

E-MAIL USE BY BOARD MEMBERS AND OPEN PUBLIC MEETINGS IMPLICATIONS

By: Samuel J. McNulty, Esq.

Hueston McNulty & Mueller, P.C. Attorneys / Florham Park / Toms River, N.J.

With the increased use of email by members of Condominium Boards of Trustees it is important to revisit the requirements of a valid open meeting and to apply the law's requirements to guide Board Members.

Since 1991, Community Associations in New Jersey have been required to open their meetings to the public. In that year, the New Jersey Condominium Act was amended to include at N.J.S.A. 46:8B-13(a) a requirement that the by-laws of the association shall provide that

All meetings of that governing board, except conference or working sessions at which no binding votes are to be taken, shall be open to attendance by all unit owners, and adequate notice of any such meeting shall be given to all unit owners in such manner as the by-laws shall prescribe . . .

Pursuant to this statute, the Commissioner of the Department of Community Affairs (the "DCA") was directed to prepare general guidelines to assist in complying with this provision of law. These guidelines can be found in the New Jersey Administrative Code at 5:20-1.1 et seq. The regulations contain specific direction as to what the statutory requirement of "adequate notice" means at N.J.A.C. 5:20-1.2.

Given this statutory context for adequate notice and the conduct of meetings, it is clear that a community association board of trustees must be careful not to meet to discuss and act upon association matters unless adequate notice of the meeting has been given. Does this also now apply to the situation where a board communicates via email?

In some associations, the board of trustees post messages and have online "discussions" regarding issues. In some cases, a consensus for action is reached after an exchange of messages directed to and from board members, property managers, attorneys and accountants. This mode of communication is readily available and convenient to a volunteer board. Rather than making time for a conference telephone call or preparing written faxes, the board member can read and respond to an e-mail at any time. One member could post a message during business hours and another read and responds later that evening. For those board members using e-mail, it is an effective and timesaving method of doing board business.

However, email "discussions" can be considered "meetings" and therefore can be considered violations of the open meetings provisions of the N.J. Condominium Act because of that practice. For example, if a board "discusses" an issue on line and then each board member "votes" on the issue, a violation

may have occurred. The act that was the subject of the vote is subject to attack by a disgruntled association member seeking to overturn or set aside the act. Accordingly, a board of trustees should be careful to comply with the open meetings provisions of the N.J. Condominium Act in its e-discussions.

Guidance in dealing with this potential problem can be found in the meeting notice requirements of N.J.A.C. 5:20-1.2. and in the definition of "meetings" found in N.J.A.C. 5:20-1.1 (a). First, N.J.A.C. 5:20-1.1(a) states that "... *all meetings of [the] governing board, except conference or working sessions at which no binding votes are to be taken, shall be open to attendance of all unit owners.*"

Further, N.J.A.C. 5:20-1.2 (d) provides that "*in the event that a meeting of the governing body is required in order to deal with matters of such urgency and importance that delay for the purposes of providing 48 hours advance notice would be likely to result in substantial harm to the interests of the association, and provided that the meeting is limited to discussion or an acting with respect to such matters of urgency and importance, notice of the meeting shall be deemed to be adequate if it is provided as soon as possible following the calling of the meeting by posting, delivering and filing written notice of the meeting in the manner set forth in (b).*"

Moreover, N.J.S.A. 46:8B-13(a) sets forth the four exceptions to the open meetings requirements. That statute states that the governing board may exclude or restrict attendance at those meetings, or portions of meetings, dealing with the following:

- (1) any matter the disclosure of which would constitute an unwarranted invasion of individual privacy;
- (2) any pending or anticipated litigation or contract negotiations;
- (3) any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer;
- (4) any matter involving the employment, promotion, discipline or dismissal of a specific officer or employee of the association. At each meeting required under this subsection to be open to all unit owners, minutes of the proceedings shall be taken, and copies of those minutes shall be made available to all unit owners before the next open meeting.

It is clear that the intent of the statute and administrative regulations is strongly in favor of open meetings with adequate notice of the time, date and location of the meeting being given in a meaningful way to unit owners. Although unit owners may be excluded in matters involving the four exceptions to the open meetings requirements set forth in N.J.A.C. 5:20-1.1(a), it is unclear whether such

discussions by the board of trustees must still be the subject of "adequate notice" as defined therein. In other words, notice of the meeting date, time and location must still be given in the form and manner set forth in the administrative code. It is at that meeting then that the board could go into executive session to discuss matters within the four exceptions. There are no cases clarifying the apparent ambiguity in the statute and therefore a conservative approach would include refraining from e-mail discussions and meetings on matters involving the four exceptions to the open public meeting requirements.

Accordingly, there is one clear situation where e-mail discussions regarding association business (as well as other forms of meetings) by boards of trustees in New Jersey community associations is acceptable under the open meetings provisions of the N.J. Condominium Act: **Conferences and working sessions where no binding votes are to be taken.** There is no requirement that these informal meetings be open. There is no requirement for "adequate notice" as required in the statute or administrative regulations. The conclusion then is that members of Boards of Trustees may properly use e-mail as a quasi-work session and not be in violation of law.