ALAN WILSON
ATTORNEY GENERAL

May 15, 2017

The Hon. Deborah Long
South Carolina House of Representatives
1115 John Short Road
Indian Land, SC 29707

Dear Representative Long:

Attorney General Alan Wilson referred your letter dated September 22, 2016 to the Opinions section for a response. Please find following our understanding of your questions and our response.

Issue:

You forwarded to us a written request from a constituent, and based upon that letter and a later phone conversation with your constituent, I understand that this question arises out of a disagreement between your constituent, his homeowners' association, and the county. We quote in part from his letter here:

I live in Lancaster County. I filed a Nuisance Complaint under County Code 22 to have the weeds at the rear of my property mowed. The area is common open space, owned by the community. The home owners association [named] would not cut the weeds and would not grant me permission to cut the weeds even if [I] agreed to pay all costs.

The County inspected, found a Nuisance existed under Ordinance 22 and issued a citation to my HOA ordering the weeds to be cut.

Thereafter, the case went before a local magistrate without notice to your constituent. While your constituent was unsure of the exact procedural result until recently, just before the issuance of this opinion he learned and communicated that the code enforcement agent who issued the citations withdrew them (*nolle prossequi*).

We understand that your constituent's two essential questions are:

1. In the event of a conflict between a county ordinance and the restrictive covenants of a homeowners' association, does the ordinance prevail over the restrictive covenants?
2. When a county issues a citation against a homeowners' association in response to the complaint of a citizen, must that citizen be notified of any proceedings pursuant to that citation?

Our understanding of these essential questions is based both on your constituent's letter and our subsequent phone conversations with him. The letter also alluded to a few related but ancillary issues, such as the power of the courts to void an ordinance or exempt a specific person or organization from such an ordinance. We do not address those issues directly in this opinion because our phone conversations with the constituent clarified and narrowed the scope of his questions.

Before discussing and answering these questions, we take this opportunity to clarify that we are issuing this opinion in response to your constituent's general questions, and not as any comment upon the case which led to these questions. When a member of the general public has a specific question concerning the facts and merits of a specific instance of litigation, whether anticipated or concluded, our longstanding policy is to decline to opine on that matter, and to suggest that the individual consult with a private attorney. Our Office previously has stated:

> [W]e do not opine in a legal opinion on questions regarding potential criminal charges and penalties for an action already taken. Our longstanding policy is to . . . direct those questions to local law enforcement and the local solicitor to make a prosecutorial decision. See Op. S.C Att'y Gen., 1989 WL 406160 (July 11, 1989) ("this Office can only set forth the general law to you in the abstract. [W]hether a specific prosecution is warranted, or is on sound legal ground in an individual case, remains a matter within [the solicitor's] exclusive discretion and jurisdiction.").

Op. S.C Att'y Gen., 2016 WL 3946153 (July 5, 2016). For this reason, nothing in this opinion should be construed as a comment upon the particular case which led to your constituent's questions or the merits of any exercise of prosecutorial discretion. Our answer below simply sets out general law in response to those questions.

Law/Analysis:

For the reasons set out below, it is the opinion of this Office that where restrictive covenants conflict with the law, including duly enacted county ordinances, then the law prevails. This Office has opined on several previous occasions that HOAs are subject to state law, and a county ordinance has the force of law within that county's jurisdiction. Please note that for the purposes of this discussion, we presume that the restrictive covenants directly conflict with a duly-enacted and constitutionally sound ordinance, and the covenants cannot be reconciled with the ordinance or permitted under an exception.

It is also the opinion of this Office that absent a statute to the contrary, a third-party complainant who is not a party to an ordinance enforcement action generally is not entitled to notice of that proceeding. While a private citizen who brings a violation to the county's attention may be called as a witness or may be notified of proceedings as a matter of county policy, our Office is not aware of any law requiring such notice.

1. **In the event of a conflict between a county ordinance and the restrictive covenants of a homeowners' association, does the ordinance prevail over the restrictive covenants?**

This Office has opined on several previous occasions that HOAs are subject to state law. Before exploring those opinions, it may be helpful first to recall the basic structure of homeowners' associations. We quote here extensively from our August 5, 2016 opinion to Rep. Goldfinch, which sets out this structure (beginning by quoting from South Carolina Jurisprudence):

> 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.
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> 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.

Op. S.C. Att'y Gen., 2016 WL 4419890 (August 5, 2016). We note that the reference in SC Jurisprudence to restrictions, easements, and rights of use is consistent with the nature of restrictive covenants as a private contractual relationship between two or more parties, even though the private document regulates property rights and uses and enforcement by the HOA in ways that mirror ordinances with the force of law and government enforcement.

