POLICY BRIEF

Tyler v. Hennepin County

Updated Analysis and Policy Reform Options

On May 25, 2023, the US Supreme Court handed down its decision in *Tyler v. Hennepin County*,[1] making a significant incursion into the state and local government practice of property tax foreclosure.

In short, the *Tyler* decision posits that tax foreclosure is solely a debt collection tool and that local governments can recover only what they are owed in a tax foreclosure and no more. According to the Court, the failure of the state or local government to provide the former owner or other interested party an opportunity to obtain this "surplus" value, if any exists, violates the Takings Clause of the 5th Amendment of the US Constitution.

The decision has left local governments to work with state legislatures to identify and draft necessary reforms to state law while defending dozens of lawsuits from former owners of tax-foreclosed property who claim they were denied excess value in their homes.

This brief, published in October 2024, is a resource for local government officials and lawyers, land banks, and state policymakers working to respond to the *Tyler* ruling.

Note: This brief is not a comprehensive introduction to or summary of the delinquent property tax system. For more information on reforming property tax systems, see the following resources:

Progress Point: Delinquent Property Tax Enforcement

Reimagine Delinquent Property Tax Enforcement

This brief includes:

- **A summary of what Community Progress has observed in state and local policy environments since the ruling.** This section covers lawsuits filed after the *Tyler* decision, state-level reforms and reform climate, and the involvement of homeownership advocates in reform efforts. **This summary begins on page 2**.
- **Policy recommendations for communities reforming their tax enforcement systems.** The *Tyler* decision presents an opportunity for leaders and advocates on the local level to reimagine a more equitable, efficient, and effective delinquent tax enforcement system. This list refines and expands on the policy recommendations in our August 2023 policy brief.[2] **These recommendations begin on page 6**.

Community Progress is committed to helping communities navigate policy reform related to property revitalization. For over 15 years, we have worked closely with state and local leaders and community advocates to reform state laws and practices to address vacant, abandoned, and deteriorated (VAD)

[1] *Tyler v. Hennepin County*, 598 U.S. 631 (2023).

[2] "*Tyler v. Hennepin County*: Analysis and Policy Reform Options for State and Local Governments", (Center for Community Progress, 2023), **https://communityprogress.org/publications/tyler-hennepin-policy-brief/**. The 2023 policy brief contains additional details on the *Tyler v. Hennepin County* decision, as well as more context on how the decision impacts property tax systems in general, including the decision's impact on the critical role delinquent property tax processes play in addressing vacant, abandoned, and deteriorated properties.

properties—including reforms related to property tax systems, code enforcement systems, and land banking.

Questions? Contact Matt Kreis, General Counsel, **mkreis@communityprogress.org**.

Post-*Tyler* Observations

1 Lawsuits Demand Significant Government Attention

Since the *Tyler* decision, plaintiffs have filed many lawsuits in state and federal courts. The volume of lawsuits and amount of damages sought has forced state and local governments to focus attention and resources on defending their property tax systems and limiting potential public liability. These cases largely focus on **retroactive liability**—whether governments are responsible for providing a surplus to former owners for properties that have already been allegedly "taken" by the government—but highlight the need for prospective fixes to the system to limit future liability.

Questions left unanswered by the Court's opinion in *Tyler* have made it challenging to predict how various state and federal courts will resolve these matters. Most of these lawsuits allege that the challenged tax foreclosure system fails to provide a constitutionally valid mechanism to:

1. Determine the value of the property, and
2. Return any surplus value to the former owner or interested parties.

Former owners are also challenging an array of other, related parts of their jurisdictions' tax foreclosure processes. These challenges include:

- Methods and timeframes by which any excess value must be returned to the former owner[3]
- Whether former owners or interested parties can be required to proactively file a response to claim excess proceeds[4]
- If private tax lien buyers who take title to property through strict foreclosure can be held liable[5]
- Tools local government and land banks use to address VAD properties, including the ability to use a separate strict foreclosure process to take direct title to abandoned property without a public auction or sale[6]

The local governments named in these lawsuits seek to demonstrate how their property tax systems differ from the Minnesota system examined in the *Tyler* case. Many are attempting to convince the courts that the tools they use to address VAD properties are critical and that the mechanisms to value property (e.g., public auctions, appraisals) fail to adequately incorporate the substantial cost required to get the property back to productive use after the owner has walked away.

Other states, such as Michigan and Minnesota (both of which had a system of strict foreclosure and no mechanism to return excess value to former owners pre-*Tyler*), are exploring or have finalized settlements in class-action lawsuits in an attempt to cap unknown retroactive liability, sometimes for tens or even hundreds of millions of dollars.[7]

2 State Legislatures are Implementing Incremental Reforms Rather than Overhauling Property Tax Systems

Several state legislatures have already implemented property tax system reforms, focused on addressing pieces of statutes that would likely have been declared unconstitutional in the wake of the *Tyler* ruling.

Addition of Public Auction or Sale

In states with systems most vulnerable to *Tyler* lawsuits—states with systems of strict foreclosure

[3] See *Schafer v. Kent County*, 2024 Mich. LEXIS 1438 (Mich 2024). See the Michigan Supreme Court opinion: **https://www.courts.michigan.gov/siteassets/case-documents/uploads/OPINIONS/FINAL/SCT/164975_116_01.pdf**.

