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VIA EMAIL

Mr. Dave Morley
KICA Chair
dave.morley@kica.us

Re: Legal Opinion for Board Expansion
ATTORNEY-CLIENT PROTECTED COMMUNICATION

Dear Mr. Morley,

I understand that Board of Directors of the Kiawah Island Community Association, Inc. (KICA) may be considering expanding the number of people serving on the Board. The current Board is comprised of seven members, as of the most recent election. This letter is intended to provide you with my professional opinion as to the Board's authority to take any action with regards to such an expansion. The questions to be considered in this analysis are:

1. Can the Board vote to increase the number of Directors?
2. What are the pros and cons of increasing the number of Directors?
3. What is the procedure for filling the positions?
4. Can one of the seats be allocated to Roger Warren, President of Kiawah Island Golf Resort?

Relevant Legal Authority

There are three sources of materials that we are guided by when reviewing the possibility of board expansion. These include: The South Carolina Nonprofit Act; The Declaration of Covenants and Restrictions of The Kiawah Island Community Association, A/K/A the "KICA Covenants"; and The Kiawah Island Community Association Bylaws, A/K/A the "KICA Bylaws". I will discuss the relevant provisions of each in turn.

The South Carolina Nonprofit Act: SC Code § 33-31-811 creates default rules for filling board positions and addresses the issue of vacancies on a board created by the expansion of the board. Specifically, it provides as follows:

Unless the articles or bylaws provide otherwise, and except as provided in subsections (b) and (c), if a vacancy occurs on a board of directors, including a vacancy resulting from an increase in the number of directors:

(1) the members, if any, may fill the vacancy; if the vacant office was held by a director elected by a class, chapter, or other organizational unit or by region or other geographic grouping, only members of the class, chapter, unit, or grouping are entitled to vote to fill the vacancy if it is filled by the members;

(2) the board of directors may fill the vacancy; or

(3) if the directors remaining in office constitute fewer than a quorum of the board, they may fill the vacancy by the affirmative vote of a majority of all the directors remaining in office.

(b) Unless the articles or bylaws provide otherwise, if a vacant office was held by an appointed director, only the person who appointed the director may fill the vacancy.

(c) If a vacant office was held by a designated director, the vacancy must be filled as provided in the articles or bylaws. In the absence of an applicable article or bylaw provision, the vacancy may not be filled by the board.

(d) A vacancy that will occur at a specific later date, by reason of a resignation effective at a later date under Section 33-31-807(b) or otherwise, may be filled before the vacancy occurs but the new director may not take office until the vacancy occurs.

Emphasis supplied.

Because subsection (a) says “Unless the articles or bylaws provide otherwise”, it is clear that this statute is only implicated if the KICA Covenants or the KICA Bylaws are silent on the issue. In our case, we have helpful guiding language in both.

The KICA Covenants: Article III, Section 3 states: “The Association shall be governed by a Board of Directors consisting of Three (3), Five (5), Seven (7), Nine (9), or Eleven (11) members. Initially the board shall consist of Three (3) Members, with the number in subsequent years to be determined by the Board of Directors as provided for in the Bylaws of the Association.” (Emphasis supplied).

The KICA Bylaws: Article III, Section 1 of the Bylaws does provide, in part, “The individual directors must be natural persons¹ who have a right of easement of enjoyment in and to the Common Property pursuant to Article IV, Section 1, of the declaration of Covenants and Restrictions of the Kiawah Island Community Association, Inc. Such persons are not eligible to serve on the board if they are guests or tenants of a Member or the right of easement of enjoyment arises from a Member in default of any of his obligations under the By-Laws.”

¹ KICA has historically interpreted the term “natural persons” to include an individual who is the principal of an entity who holds such a right of easement and enjoyment. In keeping with that interpretation, KICA Directors have previously included representatives of Trusts, Limited Liability Companies, and other corporate entities.

Article III Section 2 of the Bylaws provides, in pertinent part, that “Initially the number of directors shall be three (3) with the number of directors in subsequent years to be set by the Board of Directors at three (3), five (5), seven (7), nine (9) or eleven (11) Members as the directors deem appropriate. . . . Any vacancy occurring in the initial or subsequent Board of Directors may be filled at any meeting of the Board of Directors by the affirmative vote of a majority of the remaining directors, though less than a quorum of the Board of Directors, or by a sole remaining director and, if not previously filled, shall be filled at the next succeeding meeting of the Members of the Corporation. . . .” (Emphasis supplied).

