

Keeping the Surplus?

Examining Colorado's Real
Property Tax Lien System in
Light of *Tyler v. Hennepin County*

BY MAKENNA X. JOHNSON



This article examines Colorado's real property tax lien system and discusses how Tyler v. Hennepin County may impact Colorado law.

In Colorado, if a property owner allows property taxes to become delinquent due to nonpayment, the county in which the property is located can sell a lien on the property to a private investor in a public tax certificate auction.¹ The property owner may redeem their property by paying the property taxes, the accrued interest, and other costs.² If the property owner does not assert their right of redemption within three years from the date of the auction, the tax lien holder can apply for and obtain a deed from the county, thereby obtaining title (in the form of a treasurer's deed) to the property.³

In *Tyler v. Hennepin County*, Hennepin County, Minnesota (County) acquired title to Tyler's property to satisfy past-due real property taxes and associated penalties and interest totaling \$15,000.⁴ The County sold Tyler's property at auction for \$40,000 and kept the surplus \$25,000 ("surplus" here means the "home equity" or the money property owners forfeit above their tax debt).⁵ Tyler filed suit, arguing that the County had appropriated her property in violation of the Takings Clause of the Fifth Amendment ("nor shall private property be taken for public use, without just compensation") and imposed an excessive fine within the meaning of the Eighth Amendment ("nor excessive fines imposed . . .").⁶ Ultimately, Tyler brought both issues to the US Supreme Court, which unanimously determined that the County deprived Tyler of her property without just compensation in violation of the Fifth Amendment.⁷ Having resolved the takings claim in Tyler's favor, the Court did not address the excessive fines issue.⁸ But Justice Gorsuch, joined by Justice Jackson, addressed the Eighth Amendment question in concurrence, highlighting the lower courts' reasoning, which "future lower courts should not be quick to emulate."⁹

Tyler may impact the real property tax systems of several states and the District of

Columbia. Although Colorado's real property tax lien sale process is not identical to Minnesota's, *Tyler* suggests that Colorado's system may run afoul of the Takings Clause of the Fifth Amendment because it does not provide a mechanism for property owners to receive the surplus of their property above the tax debt.¹⁰ In addition to the *Tyler* majority, other sources support the notion that Colorado's system may be constitutionally suspect, such as the US Supreme Court's decision to remand two cases questioning tax lien systems that are similar to Colorado's in light of *Tyler*,¹¹ Justice Gorsuch's concurrence in *Tyler* discussing the Excessive Fines Clause,¹² and Attorney General Weiser's formal opinion regarding *Tyler*.¹³ Notably, *Tyler* may impact Colorado law soon. On September 28, 2023, the City and County of Denver filed a Complaint for Declaratory Relief requesting the Denver District Court to determine whether Colorado's tax lien system is unconstitutional.¹⁴ Additionally, the Interim Legislative Oversight Committee Concerning Tax Policy & Task Force recommended changes to the Colorado Revised Statutes in light of *Tyler*.¹⁵ This article describes Colorado's tax lien process, analyzes the *Tyler* opinion, and considers the implications of *Tyler* on Colorado law.

Colorado's Property Tax Lien Process

Although municipalities can receive title to tax-delinquent properties in some scenarios, Colorado's property tax lien process primarily involves the sale of tax liens to private investors.¹⁶ Once a tax lien is sold, the purchaser of the tax lien receives a certificate of purchase.¹⁷ Like a private investor, in some circumstances, municipalities can own a certificate of purchase.¹⁸ Any time after three years from the date of the tax lien sale, the holder of the certificate of purchase may acquire title to the tax-delinquent property if the property owner did not redeem their interest.¹⁹

Colorado's real property tax lien system begins with the county compiling a list of property owners who have not paid their property taxes for the past year and sending the property owners a notice of unpaid taxes.²⁰ This notice must state the amount due and warn the property owner that if the amount is not paid before a specified date (which cannot be less than 15 days from the mailing date of the notice), the treasurer will advertise and sell a tax lien on the real property at a public auction.²¹ The treasurer must also publish and post notice pursuant to CRS § 39-11-102.

After proper notice and expiration of the payment period, the county treasurer may hold a public auction to sell tax liens to private investors who, upon payment of the taxes, interest, and fees due, receive a certificate of purchase.²² If more than one private investor bids on a tax lien, it will be sold to the person who bids the largest amount in excess of the delinquent taxes, interests, and fees.²³ Counties credit any amount in excess of the tax delinquency to the county general fund.²⁴ If there are no bids on a specific tax lien, then the treasurer will "strike off" the tax lien and issue a certificate of purchase "to the county, city, town, or city and county."²⁵ These municipalities may sell, assign, and deliver the certificate to any private purchaser willing to pay the amount for which the tax lien was bid and all interest and costs accrued since the sale of the tax lien.²⁶ Likewise, any private investor who successfully bids on and acquires a tax lien (evidenced by a certificate of purchase) can sell or otherwise transfer the certificate to another party.²⁷ Thus, one who possesses a certificate of purchase holds a tax lien on the underlying real property.

