



ALAN WILSON
ATTORNEY GENERAL

September 1, 2016

David A. Root, Esquire
Oconee County Attorney
Administrative Offices
415 South Pine Street
Walhalla, SC 29691

Dear Mr. Root:

Attorney General Alan Wilson has referred your letter dated April 26, 2016 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Question (as quoted from your letter):

"1. Is the accompanying Ordinance (2015-35) authorizing the execution and deliverance of a Reformed and Restated Ground Lease Agreement and a Settlement Agreement and Release in relation to certain related litigation, a valid exercise of Council's legislative powers? (This question relates solely to the content and effect of the Ordinance and not to its manner of adoption.) The following questions are meant to narrow and refine this initial question:

- a. As the allegations in the accompanying Amended Complaint remain contested, are you able [to] opine as to whether the 2001 Lease was valid?*
- b. As the allegations in the accompanying Amended Complaint remain contested, are you able [to] opine whether the dismissal of the County's lawsuit amounted to an unlawful forgiveness of property taxes?*
- c. Assuming the allegations in the Amended Complaint are true, was the referenced 2001 Lease valid?*
- d. Assuming the validity of the 2001 Lease, if Defendants declined to pay taxes in reliance on the terms thereof, particularly paragraph 8, was the dismissal of the County's lawsuit an unlawful forgiveness of property taxes?*

In addition to Ordinance 2015-35, I have included a copy of the referenced 2001 Lease, as well as a copy of the Amended Summons and Complaint, along with Defendants' responsive pleadings thereto, and the Stipulation of Dismissal recently filed.

I understand that it is not within the purview of the Attorney General's Office to determine questions of fact, but in order to help further refine the questions presented - note that while the Amended Complaint naturally outlines Plaintiffs' allegations giving rise to the underlying lawsuit - Defendants' pleadings never matured to the point that their responses completely met the allegations contained in the Amended Complaint. With that said, I understand that in addition to Defendants' Rule 12(b)(6) Motion to Dismiss for failure to state causes of action upon which relief could be granted, Defendants generally contest the allegations of the Amended Complaint. Additionally, it is my understanding that Defendants would aver

that the alleged taxes were either not due and owing (1) as a result of the 2001 Lease and/or (2) by virtue of the situs of the entities owning the airplanes (and/or the situs of the airplanes themselves) being located outside of Oconee County and/or the State of South Carolina for the relevant tax determination periods. Defendants also may have raised questions related to proper party defendants. That said, the full extent of Defendants' defenses, allegations, and potential counterclaims are unknown."

Law/Analysis:

Without commenting on the litigation you mention in your letter, our general legal positions are as follows:

a. This Office has previously opined and still maintains the position that we believe that the requirement of a public hearing in adopting an ordinance to sell, lease, or contract to sell or lease real property owned by the county stated in South Carolina Code § 4-9-130 is mandatory. This Office previously opined on South Carolina Code § 4-9-130 and whether the statute's language is mandatory. See Op. S.C. Att'y Gen., 1984 WL 249835 (S.C.A.G. February 23, 1984). Quoting from the 1984 opinion, this Office stated:

Section 4-9-130, Code of Laws of South Carolina (1983 Cum.Supp.) contains the following provisions for public hearings in the process of ordinance adoption:

...

(6) sell, lease or contract to sell or lease real property owned by the county.

...

Use of the term 'must' may be construed as 'shall.' See Moore v. Waters, 148 S.C. 326, 146 S.E. 92 (1928), and cases in 27A Words and Phrases, 'Must' p. 649 et seq. Where statutes use the terms 'must' or 'shall,' such terms connote mandatory compliance with the statutes. 2A Sutherland Statutory Construction § 57.03. Such a construction imposing mandatory duties is particularly warranted where, as here, the statute's purpose would be protection of a public right. Cf. South Carolina Wildlife Federation v. Alexander, 457 F.Supp. 118 (D.S.C. 1978). Thus, for the six enumerated areas in which an ordinance may be adopted, a public hearing, after reasonable public notice, is required to be held.

Id. This Office has also opined that Section 4-9-130 applies when real property is being leased. See, e.g., Op. S.C. Att'y Gen., 2000 WL 356783 (S.C.A.G. January 11, 2000). The 2000 opinion even went so far as to conclude that "a party which contracts with a public body is charged with the knowledge of its limitations and restrictions in making contracts." Id. Moreover, this Office also previously concluded in a 2012 opinion that:

[a]ny conveyance of public property or use of public funds must serve a public purpose. Whether a particular transaction meets these requirements is a fact-specific inquiry for determination by county council in the first instance.

