December 21, 1993

OPINION NO. 93-064

The Honorable Alan R. Mayberry
Wood County Prosecuting Attorney
One Courthouse Square
Bowling Green, Ohio 43402

Dear Prosecutor Mayberry:

You have requested an opinion concerning the withholding of real property taxes from the proceeds of a judicial sale of real property. Your letter states that, in reviewing confirmation entries on bank foreclosure, partition, and other judicial sales of property, your office has found that different counties employ different methods of withholding real property taxes from proceeds at those sales. For example, when a sale occurs in January, some counties withhold only the first half taxes and others withhold taxes due for the entire year in collection. Still others withhold taxes for the entire year in collection and also withhold a prorated portion of taxes for the current year on the basis of tax figures from the prior year. Your question is which of these methods is correct.

Sales Under R.C. 323.47

Your letter of request asks about sales made pursuant to R.C. 323.47, which, as recently amended,[1] reads as follows:

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[1] *See* 1991-1992 Ohio Laws, Part IV, 6487, 6489 (Am. Sub. H.B. 782, eff. Jan. 8, 1993, with certain provisions effective on other dates) (amending R.C. 323.47, eff. April 8, 1993). Am. Sub. H.B. 782 changed the language of R.C. 323.47 to specify that taxes discharged from the proceeds of a judicial sale are amounts due and payable that will be a lien on the land or real estate "at the time the deed is transferred following the sale," rather than "at the time of the sale." Am. Sub. H.B. 782 also added to R.C. 323.47 language regarding the estimate of taxes that will be due and payable at that time, and made similar changes to R.C. 323.28 (tax sale), R.C. 5721.16 (foreclosure and forfeiture under R.C. 5721.14), R.C. 5721.19 (foreclosure under R.C. 5721.18), R.C. 5721.191 (advertisement for sale under R.C. 5721.19), and R.C. 5723.06 (sale of forfeited lands under R.C. 5723.04).

> If land held by tenants in common is sold upon *proceedings in partition*, or taken by the election of any of the parties to such proceedings, or *real estate is sold at judicial sale*, or by administrators, executors, guardians, or trustees, *the court shall order that the taxes, penalties, and assessments then due and payable, and interest thereon, that are or will be a lien on such land or real estate at the time the deed is transferred following the sale, be discharged out of the proceeds of such sale or election*. For purposes of determining such amount, the county treasurer may estimate the amount of taxes, assessments, interest, and penalties that will be payable at the time the deed of the property is transferred to the purchaser. If the county treasurer's estimate exceeds the amount of taxes, assessments, interest, and penalties actually payable when the deed is transferred to the purchaser, the officer who conducted the sale shall refund to the purchaser the difference between the estimate and the amount actually payable. If the amount of taxes, assessments, interest, and penalties actually payable when the deed is transferred to the purchaser exceeds the county treasurer's estimate, the officer shall certify the amount of the excess to the treasurer, who shall enter that amount on the real and public utility property tax duplicate opposite the property; the amount of the excess shall be payable at the next succeeding date prescribed for payment of taxes in section 323.12 of the Revised Code. (Emphasis added.)

The language of R.C. 323.47 states that the amount that is to be discharged out of the proceeds of a judicial sale is the amount of "taxes, penalties, and assessments then due and payable, and interest thereon, that are or will be a lien on such land or real estate at the time the deed is transferred following the sale." Prior to the recent amendment of R.C. 323.47, the word "then" referred to the time of sale, which was also the time at which the taxes due and payable were to be determined. *See* note 1, *supra*. The word "then" was retained when the time for that determination was changed to the time of transfer of the deed, and it appears that "then" must now be construed as applying to "the time the deed is transferred following the sale." The issue for determination is which taxes, penalties, assessments, and interest are due and payable and are a lien on land or real estate when a deed is transferred following a sale to which R.C. 323.47 relates, or which amounts may properly be estimated by the county treasurer as coming within that category.[2] For purposes of R.C. Chapter 323, the term "taxes" is defined to mean "the total amount of all charges against an entry appearing on a tax list and the duplicate thereof that was prepared and certified in accordance with [R.C. 319.28]." R.C. 323.01(C).

Determination of Real Property Taxes

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[2] Since R.C. 323.47 now applies to amounts that will be payable at the time of transfer of the deed, rather than to amounts that were determined at the time of sale, there may be some uncertainty as to the precise amounts. R.C. 323.47 provides for making estimates and establishes procedures for correcting those estimates. *See also* note 1, *supra*. This opinion does not address the matter of determining a precise amount that will be payable in particular circumstances.

Pursuant to R.C. 323.11, the lien of the state for real property taxes levied on the tax list and duplicate for a particular year attaches to all real property subject to those taxes on the first day of January of that year, or as provided in R.C. 5727.06, which pertains to taxable property of a public utility or interexchange telecommunications company. The tax lien continues until the taxes, including any penalties, interest, or other charges, are paid. R.C. 323.11.

