

A Check on Board Power:

The Common Interest Development Open Meeting Act

Email Article Print Article Download PDF by Steven S. Weil, Esq.

It would be impractical to require that every act and decision for an association be approved by its membership. On the other hand, it would be equally unwise to allow a board of directors to have sole control over the operation of an association. Where should the lines of power be drawn?

The Davis-Stirling Common Interest Development Act (DSA) and the Corporations Code contain many laws that reflect the tension between membership rights and board prerogative. One of the most important are the laws regulating the conduct of board meetings. These are contained in Civil Code section 1363.05. They are so important that this statute is referred to as the "Common Interest Development Open Meeting Act" the only statute within the DSA called an "Act." This article highlights the check on board power contained in the Act as well as rights and powers which are reserved to the board. It's mostly written as a "Q&A" reflecting the kind of questions about board meetings posed to us by our clients and their managers. Also, we've tried to handle these issues on an informal, practical and general basis.

Quick Background

Most associations are non-profit corporations and thus subject to the Corporations Code. It requires the board to keep and permit the inspection of board meeting minutes but otherwise gives members virtually no rights concerning board meetings. Member rights under the DSA were originally minimal but over the years expanded to address posting of notices (and special notices for meetings to consider reserve fund borrowing); access to draft minutes; requiring executive session for certain assessment collection issues; and, most recently by generally limiting board discussions to those contained in a notice (an agenda) published four days prior to the meeting.

Current Law – What You Need to Know about Limits on Director Discretion

Q: The directors want to meet for a "study session" to go over a draft budget; is this a board meeting? What is the definition of a meeting and why is it important?

A: A board meeting "happens" when a majority of the board meets to discuss or vote on association business that is the subject of ongoing board meetings or a planned agenda. An informal work study session attended by a majority is probably a "meeting." The significance of labeling a gathering a meeting is that it requires the posting on common area of a notice and an agenda four days prior and members are entitled to attend. The idea is to compel boards to meet in the open and so publicly defend or speak for their positions and votes.

Q: Do members have the right to attend all board meetings?

A: Yes except for emergency board meetings or those held in executive session. In general, these should be infrequent so the general rule is that members can attend all board meetings and thus "monitor" the doings of their elected representatives.

Q: How do the members know if the board has had an emergency or executive session meeting?

A: Minutes of an emergency meeting must be taken and available to members, just like an “open” meeting of the board. Minutes of executive session, if kept, are not subject to membership examination but the subject matter of an executive session meeting must be included in “open session” minutes.

Q: What subjects are proper for executive session?

A: The Act says that executive session meetings are to consider litigation, contract formation, member discipline, payment plans and foreclosures. Executive session is also proper to consider claims strategies or other confidential issues, especially when legal advice is sought or considered.

Q: How do members know what the board discussed or decided in executive session?

A: This is one area where the law permits the board wide latitude to be “discreet.” There is no specific legal requirement for what information a board publishes about its executive session meetings. Here are some examples: “The directors met with an owner to discuss an alleged violation of the CC&Rs” or “The directors met with counsel to consider hiring experts to investigate roof concerns” or “The board met to discuss the contractor's last proposal to make repairs” or “counsel's analysis of the association's risk of getting sued for opposing the construction of a nearby strip mall.”

Practice Point

Executive session meetings permit the board to weigh risks, benefits, costs and the consequences of one course of action or another without disclosing its strategies or concerns. This is essential to help the board discharge its “fiduciary duty.” However, sooner or later, a smart board will want to “go public” to explain and defend decisions made.

Q: Why are published agendas so important? Can't the board just amend the agenda at the meeting to talk about whatever it wants or whatever comes up?

A: No! The main point of the 2008 amendments to the Act was to limit board discussion only to those items contained in an agenda posted on common area at least four days prior to the meeting. This is another check on the arbitrary exercise of power because it requires directors to frame their meeting in advance and to telegraph to members exactly what issues are planned for discussion and action and prevents the board from acting on any other issue, subject to some exceptions.

Q: Can a board be “tricky” and try to say something is an exception to the agenda rule and talk or vote on things not included in the agenda?

A: The exceptions are pretty strict as to decision making but less so in relation to “comments.” The board can ask fellow directors, committee members or the manager to make a report or otherwise respond to questions “from the floor.” And, if there are emergencies or late breaking situations requiring immediate action, in some situations, these can be acted on as well, even if not posted on the agenda. Boards should not use the exceptions to hide behind a failure to properly agendize a meeting.

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Practice Point

In light of the “can't discuss it unless it was on the Agenda” rule, decisions about what will be included in the agenda can be very important (and sometimes very political). Should the manager set the agenda? The board? The President? The Act doesn't speak to this and it isn't usually addressed in an association's governing documents. In general we think the board should set the agenda for the “next meeting” but the President should be given the discretion to add topics based on situations that arise between the last board meeting and the posting of the agenda for the next board meeting. Each agenda for a meeting should include (perhaps at the end) “adoption of agenda for next meeting.”

Q: How specific must the agenda be?

A: The Act doesn't say; the agenda should be specific enough to give members meaningful notice as to what might be discussed at a meeting. For example, a reference to “Landscaping Issues” may not really convey that the board will debate a complete renovation of common area trees and irrigation systems; a reference to “architectural matters” may not be adequate to communicate consideration of an owner's request to add a second story addition that would negatively impact neighbor privacy. On the other hand, agendas which are too specific may unnecessarily limit the board's ability to consider issues likely to come up.

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In our experience, very few boards abused their power before the Act and few do so now. Still, the Common Interest Development Open Meeting Act is a good law that helps directors and members focus on the key issues affecting the association. Proposing posting of and respect for the notice and agenda requirements facilitates prudent decision making and confidence in the board's integrity. The law strikes a reasonable balance between the need for confidentiality and openness that is the hallmark of a well run organization.