



ALAN WILSON
ATTORNEY GENERAL

August 31, 2020

The Honorable David A. Adams
Treasurer
Richland County
P.O. Box 11947
Columbia, South Carolina 29211

Dear Mr. Adams:

We received your letter addressed to Attorney General Alan Wilson requesting an opinion of this Office concerning delinquent tax sales during the Covid-19 pandemic. Your request consists of eight specific questions which we address individually below.

Law/Analysis

- 1. Pursuant to its Industry Alert, “COVID-19 CONTINUITY OF OPERATIONS UPDATE,” the United States Postal Service has changed its certified mail procedures to not allow signatures on certified mail return receipts. Instead, “[c]arriers will maintain a safe distance by not requesting a signature – instead they will ask for the customer’s first initial and last name.” [Delinquent tax collectors (DTCs)] have no control over the action of the USPS. Heretofore, only a legible recipient’s signature was deemed sufficient notice to delinquent taxpayers. Properties without a recipient signature would then go through the costly process of physically putting a sign on each property. If the USPS’ new certified procedures do not meet the legal standard then all properties will have to be physically “posted” even after the counties have mailed the required/costly certified mail. Will USPS’ new procedures (to enter the initials of the recipient), changed specifically due to COVID-19, be sufficient for the purposes of Subsection 12-51-40(b)?**

Section 12-51-40 of the South Carolina Code (2014 & Supp. 2019) is contained in the sections of the Code governing alternative procedures for the collection of property taxes. Section 12-51-40 pertains to procedures by which DTCs levy the execution by distress and sell a defaulting taxpayer’s property to satisfy outstanding taxes. As part of this process, the

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DTCs must take “possession” of the property. Section 12-51-40(b) allows DTCs to take possession by certified mail and states as follows:

If the taxes remain unpaid after thirty days from the date of mailing of the delinquent notice, or as soon thereafter as practicable, take exclusive possession of the property necessary to satisfy the payment of the taxes, assessments, penalties, and costs. In the case of real property, exclusive possession is taken by mailing a notice of delinquent property taxes, assessments, penalties, and costs to the defaulting taxpayer and any grantee of record of the property at the address shown on the tax receipt or to an address of which the officer has actual knowledge, by “certified mail, return receipt requested-restricted delivery” pursuant to the United States Postal Service “Domestic Mail Manual Section S912”. If the addressee is an entity instead of an individual, the notice must be mailed to its last known post office address by certified mail, return receipt requested, as described in Section S912. In the case of personal property, exclusive possession is taken by mailing the notice of delinquent property taxes, assessments, penalties, and costs to the person at the address shown on the tax receipt or to an address of which the officer has actual knowledge. 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. The return receipt of the “certified mail” notice is equivalent to “levying by distress”.

S.C. Code Ann. § 12-51-40(b) (2014).

From your letter, we understand while DTCs are continuing to use certified mail through the USPS as is required by the statute, the USPS’ procedures have changed and no longer require a signature. Therefore, you are concerned that despite mailing the delinquent notice to the taxpayers via certified mail, return receipt requested-restricted delivery, this process is not sufficient to gain exclusive possession over the property in accordance with section 12-51-40.

As you noted in your request letter and as we acknowledged in a recent opinion issued by our Office on August, 3, 2020, our courts require strict compliance with the legal requirements pertaining to tax sales, especially in dealing with notice requirements. Op. Att’y Gen., 2020 WL 4730384 (S.C.A.G. Aug. 3, 2020). The Court of Appeals recently explained,

“[F]ailure 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 v. Bruno Yacht Sales, Inc., 353 S.C. 31, 36, 577 S.E.2d 202, 205 (2003). “The sound view is that all requirements of law leading up to the tax sales [that] are intended for the protection of the tax payer against surprise or the sacrifice of his property are to be regarded as mandatory and are to be

strictly enforced.” Rives, 325 S.C. at 292–93, 478 S.E.2d at 881. Even “the fact that the defaulting taxpayer has actual notice of the impending tax sale ‘is insufficient to uphold a tax sale absent strict compliance with statutory requirements.’” Hawkins, 353 S.C. at 36, 577 S.E.2d at 205 (quoting In Re Ryan Inv. Co., 335 S.C. at 395, 517 S.E.2d at 693).

Halsey v. Simmons, 429 S.C. 385, 395, 837 S.E.2d 919, 925 (Ct. App. 2020), reh’g denied (Feb. 20, 2020). Thus, we must strictly construe section 12-51-40 to protect the taxpayer against any surprise or the sacrifice of his or her property.

