

OPINION NO. 2010-010

Syllabus:

2010-010

1. A county may retain the services of a private attorney to assist the county prosecuting attorney in handling foreclosure proceedings under R.C. 323.65-.79, provided the private attorney is employed and compensated in the manner prescribed in R.C. 305.14 and R.C. 305.17.
2. Pursuant to R.C. 323.66(D), R.C. 323.75(A), and R.C.

5721.37(B)(3), money paid to a private attorney to assist the county prosecuting attorney in handling foreclosure proceedings under R.C. 323.65-.79 is an actual identified cost for purposes of R.C. 323.75(A) that is to be assessed in connection with foreclosure proceedings under R.C. 323.65-.79.

To: Jonathan D. Blanton, Jackson County Prosecuting Attorney, Jackson, Ohio

By: Richard Cordray, Ohio Attorney General, March 18, 2010

You have requested an opinion whether a county may retain the services of a private attorney to assist the county prosecuting attorney in handling foreclosure proceedings under R.C. 323.65-.79 and assess the money paid to the private attorney as a cost under R.C. 323.75(A).

Foreclosure Proceedings under R.C. 323.65-.79

R.C. 323.65-.79 establish expedited foreclosure proceedings for abandoned land.¹ In order to implement the expedited foreclosure of abandoned land under R.C. 323.65-.79, a county board of revision may do the following:

In lieu of utilizing the judicial foreclosure proceedings and other procedures and remedies available under [R.C. 323.25-.28] or under [R.C. Chapters 5721, 5722, or 5723], a county board of revision created under [R.C. 5715.01], upon the board's initiative, expressed by resolution, *may foreclose the state's lien for real estate taxes upon abandoned land in the county* and, upon the complaint of a certificate holder or county land reutilization corporation, *foreclose the lien of the state or the certificate holder held under [R.C. 5721.30-.43]. The board shall order disposition of the abandoned land by public auction or by other conveyance in the manner prescribed by [R.C. 323.65-.79].* (Emphasis added.)

¹ As used in R.C. 323.65-.79, "abandoned land" means

delinquent lands or delinquent vacant lands, including any improvements on the lands, that are unoccupied and that first appeared on the list compiled under [R.C. 323.67(C)] or the delinquent tax list or delinquent vacant tax list compiled under [R.C. 5721.03] at whichever of the following times is applicable:

(1) In the case of lands other than agricultural lands, at any time after the county auditor makes the certification of the delinquent land list under [R.C. 5721.011];

(2) In the case of agricultural lands, at any time after two years after the county auditor makes the certification of the delinquent land list under [R.C. 5721.011].

R.C. 323.65(A).

R.C. 323.66(A).

In addition, R.C. 323.67 provides:

(A) The county treasurer, county auditor, a county land reutilization corporation, or a certificate holder, from the list compiled under division (C) of this section² or the delinquent tax list or delinquent vacant land tax list compiled under [R.C. 5721.03] may identify and compile a list of the parcels in the county that the treasurer, auditor, corporation, or certificate holder determines to be abandoned lands suitable for disposition under [R.C. 323.65-.79]. The list may contain one or more parcels and may be transmitted to the board of revision in such a form and manner that allows the board to reasonably discern that the parcels constitute abandoned lands.

(B)(1) From the list of parcels compiled under division (A) of this section, *the county treasurer or prosecuting attorney*, for purposes of collecting the delinquent taxes, interest, penalties, and charges levied on those parcels and expeditiously restoring them to the tax list, *may proceed to foreclose the lien for those impositions in the manner prescribed by [R.C. 323.65-.79]*.

(2) If a certificate holder or county land reutilization corporation compiles a list of parcels under [R.C. 323.67(A)] that the certificate holder determines to be abandoned lands suitable for disposition under [R.C. 323.65-.79], the certificate holder or corporation may proceed under [R.C. 323.68 and R.C. 323.69]. (Footnote and emphasis added.)

Except as provided in R.C. 323.68(A)(2),³ when parcels are subject to foreclosure proceedings under R.C. 323.65-.79, the county prosecuting attorney “shall cause a title search to be conducted for the purpose of identifying any lienholders or other persons having a legal or equitable ownership interest or other security interest of record in such abandoned land.” R.C. 323.68(A)(1). Upon completion of the title search required by R.C. 323.68(A)(1), the county prosecuting attorney on behalf of the county treasurer, “may file with the clerk of court a complaint for the foreclosure of each parcel of abandoned land appearing on the abandoned land list, and for the equity of redemption on each parcel.” R.C. 323.69(A); *see also* R.C.

