



ALAN WILSON
ATTORNEY GENERAL

June 29, 2018

The Hon. Phyllis Henderson
South Carolina House of Representatives
522-B Blatt Building
Columbia, SC 29201

Dear Representative Henderson:

We received your request dated April 3, 2018 seeking an opinion on certain questions related to possession of a handgun in common areas governed by an HOA and the issuance of warrants upon probable cause. This opinion sets out our Office's understanding of your question and our response.

Issue:

Your opinion request forwards to us a constituent's letter which requests an opinion on five questions related to the application of Section 16-23-20 to areas of common ownership, such as swimming pools, recreation grounds, tennis courts, and other such areas, in a community governed by an incorporated homeowners' association in South Carolina. We have lightly edited the questions here for the sake of clarity:

1. Can a homeowners' association ("HOA") deny a property owner, who by virtue of this property ownership also has an ownership interest in the HOA's common property, the protections of the exemption found in S.C. Code § 16-23-20(8) (2015) which provides for lawful possession of a handgun by "a person in his home or upon his real property or a person who has the permission of the owner or the person in legal possession or the person in legal control of the home or real property"? If so, what legal steps must the association take?
2. Does a magistrate judge have a duty when reviewing an application for a warrant upon probable cause for violation of Section 16-23-20 by a law enforcement officer to question that officer and determine that no exemption applies?
3. Does a law enforcement officer investigating a violation of Section 16-23-20 have a duty to investigate and present information to the magistrate concerning exemptions (or in the inverse that no lawful exemption exists) while establishing that probable cause for the issuance of a warrant does exist?
4. If an officer obtains a warrant for arrest and fails to determine if the person had a valid exemption (e.g. a CWP or the owner's permission) because no investigation of

an exemption was completed, is that oversight so negligent as to rise to tort liability in a civil cause of action against the officer and the employing department?

5. Does any legal standard apply in the course of a law enforcement investigation? Can an investigation be so incompetent as to rise to the level of negligence?

After carefully reviewing your opinion request, we have concluded that we cannot opine definitively on these specific questions for reasons more fully set out below. However we will set out relevant law and prior opinions of this Office in order to be as responsive as possible to your questions.

Response:

1. Can a homeowners' association ("HOA") deny a property owner, who by virtue of this property ownership also has an ownership interest in the HOA's common property, the protections of the exemption found in S.C. Code § 16-23-20(8) (2015) which provides for lawful possession of a handgun by "a person in his home or upon his real property or a person who has the permission of the owner or the person in legal possession or the person in legal control of the home or real property"? If so, what legal steps must the association take?

As noted in your question, Section 16-23-20 of the South Carolina Code generally addresses the legality of carrying a handgun in this State and provides in relevant part:

It is unlawful for anyone to carry about the person any handgun, whether concealed or not, except as follows, unless otherwise specifically prohibited by law:

...

(8) a person in his home or upon his real property or a person who has the permission of the owner or the person in legal possession or the person in legal control of the home or real property;

S.C. Code Ann. § 16-23-20(8) (2015). This is consistent with the historical practice of the South Carolina Legislature to carefully avoided criminalizing the possession of a handgun on private property by the property owner. *See, e.g., Op. S.C. Att'y Gen.*, 2018 WL ____ (June 28, 2018) (discussing 1881-1882 S.C. General Statutes § 2472).

However, this author's research has not identified any reported South Carolina case where a court of our State ruled on the question of whether a person could carry a handgun pursuant to Section 16-23-20(8) where the person had some property interest in the land but did not hold title

to the real property or have legal possession and control as a leaseholder. In the case described in your letter where a person holds an interest in real property as a cotenant with dozens or perhaps hundreds of other homeowners and the HOA itself, it appears that a court would be required to review and interpret the restrictive covenants and bylaws which govern the common areas to answer that question. Such a court likely would be called upon to determine the nature of the property and possessory interests of all parties, which necessarily would be a fact-specific undertaking. For this reason, it appears that such questions must be decided on a case-by-case basis.

Due to the fact-specific nature of this question, our Office cannot answer it definitively without making findings of fact and any such undertaking would exceed the proper scope of an opinion of this Office. This Office consistently has recognized that, unlike a court, our Office cannot adjudicate factual disputes or make independent findings of fact in an opinion. *See, e.g., Op. S.C. Att'y Gen.*, 2003 WL 21108489 (May 5, 2003) (internal citations omitted). In order to be as responsive as possible to your question, however, we will discuss certain provisions of South Carolina law which appear to be relevant to its resolution.

