



ALAN WILSON
ATTORNEY GENERAL

November 10, 2021

The Hon. Luke A. Rankin
South Carolina Senate
101 Gressette Building
Columbia, SC 29202

Dear Senator Rankin:

We received your request seeking an expedited opinion clarifying our prior opinion dated September 3, 2020 which addressed a nonprofit corporation holding a member meeting through the use of remote technology. This letter sets out our Office's understanding of your question and our response.

Issue:

Your letter relays that one of your constituents is a member of a homeowners association, which is holding its meeting remotely for the second year in a row, partly in reliance on our September 3, 2020 opinion.

In light of this and other facts relayed in your letter, you ask for an expedited opinion on two questions:

1. Is a board entitled to have a Zoom annual meeting when circumstances allow for an in-person meeting?
2. If a board has a Zoom meeting, can it limit interaction and ability to receive information by muting all the homeowners during the meeting and requiring that any questions from the homeowners be submitted in advance?

Law/Analysis:

We address each of your questions in turn:

1. Is a board entitled to have a [remote, web-based member] annual meeting when circumstances allow for an in-person meeting?

Our prior opinion focused on situations where “the bylaws do not specifically allow for the use of electronic means to conduct annual meeting or the bylaws are silent as to where or how the annual meeting shall be held.” *Op. S.C. Att’y Gen.* 2020 WL 5591998 (September 3, 2020). The opinion concluded that “a court could find holding a meeting virtually or electronically substantially complies with section 33-31-701.” *Id.* The reasoning of this opinion was based in part on the “current situation,” i.e. the COVID-19 pandemic.

Our prior opinion also was directed at those nonprofits which had concluded that in-person meetings would be unwise, and were seeking to continue operating in compliance with state law. Our recognition of situation caused by the pandemic was an observation of current events at the time, and not a finding of fact. It is beyond the scope of an opinion of this office to determine whether the COVID-19 pandemic is sufficiently severe at a particular point in time to justify a deviation from strict compliance with the Act’s meeting requirements. That is a judgement for the board and the members in the first instance, and ultimately for a court if needed. *See* S.C. Code Ann. § 33-31-703 (providing for court-ordered meetings).

2. If a board has a [remote, web-based member] meeting, can it limit interaction and ability to receive information by muting all the homeowners during the meeting and requiring that any questions from the homeowners be submitted in advance?

The SC Nonprofit Corporation Act does require a written request in advance in the notice procedure when a member raises a matter for consideration at a meeting, as discussed below. *See* S.C. Code Ann. § 33-31-705(e) & *discussion, infra.* Beyond that provision, the Act is largely silent on the specific conduct of member meetings. However, the duties and responsibilities of the members and directors imply that meetings generally should be conducted so as to facilitate member participation within reasonable time, place, and manner restrictions set by the board.

First, if a member intends to raise a matter for consideration and action by the members, the Act requires that other members be notified of it if the matter is raised sufficiently far in advance of the meeting to allow for timely notice.

When giving notice of an annual, regular, or special meeting of members, a corporation shall give notice of a matter a member intends to raise at the meeting if: (1) requested in writing to do so by a person entitled to call a special meeting; and (2) the request is received by the secretary or president of the corporation at least ten days before the corporation gives notice of the meeting.

S.C. Code Ann. § 33-31-705(e). The Act contains numerous other provisions related to notice and member meetings, including notice waiver provisions. Additionally, the bylaws of a nonprofit or other adopted rules of order could, in theory, allow for a member to raise a matter in

another way. This expedited opinion will not explore all such possibilities. We simply highlight this provision because it is specifically responsive to the question about written submissions in advance of the meeting.

Next, the SC Nonprofit Corporation Act expressly requires that members “consider and act upon matters” at a meeting of the members: “[a]t regular meetings, the members shall consider and act upon matters as raised consistent with provisions of the articles of incorporation or bylaws and, in addition, with the notice requirements of this chapter.” S.C. Code Ann. § 33-31-701(e). Subject to the facts and circumstances of a specific meeting, a court may well conclude that this mandate to “consider and act” implies some level of participation by the members.

Furthermore, the Act charges that directors of a nonprofit corporation “shall discharge [their] duties . . . (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interests of the corporation.” S.C. Code Ann. § 33-31-830(a). This charge would extend also to the control that the directors exercise over a members meeting.

