



# Advertising Tax Liens

Christopher B. McLaughlin

The Machinery Act sends mixed messages regarding a taxing unit's obligation to advertise tax liens on real property. Section 105-369 of the North Carolina General Statutes (hereinafter G.S.) expressly requires the advertisement of tax liens. The statute uses the terms "must" and "shall" more than a dozen times when describing the duty to advertise, leaving little room to argue that these ads are optional.<sup>1</sup> However, the statute also declares, in two separate provisions, that the failure to advertise or to send advance notice of the advertisement to the taxpayer "does not affect the validity" of the taxes, the tax liens, or a subsequent foreclosure action.<sup>2</sup>

How should a tax collector decipher these seemingly incongruent messages? Despite the understandable desire to avoid the often substantial costs, the safest course of action is to assume that the obligation to advertise is a non-negotiable requirement. North Carolina courts have not yet been asked to opine on the "escape clauses" that apparently excuse the failure to advertise. With this in mind, tax collectors would be wise to assume that these provisions do not excuse the deliberate decision not to advertise real property tax liens. This is especially true for taxing units that employ the in rem foreclosure process under G.S. 105-375, for which the advertisement of a tax lien is the first step.

## 1. Which taxes should be advertised?

G.S. 105-369(a) mandates that the tax collector must first inform the governing body of and then advertise the "total amount of unpaid taxes for the current fiscal year that are liens on real property."<sup>3</sup> This amount should include any special service district property taxes but not special

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1. These mandates include the following: "the governing body *must* order the tax collector to advertise the tax liens," N.C. GEN. STAT. (hereinafter G.S.) § 105-369(a); and, "the county tax collector *shall* advertise county tax liens by posting a notice of the liens at the county courthouse and by publishing each lien at least one time in one or more newspapers having general circulation in the taxing unit. The municipal tax collector *shall* advertise municipal tax liens by posting a notice of the liens at the city or town hall and by publishing each lien at least one time in one or more newspapers having general circulation in the taxing unit." G.S. 105-369(c) (emphasis added).

2. G.S. 105-369(b1) and (c).

3. A taxing unit has the option of also advertising personal property taxes that are *not* a lien on real property,

assessments, which fall outside of the Machinery Act's definition of "taxes" (G.S. 105-273(17)). The amount advertised should be only the principal amount of taxes owed, not including any interest, costs, or fees (see Question 5 for additional information).

Tax liens on real property represent real property taxes as well as personal property taxes owed by taxpayers who own real property in the taxing unit as of the January 1 listing date.<sup>4</sup> Personal property taxes are a lien on *all* real property parcels owned by the same taxpayer in the taxing unit. If the taxpayer owns personal property and multiple parcels of real property, the tax collector has the options of either (1) adding the personal property taxes to only *one* of the real property liens or (2) adding the personal property taxes to *all* of the real property liens. The personal property taxes may be collected only once, and until they are paid they will constitute a lien on all real property owned by the taxpayer in the taxing unit regardless of how they are advertised.

## 2. How should subdivided parcels be advertised?

How should a tax lien be advertised if the underlying parcel has been subdivided and transferred since the listing date? The advertising statute itself is silent on this question, but general Machinery Act principles provide some guidance.

If the subdivided parcels have been individually appraised and listed by the assessor by the time the tax collector begins the advertising process, the tax collector should advertise the tax liens that arise from the subdivided parcels' new assessments. This approach is consistent with the opportunity created by G.S. 105-362(b)(2) for the owner of a subdivided parcel to release the lien on the parcel by paying the new assessment, plus a proportionate share of the original owner's personal property taxes that were secured by the parcel, if any such taxes exist.

If the subdivided parcels have not yet been individually appraised by the assessor, best practice is to advertise the full amount of the original tax lien for each subdivided parcel and make the necessary adjustments when the subdivided parcels are appraised by the assessor. In the text of the advertisement, the tax collector should explain this approach and add an indicator such as "(subd.\*)" next to each subdivided parcel so that the taxpayer is aware that adjustments to the advertised amount will be required when the tax lien is satisfied. This approach is preferable to the tax collector attempting to estimate the values of the subdivided parcels, which is a task the Machinery Act reserves exclusively for the assessor.

