

OPINION NO. 85-018**Syllabus:**

1. Pursuant to R.C. 5723.06, the county auditor may sell a forfeited tract of land for an amount which is sufficient to pay the taxes, assessments, penalties, interest, and costs which stand against the tract, or, if no bid in such amount is forthcoming, for the best price obtainable, provided that such price is reasonably adequate and bears a reasonable relation to the value of the property sold. Whether a price which is less than the amount of the taxes, assessments, penalties, interest, and costs due on the tract is a reasonable price will depend upon the facts surrounding the particular sale.
2. Pursuant to R.C. 5723.03, the former owner of a tract of land or town lot which has been forfeited to the state for nonpayment of taxes may redeem the forfeited land at any time before the county auditor executes and delivers a deed for the land to a purchaser, his heirs, or assigns; such redemption may be made even though the auditor has issued a certificate of sale for the land under R.C. 5723.12. (1953 Op. Att'y Gen. No. 3373, p. 6, approved and followed.)
3. The language of R.C. 5723.06 which permits a county auditor to adjourn the sale of forfeited lands from day to day does not permit the auditor to simply keep the sale open indefinitely so that he may receive bids at his office throughout the year.

To: John W. Allen, Richland County Prosecuting Attorney, Mansfield, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, May 14, 1985

You have raised several questions concerning the disposal of lands which have been forfeited to the state for nonpayment of taxes. R.C. Chapter 5723 deals generally with forfeited lands. Your specific questions relate to the county auditor's authority to dispose of such lands at public auction pursuant to R.C. 5723.06, which states, in part:

The county auditor, on the day set for the annual sale provided in section 5723.04 of the Revised Code shall attend at the courthouse and offer for sale the whole of each tract of land as contained in the list provided for in such section, at public auction, to the highest bidder, for an amount sufficient to pay the taxes, assessments, penalties, interest, and costs which stand against it. He shall offer each tract separately, beginning with the first tract contained in the list. If no bid is received for any of said tracts in an amount sufficient to pay the taxes, assessments, penalties, interest, and costs which stand against it, the auditor may offer such tract for sale forthwith, and sell it for the best price obtainable, irrespective of the amount of taxes, assessments, penalties, interest, and costs due upon it. He shall continue through such list and may adjourn the sale from

day to day until he has disposed of or offered for sale each tract of land specified in the notice. He may offer a tract of land two or more times at the same sale. (Emphasis added.)

Your letter of request provides the following background information:

In disposing of forfeited land for the state the County Auditor acts as trustee for all interested parties and is bound to exercise all loyalties to the trust. He may exercise sound discretion to accept "only bids as are reasonably adequate and bear a reasonable relation to the value of the property sold." State, ex rel. Hecht v. Zangerle, 34 Ohio Opinions, 467, 1947.

At a recent sale of forfeited lands, our Auditor was in the process of accepting bids on properties which were token amounts, having no relation to values as shown on his real property record cards. We advised that such sale should be voided as we had previously determined that a reasonably adequate bid must equal the amount of taxes, assessments, penalties, interest and court costs due - or - two-thirds of the true value carried on the property cards - whichever was lower. Under these guidelines, we felt that accepting a lesser bid, e.g., \$25 for property worth \$2700 with \$443.29 taxes, [etc.] due, would not fall within the bounds of the auditor's discretion as a trustee of the state property.

Your questions are as follows:

1. In light of Hecht v. Zangerle, [148 Ohio St. 9, 72 N.E.2d 453 (1947)], and the auditor's discretion as to "best price obtainable" under §5723.06, is our determination of a "reasonably adequate bid" a valid one and, if not, how should we identify a "reasonably adequate" (i.e. acceptable) bid which will protect the auditor from charges of breach of his fiduciary duty to the state?

2. Since the auditor's sale of forfeited lands is not subject to confirmation by a court, at what point is "disposition of such land" final? Since §5723.12 provides for no waiting period between issue of a certificate of sale and the auditor's deed to a property, and §5723.03 permits redemption "at any time before the state disposes of such land", can redemption of a property take place after issue of the certificate of sale and before issue of the auditor's deed?

