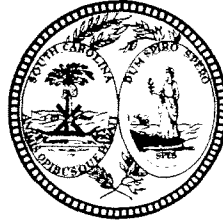


6180 February



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

February 10, 1997

Mr. Hampton J. Walker
1802 River Place
One Seventh Street
Augusta, GA 30901

Dear Mr. Walker:

Thank you for your letter to Attorney General Condon dated January 13, 1997, which was referred to me for a response.

In your letter, you raise the question of whether directors of a non-profit corporation may vote by proxy. You further stated in your letter that this matter affects the election to the Board of Visitors of The Citadel which would be conducted pursuant to §59-121-10, S.C. Code of Laws, 1976 as amended. You also provided in your correspondence a copy of Article V, Section 2 of the Constitution and Bylaws of the Association of Citadel Men Organization, the organization, per §59-121-10, that is to conduct the election. The Association of Citadel Men is a non-profit corporation currently on file with the Office of the Secretary of State.

Article V, Section 2, states as follows:

Section 2. Proxies

Directors who are unable to attend called meetings of the Board may designate other members of the Association to represent them, but no person shall act as proxy for more than one Director.

By way of a prior opinion of this Office, it was stated that a bylaw of a non-profit corporation that permitted its members to vote by proxy would be valid under South Carolina law. See 75-76 S.C. Op. Atty. Gen. 375, No. 4515 attached. In that opinion, the issue of directors voting by proxy was also addressed. That opinion stated that the status of the South Carolina statutes at that time did not specifically provide for voting by

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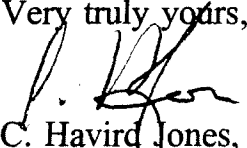
proxy by directors of non-profit corporations and that for a non-profit corporation to have a bylaw authorizing such a proxy could be subject to challenge, specifically if wide discretion in its use was permitted. See 1975-76 S.C. Op. Atty. Gen. 4515 at 378.

Some State statutes today address directors voting by proxy. (Howard L. Oleck, Non-Profit Corporations, Organizations and Associations, 5th Ed. 1988, p. 731). Our Non-profit Corporation Act specifically addresses members of non-profits voting by proxy. See §33-31-724, "Proxies." The Act makes no provision for a director of a non-profit corporation to take action as a director rather than a member by proxy. However, the South Carolina Reporters' Comments to §33-31-724 specifically addresses this issue. Those Comments to that Section state that "directors taking action as directors may not act by proxy, but directors taking action as the members may."

Additionally, as pointed out by your letter, §33-31-824(b), Quorum and Voting, states that the affirmative vote of a majority of the directors present is an act of the Board . . . (emphasis added). In further support of the position that directors must be present for a vote to be counted is the "Official Comment" to §33-31-824.

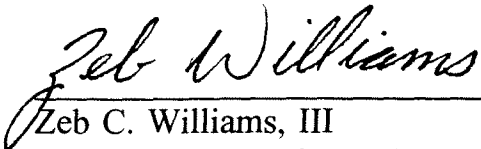
While it appears to be a practice of many non-profit corporations to provide for proxy voting by the directors in their Articles or ByLaws due to the fact that on occasion it is difficult for a Trustee to be physically present at a meeting and yet be very anxious to vote for or against a specific proposal, and further that some State statutes permit directors to vote by proxy in areas that are confined to narrow specific vote issues, our Act appears to require the director of a non-profit corporation to be present in order for his vote to be considered.

Very truly yours,


C. Havard Jones, Jr.
Senior Assistant Attorney General

CHJJr/rho
Enclosure
cc: J. Thomas Mikell, Esquire

REVIEWED AND APPROVED BY:



Zeb C. Williams, III
Deputy Attorney General