That opinion went on to conclude that "in general . . . 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." *Id.* (emphasis added). That conclusion was preceded by a caveat that is particularly relevant to the question presented here: "it is impossible to set out an absolute rule that [a covenant] will always prevail over [a bylaw], 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." *Id.* (emphasis added).

That same opinion went on to whether the board of an HOA could change the bylaws without a vote. *Id.* The analysis there also focused on the state law governing the powers of the board:

> "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 omitted).

Id. (emphasis added). The opinion went on to discuss the specific provisions of the South Carolina Corporation Act which governed amendments without a vote of the members.

This 2016 opinion was followed earlier this year by a subsequent opinion to Rep. Sottile which confirmed the conclusion of the South Carolina General Assembly's Study Committee on Homeowners Associations that the South Carolina Nonprofit Corporation Act applies to HOAs organized under that Act. Op. S.C. Att'y Gen., 2017 WL 569543 (January 3, 2017). After discussing our 2016 opinion, our 2017 opinion went on to discuss additional support for that conclusion:

> The Act defines a "corporation" for the purposes of that chapter to include a "public benefit, mutual benefit, and religious corporation." S.C. Code Ann. § 33-31-140(7) (2006). This definition is sufficiently broad to encompass not just charitable nonprofits or churches, but also nonprofit corporations that do not serve a charitable purpose. Moreover, the comments to the Act demonstrate that the General Assembly contemplated that the Act generally would apply to nonprofit homeowners' associations. For example, S.C. Code § 33-31-1030 (2006) permits "the articles of only a religious corporation or public benefit corporation" to give a third party veto power over "an amendment to the articles or bylaws." The non-binding South Carolina Reporters' Comments to that Section discussed why mutual benefit corporations were excluded from this Section and noted, in relevant part:

> [c]onsideration was given to the fact that similar provisions have caused problems in the mutual benefit corporate area. Real estate developers have given themselves veto powers over homeowner corporations which they set up to manage developments. If the developer goes bankrupt or merely vanishes before he is out of the project and relinquishes his rights, there may be substantial confusion as to how the corporation is to act.
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> S.C. Code Ann. § 33-31-1030 (2006) S.C. reporter cmt. para. 2 (emphasis added).
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> For these reasons, it is the opinion of this Office that a court would find that the South Carolina Nonprofit Corporation Act does apply to any homeowner association organized under that Act.

Op. S.C. Att'y Gen., 2017 WL 569543 (January 3, 2017). This conclusion is consistent with several other prior opinions of this Office which have concluded that state law governs homeowners associations. *See, e.g.*, Op. S.C. Att'y Gen., 2013 WL 3479876 (June 26, 2013) ("The simple answer to your question is yes, nonprofit corporations have to follow the law."). For these reasons, we have no doubt that where restrictive covenants are in direct and irreconcilable conflict with state law, a South Carolina court will hold that the law controls. *See* S.C. Code Ann. § 33-31-206(b) (2006).

County ordinances are one type of state law which governs HOAs. South Carolina counties are political subdivisions of the state, and exercise a portion of the sovereign powers delegated to them by the South Carolina General Assembly. *See* S.C. Const. Art VIII § 7. The South Carolina Code provides that:

> All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

S.C. Code Ann. § 4-9-25 (2016). Section 6-29-710 et. seq. sets out specific powers and processes for a county to zone property by ordinance, and Section 6-29-950 provides for enforcement of these ordinances – stating in part that "[a] violation of any ordinance adopted pursuant to the provisions of this chapter is a misdemeanor.[1]" The South Carolina Supreme

[1] This Section also provides for a private right of action, such that "an adjacent or neighboring property owner who would be specially damaged by the violation may in addition to other remedies, institute injunction, mandamus, or other appropriate action or proceeding to . . . correct or abate the violation."

Court also has upheld a county ordinance restricting the location of sexually oriented businesses even though the challenged ordinance did not comply with this statutory process because it nevertheless was a valid exercise of the county's general police power. *Greenville County v. Kenwood Enterprises, Inc.*, 353 S.C. 157, 165, 577 S.E.2d 428, 432 (2003).