Although a lien for real property taxes attaches on January first, the precise amount of taxes due is not known until a later date. Each year, on or before the first Monday in August, the county auditor prepares a general tax list and duplicate of real property in the county. R.C. 319.28. Based upon information provided to him, the county auditor determines the amount of real property tax to be levied upon each tract and lot, adding taxes of previous years that have been omitted or are delinquent and including penalties and interest, and enters that amount upon the general tax list and duplicate. R.C. 319.30. After making appropriate corrections, the county auditor certifies the tax lists. On October first, or on a later date authorized pursuant to statute, the county auditor delivers the tax duplicate to the county treasurer for collection. R.C. 319.28, 323.17.

If the tax duplicate is certified to the county treasurer on October first, then each person charged with taxes "shall pay to the county treasurer the full amount of such taxes on or before the thirty-first day of December, or shall pay one-half of the current taxes together with the full amount of any delinquent taxes before such date, and the remaining half on or before the twentieth day of June next ensuing." R.C. 323.12(A). If the time for delivery of the tax duplicate is extended to the first Monday in December, then the times for payment of taxes may be extended to the thirty-first of January and the twentieth of July. Additional extensions may be granted in certain circumstances. R.C. 323.17. After the duplicate is delivered to the treasurer, the office of the treasurer must be kept open for the collection of taxes, except as provided by statute. R.C. 323.09.

The county treasurer is responsible for preparing and mailing tax bills "immediately upon receipt of any tax duplicate from the county auditor, but not less than twenty days prior to the last date on which the first one-half taxes may be paid without penalty." R.C. 323.13. When taxes are paid by installments, the county treasurer must send a second tax bill, at least twenty days prior to the close of the second half tax collection, showing the amount due at that time. R.C. 323.13. Failure to receive a bill required by R.C. 323.13 does not, however, excuse failure or delay to pay any taxes shown on the bill. R.C. 323.13.

Determination of Taxes that Are Subject to R.C. 323.47

The question of which taxes should be discharged from proceeds of a judicial sale was considered by the Ohio Supreme Court in *Hoglen v. Cohen*, 30 Ohio St. 436 (1876). In that case, the court concluded that, for purposes of the predecessor provisions of R.C. 323.47 then in effect, taxes charged against real property became due and payable on the date when the tax duplicate was required to be delivered to the county treasurer, and taxes which were so due and payable were subject to discharge from proceeds of a judicial sale. *Hoglen*, 30 Ohio St. at 436 (syllabus). The court stated, in part:

> We think that from the 1st day of October, annually [date of delivery of tax duplicate to county treasurer], the *taxes levied against the land, are so far due and payable*, that they should be discharged out of the proceeds arising from a judicial sale. *From that date the county treasurer may lawfully receive the taxes*, and give full acquittances therefor. True, the treasurer cannot enforce collection until after the 20th day of December, not for the reason that the taxes are not due, but because certain days of grace are given the owner in which to make payment before penalty will be added for his delinquency.

Id. at 443 (emphasis added). Courts applied the analysis adopted in *Hoglen v. Cohen* in various subsequent cases. *See, e.g., Makley v. Whitmore*, 61 Ohio St. 587, 56 N.E. 461 (1900); *Magnolia Building & Investment Co. v. Sulzman*, 57 Ohio App. 431, 14 N.E.2d 623 (Cuyahoga County 1937); *Schmidt v. Penn Mutual Life Insurance Co.*, 25 Ohio L. Abs. 652 (Ct. App. Franklin County 1935); *Campbell v. Gumina*, 7 Ohio L. Abs. 454 (Ct. App. Mahoning County 1929); *Lenox Building & Loan Co. v. Young*, 30 Ohio Op. 207 (C.P. Hamilton County 1945); *see also, e.g.*, 1954 Op. Att'y Gen. No. 4653, p. 677; 1941 Op. Att'y Gen. No. 4504, p. 937.

When *Hoglen v. Cohen* was decided, the relevant statute did not use the words "lien" or "due and payable" but referred simply to "taxes and penalties, and interest thereon, *against* such lands." *Hoglen*, 30 Ohio St. at 439 (emphasis added). This does not, however, undermine the *Hoglen* analysis. Statutory provisions in effect when *Hoglen* was decided provided for taxes to be paid in two installments, and the conclusion of *Hoglen* that real property taxes became due and payable when the tax duplicate was delivered to the county treasurer applied to both the half that was required to be paid on or before December twentieth and the half for which payments could be extended until June twentieth. *Id.* at 442-43.

