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# COUNTY ADVISORY BULLETIN

**CAB**

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**Bulletin 2016-03**

**AUGUST 2016**

## **EXPEDITED REAL PROPERTY FORECLOSURE**

**APPLICABLE LEGISLATION:** HB 390 (131st General Assembly)

**REVISED CODE SECTIONS EFFECTED:**

**Amends sections:** 301.28, 323.47, 1303.38, 2303.26, 2327.01, 2327.02, 2327.04, 2329.01, 2329.151, 2329.17, 2329.18, 2329.19, 2329.20, 2329.21, 2329.26, 2329.271, 2329.28, 2329.30, 2329.31, 2329.33, 2329.34, 2329.39, 2329.45, 2329.52, 2329.56, 2909.07, 5302.01, 5721.371, 5721.39, 5739.01, and 5739.02

**Enacts sections:** 2308.01, 2308.02, 2308.03, 2308.04, 2329.071, 2329.152, 2329.153, 2329.154, 2329.211, 2329.311, 2329.312, 5302.31, 5721.372, and 5721.373

**LEAD SPONSOR:** Representative Dever

**EFFECTIVE DATE:** September 26, 2016

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### **BACKGROUND**

This proposal was initially introduced as HB 463, sponsored by Representative Dever (R-Cincinnati), and was amended into HB 390 which became the vehicle for a multitude of issues that was passed by the Legislature during the final week of the 2016 Session prior to the pre-election recess. The provisions are aimed at creating a fast-track mortgage foreclosure process for vacant and abandoned residential properties and expediting the foreclosure and transfer of unoccupied, blighted parcels. Because it often takes properties a long time to move through the current process, blight has become a serious public policy concern.

The provisions will cut down mortgage foreclosures for vacant and abandoned properties to as little as 75 days, provides judicial oversight to ensure that the property is actually vacant and abandoned, and stops the foreclosure process if a borrower contests the foreclosure action.

A major component of the bill is designed to modernize the sheriff sale process. The intent is to move the sale from the courthouse steps to a single website for use by all county sheriffs for online sales with the goal of opening up the process to a wider audience and ultimately obtaining higher sale prices. The Department of Administrative Services is required to issue a request for proposals for a new online sheriff sale website, which eventually must be used by sheriffs across the state to reduce the administrative costs of foreclosure sales.

## **OHIO MORTGAGAGE FORECLOSURE PROCESS**

There are two primary types of foreclosure processes in the U.S. Under judicial foreclosure a court conducts and oversees the process and the plaintiff obtains title only if the plaintiff is the successful bidder at auction. In the nonjudicial process, a lender or a trust may obtain title after a notice of foreclosure and then may sell the property, often at private auction. Ohio has the judicial form of foreclosure.

In Ohio, the holder of the mortgage note, usually the mortgagee, must file a complaint in a court of common pleas to initiate the foreclosure action. After a hearing in which the homeowner has an opportunity to be represented and heard, a court can issue a judgment in favor of the plaintiff mortgage holder. Then, the holder must file for a writ of execution of that judgment, which directs the sheriff to sell the property at auction. Upon receiving that order of sale, a sheriff has the property appraised and sells it at auction.

Before the title of the property may transfer to the purchaser, the court must confirm the sale, indicating that the entire foreclosure procedure was conducted pursuant to the laws governing foreclosure. Only after the court's confirmation of the sale does the entity who was the successful bidder at auction obtain title to the property. The homeowner has until the court's confirmation of the sale to redeem the property and pay the amount owed. Ohio law also grants the mortgage holder the right to obtain a deficiency judgment against the homeowner if the proceeds of the sale do not cover the amount the homeowner owed on the mortgage.

Mortgage foreclosure procedures in Ohio are governed by the Ohio Rules of Civil Procedure, common law, statute, and local court rules. The early stages of foreclosure, including the filing for a foreclosure action and the notice provided to parties, are governed primarily by the Rules of Civil Procedure. The sale procedures and court confirmation are primarily governed by statute.

## **THE NEW EXPEDITED FORECLOSURE OPTION FOR VACANT AND ABANDONED RESIDENTIAL PROPERTY**

The hallmark of the reform creates an expedited foreclosure option if the residential property is determined to be vacant and abandoned. When the mortgagee files a foreclosure action on a residential property, it is also permitted to file a motion with the court to proceed in an expedited manner on the basis the property is vacant and abandoned.

