CHAPTER 3

Purposes and Powers

**SECTION 33‑3‑101.** Purposes.

 (a) Every corporation incorporated under Chapters 1 through 20 of this Title has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation.

 (b) A corporation engaging in a business that is subject to regulation under another statute of this State may incorporate under Chapters 1 through 20 of this Title only if permitted by, and subject to all limitations of, the other statute.

HISTORY: Derived from 1976 Code Section 33‑3‑10 [1962 Code Section 12‑12.1; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑7‑10 [1962 Code Section 12‑14.1; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 3.01(a) (Section 33‑3‑101(a)) provides that every corporation automatically has the purpose of engaging in any lawful business unless a narrower purpose is described in the articles of incorporation. The specification of an “any lawful business” clause has become so nearly universal in states that permit the clause that no reason exists for treating it otherwise than as the norm for the “standard” corporation.

The option of a narrower purpose clause is most likely to be elected only in situations where one or more participants in the corporation desire to limit or retain a check on the business operations of the corporation. The articles of incorporation may limit lines of business in which the corporation may engage. It should be recognized, however, that the limited scope of the ultra vires concept in litigation between the corporation and outsiders means that a third person entering into a transaction that violates the restrictions in the purpose clause may be able to enforce the transaction in accordance with its terms if he was unaware of the narrow purpose clause when he entered the transaction. See the Official Comment to section 3.04 (Section 33‑3‑104).

Many corporations may also find it desirable to supplement a general purpose clause with an additional statement of business purposes. This may be necessary for licensing or for qualification purposes in some states.

Section 3.01(b) (Section 33‑3‑101(b)) is designed to tie in the limitless lawful purpose corporation permitted by section 1.01(a) (Section 33‑1‑101(a)) with the numerous state statutes that impose regulations or limitations on corporations formed to, or actually engaging in, certain lines of business. These state statutes are of various types.

a. Special incorporation statutes.

Some of these statutes, particularly those relating to banking and insurance, establish a separate incorporation process and incorporating agency. These special incorporating statutes may refer back to or incorporate by reference portions of the general business corporation statute.

b. Miscellaneous regulatory statutes.

Other regulatory statutes may permit incorporation under the general business corporation act if the corporation imposes restrictions or limitations in its articles of incorporation; these restrictions may relate to the business in which the corporation may engage, its manner of internal governance, or the persons who may or may not be shareholders and participate in the venture. The language of section 3.01(b) (Section 33‑3‑101(b)) is designed to cover all these multiple variations and is a substitute for the narrower language “except for the purpose of banking or insurance” that appeared in earlier versions of the Model Act and the statutes of many states.

c. Professional corporations.

Traditionally, incorporation was not permitted at all for the purpose of practicing the learned professions—e.g., law, medicine, and dentistry—primarily because of the personal skills and confidential relationships between lawyer and client or physician and patient. In the early 1960s, however, a significant movement toward incorporation of professionals surfaced as part of an effort by professionals to obtain employee federal tax benefits. Professionals hoped to form corporations to conduct their practice as employees of the corporation rather than as independent entrepreneurs. Early efforts by professionals to form entities to conduct their practice (despite the lack of state statutory authority to incorporate) met with opposition from the Internal Revenue Service. In 1960 the I.R.S. issued the “Kintner” regulations, which in effect provided that federal tax status would be determined on the basis of the organization’s characterization under state law. TREAS. REGS. Section 301.7701‑2 (1960). In response, a number of states passed legislation specifically authorizing professionals to incorporate. Recognition of the corporate tax status of professional corporations was eventually conceded. REV. RUL. 70‑101, 1970‑1 C.B. 278. All jurisdictions now have statutes providing for incorporation for the purpose of practicing a profession, and in 1977 a Professional Corporation Supplement to the Model Act was approved. For further consideration of professional corporation acts, see the Annotations to the Model Professional Corporation Supplement.

d. Miscellaneous organizations.

Other types of corporations, such as nonprofit corporations, cooperatives, and unions, usually may not incorporate under the business corporation act. Many states have enacted special statutes for these classes of entities: a Model Nonprofit Corporation Act was approved in 1952 and has been periodically revised since then.

Section 3.01(b) (Section 33‑3‑101(b)) is designed to preserve all statutory requirements applicable to all of these various classes of specialized and nonbusiness corporations.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section is similar to Sections 33‑3‑10 and 33‑7‑10 of the 1981 South Carolina Business Corporation Act. The major changes are:

(1) The new statute does not require a specific purpose for each company. All companies can engage in any lawful purpose (unless a more restrictive purpose or purposes are set forth).

(2) The old law provided that, during a national emergency, the company was empowered to do any lawful business directed by a governmental authority. Because companies no longer have specific purposes, this provision is obsolete and thus has been deleted.

(3) New subsection (b) continues to recognize that a corporation may be subject to the more rigorous requirements of another statute. If so, the provisions of this second statute must be met. This language is essentially the same as was previously set forth in Section 33‑7‑10(b) of the 1981 South Carolina Business Corporation Act.

