

July 11, 2007

The Honorable Chip Huggins  
Member, House of Representatives  
308 Wayworth Court  
Columbia, South Carolina 29212

Dear Representative Huggins:

We received your letter requesting an opinion of this Office on a homeowners' association's ability to impose a transfer fee on the purchasers of homes located in the area covered by the homeowners' association. As you explain in your letter:

A recent trend in homeowner association management is implementing a new transfer fee to offset potential increases in periodic dues to all members or to offset a special assessment on existing members.

This new transfer fee is often levied like a transfer tax. Example: The transfer fee is calculated as a percentage of the sale (0.25% to 1%) or a fixed fee (\$3,000 to \$20,000) and collected by the closing attorneys  
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When a homeowners association creates a new transfer fee, existing homeowners who do not intend to sell or move have personal incentives to vote or lobby the Board of Directors for the new transfer fee. Existing members seek to shift their personal financial burden of increased dues and special assessments onto new residents in the form of a transfer fee.

Based on this information, you ask for a legal opinion addressing the following questions:

In your opinion, does the term "transfer fee" used in the South Carolina Nonprofit Corporation Act (SC Code Section 33-31-302(15)) . . . apply to real property transaction by the property owners in the non-profit homeowners association?

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As a second question, can a homeowner association (not incorporated under the non-profit act) charge a fee or tax (through their covenants and restrictions) that is levied only on those property owners that sell or buy property within the association (not applied equally among all property owners)?

### **Law/Analysis**

Section 33-31-302 of the South Carolina Code (2006), as part of the South Carolina Nonprofit Corporation Act, affords specific powers to nonprofit corporations. This provision states: “Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers of an individual to do all things necessary or convenient to carry out its affairs including, without limitation, power . . . .” This provision continues by listing eighteen specific powers afforded to nonprofit corporations. As you mentioned in your letter, among these is subsection (15), which gives nonprofit corporations the power “to impose dues, assessments, and admission and transfer fees upon its members . . . .” S.C. Code Ann. § 33-31-302(15). Thus, you question whether this provision gives homeowners’ associations registered as nonprofit corporations the authority to impose the transfer fees described in your letter.

In order to make this determination we must employ the rules of statutory interpretation. As our Supreme Court recently stated in Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 525-26, 642 S.E.2d 751, 754 (2007).

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). If a statute’s language is plain, unambiguous, and conveys a clear meaning, then “the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute’s operation. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

Section 33-31-302 states not only shall nonprofit corporations have the same power as that of an individual “to do all things necessary or convenient to carry out its affairs,” but also suggested a list of powers specifically enumerated for nonprofit corporations. However, the Legislature was careful to state that a nonprofit corporation’s powers are not limited to those listed. Furthermore, the only language we find limiting a nonprofit corporation’s authority under this provision is that portion of section 33-31-302 states “[u]nless its articles of incorporation provide otherwise . . . .”

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Thus, from the plain wording of section 33-31-302, we believe the Legislature intended to give nonprofit corporations broad authority.

In addition to the broad grant of authority provided to nonprofit corporations under section 33-31-302, as you point out, subsection (15) appears to give nonprofit corporations the specific authority to imposed transfer fees on its members. Accordingly, based on section 33-31-302, 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. When a homeowner sells his or her property covered under a homeowners' association, we presume he or she transfers his or her membership in the homeowners' association to the purchaser of the property. Therefore, we presume this type of transfer of membership is that contemplated by the Legislature in specifically allowing for the imposition of transfer fees on its members. Thus, it is our opinion that homeowners' associations, which are registered nonprofit corporations under the South Carolina Nonprofit Corporations Act, have authority to collect transfer fees from their members, so long as such action is not in violation of the association's articles of incorporation.

Next, you inquire as to whether a homeowner's association, which is not incorporated under the South Carolina Nonprofit Corporation Act, may impose a transfer fee or tax. In your letter, you refer to section 6-1-70 of the South Carolina Code (2004). This provision prohibits the imposition of real estate transfer fees by local governing bodies and states as follows:

(A) Except as provided in subsection (B), the governing body of each county, municipality, school district, or special purpose district may not impose any fee or tax of any nature or description on the transfer of real property unless the General Assembly has expressly authorized by general law the imposition of the fee or tax.

(B) A municipality that originally enacted a real estate transfer fee prior to January 1, 1991 may impose and collect a real estate transfer fee, by ordinance, regardless of whether imposition of the fee was discontinued for a period after January 1, 1991.

S.C. Code 6-1-70.

In an opinion issued in 2005, we addressed the legality of the imposition of a transfer fee by a homeowners' association. Op. S.C. Atty. Gen., January 5, 2005. The requester asserted the homeowners' association in question was a "quasi-governmental body." Id. However, the author of that opinion noted "I am unaware of any State statute granting [the homeowners' association] any particular authority." Id. In addition, we considered section 6-1-70 and its application in preventing a homeowners' association from imposing a transfer fee. Id.

I am unaware of any basis to apply such provisions to the [homeowners' association] as that organization is clearly not a county, municipality, school district or special purpose district. Moreover, I am unaware of any other State statutory provision that would be applicable so as to prohibit the charging of a real estate transfer fee by the [homeowners' association].

Id. We also quoted a portion of a prior opinion concerning the ability of homeowners' association's authority to assess fines.

[T]he 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. Courts in other jurisdictions have addressed similar questions. In Florida, the State District Court of Appeal held that a homeowners' association had the authority to assess fines against a homeowner based on violations of covenants restricting parking . . . Similarly, the Court of Appeals of Wisconsin noted . . . that the property owners' "association's power to fine its members depends on the contract between the association and the members embodied in the bylaws and articles."

Id. (quoting Op. S.C. Atty. Gen., August 30, 2001). We added: "The opinion further stated that a property owners' association ability to collect penalties would be strictly a private matter between the association and the member." Id. Based on these findings, we concluded that whether the homeowners' association may impose a transfer fee on its members is a private matter dependent upon the agreement or contract between the homeowners' association and its members. Id.

In addressing your question as to whether a homeowners' association may charge a fee or tax, we reiterate the findings and conclusions of our 2005 opinion. 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 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.

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### **Conclusion**

Based on plain reading of the language used in section 33-31-302(15) of the South Carolina Code, we find this provision allows nonprofit corporations to impose transfer fees on their members assuming such is not prohibited by their articles of incorporation. Thus, this provision appears to allow a homeowners' association registered under the Nonprofit Corporations Act the ability to impose a fee on the transfer of membership by one homeowner to another, presuming such is not prohibited by the homeowners' association's articles of incorporation. Furthermore, we are of the opinion that homeowners' associations are private organizations and their ability to collect particular fees and assessments is a private matter between the association and its members. Thus, we suggest you look to that agreement to determine whether transfer fees are authorized.

Very truly yours,

Henry McMaster  
Attorney General

By: Cydney M. Milling  
Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook  
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