ALAN WILSON
ATTORNEY GENERAL

August 5, 2016

The Hon. Stephen L. Goldfinch, Jr.
South Carolina House of Representatives
PO Box 823
Murrells Inlet, SC 29576

Dear Representative Goldfinch:

Attorney General Alan Wilson referred your letter dated May 31, 2016 to the Opinions section for a response. Please find following our understanding of your questions and our response.

Issue (as quoted from your letter):

I respectfully request an Attorney General Opinion on the following questions:

1. *Do the covenants and bylaws prevent a homeowner from renting a single-family residential house as a vacation rental without restrictions on the lease/rental period?*
2. *Do by-laws prevail over covenants?*
3. *Can a HOA board make changes to the bylaws without a vote by the home owners? Please see document entitled "Romain Retreat Homeowners Association Rules for Use of Common Areas." Is this document valid without an official vote by the homeowners?*

A copy of the Romain Homeowners Association Declaration of Covenants, the Bylaws of the Romain Retreat Homeowners Association and the Romain Retreat Homeowners Association Rules for Use of Common Areas are provided as points of review and reference.

Law/Analysis:

By way of background, this Office understands that the Romain Retreat Homeowners Association is a South Carolina nonprofit corporation, incorporated in 1984 and currently in good standing with the South Carolina Secretary of State.[1] Our Office does not have access to and has not reviewed the Articles of Incorporation. It appears that the Declaration of Covenants Conditions and Restrictions which you enclosed was executed on July 14, 1978 and subsequently recorded in the Register of Mesne Conveyances for Charleston County, S.C. in Book U116 at Page 93. It also appears that the Bylaws of Romain Retreat Homeowners Association were executed on or about March 21, 1988 and subsequently filed in the same Register in Book W182

[1] http://www.sos.sc.gov/index.asp?n=18&p=4&s=18&corporateid=7966 (last viewed August 3, 2016).

at Page 202. Our Office assumes for the sake of this opinion that these documents were properly executed and adopted.

1. **Do the covenants and bylaws prevent a homeowner from renting a single-family residential house as a vacation rental without restrictions on the lease/rental period?**

We must respectfully decline to answer this question. As you may know, state law does not authorize this Office to issue an opinion on any private matter, or in response to questions which are not public in nature. S.C. Code Ann. § 1-7-90 et. seq. (2005); *see Langford v. McLeod*, 269 S.C. 466 at 473, 238 S.E.2d 161 at 164 (1977) ("The Attorney General has no standing to intervene in grievances not affecting the public interest."). Additionally, answering this question would amount to making a factual determination, which this Office cannot do in a legal opinion. As you may know, "[t]his Office is not a fact-finding entity; investigations and determinations of facts are beyond the scope of an opinion of this Office and are better resolved by a Court." Op. S.C. Att'y Gen., 2011 WL 6959369 (December 21, 2011). We advise you to contact a private attorney to determine the answer to this question.

2. **Do by-laws prevail over covenants?**

While it is not possible to state an absolute rule in response to this question, it is the opinion of this Office for the reasons set out below that a South Carolina court generally would find that restrictive covenants prevail over bylaws adopted pursuant to those covenants if there is a conflict between them. Our Office is not aware of any precedential South Carolina authority which squarely addresses a conflict between restrictive covenants and a bylaw of a homeowners' association. However, as discussed below, both South Carolina law and authority from other jurisdictions point to restrictive covenants as the constitutional document of a homeowners' association ("HOA") which generally takes precedence over any bylaws adopted pursuant to the covenants in the event of a conflict.

At the outset, it is helpful to understand the relationship between HOAs, restrictive covenants, and bylaws. The Court of Appeals of Kansas aptly and succinctly set out the relationship between bylaws and covenants in the case of *Kiekel v. Four Colonies Homes Ass'n*, stating:

> Creating a community association, such as [a homeowners' association], requires a set of documents that generally includes a declaration and bylaws.
>
> > The first creating document in a community association is the declaration. . . . For an HOA, the document is generally referred to as the Declaration of Covenants, Conditions, and Restrictions ('CCRs'). The declaration is a document containing the plan of development and the essentials of ownership, the method of

> operation, and the rights and responsibilities of the association and the owners within the association. It is a covenant running with the land, recorded in the land records, and binding on every person who becomes a property owner in the project. Hyatt, Condominium and Homeowner Association Practice: Community Association Law § 1.06(e) (3d ed. 2000) (hereinafter Community Association Law).

