LEGISLATURE TARGETS BOARD ACTIONS BY E-MAIL

By Stephanie J. Hayes

It is very common for board members to communicate with each other (and with management) via e-mail, and this is often the preferred method of communication on HOA issues. For some time there were no explicit statutory prohibitions or restrictions on the use of e-mails by board members to discuss or even take action on HOA business but there will be on January 1, 2012 when Senate Bill 563 goes into effect. One of SB 563's major impacts will be to ban Board "action" via e-mail except in an emergency situation and, in that situation, all Board members must unanimously consent to the action in writing (which "written" consent can be given by board members separately via e-mail). Additionally, SB 563 appears to prohibit a majority of the board from even discussing "any item of business that is within the authority of the board" via e-mail unless it qualifies as a bona fide emergency.

SB 563, which becomes effective January 1, 2012, amends several sections of The Davis-Stirling Common Interest Development Act, including the "Common Interest Development Open Meeting Act" (Civil Code section 1363.05 -- the "Act"). The Act has been specifically revised to state that "the board of directors shall not take action on any item of business outside of a meeting" (new Civil Code section 1363.05(j)(1)). Directors are expressly prohibited from conducting a meeting via a series of e-mails except for an emergency meeting if all of the board members consent in writing (either individually or collectively), and the written consent(s) must be filed with the board minutes (new Civil Code section 1363.05(j)(2)(B)). Written consent to conduct the emergency meeting may be transmitted electronically (new Civil Code section 1363.05(j)(2)(B)).

SB 563 also makes significant changes to the definition of board meeting. The Act, *until December 31, 2011*, defines a meeting as "any congregation of a majority of the members of the board at the same time and place to hear, discuss, or deliberate upon any item of business **scheduled to be heard by the board**, except those matters that may be discussed in executive session." Thus, it was okay to discuss the issue outside a board meeting (including by e-mail) if it was not on the board agenda (i.e., **scheduled**) or it was a matter that could be considered in executive session (e.g., litigation, contracts, member discipline, personnel, member's payment of assessments).

After January 1, 2012, the definition of meeting has been expanded to include any congregation of a majority of the members of the board at the same time and place to hear, discuss, or deliberate upon any item of business **that is within the authority of the board** (new Civil Code section 1363.03(k)(2)(A)). Under the new law, there is no exception for executive sessions which are now included in the definition of board "meeting." Additionally, the requirement that the item must be "scheduled to be heard by the board" has been dropped. The

issue need only be within the board's decision-making authority which, in contrast to "any item of business scheduled to be heard by the board," has a massive scope.

With the passage of SB 563, we will advise boards and managers of our HOA clients that the board cannot take *action* by e-mail except in an emergency. It is not crystal clear that e-mail *discussion* by a majority of the board is prohibited by the new statute because "action" is not defined. However, we surmise the intent of the statute was to eliminate e-mail *discussions* among board members. As a result, our advice will be that if a majority of the directors *discusses* "any item of business that is within the authority of the board" through e-mail they will be taking a risk if the issue does not qualify as an emergency.

The Act already defines emergency as "circumstances that could not have been reasonably foreseen which require immediate attention and possible action by the board, and which of necessity make it impracticable to provide notice as required by this section" [i.e., the Act] (Civil Code section 1363.03(g)). There can be conflicting opinions about whether a particular situation is an "emergency." In case of a challenging member's lawsuit, board action via e-mail that is contrary to the restrictions imposed by SB 563 can be the basis for a court finding that the board violated the Open Meeting Act. This could subject the association to a "civil penalty" of up to $500 per violation and a requirement that the association pay the challenging member's attorney's fees and court costs. For the above reasons, boards should be extremely cautious about taking action via e-mail and consult with legal counsel before deciding they are justified in doing so due to an emergency.

Corporations Code section 7211(b) permits the board of a California nonprofit mutual benefit corporation (which most HOAs are) to take any action that is required or permitted to be taken by unanimous written consent of the board. The unanimous written consent is board action "outside of a meeting." But SB 563 states that "the board of directors shall not take action on any item of business outside of a meeting" but allows an "emergency meeting" via e-mail with unanimous written consent of all board members. While SB 563 does not expressly override Corporations Code section 7211(b), it also does not grant an exception that would allow the use of unanimous written consents as an exception to the broad prohibition on boards taking action outside of a meeting. For these reasons, the safest approach would be for HOA boards to stop using unanimous written consents after January 1, 2012 except in the event of a legitimate emergency, and consult with legal counsel before doing so.

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