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July 30, 1993

The Honorable Glen B. Gainer, III
State Auditor
Office of the State Auditor
State Capitol Building, Room W-100
Charleston, West Virginia 25305

Dear Mr. Gainer:

You have requested an opinion of this Office regarding whether delinquent and forfeited land may continue to be sold in accordance with W. Va. Code §§ 11A-3-1 et. seq. and 11A-4-1 et. seq. after deletion of sections 3, 4, 5, and 6 of Article XIII of the West Virginia Constitution.

By way of background, it should be noted that House Bill 2781 would have replaced Articles 3 and 4 of Chapter 11A of the West Virginia Code. The Governor's veto of the bill has raised concerns about the continued validity of Articles 3 and 4 of Chapter 11A, because those Articles as currently written make reference to the deleted sections of the Constitution.

Generally, Articles 3 and 4 of Chapter 11A of the West Virginia Code do not rely on sections 3, 4, 5, and 6 of Article XIII of the Constitution for their validity. States have a sovereign right to tax, and this right would be worthless without the power to enforce collection of taxes imposed. State v. Gray, 132 W. Va. 472, 52 S.E.2d 759, 768 (1949). The right of enforcement necessarily includes the right to proceed against delinquents by creating a lien on the thing taxed. Id. It stands to reason that the State's right to create a lien would be meaningless without the power to execute on the lien to satisfy the delinquency. Thus, the State has the inherent power to sell delinquent land to satisfy taxes due upon it, and this power is not reliant upon Article XIII of the Constitution.

The purpose behind Article XIII of the Constitution was to assure the purchasers of delinquent property a good title to the land, not to safeguard the rights of the former owners. See John W. Fisher, II, Forfeited And Delinquent Lands -- The Unresolved Constitutional Issue, 89 W. Va. L. Rev. 961, 967 (Spring 1987). The deleted sections of Article XIII of the Constitution merely dealt with procedure to be followed when exercising the State's inherent powers, and did not establish the powers themselves.

However, several sections of Articles 3 and 4 of Chapter 11A refer to various sections of Article XIII in ways that may cause confusion. For example, the first paragraph of W. Va. Code § 11A-3-8 provides as follows:

The former owner of any real estate so purchased by the State, or any other person who was entitled to pay the taxes thereon, may deem such real estate from the auditor at any time within eighteen months after the date of such purchase. Thereafter such real estate shall be irredeemable and subject to transfer or sale under the provisions of sections 3 and 4, article XIII of the Constitution. (Emphasis added).

The current non-existence of sections 3 and 4 of Article XIII raises the question of whether the last sentence of the quoted paragraph now has any meaning. Similar questions exist regarding other references to sections 3, 4, 5, and 6 of Article XIII in other sections of the Code. See W. Va. Code §§ 11A-4-1, 11A-4-2, 11A-4-9, 11A-4-12, 11A-4-19, 11A-4-25, 11A-4-34, 11A-4-39, 11A-4-39b.

The question becomes one of statutory construction -- whether statutory language which refers to a Constitutional provision remains in effect upon deletion of the Constitutional provision.

Several principles of statutory construction are relevant to this question. "Repeal of a statute by implication is not favored in law." Syl. pt. 1, Trumka v. Clerk of Circuit Court of Mingo County, 175 W. Va. 371, 332 S.E.2d 826 (1985). A statute should be presumed to have effect until it is repealed, regardless of whether a Constitutional provision it refers to is repealed.

The primary concern in construing statutes is implementation of legislative intent. "The basic and cardinal principle governing the interpretation and application of a statute, is that the Court should ascertain the intent of the Legislature at the time the statute was enacted, and in the light of the circumstances prevailing at the time of the enactment." Syl. pt. 1, Pond Creek Pocahontas Co. v. Alexander, 137 W. Va. 864, 74 S.E.2d 590, appeal dismissed, 346 U.S. 803, 74 S. Ct. 36, 98 L. Ed. 334 (1953). Thus, the fact that Constitutional provisions referred to in the statute no longer exist is not controlling, since the provisions existed at the time the statute was enacted. References to the deleted provisions of the Constitution were clearly meant to incorporate the language and intent of the Constitution, as it existed at the time the statute was enacted, in the statute. Since the statute has not been repealed, the Legislative intent evidenced in the statute should be given effect.

"All former statutes on the same subject, whether repealed or unrepealed, may be considered in construing provisions that remain in force." Syl. pt. 12, Wellsburg & S.L.R. Co. v. Panhandle Traction Co., 56 W. Va. 18, 48 S.E. 746 (1904). The situation you wish us to address is one in which a statute and a Constitutional provision speak on the same subject, but the result should be the same when the statute does not rely on the Constitutional provision for its existence.

Thus, the operation of Articles 3 and 4 of Chapter 11A of the West Virginia Code is unchanged by deletion of sections 3, 4, 5, and 6 of the State Constitution.

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The answer to your question, then, is in the affirmative. Delinquent and forfeited land may continue to be sold in accordance with West Virginia Code § 11A-3-1 et seq. and § 11A-4-1 et seq., despite the absence of sections 3, 4, 5, and 6 of Article XIII of the West Virginia Constitution.

Very truly yours,

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

By



STEPHEN B. STOCKTON
ASSISTANT ATTORNEY GENERAL

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