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TO: Clients and Friends

FROM: David F. Dulock

SUBJECT: Recent Legislative Changes Affecting Refinances of Ad Valorem Tax Liens on Texas properties

For quite sometime Sections 32.06 and 32.065, Texas Tax Code, have provided the mechanism for lenders to refinance ad valorem tax debt secured by tax liens against Texas homestead (and other property) permitted by Section 50(a)(2), Article XVI, Texas Constitution. Over the years, many mortgage lenders have taken advantage of this mechanism, to the benefit of their borrowers, by traditional refinance loans that refinance the ad valorem tax debt with other debt secured by homestead property. Recent amendments to Sections 32.06 and 32.065 made by Senate Bill 1587 and House Bill 2491, to be effective September 1, 2005, have added new requirements to this procedure. This memorandum summarizes these legislative changes.

Senate Bill 1587 amends subsection (g) of Section 32.06 to require the transferee of a tax lien or any successor in interest to notify the holders of all recorded liens on the property before foreclosure in the same manner and within the same time frame as the transferee must notify the owner of the property under Section 51.002 of the Texas Property Code [*Texas' real property foreclosure statute*].

In addition, Senate Bill 1587 amends Section 32.065 by adding subsection (g) to read as follows: "A contract under this section must require that the lienholder notify the holders of all recorded liens on the property before foreclosure in the same manner and within the same time frame as the lienholder must notify the owner of the property under Section 51.002, Property Code."

New subsection (g) to Section 32.065 applies only to a contract entered into under Section 32.065 on or after September 1, 2005. A contract entered into before September 1, 2005, is governed by the law in effect on the date the contract was entered into, and the former law is continued in effect for that purpose. (*This means pre-September 1, 2005 deeds of trust that refinance ad*

valorem tax debt in accordance with the law in effect on the date the deed of trust was entered into are still effective.)

In addition to the changes made by Senate Bill 1587, further changes to Sections 32.06 and 32.065 of the Texas Tax Code are made by House Bill 2491, which are summarized as follows:

1. Only delinquent taxes may be transferred and refinanced unless the real property is not subject to a lien other than the tax lien. (*Note: Pursuant to §31.02 of the Tax Code, taxes are delinquent if not paid before February 1 of the year following the year in which imposed, except for military personnel on active duty, split payment of taxes, and tax bills mailed after January 10th of the following year.*)
2. After a tax lien is transferred, taxes on the property that become due in subsequent tax years may be transferred before the delinquency date in the manner provided Section 32.06.
3. A tax lien may be transferred before the delinquency date in the manner provided by Section 32.06 only if the real property is not subject to a lien other than the tax lien.
4. The sworn document required by Section 32.06 must now contain the street address of the lender and the street address of the property.
5. The tax collector may either attach to the sworn document its seal of office or sign and acknowledge the document.
6. In addition to delivering the completed sworn document to the lender, the tax collector must also deliver to the lender within 30 days a tax receipt and an affidavit attesting to the transfer of the tax lien. The sworn document, tax receipt, and affidavit attesting to the transfer of the tax lien may be combined into one document.
7. For the transferred tax lien to be enforceable, the affidavit attesting to the tax lien transfer and the sworn document must be recorded in the real property records of each county where the property is located.
8. Funds advanced in connection with a tax lien transfer now include (in addition to the taxes, penalties, interest, and recording expenses) collection costs shown on the tax receipt and reasonable closing costs.
9. The transferee of a transferred tax lien may charge a reasonable fee for a payoff statement that is requested after an initial payoff statement is provided.
10. At any time after the end of six months after the date on which the tax lien is recorded and before a notice of foreclosure of the transferred tax lien is sent, the transferee of the tax lien or the holder of the tax lien may require the property owner to provide written authorization and pay a reasonable fee before providing information regarding the current balance owed by the property owner to the transferee or the holder of the tax lien.