3. Section 5723.06 authorizes the auditor to "adjourn the sale from day to day until he has disposed of or offered for sale each tract specified in the notice". Would this permit sales from day to day to individuals coming into the auditor's office and entering a "reasonable bid" on an unsold property or must a full blown auction be held daily in order for a sale to be valid?

Your first question concerns a determination as to when a bid is "reasonably adequate," and bears a "reasonable relation" to the value of the property sold, so as to protect the county auditor from charges of breach of his fiduciary duty to the state. State ex rel. Hecht v. Zangerle, 148 Ohio St. 9, 72 N.E.2d 453 (1947), referenced in your letter, sets forth in the syllabus the duties of a county auditor with respect to the sale of forfeited lands:

1. In the conduct of sales of land forfeited for taxes, the county auditor, as liquidating officer, acts in the capacity of a trustee for all the parties interested in the property, and as such trustee is bound to exercise all loyalties to the trust.
2. The county auditor, as liquidator of forfeited lands to satisfy delinquent taxes, must strictly follow statutory requirements as to the conduct of such sales, but he may exercise a sound discretion, not inconsistent with the statutes, to accept at such

sales only bids as are reasonably adequate and bear a reasonable relation to the value of the property sold. (Emphasis added.)

It is the duty of a trustee to act in good faith, to exercise diligence, and to act reasonably. See generally Dombey v. Rindsfoos, 105 Ohio App. 335, 151 N.E.2d 563 (Franklin County 1958). R.C. 5723.06 specifically authorizes the county auditor to sell a tract of land "for an amount sufficient to pay the taxes, assessments penalties, interests, and costs which stand against it." It also authorizes him, if no such bid is forthcoming, to "sell it for the best price obtainable, irrespective of the amount of taxes, assessments, penalties, interest, and costs due upon it." The authority to sell for a price less than the amount due upon the tract of land is, however, restricted by the principles set forth in State ex rel. Hecht v. Zangerle, that the price must be "reasonably adequate" and "bear a reasonable relation to the value of the property." See generally Magennis v. Myers, 158 Ohio St. 405, 109 N.E.2d 849 (1952).

Whether a proposed purchase price is reasonably adequate in a particular situation will depend upon the facts of that particular situation. See generally Cleveland Trust Co. v. Manchester, 73 Ohio L. Abs. 98, 128 N.E.2d 216 (App. Cuyahoga County 1955) (trustee had power to sell at a price reflecting a fair and reasonable value; two thoroughly honest and competent individuals may disagree upon the fair and reasonable value of an unlisted stock), modified on other grounds, 73 Ohio L. Abs. 513, 139 N.E.2d 673 (App. Cuyahoga County 1956). I am, thus, unable to prescribe a general rule for determining a reasonably adequate purchase price which will apply to all circumstances. The standard which you have proposed—that the county auditor should not accept a bid unless it equals the amount of taxes, assessments, penalties, interest, and court costs due, or two-thirds of the true value carried on the property cards, whichever is lower—appears, on its face, to be a sensible guideline, though the reasonableness of its application in particular circumstances may depend both upon the accuracy of the "true value" carried on the property cards and upon market conditions. See generally Cleveland Trust Co. v. Manchester, 73 Ohio L. Abs. 513, 139 N.E.2d 673 (App. Cuyahoga County 1956) (as used in a finding of the court, the phrases "fair and reasonable value" and "fair market value" are synonymous). It should be noted that the auditor has the duty of exercising reasonable discretion in the circumstances of each sale, and that he should remain alert for circumstances in which the application of a general rule may not yield satisfactory results. See generally State ex rel. Hecht v. Zangerle; Monroe v. Gemeiner, 45 Ohio Op. 504, 101 N.E.2d 178 (C.P. Cuyahoga County 1951) (sheriff's tax foreclosure sale of property may be for less than the amount of accrued taxes, assessments, penalties, and interest due, but must be bona fide, with no intent to defraud the public).