Nonetheless, section 12-51-40 does not specifically require the taxpayer’s signature, but only requires the notice be sent by “certified mail.” “The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature.” Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009) (citations omitted) (quotation omitted). “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.” Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (quoting Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992)). Accordingly, we believe by mailing the notice certified mail return receipt-restricted delivery, DTCs are complying with the requirements of the statute even under a strict compliance standard.

As you mentioned in your letter, use of certified mail traditionally involves the USPS employee obtaining the signature of the recipient. Obtaining a signature ensures the taxpayer receives actual notice of the delinquent taxes, the amount owed, and that the property is scheduled to be sold. While not free from doubt, we are of the opinion that a court could find the USPS employee’s verbal verification of the recipient could also provide the same safeguards. Therefore, in addition to complying with the letter of the law, we believe the current USPS procedures also comply with the spirit of the statute.

2. Can the person charged with the collection of delinquent taxes delay a sale? For how long? If so, what sort of public notice would be required to have a tax sale at a later date than previously established?

To answer your question, we first look to the process when taxes go unpaid. First, section 12-45-180 of the South Carolina Code (2014 & Supp. 2019) provides:

If the 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 for their collection as provided in Chapter 51 of this title and they must be collected as required by that chapter.

Section 12-51-40 states that after the county treasurer issues the execution pursuant to section 12-45-180, the officer authorized to collect delinquent taxes shall:

- (a) On April first or as soon after that as practicable, mail a notice of delinquent property taxes, penalties, assessments, and costs to the defaulting taxpayer and to a grantee of record of the property, whose value generated all or part of the tax. The notice must be mailed to the best address available, which is either the address shown on the deed conveying the property to him, the property address, or other corrected or forwarding address of which the officer authorized to collect delinquent taxes, penalties, and costs has actual knowledge. The notice must specify that if the taxes, penalties, assessments, and costs are not paid, the property must be advertised and sold to satisfy the delinquency.

Section 12-51-40(b), quoted in full above, sets forth that if the taxes remain unpaid after thirty days from the date of the mailing of the delinquent tax notice as described in (a), the officer shall then take exclusive possession of the property in order to satisfy the taxes, assessments, penalties, and cost owed.

Section 12-49-40 of the South Carolina Code (2014) requires the sale of real property for which taxes are returned as delinquent and not otherwise satisfied.

All personal property subject to taxation shall be liable to distress and sale for the payment of taxes, in the manner provided in this title, and all real property returned delinquent by the county treasurer upon which the taxes shall not be paid by distress or otherwise shall be seized and sold as provided in this title. The distress and sale of personal property shall not be a condition precedent to seizure and sale of any real property under this title.

S.C. Code Ann. § 12-49-40.

Section 12-51-50 of South Carolina (2014) governs the sale of the property and states in pertinent part:

The property duly advertised must be sold, by the person officially charged with the collection of delinquent taxes, at public auction at the courthouse or other convenient place within the county, if designated and advertised, on the advertised date 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.

Very few of these statutes mandate action by specific dates. Section 12-45-180 requires treasurers to issue an execution if taxes are not paid by March 17, but does not state when the execution must be issued. Section 12-51-40 requires the DTC to mail the delinquency notice on April first, “or as soon as practicable” Thus, suggesting a date, but not mandating one. Section 12-51-50, dealing specifically with the actual sale of property, does not mandate the sale be held on or by a particular date. Therefore, we do not believe the Legislature intended require tax sales take place by a certain date.

As we previously noted, many of the mandatory requirements placed on DTCs are to protect the taxpayer against surprise or the sacrifice of his or her property. We do not envision how delaying the date of the tax sale would prejudice the taxpayer as long as the new date is properly noticed. Therefore, we believe a DTC could delay the sale especially in light of the Covid-19 pandemic, but would be required to notify the taxpayer of the new sale date. The type of notice required depends on where the DTC is in the process. If the DTC already sent out notices by certified mail as required in section 12-51-40(b) to gain exclusive possession over the property, then we believe a change in the sale date would require this notice be resent reflecting the new sale date.