An example of a situation where the general corporation law was inapplicable, due in part to a more specific provision in another title, is Temple v. Mckay 172 S.C. 305, 174 S.E. 23 (1934). In this pre‑depression case, a state bank had pledged certain of its assets to the county as security for the county’s bank deposits (there being an admitted debtor/creditor relationship). When the bank became insolvent and the receiver attempted to rescind the pledge of the bank’s assets to the county, the receiver argued that the then general corporate statute, Section 7745, which granted corporations the power to borrow money had no application to this banking corporation’s action. The court agreed. Although the court did not specify why, the implicit assumption of the court was that the banking laws were more precise and more directly related to the matter, and that they, not the general corporate statute, should apply.

However, it is interesting to note that in deciding whether or not the officers acted without the express authority of the board in pledging the bank’s assets, the court appeared to apply the general corporate law (172 S.C. 327) in determining that the officers were properly authorized and, therefore, their acts could not be deemed to be ultra vires.

Another example is Parker v. Carolina Savings Bank, 53 S.C. 583, 31 S.E. 673 (1898). In that case, the six‑year statute of limitations for claims against bank shareholders controlled over the then two‑year statute of limitations for claims against shareholders of general corporations. The court specifically pointed to the then existing general corporate law provision which exempted railroad and banking companies from the operation of the general corporate code, at least as to the operation of the statute of limitations provision.

At one point in time, railroad companies were governed by special provisions of the South Carolina Constitution. As such, the Attorney General opined that the provisions of the new 1962 South Carolina Business Corporation Act did not apply to such companies, 1963‑64 Op. S.C. Attorney General 1987 (#1716). Because of the then constitutional provisions, railroads were not required to maintain a statutory agent or registered office. The opinion distinguishes the case of State of South Carolina v. National Postal Transport Association 234 S.C. 260, 107 S.E.2d 763 (1959).

There is one older case which allowed a nonprofit country club to maintain its tax exempt status even though it was technically subject to regulation under the “for profit” statute. See Columbia Country Club v. Livingston, 252 S.C. 490, 167 S.E.2d 300 (1969). The Columbia Country Club had been formed as a nonprofit entity under the predecessor statute to the Model Business Code. The 1962 version of the Model Act, as does this current version, stated that the 1962 law governed existing companies. The statute indicated that all old and new companies with authority to issue capital stock were automatically deemed to be for profit. Therefore, the Tax Commissioner claimed that when the new statute became effective, the Columbia Country Club, being a stock issuing entity, automatically became a for‑profit entity.

It is not entirely clear why the court allowed Columbia Country Club to retain its nonprofit status, since it was formed pursuant to Chapters 1 through 7, rather than Chapter 31 of this title, which governs nonprofit (nonstock) companies. Today, it would seem more prudent to form any new nonprofit entities as nonstock companies pursuant to the provisions of Chapter 31 of this title. In this connection, see Sections 33‑1‑400(5) and 33‑20‑103 which apply this act to nonprofit corporations except to the extent the nonprofit statutes contain inconsistent provisions.

DERIVATION: 984 Model Act Section 3.01.

CROSS REFERENCES

Corporate purposes for benefit corporations, see Section 33‑38‑300.

Foreign corporations, see Section 33‑15‑105.

Name of corporation indicating purpose, see Section 33‑4‑101.

Professional corporations, Professional Corporation Supplement, see Section 33‑19‑103.

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Forms

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South Carolina Legal and Business Forms Section 1:85 , Corporate Power‑All Power Granted by Law.

**SECTION 33‑3‑102.** General powers.

 Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation power to:

 (1) sue and be sued, complain, and defend in its corporate name;

 (2) have a corporate seal, which may be altered at will, and to use it, or a facsimile of it, by impressing or affixing it or in any other manner reproducing it;

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

 (4) purchase, receive, lease, or otherwise acquire and own, hold, improve, use, and otherwise deal with real or personal property, or any legal or equitable interest in property, wherever located;

 (5) sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;

 (6) purchase, receive, subscribe for, or otherwise acquire, own, hold, vote, use, sell, mortgage, lend, pledge, or otherwise dispose of, and deal in and with shares or other interests in, or obligations of, any other entity;

 (7) make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations (which may be convertible into or include the option to purchase other securities of the corporation), and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income;

 (8) lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment;

 (9) be a promoter, partner, member, associate, or manager of any partnership, joint venture, trust, or other entity;

 (10) conduct its business, locate offices, and exercise the powers granted by Chapters 1 through 20 of this Title within or without this State;

 (11) elect directors and appoint officers, employees, and agents of the corporation, define their duties, and fix their compensation, to lend money and credit to them, or to officers, employees, and agents, of affiliated or subsidiary corporations;

 (12) pay pensions and establish pension plans, pension trusts, profit sharing plans, share bonus plans, share option plans, and benefit or incentive plans for any or all of its current or former directors, officers, employees, and agents, and such directors, officers, agents, and employees of affiliated, subsidiary, or constituent companies;

 (13) make donations for the public welfare or for charitable, scientific, or educational purposes;

 (14) transact any lawful business that will aid governmental policy;

 (15) make payments or donations, or do any other act, not inconsistent with law, that furthers the business and affairs of the corporation.