After a tax lien is sold, the owner of the property encumbered by a tax lien may redeem the property within three years from the date of the sale by paying all taxes, fees, and interest.²⁸ If the property owner fails to do so, the certificate

of purchase holder may request a treasurer's deed from the treasurer.²⁹ Before the certificate of purchase holder is entitled to the deed, they must request that the treasurer serve a notice on every person in actual possession of the property, the person in whose name the taxes are assessed, and all parties with an interest in the land.³⁰ If the property assessment value is \$500 or more, the treasurer must also publish notice.³¹

After the treasurer complies with the notice provisions, the treasurer must sign the deed, which "shall vest in the purchaser all the right, title, interest, and estate of the former owner in and to the land conveyed and also all right, title, interest, and claim of the state and county thereto."³² Notably, courts have interpreted this language so that "a treasurer's deed issued pursuant to a valid tax sale extinguishes all prior liens, encumbrances, and other charges against the real property and conveys a new and paramount title to the grantee."³³ Counties are permitted to receive tax deeds in this manner as well.³⁴ After a county receives a deed, the county can retain, lease, or sell the property.³⁵ All proceeds from the property, whether by sale, lease, or otherwise, are paid to the treasurer and distributed to the taxing jurisdictions in which the property is located.³⁶

A property owner whose land was transferred by a treasurer's deed must bring an action for recovery of the land within five years after the execution and delivery of the deed.³⁷

Tyler v. Hennepin County

In *Tyler*, the US Supreme Court determined that the County had taken private property without just compensation in violation of the Fifth Amendment when it sold Tyler's property to satisfy delinquent real property taxes and kept the surplus.³⁸ The unanimous decision by the Court turned on the determination that Tyler's "home equity," or the surplus, is a property interest protected by the Fifth Amendment, overruling the US District Court of Minnesota and the Eighth Circuit Court of Appeals.

Background: How Tyler Brought Her Case to the US Supreme Court

Geraldine Tyler, a 94-year-old woman, owned a

condominium in Hennepin County, Minnesota. After moving out of her condominium, she neglected to pay her property taxes. By 2015, her taxes amounted to roughly \$2,300, plus costs, interest, and penalties of approximately \$12,700.³⁹ In total, Tyler's property tax debt amounted to roughly \$15,000.

The County foreclosed on Tyler's property under Minnesota's delinquent property tax statutory scheme. Under Minnesota law, property taxes become delinquent on January 1 of the year following the year in which the delinquent taxes were due.⁴⁰ Minnesota counties generate lists of property owners with delinquent property taxes and file the lists in court, initiating a lawsuit against each property owner.⁴¹ The counties must mail notice of the lawsuit to the property owners.⁴² If the property owner fails to file a response to the lawsuit within 20 days, the court enters a judgment for the property taxes.⁴³ If the property owner does not pay the property tax judgment by the deadline, ownership is transferred to the state.⁴⁴ The property owner has three years from the date of the conveyance to the county to redeem the property by paying the total taxes, accrued interest, fees, and costs, and the county must provide notice to the property owner of their right to redeem.⁴⁵ If the property owner cannot afford to redeem the property, Minnesota law provides the option of filing a "confession of judgment" requiring the property owner to agree to the entry of judgment against them, but this process permits the tax debt to be consolidated and paid over time, up to 10 years.⁴⁶ If the property owner does not enter a confession of judgment or redeem the property, title to the property vests in the county. The county is not required to refund any surplus amount above the property tax debt.⁴⁷ Once the county receives title to the property, it can sell the property and keep all proceeds, distributing them for various county purposes.⁴⁸ Minnesota law does not provide property owners with a mechanism to obtain the surplus.⁴⁹

Here, the County obtained title to Tyler's property and sold it for \$40,000. The County kept the \$25,000 in surplus proceeds from the sale. Tyler brought suit against the County in the US District Court for the District of Minnesota, arguing that the County had (1) taken her equity

in her property (the \$25,000 excess of the tax debt) without just compensation in violation of the Fifth Amendment, and (2) imposed an excessive fine in violation of the Eighth Amendment.⁵⁰

The district court dismissed Tyler's suit for failure to state a claim, and the Eighth Circuit Court of Appeals affirmed.⁵¹ Chiefly, the Eighth Circuit concluded that Tyler did not have a property interest in the surplus of her property; therefore, she did not have a valid Takings Clause claim.⁵² The Eighth Circuit similarly determined that Tyler did not have a claim under the Excessive Fines Clause because the forfeiture was intended to remedy the state's loss of taxes, not to punish delinquent taxpayers.⁵³ Tyler sought and was granted discretionary review by the US Supreme Court.

The Decision: "The taxpayer must render unto Caesar what is Caesar's, but no more."⁵⁴

On May 25, 2023, the US Supreme Court issued a rare unanimous opinion, holding that the County's retention of the surplus of Tyler's property sale above her tax debt constituted a taking of property without just compensation in violation of the Fifth Amendment. The Court determined that (1) Tyler had standing because she suffered a "classic pocketbook injury," (2) history and precedent dictate that "home equity" or surplus is a property interest subject to the Takings Clause of the Fifth Amendment, and (3) Tyler did not abandon her property interest by failing to pay her taxes.

