



ALAN WILSON
ATTORNEY GENERAL

September 11, 2019

The Honorable William E. Sandifer
Member
South Carolina House of Representatives
407 Blatt Building
Columbia, South Carolina 29211

Dear Representative Sandifer:

You seek our opinion regarding the Perpetual Care Cemetery Act (the "Act") passed by the General Assembly in 2002. In your letter to us, you describe a cemetery that "dates back to the mid 1960's and therefore was in operation prior to the enactment of [the Act]." You also informed us that the cemetery has "less than 30 acres" in contravention to the Act. But, according to your letter, the cemetery was grandfathered in under sections 40-8-120(D) and 40-8-210 of the South Carolina Code. You state

the cemetery was grandfathered in and has continued in operation until this day. However, the cemetery failed to renew their license under the established renewal timelines. Due to the failure to renew in a timely manner, the Perpetual Care Cemetery Board is requesting the licensee to submit a new application as opposed to a renewal application. Because the cemetery has less than 30 acres . . . , it does not meet the current requirements of the Perpetual Care Cemetery Act established in 2002.

Thus, you request an opinion of this Office as to "whether the Board has the authority to allow the licensee to maintain their grandfathered status despite failing to renew in a timely manner."

Law/Analysis

As you noted in your letter, the General Assembly passed the Act in 2002 to regulate perpetual care cemeteries in this State. Section 48-8-40 of the South Carolina Code (2011), under the Act, prohibits entities from engaging "in the business of operating a perpetual care cemetery company, except as authorized by this chapter, without first obtaining a license from the board." Section 40-8-90 of the South Carolina Code (2011) prescribes the procedure by which a legal entity wishing to establish a cemetery can apply for a license. Section 40-8-120 of the South

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Carolina Code (2011) pertains specifically to the licensing of cemeteries existing prior to the Act. This provision provides:

(A) A perpetual care cemetery licensed by the South Carolina Cemetery Board and operating in good standing on June 30, 1990, may continue to operate and must be granted a license by the South Carolina Perpetual Care Cemetery Board.

(B) A perpetual care cemetery established between July 1, 1990, and the effective date of this chapter may continue to operate and must be granted a license by the South Carolina Perpetual Care Cemetery Board, provided an Irrevocable Care and Maintenance Trust Fund Agreement with a trust institution doing business in this State has been properly entered into by the perpetual care cemetery, and a copy of the same is on file with the board.

(C) Effective January 1, 2003, all perpetual care cemeteries must be operated in accordance with the provisions of this chapter.

S.C. Code Ann. § 40-5-210. As you state in your letter, the cemetery in question was established in the 1960's and therefore, obtained a license under section 40-5-210.

Section 40-8-120 of the South Carolina Code (2011) sets forth land requirements for perpetual care cemeteries. Subsection (A) of this provision states "A licensee shall set aside a minimum of thirty acres of land for use as a cemetery, except as may otherwise be provided in this chapter, and may not mortgage, lease, or encumber it." S.C. Code Ann. § 40-8-120(A). Subsection (D) provides the following exception: "The provisions of subsections (A) and (B) relating to a requirement for minimum acreage do not apply to those cemeteries in existence before the effective date of this chapter." S.C. Code Ann. § 40-8-120(D).

You informed us that the cemetery does not meet the minimum acreage requirement under section 40-8-120(A). Nonetheless, the effective date of the chapter was January 1, 2003. 2002 S.C. Acts 322. Accordingly, the cemetery you reference existed prior to the effective dates of the chapter and we presume it qualified for the exemption from the land requirements under section 40-8-120(D).

Section 4-8-80 of the South Carolina Code (2011) pertains to license fees. This provision sets forth the annual fees assessed on licensees and addresses a licensee's failure to renew a license.

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.

S.C. Code Ann. § 40-8-80(D).

In your letter, you explain the cemetery in question failed to meet the renewal requirements under section 40-8-80(D) by not submitting a timely renewal. We also understand the cemetery is outside of the reinstatement period provided in that provision. You ask us whether the South Carolina Perpetual Care Cemetery Board (the “Board”) may allow this cemetery to maintain its grandfathered status for purposes of the acreage requirement despite its failure to renew its license as required by section 40-8-80(D).

According to section 40-8-80(D), the cemetery is required to submit a new application under the guidelines in effect for the current period. Whether this language results in a cemetery losing its grandfathered status is a question of statutory interpretation. As our Supreme Court explained in State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011),

The cardinal rule of statutory construction is to ascertain and effectuate legislative intent. As such, a court must abide by the plain meaning of the words of a statute. When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute’s operation.

