ALAN WILSON
ATTORNEY GENERAL

September 19, 2011

The Honorable Michael T. Rose
SC Senate, District #38
409 Central Avenue
Summerville, SC 29483

Dear Senator Rose:

We received your letter requesting an opinion of this Office concerning a lease agreement between the City of Aiken and Aiken Aviation Enterprises. You specifically asked the following questions:

1. Whether the Lease agreement and Fixed Base Operator agreement dated February 19, 1999 referenced [below] for the Aiken Municipal Airport is an impermissible extension of the October 1, 1982 Lease Agreement in violation of South Carolina Code § 55-9-190(3)'s twenty-five (25) year limitation that existed on the date of the February 19, 1999 agreements and their October 1, 1982 extension, as described [below];
2. Whether the Lease agreement and Fixed Base Operator agreement dated February 19, 1999 for Aiken Municipal Airport terminated on September 30, 2007, 25 years after it was leased on October 1, 1982, because of South Carolina Code § 55-9-190(3)'s [below] referenced twenty-five (25) year limitation that existed on February 19, 1999 and on October 1, 1982;
3. Whether the action of the fixed based operator in removing Mr. Jackson's aircraft from the hangar in response to his submitting his claim as described [below] violated South Carolina Code § 55-9-190(3) by depriving Mr. Jackson, as a member of the public, of his rightful, equal and uniform use of the Aiken Airport or its space or facilities; and
4. Whether the City of Aiken deprived Mr. Jackson, as a member of the public, of his rightful, equal and uniform use of the Aiken Airport or its space and facilities in violation of South Carolina Code § 55-9-190(3), by (a) not terminating and by (b) not otherwise enforcing the lease with Aiken Aviation Enterprises, Inc., since the lease states that "the fixed based operator shall furnish service on a fair, reasonable and non-discriminatory basis to all users of the Airport . . . [and] . . . Failure of the Fixed Based Operator to comply with these Operating Standards shall be considered an event of default and will result in the termination of this Lease Agreement.

By way of background, you provided that on October 1, 1982 the City of Aiken "entered into a lease with Aiken Aviation, Inc. for the operation of the Aiken airport. In or about 1996 Aiken Aviation Enterprises, Inc., assumed the lease that Aiken Aviation, Inc. had for the operation of the Aiken airport. On February 19, 1999, the City entered into another Lease agreement and Fixed Base Operator agreement" which stated, in part, as follows:

> Whereas Lessee has assumed all the rights, title and obligations of the previous lease agreement by and between the Lessor and Aiken Aviation, Inc. dated October 1, 1982; and Whereas Lessor and Lessee desire to amend the terms of the October 1, 1982 Lease Agreement as appears more fully herein.

You also provided that, as part of the lease, the City leased to Aiken Aviation "almost all of the hangar space, the terminal, the fuel farm and much of the other facilities at the Aiken airport." Stanley Jackson "had a rental agreement for community hangar space with Aiken Aviation and "entrusted his airplane to Aiken Aviation Enterprises, Inc.'s custody and care. On July 1, 2011, Mr. Jackson filed a claim with Aiken Aviation asking it to pay for damage to his airplane that Mr. Jackson believes was caused by Aiken Aviation." The attorney for Aiken Aviation wrote Mr. Jackson a letter denying the claim and "requiring the removal of Mr. Jackson's aircraft from Aiken Aviation Enterprises' leased hangar at the Aiken Airport within 30 days. The letter gave no reason for the eviction." Seemingly, with no alternative, Mr. Jackson relocated his aircraft on August 18, 2011.

Law/Analysis

Questions 1 & 2

The Uniform Airports Act can be found in Title 55, Chapter 9 of the South Carolina Code of Laws of 1976. Specifically, S.C. Code § 55-9-190(3) states as follows:

> The division, counties, municipalities and other political subdivisions of this State which have established airports or landing fields or which acquire, lease or set apart real property for any such purpose may:
>
> . . .
>
> (3) Lease for a term such airports or landing fields to private parties for operation or lease or assign for a term to private parties for operation space, area, improvements and equipment on such airports or landing fields, **provided in each case that in so doing the public is not deprived of its rightful, equal, and uniform use thereof.**

S.C. Code § 55-9-190(3) (emphasis added). This statute was amended by 2010 Act No. 288, § 1 to eliminate the 25 year term limit placed on the length of a lease. The language "not exceeding twenty-five years" was deleted from subsection (3) twice, following the word "term." The change was effective June 29, 2010.

In an opinion of this Office dated October 13, 2005, we acknowledged that "certain local law provisions dealing with county airport commissions provide for the leasing of airport property

but do not limit such leases to any particular time, such as the twenty-five year term." Op. S.C. Atty. Gen., October 13, 2005. Such specific legislation would likely control over the general law provision of S.C. Code § 55-9-190(3), which had a 25 year term limit prior to 2010. This Office is unaware of any such provision for Aiken County governing the lease of airport property.

