

**From:** Community Preservation Committee  
**Sent:** Monday, January 8, 2018 10:39 AM  
**To:** Finance Committee  
**Subject:** Fw: Harwich: Judah Elddredge Property - Back Taxes

OS-12  
1.11.18

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**From:** Christopher Clark  
**Sent:** Friday, January 5, 2018 2:46 PM  
**To:** Community Preservation Committee  
**Cc:** Shirin Everett; Ann Steidel; Sandy Robinson; Charleen Greenhalgh; Carol Coppola; Michael D. MacAskill; Julie Kavanagh; Jannell Brown; Don Howell; Larry Ballantine  
**Subject:** FW: Harwich: Judah Elddredge Property - Back Taxes

David Nixon, Chairman CPC

I was requested to provide additional backup information after my presentation on the acquisition by eminent domain of the Judah Eldredge property. My last presentation to the CPC I provided this information verbally. I have already provided this information to Real Estate and Open Space committee and am now happy to share with you. KP law was asked to comment on two primary issues. The first was the options related to acquisition for property that may have conservation value but also tax obligations due. The second was the issue of the balance of cash owed on taxes versus the appraised value of the property. The below email details out the various options. The only option that clearly cleans title that would make the property more immediately available to the town is the eminent domain taking process. It is for this reason that administration strongly recommends that CPC funds be used to fund the purchase of this parcel and that the stated public purpose is for conservation land. State statute and additionally verified with an inquiry into the Department of Revenue indicate that the back taxes owed can be waived based upon the town's acquisition of property. I have engaged the services of the title examiner to do the necessary work for the eminent domain process. I anticipate this work be done by the end of January. My review of the file did indicate that there may be over 400 persons having some connection to this parcel. The fractional interest that someone could get from challenging the eminent domain process would not merit in my professional opinion someone significantly challenging the eminent domain process.

I'm not sure will be able to answer every hypothetical question that may emerge regarding this project but would hope that the committee recognizes the value of obtaining an important piece of conservation land and also appreciate the selectmen's desire to make some headway into collecting or resolving issues of back taxes.

Christopher Clark

Christopher Clark

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**From:** Shirin Everett [<mailto:SEverett@k-plaw.com>]  
**Sent:** Thursday, December 14, 2017 4:00 PM  
**To:** Christopher Clark <[cclark@town.harwich.ma.us](mailto:cclark@town.harwich.ma.us)>  
**Cc:** John Giorgio <[JGiorgio@k-plaw.com](mailto:JGiorgio@k-plaw.com)>  
**Subject:** Harwich: Judah Elddredge Property - Back Taxes

Hello Chris,

I am summarizing our conversation of yesterday regarding the Judah Elddredge property, particularly as to the what options are available to the Town to acquire title to the property and whether the amount of the outstanding taxes will be deducted from the Town's free cash. You mention below that the taxes owed on the property are approximately \$475,000, while the value of the property is approximately \$369,000, and that the property will likely be used for conservation purposes. I assume that the Town has recorded an instrument of taking and the outstanding taxes constitute a lien of record against the property. By separate email, I will send you copies of the statutes cited herein and relevant cases, if any. I discuss the options below:

A. Eminent Domain Taking (GL c. 40, §8C and GL c.79)

The Town could acquire title to the property by eminent domain for a public purpose (conservation of land is a public purpose). In order to take the property by eminent domain, the Town needs to take the following steps:

- (a) Review the title to the property. Since a taking results in the Town acquiring sole and absolute title to the property free and clear of liens, easements, and other encumbrances, the Town is required to record the taking against the names of persons having an interest in the property, and must send them notice of the taking. These days, the Town is required to conduct a reasonable search of Registry and other records to identify such persons. You said that you will request the title examiner the Town uses to conduct the research;
- (b) Appraise the property. The Town is required to appraise the property before taking it in order to determine the damages that the Town owes for the taking. The Town does not have to retain an independent third party appraiser for every taking (the Assessor could be requested to make a determination on the value of the property provided that the Assessor uses techniques customary in the appraising profession). However, since the Town intends to appropriate CPA funds, I recommend a formal appraisal. You mention below that, according to an appraisal, the value of the property is approximately \$369,000. I assume that a third-party appraiser prepared the appraisal;
- (c) Town Meeting Vote. Town Meeting must vote to authorize the taking, which, if done for conservation purposes, requires a 2/3rds vote of Town Meeting under GL c.40, s.8C and GL c. 44B;
- (d) Appropriation of Funds. The Town needs to appropriate money to pay damages even though the Town is not aware of anyone who may have a right to the damages;
- (e) Payment. The Town does not need to maintain the funds appropriated to pay the owner. Rather, since the owner (whoever it is) owes taxes on the property to the Town, the Town is permitted under GL c. 79,

§44A and GL c. 60, §93 to deduct from the damages owed by the Town to the owner the sums that the owner owes to the Town in taxes. Here, since the taxes owed are greater than the damages, the funds appropriated are paid to the Treasurer/Collector; and

- (f) Effect on Free Cash. No effect. I spoke with DOR counsel, who confirmed it with the DOR Accountant and Kathleen Colleary, that the Town does not have to pay itself the outstanding taxes and DOR does not deduct such sums from funds that would otherwise be certified as free cash. The Town Accountant makes the same accounting entry as is made when the Town forecloses on a tax lien and keeps the property, instead of selling it to recover taxes.

