



ALAN WILSON
ATTORNEY GENERAL

June 12, 2018

The Honorable Mike Sottile
Member
South Carolina House of Representatives
District No. 112
310-A Blatt Building
Columbia, SC 29201

Dear Representative Sottile:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter forwards an opinion request on behalf of one of your constituents. The request reads as follows:

The SC Nonprofit Act allows for three types of corporate constructs:

1. Public benefit corporations
2. Religious corporations
3. Mutual benefit corporations.

Traditionally, mutual benefit corporations are understood to be created with the intent to provide mutually beneficial benefits to its corporate members.

If a nonprofit corporation is organized under the SC Nonprofit Act as a mutual benefit corporation, but states in its Articles of Incorporation that it will not have members, does this constitute a legally valid corporate form under the SC Nonprofit Act? Additionally, would a corporation that intentionally chose this incorporation strategy be able to validly claim the protections and rights of the SC Nonprofit Act in legal, tax and other regulatory proceedings and who, legally, would such a corporation be construed to benefit given it does not have any members?

Law/Analysis

Nonprofit corporations in South Carolina must comply with the terms of the South Carolina Nonprofit Corporation Act (the "Act") which is codified in the South Carolina Code of Laws at Chapter 31, Title 33. S.C. Code Ann. § 33-31-101 *et seq.*¹ Section 33-31-202 lists the information which must be included in a nonprofit corporation's articles of incorporation as follows:

(a) The articles of incorporation must set forth:

(1) a corporate name for the corporation that satisfies the requirements of Section 33-31-401;

(2) one of the following statements:

(i) This corporation is a public benefit corporation.

(ii) This corporation is a mutual benefit corporation.

(iii) This corporation is a religious corporation;

(3) the street address of the corporation's initial registered office with zip code and the name of its initial registered agent at that office;

(4) the name, address, and zip code of each incorporator;

(5) whether or not the corporation will have members;

(6) provisions not inconsistent with law regarding the distribution of assets on dissolution; and

(7) the address, including zip code, of the proposed principal office for the corporation which may be either within or outside South Carolina.

S.C. Code Ann. § 33-31-202 (emphasis added). As the request letter states, subsection (a)(2) requires a nonprofit corporation's articles of incorporation to elect one of the three listed classifications: a public benefit corporation, a mutual benefit corporation, or a religious corporation. Subsection (a)(5) also requires that the article of incorporation state "whether or not

¹ This opinion makes reference to the Official Comments following relevant statutes in the South Carolina Nonprofit Corporation Act. The South Carolina Reporters' Comments following S.C. Code Ann. § 33-31-101 explain the intent behind including these comments within the South Carolina Code as follows:

The Official and South Carolina Reporters' Comments are intended to assist those who use and interpret this act to determine the intention of the drafters and the interrelationship between the various sections. As such, the comments serve the same function and purposes as the comments to the Uniform Commercial Code, Title 36, of the 1976 Code. They can be useful particularly in a state like South Carolina because the State does not have a large body of nonprofit corporation case law. The comments are not, however, part of the statutory law and, therefore, are not binding on any court or other adjudicatory body.

the corporation will have members.” There is no express or implied prohibition which would preclude a nonprofit corporation which elects to be formed as a mutual benefit corporation from also electing not to have members. Therefore, the plain meaning of these subsections suggests that each of three types of nonprofit corporations may elect not to have members. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (“What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.”) (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992).

Official Comment 2(e) to Section 33-31-202 explains how a nonprofit corporation functions when its articles of incorporation state it will not have members as follows:

Many nonprofit corporations do not have members. They operate with a self-perpetuating board of directors, delegates, or some other system. Those corporations that will not have members must so indicate in their articles. Those corporations that will have members must indicate that there will be members. However, the bylaws and not the articles usually set forth the characteristics, qualifications, rights, limitations and obligations of the members.

S.C. Code Ann. § 33-31-202.

As used in the Act, mutual benefit corporations are defined to mean “a domestic corporation which either is formed as a mutual benefit corporation pursuant to Sections 33-31-201 through 33-31-207, is designated a mutual benefit corporation by a statute, or does not come within the definition of public benefit or religious corporation.” S.C. Code Ann. § 33-31-140(25) (emphasis added). Essentially, mutual benefit corporations are the default form for nonprofit corporations under the Act. Certainly, one purpose of a mutual benefit corporation can be to benefit its members. However, that is not the only recognized purpose. The Act broadly allows nonprofit corporations to “engag[e] in any lawful activity unless a more limited purpose is set forth in the articles of incorporation.” S.C. Code Ann. § 33-31-301(a). The Official Comment to Section 33-31-301 discusses the purposes of each of the three nonprofit types as follows:

Public benefit corporations operate for some public or charitable purpose, while religious corporations operate primarily or exclusively for religious purposes. Mutual benefit corporations act on behalf of their members or those they hold themselves out as representing or benefiting. The Model Act requires an election between public benefit, mutual benefit and religious status and allows each type of nonprofit corporation to engage in any lawful activity unless a narrower purpose clause is set forth in its articles. ...

Id. (emphasis added). As the comment makes clear, mutual benefit corporations can be incorporated for the purpose of representing people or purposes without any requirement that those who are benefited be included within its membership.

Conclusion

It is this Office's opinion that a court would find a nonprofit corporation may elect to be formed as a mutual benefit corporation without members in its articles of incorporation. S.C. Code Ann. § 33-31-202(a).

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General