Tyler suffered a "classic pocketbook injury"

The Court began by determining that Tyler had standing because her claim "constitutes a classic pocketbook injury."⁵⁵ The County argued that Tyler lacked standing because she did not suffer any financial harm from the sale of her home since her mortgage and lien for unpaid homeowners' association fees totaled more than the surplus.⁵⁶ The Court rejected the County's argument, finding that Tyler alleged a financial harm because "[t]he County has kept \$25,000 that belongs to her."⁵⁷ The Court relied on the fact that the tax sale did not extinguish Tyler's unsecured debts and that she could have used the \$25,000 to reduce the mortgage and lien liability.⁵⁸

The surplus value is a property interest subject to the Takings Clause of the Fifth Amendment. After addressing standing, the Court turned to the merits of the case: “The question is whether that remaining value is property under the Takings Clause, protected from uncompensated appropriation by the State.”⁵⁹ Because the Takings Clause does not define what constitutes property,⁶⁰ the Court relied “on existing rules or understandings” about property rights.⁶¹ Justice Roberts noted that state law is an important source for guidance, “[b]ut state law cannot be the only source. Otherwise, a State could sidestep the Takings Clause by disavowing traditional property interests in assets it wishes to appropriate.”⁶² Thus, the Court looked to traditional property law principles, the Court’s precedent, and history.⁶³

Looking to Minnesota history and property law principles, the Court determined that Minnesota recognizes the right to own real property and financial interests in real property, “like home equity.”⁶⁴ The Court also noted that Minnesota law prior to 1935 recognized a property interest in the surplus after a real property tax debt sale.⁶⁵ Additionally, the Court pointed out that Minnesota law requires the return of the surplus after a debt is extinguished in other contexts, including bank foreclosures and all other cases satisfying tax debts.⁶⁶ The Court determined that “Minnesota may not extinguish a property interest that it recognizes everywhere else to avoid paying just compensation when the State does the taking.”⁶⁷

The Court called upon US and world history generally to underscore the principle that governments cannot take more from a taxpayer than they owe. The Court analyzed historical data from the Magna Carta, Blackstone, colonial America, and finally, the United States after the passage of the Fourteenth Amendment.⁶⁸ Based on these sources, the Court determined that, other than a few short-lived divergences, governments typically have not been permitted to take more property than they are owed.⁶⁹

The Court concluded that precedent also recognizes home equity as a property interest. In *United States v. Taylor*,⁷⁰ private property was sold due to nonpayment of a federal tax.⁷¹ The US Supreme Court determined that even

though one of the acts imposing the tax did not mention a requirement to return the surplus, the property owner was entitled to the surplus.⁷² Additionally, in *United States v. Lawton*,⁷³ under the same acts that were the subject of the *Taylor* case, the government retained property it acquired due to delinquent taxes.⁷⁴ The Court determined that the taxpayer was still entitled to the surplus even though the property was not sold.⁷⁵

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The Court rejected the County’s argument that *Taylor* and *Lawton* were superseded by *Nelson v. City of New York*.⁷⁶ In *Nelson*, under New York City law, the city could foreclose on property for unpaid water bills, but property owners had two months to pay the delinquent water bill and an extra 20 days to obtain the surplus.⁷⁷ The Court distinguished *Nelson* from *Lawton* and *Taylor* by noting that under New York City law, property owners had the option

to comply with the procedure to obtain the surplus and, if they chose not to, they forfeited their home equity.⁷⁸ Unlike the laws at issue in *Taylor*, Minnesota law does not provide property owners the opportunity to obtain the surplus.⁷⁹ In other words, once the County obtains title to a property, the property owner is out of luck. The County argued that property owners could preemptively sell their homes and pay their delinquent taxes with a portion of their proceeds in order to keep the surplus.⁸⁰ But the Court did not agree that a property owner selling their home is akin to providing an opportunity to recover the surplus after the County sells the property.⁸¹

After weighing the above history and precedent, the Court determined that home equity or the surplus is a property interest for purposes of the Fifth Amendment’s Takings Clause.

Tyler did not abandon her property interest by failing to pay her property taxes. Next, the Court addressed the County’s argument that Tyler abandoned her property by failing to pay her taxes.⁸² In support of its argument, the County cited *Texaco, Inc. v. Short*,⁸³ in which the Court determined that an Indiana law treating a mineral interest as abandoned after it was not used (and for which taxes were not paid) for 20 years did not violate the Takings Clause.⁸⁴ The Court did not find that Tyler “abandoned” her property because abandonment requires a relinquishment or surrender of all property interests.⁸⁵ Additionally, the Court noted that Minnesota’s property tax process is not about abandonment at all; it only concerns taxes and not the use of the property.⁸⁶

Overall, the Court determined that Tyler, who lost her \$40,000 home to the County to pay \$15,000 in taxes, costs, and fees, “ha[d] made a far greater contribution to the public fisc than she owed. The taxpayer must render unto Caesar what is Caesar’s, but no more.”⁸⁷ The Court stated that by selling Tyler’s property and keeping the profits, the County used “the toehold of the tax debt to confiscate more property than was due.”⁸⁸ The Takings Clause was designed to protect property owners in situations such as these, by barring the “[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the

public as a whole.”⁸⁹ The Court determined that because the County forced Tyler to bear a far greater financial burden than she owed, Tyler’s property was appropriated without just compensation in violation of the Fifth Amendment.

