In Search of Due Process: Notice in New York Administrative Tax Sales

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In the state of New York, the real property tax is a locally levied and administered tax.\(^1\) In addition to the New York Real Property Tax Law ("RPTL"), which contains general procedures that may be used statewide for the administration of property taxes,\(^2\) many localities impose property taxes under their local laws.\(^3\) Taxes on real property have been and continue to be the

\(^1\) See N.Y. Const. art. IX, § 2(c)(8). This section of the state constitution allows localities to levy and collect property taxes. See infra note 3. Real property taxes are levied by each "assessing unit," defined by the New York Real Property Tax Law ("RPTL") as "a city, town, county having a county department of assessment with the power to assess real property, or a village . . . ." N.Y. REAL PROP. TAX LAW § 102(1) (McKinney Supp. 1987).

\(^2\) With minor exceptions, there have been no taxes on real property actually levied by the State of New York itself since 1928, all such taxes being levied by municipalities." Godfrey, Enforcement of Delinquent Property Taxes in New York, 24 ALB. L. REV. 271, 274 n.7 (1960). The real property tax is an ad valorem tax, based upon the value of the property taxed. See N.Y. REAL PROP. TAX LAW § 102(14) (McKinney Supp. 1987); Ampco Printing-Advertiser's Offset Corp. v. City of New York, 14 N.Y.2d 11, 22, 197 N.E.2d 285, 288, 247 N.Y.S.2d 865, 870, appeal dismissed, 379 U.S. 5 (1964). The most attractive aspect of a real property tax is the theoretical ease and certainty of collection; the land itself is a readily available, unconcealable asset from which the taxing authority may satisfy the taxes due. See Godfrey, supra, at 273-74; REPORT OF THE STATE OF NEW YORK TEMPORARY COMMISSION ON THE REAL PROPERTY TAX 1-2 (1979) [hereinafter TAX COMMISSION REPORT].


\(^4\) See N.Y. Const. art. IX, § 2(c)(ii) "[E]very local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects . . . . (8) The levy, collection and administration of local taxes authorized by the legislature and of assessments for local improvements, consistent with laws enacted by the legislature." Id. "This chapter shall not be deemed to repeal or otherwise affect the provisions of any special or local law . . . . it being the intention of the legislature that the same shall continue in full force and effect. . . ." N.Y. REAL PROP. TAX LAW § 1606 (McKinney 1972). Some of the largest municipalities in the state use their
largest single source of revenue for New York's municipalities. Thus, it is important for the financial health of the municipality that the real property tax be efficiently enforced. The methods used to enforce the payment of delinquent property taxes include: levying upon any personal property of the delinquent taxpayer; instituting supplementary proceedings akin to an action upon a judgment docketed; foreclosure of tax liens, as in an action to own tax sale procedures. See, e.g., New York, N.Y., Admin. Code §§ 11-201 to 11-428 (1986); Westchester County, N.Y., Admin. Code §§ 283.091 to § 671 (1987), reprinted in 1 N.Y. State & Loc. Tax Serv. (P-H) ¶¶ 34,060-34,095 (1982); Nassau County, N.Y., Admin. Code §§ 5-2.0 to 6-29.0 (1981), reprinted in 1 N.Y. St. & Loc. Tax Serv. (P-H) ¶¶ 33,810-33,871 (1961). The rationale for "home rule" in New York is "a recognition that essentially local problems should be dealt with locally and that effective local self-government is the desired objective." Kelley v. McGee, 57 N.Y.2d 522, 535, 443 N.E.2d 908, 912, 457 N.Y.S.2d 434, 438 (1982). See generally Godfrey, supra note 1, at 287-90 (historical discussion of "home rule" collection of property taxes).

4 See The Temporary State Commission on State and Local Finances, Vol. 2: The Real Property Tax 6 (1976); Godfrey, supra note 1, at 274.

For the fiscal year ending in 1984, local governments in New York State raised $11,782.2 million (of their total revenues of $37,049.7 million, which includes money from the state and federal governments) from real property taxes. The Nelson A. Rockefeller Institute of Government, 1985-86 New York State Statistical Yearbook 386 (12th ed. 1986).


6 See N.Y. Real Prop. Tax Law § 926(2) (McKinney 1972). Once notice of the auction has been posted for at least six days in three public places in the city or town where the sale is to take place, the owner's personal property is then seized and sold at public auction. Id. § 926(2), (3) (McKinney 1972). This action is taken by the collecting officer of the municipality. Id. § 926(2); see also N.Y. Real Prop. Tax Law § 102(5) (McKinney 1984) (collecting officer defined). Levying upon personal property is possible because the owner of real property is personally liable for the tax due on his property. See id. § 926(1) (McKinney 1972). This remedy is rarely invoked by taxing authorities, presumably because to do so on a regular basis would require procedures that are inefficient relative to proceedings against property. See 1 N.Y. St. & Loc. Tax Serv. (P-H) ¶ 31,570 (May 7, 1986); 3 N.Y. Tax Serv. (MB) ¶ 76.20 (1987).