² R.C. 323.67(C) states that, “[f]or purposes of [R.C. 323.65-.79], the county auditor or county treasurer may compile or certify a list of abandoned lands in any manner and at such times as will give effect to the expedited foreclosure of abandoned land.”

³ R.C. 323.68(A)(2) provides, if a certificate holder or a county land reutilization corporation compiles a list of the parcels that the certificate holder or corporation determines to be abandoned land under R.C. 323.67(A), “the certificate holder or corporation shall cause a title search to be conducted for the purpose of identifying any lienholders or other persons having a legal or equitable ownership interest or other security interest of record in the abandoned land.”

5721.37(C)(1) (within 90 days of receiving a copy of a foreclosure request under R.C. 5721.37, a county prosecuting attorney “shall commence a foreclosure proceeding in the name of the county treasurer in the manner provided under [R.C. 323.25, R.C. 323.65-.79, R.C. 5721.14, or R.C. 5721.18] to enforce the lien vested in the certificate holder by the certificate”).

Thirty or more days after the service of summons and complaint has been perfected, the county board of revision shall, unless the board has dismissed the complaint,⁴ conduct a final hearing on the merits of the complaint. R.C. 323.70(A); *see also* R.C. 323.69(D); R.C. 323.71(B); R.C. 323.72(D). If, after a final hearing, the county board of revision renders a decision ordering the foreclosure and forfeiture of abandoned land, the abandoned land shall be disposed of pursuant to a public auction unless an exception set forth in R.C. 323.78 or R.C. 323.73(G) applies.⁵ R.C. 323.72(D); R.C. 323.73; *see also* R.C. 323.74(D).

If a public auction is held for abandoned land pursuant to R.C. 323.73, but the land is not sold at the public auction, the county board of revision may order the disposition of the land in accordance with R.C. 323.74. This statute provides, in pertinent part:

(B) The abandoned land offered for sale at a public auction as

⁴ Pursuant to R.C. 323.69(D), at any time after a foreclosure action is filed under R.C. 323.69, a “county board of revision may, upon its own motion, dismiss the case without prejudice if it determines that, given the complexity of the case or other circumstances, a court would be a more appropriate forum for the action.” In addition, a county board of revision may not conduct a final hearing on the merits of a foreclosure complaint filed under R.C. 323.69 when (1) a record owner or the United States government requests the complaint be dismissed, *see* R.C. 323.70(B); (2) the board dismisses the complaint because the outstanding impositions against the parcel that is the subject of the complaint have been paid, *see* R.C. 323.72(B), (D); or (3) the board dismisses the complaint to preserve a lienholder’s or other person’s security interest of record in the parcel that is the subject of the complaint, *see* R.C. 323.72(C)-(D).

⁵ R.C. 323.78 authorizes the transfer of a parcel that is the subject of a foreclosure complaint to a municipal corporation, township, county, school district, or county land reutilization corporation without a sale. The exception in R.C. 323.73(G) reads, in part, as follows:

If the county board of revision finds that the total of the impositions against the abandoned land are greater than the fair market value of the abandoned land as determined by the auditor’s then-current valuation of that land, the board, at any final hearing under [R.C. 323.70], may order the property foreclosed and, without an appraisal or public auction, order the sheriff to execute a deed to the certificate holder or county land reutilization corporation that filed a complaint under [R.C. 323.69] or to a community development organization, school district, municipal corporation, county, or township, whichever is applicable, as provided in [R.C. 323.74].

described in [R.C. 323.73], but not sold at the auction, may be offered for sale in any usual and customary manner by the sheriff as otherwise provided by law

(C) Upon certification from the sheriff that abandoned land was offered for sale at a public auction as described in [R.C. 323.73] but was not purchased, a community development organization or any school district, municipal corporation, county, or township in which the land is located may request that title to the land be transferred to the community development organization, school district, municipal corporation, county, or township at the time described in this division

(D) The order by the board shall include instructions to the sheriff to transfer the land to the specified community development organization, school district, municipal corporation, county, or township after payment of the costs of disposing of the abandoned land pursuant to [R.C. 323.75] or, if any negotiated price has been agreed to between the county treasurer and the community development organization, school district, municipal corporation, county, or township, after payment of that negotiated price as certified by the board to the sheriff.