Basically, the declaration is considered the enabling document or the constitution of the association. Generally, any attempt to restrict a property owner's use of the property as authorized in the declaration is considered void and unenforceable. Community Association Law § 1.06(e); 8 Powell on Real Property § 54A.01(11)(a) (2007).

> The second legal document essential to the community association is a set of bylaws, which set forth procedures for the internal government and operation of the association. Generally, fundamental provisions dealing with ownership and property rights are in the declaration; the bylaws typically contain governance and operational provisions, and function in the same capacity as corporate bylaws. Community Association Law § 1.06(e).

Kiekel v. Four Colonies Homes Ass'n, 38 Kan.App.2d 102, 107 (Kan. Ct. App. 2007) (emphasis added).

The facts and decision in *Kiekel* are instructive here. In *Kiekel*, the court was tasked with deciding whether certain amended bylaws could greatly curtail the ability of a property owner to lease their property to third parties. 38 Kan.App.2d at 104-06. The court noted that the Declaration of Covenants

> neither expressly prohibits nor expressly permits lot owners to rent their property. The Declaration does, however, include three distinct references to lot owners' tenants. In one specific instances, the Declaration defines "resident" to include not only the owners of lots "but also the lessees and tenants of such owners." Strictly construing the Declaration, it does not place any restrictions on owners' rights to rent their property.

38 Kan.App.2d at 108. The trial court erroneously found no conflict between the covenants and the bylaws on the basis that the amended bylaws did not abolish a homeowners' ability to rent his or her property. *Id.* at 106. The Kansas Court of Appeals disagreed, finding a conflict where "[t]he bylaw amendment contained extensive property use restrictions concerning the rental of property . . . which only could be accomplished through an amendment to the Declaration." The

appellate court held that the HOA could not "circumvent the intent of the Declaration, the enabling document, by subsequently amending the Bylaws." *Id.* at 110. *Kiekel*, therefore, stands for the rule that where the bylaws of an HOA purport to restrict the use of property further than contemplated in the covenants, there is a conflict and the covenants will control. *See id.; accord Estates at Desert Ridge Trails Homeowners' Ass'n v. Vazquez,* 2013-NMCA-051, 300 P.3d 736 (2013) (citing *Kiekel*) ("If the HOA desired to prevent short-term rentals, this restriction should have been included in the originally filed [covenants], not in the HOA Rules adopted nearly three years later.").

The general relationship between covenants and bylaws described in *Kiekel* is consistent with South Carolina law. South Carolina Jurisprudence states in part:

> Restrictive covenants often authorize the creation of a homeowners' association, usually in the form of a not-for-profit corporation, and grant it authority to manage common areas, make regulations, levy assessments, and other similar privileges. Homeowners' associations are contractually limited by the restrictive covenants establishing them.
>
> While homeowners' associations typically have the power to regulate the use of common areas, their regulations cannot prohibit a usage contrary to any restrictions creating easements or rights of use of property in owners.

17 S.C. Jur. *Covenants* § 88 (1993 & Supp. 2005) (footnotes & citations omitted). The South Carolina Nonprofit Corporation Act governs those homeowners' associations which are organized as nonprofit corporations, as described above. *See, e.g., Lovering v. Seabrook Island Property Owners Ass'n,* 289 S.C. 77, 344 S.E.2d 862 (Ct.App. 1986) (applying a section of the Act to a homeowners' association organized as a nonprofit corporation). Under the Act, the bylaws of a nonprofit corporation "may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation." S.C. Code Ann. § 33-31-206(b) (2006). Although neither that code section nor the comments refer to restrictive covenants, such covenants define the scope of authority of the directors of a homeowners' association, just as the articles of incorporation do in other nonprofit corporations. *See Lovering,* 289 S.C. 77, 344 S.E.2d 862 (discussed below).