7 See N.Y. Real Prop. Tax Law § 990 (McKinney 1972); Nassau County, N.Y., Admin. Code § 5-32.0 (1981), reprinted in 1 N.Y. St. & Loc. Tax Serv. (P-H) ¶ 33,826 (May 22, 1948). This action is taken by the county treasurer after the collecting officer has returned the tax unpaid. N.Y. Real Prop. Tax Law § 990(1) (McKinney 1972); see also N.Y. Civ. Prac. L. & R. 5201-5252 (McKinney 1978 & Supp. 1987) (describing procedures for enforcement of judgment docketed). The advantage of these procedures is that the delinquent taxpayer is brought into court to determine whether there are any assets from which the tax may be satisfied. See N.Y. Civ. Prac. L. & R. 5231 (McKinney 1978). Again, these procedures are rarely used due to tax districts' preference for the more reliable proceedings against
foreclose a mortgage, and the oldest and most controversial procedure, the administrative tax sale.

The administrative tax sale is viewed as a relatively quick way to collect delinquent property taxes and to transfer property from delinquent taxpayers to persons willing and able to pay their taxes. Implicit in this procedure is a conflict between the interest of the municipality in seasonably collecting the tax due and the constitutional right of the delinquent taxpayer to receive due process before being deprived of his property. Recently, several courts have differed as to the constitutionality of administrative tax sale procedures used in New York. Nassau County has re-
responded to criticism by enacting sweeping procedural changes to avoid constitutional challenges.13

Challenges to administrative tax sales have focused on the adequacy of the notice informing property owners that they might lose their properties.14 Although in rem proceedings, including tax sales, were historically thought to require only minimal notice,15 the United States Supreme Court long ago rejected that theory in Mullane v. Central Hanover Bank & Trust Co.16 More recently, in Mennonite Board of Missions v. Adams,17 the Court held the general standards of due process applicable in the context of an administrative tax sale.18

13 See Nassau County, N.Y. Local Law No. 13 (Nov. 17, 1986); see also Nassau County Ends Home Tax-Lien System, N.Y. Times, Nov. 24, 1986, at D14, col. 1. (discussing amendments to NCAC tax sale procedures).
14 See Cooper, 629 F. Supp. at 659; Sheehan, 67 N.Y.2d at 56, 490 N.E.2d at 524, 499 N.Y.S.2d at 657; McCann, 123 App. Div. 2d at 112, 510 N.Y.S.2d at 150.
15 See Longyear v. Toolan, 209 U.S. 414, 417-18 (1908); see also Ballard v. Hunter, 204 U.S. 241, 262 (1907) (notice by publication did not deprive owner of due process); Leigh v. Green, 193 U.S. 79, 90-93 (1904) (publication of notice which merely described land adequate).

The rationale for requiring less notice in proceedings against property stemmed from the territorial theory of jurisdiction, under which a state could adjudicate matters relating only to persons and property within its borders. See Pennoyer v. Neff, 95 U.S. 714, 720 (1878). Thus, states developed in rem proceedings to gain jurisdiction over the property of nonresident owners against whom notice by publication was deemed sufficient. Id. at 727. This minimal notice rule was then invoked in in rem proceedings against resident property owners despite the availability of personal service. See Leigh, 193 U.S. at 92. Notice by publication in tax sales was justified by the fiction that the proceeding was against the land only and that the owner was deemed to have a duty to keep informed of actions affecting his property—the "caretaker theory," see, e.g., Huling v. Kaw Valley Ry. & Improvement Corp., 130 U.S. 559, 563-64 (1889); the argument that when one does not pay the property taxes due on his land, he knows that his property will be sold, see Botens v. Aronsauer, 32 N.Y.2d 243, 248-49, 298 N.E.2d 73, 74-75, 344 N.Y.S.2d 892, 895, appeal dismissed, 414 U.S. 1059 (1973); and the government's strong interest in collecting taxes. See supra notes 4-5 and accompanying text; Note, supra note 11, at 1511-14.
18 Id. at 798. Articulating the standard for notice that satisfies due process, the Mullane Court stated that notice should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314. Mullane expressly rejected the contention that the notice required should hinge on the classification of an action as in personam, in rem, or quasi in rem. Id. at 312. Nonetheless, before Mennonite, several state courts, including the New York Court of Appeals, held that publication was adequate notice of a pending tax sale. See, e.g., Botens, 32 N.Y.2d at 249, 298 N.E.2d at 75, 344 N.Y.S.2d at 896 (distinguish-
This Note will analyze existing law regarding administrative tax sales in New York and will discuss procedures which may lack the degree of notice required by the due process clause. The Note will outline the RPTL enforcement procedures with respect to delinquent tax and compare them with the procedures used by Nassau County. These procedures will be evaluated in light of recent case law, and it will be suggested that several major municipalities in New York must amend their administrative tax sale procedures to provide to property owners actual notice prior to any tax sale. Furthermore, it will be suggested that the RPTL, as well as several local laws, must be changed to afford mortgagees, and others with an interest in the property, notice prior to a tax sale.

