



ALAN WILSON
ATTORNEY GENERAL

June 19, 2023

The Honorable Richard L. Yow
178 Mill Street
Chesterfield, SC 29709

Dear Representative Yow:

You have requested an opinion of this Office regarding the directors and bylaws of Teal's Mill Rural Volunteer Fire Department, Inc., a nonprofit corporation. In your request letter, you explain that "the original directors of this organization have passed away, or are otherwise no longer active with the day-to-day operations of this group." You also inform us that "there are no current bylaws for this group that their directors approved." Your concern is "how to keep this group viable given their reported lack of bylaws or directors to call annual meetings or conduct other business of this nonprofit organization." You have presented us with several questions which will be answered in turn.

LAW/ANALYSIS

As we have stated in many prior opinions, this Office is not empowered to make factual findings.¹ However, we can provide you with the general law regarding nonprofit corporations. We will now respond to each of your questions.

1. If only two of the original directors are around, do they retain the authority to call an annual meeting to elect directors and conduct other necessary business?

A nonprofit corporation must have a board of directors to exercise the corporate powers and manage the affairs of the corporation.² S.C. Code Ann. § 33-31-801 (1976 Code, as amended). The number of directors on a board of directors is set by the nonprofit corporation's articles of incorporation or bylaws. S.C. Code Ann. § 33-31-803 (1976 Code, as amended). However,

¹ See Op. S.C. Atty. Gen., 1989 WL 406130 (April 3, 1989) ("[b]ecause this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions.")

² The board of directors is authorized, however, to delegate all or some of its duties and responsibilities to another person. See S.C. Code Ann. § 33-31-801.

there must be a minimum of three directors. Id. Because a board of directors acts as a whole, any vacancies must be filled for a nonprofit corporation to transact business. Section 33-31-811 provides alternative methods of filling vacancies:

(a) Unless the articles or bylaws provide otherwise, and except as provided in subsections (b) and (c), if a vacancy occurs on a board of directors, including a vacancy resulting from an increase in the number of directors:

(1) the members, if any, may fill the vacancy;

(2) the board of directors may fill the vacancy; or

(3) if the directors remaining in office constitute fewer than a quorum of the board, they may fill the vacancy by the affirmative vote of a majority of all the directors remaining in office . . .

S.C. Code Ann. § 33-31-811 (1976 Code, as amended).

The Official Comment to section 33-31-811 explains that “vacancies arising when directors named in the original articles cease to be directors may be filled by the members or the board in the absence of a contrary article or bylaw provision.” Official Comment, S.C. Code Ann. § 33-31-811. The Official Comment also states that “[i]f the sole remaining director of [or] directors constitute less than a quorum, section 8.11(a)(3) allows the remaining director or directors to fill the vacancy if the board is authorized to fill the vacancy.” Id.

In the question you present, the articles of incorporation and bylaws of the nonprofit corporation should be reviewed and any provisions regarding vacancies on the board of directors should be complied with. If vacancies are not addressed, then one of the alternative methods in section 33-31-811 may provide a remedy.

2. Aren't they the officials that have to approve the bylaws the department operates under?

We understand your question as being whether a nonprofit corporation's board of directors must adopt and amend the corporate bylaws. If this is not correct, please let us know. Either the incorporators or the board of directors adopts the initial bylaws of a nonprofit corporation. S.C. Code Ann. § 33-31-206 (1976 Code, as amended). The bylaws can be amended by either the board of directors or the members, depending on whether the nonprofit corporation has members and the subject matter of the bylaw.

If a nonprofit corporation does not have members or its members are not entitled to vote on an amendment to the bylaws, its board of directors can adopt amendments with the appropriate

notice. S.C. Code Ann. § 33-31-1020 (1976 Code, as amended). In a nonprofit corporation with voting members, both the directors and the members can amend or repeal the bylaws. See S.C. Code Ann. § 33-31-1021 (1976 Code, as amended). However, a board of directors cannot amend or repeal bylaws when the articles of incorporation or the South Carolina Nonprofit Corporation Act³ have restricted such action to the members or the members have expressly prohibited the board of directors from acting in a bylaw. Id.