[4] Id.

[5] See *Continental Resources v. Fair*, 317 Neb. 391 (Neb. 2024); see also *257-61 20th Ave. Realty, LLC v. Roberto*, 477 N.J. Super. 339 (App. Div. 2023), certification granted by *257-261 20th Ave. Realty, LLC v. Roberto*, 2024 N.J. LEXIS 287 (N.J., Mar. 19, 2024).

[6] See, for example, a pending class-action filed this year in the Cuyahoga County Court of Common Pleas: "Homeowners file class action lawsuit over equity allegedly stolen by Cuyahoga County," News 5 Cleveland, June 25, 2024, **https://www.news5cleveland.com/news/local-news/homeowners-file-class-action-lawsuit-over-equity-allegedly-stolen-by-cuyahoga-county**.

[7] See, for example, *Wayside Church v. Van Buren County et al.* (W.D. Mich. 2024); see also, the Order of the Minnesota Second Judicial District Court, ordering the consolidation of several lawsuits, including *Tyler v. Hennepin County* (Case No. 62-CV-19-6012), approving a class, and preliminarily approving a settlement plan and allocation, dated June 28, 2024. Minnesota H.F. 5264, 92nd Leg., Reg. Sess. (2024), appropriated $109 million to be deposited in an escrow account for purposes of the settlement.

and inadequate or nonexistent mechanisms to return excess proceeds—state legislatures have largely made targeted, incremental reforms. These reforms essentially preserve each states' existing approach to tax collection with one fundamental difference: They have added **some form of public auction or sale to determine whether excess proceeds are due to the former owner or interested parties**.

The following eight states have passed incremental reforms incorporating or affirming some type of public auction component:

- Colorado
- Louisiana
- Maine
- Minnesota
- Massachusetts
- Nebraska
- New Jersey
- New York

How and when the public auction is used varies by state. In general, the above states have followed one of the following blueprints: mandatory public auction or sale, discretionary public auction or sale, and affirmatively requested public auction or sale.

Mandatory Public Auction or Sale

In May 2024, Minnesota enacted reforms *mandating* counties offer properties acquired through the tax foreclosure process at a public sale within six months of the foreclosure and return any surplus proceeds to former owners. Counties must first offer the property for sale at its assessed value. If the property does not sell within 30 days, they can offer the property at a subsequent sale for amount of back taxes owed. Counties must notify interested parties of any surplus proceeds and pay out these funds upon request.[8]

Discretionary Public Auction or Sale

In July 2024, Massachusetts enacted reforms that give local governments the option of retaining tax-foreclosed properties or offering them for sale.

If the local government retains the property, the amount of any surplus proceeds that could be claimed by a former owner is determined based on the appraised value of the property. If the local government elects to sell the property, it must attempt to do so using a licensed real estate agent or broker for 12 months before the property can be offered for sale at public auction.

Affirmatively Requested Public Auction or Sale

In July 2024, New Jersey passed reform that largely preserves the current tax sale certificate process in place, but now allows the property owner to make an affirmative request to have the property foreclosed and sold at public auction.

This request must be made before a final judgment of foreclosure is entered in by either the tax lien investor or local government's action to foreclose the owner's right to redeem. This "request sale" allows the owner to claim excess proceeds if any are generated from the sale.[9] This approach appears to rely heavily on the Supreme Court's treatment in the *Tyler* decision

What is Strict Foreclosure? Strict Foreclosure occurs where the foreclosing entity in a tax foreclosure, either the local government or a tax lien holder, takes direct title to the property in full satisfaction of the public debt. There is typically no public auction or sale.

Strict foreclosure states (pre-*Tyler* reforms) included:

Minnesota and Massachusetts: Local government takes direct title to tax-delinquent property if not redeemed by the conclusion of the foreclosure process. Prior to reform, there was no process to value the property and return any surplus to former owners.

New Jersey and Illinois: Local governments transfer strict foreclosure power to private investors via tax lien or tax certificate sales. The investor bids on the unpaid taxes by offering to charge the lowest amount of interest to the owner in exchange for the right to collect taxes, charge fees, and potentially obtain title. Local governments retain such power if no private investor bids on the tax lien. Prior to reform, there was limited or inadequate methods used to return surplus to former owners.

[8] See Minnesota H.F. 5247, 92nd Leg., Reg. Sess. (2024).

[9] N.J. Stat. Ann. P.L. 2024, c.39. Our quick summary highlights our interpretation of key elements of existing New Jersey law and this bill. Local New Jersey lawyers should be consulted to confirm the accuracy of these interpretations.

of the Court's prior decision in *Nelson v. City of New York*, 352 U.S. 103 (1956), which may be susceptible to future *Tyler* claims.[10]

Missed Opportunity for More Comprehensive Reforms

While the introduction of a public auction is a step in the right direction, we are disappointed that more states haven't engaged in comprehensive reforms. This is unsurprising due to the longevity and complexity of property tax laws, many of which are several decades old and purposefully convoluted. Education on how—or if—the state must reform these entrenched laws requires time and resources. Municipalities may also be wary of the resources and infrastructure required to support substantive reforms, or feel protective of the strong rate of tax collection their current systems generate.

