



ALAN WILSON
ATTORNEY GENERAL

June 22, 2020

Karen Blair Manning, Esquire
Chief Legal Counsel
South Carolina Department of Commerce
1201 Main Street
Suite 1600
Columbia, South Carolina 29201

Dear Ms. Manning:

We received your request for an opinion of this Office on behalf of the South Carolina Department of Commerce. You request an opinion as to the proper construction of the deed restriction on a parcel of property located in Chester County. Specifically, you ask “whether the use of the property as part of the mitigation efforts related to a Department project qualifies as a ‘commercial purpose’ as set forth in the deed restrictions on the property.”

Law/Analysis

By way of background, you informed us

[t]he Department of Commerce has proposed the construction of a mixed-use, pedestrian-friendly development community in York County. The project will have unavoidable adverse impacts to waters of the United States, necessitating environmental mitigation. The project sponsor has proposed using the parcel of property as part of those mitigation efforts.

Specifically, you note the project will necessitate the use of stream and wetland mitigation credits. The project sponsor wishes to use the property in question, which you refer to as the Landsford Tract, as the focal point of the mitigation plan. You also informed us that the Open Space Institute Trust, Inc. (“OSI”) purchased the Landsford Tract as a part of this plan. You state OSI is “engaged in the business of land conservation” and its activities include “preserving land for water quality purposes.” You also note, “[m]any of the lands they buy, they steward to become parks and other community assets.”

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You describe the Landsford Tract as “approximately 500 acres of forested land” located in Chester County, just south of York County. The property is subject to several deed restrictions. You state:

Pursuant to the General Deed Restrictions, the property may be used for either single-family residential purposes or for commercial purposes. General Deed Restrictions §§ 2-3. The deed does not define “commercial purposes,” but does preclude usage of the property for purposes which create a nuisance or for certain specific commercial uses, such as adult-oriented businesses, flea markets, a junk yard, or recycling stockyard, among others. *Id.* at § 3. The deed also prohibits raising, breeding, or keeping animals, livestock or poultry of any kind. *Id.* at § 4. While the deed allows for both residential and commercial usage of the property, neither of these uses is required.

Thus, you asked whether the use of the Landsford Tract for mitigation purposes falls within a commercial purpose as expressed by the deed.

The Court of Appeals in Community Services Associates, Inc. v. Wall, 421 S.C. 575, 582-83, 808 S.E.2d 831, 835 (Ct. App. 2017) aptly described how courts should construe restrictive covenants.

“‘Restrictive covenants are contractual in nature,’ so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document.” Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863-64 (1998) (quoting Palmetto Dunes Resort v. Brown, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (1985)). “When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract’s force and effect and the court must construe it according to its plain, ordinary, and popular meaning.” Moser v. Gosnell, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999). Accordingly, when “the language imposing restrictions upon the use of property is unambiguous, the restrictions will be enforced according to their obvious meaning.” Shipyard Prop. Owners’ Ass’n v. Mangiaracina, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App. 1992).

“A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation.” McClellanville, 345 S.C. at 623, 550 S.E.2d at 302. When such an ambiguity exists, all doubts are to be “resolved in favor of free use of the property.” Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). Thus, “a restriction on the use of the property must be created in express terms or by plain and unmistakable implication.” *Id.* (emphasis added) (quoting Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980)).

Id. at 582-83, 808 S.E.2d at 835.

We have not reviewed the deed in question, but understand from your letter the General Deed Restrictions include a provision stating the property may be used “for either single-family residential purposes or for commercial purposes.” Black’s Law Dictionary defines “commercial” as “[o]f, relating to, or involving the buying and selling of goods; mercantile.” Black’s Law Dictionary (11th ed. 2019). We also found several definitions for the term “commercial purposes” in the South Carolina Code. While none pertain to the construction of deeds and all of them provide slightly different definitions, they all center on the idea of income production. See S.C. Code Ann. § 50-18-210(5) (2008) (defining “commercial purpose” under the Aquaculture Enabling Act as “the culture, processing, purchase, sale, transfer, exchange, or the offer or exposure for sale, transfer, or exchange of a product, or engaging in aquaculture or aquaculture business in order to derive income or other consideration.”); S.C. Code Ann. § 50-15-310(5) (Supp. 2019) (defining “commercial purposes” under the South Carolina Captive Alligator Propagation Act as “to derive income or with the intent to derive income.”); S.C. Code Ann. § 50-13-10(B)(2) (Supp. 2019) (defining “commercial purpose” in regard to fishing regulation as “(a) being engaged in selling fish; or (b) taking or attempting to take fish in order to derive income or other consideration; or (c) fishing more devices than allowed for recreation.”); S.C. Code Ann. § 12-6-3620(C)(2) (2014) (defining “commercial use” for purposes of biomass energy production as “a use intended for the purpose of generating a profit.”).

