

REDUCING ALABAMA STATE-OWNED, TAX-DELINQUENT PROPERTIES BY CLARIFYING THE LAW OF REDEMPTION

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I. Introduction

The State of Alabama owns tens of thousands of tax-delinquent properties, and that number is increasing at an alarming rate. According to a recent Cumberland Law Review article, the state owned 8,595 tax-delinquent properties in 2005, and the number jumped to 25,000 by 2012, representing \$141 million in property value at that time.¹ The increase continued after 2012, reaching a total of 38,664 state-owned tax-delinquent properties as of September 21, 2017.² These properties create a multitude of problems for the state and local communities. For one, they represent millions of dollars in uncollected property tax revenues, on which counties, cities, and local school districts rely. Further, because state-owned properties are not taxed, they represent the continuing loss of millions of dollars of tax revenue each year during the state's ownership. Moreover, there is a high correlation between urban blight and the number of tax-delinquent properties, and efforts to address blighted properties are intertwined with the state's ability to sell tax-delinquent properties.³

One of Alabama's state senators, Senator Pittman, recognized the need to address the state's ownership of tax-delinquent properties, and introduced legislation in both 2016 and 2017 directed specifically at reducing the number of those properties.⁴ The legislation, had it passed,

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¹ Andrew S. Olds, *Saving Alabama's Urban Neighborhoods: Revisions to Alabama's Property Tax Sale Law*, 44 CUMB. L. REV. 497, 503 (2014).

² Derrick Coleman, Director, Property Tax Division, Alabama Department of Revenue, STATE OWNED TAX DELINQUENT PROPERTIES, October 3, 2017.

³ Anna Clark, *Why Cities Need to Get Smarter About Property Taxes*, May 19, 2015 <https://nextcity.org/daily/entry/foreclosure-vacant-properties-taxes-cities> (“property tax problems are a root cause of ‘every aspect of distress in a given neighborhood,’ from vacancy to poor public health to crime.”); Olds, *supra* note 1, at 498.

⁴ S.B. 373, 2016 Leg., Reg. Sess. (Ala. 2016); S.B. 264, 2017 Leg., Reg. Sess. (Ala. 2017).

would have required the Alabama Department of Revenue to auction off all state-owned tax-delinquent properties that were more than five years tax-delinquent.⁵ As of September 21, 2017, the state owned 21,666 properties that were five or more years tax delinquent.⁶ Though Senator Pittman's 2016 and 2017 bills did not pass, his efforts recognize the practical need for the state to recover whatever uncollected revenue it can from the thousands of non-tax-producing properties it holds, and additionally, to place those properties back on the tax rolls and into the hands of owners who will utilize and care for the properties.

Given the magnitude of this problem, the wide array of factors impacting the state's ability to sell its tax-delinquent properties need to be carefully considered. This article focuses only on a specific factor relating to the demand for the state's properties: the impact that an ambiguity involving Alabama's property tax sale redemption law has on the demand for the state's properties. The article seeks to clarify the law in that area to improve the demand for state-owned properties and maximize the benefit to the state.⁷

Two recent articles describe how Alabama's property tax sale laws create disincentives for the purchase of tax-delinquent properties.⁸ Both articles note that Alabama law strongly favors the interest of the owner of property sold for taxes.⁹ One of the authors stated: "Alabama courts have been very deferential to property owners, construing tax sale statutes in their favor at every turn."¹⁰ The other article points out that there is judicial

⁵ *Id.* The legislation focused on properties that have been tax-delinquent for five or more years, due to the greater flexibility the State has in pricing those properties. Before a property is five years tax-delinquent, the State cannot sell the property to a private purchaser for less than a full redemption amount. Once a property is five years tax-delinquent, the State can sell the property for a "best price." ALA. CODE § 40-10-134 (1975).

⁶ Coleman, *supra* note 2.

⁷ That this article focuses only on one particular issue is not intended to suggest that other issues are of less importance. When the prospect of selling 20,000 plus properties is being considered, there are numerous issues that require careful consideration, including the type of notification that must be given to the former owners, the most effective way to bulk sale tax delinquent property, the potential outcomes of a bulk sale, the potential use of the properties, the impact on neighborhoods, the likelihood of the purchasers paying taxes going forward, etc.

⁸ Olds, *supra* note 1, at 498; Gary E. Sullivan, *Alabama Tax Certificate Investors Beware: Negotiating Through the Labyrinth, and Important Limitations to Recovering Money in, the Redemption Process*, 73 ALA. LAW. 416, 420 (2012).

⁹ See generally William R. Justice, *Redemptions of Real Property Following Tax Sales in Alabama*, 11 CUMB. L. REV. 331 (1980).

¹⁰ Olds, *supra* note 1, at 503.

hesitancy “toward governmental property divestitures,” and that “the judiciary strictly scrutinizes tax sale procedure to protect landowner and lienholder rights.”¹¹ One can understand this favoritism as it seeks to prevent a taxpayer from forever losing his property due to an obligation (the ad valorem tax) that is a tiny fraction of the value of the property.¹²

The Sullivan article explains that a purchaser of a tax-delinquent property may potentially recover twelve percent interest on the amount paid for the tax-delinquent property if the owner redeems.¹³ However, there is a great deal of uncertainty and risk threatening an investment in tax-delinquent properties. This risk is due to the lack of clarity of Alabama law, the risk of the sale being declared invalid by a court, and the potential that new legislation will reduce the rate of interest on redemptions.¹⁴ Indeed, new bills are introduced almost every year that would reduce the interest on redemptions.¹⁵ In the Olds article, the author notes that the challenge of renewing urban neighborhoods impacted by blight is “exacerbated by Alabama’s property tax sale laws, which represent a significant barrier to redevelopment in urban neighborhoods.”¹⁶ He further concludes that “[t]he system does not incentivize acquisition of [tax-delinquent] property for redevelopment,” thus, “investors interested in revitalization likely will be discouraged from acquiring properties that are otherwise ripe for renovation.”¹⁷

These recent articles identify a legal landscape that impedes the sale of the state’s tax-delinquent properties, and also note the link between this impediment and urban renewal through private development. This article builds on those two articles by focusing on one aspect of Alabama tax sale law that diminishes the demand for the state’s tax-delinquent properties: a perceived ambiguity with respect to when the right to redeem property sold for taxes is eliminated. This perceived ambiguity negatively impacts the ability of a purchaser of a state-owned property to insure the title to the property acquired, and consequently, diminishes the demand for the state’s properties.

¹¹ Sullivan, *supra* note 8, at 418.

¹² Olds, *supra* note 1, at 503.

¹³ Sullivan, *supra* note 8, at 418.

¹⁴ *Id.*

¹⁵ S.B. 218, 2015 Leg., Reg. Sess. (Ala. 2015); S.B. 362, 2015 Leg., Special Sess. (Ala. 2015); S.B. 286, 2016 Leg., Reg. Sess. (Ala. 2016); S.B. 350, 2016 Leg., Reg. Sess. (Ala. 2016); S.B. 44, 2017 Leg., Spec. Sess. (Ala. 2017).

¹⁶ Olds, *supra* note 1, at 498.

¹⁷ *Id.*

A primary factor for incentivizing the purchase of tax-delinquent properties from the state is the potential to perfect title in the properties purchased, and thereafter, sell the properties at market value for a profit. Because the ultimate measure of a perfected title is whether a title company will insure the title, the ability to obtain title insurance is a critical factor for a purchaser. If the steps to obtain title insurance are too costly and uncertain, then the profit potential is significantly reduced. Additionally, if the purchaser is unable to obtain title insurance, then the profit potential may be altogether eliminated. Accordingly, the demand for the state's properties is linked to the ability of purchasers to ultimately obtain title insurance to the properties.¹⁸

Perfecting the title to tax-delinquent property purchased from the state requires eliminating all rights of redemption and all rights to challenge the purchaser's interest.¹⁹ Until all of those rights are eliminated, the risks associated with the purchaser's title will prevent the purchaser from obtaining title insurance. Due to perceived ambiguities in the law, title insurance companies are concerned that the following are, or may be, "rules" of law with respect to the elimination of the right to redeem: (i) there is a minimum of six years from the initial county tax sale during which the right to redeem cannot be eliminated; and (ii) the right to redeem cannot be eliminated without the purchaser establishing actual possession for at least three years.²⁰

Though it can be explained that the foregoing "rules" do not apply in certain situations, title underwriters, who must minimize risk to stay in business, condition the insuring of title on the assumption that the rules always apply to property derived from a tax sale. As a result, a purchaser of property from the state will have to obtain actual possession of the property acquired, and thereafter wait an additional three years before being able to finance development of the property or sell the property at market value.²¹ This time frame, especially when combined with the other risks of buying tax-delinquent property, the unpredictable costs and expense of perfecting title, and the uncertainty of the real estate market, suppress the demand for

¹⁸ See *id.* at 502 (noting the relationship title insurance has with the value of tax-delinquent properties due to the inability to finance redevelopment without title insurance).