However, relatively minor changes may fail to adequately address future local government liability. Incremental, rather than comprehensive reforms, have the potential to:

- Extend the foreclosure timeline
- Make foreclosures more difficult and costly
- Limit the ability of local governments to address VAD properties
- Reduce municipal revenue

Community Progress is working to bring attention to these issues. We hope national and state organizations that represent the interests of counties, municipalities, land banks, homeowners, local developers, and others, will join us in educating lawmakers on the importance of more comprehensive property tax system reform.

A Note on the Sale of Tax Liens

Tax lien sales can be particularly problematic for communities trying to address VAD properties because they often prolong the period before a property can be moved into the hands of a new, more responsible owner or make it more expensive or difficult to do so. But states with these complicated practices,[11] like Illinois and New Jersey, have not used the need for post-*Tyler* reform to overhaul existing processes.

What is clear is that tax lien investors who acquire tax-delinquent property likely have some exposure should a court find that the foreclosure or tax deed process results in an unconstitutional taking of the former owner's right to surplus.[12] Moreover, states that rely on the sale of the tax debt via lien or certificate to private investors to establish whether excess proceeds might exist (as opposed to a judicial foreclosure and sale of the property itself) may also run the risk of lawsuits challenging the adequacy of such proceedings to determine just compensation.[13]

3 Homeowner Advocates at the State and Federal Levels Have Played an Important Role in Helping Shape Reform

Much rhetoric around the *Tyler* case has been around protecting the "equity" of vulnerable homeowners. If we truly want to help these owners protect "equity" in their homes, **we urge advocates to focus policy reform efforts on ensuring property tax bills are fair and affordable and making resources available to help vulnerable property owners** exit delinquency and avoid foreclosure.

This is not to say advocates should not fight for a fair mechanism to determine surplus. However, the amount of potential surplus usually pales in comparison to the value that could be preserved by avoiding an involuntary transfer of the property through foreclosure.

The *Tyler* case does little to effectively protect vulnerable homeowner equity. A property in the foreclosure process often remains in stasis for two to five years. While the foreclosure process drags on, the property deteriorates in condition and value. Sometimes it becomes vacant and needs significant public resources to address the harm imposed on neighbors.

At the end of the multi-year process, the property is finally subject to an involuntary sale or transfer which, in nearly any form (e.g., public auction, negotiated sale), will not achieve anything close to the value it would have sold for had it been voluntarily offered for sale before it began to decline or been subject to foreclosure.

We are encouraged to see homeownership advocates at the national and state levels push for a seat at the table in states discussing property tax foreclosure reform. Their presence in the development of tax foreclosure legislation has helped advance other reforms. In New York, advocates successfully helped create and pass a new "Homeowner Bill of Rights."[14] This law, among other measures, provides homeowners a statutory right to "receive a share of any surplus resulting from the sale of the property in the manner provided by law" and to "enter into installment plans or repayment plans."[15] In Illinois, conversations with homeownership advocates led to the creation of a legislative Payment Plan Task Force in 2023;[16] these conversations also encouraged the Cook County Treasurer to adopt a process to accept partial property tax payments and help owners calculate their payments with the use of a Payment Plan Calculator.[17]

Community Progress looks forward to working alongside these advocates to ensure that future reform benefits and protects vulnerable homeowners from loss of property and equity and gives local governments the tools they need to help communities address tax-delinquent properties.

4 More Legal Rulings to Come

Lawsuits will continue to litigate questions the Court failed to address in *Tyler*. We expect to see various state and federal courts make decisions on the following issues in the coming year:

- Whether local governments can opt to conduct a third-party appraisal, retain title to the property, and put any excess amounts into escrow—as opposed to publicly auctioning the property and taking title only in the absence of a higher bid or if they choose to participate in the bidding and pay cash).
- Whether local governments can require a former owner to affirmatively request a public auction of the property prior to foreclosure or risk losing any excess value in the property (i.e., the *Nelson v. City of New York* (1956) justification) following foreclosure judgment and sale.
- Whether local governments can require a former owner or interested party to make a claim for excess value within a defined period (e.g., within two years of sale).
- Whether laws allowing former owners to make claims for excess value apply to other interested parties, like mortgage lien holders.
- The reasonableness of charges local governments may seek to add to tax foreclosure judgments and minimum bid amounts at the foreclosure sale/auction to recover public costs incurred in either maintaining tax-delinquent property or in generally administering tax foreclosure systems.

The outcomes of these rulings may vary across jurisdictions.

Reimagining Property Tax Systems

To truly protect homeowners and break the continued cycle of vacancy, state and local governments must examine their delinquent property tax enforcement processes to identify where they are inequitable, ineffective, or inefficient, and doggedly pursue policy reform.

Reform should not undermine the core objective of delinquent property tax enforcement: to maximize the collection of property taxes to fund basic and essential community services.[18] However, most delinquent property tax enforcement processes—indeed, most property tax systems—sorely needed reform to correct long-standing inequities and inefficiencies well before *Tyler* was decided. State legislatures reforming these laws incrementally, with the sole objective of limiting potential *Tyler* liability, are missing a critical opportunity to engage in needed comprehensive reform.

Community Progress suggests the following priorities for property tax system reforms:

1. **Keep people in their homes**
2. **Address and prevent VAD properties**

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10 "Policy Brief: *Tyler v. Hennepin County*," (Center for Community Progress, 2023).