Justice Gorsuch’s Excessive Fines Clause concurrence. Because the Court resolved the case on Tyler’s Takings Clause claim, the majority did not address the Excessive Fines Clause.⁹⁰ But Justice Gorsuch wrote a concurrence, joined by Justice Jackson, determining that the lower courts’ Eighth Amendment analyses contained flaws. First, Justice Gorsuch disagreed with the district court’s determination that the primary purpose of Minnesota’s law was not punitive but instead was remedial. Justice Gorsuch noted that the “Excessive Fines Clause applies to any statutory scheme that serves in part to punish.”⁹¹ In addition, Justice Gorsuch noted that the Court has not determined that it is “appropriate to label sanctions as remedial when (as here) they bear no correlation to any damages sustained by society or to the cost of enforcing the law and any relationship between the Government’s actual costs and the amount of the sanction is merely coincidental.”⁹²

Justice Gorsuch also addressed the district court’s contention that the tax scheme creates a windfall for property owners when the value of the property that is forfeited is less than the taxes due.⁹³ He determined that this may be true in some circumstances, but “punishment remains punishment all the same.”⁹⁴ Justice Gorsuch also disagreed with the district court’s finding that Minnesota’s process is not punitive because it does not take culpability into account.⁹⁵ Ultimately, Justice Gorsuch determined that “[e]conomic penalties imposed to deter willful noncompliance with the law are fines by any other name. And the Constitution has something to say about them: They cannot be excessive.”⁹⁶

Colorado Law in Light of Tyler

Colorado’s real property tax system resembles Minnesota’s principally in that it provides no mechanism for a property owner to recover any surplus or equity in excess of the taxes and fees owed. Although in Colorado a surplus

may be retained by either a private party or a municipality, the result is the same: the owner’s property interest in the surplus is forfeited. Applying the logic of *Tyler*, a court might deem unconstitutional any system that

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requires property owners to forfeit the surplus without allowing them an opportunity to request a refund. Outside of the *Tyler* holding, three other sources indicate that Colorado’s property tax system may run afoul of the Takings

Clause and Excessive Fines Clause: the Court’s decision to remand two cases questioning a tax system resembling Colorado’s, Justice Gorsuch’s concurrence in *Tyler*, and Attorney General Weiser’s formal opinion regarding *Tyler*, all of which are addressed below. The outcome of the Denver District Court case and proposed statutory changes will shape the impact of *Tyler* on Colorado law.

A Comparison of Colorado’s and Minnesota’s Real Property Tax Systems

Colorado’s and Minnesota’s real property tax systems contain similarities, primarily because both require property owners to relinquish the surplus value of their properties after the title to tax-delinquent property transfers. In both systems, after real property taxes are deemed delinquent, property owners have three years to redeem before title transfers.⁹⁷ After title transfers, the recipient of the tax deed—the county or a private investor—may retain and use the property or sell it.⁹⁸ If the county sells the property, the proceeds are divided between several governmental entities.⁹⁹ But the most notable similarity between the two states is that neither state’s system contains a mechanism to refund the surplus to the former owner.¹⁰⁰

Additionally, Colorado, like Minnesota, recognizes that in other contexts, debtors have the right to the surplus. Private creditors can sell property to enforce a judgment but must return the surplus.¹⁰¹ In a foreclosure action, the property owner is entitled to the overbid proceeds.¹⁰² In other tax collection scenarios, such as personal property taxes, the debtor is owed the surplus.¹⁰³

Although Colorado’s and Minnesota’s systems contain similarities, they vary slightly. One key difference is that Colorado’s system primarily involves the sale of tax liens to private investors, who can obtain title to the property after the statutory redemption period.¹⁰⁴ In Minnesota, counties are the only recipients of the surplus. Additionally, in Minnesota, when property taxes are delinquent, the county can obtain a judgment against the property owner, transferring limited title to the county.¹⁰⁵ In Colorado, no title transfers until the treasurer signs the treasurer’s deed.¹⁰⁶

These differences likely do not impact *Tyler*'s applicability to Colorado law. The *Tyler* Court determined that Tyler had a property interest in the surplus, also known as her "home equity."¹⁰⁷ Property owners in Colorado who lose title to their properties are still deprived of their home equity, regardless of the recipient of their property. Additionally under *Tyler*, counties can sell property to recover unpaid tax debt, but they cannot "confiscate more property than was due."¹⁰⁸ Even if a private investor, as opposed to a county, ends up with title to the property, the county still transferred title to the property through the treasurer's deed and is receiving more than it is owed because all proceeds it receives above the tax debt, interest, and costs are credited to the county general fund.¹⁰⁹ Thus, like Minnesota law, Colorado's real property tax lien system may unconstitutionally deprive taxpayers of more property than is owed.