¹⁹ See *id.* at 511.

²⁰ *Id.* at 502 ("[A] private developer who buys a tax certificate at the tax sale generally must wait for a minimum of six years before he can cut off the right of redemption and bring a successful quiet title action."); *Id.* at 511 ("To cut off the owner's right of redemption, the purchaser . . . must maintain adverse possession for at least three years from the date he is entitled to demand a tax deed.").

²¹ Olds, *supra* note 1, at 502, 511.

the state's tax-delinquent properties, and greatly reduce the value of those properties to the state.

This article proposes that the perceived ambiguity be addressed by legislation to clarify that, following the initial minimum three-year redemption period, the right to redeem can be eliminated by a properly entered court order without a purchaser being in possession for three years and without having to wait a minimum of six years from the date of the county tax sale. As explained below, such clarification is consistent with Alabama's property tax sale laws, particularly when those laws are considered in light of the law relating to quiet title and ejectment. Moreover, the clarification will not negatively impact any of the competing interests affected by the property tax sale laws.

One response to the fact that there are a number of conditions negatively impacting the demand for tax-delinquent properties may be to ask, "Who cares that it is costly, difficult, and unpredictable to perfect title in tax-delinquent properties?" The reason to care is due to the magnitude of problems relating to tax-delinquent property and to the fact that these factors diminish the state's ability to sell its properties. These conditions have a broad impact on a number of public and private concerns, including the recovery of millions of dollars in delinquent and future taxes desperately needed by counties, cities, and school districts, as well as the ability of the private sector to participate in urban neighborhood improvement through the purchase and repurpose of abandoned and blighted properties.

A. Tax-delinquent Properties

"Tax-delinquent properties," as referred to in this article, are real properties sold at the annual county "tax sales." Each year, *ad valorem* taxes on real properties are billed on October 1, and are considered delinquent if not paid by December 31.²² After December 31, a notification process begins, leading to an auction sale of all properties for which taxes remain delinquent.²³ These tax sales occur between March and June every year. Properties are sold to the highest bidders, provided the winning bid must equal or exceed the minimum bid requirement of the total of the past due taxes, interest on the taxes, and the expenses of sale.²⁴ On the other hand, properties not receiving the minimum bid are deemed to be sold to the State of Alabama.²⁵

²² ALA. CODE § 40-11-4 (1975).

²³ ALA. CODE § 40-10-4 (1975).

²⁴ ALA. CODE § 40-10-16 (1975).

²⁵ See ALA. CODE § 40-10-18 (1975).

This article focuses on the properties not receiving a minimum bid at the annual county tax sales that are deemed to be sold to the state (referred to as state-owned properties). As a result of the annual tax sales, thousands of properties are sold to the state each year, thus increasing the number of such properties owned by the state. Each property sold to the state is removed from the tax roll and is no longer assessed for taxes for the duration of the state's ownership.²⁶ Accordingly, each state-owned property represents a loss of tax revenue not only for the year in which it is sold, but additionally, for each subsequent year the state owns the property.

The number of state-owned properties is reduced by one of two ways — the first of which is redemption of the property by the owner. Redeeming property from the state is a relatively simple process. Anyone possessing a right to redeem (generally anyone with an interest in the property, such as owners, mortgagees, or lienholders)²⁷ may redeem the property from the state by applying to the county tax official who processes redemptions — typically an official in the Revenue Commissioner's office or the Tax Collector's office — and then paying the redemption amount.²⁸ The redemption amount consists of the total of past due taxes and the related sales expense, any subsequent taxes which would have come due since the tax sale, plus twelve percent interest on those amounts.²⁹

Senator Pittman's proposed legislation focused on the second way to reduce the number of state-owned properties — the state selling its interest to third parties.³⁰ Depending on the price charged by the state, the payment by the third party could replace all or some portion of the delinquent taxes. Following the sale, the purchaser becomes the assessed owner of the property, subject to continuing redemption rights of the owner, and assumes responsibility for paying future taxes.³¹

Despite the relative simplicity of redeeming a property from the state, many owners do not and/or cannot redeem their properties. Moreover, although the state, through the Department of Revenue, has an active process for selling tax-delinquent properties, the number of those sales, when combined with the redemptions, falls far short of the number of properties acquired by the state each year. Data from the Alabama

²⁶ See ALA. CODE § 40-9-1(1) (1975).

²⁷ See ALA. CODE § 40-10-120(a) (1975).

²⁸ See ALA. CODE § 40-10-121 (1975).

²⁹ See *id.*

³⁰ S.B. 373, 2016 Leg., Reg. Sess. (Ala. 2016); S.B. 264, 2017 Leg., Reg. Sess. (Ala. 2017).

³¹ See ALA. CODE § 40-10-135 (1975).

Department of Revenue shows that there has been a significant increase in the number of properties that have been tax-delinquent for five or more years, which were the focus of Senator Pittman's bills.³² In August 2012, the number of properties owned by the state for five or more years was approximately 12,100.³³ As of September 21, 2017, that number had grown to more than 20,100, an increase of more than sixty-three percent in just five years.³⁴

B. Balancing of Competing Interests

Before digging deeper into the topic of this article, it is worth noting the various interests and policy concerns impacted by the real property tax sale laws. The first area concerns the need for state and local governments to collect revenue. Despite one's view on the size of government, most people accept that there is a need for some level of government to provide security and services, and that the government must collect some amount of tax revenue on which to operate. Tax sales provide the enforcement mechanism to collect *ad valorem* taxes.

Another area of concern is the interests of the taxpayers whose properties are sold to satisfy the tax obligations. The average tax on owner occupied residential properties in Alabama is about one-half percent of the property value.³⁵ Thus, a taxpayer risks losing their property to a tax sale because of a tax obligation that is a fraction of the value of the property sold. It is understandable that the law would provide an opportunity for a taxpayer to reclaim property lost to a tax sale. This opportunity is provided by Alabama law granting the owner (and other parties with an interest in the property) extensive rights to redeem the property and/or to challenge the tax sale.³⁶

The next group affected by a tax sale consists of the purchasers. For a government to incentivize others to pay someone else's taxes, something has to be received by the purchaser to make it a worthwhile purchase. Thus, the tax sale laws create incentives for the purchaser through granting certain defined rights in the properties sold. Those rights include the right to recover interest on the purchase amount and any subsequent tax

³² See *supra*, notes 4, 5, and accompanying text.

³³ Bill Bass, Director, Property Tax Division, Alabama Department of Revenue, STATE TAX DELINQUENT PROPERTIES, September 7, 2012.

³⁴ Coleman, *supra*, note 2.

³⁵ Lee Roop, *Who Pays the Highest Property Taxes in Alabama?*, AL.COM (July 20, 2017, 11:00 AM), http://www.al.com/news/index.ssf/2017/07/who_pays_the_highest_property.html.

³⁶ See ALA. CODE §§ 40-10-82, 83, 120, 122 (1975).

payments if the owner redeems, or the right to eventually obtain total possession of, and to establish title in, the property if the owner does not redeem.³⁷

Corresponding to the purchasers' interest is the public interest in allowing for the transferability of real property. Various laws and mechanisms are designed to support the transferability of property as it is recognized that there is a "social interest in preserving property from excessive interference with its alienability," and a desirability of "keeping property responsive to the current exigencies of its current beneficial owners."³⁸ These policies are promoted through the law of ejectment and quiet title that provide for the orderly resolution of conflicts relating to title and possession of real property.³⁹ The policies favoring the alienability of property are thwarted by current interpretations of Alabama law, which significantly burden the ability to convert a tax-delinquent property to property with a clear title that can be taxed, freely utilized, developed, and transferred. This burden negatively impacts the value of thousands of state-owned, tax-delinquent properties whose former owners have not exercised their right to redeem in over five years from when the properties were sold for taxes.

