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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

March 15, 1999

The Honorable Linda Sharpe
Treasurer of Aiken County
828 Richland Avenue, W.
Aiken, South Carolina 29801

Re: Informal Opinion

Dear Treasurer Sharpe:

Attorney General Condon has forwarded your opinion request to me for reply. In your request, you state:

In 1991 the Forfeited Land Commission of Aiken County became the owner due to delinquent taxes of the Clearwater Finishing Plant that was a dye and finishing plant once a division of United Merchants. It was determined that this property was contaminated and in 1995 EPA was involved in a cleanup effort.

In the spring of 1998 the Commission began negotiations with a prospective buyer and stated a price equal to the amount of taxes owed when ownership was transferred. In September the EPA placed a lien on the property of \$1,120,462.50 plus interest and future costs.

The Commission has since retained an environmental attorney because the county chose not to represent the Commission due to possible conflict of interest between the Forfeited Land Commission and Aiken County. Through the Commission attorney an offer to settle with EPA was made but the offer

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was declined since Aiken County was not a part of the negotiations.

The Commissions question, based on state statute 12-59-100 is whether the settlement amount, the attorney's fees and all other expenses incurred resulting from these negotiations are legal expenses to be deducted from the proceeds of the sale before any distribution is made. Also would the county settlement portion be considered as expenses to be taken from the gross amount of the sale since they believe themselves to be a separate entity?

Law/Analysis

The legislation governing a county forfeited land commission (hereinafter "commission") is found in Chapter 59 of Title 12. Section 12-59-100 addresses the disposition of the proceeds from the sale of land by the commission. Under this section, the proceeds of any sale are to be turned over by the commission to the county treasurer. The county treasurer then, at the close of his fiscal year, divides the funds, after deducting the expense warrants as drawn on him by the commission, between the county and the state in proportion to their respective interests. Id. If any tract of land is sold for less than the taxes and penalties due thereon the proceeds of such sale shall be divided between the State and county in proportion of the amount of taxes and penalties due each of them. Id.

In essence, your question is whether the settlement amount, attorney's fees and other expenses incurred while negotiating the sale of land would be considered allowable "expense warrants" under Section 12-59-100. Unfortunately, the statute does not set forth the permitted expenditures of the commission and I have been unable to locate any South Carolina cases or prior opinions of this Office addressing this question. Therefore, attention must be focused on the statutory powers of the commission to determine what might be considered necessary expenses incurred by the commission while fulfilling its statutory duties.

Pursuant to Section 12-59-40, the commission shall effect the sale of lands forfeited and bid in for the commission. All lands deeded to the commission of any county are to be held by it as assets of the county and State and sold to the best interest of the county and State. Id. The commission shall sell and dispose of such lands in such a manner and upon such terms and conditions as to it may appear to be for best interest of its county, but the terms of sale shall not in any case provide for a longer term than ten years for the full payment of the purchase price of such property and shall be secured by a first real estate mortgage upon the property sold. Id.

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As a general rule, an express grant of power to an administrative body or officer includes the authority to do all that is reasonably necessary to execute that power or to perform the duty specifically conferred. O'Grady v. Cook County Sheriff's Merit Board, 632 N.E.2d 87 (Ill.App.Ct.1994). In addition, courts have concluded that attorney's fees are considered to be an inherent expense of repossession and sale of property. The National Cash Register Co. v. Warner, 142 N.E.2d 584 (Mass.1957).

One of the main purposes of the commission is to return lands to the tax rolls, rather than have the lands continue as a drain on the tax base. The commission is charged with the duty of selling and disposing of lands in a manner and upon such terms and conditions which appear to be for the best interests of the county and the State. The General Assembly did not rule out that in certain situations, the interests of the county and State would be best served by the commission selling the land for a price lower than the amount of taxes and penalties due on the land. In order to adequately perform their duties, the General Assembly seems to have granted the commission broad discretionary authority to structure the sale of lands in such a way as it may deem appropriate, so long as the sale is in the best interest of the county and State.

Given its purpose and duties, it seems necessary that the commission incur certain expenses while carrying out its statutory responsibilities. It is reasonable to conclude that one of these expenses may be attorney's fees, as such are considered by courts to be an inherent expense in the repossession and sale of property. In fact, the Massachusetts Supreme Court found "[i]t is certain that the average layman often could not take these steps [those necessary for the repossession and sale of land] without legal advice." The National Cash Register Co. v. Warner, *supra*. It is also reasonable to conclude that the commission may incur other expenses, such as the settlement amount present here, which are necessary to facilitate the sale of the land and, thus, usher reentry of the land onto the tax rolls.

Since the commission has been granted broad discretion in determining whether a particular sale is for the best interest of the county and State, its decision is entitled a great deal of deference. If the commission determines the types of expenses raised in your opinion request are necessary to facilitate the sale of the land, such expenses would appear to be of the type allowable under Section 12-59-100.¹ I have no legal basis, at this time, to conclude otherwise. Of course, a final decision as to what types of expenses are necessary in a

¹ Pursuant to Section 12-59-100, the county would receive its portion of the proceeds of the sale of the land after the expenses incurred by the commission are paid.

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particular case is a policy decision left up to the commission.

This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I remain

Very truly yours,

A handwritten signature in black ink, appearing to read "Paul M. Koch". The signature is written in a cursive, slightly stylized font.

Paul M. Koch

Assistant Attorney General