

# Acquiring Property Post-Rafaeli

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# The Rafaeli Decision

- ▶ *Rafaeli v. Oakland County* 505 Mich. 429 (2020)
  - ▶ 2020 Michigan Supreme Court Decision
- ▶ Fundamentally Changed Michigan Tax Foreclosure
- ▶ Held that former owners have a property interest in surplus proceeds from the sale of their foreclosed real property
  - ▶ Protected by the Michigan Constitution

# The Rafaeli Decision

- ▶ What Does This Mean?
  - ▶ Since PA 123 of 1999 Foreclosing Governmental Units required to retain surplus
    - ▶ Used to cover delinquent taxes on unsold parcels (make local units whole)
    - ▶ Remaining surplus could be transferred to county general fund
  - ▶ *Rafaeli* said this was unconstitutional
    - ▶ Must provide an avenue for former owners to recover surplus
    - ▶ Otherwise, retention resulted in a “taking”

# The Rafaeli Decision

- ▶ Major Implications for Foreclosed Property Disposition
  - ▶ Not just collecting tax/breaking even
  - ▶ Former owner's right to surplus
    - ▶ Obligation to realize a surplus?
    - ▶ First right for minimum bid still viable?

# PA 256 of 2020

- ▶ PA 256 of 2020 Adopted Unanimously by Michigan Legislature
  - ▶ Intended to recognize and give effect to *Rafaeli* ruling
  - ▶ Created mechanism for former owners to claim auction surplus (Remaining Proceeds)
    - ▶ MCL 211.78t
  - ▶ Modified disbursement priority for sale proceeds
  - ▶ Modified right of first refusal process

# MCL 211.78t - Claims Process

- ▶ To Claim Proceeds , Former Owner Must:
  - ▶ File Notice of Intention to Claim Sale Proceeds by July 1 following foreclosure
    - ▶ Michigan Department of Treasury Form 5743
  - ▶ File motion in the Circuit Court by May 15 following sale

# Right of First Refusal

- ▶ City and County Land Banks now have right of first refusal
  - ▶ MCL 211.78m(1) and (3)
- ▶ Priority:
  - ▶ State of Michigan
  - ▶ City, Village, Township, City Land Banks
  - ▶ County
  - ▶ County Land Bank

# Right of First Refusal

## ▶ Cost of Acquisition?

- ▶ If a claim form has been filed for parcel in question:
  - ▶ Greater of fair market value or minimum bid
  - ▶ Fair market value not defined
    - ▶ 2x SEV easiest metric available
- ▶ No claim forms filed or unsold at first round sale:
  - ▶ Minimum bid



# Hall v. Meisner

- ▶ Hall, et al. v Meisner, et al. (6<sup>th</sup> Cir. 2022)
  - ▶ Properties foreclosed in 2018 (pre-PA 256 and *Rafaeli*)
  - ▶ City of Southfield exercised right of first refusal for min. bid
  - ▶ Subsequently conveyed parcels to Southfield Neighborhood Revitalization Initiative for \$1
  - ▶ Treasurer/City received no surplus
  - ▶ Former owners received no compensation

# Hall v. Meisner

- ▶ 6<sup>th</sup> Circuit held that this was a “taking” under the 5<sup>th</sup> Amendment of the United States Constitution
  - ▶ Reversed lower court
  - ▶ 5<sup>th</sup> Amendment protects “equitable” interest
  - ▶ Occurred *at the time of foreclosure* when that interest was extinguished

# Hall v. Meisner

- ▶ What exactly is this equitable interest?
  - ▶ Not entirely clear
  - ▶ Seems to suggest that a public sale a necessary component of foreclosure
    - ▶ Took former owners' “equitable titles . . . without a public foreclosure sale and without payment to the plaintiffs for the value of those titles.”

# Hall v. Meisner

- ▶ How does this relate to *Rafaeli*?
  - ▶ Not necessarily incompatible
  - ▶ Suggests that *Rafaeli* right to surplus is reflective of equitable title
    - ▶ “The owner’s right to a surplus after a foreclosure sale . . . follows directly from her possession of equitable title before the sale. The surplus is merely the embodiment in money of that equitable title.”

# Hall v. Meisner

- ▶ What does this mean for right of first refusal?
  - ▶ May preclude minimum bid acquisition under first right
    - ▶ Hall makes clear cannot foreclose without providing some opportunity to realize value for “equitable interest”
    - ▶ Proceed with caution until additional clarity from courts

# Other Strategies

- ▶ Purchasing for Fair Market Value
  - ▶ May still be viable option depending upon project and funding available

# Other Strategies

- ▶ Bidding at the Auction

- ▶ May be less expensive than first refusal purchase for FMV

# Other Strategies

## ▶ Bundling

### ▶ Still viable, but:

- ▶ Not to circumvent paying FMV

- ▶ Avoid sale restrictions that may reduce sale price where claims filed

  - ▶ Compelling justification

  - ▶ E.g. imminent health or safety concerns



# Other Strategies

- ▶ Bundling
  - ▶ If no claim or increases salability—more freedom
    - ▶ Blight bundle
    - ▶ Adjacent parcels

# Funding Mechanisms

- ▶ Restricted Funds - MCL 211.78 *et seq.*
  - ▶ \$175 fee - MCL 211.78g
    - ▶ Must be used “for the administration of sections 78 to 79a, including, but not limited to, costs associated with providing required notices and with the forfeiture, foreclosure, sale, maintenance, repair, and remediation of property.
  - ▶ Remaining Sale Proceeds - MCL 211.78m(8)(i)
    - ▶ “must be used for costs incurred by the foreclosing governmental unit in connection with the forfeiture, foreclosure, sale, maintenance, repair, or remediation of foreclosed property, the defense of title actions and other legal expenses, or the administration of this act, or for the payment of claims for remaining proceeds or other amounts ordered under section 78t.”

# Funding Mechanisms

- ▶ Restricted Funds - MCL 211.78 *et seq.*
  - ▶ Land Banks' continued management of leftover parcels appears to be within permitted uses
  - ▶ Consult with your counsel

# Conclusion

- ▶ Opportunities remain
- ▶ New possibilities for funding from restricted funds
- ▶ More challenging and expensive to acquire tax foreclosed parcels

# Questions?



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