II. Third Party Sales To Reduce The Number of Tax-delinquent Properties

The state is authorized to sell its interest in a tax-delinquent property for an amount that is the equivalent of a redemption amount — the amount of the past due taxes, including taxes that would have come due absent the state's ownership, plus interest on those amounts.⁴⁰ If the state sells a tax-delinquent property during the first three years following a county tax sale, the state will assign its interest to the purchaser, who then can apply to receive a deed to the property once it has been more than three years from the county tax sale.⁴¹ If the state sells its interest in a tax-delinquent

³⁷ See ALA. CODE §§ 40-10-73, 74, 83, 121, 122 (1975).

³⁸ Earle v. Int'l Paper Co., 429 So.2d 989, 995 (Ala. 1983) (quoting RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS § 12 (AM. LAW INST., Tent. Draft No. 2, 1979)).

³⁹ ALA. CODE § 6-6-540 (1975); City of Jasper v. Sanders, 226 Ala. 84, 145 So.827 (Ala.1933) (purpose of quiet title statute is to fix the status of the ownership of land); ALA. CODE § 6-6-280 (1975); Kelley v. Mashburn, 236 So.2d 326 (Ala. 1970) ("Ejectment is a favored action for the trial of title to land.")

⁴⁰ ALA. CODE §§ 40-10-21, 132 (1975).

⁴¹ ALA. CODE §§ 40-10-21, 29 (1975).

property that it has owned for three or more years, it will issue a deed (or “tax deed”) to the purchaser.⁴²

The state is granted greater flexibility with setting the price to sell its interest once it has owned a property for at least three years.⁴³ Specifically, if the state has owned a tax-delinquent property for three years, it can sell the property to *municipalities* and *county governments* for the “best price offered, irrespective of the amount of taxes and interest due.”⁴⁴ After owning a property for at least five years, the state has the option to sell the property to *any purchaser* for a “best price.”⁴⁵

Sections 40-10-132 and 40-10-134 recognize that there may not be a market for some tax-delinquent properties at a redemption price, and that it will be better for the state in some circumstances to sell a property for less than the redemption price.⁴⁶ When the state sells a property at a “best price,” it recovers at least some of the delinquent taxes and places the property back on the tax roll so future taxes can be assessed and collected. Unless the state believes that a certain property is going to appreciate greatly in value, it would presumably be in the state’s best interest to always sell a tax-delinquent property as soon as it can to recover what it can in delinquent taxes and to return the property to the tax roll to generate future taxes.

A. Value of State-Owned, Tax-Delinquent Properties to Potential Buyers

The demand for state-owned properties falls into two general categories. The first involves some organization, group, or individual who has identified a particular state-owned property that meets their needs and represents a good acquisition opportunity. For example, a neighborhood association may identify a property it would like to use as a community garden, or, Habitat for Humanity may identify a property in an area it is developing that it would like to acquire and develop. While these are good uses for tax-delinquent properties and should be encouraged, there has not been, and is unlikely to be, enough demand of this type to result in any significant reduction of the state’s tax-delinquent properties.

The other category of demand for state-owned properties is represented by investors who believe the properties can be purchased to

⁴² ALA. CODE § 40-10-135 (1975).
⁴³ ALA. CODE §§ 40-10-132, 134 (1975).
⁴⁴ ALA. CODE § 40-10-132(a)(2) – (4) (1975).
⁴⁵ ALA. CODE § 40-10-134 (1975).
⁴⁶ See ALA. CODE §§ 40-10-132, 134 (1975).

generate a profit. Significantly reducing the number of tax-delinquent properties will require that there be an increased demand from such investors. Thus, it is necessary to consider the value of the state-owned properties from the perspective of potential investors.

There are two paths to potential profit from purchasing a state-owned property. The first is through the redemption of the property by the former owner after the purchaser acquires the property from the state. Tax-delinquent property acquired from the state remain subject to being redeemed by former owners and interest holders of the property.⁴⁷ Because the redemptioner must pay twelve percent interest on the amount the purchaser paid the state, such a redemption has the potential to generate a twelve percent return on the purchaser's investment.⁴⁸ The second path for a potential profit is for the purchaser to perfect his or her title in the purchased property so that the purchaser can garner the market value of the property. The possibility of a profit exists when the market value exceeds the amount that must be expended to purchase the property from the state and to perfect the title.

However, both paths involve many risks and generally require the purchaser to expend significantly more than their initial investment in the property before recovering on their investment.⁴⁹ Because of these inherent risks, a purchaser cannot be sure they will even recover all of their investment, much less make a profit. Although these same types of risks exist in all real estate transactions, the circumstances relating to tax-delinquent properties make it more difficult to assess these risks. In most real estate transactions, there is typically no risk of a former owner redeeming the property and any other title issues are resolved by the time of the closing. In contrast, when buying a tax-delinquent property from the state, there is always a right to redeem following the purchase and the process of establishing clear title occurs after the transfer.⁵⁰

B. Profiting from Redemptions

The potential for a twelve percent return from redemptions should attract significant demand for the state-owned properties. However, the reality is that a twelve percent return may be difficult to achieve given the risks associated with buying tax-delinquent property, particularly in light of the additional costs the purchaser is likely to incur.

⁴⁷ ALA. CODE §§ 40-10-82, 83, 120, 121 (1975).

⁴⁸ ALA. CODE §§ 40-10-83, 121(a) (1975).

⁴⁹ Sullivan, *supra* note 8, at 420–21.

⁵⁰ *Id.* at 418.

An owner's assertion of a right to redeem typically comes in response to the steps the purchaser takes to obtain possession of, and perfect their interest in, the property. Perfecting ownership requires giving notice to all persons and entities who may have a right to redeem the property.⁵¹ This includes all owners and lienholders at the time of the county tax sale, and typically requires ultimately filing a lawsuit to establish the purchaser's title and right to possess the properties.⁵² The owner can, with relatively little effort or costs on their part, challenge a purchaser's title and drive up the purchaser's costs even when the owner does not have the ability or ultimate intent to redeem the property or cure the tax delinquency.⁵³ Until all redemption rights are completely eliminated, the possibility of a redemption continues to exist. When the right is asserted, there is no assurance that the purchaser will recover from the redemption all of the costs it has incurred leading up to the redemption, thus putting at risk the potential for a twelve percent return on the purchaser's investment.

C. Perfecting Title to Obtain Market Value

The other way to potentially profit from property purchased from the state is for the purchaser to perfect the ownership and sell the property for more than the purchase price and the expenses accrued perfecting ownership. The property interest acquired from the state is far from the equivalent of a clear, marketable title, and thus steps must be taken to create a clear marketable title. When the state sells a property that has been tax-delinquent for three or more years,⁵⁴ it issues a deed to the purchaser of the property.⁵⁵ Although the tax deed constitutes "legal title" to the property,⁵⁶ that legal title, as already noted, is subject to continuing rights belonging to

⁵¹ ALA. CODE §§ 40-10-73, 74, 82, 83, 120 (1975).

⁵² *Id.*

⁵³ Challenging the purchaser's title is accomplished by asserting the right to redeem or challenging the validity of the tax sale. *See* ALA. CODE § 40-10-82, 83 (1975). Succeeding on either of those challenges, however, ultimately requires that the owner pay some amount to reinstate their interest in the property, either a redemption amount or the amount required to cure the tax delinquency. *See* ALA. CODE § 40-10-70, 71, 72, 75, 76, 77, 83. The State of Georgia has addressed the potential of owners driving up acquisition costs without an intent to redeem. In Georgia, after a statutory period of notice to parties with a right to redeem, anyone seeking to challenge the purchaser's interest must first tender into court the amount that would be required to redeem the property. GA. CODE ANN. §§ 48-4-47(a) (West 2016).

⁵⁴ Senator Pittman's legislation is focused on properties the State has held for five or more years. *See supra*, notes 4 and 5.

⁵⁵ ALA. CODE § 40-10-135 (1975).

⁵⁶ ALA. CODE § 40-10-29 (1975); *Thomas v. Benefield*, 494 So.2d. 452, 453 (Ala. Civ. App. 1986) ("[T]he tax deed delivered to defendants vested in the defendants legal title that Plaintiff had originally held but lost due to non-payment of taxes.").

the former owner and lienholders to redeem the property and/or challenge the underlying tax sale. Thus, to perfect title of a tax-delinquent property, the purchaser must take steps to eliminate all rights of the former owner and other parties with an interest in the property, with the ultimate goal of achieving an insurable title to the property. This process is almost always costly, time consuming, and can take several years to complete. At any time during this process, the former owner or another interested party could assert a right to redeem or challenge the tax sale, leading to significant delays and extra costs for the purchaser.

