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HOA Brief Newsletter

Return of the Reply-All: Court Decides the Open Meeting Act Does Not Prohibit Board E-mail Discussions Without Action

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The California Fourth District Court of Appeal, in LNSU #1, LLC, et al. v. Alta Del Mar Coastal Collection Community Association, 2023 WL 5496747 (August 25, 2023), recently examined whether board members can engage in e-mail discussions about association business outside of regular noticed meetings.

The case involved a small common interest development of 10 homes located in San Diego County. Two homeowners sued the association claiming the board engaged in multiple violations of the Open Meeting Act ("OMA") (Civil Code §§ 4090 et seq.), including that directors had exchanged e-mails discussing landscaping plans and other association business without giving members notice or an opportunity to participate. The trial court found in favor of the association and determined that the e-mail discussions between board members did not violate the OMA.

In affirming the trial court's ruling, the Appellate Court rejected the homeowners' argument that board members' e-mail exchanges constituted a board meeting under Civil Code § 4090(a) in violation of the OMA. That section defines a "board meeting" as "[a] congregation, at the same time and place, of a sufficient number of directors to establish a quorum of the board, to hear, discuss, or deliberate upon any item of business that is within the authority of the board."

Historically, board members have been cautioned to avoid discussing association issues through e-mails, as that could be deemed a "virtual assembly" of the board. However, the Court rejected that argument and concluded that by specifying that the congregation be "at the same time and place," the Legislature intended this provision to only reflect "an in-person gathering of a quorum of the directors." The Court reasoned that e-mails are often sent "hours or days apart and from different homes and offices." The Court concluded that e-mail exchanges that occur before a board meeting in which no action is taken on the items discussed, therefore do not fall within the definition of a "board meeting" under Section 4090(a).

The Court also held that the directors' e-mail exchanges did not constitute a "board meeting" within the second definition found in Civil Code § 4090(b), referring to a "teleconference," because e-mails do not allow the participating directors "to hear one another, and the discussion did not take place at the same time and place...."

In holding that discussions via e-mail did not violate the OMA, the Court relied on a significant distinction between the language in the Civil Code and near-similar provisions found in the Brown Act (Gov. Code § 54950), which governs meetings by state and local legislative bodies. The Court noted that in adopting the Brown Act, the Legislature prohibited any form of discussions outside of a meeting by expressly including language that "[a] majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body." In contrast, the Legislature did not include such language in the Civil Code, but instead only prohibited boards from "tak[ing] action on any item of business outside of a board meeting." (Civ. Code § 4910(a).) The Court reasoned that the Legislature knew how to draft the necessary language if it intended to prohibit e-mail or other discussions by a majority of board members outside of a noticed meeting. Because the Legislature did not include similar language in the Civil Code, it must not have intended to prohibit board member discussions via email in the OMA.

Thus, the Court concluded that while the OMA prohibits the board from acting on items of association business outside a board meeting, it does not prohibit the board from discussing items via email outside a meeting.

Despite the clear holding by the Appellate Court, boards should continue to exercise caution before engaging in this type of approach. It remains possible that this decision may yet be altered, withdrawn from publication, or further appealed.

The decision is not final until 30 days after filing, or September 24, 2023, and a petition for review to the California Supreme Court may still be submitted until October 4, 2023. Additionally, this is the first time that any appellate court has interpreted the meaning of "board meetings" found in this portion of the Civil Code. Other appellate districts are not required to follow this decision, which may potentially create a conflict that will need to be resolved by the California Supreme Court.

Boards are urged to consult their legal counsel regarding the interpretation and possible

impact of this case, as well as to keep in mind that there are also practical implications that these types of e-mail discussions might have on how the membership perceives the board, issues of transparency, and the way the association is governed. In addition, a director should consider that all directors should have the same information, so all directors and managers should be included on email discussions between board members.

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