Email Do's and Don'ts for Community Associations

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Amendments to the Davis-Stirling Common Interest Development Open Meeting Act (the "Act") which restrict the use of emails by board members have resulted in many questions, some of which remain unanswered. While the Act itself does not address some of the more common questions about use of email, the Brown Act (which regulates the meetings of *public* agencies, and upon which the Act is modeled) has the virtue of quite a bit of case and law commentary. It appears to answer many of the questions regarding Davis-Stirling, so even though the Brown Act does not, itself, apply to community association board meetings, the following discussion, based on the Brown Act, will be helpful.

Question: Can a director email the rest of the board purely to discuss a possible action the board might take in the future? It's not on the agenda yet, and all that would happen is a discussion of the issue, not any action.

Answer: Probably not. A lot depends on the extent to which the current prohibitions on email meetings are intended to mirror what's already in the Brown Act. The Davis-Stirling Act now defines a "meeting" as a congregation of the majority of the directors "to hear, discuss or deliberate" on some action that is within the board's purview. The language in the Brown Act defining "meeting" (Gov. Code § 54952.2) is very similar.

By analogy to the Brown Act, such communication would be prohibited, even if there isn't a vote on the issue. As one court put it (in connection with the Brown Act), "It is clearly the public policy of this state that the proceedings of public agencies, and the conduct of the public's business, shall take place at open meetings, and that the deliberative process by which decisions related to the public's business are made shall be conducted in full view of the public…[T]he legislature has considerably broadened the [Brown Act] by passing amendments 'intended to bring the informal deliberative and fact-finding meetings within [the Brown Act's] scope…'" *Wolfe v. City of Fremont* (2006) 144 CA4th 533, 541-542.

It's *dangerous* too: those email exchanges are not privileged. In case of litigation, those are going to be the first thing opposing counsel will demand in discovery, so count on everything you write (with the possible exception of emails directed to the association's attorney) being shown in court. Beware!

Question: Can a director email the community association manager with directions? What if that email goes to all the other directors too?

Answer: Generally, a director can email the manager with either directions or questions. And that email can be copied to the other directors. What is prohibited is using the manager as an intermediary, to obtain the concurrence of the other directors on a possible issue of association business, outside of a meeting. Thus, in *Stockton Newspapers v. Redevelopment Agency* (1985) 171 CA3d 95 (another Brown Act case), the court condemned the use of an intermediary (in this case, the attorney for the agency) to take a "poll…for the purpose of obtaining a collective commitment or promise" from the members on an issue to go before the board. Accordingly, if the direction given by the initial email is 'go ask the others how they would vote on this issue,' the email to the manager would violate the Davis-Stirling Act. But if it's simply, 'put this item on the agenda' or 'here's how I want you to handle that situation,' the email does NOT violate the Act.

Question: Can a director email one or two, but less than all, the directors about anything that remotely concerns the association?

Answer: It depends on what constitutes a majority of the board. If the board only has three members, such an email would violate the Act. If there are five directors, emailing one other director would be appropriate, but emailing two others would constitute a congregation of the majority of the board. If there are seven directors, then one director could safely email two others. Note, however, that if such emails are part of a serial attempt to obtain the concurrence of all other board members (discussed below), the numbers don't matter: such a communication is not allowed.

Question: Can one director individually email each of the other directors what they think about an issue the director proposes to bring up?

Answer: As above, that would be permissible UNLESS the emails were part of a serial attempt to obtain a concurrence of the board on an issue of association business. Part of the problem with drawing bright lines of distinction is that the permissibility of such communications depends on the subjective intent of the parties to the communication. A director might not start out with that goal in mind, but over time as responses come in, that director might shift to the "polling" mentality condemned in the *Stockton Newspapers* case discussed above. To avoid this, refrain at all times from forwarding "threads" about a subject, which contain other directors' observations and thoughts.

Question: Can one director individually email each of the other directors to discuss what a committee (say, the budget committee) has said during its deliberations?

Answer: Yes, provided the communication is not a direct or indirect action leading to a concurrence of the other directors as to the subject matter of the communication.

