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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER  
ATTORNEY GENERAL

February 18, 2004

Gary T. Pope, Esquire  
Newberry County Attorney  
Post Office Box 156  
Newberry, South Carolina 29108

Dear Mr. Pope:

You have requested an advisory opinion from this Office regarding the applicability of Hawkins v. Bruno Yacht Sales, 353 S.C. 31, 577 S.E.2d 202 (2003), to delinquent tax sales conducted in 2002 by the Delinquent Tax Collector for Newberry County. You have indicated that the levy notices issued by the County for the thirty-three parcels of real property sold at the 2002 delinquent tax sales contained the following language:

... FINAL TAX NOTICE. . . TAXES, PENALTIES, AND COSTS MUST BE PAID  
BY SEPTEMBER 30, 2002 OR PROPERTY WILL BE ADVERTISED AND SOLD  
ON THE FIRST MONDAY IN NOVEMBER.

Because the Supreme Court in Hawkins held that a levy notice which sets an artificial deadline for full payment on a date prior to the tax sale date violates S.C. Code Ann. Section 12-51-40 (Supp. 2003) and is thus defective, it is your position that the Newberry County tax levy notices for 2002 are defective pursuant to Hawkins. You have expressed concern on the effect that this will have on the parcels of real property that were sold by the County Delinquent Tax Collector in 2002. You have noted that tax titles have not yet been issued on these thirty-three parcels of property. Based on your conclusion that the 2002 levy notices are defective under current state law, you have asked the following questions:

1. Is our Delinquent Tax collector required to void the entire tax sale as to the remaining, unredeemed properties and send new notices to these 33 defaulting taxpayers, and thereafter conduct a new sale, if the taxes are not paid;
2. Are the sales conducted using the defective notice merely voidable by the court if someone complains, instead of void *ab initio*, and if that is the case, if the bidder demands his tax title, is the Delinquent Tax Collector required

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to issue the tax titles to the parcels sold at the 2002 tax sale, in spite of the defective notice;

3. Since the Supreme Court ruling came out in February 2003, and our sale was conducted several months before that, is the rule prospective only, and applicable only to sales held after the date of the Supreme Court opinion? If that is the case, should Newberry County proceed to issue tax titles for properties sold at the 2002 sale; and
4. If the tax sale is voided under §12-51-150 pursuant to Hawkins, is the County obligated to pay interest on the moneys paid by the successful bidders who were expecting to receive tax titles and whose money was tied up for over a year, awaiting the end of the redemption period, and if so, at what rate.

As a threshold matter, we will first address your third question regarding whether Hawkins should be applied retroactively or should only operate prospectively. We would note that determinations on the retroactive effect of court decisions are typically close questions that can only be conclusively answered by the courts themselves. This Office advised in an opinion dated July 6, 1983 that, "[T]his office is not a court and it would be presumptuous, if not impossible to accurately predict whether a court would apply [a court decision] prospectively or retroactively. The issue must be decided on a case by case basis." With this caveat in mind, we will give you our best legal opinion as to how a court, in the context of Hawkins, would rule on the question of retroactivity.

The Supreme Court of South Carolina provided an analysis for whether one of its decisions should be applied retroactively, or prospectively only in Hardaway v. County of Lexington, 314 S.C. 22, 443 S.E.2d 569 (1994). As a general matter, "...a judicial decision that creates a new liability where none formerly existed is applied prospectively only." Hardaway, 314 S.C. at 24, *citing* Toth v. Square D, 298 S.C. 6, 377 S.E.2d 584 (1989). The majority in Hardaway (a 3-2 decision) determined that it should not retroactively apply Bailey v. State, 309 S.C. 455, 424 S.E.2d 503 (1992), in which it held that counties are liable for reasonable attorneys fees and costs beyond those set forth by the Defense of Indigents Act.

