

May 13, 2014

The Honorable Kelly A. Riddle
Noble County Prosecuting Attorney
406 North Street
Caldwell, Ohio 43724

SYLLABUS:

2014-020

A prosecuting attorney may not charge a fee to recover legal costs incurred in delinquent real estate tax foreclosure proceedings initiated pursuant to R.C. 5721.14 or R.C. 5721.18.



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OPINION NO. 2014-020

The Honorable Kelly A. Riddle
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Dear Prosecutor Riddle:

We have received your request for an opinion whether a prosecuting attorney may charge a fee to recover legal costs incurred in delinquent real estate tax foreclosure proceedings initiated pursuant to R.C. 5721.14 and R.C. 5721.18.¹ If so, you ask whether the fee may be deposited into the delinquent tax and assessment collection fund. *See* R.C. 321.261. You note in your request that legal costs are collectible pursuant to R.C. 5721.37(B)(3), a provision establishing procedures for foreclosures initiated by a tax certificate holder, and you ask whether there is any similar mechanism when foreclosure proceedings are initiated by the county prosecuting attorney pursuant to R.C. 5721.14 and R.C. 5721.18. Before we answer your question, it will be helpful to give some background on these various delinquent real estate tax laws.

R.C. Chapter 5721

R.C. Chapter 5721 outlines the law relevant to delinquent lands. Delinquent lands are lands on which delinquent taxes² remain unpaid at a time set by statute. R.C. 5721.01. The county auditor

¹ You also asked about proceedings initiated pursuant to R.C. 5721.10. As explained below, R.C. 5721.10 simply grants authority to the state to initiate foreclosures proceedings, whereas other statutory provisions describe the procedure to be followed in those foreclosure proceedings. *See Rinehart v. Goberdhan*, 70 Ohio App.2d 270, 272, 436 N.E.2d 1384 (Franklin County 1980); *Suggs v. McCool*, No. CA93-05-009, 1994 WL 61053, *3 (Preble County App. Feb. 28, 1994).

² R.C. Chapter 5721 incorporates the definition of “delinquent taxes” from R.C. Chapter 323 (collection of taxes) into the definition of delinquent lands. R.C. 5721.01(A)(1). As used in R.C. Chapter 323, “[d]elinquent taxes” are defined as:

must compile a list of all the delinquent lands in the county, known as the “delinquent land list.” R.C. 5721.011. At the time of making this list, the county auditor also compiles a second list that contains all the lands on the delinquent land list on which taxes have become delinquent at the close of the collection period immediately preceding the making of the delinquent land list. R.C. 5721.03. This second list is known as the “delinquent tax list.” R.C. 5721.03. Finally, the auditor compiles a “delinquent vacant land tax list” for delinquent vacant lands. R.C. 5721.03. The delinquent tax list and the delinquent vacant land tax list must be published with a notice attached stating the delinquent lands will be certified for foreclosure or foreclosure and forfeiture by the auditor unless the taxes, assessments, interest, and penalties due are paid. R.C. 5721.03(B)(3).

Various provisions of the Revised Code require a county to institute foreclosure or foreclosure and forfeiture proceedings against delinquent lands for the payment of taxes and assessments. *See* R.C. 323.25 (enforcement of tax lien); R.C. 323.65-.79 (foreclosure proceedings for abandoned lands); R.C. 5721.10; R.C. 5721.14; R.C. 5721.18; 2013 Op. Att’y Gen. No. 2013-001, at 2-2. Your question concerns R.C. 5721.10, R.C. 5721.14, R.C. 5721.18, and by way of comparison, R.C. 5721.37. R.C. 5721.25, the law regarding redemption of delinquent lands, is also relevant. Thus, we will discuss each of these provisions in turn.

