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November 19, 2020

VIA EMAIL ONLY

Tyler Clark
Appeals Specialist
SC Court of Appeals
1220 Senate St.
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RECEIVED

Nov 19 2020

SC Court of Appeals

Re: Dana Advocaat v. Community Services Associates, Inc.
Beaufort County Case No.: 2020-CP-07-00768
Appellate Case No.: 2020-001500
CSKL File No.: 4610-60386

Dear Mr. Clark:

Pursuant to the Court's deficiency letter dated November 16, 2020 (enclosed for your reference), please find attached a file-stamped copy of Community Services Associates, Inc.'s Notice of Appeal, together with a copy of the Order challenged on appeal dated September 4, 2020.

By copy of this letter, we are copying Respondent's counsel on this letter and enclosures. Please let us know if the Court needs anything further at this time. If you have any questions or concerns, please do not hesitate to give me a call.

Sincerely,

s/Douglas W. MacKelcan

DOUGLAS W. MACKELCAN
MICHAEL C. MASCIALE

DWM:tjr
Enclosures

cc: Ian S. Ford, Esq.; Ainsley F. Tillman, Esq. (via email only – with enclosures)
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge
Case No.: 2020-CP-07-00768

RECEIVED

NOV 09 2020

SC Court of Appeals

Appellate Case No. Pending

Dana Advocaat, both individually and as Trustee of the Advocaat
Living Trust dated March 7, 2019.....Respondent,

v.

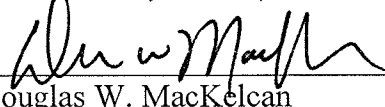
Community Services Associates, Inc.Appellant.

NOTICE OF APPEAL

Community Services Associates, Inc. appeals the judgment of the Honorable Brooks P. Goldsmith entered September 4, 2020 ("Judgment"). Appellant timely filed a Motion to Alter or Amend the Judgment on September 14, 2020 and received written notice of the denial thereof on October 6, 2020.

November 4, 2020.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
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Community Services Associates, Inc.Appellant.

PROOF OF SERVICE

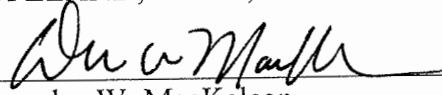
I certify that I have served *Appellant Community Services Associates, Inc.'s Notice of Appeal*, upon the parties below by electronic mail and regular United States Mail, addressed as follows:

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[SIGNATURE PAGE TO FOLLOW]

This 4th day of November, 2020.

COPELAND, STAIR, KINGMA & LOVELL, LLP



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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2020-CP-07-00768

Dana Advocaat, both individually and as
Trustee of the Advocaat Living Trust,
dated March 7, 2019

Plaintiff,

v.

Community Services Associates, Inc.,
Defendant.

**ORDER GRANTING PLAINTIFF'S
MOTION TO INSPECT
CORPORATE RECORDS**

This matter came before this Court on August 4, 2020, upon Plaintiff's Motion and Application for Inspection of Corporate Records, pursuant to the South Carolina Nonprofit Corporation Act, South Carolina Code § 33-31-1604, the South Carolina Homeowners' Association Act, and the common law. Upon thorough consideration of the arguments of counsel, together with the memoranda of law, exhibits, pleadings, affidavits, and other filings, this Court grants the Plaintiff's Motion and makes the following factual determinations and judgments of law.

FACTUAL BACKGROUND

Sea Pines Plantation ("Sea Pines") is a private, 5,000-acre resort community in Hilton Head, South Carolina. The Sea Pines development includes residential homes, a resort hotel, commercial establishments, and various recreational facilities. Defendant Community Services Associates, Inc. ("CSA") is a nonprofit corporation, organized pursuant to the South Carolina Nonprofit Corporation Act, organized for the purpose of (*inter alia*) managing and maintaining the common areas within Sea Pines. The common areas include roads, as well as gates for entrance and exit into the development. Plaintiff

is a member of CSA by virtue of her ownership of property encumbered by various declarations imposed upon the property.¹

CSA is governed by its governing documents, including its covenants, declarations, articles of incorporation, and bylaws. One of CSA's responsibilities is to run and control the gates into the community, pursuant to the Sea Pines Plantation Gate Policy. Outside visitors are charged fees at the gate. Gate fees are a significant source of revenue for the community. The administration of the Gate Policy, and the use of gate fees, is governed by the CSA governing documents. The governing documents expressly state that "[a]ll gate fees collected by [CSA] shall be contributed to and used for community services." 1974 Declaration, Art. II, § B(11).

