

STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

June 6, 1977

ATTORNEY GENERAL OPINION NO. 77-181

Mr. Frank Schultz
Chairman
Board of County Commissioners
Greeley County Courthouse
Tribune, Kansas 67879

Re: Counties--Property--Deeds

Synopsis: A restriction on the use of certain lots in the City of Tribune, contained in a deed dated October 28, 1976, which prohibits the use or erection of any building thereon except a "single or multi-family residence with either attached or detached garage" upon any portion of the property does not as a matter of law prohibit the use of mobile home units for residential purposes on such property, nor require that each residential unit erected or used on said property have either an attached or detached garage.

* * *

Dear Mr. Schultz:

We have your letter of May 28, 1977, enclosing a copy of a general warranty deed from the board of county commissioners of Greeley County of several lots located in the City of Tribune, all subject to the restriction that

"neither the Grantee, nor their heirs or assigns, shall erect or use any building except a single or multi-family residence with either attached or detached garage, upon any portion of said premises for a period of thirty-five (35) years from the date of this deed."

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A portion of this property has since been sold again, and you indicate that a mobile home facility is under construction there, to the considerable concern of several of the area residents. Mr. Anderson, your county attorney who drew the deed, has advised that a mobile home constitutes a "residence," and you request our opinion upon this question.

In order to provide the most efficient service to all of the 105 counties, we have generally asked that all elected county officers coordinate their request for opinions from this office concerning county matters through the county attorney. As the chief legal officer of the county, he or she is best able to provide the needed advice promptly and with better familiarity with local factual circumstances which may be relevant. Generally, if further review of the question is needed by our office, we will be happy to assist; however, for obvious reasons of professional courtesy, we wish to avoid "second-guessing" him, as it were, without his knowledge, as I am sure you can appreciate.

However, I have discussed this matter with Mr. Anderson, and our own research confirms his interpretation of the deed restrictions. In Sporn v. Overhold, 175 Kan. 197, 262 P.2d 828 (1953), deed restriction required that the lots be used as "residence lots," and prohibited the erection of any "dwelling" which did not cost less than a specified amount. One party commenced construction of a duplex residence on one of the lots, and the court was asked to construe the deed restriction. The court upheld the erection of the duplex, stating thus:

"Generally, the restrictions using the unqualified terms 'residence' or 'dwelling' have been held merely to limit the type of use to be made of the property and not to forbid the erection of a residence for occupancy by several families such as a duplex or double house which under the weight of authority, has been held permissible, as the terms 'residence' and 'dwelling' have the effect merely to limit the property to living quarters, as distinguished from business or commercial uses." 175 Kan. at 200.


Where a deed restricts the use of the property by words such as "residence" or "residential purposes," the courts generally tend to construe the restriction as prohibiting business or commercial

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uses, as distinguished from residential uses, and not as forbidding a particular kind of residential use, such as a duplex or multi-family apartment structure, for example. I have not found a case in which the question was raised whether a mobile home or group thereof was permitted under a restriction dealing with residences. However, in view of the decided cases which, by a clear weight of authority, have construed "residence" restrictions to apply merely to the kind of use, rather than the kind of structures used for residential use. While the restriction in this deed uses the term "building," it also refers to the erection or use of buildings, which impliedly permits buildings for residential uses which are not erected on the site, such as mobile home units. I think that Mr. Anderson's construction of the restriction is fairly supported by the general trend of court decisions construing deed restrictions involving residential uses, and certainly, I cannot conclude as a matter of law that the language used in the deed prohibits the use of mobile homes for residential purposes on the lots in question.

You indicate that the question has also arisen concerning the garage clause, some interpreting the language to require either a detached or attached garage with each residential unit. The language of the restriction prohibits the use or erection of any building "except a single or multi-family residence with either attached or detached garage" upon any portion of the premises. I think the better view of this language is that it was intended to indicate that garages, either detached or attached, were permitted, as well as residential units, but not to require that a garage be provided for every unit. Obviously, it may be argued that the language requires a garage for every residential unit, but the more persuasive construction of this language, in my judgment, is that it was included in the restriction to assure that garages were permitted, rather than to require them.

Yours truly,


CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj