



ALAN WILSON
ATTORNEY GENERAL

January 26, 2016

Senator Tom Davis
PO Box 142
Columbia, SC 29202

Dear Senator Davis:

This Office received your opinion request regarding books and records inspection for homeowners associations in South Carolina. Your questions are a follow up to our December 21, 2011 opinion (Op. S.C. Atty. Gen., December 21, 2011 (2011 WL 6959369)) in which we opined that “the bylaws of a nonreligious, nonprofit corporation such as a gated community concerning the inspection rights of members must be consistent with the provisions of § 33-31-1602.”¹ Each of your questions and its

¹ Section 33-31-1602 of the South Carolina Code provides:

- (a) Subject to subsection (e) and Section 33-31-1603(c), a member is entitled to inspect and copy, at a reasonable time and location specified by the corporation, any of the records of the corporation described in Section 33-31-1601(e) if the member gives the corporation written notice or a written demand at least five business days before the date on which the member wishes to inspect and copy.
- (b) Subject to subsection (e), a member is entitled to inspect and copy, at a reasonable time and reasonable location specified by the corporation, any of the following records of the corporation if the member meets the requirements of subsection (c) and gives the corporation written notice at least five business days before the date on which the member wishes to inspect and copy:
 - (1) excerpts from any records required to be maintained under Section 33-31-1601(a), to the extent not subject to inspection under Section 33-31-1602(a);
 - (2) accounting records of the corporation; and
 - (3) subject to Section 33-31-1605, the membership list.
- (c) A member may inspect and copy the records identified in subsection (b) only if:
 - (1) the member's demand is made in good faith and for a proper purpose;
 - (2) the member describes with reasonable particularity the purpose and the records the member desires to inspect; and
 - (3) the records are directly connected with this purpose.
- (d) This section does not affect:
 - (1) the right of a member to inspect records under Section 33-31-720 or, if the member is in litigation with the corporation, to the same extent as any other litigant; or

analysis follows. We will assume that the homeowners associations in your questions are non-profit corporations unless you indicate otherwise. You need to be aware that this Office cannot investigate or make factual determinations.² We can provide you with the law, however.

LAW/ANALYSIS:

I. What are “appropriate” Association accounting records (for a medium to large members plus director(s) nonprofit organization)?

We believe that you are referring to section 33-31-1601, which is part of the South Carolina Nonprofit Corporation Act of 1994 (S.C. Code Ann. § 33-31-101 et seq. (1976 Code, as amended)), and states:

- (a) A corporation shall keep as permanent records minutes of all meetings of its members and board of directors, a record of all actions taken by the members or directors without a meeting, and a record of all actions taken by committees of the board of directors as authorized by Section 33-31-825(d).
- (b) A corporation shall maintain appropriate accounting records.
- (c) A corporation or its agent shall maintain a record of its members in a form that permits preparation of a list of the name and address of all members, in alphabetical order by class, showing the number of votes each member is entitled to cast.
- (d) A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time.
- (e) A corporation shall keep a copy of the following records at its principal office:
 - (1) its articles or restated articles of incorporation and all amendments to them currently in effect;

(2) the power of a court, independently of this chapter, to compel the production of corporate records for examination.

(e) The articles or bylaws of a religious corporation may limit or abolish the right of a member under this section to inspect and copy any corporate record.

S.C. Code Ann. § 33-31-1602 (1976 Code, as amended).

² See Op. S.C. Att’y Gen., 2013 WL 3479877 (June 26, 2013) (“[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”); see also Op. S.C. Att’y Gen., 2013 WL 3479876 (June 26, 2013) (explaining this Office does not investigate facts, but instead only issues legal opinions).