## 3. When should tax liens be advertised?

G.S. 105-369(c) requires that real property tax liens for the current tax year be advertised at any time from March 1 through June 30. Most taxing units prefer to advertise earlier rather than later. Three actions must occur before the advertisement may be published and posted.

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but the cost of that advertisement may not be passed along to taxpayers as is the cost of the real property tax lien advertisement. G.S. 105-373(a)(1)(b).

4. G.S. 105-355(a) ("the lien for taxes levied on a parcel of real property shall attach to the parcel taxed on the date as of which property is to be listed under G.S. 105-285, and the lien for taxes levied on personal property shall attach to all real property of the taxpayer in the taxing unit on the same date").

First, in February the tax collector must report to the governing body the “total amount of unpaid taxes for the current fiscal year that are liens on real property.”<sup>5</sup> Second, the governing body must issue an order to the tax collector to advertise the tax liens; the order will be issued, presumably, immediately upon receipt of the tax collector’s report.<sup>6</sup> Third, at least thirty days before the advertisement is published and posted, the tax collector must provide written notice to the affected taxpayers of the intent to publish outstanding current tax liens.<sup>7</sup> In many counties, this notice produces more tax payments than does the actual advertisement.

#### 4. Who should be named in the advertisement?

The advertising statute requires that a tax lien be advertised in the name of the owner as of the date of delinquency. Generally, real property taxes are delinquent on January 6 of the fiscal year in which they are levied; 2009 real property taxes, for example, are delinquent on January 6, 2010.<sup>8</sup> If Parcel A is listed for 2009 taxes in the name of Taxpayer 1 but is owned by Taxpayer 2 on January 6, 2010, the outstanding tax lien on the parcel must be advertised in the name of Taxpayer 2.

G.S. 105-369 originally required that a tax lien be advertised in the name of the listing taxpayer, regardless of subsequent transfers. This requirement changed along with the Machinery Act’s enforced collection procedures. Prior to 2006, the listing taxpayer was the only taxpayer who could be targeted by enforced collections. Beginning with the 2006 tax year, the taxpayers who are subject to enforced collection remedies for real property taxes include not only the record owner on the date of delinquency but also all subsequent owners.<sup>9</sup> When the responsibility for delinquent taxes shifted from the listing taxpayer to the owner as of the date of delinquency, the burden of being named in the tax lien advertisement also shifted.

Suppose a delinquent parcel changes hands between January 6 and the date on which the tax collector sends the required notice of advertisement. Taxpayers who take ownership subsequent to January 6 share responsibility for the delinquent taxes along with the owner prior to January 6. Because the advertising statute makes no mention of post-January 6 owners, a tax collector must still send notice of the intent to advertise to the January 6 owner despite the fact that the parcel has changed hands. In the interest of providing notice to all taxpayers potentially subject to enforced collection remedies, the tax collector also may, and probably should, send notice of the intent to advertise to all post-January 6 owners and advertise in their names as well.

The following example illustrates this approach. Assume Parcel A is listed in the name of Taxpayer 1, is owned by Taxpayer 2 on the following January 6, and is transferred to Taxpayer 3 on February 1. If taxes remain outstanding when the tax collector prepares to advertise tax liens, notice must be sent to Taxpayer 2, the owner on January 6. However, Taxpayer 3 is also responsible for the outstanding taxes, and it is also appropriate to send notice to Taxpayer 3. If the taxes remain unpaid thirty days later, the tax collector must advertise in the name of Taxpayer 2

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5. G.S. 105-369(a). County tax collectors must make their reports by the first Monday in February; municipal tax collectors must do so by the second Monday in February.

6. *Id.*

7. G.S. 105-369(c).

8. Taxes that are not deferred taxes are delinquent on the date they first accrue interest. G.S. 105-365.1(a)(1). Real property taxes are due on September 1 of the fiscal year for which they are levied and first accrue interest on January 6 following the due date. G.S. 105-360(a).

9. G.S. 105-365.1(b)(1).

and may also advertise in the name of Taxpayer 3. However, under no circumstances should the tax collector advertise in the name of Taxpayer 1.