The Gate Policy hinges upon a Gate Pass Agreement (sometimes referred to as a Gate Fee Agreement) ("Gate Agreement"), which controls the amount of the fees and dictates the manner in which those fees are to be spent. The Gate Agreement is an agreement between CSA and two of its commercial members, the Sea Pines Resort, LLC, and the Sea Pines Center Associates, LLC; the agreement is referenced and incorporated into the 1988 Declaration for Sea Pines. The Gate Agreement, as amended, had previously been disclosed by CSA to its members. However, in 2018, CSA entered into an Amendment to the Gate Agreement. The 2018 Amendment pertains to the prices of

¹ Recorded instruments affecting the property include, but are not limited to the 1974 *Declaration of Covenants and Restrictions by Sea Pines Plantation Company, Inc.*, recorded with the Beaufort County Register of Deeds, in Book 224, Page 1036, as well as the *Declaration of Covenants and Agreement of 1988 for the Transfer of Properties, Reserved Rights and Obligations of Hilton Head Liquidation Corp. to Community Services Associates, Inc.*, recorded with the Beaufort County Register of Deeds in Book 519, Page 1161 (the "1988 Declaration"), as amended from time to time.

gate entry fees from 2018 through 2021, and Plaintiff believes that it may impose new items on which those fees may be spent, in violation of the covenants.

CSA has refused to allow its members to inspect the 2018 Amendment to the Gate Agreement. However, it has expended a significant amount of corporate energy in describing to its members limited portions of the 2018 Amendment, and its financial ramifications for the community.

PROCEDURAL BACKGROUND

On several occasions, Plaintiff gave to CSA written notice that she wished to inspect certain corporate records of CSA. Specifically, she asked to inspect and copy the Gate Agreement, as well as any amendments thereto (the "Requested Records").

Plaintiff first asked to inspect the Requested Records by herself sending correspondence to CSA's president. This request was denied by CSA.

Plaintiff then hired an attorney to pursue the matter. By letter from her attorney, Plaintiff again requested to inspect the Gate Agreement and any amendments thereto. CSA again denied Plaintiff's request.

Plaintiff then filed this lawsuit, and she further demanded within her Complaint to inspect the Requested Records. In its Answer, CSA continued to deny Plaintiff's right to inspect the Requested Records.

Plaintiff further requested to see the Requested Records within her discovery requests to CSA. CSA objected to the request, claiming "Executive Privilege" within a privilege log attached to its discovery responses.

Plaintiff filed an Application with the Court for Inspection of Corporate Records, which is the motion that is the subject of this Order. In support of her application, in addition to the pleadings on file, the Plaintiff filed the Affidavit of Dana Advocaat, which delineated the numerous times Plaintiff had demanded – and been denied – the right to inspect the Requested Records.

CSA filed a Memorandum in Opposition to Plaintiff’s Application for Inspection. Plaintiff filed a Reply to Defendant’s Memorandum in Opposition. CSA then filed a Reply to Plaintiff’s Reply to Defendant’s Memorandum in Opposition.

On August 4, 2020, the parties appeared before the Honorable Brooks P. Goldsmith for a hearing on Plaintiff’s motion.

CONCLUSIONS OF LAW

This Court finds that Plaintiff is entitled to inspect the Requested Records, specifically the Gate Agreement and its amendments and attachments, for any one – and all – of the reasons set forth below.

I. Plaintiff is entitled to inspect the Requested Records pursuant to the South Carolina Nonprofit Corporation Act.

This Court finds that the Nonprofit Corporation Act operates to permit Plaintiff to inspect the Gate Agreement and its amendments.

A. Plaintiff is entitled to inspect the Requested Records because they are bylaws.

The South Carolina Nonprofit Corporation Act defines “Bylaws” of a nonprofit corporation as “the code or codes of rules, other than the articles, adopted pursuant to this chapter for the regulation or management of the affairs of the corporation irrespective

of the name or names by which the rules are designated.” S.C. Code § 33-31-140(b)(4). The Nonprofit Corporation Act permits members to inspect the corporation’s bylaws: “. . . 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)[²]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.” S.C. Code § 33-31-1602(a).