A long line of South Carolina jurisprudence points to restrictive covenants as the controlling document in determining the authority of a grantor or a homeowners' association to regulate use of property. As early as 1950, the South Carolina Supreme Court held in *Forest Land Co. v. Black* that the power of a grantor to reasonably regulate a common area cannot exceed the authority reserved in the deed to make such rules. *Forest Land Co. v. Black,* 216 S.C. 255, 262, 57 S.E.2d 420, 424 (1950). In *Forest Land Co.,* the Court considered the rights of a lakefront-property owner who was granted the right to boat in the lake, "subject to reasonable rules of the Grantor [Forest Land Co.], which may . . . reasonably restrict the use of certain kinds

of boats or motors and other kinds of craft." *Id.* at 258-59, 57 S.E.2d at 422. The property owner had purchased the property subject to these covenants, and then purchased a motorboat to use on the lake. *Id.* at 258-60, 57 S.E.2d at 422-23. The Forest Land Company then made a rule pursuant to its authority under the reservation in the deed that purported to prohibit the use of motorboats on the lake. *Id.* at 259, 57 S.E.2d at 422. Our Supreme Court held that the rule was invalid because it attempted to eliminate a right which was expressly and unambiguously granted in the deed. *Id.* at 262, 57 S.E.2d at 424. The Court held that while the reservation in the deed permitted the grantor to reasonably regulate the use of the lake, the grantor could not expand the regulations to effectively abolish the right to use it altogether. *Id.*

While the *Forest Lake Co.* decision predates the rise of the modern HOA, it remains good law for the rule that while property rights may be regulated by subsequently-amended rules pursuant to a deed, the rules are constrained by the restrictive covenants in the underlying deed. *See* 17 S.C. Jur. *Covenants* § 88 n.3 (1993 & Supp. 2005) (citing *Forest Land Co.*). Notably, the *Forest Land Co.* decision used the same reasoning later adopted by the Kansas Court of Appeals in *Kiekel v. Four Colonies Homes Ass'n,* 38 Kan.App.2d 102 (Kan. Ct. App. 2007) (discussed above). 216 S.C. at 262, 57 S.E.2d at 424. In both cases, the fundamental inquiry centered on whether and to what extent a property right could be restricted by subsequent amendments to bylaws or rules contemplated in the enabling document; and in both cases, the decision that the covenants controlled turned on the supremacy of that document. *Id; cf. Kiekel,* 38 Kan.App.2d 102.

Since the rise of the modern homeowners' association, several South Carolina cases have interpreted restrictive covenants as foundational both to granting and to limiting an HOA's power. For example, in *Lovering v. Seabrook Island Property Owners Ass'n*, our Court of Appeals considered whether an HOA could charge an emergency assessment when the covenants and bylaws referred only to annual assessments, and was silent on the issue of emergency assessments. *Lovering v. Seabrook Island Property Owners Ass'n,* 289 S.C. 77, 344 S.E.2d 862 (Ct.App. 1986). The court held there that the emergency assessment exceeded the scope of the HOA's authority, stating:

> [a] corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and any by-laws made pursuant thereto. *Lurie v. Arizona Fertilizer & Chemical Co.*, 101 Ariz. 482, 421 P.2d 330 (1966). Acts beyond the scope of a corporation's powers as defined by law or its charter are *ultra vires*. *United States Rubber Products, Inc. v. Town of Batesburg*, 183 S.C. 49, 190 S.E. 120 (1937).

Id. at 82, 344 S.E.2d at 865. The South Carolina Supreme Court affirmed the holding of the Court of Appeals that the emergency assessment was *ultra vires*,[2] while modifying the decision

[2] The General Assembly subsequently amended the South Carolina Nonprofit Corporation Act to empower homeowners' associations to make such assessments. *See* S.C. Code Ann. 33-31-302(15) (2006).

by vacating a portion of it not relevant here. *Lovering v. Seabrook Island Property Owners Ass'n,* 291 S.C. 201, 352 S.E.2d 707 (1987). Although not at issue in the case, we note that the language "by-laws made pursuant thereto" is indicative of the general scheme of restrictive covenants laying the foundation for the formation and powers of an HOA, and the HOA in turn adopting bylaws within the parameters of those covenants. 289 S.C. at 82, 344 S.E.2d at 865, *cf. Kiekel v. Four Colonies Homes Ass'n*, 38 Kan.App.2d 102, 107 (Kan. Ct. App. 2007).

Similarly, in subsequent litigation involving the same Seabrook Island Property Owners Association, the South Carolina Court of Appeals held that an HOA could not assess flat fees for all lots, regardless of their value, where the restrictive covenants subjected the lots to assessments "based upon the assessed valuation of the premises." *Seabrook Island Property Owners Ass'n v. Pelzer,* 292 S.C. 343, 345, 356 S.E.2d 411, 413 (Ct.App. 1987). Notably, the bylaws here went further than the restrictive covenants: the bylaws specified that the maintenance charge could be assessed at two different rates for unimproved and improved property, while the covenants were silent on this point. *Id.* at 345-46, 356 S.E.2d at 413. The court in *Pelzer* did not take issue with this distinction, apparently because the court did not find a conflict between the covenant's general grant of authority to make assessments and the bylaw's specification of the manner of that assessment. *Id.* at 347, 356 S.E.2d at 414. Instead, the court focused on the flat fee structure as an *ultra vires* act of the HOA not authorized by the covenants, regardless of the reasonableness of the assessment. *Id.* at 347-48, 356 S.E.2d at 414. The opinion of our Court of Appeals stated: "[r]estrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract." *Id.* Therefore, quite simply, "[t]he Association is bound to follow the covenants and its own bylaws."

