



HENRY McMASTER
ATTORNEY GENERAL

September 5, 2006

The Honorable Ronnie Cromer
Member, South Carolina Senate
Post Office Box 378
Prosperity, South Carolina 29127

Dear Senator Cromer:

We issue this opinion in response to your letter concerning fees assessed by the Department of Labor, Licensing and Regulation on behalf of the Perpetual Care Cemetery Board. You state: "It has been brought to my attention that the SC Perpetual Care Cemetery Board, a division of Labor, Licensing and Regulation is interpreting the law differently and has been charging non-profit cemeteries undue fees." In addition, you included copies of section 501(c)(13) of the Internal Revenue Code and section 40-8-200 of the South Carolina Code, which you point out states "that the provisions of Chapter 40 of the SC Code do not apply to nonprofit cemeteries."

Law/Analysis

Chapter 8 of title 40 of the South Carolina Code, known as the "South Carolina Perpetual Care Cemetery Act" (the "Cemetery Act"), provides for the creation of a Perpetual Care Cemetery Board, the establishment of licensure requirements and fees for cemeteries, as well as, laws generally regulating cemeteries located in this State. S.C. Code Ann. §§ 40-8-10 et seq. (Supp. 2005). Section 40-8-80 of the South Carolina Code (Supp. 2005), of which you included a copy in your request, pertains to license fees. This section states as follows:

(A) The following fees must be assessed, collected, and adjusted on behalf of the board by the Department of Labor, Licensing and Regulation in accordance with this chapter and the provisions of Section 40-1-50(D):

- (1) a license fee of eight hundred fifty dollars, annually;
- (2) an application fee of two hundred fifty dollars.

Request Letter

(B) Notwithstanding subsection (A), the fees for a cemetery in existence on the effective date of this chapter, which consists of ten acres or less of land are as follows:

- (1) a license fee of four hundred dollars, annually;
- (2) an application fee of two hundred fifty dollars.

(C) The license period is from January first through December thirty-first.

(D) Failure to renew a license by the December thirty-first renewal date renders the license invalid. The license may be reinstated upon receipt of an application postmarked not later than January thirty-first. Delinquent renewal requests not postmarked on or before January thirty-first require that a new application be submitted under the guidelines in effect for the current period.

(E) All fees are nonrefundable.

S.C. Code Ann. § 40-8-80. However, section 40-8-200 of the South Carolina Code states: "The provisions of this chapter do not apply to governmental cemeteries, nonprofit cemeteries, church cemeteries, nature preserve cemeteries, or family burial grounds." Thus, as you suggest and we agree, the provisions contained in chapter 8, title 40 "do not apply to nonprofit cemeteries."

In your letter, you mention the definition of a nonprofit cemetery contained in the Internal Revenue Code in stating that the provisions of chapter 8 of tile 40 do not apply to nonprofit cemeteries. In particular, you referenced section 501(c)(13) of the Internal Revenue Code. Section 501 provides that certain organizations are exempt from federal income tax. Section 501(c) contains an enumerated list of specific exempt organizations. This list includes:

Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for the purpose of the disposal of bodies by burial or cremation which is not permitted by its charter to engage in any business not necessarily incident to that purpose and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

26 I.R.C. § 501(c)(3).

Section 40-8-200 does not specifically provide that a nonprofit cemetery pursuant to section 501(c)(13) is exempt from the provisions of chapter 8 under title 40 of the South Carolina Code. Moreover, section 40-8-200, nor section 40-8-30, containing a list of defined terms for purposes of the Cemetery Act, do not define “nonprofit cemetery.” Thus, we must employ the rules of statutory interpretation to ascertain what types of organizations or entities the Legislature intended to include in this exception.

“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” South Carolina Dept. of Transp. v. First Carolina Corp. of South, 369 S.C. 150, ___, 631 S.E.2d 533, 535 (2006). “In determining the meaning of a statute, the terms used therein must be taken in their ordinary and popular meaning, nothing to the contrary appearing.” Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994).

Finding the term “nonprofit” is not defined under the provisions of the Cemetery Act, we turn to the ordinary and popular meaning of the term. In previous opinions, this Office discussed the ordinary meaning of “nonprofit.” In an opinion dated November 14, 1967, we addressed the meaning of the term “nonprofit organization.” Citing the definition of “nonprofit” in Webster’s New International Dictionary, we stated this term means “not conducted or maintained for the purpose of making a profit; not based on the profit motive; or not organized on capitalistic principles.” Op. S.C. Atty. Gen., November 14, 1967.

