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Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3680
FACSIMILE: 803-253-6283

March 30, 1992

The Honorable Grady L. Patterson, Jr.
State Treasurer
P. O. Drawer 11778
Columbia, South Carolina 29211

Dear Mr. Patterson:

By your letter dated February 14, 1992, to Attorney General Medlock, you ask for an opinion concerning a request by Florence County to match an in-kind contribution pursuant to Act No. 638, §1, par. 35, 1988 S.C. Acts 11, relative to the Florence County Civic Center. Your question is:

> Can we consider for match funds purposes an in-kind contribution which has certain caveats regarding title to the property? More specifically, the agreement entered into by the grantors of the property and Florence County has two conditions which could result in the land's reverting to the grantors. One case is if the Civic Center is not completed within five years of the date the land is granted to the County, and the other is if, for any reason, the Civic Center ceases to be used by the County.

Attorney General Medlock referred your letter to me for response.

Section 1, par. 35, provides:

35.	Florence County-Civic Center	5,000,000
	Total, Florence County-Civic Center	5,000,000

> The funds authorized in this subitem for the Florence County-Civic Center must be matched on a three-to-one value basis as provided by the governing body of Florence County and any governing body of any municipality in Florence County, donations in-kind, and any other source of funds which may be obligated for the center.

Act No. 638, §1, par. 35, 1988 S.C. Acts 11. Your inquiry requires statutory construction of §1, par. 35. Of course, the primary function of statutory construction or interpretation is to ascertain the intention of the legislature which does not require looking beyond the words of the statute when the legislative intent appears on the face of the statute. Wright v. Colleton County School Dist., 301 S.C. 282 391 S.E.2d 564 (1990). Where a statute is clear and unambiguous, its terms must be given their literal meaning, Crown Cork and Seal Co., Inc. v. South Carolina Tax Comm'n, 302 S.C. 140, 394 S.E.2d 315 (1990). In construing a statute, its words must be given their plain and ordinary meaning without resort to a subtle or forced construction to limit or expand the statute's operation. Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988).

Resolution of your inquiry hinges upon whether this specific in-kind donation is "obligated" for the Civic Center. "Obligated" means "[t]o bind or constrain; to bind to the observance or performance of a duty; to place under an obligation. To bind one's self by an obligation or promise; to assume a duty; to execute a written promise or covenant; to make a writing obligatory." Black's Law Dictionary 1073 (6th ed. 1990). Accord Wachter v. Famachon, 62 Wis. 117, 22 N.W. 160 (1885) ("Obligated" means strictly, and in common parlance, to be bound.).

The Agreement between the grantors of the property and Florence County is expressly subject to certain terms, conditions, and promises, including the following two:

> 1. The GRANTEE agrees that the property conveyed to it by GRANTORS will not be used for any purpose other than for a publicly owned civic center, and if it shall cease to be used for that purpose, the GRANTEE, or its successor, will within one (1) year following the discontinuance of the use of the property for a civic center remove the said twenty-five (25) acres above described to the GRANTORS, or their successors and assignees free and clear of all liens or encumbrances.

> 2. The GRANTEE agrees that if the proposed civic center has not been completed on the property conveyed by the GRANTORS to GRANTEE within five (5) years of the date of the conveyance of the twenty-five (25) acres above described, then the GRANTEE will forthwith reconvey the said twenty-five (25) acres to the GRANTORS or their successors and assigns.

The body of property law recognizes certain estates and future interests. Freehold estates include the fee simple absolute and the qualified or defeasible fee simple. The fee simple absolute is defined as:

> an estate limited absolutely to a person and his or her heirs and assigns forever without limitation or condition. An absolute or fee-simple estate is one in which the owner is entitled to the entire property, with unconditional power of disposition during one's life, and descending to one's heirs and legal representatives upon one's death intestate. Such estate is unlimited as to duration, disposition, and descendability. [Citation omitted.]

Black's Law Dictionary 615 (6th ed. 1990). Two types of a qualified or defeasible fee simple estate are: a fee simple determinable and a fee simple subject to a condition subsequent. "A fee simple normally comes to an end upon the death of the owner thereof intestate and leaving no heirs but a fee simple determinable is also limited to expire automatically upon the happening or non-happening of an event stated in the conveyance or will creating the estate." C. Moynihan, Introduction to the Law of Real Property Ch. 2, §4 (1977). "A fee simple subject to a condition subsequent exists when the fee simple is subject to a power in the grantor to terminate the estate granted on the happening of a specified event." Id.