Because the Requested Records were adopted by CSA to regulate and manage the affairs of the corporation (namely the regulation and management of the gates to the community, and the fees associated therewith), the requested records are corporate bylaws. The Gate Agreement binds and regulates the corporation and its resources—indeed, *millions of dollars* of resources that the Declarations mandate may only be used for “community services.” Further, the Requested Records govern the (contractual) relationship between CSA and several of its own members (i.e., the Resort and the Sea Pines Center), pertaining to those members’ special rights. The Gate Agreement has its provenance in the 1988 Declaration, which is the covenant from which CSA derives its purpose, power, and direction.

Plaintiff presented the Court with numerous exhibits which indicate that CSA itself views the Requested Records as governing the rights of the corporation and its

² “(e) A corporation shall keep a copy of the following records at its principal office: . . . (2) its bylaws or restated bylaws and all amendments to them currently in effect.” S.C. Code § 33-31-1601.

members. Plaintiff has every right, as a member of CSA, to inspect the documents (including contracts) that govern CSA's affairs and thus constitute bylaws under a plain reading of the Nonprofit Corporation Act's definition of the term.

Plaintiff brings this application pursuant to S.C. Code § 33-31-1604, which states:

[i]f a corporation does not allow a member who complies with Section 33-31-1602(a) to inspect and copy any records required by that subsection to be available for inspection, the circuit court in the county where the corporation's principal office in this State, or, if none in this State, its registered office, is located may summarily order inspection and copying of the records demanded at the corporation's expense upon application of the member.

S.C. Code § 33-31-1604(a). Accordingly, this Court orders CSA to permit the inspection of the Requested Records, which constitute bylaws of CSA.

B. Plaintiff is further entitled to inspect the Requested Records because they are accounting records for which she has made a statutorily sufficient demand.

The Nonprofit Corporation Act requires a nonprofit corporation to "maintain appropriate accounting records." S.C. Code § 33-31-1601. A member of the corporation is entitled to inspect those accounting records if the member makes a written demand, in good faith, for a proper purpose, and the accounting records are directly connected to that purpose. S.C. Code § 33-31-1602.

The Requested Records are accounting records, in that they are documents that underly the finances of CSA and/or they are materials used to prepare CSA's financial and accounting statements. CSA's President made it clear that the agreement underlies the corporation's finances:

Many of you may already be aware that on July 5th, 2018 the Sea Pines Community Services Associates, (CSA), Board of Directors passed a resolution to enter into an agreement to increase the Sea Pines “daily visitor gate fee” from \$6 to \$8 . . . **Today, gate fees now far outpace the growth of any other major revenue sources to CSA.** These gate fee increases and the new agreement, updates and confirms all prior gate fee agreements and current policies, and **comprise the largest ongoing revenue increase to any CSA revenue source ever made!** The agreement also provides for the first time, a specified opportunity for additional defined future gate fee increases. These daily gate fee increases will help us **address critical projects for the Sea Pines community**, including funding improvements to increase efficiencies and flow at our gate entrances, repairing and improving our roadways and help to provide for other vital community needs.

(emphasis added)

CSA has also told its members—without allowing them to inspect the agreement—that the document is “critical” to important projects at Sea Pines:

Without the agreement we would not have been able to collect the additional funds to help us address critical projects for the Sea Pines community, including funding improvements to increase efficiencies and flow at our gate entrances, repairing and improving our roadways and to help provide for other vital community needs.

Further CSA has provided its members with a history of the 2018 Amendment, including a detailed “description of the various assigned rights, CSA history and financial impacts of Sea Pines gate fee changes over the years.” It is clear from CSA’s own communications to its members that the documents Plaintiff seeks to inspect are very much accounting records of the corporation, profoundly affecting its finances.

Although not binding, this Court finds the opinion of the South Carolina Attorney General to be persuasive on the topic of which accounting records a corporate member may inspect. *See, e.g., Op. S.C. Atty. Gen.*, January 26, 2016, p. 12, ¶ 2 (“Legislative intent

was for any and all underlying documents or materials used to prepare the non-profit corporation's accounting statements to be inspected by a member as long as the member provides written notice, the member's demand is made in good faith and for a proper purpose, the member specifically describes the purpose and the records he wants to inspect, and the records are directly connected to that purpose." (emphasis in original).