It is well established that a statute should not be retroactively applied in the absence of statutory intent. Op. S.C. Atty. Gen., June 28, 2011; State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614, 616 n. 2 (1999); Hercules Incorporated v. South Carolina Tax Commission, 274 S.C. 137, 262 S.E.2d 45 (1980); Hyder v. Jones, 271 S.C. 85, 245 S.E.2d 123 (1978) ("In the construction of statutes, there is a presumption that enactments are to be considered prospective rather than retroactive in their operation, unless there is a specific provision or clear legislative intent to the contrary"); Op. S.C. Atty. Gen., July 19, 2000 ("'[n]o statute will be applied retroactively unless the result is so clearly compelled as to leave no room for reasonable doubt ... [T]he party who affirms such retroactive operation must show in the statute such evidence of a corresponding intention on the part of the Legislature as shall leave no room for reasonable doubt. It is not necessary that the Court shall be satisfied that the Legislature did not intend a retroactive effect. It is enough, if it is not satisfied that the Legislature did not intend such effect.'" [quoting Ex Parte Graham, 47 S.C. Law (13 Rich. Law) 53, 55-56 (1864)]; see also, Am. Nat. Fire Ins. Co. v. Smith Grading & Paving, 317 S.C. 445, 454 S.E.2d 897 (1995); Pulliam v. Doe, 246 S.C. 106, 142 S.E.2d 861 (1965)."). "An exception to the above-referenced presumption is that remedial or procedural statutes are generally held to operate retrospectively." Op. S.C. Atty. Gen., June 28, 2011 (*citing* Hercules Incorporated, 263 S.E.2d at 48.).

Therefore, in this instance, it would appear that the 25 year limitation on lease terms would have applied in 1982 when the City of Aiken and Aiken Aviation entered into the lease agreement. The fact that Aiken Aviation Enterprises, Inc. assumed the lease which Aiken Aviation, Inc. possessed for the operation of the Aiken airport in 1996 does not appear to affect the lease term. "Investigations and determinations of facts are beyond the scope of an opinion of this Office and are better resolved by a court." Ops. S.C. Atty. Gen., September 14, 2006; April 6, 2006. Hence, we must depend on the information provided in the request letter. It is our understanding that, in 1996, Aiken Aviation Enterprises simply assumed the remaining term of the lease Aiken Aviation entered into with the City of Aiken in 1982, which would have no effect on the 25 year limitation.

The lease agreement was renewed on February 19, 1999. This Office has previously opined that "the language of Section 55-9-190(3) does not prohibit the renewal options." However, "the area of property in question [was] not being leased for airport operation or landing field purposes," but as a hotel. Op. S.C. Atty. Gen., April 20, 1979. Such opinion thus suggests that renewal for airport operation would be proscribed. Therefore, the 1999 renewal may not have been permissible in this instance.

However, while the above legal analysis regarding the 25 year limitation is relevant, the focus should be directed more to the duty owed by the City of Aiken. The City of Aiken has a duty to

ensure that "the public is not deprived of its rightful, equal, and uniform use" of the airport. S.C. Code § 55-9-190(3).

Questions 3 & 4

On May 13, 2003, Mr. Jackson entered into a rental agreement with Aiken Aviation Enterprises to rent a hangar space on a month to month basis beginning June 1, 2003. The agreement explains that "[w]ith thirty days written notice, either party may terminate this agreement without cause." Mr. Jackson was provided with 30 days written notice that he must remove his plane, but no reason was given. According to the rental agreement, Aiken Aviation has a right to terminate "without cause." However, such language does not authorize Aiken Aviation to terminate agreements for an unconstitutional purpose.

Duty of City of Aiken

S.C. Code § 55-9-190(3) is clear that the City of Aiken has a duty to make certain that "the public is not deprived of its rightful, equal, and uniform use" of the airport. S.C. Code § 55-9-190(3). As mentioned above, this Office is not a fact-finding entity; therefore, we cannot be certain as to the circumstances surrounding Mr. Jackson being asked to remove his plane. See, Ops. S.C. Atty. Gen., September 14, 2006; April 6, 2006. However, based upon the information provided, it appears that Mr. Jackson may have been ousted for filing a claim against Aiken Aviation.

Mr. Jackson approached the City of Aiken about his situation, asking for assistance and a place to store his plane. Yet, the request letter provides that the City Manager informed Mr. Jackson that the "City of Aiken would not intervene with Aiken Aviation Enterprises, Inc." A copy of the lease between the City of Aiken and Aiken Aviation was provided; the lease requires Aiken Aviation, as the Fixed Base Operator, to "[f]urnish such services on a fair, equal and non-discriminatory basis to all users" of the airport. Even if the lease did not include such language, S.C. Code § 55-9-190(3) requires the municipality to provide equitable use of the airport regardless of whether the airport has been leased to a private party.