Your second question concerns the point at which disposition of land by sale under R.C. 5723.06 becomes final. R.C. 5723.03 provides that the former owner of a tract of land or town lot which has been forfeited may, "at any time before the state has disposed of" the land or lot, redeem the land or lot by paying into the county treasury all the taxes, assessments, penalties, and interest due on the land or lot at the time of payment. R.C. 5723.12, which governs the transfer of title to forfeited land, states in relevant part:

¹ I note that in State ex rel. Hecht v. Zangerle, 148 Ohio St. 9, 13-14, 72 N.E.2d 453, 455 (1947), the county auditor had adopted a rule of procedure for forfeited land tax sales which stated:

All bids at this auction will be accepted only tentatively, the county auditor reserving the right, before the auditor's deed is delivered to investigate and reject any bid within 60 days of the date the parcel in question is offered.

This policy permitted the auditor to investigate any sale which did not clearly appear to result in a reasonable purchase price, and to reject a bid if appropriate.

The county auditor, on making a sale of a tract of land to any person under section 5723.01 to 5723.19 of the Revised Code, shall give the purchaser a certificate of sale. On producing or returning to the auditor the certificate of sale, the auditor, on payment to him by the purchaser, his heirs, or assigns, of the sum of five dollars, shall execute and deliver to the purchaser, his heirs, or assigns, a deed, which deed shall be prima-facie evidence of title in the purchaser, his heirs, or assigns. (Emphasis added.)

You have noted that R.C. 5723.12 provides for no waiting period between issuance of a certificate of sale and delivery of the auditor's deed and have asked whether the former owner may redeem the property after a certificate of sale is issued and before the deed is executed and delivered.

This question was addressed by the Ohio Supreme Court in Kinney v. Hoffman, 151 Ohio St. 517, 86 N.E.2d 774 (1949). The syllabus to that case reads as follows:

1. The law providing for the redemption of land sold for taxes is equitable in character and should receive a liberal interpretation.
2. Under the provisions of Section 5746, General Code [now R.C. 5723.03], if the former owner of a tract of land or town lot which has been forfeited for nonpayment of taxes, at any time before the state has disposed of such land or lot shall pay into the treasury of the county in which such land or lot is situated all the taxes, assessments, penalties and interest due thereon at the time of such payment, the state shall relinquish to such former owner or owners, all claim to such land or lot.
3. Such premises are not "disposed of" within the purview of Section 5746, General Code [now R.C. 5723.03], until the county auditor executes and delivers his deed therefor, which deed, under the provisions of Section 5762, General Code [now R.C. 5723.12], becomes prima facie evidence of the title in the purchaser. (Emphasis added.)

Thus, it has been determined that redemption of forfeited land by the former owner may occur at any time before the county auditor executes and delivers the deed, even though a certificate of sale has been issued under R.C. 5723.12. The same result was reached in Uhinck v. Boyle, 84 Ohio App. 71, 85 N.E.2d 409 (Cuyahoga County 1948), and 1953 Op. Att'y Gen. No. 3373, p. 6. See generally Jonke v. Rubin, 170 Ohio St. 41, 162 N.E.2d 116 (1959); State ex rel. Fodor v. Monroe, 160 Ohio St. 495, 117 N.E.2d 11 (1954).

Your third question concerns the authority of the auditor to "adjourn the sale from day to day until he has disposed of or offered for sale each tract of land specified in the notice." R.C. 5723.06. You ask whether this language would permit sales from day to day to individuals who come into the auditor's office and enter bids on unsold property, or whether it requires that a "full blown auction" be held daily.

R.C. 5723.04 provides that the county auditor "shall maintain a list of forfeited lands and shall offer such lands for sale annually." Pursuant to R.C. 5723.06, on the day set for the annual sale of forfeited lands, the county auditor "shall attend at the courthouse and offer for sale the whole of each tract of land as contained in the list. . . , at public auction, to the highest bidder," as specified therein. R.C. 5723.06 provides that the auditor shall offer each tract separately, beginning with the first tract on the list. It states that he shall continue through the list and "may adjourn the sale from day to day until he has disposed of or offered for sale each tract of land specified in the notice," and that he may offer a tract of land two or more times at the same sale.

An essential element of the procedure established by R.C. 5723.06 is that the forfeited lands are to be offered for sale "at public auction, to the highest bidder." The provision that the sale may be adjourned from day to day until all tracts specified in the notice have been disposed of or offered for sale, and the provision

that particular tracts may be offered more than once at the same sale, do not change the nature of the sale. By statute, the tracts must be offered for sale "at public auction, to the highest bidder."