We must caution that we do not believe a DTC could indefinitely delay tax sales as we are concerned that a court could find that delaying tax sales indefinitely would amount to a defiance of his or her mandated statutory duties. In Parker v. Brown, 195 S.C. 35, 10 S.E.2d 625 (1940) our Supreme Court considered whether a tax collector could bring suit against a county treasurer for failing to issue an execution on unpaid taxes. The Court acknowledged “[i]t is important that taxes be collected, as revenue is essential to the operation of the State and County governments, and the various public institutions dependent upon them for their sustenance.” Id. at ___, 10 S.E.2d at 630. Based on this consideration, the Court determined the requirement that the treasurer issue the executions is for the benefit of the public, not the tax collector. Id. at ___, 10 S.E.2d at 630. Accordingly, the Court did not find the tax collector had a cause of action against the treasurer in his capacity as tax collector. Id. In addition, the Court addressed the tax collector’s argument that he could have required the treasurer to issue the executions by mandamus. Id. The Court instructed that the interest of the public is paramount in granting a mandamus. Id. at ___, 10 S.E.2d at 634-35. Finding the tax collector’s primary motive as pecuniary and not public interest, the Court also rejected this argument, but advised:

The Tax Collector could not have obtained a mandamus against the Treasurer here to issue executions in order that he might collect his fees and commissions. He had a pecuniary interest in the executions held by the Treasurer, but this, alone, would not be sufficient to warrant a mandamus to lie against the Treasurer to issue such executions. However, it may not be

amiss to say that if a Tax Collector, as any other citizen, should bring a proper petition for mandamus against a County Treasurer to require him to issue executions, it being shown in the petition to the satisfaction of the Court that the public interest demanded that the writ be granted, we have no hesitancy in saying that there would be merit in such petition, and the fact that the Tax Collector would receive fees and commissions from the executions in such case, of which he might be deprived otherwise, would not affect the action of the Court, as compensation is a mere incident to his office, the main function of which is to faithfully perform his duties in the interest of the public.

Id. at ___, 10 S.E.2d at 635.

While the tax collector's efforts failed in Parker, we believe the citizenry has an interest in the collection of taxes and could seek to enforce the duties placed upon DTCs including the sale of property. However, a court would have to find enforcing such requirements are in the public interest. During this time of the Covid-19 pandemic, a court would have to weigh the public's interest in obtaining the revenue derived from a public sale with the need to avoid the large gatherings which in-person tax sales invite. Such a determination is factual in nature and thus, beyond the scope of an opinion of this Office. Op. Att'y Gen., 2020 WL 2992184 (S.C.A.G. Mar. 11, 2020) (“[T]his Office is not empowered to investigate or determine factual questions.”). However, we believe a court would not seek to require in person tax sales that DTCs only temporarily postponed due to the pandemic.

3. S.C. Code Ann. Section 12-51-50 provides in part:

The property duly advertised must be sold, by the person officially charged with the collection of delinquent taxes, at public auction at the courthouse or other convenient place within the county, if designated and advertised, on the advertised date for legal tender payable in full by cash, cashier's check, certified check, or money order on the date of the sale . . .

Regarding, “. . . sold, by the person officially charged with the collection of delinquent taxes,” is there going to be a technical interpretation of this language if the sale actually is conducted by an online outfit that is under the obvious direction and control of “the person officially charged with the collection of delinquent taxes?” In other words, does an online auction company under a DTC's direction constitute the sale of property “by the person charged with the collection of delinquent taxes?”

In a recent opinion, this Office addressed the question of whether section 12-51-50 permits the use of an online platform to conduct tax sales as a way to deal with the issue of having large gatherings during the Covid-19 pandemic. Op. Att'y Gen., 2020 WL 4730384 (S.C.A.G. Aug. 3, 2020). In that opinion, we concluded

The plain and ordinary meaning of the terms in this statute indicate the Legislature likely intended for tax sales to take place at a physical location rather than on an online platform. However, given the unprecedented nature of the Covid-19 pandemic, a court could find that conducting a live auction within the county, but allowing bidding through an online platform, substantially complies with the requirements of section 12-51-50 if the taxpayer is provided the same level of protection as he or she would by a live auction conducted in person.

Id. However, we advised the requesters to seek either a judicial determination from a court or an amendment of the statute by the Legislature specifically allowing for the use of an online platform. Id.

As to your question, presuming a court found the use of an online platform to conduct tax sales within the authority of section 12-51-50, we believe this provision would require the person officially charged with the collection of the delinquent taxes to oversee all aspects of the sale. The plain language in section 12-51-50 requires the person officially charged with collection of the delinquent taxes to conduct the sale. Whether the DTC can delegate the performance of the auction to an auction company depends on how a court would view the authority given to the auction company by the DTC.