Op. S.C. Att'y Gen., 2012 WL 440538 (S.C.A.G. January 12, 2012). Thus, to summarize prior opinions of this Office, we believe a court will find that conveyance of public property must be for a public purpose (the determination of which is factual) and that a county must hold a public hearing in adopting an ordinance to lease pursuant to South Carolina Code § 4-9-130. Id.; Op. S.C. Att'y Gen., 1984 WL

24983 (S.C.A.G. February 23, 1984). For purposes of this opinion, and as you state in your letter, we will not make factual determinations. Nevertheless, as we have done in the past, we will assume facts you have provided for purposes of our analysis. See, e.g., Op. S.C. Att’y Gen., 1986 WL 289893 (S.C.A.G. November 18, 1986). Thus, the lack of a public hearing in the passing of an ordinance to lease real property belonging to the county (or the lack of an ordinance altogether) could result in a failure which, left uncured, could invalidate the lease. Op. S.C. Att’y Gen., 1986 WL 289893 (S.C.A.G. November 18, 1986). Furthermore, this Office has previously stated that “[e]very contract entered into in this State embodies all applicable laws of the State as completely as though the contract expressly so stipulated.” Op. S.C. Att’y Gen., 1963 WL 11866 (June 25, 1963) (citing Inabinet v. Royal Exchange Assur. of London, 165 S.C. 33, 162 S.E. 599 (1932); Ayres v. Crowley, 205 S.C. 51, 30 S.E.2d 785 (1944); General Construction Co. v. Hering Realty Co., 201 F.Supp. 487(D.S.C. 1962)). However, as we stated in the 1986 opinion, only a court may invalidate such a lease. Op. S.C. Att’y Gen., 1986 WL 289893 (S.C.A.G. November 18, 1986).

b. Your question asks whether this Office is able to opine whether the dismissal of the County’s lawsuit was unlawful forgiveness of property taxes. This Office is reluctant to allege that the implications of a ruling by a court could be unlawful and will not do so here. We decline to opine as to whether or not we believe it is or would be unlawful for the court to forgive the property taxes in your situation because we would not want to undermine the court or appear to attempt to do so. Another reason we decline to do so here is because it would require a factual determination, and, as you note in your letter, we generally do not make factual determinations in a legal opinion. See, e.g., Op. S.C. Atty. Gen., 1996 WL 599391 (S.C.A.G. September 6, 1996) (citing Op. S.C. Atty. Gen., 1983 WL 182076 (S.C.A.G. December 12, 1983)). Thus, we interpret your question as asking whether forgiveness of property taxes by a court is legal.

Certainly a court has the inherent authority to interpret the law, and the court has ordered forgiveness of paid property taxes in spite of a county’s objections. See, e.g., Hinkle v. Pickens County Assessor, 2013 WL 683548 (S.C. ALC January 24, 2013); see also Op. S.C. Att’y Gen., 2008 WL 4829835 (S.C.A.G. October 8, 2008) (where this Office opined that an airport district could seek a refund of taxes paid to the county which went against the county’s interpretation of the law). This Office has previously summarized property tax appeals in South Carolina as follows:

[P]reviously in South Carolina real property tax appeals were handled through the county assessor’s office and then went to the Comptroller General per S.C. Code of Laws § 65-2653 and § 65-2654 (1962 Code). Op. S.C. Atty. Gen., 1973 WL 20941 (February 23, 1973). However, those statutes, which later became S. C. Code § 12-47-30 and § 12-47-40 (1976 Code), were repealed in 1995. Currently, real property tax appeals (other than exemptions) in South Carolina begin with the assessor and then are handled through the local county board of assessment appeals. S.C. Code § 12-60-2510, -2520, - 2530 (1976 Code, as amended). The board of assessment appeals is authorized to hear any relevant claims to a property tax assessment other than claims concerning property tax exemptions. S.C. Code § 12-60-2530 (1976 Code, as amended). Appeals from the county board of assessment appeals go to the Administrative Law Judge Division, per S.C. Code § 12-60-2530(J)(3)(c) and § 12-60-2540 (1976 Code, as amended). Appeals from the Administrative Law Judge Division are then heard by the South Carolina Court of Appeals. S.C. Code

§ 12-60-3380 (1976 Code, as amended). As long as the taxpayer pays or posts bond for the outstanding taxes, he may appeal the Administrative Law Judge Division's decision. S.C. Code § 12-60-3370 (1976 Code, as amended). Homestead exemptions and personal property tax appeals are handled through the county auditor's office pursuant to S.C. Code § 12-60-2910 (1976 Code, as amended).

Op. S.C. Att'y Gen., 2013 WL 1695509 (S.C.A.G. Mar. 12, 2013). We agree with your conclusion that situs of a business airplane within South Carolina subjects the airplane to South Carolina personal property taxes pursuant to South Carolina Code § 12-37-890. See, e.g., Op. S.C. Att'y Gen., 2013 WL 6210751 (S.C.A.G. November 8, 2013); 2013 WL 6210752 (S.C.A.G. November 13, 2013). Nevertheless, you must comply with a court order. As you are aware, if there is a matter that you think violates the law, the proper procedure is to file an appeal with the appropriate court.

