



ALAN WILSON  
ATTORNEY GENERAL

September 19, 2012

The Honorable Cheryl H. Morgan  
Lancaster County Auditor  
P.O. Box 2016  
Lancaster, South Carolina 29721

Dear Ms. Morgan:

In response to the opinion of this Office dated September 23, 2011, you have requested an opinion concerning the manner in which the proceeds of a sale by the Lancaster County Forfeited Land Commission should be distributed when such proceeds are insufficient to pay all "unpaid property taxes, penalties, assessments . . . and costs including taxes levied for the year in which the redemption period begins."<sup>1</sup> Via telephone, you have clarified that assessments are due on certain property deeded to the Commission. You have stated that these assessments secure bonds issued pursuant to the County Public Works Improvement Act and the Revenue Bond Act for Utilities.<sup>2</sup> You request an opinion concerning whether, if the proceeds of a sale by the Commission are insufficient to pay all taxes and assessments in full, a portion of those proceeds must be allocated to a fund for payment on the bonds.

#### Analysis

Section 12-45-180 of the South Carolina Code (2000) provides that when "taxes, assessments, and penalties are not paid before the seventeenth day of March, the county treasurer shall issue his tax execution to the officer authorized and directed to collect delinquent taxes, assessments, penalties, and costs . . . as provided in Chapter 51 of this title and they must be collected as required by that chapter." Pursuant to section 12-51-55:

The officer charged with the duty to sell real property . . . for nonpayment of ad valorem property taxes shall submit a bid on behalf of the Forfeited Land Commission equal to the amount of all unpaid property taxes, penalties, assessments including, but not limited to, assessments owed to a special taxing district established pursuant to Section 4-9-30, Chapter 19 of Title 4, or an assessment district established pursuant to Chapter 15 of Title 6, and costs including taxes levied for the year in which the redemption period begins. . . .

<sup>1</sup> See S.C. Code Ann. § 12-51-55 (2000 & Supp. 2011).

<sup>2</sup> This Office has not examined any ordinances or documents concerning these assessments or bonds; rather, for the purposes of this opinion only, we rely upon your representations regarding the nature of obligations at issue.

If the property is not redeemed, the excess above the amount of taxes, penalties, assessments, charges, and costs for the year in which the property was sold must be applied first to the taxes becoming due during the redemption period.

Thus, even though a lien for unpaid assessments—such as one imposed pursuant to the County Public Works Improvement Act<sup>3</sup>—is subordinate to the lien for delinquent taxes, section 12-51-55 ensures that an attempt will be made to sell the property for an amount that would satisfy both liens.

Property sold at public auction pursuant to chapter 51, title 12 “must be sold . . . for legal tender payable in full by cash, cashier’s check, certified check, or money order on the date of the sale.” S.C. Code Ann. § 12-51-50. “The successful bidder at the delinquent tax sale shall pay legal tender as provided in Section 12-51-50 . . . in the full amount of the bid on the day of the sale.” *Id.* § 12-51-60 (emphasis added). Section 12-51-60 provides that “[e]xpenses of the sale must be paid first” out of the proceeds of the successful bid, “and the balance of all delinquent tax sale monies collected must be turned over to the treasurer.” The treasurer must “mark . . . the public tax records regarding the property . . . [p]aid by tax sale,” *id.*, and must “make full settlement of tax sale monies, within thirty days after the sale, to the respective political subdivisions for which the taxes were levied,” S.C. Code Ann. § 12-51-80 (emphasis added). Thus, when a party other than a forfeited land commission bids for property at a tax sale, chapter 51, title 12 ensures that all assessments subject to collection by county officials will be paid in full.

Nothing in chapter 51, title 12, explicitly excludes forfeited land commissions from these provisions regarding the payment of a successful bid. Nonetheless, this Office issued an opinion in 1994 concluding that forfeited land commissions need not pay for the property bid in for them at the time of the delinquent tax sale. Instead, we concluded such commissions need only pay for the property “when the forfeited property is sold by either the [commission] or the former owner of the property.” Letter to Michael L. Horton, Op. S.C. Att’y Gen. (July 5, 1994). This conclusion was premised in part upon the view that the proceeds of such sale would “be turned over to the county treasurer for disbursement to the various entities for which taxes on the property were levied.” *Id.*; see S.C. Code Ann. § 12-51-80 (requiring full settlement to the taxing entities following a tax sale).<sup>4</sup> However, where a sale by the forfeited land

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<sup>3</sup> See generally S.C. Code Ann. § 4-35-120 (Supp. 2011) (“[F]rom the time of filing the assessment impressed in the assessment roll constitutes and is a lien on the real property against which it is assessed superior to all other liens and encumbrances, except the lien for property taxes, and must be annually assessed and collected with the property taxes on it.”).