The bill provides that in deciding the motion to proceed in an expedited manner, the court is required, in addition to determining by a preponderance of the evidence that the traditional

elements of a foreclosure are present, to also find by clear and convincing evidence that at least three of the following factors are true to support a determination that the property in fact is abandoned and vacant [ORC Sec. 2308.02(C)]:

1. No one appears to be residing in the property at the time of an inspection of the property;
2. Gas, electric, sewer, or water utility services to the property have been disconnected;
3. Windows or entrances to the property are boarded up or closed off, or multiple window panes are broken and unrepaired;
4. Doors on the property are smashed through, broken off, unhinged, or continuously unlocked;
5. The property is sealed because, immediately prior to being sealed, it was considered by the appropriate official of a county, municipal corporation, or township in which the property is located to be open, vacant, or vandalized;
6. Junk, litter, trash, debris, or hazardous, noxious, or unhealthy substances or materials have accumulated on the property;
7. Furnishings, window treatments, and personal items are absent from the structure on the land;
8. The appropriate official of a county, municipal corporation, or township in which the property is located provides a written statement or statements indicating that the structure on the land is vacant and abandoned;
9. The property is the object of vandalism, loitering, criminal conduct, or there has been physical destruction or deterioration of the property;
10. A mortgagor issues a written statement expressing the intent of all mortgagors to abandon the property;
11. Other reasonable indicia of abandonment exist.

If the court decides that the property is vacant and that the mortgagee who filed the motion to proceed in an expedited manner is entitled to judgment, the court will enter a final judgment and decree of foreclosure and order the property to be sold for the benefit of the mortgagee who is now the judgement creditor. Under the new, expedited proceedings, the officer conducting the sale, which is usually the county sheriff or may be a private selling officer, must offer the property for sale within 75 days after the issuance of the order of sale. The sale must be conducted in accordance with existing execution of property procedures found in ORC Chapter 2329.

## **THE FORECLOSURE SALE PROCESS**

In every foreclosure action demanding the judicial or execution sale of real property, the county sheriff sells the property at a public auction. The judgement creditor, however, may file a motion with the court requesting a private selling officer to sell the property at a public auction. In some instances, the court may designate a private selling officer to sell the property and the judgment creditor can either seek to have the property sold by the private selling officer authorized by the court or by the county sheriff. In either case, the sheriff must first conduct an appraisal to determine the value of the foreclosed property and file a copy of the appraisal with the clerk of court.

The new provisions change the procedures for judicial or execution sale of residential property after the first attempt. The procedure for the first sale at public auction remains the same as under existing law. The auction must obtain a sale price that is not less than two-thirds of the appraised value. The new provisions require that if a sale of the residential property is held at a physical location and not online and does not obtain the minimum required bid of 2/3 of the

appraised value, a second auction is required with no set minimum bid and the property is to be sold to the highest bidder. The second auction must be held not earlier than seven days and not later than thirty days after the first auction. If the property remains unsold after two auctions, the sheriff or private selling officer is allowed to offer the property for sale with no set minimum bid or the property may be disposed of in any other manner provided by law. This differs from existing law, which allows the court, on motion of the plaintiff or defendant, to order a new appraisal and sale or direct the amount for which the property may be sold if the property remains unsold after the first sale [ORC Sec 2329.52(B)].

The new procedures authorize both the sheriff and a private selling officer to sell the foreclosed property online. The private selling officer may use any online sales site; however, the sheriff ultimately will be required to utilize the official public sheriff sale website which is established under the new provisions.

### **OFFICIAL PUBLIC SHERIFF SALE WEBSITE AND INTEGRATED AUCTION MANAGEMENT SYSTEM [ORC Sec. 2329.153]**

HB 390 requires the creation of the official public sheriff sale website. Within 90 days of the effective date of the bill, the Department of Administrative Services is to solicit competitive sealed proposals for the creation, operation, and maintenance of the official public sheriff sale website and an integrated auction management system. The website and the integrated auction management system must be a single statewide system that will be used by all county sheriffs in accordance with the requirements under the bill. The winning bidder must work with sheriffs and other groups to address issues regarding the website, including potential cost and recoupment, details of the implementation of the online system, and other unresolved concerns. The minimum requirements for the website are outlined in ORC Sec 2329.153(B) and for the auction management system are outlined in ORC Sec 2329.153(C). [The complete text of this new Section is attached as an addendum to this CAB]

