



ALAN WILSON
ATTORNEY GENERAL

December 21, 2011

The Honorable Tom Davis
Senator, District No. 46
P.O. Box 142
Columbia, S.C. 29202

Dear Senator Davis,

You requested an opinion of this Office as to whether the provisions of section 33-31-1602 of the South Carolina Code (Supp. 1994) supersede the bylaws and covenants of gated communities.

Law/Analysis

The statute you reference provides the members of a nonprofit corporation with the right to inspect the corporation's records subject to certain conditions and restrictions:

(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
 - (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 § 33-31-1602 (Supp. 1994) (emphasis added).

The preceding statute is part of the South Carolina Nonprofit Corporation Act of 1994 ("Nonprofit Act"), S.C. Code sections 33-31-101 et seq., which generally governs the establishment, organization, and operation of nonprofit organizations.' Thus, we interpret your question as one concerning the validity of the bylaws of a nonprofit corporation under State law.

South Carolina courts have recognized the general rule that the bylaws of a corporation are invalid to the extent they are inconsistent with State law. See King v. Ligon, 180 S.C. 224, 185 S.E. 305 (1936) ("All resolutions and by-laws must be conformable and subordinate to the general laws"); Davis v. S.C. Cotton Growers' Co-op. Ass'n, 127 S.C. 353, 121 S.E. 260, 261 (1924) ("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"); Lovering v. Seabrook Island Property Owners Ass'n, 289 S.C. 77, 82, 344 S.E.2d 862, 865 (Ct. App. 1986) aff'd as modified, 291 S.C. 201, 352 S.E.2d 707 (1987) ("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"); Ortega v. Kingfisher Homeowners Ass'n, Inc., 314 S.C. 180, 182-83, 442 S.E.2d 202, 204 (Ct. App. 1994) (provision in association's bylaws calling for up to five directors with staggered terms violated statute requiring at least nine directors in order to stagger terms); see also 18 C.J.S. Corporations § 163 ("by laws inconsistent with statutory law, the common law, or with public policy or good morals, are void").

The general rule that a corporation's bylaws must be consistent with State law has also been codified by the General Assembly. See § 33-3-102(3), (15) (every corporation generally has power to adopt bylaws or do any other act not inconsistent with State law). The Nonprofit Act describes the general powers of a corporation, in pertinent part, as follows:

Unless its articles of incorporation provide otherwise, **every corporation...has the same powers as an individual to do all things necessary or convenient to carry out its affairs, including, without limitation, power:**

The 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.

- (3) **to make and amend bylaws *not inconsistent* with its articles of incorporation or *with the laws of this State* for regulating and managing the affairs of the corporation;**

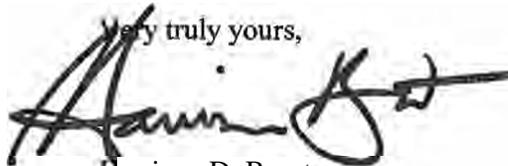
- (18) **to do all things necessary or convenient, *not inconsistent with the law*, to further the activities and affairs of the corporation.**

§ 33-31-302 (emphasis added); *see also* § 33-31-206(b) ("The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation").

Consistent with the general rule set forth in the case law and statutes discussed above, we have no difficulty concluding that a nonprofit corporation's bylaws concerning a member's inspection rights are valid only to the extent they are consistent with the provisions of section 33-31-1602. Further support for this conclusion is found in subsection (e) of this statute. See 33-31-1602(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") (emphasis added). It would have been unnecessary for the Legislature to expressly allow only religious corporations to adopt bylaws abolishing or limiting a member's statutory inspection rights if the general rule did not otherwise apply to all nonprofit corporation. Thus, it is our opinion 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.

We note that "[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. Atty. Gen., September 23, 2011. We have not been provided with the bylaws of any corporation in conjunction with this request, and thus provide no opinion as to the validity of the bylaws of any particular corporation.

Very truly yours,



Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:




Robert D. Cook
Deputy Attorney General