

OPINION NO. 91-027**Syllabus:**

1. A municipal corporation, county, or township that establishes a land reutilization program pursuant to R.C. Chapter 5722 and elects to acquire certain nonproductive forfeited land pursuant to R.C. 5722.04 does not have title to the selected nonproductive land until the certificate of sale has been returned to the county auditor and the auditor has executed and delivered to the electing subdivision a deed to the selected nonproductive land.
2. If the certificate of sale of nonproductive forfeited land is not returned to the county auditor pursuant to R.C. 5722.04, the county auditor has no authority to execute and deliver to the electing subdivision a deed to the land or to charge related costs to the taxing districts under R.C. 5722.04. Instead, the land remains forfeited land and, if the amounts due on the forfeited land are not paid, the land is subject to sale in accordance with R.C. 5723.04-.06 at the county auditor's next sale of forfeited lands.

To: Lynn C. Siaby, Summit County Prosecuting Attorney, Akron, Ohio
By: Lee Fisher, Attorney General, June 6, 1991

I have before me your request for an opinion concerning the operation of R.C. 5722.04. That section is part of the statutory scheme of R.C. Chapter 5722 that permits the establishment of land reutilization programs, intended to "facilitate the effective reutilization" of certain lands upon which delinquent taxes remain unpaid. R.C. 5722.02; *see also* R.C. 5721.01; R.C. 5722.01. Under a land reutilization program, a municipal corporation, county, or township may acquire

nonproductive land¹ situated within its boundaries² for the purpose of either returning the land to tax revenue generating status or devoting it to public use. R.C. 5722.02. R.C. 5722.02 states, in part:

Any municipal corporation, county, or township may elect to adopt and implement the procedures set forth in this chapter to facilitate the effective reutilization of nonproductive land situated within its boundaries. Such election shall be made by ordinance in the case of a municipal corporation, and by resolution in the case of a county or township.

You have asked specifically about the powers and duties of a municipality under R.C. Chapter 5722. When your question was submitted, only municipal corporations had authority to establish land reutilization programs pursuant to R.C. Chapter 5722. Language authorizing counties and townships to establish such programs was added by Am. H.B. 557, 118th Gen. A. (1990) (eff. April 5, 1991). In order to make this opinion as useful as possible, I am discussing the provisions of R.C. Chapter 5722 as they are currently in effect. See also Am. Sub. H.B. 576, 118th Gen. A. (1990) (eff. March 27, 1991) (amending, *inter alia*, R.C. 5722.01 and 5722.03). I am, however, aware that the particular events to which your problem relates may have occurred under provisions of prior law.

In particular, a member of your staff has informed me that, prior to April 5, 1991, the government of Summit County, acting pursuant to its charter, exercised certain rights under R.C. Chapter 5722.³ Ohio Const. art. X, §3 states, in part: "Any such [county] charter may provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the constitution or laws of Ohio in municipalities...." Thus, under R.C. Chapter 5722

¹ R.C. 5722.01(E) contains the following definition:

"Nonproductive land" means any parcel of delinquent vacant land with respect to which a foreclosure proceeding pursuant to section 323.25, a foreclosure proceeding pursuant to division (A) or (B) of section 5721.18, or a foreclosure and forfeiture proceeding pursuant to section 5721.14 of the Revised Code has been instituted; and any parcel of delinquent land with respect to which a foreclosure proceeding pursuant to division (A) or (B) of section 5721.18 of the Revised Code has been instituted, and upon which there are no buildings or other structures, or upon which there are either:

(1) Buildings or other structures that are not in the occupancy of any person and as to which the township or municipal corporation within whose boundaries the parcel is situated has instituted proceedings under section 505.86 or 715.26 of the Revised Code, or Section 3 of Article XVIII, Ohio Constitution, for the removal or demolition of such buildings or other structures by the township or municipal corporation because of their insecure, unsafe, or structurally defective condition;

(2) Buildings or structures that are not in the occupancy of any person at the time the foreclosure proceeding is initiated and whose acquisition the municipal corporation, county, or township determines to be necessary for the implementation of an effective land reutilization program.

² R.C. 5722.01(G) states: "'Land within an electing subdivision's boundaries' does not include land within the boundaries of a municipal corporation unless the electing subdivision is the municipal corporation."