One of the minimum requirements for the website is that it accept online financial transaction device payments. [ORC 2329.153(B)(5)]. Consequently, the county commissioners' authority to adopt policies for the acceptance of payments by financial transaction devices for county expenses had to be amended by including online financial transaction device payments made through the official public sheriff sale web site pursuant to section 2329.153 of the Revised Code as a "county expense." [ORC Sec. 301.28(A)(2)]

The sheriffs will eventually be required to utilize this website. For a judicial sale of residential real property, the official public sheriff sale website may be used to conduct the sale not later than beginning in September 2017 and during the five-year period after which the website is fully operational. After this five-year period, the judicial sale of residential property must be conducted on the website. Judicial sales of commercial property may be conducted on the website at any time. All sales conducted on the website must be open for bidding for at least seven days. In addition, a sheriff is permitted to conduct a dual real property foreclosure sale on the official public sheriff sale website and at a physical location considered appropriate by the sheriff.

The costs associated with the operation of the website will be recovered through a license fee charged for each use of the website. The license fee for the creation, operation, and maintenance of the official public sheriff sale website and integrated auction management system must be determined using a per-transaction license fee model or a per-use license fee model. The addition of a property to the website or the auction management system is

considered a transaction for purposes of determining the license fee. The license fee applicable to each judicial sale of real property is to be taxed as costs in the case and no other license fees or costs may be assessed to the county sheriff.

### **PAYMENT OF PROPERTY TAXES FROM PROPERTY SALE PROCEEDS MODIFIED**

HB 390 modifies how property taxes are determined and paid when real property is sold under judicial foreclosure. Under current law, a court is required to discharge from the proceeds of such a sale the property taxes, assessments, penalties, and interest ("property charges") that are a lien on the property as of the day the deed is transferred, including undetermined (pro-rated) taxes. The county treasurer is required to estimate the amount that will be payable as of that day in order for the court to determine how much of the proceeds to pay toward the property charges. If the treasurer's estimate ultimately exceeds the property charges "actually payable" as of that date, the excess is refunded to the property's purchaser. In the case of a judicial sale, the amount payable is the current year's taxes pro-rated to the date of the confirmation of sale plus any unpaid taxes from prior years. Under continuing law, if the estimate is less than the actual amount payable, that shortfall becomes due and payable at the next semiannual property tax payment date.

The bill continues to require that the property charges be paid, but only those charges that are a lien as of the date of the sale, rather than the date the deed is transferred. Additionally, the bill no longer requires the treasurer to estimate the amount payable on that date. But if the treasurer does complete an estimate, and the estimate exceeds the amount of charges actually payable on the date of sale, the bill no longer requires the excess to be refunded to the purchaser. This also allows a bank who foreclosed and then bought the property at the sale the option of paying the pro-rated taxes now or wait until they sell the property and the title company can pro-rate as part of that transaction. Instead, the treasurer will hold that excess until the judgment creditor requests that the treasurer refund that amount to the lienholders or, if all such liens are satisfied, to the court for appropriate distribution. These changes help to establish the sale date as the definitive date upon which the "property charges" are calculated and determined. These changes also allow greater flexibility to determine "Property Charges" while also allowing the pro-rated taxes to be paid from a closing if the Plaintiff (i.e. bank) buys the property at the Court ordered sale. This concrete date set in the statute establishes uniformity and reduces the need to try to hit a moving target of the deed transfer date.

The bill's changes will not have a direct effect on the revenue collected but may impact the timing of when taxes are paid. The law still provides that the property taxes are not to be extinguished even if at the second sale the price is not enough to cover the taxes. Consequently, even though a new owner may pick up a property at a significant discount they will take title subject to the taxes on the property.

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### **ADDENDUM: NEW LANGUAGE REGARDING THE OFFICIAL PUBLIC SHERIFF SALE WEBSITE AND INTREGATED AUCTION MANAGEMENT SYSTEM [ORC Sec. 2329.153]**

**Sec. 2329.153.** (A) Not later than ninety days after the effective date of this section, the department of administrative services shall solicit competitive sealed proposals for the creation, operation, and maintenance of the official public sheriff sale website and an integrated auction management system. The official public sheriff sale website and integrated auction

management system shall be a single statewide system for use by all county sheriffs in accordance with the requirements of this section.

