Richardson•Harman•Ober PC

234 E. Colorado Blvd., 8th Floor
Pasadena, California 91101
Telephone: 626.449.5577
Facsimile: 626.449.5572
Toll Free: 877.446.2529

Author E-mail: krichardson@RHOPC.com

SOUTH COAST HOMEOWNERS ASSOCIATION
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Board Meeting Survival 101

by Kelly G. Richardson, Esq.

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Richardson•Harman•Ober PC Community Association Living

The Most Ignored Law In California

By: Kelly G. Richardson, Esq.

There are a number of laws which it seems hardly anyone obeys or takes seriously. For example, the "California rolling stop" at stop signs, or the law prohibiting the removal of mattress tags. In the community association arena, there is a law which is almost universally ignored at one time or another by many homeowner associations. The law is the Open Meeting Act, found at Civil Code Section 1363.05. That law confirms members' rights:

1. To attend meetings;

2. To have the opportunity to speak to the board at some time during the meeting;

3. To receive proper advance notice of meetings;

4. To receive minutes soon after meetings; and

5. To only be excluded from closed executive session meetings under certain defined circumstances.

It is this last requirement of the Open Meeting Act which seems to be the most widely abused, as boards all too often conduct important business in closed sessions.

WHY EXECUTIVE SESSION?

Sometimes boards would prefer to be in closed session to avoid the comments, criticism or even disruption caused by some members. A closed session insulates them from having to "take any guff". Closed sessions also are often argued to be much more efficient. Because a much smaller number of people attend the meeting, business can be conducted much more informally, and directors feel more free to speak openly without fear of repercussions (whether deserved or not). Some boards have closed sessions but they call them "working meetings."

NEGATIVE RESULTS

Illegal closed door meetings reap in a number of negative results. They will produce mistrust and further division. Closed door meetings deprive members of valuable information pertaining to their homes, and deprive the Board of potentially valuable input, information and support.

How can members support what they don't know?

FOUR NARROW SUBJECTS

Executive sessions may only address four narrow subjects:

- Litigation
- Personnel issues
- Formation of contracts (when the member requests it)
- Member discipline or member payment plans on dues arrearages

That is it. Only those four subjects are proper executive session topics. Everything else must be in open session.

Litigation. By "litigation" it would seem clear that this would include threatened or potential litigation. The preservation of the attorney-client privilege in discussions potentially involving claims against the association, or to be brought by the association, is very important, and protected by the Open Meeting Act. However, if the Board is asking for clarification of maintenance responsibilities, in the absence of a lawsuit threat that might be legal advice that should be properly shared with the members in open session. Rule of thumb: If it pertains to a dispute or to only one member, it is potential litigation and should be kept in closed session.

Personnel Issues. By "personnel issues" the statute protects the privacy of association employees who have their own privacy rights. However, most associations do not have employees of their own, but hire vendors such as managers, gardeners and plumbers to do work - and they are not employees.

Formation of Contracts. Does this mean the Board can hire a new manager or landscaper in secret? No. While many argue that this means that even the interview process or the submission of bids be in executive session, this writer disagrees. The healthiest approach for the association is to conduct the entire vendor search in open session, until the first choice bidder is selected. Then the board adjourns to closed session to discuss what contractual terms will be offered, and what will be the association's final negotiating position on the subject.

Member Discipline and Dues Arrearages. Members have a right to some privacy. There is little to be gained in embarrassing people about their delinquencies or their failures to follow association rules. Although some members may not request closed session, the member should be invited to do so. If they do not request it, the matter may be discussed in open session.

CONSEQUENCES OF IMPROPER CLOSED MEETINGS

The Open Meeting Act does not have any explicit penalty for associations that violate the law. There is not yet any reported appellate court opinion which discusses the consequences of violation. However, the consequences could be extremely severe. It could be that a vendor voted upon in an improper executive session was not an action of the corporation, but only a personal liability of the board members, or that a court could set aside association decisions and actions made during illegal closed sessions. We don't yet know the answer to this; do you want your association to be the test case?

THERE ARE ALTERNATIVES.

There are alternatives to help make your open board meetings run more smoothly. First, have some basic rules of conduct. Unruly, disruptive persons (sometimes those are directors, not the audience) should upon majority board vote be asked to leave if they violate the meeting rules or interfere with the progress of the meeting.

Second, have an organized agenda, and keep discussions on topic. Third, require your chairperson to take personal responsibility to move the meeting in an orderly manner through that agenda. Don't be afraid to allow questions from the floor, within reason, and don't be afraid to proceed to a vote when things become repetitive. Fourth, don't equate dissent with disloyalty, and don't take questions as insults. Finally, remember that you as a director are working for your neighbors, and not vice versa. They have a right to know how you are exercising the power which they have entrusted to you. Obey the Open Meeting Act. As for the mattress tags, California rolling stops, and music file sharing on the internet, I'll leave those to your conscience.