HISTORY: Derived from 1976 Code Section 33‑3‑20 [1962 Code Section 12‑12.2; 1952 Code Sections 12‑74, 12‑101 to 12‑105; 1942 Code Sections 7677, 7685, 7745, 7747, 7755, 7756; 1932 Code Sections 7677, 7685, 7745, 7747, 7755, 7756; Civ. C. ‘22 Sections 4251, 4259, 4319, 4321, 4329, 4330; Civ. C. ‘12 Sections 2784, 2792, 2850, 2852, 2860, 2861; Civ. C. ‘02 Sections 1843, 1848, 1893, 1895; R. S. 1500; R. S. 1504; 1896 (22) 99; 1898 (22) 770; 1903 (24) 74; 1905 (24) 842; 1911 (27) 153; 1933 (38) 62; 1940 (41) 1636; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑9‑250 [1962 Code Section 12‑15.24; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The law of corporations has always proceeded on the fundamental assumption that corporations are creations with limited power; such an assumption was articulated by the United States Supreme Court as early as 1804, Head & Armory v. Providence Insurance Co., 6 U.S. (2 Cranch) 127, 169 (1804), and appears never to have been seriously questioned as a judicial matter.

It is clear that narrow and limited powers clauses are undesirable: they encourage litigation by bringing into question reasonable transactions that further the business and interests of the corporation and to the extent transactions are unauthorized, may defeat valid and reasonable expectations. The history of the Model Act and of many state statutes in this area is largely one ensuring that corporate powers are broad enough to cover all reasonable business transactions.

In developing section 3.02 (Section 33‑3‑102), serious consideration was given to whether there was a continued need for a long list of corporate powers or whether a general provision granting every corporation power to act to the same extent as an individual might be substituted. Because of the long history of these powers, however, it was feared that no matter how broadly phrased a general provision might be, a court might conclude that some power might not exist because no specific reference to it was made in the statute. It was also feared that cautious attorneys might begin to restore power clauses to articles of incorporation out of concern that a general clause of the type in question might not be interpreted literally. Hence, the present language, which is similar to that included in the statutes of California and other states, was adopted. The general clause granting the corporation essentially the same powers as an individual is coupled with a nonexclusive listing of powers, including the traditional power clauses that appear in many state statutes.

The general philosophy of section 3.02 (Section 33‑3‑102) is thus that corporations formed under the Model Act provisions should be automatically authorized to engage in all acts and have all powers that an individual may have. Because broad grants of power of this nature may not be desired in some corporations, section 3.02 (Section 33‑3‑102) generally authorizes articles of incorporation to deny or limit specific powers to a specific corporation if that is felt desirable. This power to exclude specific powers does not reflect a substantive change from earlier versions of the Model Act (which did not contain an express provision to this effect) but simply makes explicit what was always implicit. Illustrative of the powers that may be appropriate for limitation in specific corporations are the powers (discussed below) to make political contributions to the extent permitted by law or to make expenditures to influence elections affecting the corporate business to the extent permitted by law.

The powers listed in section 3.02 (Section 33‑3‑102) were broadened in several significant respects:

(1) All limitations on loans to directors have been eliminated. The wisdom and propriety of these loans should be evaluated on the basis of general fiduciary standards and the benefits to the corporation. See sections 8.30, 8.31 and 8.32 (Sections 33‑8‑300, 33‑8‑310, and 33‑8‑320). Section 3.02(11) (Section 33‑3‑102(11)) thus rejects the conceptual argument that because certain transactions are subject to abuse, all such transactions should be prohibited.

(2) It is made clear in section 3.02(12) (Section 33‑3‑102(12)) that former as well as present directors, officers, employees, and agents may participate in pension, option, and similar benefit plans.

(3) Section 3.02(15) (Section 33‑3‑102(15)) permits payments or donations or other acts “that further the business and affairs of the corporation.” This clause, which is in addition to and independent of the power to make charitable and similar donations under section 3.02(13) (Section 33‑3‑102(13)), permits contributions for purposes that may not be charitable, such as for political purposes or to influence elections. This power exists only to the extent consistent with law other than the Model Act. It is the purpose of this section to authorize all corporate actions that are lawful or not against public policy.

The powers of a corporation under the Model Act exist independently of whether a corporation has a broad or narrow purpose clause. A corporation with a narrow purpose clause nevertheless has the same powers as an individual to do all things necessary or convenient to carry out its business. Many actions are therefore intra vires even though they do not directly affect the limited purpose for which the corporation is formed. For example, a corporation may generally make charitable contributions without regard to the purpose for which the charity will use the funds or may invest money in shares of other corporations without regard to whether the corporate purpose of the other corporation is broader or narrower than the limited purpose clause of the investing corporation. In some instances, however, a limited or narrow purpose clause may be considered to be a restriction on corporate powers as well as a restriction on purposes. Since the same ultra vires rule is applicable to corporations that exceed their purposes or powers (see the Official Comment to section 3.04 (Section 33‑3‑104)), it is not necessary to determine whether a narrow purpose clause also limits the powers of the corporation but simply whether the purpose of the transaction in question is consistent with the purpose clause. Of course, these issues cannot arise in corporations with an “any lawful business” purpose clause.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section, which deals with corporate powers, makes numerous language changes in the equivalent provision in the 1981 South Carolina Business Corporation Act. Most of these changes should have minimal, if any, effect on the actual powers held by corporations.