Based on current practices of title underwriters, a purchaser would expect that perfecting her title and obtaining title insurance would require filing a lawsuit to confirm the validity of the tax sale, their possession, and title to the property and possessing the property for at least three years. However, there is no guarantee that after possessing the property for at least three years and spending thousands of dollars to establish ownership a title company will agree to insure the title. On top of these uncertainties, the anticipated market value of the property may turn out to be less than expected. Hence, what may appear to be a great investment opportunity looks different when one considers the uncertainties facing a purchaser of state-owned properties.

III. Title Underwriters' Concerns and Alabama Redemption Law⁵⁷

Title insurance is a commitment by a title company to the holder of the insurance that the title company will protect the insured from any claims that would defeat or diminish the title of the insured in the underlying real property.⁵⁸ In contrast to most other types of insurance, that protect against future events, title insurance protects the insured from conditions and events (or non-events) arising before the policy is issued, but which can give rise to future claims. As long as the insured has an interest in the underlying real property, the title insurance will respond on behalf of the insured to defend any claims challenging the insured's title that arise out of circumstances existing before or at the time the title policy is issued. Title companies receive a one-time premium at the time the policy is issued to undertake this ongoing risk. Title companies know that any claim asserted against the title insured will result in costs to address the claim that will most certainly exceed, by many times, the amount of premium received.

⁵⁷ This explanation of the underwriters' concerns and the subsequent description of underwriting conditions were written with the helpful review and comment from Thomas Williams, The Title Group.

⁵⁸ *What is Title Insurance?*, STEWART, <http://www.stewart.com/en/insurance/title-insurance/what-is-title-insurance.html>.

Accordingly, for a title company to succeed financially, it is extremely important that the title company closely examines the underlying title and requires that any issues which could lead to a claim in the future be resolved before the title insurance is provided.

The risk factor unique to insuring title to tax-delinquent property is the risk associated with the particular redemption rights applicable to property sold for taxes. Thus, if a title company insures title to property in which redemption rights still exist, there is a risk that the title will be challenged by someone having that right to redeem. Accordingly, title underwriters understandably require that all redemption rights in a tax-delinquent property be eliminated as a condition for insuring title. However, from the perspective of many title underwriters, Alabama law is ambiguous as to what is required to eliminate all redemption rights.

A. Tax Sale Redemption Law

To better understand the concerns title underwriters have with insuring the title to tax-delinquent properties, this section will look more closely at Alabama tax sale redemption laws. Alabama law grants redemption rights to all persons or entities having an ownership interest in the property or who hold a mortgage or lien on the property at the time of the tax sale.⁵⁹ Alabama's time frame for redemption may be the longest of any state in the country.⁶⁰ Whereas most states have a one to two year redemption period, the right to redeem in Alabama lasts at least three years, but can continue indefinitely.⁶¹ As additional context, the length of time to redeem from a tax sale is considerably longer than the right to redeem from a mortgage foreclosure sale, which is either six months for residential property or one year for non-residential property.⁶²

Alabama law recognizes two distinct tax sale redemption periods. The first period, sometimes referred to as the "administrative" or "statutory" period, begins when the property is sold for taxes and continues for at least three years.⁶³ The second period, which has been referred to as the "judicial redemption" period, begins at the conclusion of the statutory period and continues as long as the former owner retains the level of "possession"

⁵⁹ ALA. CODE §§ 40-10-82, 83, 120, 122 (1975).

⁶⁰ See *A View of How the States Do It*, REAL ESTATE TAX INVESTING: MAKING MONEY WITH DEEDS AND LIENS, <http://taxliens.homestead.com/SalesByState.html> (last visited Nov. 5, 2017).

⁶¹ *Id.*

⁶² ALA. CODE § 6-5-248(b) (1975).

⁶³ ALA. CODE § 40-10-120 (1975).

identified by statutory and case law.⁶⁴ Those two redemption periods are summarized as follows:

Under Alabama law, after a parcel of property has been sold because of its owner's failure to pay ad valorem taxes assessed against that property (*see* § 40-10-1 et seq., Ala. Code 1975), the owner has two methods of redeeming the property from that sale: "statutory redemption" (also known as "administrative redemption"), which requires the payment of specified sums of money to the probate judge of the county in which the parcel is located (*see* § 40-10-120 et seq., Ala. Code 1975), and "judicial redemption" under § § 40-10-82 and 40-10-83, Ala. Code 1975, which involves the filing of an original civil action against a tax-sale purchaser (or the filing of a counterclaim in an ejectment action brought by that purchaser) and the payment of specified sums into the court in which that action or counterclaim is pending. *See generally* William R. Justice, "Redemption of Real Property Following Tax Sales in Alabama," 11 Cumb. L.Rev. 331 (1980-81).⁶⁵

1. Statutory Redemption Period

The initial or statutory redemption period begins immediately upon property being sold at the county tax auction sale.⁶⁶ When a minimum bid is received at the tax sale (meaning the land is sold to an individual rather than the state)⁶⁷, the owner of the property and any party with an interest in the property (including mortgagees) may redeem the property at any time within three years of the date of the tax sale.⁶⁸ On the other hand, when a tax-delinquent property is sold to the state (as a result of there not being a sufficient minimum bid)⁶⁹, the right to redeem is the greater of three years or until the state sells its interest in the land to a private party.⁷⁰ Thus, the statutory redemption period is a minimum of three years from the date of the county auction sale, and, for property sold to the state, will continue

⁶⁴ *See* ALA. CODE. §§ 40-10-82, 83 (1975). *See also* O'Connor v. Rabren, 373 So.2d 302, 306 (Ala. 1979).

⁶⁵ First Properties, L.L.C. v. Bennett, 959 So.2d 653, 654 (Ala. Civ. App. 2006).

⁶⁶ ALA. CODE § 40-10-120(a) (1975).

⁶⁷ ALA. CODE § 40-10-16 (1975).

⁶⁸ ALA. CODE § 40-10-120 (1975).

⁶⁹ ALA. CODE § 40-10-18 (1975).

⁷⁰ ALA. CODE § 40-10-120 (1975). Additionally, pursuant to § 40-10-120(a), the statutory redemption period for mortgagees and other lienholders is the longer of three years or one year of notice of the sale given by the purchaser. *O'Connor*, 373 So.2d at 307.

beyond three years until the state sells its interest. There is no significant area of confusion with respect to when the statutory redemption period ends. The confusion and uncertainty lies with the next redemption period known as judicial redemption.

2. Judicial Redemption

At the point when the statutory redemption ends, a new set of redemption rights known as judicial redemption come into existence. This is the period of redemption that will apply to the state's sale of its properties which have been tax-delinquent for three or more years.⁷¹ Through a series of Alabama judicial opinions over many decades applying what is arguably a strained interpretation of previous versions of sections 40-10-82 and 83, courts established the principle that as long as the original owner maintains “possession” of the property, the owner’s right to redeem the property is not barred.⁷² The right to redeem judicially is initiated by the owner either filing a lawsuit to redeem or by filing a counter-claim to redeem in a lawsuit for ejectment filed by the purchaser.⁷³

An often-repeated explanation of the judicial redemption right was given by the Alabama Supreme Court in *O’Connor v. Rabren*, where the court defined the right by contrasting it to the statutory right of redemption.⁷⁴ Referring to section 40-10-120 (statutory redemption) and section 40-10-83 (judicial redemption), the court stated as follows:

Land sold for taxes to a purchaser other than the state may be redeemed within three years of the date of sale. Code 1975, § 40-10-120. The O’Connors’ suits for redemption came four years after the sales. Thus, their only right to redeem is under Ala. Code 1975, § 40-10-83. *Heard v. Gunn*, 262 Ala. 283, 78 So.2d 313 (1955).

The purpose of § 40-10-83 is to preserve the right of redemption without limit of time, if the owner of the land seeking to redeem has retained possession. *Moorer v. Chastang*, 247 Ala. 676, 26 So.2d 75 (1946). The character of possession need not be actual and peaceable, but may be

⁷¹ ALA. CODE § 40-10-120 (1975).