Of course, it is self-evident that a meeting of five members would allow for very different participation than a meeting of five hundred. This Office cannot set out a bright-line rule of order for the conduct of meetings, such as when and for how long members are allowed to hold the floor, when the Nonprofit Act does not undertake to set out such rules.

That said, the Legislature plainly intended that the members of a nonprofit corporation would at least have the opportunity to meet and actually conduct business – that is the entire rationale for Article 7, titled “Member Meetings and Voting,” of the SC Nonprofit Corporation Act. *See generally* S.C. Code Ann. § 33-31-701 *et seq.* Indeed, the Act goes so far as to provide for court-ordered meetings on the application of a member in S.C. Code Ann. § 33-31-703.

The combined effect of these provisions, when taken together and applied in the context of a member meeting, imply that such meetings generally should be conducted so as to facilitate member participation within reasonable time, place, and manner restrictions set by the board, so that the members can consider and act upon matters at hand. *See discussion, supra.* In other words, while the board generally would have latitude to provide for the orderly procedure of a member meeting, there must be an actual meeting, and not merely the appearance of one.

By analogy, our Office has issued numerous opinions that discuss how citizens may participate in open meetings of a public body. Even if a nonprofit corporation does not qualify as a public body for purposes of FOIA, we believe they may offer useful, persuasive guidance given the similar goals of transparency and participation. As a general matter, in the absence of

The Hon. Luke A. Rankin
South Carolina Senate
Page 4
November 10, 2021

an express rule to the contrary, public bodies have broad latitude to develop reasonable parameters for the time, place, and manner of public participation. *See, e.g., Op. S.C. Att’y Gen.*, 2019 WL 5669045 (October 17, 2019) (“[W]e suggest the Board look to its own policies regarding public comments at Board meetings, as a court is likely to uphold those policies so long as they are reasonable.”). It appears that a similar standard generally would apply in nonprofit member meetings.

Conclusion:

In conclusion, we appreciate this opportunity to clarify our September 3, 2020 opinion which addressed a nonprofit corporation holding a member meeting through the use of remote technology. This opinion has been expedited and should be read in the context of that prior opinion and other applicable law.

First, we clarify that our prior opinion was directed at those nonprofits which had concluded of their own accord that in-person meetings would be unwise, and were seeking to continue operating in compliance with state law. It is beyond the scope of an opinion of this office to determine whether the COVID-19 pandemic is sufficiently severe at a particular point in time to justify a deviation from strict compliance with the Act’s meeting requirements. That is a judgement for the board and the members in the first instance, and ultimately for a court if needed. *See* S.C. Code Ann. § 33-31-703 (providing for court-ordered meetings).

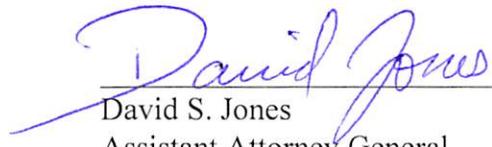
Second, the SC Nonprofit Corporation Act does require a written request in advance in the notice procedure when a member raises a matter for consideration at a meeting, as discussed below. *See* S.C. Code Ann. § 33-31-705(e). Beyond that provision, the Act is largely silent on the specific conduct of member meetings. However, the duties and responsibilities of the members and directors together imply that such meetings generally should be conducted so as to facilitate member participation within reasonable time, place, and manner restrictions set by the board, so that the members can consider and act upon matters at hand. *See discussion, supra*. In other words, while the board generally would have latitude to provide for the orderly procedure of a member meeting, there must be an actual meeting, and not merely the appearance of one. The goal of these measures is not to stifle participation, but to facilitate it through an orderly meeting.

We also note that this request arose from a constituent’s dealings with their HOA. Our Office has opined previously that “[h]omeowners’ associations are uniquely self-policing among nonprofit corporations, and are capable of robust self-government” by their members. *Op. S.C. Att’y Gen.*, 2017 WL 569543 (January 3, 2017). Consistent with this, it is all the more important

The Hon. Luke A. Rankin
South Carolina Senate
Page 5
November 10, 2021

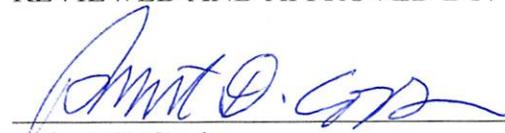
that a meeting of the members of a nonprofit HOA be conducted with transparency and the opportunity for reasonable participation.

Sincerely,



David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General