ALAN WILSON
ATTORNEY GENERAL

January 3, 2017

The Hon. Mike Sottile
South Carolina House of Representatives
132 Sparrow Drive
Isle of Palms, SC 29451

Dear Representative Sottile:

Attorney General Alan Wilson referred your letter dated July 18, 2016 to the Opinions section for a response. Please find following our understanding of your questions and our response.

Issue (as quoted from your letter):

I am respectfully requesting an opinion from your office on whether your office is permitted to investigate homeowner associations under South Carolina's Nonprofit Corporation Act? Specifically, I am seeking your office's legal opinion as to whether the State's Nonprofit Corporation Act applies to homeowner associations established as non-profit corporations? I also ask, if you find in the affirmative, whether your office may investigate homeowner associations pursuant to Section 33-31-171 of the South Carolina Code of Laws?

Homeowner associations are prevalent throughout South Carolina. The majority of associations operate in a manner that promotes the common interest of its members. However, there are associations that tend to operate in ways that frustrate the intended purpose. The General Assembly created the Study Committee on Homeowners Associations under Part 1B, § 117.135 of the 2015-2016 Appropriation Act. The Committee's charge was to "review information, including, but not limited to, case law, statutes, uniform laws, and other information from South Carolina and other jurisdictions concerning homeowner[] associations." [Citation omitted.] The Study Committee agreed that South Carolina's Nonprofit Corporation Act applies to homeowner associations incorporated under that Act. Section 33-31-171 of the South Carolina Code of Laws provides that:

> *[t]he Attorney General, or any of his assistants or representatives when authorized by the Attorney General, may make investigations into the organization, conduct, and management of a nonprofit corporation, domestic or foreign, operating in this State. Every such corporation shall permit the Attorney General or any of his authorized assistants or representatives to examine and take copies of all its books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, articles, bylaws, and any and all other*

> *records of any such corporation as often as the Attorney General may deem it necessary to show or tend to show that the corporation has been, or is, engaged in acts or conduct in violation of its charter rights and privileges or in violation of any law of this State.*

I ask for your opinion on whether your office may investigate homeowner associations incorporated as nonprofits when warranted?

Law/Analysis:

It is the opinion of this Office that the South Carolina Nonprofit Corporation Act does apply to any homeowners' association organized under that Act, and that S.C. Code Ann. § 33-31-171 (2006) explicitly empowers the South Carolina Attorney General to investigate any such homeowners' association consistent with that Section. In other words, we believe that the Study Committee on Homeowners Associations correctly interpreted Section 33-31-171 as set out in your opinion request. As a practical matter, however, this Office typically does not devote its limited resources, derived from the taxpayer, to investigations of homeowners associations because these associations are particularly well-suited to be carefully governed and vigilantly policed by their members. This opinion will consider each of the two parts of your question in turn.

1. **I am seeking your office's legal opinion as to whether the State's Nonprofit Corporation Act applies to homeowner associations established as non-profit corporations.**

It is the opinion of this Office that the South Carolina Nonprofit Corporation Act does apply to any homeowners' association in South Carolina which is organized as a nonprofit corporation. We recently noted this applicability in an opinion of this Office dated August 5, 2016 (shortly after you submitted this request). There, we wrote:

> 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).

Op. S.C. Att'y Gen., 2016 WL 4419890 (August 5, 2016) (emphasis added). That opinion later noted that the "[t]he General Assembly subsequently amended the South Carolina Nonprofit Corporation Act to empower homeowners' associations to make [emergency assessments]," as attempted by the nonprofit HOA in *Lovering* prior to the amendment. *Id.* at n.2 (citing S.C. Code Ann. § 33-31-305(15) (2006)). Given that both our courts and the General Assembly have acted on the premise that the Act applied to nonprofit homeowners' associations, we believe that this is a settled question of law in our State.

We stand by the statement and the reasoning in our prior opinion, but faced with the question directly, we take this opportunity to note additional support for applying the Act to HOAs organized as nonprofit corporations. The Act defines a "corporation" for the purposes of that chapter to include a "public benefit, mutual benefit, and religious corporation."[1] 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

[1] Note that S.C. Code Ann. § 33-31-1708 (2006) excludes from the Act "cooperative nonprofit membership corporations organized under or transacting business pursuant to [other chapters of the Code]," which generally are public utilities.

> of the project and relinquishes his rights, there may be substantial confusion as to how the corporation is to act.

S.C. Code Ann. § 33-31-1030 (2006) S.C. reporter cmt. para. 2 (emphasis added).

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.

2. I also ask, if you find in the affirmative, whether your office may investigate homeowner associations pursuant to Section 33-31-171 of the South Carolina Code of Laws?

As noted in your request letter, S.C. Code Ann. § 33-31-171 (2006) states that "[t]he Attorney General . . . may make investigations into the organization, conduct, and management of a nonprofit corporation, domestic or foreign, operating in this State." Sections 33-31-172 through -174 go on to spell out certain specific procedures for such investigations, and penalties for nonprofits which do not comply with an investigation. Section 33-31-175 provides that these powers are "cumulative of all other laws now in force in this State."