Additional Sources Indicate That Colorado's Property Tax Lien Laws May Be Unconstitutional

In addition to *Tyler*'s holding, other legal authorities suggest that Colorado's tax lien process may be unconstitutional, including the procedural posture of other 2022 term US Supreme Court cases, Justice Gorsuch's concurrence, and Attorney General Weiser's formal opinion regarding *Tyler*.

Other private investor system cases. *Tyler* reached the US Supreme Court accompanied by two other cases, *Fair v. Continental Resources*¹¹⁰ and *Nieveen v. Tax 106*.¹¹¹ *Fair* and *Nieveen* asked the Court to determine whether Nebraska's real property tax system, which involves the transfer of title to private investors upon payment of the delinquent taxes, violates the Takings Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment.¹¹² Nebraska's real property tax system resembles Colorado's because both systems primarily convey title to tax-delinquent properties to private investors. After releasing the *Tyler* opinion, the Court granted certiorari, vacated judgment, and remanded *Fair* and *Nieveen* for further consideration in light of *Tyler*.¹¹³

The Court's decision to remand these cases for proceedings consistent with *Tyler* may imply

that, although the Nebraska system benefits private investors rather than the government solely, the system is still unconstitutional in light of *Tyler*. Because Colorado's real property tax lien system resembles Nebraska's, the procedural posture of *Fair* and *Nieveen* may support the conclusion that Colorado's real property tax law is constitutionally suspect.

Excessive Fines Clause. In *Tyler*, the Court did not analyze whether Minnesota's scheme violates the Excessive Fines Clause of the Eighth Amendment because *Tyler*'s Takings Clause claim provided a complete remedy.¹¹⁴ Based on Justice Gorsuch's concurrence, which briefly analyzes the lower courts' Eighth Amendment analyses,¹¹⁵ there may be an argument that Colorado's system violates the Excessive Fines Clause.

The purpose of Colorado's real property tax lien law, as the Colorado Supreme Court has stated, is "to coerce the negligent and unwilling citizens to obedience of the law in payment of their taxes, the sole object of the state in such sales is to collect its revenue."¹¹⁶ As noted above, Justice Gorsuch's statement that financial penalties for noncompliance are fines, so they cannot be excessive, may indicate that Colorado's system runs afoul of the Excessive Fines Clause.

Formal opinion of Attorney General Weiser. On July 27, 2023, Colorado Attorney General Weiser released a formal opinion addressing whether Colorado's property tax lien laws are unconstitutional, in part or in full, following *Tyler*.¹¹⁷ Weiser stated that in circumstances where a taxpayer may lose all rights to their property and have no ability to seek the surplus, "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."¹¹⁸ In coming to this conclusion, Weiser made three determinations. First, tax lien sales do not constitute takings, so "*Tyler* does not apply at this stage in Colorado's statutory process."¹¹⁹ Second, the issuance of a treasurer's deed may constitute an unconstitutional taking.¹²⁰ Weiser stated that "the logic of *Tyler* (and of takings jurispru-

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dence in general) does not warrant a different outcome where the county gives property away versus selling it.”¹²¹ Lastly, distraint sales of mobile homes are unconstitutional unless the tax debt exceeds the value of the mobile home, or the property has been abandoned.¹²² Weiser mentioned *Fair* and *Nieveen*, stating that Nebraska’s system “follows a process similar to Colorado law.”¹²³ Thus, in addition to the *Tyler* opinion, *Fair* and *Nieveen*, and Justice Gorsuch’s concurrence, Weiser’s formal opinion is another indication that Colorado’s property tax lien system may be unconstitutional.

City and County of Denver v. Colorado and Potential Legislative Changes in Light of Tyler

In the months following Attorney General Weiser’s opinion, two actions were initiated with the potential to change Colorado law. First,

a Denver District Court declaratory judgment case seeks a ruling on whether Colorado law is unconstitutional in light of *Tyler* or if it satisfies the Takings Clause of the Fifth Amendment.¹²⁴ Second, a bill proposed by the Interim Legislative Oversight Committee Concerning Tax Policy & Task Force suggests changes to the Colorado Revised Statutes in order to “align with a federal supreme court decision.”¹²⁵

On September 28, 2023, the City and County of Denver filed a complaint for declaratory relief pursuant to CRCP 57, requesting the Denver District Court to determine whether Colorado’s tax lien system is unconstitutional in light of *Tyler*.¹²⁶ Denver filed this declaratory judgment action because it must follow Colorado’s property tax lien process, which requires the Denver treasurer to make out treasurer’s deeds.¹²⁷ Currently, Denver has 186 pending applications for treasurer’s deeds.¹²⁸

Thus, as Denver stated, it is “in the untenable position of either complying with the Colorado Revised Statutes, and potentially violating the U.S. Constitution, or complying with the U.S. Constitution and violating state law.”¹²⁹ The resulting judgment from this case will likely be *Tyler*’s first impact on Colorado law.