As a general policy matter, the overall scope of the powers has been broadened. The new law states that the corporation has all the powers an individual would have. The old law was potentially more limiting in stating that the corporation, subject to any limitations in Title 33, had the powers necessary and proper to effect the purposes for which the corporation was organized (see Section 33‑3‑20(a)(21) of the 1981 South Carolina Business Corporation Act).

The new law revises the listing of specific powers that, if exercised to carry out the corporation’s business, are proper. Like the prior law, the listing is not exclusive and merely illustrative.

The use of the corporate seal has for years in South Carolina been totally discretionary and the absence of it is of no consequence (see Thew v. Porcelain Manufacturing Co. 5 S.C. 415, (1874) and 1963 Op S.C. Att’y Gen. 153 (#1581)).

The historical debate as to whether a South Carolina corporation could be a partner has been resolved long ago in favor of allowing the power (see 1964 Op. S.C. Att’y Gen. 81 (#1647)). This right is continued in new subsection (g).

The following lists the changes from Section 33‑3‑20 of the 1981 South Carolina Business Corporation Act which this act makes:

(1) Arbitration and Administrative Proceedings Continued.

New subsection (1) no longer specifically states that a corporation can participate in an administrative proceeding or arbitration. Unlike some other changes, one should not read into this deletion an intent to prohibit a corporation from being a party to any administrative proceeding or arbitration. Individuals can so participate, thus a corporation with the same powers as an individual likewise can participate. Further, the definition of a “proceeding” specifically includes both administrative matters and arbitrations. See Section 33‑1‑400(19).

(2) Dealing with Entity.

New subsections (6) and (9) allow the corporation to acquire, be a member of, and otherwise deal with an ownership interest in any “entity”. An “entity” is defined in Section 30‑1‑400(10) to include all forms of businesses and organizations. This is a technical broadening of the company’s power.

(3) Convertible Securities.

New subsection (7) explicitly recognizes the power of corporations to issue obligations which are convertible into other securities of the company.

(4) Loans to Directors and Others—Subsidiary Employees Also Covered.

New subsection (11) acknowledges the corporation’s power to define the duties, fix compensation, and lend money to directors, officers, and agents.

This section differs from the prior law in adding the directors. The practical effect of this, according to the Official Comment, is to eliminate all limitations on loans to directors (so long as the requirements of Sections 33‑8‑300, 33‑8‑310, and 33‑8‑320 have been met).

The South Carolina law has provided that a parent corporation also could lend money to, and use its credit for, the benefit of employees of affiliated and subsidiary companies. The 1981 South Carolina Business Corporation Act provision, allowing for loans to employees of subsidiaries and affiliated companies has been retained. This is a very minor deviation from the Model Act Official Text.

(5) Pensions Can be Provided for Subsidiary Employees.

The Official Comment suggests that the language of subsection (12) is new. This subsection permits companies to provide pension plans, or other similar benefits, for both current and retired officers, directors, etc. However, this has been the express law of South Carolina since the enactment of the 1981 South Carolina Business Corporation Act (and likely was implied prior to 1981).

Existing South Carolina law has been retained which authorizes a parent company to provide pensions for employees of subsidiaries, affiliates, or constituent companies. Although this is a change from the Official Text of the Model Act, it is not a significant one.

(6) No Limit on Charitable Gift.

The prior law limited the amount of charitable contributions which could be made to five percent of income. There is no limit set forth in new subsection (13).

(7) Go Out of Business.

The prior statute specifically stated in Section 33‑3‑20(a)(6) that one of the corporation’s powers was to “cease its corporate activities and surrender its corporate powers.” Although this language no longer appears in this section, this is not intended to be a substantive change. Rather, the language has been removed as unnecessary, given the extensive provisions of Chapter 14 which deals with the right of a corporation to dissolve.

(8) Formation of Subsidiaries.

Section 33‑3‑20(a)(15) of the 1981 South Carolina Business Corporation Act specifically provided that one corporation could form or acquire another corporation. In light of the very broad language in new subsection (6), which authorizes this, a specific additional subsection no longer is needed.

(9) Acquiring Life Insurance.

The old statute also had a section dealing with acquiring life insurance on the life of a director, officer, employee, or shareholder for the company’s own benefit. Given the very broad language of new subsection (4), relating to acquiring and owning personal property, a separate section regarding life insurance is unnecessary.

(10) Reimbursement of Litigation Costs.

Old Section 33‑3‑20(19) which granted the power to reimburse and indemnify litigation expenses of directors, officers, and employees was also deemed unnecessary, since the same powers are more precisely spelled out in Section 33‑8‑500, et al.

(11) Acquire Its Own Shares.