³ You raised no issues concerning the authority of the county to take such action, and I am assuming that its powers were properly exercised.

as in effect prior to April 5, 1991, the statutory term "municipal corporation" was applicable to both municipal corporations and any charter county that acquired powers under R.C. Chapter 5722 pursuant to its charter and the provisions of Ohio Const. art. X, §3.

Prior to the effective date of Am. H.B. 557, a county could act under R.C. Chapter 5722 only by exercising the powers of a municipal corporation pursuant to a county charter. Under R.C. Chapter 5722 as currently in effect, however, a county has statutory authority to establish a land reutilization program pursuant to R.C. Chapter 5722. For purposes of this opinion, I am using the statutory term "electing subdivision" to encompass counties, whether or not they have adopted charters, and also municipal corporations and townships that are acting pursuant to R.C. Chapter 5722.

Your questions pertain to R.C. 5722.04, which sets forth the procedure by which nonproductive forfeited lands may be sold to an electing subdivision for purposes of a land reutilization program. After a subdivision elects by ordinance or resolution to adopt and implement a land reutilization program, it delivers certified copies of the ordinance or resolution to certain officials, including the county auditor. R.C. 5722.02. The county auditor then delivers to the electing subdivision a list of delinquent lands situated within the subdivision's boundaries that have been forfeited to the state pursuant to R.C. 5723.01. R.C. 5722.04. The electing subdivision selects from the list the nonproductive lands that it wishes to acquire and notifies the county auditor of its selection. The nonproductive lands forfeited to the state and selected by an electing subdivision are advertised for sale and sold to the highest bidder, if a bid is received for an amount at least sufficient to pay the taxes, assessments, charges, penalties, interest, and costs that stand against the land on the date of the sale. R.C. 5722.04; R.C. 5723.06(A)(1)(a). The nonproductive lands forfeited to the state and selected by an electing subdivision are advertised separately from other forfeited lands, and the advertisement must state that the lands shall be sold to the electing subdivision if a minimum bid is not received at the forfeiture sale. R.C. 5722.04.

With respect to the procedure for the sale of nonproductive forfeited land to an electing subdivision, R.C. 5722.04 states:

(B) If any nonproductive land that has been forfeited to the state and selected by an electing subdivision is advertised and offered for sale by the auditor pursuant to Chapter 5723. of the Revised Code, but no minimum bid is received, the electing subdivision shall be deemed to have submitted a minimum bid. If both a county and a township in that county have adopted a resolution pursuant to section 5722.02 of the Revised Code and both subdivisions select the same parcel or parcels of land, the subdivision that first notifies the county auditor of such selection shall be the electing subdivision deemed to have a minimum bid under this division.

The auditor shall announce the bid at the sale and shall declare the selected nonproductive land to be sold to the electing subdivision. The auditor shall deliver to the electing subdivision a certificate of sale. The amount deemed to be bid by the electing subdivision is not payable until it sells or otherwise disposes of the land as part of its land reutilization program. Such amount shall be payable solely from the proceeds of the sale made as part of the land reutilization program.

(C) On the returning of the certificate of sale to the auditor, the auditor, without charge, shall execute and deliver to the electing subdivision a deed to the selected nonproductive land, and this conveyance shall extinguish all previous title. The title in the electing subdivision shall be incontestable and free and clear from all liens and encumbrances, except taxes and special assessments that are not due at the time of the sale; and any easements and covenants of record running with the land and created prior to the time at which the taxes or assessments, for the nonpayment of which the nonproductive land was forfeited, became due and payable.

Upon delivery of a deed conveying any nonproductive land to an electing subdivision, the subdivision shall pay to the auditor all costs incurred in any proceeding instituted under section 5721.14 or 5721.18 of the Revised Code or incurred as a result of the forfeiture and sale of the nonproductive land. The auditor shall charge the costs to the taxing districts, including the electing subdivision, in direct proportion to their interest in the taxes, assessments, charges, interest, and penalties on the nonproductive land due and payable at the time the land was sold at the forfeiture sale. In making his semiannual apportionment of funds, the auditor shall retain at the next apportionment the amount charged to each such taxing district. The amounts charged and retained shall be credited to the general fund of the electing subdivision. (Emphasis added.)

You have raised the following questions:

- 1) When does legal title to nonproductive forfeited land pass to [an electing subdivision] pursuant to O.R.C. §5722.04?
- 2) What is the Auditor's recourse, if any, if the [electing subdivision] does not return the certificate of sale to the Auditor after all other procedures are followed under O.R.C. §5722.04?

