



ALAN WILSON
ATTORNEY GENERAL

July 30, 2019

Karen Blair Manning, Esquire
Chief Legal Counsel
South Carolina Department of Commerce
1201 Main St., Ste. 1600
Columbia, SC 29201

Dear Ms. Manning:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states:

This letter is to request an opinion regarding the ability of a public body to amend an agenda for a public meeting under circumstances that do not appear to be contemplated by current law. The specific question is as follows:

Whether and how a public body may amend the agenda for a properly noticed public meeting to add a non-substantive, administrative item that requires a vote, but does not implicate the substantive duties of the public body when (1) reposting the amended agenda with 24 hours' notice is not possible and (2) the administrative item does not present an emergency or exigent circumstances, but when (3) the administrative item is important to facilitate staff support of the public body?

By way of background, the issue recently arose before a properly noticed meeting of the Rural Infrastructure Authority (RIA). RIA was created to provide grants and loans to units of local government and other qualified recipients to construct and improve rural infrastructure facilities in South Carolina. See S.C. Code Section 11-50-30. A seven member board of directors serves as RIA's governing body and is chaired by the Secretary of Commerce. See id. 11-50-50. The board makes all substantive funding decisions upon recommendation of RIA's staff, and the South Carolina Department of Commerce provides legal, IT, human resources, and accounting support for the agency pursuant to a contract.

Immediately prior to the public meeting, the Executive Director wished to add the election of a vice-chair to the agenda because the board member serving in that

capacity had recently resigned from the South Carolina General Assembly and from his position on the RIA board. The agenda included an item for "Other Business", but contained no specific item related to the election of officers, or specifically, a vice-chair. The RIA board only meets two or three times annually, and while the election of a vice-chair clearly requires a vote by the board members, it certainly is not related to the substantive duties of RIA to approve grants and loans.

Without the ability to repost an amended agenda for the requisite 24 hour period, current law allows an addition to the agenda after a meeting begins, but only upon a two-thirds vote of the members present and voting and only after a finding that an emergency or exigent circumstance exists if the item is not added. See id. § 30-4-80(A); see also Op. S.C. Att'y Gen., 2018 WL 4385558 (September 5, 2018) (concluding that "a statutory deadline cannot be deemed an 'emergency' or an 'exigent circumstance'" when compliance with the deadline was in the county council's control and could have been foreseen and when such action "cannot be deemed 'urgent,' 'pressing' or one 'requiring immediate action.'") Voting on a vice-chair clearly does not present an emergency and instead is simply an important housekeeping item for RIA that the public has little interest in and that would best not be deferred to a later meeting.

The bottom line is whether the current legal framework allows for a practical solution for a public body to take up this type of non-substantive administrative issue, which requires a vote of the members present, when the issue was overlooked in a properly noticed meeting. If so, what might be some potential solutions (e.g., a catchall "Other Administrative Business" agenda item) that would satisfy the statutory notice requirements?

Law/Analysis

It is this Office's opinion that a court likely would hold a public body may only amend an agenda for a regularly scheduled meeting as provided in Section 30-4-80 of the South Carolina Code of Laws. The South Carolina Court of Appeals explained that the S.C. Freedom of Information Act ("S.C. FOIA") was amended in 2015 "to prohibit the amendment of a posted meeting agenda during the meeting without a finding of exigent circumstances and a two-thirds vote of the members present." Atkins v. Wilson, 417 S.C. 3, 7 n.2, 788 S.E.2d 228, 230 n.2 (Ct. App. 2016). Act 70 of 2015 amended Section 30-4-80 "to provide the time and manner for posting these agendas and notices of meetings ... and to provide for the manner in which these agendas subsequently may be amended." 2015 Act No. 70, § 1. Subsection 30-4-80(A) was amended to read as follows:

All public bodies, except as provided in subsections (B) and (C) of this section, must give written public notice of their regular meetings at the beginning of each calendar year. The notice must include the dates, times, and places of such meetings. An agenda for regularly scheduled or special meetings must be posted on a bulletin board in a publicly accessible place at the office or meeting place of the public body and on a public website maintained by the body, if any, at least twenty-four hours prior to such meetings. All public bodies must post on such bulletin board or website, if any, public notice for any called, special, or rescheduled meetings. Such notice must include the agenda, date, time, and place of the meeting, and must be posted as early as is practicable but not later than twenty-four hours before the meeting. This requirement does not apply to emergency meetings of public bodies. Once an agenda for a regular, called, special, or rescheduled meeting is posted pursuant to this subsection, no items may be added to the agenda without an additional twenty-four hours notice to the public, which must be made in the same manner as the original posting. After the meeting begins, an item upon which action can be taken only may be added to the agenda by a two-thirds vote of the members present and voting; however, if the item is one upon which final action can be taken at the meeting or if the item is one in which there has not been and will not be an opportunity for public comment with prior public notice given in accordance with this section, it only may be added to the agenda by a two-thirds vote of the members present and voting and upon a finding by the body that an emergency or an exigent circumstance exists if the item is not added to the agenda. Nothing herein relieves a public body of any notice requirement with regard to any statutorily required public hearing.