(B) The official public sheriff sale web site shall meet the following minimum requirements:

- (1) The website shall have a domain name relevant to the judicial sale of real property.
- (2) The website shall be limited to the judicial sale of real property located in this state.
- (3) The website shall not charge a fee for members of the public to view properties for sale.

(4) The website shall allow each county sheriff to add text, images, or graphics to the web site for the purpose of identifying the county or sheriff conducting the sale.

(5) The website shall include industry-standard features and functionality, including user guides, online financial transaction device payments, anti-snipe functionality, watch lists, electronic mail notifications, maximum bid limits, automatic incremental bidding, and search and map features that allow users to search by county, zip code, address, parcel number, appraised value, party name, case number, and other variables relevant to the judicial sale of real property. As used in this section, "financial transaction device" has the same meaning as in section 301.28 of the Revised Code.

(6) The website shall include features that allow for the cancellation of sales as required by law or court order and the postponement of sales in accordance with divisions (E)(2) and (3) of this section.

(7) The website shall provide a secure payment processing system that accepts online payments for property sold via the website and, in an efficient and cost effective manner, transfers those payments to the appropriate county official or account.

(8) The website shall include the ability for an attorney or law firm to enter a bid in a representative capacity.

(9) The website shall be integrated with the auction management system described in division (C) of this section.

(C) The auction management system shall meet the following minimum requirements:

(1) The auction management system shall have a role-based workflow engine to assist in conducting sales on the website, capturing data, complying with all relevant laws, and managing administrative processes related to the judicial sale of real property in a timely, secure, and accurate manner.

(2) The auction management system shall record the data necessary to meet the reporting requirements of section 2329.312 of the Revised Code.

(3) The auction management system shall be able to generate documents required by the court ordering the sale or related to the judicial sale of real property.

(4) The auction management system shall be able to record fees, costs, deposits, and other money items with the objective of ensuring an accurate accounting of moneys received and disbursed in each judicial sale of real property.

(5) The auction management system shall be integrated with the website described in division (B) of this section.

(D) The license fee for the creation, operation, and maintenance of the official public sheriff sale web site and integrated auction management system shall be determined using a per-transaction license fee model or a per-use license fee model. The addition of a property to the official public sheriff sale web site or the auction management system shall each be deemed a transaction for purposes of determining the license fee. The license fee applicable to each judicial sale of real property shall be taxed as costs in the case. No additional license fees shall be assessed to the county sheriff.

(E)(1) Not later than one year after the effective date of this section, in all cases in which the sheriff is ordered to conduct a judicial sale of real property, the following shall occur:

(a) For residential property, the sale may be conducted on the official public sheriff sale web site for a five-year period beginning on the date the online system is fully operational. After this five-year period, sales shall be conducted on the official public sheriff sale web site.

(b) For commercial property, the sale may be conducted on the official public sheriff sale website. All sales conducted on the official public sheriff sale web site shall be open for bidding for at least seven days.

(2) If the sale of the real property is to be conducted on the official public sheriff sale web site, the judgment creditor may instruct the sheriff to postpone the sale of the real property one time for up to one hundred eighty days after the initial sale date. Upon receiving such instruction for postponement, the sheriff shall postpone the sale of the property by announcing on the official public sheriff sale web site that the sale is postponed and giving notice of the rescheduled sale date. This announcement shall be deemed to meet the notice requirement of section 2329.26 of the Revised Code.

(3) If the judgment creditor does not wish to postpone the sale of the real property, the judgment creditor may instruct the sheriff to cancel the sale of the property. Upon receiving this instruction, the sheriff shall cancel the sale of the property by announcing on the official public sheriff sale web site that the sale is canceled. This announcement shall remain posted on the official public sheriff sale web site until at least the end of the seven-day bidding period described in division (E)(1) of this section.

(4) If the sale of the real property is postponed or canceled according to divisions (E)(2) and (3) of this section, all bids made on the real property prior to the postponement or cancellation of the sale shall be void.

(F) Pursuant to their authority in section 9.482 of the Revised Code, counties may elect to enter into a shared services agreement relating to the judicial sale of real property on the official public sheriff sale website. The shared services agreement may seek to improve efficiency and reduce costs in the judicial sale of real property by consolidating administrative functions and processes.