CURRENT PROCEDURE FOR ADMINISTRATIVE TAX SALE IN NEW YORK

The RPTL requires administrative tax sale proceedings to be initiated whenever unpaid taxes are returned to the county treasurer. If those taxes remain unpaid for a locally specified period, the county treasurer commences a tax sale proceeding by sending notice of the sale by first class mail to the name and address of the owner or occupant listed on the assessment roll, and publishing a notice describing the properties to be sold. When the statutory

ing Mullane because a delinquent taxpayer should know his property will be sold); see also Comment, supra note 5, at 395 n.33 (collecting cases).

In Mennonite, the Court attempted to end this controversy by applying the Mullane standards to tax sales. See Mennonite, 462 U.S. at 798. Plaintiff, the Mennonite Board of Missions, was the mortgagee of certain property which, pursuant to Indiana law, was sold at a tax sale when the mortgagor failed to pay the property tax. Id. at 792-94. The Mennonite Board did not receive actual notice either prior to the tax sale or before expiration of the period during which the property could be redeemed. See id. at 794. Thus the only notice informing the Mennonite Board of the threat to its valuable interest in the property was the notice posted in the county courthouse and published three times in a newspaper. See id. at 793. The Court, citing Mullane, held that the notice provisions of the Indiana code violated the mortgagee's right to due process. See id. at 798; see also Mullane, 339 U.S. at 315 (“It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts.”).

19 See N.Y. REAL PROP. TAX LAW §§ 936, 1000 (McKinney 1972 & Supp. 1987). Upon the return of the unpaid delinquent taxes, five percent of the tax is added to the total amount due. See id. § 936(2) (McKinney 1972). This Note will be limited primarily to county procedures since counties are generally responsible for the enforcement of real property taxes; special rules are applicable to other governmental units. See id. §§ 1300-1342 (school districts); §§ 1400-1412 (villages) (McKinney 1972 & Supp. 1987).

20 See N.Y. REAL PROP. TAX LAW §§ 1000, 1002 (McKinney 1972 & Supp. 1987); see, e.g., 17 Op. State Compt. 58 (1961) (treasurer must hold tax sale of properties on which taxes are delinquent). In most counties following the RPTL, tax sale proceedings commence
notice requirements are satisfied, the county treasurer must "sell the property" for the amount of tax owing on it. Following the sale, the owner, occupant, mortgagee, or other interested party may, within a one-year period, redeem the property. Moreover, at least three months prior to the expiration of the one year redemption period, the county treasurer must publish a notice of unredeemed property and must, prior to publication, send notice by first class mail to the name and address of the owner or occupant.

on August 1, if the tax is still unpaid as of that date. See N.Y. REAL PROP. TAX LAW § 1000 (McKinney 1972 & Supp. 1987). The mailed notice must "contain a brief description of such parcel, the aggregate amount due on such parcel at the time of sale, and a statement that unless such amount is paid prior to the commencement of tax sale proceedings the parcel will be sold." Id. § 1002(4) (McKinney 1972 & Supp. 1987) The published notice should include a brief description of the parcel, the name of the owner or occupant appearing on the tax rolls, and the aggregate amount of taxes due at the time of the sale. Id. § 1002(1). The published notice must appear in two newspapers designated by the county board of supervisors, and must be published once every other week for a six week period prior to the day of the tax sale. See id. § 1002(2).

21 N.Y. REAL PROP. TAX LAW § 1006 (McKinney 1972). The sale price includes the amount of the original tax plus: five percent of the original tax, added pursuant to section 936; ten percent per annum interest from the day of February following the levy of the tax; and expenses chargeable against the parcel, including the expense of mailing the notice of the tax sale. Id. § 1002 (McKinney 1972 & Supp. 1987).

At the tax sale the purchaser does not actually obtain the property, rather he receives a tax sale certificate; this certificate represents an inchoate right to a conveyance of the realty that will mature only in the event that a redemption payment is not made. See United States v. General Douglas MacArthur Senior Village, Inc., 366 F. Supp. 302, 304 (E.D.N.Y. 1973), aff'd, 508 F.2d 377 (2d Cir. 1974).