Tax collectors must work closely with assessors to ensure that they have accurate record owner information as of January 6. The longer it takes to compile this information, the later the advertising date. If a taxing unit wishes to advertise in early March, the transfer information needs to be provided to the tax collector by late January so that the required notices can be compiled and mailed in early February.

The Machinery Act provides several layers of protection to tax collectors who advertise in the name of the wrong taxpayer. The advertising statute expressly states that neither the failure to notify the correct taxpayer (G.S. 105-369(b1)) nor the failure to advertise the correct taxpayer (G.S. 105-369(f)) shall affect the validity of a tax lien. Furthermore, the general immaterial irregularity provision, G.S. 105-394, excuses minor defects in any Machinery Act procedure. That said, it is best practice for a tax collector to correct any taxpayer identification errors if a city or county intends to proceed with an in rem foreclosure under G.S. 105-375. Because the advertisement of a tax lien is the first step in an in rem foreclosure process, the tax collector would be wise to send a new notice to the correct taxpayer and publish a new advertisement in the correct taxpayer's name before moving forward. Note that the advertising statute provides for criminal penalties if a tax collector knows that a tax has been paid but willfully advertises the parcel regardless.<sup>10</sup>

## 5. What information must be included in the advertisement?

G.S. 105-369(c) mandates that the advertisement includes

- the name of the record owner as of the date of delinquency,
- a brief description of the parcel (such as street address or tax map number),
- the principal amount of taxes that are a lien on the parcel,
- a statement that the amounts advertised will be increased by interest and costs,
- the names of the newspapers and the dates on which the advertisements will run (if the list of tax liens has been divided among several newspapers), and
- a statement that the liens may be foreclosed and the properties sold.

Note that the statute (1) directs that only the “principal amount” of taxes be included in advertisement, despite the fact that at least three months of interest will have accrued on these liens by the date of the advertisement and (2) does not permit a tax collector to add to the advertised amounts any fees, penalties, or costs that the taxpayer might have already accumulated. In the interest of providing taxpayers with more accurate information about their tax obligations, some tax collectors include in the advertisement all amounts owed. The better practice, however, is to conform to the statutory requirement and print only the principal taxes along with a prominent warning that these amounts will be increased by interest and costs. See Question 7 for details on how interest and advertising costs are calculated.

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10. G.S. 105-369(g).

The text of the advertisement could read as follows:

NOTICE OF ADVERTISEMENT OF TAX LIENS ON REAL PROPERTY

\_\_\_\_\_ COUNTY

TOWN OF \_\_\_\_\_

Under the authority vested in me by Section 105-369 of the North Carolina General Statutes and pursuant to an order of the Board of Commissioners/Town Council of \_\_\_\_\_ dated, \_\_\_\_\_, I am hereby advertising tax liens for the year \_\_\_\_ upon the real property described below.

The real property parcel subject to the lien, the name of the parcel’s owner as of January 6, \_\_\_\_ (and/or the names of subsequent owners), and the amount of taxes due are set out below. The amount advertised represents only the principal taxes for tax year \_\_\_\_ that were unpaid as of \_\_\_\_\_. The actual amount owed by the taxpayer will be increased by all taxes owed for prior tax years and by all applicable interest, costs, and fees. The omission of prior years’ taxes and interest, costs, and fees from the amount advertised will not constitute a waiver of the taxing unit’s claim for these items.

If the taxes remain unpaid, the tax collector will use all available collection remedies to collect the delinquent taxes, including the levy on personal property, the garnishment of wages, the attachment of bank accounts, rents, debts, or other property and the foreclosure and sale of the real property. These collections procedures do not apply to taxpayers subject to pending federal bankruptcy petitions.

When a parcel was subdivided after January 1, \_\_\_\_, and the ownership of one or more of the resulting parcels were transferred, the amount of the tax lien on each parcel, as shown in this advertisement, is the amount of the lien on the original parcel as it existed on January 1, \_\_\_\_, and is subject to adjustment when the taxes are paid or the lien is foreclosed.

This the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_ County Tax Collector

Town of \_\_\_\_\_ Tax Collector

## 6. Where must the advertisement be posted and published?

The tax lien advertisement must appear publicly in at least two locations: posted at the county courthouse or town hall and published in a newspaper having “general circulation” in the taxing unit.<sup>11</sup> In light of the substantial costs involved—Forsyth County spent more than \$33,000 on its tax lien advertisement in 2009—the newspaper selection process can be a delicate legal, political, and financial issue.

