

POST PANDEMIC APPLICATION OF EXECUTIVE ORDER NO. 190

By: Keith Bonchi, Esquire, Association Counsel

OPINION NO: 2021-0001

I had previously issued Legal Opinion 2020-0001 on the implementation of Executive Order No. 190. The purpose of this legal opinion is to address the issue of how a tax collector should implement this Executive Order as of January 1, 2022. It is important to note that this legal opinion may be superseded by actions of the Governor, or Legislature or the Division of Local Government which may provide new direction to tax collectors. In the absence of the above, it is my intent to provide guidance to a tax collector as to how to deal with the application of interest on unpaid water charges after the expiration of Executive Order No. 190 as extended by Executive Order No. 229 and further extended by Executive Order No. 246.

It is important to note from the outset, that a legal opinion by the undersigned is simply educational guidance to a tax collector. Ultimately, a tax collector should check with his or her municipal attorney for legal advice in this matter. As you are aware, only your municipal attorney can provide you legal advice but I am attempting to utilize the resources of the TCTA to help educate you so that you can better perform your duties as a tax collector.

In Legal Opinion No. 2020-0001, I stated that the New Jersey Legislature pursuant to the Emergency Health Powers Act as set forth in N.J.S.A. 26:13-1 et seq. and the Civil Defense and Disaster Control Act had provided extraordinary powers to the Governor of the State of New Jersey during a public health emergency. Governor Murphy had the heavy burden of guiding the State of New Jersey and its residents through the pandemic. While we are still dealing with pandemic issues, there is no question that the pandemic was the type of emergency that provided to the Governor's Office extraordinary powers.

It is also important to remember that during the State of Emergency, the New Jersey Legislature delegates certain powers to the Governor so he can instantaneously act to address an emergent situation. Hence, in these rare extraordinary circumstances, the Governor is acting both with the powers of the Governor's Office and with some special powers from the Legislature. It is these increased powers that give the Governor the extraordinary power to issue Executive Orders that may contravene statutes.

In Opinion No. 2020-0001, I had opined on Executive Order No. 190 which became effective on October 15, 2020, and was to remain in effect until March 15, 2021, unless extended by another Executive Order. In Paragraph two of this Executive Order, it clearly stated that "No gas or electric public or municipal utility or privately or publicly owned water system shall collect any fee or charge imposed for late or otherwise untimely payments". When this Executive Order was issued, I was working with the Division of Local Government Services and had relayed certain questions to the Division who had their own questions. On November 6, 2020, an email was received clarifying Executive Order No. 190. The clarifications clearly stated that during the public health emergency, "penalties or interest cannot be collected on late or otherwise delinquent water payments from residential accounts or accounts primarily serving residential customers (such as an apartment building where the landlord is billed)." Furthermore, delinquent water charges could not be used as part of a year-end penalty under N.J.S.A. 54:4-67. The clarification further stated that the municipalities could not sell delinquent water charges in their tax sale for the remainder of the public health emergency.

On March 3, 2021, Governor Murphy issued E.O. 229 which essentially extended E.O. 190 through June 30, 2021. On June 4, 2021, Governor Murphy signed Assembly Bill No. 5820 which became Chapter 103 of the Public Laws of 2021, which terminated the public health emergency

but also provided additional powers to the Governor. Assembly Bill No. 5820 terminated and modified all Executive Orders with the exception of fourteen Executive Orders including E.O. 229. Hence, the Legislature specifically adopted and put its stamp of approval on E.O. 229 and provided the Governor the authority to extend same. On June 14, 2021, Governor Murphy issued E.O. 246 modifying E.O. 229 to provide “a grace period shall be in effect from July 1, 2021, through December 31, 2021”. E.O. 246 goes on to state at paragraph four that during the grace period, “no municipal utility or privately or publicly owned water system shall collect any fee or charge imposed for late or otherwise untimely payments”.

Tax collectors in the State of New Jersey hold their license through the Division of Local Government which is part of the Department of Community Affairs. Therefore, the role of a tax collector is not to challenge the legitimacy of the Executive Order but to do his or her best to implement same. Hence, while there may be third party lienholders or municipal governments that may choose to challenge same, it is not your role as a tax collector to do anything other than to try and do your best to implement same. The purpose of this Opinion is to provide you guidance.

A review of E.O. 246 at Paragraph 4 clearly states that **during and after** the termination of the grace period, no public owned water system shall collect any fee or charge imposed for late or otherwise untimely payments. Hence, unlike the conventional grace period for nonpayment of taxes which after the ten days have expired, the full amount of taxes are due with interest and penalties, this Executive Order clearly states that you cannot charge retroactive interest after the termination of the grace period. Hence, it is clear from the implementation of Executive Order 190 on October 15, 2020, until the expiration of E.O. 246 which remains in effect until December 31, 2021, the Governor’s intent is to have no municipality charge a late fee or interest on unpaid water bills. Therefore, in your calculations, you are to charge **no interest** for the time the

Executive Orders are in effect. This means that the unpaid water will not be put in any year-end penalty. Interest will go back into effect on January 1, 2022, as long as there is not another Executive Order or other legislation changing same. Therefore, from October 15, 2020, through December 31, 2021, you will not be charging any interest on unpaid water or water liens. It is my opinion that the Executive Orders are limited to residential properties. Hence, you can charge full interest on commercial properties. Please note that if the commercial property has any portion leased to residential tenants, then it is deemed to be a residential property under the Executive Orders.

In addition to the above, it is the opinion of the undersigned, that the Governor intended not to have you place any unpaid water charges into your tax sale if it is conducted in 2021. As stated previously, you will announce at the sale that it does not include water charges during the time period covered by the Executive Orders.

I understand that many tax collectors will hear grief from third party investors and other individuals who purchased water liens before the pandemic expecting to receive interest. However, their dispute is with the Governor and not with you. As a member of the Executive branch of the government, you are required to follow the law even if the law has been modified by Executive Orders promulgated by the Governor during a pandemic emergency. Therefore, absent further guidance from the Division of Local Government Services, the Court system, further Executive Orders and any other newly enacted legislation, it the opinion of the undersigned that the above is the proper way to implement Executive Orders 190, 229 and 246. Again, ultimately if you are not sure what to do, you should consult your municipal attorney because it is his/her legal advice that you will follow.