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Issue 1

Recent Updates and Impacts on Association Law

2008



Board Meetings; Stats 2007 Ch. 250 (SB 528; Aanestad)

This bill amends Civil Code Section 1363.05 (the Common Interest Development Open Meeting Act) by (a) requiring notice posted or given to members of non-emergency and non-executive session board meetings to contain the agenda for the meeting, and, (b) subject to certain exceptions, prohibiting the Board of Directors from discussing or taking action on any item at a non-emergency board meeting unless that item was included in the notice/agenda that was posted or given to members. Further, before discussing any item, the board is required to openly identify the item to the association members in attendance (“Okay, boys and girls, now we’re going to discuss item II.B.3, toilet repair in the clubhouse men’s room”).

The exceptions to the “board cannot discuss or act on an item unless the item is on the agenda” rule are:

- (a) Directors, managing agents or other board agents or board staff members may
 - (i) briefly respond to statements or questions from homeowners
 - (ii) ask a question for clarification, make a brief announcement or make a brief report on his or her own activities
- (b) The board or individual directors may
 - (i) provide a reference to, or provide other resources for factual information to, the managing agent or other agents or staff
 - (ii) request the managing agent or other agents or staff to report back to the board at the subsequent meeting concerning any matter, or take action to direct the managing agent or other agents or staff to place a matter of business on a future agenda

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- (iii) direct the managing agent or other agents or staff to perform administrative tasks that are necessary to carry out “this subdivision” (it is unclear what “this subdivision” refers to; is it the entire Davis-Stirling Act? The Open Meeting Act provisions only? Something else?)
- (c) The board may take action on any item of business that is not on the agenda that was posted and/or distributed under any of the following conditions:
- (i) if a majority of the directors present at the board meeting determines that “an emergency situation” (*i.e.*, circumstances that could not have reasonably been foreseen by the board that require immediate attention or possible action by the board or that, of necessity, make it impractical to provide notice) exists
 - (ii) if two-thirds of the directors present (or, if less than two-thirds of all the association’s directors are present, by a unanimous vote of the directors present) determine that there is a need to take immediate action and that the need for action came to the board’s attention after the agenda was posted and/or distributed per Section 1363.05(f)
 - (iii) the item appeared on an agenda that was duly posted and/or distributed for a prior meeting of the board that occurred not more than 30 calendar days before the date that action is taken on the item, and at that prior meeting, action on the item was continued to the meeting at which the action is taken.

Comment:

Preparation of the board meeting agenda is now more important than ever because of the revision to California Civil Code Section 1363.05. Although well intended (*i.e.*, the impetus for the revision was to close a perceived loophole that allowed community association boards to take actions without the knowledge and consent of association members), the revised statute can be problematic in some respects. First, it is obviously easier to pre-schedule board meeting dates and times than it is to pre-schedule the agenda, as agenda items frequently present themselves only shortly before the scheduled meeting date. Associations will therefore have to move up the timing for agenda preparation rather than waiting until the last minute. Accordingly, any item that comes up after the agenda is prepared and distributed will have to be put off until the next board meeting so that the item can be properly placed on the agenda and posted or given to the members before being addressed (unless the item otherwise fits under one of the exceptions to the “board cannot discuss or act on an item unless the item is on the agenda” rule).

Another potential problem may arise if an association does not have common area in which to post the agenda. In such a case, an association can mail the agenda to each member. However, it could get quite onerous and expensive if before each board meeting a mailing had to be arranged (especially for boards that meet on a monthly basis). Other options may include posting the agenda by the mailboxes (if there are any clusters), installing a kiosk somewhere near a street if there are private streets, or in a parking area if there is any, on a street lamp, or anywhere in the Common Area where space is available. The agenda could additionally be posted on the association’s website; however, this should not be the primary posting. Because of the ambiguity of the statute, until judicially tested, an association runs the risk of violating the statute by merely posting the agenda on its website.

Finally, associations must bear in mind that California Civil Code Section 1363.09 entitles a member to bring a civil action for declaratory or equitable relief for an association's violation of California Civil Code Section 1363.05 for a period of one (1) year from the date the cause of action accrues. If a member prevails in such an action, the member is entitled to receive from the association reasonable attorney's fees and court costs, plus a civil penalty of up to \$500.00. If the association is the prevailing party, then the association is *not* entitled to recover any costs unless the court finds the action to be frivolous, unreasonable or without foundation.

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