Analysis

Both the SC Nonprofit Act and the KICA Covenants defer to the KICA Bylaws on filling vacancies, including vacancies created by increasing the number of directors. The KICA Bylaws allow the KICA Board to set the number of Board members “as it deems appropriate.” If the Board wanted to increase the number of members, it could do so by adding 2 or 4 additional seats for a total of 9 or 11 Directors. There is no restriction or limitation on how or when or why the Board can make this determination of appropriateness.

Although the term of directors added to the Board is not addressed specifically in the Bylaws, Article III Section 2 created staggered terms for the initial directors elected by the Members. Thereafter, directors elected by the members were elected to a three-year term in order to preserve the stagger. Because the members do not elect the persons to expand the Board and the need to maintain the stagger, the three-year term for elected directors does not apply to persons appointed to expand the Board unless or until the Director is elected by the Members.

If the Board votes to increase the number of directors, once approved, the new seats are vacant. The sitting Board gets to decide how to fill the vacancies. It may choose to fill the seats by majority vote of the Board, or at the next meeting of the Members². If the Board decides to fill the vacancies, it can do so by selecting persons of their choosing. One way that I might suggest, is to consider appointing the candidates who finished 3rd, 4th, 5th, etc. in the last election by the Members. But certainly, it is not required that the Board be limited to those individuals, provided that a majority of the sitting directors could elect any member to fill the vacancies.

To that end, there is also some interest within the Board and community at large in having Roger Warren, the President of the Kiawah Island Golf Resort, A/K/A The Resort, serve on the KICA Board due to his standing in the community and the significant presence of the Resort on the Island. Since the Board has the ability to decide who will fill the a newly created Board position, so long as that person satisfies the requirements of Article III, Section 1 of the Bylaws, as discussed above, it would appear that Mr. Warren is eligible to serve as a KICA Director and the KICA Board is authorized to name him to one of the newly created seats.

² This is a meeting with notice and quorum requirements outlined in the governing documents. Typically for KICA, this only occurs annually, though there have been occasional instances where special votes have happened between annual meetings.

If Mr. Warren is appointed to fill a newly created seat on the Board, at the expiration of that seat's term, it will be filled by an election of the KICA Members. If there is a desire to create a seat on the Board which is permanently allocated to The Resort (in the way that a seat on the Board is reserved to Kiawah Island Partners), this would only be possible through an amendment to the KICA Covenants. A discussion of the particulars of that process is beyond the scope of this letter. However, I will be happy to supplement this letter with a discussion of that process, at such time as you or the Board request it.

Conclusion

The foregoing analysis answers the questions in the affirmative as to whether the Board has the authority to increase the number of Directors. It also sets out what the process would be, if the Board wants to take this step. The Board may also want to consider an additional question of whether it *should* exercise this authority.

There are many "pros" to expanding the board. First, doing so involves more property owners in KICA decision making, which is something I understand members of the community have consistently supported over the years. Second, it spreads the workload of board members out among more people. This makes board service less onerous for the individual Directors (and therefore more appealing to potential candidates). Third, it forces more consensus building, and dilutes the authority of any one board member or faction from exercising a disproportionate amount of control over the community.³

The only "con" arguing against moving forward that occurs to me is the past difficulty of attracting candidates to run for the Board. However, in light of this election's record number of thirteen candidates vying for only two seats, there is concrete reason to believe that a stable of highly qualified members are willing to serve the community now, and in the future.

Given the considerable interest in Board service, it makes sense to increase the board by four members, from seven to eleven. While the Board could choose any four people it would like, an election has just wrapped up and it may make sense for the Board to consider asking those who finished 3rd, 4th, 5th, and 6th, in addition to the 1st and 2nd place finishers who will be seated regardless. Or if there is a desire to allocate one newly created Director position to Mr. Warren, then fill the remaining three seats with the 3rd, 4th, and 5th finishers from the most recent election, assuming they are still willing to serve.

I hope this information is helpful. If you have any questions about the contents of this letter or any other matter, please do not hesitate to let me know.

With best regards,

/s/ *Allison C. Jett*

³ I understand that KICA currently enjoys a positive working relationship with the developer director, nonetheless members are sometimes concerned that the developer could have too much influence on the board. With a bigger board, this should lessen that worry.