Approximately one month later, the Interim Legislative Oversight Committee Concerning Tax Policy & Task Force recommended changes to the Colorado Revised Statutes in order to comply with *Tyler*.¹³⁰ The proposed legislation, Bill B, ends the requirement for a county treasurer to issue a treasurer’s deed upon presentation of a certificate of purchase.¹³¹ Bill B proposes an addition to Colorado’s property tax lien process:

Section 4 establishes a process by which the lawful holder of a certificate of purchase of a tax lien (lawful holder) may apply for a public auction for the sale of a certificate of

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- A retired NFL Player, a bizarre shooting, and CTE. Zaner Harden advocates for the innocent victim in a civil suit. — USA Today

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option for treasurer's deed (public auction). If the public auction results in an "overbid", meaning the purchaser of the sale of a certificate of option for treasurer's deed pays an amount in excess of the value of the tax lien, then the amount of the overbid must be paid in order of recording priority to junior lienors who have filed a notice of intent to redeem. After payment to all lienors, any remaining overbid must be paid to the owner of the property subject to the tax lien. By providing for payment of any remaining overbid amount to the property owner, the bill brings Colorado law into compliance with the United States supreme court's recent decision affirming a property owner's constitutional right to the value of their property in excess of their tax debt.¹³²

This new process creates a procedure requiring the holder of a certificate of purchase to apply for a public auction for the sale of a certificate of option for treasurer's deed instead of requesting a treasurer's deed after three years from the tax lien sale.¹³³ Unlike Colorado's current procedure, if there is an overbid, it must be paid in order of recording priority to junior lienors.¹³⁴ If there is any remaining money following payment to the qualified lienors, it shall be paid to the property owner.¹³⁵ If Bill B is adopted, Colorado's property tax lien process will change drastically, impacting not only property owners, but also counties and private investors.

Conclusion

Several states and the District of Columbia may be impacted by *Tyler v. Hennepin County* because their real property tax systems do not permit a refund of the surplus from real property tax sales.¹³⁶ Based on *Tyler*, Colorado's own property tax lien system may run afoul of the Takings Clause of the Fifth Amendment and possibly the Excessive Fines Clause of the Eighth Amendment. This cloud of uncertainty has spurred two separate actions in Colorado—Bill B and *City and County of Denver v. Colorado*. Depending on the outcomes of these matters, Colorado law could see a flurry of changes impacting property owners, private investors, and municipalities. ^{CL}



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NOTES

1. CRS §§ 39-11-101 and -108.
2. CRS §§ 39-12-103 and 39-11-130.
3. CRS § 39-11-120.
4. *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 143 S.Ct. 1369 (2023).
5. Petition for Writ of Certiorari at 5, *Tyler*, 598 U.S. 631, 143 S.Ct. 1369 (No. 22-166).
6. *Tyler v. Hennepin Cnty.*, 505 F.Supp. 3d 879 (D.Minn. 2020); US Const. amend. V; US Const. amend. VIII.
7. *Tyler*, 598 U.S. 631, 143 S.Ct. 1369.
8. *Id.* at 1381.
9. *Id.*
10. CRS §§ 39-11-101 to -152.
11. Judgment and Mandate Issued, *Fair v. Continental Resources*, 143 S.Ct. 2580 (June 5, 2023) (No. 22-160), <https://bit.ly/3RxCTGH>; Judgment and Mandate Issued, *Nieveen v. Tax 106*, 143 S.Ct. 2580 (June 5, 2023) (No. 22-237), <https://bit.ly/4a81cJY>.
12. *Tyler*, 143 S.Ct. at 1381-82 (Gorsuch, J., concurring).
13. State of Colorado, Department of Law, *Formal Opinion of Philip J. Weiser*, No. 23-01 at 1 (July 27, 2023), <https://coag.gov/app/uploads/2023/07/AG-Formal-Opinion-No-23-01.pdf>.
14. Complaint for Declaratory Relief Pursuant to C.R.C.P. 57, *City and Cnty. of Denver v. Colorado*, No. 2023CV32847 (Den.Dist.Ct. filed Sept. 28, 2023).
15. Interim Legislative Oversight Committee Concerning Tax Policy & Task Force Bill B, Drafting No. LLS 24-0384 (Bill B), https://leg.colorado.gov/sites/default/files/images/committees/bill_b_24-0384.02.pdf.
16. For simplicity, this article describes Colorado's system as primarily involving the sale of tax lien to private investors. This statement is a generalization based on the language of the tax lien sale statutes and statistics from various Colorado counties. The tax lien sale statutes, CRS §§ 39-11-101 et seq., mention throughout that governmental entities, such as counties, only receive title to or tax liens on tax-delinquent properties in certain circumstances. Additionally, data posted by several counties supports the conclusion that primarily private investors receive title to property tax-delinquent property. See, e.g., Morgan County Tax Lien Sales Statistics, <https://morgancounty.colorado.gov/tax-lien-sale/tax-lien-sales-statistics>; Weld County Tax Lien Sale, <https://www.weld.gov/Government/Departments/Treasurer-Public-Trustee/Tax-Sale-Information/Tax-Lien-Sale>; Boulder County Tax Lien Sale, <https://bouldercounty.gov/property-and-land/treasurer/taxes/tax-lien-sale>; El Paso County Real Estate Tax Lien Questions, Statistics, <https://treasurer.elpasoco.com/real-estate-tax-lien-questions/#1515911350691-Of0ea1bb-b4ac>; Summit County Tax Lien Sale, <https://www.summitcountyco.gov/1152/Tax-Lien-Sale>.
17. CRS §§ 39-11-108 and -115(1).
18. CRS § 39-11-108(3).
19. CRS §§ 39-11-115(1), 39-11-130, and 39-12-103.
20. CRS § 39-11-101.
21. *Id.*
22. CRS §§ 39-11-108, -115(1), and -117.
23. CRS § 39-11-115(1).
24. *Id.*
25. CRS § 39-11-108(3).
26. CRS §§ 39-11-120(4) and -122.
27. CRS § 39-11-118.
28. CRS §§ 39-11-115(1), 39-11-130, and 39-12-103.
29. CRS § 39-11-120(1). In addition to the property owner, "any person having a legal or equitable claim" to the property may redeem the property. CRS § 39-12-103(1).
30. CRS § 39-11-128(1)(a).
31. CRS § 39-11-128(1)(b).
32. CRS § 39-11-136(1). See *Hughey v. Jefferson Cnty. Bd. of Comm'rs*, 921 P.2d 76, 79 (Colo.App. 1996) ("Only when a deed issues does the tax lien purchaser acquire all right, title, interest, and estate of the former owner in and to the land conveyed.").