22 See N.Y. REAL PROP. TAX LAW § 1010 (McKinney Supp. 1987). Payment is made to the county treasurer for the benefit of the tax sale purchaser. See id. The redemption price includes the amount paid at the tax sale plus interest and other amounts assessed on the property. See id. "The right to redeem land sold to enforce the collection of taxes assessed against it exists only as permitted by [the RPTL] and under such conditions as are expressed therein." See Elinor Homes Co. v. St. Lawrence, 113 App. Div. 2d 25, 29, 494 N.Y.S.2d 889, 892 (2d Dep't 1985). A one year redemption period is extended to three years in the case of occupied or mortgaged property. N.Y. REAL PROP. TAX LAW §§ 1022, 1024 (McKinney 1972 & Supp. 1987); see infra note 24 and accompanying text.

23 See N.Y. REAL PROP. TAX LAW § 1014 (McKinney 1972 & Supp. 1987). The notice must contain, inter alia, “the amount necessary to redeem the parcel computed to the last day on which such redemption can be made and . . . [must state] that unless such parcel is redeemed on or before such day it will be conveyed to the purchaser.” Id. § 1014(3) (McKinney Supp. 1987). The mailed notice must be given at least fourteen days prior to the commencement of the published notice, and the expense of such notice is deemed part of the tax due on the property so that either the redeeming owner or the tax sale purchaser who eventually takes title to the property must pay said tax. See id. The mailed notice required by section 1014 should be addressed to the owner of record at the time of the mailing. See Op. Couns. St. Bd. Equalization & Assessment No. 68. Section 1022 requires that notice to redeem be given to the occupant, but failure to do so merely extends the redemption period. See N.Y. REAL PROP. TAX LAW § 1022 (McKinney 1972 & Supp. 1987); see, e.g., Congrega-
If the property is not redeemed, the county treasurer will execute a recordable conveyance of the property, which vests absolute title in fee in the tax sale purchaser.\textsuperscript{24}

Local laws also govern administrative tax sales and where the RPTL differs, local law controls.\textsuperscript{25} The Nassau County Administrative Code ("NCAC"), unlike the RPTL, provides advance notice of the tax sale solely by publication.\textsuperscript{26} In addition, the RPTL and several local laws do not provide notice to mortgagees and others with similar interests in real property.\textsuperscript{27} The NCAC had been severely

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\textsuperscript{24} See \textit{N.Y. Real Prop. Tax Law} §§ 1018(1), 1020(1) (McKinney 1972 & Supp. 1987). The tax sale purchaser must, within five years, apply to the county treasurer for a conveyance of the property otherwise his certificate becomes void. \textit{Id.} § 1018(2), (3) (McKinney 1972). In tax districts that have adopted Title Two of the Uniform Act (RPTL sections 1110-1116), tax purchasers may, in the alternative, foreclose their tax lien as in an action to foreclose a mortgage pursuant to the real property actions and proceedings law. \textit{Id.} §§ 1114, 1116 (McKinney 1972 & Supp. 1987). It would, however, be highly unusual for a tax lien speculator to elect to go through the expensive foreclosure proceeding merely to recoup his investment plus interest; he could more easily take a conveyance of the property in fee and dispose of it, possibly receiving windfall profits. See \textit{McCann v. Scaduto}, 123 App. Div. 2d 111, 120, 510 N.Y.S.2d 149, 155 (2d Dep't 1986) (Lazer, J., dissenting) ("Not suprisingly, nearly all lienholders opted for the much simpler procedure 'to elect to accept a deed of conveyance of such property'" under similar provisions of NCAC).

The redemption period for occupied or mortgaged parcels, or both, is extended to three years. \textit{N.Y. Real Prop. Tax Law} §§ 1022, 1024 (McKinney 1972 & Supp. 1987). The purchaser, after receiving a conveyance upon the expiration of section 1018's one year redemption period, may limit the three year period to six months (effectively making the minimum redemption period one year and six months) by personally serving the occupant or a mature member of his family, or, when the occupant resides outside the city or town where the property is located, by mailing a duly prescribed notice of redemption and filing within one month an affidavit stating that the notice was duly served. \textit{See id.} (McKinney 1972 & Supp. 1987). If notice is duly served and recorded, and the property has not been redeemed, the purchaser acquires indefeasible title to the property and all others shall be forever barred from redeeming such real property. \textit{See id.} §§ 1022(1)(c), 1024(1) (McKinney 1972 & Supp. 1987). Thereafter, the conveyance may be cancelled only upon a finding, within five years of the expiration of the redemption period, that the tax sale, or the underlying tax, was unconstitutional or otherwise illegal. \textit{Id.} § 1020(3) (McKinney 1972); see, e.g., \textit{Union & New Haven Trust Co. v. People}, 26 Misc. 2d 831, 215 N.Y.S.2d 88 (1960) (when assessment of land invalid, tax deed to land void), aff'd, 15 App. Div. 2d 1, 221 N.Y.S.2d 320 (3d Dep't 1961).

\textsuperscript{25} See \textit{Nassau County, N.Y., Admin. Code} §§ 5-37.0, 5-39.0 (1982). The NCAC provides for publication in a designated newspaper once in each of three successive calendar weeks and provides for sale of the tax liens "without further notice." \textit{See id.}

criticized because of its notice by publication provisions, and the intricate legal jargon contained in mailed notices.

