example, the average premium in recent years has been between 5 and 7 percent of the tax due.⁶ However, it’s been reported that investors may pay much larger premiums for more desirable property.

As noted above, if the property owner does not redeem within three years, the lien holder may pay the tax and interest due and apply to the county treasurer for a treasurer’s deed. § 39-11-120(1), C.R.S. Title to the property does not transfer until after the treasurer processes the application and gives certain statutorily required notices. § 39-11-128, C.R.S. The time to process the deed varies by county but is typically several months or longer.

Even after the new owner acquires title, the original owner has an additional nine-year window to redeem the property if they can establish that they were “under legal disability” when the tax deed was executed. § 39-12-104(1), C.R.S. Colorado law defines “disability” to include “any person who is a minor under eighteen years of age, a mental incompetent, or a person under other legal disability and who does not have a legal guardian.” § 13-81-101(3), C.R.S.; *see also Actarus, LLC v. Johnson by & through Johnson*, 451 P.3d 1270, 1274 (Colo. App. 2019). As a

⁴ See <https://bouldercounty.gov/property-and-land/treasurer/taxes/tax-lien-sale/>.

⁵ A lien holder who pays a premium risks losing money if the property owner redeems quickly. According to the Adams County treasurer, 38% of liens are paid off within six months. See <https://www.adcogov.org/sites/default/files/investing-in-tax-lien-certificates-v2019.pdf>.

⁶ See <https://bouldercounty.gov/property-and-land/treasurer/taxes/tax-lien-sale/>.

practical matter, this can make it difficult for the new owner to sell the property, unless they pursue a quiet title action.

B. The process for mobile homes.

Mobile homes and manufactured homes without a permanent foundation are subject to a property tax separate from the tax for the land they sit on. § 39-5-202, C.R.S.⁷ Colorado statute grants county treasurers discretion to pursue one of four mechanisms to recover tax debt on mobile homes: (1) pursue a collection action for the tax; (2) distraint and sell the mobile home; (3) “strike off to the county the tax liens by declaring them county-held”; or (4) sell the tax lien on the mobile home. § 39-10-111.5(2)(a), (4), C.R.S.

If the former owner of a mobile home wishes to redeem their home after a “sale,” they must pay the full purchase price (as opposed to merely paying the tax debt). § 39-10-111.5(6)(a)(I), (II), C.R.S. And for a mobile home located on land not owned by the homeowner, the redemption period is one year. § 39-10-111.5(6)(a)(I), C.R.S. The statute is at best ambiguous as to whether this redemption provision applies only to outright sales or to sales of tax liens also. Unlike real property, the mobile home statute contains no safeguards for owners experiencing a disability at the time they lose the property. *See generally* § 39-10-111.5, C.R.S. Finally, though the statute requires pre-sale notice to owners and the holders of any liens, § 39-10-111.5(3), C.R.S., it’s been reported that some owners of mobile homes lose title without effective notice.

II. The Supreme Court recently held in *Tyler* that Minnesota’s statutory process for collecting property tax violates the Takings Clause.

The Takings Clause of the Fifth Amendment, applicable to states through the Fourteenth Amendment, provides “. . . nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. The Colorado Constitution contains similar private property protections: “Private property shall not be taken or damaged, for public or private use, without just compensation.” COLO. CONST. art. II, § 15.⁸

⁷ For property tax years commencing on or after January 1, 2022, a mobile home with an actual value less than or equal to \$28,000 is exempt from property tax. § 39-3-126.5(3), C.R.S.

⁸ Read in isolation, the language of the Fifth Amendment could suggest that the government can take property for *private use* without compensation. This is not so. Taking for private use is unconstitutional under both the Fifth Amendment and Colorado law, regardless of whether the government pays compensation. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (collecting cases); *Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc.*, 442 P.3d 402, 408 (Colo. 2019).

A taking occurs when the government takes title to—or other interest in—private property. See *Hall v. Meisner*, 51 F.4th 185, 196 (6th Cir. 2022), *cert. denied*, ___ S. Ct. ___ (June 20, 2023). The remedy for a taking is to “put the landowner in the same pecuniary position as though the taking had not occurred.” *Fowler Irrevocable Trust 1992-1 v. Boulder*, 17 P.3d 797, 806 (Colo. 2001) (citing *U.S. v. Miller*, 317 U.S. 369, 373 (1943)). So long as a property owner has a reasonable mechanism to receive compensation for takings, the property owner has no takings claim. See *Preseault v. ICC*, 494 U.S. 1, 11 (1990); see also *E-470 Public Highway Authority v. Revenig*, 91 P.3d 1038, 1041 (Colo. 2004) (“The General Assembly may provide the method for calculating just compensation when a landowner’s property is taken in a condemnation proceeding provided that the method satisfies the constitutional guarantee of just compensation.”). Because the Takings Clause requires only a reasonable method to receive compensation, not actual compensation, *Tyler* describes with approval a New York City statute that allows the city to foreclose on property for unpaid water bills—and keep any excess value—because the property owner had a 20-day window to demand any surplus from the sale. 143 S. Ct. at 1378 (discussing *Nelson v. City of New York*, 352 U.S. 103 (1956)).

