



## **Major Changes in the Open Meeting Act, and in Board Procedure**

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The Open Meeting Act (Civil §1363.05) is an Act within an Act; found in the middle of the Davis-Stirling Act. Since being passed in 1995, it has been expanded several times, but the changes now in effect from 2011's SB 563 are by far the most sweeping in their impact upon California common interest developments.

### **Elimination of action without a meeting**

The core of SB 563 was its ban of board decisions by unanimous written consent. This method of decision-making was previously permitted by the Corporations Code, but no longer.

### **Agenda notice of executive session meetings**

Although the Act requires agendas and notice to be posted four days before an open board meeting, it was not previously clear regarding whether notice was for a meeting solely to be in executive session. Now, two days minimum notice is required for meetings which are solely in closed session.

### **No decisions by e-mail (except emergencies)**

The law now specifically bans boards from making decisions by e-mail, with the exception of emergencies. This is a growing problem in associations, as almost everyone uses e-mail. E-mail can be a useful way of exchanging information, but also can be used to circumvent the healthy deliberation process of open board meetings. Pre-deciding issues in e-mail not only now violates the law, but also can harm the board's credibility with the members.

### **Emergency decisions by e-mail**

While unanimous written consent is now prohibited on ordinary board decisions, the board can make an emergency decision using e-mail if the board unanimously agrees on the action. The e-mails must be made part of the minutes.

Note: The term "emergency" is already defined in the Open Meeting Act: ". . . if there are circumstances that could not have been reasonably foreseen which require immediate attention and possible action. . ."

### **Director telephonic attendance**

The Open Meeting Act now declares a telephone conference between a majority of the directors to be a "board meeting." A director may participate by telephone, so long as there is a location where members can listen. A mobile phone on "speaker" mode is not recommended, because all in the room must be able to hear and be heard. The Corporations Code already previously permitted telephonic participation, but the procedure is now contained in the Open Meeting Act.

### **New definition of "meeting"**

By far the most significant and problematic change is the new, very broad definition of what considered a meeting. Previously, a "meeting" meant a gathering of a majority of directors to discuss an item "scheduled to be heard." Now, a meeting is "a 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.”

### **The impact**

This means that three or more of a five-member board cannot simultaneously tour the property, serve on the same committee, or discuss anything about the association, except in a formal meeting of the board.

Bluntly, many boards without the benefit of legal counsel, management or CAI education will frequently violate this new law, unaware they are subject to a state-imposed gag order outside of meetings. While all would agree that it is important for directors to deliberate in board meetings and not in the hallway, this law has gone too far. However, it is the law, and boards must make substantial changes in how directors conduct themselves.

### **Compliance tips**

No committee should include a majority of the directors. Educate directors on proper corporate process. Avoid activities which otherwise might involve a majority of the directors outside meetings. Delegate reasonably limited and specified authority to a committee, director, or manager.

Finally, if the board has discovered a procedural violation of this law, ratify the decision at the next open board meeting, promptly disclosing the circumstances in which the violation occurred.