The *Hoglen* analysis, therefore, continues to be valid under existing statutory provisions. As discussed above, the amount of real property tax that becomes a lien on January first is fixed when the tax duplicate is delivered to the county treasurer. R.C. 319.28. The tax can then be paid to the county treasurer. *See* R.C. 323.09; *Black's Law Dictionary* 1128 (6th ed. 1990) (defining "payable" as "capable of being paid"); 1991 Op. Att'y Gen. No. 91-058. Even though the taxpayer is permitted to pay the tax in two installments, the entire amount is, by statute, payable as soon as the tax duplicate is delivered to the county treasurer.[3] The tax obligation continues to be due and payable

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[3] The concept that a tax becomes due and payable on the date on which it is fixed in amount and capable of being paid, even though the statutory scheme permits payments to be made in two installments, appears elsewhere in Ohio law. 1991 Op. Att'y Gen. No. 91-058 discusses the taxation of manufactured homes, as follows:

> [W]hen a manufactured home has a taxable situs on January 1, the entire annual tax is imposed at that time. R.C. 4503.06(A) describes this amount as "payable," *i.e.*, "capable of being paid." *See Black's Law Dictionary* 1128 (6th ed. 1990); *see also Webster's New World Dictionary* 1044 (2d college ed. 1984). Pursuant to R.C. 4503.06(G)(1), when a manufactured home has situs in Ohio on January 1, one-half

without penalty until the dates established by statute. *See* R.C. 323.121, .132.

It follows that, when there is a sale governed by R.C. 323.47, the court must apply the proceeds of the sale to discharge the taxes, penalties, assessments, and interest that will, at the time at which the deed is transferred, appear on the tax duplicate delivered to the county treasurer, or the county treasurer's estimate of that amount. *See* note 2, *supra*. Amounts appearing on the tax duplicate are, for purposes of R.C. 323.47, a lien on the property that is "due and payable" at that time. If a figure estimated by the county treasurer exceeds the amount actually payable at the time the deed is transferred to the purchaser, the purchaser will receive a refund. If a greater amount is actually payable when the deed is transferred, the amount of the excess will be entered on the tax duplicate and will be payable at the next date prescribed for payment of taxes in R.C. 323.12. *See* R.C. 323.47.

Application of R.C. 323.47

Your letter suggests that some counties are not applying R.C. 323.47 in accordance with the construction outlined above. Some counties may, in addition to withholding taxes for the tax year in collection, also withhold taxes for the current year, even if the tax duplicate for that year has not yet been delivered to the county treasurer and will not be so delivered prior to the time at which the deed is transferred. This practice must be rejected on the basis of the analysis presented above. As was stated in *Hoglen v. Cohen*: "Until such levy of taxes is, or can be, made on the duplicate, and legally placed against the land sold at judicial sale, no order can be rightfully made to discharge taxes out of the proceeds of a judicial sale. It must stand on the duplicate as a tax ascertained and charged against the land." 30 Ohio St. at 441; *see also Makley v. Whitmore*; *Magnolia Building & Investment Co. v. Sulzman*; *Schmidt v. Penn Mutual Life Insurance Co.*; 1954 Op. No. 4653; 1941 Op. No. 4504.

Other counties may use proceeds of a sale under R.C. 343.47 to discharge only half of the taxes due for a particular year, if the transfer of the deed occurs between the deadlines for the two installments. This practice must, similarly, be rejected on the basis of the authorities discussed above. *See, e.g., Hoglen v. Cohen*; *Campbell v. Gumina*, 7 Ohio L. Abs. at 455 ("[i]t is true taxes are, by the system applicable in Ohio, paid on or before the 20th day of December, and on or before the 20th day of the following June.... Following the first day of October the taxes for the whole year

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> of the annual tax is "due and payable on *or before* January 31," while the remainder is "due and payable on *or before*" July 31. (Emphasis added.) Thus, the entire tax is "due and payable" after January 1 and the owner may choose to pay the whole tax or choose to pay it in segments. One-half of the tax, however, becomes delinquent after January 31, the last day on which it is "due and payable," and the remainder becomes delinquent after July 31.

Op. No. 91-058 at 2-288.

were due and became a lien upon this property"); *Lenox Building & Loan Co. v. Young* (holding that proceeds from a sale made prior to the payment date for the second half installment must be used to pay the taxes due for the entire year).

Conclusion

On the basis of the analysis discussed above, it is my opinion, and you are advised, as follows:

1. Real property taxes become due and payable for purposes of R.C. 323.47 when the tax duplicate on which they appear is delivered to the county treasurer for collection pursuant to R.C. 319.28. Taxes for the entire year become due and payable at that time, even though it would be permissible to pay them in two installments.

2. When there is a sale to which R.C. 323.47 applies, the court must use proceeds of the sale to discharge the taxes, penalties, assessments, and interest that will, at the time when the deed is transferred, appear on the tax duplicate delivered to the county treasurer, or the county treasurer's estimate of that amount.

Respectfully,

LEE FISHER
Attorney General

December 21, 1993

The Honorable Alan R. Mayberry
Wood County Prosecuting Attorney
One Courthouse Square
Bowling Green, Ohio 43402

SYLLABUS: 93-064

1. Real property taxes become due and payable for purposes of R.C. 323.47 when the tax duplicate on which they appear is delivered to the county treasurer for collection pursuant to R.C. 319.28. Taxes for the entire year become due and payable at that time, even though it would be permissible to pay them in two installments.

2. When there is a sale to which R.C. 323.47 applies, the court must use proceeds of the sale to discharge the taxes, penalties, assessments, and interest that will, at the time when the deed is transferred, appear on the tax duplicate delivered to the county treasurer, or the county treasurer's estimate of that amount.