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October 4, 2021

ATTORNEY GENERAL OPINION NO. 2021- 3

The Honorable David Haley
State Senator, 4th District
936 Cleveland Avenue
Kansas City, KS 66101

Re: Taxation—Judicial Foreclosure and Sale of Real Estate by County—Order of Sale; Publication Notice; Auctioneer May Be Employed; Procedure for Bidding in Behalf of County; Deed, Execution and Recordation

Synopsis: K.S.A. 79-2804 requires foreclosure sales be held by public auction. The requirement for public auction is satisfied by use of an online auction site with members of the public being allowed an in-person place in the county to observe or bid. Kansas law does not specifically require a public auction be held solely in person. Cited herein: K.S.A. 58-1015, 75-4317a, 79-2302, 79-2303, 79-2306, 79-2401a, 79-2801, 79-2803, 79-2804.

* * *

Dear Senator Haley:

As State Senator for the 4th District, you ask for our opinion on whether an online auction conducted only electronically over the internet constitutes a public auction and satisfies statutory requirements for a tax sale of real estate for delinquent property taxes pursuant to K.S.A. 79-2801 *et seq.* and any other applicable provisions of law.

Specifically, you question whether a county's use of an online auction service to conduct an auction of real estate for delinquent property taxes satisfies the statutory requirements of K.S.A. 79-2804.

You explained that Wyandotte County (hereinafter "County") conducts its delinquent property tax sales online through an auction site.¹ The County advertises that the sale will take place via online auction. In addition, the County maintains computer terminals with in-person staff assistance at Memorial Hall during the day of the auction. The County provides a method for bidders to make payment in person at Memorial Hall or to make payment online.

As discussed below, we conclude that K.S.A. 79-2804 requires the tax sale of delinquent property to be held through public auction, but does not specify that the public auction be held entirely in person.

In July of each year, each county treasurer prepares a list of real estate for which taxes are delinquent.² After publication of this list and accompanying notice pursuant to K.S.A. 79-2303 *et seq.*, any property that remains subject to the automatic tax lien arising when taxes become delinquent may be "bid off" or sold for the amount of the unpaid taxes and legal charges due on the property.³ We note that the county treasurer is the only entity allowed to bid in this sale.⁴ The real property sold to the county under K.S.A. 79-2306 is then held for two years from the date of the sale, unless the property is redeemed pursuant to K.S.A. 79-2401a, until it can be sold in foreclosure pursuant to K.S.A. 79-2801 *et seq.*

K.S.A. 79-2801 *et seq.* establish and authorize the procedure by which real property may be judicially foreclosed upon and sold at public auction. Once the foreclosure petition authorized by K.S.A. 79-2801 has been filed, the property owner has one final opportunity to redeem the property before the day of the sale.⁵ K.S.A. 79-2804 governs the procedure through which delinquent property is placed for public auction and sold after entry of judgment in a foreclosure action. K.S.A. 79-2804 requires the following:

[T]he sheriff of the county ... shall ... cause notice of sale to be published once each week for three consecutive weeks in some newspaper of general circulation in the county. ... The notice shall state that the sale will be held at the front door of the courthouse in the county or shall identify some other location in the county where the sale will be held, as selected by the chief judge of the judicial district in which the county is located.

On the day fixed for the sale by such notice, the sheriff shall offer each such tract, lot or piece of real estate for sale, separately, and the same shall be

¹ Wyandotte County conducts these auctions through CivicSource. CivicSource is an online auction company that requires registration in order to bid or view auctions. There is no cost to register for this service. <https://www.civicsource.com/> (last accessed 9/28/2021).

² K.S.A. 79-2302.

³ K.S.A. 79-2306.

⁴ See Attorney General Opinion 2007-01 (discussing the property tax cycle and process for foreclosure of delinquent real property).

⁵ K.S.A. 79-2803 (providing the process by which the property may be redeemed before the day of the sale by the owner or holder of the record title, his or her heirs, devisees, executors, administrators, assigns, or any mortgagee or his or her assigns).

sold at *public auction* for the highest and best bid obtainable therefor. The sheriff may employ an auctioneer for such reasonable compensation as may be determined by the court, to be allowed as a part of the costs and expenses of the proceedings and sale.⁶

In the scenario you describe, it appears that notice was properly given. The next requirement of the statute is that the sale be held "at the front door of the courthouse in the county or ... some other location in the county ..., as selected by the chief judge of the judicial district in which the county is located."⁷ We interpret this provision as requiring that the sale be conducted in a way that allows people to attend in person at a defined location in the county and make bids. The statute contains no prohibition on online participation. We opine that allowing people to participate electronically from remote locations is permissible, so long as members of the public are permitted to attend and participate in person at a physical location in the county. We also note that the Wyandotte County District Court approved the details of the sales.