(citations omitted) (internal quotations omitted). However, “[i]n construing a statute, all rules are subservient to the one which requires that the legislative intent prevail.” State v. Harris, 268 S.C. 117, 119, 232 S.E.2d 231, 232 (1977). Moreover, “[a] statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers.” State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015) (citations omitted) (internal quotations omitted).

Because section 40-8-80(D) directs licensees failing to timely renew their license to submit a new application, we presume the General Assembly intended for those licensees to follow the application procedures set forth in section 40-8-90. Section 40-8-90 sets forth numerous requirements for licensure of cemeteries including the establishment and maintenance of an irrevocable care and maintenance trust fund. Section 40-8-90(4)(c) states if the Board intends to grant approval to an applicant, the applicant must present

a description, by metes and bounds, of the acreage tract of the proposed cemetery, with evidence, by title insurance policy or certificate or certification by an attorney at law, that the applicant is the owner in fee simple of the tract of land which must contain not less than thirty acres, and may not mortgage, lease, or encumber it.

(emphasis added). Section 40-8-90(4)(c) continues on to provide the following exception: “In counties with a population of less than thirty-five thousand inhabitants according to the latest

official United States census, the tract needs to be only fifteen acres” In addition, section 40-8-90(C) provides an exception to the acreage requirement when

the governing body of a municipality which is within fifteen miles of the corporate limits of the City of Charlotte, North Carolina, and in which the cemetery is to be located passes an ordinance authorizing a cemetery with less than thirty acres of land when a license establishes an irrevocable trust with a trust corpus of at least fifteen thousand dollars and five acres of land, and the dedication of fifteen percent of all future sales to deposit in the trust on a quarterly basis.

Section, 40-8-90 does not speak to cemeteries existing prior to the Act. A court reading section 40-8-90 in isolation certainly could rule the cemetery you refer to must meet all of the application requirements set forth in section 40-8-90, including the minimum acreage requirement. Moreover, section 40-8-80(D) states a licensee failing to timely renew must submit a new application “under the guidelines in effect for the current period.” A court could also find the acreage requirement set forth in section 40-8-120 is a “guideline in effect” at the time of the application.

However, reading the Act as a whole, we gather the General Assembly’s intent to treat cemeteries established prior to the Act differently. As we noted above, the General Assembly provided these cemeteries with a separate avenue for licensing in section 40-8-210. The General Assembly provided for reduced licensing fees for these cemeteries in section 40-8-80(B). Perhaps most significant to your inquiry, the General Assembly provided a specific exemption from the acreage requirements to cemeteries existing prior to the Act in section 40-8-120(D). Furthermore, cemeteries established prior to the Act may be unable to increase their acreage depending on availability of property adjacent to them, which is most likely the reason the General Assembly sought to exempt them from the acreage requirement in section 40-8-120(D). Thus, we believe a court could determine, based on legislative intent and a practical reading of the Act, the cemetery you describe may continue its exemption from the acreage requirement despite the requirement it submit a new application due to failing to timely renew its license.

Only a court, not this Office, can conclusively determine the correct interpretation of the Act. Nonetheless, the General Assembly granted the Board “full power to regulate the issuance of licenses.” S.C. Code Ann. § 40-8-70 (2011). In addition, our courts recognize “[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.” Dunton v. S.C. Bd. of Examiners In Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987). Accordingly, we believe a court would give deference to the Board’s interpretation of whether a licensee who fails to timely renew its license may maintain their grandfathered status under section 40-8-120(D).

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Conclusion


We cannot make a conclusive decision as to the ability of a licensee to claim grandfathered status with regard to the acreage requirement when the licensee fails to timely renew its license. A court could find because the licensee must submit a new application under section 40-8-90, the licensee is now subject to the acreage requirement under that provision as well as in section 40-8-120. However, given our understanding of the General Assembly's intent to treat cemeteries established prior to the Act differently, we also believe a court could find the exemption provided in section 40-8-120(D) applies to these cemeteries even if they must submit to the application provisions in section 40-8-90. In addition, if the Board interprets section 40-8-120(D) as allowing cemeteries existing prior to the effective date of the Act to be exempt from the minimum acreage requirement regardless of their licensing status, we believe a court would give deference to the Board's interpretation.

Sincerely,



Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General