The sole North Carolina appellate court decision interpreting the “general circulation” requirement in G.S. 105-369 is a 1981 case that approved the advertisement of county tax liens in a weekly paper with fewer than 500 subscribers.<sup>12</sup> In determining that the newspaper used by the county satisfied the advertising statute, the North Carolina Supreme Court identified four standards that still apply today. To meet the “general circulation” requirement a newspaper must

- offer content that is “appealing to the public generally,”
- have more than a *de minimus* number of actual paid subscribers,
- have paid subscribers in more than one community or section of the taxing unit, and
- be available to anyone one in the taxing unit that wishes to subscribe.<sup>13</sup>

The fact that a newspaper with only a few hundred paid subscribers can satisfy these standards indicates that a tax collector need not run the advertisement in the newspaper with the largest or most geographically diverse subscriber base in the taxing unit. The chosen newspaper’s subscribers are not required to be evenly distributed throughout the city or county, nor does the newspaper need to have subscribers in *every* part of the taxing unit. As long as there are some paid subscribers in more than one community of the city or county, the newspaper could satisfy these standards.

The tax collector must use at least one newspaper that satisfies the “general circulation” requirement, assuming one exists. Although running the advertisement in several small newspapers may be less expensive and may actually reach more local readers than doing so in one larger newspaper, a tax collector cannot rely on this piecemeal approach. If no single newspaper in the taxing unit is able to satisfy the “general circulation” requirement, it might be acceptable to rely on several newspapers with limited circulation.

Beyond the Machinery Act mandates, additional statutory requirements for the chosen newspaper are created by G.S. 1-597, which sets the regulations for the publication of all legal notices and advertisements in the state. The newspaper must

- be admitted to the United States mails as a second-class matter and
- have been regularly and continuously issued in the city or county at least one day in each calendar week for at least twenty-five of the twenty-six weeks preceding the advertisement date.

Read together with the Machinery Act, these provisions eliminate a number of possibly less expensive publication options. A tax collector cannot advertise *exclusively* in the following publications, regardless of how popular they might be among local readers:

- a free newspaper,
- a newspaper available only on the Internet,
- a monthly newspaper or magazine or
- a newspaper that has been in publication for fewer than six months.

11. G.S. 105-369(c).

12. Great Southern Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

13. *Id.* at 442, 284 S.E.2d at 467.

Another inexpensive approach that does not pass muster under the current statute is to advertise by posting tax liens on the county or city website. Although the General Assembly has authorized several localities to forgo traditional newspaper publication in favor of website postings for public meetings,<sup>14</sup> this authority has yet to be extended to cover Machinery Act procedures.

One creative legal solution to the advertising question is for a county to work with a local newspaper to produce a special section (similar to one commonly published for television listings) for the tax lien advertisement.<sup>15</sup> Often less expensive than a traditional advertisement, a special section may better attract readers' attention and can provide space for the tax office to share with taxpayers details about the county's budget or property tax procedures.<sup>16</sup>

## 7. How are costs and interest calculated?

G.S. 105-369(d) mandates that each parcel included in the tax lien advertisement be assessed an advertising fee to cover publication costs. The statute allows the tax collector to allocate the cost among the tax liens "on any reasonable basis," and the standard approach is to evenly divide the cost of advertising by the total number of listed parcels. For instance, if the advertisement costs \$100, and there are 100 parcels listed in the advertisement, the tax collector will add \$1 to each advertised tax lien. Keep in mind that only the original tax lien amount should be advertised, however.

Interest accrues on advertised tax liens in this standard process: 2 percent beginning on the delinquency date (usually January 6) and 0.75 percent on the first day of each subsequent month until paid.<sup>17</sup> The advertising cost is added to the tax liens on the day the advertisement is published, and that cost will accrue interest along with the principal taxes.

For example, assume that \$100 of principal taxes are delinquent on Parcel A when the county advertises tax liens on March 15. If the advertising cost allocated to Parcel A is \$5, what is the total amount that the parcel's owner must pay to release the tax lien if the owner appears at the tax office prepared to pay the taxes on July 1?