Whether an online internet auction complies with the public auction provisions of K.S.A. 79-2804 depends on whether the word "public" requires in-person attendance to conduct or participate in the statutorily-required auction. The most fundamental rule of statutory construction is that the intent of the Legislature governs if it can be ascertained.⁸ In order to determine the legislative intent, the courts first look to the plain language in the statute, giving common words their ordinary meanings. If the language is clear and unambiguous, the courts do not engage in speculation as to the legislative intent.⁹

K.S.A. 79-2801 *et seq.* do not provide a definition for public auction, public, or auction. The only Kansas statute that defines "public auction" is found in the new goods public auction law (K.S.A. 58-1014 *et seq.*) and applies only to public auction sales of new goods, wares and merchandise by itinerant merchants. K.S.A. 58-1015 states "(e) "public auction" means the offering for sale or selling of new goods, wares or merchandise to the highest bidder or offering for sale or selling of new goods, wares or merchandise at a high price and then offering the same at successive lower prices until a buyer is secured." The Kansas Supreme Court has stated, "[t]he public auction sale is as old as the law of sales and is generally understood to be a public sale of property to the highest bidder. An essential element of an auction sale is competitive bidding and any sale without competitive bidding which is based on a fixed or negotiated price is not an auction sale."¹⁰ An auction that is advertised to the public and conducted online meets these definitions.

The term "public" is not defined in the statute, so we give that word its ordinary meaning, in accordance with the fundamental rules of statutory construction discussed above. "Public" means "1. Of, relating to, or involving an entire community, state, or

⁶ Emphasis added.

⁷ K.S.A. 79-2804.

⁸ *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 918 (2013).

⁹ *Id.*

¹⁰ *Feaster Trucking Serv., Inc. v. Parks-Davis Auctioneers, Inc.*, 211 Kan. 78, 82 (1973).

country. 2. Open or available for all to use, share, or enjoy.”¹¹ Similarly, the term “auction” is not defined in the statute. “Auction” means “[a] public sale of property to the highest bidder; a sale by consecutive bidding, intended to reach the highest price of the article through competition for it.”¹² The statute is silent as to the method of auction to be used – it does not designate that bids be made orally or with auction paddles, for instance, and it does not forbid online bid-casting.¹³ We will not read into the statute something not readily found in it.¹⁴ Here, K.S.A. 79-2804 requires sale to the highest and best obtainable bidder by public auction. Because we find that the language of K.S.A. 79-2804 is plain and unambiguous, there is no need to resort to statutory construction or review legislative history to ascertain the Legislature’s intent.¹⁵

Your request also references the provisions of the Kansas Open Meetings Act (hereinafter “KOMA”) (K.S.A. 75-4317 *et seq.*). We note that the provisions of K.S.A. 79-2804 control the process through which a public auction is conducted for the sale of delinquent real property, not the KOMA. However, we note that the KOMA specifically provides for the use of a telephone or other medium for interactive communication as means to conduct meetings covered by the act.¹⁶

Finally, we note that the questioned auctions that are the subject of your request are not conducted solely online. The County continues to provide a physical location that allows in-person attendance at these public auctions at Memorial Hall and provides access to computer terminals to view and/or participate in these auctions. In addition, the County provides staff to assist members of the public with the use of these computer terminals during the time of the auctions. K.S.A. 79-2804 also allows the County Sheriff to employ the use of an auctioneer to conduct these auctions. CivicSource acts as auctioneer of these sales. We find no requirement in the statute that the auctioneer need be physically present at the location of the public auction.

In summary, we conclude that K.S.A. 79-2804 does not require that judicial foreclosure auctions be held solely in person and that an online auction site functioning as an

¹¹ *Public*. Black’s Law Dictionary (11th ed. 2019).

¹² *Auction*. Black’s Law Dictionary (11th ed. 2019).

¹³ Several states conduct public auctions for the disposition of judicial foreclosures. See Laura B. Bartell, *Tax Foreclosures As Fraudulent Transfers - Are Auctions Really Necessary?*, 93 Am. Bankr. L.J. 681, 696 (2019) (stating that approximately half of the states conduct some form of auction for delinquent real property). Some states specifically list online auctions as a manner of conducting a public auction. See Colo. Rev. Stat. Ann. § 39-11-108 (“A public auction conducted by means of the internet or other electronic medium to sell lands and town lots under this article shall allow members of the public to submit bids by computer and permit the treasurer to accept bids for as long as the treasurer deems necessary.”); Ohio Rev. Code Ann. § 5721.39 (“The officer to whom the order of sale is directed may conduct the public auction of the parcel at a physical location in the county in which the parcel is located or online.”). We note that these states discuss online or in-person auctions as types of public auction. Some states specify the requirement for in-person attendance. See Ark. Code Ann. § 26-37-202. Most states only refer to a public auction without providing more specificity for location. See Cal. Rev. & Tax Code § 3693.

¹⁴ *Northern Natural Gas Co.*, 296 Kan. at 918.

¹⁵ *State v. Pulliam*, 308 Kan. 1354, 1364 (2018).

¹⁶ K.S.A. 75-4317a; see also K.A.R. 16-20-1 discussing the use of mediums of interactive communication to conduct meetings during a period of emergency declaration.

auctioneer on behalf of the Sheriff satisfies the requirement to hold a public auction found in the statute. Moreover, we also conclude the County's provision of a physical location in the county, computer terminals, in-person payment option, and staff assistance provides the required physical location component to the questioned auctions.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Kansas Attorney General

/s/Philip R. Michael

Philip R. Michael
Assistant Attorney General

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