> The basic difference, therefore, between the fee simple determinable and the fee simple on condition subsequent is that the former automatically expires by force of the special limitation, contained in the instrument creating the estate, when the stated contingency occurs, whereas the fee simple on condition subsequent continues despite the breach of the specified condition until it is divested or cut short by the exercise by the grantor of his power to terminate.

Id. "[A] future interest in land may be defined as a present right in relation to the land by virtue of which possession will be had, or may be had, in the future." Id. at Ch. 5, §1. "The future interest arising in the grantor of a determinable fee simple is a possibility of reverter; the future interest arising in the grantor of a fee simple on condition subsequent is a right of entry for condition broken. [Footnote omitted.]" Id. at Ch. 5, §5.

Based on the language quoted above from the Agreement between the grantors and Florence County, there appears to be a fee simple determinable estate with a possibility of reverter. 1/ The question, therefore, is: Can a fee simple determinable estate constitute an obligation under §35? The Restatement of the Law of Property recognizes that the future interest of a possibility of reverter related to a fee simple determinable is tenuous. Restatement of Property §49 comment a (1936). Furthermore, the Restatement of the Law of Property describes the similarities between a fee simple absolute and a fee simple determinable estate.

> The privilege of the owner of a possessory estate in fee simple defeasible to use the land is identical with that of an owner of a possessory estate in fee simple absolute, except that the privilege is limited by a duty not to commit waste.

1/ I was unable to locate a South Carolina case specifically on point. The Supreme Court of Maine, however, in State v. Rand, 366 A.2d 183 (Me. 1976), considered a similar situation. In Rand, a grantor deeded to the City of Portland a parcel of land conditioned upon it being held and maintained forever as a public park and otherwise it was to revert to the grantor. When the State of Maine took the parcel of land by eminent domain, a dispute arose as to whether the City of Portland or the grantor's heirs were entitled to the just compensation for the award. The City of Portland contended that the grantor's deed effected a fee simple determinable with a possibility of reverter to the grantor's heirs which entitled the City to the award because the grantor's heirs' future interest was too remote and speculative to be compensable. The court concluded, however, that the grantor's deed created a charitable trust which was subject to cy pres administration whereby the City of Portland could relocate the public park to a new site and thus entitled the City of Portland to the award. Therefore, at least one other jurisdiction has considered language similar to that found in the Florence County agreement to be a charitable trust subject to cy pres administration rather than a fee simple determinable estate with a possibility of reverter. The practical result of either determination would, however, be to leave the grantee with control of the land.

Id. at §49.

> Except as modified by the terms of the limitation creating an estate in fee simple defeasible, the power and the privilege of the owner of such an estate to create an interest in the affected land are identical with those of an owner having an estate in fee simple absolute therein, but all interests so created are subject to the defeasibility which existed as to the estate of the transferor.

Id. at §50.

> When a possessory estate in fee simple defeasible is owned by a tenant in common, a joint tenant or a tenant by the entirety, the power of such concurrent owner to compel the making of a partition of the land in which he has such estate, is identical with the power possessed by an owner of a possessory estate in fee simple absolute owned in the same form of concurrent ownership.

Id. at §51.

> The liability of the owner of an estate in fee simple defeasible to have his interest subjected to the claims of his creditors, is identical with that of an owner of an estate in fee simple absolute.

Id. at §52.

> The liability of an owner of an estate in fee simple defeasible to have his interest taken under eminent domain proceedings is identical with that of an owner of a [sic] estate in fee simple absolute.

Id. at §53.

> On the intestate death of an owner of an estate in fee simple defeasible, such estate passes, in accordance with the rules of intestate succession applicable to an estate in fee simple absolute, except that all interests so passing are subject to the defeasibility which existed as to the estate of the deceased owner.

Id. at §54. In many significant respects, a fee simple determinable operates like a fee simple absolute. Thus, based on those similarities, the fee simple determinable estate involved in this Agreement would appear to rise to the level of being "obligated for the Civic Center," as would a fee simple absolute.

I hope the above analysis is of assistance to you. If I can answer any question, please advise me.

Sincerely,

Samuel L. Wilkins

Samuel L. Wilkins
Assistant Attorney General

SLW/fg

REVIEWED AND APPROVED BY:

Edwin E. Evans
Chief Deputy Attorney General

Robert D. Cook
Executive Assistant for Opinions