Kelly G. Richardson, Esq. is a licensed broker, CAR member, and Managing Partner of Richardson Harman Ober PC, a firm serving Associations of Realtors® and real estate professionals throughout Southern California.

YOUR BOARD MEETINGS CAN BE SHORTER

By: Kelly G. Richardson, Esq.

Most homeowner association board meetings are too long. All too often boards begin meetings at six in the evening, and are unable to adjourn until after ten.

Routinely long board meetings need to be avoided like the plague. Directors become fatigued, irritable, and prone to bad decisions. Members become discouraged from attending board meetings, and are less likely to consider serving on the board in the future. Conflict becomes more likely as the participants tire. Frustration leads to discouragement, making the experience of serving on the board much more negative than it has to be.

It has often been said that if you do not have a target, you will achieve just what you shoot at . . . nothing. So, how about this for a goal: Board meetings, except in extraordinary situations, should be no longer than 1-1/2 to 2 hours long. Executive sessions should be as short as possible, and rarely more than one hour.

Here are some tips that may help shorten your meetings:

1. Meet more frequently. If your meetings are routinely too long, meet more frequently. Monthly should normally be sufficient for most associations.

2. The agenda. Advance planning is critical. The law now requires that you must plan exactly what will be addressed in that meeting. That plan becomes the agenda, which the law now requires must be announced four days prior to the meeting.

3. Overly ambitious agendas. Some agendas are simply too full. Are all of the items on the agenda critical to be discussed that day, or can some items be delayed for a later meeting? Board chairs should be realistic in setting agendas.

4. Preparation for the meeting. Good professional managers provide "board packets," containing the essential information for the meeting, such as draft minutes, financial reports and summaries, and copies of documents on matters to be considered that meeting. For self-managed associations, preparing a board packet takes planning, but the preparation will cause a more efficient meeting.

5. Directors should be prepared. Prepared directors, having read their board packets, help make a meeting shorter.

6. Open forum abuse. Open forum must be a part of every board meeting, but sometimes members can abuse it. Have a reasonable time limit. Directors should not interrupt or argue with the speaker, which is inappropriate and causes conflict, but should listen and take notes.

7. Filibustering. Some directors like to talk a long time on every issue. A chair needs to exercise a firm hand in moving the agenda forward. **Note:** What is extended to you may be reasonable to others - be judicious.

8. Consent calendar. Some boards work with a consent calendar, where items are non-controversial and yet still need specific approval.

9. Overemphasis on unanimity. A board hopefully includes people of different backgrounds and viewpoints, healthy boards have disagreements. Acknowledging that dissent is not disloyalty will free the board to move on once it is clear that complete consensus is not going to occur. Some decisions are so important that unanimity is required, but most are not. When the debate becomes repetitive, call for the question and vote.

10. Meeting rules. Adopt a set of meeting rules, which state the standard order of business and reasonable conduct standards.

11. Save it for another day. When the meeting is running long, are there topics that can be tabled until a later meeting? Consider setting a special meeting to conclude the agenda.

12. No hiding in executive session. Executive session is reserved for only personnel, litigation, member discipline or arrearages, and contract information matters. Shortening the open meeting by moving other decisions into executive session violates the law and builds mistrust of the board.

13. Committees. Busy associations benefit greatly from committees. Building and grounds, architectural, finance, personnel, communications and social committees help spread out the work, and involve more members in the association.

Give it a shot. You might get home earlier.

Kelly G. Richardson is Managing Partner of Richardson Harman Ober PC, a law firm known for community association advice. Direct questions to KRichardson@RHOpc.com.

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The Very Valuable Open Forum

By: Kelly G. Richardson

The CID "Open Meeting Act" (Civil Code §1363.05(h)), requires board meetings have a time set aside for members to speak to the board. If properly used, open forum can be a very valuable time of your meetings. Many associations avoid open forum, while others have unrestricted open forum . . . and both extremes are unhealthy for your community.

This law requires that, except for closed sessions, members have an opportunity to observe board deliberation, but does it not give members the right to participate. Open forum is an important element of a healthy association. If members have a fair opportunity to speak in open forum, and perceive they are being heard, members will have a more positive view of their association, and directors may be better connected with the community.

Consider these guidelines:

Directors:

1. Have reasonable time limits, to protect participation by all. Most associations allow 2 or 3 minutes per speaker. Have a timekeeper, and consider giving members a "30 second warning" to help them.