- (2) its bylaws or restated bylaws and all amendments to them currently in effect;
- (3) resolutions adopted by its board of directors relating to the characteristics, qualifications, rights, limitations, and obligations of members or any class or category of members;
- (4) the minutes of all meetings of members and records of all actions approved by the members for the past three years;
- (5) all written communications to members generally within the past three years, including the financial statements furnished for the past three years under Section 33-31-1620;
- (6) a list of the names and business or home addresses of its current directors and officers; and
- (7) its most recent report of each type required to be filed by it with the Secretary of State under this chapter.

S.C. Code Ann. § 33-31-1601 (1976 Code, as amended) (emphasis added).

We could not find a specific answer to your question. The South Carolina Reporters' Comments to the South Carolina Nonprofit Corporation Act of 1994 explains that the South Carolina law was based on the American Bar Association's Revised Model Nonprofit Corporation Act. It states:

[t]his act is derived from the Revised Model Nonprofit Corporation Act adopted in 1987 by the Subcommittee on the Model Nonprofit Corporation Law of the Business Law Section of the American Bar Association. The Official Comments following each section were prepared by the Subcommittee on the Model Nonprofit Corporation Law of the Business Law Section of the American Bar Association. They are reproduced with permission. These Official Comments describe the substantive decisions made in the drafting process and in many cases explain the meaning and purpose of the section.

South Carolina Reporters' Comments, S.C. Code Ann. § 33-31-101 (1976 Code, as amended).
Based upon the Reporters' Comments, we reviewed the Official Comment to section 33-31-1601 for an explanation of the meaning and purpose of the section. While helpful, it is not dispositive, and it provides:

[t]he question of what accounting records are "appropriate" depends on the nature, size and other characteristics of the corporation. Numerous

nonprofit corporations have a relatively small amount of money and operate with volunteer staffs. In such cases, “appropriate accounting records” may be composed of checkbooks, canceled checks and receipts. In the case of entities with significant funds, more detailed accounting records are appropriate.

“Appropriate” records should allow the financial statements to be prepared in a fashion that fairly presents the financial condition and results of operations of the corporation.

Official Comments, S.C. Code Ann. § 33-31-1601 (1976 Code, as amended).

In our December 21, 2011 opinion mentioned above³, we opined that

[t]he provisions of the South Carolina Business Corporation Act of 1988, which encompasses Chapters 1 through 20 of Title 33 of the S.C. Code, are applicable to nonprofit corporations to the extent such provisions are not inconsistent with those of the Nonprofit Act. § 33-20-103.

A review of the South Carolina Business Corporation Act of 1988, S.C. Code Ann. § 33-1-101 et seq. (1976 Code, as amended) shows that the language of section 33-16-101 is similar to that of section 33-31-1601 in that it provides for a corporation maintaining “appropriate accounting records.” S.C. Code Ann. § 33-16-101 (1976 Code, as amended). Section 33-16-102 succinctly states that “[t]he [South Carolina Business Corporation] Act does not attempt to define what accounting records must be kept.” S.C. Code Ann. § 33-16-102 (1976 Code, as amended).

Both the Nonprofit Corporation Act and the Business Corporation Act indicate that what books and records are “appropriate” varies from corporation to corporation, based on factors such as type of operations and financial situations. The best method of determining what records are “appropriate” for a medium to large members plus director(s) nonprofit corporation is to seek a ruling from a court.

- II. Given a member provides and establishes a “proper purpose” or shows good cause and meets other Non-Profit Corporation Act requirements, what is the scope for backup or underlying documentation or materials required to prepare an Association’s financial statements is a member generally and specifically entitled to inspect and/or obtain?**

Executed vendor, management and professional advisory or services contracts and options? A breakdown of Professional Services expenses? Aggregate schedule, hours and compensation of employees for each cost center? Delinquency reports? Invoices? Vouchers? Statements reflecting all cash receipts and disbursements (Cash Flow Statements)? Cancelled Checks? Check registers? Bank statements? Information relating to any interest earned? Information relating to any loans? Information

³ Op. S.C. Atty. Gen., December 21, 2011, supra.

