

**INCREASED RISKS IN THE USE OF E-MAILS BY BOARDS AND MANAGERS –
THE LEGISLATURE RAISES THE STAKES STARTING JANUARY 1, 2012¹**

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The laws governing California homeowners associations are slowly starting to catch up with advances in communications technology. This is evidenced by changes over the past few years to the Corporations Code to, among other things, permit “electronic transmission” of specified types of information from *the corporation* to its members, and from a member to *the corporation* (Corporations Code sections 20 and 21, respectively). These broader corporate electronic transmission provisions are significant to HOAs because the overwhelming majority of HOAs are nonprofit corporations. Civil Code section 1350.7 was amended, effective January 1, 2010, to permit HOAs to distribute “annual disclosure packages” and other specified financial disclosures to owners via electronic mail, facsimile or other electronic means, with the owner’s written consent.

The use of e-mail as a convenient way for board members to communicate with each other (and with management) has become very common, and 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 will 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.

This article will address the limits placed on e-mail use by directors and managers and the risks in director and management use of e-mails, and provide recommendations for how to avoid those risks. This article will also identify other means available to board members to conduct HOA business quickly and efficiently.

BOARD ACTION VIA E-MAIL

We are often asked a variation of the following question by board members or managers: “Can’t the board just approve that _____ (fill in the blank: contract, repair proposal, etc.) by e-mail?”

¹ This is an update to the article entitled “Risks in the Use of E-Mails by Boards and Managers” published in 2010.

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” (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 (Civil Code section 1363.05(j)(2)(B)). Written consent to conduct the emergency meeting may be transmitted electronically (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.” *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**” (Civil Code section 1363.03(k)(2)(A)). As a result, executive sessions are now included in the definition of “meeting” and the requirement that the item must be “scheduled to be heard by the board” has been dropped.

With the passage of SB 563, our advice to boards and managers of our HOA clients will be that the board cannot take **action** by e-mail except in an **emergency**. But more than that, we will advise our clients that a majority of the directors cannot even **discuss** “any item of business that is within the authority of the board” through email *unless* it qualifies as an emergency.

The Act does define 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 something is an “emergency.” Board action via e-mail contrary to the restrictions imposed by SB 563 would be a violation of the Open Meeting Act which may result in significant legal and financial risk to the association. For the above reasons, we will strongly urge boards to 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.

Remedies for Open Meeting Act Violations

Failure to comply with the requirements of the Open Meeting Act can result in significant legal and financial risk to an association. Homeowners have the right to sue their association for violations of the Act (Civil Code section 1363.09).

If the court finds that the board violated the Act, the court has the authority to impose a civil penalty of up to \$500 per violation against the association, and require the association to pay the owner's reasonable attorneys' fees and costs.

ALTERNATIVE METHODS OF TAKING "BOARD ACTION"

There are a number of legal alternatives for boards to take action other than making decisions by e-mail.

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.**" However, 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.

If board action is required which cannot wait for the next regularly scheduled meeting, the board may call and hold a **special board meeting**. The requirements of the Open Meeting Act apply to special board meetings (e.g., notice of the special meeting, including the agenda, must be "posted" at least four days prior to the meeting and owners must be permitted to attend). As is the case with regular board meetings, board members who are not able to physically attend the special meeting may participate via conference call, on a speaker phone, or by electronic video screen communication so long as the board complies with the Open Meeting Act requirements designed (again) to achieve transparency and to allow members to attend and "observe" the deliberations. The requirements of Corporations Code section 7211(a)(6) must also be satisfied (e.g., all directors must be able to hear one another). The ease of enabling directors to participate by conference call and other electronic means should be recognized as making it easier to schedule and hold special board meetings as the need arises.

If the issue requiring board action falls under one of the categories that may be considered and acted upon in executive session (such as litigation, member discipline, or matters related to the formation of a contract with a third party), the board may take action on that issue in **executive session** (Civil Code section 1363.05(b)). However, effective January 1, 2012, the board will be required to give at least two (2) days notice of a non-emergency meeting that will be held solely in executive session (Civil Code section 1363.03(f)).

Boards should also consider adding a **consent calendar** to their regular meeting agenda to handle matters that are routine or simple. This practice is followed by the governing bodies of many city councils and allows for a motion to approve the matters on the consent calendar,

subject to the objection of one or more of the council members. If there is an objection to a specific matter, that matter is removed from the consent calendar, and deliberated and voted upon separately. A similar practice by HOAs could shorten board meetings and help eliminate the practice or tendency to “deliberate” in advance of the meeting by e-mail.