Conversely, if the case being applied is simply an interpretation of a statute, through which the court merely recognizes liabilities that were created by the Legislature at the time that the statute was enacted, then the case should be applied retroactively. Hardaway, 314 S.C. at 25 (Harwell, C.J., dissenting). The dissent in Hardaway referenced that in State v. Southern Farm Bureau Insurance Company, 265 S.C. 402, 219 S.E.2d 80 (1975) the litigants attempted to have the Court prospectively apply its decision in Lindsay v. Southern Farm Bureau Casualty Insurance Company, 258 S.C. 272, 188 S.E.2d 374 (1972) which was a declaratory judgment action involving the interpretation of two statutes. The Court rejected the attempt stating

Life and Casualty now take the position that Lindsay v. Southern Farm, supra, being a declaratory judgment only, is not retroactive in effect. They ask the Court to hold that our opinion is to be applied prospectively only. We think the position is untenable. Our ruling was not the making of new law for prospective application; it was the construction of a statute which had been the law since its enactment in 1934...Accordingly, we find the exception without merit and hold that our opinion in Lindsay v. Southern Farm, supra, was retroactive in its nature and effect.

443 S.E.2d at 571-572.

Applying these principles to the question at hand, it is the opinion of this Office that the rule in Hawkins v. Bruno Yacht Sales would likely be applied retroactively by the courts. The decision in Hawkins does not appear to create new liabilities, but it simply recognizes liabilities created by the General Assembly when Section 12-51-40 was enacted. The treatment given by the Hawkins court to the levy notice issued by Beaufort County is dispositive to this conclusion. The Beaufort County levy notice read as follows:

IF NOT PAID ON OR BEFORE 31 AUGUST THIS PROPERTY WILL BE DULY  
ADVERTISED AND SOLD FOR DELINQUENT TAXES AS DESCRIBED  
ABOVE ON THE FIRST MONDAY IN OCTOBER THIS YEAR.

353 S.C. at 37. The Court unequivocally held that notices of delinquent personal property taxes that set an artificial deadline for payment of taxes, which fall before the date of the tax sale, fail to comply with the requirements laid out in Section 12-51-40(b) of the Code.<sup>1</sup> Id. Furthermore, the Court held that strict compliance with the notice requirements for tax sales is necessary, and that, "failure to give the required notice of a tax sale is a fundamental defect in the tax sale proceedings that renders the proceedings **absolutely** void." 353 S.C. at 36. The Hawkins Court therefore held that the sale of the boat in question must be rendered absolutely void as a direct result of the defective levy notice. It should be noted that the Court did not, either expressly or by implication, hold that its interpretation of Section 12-51-40(b) should be given prospective application only, or limit its retroactive application to only the Beaufort County levy notice. The language of the Beaufort County levy notice in Hawkins is essentially identical to the 2002 Newberry County levy notice. The courts would, therefore, probably apply the Hawkins holding retroactively to the Newberry County tax sales, just as Hawkins itself applied its interpretation of the notice statute to the Beaufort County tax sale at issue in that case. Accordingly, it is likely that a court would hold

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<sup>1</sup> S.C. Code Ann. §12-51-40(b) mandates that, "all delinquent notices shall specify that if the taxes, assessments, penalties, and costs are not paid **before a subsequent sales date**, the property must be duly advertised and sold for delinquent property taxes, assessments, penalties, and costs". (emphasis added).

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the 2002 Newberry County delinquent tax sales, made under the defective levy notices, to be absolutely void pursuant to Section 12-51-40(b) of the Code.

While we advise that a court would likely give Hawkins retroactive effect and declare void the tax sales in question, a plausible argument could certainly be made, on public policy grounds, to limit Hawkins to prospective application only. You have indicated in your letter that many other counties around the state were using artificial payment deadlines, in a manner similar to Newberry County, before Hawkins proscribed such deadlines. This fact may demonstrate that prior to Hawkins, Section 12-51-40(b) was less than clear to the counties that administered it. Furthermore, it is certainly foreseeable that a number of legal problems will arise statewide regarding delinquent tax sales that would be rendered void should Hawkins apply retroactively. Notwithstanding the plausible policy arguments that could be made, we would advise Newberry County to treat Hawkins as having retroactive effect on the 2002 delinquent tax sales in question and not proceed to issue tax titles for properties sold at the 2002 sale.