**relating to any property taxes? Information relating to any business license taxes?
Journals? Ledgers?**

There are certain laws to which you allude. The South Carolina Nonprofit Corporation Act of 1994 requires a nonprofit corporation to furnish its latest annual financial statements, that include a balance sheet as of the end of the fiscal year and statement of operations for that year, to any member who demands it. S.C. Code Ann. § 33-31-1620 (1976 Code, as amended). As shown above, section 33-31-1602(b) and (c) allows a member who gives written notice to inspect and copy the accounting records of a non-profit corporation if the member's demand is in good faith and for a proper purpose, the member specifically describes the purpose and the records he wants to inspect, and the records are directly connected with the purpose. S.C. Code Ann. § 33-31-1602(b),(c), supra. Further, we determined in our response to your question number I that the books and records of each non-profit corporation will vary. So, we cannot provide you with specific underlying documents that a member can inspect.

However, we can provide you with the law. In a prior opinion, we discussed some principles of statutory construction and they are as follows:

“[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 581 (2000). “[Courts] will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation.” Harris v. Anderson County Sheriffs Office, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009). “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.” Strickland v. Strickland, 375 S.C. 76, 85, 650 S.E.2d 465, 472 (2007)

Op. S.C. Atty. Gen., September 18, 2013 (2013 WL 5494616).

The text of section 33-31-1602(b) clearly and plainly provides that the “accounting records of the corporation” can be inspected by a member if he gives written notice and meets the requirements of subsection (c). The inspection is not restricted to particular documents. Accordingly, we believe that Legislative intent was for any and all underlying documents or materials used to prepare a non-profit corporation's financial statements to be inspected by a member as long as the member provides written notice, the member's demand is in good faith and for a proper purpose, the member specifically describes the purpose and the records he wants to inspect, and the records are directly connected with the purpose. However, the Legislature may wish to provide clarification of this issue.

III. Are there any South Carolina laws or regulations that address or prohibit a Declarant or Association Board of Directors from adopting a resolution unilaterally, without advance member notice and a reasonable opportunity for members to be heard before an action is put to a vote that changes Rules⁴ in general or specifically impacts the Rules for books and Records inspection?

We are not aware of any South Carolina laws or regulations that address whether a declarant or board of directors must give a member notice and a hearing before adopting a resolution which impacts the Rules for books and records inspection. However, it must be remembered that “[a]ll resolutions and by-laws must be conformable and subordinate to the general laws.” King v. Ligon, 180 S.C. 224, 185 S.E. 305 (1936). Accordingly, any resolutions are invalid to the extent that they conflict with South Carolina law.

IV. Is it a violation of any South Carolina laws or regulations for a Declarant or Association Board of Directors to unilaterally change a Community Charter concerning books and records inspection in the midst of processing a member’s rightful books and records inspection request so as to frustrate the member’s rights for disclosure?

By community charter, we believe you mean a declaration of covenants. See Tradition Development Company, LLC, Community Charter for Tradition at traditionfl.com/home/wp.../TraditionCommunityCharter.pdf.⁵ According to a newsletter from Sentry Management, the declaration of covenants and restrictions serves the following purposes:

[t]he declaration of covenants and restrictions is the document or set of documents that establishes the formal regulations for all of the property in the residential community. They restrict its use and govern the

⁴ We assume by “Rules” you mean the following:

[t]he supplemental restrictions authorized by the governing documents and promulgated by the board of directors are traditionally referred to as the “rules and regulations”. The rules and regulations are similar to the restrictions and covenants contained in the recorded declaration, but they do not carry the same validity and enforceability unless they are also recorded as part of the community documents.

The rules and regulations promulgated by the board of directors and not actually recorded can best be described as supplemental to the covenants and restriction. These rules cannot contradict or act contrary to the provisions in the declaration or its recorded exhibits. The standard of reasonableness for rules and regulations made by the board of directors must be carefully applied to insure their enforceability. To be valid, the regulations must be within the scope of the board of directors' authority as described in the association's governing documents.