33. *Moorehead v. John Deere Indus. Equip. Co.*, 572 P.2d 1207, 1209 (Colo. 1977) (citing *Webermeier v. Pace*, 563 P.2d 950 (Colo. 1977); *Sherman v. Greeley Assoc.*, 181 P. 975 (Colo. 1919); *Benedict v. Coriolanus Corp.*, 491 P.2d 985 (Colo.App. 1971); *Wells v. Brown*, 128 P. 869 (Colo.App. 1912)). Similarly, the Colorado Supreme Court construed CRS § 39-11-136(1) to mean that title by adverse possession is also extinguished by the issuance of a treasurer's deed pursuant to a valid tax lien sale. *First Nat'l Bank v. Fitzpatrick*, 624 P.2d 927, 928-29 (Colo. App. 1981) (citing *Linville v. Russell*, 452 P.2d 18 (Colo. 1969); *Harrison v. Everett*, 308 P.2d 216 (Colo. 1957)). Thus, to protect their investment, lenders, claimants, and other interest holders may desire to purchase the tax lien on the property in which their interest is secured. See, e.g., *Fitzpatrick*, 624 P.2d at 928 (After learning that Fitzpatrick and Reay had purchased the tax lien at a tax sale and made an application for a treasurer's deed, the bank attempted to redeem the property, but its redemption attempt was rejected.).
34. CRS § 39-11-142(1).
35. CRS § 39-11-143(2), (3), and (4).
36. CRS § 39-11-145.
37. CRS § 39-12-101; *Bald Eagle Mining & Ref. Co. v. Brunton*, 437 P.2d 59, 61 (Colo. 1968) ("Until the applicable periods of limitation have expired, tax deeds, even though valid on their face, are subject to attack for irregularities in the proceedings.").
38. *Tyler*, 598 U.S. 631, 143 S.Ct. 1369.
39. Petition for Writ of Certiorari at 5, *Tyler*, *id.*
40. Minn. Stat. § 272.31.
41. Minn. Stat. § 279.05.
42. Minn. Stat. §§ 279.06, .09, and .091.
43. Minn. Stat. § 279.16.
44. Minn. Stat. § 280.41.
45. Minn. Stat. §§ 281.01, .02, and .17.
46. Minn. Stat. § 279.37.
47. Minn. Stat. §§ 281.18 and 282.07; *Tyler*, 143 S.Ct. at 1373.
48. Minn. Stat. § 282.01.
49. *Tyler*, 26 F.4th 789, 791 (8th Cir. 2022).
50. *Tyler*, 505 F.Supp. 3d 879.
51. *Tyler*, 26 F.4th 789.
52. *Id.* at 793.
53. *Id.* at 794.
54. *Tyler*, 143 S.Ct. at 1380.
55. *Id.* at 1374.
56. *Id.*
57. *Id.*
58. *Id.* at 1375.
59. *Id.*
60. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998).
61. *Tyler*, 143 S.Ct. at 1375 (internal citations omitted).
62. *Id.* (citing *Phillips*, 524 U.S. at 167; *Webb's Fabulous Pharm., Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *Hall v. Meisner*, 51 F.4th 185, 190 (6th Cir. 2022)) (internal citations omitted).
63. *Tyler*, 143 S.Ct. at 1375.
64. *Id.*
65. *Id.* at 1375-76.
66. *Id.* at 1379.
67. *Id.*
68. *Id.* at 1376-78.
69. *Id.*
70. *United States v. Taylor*, 104 U.S. 216 (1881).
71. *Id.* at 218-19; *Tyler*, 143 S.Ct. at 1378.
72. *Taylor*, 104 U.S. at 218-19; *Tyler*, 143 S.Ct. at 1378.
73. *United States v. Lawton*, 110 U.S. 146 (1884).
74. *Id.* at 148; *Tyler*, 143 S.Ct. at 1378.
75. *Lawton*, 110 U.S. at 149-50; *Tyler*, 143 S.Ct. at 1378.
76. *Tyler*, 143 S.Ct. at 1378.
77. *Nelson v. City of New York*, 352 U.S. 103, 104-05 (1956); *Tyler*, 143 S.Ct. at 1378.
78. *Tyler*, 143 S.Ct. at 1378-79.