Authority to Institute Foreclosure Pursuant to R.C. 5721.10

R.C. 5721.10 grants to the state the first lien on the lands and lots described in the delinquent land list for the amount of taxes, assessments, interest, and penalty charged against those lands prior to delivery of that list. It also grants authority to the state to institute foreclosure proceedings in the manner provided by either R.C. 323.25, R.C. 323.65-.79, or R.C. 5721.01-.28 for land on which the taxes have not been paid for one year after having been certified as delinquent. R.C. 5721.10. Thus, R.C. 5721.10 provides the general grant of authority to institute foreclosure proceedings, while other statutory provisions describe the procedure to be followed in those foreclosure proceedings. *Rinehart v. Goberdhan*, 70 Ohio App. 2d 270, 272, 436 N.E.2d 1384 (Franklin County 1980); *Suggs v. McCool*, No. CA93-05-009, 1994 WL 61053, *3 (Preble County App. Feb. 28, 1994). You have only asked about foreclosure proceedings under R.C. 5721.14 and R.C. 5721.18, and not about foreclosure

(1) Any taxes charged against an entry on the general tax list and duplicate of real and public utility property that were charged against an entry on such list and duplicate for a prior tax year and any penalties and interest charged against such taxes.

(2) Any current taxes charged on the general tax list and duplicate of real and public utility property that remain unpaid after the last day prescribed for payment of the second installment of such taxes without penalty, whether or not they have been certified delinquent, and any penalties and interest charged against such taxes.

R.C. 323.01(E).

proceedings under R.C. 323.25 and R.C. 323.65-.79. Thus, this opinion does not discuss foreclosure proceedings under R.C. 323.25 or R.C. 323.65-.79.³

Foreclosure and Forfeiture Proceedings Pursuant to R.C. 5721.14

R.C. 5721.14 applies to foreclosure and forfeiture proceedings for delinquent *vacant* lands. R.C. 5721.14. A foreclosure and forfeiture proceeding pursuant to R.C. 5721.14 constitutes an action in rem.⁴ R.C. 5721.14(B). Prior to filing a R.C. 5721.14 foreclosure and forfeiture action, the county prosecuting attorney shall cause a title search to be conducted in order to identify any lienholders or other people with interests in the property. R.C. 5721.14(B). Following this title search, the action is instituted by filing a complaint in court in the name of the county treasurer. R.C. 5721.14(A)-(B). The complaint asks that the court issue an order that the lien of the state on the property be foreclosed, that the property be forfeited to the state, and that the land be offered for sale in the manner provided in the Revised Code for the sale of forfeited lands. R.C. 5721.14(B). The prosecuting attorney must prosecute the proceeding to final judgment and satisfaction. R.C. 5721.14(A)(1).

In its judgment of foreclosure and forfeiture, the court must enter a finding as to the amount of the taxes, assessments, charges, penalties, and interest, and the costs incurred in the foreclosure and forfeiture proceedings instituted against the property, which are due and unpaid. R.C. 5721.16(A). The court shall order the property sold pursuant to R.C. Chapter 5723, which governs forfeited lands, for not less than the lesser of either: (1) the fair market value of the property plus the costs incurred in the foreclosure and forfeiture proceeding, or (2) the total amount of the finding entered by the court, including all taxes, assessments, charges, penalties, and interest payable, plus the costs incurred in the foreclosure and forfeiture proceeding. R.C. 5721.16(A)(1). For purposes of determining such amount, the county treasurer may estimate the amount of taxes, assessments, interest, penalties, and costs that will be payable at the time the deed of the property is transferred to the purchaser. R.C. 5721.16(A)(2).

At the sale of the forfeited land, if no bid is received sufficient to pay the required amount, then the county auditor may sell the land for the best price obtainable. R.C. 5723.06(A)(2). If the land remains unsold, the county auditor may attempt to sell it again at his next sale. R.C. 5723.07. The proceeds from a forfeiture sale are distributed according to priority laid out in the Revised Code. R.C. 5723.18(A). First, all costs of the foreclosure and forfeiture are paid. R.C. 5723.18(A)(1). If the

³ This opinion outlines *general* procedures for R.C. 5721.14 and R.C. 5721.18. It does not address each and every potential circumstance presented in these sections. *See, e.g.*, R.C. 5721.17 (foreclosures involving receiverships); R.C. 5721.14 and R.C. 5721.18 (foreclosures involving mineral rights); R.C. 5721.14(A)(2) and R.C. 5721.18 (procedures for delinquent tax contracts).