In *Tyler*, the U.S. Supreme Court held that a government may take property to pay a tax debt, but not without compensating the property owner for the difference between the value of the property and the debt. 143 S. Ct. at 1379. The *Tyler* legal analysis reaches back to the Magna Carta and analyzes U.S. law during the time periods of the Constitution’s enactment and the Fourteenth Amendment’s enactment. *Id.* at 1376-78. *Tyler* finds a “consensus” in all three times that “a government could not take more property than it was owed.” *Id.* at 1377. Nothing in *Tyler*’s analysis turns on whether the property is sold to satisfy the tax debt. The focus is on whether the property owner has an opportunity to recover the excess. And *Tyler* discusses with approval an 1884 case holding that just compensation is required where the government keeps a property, rather than selling it. *Id.* at 1378 (discussing *United States v. Lawton*, 110 U.S. 146 (1884)). There does not appear to be a reasonable basis to conclude that the *Tyler* Court would have ruled differently where the government gives the property to a third party who has paid the tax debt with no opportunity for the taxpayer to recover the excess.

Following *Tyler*, the Supreme Court vacated and remanded a pair of Nebraska cases “for further consideration in light of” *Tyler*. *Fair v. Continental Res.*, ___ S. Ct. ___; *Nieveen v. Tax 106*, ___ S. Ct. ___. Those cases appealed the Nebraska Supreme Court’s decision that Nebraska’s tax lien statute—a statutory scheme that follows a process similar to Colorado law—does not violate the Takings Clause. *Continental Res. v. Fair*, 971 N.W.2d 313, 323 (Neb. 2022); *Nieveen*, 974 N.W.2d 15, 26 (Neb. 2022).

ANALYSIS

A. Tax lien sales are not a taking; therefore, *Tyler* does not apply at this stage in Colorado’s statutory process.

Colorado follows a two-step statutory process for delinquent real property taxes and most mobile home property taxes: (1) the tax lien sale; and (2) the treasurer’s deed. A tax lien sale does not implicate the Fifth Amendment for two reasons. *First*, as discussed above, whether the county receives the sale proceeds is irrelevant to the *Tyler* analysis. What matters is whether the property owner is deprived of property with a value exceeding the tax debt owed. *Second*, the tax lien sale is not a taking. After the tax lien sale, the property owner’s right, title, and interest to the property remains unchanged. *See Hall*, 51 F.4th at 196. Because there is no taking, *Tyler* does not apply at this stage.

That said, a tax lien investor may, if certain conditions are met, eventually receive the property.⁹ But at the time of the tax lien sale, the investor has no present interest in the property, and the original owner’s interest is unchanged. If there is no taking, then no takings analysis is necessary.

B. Under *Tyler*, in rare circumstances, an unconstitutional taking occurs by the issuance of a treasurer’s deed.

A taking may occur under *Tyler* when a treasurer’s deed is issued because, at that stage, the property owner loses their interest in the property. *See Hall*, 51 F.4th at 196. *Tyler* holds that a government may take property to satisfy delinquent property tax, but it may not take more than is owed. 143 S.Ct. at 1379. And as discussed above, the logic of *Tyler* (and of takings jurisprudence in general) does not warrant a different outcome where the county gives property away versus selling it. Colorado statute directs county treasurers to issue treasurer’s deeds when certain conditions are met. § 39-11-120(1), C.R.S. Because the statute does not grant county treasurers discretion over when to issue treasurer’s deeds, a court is likely to find these statutes unconstitutional to the extent they result in the government taking property valued in excess of the amount owed.

C. Under *Tyler*, distraint sales of mobile homes are unconstitutional unless the home has been abandoned or the tax debt exceeds the value of the home.

The portion of the statute that allows counties to sell a mobile home, rather than a tax lien on the home, violates *Tyler* because “any surplus of the sale proceeds over and above taxes, delinquent interest, and costs of making the seizure and advertising the sale of a mobile home shall be credited to the county general fund.”

⁹ There is a related question as to whether a tax lien investor who is denied a treasurer’s deed because of *Tyler* would have a claim. This opinion does not address that issue.

§ 39-10-111.5(6)(a)(II)(d), C.R.S. Such sales, however, are uncommon because most counties hold tax lien sales on mobile homes, rather than selling the home outright and keeping the proceeds.

To the extent that any county sells a mobile home for more than the tax debt in a distraint sale pursuant to section 39-10-111.5(6)(a)(II)(d), such sale is likely unconstitutional under *Tyler*. The former owner is entitled to just compensation unless the county can show that the mobile home was abandoned.¹⁰

Issued this 27th day of July, 2023.

/s/ Philip J. Weiser
PHILIP J. WEISER
Colorado Attorney General

¹⁰ As discussed in subsections B and C of the Analysis section, it is the opinion of the Attorney General that *Tyler* will render several Colorado statutes unconstitutional, when ultimately applied by a court. Accordingly, the policymaking branches of Colorado state government may wish to amend the statutes at issue to ensure any such processes do not violate a property owner's rights protected by the Takings Clause of the Fifth Amendment of the U.S. Constitution.