Notes: An eminent domain taking may be the quickest way of obtaining title to the property, though the funds appropriated must be paid to the Collector. A taking will also give the Town good title to the property, free and clear of all liens, provided that the Town conducted a reasonable title search.

#### B. Tax Title Foreclosure (GL c. 60, §65 et seq.)

The Town could follow the usual process of foreclosing on the property by filing a petition in the Land Court. Note that when the Land Court receives a petition, the Land Court examiner reviews the title to the property. The Town can help shorten this process if the Town has the title research done ahead of time by a Land Court-approved examiner, as the Land Court will typically accept the Town's title examiner's report. Once the Land Court proceedings have been completed, the Land Court will issue a judgment in tax lien case, unless an owner comes to Court to pay the outstanding taxes before the judgment is issued. Note, though, that owner or person having a property interest has a period of 1 year after the date on which the judgment was issued to redeem the property. The Town could shorten this period from 1 year to 90 days by using the GL c.60, s.81B proceedings discussed below. Ordinarily, tax title property is sold to recover the back taxes. Here, however, since the Town intends to retain the property as conservation land, the Treasurer/Collector will make an appropriate ledger entry. The Town does not have to repay itself the taxes. Town Meeting must vote, by a 2/3rds vote, to transfer the property to the Conservation Commission.

Notes: (i) Should the Town wish to foreclose on the taxes, I recommend the Town have the title to the property examined by a Land Court-approved title examiner. Note that these days, there is a significant delay in Land Court proceedings as the Land Court is very short-staffed. It may still take many months for a judgment to be issued; and (ii) Note that some municipalities prefer to do an eminent domain taking of the property after the foreclosure judgment to clear title to the property particularly if they wish to develop the property (that is, to ensure that the property is free of all encumbrances, as a foreclosure does not typically wipe out easements and similar encumbrances, only mortgages and similar monetary liens). Here, unless the title report lists the identities of all persons having an interest in the property, the Town may wish to terminate all potential claims, even though the property is to be retained in its natural condition.

#### C. "Expedited" Title Foreclosure (GL c.60, §81B)

The Town may use an expedited foreclosure process since the amount of outstanding taxes, interest, and other charges exceeds the assessed value of the property. GL c. 60, §§81B, 65. The steps are as follows:

- (a) The Treasurer certifies that the redemption amount owed exceeds the assessed value of the property, and records an affidavit to that effect with the Barnstable Registry;
- (b) The Treasurer files a petition in Land Court to foreclosure on the property. Typically, a foreclosure action cannot be brought until 6 months after a tax taking, but, if an affidavit is recorded under GL c. 60, §81B, the foreclosure procedure can be commenced any time after the recording. Here, I expect that many months/years have lapsed since the Town recorded an instrument of taking;
- (c) The Land Court obtains a title search. As mentioned above, the Town can shorten the time it takes for the Land Court to research the title to the property by having a Land Court-approved examiner conduct

the research ahead of time; a Town's petition asking the Land Court to use the Town's title research is usually accepted;

- (d) After compliance with other foreclosure procedures, and assuming an owner does not show up to pay the outstanding taxes prior the completion of the foreclosure process, the Land Court issues a judgement in tax lien case, giving the Town title to the property;
- (e) Although, in "regular" tax title foreclosures, persons having an interest on the property can redeem the property within 1 year after the foreclosure judgment, when the Town forecloses under GL c. 60, s.81B, the period of redemption is shortened to 90 days. This is where the foreclosure process is expedited. GL c. 60, §69A;
- (f) The Town owns the property, and the Town may transfer the property to the Conservation Commission by a 2/3rds vote of Town Meeting. A taking could be done to obtain good title to the property; and
- (g) Effect on Free Cash. The Town does not pay itself back, and DOR does not deduct that sum from free cash.

D. Deed in Lieu of Foreclosure (GL c. 60, §77C)

Instead of foreclosing on the property by going through Land Court, the Town may take title to the property by accepting a deed in lieu of foreclosure from the owner. This option is not available to the Town, unless the Town can locate the current owners of the property, which may be unlikely. However, in cases where the owner is available, the Town may accept the property instead of requiring the owner to pay taxes by taking the following steps:

- (a) Town Meeting Vote. Town Meeting must specifically authorize the Town to accept a deed in lieu of foreclosure under GL c. 60, s.77C;
- (b) Deed. The Town's outstanding taxes should be the only lien that encumbers the property or all those holding a lien must join in the conveyance, acknowledging a release of their interests; and
- (h) Effect on Free Cash. Since the title to the property is accepted in lieu of foreclosure, all municipal taxes and charges that are outstanding as of the date the deed is recorded are deemed paid in full. The Town does not pay itself back, and DOR does not deduct that sum from free cash.

Please let me know if you have any questions/comments or would like assistance in pursuing any of the options.

Shirin

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