⁷² See Justice, *supra* note 9, at 335–340, in which the author describes the evolution of the judicial redemption right and the ever expanding nature of the type of possession that will sustain the right.

⁷³ *First Properties*, 959 So.2d at 654.

⁷⁴ *O’Connor*, 373 So.2d at 306.

constructive or scrambling. *Tensaw Land & Timber Co. v. Rivers*, 244 Ala. 657, 15 So.2d 411 (1943).

Where there is no real occupancy of the land, constructive possession follows the title of the original owner and will not be cut off by any possession by the tax purchaser short of adverse possession. *Tensaw Land & Timber Co. v. Rivers - supra.*⁷⁵

The *O'Connor* court emphasized that the continuing right to redeem after the expiration of the initial three-year statutory period depends on the original owner or his successor maintaining possession:

The original owner, or his successor in interest, may redeem the land within three years from the date of sale to a purchaser other than the state, or any time before title passes out of the state if the land was sold to the state. Code 1975, § 40-10-120. Once that initial redemption period expires, *only those original owners or their successors who have possession may redeem*, without limit of time. Code 1975, § 40-10-83; *Tensaw Land & Timber Co. v. Rivers, supra.*⁷⁶

The judicial redemption right was codified in 2009 when section 40-10-82 of the Alabama Code was amended to add to the following sentence to the end of the statute:

There shall be no time limit for recovery of real estate by an owner of land *who has retained possession*. If the owner of land seeking to redeem has retained possession, character of possession need not be actual and peaceful, but may be constructive and scrambling and, where there is no real occupancy of land, constructive possession follows title of the original owner and may only be cut off by adverse possession of the tax purchaser for three years after the purchaser is entitled to possession.⁷⁷

⁷⁵ *Id.*

⁷⁶ *Id.* at 307 (emphasis added); *see also* *Gulf Land Co. v. Buzzelli*, 501 So.2d 1211, 1213 (Ala. 1987) (“We have stated many times that the purpose of § 40-10-83 is to preserve the right of redemption without a time limit, if the owner of the land seeking to redeem has retained possession.”); *Moorer v. Chastang*, 26 So.2d 75, 78 (Ala. 1949) (possession, either actual, scrambling or constructive, is required for judicial redemption).

⁷⁷ ALA. CODE § 40-10-82 (1975) (emphasis added). The full text of § 40-10-82, as amended in 2009, is as follows:

The last sentence of section 40-10-82, as amended in 2009, adopted language from a long line of cases defining the possession of the former owner that is sufficient to maintain the right to exercise the right of judicial redemption. The required "possession" as shown is defined very favorably for the owner. Section 40-10-82 provides that the owner's possession necessary to preserve the right to redeem "may be constructive or scrambling, and where there is no real occupancy of land, constructive possession follows the title of the original owner."⁷⁸ Further, where the owner has such constructive possession, the possession "may only be cut off by adverse possession of the tax purchaser for three years after the purchaser is entitled to possession."⁷⁹ Thus, even where an owner has no actual possession and the purchaser is in actual adverse possession for less than three years, the owner is still considered to be in "possession" for purposes of maintaining a right to redeem.

The *O'Connor* court, however, clarified that section 40-10-82 does not create or preserve a right to redeem, but instead establishes a bar to that right.⁸⁰ The beginning of section 40-10-82, which is the same now as it was at the time of the *O'Connor* opinion, states, "No action for the recovery of

No action for the recovery of real estate sold for the payment of taxes shall lie unless the same is brought within three years from the date when the purchaser became entitled to demand a deed therefor; but if the owner of such real estate was, at the time of such sale, under the age of 19 years or insane, he or she, his or her heirs, or legal representatives shall be allowed one year after such disability is removed to bring an action for the recovery thereof; but this section shall not apply to any action brought by the state, to cases in which the owner of the real estate sold had paid the taxes, for the payment of which such real estate was sold prior to such sale, or to cases in which the real estate sold was not, at the time of the assessment or of the sale, subject to taxation. There shall be no time limit for recovery of real estate by an owner of land who has retained possession. If the owner of land seeking to redeem has retained possession, character of possession need not be actual and peaceful, but may be constructive and scrambling and, where there is no real occupancy of land, constructive possession follows title of the original owner and may only be cut off by adverse possession of the tax purchaser for three years after the purchaser is entitled to possession.

⁷⁸ ALA. CODE § 40-10-82 (1975).

⁷⁹ *Id.*

⁸⁰ *O'Connor*, 373 So.2d at 307. *See also* *Pugh v. Youngblood*, 69 Ala. 296 (1881) (in which the court, in interpreting an earlier version of § 40-10-28 containing a five-year limitation period, stated that the time period in the statute was "intended to foreclose all inquiry into the regularity of the [tax] sale" to cure the common law problem, in which there was no time limit and rendered title to property acquired for taxes "almost, if not quite valueless." *Pugh*, 69 Ala. at 298-299).

real estate sold for the payment of taxes shall lie unless the same is brought within three years from the date when the purchaser became entitled to demand a deed”⁸¹ The O’Connor’s, who were asserting a right to redeem four years after the tax sale and did not have even the minimal amount of constructive possession, argued that this language preserved their right to redeem for an additional three years from “when the purchaser is entitled to demand a tax deed” regardless of whether they had possession.⁸² The court, in denying their attempt to redeem, rejected their argument, stating that their reliance on section 40-10-82 was “misplaced,” as there is nothing in section 40-10-82 “*creating* or *preserving* a right to redeem, only a provision *barring* such a right.”⁸³

The distinction noted by the *O'Connor* court is the difference between a cause of action and the time limitation for bringing a cause of action.⁸⁴ That a cause of action has not been barred by a time limit does not mean there is a cause of action. The Alabama Supreme Court confirmed that the right (or cause of action) to redeem after the initial statutory redemption period exists only if the original owner or their successor has retained possession.⁸⁵ Although the possession required to maintain the right to redeem may be satisfied by constructive possession, section 40-10-82 does not extend the right to redeem if the owner does not have the minimal constructive possession identified by the statute.⁸⁶ Furthermore, though Alabama judicial decisions and the 2009 amendment to section 40-10-82 establish a three-year adverse possession rule for eliminating the former owner’s possession and cutting off any challenge to the purchaser’s title — similar to the effect of the general ten-year adverse possession rule of Alabama Code § 6-6-200 — the three-year adverse possession rule applicable to tax deeds does not establish that adverse possession is the only way to eliminate the former owner’s possession and right to redeem.

There are at least two ways a former owner’s possessory interests could be eliminated completely. One is by agreement; that is, an owner could agree to release to the purchaser any possessory, redemption, or other rights in the property sold for taxes, which could be evidenced by a deed to the purchaser or by written agreement.⁸⁷ Another way to completely

⁸¹ *O'Connor*, 373 So.2d at 307.

⁸² *Id.*

⁸³ *Id.* (Emphasis in original).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ ALA. CODE § 42-10-80 (1975).

⁸⁷ See *Priest v. Ernest W. Ball & Assocs., Inc.*, 62 So.3d 1013, 1019 (Ala. 2010) (citations omitted) (“the granting clause in a deed determines the interest conveyed, and that, unless

eliminate the former owner's possessory interest in the property is by a court ordered ejectment. There is no reason to conclude in circumstances where, after the initial three-year redemption period, a former owner's possession has been completely eliminated by a court ordered ejectment, that a purchaser must remain in possession for an additional three years to completely eliminate the right to redeem.

B. The Ambiguity

If one focuses on the principle stated in *O'Connor* that the judicial redemption right does not exist if an owner does not have the required minimal constructive possession, there would not seem to be any significant confusion in determining whether a right to redeem exists. If it is shown that the former owner has no possessory interest whatsoever, then one could safely conclude that there are no more redemption rights. However, it is admittedly somewhat difficult to pick up on this principle as it is rarely emphasized in judicial opinions.⁸⁸ It is also somewhat lost in a sea of judicial opinions emphasizing the three-year adverse possession rule in cases upholding an owner's right to redeem in the face of a purchaser unable to prove either peaceable possession or three years of adverse possession.⁸⁹

Because of the repeated emphasis on the three-year adverse possession rule in numerous quiet title cases upholding the owner's right to redeem, an understanding (or at least a concern) has developed that the beginning language of section 40-10-82 establishes an additional three-year time period to redeem. This additional period follows the initial three-year statutory period, and does not begin to run until the later of when the purchaser could have obtained a tax deed or when the purchaser went into

there be repugnancy, obscurity or ambiguity in that clause, it prevails over introductory statements or recitals in conflict therewith, and over the habendum, too, if that clause is contradictory of or repugnant to it").