You also asked whether the defective tax sales are void *ab initio* or merely voidable if challenged in court. In my opinion, the delinquent tax sales which were made under the defective levy notice would be void *ab initio*, not merely voidable. As noted above, the Hawkins Court stated unequivocally that, "failure to give the required notice of a tax sale is a fundamental defect in the tax sale proceedings that renders the proceedings **absolutely** void." Hawkins, 353 S.C. at 36, citing Rives v. Balsa, 325 S.C. 287, 478 S.E.2d 878 (Ct.App. 1996)(emphasis added). Accordingly, this Office advises against the Newberry County Delinquent Tax Collector issuing what is essentially an invalid tax title to a successful bidder, even if the bidder demands such title.

Additionally, you asked whether the tax sales should be voided and whether Newberry County should conduct a new sale if the taxes are not paid. As indicated previously and as you have suggested in your request, in my opinion, the Newberry County Delinquent Tax Collector should void the 2002 tax sales pursuant to Section 12-51-150 of the Code. Such provision clearly provides that:

In the case that the official in charge of the tax sale discovers before a tax title has passed, the failure of any action required to be properly performed, the official may void the tax sale and refund the amount paid to the successful bidder. If the full amount of the taxes, assessments, penalties, and costs have not been paid, the property must be brought to tax sale as soon as practicable.

Such provision clearly authorizes the Newberry County Delinquent Tax Collector to void the 2002 delinquent tax sales, which were not conducted in compliance with the statutory notice requirements, and give a full refund to all of the successful bidders. As stated, if the full amount of the taxes, assessments, penalties and costs are not paid, a new tax sale must be held.

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In your final question, you asked whether in situations of a tax sale being voided, should successful bidders be paid interest on the moneys they paid and at what rate. In my opinion, the County is obligated to pay interest to the successful tax sale bidder along with a full refund of the purchase price. S.C. Code Ann. Section 12-51-90 (Supp. 2003) provides that a defaulting taxpayer may redeem real estate sold at a delinquent tax sale by paying the taxes, assessments, penalties, costs and interest provided by subsection (B). Additionally, S.C. Code Ann. Section 12-51-100 (2000) provides as follows:

Upon the real estate being redeemed, the person officially charged with the collection of delinquent taxes shall cancel the sale in the tax sale book and note thereon the amount paid, by whom and when. The successful purchaser, at the delinquent tax sale, shall promptly be notified by mail to return the tax sale receipt to the person officially charged with the collection of delinquent taxes in order to be expeditiously refunded the purchase price plus the interest provided in Section 12-51-90.

Therefore, it is apparent that the General Assembly contemplated that successful tax sale bidders are entitled to interest for the time period that their money was tied up. The interest provisions noted above apply in a context where the sale is not ultimately completed and the bidder does not receive title to the purchased property.

As you noted in your request, the interest provisions in Section 12-51-90(B) specifically apply in the context of a parcel being redeemed by the delinquent taxpayer during the redemption period and where the successful bidder does not receive title to the property. In my opinion, such provision is also instructive as to the rate of interest to be paid where the successful bidder does not receive title to the property as the result of the County's error pursuant to Section 12-51-150. Therefore, the interest provisions of Section 12-51-90(B) would appear to also apply to a successful bidder who is deprived of title to the purchased property as the direct result of the County's mistake where the sale is subsequently voided pursuant to Section 12-51-150. The common element of the redemption situation and the situation presented here is the ultimate effect on the successful bidder. In both situations the bidder's purchase money is tied up for an extended period of time. Instead of receiving title to the purchased property, the successful bidder only receives a refund of the purchase money. The primary difference in these two situations is that the delinquent taxpayer pays the interest in the redemption situation, and here the county would be responsible for the interest payment.

It does not appear that the six percent interest rate limitation in S.C. Code Ann. Section 37-10-106(1) (2002) suggested by you would be applicable in the context of refunds on delinquent tax sales. That provision was enacted by the General Assembly as a part of the Consumer Protection Code (Title 37) in the context of a lender who might charge an unreasonably high rate of interest on loans to private persons or entities. The party who is "charged" with interest in the situation at hand would be Newberry County, not a loan consumer. Therefore, while not free from doubt, in my

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opinion, the interest provisions of Section 12-51-90(B) appear to be more applicable and relevant in the context of refunds on delinquent tax sale purchases than the interest provisions of Title 37. Accordingly, this Office advises that Newberry County has a duty to pay interest on refunds to its successful bidders consistent with such provision.

Sincerely,



Charles H. Richardson  
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Assistant Deputy Attorney General