This Court finds that, in good faith, Plaintiff made a demand of CSA to inspect the accounting records related to the gates, including the Gate Policy, Gate Agreement, and any amendments and attachments thereto. Plaintiff described the purpose of the inspection as being to discern whether the gate fees collected by CSA are being used by CSA in accordance with the requirements of the governing documents, including the declarations and covenants, which expressly require that CSA use all gate for community services. This Court finds that because the Requested Records control the gate fees collected by CSA, as well as the manner in which those fees are used by CSA, they are directly related to Plaintiff's purpose for inspecting them.

Following her good faith demands, CSA refused to provide Plaintiff with a final, complete copy of that Gate Agreement, with amendments, and the underlying accounting documents. Plaintiff therefore brought this application pursuant to the Nonprofit Corporation Act, which states:

[i]f a corporation does not within a reasonable time allow a member to inspect and copy any other record, the member who complies with Section 33-31-1602(b) and (c) may apply to the circuit court in the county where the corporation's principal office in this State, or if none in this State, its registered office, is located for an order to permit inspection and copying of the records demanded. The court shall dispose of an application under this

subsection on an expedited basis.

S.C. Code § 33-31-1604(b). Accordingly, this Court hereby orders CSA to permit the inspection of the Requested Records, which constitute accounting records of CSA.

II. Plaintiff is entitled to inspect the 2018 Amendment because it seeks to bind her property.

In addition to the statutory rights that it delineates, the Nonprofit Corporation Act expressly references and does not exclude a member's common law right to inspect corporate records, and the power of the Court to order production of corporate records for inspection. S.C. Code § 33-31-1602(d)(2).

In this instance, Plaintiff's right to inspect the 2018 Amendment is compounded by the fact that the nonprofit corporation of which she is a member is not just any corporation: it is a homeowner's association. Plaintiff's membership in CSA is tied to her property, which is bound by various declarations of covenants and restrictions that run with the land. When she purchased property within Sea Pines Plantation, Plaintiff acquired a vested interest in the common areas of the development (including the gate), as well as the obligation to pay assessments to maintain them. CSA is the entity charged with managing the assessments paid by its members and maintaining the common areas.

The Gate Agreement and the 2018 Amendment materially affect Plaintiff's property interest. The Gate Agreement itself is a creature of the 1988 Declaration, which incorporates its early terms into the covenants running with Plaintiff's property. The agreement directly pertains to CSA's ability to maintain community infrastructure; the agreement dictates in part the amount of assessments that must be paid by CSA's

members for the maintenance of common areas; the agreement governs certain amenities of the community; ultimately, the agreement directly affects Plaintiff's property value. In other words, Plaintiff has asked to inspect a contract which binds her property and vests it with rights and obligations. This Court finds that she is entitled to do so.

III. Plaintiff has a right as a litigant to inspect the Requested Records.

Finally, the Nonprofit Corporation Act expressly does not exclude a member's right to inspect corporate records "if the member is in litigation with the corporation, to the same extent as any other litigant." S.C. Code § 33-31-1602(d)(1). In the course of discovery in this lawsuit, Plaintiff served requests for production on CSA, pursuant to Rule 34, SCRPC. CSA objected to the production of the Gate Agreement and its amendments, citing "Executive Privilege." This Court finds that the Requested Records are not covered by any privilege which would permit CSA to withhold them, and it orders CSA to produce them to the Plaintiff.

CONCLUSION

For the reasons set forth above, this Court grants Plaintiff's Motion and Application to Inspect Corporate Records, and it hereby orders CSA to permit Plaintiff to inspect the Requested Records. Based on this Court's above-findings and the applicable law, this Court further finds that Plaintiff is entitled to an award of fees and costs in an amount to be determined in another hearing. The undersigned does not retain jurisdiction over this case.

IT IS SO ORDERED!

The Honorable Brooks Goldsmith

September ____ , 2020



Beaufort Common Pleas

Case Caption: Dana Kindel Advocaat , plaintiff, et al VS Community Services Associates Inc
Case Number: 2020CP0700768
Type: Order/Other

It is so Ordered

Brooks P. Goldsmith, Circuit Court Judge