⁸⁸ That there are few judicial opinions emphasizing this principle may be explained by considering that appeals will generally arise only when the tax deed holder is opposing the right to redeem. However, in ejectment and quiet title cases involving tax deeds where the purchaser does not deny the owner's redemption rights, either the owner redeems and the case is settled or the owner does not redeem and has no basis to oppose a judgment in favor of the purchaser. It would seem unlikely that an owner who, given the right to redeem, chooses not to, would appeal an order in favor of the purchaser.

⁸⁹ *Giardina v. Williams*, 512 So.2d 1312 (Ala.1987); *Williams v. Mobil Oil Exploration and Producing Southeast, Inc.*, 457 So.2d 962 (Ala.1984); *Stallworth v. First Nat. Bank of Mobile*, 432 So.2d 1222 (Ala.1983); *Tensaw Land & Timber Co. v. Rivers*, 244 Ala. 657, 15 So.2d 411 (1943); *Belcher v. McGinty*, 251 Ala. 342, 37 So.2d 430 (1948); *Singley v. Dempsey*, 252 Ala. 677, 42 So.2d 609 (1949); *Tanner v. Case*, 273 Ala. 432, 142 So.2d 688 (1962); *McGuire v. Rogers*, 794 So.2d 1131 (Ala.Civ.App.2000), rehearing denied, certiorari denied; *Tabor v. Certain Lands*, 736 So.2d 622 (Ala.Civ.App.1999).

possession of the property.⁹⁰ Under this interpretation, a combined, minimum redemption period of six years is created when the second three-year redemption period is added to the initial three-year statutory period.⁹¹ According to this interpretation, because the second three years does not begin until the later of when the deed could have been issued or when the purchaser goes into possession, the total redemption period can be extended for far more than six years.⁹² For instance, if a purchaser does not go into possession until five years after the initial county tax sale, then the entire redemption period would be eight years.⁹³

The Alabama appellate decisions which arguably support the development of a combined minimum six-year right to redeem involved a tax purchaser either seeking quiet title relief or opposing an owner's right to redeem.⁹⁴ In cases where the purchaser sought quiet title relief, the courts denied that relief either on the basis that there was no peaceable possession⁹⁵ or on the basis that the right to redeem still existed because the purchaser had not been in adverse possession for at least three years after the time when the deed could have been issued.⁹⁶ No decision holding that the right to redeem still existed involved facts where the purchaser had established a basis for quiet title under the quiet title statutes. That is, there are no decisions upholding the right to redeem where the purchaser seeking quiet title proved that they had peaceable possession or that they had been in adverse possession for three years.

In cases where a purchaser could not establish peaceable possession, it would be accurate for the courts to state that the right to redeem lasted at least six years. Those cases, however, did not hold that the right to redeem lasted for a minimum of six years and that a purchaser must show adverse possession for three years in circumstances where the purchaser could establish peaceable possession. There would be no logical basis to deny

⁹⁰ See Olds, *supra* note 1, at 498, 509.

⁹¹ *Id.* at 509.

⁹² Olds, *supra* note 1, at 498, 509. “[A]n owner may redeem within six years from the date of the [county auction] tax sale regardless of possession”; *Id.* “Alabama law provides for a minimum six-year right of redemption period on all tax-delinquent property sales . . .” *Id.*

⁹³ Olds, *supra* note 1, at 511; *Giardina v. Williams*, 512 So.2d 1312 (Ala. 1987).

⁹⁴ See *Childers v. Darby*, 163 So.3d 323 (Ala. 2014); *Reese v. Robinson*, 523 So.2d 398, 399 (Ala. 1988); *Gulf Land Co. v. Buzzelli*, 501 So.2d 1211, 1212 (Ala. 1987); *Karagan v. Bryant*, 516 So.2d 599 (Ala. 1987); *Tanner v. Case*, 142 So.2d 688 (Ala. 1962); *Giardina v. Williams*, 512 So.2d 1312 (Ala. 1987); *Stallworth Tanner v. Case*, 142 So.2d 688 (Ala. 1962).

⁹⁵ See *Childers v. Darby*, 163 So.3d 323, 328 (Ala. 2014) (quiet title denied because evidence did not demonstrate that the tax title purchaser had peaceable possession).

⁹⁶ See *Buzzelli*, 501 So.2d at 1214; *Reese*, 523 So.2d at 400.

quiet title relief to a purchaser who establishes peaceable possession simply because he did not have adverse possession for three years, especially if the owner neither challenged possession nor exercised the right to redeem.

The ambiguity leading to the title underwriters' concerns arises from a perceived conflict between two clearly established principles. The first principle relates to the existence of the claim, and the second goes to the limitation period for asserting the claim if the claim exists. The first principle is that, following the initial statutory redemption period, the existence of the right to redeem depends on the owner having the minimal "constructive possession" defined by Alabama Code § 40-10-82.⁹⁷ The other principle is that if the owner has constructive possession, the time period for asserting the right to redeem based on that possession does not end until the purchaser has been in adverse possession for at least three years from the date when the purchaser could receive a tax deed.⁹⁸ These principles are not in conflict if they are considered for what they are: one states the basis for the claim and the other relates to the time limitation for bringing the claim, if the claim exists.⁹⁹

Perhaps the above discussion sufficiently clarifies what has seemed ambiguous about the law in this area. However, even if that has been accomplished, because there are no reported decisions that clearly explain the interaction between the two principles, title underwriters are likely to remain concerned that redemption rights last a minimum of six years from the initial tax sale and that those rights cannot be eliminated without the purchaser being in possession for three years. If this is correct, then even when a purchaser with a tax deed establishes exclusive, peaceable possession through a court order that affirms the validity of the tax sale and the purchaser's title against the world, title companies will continue to

⁹⁷ ALA. CODE § 40-10-82 (1975).

⁹⁸ *Id.*

⁹⁹ *Id.* This author understands why confusion exists with these principles. For years, I viewed this area of law similarly to the title underwriters and other commentators, and believed that there may be six-year minimum redemption period and a three-year possession requirement. I came to the conclusions stated in this article only after grappling for several more years with trying to understand how the requirement that the judicial right of redemption depended on the owner having "retained" at least a minimum level of constructive or scrambling possession could have actual meaning in light of the numerous opinions emphasizing the continued right to redeem in cases where there was no finding of adverse possession for three years. To give meaning to the requirement that the owner have retained possession meant that there must be some circumstances, other than three years of adverse possession, where it could be shown that the owner did not have even the minimum level of possession to sustain the right to redeem.

require the purchaser to have three years of actual possession as a condition for insuring the title.

C. Underwriter Conditions

Given the current perceived ambiguity of the law and the concerns described in this article, several respected Alabama title underwriters have adopted the following conditions for insuring property acquired through a tax sale:

- i. There must be a court order establishing the tax-delinquent purchaser's exclusive possession of the property;
- ii. As to every interest holder having a right to redeem, there must either be a deed or release from that party to the purchaser or a court order entered against the interest of that entity eliminating said parties' rights in the property;
- iii. The tax-delinquent purchaser must have been in actual possession of the property for at least three years; and
- iv. It must be six years from the date of the actual county tax sale.¹⁰⁰

These conditions, which may be understandable from a title underwriter's perspective, have a significant negative impact on the demand for state-owned, tax-delinquent properties. It is often difficult enough to establish that all necessary parties have been included and served in a title clearing lawsuit, to address any challenges raised in the lawsuit, and then to prevail to obtain an order granting clear title in favor of the purchaser against all parties having an interest in a property. It may take four years or more from the date of the initial county auction sale to reach that point. Then, three more years of actual possession may be required before title insurance can be obtained. These extended periods of time, along with the expense and time it takes to establish a marketable title to the property, weigh heavily against the transferability of tax-delinquent properties acquired from the state, and thus diminish the value and demand for those properties.

¹⁰⁰ Gina K. Matthews, *An Overview of Title Insurance and Underwriting: Preparing a Title Commitment and Policy & Eliminating Claims From the Beginning*
<https://www.mvt.com/Content/Public/Files/GinaPowerPointPresentation.pdf>.