Nassau, in November 1986, amended the NCAC. Residential “class one” property owned by county residents now requires that notice to redeem must be personally served on the owner. With regard to all property, the notice must “be printed in a clear and coherent manner using words with common and everyday meanings.” Moreover, those holding liens on residential property may no longer “elect to accept a conveyance to the property.” Instead, their remedy “shall be limited to an action to foreclose the tax lien.” Although these amendments to the NCAC are a welcome

N.Y. St. & Loc. Tax Serv. (P-H) ¶¶ 34,018-34,019 (1986).

28 Nassau County, N.Y., Admin. Code § 5-37.0 (1982); see McCann v. Scaduto, 123 App. Div. 2d 111, 119, 510 N.Y.S.2d 149, 155 (2d Dep't 1986) (Lazer, J., dissenting) (amendments to NCAC “prompted in part . . . by the extreme results” it allowed). The NCAC has been criticized for permitting private individuals, hoping to get title to properties for much less than market value, to speculate in tax liens. See Newsday, Nov. 16, 1986, at 22.

29 See Newsday, Nov. 16, 1986, at 5; N.Y. Times, Nov. 24, 1986, at D14, col. 1 (“people who lost their homes [thought] . . . the letter [informing them that they had three months to redeem their property] was unclear and did not spell out the consequences of the action”). When notice is mailed to the owner, its only reference to the consequences of nonredemption is an indication of the “day upon which the holder of the tax lien may elect to accept a deed of conveyance of such property or to call his money and foreclose his tax lien.” Nassau County, N.Y., Admin. Code § 5-51.0 (as amended Nov. 17, 1986). A conveyance under the NCAC entails consequences radically different from those of a conveyance under the RPTL: the conveyance in Nassau entitles the holder, upon recordation, to obtain actual possession of the property; whereas even after a conveyance pursuant to RPTL section 1018, in the case of occupied or mortgaged property, or both, there is an additional redemption period of up to two years. Compare Nassau County, N.Y., Admin. Code §§ 5-52.0, 5-56.0 (1981) with N.Y. Real Prop. Tax Law § 1020(2) (McKinney 1972 & Supp. 1987). See also N.Y. Real Prop. Tax Law §§ 1022, 1024 (McKinney 1972 & Supp. 1987) (sections extending redemption period even after conveyance).

30 See Nassau County, N.Y., Local Law No. 13 (as amended Nov. 17, 1986).

31 See Nassau County, N.Y., Admin. Code 5-51.0(c) (as amended Nov. 17, 1986). Notice to nonresident owners is by certified mail. See id. Personal service to a natural person is delivery to the person to be notified or delivery to a qualified other person at the home or business, provided that in the latter case notice must also be mailed to the person’s last known residence. See N.Y. Civ. Prac. L. & R. 308(1), (2) (McKinney Supp. 1987). If neither of these methods is possible, personal service may be accomplished by affixing a notice to the door of the person’s business or home and mailing notice to the last known address. N.Y. Civil Prac. L. & R. 308(4) (McKinney 1987); see also N.Y. Civ. Prac. L. & R. 309, 310, 311 (McKinney 1972 & Supp. 1987) (personal service upon infants and incompetents; partnerships; and corporations, respectively).

“Class one” property is defined in the RPTL to include all one, two and three family residential property. See N.Y. Real Prop. Tax Law § 1802(1) (McKinney Supp. 1987).

32 Nassau County, N.Y., Admin. Code § 5-51.0(b) (as amended Nov. 17, 1986).

33 See Nassau County, N.Y., Admin. Code § 5-75.0 (added Nov. 17, 1986) (only applicable to residential “class one” property). The clear benefit of limiting the remedy to foreclo-
step towards more equitable administration of the real property tax, it is submitted that the changes made in Nassau and other counties, particularly with respect to notice procedures, still do not satisfy the due process clause of either the federal or New York constitution.\textsuperscript{34}

\section*{Constitutional Notice Due Persons Subject to a Tax Sale}

\subsection*{A. Notice to Owners and Occupants}

Notice by personal service, though certainly more reliable than other methods,\textsuperscript{35} has never been held to be constitutionally required in tax sales.\textsuperscript{36} The requirement that tax lienors of residence of the lien is the avoidance of a complete forfeiture of the owner's interest in cases in which the amount of the lien is far less than the value of the property. This is true because, in a foreclosure proceeding, after all liens on the property and expenses of the mortgage proceeding have been paid, the prior owner of the property, as owner of the equity of redemption, is entitled to any surplus. See N.Y. REAL PROP. ACTS. LAW §§ 1311, 1361 (McKinney 1979). Thus, the tax sale purchaser's recovery would be limited to the amount he paid at the sale plus interest and costs. See id. § 1354 (McKinney 1979 & Supp. 1987).

