

OPINION NO. 82-102**Syllabus:**

If a mortgagee purchases the mortgaged property at a sheriff's sale, the transfer is not exempt from the auditor's fee imposed by R.C. 319.54(F)(3). The mortgagor is the grantor for purposes of payment of the fee as required by R.C. 319.202.

To: Lee C. Falke, Montgomery County Prosecuting Attorney, Dayton, Ohio
By: William J. Brown, Attorney General, December 10, 1982

I have before me your request for my opinion concerning the collection of a conveyance fee on the transfer of ownership of real property pursuant to R.C. 319.202 and 319.54(F). You have described a transaction which is commonly referred to as a mortgage buy back and have asked whether it is exempt from the imposition of the fee.

The series of events which comprise a mortgage buy back begins with a loan made for the purpose of purchasing real estate. When the land is purchased it is made subject to a mortgage to secure the repayment of the loan. If, after the mortgagor has paid a portion of his outstanding indebtedness, he defaults, the mortgagee initiates a foreclosure action to collect the debt. Pursuant to R.C. 2323.07, a sale of the property is ordered by the court. A sheriff's sale is held at which time the mortgagee bids on the property to the amount of his security interest and purchases the property.

R.C. 319.54(F)(3) states that the county auditor shall charge a fee "[f]or receiving statements of value and administering section 319.202 of the Revised Code. . ." The fee is imposed upon all transfers of real property except those specifically exempted. In the situation you have described complications arise from the fact that the property is transferred indirectly pursuant to a court order. R.C. 319.54(F)(3)(f) states that no fee shall be charged when the transfer is made "[p]ursuant to court order, to the extent that such transfer is not the result of a sale effected or completed pursuant to such order." The language of this section indicates the intent of the legislature that a transfer which does result from a

court ordered sale is ordinarily subject to the auditor's fee. Such an implication cannot, however, be drawn in situations where the General Assembly has explicitly exempted a particular type of transfer even if it is made as a result of a court ordered sale.

You have suggested that a transfer made as a result of a mortgage buy back is explicitly exempted from the auditor's fee by R.C. 319.54(F)(3)(b). That section applies to transfers made "[s]olely in order to provide or release security for a debt or obligation." The exceptions contained in R.C. 319.54(F)(3) are to be strictly, but reasonably, construed in favor of the fee and against the exemption. 1968 Op. Att'y Gen. No. 68-165. R.C. 319.54(F)(3)(b), strictly construed, applies to a situation where the security is given in exchange for cancellation of a debt or obligation, such as by deed from the mortgagor to the mortgagee as consideration for cancellation of the debt. R.C. 317.54(F)(3)(b), however, does not necessarily contemplate a situation in which a sale of the property is held. If a mortgagee purchases the mortgaged property at a sheriff's sale "the land is transferred to him by sheriff's deed, but such transfer is to him as purchaser and not as a mortgagee." Kerr v. Lydecker, 51 Ohio St. 240, 251-52, 37 N.E. 267, 270 (1894); see Sun Fire Office of London v. Clark, 53 Ohio St. 414, 42 N.E. 248 (1895). Since a transfer at a sheriff's sale to a purchaser who is not the mortgagee would be subject to the auditor's fee imposed by R.C. 319.54(F)(3) and the mortgagee acts merely as any other purchaser at such sale, the transfer to him is not exempt under subsection (b).

You have also suggested that the transfer is exempt by virtue of R.C. 319.54(F)(3)(m) which provides an exception from the imposition of the auditor's fee if a transfer is made "[t]o or from a person when no money is paid or to be paid for the real estate and the transaction is not a gift." A purchaser at a judicial sale, however, is required to pay for the property upon which he has bid.

[W]hen the sale to him has been confirmed, and the property order sold to him, he subjects himself to the jurisdiction of the court, and becomes a party to the proceedings in which the sale was had, for he has voluntarily submitted himself to that court's jurisdiction; and the order of a court ratifying and confirming a sale for cash amounts to a decree for the payment of money. . . .

Bloomberg v. Roach, 43 Ohio App. 178, 183, N.E. (1930). However, "[i]t is not necessary, where the mortgagee is the purchaser of the property, to pay the entire purchase money into court when the principal amount thereof would be redistributed to him on account of his lien." Beckman v. Emery-Thompson Machinery and Supply Co., 9 Ohio App. 275, 284 (Hamilton County 1918). Thus, where a mortgagee purchases property in which he has a security interest at a sheriff's sale, R.C. 319.54(F)(3)(m) does not exempt such transfer from the auditor's conveyance fee.

Since I have concluded that the transfer of land to a mortgagee who has purchased the mortgaged property at a sheriff's sale is not exempt from the auditor's fee, I must consider which party is to pay the fee. R.C. 319.202(A) requires that the grantor pay the fee required by R.C. 319.54(F)(3). Although the property is conveyed by a sheriff's deed, the sheriff does not thereby convey his interest in the land since he has none. Rather, a sheriff's sale vests in the purchaser "[a]ll the estate and interest of the person whose property the officer so professed to sell and convey. . . ." R.C. 2329.37. Thus, pursuant to R.C. 319.202, the mortgagor is required to pay the fee imposed by R.C. 319.54(F)(3). As a practical matter, if the mortgagor refuses to pay such fee, it may be paid on his behalf by the purchaser at a sheriff's sale in order that the conveyance can be indorsed by the auditor, and subsequently recorded by the county recorder. See R.C. 317.22 ("No county recorder shall record a conveyance if the . . . indorsements. . . of a county auditor indicating compliance with section 319.202 [319.20.2] of the Revised Code on the conveyance are in whole or in part. . . incomplete"); R.C. 319.202(B) ("The auditor shall indorse each conveyance on its face to indicate the amount of the conveyance fee and compliance with this section").

Based on the foregoing, it is my opinion, and you are advised, that if a

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mortgagee purchases the mortgaged property at a sheriff's sale, the transfer is not exempt from the auditor's fee imposed by R.C. 319.54(F)(3). The mortgagor is the grantor for purposes of payment of the fee as required by R.C. 319.202.