⁴ Actions “in rem,” as opposed to actions “in personam,” operate on the land itself and not on the title of the one in whose name the property is listed for taxation. *In re Foreclosure of Lien for Delinquent Taxes by Action in Rem*, 117 Ohio St. 3d 1472, 2008-Ohio-1899, 884 N.E.2d 1106, at ¶18.

sale proceeds from the forfeiture sale are insufficient to pay the costs, the county auditor must reduce the amount of real property taxes that the auditor otherwise would distribute to each subdivision to which taxes, assessments, charges, penalties, or interest charged against the property are due. *Id.* Next, a certain amount of the proceeds will go to the delinquent tax and assessment collection fund under R.C. 321.261. R.C. 5723.18(A)(2). Finally, the remaining money will go to the county auditor to pay the appropriate subdivision the taxes, assessments, charges, penalties, and interest which are due and unpaid. R.C. 5723.18(A)(3). If the proceeds from the sale of forfeited lands are insufficient to pay in full the amount of taxes, assessments, charges, penalties, and interests, and the costs incurred in the proceedings, the court may enter a deficiency judgment against the last owner of record of the land before its forfeiture to the state for the unpaid amount. R.C. 5721.192; R.C. 5723.18(B).

Foreclosure Proceedings Pursuant to R.C. 5721.18

R.C. 5721.18 sets forth three different foreclosure proceedings for delinquent lands. Under each, a prosecuting attorney institutes foreclosure proceedings in court in the name of the county treasurer to foreclose the lien of the state.⁵ R.C. 5721.18. The prosecuting attorney must prosecute the proceeding to final judgment and satisfaction. *Id.*

The first type of foreclosure proceeding pursuant to R.C. 5721.18 is set forth in division (A). Division (A) proceedings apply to all foreclosure proceedings not instituted and prosecuted under R.C. 323.25 or R.C. 5721.18(B) or (C) and are to be instituted and prosecuted as in personam actions. R.C. 5721.18(A); R.C. 5721.18(D). The second type of foreclosure proceeding pursuant to R.C. 5721.18 is set forth in division (B). Division (B) proceedings apply to foreclosure actions commenced by filing a complaint after the end of the second year from the date on which the delinquency was first certified by the county auditor and are prosecuted as in rem actions. R.C. 5721.18(B). The third type of foreclosure proceeding pursuant to R.C. 5721.18 is set forth in division (C). Division (C) proceedings are similar to foreclosure proceedings under R.C. 5721.18(B) and are also prosecuted as in rem actions. R.C. 5721.18(C). Division (C) proceedings, however, have different requirements than division (B) proceedings with regard to identifying and notifying lienholders and other persons with an interest in the property. R.C. 5721.18(C)(1)-(4).

In all actions filed pursuant to R.C. 5721.18, the court must enter a finding with respect to the property in the amount of taxes, assessments, charges, penalties, and interest and the costs incurred in the foreclosure proceeding instituted against it, that are due and unpaid. R.C. 5721.19(A). The court will order the premises transferred or sold for not less than either (1) the fair market value of the property as determined by the county auditor, plus the costs in the foreclosure proceeding, or (2) the total amount of the finding entered by the court, including all taxes, assessments, charges, penalties, and interest payable subsequent to the delivery to the prosecuting attorney of the delinquent land tax

⁵ R.C. 5721.18 proceedings can also be brought in a county board of revision with jurisdiction pursuant to R.C. 323.66. R.C. 5721.18. For ease of discussion, this opinion will only refer to proceedings that take place in court.

certificate or master list of delinquent tracts, but prior to the transfer of the deed of the property to the purchaser following confirmation of sale, plus the costs of the foreclosure proceeding. R.C. 5721.19(A)(1)-(2). The county treasurer may estimate the amount of taxes, assessments, interest, penalties, and costs that will be payable at the time the deed of the property is transferred to the purchaser. R.C. 5721.19(A)(2).