The only other significant amendment to the NCAC is the establishment of a "Hardship Review Board" which has the power, in cases of hardship applicable only to "class one" residential property that the owner uses as his principal dwelling place, and upon application within two years of the tax sale, to grant a one year extension to pay back taxes, interest, and other charges. NASSAU COUNTY, N.Y., ADMIN. CODE §§ 5-76.0(c), 5-24.0(8) (as amended Nov. 17, 1986).


\textsuperscript{35} See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) ("Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding").

\textsuperscript{36} See Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983); see also Mullane, 339 U.S. at 314 ("Personal service has not in all circumstances been regarded as indispensable to the process due to residents . . . We disturb none of the established rules on these subjects."). The factors that weigh against providing personal notice are: the sheer expense of providing such service to delinquent taxpayers, see Harris v. Gaul, 572 F. Supp. 1554, 1558-59 (N.D. Ohio 1983); Comment, supra note 5, at 403-04 n.81; the fact that taxpayers are charged with the knowledge that taxes must be paid regularly, see Congregation Yetev Lev D'Satmar, Inc. v. County of Sullivan, 59 N.Y.2d 418, 427, 452 N.E.2d 1207, 1212, 465 N.Y.S.2d 879, 884 (1983); cf. Mennonite, 462 U.S. at 807-08 (O'Connor, J., dissenting) (state tax assessment occurs with regularity and predictability); Texaco, Inc. v. Short, 454 U.S. 516, 532 (1982) (that persons owning property within State charged with knowledge of relevant statutory provisions affecting control or disposition of such property); and the need of local government to collect the tax expeditiously, see Mennonite, 462 U.S. at 805-06
tial property foreclose the lien instead of simply accepting a conveyance, as they had formerly done, is likewise not constitutionally required, because the forfeiture involved in the automatic conveyance occurs only after a lengthy redemption period. Similarly, the requirement that notice be in comprehensible language is a reform that enhances the likelihood that the tax will be paid and protects property owners by informing them clearly of the consequences of inaction. Therefore, while the amendments to the NCAC give greater protection to property owners, they are not constitutionally required. Nassau County and several other counties in New York, however, still give notice prior to the tax sale only by publication. In light of the holding in Mennonite that "[t]he tax sale immediately and drastically diminishes the value" of the property, it is argued that, at minimum, mailed notice must be given to the owner in fee prior to the tax sale.

The Court in Mennonite stated that, before conducting a tax sale at which a lien diminishing a person’s property interest will be granted, and which “may result in the complete nullification” of

(O'Connor, J., dissenting).


40 Mennonite, 462 U.S. at 798. Justice O’Connor’s vigorous dissent in Mennonite did not question the majority’s assertion that the tax sale diminished the value of the mortgagee’s interest. See id. at 806-09 (O’Connor, J., dissenting).

41 See McCann, 123 App. Div. 2d at 124, 510 N.Y.S.2d at 158 (Lazer, J., dissenting) (attributing failure to comply with Mullane in tax sales to “apparent reluctance to upset widespread traditional practices”). Justice Lazer recognized that notice of the tax sale mailed to the owner is a fundamental due process requirement. See id. at 123, 510 N.Y.S.2d at 157 (Lazer, J., dissenting). It was erroneously assumed that Nassau County’s amendments to the NCAC provided for such notice. Id. at 125, 510 N.Y.S.2d at 159 (Lazer, J., dissenting). Justice Lazer also mistakenly asserted that “until [Nassau County’s] recent repair of relevant portions of the code, it remained alone among the counties in the State to retain publication as the only method of giving notice of tax lien sales.” Id. In fact, other counties in the state use publication as the sole method of notice of impending tax sale. See supra note 39 and accompanying text.
his property interest, the municipality must give due process notice to those affected. Both the granting of a lien and the ultimate divestment of the property are basic to tax lien sales, as are the NCAC procedures. When the interested party is "reasonably identifiable" this requirement is not met solely by constructive notice. The Court found that mortgagees who have recorded their mortgages in the public land records are "reasonably ascertainable." Furthermore, owners have a greater property interest than mortgagees, and are easier to identify and locate. Therefore, mandatory mailed notice to owners and occupants, before the