First, calculate the interest owed up to the publication date, which is 3.5 percent of \$100, or \$3.50. This represents 2 percent for January and 0.75 percent each for February and March, multiplied by the principal tax of \$100. The advertising cost is not included in the January, February, and March interest calculation because it is not incurred until the publication date in mid-March. Next, calculate the interest owed *after* the publication date, which is \$3.15. This represents 3 percent in interest—0.75 percent each for April, May, June and July, multiplied by \$105, the sum of the principal tax plus the allocated advertising cost. Because Machinery Act interest is not compounded, interest is not charged again to the pre-

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14. For example, S.L. 2003-81 (Cabarrus County); S.L. 2007-86 (towns of Apex, Garner, and Knightdale).

15. However, an insert similar to the traditional Sunday morning coupon and store flyers would likely not satisfy the publication requirement. While such inserts are distributed with the newspaper, they are not actually published as part of the newspaper. A special section avoids this problem because it carries the newspaper banner and is published as part of the regular newspaper.

16. Both Forsyth and Guilford counties have used this approach for several years. Pete Rodda, the Forsyth County assessor and collector, reports that the county saves at least 20 percent in publishing costs by relying on a special section rather than a traditional advertisement. Jay Heavner, the Gaston County director of revenue, uses extra space at the back of the county's special section to provide answers and contact information for common property tax questions and to share details about the county's revenues and expenses.

17. G.S. 105-360(a).

advertisement totals. If the taxpayer satisfies the tax lien on July 1, the total owed is \$111.65, which is the sum of the principal tax (\$100), the allocated advertisement cost (\$5), the pre-publication interest (\$3.50), and the post-publication interest (\$3.15).

## 8. Should a tax collector advertise a taxpayer in bankruptcy?

When a taxpayer files a bankruptcy petition, an “automatic stay” immediately becomes effective. Essentially this stay bars any effort by a creditor to collect a debt from the debtor in bankruptcy, including “any act to create, perfect, or enforce any lien” on property covered by the bankruptcy filing.<sup>18</sup> Willful violations of the automatic stay—that is, a collection action undertaken with knowledge that the debtor is in bankruptcy—may be punished with contempt of court sanctions as well punitive damages and the assessment of attorneys fees.<sup>19</sup>

The advertisement of a tax lien arguably qualifies as an act to enforce a tax lien and is therefore barred by the automatic stay.<sup>20</sup> The safest course of action is for the tax collector to exclude from the advertising process any taxpayer who is the subject of a pending bankruptcy petition—taxpayers in bankruptcy should not receive a notice of advertisement nor should their names or parcels be included in the published advertisement. Some tax collectors take the additional precaution of including in the text of the advertisement a disclaimer stating that enforced collection actions will not be undertaken against taxpayers involved in pending bankruptcies, just in case such a taxpayer is mistakenly included in the advertisement.

Once a bankruptcy case is terminated through either a discharge or dismissal, a tax collector generally may proceed with advertising and enforced collections for delinquent tax liens that remain.<sup>21</sup>

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18. 11 U.S.C. § 362(a).

19. *Id.* at 362(h) and 362.11.

20. Although there appear to be no federal bankruptcy court opinions on this specific issue, several have held that the *sale* of a tax lien violates the automatic stay. *In re Haight*, 52 B.R. 104, 105 (Bankr. W.D.N.Y. 1985) (sale of tax lien constitutes a prohibited collection action because it is “a step along the road to the enforcement of the tax lien by attempting to coerce the debtor into paying the delinquent taxes”). Because the motivation behind the notice and advertisement of tax liens under the Machinery Act is to induce payment and to lay the foundation for a foreclosure, it seems reasonable to conclude that the automatic stay would bar the advertisement of tax liens as it does their sale.

21. For a detailed discussion of how a bankruptcy filing affects the tax collection process, please see Shea Riggsbee Denning & Robert E. Price, Jr., *Property Tax Bulletin* #139, “Collecting Property Taxes in Bankruptcy,” (School of Government, August 2006), available at [www.sog.unc.edu/pubs/electronicversions/pdfs/ptb139.pdf](http://www.sog.unc.edu/pubs/electronicversions/pdfs/ptb139.pdf).

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