

**LETTER OPINION
2002-L-56**

October 14, 2002

Mr. Paul Murphy
Steele County State's Attorney
PO Box 355
Finley, ND 58230-0355

Dear Mr. Murphy:

You ask whether the sheriff is entitled to a commission under N.D.C.C. § 11-15-08 regarding a foreclosure by advertisement. Section 11-15-08, N.D.C.C., provides that the sheriff is entitled to a commission¹ "on all moneys received and disbursed by the sheriff on an execution, order of sale, order of attachment, requisition in claim and delivery, or decree for the sale of real . . . property." Furthermore, N.D.C.C. § 35-22-01 provides for the foreclosure by advertisement of a mortgage of real property held by the state. As in a foreclosure by action, a sale of the mortgaged premises in a foreclosure by advertisement is made at the front door of the courthouse by the sheriff or deputy pursuant to the notice of sale. N.D.C.C. §§ 32-19-08², 35-22-08. See also Stutsman County v. Wright, 170 N.W. 326, 327 (N.D. 1918) (sheriff is duty bound to make foreclosure sales on mortgages foreclosed by advertisement).

Foreclosure by advertisement is allowed only if no action or proceeding at law has been instituted or if instituted, discontinued, or if in an action, an execution upon a judgment has been returned unsatisfied. N.D.C.C. § 35-22-02(2). In a foreclosure by advertisement there is no judicial involvement unless a mortgagor raises a counterclaim or other valid defense in which case the foreclosure proceeds by action. N.D.C.C. § 35-22-04. Thus, in a foreclosure by advertisement, leading to sale, there is no "execution, order of sale, order of attachment, requisition in claim and delivery, or decree for the sale of real . . . property" which is a prerequisite to the collection of a commission under N.D.C.C. § 11-15-08(1). See also, 1991 N.D. Op. Att'y Gen. F-09 ("N.D.C.C. § 11-15-08 . . . is a legislative effort to

¹ The commission is \$50 for the first \$1,000 and one percent on all moneys in excess of \$1,000. N.D.C.C. § 11-15-08(1).

² A sale of mortgaged real property following a judgment of foreclosure is to be made by the sheriff, a deputy sheriff, or some person appointed by the court as for an execution sale. The requirements for an execution sale are contained in N.D.C.C. ch. 28-23.

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define when commissions may be received by a sheriff for enforcement of court process.”).

A similar issue was addressed in 1972-74 N.D. Op. Att’y Gen. 399. A sheriff charged the State Land Department a commission under N.D.C.C. § 11-15-09 relating to a fee allowed when a plaintiff bids at an execution or foreclosure sale. Attorney General Helgi Johanneson noted that section 11-15-09 does not relate to a mortgage foreclosure by advertisement but to an execution or order of sale. Id.

The commission allowed under N.D.C.C. § 11-15-08 pertains to the enforcement of a court proceeding. It is therefore my opinion that a sheriff selling real property that has been foreclosed by advertisement is not entitled to a commission under N.D.C.C. § 11-15-08 because a sale in a foreclosure by advertisement does not pertain to a court proceeding.³

Sincerely,

Wayne Stenehjem
Attorney General

tam/vkk

³ However, N.D.C.C. § 11-15-07(10) allows a sheriff to collect a fee of \$50 for “selling real or personal property under foreclosure of any lien or mortgage.”