11 "What is a tax lien sale and why is it a bad way of dealing with vacant properties?" Center for Community Progress (blog), October 9, 2023, https://communityprogress.org/blog/what-is-a-tax-lien-sale/.

12 See, for example, *251-67 20th Avenue Realty, LLC v. Alessandro Roberto*, 477 N.J. Super. 339 (App. Div. 2023): https://www.njcourts.gov/system/files/court-opinions/2023/a3315-21.pdf.

13 See, for example, *Continental Resources v. Fair*, 317 Neb. 391 (Neb. 2024). See also Hallie Miller and Dylan Segelbaum, "In lawsuit, West Baltimore community association alleges city's tax sale system is unconstitutional," *Baltimore Banner* (July 2, 2024), https://www.wypr.org/the-baltimore-banner/2024-07-02/in-lawsuit-west-baltimore-community-association-alleges-citys-tax-sale-system-is-unconstitutional.

14 NY CLS RPTL § 1142 (LexisNexis 2024).

15 Id.

16 See Ill. S.B. 73, 103rd Gen. Assemb., Reg. Sess. (2023); "Property Tax Payment Plan Task Force Report to the Illinois General Assembly," Illinois Housing and Development Authority: https://www.ihda.org/wp-content/uploads/2024/05/Property-Tax-Payment-Plan-Task-Force-Draft-Report.pdf.

17 "Payment Plan Calculator," Cook County Treasurer, https://www.cookcountytreasurer.com/paymentplaninformationalvideos.aspx.

18 See, for example, Andrew Kahrl, "It's Time to End the Quiet Cruelty of Property Taxes," *New York Times* (opinion), April 11, 2024, https://www.nytimes.com/2024/04/11/opinion/property-taxes-racism-inequality.html.

Definitions

Property Tax System: The system of processes encompassing the valuation of real property, assessment of taxes, issuance of property tax bills, collection of property tax due, and enforcement of delinquent property taxes.

Delinquent Property Tax Enforcement: The process whereby government seeks the repayment of unpaid property tax. Depending on state statute, the delinquent property tax enforcement process concludes when (1) the taxpayer fully repays their tax debt, or (2) a tax foreclosure action is completed.

The following sections contain policy ideas to meet these vital objectives. These policies engage with a range of stakeholder perspectives on how to balance the need for revenue for basic public services, protect vulnerable homeowners from displacement or loss of equity, and stabilize neighborhoods and protect neighbors from the harms cause by problem properties.

1 Policies to Keep People in Their Homes

Our primary focus has been on how delinquent property tax enforcement can facilitate the transfer of vacant and abandoned property to a new, responsible owner. **However, this enforcement system is neither equitable nor effective when used to displace homeowners or strip them of family wealth.** To that end, policies must work to prevent the loss of homes to tax foreclosure. The below policy ideas focus on assessing, billing, and collecting property taxes, and we welcome the insight of consumer and housing advocates to help expand upon these ideas.

Determining the Appropriate Tax

Ensuring homeowners' taxes are fair and can be spread out or reduced to accommodate homeowners on a fixed income or those experiencing economic hardship is the most critical point at which the property tax system can keep people in their homes.

Assessments Must be Fair and Equitable Across All Neighborhoods[19]

Property taxes tend to be regressive as they relate to low-income families and people of color. These families pay a greater percentage of their income to property taxes than wealthier families.[20] Homes owned by lower-income families and by people of color are also often over-assessed, especially as it relates to those homes owned by high-income families.[21]

Exemptions Must be Appropriate and Designed to Ensure Vulnerable Homeowners Can Afford Their Taxes

Policies could include the following:

1. **Homeowner exemptions** in the following circumstances:
    - The individual or family occupies the property as their principal residence.
    - The individual or family have valid title or have a valid claim to the actual or equitable title to the property (e.g., heir of an owner who died without a will).[22]
    - The property is a single-family detached home, a single family attached home (e.g., row house, townhome, etc.), or a 1–4-unit property, at least one unit of which is occupied by the owner(s) as their principal residence.
    - Exemptions could be granted for the first $100,000 in market value or the corresponding percentage of assessed value if that amount is different (e.g., if assessed value is one-third of market value, then the exemption should be for up to $33,333 of assessed value).[23]

[19] Read more about the data supporting the critical need for more fair and equitable assessments from the University of Chicago's, Center for Municipal Finance at the Harris School for Public Policy, https://propertytaxproject.uchicago.edu/.

[20] "Who Pays? 7th Edition," Institute on Taxation and Economic Policy, https://itep.org/whopays-7th-edition/.

[21] Christopher Berry, "Reassessing the Property Tax," (University of Chicago Harris School for Public Policy, draft February 7, 2021), https://cpb-us-w2.wpmucdn.com/voices.uchicago.edu/dist/6/2330/files/2019/04/Berry-Reassessing-the-Property-Tax-2_7_21.pdf.

[22] See, for example, Tex. S.B. 1943, 87th Leg., Reg. Sess. (2021).

[23] See, for example, Kansas proposed bill to raise homestead exemption to $100,000. Tim Carpenter, "Gov. Laura Kelly affirms plan to veto bipartisan $2.3 billion, five-year tax reform bill," Kansas Reflector, May 9, 2024, https://kansasreflector.com/2024/05/09/gov-laura-kelly-affirms-plan-to-veto-bipartisan-2-3-billion-five-year-tax-reform-bill/.