As we explained in prior opinions, public officers and public bodies cannot divulge the authority given to them by statute to others when such functions are discretionary or quasi-judicial. See Op. Att’y Gen., 1976 WL 30405 (S.C.A.G. Aug. 6, 1976). However, we recognize such officers and bodies can delegate ministerial functions. Id. In a 2017 opinion, we discussed whether publicly funded programs at the South Carolina Governor’s School for Science and Math may be delegated to a non-profit corporation. Op. Att’y Gen., 2017 WL 3841517 (S.C.A.G. Aug. 22, 2017). In that opinion, we stated:

While “an administrative body cannot delegate quasi judicial functions, it can delegate the performance of administrative and ministerial duties . . .” Krug v. Lincoln Nat. Life Ins. Co., 245 F.2d 848, 853 (5th Cir. 1957); see also 73 C.J.S. Public Adm. Law and Procedure, § 53; McQuillin, Municipal Corporations, § 29.08, n. 6. This is consistent with the law in South Carolina. See, Green v. City of Rock Hill, 149 S.C. 234, 270, 147 S.E. 346 (1929) (contract between a city and a private company for the control, management and operation of waterworks plant is valid). This law has been applied to analogous situations such as the administration of hospitals

Id. Our courts describe a duty as ministerial “when it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts.” Long v. Seabrook, 260 S.C. 562, 568, 197 S.E.2d 659, 662 (1973). The determination of whether an auction is ministerial rather than discretionary is a question of fact, which cannot be resolved in

an opinion of this Office. Op. Att’y Gen., 2020 WL 2992184 (S.C.A.G. Mar. 11, 2020). However, because auctions generally require a well scripted set of procedures leaving little up to the discretion of the auctioneer, a court may find they are ministerial and therefore, can be delegated to a private entity. However, we believe the person charged with collecting the delinquent taxes would remain responsible to ensure the auction is conducted in accordance with the statute.

- 4. Staying with Section 12-51-50, regarding the requirement that “property duly advertised must be sold . . . at public auction at the courthouse or other convenient place within the county,” health concerns could severely limit the number of people allowed to participate in tax sales in a physical location. County governing bodies, committees, boards and other public entities have since at least March 2020 conducted numerous online meetings (through Zoom, WebEx, YouTube, e.g.). Would an auction conducted in a similar fashion that permits the public access in person, by phone or online, be considered a public auction for purposes of 12-51-50?**

The South Carolina Freedom of Information Act (“FOIA”) contemplates the conduct of meetings by public bodies via electronic means. Section 30-4-20(d) of the South Carolina Code (2007) defines “meeting” for purposes of FOIA as “the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.” (emphasis added). This Office has long advised such language authorizes meetings to be conducted via telephone conference call so long as the public body is not statutorily restricted to meeting in a physical location. See Ops. Att’y Gen., 1981 WL 96555 (S.C.A.G. Mar. 25, 1981) and 1980 WL 121071 (S.C.A.G. Nov. 17, 1980). More recently, we interpreted this language as also allowing meetings conducted with video via the internet. Op. Att’y Gen., 2020 WL 2266981 (S.C.A.G. Apr. 27, 2020).

These opinions pertain to the open meeting requirements for public bodies, not the conduct of auctions by DTC. Therefore, we do not believe they are relevant to your inquiry other than to note the Legislature, by allowing for the conduct of meetings by public bodies via electronic means, indicates that the Legislature believes electronic meetings guarantee the public the same reasonable access to activities of the government as in person meetings and maybe would also allow for online tax sales if they provide the same level of protection to the taxpayer as an in person auction. We considered this argument in a recent opinion concerning the use of online tax sales issued earlier this month. Op. Att’y Gen., 2020 WL 4730384 (S.C.A.G. Aug. 3, 2020). Thus, we suggest you refer to this opinion for a more thorough analysis of the ability of DTCs to use an online platform to conduct tax sales.

- 5. Still in Section 12-51-50, regarding, “. . . at the courthouse or other convenient place within the county,” if an online auction is “hosted” in another state (because that’s where the auctioneers are incorporated or work, e.g.) under the direction and control of the “the person officially charged with the collection of delinquent taxes,”**

if the hosting platform is accessible to Internet users in Richland County, does that constitute a “place” within the county, or does the “place” have to be a physical as opposed to “virtual?”

As we stated in our August 3, 2020 opinion, section 12-51-50 does not address the use of an online platform, but the language in section 12-51-50 suggests a physical place as opposed to a virtual place. Op. Att’y Gen., 2020 WL 4730384 (S.C.A.G. Aug. 3, 2020). However, we were asked whether a situation in which conducting a live, public auction within the county but on a virtual platform met the statute’s requirements. Id. While not free from doubt, we concluded that given the circumstances of the Covid-19 pandemic, a court may find “conducting a live auction within the county, but allowing bidding through an online platform, substantially complies with the requirements of section 12-51-50 if the taxpayer is provided the same level of protection as he or she would by a live auction conducted in person.” Id.