2. Do not interrupt, argue with, or respond to the speakers during their time.

3. Listen to the speakers and take notes. Show them you are attentive to their concerns. Remember, you are serving your neighbors, and you might just learn something new.

4. Do not record open forum comments in the meeting minutes – comments are not action.

5. Some owners may disagree or even criticize the board. Deal with it -- you are in a position of service, and they might sometimes be right!

6. After open forum concludes, the chair should inquire if any items learned in open forum need to be referred to a committee or management. If any answers are available immediately to a question, then that is the time to provide answers.

7. Be consistent. The Chair should not allow comments from the floor once open forum is closed, and bar directors from interrupting open forum speakers.

8. Consider reopening open forum on issue perceived to be of major importance to the community, or where the board desires member input.

9. Do not start discussing open forum topics. In open forum, members can say what they want, but unless the item is an emergency, it can't be discussed by the board until it is placed on an agenda.

10. Adopt written board meeting rules, informing attendees about how meetings are run, and setting decorum standards.

To association members:

1. Open forum is for members, not tenants or other non-owners. If you need to get information or opinion to the board, you should personally attend the meeting.

2. Be organized. Two or three minutes is short. To get your point across, make sure you focus on your point and not everything you can think of.

3. Address issues the board can handle, and don't use your time to talk about global warming or high taxes.

4. Don't play Phil Donahue, and bring a list of questions and demand that you be answered on the spot. Open forum is not a debating time, or a time to cross-examine your neighbors serving as directors.

5. The Golden Rule applies to open forum also . . . do you want directors yelling, insulting, or otherwise abusing you? Then don't do it yourself.

6. Outside of open forum, just listen, don't interject. If you really want to deliberate board issues, then run for the board!

Kelly G. Richardson is Managing Partner of Richardson Harman Ober PC, a California law firm known for real estate and Community association advice. Direct questions to KRichardson@RHOpc.com. For past columns, visit www.HOAHomefront.com.

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

By: Kelly G. Richardson

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.

Kelly G. Richardson is Managing Partner of Richardson Harman Ober PC, a California law firm known for real estate and Community association advice. Direct questions to KRichardson@RHOpc.com. For past columns, visit www.HOAHomefront.com.

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Your Day Job is Different Than Your "Night Job"

By: Kelly G. Richardson

Serving as a volunteer director is hard enough, but it often is made more difficult by directors themselves. The problem is not a lack of good will, good thinking or hard work, but a misunderstanding about the basic nature of volunteer board service.

In one's career, whether in business, government service or elsewhere, one learns to deal with chain of command. In one's job, one learns to exercise authority, and to respond to authority above. In the normal corporate setting, the officer has authority to unilaterally make decisions. The president particularly is not only empowered, but expected, to make important decisions about almost all major management issues. The competent executive rarely if ever needs to meet with the corporate board of directors to make decisions.

While a business corporate president has broad and sometimes comprehensive authority to run the business, the HOA president has very little authority.

Many competent, diligent and honorable people find themselves continually frustrated with volunteer service on their common interest development (aka "HOA") board, and often are surprised to find themselves in conflict with other homeowners regarding their work for the association. This is often not because of bad intent or mismanagement, but because the volunteer officer does not fully appreciate that the non-profit mutual benefit corporation is a very different organization from that person's "day job" employer or business.

While a business corporate president has broad and sometimes comprehensive authority to run the business, the HOA president has very little authority. Where the business president controls the corporation and is ultimately held to answer for its success or failure, the HOA president controls very little and (if in the proper role) normally cannot be held personally responsible for anything. The business president runs things, while the HOA president is a coalition builder working to obtain consensus of the board.

The HOA president normally serves at the pleasure of the board. Just as any officer position, the president can be replaced any time the majority of the board determines some other director would better serve the corporation. The HOA president has only one vote, and has to obtain the votes of other directors before a decision is made. In fact, the typical president mainly has the power to set the agendas, call meetings, and chair them. Everything else is normally a decision made by at least a majority of the directors.

There is no doubt that having to wait for your board colleagues is less efficient than the management of a business. However, in the business the officer is paid and in return is also held accountable for the officer's decisions and actions. In the HOA, the officer is not compensated, and if following proper board process (as opposed to individual actions) is not held personally accountable (i.e., liable) for board decisions.

The association president who "takes things into their own hands" may find that such decisions are much quicker and more efficient. However, that president may be exposed to avoidable liability, since the non-profit corporation acts through its board of directors, not one officer.

If a board in open session grants authority to an officer on a subject, that should be documented in the minutes. When circumstances do not permit the board to convene before the officer makes a decision, that officer should make sure the decision is ratified in a board meeting as soon as possible, to document the decision was a corporate action. Understand how your "night job" is different, and it might just become easier.

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