Finally, every incorporated association’s activities and powers must be exercised by or under the direction of its board of directors. However, the board has the legal authority to delegate many of the more routine decisions (subject to limitations in the law and the association’s bylaws and CC&Rs) to “any person or persons, management company, or committee however composed” (Corporations Code section 7210). To decrease the number of issues that require board action, reduce the temptation to act via e-mail, and enable the board to focus its time and efforts on policy-setting (rather than execution of policy) and major decisions impacting the community, boards should attempt to **delegate** more tasks and decisions to management, committees, professionals and specified officers. Limits can (and should) be placed on such authority (for example, management may be authorized to make an expenditure of up to \$1,000 without board approval, provided the expense is budgeted and a written report is thereafter given to the board).

E-MAIL COMMUNICATIONS WITH HOMEOWNERS

Because all written communications regarding HOA business may have legal significance, board members must recognize that communicating with homeowners by e-mail about HOA issues carries risks that are beyond the board members’ ability to control. The most innocent of written messages from an individual director may give the impression that the director has the ability to make decisions on behalf of the board or “speaks for the board.” Additionally, e-mail exchanges between board members and owners often can be misinterpreted if taken out of context that the board member will not have an opportunity to provide to the unknowing reader. Because owners can (and often do) share board member e-mails with other owners, post such e-mails on websites, or use e-mail messages to support claims made in lawsuits filed against the association and individual board members, the benefit to board members in communicating with individual owners by e-mail is far outweighed by the potential risks.

Upon receipt of a homeowner’s e-mail regarding HOA issues, we recommend that the board or an individual board member simply respond: “It is not our practice to communicate directly with members regarding association issues via e-mail. Please direct your concerns and issues to the association’s manager, who will consult with the board and respond to you in writing.”

For similar reasons, managers need to be cautious in e-mails with members because they may give the false impression that they are the “decision-makers” or that the manager is available to provide an immediate response to any individual member request conveyed in an e-mail (which is unrealistic). To avoid these risks, managers should also consider providing a form response that (i) acknowledges receipt of the e-mail, (ii) advises that the manager will share

the member's questions and concerns with the board, and (iii) states that the member can expect a written response after a decision is made by the board.

LITIGATION PITFALLS

Use of e-mails by board members and management may also create problems if the association later is a party to a lawsuit, and sometimes even causes the lawsuit itself. While the minutes of a board meeting should only record the actions and decisions of the board (usually without reference to the content of the deliberations), e-mails further display the private thoughts and apparent motives of board members, often written in an unguarded fashion. All such e-mails may ultimately be viewed by a judge or jury.

Board members and managers must be particularly careful about what they say in an e-mail, and who they send it to, for a variety of reasons:

- E-mails create a **permanent record** – assume they will exist forever.
- E-mails, unless they are privileged, are **subject to discovery**, i.e., disclosure to any other party in litigation.
- E-mails, if disclosed to an adverse side (voluntarily, inadvertently, or by court order), can give away your **litigation strategy**, including settlement strategy, to the association's significant legal and financial detriment.
- A statement in an e-mail can be treated as an **admission of liability** and used by an adverse party to prove their case against the association (such as, "Yes, we owe that contractor \$10,000 more, but we are not going to pay it!").
- E-mails that are protected by the **attorney-client privilege** can lose their privileged status if disclosed to someone other than the HOA's attorney, manager, and other board members (for example, replying to the attorney's e-mailed advice but copying a homeowner by mistake). Even if the HOA tries to later "re-claim" the privilege, it may be incapable of determining the extent of further dissemination of the e-mail by third parties or calculating the resulting harm to the HOA.
- Disclosure of an association's confidential information by a board member can subject that director to a claim of individual liability for **breach of fiduciary duty**.
- Carelessly worded statements in e-mails that were initially thought to be private might, under certain circumstances, form the basis for a claim of **defamation** of third parties, and if originated by a director, could subject both the director and the association to a lawsuit and damage award.

CONCLUSION

How can board members and managers avoid the risks that may arise from the use of e-mails? Several solutions exist. If the e-mail or e-mail exchange may be viewed as a “meeting” (which includes **discussion** “on an item of business that is within the authority of the board), do not send it. Instead, use an alternative (e.g., call a special board meeting). Managers and board members should reduce to the absolute minimum the amount of e-mails sent to other board members, managers, and homeowners regarding HOA issues. When an e-mail is absolutely necessary, be extremely cautious about what is said and to whom it is sent. In every case, ask yourself how a judge or a jury will view your e-mail a year later. When in doubt, don’t send it. Pick up the phone or send a letter instead, OR call the association’s attorney for guidance.

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