For these reasons, we believe that a court would find that a county ordinance with the force of state law will control in a conflict with a restrictive covenant, which is a creature of contract. We reiterate that for the purposes of this discussion, we presume that the restrictive covenant directly conflicts with a duly-enacted and constitutionally sound ordinance,[2] and the covenants cannot be reconciled with the ordinance or permitted under an exception. This opinion should not be construed to imply, for example, that the restrictive covenants cannot restrict the use of property to a subset of the uses permitted under the general zoning ordinances. Rather, consistent with our prior opinions, we simply reaffirm that restrictive covenants are governed by state law, including local ordinances which carry the force of law.

2. **When a county issues a citation against a homeowners' association in response to the complaint of a citizen, must that citizen be notified of any proceedings pursuant to that citation?**

Absent a statute or constitutional mandate to the contrary, or a local ordinance, a third-party complainant who is not a party to a zoning ordinance enforcement action generally is not legally entitled to notice of that proceeding. As you no doubt are aware, the Due Process Clauses of the Constitutions of the United States and South Carolina mandate notice to criminal defendants in scenarios which are too numerous to set out exhaustively in this opinion. *See* U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3; *see also* S.C. Rule Crim. Pro. 16 (providing for trial in absence of defendant only after "a finding by the court that such person has received notice."). Third persons who are not parties to criminal proceedings or witnesses expected to testify generally only receive notice when such notice is mandated by law, such as the SC Victims Bill of Rights. *See* S.C. Const. art. I § 24(A) ("victims of a crime have a right to . . . (4) be informed of and present at any criminal proceedings which are dispositive of the charges where the defendant has the right to be present.")

Many code enforcement cases are brought as a result of private citizens notifying the appropriate authority about illegal actions or conditions. Such citizens might be given notice of these cases as a matter of courtesy or local policy, but our Office is not aware of any state law mandating notice simply because they made the initial complaint. Generally speaking, the law does not require that persons who are neither parties to a criminal action nor designated by the

[2] Compare *Byrd v. City of North Augusta*, 261 S.C. 591 (1974), which held that a city's attempt to rezone property from commercial to only residential use after 19 years of zoning and use for commercial purposes was "unreasonable and arbitrary," and affirmed the trial court's order requiring the city to issue a commercial construction permit.

court as a victim of the crime be given notice of proceedings in that criminal action.[3] For example, in *Leeke v. Timmerman*, 454 U.S. 83, 87 (1981), the US Supreme Court held that '[a] private citizen . . . has no judicially cognizable right to prevent state officials from presenting information, through the intervention of the state solicitor, that will [discourage the issuance of an] arrest warrant." Incidentally, the *Leeke* opinion (which predated the 1998 adoption of the SC Victims Bill of Rights) noted that "[a]s early as 1870 the South Carolina Supreme Court indicated that under South Carolina law, '[s]ave for the just and proper vindication of the law, no one has an interest in the conviction of [another]." *Id.* at n.2 (quoting *State v. Addison*, 2 S.C. 356, 364 (1871).). For these reasons, we believe that a court would find that a third-party complainant who is not a party to an ordinance enforcement action generally is not legally entitled to notice of that proceeding.

In closing, we note that while a reporting homeowner generally would not be given notice in the case described by your constituent, homeowners in that position are not entirely without a remedy when they believe the covenants or bylaws are being violated. This Office has previously opined:

> 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. . . . . 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.

Op. S.C. Att'y Gen., 2017 WL 569543 (January 3, 2017). Additionally, if a local ordinance is passed pursuant to the South Carolina Local Government Planning Act, codified at S.C. Code § 6-29-310 et. seq., then Section 6-29-950(A) provides for a private cause of action by "an adjacent or neighboring property owner who would be specially damaged by the violation" of such an ordinance to "correct or abate the violation." Finally, we note that the General Assembly recently debated a bill, H3886, which would address conflicts between homeowners and their Associations.

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[3] We note that one exception to this general rule is that certain open document laws, such as FOIA, might entitle a person to such notice. But that person would be so entitled only after utilizing that statutory process, and not by virtue of any role in the circumstances of the case.

We reiterate that our Office is issuing this opinion in response to your constituent's general questions, and not as any comment upon the case which led to these questions. We offer this observation simply to note the remedies which are generally available to South Carolina homeowners.

Conclusion:

In conclusion, for the reasons set out above, it is the opinion of this Office that that where restrictive covenants conflict with a duly enacted county ordinance, then the law prevails. It is also the opinion of this Office that absent a statute to the contrary, a third-party complainant who is not a party to an ordinance enforcement action generally is not entitled to notice of that proceeding.

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. This opinion is not an attempt to comment on any pending litigation or criminal proceeding. 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