Also, if a public auction is held for abandoned land pursuant to R.C. 323.73 and the land is not sold for want of a minimum bid at the auction, the land may be deemed sold to an electing subdivision or a county land reutilization corporation pursuant to R.C. 323.77(B), which provides, in part, as follows:

At any time from the date the complaint for foreclosure is filed under [R.C. 323.69], but no later than sixty days after the date on which the land was first offered for sale, an electing subdivision⁶ or a county land reutilization corporation may give the county treasurer, prosecuting attorney, or board of revision notice in writing that it seeks to acquire any parcel of abandoned land, identified by parcel number, from the abandoned land list. If any such parcel of abandoned land identified under this section is offered for sale pursuant to [R.C. 323.73], but is not sold for want of a minimum bid, the electing subdivision or a county land reutilization corporation that identified that parcel of abandoned land shall be deemed to have appeared at the sale and submitted the winning bid at the auction, and the parcel of abandoned land shall be sold to the electing subdivision or corporation for no consideration other than the costs prescribed in [R.C. 323.75] or those costs to which the electing subdivision or corporation and the county treasurer mutually agree. (Footnote added.)

⁶ For purposes of R.C. 323.77, an “electing subdivision” is “a municipal corporation that has enacted an ordinance or a township or county that has adopted a resolution pursuant to [R.C. 5722.02] for purposes of adopting and implementing the procedures set forth in [R.C. 5722.02-.15].” R.C. 5722.01(A); *see* R.C. 323.77(A).

When abandoned land is offered for sale at a public auction held pursuant to R.C. 323.73 or R.C. 323.74, the county treasurer or county prosecuting attorney “shall apportion the costs of the proceedings with respect to abandoned lands . . . among those lands according to actual identified costs, equally, or in proportion to the fair market values of the lands.” R.C. 323.75(A).⁷ The entity acquiring title to abandoned land under R.C. 323.73 or R.C. 323.74 is required to pay all costs assessed against the land pursuant to R.C. 323.75(A) unless the county treasurer has provided otherwise. *See* R.C. 323.73(B); R.C. 323.74(B); R.C. 323.74(E); R.C. 323.75(B); R.C. 323.77(B).

Authority of a County to Hire Private Counsel to Assist the County Prosecuting Attorney in Handling Foreclosure Proceedings under R.C. 323.65-.79

The first part of your question asks whether a county may retain the services of a private attorney to assist the county prosecuting attorney in handling foreclosure proceedings under R.C. 323.65-.79. R.C. 305.14(A) sets forth the following procedures by which a county may employ private legal counsel to assist the county prosecuting attorney in discharging his duties:

The court of common pleas, upon the application of the prosecuting attorney and the board of county commissioners, *may authorize the board to employ legal counsel to assist the prosecuting attorney*, the board, or any other county officer *in any matter of public business coming before such board or officer*, and in the prosecution or defense of any action or proceeding in which such board or officer is a party or has an interest in its official capacity. (Emphasis added.)

In addition, R.C. 305.17 provides that the compensation paid to private

⁷ R.C. 323.74(G) provides that “[a]ny parcel that has been advertised and offered for sale pursuant to foreclosure proceedings and has not sold for want of bidders or been otherwise transferred under [R.C. 323.65-.79] shall be forfeited or otherwise disposed of in the same manner as lands under [R.C. 323.25, R.C. 5721.18, or R.C. Chapter 5723].” In addition, R.C. 323.78(C) states that, “[u]pon the expiration of the alternative redemption period in cases to which the alternative redemption period has been ordered, if no community development organization, county land reutilization corporation, municipal corporation, county, township, or school district has requested title to the parcel, the court or board of revision may order the property sold as otherwise provided in [R.C. Chapters 323 and 5721], and, failing any bid at any such sale, the parcel shall be forfeited to the state and otherwise disposed of pursuant to [R.C. Chapter 5723].” Because your question concerns the collection of costs when abandoned land has been sold or otherwise disposed of in accordance with the foreclosure proceedings set forth in R.C. 323.65-.79, this opinion does not address whether moneys paid to a private attorney who is hired to assist the county prosecuting attorney in the handling of foreclosure proceedings under R.C. 323.65-.79 may be assessed as a cost under R.C. 323.75 when abandoned land is not sold or otherwise disposed of in accordance with the foreclosure proceedings set forth in R.C. 323.65-.79.

legal counsel employed under R.C. 305.14(A) to assist the county prosecuting attorney must be fixed by the board of county commissioners and paid from the county treasury upon the allowance of the board of county commissioners. R.C. 305.14(A) and R.C. 305.17 thus authorize a county to employ and compensate private legal counsel to assist the county prosecuting attorney in discharging his duties. *See State ex rel. Sartini v. Trumbull Township Volunteer Fire Dept.*, 163 Ohio App. 3d 603, 2005-Ohio-4903, 839 N.E.2d 938, at ¶18 (Ashtabula County 2005) (“the wording of R.C. 305.14(A) readily indicates that the statute was also intended to apply when the prosecutor himself has a need for . . . assistance in the performance of his duties”); *see also* 1996 Op. Att’y Gen. No. 96-054 at 2-209 and 2-210 (a county treasurer may employ a private attorney to collect delinquent personal property taxes in accordance with the provisions of R.C. 305.14(A), and R.C. 305.17 requires the compensation of the private attorney to be fixed by the board of county commissioners and paid out of the county treasury); 1963 Op. Att’y Gen. No. 285, p. 349, at 350-51 (same as the previous parenthetical).