<sup>4</sup> Additional support was found in section 12-59-60, which provides for the forfeited land commission to “release the lien for taxes” on property sold by the owner (with the commission’s approval) prior to a sale by the forfeited land commission. We reasoned that “if the FLC had already satisfied the taxes by payment of the bid, there would be no lien to release.” Letter to Michael L. Horton, *supra*. However, an alternate reading of that section would be that the lien referred to is the lien for taxes that became due following the tax sale. We have opined previously that the defaulting taxpayer is responsible for property taxes that accrue during the redemption period. Letter to The Honorable Murrell Smith, Op. S.C. Att’y Gen. (Nov. 23, 2010). Section 12-59-50 (2000) provides:

commission fails to bring the full amount due to all political subdivisions, a premise of our 1994 opinion no longer holds true. Rather, if only the proceeds of the commission's subsequent sale are to be used to pay the delinquent taxes, assessments, and other charges, the result would be that the forfeited land commission would never pay the full amount of its bid. Therefore, there would not be a full settlement to all taxing entities as required by section 12-51-80. There are several possible approaches to the problem presented by this shortage of funds.

One solution would be to conclude that the forfeited land commission must bear the risk of loss when it bids for the full amount of all taxes, assessments, etc., due. In general, the effect of the requirement that a successful bidder pay the bid in full on the day of sale is to shift the risk of resale at a loss to the successful bidder. As explained by Associate Justice Haskell in his dissenting opinion in the case of *State ex rel. Cathcart v. City of Columbia*, a successful bidder, after complying with the terms of the bid, has substantial discretion as to how to dispose of the property for the bidder's benefit. In the *Cathcart* case, certain city officials bid in at the city's public sale of bonds. The majority viewed the officials as mere "volunteers," rather than as agents of the city. 12 S.C. 370, 394 (1879). Justice Haskell took the opposing view of the facts, and explained the legal consequence of that position as follows:

The city council, to prevent sacrifice, limited the price at which the bonds should be allowed to go, and had large amounts thus bid off by its agents. But bidders at auction sales do not perfect their titles until they have complied with the terms. The city, which was both vendor and vendee, when it bid off the bonds by its agents, held them still subject to the same trusts as before, and the same limitations, with this exception, viz., that, having complied with the requirements of the act [as to the mode of sale], intended to fix a fair market price, it was left to the discretion of the city officers whether they would put the bonds up again for public sale, or transfer the city bid to third parties at the

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The owner of any property which has been sold for delinquent State and county taxes and which has been bid in by the forfeited land commission may sell all or any part of such property . . . upon securing the approval, in writing, of the forfeited land commission, if such land has not theretofore been sold by such commission and application for such approval be made . . . within five years from the day following the expiration of the period allowed by law to owners to redeem property sold for taxes.

(Emphasis added). Section 12-59-60 then provides:

The forfeited land commission shall not give its approval for the sale of the entire lot or tract unless the owner pays all taxes which may at any time be due thereon. In case the owner petitions the commission to sell a part thereof . . . the owner shall pay to the forfeited land commission from the proceeds of the sale of such part or portion of the property involved not less than seventy-five per cent of the entire sale price, unless a smaller amount is sufficient to pay all taxes due, and upon such payment the commission shall release the lien for taxes on the property so sold.

(Emphasis added). Thus, the language in section 12-59-60 concerning releasing a lien for taxes could be read to refer to taxes that became due after the tax sale.

same or an advanced price for the benefit of the city, subject to the purposes of the act.

*Id.* at 417 (Haskell, A.J., dissenting) (emphasis added). Holding the forfeited land commission to the terms of its bid in exchange for its similar discretion in the later disposal of the property would be consistent with sections 12-51-60 and 12-51-80 requiring full payment of the bid and full settlement to all taxing entities; with sections 12-59-50 through 12-59-80 allowing the forfeited land commission to assign its bid or authorize a sale by owner; and with section 12-59-100, which provides that after expenses the proceeds of a sale of property deeded to the commission should be divided “between the county and State in proportion to their respective interests.” Moreover, it would be consistent with the fact that the forfeited land commission is exempt from bidding on certain properties likely to create an unacceptably high risk of sale at a loss. S.C. Code Ann. § 12-51-55 (“The Forfeited Land Commission is not required to bid on property known or reasonably suspected to be contaminated. If the contamination becomes known after the bid or while the commission holds title, the title is voidable at the election of the commission.”).