11. A foreclosure of a tax lien transferred as provided by Section 32.06 may not be instituted within one year from the date on which the lien is recorded in the real property records of each county where the property is located, unless the contract between the owner of the property and the transferee provides otherwise.
12. Beginning on the date the foreclosure deed is recorded, the person whose property is sold or the mortgage servicer of a prior recorded lien against the property is entitled to redeem the foreclosed property from the purchaser by paying the purchaser or successor 125 percent of the purchase price during the first year of the redemption period or 150 percent of the purchase price during the second year of the redemption period with cash or cash equivalent funds. The right of redemption may be exercised on or before the second anniversary of the date on which the purchaser's deed is recorded if the property sold was the residence homestead of the owner, was land designated for agricultural use, or was a mineral interest. For any other property, the right of redemption must be exercised not later than the 180th day after the date on which the purchaser's deed is recorded.
13. The contract entered into between a transferee and the property owner pursuant to Sections 32.06 and 32.065 must provide for:

- (1) a power of sale and foreclosure under Chapter 51, Property Code;
- (2) an event of default;
- (2) notice of acceleration;
- (2) recording of the contract in each county in which the property is located;
- (5) recording of the sworn document and affidavit attesting to the transfer of

the tax lien;

(6) requiring the transferee to serve foreclosure notices on the property owner at the property owner's last known address in the manner required by Sections 51.002(b), (d), and (e), Texas Property Code, or by a commercially reasonable delivery service that maintains verifiable records of deliveries for at least five years from the date of delivery; and

(7) requiring, at the time the foreclosure notices required by No. (6) above are served on the property owner, the transferee to serve a copy of the notice of sale in the same manner on the mortgage servicer or the holder of all recorded real property liens encumbering the property that includes on the first page, in 14-point boldfaced type or 14-point uppercase typewritten letters, a statement that reads substantially as follows:

"PURSUANT TO TEXAS TAX CODE SECTION 32.06, THE FORECLOSURE SALE REFERRED TO IN THIS DOCUMENT IS A SUPERIOR TRANSFER TAX LIEN SUBJECT TO RIGHT OF REDEMPTION UNDER CERTAIN CONDITIONS. THE FORECLOSURE IS SCHEDULED TO OCCUR ON THE (DATE)."

14. On an event of default and notice of acceleration, the mortgage servicer of a recorded lien encumbering real property may obtain a release of a transferred tax lien on the property by paying the transferee of the tax lien or the holder of the tax lien the amount owed by the property owner to that transferee or holder.

15. Notwithstanding any other provision of the Texas Tax Code, a transferee of a tax lien is prohibited from exercising a remedy of foreclosure or judicial sale where the transferring taxing unit would be prohibited from foreclosure or judicial sale.
16. Before accepting an application fee or executing a contract, the transferee shall disclose to the transferee's prospective borrower each type and the amount of possible additional charges or fees that may be incurred by the borrower in connection with the loan or contract under Section 32.065.
17. An affidavit of the transferee executed after foreclosure of a tax lien that recites compliance with the terms of Section 32.06 and Section 32.065 and is recorded in each county in which the property is located: (1) is prima facie evidence of compliance with Section 32.06 and Section 32.065; and (2) may be relied on conclusively by a bona fide purchaser for value without notice of any failure to comply.

Our Comments:

- (1) The Fannie Mae/Freddie Mac deed of trust for Texas already contains the power of sale, event of default and notice of acceleration provisions required by No. 13 above. A tax lien rider can easily add the remaining document requirements. This firm prepares the sworn document required by Section 32.06, and we will also prepare the tax lien rider. We are in the process of drafting a tax lien rider and amending the sworn document and our other documents to comply with these new requirements. However, lenders who use other document preparation systems are advised that these changes will require them to amend their loan documents. Finally, all lenders will need to amend their servicing procedures to comply with these new requirements.
- (2) Senate Bill 1587 and House Bill 2491 both require a foreclosure notice to the holders of all recorded liens on the property. House Bill 2491, however, requires an additional statement on the notice (see No. 13-(7) above).
- (3) With the one exception noted on page one of this memorandum, all requirements summarized above apply to pre-and-post September 1, 2005 loans that refinance ad valorem tax debt pursuant to Sections 32.06 and 32.065 of the Texas Tax Code.

This memorandum is not a complete description of the changes made by these bills regarding the transfer and refinance of ad valorem tax liens and other ad valorem tax matters. You are urged to review the entirety of these bills if you believe they affect your business. You may request copies of these bills from us, if you so desire.

This Memorandum is provided for the general information of the clients and friends of our firm only and is not intended as specific legal advice. You should not place reliance on this general information alone but should consult counsel regarding the application of information in this Memorandum to your specific case or circumstances.