As indicated above, a county prosecuting attorney may be required to represent the county treasurer in foreclosure proceedings under R.C. 323.65-.79. R.C. 323.69(A); R.C. 5721.37(C)(1). A county prosecuting attorney may also be required to conduct title searches, R.C. 323.68(A)(1), and prepare and execute deeds conveying title to abandoned land forfeited under R.C. 323.65-.79, R.C. 323.75(C). Because R.C. 305.14(A) and R.C. 305.17 authorize a county to employ and compensate legal counsel to assist the county prosecuting attorney in discharging his duties, it follows that a county may employ and compensate a private attorney to assist the county prosecuting attorney in carrying out his duties under R.C. 323.65-.79. Accordingly, a county may retain the services of a private attorney to assist the county prosecuting attorney in handling foreclosure proceedings under R.C. 323.65-.79, provided the private attorney is employed and compensated in the manner prescribed in R.C. 305.14 and R.C. 305.17. *See State ex rel. Sartini v. Trumbull Township Volunteer Fire Dept.*, at ¶18 (R.C. 305.14(A) “delineates the procedure a county prosecutor *must follow* when the nature of the situation is such that he cannot employ the funds appropriated to him by the court of common pleas under R.C. 309.06(A) to obtain the necessary assistance for the proper performance of his duties” (emphasis added)); 1996 Op. Att’y Gen. No. 96-054 at 2-209 and 2-210 (a county treasurer may employ and compensate a private attorney to collect delinquent personal property taxes only in the manner specified in R.C. 305.14 and R.C. 305.17); 1963 Op. Att’y Gen. No. 285, p. 349 (syllabus, paragraph 2) (same as the previous parenthetical). *See generally City of Cincinnati v. Roettinger*, 105 Ohio St. 145, 152, 137 N.E. 6 (1922) (“[f]or the purpose of determining the legislative intent the maxim *expressio unius est exclusio alterius* has direct application. That maxim has peculiar application to any statute which in terms limits a thing to be done in a particular form, and in such case it necessarily implies that the thing shall not be done otherwise”).

Authority of a County to Collect a Fee to Cover the Cost of Private Legal Counsel Hired to Assist the County Prosecuting Attorney in Handling Foreclosure Proceedings under R.C. 323.65-.79

The second part of your question asks whether a county that retains a private

attorney to assist the county prosecuting attorney in handling foreclosure proceedings under R.C. 323.65-.79 may include the money paid to the private attorney as a cost under R.C. 323.75(A). When foreclosure proceedings are brought under R.C. 323.65-.79, the county treasurer or county prosecuting attorney is required to “apportion the costs of the proceedings with respect to abandoned lands offered for sale at a public auction held pursuant to [R.C. 323.73 or R.C. 323.74] among those lands according to *actual identified costs*, equally, or in proportion to the fair market values of the lands.” R.C. 323.75(A) (emphasis added). The actual identified costs of foreclosure proceedings for purposes of R.C. 323.75(A) include the following:

[T]he costs of conducting the title search, notifying record owners or other persons required to be notified of the pending sale, advertising the sale, and *any other costs incurred by the county board of revision, county treasurer, county auditor, clerk of court, prosecuting attorney, or county sheriff in performing their duties under [R.C. 323.65-.79].* (Emphasis added.)

R.C. 323.75(A). R.C. 323.75(A) thus provides that the costs of foreclosure proceedings held under R.C. 323.65-.79 include every actual identified cost incurred by the county prosecuting attorney in performing his duties under R.C. 323.65-.79. *See generally* 2000 Op. Att’y Gen. No. 2000-046 at 2-283 (“[w]here a statute uses the word ‘any’ to modify a noun without selection, distinction, or limitation, it is presumed that the legislative intent is that the noun modified by ‘any’ be treated as a whole class without division into smaller classes, and that ‘any’ may be equated to mean ‘all’ or ‘every’ in that context, especially where the statute uses mandatory language”).

