HENRY MCMASTER
ATTORNEY GENERAL

June 2, 2010

The Honorable Glenn G. Reese
South Carolina Senate, District No. 11
PO Box 142
Columbia, SC 29202

Dear Senator Reese:

We received your letter requesting an opinion of this Office concerning Homeowners Associations (HOA) in South Carolina. You asked "if Hinson Management is in violation of any code of law or regulation [by refusing to give home owners] the financial documents requested."

As a way of background, you explained in your request letter that Hinson Management is a "professional management company [that] was originally hired by the builder/developer Tower Homes. The turnover meeting where the builder/developer relinquishes the corporate board positions has never been formally done because of some very serious legal charges that have been brought against Tower Homes." "The volunteer board has continued to employ . . . Hinson Management." "Since there has been no formal turnover meeting[,] the legalities of the HOA Board of Directors is questionable." You also expressed concern that "the current laws clearly favor Managements for HOAs who use a predatorial approach with the homeowner and the volunteer board members of a HOA administrated community."

This opinion will address prior opinions, legislative intent, relevant statutes and caselaw in responding to the above request.

Law/Analysis

To address whether Hinson Management is in violation of **any** code of law, this opinion will provide a brief summary of each time homeowners associations are addressed in the South Carolina Code of Laws of 1976. "Homeowners' association" is defined as "an organization which is organized and operated to provide for the acquisition, construction, management, and maintenance of property." S.C. Code § 12-43-230(d). There is no specific chapter dedicated to the governance of Homeowners'

Associations. However, reference is made throughout the Code, so this opinion will address each reference in the order in which it appears.

For example, Title 12 of the South Carolina Code of Laws governs Taxation but references homeowners' associations several times in relation to property taxes and assessments.[1]

Title 23 governs Law Enforcement and Public Safety but specifically explains that "[a] sheriff is authorized to employ a deputy and pay his compensation from funds received from a residential homeowner's association in the county and, in doing so, may assign that deputy to patrol the territory comprising the geographical area represented by the homeowner's association. Nothing herein shall prevent the sheriff from assigning such deputy to other areas or to perform other duties, if, in the sheriff's discretion, it is necessary to do so." S.C. Code § 23-13-15 (Patrol of homeowner's association territory; compensation from association funds).

Title 27 governs Property and Conveyances, but notes the right of a homeowner or tenant to fly the American flag in a respectful manner on his or her property. Specifically, S.C. Code § 27-1-60(B)(1) states that "[n]o homeowners' association document may preclude the display of one portable, removable United States flag by homeowners. However, the flag must be displayed in a respectful manner."

The background information under the South Carolina Reporter's Comments for Title 33, which governs Corporations, Partnerships, and Associations, explains that the "policy of not requiring statutory agents for nonprofit corporations created problems in the context of litigation respecting homeowners associations . . . it was obvious and logical that nonprofit corporations should also have agents." S.C. Code § 33-31-501. In an opinion of this Office dated July 11, 2007 we addressed the question of whether homeowners' associations could impose a transfer fee on the purchasers of homes located in the area covered by the homeowners' association. We cited to S.C. Code § 33-31-302 and stated that "we believe the Legislature intended to give nonprofit corporations broad authority." Op. S.C. Atty. Gen., July 11, 2007. Specifically, we stated the following:

> [S.C. Code § 33-31-302](15) appears to give nonprofit corporations the specific authority to [impose] transfer fees on its members . . . as long as the nonprofit corporation is not acting in contradiction of its articles of incorporation, it has the authority to impose a transfer fee.

Op. S.C. Atty. Gen., July 11, 2007.

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[1] See S.C. Code § 12-43-230 (definition; property taxes; assessments); S.C. Code § 12-43-227 (property taxes; assessments); S.C. Code § 12-43-230 (income tax rates for exempt organizations and cooperatives is imposed annually at the rate of five percent); S.C. Code § 12-6-4910(10) (entities required to make tax returns include homeowners associations); S.C. Code § 12-20-110(7) (Corporation license fees do not apply to homeowners' associations).

The 2007 opinion then addressed the ability of a homeowners' association which is not incorporated under the South Carolina Nonprofit Corporation Act to impose a fee. We concluded as follows:

> A homeowners' association is a private entity, and therefore, without specific statutory authority, it does not have the authority to levy a fee or tax upon the public at large. Thus, we do not find section 6-1-70[2] applicable to homeowners' associations. Furthermore, whether or not it has the authority to impose a transfer fee or any other fee on its members depends upon the agreement it has with those members. Finding no statutory authority preventing the imposition of such fees on its members, we suggest you look to the particular association's agreement with its members or its articles of incorporation, if such is applicable, to determine the scope of the association's authority.