2. **Additional exemptions for vulnerable homeowners**, including:
    - Senior homeowner exemptions (additional for seniors with disability).
    - Veteran homeowner exemptions (additional for veterans with disability).
3. **Legacy homeowner tax freezes**, including:
    - Seniors or any homeowner with a household income of less than 100 percent of AMI and who have owned and occupied the property as their principal residence for 15 years or more can apply to have their property tax rate frozen at current rate.[24] While many existing programs support senior tax freezes, applying this to a broader constituent base based on income is worth exploring.
    - Heirs acquiring the property, either through a valid will or intestate, can apply for the legacy freeze to apply in the following circumstances:
        - Up to two years post-death with no restrictions.
        - In perpetuity so long as the heir that is planning to occupy the home can document via USPS, utility bills, affidavit, or otherwise, that they have lived in the house for 15 or more years and are working with an attorney/advisor to resolve title issues and create a will/estate plan of their own.
        - Gradual easing of the freeze over a five year period if the heir is not seeking to resolve title issues or create a will/estate plan of their own.
        - Freeze removed as soon as the property is transferred to a new owner, however, a transfer of the property to an heir that occurs as a result of the title resolution indicated above does not invalidate the freeze unless at least one of the transferees are not an heir, noting there should be an exception if one of the transferees is married to or in a civil union with an heir.
4. Allow **exemptions to be applied retroactively** for up to one year.
5. Provide **additional tax credits or other types of circuit breakers that offer tax credits/reductions to vulnerable homeowners or renters**. These could include:
    - If property taxes exceed a certain percentage of income for seniors on a fixed income, the amount above that "capped" percentage can be refunded or otherwise reduce the homeowners tax bill.[25]
    - It might also be appropriate to provide some type of tax exemption or credit to certain landlords who provide safe, healthy rental options at rates that are affordable to lower-income renter families, such as those earning 80 percent of AMI or less.[26]

Billing and Payments

Once the appropriate and fair tax is assessed and the appropriate exemptions, credits, and other circuit breakers are applied, the billing process must be clear and payment options must meet the needs of constituents. Policies could include the following:

1. Make **all tax bills available online** as well as sending by mail.
2. Give owners the option to **choose how to be notified of pending bills** and due dates (e.g., email, phone call, or text).
3. Local governments must accept—and publicize their ability to accept—annual property tax payments in **monthly installments** (e.g., over a span of 10–12 months).
4. Local governments **accept payment in a variety of ways** (e.g. by mail, online, or in-person at easy-to-access central and local locations).[27]
5. Send notices of the tax in **multiple languages** appropriate to the jurisdiction, and **use clear, plain language** to clarify key information, including the following points:
    - Amount due
    - Notice of, links to, and contact information for any property tax relief programs
    - How and in what situations an owner can make monthly or partial payments
    - Information for how to claim exemptions if not

[24] See, for example, https://www.phila.gov/documents/application-for-senior-citizen-real-estate-tax-freeze/. See also, https://www.cookcountyassessor.com/senior-freeze-exemption.

[25] "Senior Citizens Tax Credit," West Virginia Tax Division, https://tax.wv.gov/Individuals/SeniorCitizens/Pages/SeniorCitizensTaxCredit.aspx.

[26] See Ill. H.B. 2621, 102nd Gen. Assemb., Reg. Sess. (2021).

[27] See, for example, "City of Detroit - Ways to Pay Your Property Taxes," City of Detroit Office of the Treasury, https://detroitmi.gov/sites/detroitmi.localhost/files/2018-07/Methods%20to%20Pay.pdf.

already claimed
- How amount due might change if the taxes become delinquent

6. Local governments consider staffing or partnering with other government agencies or nonprofits to monitor the tax-delinquent list and identify potential owner-occupied homes that enter delinquency to **conduct additional outreach** to such owners.
7. Additional property **tax relief to help folks experiencing financial hardship or shock**, including the loss of a job or inability to afford tax increases on a fixed income. These programs work as a supplement to exemptions and/or circuit breakers and may be administered prior to taxes becoming delinquent *or after.* These should include:
   - Additional payment plan options that may extend the date by which property taxes become delinquent, or that prevent the foreclosure or transfer from moving forward if the property is already delinquent, so long as the taxpayer remains current[28]
   - Access to funds that may be available to help eliminate or reduce current or delinquent property taxes[29]
   - Deferral programs to defer tax payments into the future[30]
8. Partner with local philanthropic and other partners to **develop and fund resources for homeowners** of property that is or will likely become delinquent. Local governments could provide homeowners with housing counseling and other support, similar to how many states provide such resources for homeowners facing mortgage foreclosure.[31] Housing counselors could help outline available options to keep the home or transition to a different housing option with dignity and in a way that best serves the individual needs of the owner or family.
9. If the property becomes delinquent, homeowners—including heir owners—should have an **extended period of time to cure the delinquency or redeem the property**, as opposed to owners of VAD or other types of property. This period could be anywhere from 18 months to three years, depending on the priorities of the jurisdiction. This should allow time to identify and direct homeowners in need of additional support to the appropriate resources or programs.