In conversations with my staff, your representative has stated that the situation in question involves nonproductive forfeited land that was selected by the charter government of Summit County. The land was advertised for sale and no minimum bid was received, so the county was deemed to have submitted a minimum bid. The auditor delivered a certificate of sale to the county, and the county has failed to return the certificate of sale to the auditor.⁴ Your questions concern the appropriate procedures to be followed in such circumstances.

It is clear, in response to your first question, that, under R.C. 5722.04, an electing subdivision does not have title to selected nonproductive land until the certificate of sale has been returned to the auditor and the auditor has executed and delivered to the electing subdivision a deed to the selected nonproductive land. R.C. 5722.04. The statute states clearly that "this conveyance shall extinguish all previous title." R.C. 5722.04. If the certificate of sale has not yet been returned to the auditor, the title to the property cannot yet have passed to the electing subdivision.

In this regard, the language of R.C. 5722.04 is analogous to that governing sales of forfeited land for purposes other than land reutilization programs. R.C. 5723.12 states, in part:

(A) The county auditor, on making a sale of a tract of land to any person under sections 5723.01 to 5723.19 of the Revised Code [forfeited lands], 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.)

This language has consistently been construed as providing that title to a tract of forfeited land does not pass until the auditor has executed and delivered the deed to the land. See, e.g., *Kinney v. Hoffman*, 151 Ohio St. 517, 86 N.E.2d 774 (1949); *Uhinck v. Boyle*, 84 Ohio App. 71, 75, 85 N.E.2d 409, 411 (Cuyahoga County 1948)

⁴ I assume that the county has intentionally failed to return the certificate of sale to the county auditor. I am not considering a situation in which a certificate of sale has been mislaid, destroyed, or lost. See R.C. 5723.19.

("[t]he certificate [of sale] does not convey the title to the property to the purchaser at a forfeited land sale. The certificate is simply evidence that he was the highest bidder entitling him to a deed for the property"); 1939 Op. Att'y Gen. No. 192, vol. I, p. 237; 1936 Op. Att'y Gen. No. 5807, vol. II, p. 1014. The procedure established under the provisions governing the sale of forfeited lands has been found to permit the former owner of land that has been forfeited to redeem that land by making the appropriate payment at any time before the deed is executed and delivered, even if a certificate of sale has been issued. *See, e.g., State ex rel. Fodor v. Monroe*, 160 Ohio St. 495, 117 N.E.2d 11 (1954); *Kinney v. Hoffman*; *Uhinck v. Boyle*; 1985 Op. Att'y Gen. No. 85-018; 1953 Op. Att'y Gen. No. 3373, p. 726. *See generally State ex rel. U.S. Mortgage & Trust Co. v. Godfrey*, 62 Ohio St. 18, 56 N.E. 482 (1900) (construing statutes that provided a two-year period between issuance of a certificate of purchase and issuance of a deed for the sale of delinquent land, during which time the former owner could exercise the right of redemption).

The language of R.C. 5722.04 parallels that of R.C. 5723.12, and both statutes clearly indicate that title to the land passes upon execution and deliverance of a deed. I conclude, accordingly, that a municipal corporation, county, or township that elects to acquire certain nonproductive forfeited land pursuant to R.C. 5722.04 does not have title to the selected nonproductive land until the certificate of sale has been returned to the county auditor and the auditor has executed and delivered to the electing subdivision a deed to the selected nonproductive land.

Your second question concerns the action to be taken by the county auditor if the electing subdivision does not return the certificate of sale to the auditor. R.C. Chapter 5722 does not contemplate that the certificate of sale will not be returned and does not state specifically what will happen in such circumstances. The statutory scheme does not directly discuss the point at which the decision of an electing subdivision to acquire selected nonproductive land becomes irrevocable. *See generally, e.g.,* 1948 Op. Att'y Gen. No. 3782, p. 453.⁵

Your letter of request asks what recourse the county auditor has in these circumstances. I find it helpful to begin with a consideration of actions that the county auditor is not authorized to take. It is clear from R.C. 5722.04 that the county auditor may not execute and deliver to the electing subdivision a deed to selected nonproductive land until the certificate of sale is returned to the auditor. Thus, if the certificate of sale is not returned, the deed will not be executed and title will not pass to the electing subdivision. If no deed is executed and delivered pursuant to R.C. 5722.04, R.C. 5722.04 imposes no obligation upon an electing subdivision to pay to the auditor the costs described in the final paragraph of R.C. 5722.04, and, correspondingly, R.C. 5722.04 grants the auditor no authority to charge such costs to the taxing districts.