Read together, the decisions in *Lovering* and *Pelzer* both demonstrate the role of restrictive covenants as the constitutional documents of HOAs which form them, empower them, and limit them. *Lovering*, 289 S.C. 77, 344 S.E.2d 862; *Pelzer,* 292 S.C. 343, 356 S.E.2d 411. These cases built on the foundation laid out by the rule in *Forest Land Co.* that subsequently-enacted land use regulations pursuant to restrictive covenants cannot exceed the authority established in those covenants. *Forest Land Co.*, 216 S.C. 255, 57 S.E.2d 420. While our Office is not aware of any precedential South Carolina authority which squarely addresses a conflict between the restrictive covenants and a bylaw of a homeowners' association,[3] we believe that our state's jurisprudence clearly and unambiguously points to the restrictive covenants as the controlling document in accordance with the reasoning in *Kiekel v. Four Colonies Homes Ass'n,* 38 Kan.App.2d 102 (Kan. Ct. App. 2007). We reiterate that the reasoning and result in *Forest*

[3] The South Carolina Court of Appeals did touch on this issue in *Rawlinson Road Homeowners Ass'n, Inc. v. Jackson*, 395 S.C. 25, 716 S.E.2d 337 (Ct.App. 2011). There, the master-in-equity granted summary judgment to a landowner and held that the bylaws in question were void, apparently because they were not authorized under the restrictive covenants. *Id.* at 31, 716 S.E.2d at 341. The Court of Appeals affirmed the grant of summary judgment, which tends to support our conclusion in this opinion. *Id.* at 32-34, 716 S.E.2d at 341-42. *Rawlinson*, however, did not explicitly hold that covenants control over conflicting bylaws, did not cite any authorities relevant to such a holding, and did not set out any reasoning which would support such a holding – perhaps because it was conceded at trial, not appealed, or patent to the court. *Id.* We believe that *Rawlinson* is not dispositive here.

Land Co. match those of *Kiekel*, in that the *Kiekel* court framed the issue as "whether [the HOA] could impose a post-purchase property use restriction on lot owners through an amendment to the Bylaws," and held that it could not. 38 Kan.App.2d at 106. Because bylaws are adopted pursuant to the authority granted in the covenants, it logically follows that a homeowners' association cannot exceed that grant of authority by adopting bylaws contrary to those covenants. *See Loverling,* 289 S.C. 77, 344 S.E.2d 862; *accord Booker v. First Federal Sav. and Loan Ass'n*, 215 Ga. 277, 110 S.E.2d 360 (1959) ("It is a general rule that a corporation may enact any bylaw for its internal management so long as such bylaws are not contrary to its charter, a controlling statute, its articles of incorporation, or violative of any general law or public policy."). For that reason, we find the *Kiekel* decision highly persuasive, and we believe that a South Carolina court faced with conflicting restrictive covenants and bylaws would adopt the reasoning of *Kiekel* as a logical extension of existing South Carolina law.

Because restrictive covenants and bylaws may be drafted in myriad ways, it is impossible to set out an absolute rule that one will always prevail over the other, with no exceptions. If, for instance, a restrictive covenant and a bylaw conflicted with each other but the covenant provision violated state law, then the bylaw might control. In general, however, the restrictive covenants form the foundation upon which the homeowners' association rests and the authority upon which, together with the law and the articles of incorporation, all corporate action depends – including the adoption of bylaws. *See Kiekel,* 38 Kan.App.2d 102; *see also Lovering,* 289 S.C. 77, 344 S.E.2d 862. Therefore, in the absence of other facts, it is the opinion of this Office that in the event of a conflict between a declaration of covenants and a bylaw adopted pursuant to those covenants, a South Carolina court almost certainly would hold that the declaration prevails.[4] *See id.* This is especially true in the case where a bylaw attempts to restrict the use of property further than is permitted, whether expressly or by implication, in the covenants. *See Forest Land Co. v. Black*, 216 S.C. 255, 57 S.E.2d 420 (1950).