In general, the proceeds of the sale shall be applied as follows: (1) the costs incurred in any proceeding filed against the property pursuant to R.C. 5721.18 shall be paid first, (2) a certain percentage of the taxes and assessments due shall be deposited in equal shares into each of the delinquent tax and assessment collection funds created pursuant to R.C. 321.261,⁶ and (3) the amount found due for taxes, assessments, charges, penalties, and interest shall be paid. R.C. 5721.19(D). If the property remains unsold after being offered at two sales, or if the property sells at less than the costs incurred in the proceedings instituted under R.C. 5721.18, then the clerk of the court shall certify to the county auditor the amount of those costs that remain unpaid. R.C. 5721.19(C)(2)(a). The county auditor shall then reduce the real property taxes that the auditor otherwise would distribute to each taxing district. *Id.* The auditor promptly shall pay to the clerk of the court the amounts of the reductions. *Id.* If the proceeds from a sale are insufficient to pay in full the amount of taxes, assessments, charges, penalties, and interest which are due and unpaid, and the costs incurred in the foreclosure proceeding, the court may enter a deficiency judgment against the owner of record for unpaid amounts. R.C. 5721.19(E); R.C. 5721.192.

Redemption Pursuant to R.C. 5721.25

Although not specified in your letter, R.C. 5721.25, governing redemption of delinquent land, is relevant to your question. Delinquent land may be redeemed before or after a foreclosure proceeding has commenced. The amount of costs that are due depends on how far the proceeding has progressed. *See* R.C. 5721.25. All delinquent land upon which the taxes, assessments, penalties, interest, or charges have become delinquent may be redeemed before foreclosure proceedings have begun by paying to the county treasurer an amount sufficient, as determined by the court, to pay the taxes, assessments, penalties, interest, and charges then due and unpaid, and the costs incurred in any proceeding instituted against such land under R.C. Chapter 323 or R.C. Chapter 5721. R.C. 5721.25. After a foreclosure proceeding has begun under R.C. Chapter 5721, but before the sale, land may be redeemed by tendering to the county treasurer an amount sufficient, as determined by the court, to pay the taxes, assessments, penalties, interest, and charges then due and unpaid, and the costs incurred in any proceeding instituted against such land under R.C. Chapter 5721, and by demonstrating that the

⁶ If a county land reutilization corporation is operating in the county, the board of county commissioners, by resolution, may provide that an additional amount, not to exceed five per cent of such taxes and assessments, shall be credited to the county land reutilization corporation fund created by R.C. 321.263 to pay for the corporation's expenses. R.C. 5721.19(D). If such a resolution is in effect, the percentage of such taxes and assessments so provided shall be credited to that fund. *Id.*

property is in compliance with all applicable zoning regulations, land use restrictions, and building, health, and safety codes. R.C. 5721.25.

Sale of Tax Certificates Pursuant to R.C. 5721.30 to R.C. 5721.43

As an alternative to a county attempting to collect delinquent taxes, the General Assembly has devised a scheme for a private party to attempt to collect delinquent taxes through the sale of tax certificates. At one time, only counties with a population of at least 200,000 could participate in the sale of tax certificates. Am. Sub. H.B. 562, 127th Gen. A. (2008) (eff. Sept. 28, 2008, with certain sections effective on other dates); Ohio Legislative Service Comm'n, Analysis, Am. Sub. H.B. 562 (as passed by the General Assembly) (discussing changes to R.C. 5721.30). Today, however, all counties are eligible to participate. Ohio Legislative Service Comm'n, Analysis, Am. Sub. H.B. 562 (as passed by the General Assembly) (discussing changes to R.C. 5721.30).

Tax certificate sales are governed by R.C. 5721.30-43. R.C. 5721.31. After receiving the delinquent land list, the county treasurer may select from the list parcels of delinquent land that the county treasurer may attempt to transfer by the sale of tax certificates. R.C. 5721.31. The county treasurer may then choose to sell some of these tax certificates and transfer the lien that the state holds to the new tax certificate holder. These tax certificates are sold at public auction, R.C. 5721.32(B)(1), negotiated in a sale by the county treasurer, R.C. 5721.33, or sold to the certificate holder of the most recently issued tax certificate, R.C. 5721.42. After the tax certificate is sold and transferred to the certificate holder, the certificate holder has the superior lien of the state and its taxing districts for the delinquent taxes. R.C. 5721.32(E). The tax certificate holder must wait at least one month after purchasing the certificate before contacting the owner of the property to demand payment. R.C. 5721.43.

