5279 Literacy

HENRY MCMASTER
ATTORNEY GENERAL

November 8, 2006

The Honorable Herb Kirsh
Member, House of Representatives
Box 31
Clover, South Carolina 29710

Dear Representative Kirsh:

We received your letter requesting an opinion of this Office interpreting section 12-43-232. In your letter, you indicated you have a constituent, John Gossett, who is having problems with York County on this matter. At your suggestion, we spoke with Mr. Gossett about his concerns over York County's interpretation of this statute. Through that conversation, Mr. Gossett posed three questions in regard to section 12-43-232. First, he desires clarification on what qualifies as a "management system" under section 12-43-232(1)(a) and specifically, whether a written timber management plan is required to establish such a system. Second, he wishes to know whether a piece of property that qualifies for agricultural use in one county, may be used to qualify a piece of property in another county for agricultural use. Third, he requests interpretation of the language "owned in combination" as found in section 12-43-232.

Law/Analysis

Section 12-43-232 of the South Carolina Code (2000 & Supp. 2005) governs the requirements for agricultural use property in South Carolina. Subsection (1)(a), in particular, deals with the qualifications for property used to grow timber. S.C. Code Ann. § 12-43-232(1)(a) (2000). This provision states as follows:

> If the tract is used to grow timber, the tract must be five acres or more. Tracts of timberland of less than five acres which are contiguous to or are under the same management system as a tract of timberland which meets the minimum acreage requirement are treated as part of the qualifying tract. Tracts of timberland of less than five acres are eligible to be agricultural real property when they are owned in combination with other tracts of nontimberland agricultural real property that qualify as agricultural real property. For the purposes of this item, tracts of timberland must be devoted actively to growing trees for commercial use.

Ingrid Gotte

When interpreting statutes, we like a court, employ the rules of statutory interpretation. The primary consideration in statutory interpretation

> is to ascertain and effectuate the intent of the legislature. All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. Whenever possible, legislative intent should be found in the plain language of the statute itself.

South Carolina Dep't of Transp. v. First Carolina Corp. of South Carolina, 369 S.C. 150, ___, 631 S.E.2d 533, 535 (2006).

First, with regard to the meaning of "management system," we did not find an appellate court decision interpreting this phrase. However, we found several decisions by the Administrative Law Judge Division (the "ALJ") that touch on this matter.

In an opinion issued in 1998, the ALJ considered a case in which a property owner owned a 3.39-acre tract of land, which was covered under a Timber Management Agreement entered into by the property owner and her sons who owned a 6.67-acre tract of land. Smith v. Hendrix, 1998 WL 229749 (S.C. A.L.J. 1998). The ALJ found although a Timber Management Agreement existed between the property owner and her sons, the agreement

> fails to present any evidence of a deliberate harvesting or planting on the property, nor of any real intent to cultivate, harvest or plant in the future. It refers to a management plan for another property, but that other plan has not been submitted as evidence. The bid for timber and the checkbook record do not establish what trees were taken or from where the trees were taken. Assuming arguendo that the payment was for trees from the subject property, Petitioner asks this Court to hold that a single timber sale in the past 20 years qualifies a property for an agricultural use classification forever.

Id. Thus, the ALJ ultimately found the property owner's property "is not used in actively growing timber as required by S.C. Code Ann. § 12-43-232(1)(a) and is not under a proper management system." Id. This decision indicates the ALJ's view that just because a timber management agreement exists, the existence of such an agreement does not automatically establish a timber management system per section 12-43-232(1)(a). Rather, it appears the ALJ's concern rests with whether the property claimed as part of the timber management system is property actively used for growing and selling timber.

In another case before the ALJ, a property owner owned a parcel consisting of 4.33 acres. Hendrix v. Lexington County Assessor, 2005 WL 1900512 (S.C. A.L.J. 2005). In addition to the 4.33 acres, the same property owner also owned a total of 51.26 acres in the same county. Id. The ALJ noted the 4.33 acres are not contiguous with the other property. Id. In addition, the ALJ added:

> The Petitioner has not cleared the brush from the property, has not thinned any trees, has not contracted with a timber company, nor has he planted trees in rows to facilitate harvesting. Likewise, the Petitioner did not submit any written plans, contracts or management agreements on any of the parcels he owns.