In a situation involving a similar statute, the Supreme Court of Wisconsin found that, "although contracts may be made with private parties for the operation of municipal airports, they may in no case deprive the public of equal and uniform use of the airports." Wussow v. Gaida, 251 Wis. 328, 331, 29 N.W.2d 42, 43 (1947). More recently, in 2007, the Supreme Court of Wisconsin affirmed the holding in Wussow, stating that an existing lease does not give the "right to arbitrarily exclude members of the public from the use of the airport." County of Milwaukee v. Williams, 301 Wis.2d 134, 149, 732 N.W.2d 770, 778 (2007). In other words, "[an] exclusion without a reasonable justification . . . 'deprive[s] the public of equal and uniform use.'" Williams, 301 Wis.2d 134, 150 (*citing* Wussow v. Gaida, 251 Wis. 328).

Alaska has a comparable statute to S.C. Code § 55-9-190(3) in which the legislature made it clear that "in no case shall the public be deprived of its **rightful, equal and uniform use** of . . . airport [facilities]." Plancich v. State of Alaska, 693 P.2d 855, 858 (1985) (*citing* AS 02.15.090(a)) (emphasis added). In Plancich, the Alaska Supreme Court acknowledged that reference to "the public" means "those persons operating aircraft or machinery used incidental to

the operation of aircraft." Plancich, 693 P.2d 855, 858. The Court explained that the State owed a duty of reasonable care to the class of persons the statute was intended to protect. While the State was not "required to guarantee the availability of docking space for every [aircraft] that might happen along[;] [t]hey were, however, under a duty to keep the [aircraft] docking space that was available accessible to [aircraft]." Plancich, 693 P.2d at 859.

Based upon these authorities, it is the opinion of this Office, that S.C. Code § 55-9-190(3) establishes a duty for any county, municipality or political subdivision of this State to ensure that "the public is not deprived of its rightful, equal, and uniform use" of the airport. The City of Aiken is free to lease the airport to a private party, such as Aiken Aviation. However, regardless of the terms of the lease, there is a statutory duty placed upon the City of Aiken to ensure that members of the public, like Mr. Jackson, have rightful, equal and uniform use of the airport. Of course, only a court may determine in a given situation whether such duty has been infringed.

We note also that the S.C. Constitution, article I, § 22 explains that individuals are entitled to due process rights before being deprived of a liberty or property interest:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of **liberty or property** unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

S.C. Const. art. I, § 22 (emphasis added).

In South Carolina Ambulatory Surgery Center Ass'n v. South Carolina Workers' Compensation Commission, 389 S.C. 380, 699 S.E.2d 146 (2010), the Supreme Court of South Carolina further clarified due process rights as follows:

> Although our appellate courts have not always used the term "due process rights" when discussing Article I, Section 22, we have consistently indicated that the protections provided under this section are the equivalent of those afforded by the Due Process Clause of our state and federal Constitutions. See, *e.g.*, Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (*citing* Article I, Section 22 and stating "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution. The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." (citation omitted)); Harbit v. City of Charleston, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct.App.2009) (citing Amendments V and XIV of the United States Constitution and Article I, Section 22 of the South Carolina Constitution and stating "[t]he fundamental requirements of due process under the United States Constitution and the South Carolina Constitution include notice, an opportunity to be heard in a meaningful way, and judicial review").

South Carolina Ambulatory Surgery, 389 S.C. 380, 391.

While Mr. Jackson was provided with 30 days notice to remove his plane, nevertheless, a court may well determine that he was deprived of a property interest without reasonable justification. It is suggested that Mr. Jackson was asked to remove his plane because he filed a claim against Aiken Aviation.

Conclusion

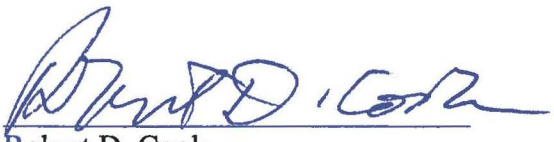
It is the opinion of this Office, that S.C. Code § 55-9-190(3) establishes a duty for the City of Aiken to ensure that Mr. Jackson, or any other member of "the public is not deprived of its rightful, equal, and uniform use" of the airport. The City of Aiken is free to lease the airport to a private party, such as Aiken Aviation.[1] However, regardless of the terms of the lease, the City of Aiken must act with reasonable care to make sure members of the public have rightful, equal and uniform use of the airport. Only a court may determine in a given instance whether this duty has been infringed.

Here, according to the rental agreement entered into with Aiken Aviation, Mr. Jackson was rightfully using the airport to store his plane. While he was provided with 30 days notice to remove his plane, a court could nevertheless determine that the statutory duty to ensure equal treatment to members of the public was breached, particularly if Mr. Jackson was deprived of his right as retaliation for filing a claim against Aiken Aviation. This Office cannot make a determination of the facts in this situation; however, it is clear that the City of Aiken has the duty and responsibility to determine whether Mr. Jackson was being provided with rightful, equal and uniform use of the airport.

Sincerely,

Leigha Blackwell Sink
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General

[1] Prior to 2010, the lease term had a 25 year limit.