I consider now the actions that the county auditor may take with respect to selected nonproductive forfeited land after a certificate of sale has been issued and before the certificate has been returned. I note that, when land is forfeited to the state because of delinquent taxes, the land appears on the tax list and duplicate in the name of the state. *See* R.C. 5723.01 (forfeiture of lands to the state is

⁵ R.C. 5722.12 governs the discontinuance by an electing subdivision of its land reutilization program, as follows:

An electing subdivision may discontinue its land reutilization program at any time by repealing the ordinance or resolution enacted under section 5722.02 of the Revised Code, but it shall continue to be governed by the procedures set forth in this chapter concerning the administration and disposition of real property acquired as a part of its land reutilization program until all such lands have been sold or otherwise transferred and the proceeds thereof distributed in compliance with this chapter.

This provision does not appear to be applicable to the situation with which you are concerned.

effective upon entry of an order by the court; all right, title, claim, and interest of the former owner is transferred to the state). R.C. 5723.02 states:

All lands or lots which have been forfeited to the state shall be preserved on the tax lists and duplicates until sold or redeemed, and the taxes and assessments thereon regularly assessed in the name of the state. Such taxes and assessments shall be returned annually by the county treasurer as delinquencies and credited to him as other delinquencies in his settlement.

Upon forfeiture of lands for the nonpayment of taxes, the state acquires possession of the lands and the entire estate therein, with the power to dispose of the lands for the purpose of securing the amount of the unpaid taxes. *Dubin v. Greenwood*, 139 Ohio St. 546, 549, 41 N.E.2d 240, 241 (1942). See generally R.C. 5723.05; *Bauman v. Guckenberger*, 148 Ohio St. 292, 299-300, 74 N.E.2d 369, 373 (1947) ("[a]fter the forfeiture is declared, title rests in the state..."). The state's name appears on the tax list and duplicate until the forfeited land is sold and title to the land passes to a purchaser. Then the land is listed in the name of the purchaser. See R.C. 319.20 (authorizing the county auditor to transfer property on the tax list into the name of the owner "on application and presentation of title, with the affidavits required by law, or the proper order of a court"); R.C. 319.201-202; R.C. 319.28 (indicating that property is entered on the tax list in the name of the "owner" or as "unknown"); 1987 Op. Att'y Gen. No. 87-110; 1986 Op. Att'y Gen. No. 86-028; 1980 Op. Att'y Gen. No. 80-029; 1968 Op. Att'y Gen. No. 68-068. Compare R.C. 319.20-202 with 1859 Ohio Laws 128, 138 (Act of April 4, 1859; sec. 47, subsequently codified at R.S. 2888) ("[e]very county auditor hereafter delivering any certificate of purchase of forfeited lands...shall immediately, on his duplicate, transfer the same into the name of the purchaser..."). See generally *State ex rel. U.S. Mortgage & Trust Co. v. Godfrey*. Thus, in the situation you have presented, the land in question appears on the tax list and duplicate in the name of the state, rather than in the name of the electing subdivision. Until title passes, the taxes and assessments continue to be assessed in the name of the state pursuant to R.C. 5723.02.

R.C. 5722.15(A) states that, when an electing subdivision purchases nonproductive land under R.C. 5722.04, "the county auditor shall remove from his tax lists and duplicates all taxes, assessments, charges, penalties, and interest that are due and payable on the land at the time of the sale in the same manner as if the property had been sold to any other buyer at the...forfeiture sale." It does not, however, appear that such amounts may be removed until the purchase is final - that is, until title has passed. See generally, e.g., 1974 Op. Att'y Gen. No. 74-100 at 2-411 ("R.C. 319.20 clearly indicates that taxes may be apportioned only upon the completion of the transfer of real estate"). Hence, on the facts that you have presented, the amounts of taxes, assessments, charges, penalties, and interest charged against the land remain on the tax list and duplicate.