Additionally, a board of directors can be prohibited from amending bylaws with a particular subject matter. Only the members can adopt or amend bylaws that fix a greater quorum or voter requirement for members than is required by statute. S.C. Code Ann. § 33-31-1023 (1976 Code, as amended). The members amend or repeal bylaws that fix a greater quorum or voter requirement for the board of directors if the members originally adopted the bylaw. S.C. Code Ann. § 33-31-1024 (1976 Code, as amended).⁴ Therefore, in some instances the adoption and amendment of corporate bylaws may not be restricted to a nonprofit corporation's board of directors.

3- Is there any statutory provision, common law consideration, or equity principle that would allow the currently serving volunteer firefighters as trustees, or other legal designation to meet, adopt bylaws, and maintain this group in good standing?

This Office cannot make factual findings and the question you present is fact-specific. However, section 33-31-702 provides various means for a nonprofit corporation with members to hold a special meeting:

(a) A corporation with members shall hold a special meeting of members:

(1) on call of its board or the person or persons authorized to do so by the articles or bylaws; or

(2) except as provided in the articles or bylaws of a religious corporation, if the holders of at least five percent of the voting power of any corporation sign, date, and deliver to any corporate officer one or more written demands for the meeting describing the purpose or purposes for which it is to be held.

³ S.C. Code Ann. § 33-31-101 et seq. (1976 Code, as amended).

⁴ Both the members and the directors can amend or repeal bylaws that fix a greater quorum or voter requirement for the board of directors if the board of directors originally adopted the bylaws. S.C. Code Ann. § 33-31-1024.

(b) The close of business on the thirtieth day before delivery of the demand or demands for a special meeting to any corporate officer is the record date for the purpose of determining whether the five percent requirement of subsection (a) has been met.

(c) If a notice for a special meeting demanded under subsection (a)(2) is not given pursuant to Section 33-31-705 within thirty days after the date the written demand or demands are delivered to a corporate officer, regardless of the requirements of subsection (d), a person signing the demand or demands may set the time and place of the meeting and give notice pursuant to Section 33-31-705.

(d) Special meetings of members may be held in or out of this State at the place stated in or fixed in accordance with the bylaws. If no place is stated or fixed in accordance with the bylaws, special meetings must be held at the corporation's principal office.

(e) Only those matters that are within the purpose or purposes described in the meeting notice required by Section 33-31-705 may be conducted at a special meeting of members . . .

S.C. Code Ann. § 33-31-702 (1976 Code, as amended).

A lawsuit provides another means of compelling a meeting. Pursuant to S.C. Code Ann. § 33-31-703 (1976 Code, as amended), a member who signed a demand for a special meeting and a person entitled to call a special meeting can apply to a court for an order requiring a special meeting to be held. Additionally, members and directors of a nonprofit corporation can petition a court to order a meeting or a vote to be held when it is impractical or impossible to conduct meetings or to obtain the consent of its members or directors.⁵ S.C. Code Ann. § 33-31-160 (1976 Code, as amended). You may wish to contact a private attorney to determine if any of these options would be beneficial.

4-If not the current firefighting volunteers, who can act on behalf of this organization?

We believe our responses to the previous questions have provided you with some possible options. You may wish to contact a private attorney to determine if any of these options are viable.

CONCLUSION

⁵ Section 33-31-160 provides that the Attorney General can petition a court to order a meeting or a vote to be held. The Attorney General is empowered to commence a proceeding to protect the public interest when it may be adversely affected. See Official Comment, S.C. Code Ann. § 33-31-170.

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This Office cannot make factual findings and the questions you present are fact-specific. See Op. S.C. Atty. Gen., 1989 WL 406130 (April 3, 1989) (“[b]ecause this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions.”). Therefore, we can only discuss the law regarding nonprofit corporations in the abstract.

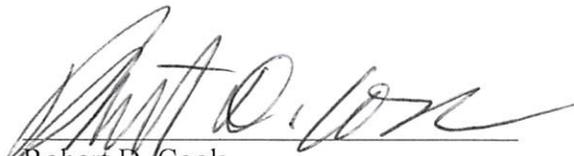
Within this opinion, we have described various ways a nonprofit corporation can transact business. Corporate bylaws can be adopted or amended by either the board of directors or the members, depending on whether the nonprofit corporation has members and the subject matter of the bylaw. Determining whether filling a vacancy on the board of directors, holding a special meeting, or commencing a lawsuit to compel a meeting is an appropriate remedy for Teal’s Mill Rural Volunteer Fire Department, Inc. is beyond the scope of an opinion of this Office. You may wish to contact a private attorney to determine if any of these options are viable.

Sincerely,



Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General