The South Carolina Reporters' Comments to each of these sections note that each "is neither a Model Act provision nor similar to any provision in the South Carolina Business Corporation Act.[2] It is essentially identical with the former [applicable Section] of the 1976 Code." *See, e.g.*, S.C. Code Ann. § 33-31-171 (2006) S.C. reporter cmt. In other words, the General Assembly here made a deliberate decision to add to the Model Act and to carry over legal provisions that are specific to nonprofit corporations in South Carolina.

As stated in prior opinions of this Office:

> The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.,E.2d 203 (Ct. App. 2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).

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[2] For this reason, this opinion should be construed as responding directly to the specific question as presented in your request letter: "whether [the Attorney General] may investigate homeowner associations *incorporated as nonprofits* when warranted" (emphasis added). Because Section 33-31-171 applies specifically to nonprofit corporations, we express no opinion at this time on the power to investigate an HOA organized pursuant to another chapter of the Code. We would reiterate, however, that these particular investigatory powers are "cumulative of all other laws now in force in this State." S.C. Code Ann. § 33-31-175 (2006).

> The legislature's intent should be ascertained primarily from the plain language of the statute. *Morgan*, supra. Words must be given their plain and ordinary meaning without resort to subtle or forced construction which limits or expands the statute's operation. *Id.* When construing an undefined statutory term, such term must be interpreted in accordance with its usual and customary meaning. *Id.* When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and a court has no right to look for or impose another meaning. *City of Camden v. Brassell*, 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997). The statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. *Id.*

Op. S.C. Att'y Gen., 2005 WL 1983358 (July 14, 2005).

We believe that a court would find that the language of Section 33-31-171 "is plain and unambiguous, and conveys a clear and definite meaning. "[3] *See Brassell*, 326 S.C. 556, 486 S.E.2d 492. It is patent that the General Assembly intended that the Attorney General have the power to investigate any corporation which operates under the nonprofit laws of our State. We are not aware of any exceptions to this investigatory power set out in the Code or established by the courts; therefore, this power would naturally extend to every corporation subject to the South Carolina Nonprofit Corporation Act. As discussed above, homeowners' associations which organize as nonprofit corporations are subject to the Act. Therefore, we believe that a court would find that Section 33-31-171 empowers the South Carolina Attorney General to investigate a nonprofit homeowners' association pursuant to that Section.

Although we are not aware of any reported case which squarely addresses this conclusion, our opinion today is consistent with prior opinions of this Office. For example, a 2013 opinion of this Office responded to a request which posed a variety of questions related to the actions of a specific homeowners' association operating under the Act. We stated there: "[o]ur investigations pursuant to S.C. Code Section 33-31-171 are for violations of a nonprofit's charter or other laws of this State. It appears what you are asking for in this question is an investigation and therefore [it] will be forwarded to the civil section of this Office for review." Op. S.C. Att'y Gen., 2013 WL 3479876 (June 26, 2013).

For these reasons, we believe that Section 33-31-171 unambiguously empowers our Office to investigate any homeowners' association organized under the Nonprofit Corporation Act.

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[3] As succinctly put by the ancient maxim, "*quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est*" ("when there is no ambiguity in the words, then no interpretation contrary to the actual words is to be adopted."). Co. Litt. 147.

3. We offer one additional note on the practical exercise of the investigatory power of this Office with respect to homeowner associations.

Independent of our legal conclusion, we offer one additional observation to assist your committee in its work. This Office can and does investigate nonprofit corporations pursuant to Section 33-31-171, but we are not aware of any recent case in which one of those nonprofits was a homeowners' association. This is not to say that our Office categorically refuses to investigate any complaint that relates to a homeowners' association. Reports of egregious violations are considered on a case-by-case basis. As a practical matter, however, this Office generally chooses to devote its limited resources, derived from the taxpayer, to investigate other types of nonprofits. When contacted by a constituent regarding an HOA matter, we generally have advised them that such matters are addressed through private litigation. We also note in our responses that this is an area ripe for a legislative fix, and direct constituents to certain bills that have been considered by the General Assembly.

Moreover, any investigation by this Office pursuant to Section 33-31-171 would implicate statutory restrictions on the disclosure of discovered information which likely would frustrate a homeowner bringing the complaint. S.C. Code Ann. § 33-31-173 (2006) provides:

> The Attorney General, or his authorized assistants or representatives, may not make public or use any document, copy, or other information derived in the course of an examination authorized by Sections 33-31-170 through 33-31-175, except in a judicial proceeding to which the State is a party or in a suit by the State to revoke the certificate of authority or cause the articles of the corporation to be forfeited or to collect penalties for a violation of the laws of this State or for the information of any officer of this State charged with the enforcement of its laws.