After one year from the date of sale of the tax certificate, a certificate holder may file with the county treasurer a request for foreclosure.⁷ R.C. 5721.37(A)(1). As an alternative, a private attorney on behalf of the certificate holder may file with the county treasurer a notice of intent to foreclose. *Id.* Where a request for foreclosure is filed, the prosecuting attorney commences a foreclosure proceeding in the name of the county treasurer to enforce the lien vested in the certificate holder by the certificate. R.C. 5721.37(C)(1). Where a notice of intent to foreclose has been filed by a private attorney, the private attorney commences a foreclosure proceeding in the name of the certificate holder to enforce the lien vested in the certificate holder by the certificate. R.C. 5721.37(C)(2).

When a request for foreclosure or a notice of intent to foreclose is filed under R.C. 5721.37, the certificate holder must submit a payment to the county treasurer that equals the sum of 1) the

⁷ If the certificate holder is a county land reutilization corporation, the corporation may institute a foreclosure action under the statutes pertaining to the foreclosure of mortgages or as permitted under R.C. 323.65-.79 at any time after it acquires the tax certificate. R.C. 5721.37(A)(1).

certificate redemption prices⁸ of all outstanding tax certificates sold on the property, other than tax certificates held by the person requesting foreclosure, 2) taxes, assessments, penalties, interest, and charges appearing on the tax duplicate that are not covered by a tax certificate, and 3) if the foreclosure proceedings are filed by the county prosecuting attorney pursuant to R.C. 323.25, R.C. 323.65-.79, R.C. 5721.14, or R.C. 5721.18, a fee in the amount prescribed by the county prosecuting attorney to cover the prosecuting attorney's legal costs incurred in the foreclosure proceeding. R.C. 5721.37(B). The amount received for the fee prescribed by the prosecuting attorney to pay the prosecuting attorney's legal costs incurred in the foreclosure proceeding, R.C. 5721.37(B)(3), is to be credited to the delinquent tax and assessment collection fund. R.C. 5721.37(D).

In its judgment of foreclosure, the court must enter a finding that includes (1) the amount of the sum of the certificate redemption prices for all the tax certificates sold against the property; (2) interest on the certificate purchase prices of all certificates; (3) the amount paid by the certificate holder under R.C. 5721.37(B)(2) for taxes, assessments, penalties, interest, and charges, plus interest; (4) any delinquent taxes on the property that are not covered by a payment under R.C. 5721.37(B)(2); (5) fees and costs incurred in the foreclosure proceeding instituted against the property, including the fees and costs of the prosecuting attorney represented by the fee paid under R.C. 5721.37(B)(3), plus interest, or the fees and costs of the private attorney representing the certificate holder, and charges paid or incurred in procuring title searches and abstracting services. R.C. 5721.39(A).

The court may order the certificate property to be sold or transferred for not less than the amount of its finding, or if the true value is less than the certificate redemption price, the court may issue a decree transferring title free and clear of all subordinate liens to the certificate holder or as otherwise provided in the Revised Code. R.C. 5721.39(B). A decree of the court transferring fee simple title to the certificate holder is forever a bar to all rights of redemption with respect to the certificate property. *Id.*

Once the sale has been confirmed, the proceeds of the sale are distributed as specified in R.C. 5721.39(D). First, the fees and costs incurred in the proceeding under R.C. 5721.37 are paid, including attorney's fees or county prosecutor's costs that were covered by the fee paid by the certificate holder pursuant to R.C. 5721.37(B)(3). R.C. 5721.37(D)(1). Second, the certificate holder is paid the amount due for the certificate redemption prices of all tax certificates that are sold against the property, any premiums paid by the certificate holder at the time of purchase, and the amounts paid in the fee under R.C. 5721.37(B)(1)-(3) plus interest. R.C. 5721.39(D)(2)(a)-(e). Third, the amount due for taxes, assessments, charges, penalties, and interests not covered by the tax certificate holder's payment under R.C. 5721.37(B)(2) are paid. R.C. 5721.39(D)(3). If the property remains

⁸ The certificate redemption price is the certificate purchase price plus the greater of simple interest or six percent of the certificate purchase price. R.C. 5721.30(E). In certain circumstances not relevant here, the certificate redemption price is the certificate purchase price plus the fee charged by the county treasurer to the purchaser of the certificate under R.C. 5721.32(H). *Id.*

unsold after two attempts to offer it for sale, the property is forfeited to the certificate holder. R.C. 5721.40.⁹