It appears, therefore, that if the certificate of sale is not returned to the auditor, the title to the land does not pass to the electing subdivision. Rather, the land remains as forfeited land, and the auditor should treat it as such. R.C. 5723.04 provides that the county auditor shall offer forfeited lands for sale "annually, or more frequently if the auditor determines that more frequent sales are necessary." Pursuant to R.C. 5723.05, "[i]f the taxes, assessments, charges, penalties, interest, and costs due on the forfeited lands have not been paid when the county auditor fixes the date for the sale of forfeited lands," the county auditor shall give notice of them and proceed to offer the land for sale. Provisions governing such a sale are set forth in R.C. 5723.06. If a deed to particular lands has been executed and delivered to an electing subdivision pursuant to R.C. 5722.04, those lands are no longer forfeited lands and are not subject to sale under R.C. 5723.05. If, however, title has not passed and the amounts due on the lands have not been paid, then the lands appear to be subject to sale by the county auditor at his next sale, see R.C. 5723.04-06, even though they have previously been declared sold to an electing subdivision under R.C. 5722.04. See generally Op. No. 85-018.

It does not, however, appear that R.C. 5723.07 applies to the situation you have described. R.C. 5723.07 permits the county auditor, after closing his sale of forfeited lands and prior to his next sale, to again advertise and offer for sale a tract

or parcel of land that has been offered for sale as provided in R.C. 5723.06 and remains unsold. The land with which you are concerned has been offered for sale pursuant to both R.C. 5722.04 and R.C. 5723.06, thus raising the issue as to whether R.C. 5723.07 is applicable. Further, the land in question has been declared sold, *see* R.C. 5722.04, and the statutory scheme provides no procedure for changing that declaration. In the situation you have described, the county has not communicated to the auditor an intent to refrain from completing the sale. On these facts, where the county auditor has no firm basis for determining that the sale will not be completed, it appears that the auditor may not act under R.C. 5723.07 to offer the land for sale again but must, instead, wait until the next sale of forfeited lands scheduled pursuant to R.C. 5723.04.

As discussed above, R.C. 5723.12 is part of a statutory procedure established to sell forfeited lands for purposes other than land reutilization programs. R.C. 5723.12 provides that, on making a sale of a tract of land under R.C. 5723.01-19, the county auditor shall give the purchaser a certificate of sale. Upon the return of the certificate of sale and the payment of five dollars by the purchaser, his heirs, or assigns, the auditor shall execute and deliver a deed to the purchaser, his heirs, or assigns. *See* R.C. 5723.06. In such circumstances, the certificate of sale evidences that the purchaser is the assignee of the state; if the certificate is not returned and the deed is not issued to the purchaser, the purchaser has a lien in the amount of the purchase price and any taxes subsequently paid by the purchaser. R.C. 5723.16; *see* 1936 Op. No. 5807 (syllabus, paragraph 2) ("the certificate of sale which is given to the purchaser of lands which have been forfeited to the State of Ohio, conveys the lien only of the state for taxes and penalties charged on said lands at the time they were sold. The deed given to such purchaser by the county auditor...conveys to the purchaser a fee simple title to said lands"). If the land is redeemed by the previous owner prior to the issuance of a deed to the purchaser, or if the sale is found to have been invalid, then the purchaser is entitled to the amount of the purchase price plus any taxes, assessments, or other amounts paid by the purchaser. *See* R.C. 5723.14-.16; 1953 Op. No. 3373. In the sale of forfeited land for a land reutilization program under R.C. 5722.04, the electing subdivision need make no payments at the time of purchase. Thus, if the transfer of title is not completed, there is no amount to be returned to the electing subdivision.

Based upon the discussion set forth above, it is my opinion, and you are hereby advised, as follows:

1. A municipal corporation, county, or township that establishes a land reutilization program pursuant to R.C. Chapter 5722 and elects to acquire certain nonproductive forfeited land pursuant to R.C. 5722.04 does not have title to the selected nonproductive land until the certificate of sale has been returned to the county auditor and the auditor has executed and delivered to the electing subdivision a deed to the selected nonproductive land.
2. If the certificate of sale of nonproductive forfeited land is not returned to the county auditor pursuant to R.C. 5722.04, the county auditor has no authority to execute and deliver to the electing subdivision a deed to the land or to charge related costs to the taxing districts under R.C. 5722.04. Instead, the land remains forfeited land and, if the amounts due on the forfeited land are not paid, the land is subject to sale in accordance with R.C. 5723.04-.06 at the county auditor's next sale of forfeited lands.