Several prior opinions of this Office discuss homeowners' associations and restrictive covenants at length, and we discuss two such recent opinions here. A 2016 opinion of this Office addressed to Rep. Goldfinch discussed the role of restrictive covenants in establishing the rights of homeowners with respect to each other and the homeowners' association. *Op. S.C. Att'y Gen.*, 2016 WL 4419890 (August 5, 2016). We quote at length from that opinion, which itself includes quotations from and citations to other legal authorities:

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).

Id. (quoting *Kiekel v. Four Colonies Homes Ass'n*, 38 Kan.App.2d 102, 107 (Kan. Ct. App. 2007) (emphasis added in opinion). After discussing this persuasive authority from another state, our 2016 opinion turned to South Carolina law for a further discussion of the interplay between South Carolina's Nonprofit Corporation Act and the restrictive covenants and the bylaws which govern a community with a homeowner's association:

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).

...

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.

Id. We have enclosed a full copy of this 2016 opinion for a fuller discussion of these issues.

Early in 2017 our Office relied on the 2016 opinion discussed above to issue another opinion which further discussed the role of homeowners in safeguarding their rights under the restrictive covenants in an HOA. *Op. S.C. Att'y Gen.*, 2017 WL 569543 (January 3, 2017). We quote at length from this opinion also:

Homeowners' associations are uniquely self-policing among nonprofit corporations, and are capable of robust self-government. Membership in the association often is mandatory for members of a community, and the actions of the association directly impact the daily lives of the members and one of their greatest investments: their homes. While a person might leave a voluntary club or choose not to donate to a charity which that person believes is acting contrary to their covenants and bylaws, a homeowner has a strong vested interest in monitoring the actions of their association closely, and to actively push back

against any improper action. Where homeowners are elected to the boards of associations through a vote by the members, the homeowners are democratically represented, and they retain the power vote in other board members if their interests are not represented. Furthermore, if the association abuses their power so as to overstep the governing covenants and bylaws, then all members generally have the incentive and the ability to discover those abuses, and may resort to the courts for a remedy if the matter cannot be resolved internally. Finally, if board members or agents of the association engage in fraud or other criminal activity, the local solicitor has the jurisdiction to pursue a prosecution, in his or her discretion.

It appears from our research that most (if not all) reported cases in this State related to the internal conduct of homeowners' associations originally were brought either by one of the homeowners or the association itself.

Id.

2. Does a magistrate judge have a duty when reviewing an application for a warrant upon probable cause for violation of Section 16-23-20 by a law enforcement officer to question that officer and determine that no exemption applies?

Because Questions Two and Three both address issues of probable cause we address those questions together below in a consolidated response.

3. Does a law enforcement officer investigating a violation of Section 16-23-20 have a duty to investigate and present information to the magistrate concerning exemptions (or in the inverse that no lawful exemption exists) while establishing that probable cause for the issuance of a warrant does exist?

In response to Questions Two and Three, we affirm our Office's longstanding policy to defer to magistrates in their determinations of probable cause, and to local law enforcement officers and solicitors in deciding what charges to bring and which cases to prosecute. *See, e.g., Op. S.C. Att'y Gen.*, 2017 WL 5053042 (October 24, 2017). Additionally, South Carolina law does not permit this Office to issue an opinion which attempts to supersede or reverse any order of a court or other judicial body. *Orr v. Clyburn*, 277 S.C. 536, 290 S.E.2d 804 (1928); S.C. Const. art I, § 8; S.C. Const. art V.

Our Office has issued several prior opinions related to issues of probable cause while being careful not to overstep into the province of the judiciary, and we discuss two of those prior opinions here in order to be as responsive as possible to your question. First, in 2015 our Office

issued an opinion to Municipal Judge Dana Turner in response to numerous questions regarding proposed procedural changes for the police officers seeking warrants in the City of Columbia:

You first ask, within the context of the procedural changes explained above, whether "an oath provided for the purpose of establishing probable cause by an officer unfamiliar with the evidence establishing probable cause is a valid oath?" While such an oath would in fact be invalid where an affiant lacks any knowledge of the evidence supporting probable cause, because the procedure discussed above shows that the officer assigned to the TRU is not truly unfamiliar with such evidence so long as they follow the appropriate procedures, we believe such an oath would be valid.

[A discussion of applicable law followed.]

Nevertheless we caution that while "other officers [[may] appear before the Magistrate on behalf of the arresting officer and relate what facts they are in possession of to the Judge in order to show probable cause for the issuance of a warrant" the affiant must still "satisfy the inquiring Magistrate that sufficient facts and information exist to support the issuance of the warrant, which ... is entirely in the Magistrate's good judgment." *Op. S.C. Att'y Gen.*, 1978 WL 34666 (January 20, 1978); *see also, Op. S.C. Att'y Gen.*, 1998 WL 61840 (January 30, 1998) ("The affiant to an arrest warrant must be able to satisfy an inquiring magistrate that sufficient facts and information exist to support the warrant which determination is entirely within the magistrate's judgment."); *Op. S.C. Att'y Gen.*, 1996 WL 549522 (August 5, 1996) (same); *Op. S.C. Att'y Gen.*, 1996 WL 265819 (April 30, 1996) (same).

