

GO AHEAD AND USE EMAIL: IT'S AN EMERGENCY...

IMPLEMENTING CID OPEN MEETING ACT LIMITATIONS IN 2012 AND BEYOND

In our last article “*Step Away From That Computer*” we discussed many changes to the Common Interest Development Open Meeting Act (Civil Code §4900 and following) requiring new ways of conducting association business. Perhaps the biggest impact concerns the use of email: “*the board shall not conduct a meeting via a series of electronic transmissions, including...electronic mail.*”

There is an exception:

“Electronic transmissions may be used as a method of conducting an emergency board meeting if all directors...consent in writing to that action, and if the written consent or consents are filed with the minutes of the board meeting.”

This article discusses when and how email may be used to deal with emergencies and other tools that can be used to address emergencies without reliance on the emergency exception to the ban on email for decision making.

WHAT IS AN “EMERGENCY” UNDER THE OPEN MEETING ACT?

The definition under the Open Meeting Act (“Act”) of an “emergency” warranting special decision making procedures has not changed. It exists when there are (1) circumstances that could not have been reasonably foreseen which (2) require immediate attention and (3) possible action by the board and which (4) of necessity make it impractical to give

either two days notice to the membership (for executive session meetings) or four days notice (for regular or special board meetings).

These four requirements emphasize that an “emergency” is an event or circumstance that really wasn’t planned for and must be discussed and possibly acted on sooner than two or four days (the time periods required for posting notices of board meetings on common area).

Not all emergencies will involve money, health and safety or repairs, but many will. Here are some examples of situations that in some cases could be deemed emergencies requiring fast board discussion and possible action:

Contractor found dry rot that poses threat to safe use of deck

- Decision re removal of newly found asbestos
- Final strategic decisions before impending small claims court hearing
- Lawsuit threat requiring immediate response
- Previously unknown opportunity to attend City Council meeting to protect association
- Addressing false publicly distributed emails relating to an important pending special assessment vote

As you can see, the list of topics that constitute an emergency under the Civil Code is broad. It is not, however, all encompassing. A board relying on the

emergency exception to the general ban on email decision-making should be confident enough to promptly disclose the decision made and stand behind the need to do it “secretly” (that is, without notice). The statute itself mandates this in the two ways discussed below.

UNANIMITY AND POST-DECISION NOTICE IN MINUTES

One required safeguard against abuse of the emergency exception to the email ban is that, in addition to the four requirements listed above, the emergency action to be taken must be authorized by all directors. There is some debate as to whether all directors must consent to the initial email stating the existence of the emergency and the need for action but generally the answer to this question is irrelevant: if all directors fail to respond to the email or refuse to agree to the proposed action, it cannot be authorized electronically whether or not the situation would otherwise be deemed an emergency.

The last requirement for emergency meetings by email is that copies of the email (or emails) reflecting the action taken and its unanimous support must “*be filed with the minutes of the board*”. In reality, this is not a new requirement and compliance is easy: a reference to the emergency action should be referenced in the minutes of the next board meeting and copies of the email(s) can be attached to those minutes. One purpose of this requirement is to assure that members are given notice of the action taken and perhaps this is intended to minimize abuse of the general rule against use of email for board decisions.

IF AN EMERGENCY, THAN WHAT?

An emergency can be addressed in several ways, depending on practical and political considerations and the extent to which board authority has been delegated. As discussed above, these include conducting a “meeting by email” which can work well if all directors actively use email and consent on

an issue is likely. Alternatively, if these conditions cannot be met, the President or two directors can call a meeting and if a quorum is met, emergency action can be authorized by a majority attending (in person or by telephone) even if unanimous agreement cannot be reached. The method of timing of such notice is not specified in the Civil Code; the Corporations Code provides for 48-hour personal telephonic notice to directors for “special meetings” but does not deal with emergencies. No law requires providing members with prior notice of an emergency meeting.

In reality, many associations will probably choose to deal with emergencies without any board action, whether by emails, telephonic or “in person” meetings. Amendments to the Act specifically reference the board’s authority to delegate the right to make decisions concerning association operations (which would include spending authority) to one or more officers, directors or an executive committee (in all three cases involving less than a majority of directors or the manager. In the six scenarios noted above, the right to address emergencies without board action could have been handled by less than the full board, without email or a noticed meeting, assuming a proper prior delegation had been made.

BE SMART

The days of using email to conduct normal business by the full board are over. Like so many other changes to California homeowner association law that seem so dramatic and negative, recent amendments to the Act may actually promote better decision-making, as alluded to in our previous article. As it stands, the use of email for emergencies should adhere to the rules discussed above. If a true emergency exists, email decision-making can be an excellent tool used to protect or promote an association’s interest.

¹ see: www.berding-weil.net/articles/step-away-from-that-computer.php