

JOHNSON, POPE, BOKOR, RUPPEL & BURNS, LLP
MEMORANDUM

DATE: December 30, 2020
TO: AAAPP Board of Directors
FROM: Colleen Flynn, Esq.
RE: Emergency Bylaws for Not-For-Profit Corporations per F.S. 617.0207

During the November 2020 meeting, the Board raised the issue of the ability to conduct meetings via zoom during the COVID-19 pandemic. As we discussed at the time, the AAAPP's bylaws require in person attendance for quorum purposes and that the bylaws require meetings be held at AAAPP's principal office or at such other place within PSA 5.

F.S 286.011 through 286.012 (the "Government in the Sunshine" law) applies to AAAPP by virtue of F.S. 20.41. Thus, AAAPP is bound by the "Government in the Sunshine" law when considering any contracts requiring the expenditure of funds. Notably, AAAPP is a not-for-profit incorporated entity pursuant to F.S. 617 and is not created as a local government entity. F.S. 20.41(6) recognizes this and refers to Area Agencies on Aging as "nongovernmental, independent, not-for-profit corporations." Case law has confirmed that AAAs are not considered state agencies. *First Quality Home Care v. Alliance for Aging*, 14 So.3d 1149 (Fla. Dist. Ct. App. 2009).

Because AAAPP is created a not-for-profit incorporated entity and not as a local government, AAAPP could opt to follow solely the not-for-profit corporation statute regarding convening meetings electronically provided that its bylaws allow for that and provided that the requirements of F.S. 286.011 through F.S. 286.012 are met.

AAAPP's bylaws require in person attendance (just like the requirements for local governments). However, Florida's not-for-profit corporation statute at F.S. 617.0820(4) provides as follows:

4) *Unless the articles of incorporation or the bylaws provide otherwise, the board of directors may permit any or all directors to participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting.*

Florida's not-for-profit corporation statute also allows for emergency bylaws. F.S. 617.0207 states:

Emergency bylaws.

- (1) Unless the articles of incorporation provide otherwise, the board of directors of a corporation may adopt bylaws to be effective only in an emergency defined in subsection (5). The emergency bylaws may make all provisions necessary for managing the corporation during an emergency, including:*
 - (a) Procedures for calling a meeting of the board of directors;*
 - (b) Quorum requirements for the meeting; and*
 - (c) Designation of additional or substitute directors.*
- (2) The board of directors, either before or during any such emergency, may provide, and from time to time modify, lines of succession if during such emergency any or all officers or agents of the corporation are for any reason rendered incapable of discharging their duties.*
- (3) All provisions of the regular bylaws consistent with the emergency bylaws remain effective during the emergency. The emergency bylaws are not effective after the emergency ends.*
- (4) Corporate action taken in good faith in accordance with the emergency bylaws:*
 - (a) Binds the corporation; and*
 - (b) May not be used to impose liability on a corporate director, officer, employee, or agent.*
- (5) An emergency exists for purposes of this section if a quorum of the corporation's directors cannot readily be assembled because of some catastrophic event.*

Thus, because it would be reasonable to assume that the COVID-19 pandemic is a "catastrophic event" in accordance with (5), AAAPP could opt to adopt Emergency Bylaws. Notably, the current bylaws do not prohibit Emergency Bylaws nor do they contain any Emergency Bylaws. The Emergency Bylaws could suspend the requirement that a quorum be physically present, that the meeting be held at the principal place or somewhere PSA 5 and allow the Board to hold meetings during a catastrophic event in a manner that conforms with the requirements of F.S. 617.820. AAAPP would still be subject to F.S. 286.011 through F.S. 286.012 but the meetings could be held via zoom or conference call. A quorum could be constituted through an electronic meeting. Of course, public access and participation in the zoom or conference call board meeting would occur to conform with F.S. 28.011 through F.S. 286.012 would still occur.

The Emergency Bylaws would only be in effect during the emergency. The Board could take action to implement the Emergency Bylaws in the case of an emergency or the President of the Board in conjunction with the Executive Director could be delegated authority to declare an emergency in accordance with F.S. 617.0207 has occurred and that the Emergency Bylaws are in effect until the termination of the emergency as determined by the President of the Board in conjunction with the Executive Director or by further action of the Board.

DOEA's attorney has issued an opinion stating that "procedures for attendance at meetings should be included in your organization's by-laws or other controlling

documents.” Which in essence acknowledges, that AAAs could meet in accordance with F.S. 617 and not require an in person quorum if the bylaws/governing documents allow it provided that all provisions of F.S. 286.011 through F.S. 286.012 are met.

Attorney John Bakas issued an opinion to the Florida Association of Area Agencies on Aging, Inc., opining that AAAs could conduct a meeting electronically without a quorum of the board being physically present provided the bylaws permit it in accordance with F.S. 617.

Thus, AAAPP has the option to adopt Emergency Bylaws which, while in place during the emergency, would suspend the in-person quorum requirement and allow AAAPP to conduct meetings by electronic means without a quorum of the board being physically present at the meeting. Otherwise, in accordance with the bylaws, AAAPP must have a quorum physically present to conduct business.

Draft Emergency Bylaws are submitted for your consideration should the Board wish to entertain this option. Should they Board wish to adopt this, the Emergency Bylaws should be adopted by 2/3 vote of those present at the meeting. The Board could then vote to implement the Emergency Bylaws due to the COVID-19 pandemic constituting an emergency as defined in F.S. 617.0207(5). At the end of the emergency as declared by Board action or by the President of the Board in conjunction with the Executive Director the Emergency Bylaws will cease to be in effect but will remain in existence and thus, could be used in case of another emergency such as a hurricane that prevents a quorum of the Directors from being readily assembled.

Attachments:

Opinion Letter form DOEA dated November 4, 2020

Opinion Letter to Florida Association of Area Agencies on Aging, In. dated December 9, 2020

F.S. 617.0820

F.S. 617.0207

F.S. 20.41

AAAPP Articles of Incorporation

AAAPP Bylaws revised 6/17/2013

Draft Emergency Bylaws