It is generally established that an auction sale is a public competitive sale. See Crandall v. State, 28 Ohio St. 479 (1876). Competitive bidding is the essence of a public auction. See In re Bender Body Co., 47 F. Supp. 224 (N.D. Ohio 1942). Publicity, competitive bidding, and invitation to the public are conditions which must be met before a sale may be classified as a public sale. See Liberty National Bank v. Greiner, 62 Ohio App. 2d 125, 405 N.E.2d 317 (Sandusky County 1978). These elements are lost when an auction is adjourned, not to a definite date, but to an indefinite subsequent time when any individual may, without further notice, choose to make a bid.

Questions similar to yours were considered in Ralston v. State ex rel. Horn, 218 Ind. 591, 34 N.E.2d 930 (1941), and Butler v. Delano, 42 Iowa 350 (1876). In each case, the court rejected the notion that authority to adjourn an auction from day to day permitted a public official to simply leave the sale open indefinitely and accept bids whenever an individual chose to enter his office, seeking to buy. The courts found that such procedures provided for sales which were private in nature, and which lacked competition, and, thus, that they did not constitute public auctions.

It is my opinion that the analysis applied in Ralston v. State ex rel. Horn and Butler v. Delano is applicable also to the situation which you have described. While R.C. 5723.06 authorizes the county auditor to adjourn the sale of forfeited lands from day to day, it contemplates that the sale shall remain a public auction. I believe that the statute must be read as permitting adjournment only to a definite time, see Butler v. Delano, so that an individual who may be interested in a particular tract will know when there may be bidding upon that tract.

This conclusion is supported by the fact that references in R.C. Chapter 5723 to an annual sale of forfeited lands seem to contemplate a sale which occurs once a year, rather than a sale which occurs throughout the year. See, e.g., R.C. 5723.04 ("offer such lands for sale annually"); R.C. 5723.05 ("county auditor fixes the date of his annual sale"); R.C. 5723.07. It is consistent with the general rule that strict compliance is required with statutory requirements governing the sale of land for delinquent taxes. See Magennis v. Myers; State ex rel. Hecht v. Zangerle.

That the General Assembly did not contemplate that the annual sale of forfeited lands would remain open indefinitely is evident from the language of R.C. 5723.07:

After the county auditor has closed his annual sale, if any tract or parcel of land has been offered for sale as provided in section 5723.06 of the Revised Code and the same remains unsold, the auditor, at any time prior to his next annual sale, may again advertise said tract or parcel of land in the manner provided in section 5723.05 of the Revised Code and again offer it for sale. (Emphasis added.)

This section provides a means by which the county auditor may sell a particular tract or parcel of land at a time other than the annual sale. Thus, if a person interested in purchasing a particular tract should approach the auditor at a time other than the annual sale, the auditor may proceed to offer that tract for sale pursuant to R.C. 5723.07.

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

1. Pursuant to R.C. 5723.06, the county auditor may sell a forfeited tract of land for an amount which is sufficient to pay the taxes, assessments, penalties, interest, and costs which stand against the tract, or, if no bid in such amount is forthcoming, for the best price obtainable, provided that such price is reasonably adequate and bears a reasonable relation to the value of the property sold. Whether a price which is less than the amount of the taxes, assessments, penalties, interest, and costs due on the

tract is a reasonable price will depend upon the facts surrounding the particular sale.

2. Pursuant to R.C. 5723.03, the former owner of a tract of land or town lot which has been forfeited to the state for nonpayment of taxes may redeem the forfeited land at any time before the county auditor executes and delivers a deed for the land to a purchaser, his heirs, or assigns; such redemption may be made even though the auditor has issued a certificate of sale for the land under R.C. 5723.12. (1953 Op. Att'y Gen. No. 3373, p. 6, approved and followed.)
3. The language of R.C. 5723.06 which permits a county auditor to adjourn the sale of forfeited lands from day to day does not permit the auditor to simply keep the sale open indefinitely so that he may receive bids at his office throughout the year.