At one point there was a question whether a South Carolina corporation should, or could, have the power to repurchase its own stock. This question has been long put to rest (see Shayne of Miami, Inc. v. Greyblow, Inc., 232 S.C. 161, 101 S.E.2d 486 (1957)). Section 33‑6‑310 of this act contains an extensive provision regarding the authority and mechanism for a corporation to acquire its own shares. Section 33‑6‑310 makes it unnecessary to have a duplicative provision in this Chapter 3.

(12) Political Contributions.

As noted in the Official Comment, a major change is intended in subsection (15) which authorizes political and other noncharitable contributions which further the business and affairs of the company. This express grant of power has not previously existed in the 1976 Code. This section is not intended as an expansion of the law, but a mere explicit recognition of existing corporate power, implied previously under the general provisions of Section 33‑3‑20 of the 1981 South Carolina Business Corporation Act.

DERIVATION: 1984 Model Act Section 3.02.

CROSS REFERENCES

Bylaws, see Sections 33‑2‑106, 33‑2‑107, and 33‑10‑200.

Compensation of directors, see Section 33‑8‑111.

“Employee” defined, see Section 33‑1‑400.

“Entity” defined, see Section 33‑1‑400.

Foreign corporations, effect of certificate of authority, see Section 33‑15‑105.

General powers of electric cooperatives, see Section 33‑49‑250.

General powers of marketing cooperative associations, see Section 33‑47‑230.

Indemnification of directors and officers, see Sections 33‑8‑500 et seq.

Loans to directors, see Section 33‑8‑320.

Sale of assets, see Sections 33‑12‑101 et seq.

“State” defined, see Section 33‑1‑400.

Ultra vires, see Section 33‑3‑104.

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S.C. Jur. Banks and Banking Section 98, General Corporate Powers‑ Overview.

S.C. Jur. Cooperative Credit Unions Section 10, General and Incidental Powers of State Credit Unions.

S.C. Jur. Cooperative Credit Unions Section 11, Credit Union’s Acquisition of Property.

S.C. Jur. Mortgages Section 12, Capacity of Parties.

Forms

South Carolina Legal and Business Forms Section 1:7 , Formation‑Content of Articles of Incorporation‑Corporate General Powers.

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South Carolina Legal and Business Forms Section 1:55 , Formation‑Articles of Incorporation.

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Magnolia North v. Heritage Communities: The South Carolina Court of Appeals’ end run around the necessity of equitable justification when disregarding the corporate form. Phillips L. McWilliams, 64 S.C. L. Rev. 825 (Summer 2013).

Attorney General’s Opinions

This section [Code 1962 Section 12‑12.2] empowers a corporation to enter into a partnership with another corporation or an individual. 1963‑64 Op Atty Gen, No. 1647, p 81.

Subdivisions (a)(14) and (16) of this section [Code 1962 Section 12‑12.2] are designed to give clear legal sanction to jointly owned corporations and ventures and subsidiaries thereof. 1963‑64 Op Atty Gen, No. 1647, p 81.

Bylaws of country club requiring cancellation of fully paid stock for failure to pay yearly assessment of dues in violation of corporate laws of this State is invalid (interpreting former law). Op Atty Gen, April 4, 1963.

The absence of the corporate seal upon written instruments of a corporation does not invalidate such instrument (interpreting former law). 1962‑63 Op Atty Gen, No. 1581, p 153.

NOTES OF DECISIONS

In general 1

1. In general

Banks owe a limited duty of care to their customers. Kerr v. Branch Banking and Trust Co. (S.C. 2014) 408 S.C. 328, 759 S.E.2d 724. Banks and Banking 100; Banks and Banking 119

Bank did not owe duty of care to investors in corporation, which corporation was customer of bank; investors were not bank’s customers, investors’ claims were premised on disputed contractual obligations between bank and corporation, and investors were not third‑party beneficiaries of that contract. Kerr v. Branch Banking and Trust Co. (S.C. 2014) 408 S.C. 328, 759 S.E.2d 724. Banks and Banking 100

Generally, in order for a stockholder to be able to sue for corporate injuries, he must allege that he has exhausted his remedies within the corporation or show a sufficient reason for not doing so; fact that directors or managing board are themselves the wrongdoers in some alleged breach of trust or fraudulent misappropriation, and have control of a majority of the stock, so as to control corporate action may create reasonable inference that effort for redress within the corporation would be unavailing. Grant v. Gosnell (S.C. 1976) 266 S.C. 372, 223 S.E.2d 413.

As to power to purchase corporation’s own stock, see Shayne of Miami, Inc. v. Greybow, Inc. (S.C. 1957) 232 S.C. 161, 101 S.E.2d 486.

**SECTION 33‑3‑103.** Emergency powers.

 (a) In anticipation of or during an emergency defined in subsection (d), the board of directors of a corporation may:

 (1) modify lines of succession to accommodate the incapacity of any director, officer, employee, or agent; and

 (2) relocate the principal office, designate alternative principal offices or regional offices, or authorize the officers to do so.

 (b) During an emergency defined in subsection (d), unless emergency bylaws provide otherwise:

 (1) Notice of a meeting of the board of directors need be given only to those directors whom it is practicable to reach and may be given in any practicable manner, including by publication and radio.