If, as you suggest, the auction is hosted in another state, we do not see how such a scenario could substantially comply with section 12-51-50. We believe in order to host the auction out of state, the Legislature would need to amend section 12-51-50 to allow for such as it would no longer take place within the county as required.

- 6. S.C. Code Ann. Section 12-51-60 provides in part that, “the successful bidder . . . shall pay legal tender . . . to the person officially charged with the collection of taxes” Can such payment be made to a third party contracted to host the tax sale (in a form they and their customers agree to) who then sends certified funds to the county official charged with that function?**

Section 12-51-60 specifies the bidder shall pay the legal tender to the person charged with collecting the taxes. The plain language in section 12-51-60 suggests that the bidder must be the payor and the DTC must be the payee. However, if a DTC may legally delegate his or her authority to a third party, perhaps the third party could stand in the shoes of the DTC and receive payment. But, until a court rules on the ability of the DTC to delegate such authority to a third party, we would caution against allowing a third party to receive payment.

- 7. Regarding the requirement of “. . . legal tender payable in full by cash, cashier’s check, certified check, or money order on the dates of the sale . . .” prescribed in Section 12-51-60, do online payment processors such a PayPal and Venmo constitute “legal tender?”**

Section 12-51-60 references section 12-51-50 for purposes of determining acceptable legal tender, stating: “The successful bidder at the delinquent tax sale shall pay legal tender as provided in Section 12-51-50” Section 12-51-50, as you quoted, lists the acceptable forms of legal tender as including cash, cashier’s check, certified check, or money order. “The canon of construction ‘*expressio unius est exclusio alterius*’ or ‘*inclusio unius est exclusio alterius*’ holds that ‘to express or include one thing implies the exclusion of another, or of the

alternative.” Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) (quoting Black’s Law Dictionary 602 (7th ed. 1999)). Thus, we do not believe online payments such as PayPal and Venmo are permissible legal tender for purposes of a tax sale.

- 8. Lastly, again regarding the public auction, must the delinquent properties be sold in any particular order, or can they be sold in accordance with the familiar e-bay style where bidding is open on all items for a set time period? It does not appear that such a sales approach is prohibited or addressed in Title 12, Chapter 51.**

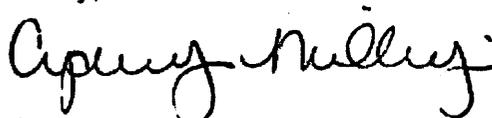
Section 12-51-50 only states the sale of the property shall be sold “at public auction.” We agree chapter 51 of title 12 does not give any further guidance or define the term “auction.” Section 40-6-20 of the South Carolina Code (2011), contained in the Code provisions regulating the auctioneering profession, defines “auction” as “the sale of goods or real estate by means of exchanges between an auctioneer and a member of an audience, the exchanges consisting of a series of invitations for offers made by the auctioneer, offers by members of the audience, and the acceptance by the auctioneer of the highest or most favorable offer.” Employing this definition, a court would likely find an e-bay style auction would not comply with the statute. However, section 40-6-20 states this definition is for “purposes of this chapter” and therefore, we do not believe the Legislature intended for it to apply to the provisions governing tax sales.

Our courts instruct us to interpret statutes by giving the terms used their plain and ordinary meaning. Proveaux v. Med. Univ. of S.C., 326 S.C. 28, 31, 482 S.E.2d 774, 776 (1997). Turning to the plain and ordinary meaning of the terms used, Black’s Law Dictionary defines “auction” as “public sale of property to the highest bidder; a sale by consecutive bidding, intended to reach the highest price of the article through competition for it.” Auction, Black’s Law Dictionary (11th ed. 2019). In accordance with this definition, as long as the property is sold to the highest bidder in a manner in which the bid price increases with each new bid, the auction would comply with the ordinary meaning of the term used in the statute.

Conclusion

Because of the number of questions addressed in this opinion, we will not attempt to summarize our findings, but refer you to each question for a summary of our response.

Sincerely,



Cydney Milling
Assistant Attorney General

The Honorable David A. Adams
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REVIEWED AND APPROVED BY:

A handwritten signature in black ink, appearing to read "R. D. Cook", written over a horizontal line.

Robert D. Cook
Solicitor General