Pursuant to R.C. 323.66(D), “for the purpose of efficiently and promptly implementing [R.C. 323.65-.79], the prosecuting attorney of the county . . . *may promulgate rules, not inconsistent with [R.C. 323.65-.79] regarding practice forms, forms of notice for hearings and notice to parties, forms of orders and adjudications, fees, publication, and other procedures customarily within [his] official purview and respective duties.*” (Emphasis added.) Moreover, R.C. 5721.37(B)(3) provides:

When a request for foreclosure or a notice of intent to foreclose is filed under division (A)(1) or (2) of this section, the certificate holder shall submit a payment to the county treasurer equal to the sum of the following:

. . .

(3) If the foreclosure proceedings are filed by the county prosecuting attorney pursuant to . . . [R.C. 323.65-.79] . . . , *a fee in the amount prescribed by the county prosecuting attorney to cover the prose-*

*cuting attorney's legal costs incurred in the foreclosure proceeding.*⁸
(Emphasis and footnote added.)

Pursuant to R.C. 323.66(D) and R.C. 5721.37(B)(3), a county prosecuting attorney may establish a fee to cover the payment of private legal counsel hired to assist the county prosecuting attorney in handling foreclosure proceedings under R.C. 323.65-.79. Since such a fee is an actual identified cost of foreclosure proceedings held pursuant to R.C. 323.65-.79, money paid to a private attorney to assist the county prosecuting attorney in handling foreclosure proceedings under R.C. 323.65-.79 is to be assessed as a cost pursuant to R.C. 323.75(A). Accordingly, pursuant to R.C. 323.66(D), R.C. 323.75(A), and R.C. 5721.37(B)(3), money paid to a private attorney to assist the county prosecuting attorney in handling foreclosure proceedings under R.C. 323.65-.79 is an actual identified cost for purposes of R.C. 323.75(A) that is to be assessed in connection with foreclosure proceedings under R.C. 323.65-.79.⁹ Cf. R.C. 5721.39(A)(5) (in its judgment of foreclosure rendered in actions filed pursuant to [R.C. 5721.37], the court or board of revision shall enter

⁸ A county treasurer is required to deposit a fee received under R.C. 5721.37(B)(3) in the county treasury to the credit of the delinquent tax and assessment collection fund. R.C. 5721.37(D).

⁹ In accordance with R.C. 305.17, money paid to a private attorney to assist the county prosecuting attorney in handling foreclosure proceedings under R.C. 323.65-.79 must be paid from the county treasury. It further appears that such money should be paid from the delinquent tax and assessment collection fund, which is established pursuant to R.C. 321.261(A).

R.C. 321.261(A) provides as follows:

Five per cent of all delinquent real property, personal property, and manufactured and mobile home taxes and assessments collected by the county treasurer shall be deposited in the delinquent tax and assessment collection fund, which shall be created in the county treasury. Except as otherwise provided in division (D) of this section, *the moneys in the fund*, one-half of which shall be appropriated by the board of county commissioners to the treasurer and one-half of which shall be appropriated to the county prosecuting attorney, *shall be used only for the following purposes:*

(1) By the county treasurer and *the county prosecuting attorney in connection with the collection of delinquent real property, personal property, and manufactured and mobile home taxes and assessments including proceedings related to foreclosure of the state's lien for such taxes against such property.* (Emphasis added.)

See also R.C. 5721.37(D) (a county treasurer is required to deposit in the delinquent tax and assessment collection fund all fees collected to cover a county prosecuting attorney's legal costs incurred in foreclosure proceedings held under R.C. 323.65-.79). See generally 1972 Op. Att'y Gen. No. 72-122 (syllabus, paragraph 1) (“[i]n the absence of specific statutory authorization, a county treasurer may not isolate

a finding that includes, *inter alia*, a fee in the amount prescribed by the county prosecuting attorney to cover the prosecuting attorney's legal costs incurred in the foreclosure proceeding).

Conclusions

In sum, it is my opinion, and you are hereby advised as follows:

1. A county may retain the services of a private attorney to assist the county prosecuting attorney in handling foreclosure proceedings under R.C. 323.65-.79, provided the private attorney is employed and compensated in the manner prescribed in R.C. 305.14 and R.C. 305.17.
2. Pursuant to R.C. 323.66(D), R.C. 323.75(A), and R.C. 5721.37(B)(3), money paid to a private attorney to assist the county prosecuting attorney in handling foreclosure proceedings under R.C. 323.65-.79 is an actual identified cost for purposes of R.C. 323.75(A) that is to be assessed in connection with foreclosure proceedings under R.C. 323.65-.79.

funds for the use of the prosecuting attorney in prosecuting tax delinquent land foreclosure proceedings”).