See Sentry Management, Homeowners Associations: The Law and Legal Principles (December 10, 2009) at <http://www.sentrymgt.com/newsletters/homeowners-associations-law-and-legal-principles>.

⁵ There is no mention of a community charter under South Carolina law.

conduct and activity of its residents. The declaration of covenants and restriction is the foundation document for the planned and well-ordered residential housing concept. The Declaration establishes the basic rights and responsibilities for each owners, resident and guest. The restriction and covenants grant easements and use rights to owners and guests, they provide services and privileges to residents of the community and they set the standards for maintenance and upkeep of all the property.

The recorded declaration imposes a greater degree of control on the rights of individual owners and the use they may make of their home and property than would otherwise be allowed if the restrictions and the homeowners association did not exist. When the declaration of covenants and restrictions is recorded, a quasi-government is created among the property owners when they become members of the association. As a member and owner, each individual must abide by the policies of the association and the conditions imposed by the restrictions.

The Declaration of covenants and restriction outlines the financial obligations of each owner and the rights which each owners has to take part in the affairs of the community. The recorded declaration creates the homeowners association and generally the organizational document of the association, to select its leadership and to oversee its financial policies.

Sentry Management, Homeowners Associations: The Law and Legal Principles, *supra*.

A review of South Carolina law shows that covenants are contractual in nature. In Kinard v. Richardson, 407 S.C. 247, 754 S.E.2d 888 (Ct. App. 2014), the Court explained:

[r]estrictive covenants, sometimes referred to as “real covenants,” are agreements “to do, or refrain from doing, certain things with respect to real property.” Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct.App.2006) (citation and quotation marks omitted).

Therefore, covenants, in a sense are contractual in nature and bind the parties thereto in the same manner as would any other contract. Restrictive covenants are construed like contracts and may give rise to actions for breach of contract. However, restrictive covenants affecting real property cannot be properly and fully understood without resort to property law.

Restrictive covenants differ from contracts in that they run with the land, meaning that they are enforceable by and against later grantees.

Id. (citations and quotation marks omitted)

Any contract which is contradictory to a statute is invalid. In footnote 9, Travelscape, LLC v. S.C. Dept. of Revenue, 08-ALJ-17-0076-CC, 2009 WL 769017 (February 12, 2009), the Court cited the following:

Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 371 S.C. 365, 638 S.E.2d 109 (Ct. App. 2006) (“If a contract provision contravenes an applicable statute, that provision is invalid, and the statute prevails.”); 17A C.J.S. Contracts § 207 (1999) (“Parties cannot by private contract abrogate statutory requirements and any act in derogation of such laws is an absolute nullity.”). . . .

Accordingly, a declarant or board of directors cannot change a community charter in any manner that would not be in compliance with statutory law.

It is difficult to answer the remainder of your question because it is a factual question which can only be determined by a court whether a declarant or board of directors changed a community charter concerning books and records inspection to frustrate a member’s rights for disclosure. However, you should note that “unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the member to inspect the records demanded,” a court can require a corporation to pay the member’s costs and attorneys fees if the court finds that the records in dispute should be inspected and copied. See S.C. Code Ann. § 33-31-1604 (1976 Code, as amended).

V. In what circumstances can a court deny an Association member’s right to inspect books and records?

Pursuant to section 33-31-1602(c), certain records, such as accounting records, can only be examined by a member if:

- (1) the member’s demand is made in good faith and for a proper purpose;
- (2) the member describes with reasonable particularity the purpose and the records the member desires to inspect; and
- (3) the records are directly connected with this purpose.

S.C. Code Ann. § 33-31-1602(c), supra.