42 Mennonite, 462 U.S. at 798.
43 See Nassau County, N.Y., ADMIN. CODE §§ 5-39.0, 5-58.0 (1981); Godfrey, supra note 1, at 282-85. The McCann court justified Nassau County's notice by publication by distinguishing the NCAC tax sale provisions from the Indiana statute at issue in Mennonite. See McCann, 123 App. Div. 2d at 116-17, 510 N.Y.S.2d at 153. The majority stated the dispositive factor in Mennonite was that "title to the mortgaged premises passed to the purchaser at the sale, subject to defeasement only if the former owner redeemed the property by paying his taxes." Id. at 116, 510 N.Y.S.2d at 153. The court used the word "title" because the Indiana statute employed the following language: "The county treasurer shall sell the real property. . . ." IND. CODE ANN. § 6-1.1-24-5(e) (West Supp. 1986). But, just as under New York's RPTL and Nassau's Administrative Code, the purchaser in Indiana does not actually become the owner in fee simple until a lengthy redemption period has expired. See IND. CODE ANN. § 6-1.1-25-4 (West 1982); N.Y. REAL PROP. TAX LAW §§ 1018, 1020, 1022, 1024 (McKinney 1972 & Supp. 1987). The McCann majority "distinguished" the NCAC, noting that "[t]he tax lien purchaser [in Nassau County] does not obtain title to the premises on the date of the sale but merely acquires a tax lien and does not become entitled to exercise any possessory interest in the premises until the end of the statutory two year redemption period." McCann, 123 App. Div. 2d at 117, 510 N.Y.S.2d at 153; NASSAU COUNTY, N.Y., ADMIN. CODE § 5-52.0 (1981). The same statement, however, describes the precise rights of the tax sale purchaser under the statutes addressed in Mennonite. See IND. CODE ANN. § 6-1.1-24-9(b) (West 1982).

A tax sale under the NCAC or the RPTL is a condition precedent to the owner losing his property and gives the purchaser "a lien which has priority over other liens and over the owner's fee title as well," see McCann, 123 App. Div. 2d at 127, 510 N.Y.S.2d at 160 (Lazer, J., dissenting), which is precisely the way the Supreme Court analyzed the Indiana statute. See Mennonite, 462 U.S. at 793 (purchaser acquires certificate of sale which constitutes lien against real property for amount paid). The liens acquired by tax sale purchasers in New York "immediately and drastically diminishes the value" of any other interest in the property, as do the liens under Indiana law, and Mennonite demands that those with such an interest be given notice prior to the tax sale. See McCann, 123 App. Div. 2d at 130, 510 N.Y.S.2d at 162 (Lazer, J., dissenting).
44 See Mennonite, 462 U.S. at 798.
45 See id.
47 See N.Y. REAL PROP. TAX LAW § 502 (McKinney 1984). The name of the property owner is recorded on the tax rolls at the county treasurer's office, so there is no need to search land records to give owners notice. See id.
value of their interests is lessened by the tax sale, is necessary to satisfy due process and should be required in all municipalities that do not already do so.

B. Notice to Mortgagees and Those With Similar Interests

New York's RPTL provides for conditional notice to mortgagees under article 11 in rem foreclosures, but mortgagees do not receive such notice under the administrative tax sale of article 10 nor the various local laws. The Supreme Court refined the Mullane standard in Mennonite, extending the due process notice requirement to administrative tax sales. In Mennonite, the Court held that a mortgagee, as a party with a substantial property interest, was entitled, when his identity was reasonably ascertainable, to actual notice prior to the tax sale, but it declined to decide whether notice could be conditioned upon such persons filing with the taxing authority. Thus, the Court shifted its focus from whether, under all the circumstances, the notice was reasonably calculated to inform, to whether the names of such persons are reasonably ascertainable.

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48 See N.Y. REAL PROP. TAX LAW § 1126 (McKinney 1972). Such notice is given without charge and the filing is valid for five years. Id.
49 See N.Y. REAL PROP. TAX LAW § 1002 (McKinney 1972 & Supp. 1987). When the mortgagee is not given mailed notice before the tax sale, conditional or otherwise, Mennonite is applicable, see supra notes 42-45 and accompanying text, therefore, this provision was held unconstitutional as applied to mortgagees. See Cooper v. Makela, 629 F. Supp. 658, 662 (W.D.N.Y. 1986).
50 See supra note 39. One New York appellate court divided on the issue of conditional notice. See In re Foreclosure of Tax Liens by County of Erie, 103 App. Div. 2d 635, 639-40, 481 N.Y.S.2d 547, 550 (4th Dep't 1984) (applying Mennonite in holding unconstitutional in rem tax foreclosure giving mortgagee only conditional notice); but see id. at 640-41, 481 N.Y.S.2d at 551 (Boomer, J., concurring) (due process satisfied if conditional notice statute was properly drafted, so that once mortgagee files, the sending of notice mandatory, not discretionary).
52 Id. at 798.
53 See id. at 798 n.2. In 1980, after the tax sale at issue had already occurred, Indiana provided for mailed notice to mortgagees if the mortgagee requested such notice each year and paid a fee to cover the cost of mailing notice. See IND. CODE ANN. § 6-1.1-24-4.2 (West 1982). The statute was amended in 1988 and now provides for mandatory, unconditional notice to mortgagees, and others with a substantial interest in the realty. See IND. CODE ANN. § 6-1.1-24-4.2 (West Supp. 1986).
54 See Mennonite, 462 U.S. at 800. "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interest of any party, . . . if its name and address are reasonably ascertainable." Id. This shift was criticized by the dissent as an unwarranted departure from the Mullane standards. See id. at 800-01 (O'Connor, J., dissenting).
The relative difficulty or ease of determining affected persons’ names and addresses should be only one factor which must be weighed against the government’s strong interest in collecting taxes and the burden involved in giving notice. The Mennonite decision was criticized as increasing the burden on the notifier beyond that intended by Mullane, yet the Court explicitly found Mullane to be controlling. Because the Mullane balancing standards have been universally followed, issues such as conditional notice of tax sales to mortgagees, should be decided based upon application of these standards rather than seeking rigid rules as to whom receives a particular form of notice.