Homeowners will inevitably fall through the cracks and enter the delinquent property tax enforcement process, and it is important to ensure that "offramps" continue to be available to these homeowners, including payment plans and other resources to prevent foreclosure.

2 Policies to Address and Prevent VAD Properties

If better policy can help families avoid or exit tax delinquency, the inventory subject to delinquent property tax enforcement should predominantly deal with VAD properties. The *Tyler* decision mandates this process incorporate a mechanism to value the property and return excess value to the former owner or interested parties.

While incorporating this mechanism should be a core focus, a truly equitable, efficient, and effective system requires more substantive reforms. Property tax reformers should seek to expand the broader policy focus of the delinquent property tax process from simply collecting unpaid taxes—which becomes increasingly unlikely the longer the property is delinquent—to swiftly transition tax-delinquent VAD properties to new, more responsible owners and back to productive, tax-paying status.

There is an added incentive to this approach post-*Tyler*: The quicker the transfer, the less time the property sits in decline, and the greater the potential value (and therefore, the greater potential *excess* value available to the former owner) the property might fetch at sale.

Speed of transfer is important because of the physical, psychological, and financial harm tax-delinquent VAD properties cause residents. These properties contribute nothing to the property tax pool needed to fund basic neighborhood services and they drain public resources by requiring constant attention from local government code enforcement, public safety, and others.

[28] See, for example, "Pay as you Stay," City of Detroit, https://detroitmi.gov/departments/office-chief-financial-officer/pay-you-stay.

[29] Learn more at "Detroit Tax Relief Fund," Wayne Metropolitan Community Action Agency, https://www.waynemetro.org/dtrf/.

[30] See, for example, "Taxpayer's Guide to Local Property Tax Deferrals," Massachusetts Department of Revenue, Division of Local Services, https://www.mass.gov/doc/guide-to-real-estate-tax-deferrals-for-qualifying-persons/download.

[31] See IHDA's Foreclosure Prevention Programs here: https://www.ihda.org/my-community/foreclosure-programs/.

It is therefore critical that the tax foreclosure system is **efficient**—accomplishing transfer in the least amount of time possible (e.g., reduced redemption period for VAD property) and limits costly, duplicative enforcement events (e.g., sale of tax liens *plus* a subsequent foreclosure and sale two years later).

It is also critical that this process is **effective**—resolving all outstanding public debts and liabilities so that upon transfer the property's title is clear and insurable, and incorporates a mechanism to return excess value to the former owner and interested parties. In other words, transfer of the property should significantly reduce the chance that it ends up cycling back through the delinquent property tax enforcement process in the future. This may add a bit more time to the process, but it is important to achieve finality in the process. The below recommendations move the property tax systems towards that outcome.

Single, Publicly Controlled Enforcement Event at Conclusion of Clearly Defined Redemption Period

1. **Provide clear notice of enforcement event:** Once a property becomes tax delinquent, local government should send notice to the owner that the redemption period has begun, and that a single enforcement event conducted by the local government—the judicial foreclosure and a sale of the property—will commence at or near the end of the redemption period.
2. **Local government administers full enforcement process:** When the local government is responsible for all steps of tax enforcement, it is easier to implement programs or additional reforms. These programs can help identify vulnerable homeowners, institute payment plans, and create or direct owners to other programs or resources to help them avoid or exit the process. When the tax-delinquent property is VAD property, it allows for similar programs or reforms to address VAD property. Transferring control to private investors via tax lien or certificate sales is an additional barrier—it is easier to institute a more equitable and *Tyler*-compliant process (e.g., appropriate redemption period, transparent and effective public auction) if the process is under public control.
3. **Clear, well-communicated enforcement process:** Local governments should provide the owners of tax-delinquent properties easy-to-read notices on how and when the cost to redeem will change as the redemption period moves along. This reduces the complexity of delinquent property tax enforcement processes, which in many cases are purposefully vague and difficult for homeowners to understand.
4. **Reasonable, effective penalties:** Penalties and interest should apply to incentivize payment once the property becomes tax delinquent and at various stages throughout delinquency, though vulnerable homeowners should be able to access resources (e.g., payment plans, grants) to avoid some of these costs or otherwise exit delinquency. Overly harsh penalties (e.g., 18 to 36 percent annual interest) that make it impossible for folks to climb out of delinquency should be largely avoided.
5. **Eliminate tax lien sales:** The sale of tax liens simply isn't an effective part of this process for the reasons we've laid out in multiple articles and publications, in particular as it relates to VAD properties. Tax lien sales also introduce uncertainty in terms of potential *Tyler* liability. For example, if a public auction of the tax lien or certificate is used to establish surplus value and the actual transfer of the property occurs one to two years *after* the tax lien sale (like in Indiana or Tennessee), then a former owner may have a legitimate claim that the prior tax lien sale bears little resemblance to the current value of the property.

   Some counties have shared the concern that eliminating tax lien sales would impact collections. However, most owners of tax-delinquent properties do redeem their property—this is not because the right to collect the tax has been sold to a third party, but because the owner doesn't want to pay more in interest and fees or, worse, lose their home.