IV. Recommendation for Clarifying Alabama Law

It is important to clarify this area of law to address the complications with obtaining title insurance on tax-delinquent properties causing a diminished demand for the state's tax-delinquent properties and impeding the redevelopment in urban neighborhoods. This clarification can be accomplished rather simply by amending Alabama Code § 40-10-82 to include language stating that, following the statutory redemption period, the right to redeem and challenge a tax sale can also be eliminated through a properly filed and served ejectment or quiet title action.¹⁰¹ The clarification preserves the three-year adverse possession rule, but confirms that adverse possession is not the only way to eliminate the right to redeem.¹⁰²

This article argues that the recommended clarification is not a change in the law. However, even if it were, that would not serve as a reason to oppose the proposed modification to section 40-10-82. The initial three-year redemption period is unaffected by the proposed clarification, and the subsequent redemption right based on the minimal "constructive possession" of section 40-10-82 is not eliminated or reduced.

The proposed clarification does not pit the rights of purchasers against the rights of owners. Rather, the clarification seeks to unburden tax-delinquent properties from the possibility that a right to redeem remains even when no one has sought to redeem the property for many years following the tax sale. Currently, tens of thousands of properties whose owners likely have no intention of redeeming the property are being encumbered by this possibility. If any of those property owners want to redeem, they still have the right to do so after being notified in a court action. If, following notice of being sued in an ejectment or quiet title action, an owner does not assert the right to redeem and an order is entered in favor of the purchaser confirming his ownership, it makes no sense for

¹⁰¹ An action under either theory would require that the elements of the cause of action be alleged and proved. Additionally, such actions would have to satisfy due process notice requirements of service on those persons or entities who would have a right to redeem, and any order entered by the court would be effective only against parties receiving due process. These due process requirements are incorporated under the ejectment and quiet title remedies, and thus, would not have to be specifically identified in any amendment to § 40-10-82.

¹⁰² In creating authority for land banks in Alabama, the legislature established the basis for land banks to clear title to tax delinquent properties without having to establish three years of possession. *See* ALA. CODE § 24-9-8(o) (1975). Thus, in respect to a particular type of purchaser, the legislature has already implemented what is being recommended in this article.

the purchaser's ownership to be encumbered by a cloud of uncertainty for another three years.

V. Legal Support for the Proposed Clarification

Although further justification for the proposed legislation may not be necessary, an explanation that it is not a change in the law may calm any fears with the modification. Reviewing the law of ejectment and quiet title in relation to the property tax sale laws demonstrates that the recommended clarification is not a change in the existing law.

A. Ejectment

The property tax sale statutes specifically incorporate the law of ejectment in sections 40-10-73 and 40-10-74.¹⁰³ Section 40-10-73 applies to properties initially sold to the state and any assignee of the state's interest,¹⁰⁴ whereas section 40-10-74 applies to purchasers other than the state at the initial county tax sales.¹⁰⁵ Both sections provide that the purchaser is entitled to immediate possession following a tax sale, and may bring a lawsuit in ejectment or in the nature of an ejectment if possession is not surrendered within six months of making a demand for possession.¹⁰⁶ Section 40-10-73 provides, in part:

When the lands are bid in for the state at tax sales, the state shall be entitled to possession of said lands immediately upon execution of the certificate of sale by the judge of probate. If possession is not surrendered within six months from the date of sale after demand therefor is made by the Land Commissioner in behalf of the state, or if the certificate has been assigned by the assignee then the Land Commissioner in the name of the state or the assignee of the state, if the certificate has been assigned, may maintain an action in ejectment or a statutory real action in the nature of ejectment or other proper remedy for the recovery of the possession of the lands purchased at such sales and shall be entitled to hold the possession thereof on recovery, subject, however, to all rights of redemption provided for in this title

. . . .¹⁰⁷

¹⁰³ See generally ALA. CODE §§ 40-10-73, 74 (1975).

¹⁰⁴ ALA. CODE § 40-10-73 (1975).

¹⁰⁵ ALA. CODE § 40-10-74 (1975).

¹⁰⁶ See ALA. CODE § 40-10-73 (1975); Ala. Code § 40-10-74 (1975).

¹⁰⁷ ALA. CODE § 40-10-73 (1975).

The Alabama Supreme Court affirms this right of possession:

A purchaser at a valid tax sale has the right to possession immediately upon receipt of the tax sale certificate. This right of possession may be enforced by ejectment or other proper remedy for recovery of possession, and may be defended once possession is obtained, subject to any rights of redemption.”¹⁰⁸

Furthermore, section 40-10-79 provides that the purchaser of property at a tax sale establishes a *prima facie* case for obtaining possession by reciting the occurrence of the tax sale and purchase:

When an action is brought to recover possession of lands by either the state, its assignee or by purchaser other than the state, or his assignee as provided by Sections 40-10-73 and 40-10-74, the complainant shall recite the fact of the tax sale and purchase, and the certificate of purchase, and the same shall *prima facie* be sufficient to entitle the complainant to judgment, and the burden shall be on the respondent to show that the complainant is not entitled to recover.¹⁰⁹

An ejectment claim is made by “alleg[ing] that the plaintiff was possessed of the premises or has the legal title thereto, properly designating or describing them, and that the defendant entered thereupon and unlawfully withholds and detains the same.”¹¹⁰ Where one party has title to property and others are in possession or assert a right of possession, ejectment is the cause of action to address those other interests.¹¹¹ Thus, if a tax deed holder's interest is subject to any competing claims of possession, the holder should, pursuant to either section 40-10-73 or section 40-10-74, bring an action in ejectment to address those claims.¹¹²

The title to property subject to an ejection action is a critical factor in determining who is entitled to possession, as “[e]jectment is not only an action for the recovery of the possession of land, but the action is also an action for the trial of title to lands.”¹¹³ Thus, in an ejectment action, the

¹⁰⁸ O'Connor v. Rabren, 373 So.2d 302, 306 (Ala. 1979).

¹⁰⁹ ALA. CODE § 40-10-79 (1975).

¹¹⁰ Steele v. Fed. Nat. Mortg. Ass'n, 69 So.3d 89, 92-93 (Ala. 2010) (quoting ALA. CODE § 6-6-280 (1975)).

¹¹¹ Kelley v. Mashburn, 236 So.2d 326, 327 (Ala. 1970).

¹¹² ALA. CODE §§ 40-10-73, 74 (1975).

¹¹³ Jesse P. Evans, III, *Alabama Property Rights and Remedies* § 20.1[c] (5th ed. 2012).

court must determine the holder of superior title.¹¹⁴ Courts have in fact expressed preference for the ejectment action for determining title to land, even though quiet title actions also exist for that purpose.¹¹⁵

When a party succeeds on an ejectment claim, they are entitled to an order granting the right to possession against the opposing party, which order may be enforced by a “writ of possession.”¹¹⁶ A sheriff executing a writ of possession in an ejectment action has a duty to place the plaintiff in *actual* and *peaceable* possession of the property.¹¹⁷

If the tax deed holder sues for ejectment and obtains an order of ejectment against the original owner, the tax deed holder will, upon exercising its right of possession, be in actual and peaceable possession of the property.¹¹⁸ Such an order leading to peaceable possession eliminates the possession of the former owner and their ability to dispute or deny the tax deed holder’s possession.¹¹⁹ Because the original owner no longer retains possession, it follows that the judicial right to redeem would be eliminated.¹²⁰

At least one Alabama appellate court has recognized the impact of an ejectment order on the right to redeem. In *First Properties, LLC v. Bennett*, the court recognized that the original owner’s constructive possession defined by section 40-10-82 does not survive a court ordered determination granting possession to the purchaser of the property.¹²¹ As that court noted, the right of redemption is merged into and extinguished by a judgment for possession:

although an owner of real property sold for taxes may, under Ala. Code 1975, § 40-10-82, be entitled to a three-year period after having lost possession of a parcel to a tax

¹¹⁴ *Id.*

¹¹⁵ *Id.* See also *Lee v. Jefferson*, 435 So.2d 1240, 1242 (Ala. 1983) (“In Alabama, ejectment is a favored action for the trial of title to land.”); *Kelley v. Mashburn*, 236 So.2d 326, 327–28 (Ala. 1970).

¹¹⁶ *Evans*, *supra* note 113, at § 20.7[a], [d].

¹¹⁷ *Lankford v. Green*, 62 Ala. 314, 319 (Ala. 1878) (“In the execution of a writ of possession, it is the duty of the sheriff to place the plaintiff in the actual and peaceable possession of the premises recovered.”)

