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SHAREHOLDER

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MEMORANDUM

TO: Colin Murphy, Executive Director, Children's Trust of Alachua County
FROM: Stephanie Marchman, GrayRobinson, P.A.
DATE: October 25, 2020
SUBJECT: Public Meetings after November 1, 2020

On September 30, 2020, the Governor issued Executive Order 20-246 extending Executive Order 20-69 until 12:01 a.m. on November 1, 2020. Under Executive Order 20-69, local governments are allowed to use communication media technology to hold public meetings, and requirements for a quorum to be present in-person and for a local government body to meet at a specific public place are suspended. A memorandum accompanying Executive Order 20-246 provides that “[l]ocal government bodies should prepare to meet in person as required by Florida law beginning November 1, 2020.”

This memorandum addresses the questions (*in bold italics*) that you posed on October 20, 2020 regarding meetings of the members of the Board of Directors (the “Board”) of the Children’s Trust of Alachua County (the “Trust”) beginning in November, 2020. Note that these requirements apply also to Board committees (modified as necessary to account for the number of individuals serving on the committee).

1. ***What are the Children’s Trust of Alachua County’s Board member requirements for public meetings under current Sunshine Law?*** With respect to public meetings of the Trust, the following laws and rules apply:
 - Chapter 26 of Alachua County’s Code of Ordinances, “Children’s Trust, Independent Special District”
 - Chapter 189 of the Florida Statutes, “Uniform Special District Accountability Act”¹
 - Chapter 286 of the Florida Statutes²
 - The By-Laws for the Children’s Trust of Alachua County (the “By-Laws”)

¹ Chapter 189, Florida Statutes, contains general requirements applicable to independent and dependent special districts.

² Pursuant to Florida Statute Section 189.015(2), which provides “[a]ll meetings of the governing body of the special district shall be open to the public and governed by the provisions of chapter 286” and Section 4 of the Trust’s By-Laws.

- a. ***Do the Board members need to be physically present?*** Yes, beginning November 1, 2020, at least 6 Board members must be physically present. The By-Laws defines a quorum as “[t]he presence of a majority or all members serving on the Trust shall be necessary at any meeting to constitute a quorum to transact business.” While the By-Laws do not require Board members to be “physically” present, the Florida Attorney General has opined numerous times that present means physically present.³ Additionally, given the language in the memorandum accompanying the recent Executive Order that “local government bodies should prepare to meet in person”, we would advise that physical presence of a quorum is necessary for the Board to transact business of the Trust. In sum, the Board has 10 members; accordingly, 6 members of the Board must be physically present to transact business of the Trust.
- b. ***If a Board member is not physically present, can they still be counted as “Present” for a quorum if participating virtually?*** No, he or she cannot be counted as present for purposes of establishing a quorum. As discussed above, a quorum of the members of the Board must be physically present to transact business.
- c. ***If a Board member is not physically present, can they still participate, even if not counted toward the quorum?*** Yes, if a quorum of the Board is physically present, the Attorney General has opined that a board may determine that there is an “extraordinary circumstance” that allows a board member to participate by electronic means.⁴ If the Board makes such a finding, then the Board member (or members) that are attending the Board meeting by teleconference or other technological means may participate in Board discussions and vote on Trust business.⁵ Such a finding of an extraordinary circumstance can be made by a resolution of the Board or simply by motion, along the following lines: “In light of COVID-19, Board member _____ (and Board member _____) have requested to participate in the Board meeting remotely. In the wake of this unprecedented pandemic, the Board deems this an ‘extraordinary circumstance.’ Therefore I make a motion to allow _____ (and _____) to participate remotely in this meeting.”
- d. ***If a Board member is not physically present, can they vote? If “maybe”, then under what circumstances?*** Yes, under the circumstances described immediately above.
- e. ***If a Board member is not physically present, can they still be counted as “Present” for attendance purposes to meet attendance requirements for bylaws?*** Yes, under the circumstances described above. It should be noted on the meeting minutes the names of the Board member(s) that participate electronically.

2. ***Public Participation***

- a. ***Is it a requirement that the public be able to participate in public meetings?*** Yes. Subsection 286.0114(2) of the Florida Statutes requires that “[m]embers of the public shall be given a reasonable opportunity to be heard on a *proposition* before a board or commission.” The opportunity to be heard does not have to occur at the same meeting at which the board or commission takes official action if the opportunity “occurs at a meeting that is during the decision making process and is within reasonable proximity in

³ Florida Attorney General Opinion 2020-03 (March 19, 2020).

⁴ Florida Attorney General Opinion 2003-41 (September 3, 2003).

⁵ Florida Attorney General Opinion 2002-82 (December 11, 2002).

time *before* the meeting at which the board or commission takes the *official action.*” [Emphasis added.]

b. ***Is it a requirement that the public be able to be physically present for public meetings?***

Most likely yes. While not expressly stated, there are two statutes that apply to the Trust that imply that members of the public are entitled to attend meetings of the Board, in person:

- A board or commission is “prohibited from holding meetings at any facility or location which discriminates on the basis of sex, age, race, creed, color, origin, or economic status or which operates in such a manner as to *unreasonably restrict public access to such a facility.*”⁶ [Emphasis added].
- “Meetings of the governing body of the special district shall be *held in a public building* when available within the district, in a county courthouse of a county in which the district is located, or in a building in the county *accessible to the public.*”⁷ [Emphasis added].

c. ***Is it legal to allow the public to participate in public meetings ONLY through phone, Zoom, or some other digital process?*** Probably not, based on the two statutes cited above. We recommend that the public be given an option to attend meetings of the Board electronically (phone, Zoom, etc.), as well as in-person.

3. ***Should the Trust be found to have violated sunshine law requirements, can you please describe the consequences as prescribed by Florida Statutes? Can you please give, to the best of your ability, an assessment of risk should the Trust depart from practices that have been described in previous AG opinions?***

- Jail time and fines – A knowing violation of the Sunshine Law is a misdemeanor of the second degree.⁸ A person convicted of a second-degree misdemeanor may be sentenced to a term of imprisonment not to exceed 60 days and/or fined up to \$500.⁹
- Attorney’s fees – Attorney’s fees may be assessed against individual members of the Board except in those cases where the Board sought, and took, the advice of its attorney.¹⁰
- Removal from office – The Governor may remove a member of the Board for cause, or upon the written petition of a majority of the Alachua County Commission, plus one.¹¹
- Action taken is void – Section 286.011 of the Florida Statutes provide that no resolution, rule, regulation or formal action is considered binding except as taken or made at an open meeting.¹²
- Bad press.

4. ***Public meetings policy.*** Enclosed with this memorandum is draft public meetings policy addressing Board member and public participation in meetings for the Trust’s consideration.

⁶ Florida Statute Section 286.011(6).

⁷ Florida Statute Section 189.015(3).

⁸ Florida Statute Section 286.011(3)(b).

⁹ Florida Statute Section 775.082(4)(b) and 775.083(1)(e).

¹⁰ Florida Statute Section 286.011(4) and (5).

¹¹ Section 26.02(b), Alachua County Code of Ordinances.

¹² *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974); *Sarasota Citizens for Responsible Gov’t v. City of Sarasota*, 48 So. 3d 755 (Fla. 2010).