   While the timing of delinquent tax payments collected may temporarily shift for those governments seeking to eliminate tax lien sales and adopt a single post-redemption foreclosure process, there are other ways to bridge that one to two year collection gap that do not involve transferring the government's right to control the collection or enforcement of unpaid taxes to private investors, something that we believe makes it both harder to comply with *Tyler* and frustrates efforts to protect homeowner equity and address VAD property.
6. **Avoid unnecessary incentives for private tax lien investors:** If jurisdictions choose to retain a

tax lien sale system, they should be cautious that reforms do not include incentives to keep tax lien investors interested in participating (e.g., additional penalties/interest or inflated charges for helping to conduct a sale of the property) at the cost of significantly increasing the redemption amount for former owners and/or decreasing the amount of excess value that might be due to the former owner.

Reduced Redemption Period for VAD Properties

Local governments should limit VAD property redemption period to one year or less. This should be a shorter redemption period than for owner-occupied properties, where occupants should be given sufficient time to identify the resources needed to exit delinquency and satisfy the amounts due. A redemption period that runs for up to three years is enough time in most jurisdictions to identify implement solutions to help homeowners identify whether a path to resolve the delinquency and avoid foreclosure is possible. State law could also allow redemption periods to be extended if an owner enters a long-term payment plan and remains current on both the plan and current taxes.[32] Redemption periods for VAD property should shorten given the risk of decline associated with tax-delinquent VAD property.

In addition to being tax-delinquent, metrics to qualify property for a reduced redemption period could include some combination of the following:[33]

- The property is registered as vacant with a local government.
- The property has been cited by the local government under state or local housing codes for being vacant, abandoned, and otherwise unsecured.
- The property is, in fact, vacant land or otherwise unoccupied.
- There is no evidence that the property is undergoing rehab or renovation efforts (e.g., no permits applied for or pulled in last six months).
- Water or other public utilities have been shut off, not paid, or discontinued for more than six months.

Court-Supervised, In Rem *Foreclosure*

The foreclosure process at the conclusion of the redemption period should:

- Impose liability against the tax-delinquent property, not the owner
- Be under the supervision of a court of competent jurisdiction
- Provide maximum notice that meets U.S. Constitutional standards for due process
- Result in a public sale and transfer of title that is insurable.

When properly designed, **judicial *in rem* foreclosure is the optimal enforcement mechanism to address VAD properties**.

The costs of implementing such a system may be significant. However, we ask jurisdictions to weigh those costs against the costs of repeatedly administering the delinquent property tax enforcement process against the same property—in addition to the costs incurred by the local government in addressing the decline of the property condition as it is transferred from speculator to speculator.

Working with local title insurers to design the appropriate judicial foreclosure system is critical. It is ultimately the decision of these insurers as to whether state and local laws and practices meet the level of notice they need to feel comfortable insuring the property, which is critical to secure financing to rehab or build. A system that does not produce insurable title will require purchasers to clear title themselves through a complicated legal proceeding (e.g., quiet title action) and risks attracting speculative investors with little concern for the long-term stability and vision for that neighborhood.

Moreover, a property offered for sale with clear title is almost always worth more to most potential auction bidders than one without, and may make the auction more accessible for local, emerging developers looking to invest in their community by acquiring and addressing VAD properties.

Conduct a Public Auction with Fully Loaded Minimum Bid

We believe a public auction at the conclusion of the judicial foreclosure is most likely to withstand future *Tyler* challenges from former owners claiming they were denied excess value in their property. Although a public auction may not produce the best outcomes for VAD property, a critical part of addressing VAD is ensuring that there is finality to the transfer and a clear path forward for that property to productive use.

A local government or land bank that acquires VAD property needs assurance that when they eventually transfer the property—especially if they do so for a reduced price in exchange for a public benefit like providing affordable housing—it will not be subject to ongoing liability. A public auction at or near the completion of foreclosure is the best way we know to provide that kind of future comfort.[34]

A public auction with fully loaded minimum bid should be conducted in the following manner:

1. **The minimum bid should be for the amount that is owed to the local government, and it should reflect all public liens and costs allowable by state law.** Setting the value at any other amount, such as the perceived "market value" of the property, is not practical. It is extremely difficult to calculate with any certainty how a specific neighborhood market might value property that is subject to involuntary sale, especially if that property is vacant. Appraisals also have a history of being far below market value in predominantly Black neighborhoods.
2. **If proceeds from the sale exceed the minimum bid and any costs associated with the sale, those dollars should go into escrow.** These excess proceeds must be distributed to the owner and other interested parties upon receipt of a claim.
3. **Local governments and land banks should be able to compete with private bidders at the foreclosure sale,** though they should pay cash for any difference between the final price and the minimum bid.
4. **If no bidder offers the minimum, the local government—or a land bank—should hold a default bid in the amount of the minimum bid**. The selling officer's records should reflect that the minimum bid was the highest amount offered and that the local government was the winning bidder. Jurisdictions that directly take title to tax-foreclosed property at the conclusion of the foreclosure should clarify in reform that there is one subsequent public auction of the property in which the local government will "purchase" it for the amount of the minimum in the absence of higher bids.
5. **The public auction should be tailored to garner the best possible price for the property while also encouraging a pool of qualified bidders who are more likely to put the property back to productive use**. We encourage local governments to work with local lawyers and lawmakers to figure out how best to exclude auction participation of individuals and entities with outstanding code violations on other owned properties, that have previously lost property to tax foreclosure, or that own properties currently tax delinquent from participating in public auctions.