¹¹⁸ *See id.*

¹¹⁹ *See Wood v. Williams*, 47 So. 202, 203 (Ala. 1908) (peaceable possession means that the possession is not being denied).

¹²⁰ *O’Connor*, 373 So.2d at 307 (“Once the initial redemption period expires, only those original owners or their successors who have possession may redeem without limit of time.”)

¹²¹ *First Properties, LLC v. Bennett*, 959 So.2d 653, 656–57 (Ala. Civ. App. 2006).

purchaser within which to *bring a judicial redemption claim* against the purchaser under § 40-10-83, there is no such right to an additional three years within which to *satisfy a judgment* into which such a claim has merged.¹²²

The *First Properties* court recognized that an order of ejectment extinguishes the right to redeem, and thus recognized that adverse possession is not the only way to eliminate that right.¹²³ This conclusion is the only way to give any meaning to an ejectment order that places a purchaser in actual, peaceable possession of the property. Otherwise, a purchaser exercising the ejectment remedy specifically provided by the property tax sale laws would be placed in an impossible position to ever obtain a marketable title. Once a purchaser obtains peaceable possession under a court order of ejectment, its possession cannot be averse or hostile to the true owner, since it is the true owner, and thus its possession cannot constitute adverse possession.¹²⁴ If the ejectment order is unable to eliminate the right to redeem due to the three-year adverse possession rule, then the purchaser placed in peaceable possession and unable to be in adverse possession will never be able to cut off the right to redeem.

B. Quiet Title

Although there are extensive requirements for bringing both *in personam* and *in rem* quiet title actions, relief can be granted under both remedies without adverse possession.¹²⁵ The *in personam* statute requires “peaceable” possession.¹²⁶ An *in rem* action may be pursued based on actual, peaceable possession, and, under certain prescribed circumstances, may even be pursued when no one is in actual possession.¹²⁷ Additionally, neither remedy imposes a minimum time period of peaceable possession as a condition for bringing a quiet title action.¹²⁸ In other words, a claimant pursuing quiet title relief based on peaceable possession does not have to be in possession for any length of time. Accordingly, the holder of a tax deed who can prove peaceable possession would be entitled to quiet title relief without having to be in possession of the property for any length of time.

¹²² *First Properties*, 959 So.2d at 657, n.1.

¹²³ See generally *First Properties*, 959 So.2d 653.

¹²⁴ Evans, *supra* note 113, at § 10.3[c], [e] (Elements of adverse possession include that the possession be adverse and hostile to the true owner).

¹²⁵ See generally ALA. CODE §§ 6-6-540, 560 (1975).

¹²⁶ ALA. CODE § 6-6-540 (1975).

¹²⁷ ALA. CODE § 6-6-560 (1975).

¹²⁸ ALA. CODE §§ 6-6-540, 560 (1975).

"Peaceable possession" can be shown by demonstrating that no one is denying the possession that is being claimed by the plaintiff.¹²⁹ Moreover, the "peaceable possession" requirement of an *in personam* action may be established by either actual or constructive possession.¹³⁰ Indeed, legal title supports a claim of constructive possession.¹³¹ Because a tax deed is "legal title,"¹³² a tax deed holder who can prove peaceable possession of the property is able to satisfy the ownership and possession requirements under Alabama's quiet title statutes.¹³³

Rather than being a requirement for bringing a quiet title action, adverse possession is a method to confer or defeat title to real property.¹³⁴ Under Alabama's adverse possession statute, title may be conferred or defeated after ten years of adverse possession.¹³⁵ Similar to the three-year adverse possession rule in section 40-10-82, the ten-year period is considered a statute of limitations that will bar a claim to title by someone who may otherwise have a valid claim.¹³⁶ Adverse possession by itself does not create a title that would be considered "marketable."¹³⁷ It provides for the possibility of establishing a "better title" and establishing a marketable title through the prosecution of a quiet title action.¹³⁸ Thus, the relationship between adverse possession and the quiet title statutes is that adverse possession can be used in a quiet title action to either establish title by one party or to defeat claims of title by another party. Adverse possession is not, however, a requirement for a quiet title action.

Granting quiet title relief to a tax deed holder in peaceable possession does not violate the three-year adverse possession rule or the policy favoring redemption. Any party that may have a redemption right would have to have been named and served in a quiet title lawsuit for their interest in the property to be decided. Such a party wishing to preserve a

¹²⁹ George E. Wood Lumber Co. v. Williams, 47 So.2d 202, 203 (Ala. 1908).

¹³⁰ ALA. CODE § 6-6-540 (1975); Williams v. Mertz, 549 So.2d 87, 89 (Ala. 1989) ("A suit to quiet title requires peaceable possession by the complainant.") (citing Mount Gilead Church Cemetery v. Woodham, 453 So.2d 362, 365 (Ala. 1984) ("This possession may be actual or constructive, as in the case of one who has legal title, but no actual possession.") (quoting Hinds v. Slack, 299 So.2d 717, 719 (Ala. 1974))).

¹³¹ See Denson v. Gibson, 392 So.2d 523, 524 (Ala. 1980) ("One has constructive possession of property when he has a legal estate in fee in the property.").

¹³² ALA. CODE § 40-10-29 (1975); Thomas v. Benefield, 494 So.2d. 452, 453 (Ala. Civ. App. 1986).

¹³³ ALA. CODE §§ 6-5-540, 560 (1975).

¹³⁴ See ALA. CODE § 6-5-200 (1975).

¹³⁵ *Id.*

¹³⁶ Lay v. Phillips, 161 So.2d 477, 480 (Ala. 1964).

¹³⁷ Evans, *supra* note 113, § 10.1(a) at 159.

¹³⁸ *Id.*

right to the property can assert the right to redeem and challenge the tax deed holder's peaceable possession. At that point, unless the tax deed holder can establish peaceable possession by a previous court order, the assertion of peaceable possession can be negated, and then the issue becomes whether the tax deed holder has been in adverse possession for three years to cut off the right to redeem.¹³⁹ On the other hand, if one named and served in the quiet title action does not want to maintain a claim to the property, they have no reason to challenge the tax deed holder's possession, and there would be no reason to deny an order establishing the purchaser's ownership and possession. Once such an order is entered, it would be nonsensical to add to the statutory quiet title requirements an additional three-year adverse possession requirement that is no longer achievable by a party in peaceable possession.

VI. Anticipated Objections

Any recommended changes or modifications to existing law should be carefully scrutinized to consider the actual impact it may have and to avoid causing unanticipated problems. The previous discussion has, hopefully, addressed many concerns with the recommended clarification. Undoubtedly, however, other concerns and objections could be raised. One anticipated objection is that the change would lead to circumstances where property owners are unfairly denied the opportunity to redeem. Particular concern has been expressed with respect to rural properties and the potential that a farmer could unfairly lose their property, and thus, their livelihood. If, as explained in this article, the clarification does not represent a change in the law, then there will be no increase in the circumstances that are feared. In addition, any opposition to a clarification based on the impact on rural properties should consider how many rural properties, if any, would possibly be affected by the proposed clarification, especially in light of the tens of thousands of properties burdened by the current confusion in the law.

Finally, any objection to the proposed clarification really comes down to a debate about how long anyone should have to redeem property sold for taxes and what should be required to maintain that right. Though a strong argument can be made that one or both of the redemption periods should be shortened, this article does not make a recommendation in that regard. Rather, this article is intended to bring clarity to what the redemption rights are and bring clarity to the confusion as to when they end.

¹³⁹ ALA. CODE § 40-10-82 (1975).

VII. Conclusion

Alabama's tax-delinquent properties represent the loss of much needed revenue for the local communities and for the state. Additionally, the legal impediments caused by current state law negatively impact the alienability of such properties, and complicate attempts to address blighted, abandoned and vacated properties. A simple modification of a single statute to clarify the law would eliminate much uncertainty in underwriting titles to state-owned properties. An improvement in the insurability of tax delinquent properties would likely lead to an enhanced demand for those properties, generating more revenue for local governments, and returning properties back to productive use. Although there can be no guarantee of any specific outcome resulting from the clarification to the law suggested in this article, the state should be given the opportunity to improve the ability to sell its tax-delinquent properties, particularly when the suggestion does not impact the public policy of preserving redemption rights, and it is consistent with existing law and the public policy favoring the transferability of real property.