Prosecutor May Not Charge a Fee Unless Specified by Statute

Now that we have explained the background of tax lien foreclosures pursuant to R.C. Chapter 5721, we can now turn to your question whether a prosecuting attorney may charge a fee to recover legal costs incurred in delinquent real estate tax foreclosure proceedings pursuant to R.C. 5721.14 or R.C. 5721.18. “[A] county prosecuting attorney may not charge a fee for any service absent express or implied statutory authority to do so.” 2003 Op. Att’y Gen. No. 2003-005, at 2-28 (overruled on other grounds by 2011 Op. Att’y Gen. No. 2011-017); *see* R.C. 325.36 (“no salaried county official . . . shall collect a fee other than that prescribed by law”); *R.R. Co. v. Lee*, 37 Ohio St. 479 (1882) (county prosecuting attorney, who in response to a citizen request exercised discretionary authority to prosecute a case in magistrate’s court, had no authority to require payment of a fee from that citizen); 1999 Op. Att’y Gen. No. 99-012, at 2-101 (“a county office or officer may not charge a fee for any service absent express or implied statutory authority”). Thus, in order to charge a fee in a foreclosure proceeding under either R.C. 5721.14 or R.C. 5721.18, there must be specific statutory authority to do so.

After detailed review, it does not appear to us that there is any provision in the Revised Code that authorizes a prosecuting attorney to charge a fee for legal costs she incurs in foreclosure proceedings under R.C. 5721.14 or R.C. 5721.18. Rather, in proceedings pursuant to R.C. 5721.14, R.C. 5721.18, or pursuant to R.C. 5721.25, the court calculates the amount of costs that are to be recouped either from the person redeeming the property, R.C. 5721.25, or the sale of the property, R.C. 5721.16(A); R.C. 5721.19(A). Because R.C. Chapter 5721 does not indicate what the term “costs” includes, it is left to the discretion of the trial court. *See* Ohio R. Civ. P. 54(D) (“[e]xcept when express provision therefor is made either in a statute or in these rules, costs shall be allowed to the prevailing party *unless the court otherwise directs*” (emphasis added)); *Hendricks v. Evertz Tech. Serv. U.S.A., Inc.*, 2012-Ohio-2252, at ¶7 (Ct. App. Butler County) (“[t]he assessment of costs is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion”); 1983 Op. Att’y Gen. No. 83-075, at 2-312 (the court has discretion in awarding costs).¹⁰

⁹ There is a process for redemption in proceedings involving the sale of tax certificates just as there is a process for redemption under R.C. 5721.14 and R.C. 5721.18. *See* R.C. 5721.38.

¹⁰ Although what constitute costs is up to the court to decide, prior opinions have touched on what may be included in “costs.” *See* 1972 Op. Att’y Gen. No. 72-122, at 2-466 to 2-467 (discussing available funding options for costs of tax lien foreclosure proceedings for the county prosecuting attorney); 1950 Op. Att’y Gen. No. 1417, p. 58 (costs do not include salaries and costs of supplies in procedures governing forfeiture of land); 1939 Op. Att’y Gen. No. 899, vol. II, p. 1223, at 1228 (listing various potential costs); 1933 Op. Att’y Gen. No. 1519, vol. II, p. 1372 (costs include advertising costs); 1932 Op. Att’y Gen. No. 4097, vol. I, p. 283 (costs include advertising costs); 1931

Had the General Assembly intended to allow the prosecuting attorney to charge a fee in foreclosure proceedings instituted pursuant to R.C. 5721.14 or R.C. 5721.18, it certainly could have done so. For example, R.C. 5721.37(B) authorizes a prosecuting attorney to charge a fee for the prosecutor's legal costs in foreclosure proceedings that are initiated by a tax certificate holder and pursued by the county prosecutor. R.C. 5721.37(B). Charging a fee for legal costs is reasonable in this type of proceeding because the prosecuting attorney is acting on the request of the private individual or entity to whom she is charging the fee. In contrast, foreclosure proceedings initiated pursuant to R.C. 5721.14 or R.C. 5721.18 are not initiated on the request of a private individual, but pursuant to a county prosecuting attorney's statutory obligations. Clearly, the General Assembly intended a different result for proceedings initiated pursuant to R.C. 5721.37 than proceedings initiated pursuant to R.C. 5721.14 and R.C. 5721.18. *See Hyle v. Porter*, 117 Ohio St. 3d 165, 2008-Ohio-542, 986 N.E.2d 1128, ¶17-18 (2008) ("drafters of legislation know the words to use" to effect a particular result); *Metro. Sec. Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81 (1927) ("[h]aving used certain language in the one instance and wholly different language in the other, it will rather be presumed that different results were intended"); *State ex rel. Enos v. Stone*, 92 Ohio St. 63, 66, 110 N.E. 627 (1915) (had the General Assembly intended a particular result, it could have employed language used elsewhere that plainly and clearly compelled that result). Because we answered your first question in the negative, we do not need to address your second question regarding where fees must be deposited.