While Mennonite left many questions unanswered, it is submitted that a careful application of the Mullane balancing approach reveals that conditional notice to mortgagees is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” The names and addresses of mortgagees may be difficult and expensive to ascertain, thereby infringing on the state’s interest in efficient collection of taxes, 

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56 See supra note 54.
57 Mennonite, 462 U.S. at 798.
58 See id. at 797 (“this Court has adhered unwaveringly to the principle announced in Mullane.”)
60 See Mullane, 339 U.S. at 313-16 (against state interest, balance individual interest protected by fourteenth amendment). The dissent in Mennonite was critical of the majority for its cursory application of the Mullane balancing test, believing too little weight was given to the state’s interest in collecting taxes. See Mennonite, 462 U.S. at 800-09 (O’Connor, J., dissenting); see also Comment, supra note 46, at 315.
61 See Mullane, 339 U.S. at 314 (emphasis added).
62 See Mennonite, 462 U.S. at 806 (O’Connor, J., dissenting). “[T]hat burden is not limited to mailing notice. Rather, the State must have someone check the records and ascertain with respect to each delinquent taxpayer whether there is a mortgagee, perhaps whether the mortgage has been paid off, and whether there is a dependable address.” Id. (O’Connor, J., dissenting); see also In re Foreclosure of Tax Liens by the County of Erie, 103 App. Div. 2d 636, 641, 481 N.Y.S.2d 547, 551 (4th Dep’t 1984) (Boomer, J., concurring) (heavy burden will be placed upon Erie County if required to make title search of each of thousands of properties in tax foreclosure proceedings); Comment, supra note 5, at 403 n.81 (expense of title search in Buffalo, New York: $75-100). The interest of the taxing municipality, which represents all of its residents, is analogous to the trust plan in Mullane, where beneficiaries not “on the books” did not have to be given actual notice. See Mullane, 339 U.S. at 317-18. “Nor do we consider it unreasonable for the State to dispense with more
whereas the mortgagees' interest, though substantial, is not as im-
portant as that of the property owner. Since it is the common 
business practice of mortgagees to keep themselves informed of ac-
tions affecting their interest, conditional notice is a reasonable 
mechanism for providing due process in light of the comparatively 
greater burden of requiring actual notice. Thus, it is suggested 
that the due process clause of the Constitution demands notice be 
given to mortgagees, and those with similar interests; but this no-
tice may be conditioned on their filing with the taxing authority.

CONCLUSION

New York's law governing delinquent property taxes divides 
responsibility among too many governing bodies and is based upon 
antiquated procedures. This may help explain why, thirty-seven 
years after the Supreme Court specified requisite notice proce-
dures in Mullane, some New York municipalities still hold admin-
istrative tax sales without adequate notice. Recent reforms in Nassau County are an encouraging sign, but Nassau and other counties 
still give only published notice prior to tax sales. It is submitted 
that these counties must minimally provide to delinquent property 
owners mailed notice of the impending tax sale to comply with 
constitutional requirements. Further, it is submitted that tax sale 
laws such as RPTL article 10, which do not provide actual notice 
to mortgagees, are likewise unconstitutional. Due, however, to the 
practical difficulties of ascertaining the identity and location of 
mortgagees and others with a substantial interest in the delinquent 
property, notice may be conditioned upon such persons filing with 
the taxing authority.

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certain notice to those . . . whose interests . . . although they could be discovered upon 
investigation, do not in due course of business come to [the] knowledge [of the person giving notice]." Id. As only the owner in fee is personally liable for property taxes, mortgagees do 
not appear on the tax rolls and thus "do not in due course of business come to [the] knowl-
edge" of the taxing authority. See N.Y. REAL PROP. TAX LAW § 502 (McKinney 1984 & Supp. 
1987).

63 See Comment, supra note 46, at 321.

64 See Mennonite, 462 U.S. at 806-09 (O'Connor, J., dissenting); In re Foreclosure of Tax Liens by County of Erie, 103 App. Div. 2d 636, 641, 481 N.Y.S.2d 547, 551 (4th Dep't 1984) (Boomer, J., concurring).

65 Godfrey, supra note 1, at 285-86.