An alternative solution would be to conclude that the forfeited land commission need not endure a loss by paying its full bid but that it must pay over the proceeds of the sale to the county treasurer to be distributed on some *pro rata* basis among the taxing entities. Section 12-59-100 provides for a *pro rata* distribution between the county and the State in the event of a sale for less than the full amount of the bid. In the 1994 opinion referenced earlier, we explained that, despite section 12-59-40’s statement that property deeded to the forfeited land commission is held as an “asset[] of the county and State and sold to the best interest of the county and State,” “[o]ver the years, the State has lost most of its interest in property taxes, but school districts, special purpose districts and other ‘political subdivisions’ do have such an interest.” Letter to Michael L. Horton, *supra*. Accordingly, in that opinion, we concluded that property deeded to the commission should be held as an “asset[] of the counties and districts which have a tax interest in the property” and “sold on terms and conditions which best satisfy both.” By extension, a court might conclude that the *pro rata* distribution of proceeds should extend to other taxing entities.

A third solution would be to conclude that the forfeited land commission need not endure a loss by paying its full bid but that it must pay over the proceeds of the sale to the county treasurer to be distributed according to the priority among the liens held by the taxing entities.<sup>5</sup> This approach might be troublesome in that where assessments have been pledged to the payment of revenue bonds the bondholders would have relied upon the forfeited land commission to protect their interests during the tax sale by bidding in an amount sufficient to cover the assessments due. On the other hand, a court might find that the county officials’ duty to collect assessments on behalf of the bondholders was exhausted by their compliance with the procedures in chapters 51 and 59 of title 12 and that the inability to collect

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<sup>5</sup> Of note, section 5-7-300(A) (2004 & Supp. 2011) provides that the lien for municipal taxes “is paramount to all other liens except the lien for county and state taxes” and that “[p]ayment of a lien for state or county taxes, without payment of a lien for municipal taxes, does not extinguish a lien for municipal taxes.” Rather, “[f]or those municipalities that . . . collect their delinquent municipal taxes without an agreement as to collection with a county, such payment makes the municipal lien a first lien on the property which shall continue in full force and effect until legally discharged.”

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some portion of the assessments due was a risk inherent in the purchase of the revenue bonds.<sup>6</sup> As noted below, the Revenue Bond Act for Utilities does provide security to these bondholders in the form of a lien upon the system or project financed with the revenue bonds.


Despite extensive research, this Office is unable to predict with certainty which, if any, of these paths a South Carolina court likely would follow. Accordingly, we recommend you seek legislative or judicial clarification regarding this important question.

Very truly yours,



Dana E. Hofferber  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Deputy Attorney General

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<sup>6</sup> Pursuant to the County Public Works Improvement Act the governing body of a county may finance certain improvements using “special district bonds, general obligation bonds of the county, or revenue bonds of the county,” in addition to assessments, general revenue, and other sources. S.C. Code Ann. § 4-35-40 (Supp. 2011). Assessments are “imposed upon real property with the consent of the owner” and “remain[] valid and enforceable . . . even if there is a later subdivision and transfer of the property or a part of it.” *Id.* § 4-35-30(1). An assessment pursuant to the Act “constitutes and is a lien on the real property against which it is assessed superior to all other liens and encumbrances, except the lien for property taxes, and must be annually assessed and collected with the property taxes . . .” *Id.* § 4-35-120. The governing body of the county may issue revenue bonds payable from these assessments, and in that instance the assessments will be treated as “revenues of the system” financed by the bonds. *Id.* § 4-35-80. Pursuant to the Revenue Bond Act for Utilities, “[t]he principal of and interest upon such bonds shall be payable solely from the revenues derived from the operation of the system or project for . . . which they are issued . . .” S.C. Code Ann. § 6-21-220 (2004). Such bonds do “not constitute an indebtedness of the [county] within any State constitutional provisions or statutory limitation.” *Id.* Rather, the revenue bonds are secured by a statutory lien upon the system or project financed. *Id.* § 6-21-330. A holder of such bonds “may, either at law or in equity, by suit, action, mandamus or other proceedings, protect and enforce such statutory lien and . . . enforce and compel performance of all duties of the officials of the [county], including the . . . collection of revenues . . . and the proper application thereof.” *Id.* § 6-21-350.