Op. Att'y Gen. No. 3495, vol. II, p. 1059 (expenses of publishing a notice are paid as costs in a proceeding for foreclosure of delinquent land tax certificates); 1930 Op. Att'y Gen. No. 1483, vol. I, p. 204 (expense of securing service by publication upon necessary party defendants in an action to foreclose the state's lien for delinquent taxes may be paid out of the proceeds of the sale of property as part of the costs in the action); *see also* R.C. 5721.04 (law regarding apportionment of expenses for publishing delinquent tax lists). Certain statutes are also relevant to what might be considered a cost in a tax lien foreclosure proceeding under R.C. Chapter 5721. R.C. 5721.10 provides that the court shall levy as costs in a foreclosure preceding the cost of an abstract or certificate of title to the property if one is required by the court. R.C. 311.17 provides that when an officer or employee, whose salary or per diem compensation is paid by the county, performs certain services, the applicable legal fees and any other extraordinary expenses, including overtime, provided for the service must be taxed as costs in the case and when collected, paid into the general fund of the county. R.C. 311.17. One of these services includes making and executing a deed of land sold on execution, decree, or order of the court, to be paid by the purchaser. R.C. 311.17(B)(5). Prior opinions have interpreted R.C. 311.17 to mean that when property is sold by the sheriff as a result of a delinquent land foreclosure action and the deed for the property is prepared by the prosecutor's office, the costs for making and executing the deed are taxed as costs and paid by the purchaser in accordance with R.C. 311.17. 1961 Op. Att'y Gen. No. 2457, p. 479, at 480-82.

In your letter, you mention 2010 Op. Att’y Gen. No. 2010-010, which addresses foreclosure procedures for abandoned lands, set forth in R.C. 323.65-.79. In that opinion, the Attorney General opined that 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 that the private attorney is employed and compensated in the manner prescribed in R.C. 305.14 and R.C. 305.17. 2010 Op. Att’y Gen. No. 2010-010 (syllabus, paragraph 1). The Attorney General also stated that 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 identifiable cost for purposes of R.C. 323.75(A) that is to be assessed in connection with the foreclosure proceedings under R.C. 323.65-.79. 2010 Op. Att’y Gen. No. 2010-010 (syllabus paragraph 2). R.C. 323.75(A) states that “[t]he county treasurer or county prosecuting attorney shall apportion the costs of the proceedings with respect to abandoned lands offered at 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.” The statute then goes on to say that costs of the proceeding include the 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. R.C. 323.75(A).

Unlike R.C. 323.75, which refers to procedures under R.C. 323.65-.79, neither R.C. 5721.14 nor R.C. 5721.18 grants the county treasurer or prosecuting attorney the power to apportion costs of foreclosure proceedings. Rather, in R.C. 5721.14 and R.C. 5721.18 proceedings, the court is given discretion to calculate these costs, with input from the county treasurer. *See* R.C. 5721.19(A) and R.C. 5721.16(A). Thus, in a proceeding under R.C. Chapter 5721, whether or not the cost of the foreclosure proceeding includes money paid to a private attorney to assist the county prosecuting attorney in handling foreclosure proceedings is a matter for the court to determine in its discretion.

Conclusion

For the reasons discussed above, it is my opinion, and you are hereby advised that a prosecuting attorney may not charge a fee to recover legal costs incurred in delinquent real estate tax foreclosure proceedings initiated pursuant to R.C. 5721.14 or R.C. 5721.18.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General