Op. S.C. Atty. Gen., July 11, 2007.

Title 44 governs Health and explains that "one member from a lake homeowner's association located on the Catawba/Wateree River" should be appointed to the Catawba/Wateree Commission. S.C. Code § 44-59-50(A)(11).

Title 56 governs Motor Vehicles and explains that "the Uniform Act Regulating Traffic on the highways in this State, shall be applicable to private roads if the owner, including any corporation or homeowners' association holding title to community roads and excluding those only holding easements over such roads, shall file a written consent stating that the undersigned is the owner of the private roads shown . . . ." S.C. Code § 56-5-6310. See also, Op. S.C. Atty. Gen., April 2, 1990. In an opinion of this Office dated September 28, 2004 we emphasized the following:

> ". . . a private security officer is not authorized to make a custodial arrest nor issue a uniform traffic ticket for a violation of a private traffic policy only. The authority to issue a private penalty would come from the homeowners' association agreement and not state traffic laws."
>
> Consistent with such, a security guard would have the authority to enforce a private sanction if the homeowners' association agreement provided for such. However, the authority for such would strictly arise from the homeowners' agreement or covenants and would not in any manner arise from the statutory authority . . .

Op. S.C. Atty. Gen., September 28, 2004 (quoting Op. S.C. Atty. Gen., August 30, 2001).

In an opinion of this Office dated August 30, 2001, we commented on a similar matter and stated the following:

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[2] This provision prohibits the imposition of real estate transfer fees by local government bodies.

> . . . the ability of a property or homeowners' association to assess and collect fines and penalties for violations occurring on private property would probably depend on the nature of the homeowners' association's agreement and whether the violator was a member of the association or in a position contractually which would bind the violator to the terms of the agreement.

Op. S.C. Atty. Gen., August 30, 2001. See also, Op. S.C. Atty. Gen., January 5, 2005. "Homeowners' associations are private organizations. . . . [T]hese associations' authority to collect fees and assessments and enforce restrictive covenants is a private matter between the association and its members. Therefore, consideration must be given to any agreement to determine whether such collections or restrictions are authorized." Op. S.C. Atty. Gen., February 5, 2008.

In an opinion of this Office dated February 5, 2008 we answered a question on the types of restrictions that a homeowners' association may place on homeowners generally, and specifically, we addressed any restrictions on the display of an American flag. We stated the following:

> Homeowners' associations are contractually limited by the restrictive covenants establishing them. While homeowner's associations typically have the power to regulate the use of common areas, their regulations cannot prohibit a usage contrary to any regulations creating easements or rights of use of property of others.
>
> Covenants that restrict the free use of property must be strictly construed against limitations upon the property's free use . . . Where there is doubt, the doubt must be resolved in favor of the property's free use . . . As voluntary contracts, restrictive contracts will be enforced unless they are indefinite or contravene public policy.

Op. S.C. Atty. Gen., February 5, 2008 (quoting Cedar Cove Homeowners Association, Inc. v. DiPietro, 368 S.C. 254, 270-71, 628 S.E.2d 284, 292 (2006). See also, Seabrook Island Property Owners Ass'n. v. Pelzer, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (1987) (restrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract).

Conclusion

This Office agrees with the statement made in the request letter that the "HOA should be under all the laws, rules and regulations that [the state of South Carolina] and the federal government already have in place." Neither management companies nor HOAs may act contrary to the laws of this state; such entities must operate within the boundaries set forth in our Code of Law and remain bound to any contractual obligations created. However, the determination as to whether Hinson Management violated any code of law is factual in nature and thus, beyond the scope of this opinion and better addressed by a court. Op. S.C. Atty. Gen., September 14, 2006; July 19, 2006; April 6, 2006.

Our Supreme Court explained in Strickland v. Strickland, that "if a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning. The words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limit or expand the statute's operation." Strickland, 375 S.C. 76, 88-89, 650 S.E.2d 465, 472 (2007). As we have noted previously, "[f]inding no statutory authority preventing the imposition of such fees on its members, we suggest you look to the particular association's agreement with its members or its articles of incorporation, if such is applicable, to determine the scope of the association's authority." Op. S.C. Atty. Gen., July 11, 2007.

Sincerely,

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REVIEWED AND APPROVED BY:

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