3. **Can a HOA board make changes to the bylaws without a vote by the home owners? Please see document entitled "Romain Retreat Homeowners Association Rules for Use of Common Areas." Is this document valid without an official vote by the homeowners?**

For the reasons set out below, it is the opinion of this Office that the board of directors of a homeowners' association which is organized as a nonprofit corporation may change its bylaws without a vote by the homeowners in some cases, subject to the limitations set by law and by the restrictive covenants, the articles of incorporation, and the bylaws.

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[4] We note that Article XV, Section Two of the Bylaws of the Romain Retreat Homeowners Association reads: "[i]n the case of a conflict between the Articles of Incorporation and these By-laws, the Articles shall control; and in the case of any conflict between the Declaration and these By-laws, the Declaration shall control." We express no opinion as to whether any such conflicts actually exist.

Typically, the bylaws or other documents of a nonprofit corporation set out the proper procedure for amending its bylaws. *See Kiekel v. Four Colonies Homes Ass'n*, 38 Kan.App.2d 102, 107 (Kan. Ct. App. 2007). As stated above, "[a] corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and any by-laws made pursuant thereto." *Lovering v. Seabrook Island Property Owners Ass'n*, 289 S.C. 77, 82, 344 S.E.2d 862, 865 (Ct.App. 1986). Our state has long held that "bylaws regulating in a reasonable manner, the method of voting at corporate elections will be sustained, if their provisions do not conflict with the charter or statute." *Davis v. South Carolina Cotton Grower's Co-op Ass'n*, 127 S.C. 353, 121 S.E.2d 260 (1924) (internal citation omited).

South Carolina law permits the board of directors of a nonprofit organization to amend the bylaws without a vote by the members in some cases. The South Carolina Nonprofit Corporations Act provides that:

> (a) [a] corporation's board of directors may amend or repeal the corporation's bylaws unless:
>
> (1) the articles of incorporation or this chapter reserves this power exclusively to the members in whole or part or requires the consent of someone pursuant to Section 33-31-1030[5]; or
>
> (2) the members in adopting, amending, or repealing a particular bylaw provide expressly that the board of directors may not adopt, amend, or repeal that bylaw or any bylaw on that subject.

S.C. Code Ann. § 33-31-1021(a) (2006). Thus, the power of a board to unilaterally amend bylaws depends in part on the documents of the homeowners' association, such as the articles of incorporation and bylaws, and the language contained therein. *See id.* If the documents demonstrate a reservation of power to amend a bylaw only by vote of the members, then the reservation controls. *See id.* Absent such a reservation, the board may amend the bylaws without a vote by the members within the limits of the law[6], the restrictive covenants, the bylaws, and the articles of incorporation. *See Lovering,* 289 S.C. 77, 344 S.E.2d 862.

We must respectfully decline to opine on the validity of the Rules which you enclosed for the reasons set out in our response to Question 1 above. We advise you to contact a private attorney to determine the answer to this question.

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[5] S.C. Code Ann. § 33-31-1030 (2006) reads in part: "[t]he articles of only a religious corporation or public benefit corporation may require an amendment to the . . . bylaws to be approved in writing by a specified person or persons other than the board." It does not apply to mutual-benefit corporations, such as homeowners' associations, per the South Carolina Reporters' Comments to that Section.

[6] For example, S.C. Code Ann. § 33-31-1021(d) (2006) expressly requires that certain amendments relating to dues "must be approved by the members."

Conclusion:

In conclusion, for the reasons set out above, it is the opinion of this Office that a South Carolina court generally would find that restrictive covenants prevail over a bylaw in the event of a conflict between the two. Furthermore, it is the opinion of this Office that without a vote by the homeowners, the board of a homeowners' association may change the bylaws of the association in some cases, subject to the limitations set by law and by the controlling documents of the association. We regret that we must decline to answer each of your questions in full, but we sincerely hope that you find this opinion helpful and responsive to your inquiry.

We note that this advisory opinion is based only on the current law and the information which you provided to us. This opinion is not an attempt by this Office to establish or comment upon public policy. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in this matter. You may also choose to petition a court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. *See* S.C. Code Ann. § 15-53-20 (2005). If it is later determined that our opinion is erroneous in any way, or if you have any additional questions or issues, please do not hesitate to contact our Office.

Sincerely,

David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General