 (2) One or more officers of the corporation present at a meeting of the board of directors may be considered to be directors for the meeting, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum.

 (c) Corporate action taken in good faith during an emergency under this section to further the ordinary business affairs of the corporation:

 (1) binds the corporation; and

 (2) may not be used to impose liability on a corporate director, officer, employee, or agent.

 (d) An emergency exists for purposes of this section if a quorum of the corporation’s directors cannot be assembled readily because of some catastrophic event.

HISTORY: Derived from 1976 Code Section 33‑11‑20 [1962 Code Section 12‑16.2; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 3.03 (Section 33‑3‑103) should be read in conjunction with section 2.07 (Section 33‑2‑107), which authorizes a corporation to adopt emergency or standby bylaws. Section 3.03 (Section 33‑3‑103) grants every corporation limited powers to act in an emergency even though it has failed to enact emergency bylaws under section 2.07 (Section 33‑2‑107).

An “emergency” for purposes of section 3.03 (Section 33‑3‑103) is defined in subsection (d) as any catastrophic event that makes it difficult or impossible to assemble a quorum of directors. In this situation, section 3.03(b) (Section 33‑3‑103(b)) dispenses with or relaxes notice requirements and permits corporate officers to serve as directors in order to achieve a quorum. The section also authorizes the board of directors, either before or during an emergency, to modify lines of succession and relocate the principal business office of the corporation. These actions may be taken only by the board of directors at a meeting at which a quorum is present after giving effect, if necessary, to section 3.03(b) (Section 33‑3‑103(b)).

These minimal provisions, it is believed, should permit a corporation to continue to function in the face of an emergency even if no emergency bylaws have been adopted under section 2.07 (Section 33‑2‑107).

SOUTH CAROLINA REPORTERS’ COMMENTS

Section 33‑11‑20 of the 1981 South Carolina Business Corporation Act contained two subsections which allowed corporations to act during a national emergency even if they had failed to adopt bylaws covering emergencies. Old subsection (c) provided that, unless otherwise provided in emergency bylaws, officers in order of seniority could take the place of absent directors (at least for purposes of establishing a quorum). This same general provision is contained in subsection (b)(2) of this section. In addition, old subsection (d) stated:

“If emergency bylaws have not been adopted by a corporation, action by shareholders, directors, officers, agents, or employees during any emergency as defined in subsection (a) shall be valid if it is substantially in compliance with this section, or if it is otherwise necessary and practical for the emergency operation and management of the business.”

In defining what actions are permitted if there are no emergency bylaws, this new provision does not contain the very broad grant of authority contained in old subsection (d) that any action necessary and practical is authorized. Instead, this section provides a much more detailed, and certainly more limited, grant of power to act other than in the normal manner.

The provisions, except as noted, are all new. Most important is the fact that the definition of “emergency” has been significantly enlarged, and thus it is much more likely that corporations will utilize this and the companion provision, Section 33‑2‑107, which provides guidelines for drafting emergency bylaws.

DERIVATION: 1984 Model Act Section 3.03.

CROSS REFERENCES

Corporate powers, see Section 33‑3‑102.

Emergency bylaws, see Section 33‑2‑107.

“Notice” defined, see Section 33‑1‑410.

Notice of directors’ meeting, see Section 33‑8‑220.

“Principal office” defined, see Section 33‑1‑400.

Library References

Corporations 370, 371.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 554 to 555, 557 to 558, 567, 573.

**SECTION 33‑3‑104.** Ultra vires.

 (a) Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.

 (b) A corporation’s power to act may be challenged:

 (1) in a proceeding by a shareholder against the corporation to enjoin the act;

 (2) in a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent of the corporation; or

 (3) in a proceeding by the Attorney General under Section 33‑14‑300.

 (c) In a shareholder’s proceeding under subsection (b) (1) to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if equitable and if all affected persons are parties to the proceeding and may award damages for loss (other than anticipated profits) suffered by the corporation or another party because of enjoining the unauthorized act.

HISTORY: Derived from 1976 Code Section 33‑3‑30 [1962 Code Section 12‑12.3; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The basic purpose of section 3.04 (Section 33‑3‑104)—as has been the purpose of all similar statutes during the 20th century—is to eliminate all vestiges of the doctrine of inherent incapacity of corporations. See Campbell, “The Model Business Corporation Act,” 11‑4 BUS. LAW. 98, 102 (1956). Under this section it is unnecessary for persons dealing with a corporation to inquire into limitations on its purposes or powers that may appear in its articles of incorporation. A person who is unaware of these limitations when dealing with the corporation is not bound by them. The phrase in section 3.04(a) (Section 33‑3‑104(a)) that the “validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act” applies equally to the use of the doctrine as a sword or as a shield: a third person may no more avoid an undesired contract with a corporation on the ground the corporation was without authority to make the contract than a corporation may defend a suit on a contract on the ground that the contract is ultra vires.