S.C. Code Ann. § 30-4-80(A) (Supp. 2018) (emphasis added). The statute's plain language states that an item may be added to an agenda after a meeting starts by a two-thirds vote, but only if the item is not "one upon which final action can be taken at the meeting" or is "one in which there has not been and will not be an opportunity for public comment with prior public notice." Id. If the item to be added to the agenda falls into either of these categories, the members must also find that "an emergency or an exigent circumstance exists if the item is not added to the agenda." Id. The request letter cites this Office's September 5, 2018 opinion which interpreted the phrase "emergency or exigent circumstances." Op. S.C. Att'y Gen., 2018 WL 4385558, at 4-5 (September 5, 2018). Therein, the opinion interpreted this mechanism to be available when "adverse events are imminent" or the action to be taken is "urgent," "pressing" or one "requiring immediate action." Id. at 5. The opinion referenced a prior example where an emergency would exist when a "police force [was] depleted due to circumstances both unforeseen and beyond [the body's] control which may not be reasonably overcome." Id. If an emergency or exigent circumstance does not exist, Subsection (A) prohibits adding such items to an agenda "without an additional twenty-four hours notice to the public."

The request letter additionally asks whether a catchall agenda entry, such as “Other Administrative Business,” could be used to allow a public body to address issues which are not otherwise noticed on an agenda. It is this Office’s opinion that a court would likely find such a practice violates the S.C. FOIA. In Brock v. Town of Mount Pleasant, 415 S.C. 625, 785 S.E.2d 198 (2016), the South Carolina Supreme Court held that a town violated the S.C. FOIA by taking unnoticed action at a special meeting following an executive session. The Court explained that a public body may not know in advance what action it will take, but that it still must “give notice that some action may be taken.” 415 S.C. at 632, 785 S.E.2d at 202. This Office has opined on the necessity that an agenda provide adequate public notice as follows:

[The S.C. FOIA] must be read broadly or liberally, and exceptions thereto narrowly, so that “public business is performed in an open and public manner” and the public is properly informed of government activity. As we stated many years ago, “[t]hese notice requirements may not be simply ignored by the public body; they are mandatory.” Moreover, as we further advised, “adequate notice to the public at large is an integral part of the public meeting concept; a meeting cannot be deemed to be public merely because its doors are opened to the public if the public is not properly informed” Op. S.C. Att’y Gen., 1984 WL 159828 (No. 84-20) (February 22, 1984) (quoting Consumers Education and Protective Assn. v. Nolan, 368 A.2d 675, 681, n. 4 (Pa. 1977)).

Op. S.C. Att’y Gen., 2018 WL 4385558, at 5. An agenda item description that is too vague to provide the public notice would not comply with the purpose and framewok of the S.C. FOIA. See Richardson v. Fairfield Cty. ex rel. Fairfield Cty. Council, No. 2006-UP-263, 2006 WL 7286041, at *5 (S.C. Ct. App. May 24, 2006) (whether an agenda is so vague that it fails to provide public notice is reviewable under the S.C. FOIA). Therefore, it is this Office’s opinion that a court may well find the use of a catchall agenda item is too vague to provide public notice and violates the S.C. FOIA.

Conclusion

As is discussed more fully above, it is this Office’s opinion that a court likely would hold a public body may only amend an agenda for a regularly scheduled meeting as provided in Section 30-4-80 of the South Carolina Code of Laws. The statute’s plain language states that an item may be added to an agenda after the a meeting starts by a two-thirds vote, but only if the item is not “one upon which final action can be taken at the meeting” or is “one in which there has not been and will not be an opportunity for public comment with prior public notice.” Id. If the item to be added to the agenda falls into either of these categories, the members must also find that “an emergency or an exigent circumstance exists if the item is not added to the agenda.” Id. Further, it is this Office’s opinion that a court may well find the use of a catchall agenda item is too vague to provide public notice and violates the S.C. FOIA.

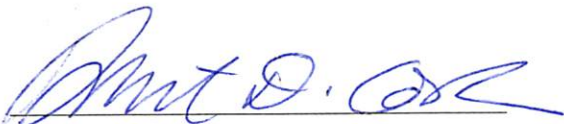
Ms. Karen Blair Manning
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Sincerely,

A handwritten signature in blue ink that reads "Matthew Houck". The signature is written in a cursive style with a long horizontal stroke at the end.

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

A handwritten signature in blue ink that reads "Robert D. Cook". The signature is written in a cursive style with a long horizontal stroke at the end.

Robert D. Cook
Solicitor General