Furthermore, the South Carolina Constitution grants the General Assembly authority to “vest the power of assessing and collecting taxes in all of the political subdivisions of the State, including special purpose districts, public service districts, and school districts” S.C. Const. Art. X, § 6. South Carolina Code § 12-43-210 requires uniform assessment throughout the State. See also S.C. Const. Art. VIII, Section 14 and Article X, Section 1 (regarding uniform assessment and taxation). Moreover, regarding a county's authority to levy taxes, this Office has previously stated:

As the South Carolina Supreme Court stated in Watson v. City of Orangeburg, 229 S.C. 367, 375, 93 S.E.2d 20, 24 (1956), “[t]he power of taxation being an attribute of sovereignty vested in the legislature subject to constitutional restrictions, taxes can be assessed and collected only under statutory authority.” It is well established the South Carolina General Assembly has chosen to grant counties the authority to assess and levy taxes pursuant to South Carolina Code § 4-9-30, which states:

...
(5)(a) to assess property and levy ad valorem property taxes and uniform service charges, including the power to tax different areas at different rates related to the nature and level of governmental services provided and make appropriations for functions and operations of the county, ...

S.C. Code § 4-9-30 (5)(a) (1976 Code, as amended). Counties are required to charge a late penalty set by statute on all taxes and assessments against any property. S.C. Code § 12-45-180. The statute reads:

(A) When the taxes and assessments or any portion of the taxes and assessments charged against any property or person on the duplicate for the current fiscal year are not paid before the sixteenth day of January or thirty days after the mailing of tax notices, whichever occurs later, the county auditor shall add a penalty of three percent on the county duplicate and the county treasurer shall collect the penalty. ...

Id.

Op. S.C. Att'y Gen., 2014 WL 3414950 (S.C.A.G. July 3, 2014). This Office also discussed this issue of forgiveness of taxes in a prior opinion when we stated that:

You have also asked whether such fees or assessments may be excused absent statutory authority from the General Assembly. Typically, administrative officers or departments are not authorized to excuse or waive the payment of taxes or fees due and owing in the absence of express statutory authority or in the absence of common law powers as the chief legal officer of the state. See, 84 C.J.S. Taxation Section 630.

You have also asked whether or not the General Assembly possesses the authority to waive or excuse the payment of taxes due and owing. It is well recognized that while the power to tax does not necessarily include the power to compromise or remit taxes, it is generally held that the General Assembly in the absence of a constitutional prohibition possesses the authority to authorize the waiver or compromise of taxes. 84 C.J.S. Taxation § 630 supra. As was stated in the opinion of the Arkansas Attorney General, Opinion No. 81-100 (June 15, 1981) in reliance upon the case of McClure v. Topf and Wright, 112 Ark. 342, 346, 166 S.W. 174 (1914), “inasmuch as the Constitution does not restrict the right of a legislature to waive the collection of taxes previously imposed by legislative directive, ... the legislature has the power to forgive or cancel personal property taxes levied and assessed in a particular year.” Thus, it would be a policy matter for the Legislature to determine whether or not it would be appropriate in a given instance to waive or excuse the payment of fees or taxes.

Op. S.C. Att’y Gen., 1989 WL 406141 (S.C.A.G. April 28, 1989) (emphasis added). Moreover, regarding penalties for late taxes, this Office has previously opined that only a county treasurer has the discretion to waive a late penalty on property taxes. See Op. S.C. Att’y Gen., 2014 WL 3414950 (S.C.A.G. July 3, 2014). Quoting from the 2014 opinion, we stated that:

neither a county governing body nor a political subdivision is authorized to waive or lower a penalty. Op. S.C. Atty. Gen., 1990 WL 482394 (January 15, 1990). County auditors, treasurers and assessors may correct mistakes in penalties. SC Code §§ 12-47-70, 80, 90; 12-39-250. Waiving a late penalty is solely within the discretion of the county treasurer. S.C. Code § 12-45-185. Nonetheless, in addition to other powers, the S.C. Department of Revenue may extend the time for collection of county taxes and postpone the time for imposition of tax penalties. S.C. Code § 12-4-520, et al.

Op. S.C. Att’y Gen., 2014 WL 3414950 (S.C.A.G. July 3, 2014). Thus, as you know, a lower court’s ruling determining the taxes is final unless and until a higher court rules otherwise.

c. See our answer to (a) above.

d. See our answer to (b) above.

Conclusion:

As stated above, we believe a court would find that South Carolina Code § 4-9-130’s requirement of a public hearing in adopting an ordinance to sell, lease, or contract to sell or lease real property owned by a

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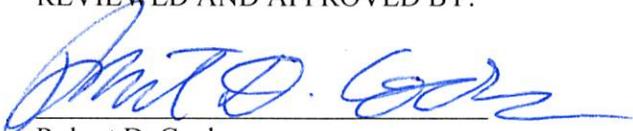
county is mandatory and interpretation as to the application of a tax is within the jurisdiction of the courts. However, this Office is only issuing a legal opinion based on the current law at this time and the information as provided to us. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may also petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20. If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

Sincerely,



Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General