Thus, if this Office were to investigate a homeowners' association and find evidence of wrongdoing that does not rise to the level that justifies the State's involvement in bringing a suit, then it appears that Nonprofit Corporation Act would preclude sharing any of the evidence with the homeowner who submitted the complaint.

We hasten to add that we are mindful of the real and legitimate concerns that constituents may have regarding the conduct of their HOAs, and the cost of pursuing judicial remedies. But because homeowners have both the incentive and the ability to hold their associations accountable, we have not prioritized investigations of these organizations over other organizations which do not have built-in watchdogs. 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. For example, consider a pair of reported cases, both involving the Seabrook Island Property Owners Association. First, in 1986, our Court of Appeals decided two combined class action lawsuits "commenced . . . to challenge the validity of a special assessment" in *Lovering v. Seabrook Island Property Owners Ass'n,* 289 S.C. 77, 79, 344 S.E.2d 862, 863 (Ct.App. 1986). In short, the association in *Lovering* needed additional funds to repair two bridges and renourish a beach, and it sought to raise those funds through an emergency assessment on the homeowners. 289 S.C. at 81-82, 344 S.E.2d at 865. A group of homeowners believed that this assessment was not permitted under the restrictive covenants, and pushed back on the association by filing the lawsuits. 289 S.C. at 79-82, 344 S.E.2d at 864-65. Our Court of Appeals agreed with the homeowners, and held that the emergency assessment was prohibited.[4] 289 S.C. at 83-84, 344 S.E.2d at 866.

The homeowners in *Lovering* were represented by J. Randolph Pelzer. 289 S.C. at 79, 344 S.E.2d at 863. Mr. Pelzer was a member of the community himself, and he discovered in the course of his work on the case that he had been paying assessments on his property that had been not been calculated in compliance with the restrictive covenants and bylaws. *Seabrook Island Property Owners Ass'n v. Pelzer,* 292 S.C. 343, 345-46, 356 S.E.2d 411, 412-13 (Ct.App. 1987). Mr. Pelzer requested a reassessment and refused to pay the incorrectly-calculated assessment, which resulted in the association filing a collection action. *Id.* That case also reached the Court of Appeals, which agreed that the assessment had been calculated incorrectly and reversed the judgment against him for that year's assessment. 292 S.C. at 348, 356 S.E.2d at 414. However, the Court of Appeals affirmed the denial of Mr. Pelzer's counterclaim seeking a refund for overpayments for the seven prior years, holding that:

> [t]he annual charges for those years were assessed in good faith. Pelzer had constructive knowledge that the maintenance charges were not being assessed in

[4] As noted earlier in this opinion, the General Assembly subsequently amended the South Carolina Nonprofit Corporation Act to empower homeowners' associations to make such assessments. *See* S.C. Code Ann. 33-31-302(15) (2006).

> accordance with the restrictive covenants and bylaws. Nevertheless, he acquiesced in the method of assessment and paid the charges. The Association expended the moneys for purposes authorized by the bylaws. Pelzer received the benefit of those expenditures. He cannot now return the benefits or restore the Association to its former position.

Id.

Taken together, this anecdotal chain of events in Seabrook Island exemplifies a pattern of homeowners policing their associations which may not be operating according to their governing documents or applicable law, and where either side may resort to private litigation in the courts when necessary. It appears that this practice is universally common practice both historically in our State and in states across the country. *See, e.g., Forest Land Co. v. Black,* 216 S.C. 255, 262, 57 S.E.2d 420, 424 (1950); *Rawlinson Road Homeowners Ass'n, Inc. v. Jackson,* 395 S.C. 25, 716 S.E.2d 337 (Ct.App. 2011); *Kiekel v. Four Colonies Homes Ass'n,* 38 Kan.App.2d 102, 107 (Kan. Ct. App. 2007); *Estates at Desert Ridge Trails Homeowners' Ass'n v. Vazquez,* 2013-NMCA-051, 300 P.3d 736 (2013). Moreover, it appears from the quoted language in *Pelzer* that the courts of our State expect that homeowners will be vigilant in policing their governing associations. Thus, while the General Assembly has empowered the Attorney General to investigate any nonprofit corporation in South Carolina, homeowners associations typically are composed of members with a vested interest in being "watchdogs" to keep that particular nonprofit accountable in a way that, generally speaking, a charitable nonprofit may not.

For these reasons, our Office historically has devoted our resources to investigating nonprofits which do not have such accountability built in. Given the numerous and varied responsibilities of this Office, we do not anticipate that this practice will change in the near future.

Conclusion:

In conclusion, for the reasons set out above, it is the opinion of this Office that a South Carolina court generally would find that the South Carolina Nonprofit Corporation Act does apply to any homeowner association organized under that Act, and that S.C. Code Ann. § 33-31-171 (2006) explicitly empowers the South Carolina Attorney General to investigate any such homeowner association consistent with that Section. As noted above, we believe that the Study Committee on Homeowners Associations correctly interpreted Section 33-31-171 as set out in your opinion request.

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. 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:

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