

The State of South Carolina



Office of the Attorney General

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November 20, 1991

The Honorable Carole C. Wells
Chairman
Spartanburg County Legislative Delegation
Room 1210, 366 North Church Street
Spartanburg, South Carolina 29303

Dear Representative Wells:

By your letter of October 29, 1991, you have inquired about the "legality" of Spartanburg County Legislative Delegation members voting by written proxy on issues at local meetings when they are unable to attend such meetings. You have asked that we address proxy voting in the context of local board and commission appointments and on matters before the Delegation such as approval of Park and Recreation Fund projects, Wildlife Resource Fund projects, and so forth.

Enclosed with your letter was a copy of a policy adopted October 16, 1989, allowing members to vote by proxy on local board and commission appointments. The policy states:

All Delegation members and interested parties will be given 30 days advance notice of a vacancy occurring [sic] on all boards and commissions. All appointments will be made at a public Delegation meeting as an item on the agenda. The resident House [sic] and Senator will not be required to be present at the meeting. They may vote by proxy. Proxy must be written and signed by the member and registered with the Delegation secretary.

As I understand the matter, the Delegation secretary prepares the proxy for the affected member, who signs it prior

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to the meeting which he or she must miss. No similar policy seems to exist as to voting on other matters, or for voting on local board and commission appointments, by proxy, by other than the resident member of the House or Senate.

The first issue considered is the status of the county legislative delegation. While S.C. Code § 2-7-40 (1986) comments to some extent on voting by the legislative delegation in some counties, there is no statute which specifically creates a county legislative delegation as an entity or which provides for the operations or procedures of a delegation. In some instances, the delegation is considered to be a "committee" of the General Assembly, such as for the applicability of the Freedom of Information Act, see Op. Atty. Gen. No. 84-111, dated September 6, 1984, but even then, we are not aware of any rules or procedures adopted by the General Assembly which would govern the conduct of delegation business.

Ordinarily, an entity would look to its enabling legislation to determine whether proxy voting would be permissible. In the absence of specific statutory authorization as to a particular board or office, this Office has previously concluded that proxy voting is not authorized. Ops. Atty. Gen. dated November 1, 1982; May 6, 1986; June 13, 1967; July 27, 1967; January 21, 1972; April 5, 1972; August 9, 1976; January 15, 1979; and May 10, 1984. Here, however, there is no express legislative enactment which establishes the delegation as an entity or prescribes its manner of operation.

Two rules of the House of Representatives are worthy of mention. Rule 4.14 provides that "No member of a committee shall be allowed under any circumstances to vote by proxy; however, pairing shall be allowed." In addition, Rule 7.3(e) provides in relevant part that "No member shall vote for another member, nor shall any person not a member vote for a member." It is doubtful that House rules would be controlling as to a delegation meeting, however.

Other considerations include the issue for which the proxy was given and the manner in which it would be exercised. Delegation of a legislative function to a private individual is, of course, prohibited. Op. Atty. Gen. No. 4274, dated March 2, 1976; Art. I, sec. 8 of the state Constitution (separation of powers, unlawful delegation). Appointment powers exercised by a legislative delegation are

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neither legislative nor executive in nature. Gould v. Barton, 256 S.C. 175, 181 S.E.2d 662 (1971); Floyd v. Thornton, 220 S.C. 414, 68 S.E.2d 334 (1951). Exercising a proxy vote in the appointment of board and commission members by a delegation member would probably not be an unlawful delegation of legislative authority, though exercising a proxy vote on matters such as appropriating funds would likely be an unlawful delegation. ^{1/} But see Op. Atty. Gen. No. 4274 (construing a statute on proxy voting and commenting on constitutional issues).

Also to be considered is the manner in which the proxy will be utilized. Certainly the proxy vote should not be exercised by one not a member of the delegation, as that would amount to delegation of such official function to a private individual. If proxy voting must be used, it would be more preferable that another legislator exercise the proxy.

Another concern is whether the written proxy is being counted toward determining whether a quorum is present. Ordinarily, a quorum is "the number of members entitled to vote who must be present in order that business can be legally transacted." Robert's Rules of Order Newly Revised, § 39, page 293 (emphasis added). Whether the delegation follows Robert's Rules or some other parliamentary procedure is unknown to this Office; perhaps the reference to Robert's Rules will offer some guidance, in that ordinarily a proxy vote would not be used in meeting the quorum requirement. Op. Atty. Gen. No. 84-54. Again, as noted earlier, no statute prescribes how a delegation is to conduct its business or prescribes how a quorum is to be determined.

In conclusion, we advise as follows:

1. No statute establishes the delegation as an entity or prescribes its manner of operation. Thus, no statute expressly addresses the practice of proxy voting by the resident House member or Senator who might not be present at a meeting at which an appointment affecting that area of residence might be made.

^{1/} Constitutionality of an act or action would ordinarily be presumed, unless or until a court should declare otherwise. Cf., Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). Only a court, and not this Office, could invalidate an act or action as described above.

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2. The problem of unlawful delegation could very well exist in a proxy voting situation, particularly if proxy votes are cast by a non-legislator or for resolution of a legislative question. Appointments to boards or commissions are not exclusively legislative or executive in nature, however, and could possibly be carried out by proxy vote of the resident House member or Senator in the absence of a controlling statute. Constitutionality of an act or action will be presumed, and only a court could void such act or action.

3. The better practice would be to cast such votes in person, as information, unavailable to the legislator when he or she voted by proxy, might be disclosed during the meeting at which the appointment is to be made; such disclosure could possibly have affected the vote of the legislator if known earlier. Certainly, voting on a legislative matter (such as budget approval or appropriating funds) needs to be accomplished in a meeting of a delegation, as the delegation may act legislatively only as a collective body. Op. Atty. Gen. No. 84-111. Because this practice as to appointments is exclusively within the control of the delegation, however, we must leave the determination of such policy decisions to the delegation.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

Robert D. Cook

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