Op. S.C. Att'y Gen., 2015 WL 7293601 (November 2, 2015).

Second, we bring to your attention a 2011 opinion of this Office related to "a person giving a false police report as proscribed by South Carolina law." *Op. S.C. Att'y Gen.*, 2011 WL 2648713 (June 28, 2011). We quote the conclusion of that opinion here in the event it is relevant to a case where law enforcement is deliberately misled and because it discusses the duties and responsibilities of law enforcement officer to detect crime generally:

An individual who makes what he or she knows to be a false report to law enforcement officials, and whose conduct consequently requires those officials to expend valuable amounts of time and resources in a futile effort to verify those reports, is obstructing the due course of justice. Such conduct cannot be considered as a mere prank or harmless gesture. Rather, making a false report

causes direct injury to the general public by causing law enforcement officials to squander public resources which ought to be devoted to genuine public needs. Diverting such resources from legitimate areas of criminal investigation directly impedes the orderly administration of justice. Such disruptions should not go unchecked.

Consistent with the above, we conclude that an individual who makes what he or she knows to be a false report to law enforcement officials falls within the ambit of §16-17-722. We also refer you to the offenses of perjury under §16-9-10 (A) (2), and false swearing pursuant to §16-9-30. Finally, there exists the offenses of making a false complaint to a law enforcement officer pursuant to §16-17-725 (A), and obstruction of justice. By stating these possible offenses, however, we do not suggest to exclude any others depending upon the complete facts and circumstances in any given case. Of course, this advice should not be construed as applying to any particular set of facts or circumstances.

Additionally, we recognize the day-to-day decisions as to whom to arrest are made primarily by law enforcement officers, and that police officers and agencies are afforded by law broad discretion to carry out their arduous daily tasks of enforcing the law. This being the case, law enforcement officers should evaluate each particular situation as it arises and gauge whether there is a likelihood of a violation of the law. Law enforcement officers should be vigilant to enforce the criminal laws of this state, and to detect and bring criminals to justice. *Op. S.C. Atty. Gen.*, July 2, 1996. This office further adheres to its long-standing policy that the judgment call as to whether to prosecute a particular individual is warranted or is on sound legal ground in a particular case is a matter within the discretion of the local prosecutor. *Ops. S.C. Atty. Gen.*, April 6, 2011; October 29, 2004; April 20, 2004; February 3, 1997. The prosecutor is the person on the scene who can weigh the strength or weakness of an individual case. *Op. S.C. Atty. Gen.*, August 14, 1995. Thus, while this office has provided to you the relevant law in this area, we must defer to the prosecutor's ultimate judgment as to whether or not to prosecute an individual in question in a given case under particular circumstances.

Id.

4. If an officer obtains a warrant for arrest and fails to determine if the person had a valid exemption (e.g. a CWP or the owner's permission) because no investigation of an exemption was completed, is that oversight so negligent as to rise to tort liability in a civil cause of action against the officer and the employing department?

Because Questions Four and Five both address issues of negligence and tort liability we address those questions together below in a consolidated response.

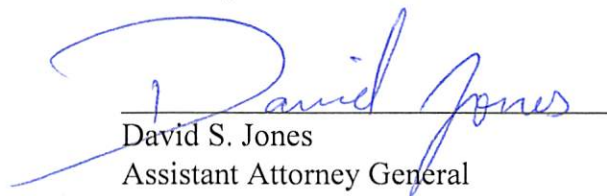
5. Does any legal standard apply in the course of a law enforcement investigation? Can an investigation be so incompetent as to rise to the level of negligence?

In response to Questions Four and Five, we note that this Office is required by law in particular circumstances to advise and to defend certain public officials if sued. Accordingly, we must decline to issue a formal opinion as requested concerning the potential liability of a public official if sued.

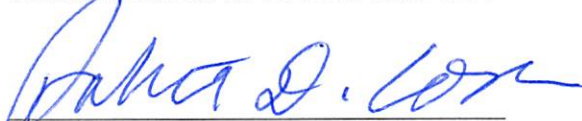
Conclusion:

In conclusion, for the reasons set forth above, our Office cannot opine definitively on the specific questions presented in your request letter. We do hope that that statutes and prior opinions we discussed in response to those questions are helpful in providing some insight into relevant South Carolina law.

Sincerely,


David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:


Robert D. Cook
Solicitor General