The language of section 3.04 (Section 33‑3‑104) extends beyond contracts and conveyances of property; “corporate action” of any kind cannot be challenged on the ground of ultra vires. For this reason it makes no difference whether a limitation in articles of incorporation is considered to be a limitation on a purpose or a limitation on a power; both are equally subject to section 3.04 (Section 33‑3‑104). Corporate action also includes inaction or refusal to act. The common law of ultra vires distinguished between executory contracts, partially executed contracts, and fully executed ones; section 3.04 (Section 33‑3‑104) treats all corporate action the same—except to the extent described in section 3.04(b) (Section 33‑3‑104(b))—and the same rules apply to all contracts no matter at what stage of performance.

Section 3.04 (Section 33‑3‑104), however, does not validate corporate conduct that is made illegal or unlawful by statute or common law decision. This conduct is subject to whatever sanction, criminal or civil, that is provided by the statute or decision. Whether or not illegal corporate conduct is voidable or rescindable depends on the applicable statute or substantive law and is not affected by section 3.04 (Section 33‑3‑104).

Section 3.04 (Section 33‑3‑104) also does not address the validity of essentially intra vires conduct that is not approved by appropriate corporate action. It does not deal, for example, with the enforceability of an executory contract to sell substantially all the assets of a corporation not in the ordinary course of business that was not approved by the shareholders as required by section 12.02 (Section 33‑12‑102). This type of transaction is not beyond the purposes or powers of the corporation; it simply has not been approved by the corporate authorities as required by law. Similarly, section 3.04 (Section 33‑3‑104) does not deal with whether a corporation is bound by the action of a corporate agent if the action requires, but has not received, approval by the board of directors. Whether or not the corporation is bound by this action depends on the law of agency, particularly the scope of apparent authority and whether the third person knew or should have known of the defect in the corporate approval process. These actions may be ultra vires with respect to the agent’s authority but they are not ultra vires with respect to the corporation and are not controlled by section 3.04 (Section 33‑3‑104).

Similarly, corporate action is not ultra vires under section 3.04 (Section 33‑3‑104) merely because it constitutes a breach of fiduciary duty. For example, a misuse of corporate assets for personal purposes by an officer or director is a breach of fiduciary duty and may be enjoined. Similarly, in some circumstances a lien on corporate assets and a contract entered into by the corporation may be cancelled or enjoined if they constitute breaches of fiduciary duty and the third person is charged with knowledge that they were improper. These transactions, however, are not ultra vires with respect to the corporation, and cannot be attacked under section 3.04 (Section 33‑3‑104). They may be enjoined because of breach of the fiduciary duty, not because the transaction exceeds the powers or purposes of the corporation.

Section 3.04(b) (Section 33‑3‑104(b)), like the prior Model Act provisions, permits challenges to the corporation’s lack of power in three limited classes of cases:

(1) In suits by the attorney general under section 14.30(Section 33‑14‑300). This provision does not answer the question whether or not a corporation may be dissolved or enjoined by the attorney general for committing an ultra vires act; it simply preserves the power of the state to assert that certain corporate action was ultra vires.

(2) In a suit by the corporation, either directly or through a legal representative, against incumbent or former officers or directors for authorizing or causing the corporation to engage in an ultra vires act. Again, this section does not address whether or not there is liability for causing the corporation to enter into an ultra vires act; it simply preserves the power of the corporation to assert that certain corporate action was ultra vires.

(3) In a suit by a shareholder against the corporation to enjoin an ultra vires act. This suit, however, is subject to the requirements of section 3.04(c) (Section 33‑3‑104(c)). Under this subsection an ultra vires act may be enjoined only if all “affected parties” are parties to the suit. The requirement that the action be “equitable” generally means that only third persons dealing with a corporation while specifically aware that the corporation’s action was ultra vires will be enjoined. The general phrase “if equitable” was retained because of the possibility that other circumstances may exist in which it may be equitable to refuse to enforce an ultra vires contract. Further, if enforcement of the contract is enjoined, either the third person or the corporation may in the discretion of the court be awarded damages from the other for loss (excluding anticipated profits).

Section 3.04(c) (Section 33‑3‑104(c)) thus authorizes a court to enjoin or set aside an ultra vires act or grant other relief that may be necessary to protect the interests of all affected persons, including the interests of third persons who deal with the corporation.

SOUTH CAROLINA REPORTERS’ COMMENTS

Most of the comparisons in the Official Comment explain the differences between Section 33‑3‑30 of the 1981 South Carolina Business Corporation Act and this new section.

Under the old law, a wrongful transfer of property or the performance of an improper contract was enjoinable as being ultra vires. Whether these were the only types of enjoinable behavior is open to question.

Today, the injunctive action can only be maintained if all the people “affected” are joined. The old law only required that all parties to the contract be joined.

The only time or way in which an ultra vires claim is likely to arise is in context of an action by the company against the directors, officers, or agents. In this context, the new law deletes the shareholder as a possible plaintiff (unless suing derivatively) but adds two possible defendants, namely employees and agents.