79. *Id.* at 1379.
80. *Id.*
81. *Id.*
82. *Id.* at 1379-80.
83. *Texaco, Inc. v. Short*, 454 U.S. 516 (1982).
84. *Id.* at 526; *Tyler*, 143 S.Ct. at 1380.
85. *Tyler*, 143 S.Ct. at 1380.
86. *Id.*
87. *Id.*
88. *Id.* at 1376.
89. *Id.* (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).
90. *Id.* at 1381.
91. *Id.* (Gorsuch, J., concurring).
92. *Id.* (Gorsuch, J., concurring) (internal citations omitted).
93. *Id.* (Gorsuch, J., concurring).
94. *Id.* (Gorsuch, J., concurring).
95. *Id.* (Gorsuch, J., concurring).
96. *Id.* at 1382 (Gorsuch, J., concurring).
97. Minn. Stat. §§ 281.17(a) and .18; CRS §§ 39-11-120(1) and 39-12-103(3).
98. Minn. Stat. §§ 281.18 and 282.07; CRS § 39-11-143(2), (3), and (4).
99. Minn. Stat. § 282.08; CRS § 39-11-145.
100. *Tyler*, 143 S.Ct. at 1379 ("Minnesota's scheme provides no opportunity for the taxpayer to recover the surplus; once absolute title has transferred to the State, any surplus always remains with the State."). See CRS §§ 39-11-101 et seq.; *Parkison v. Burley*, 667 P.2d 780, 782 (Colo.App. 1983) ("The purpose of [CRS § 39-11-128] is to afford record owners an opportunity to redeem their property before it is lost through a treasurer's deed.") (emphasis added).
101. Minn. Stat. §§ 550.20 and .08. See, e.g., CRS § 38-22-114.
102. Minn. Stat. § 580.10; CRS § 38-38-111.
103. Minn. Stat. § 277.21, subd. 13; CRS § 39-10-111(8).
104. See, e.g., CRS §§ 39-11-101 and -120.
105. Minn. Stat. §§ 279.03, 279.18, and 280.01.
106. CRS § 39-11-136(1).
107. *Tyler*, 143 S.Ct. at 1375-79.
108. *Id.* at 1376.
109. CRS § 39-11-115(1).
110. *Fair*, No. 22-160, 143 S.Ct. 2580.
111. *Nieveen*, No. 22-237, 143 S.Ct. 2580.
112. Petition for Writ of Certiorari, *Fair*, 143 S.Ct. 2580 (No. 22-160); Petition for Writ of Certiorari, *Nieveen*, 143 S.Ct. 2580 (No. 22-237).
113. Judgment and Mandate Issued, *Fair*, 143 S.Ct. 2580 (June 5, 2023) (No. 22-160), <https://bit.ly/3RxCTGH>; Judgment and Mandate Issued, *Nieveen*, 143 S.Ct. 2580 (June 5, 2023) (No. 22-237), <https://bit.ly/4a81cJY>.
114. *Tyler*, 143 S.Ct. at 1381.
115. *Id.* (Gorsuch, J., concurring).
116. *Knutson v. Dickson*, 94 P.2d 691, 692 (Colo. 1939).
117. *Formal Opinion of Philip J. Weiser*, *supra* note 13.
118. *Id.*
119. *Id.* at 6.
120. *Id.*
121. *Id.*
122. *Id.* at 6-7.
123. *Id.* at 5.
124. Complaint for Declaratory Relief Pursuant to C.R.C.P. 57, *supra* note 14.
125. Bill B, *supra* note 15.
126. Complaint for Declaratory Relief Pursuant to C.R.C.P. 57, *supra* note 14.
127. *Id.* at ¶ 21.
128. *Id.* at ¶ 22.
129. *Id.* at ¶ 24.
130. Bill B, *supra* note 15.
131. *Id.* at 2.
132. *Id.*
133. *Id.* at 10-11.
134. *Id.* at 24.
135. *Id.*
136. See, e.g., Ala. Code §§ 40-10-28(a)(1) and -198; Ariz. Rev. Stat. §§ 42-18114, -18204, and -18123; D.C. Code Ann. §§ 47-1382; 35 Ill. Comp. Stat. 200/22-30 and 22-55; Mass. Gen. Laws ch. 60, § 64; N.J. Stat. Ann. §§ 54:5-32 and -33; N.Y. Real Prop. Tax §§ 1131 and 1194(10); Or. Rev. Stat. §§ 312.100 and 270; S.D. Codified Laws § 10-25-12.