The Official Comment to section 33-31-1602 explains the logic behind section (c):

[a] demand to copy and inspect records under section 16.01(b) must be made in good faith for a proper purpose. See section 16.02(c). The proper purpose must reasonably relate to the member’s interest as a member, which may be boarder [sic] than a shareholder’s interest in a business or corporation. In addition, the member must describe with reasonable particularity the purpose and the records the member desires to inspect. The object of this requirement is to inform the corporation in

general terms of the object of the member, not to limit the purpose of the inspection rights. Thus, for example, a request to contact fellow members concerning the corporation or a request to examine records to determine whether improper transactions have occurred or a charitable trust breached states a proper purpose.

Official Comments, S.C. Code Ann. § 33-31-1602 (1976 Code, as amended).

Although we could not find any case law to answer your question, we believe that a court could deny an association member who does not meet the requirements of subsection (c) the right to inspect the books and records listed in section 33-31-1602(b).

VI. If the data and information for the Association is mixed or contained in reports, returns or records covering both a Developer operated (for-profit) company or entity and the (non-profit) Association, is a member entitled to inspect and/or obtain entire reports, returns or records? All portions of reports, returns or records covering the Association?

In our response to your question number II, we discussed some principles of statutory construction, such as that the words of a statute must be given their plain and ordinary meaning. The language of section 33-31-1602(a) and (b) is key to answering your question and it is as follows:

- (a) Subject to subsection (e) and Section 33-31-1603(c), a member is entitled to inspect and copy, at a reasonable time and location specified by the corporation, any of the records of the corporation described in Section 33-31-1601(e) if the member gives the corporation written notice or a written demand at least five business days before the date on which the member wishes to inspect and copy.
- (b) Subject to subsection (e), a member is entitled to inspect and copy, at a reasonable time and reasonable location specified by the corporation, any of the following records of the corporation if the member meets the requirements of subsection (c) and gives the corporation written notice at least five business days before the date on which the member wishes to inspect and copy:
 - (1) excerpts from any records required to be maintained under Section 33-31-1601(a), to the extent not subject to inspection under Section 33-31-1602(a);
 - (2) accounting records of the corporation; and
 - (3) subject to Section 33-31-1605, the membership list.

S.C. Code Ann. § 33-31-1602(a), (b) (1976 Code, as amended) (emphasis added).

Section (a) gives a member the right to review the records of the corporation that are described in section 33-31-1601(e) with written notice. Section (b) gives a member the ability to review the records of the corporation that are listed if he meets the requirements of subsection (c) and gives written notice. In

either circumstance, a member is only allowed to review the records of the corporation. He is not allowed to review the records of any other corporation. It is therefore our opinion that a member may only review the records of the non-profit homeowners association and not the records of any for-profit company that preceded it.

VII. Does State case law have precedence over or trump the South Carolina Non-Profit Corporation Act?

Under the South Carolina Constitution, there is a separation of powers amongst the three branches of government, the legislative, executive, and judicial. See S.C. Const. art. I, § 8. The South Carolina Supreme Court explains the separation of powers and describes the powers of each governmental branch as follows:

the South Carolina Constitution requires the branches of government be “forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.” S.C. Const. art. I, § 8. “One of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government.” *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 304 (1979). “The legislative department makes the laws[,] the executive department carries the laws into effect, and the judicial department interprets and declares the laws.” *Id.* at 84, 261 S.E.2d at 305. This delineation of powers amongst the branches “prevents the concentration of power in the hands of too few, and provides a system of checks and balances.” *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982).

S. Carolina Pub. Interest Found. v. S. Carolina Transp. Infrastructure Bank, 403 S.C. 640, 744 S.E.2d 521 (2013).

The duty of a court is to interpret the laws and not to make the laws, which is a function of the legislature. This was best described by an administrative judge, who made the following determination:

[a] court can not seek ways to rewrite statutes or regulations. To depart from the plainly expressed meaning causes the tribunal to legislate rather than interpret since “[t]he responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the courts to construe, not to make, the laws.” Creech v. South Carolina Pub. Serv. Auth., 200 S.C. 127, 146, 20 S.E.2d 645, 652 (1942) (superseded on other grounds by S.C. Code Ann. § 5-7-30).

