

**THE EFFECT OF DANIEL’S LAW ON THE TAX SALE AND
FORECLOSURE PROCESS**

By: Keith Bonchi, Esquire, Association Counsel

OPINION NO: 2023-0001

On November 20, 2020, P.L. 2020, c. 125 commonly referred to as “Daniel’s Law” was signed into law. On January 12, 2022, Chapter 371 of P.L. 2021 was signed into law implementing “Daniel’s Law”. Daniel’s Law amended the Open Public Records Act and other statutes that protect personal information for judges, prosecutors and law enforcement officers. The latest amendment also created the Office of Information Privacy within the Department of Community Affairs.

The enactment of Daniel’s Law has caused confusion among tax collectors as to conducting their tax sale and as to the issuance of tax sale certificates. Obviously, every tax collector wants to comply with Daniel’s Law and do whatever they can to protect the addresses of those covered by Daniel’s Law. However, it is the opinion of the undersigned that does not mean that if one of the protected individuals become delinquent on taxes, that a tax collector can somehow conduct a tax sale and issue a tax sale certificate in a fictitious name and thereafter foreclose the delinquent taxpayer in a fictitious manner. It is respectfully submitted that this would violate the due process clause of both the state and federal constitution. If someone is going to lose their property, they are entitled to the same due process given to other delinquent taxpayers. Our courts have repeatedly held that Due Process considerations are at the forefront in the arena of tax foreclosure, where defendants stand to lose their property. See, e.g., Montville v. Block 69, Lot 10, 74 N.J. 1 (1977); M&D Associates v. Mandara, 366 N.J. Super. 341 (App. Div. 2004); Twp. of Jefferson v. Block 447A, Lot 10, 228 N.J. Super. 1 (App. Div. 1988); Sourlis v. Red Bank, 220 N.J. Super.

434 (App. Div. 1987). A property owner who receives a tax sale notice identifying the owner as a fictitious entity may well be confused and reasonably believe it does not affect or apply to them. The same would be true if a property owner is served with a complaint that only identifies the defendant by a fictitious name. It is the undersigned's belief that courts would likely construe this procedure as unconstitutional because it does not reasonably apprise a defendant that an action has been commenced against them, which constitutes a Due Process violation. See, e.g., Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (explaining that Due Process requires "notice, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action[.]").

The first question is can the tax collector conduct a tax sale on anyone covered by Daniel's Law. It is the opinion of the undersigned that Daniel's Law was never intended to prevent a municipality from utilizing the Tax Sale Law to enforce the payment of taxes from a delinquent protected individual.

N.J.S.A. 54:5-26 specifically requires a tax collector to post notices and advertise in the paper. The purpose of the above-stated statute is to give the delinquent taxpayer notice of the tax sale. If we do not put the name of the owner in the paper, that individual is not going to receive notice required by due process. It is not unusual that someone may see the person's name in the paper and advise them of that fact. Nothing in Daniel's Law indicates that the tax collector should not post and advertise under the above-cited statute.

The next question is whether someone who is protected by Daniel's Law can have their name put on the tax sale certificate. Again, it is the opinion of the undersigned that the actual name must be on the tax sale certificate. The tax sale certificate must be recorded with the county clerk to provide the world notice that there is a municipal lien on the real estate. The county clerk has

historically used an alphabetical index. This means that a tax sale certificate is recorded against the owner of the property according to their last name. If the owner of the property is not named on the tax sale certificate, it cannot be properly indexed and therefore properly recorded. An improperly indexed instrument is generally not considered to be reasonably discoverable through standard search methods, and hence is usually unenforceable against parties who later acquire interests in the affected property, whether mortgagees or buyers. See, e.g., Howard Savings Bank v. Brunson, 244 N.J. Super. 571 (Ch. Div. 1990). It is also important to note that when a tax sale certificate is foreclosed, it is the tax sale certificate and the Final Judgment barring redemption which creates fee title. Again, the proper recording of the tax sale certificate is critical in this matter. The New Jersey Supreme Court has endorsed procedures and outcomes that “support the integrity of the recording system.” Palamarg Realty Co. v. Rehac, 80 N.J. 446, 459 (1979). Placing the actual owner’s name on the tax sale certificate furthers the integrity of the recording system, whereas using a fictitious alias would undermine it.

Finally, whether the tax sale certificate is foreclosed by the municipality or a third-party, the actual name of the owner of the property must be named in the foreclosure. There simply is no way to comply with due process and foreclose someone with a fictitious name. In fact, the Court Rules permit the prosecution of a lawsuit against fictitiously-named defendants in only one very narrow circumstance: when the defendant’s “true name is unknown.” R. 4:26-4. This, it would violate the Court Rules to file a foreclosure complaint against a fictitious defendant, where their name is actually known. It is worth noting that this is another reason why Daniel’s Law cannot be read to permit the use of fictitious names. It is well-established that laws passed by the State legislature cannot supersede matters of practice and procedure promulgated by the New Jersey

Supreme Court through its Rules. See, e.g., Mandara, supra, holding in the tax foreclosure context that, where a Court Rule and a statute conflict, the Court Rule will supersede.

Therefore, if anyone who wants to be protected by Daniel's Law wants to prevent the above, they simply will have to pay their taxes and prevent a delinquency which would lead to a tax sale. The intent of this opinion is not to violate Daniel's Law but simply to indicate that those individuals protected by Daniel's Law must understand that there are certain legal requirements perfecting a tax sale certificate and conducting a tax sale that requires compliance with due process. It is the opinion of the undersigned that the Constitution of New Jersey and of the United States requires actual notice to be given to those individuals protected by Daniel's Law and therefore this supersedes Daniel's Law as to relating to protecting the identities of delinquent taxpayers who are covered by Daniel's Law.

There is simply no way to comply with the Tax Sale Law without actually placing the owner's actual name in the newspaper and on the tax sale certificate. There is simply no way to keep the identity of the delinquent taxpayer who is covered by Daniel's Law secret since the notice in the newspaper must identify the proper owner of the property even if he is covered by Daniel's Law. The name on the tax sale certificate must be the actual name since it must be properly indexed in the county and provide the whole world notice that the real estate is now subject to a municipal lien and a priority provided by N.J.S.A. 54:5-9.