Since the new law no longer allows a plaintiff to argue that the company had no “capacity” to do anything, and since the new law does not require a corporation to have a stated purpose, are there any times when a company can still sue a director or officer arguing that the act taken was not proper as not fulfilling a corporate purpose? In this connection, note that Section 33‑3‑102 continues to grant broad powers, but only so long as they are necessary or convenient to carry out the company’s business and affairs. The Official Comment suggests that a clearly illegal act would be ultra vires.

One might question whether the Official Comment truly reflects the breadth of the statute in stating that any action that is merely a claim for breach of fiduciary duty is not cognizable as an ultra vires claim. These are the type of cases where the ultra vires claim has been raised in the past and will continue to be raised. Note, however, that making an ultra vires claim in this context may not serve any real purpose since there is no additional or separate remedy.

Assume this not too unlikely transaction. Board members enter into a contract that gives a second entity the right to buy the most significant company asset at a bargain price, but only in the event certain “unfriendly” companies attempt to take over the company by tender offer. If it can be shown that this contract has no purpose other than to deter tender offers, and if the only reason this policy has been established is to protect the directors’ jobs, then isn’t the contract wrongful? Although the company has the power to make contracts, it has no power to make contracts that do not benefit the company but only benefit the private interests of its directors. Isn’t this contract just as ultra vires as if the directors had stolen from the company? The statute does not draw the line that the Official Comment draws between these two types of wrongful behavior. The contract entered into for a noncorporate purpose is just as ultra vires as the theft.

It would be confusing to say that such behavior is the exercise of a corporate power and is thus not ultra vires. Courts could wrongfully conclude that, if the act was not ultra vires, it was thus valid and immune from challenge in a derivative suit against the wrongdoer directors.

The language in this section is still entirely in keeping with the few older South Carolina cases dealing with the ultra vires challenge.

At a time when corporations were not permitted to own stock in banks, the federal district court stated that any attempt to own such shares would be ultra vires and, thus, an invalid act.

“The Supreme Court of South Carolina in applying this statute has held that the acquisition of bank stock by an ordinary business corporation is an ultra vires act which the board of directors can neither authorize nor ratify; and, although in South Carolina a corporation cannot avail itself of the defense of ultra vires in a suit on a contract performed by the other party which does not involve moral turpitude or offend any express statute, yet, when the contract is prohibited by statute, it cannot be made the foundation for a liability of the corporation and the court will leave the parties where it finds them.”

Dixon v. Dial 24 F. Supp. 264, 266 (E.D. S.C. 1938).

In a case from the depression, a bank receiver argued that in pledging certain assets of the bank, that the officer was not explicitly authorized to make the pledges. Therefore, the acts were ultra vires, and the pledges could be rescinded, Temple v. Mckay 172 S.C. 305, 174 S.E. 231 (1934). The court was not required to determine if this argument was a proper application of the ultra vires doctrine since the court concluded that the officers were, in fact, authorized by the board to act.

Although probably not technically a true ultra vires case since the entity involved was a church and not a business corporation, the Supreme Court in DeBorde v. St. Michaels and All Angels Church 272 S.C. 409, 252 S.E.2d 876 (S.C. 1979) confirmed that the doctrine of ultra vires cannot be used as a sword by a third party to try and invalidate a corporate action. There, a third party nonchurch member argued that a church could not build a cemetery since the church’s charter did not grant it the specific power to build a cemetery. The court stated that the third party (although a person affected by the act) had no standing to raise the claim since he was not a member (shareholder). The court also noted that, given the broad purpose of a church, the power to build a cemetery was likely encompassed within its powers.

In the past, if the company has taken the benefits from a contract it later wishes to challenge, it will be estopped to raise the ultra vires charge. This is similar to the new standard of not enjoining the act if it is inequitable to do so. See Batesburg Cotton Oil Co. v. Southern Ry 103 S.C. 494, 88 S.E. 360 (1916); and Kammer v. Supreme Lodge 91 S.C. 572, 75 S.E. 177 (1912). See also Beckridge v. South Carolina Public Service Co. 185 S.C. 210, 225‑226, 193 S.E. 315, 321‑322 (1937), which held that a corporation will be held to a contract if justice requires it.

DERIVATION: 1984 Model Act Section 3.04.

CROSS REFERENCES

Corporate powers, see Section 33‑3‑102.

Corporate purposes, see Section 33‑3‑101.

Derivative proceedings, see Section 33‑7‑400.

Dissolution, see Sections 33‑14‑101 et seq.

“Employee” defined, see Section 33‑1‑400.

“Proceeding” defined, see Section 33‑1‑400.

Standards of conduct for directors, see Sections 33‑8‑300 through 33‑8‑320.

Library References

Corporations 385, 446, 487.

Westlaw Topic No. 101.

C.J.S. Corporations Section 576.

NOTES OF DECISIONS

In general 1

1. In general

A claim that a church’s operation of a cemetery for the benefit of its parishioners was ultra vires in that it went beyond the purpose for the church’s establishment, as recited in its Charter, would not be considered on appeal where the issue was not raised by the complaint and where, even if it had been, plaintiffs, not being members of the parish, had no standing to raise such issue. DeBorde v. St. Michael and All Angels Episcopal Church (S.C. 1979) 272 S.C. 490, 252 S.E.2d 876.