We again addressed the meaning of the term “nonprofit” in an opinion issued June 1, 2005. “‘Nonprofit’ has been defined to mean ‘not conducted or maintained for the purpose of making a profit; not based on the profit motive; or not organized on capitalistic principles.’” Op. S.C. Atty. Gen., June 1, 2005 (quoting Webster’s New International Dictionary at 761). Furthermore, we added:

It has often been said that the purpose of a nonprofit corporation or eleemosynary corporation or organization is charitable in nature. For example, in Ellerbe v. David, 193 S.C. 332, 8 S.E.2d 518, 520 (1940), our Supreme Court defined a “charitable purpose” as an “eleemosynary purpose.” In Sandel v. State, 126 S.C. 1, 119 S.E. 776, 778, (1922), it was stated that eleemosynary corporations are “those created for charitable and benevolent purposes.” And, in Op. S.C. Atty. Gen., November 21, 1979, citing Ellerbe v. David, supra and Johnson v. Sptg. Co. Fair Assn., 210 S.C. 56, 41 S.E.2d 599 (1947) we commented that “[t]he South Carolina Supreme Court has

previously defined eleemosynary purposes as ‘charitable’ or ‘benevolent.’” We referenced therein S.C. Code Ann. Section 61-5-20 which states that nonprofit organizations are established for social, benevolent, patriotic, recreational or fraternal purposes. The Court has also stated that the word “eleemosynary” can be used in a broader sense to denote an unselfish purpose to advance the common good in any form. See, Johnson v. Sptg. Co. Fair Assn. supra.

Id. We also noted that “[w]hether or not a corporation or organization is, in reality, entitled to nonprofit status is principally a question of fact.” Id.

In that opinion, we continued with our analysis citing the South Carolina Supreme Court case of Columbia Country Club v. Livingston, 252 S.C. 490, 167 S.E.2d 300 (1969). The Court addressed the issue of whether a private country club is statutorily exempt as an eleemosynary or nonprofit corporation or organization from a license tax charged on all places of amusement in South Carolina. Id. at 493, 167 S.E.2d at 302. Although the Court was charged with determining whether the country club was a nonprofit corporation under a state statute, it noted its consideration of federal tax law. “While much of the litigation in this field has involved exemptions under the federal tax law, the principles developed and enunciated in the cases are equally persuasive in determining the right of a corporation to tax exemption under a state statute.”

Because the determination of an organization’s or entity’s nonprofit status is a question of fact, only a court may ultimately make this determination. Op. S.C. Atty. Gen., April 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.”). However, based on Columbia County Club and our opinions as cited above, we believe a court will consider the purpose for which the entity was formed in determining its nonprofit status for purposes of section 40-8-200. We also believe a court likely will consider the fact that a particular cemetery meets the Internal Revenue Code’s description of a nonprofit cemetery and factors similar to those included in the Internal Revenue Code definition to determine whether a cemetery is a nonprofit cemetery. Thus, while a cemetery’s nonprofit status under the Internal Revenue Code may not be in and of itself determinative of whether it is a nonprofit cemetery for purposes of section 40-8-200, we believe a court would consider such status.

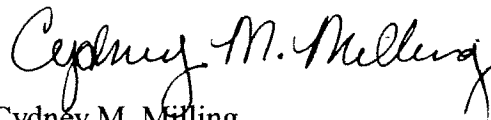
Conclusion

In accordance with our reading of section 40-8-200, we find this provision clearly exempts nonprofit cemeteries from the provisions of the Cemetery Act, which include the licensure fees imposed by section 40-8-80. Because “nonprofit cemetery” is not defined in the Cemetery Act, we

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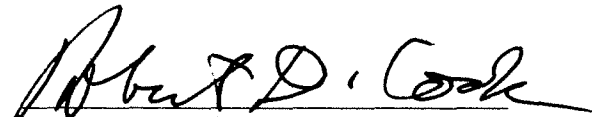
believe a court would consider a cemetery's status as a nonprofit cemetery under section 501(c)(13) of the Internal Revenue Code in determining whether it is exempt under section 40-8-200. However, we caution you that a cemetery's tax exempt status for federal income tax purposes does not necessarily exempt such a cemetery from the provisions of the Cemetery Act.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General