Id. The ALJ cited to section 12-43-232 and to regulation 117-114 of the South Carolina Code of Regulations, which the South Carolina Department of Revenue promulgated to clarify that property must be used for a bona fide agricultural use in order to qualify as agricultural use property. Id. Based on these provisions, the ALJ concluded:

> Here the property in question is unimproved, natural land. Although the Petitioner claims that the land should be considered with other property that he owns to meet the five acre requirement of SC Code Ann. § 12-43-232(1)(a) (2000), there was no timber management plan submitted, no copies of checks from timber companies, no evidence at all of any merchantability of the product of any of this land. In this case, the trees are growing of their own volition and no evidence has been presented to show they have been "managed" or "cared for" in any way as required by the Regulation. Consideration of the above factors establishes that the Petitioner's property is not used in actively growing merchantable timber as required by S.C. Code Ann. § 12-43-232(1)(a) and S.C. Code Ann. Regulation 117-114, and is not under a proper management system. There is no evidence that the property is anything other than a wooded, unimproved lot. Accordingly, the property does not qualify for the agricultural use classification.

Id.

The focus of the ALJ's determination is on whether evidence exists to show the owner managed and cared for the property in an effort to produce merchantable timber. While the existence of a timber management plan provides some evidence of this effort, the ALJ also noted other factors such as whether the trees have been thinned, whether the owner contracted with a timber company, and whether the trees have been planted in rows for harvesting should be consider when determining whether a management system exists.

Based on our review of the plain language of section 12-43-232(1)(a) and the ALJ's decisions addressing this provision, we are of the opinion that the Legislature's intent with regard to term management system was to ensure property receiving the benefit of classification as agricultural use property due to its use to grow timber is in fact managed in such a way to grow, produce, and sell timber. Thus, the intent of this qualification is to separate this type of property from property that contains timber, but for which no effort is made to manage the property to insure the production of timber.

The ALJ's decisions indicate property satisfies "management system" requirement when evidence exists to show that such property is part of a plan to produce and manage the growing of merchantable timber. The existence of a written management plan certainly provides evidence of this effort. However, we do not believe the existence of a plan is the sole or primary requirement. While our appellate courts have yet to interpret section 12-43-232(1)(a), based on the ALJ's decisions, we believe a court would find a management system exists upon a showing of sufficient evidence that a property owner holds such property with the intention to manage and care for a tract of timber for purposes of selling such timber, as evidenced by the planting, harvesting, and selling timber on such property.

Next, we address the issue of whether two or more pieces of property may meet the management system requirement under 12-43-232(1)(a) to qualify for agricultural use property if those pieces of property are located in different counties. In construing statutes, such as this one, the Supreme Court recognized: "The purpose of construction is to ascertain the legislative intent from the words used; and, if these are susceptible to any sensible meaning, the court cannot add to them other words which would give them a different meaning without making, instead of construing, the statute." Banks v. Columbia Ry. Gas & Elec. Co., 113 S.C. 99, 101, 101 S.E. 285, 285-86 (1919). Furthermore, our Court of Appeals in State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999), noted the Court "must take the statute as we find it, giving effect to the legislative intent as expressed in its language. We cannot under our power of construction supply an omission in the statute."

Section 12-43-232(1)(a) does not state that should two pieces of property be considered in order to qualify as agricultural use under this section, they must both be located in the same county. Therefore, we are of the opinion that the Legislature did not intend for such a requirement to exist. If we were to find otherwise, we would be reading language into the statute that does not exist.

Finally, we address Mr. Gossett's desire for clarification on the phrase "owned in combination with" as contained in the third sentence of section 12-43-232(1)(a). The full sentence reads: "Tracts of timberland of less than five acres are eligible to be agricultural real property when they are owned in combination with other tracts of nontimberland agricultural real property that qualify as agricultural real property." S.C. Code Ann. § 12-43-232(1)(a). From a plain reading of this sentence, we presume a property owner may satisfy this requirement by owning both qualifying nontimberland agricultural real property and a tract of timberland. However, we also note, the next

sentence requires the "tracts of timberland must be devoted actively to growing trees for commercial use." Thus, this requirement must also be met in order for the timberland to be classified as agricultural use property.

Conclusion

Based on our reading of the ALJ's decisions discussing section 12-43-232(1)(a) and touching upon timber management systems, we believe such systems are established by evidence of a plan to care for and manage a tract of land for the purposes of producing merchantable timber. While a written management plan certainly evidences this effort, we believe it is neither absolute evidence of a timber management system, nor is its absence proof that one does not exist. As for whether two or more pieces of property may be located in different counties, but yet combined for purposes of qualifying under section 12-43-232(1)(a) as agricultural use property, because this section does not specifically prohibit such a combination, it is our opinion that the Legislature intended to allow properties in different counties to be combined for such purposes. Finally, we read the third sentence of section 12-43-232(1)(a) literally to say so long as a property owner or owners own property qualifying as nontimberland agricultural real property, a tract of timberland actively devoted to growing trees for commercial use will also qualify for agricultural use. We hope this opinion sufficiently satisfies your and Mr. Gossett's questions regarding section 12-43-232(1)(a).

Very truly yours,

Cydney M. Milling

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Assistant Deputy Attorney General