

1990 WL 599334 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

October 18, 1990

***1** The Honorable John T. Campbell
Secretary of State
Post Office Box 11350
Columbia, South Carolina 29211

Dear Mr. Campbell:

You advise that "Furman University has made an application to this office (Secretary of State) to make certain changes in the charter of Furman University. One of these changes would allow the trustees to be elected by a majority vote of the trustees in office at the time of election and would allow the charter of this corporation to be amended or altered by the Board of Trustees of Furman University." You note that the "objection to this is by the ... {South Carolina} Baptist Convention which now has the authority to elect the trustees as well as approve any proposed amendment to the charter of Furman University. This authority was given to the ... {South Carolina} Baptist Convention and reaffirmed by a charter amendment in 1955 which gave the ... {South Carolina} Baptist Convention a veto over future charter amendments."

You seek advice as to whether or not your office "can file this proposed amendment without the authority granted by the ... {South Carolina} Baptist Convention in view of the power and authority previously granted them" in the charter. We assume herein that Furman University is a domestic nonprofit corporation.

The answer to your question does not depend upon the ultimate validity of the amendment in question. As will be shown below if the Secretary of State determines that the statutes which deal with filing of nonprofit corporate amendments have been met, he has no discretion in deciding whether to file or not file the document.

In an earlier opinion of this office, dated August 31, 1984, we concluded that the Secretary of State is required to file certain documents concerning a limited partnership if the particular statutory requirements dealing with his filing duties in that area are met. We noted:

{t}he above-cited sections provide that if a limited partnership complies with the requirements of the Uniform Limited Partnership Act, particularly Sections 33-42-1620 and 33-42-1640, he shall endorse the application, file a duplicate, and issue a certificate of registration. The sections do not leave the filing and so forth to the discretion of the Secretary of State once the above-referenced statutory requirements have been met. If all of the requirements have been met, then the Secretary of State must proceed with filing. See *Commonwealth Investment Co. of Cola. v. Thornton*, 244 S.C. 146, 135 S.E.2d 762 (1964); Cf., *Green v. Thornton*, 265 S.C. 436, 219 S.E.2d 827 (1975). Likewise, if the application is not in conformity with the sections above-cited, the Secretary of State cannot file the application. Cf. 18 Am.Jur.2d, Corporations, Section 40. As to such filing requirements, the duties of the Secretary of State are ministerial in nature....

Moreover, in an opinion dated April 3, 1984, we reached the same conclusions concerning the filing of articles of incorporation for domestic corporations.

***2** It is also evident that, in this instance, the Secretary of State may not resolve the legal question of whether or not the proposed amendment is legally authorized. Our Supreme Court emphasized this important principle in *Green v. Thornton*, supra. There, the Court recognized that the Secretary of State's duties are ministerial with respect to the

issuance of a commission for election as to the question of municipal incorporation. The Court unmistakably concluded that the Secretary could not determine the legal validity of the incorporation petition beyond the specific statutory requirements set forth. There, the Court held:

We interpret Section 47-101 to require the petition be signed by freehold electors residing in the area to be incorporated. The fact some of the petitioners may be registered to vote in an adjacent polling place is of no legal consequence. The petition on its face satisfied the statutory requirements. The Secretary's duty to issue the commission is mandatory and ministerial. (emphasis added).

Likewise, in this instance, the Secretary cannot judge the legal validity of the proposed amendment. If it appears valid on its face and comports with the filing requirements set forth in the Code with respect to domestic nonprofit corporations, see, Sections 33-31-10 et seq., (particularly Section 33-31-130), Section 33-1-200, Section 33-1-250, the Secretary is required by law to file the amendment. Indeed, Section 33-1-250 itself explicitly states that the Secretary of State's "duty to file documents under this section is ministerial. His filing or refusing to file a document does not ... affect the validity or invalidity of the document in whole or in part..."¹

In short, the question of the legal validity of the proposed amendment must itself be decided by the courts which possess the authority and resources to resolve questions of fact, and other critical issues necessary for a binding, final resolution. As with any private, nonprofit corporation such as Furman University, it is solely the province of the court to determine whether or not this type of amendment to a corporate charter is valid and binding.

CONCLUSION

In conclusion, I would advise that you as Secretary of State possess no discretion to determine the validity or invalidity of the proposed amendment in terms of whether or not approval by the Baptist Convention is required. Whether or not the amendment is legally authorized is solely within the province of a court to decide. Your duty, quite apart from the legal validity or invalidity is simply to determine whether the document in question appears valid on its face and whether it meets the statutory requirements relative to domestic nonprofit corporations referenced above. If it does, you must file it.

Please be advised also that in responding to your inquiry, we make no comment with respect to the validity or invalidity of the proposed amendment. Again, as with any private corporation, such is a matter solely within the province of the courts.

*3 With kindest regards, I am
Sincerely yours,

Edwin E. Evans
Chief Deputy Attorney General

Footnotes

1 Section 33-31-130 specifically provides the method of amendment of nonprofit corporation charters:
Any corporation organized for the purposes aforesaid may have its charter amended in any particular by the Secretary of State by a majority vote of its members present at a meeting held after notice stating the time, place and purpose thereof, given by publication one time in newspaper published in the county in which the corporation is located or by sending by registered mail such notice to each member not less than five days before the meeting.
Although Sections 33-31-60 through 33-31-80 provide the Secretary of State with limited investigative powers with respect to nonprofit corporations, we do not believe these provisions empower him to determine whether or not a proposed amendment is effectuated in accordance with the corporate terms of a charter. We have not found any case in South Carolina which construes these provisions so broadly as to empower the Secretary of State to determine such legal questions, which are in the

province of the courts. If the formal statutory requirements are met, and the corporate purpose is not unlawful, the Secretary must file the documents consistent with these statutory provisions. See, 18 C.J.S., Corporations, Section 37.

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