Anonymous Corp., Petitioner, 98-ALJ-17-0533-CC, 1999 WL 155759 (Mar. 3, 1999).

Since the courts and the legislature have different functions, case law does not have precedence over or trump statutory law, such as the South Carolina Non-Profit Corporation Act.

VIII. Is an Association (functioning as a special purpose district, a quasi-governmental body of the State) subject to the South Carolina Freedom of Information Act?

In order to be subject to the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 et seq. (1976 Code, as amended), a homeowners association must fall within the Act's definition of a "public body."⁶ The Freedom of Information Act ("FOIA") defines a "public body" as:

any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined in Section 1-30-10, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds. . .

S.C. Code Ann. § 30-4-20 (1976 Code, as amended) (emphasis added).

A homeowners association is clearly not a governmental entity and FOIA does not apply on this basis. In a prior opinion, we stated that a homeowners association is a private entity. See Op. S.C. Atty. Gen., July 11, 2007 (2007 WL 2459756). Additionally, our Office has an opinion in which the requestor referred to a homeowners association as a "quasi-governmental body." In the opinion, we said that we were "unaware of any State statute" granting the homeowners association "any particular authority." Op. S.C. Atty. Gen., January 5, 2005 (2005 WL 100926). We further provided that the homeowners association was "clearly not a county, municipality, school district or special purpose district." Id.

We believe your question stems from the fact that "[w]hen the declaration of covenants and restrictions is recorded, a quasi-government is created among the property owners when they become members of the association. As a member and owner, each individual must abide by the policies of the association and the conditions imposed by the restrictions." Sentry Management, Homeowners Associations: The Law and Legal Principles, supra (emphasis added).

⁶ In a prior opinion, we explained the significance of being a "public body:"

Of course, the determination of whether or not a particular entity is a "public body" for purposes of the FOIA is crucial because § 30-4-60 provides that "[e]very meeting of all public bodies shall be open to the public" Moreover, § 30-4-30(a) mandates that "[a]ny person has a right to inspect or copy any public record of a *public body*, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access." (emphasis added).

FOIA will also apply if a homeowners association is "supported in whole or in part by public funds." There is no indication from your question that the homeowners association is receiving public funds and we do not believe that would be the case. Please let us know if we are mistaken.

CONCLUSION:

In conclusion, this Office believes that the law is as follows:

1. What books and records are "appropriate" under section 33-31-1601 varies from corporation to corporation, based on factors such as type of operations and financial situations;
2. Legislative intent was for any and all underlying documents or materials used to prepare a non-profit corporation's financial statements to be inspected by a member as long as the member provides written notice, the member's demand is in good faith and for a proper purpose, the member specifically describes the purpose and the records he wants to inspect, and the records are directly connected with the purpose. However, the Legislature may wish to provide clarification of this issue;
3. Resolutions are invalid to the extent that they conflict with South Carolina law;
4. A declarant or board of directors can not change a community charter in any manner that would not be in compliance with statutory law;
5. A court could deny an association member who does not meet the requirements of section 33-31-1602(c) the right to inspect the books and records listed in section 33-31-1602(b);
6. A member may only review the records of the non-profit homeowners association and not the records of any for-profit company that preceded it;
7. Since the courts and the legislature have different functions, case law does not have precedence over or trump statutory law, such as the South Carolina Non-Profit Corporation Act; and
8. A homeowners association is not a governmental entity and FOIA does not apply on this basis.

Please be aware that this is only an opinion as to how this Office believes a court would interpret the law in this matter.

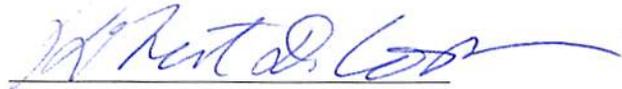
Sincerely,



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Assistant Attorney General

Senator Tom Davis
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