Appendix

The following questions were originally published in our 2023 policy brief. These questions provide an analysis of the ruling, and are reprinted here for the reference of those unfamiliar with the text of the ruling.

What mechanism(s) can state and local governments use to value tax-delinquent property for the purposes of determining whether a surplus exists, and if so, how much?

The decision strongly suggested that value established through a foreclosure sale—i.e., a public auction of the title to the property—at the conclusion of the tax foreclosure is permissible, so long as there is also a mechanism to return any surplus generated from the sale to the former owner or interested parties.

The Court did not expressly impose any other limitations on how tax-delinquent property may be valued for purposes of determining whether a surplus exists outside of a foreclosure sale, but any such valuation methods (e.g., an appraisal by the foreclosing local government) carry additional risk that the mechanism could be challenged by former owners or interested parties post-*Tyler*.

When should this valuation take place?

The date of the "taking" of the surplus in the property appears most likely to be the date that (a) the property

[32] Whether properties that are non-owner occupied (e.g., rental properties) or considered commercial or industrial should be given the same redemption period is a question of policy for state and local leaders to determine.

[33] See, for example, how Ohio defines "abandoned land" and "unoccupied land" at O.R.C. § 323.165(A) and (F).

[34] We understand the rationale for preserving a local government's ability to take direct title to VAD property in certain circumstance, so long as they understand that there may very well be future litigation over the "value" the local government retained when it failed to subject the property to public auction.

was sold or transferred, or (b) the former owners' right to redeem the property and prevent the foreclosure were extinguished, whichever one happens last. We therefore believe the valuation of the tax-delinquent property should take place on or as reasonably close as possible to that date.

If there is a surplus, how should it be distributed and to whom?

In most jurisdictions, mortgage foreclosure statutes already offer one option for how to distribute surplus, if any is generated from a public auction or some other mechanism (e.g., an appraisal and transfer to a local government entity). While the Court in *Tyler* seemed to suggest the owner is the one with the right to the surplus, most experts tend to agree that former owners and other parties with an interest in the property (e.g., mortgage or other lien holders) should be able to claim surplus. Local governments should explore whether the unclaimed surplus can be put in an escrow account for a defined period, after which those amounts default to the local government if no claim has been made.

Whatever the process, it is critical states and local governments ensure vulnerable owner-occupants know and can readily exercise the ability to claim any surplus.

Can states or local governments require property owners or other interested parties to claim an interest in future surplus prior to the public auction or transfer of the property—or risk losing the ability to do so?

Possibly, but there is risk in relying on such an interpretation. In its analysis, the Court discussed and did not overrule a 1956 Supreme Court decision, *Nelson v. City of New York*, where the Court found an ordinance requiring a property owner to file a timely answer in a foreclosure proceeding for unpaid water bills or risk forfeiting the right to future surplus did not amount to an unconstitutional taking. Specifically, the Court stated:

> "New York City's ordinance…permitted the owner to recover the surplus but required that the owner have 'filed a timely answer in [the] foreclosure proceeding, asserting his property had a value substantially exceeding the tax due.' Ibid. (citing *New York v. Chapman Docks Co.*, 1 App. Div. 2d 895, 149 N. Y. S. 2d 679 (1956)). Had the owners challenging the ordinance done so, 'a separate sale' could have taken place 'so that [they] might receive the surplus.' 352 U. S., at 110. The owners did not take advantage of this procedure, so they forfeited their right to the surplus. Because the New York City ordinance did not 'absolutely preclud[e] an owner from obtaining the surplus proceeds of a judicial sale,' but instead simply defined the process through which the owner could claim the surplus, we found no Takings Clause violation. Ibid."

We believe the discussion of *Nelson* leaves open the possibility that a state statute or local ordinance requiring property owners or interested parties to request a public auction in the foreclosure action, or otherwise make a claim for surplus, prior to the transfer of the property (or risk losing that right) may be permissible post-*Tyler*. However, local practitioners and their attorneys should be aware that this interpretation may be risky. After all, the Court in *Tyler* did not assess the adequacy of the New York City ordinance in question in *Nelson*. It merely distinguished the ordinance from the Minnesota statute, where the Court found there was no opportunity for owners to claim surplus. It is unclear how the Court, or lower courts, would assess the adequacy of a "request sale" requirement in the future if a former owner or interested party failed to make such a request and the local government or new owner later sold the property for an amount exceeding the total of the unpaid taxes and other charges.

Several states, including Illinois and New Jersey, sell tax liens or tax certificates to private buyers who, after the expiration of the owner's redemption rights, can convert the lien or certificate into a deed to the property without a public sale of the property. Are these private buyers subject to claims from former owners after Tyler?

The answer appears to be yes. When a private tax lien or tax certificate buyer purchases the property tax debt and then converts that debt to a deed to the property without a mechanism to value the property and return any surplus to the former owner or other interested parties, the claim that an unconstitutional taking has occurred is still valid. While former owners will likely name—at least—both the local government and the private tax buyer in their suit to recover a surplus, there is no reason to think that the tax buyer who acquired the title (and, presumably, the surplus) will be immune from liability for failure to provide the former owner just compensation.