Question: Can a director instruct a manager by email to contact each of the other directors to get their input on a certain issue?

Answer: No. As noted above, the use of an agent or intermediary to take a poll or obtain a consensus on anything pertaining to the association circumvents the Act.

Question: That's dumb! By this logic, the board can't even take a poll on what's a good meeting date, or where to hold the annual meeting. Can this really be the law?

Answer: Dumb doesn't even begin to cover it. Bottom line is that what's ***prohibited*** is the use of emails, between a majority of the directors (serially or all at once) "to develop a collective concurrence as to action to be taken on an item, which includes any exchange of facts, or substantive discussions which advance or clarify a member's understanding of an issue, or facilitate an agreement or compromise amongst members, or advance the ultimate resolution of an issue." Cal. Department of Justice, The Brown Act, Open Meetings for Local Legislative Bodies (2003), page 12. On the good side, the same document states that the Attorney General "does not think the prohibition against serial meetings would prevent an executive officer from planning upcoming meetings by discussing times, dates, and placement of matters on the agenda. It also appears that an executive officer may receive spontaneous input from any of the board members with respect to these or other matters so long as a quorum is not involved." *Ibid*.

Question: So exactly what can a director legally do in terms of emails to other directors?

Answer So far, as is clear today, and by analogy to the Brown Act:

1. The directors can meet/communicate via email when there is an emergency, and the individual directors have consented, in writing (including email), to such an email meeting. The consents must be filed with the minutes. (Civ. Code § 4910(b)(2).)

2. An individual director may communicate (back and forth) with another director or directors, even about association business, PROVIDED the total number of directors involved does not exceed a majority of the board, and FURTHER PROVIDED that the communication isn't part of a serial attempt to obtain board concurrence on an issue, outside of a meeting. 84 Ops. Cal. Atty. Gen. 39 (2001)

   A "serial meeting" is "a series of communications, each of which involves less than a quorum of the legislative body, but which taken as a whole involves a majority of the board's members." As one commentator put it, "[o]nce serial communications are found to exist, it must be determined whether the communications were used to develop a concurrence as to action to be taken. If the serial communications were not used to develop a concurrence as to action to be taken, the serial communications do not constitute a meeting and the Act is not applicable…" Note, however, the Attorney General goes on to say, "conversations which advance or clarify a member's understanding of an issue, or facilitate an agreement or compromise among members, or advance the ultimate resolution of an issue, are all examples of communications which contribute to the development of a concurrence as to action to be taken by the legislative body. Accordingly, with respect to items that have been placed on an agenda or that are

likely to be placed upon an agenda, members…should avoid serial communications of a substantive nature concerning such items."

Note that the *Wolfe* case further provides that the Act can be violated by improper communications which lead to a consensus, whether intentional or not. When in doubt, don't.

3. A director can communicate with the manager to give instructions, and can receive from the manager information pertaining to association business. Such information might include committee reports, legal opinions, copies of correspondence, proposed minutes--even a meeting between the manager and director wherein the manager lobbies the individual director--but generally such one-on-one communications are permissible unless and until they turn into an attempt to find out what other directors think on the issue in question. *Wolfe v. City of Fremont*, *supra,* at 546-547.

4. A director can receive, and respond to, emails from non-director homeowners (though the wise director will not respond unilaterally, but after permissible consultations with fellow directors and on behalf of the board as a whole.)

5. All directors can receive information from other directors so long as they do not deliberate collectively with respect to such information, outside of a meeting. Thus, a director can send an email to all other directors, even about association business, so long as this action is 'one way' and not an invitation to open dialog about the issue. Presumably if a director sent out an email with an opinion or facts, and said 'DON'T REPLY TO THIS EMAIL' (and there were no subsequent replies) then such communication would not violate the Act. *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363.

6. The directors can communicate regarding agendas and date, time and place of proposed meetings.

If you see the dilemma, and believe volunteerism will be impaired as a result of these prohibitions, contact your legislators, and request some amendments to allow more communication between directors, or at least to clarify what can and cannot be handled by email.