In a 2015 opinion, this Office was asked to consider whether kayak tours are a “commercial enterprise” requiring a special permit for operation in a national wildlife refuge. Op. Att’y Gen., 2015 WL 2148109 (S.C.A.G. Apr. 27, 2015). We cited to a federal district court case, McGrail & Rowlev v. Babbitt, 986 F. Supp. 1386 (S.D. Fla. 1997), which looked to the Fish and Wildlife Service Refuge Manual definition of “commercial enterprise” and noted the realization of a profit is the determining factor whether an activity is considered to be commercial. Id. Because the kayak tours were offered for a fee, we concluded they likely required a special permit and therefore could be regulated by the United States Fish and Wildlife Service. Id.

In 1974, we addressed whether possession and consumption of alcoholic beverages in apartment complex clubhouses is permitted under a statute setting forth the circumstances in which it is lawful for persons twenty-one years of age or older to transport, possess and consume lawfully acquired alcoholic liquors. Op. Att’y Gen., 1974 WL 22423 (S.C.A.G. Jan. 4, 1974). The statute excluded possession on property engaged in any business or commercial activity. Id. Thus, we considered whether a clubhouse is engaged in “commercial activity.” Id. Initially, we noted this is a question of fact rather than a question of law. Id. Then, we stated:

“Commercial activity” is broadly defined to include “any type of business or activity which is carried on for a profit.” 15A C.J.S. Commercial § 1. The actual realization of a profit is not the determinative factor, it is the intent or objective of those in charge of the operation as manifested by their words and

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conduct. Generally speaking, a gathering of apartment residents and invited guests hosted by the management at which an assessment is charged to defray the cost of entertainment and set-ups is not a “commercial activity”.

Id.

Your letter does not indicate the Landsford Tract will be used for buying or selling of any goods or services or for the purpose of producing income, which we have previously noted as indicative of commercial uses or purposes. To the contrary, it indicates the Landsford Tract will be used for conservation and possibly recreational activities. Therefore, a court could find environmental mitigation is not a commercial purpose. Nonetheless, we cannot ignore the fact that the use of the Landsford Tract for mitigation purposes is part of a larger development plan, which we presume is being undertaken for the purpose of generating a profit. Additionally, we understand the Landsford Tract was conveyed to OSI, a separate entity who is in the business of land conservation. Thus, we believe these facts weigh in favor of finding a commercial purpose.

However, like the determination of what constitutes commercial activity in our 1974 opinion, the determination of whether use of the Landsford Tract for environmental mitigation is a commercial purpose is a question of fact. As we stated in numerous opinions, this Office cannot investigate or make factual determinations. See Op. Att’y Gen., 2013 WL 3479877 (S.C.A.G. June 26, 2013); (citing Op. Att’y Gen., 2006 WL 1207268 (S.C.A.G. Apr. 4, 2006) (“[T]his Office does not have the authority of a court or other fact-finding body, and therefore, it is unable to adjudicate or investigate factual questions”)); see also Op. Att’y Gen., 2013 WL 3479876 (S.C.A.G. June 26, 2013) (explaining this Office does not investigate facts, but instead only issues legal opinions). Therefore, we cannot make a conclusive determination on the character of the proposed use of the Landsford Tract.

Additionally, you noted in your letter that while the deed allows for both residential and commercial uses, “neither of these uses is required.” We have not reviewed the deed to be able to discern whether the language used restricts the use to residential and commercial or whether it’s merely allows for such use. As we explained above, a court must construe deeds resolving all doubts in favor of free use of the property. Cnty. Servs. Assocs., Inc. 421 S.C. at 582-83, 808 S.E.2d at 835. Therefore, if the language used is permissive rather than restrictive and conservation and environmental mitigation efforts are not specifically prohibited, we believe a court could find such use of the property permissible regardless if it constitutes a commercial purpose. Nonetheless, only a court, not this Office, has the ability to review the deed and fully investigate the intent of the parties. Thus, we again suggest you seek clarification from a court as to compliance with the language contained in the deed.

Conclusion

You asked us to determine whether use of the Landsford Tract for environmental mitigation complies with the restrictions contained in its deed and specifically whether such use is a

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commercial purpose. We understand the deed does not specify what is considered commercial purposes. Therefore, we turn to the common and ordinary meaning of such term. Based on the common and ordinary meaning generally given to the term "commercial," we believe commercial purposes generally involve some effort to generate a profit. It is our understanding the Landsford Tract in particular will not be used in an effort to generate a profit. To the contrary, the information provided indicates it will be used to benefit the environment and the community. However, we also realize use of the Landsford Tract for mitigation is part of a larger commercial endeavor. Furthermore, you informed us that it has been purchased by a nonprofit engaged in the business of land conservation. Thus, these two factors appear to indicate commercial use.

In addition, you note the deed is not written to suggest that the property be used only for residential and commercial purposes. This fact, coupled with the requirement that deeds be interpreted in such ways that promote the free use of property, could lead a court to find mitigation efforts are not prohibited by the deed. However, this determination and the determination as to the character of the use of the property are questions of fact. Because this Office cannot adjudicate or investigate factual questions, we suggest you seek further clarification from a court.

Sincerely,



Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General