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HOA Brief Newsletter

Yes, You Can… But Should You? Cautioning Directors Against Unfettered Email Discussions After LNSU #1 LLC

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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, 94 Cal.App.5th 1050 (Aug. 25, 2023), recently decided that board members can engage in email discussions about association business outside of regular noticed meetings, as long as the board does not take action on those items discussed.

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") (Civ. Code §§ 4090 et seq.), including that directors had exchanged emails discussing landscaping plans and other association business without giving members notice or an opportunity to participate.

Historically, board members have been cautioned to avoid discussing association business through emails, as that could be deemed a "virtual assembly" of the board. However, the Court examined the definition of a "board meeting" in Civil Code § 4090(a) 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." The Court reasoned 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 further reasoned that emails are often sent "hours or days apart and from different homes and offices." As such, the Court held that email exchanges in which no action is taken do not constitute a "board meeting" within the OMA.

Some board members have rejoiced in learning of this decision, suggesting that email discussions between board meetings are necessary for them to be able to fully prepare to vote on those items during the meeting itself. This may be due to the amount of business that the board is required to handle or because the board does not meet as regularly as it should.

However, while the law currently permits directors to engage in email discussions outside of noticed meetings, board members should still exercise caution and discuss each of the below issues with legal counsel to determine whether they should engage in this practice and, if so, whether any practical limitations can be implemented to help protect the association.

The Finality of the Decision

A Request for Depublication was filed with the California Supreme Court on September 26, 2023, followed by a full Petition for Review on October 4, 2023. On December 13, 2023, the Supreme Court formally denied both requests. This means that the Supreme Court elected not to entertain any further challenge to the decision, which now stands as binding precedent.

Even if the Supreme Court elects not to consider the issue now, this is the first time that any appellate court has interpreted the meaning of "board meetings" as found in this portion of the Civil Code. Other appellate districts are not required to follow this decision and may adopt a different interpretation. This could potentially create a conflict that would leave board members guessing as to how they should act until the matter is finally resolved by the California Supreme Court.

The Intent of the Open Meeting Act Favors Transparency in Association Governance

The OMA was enacted to encourage transparency in board decision-making by permitting members the opportunity to witness the board conducting business. If the board only discusses a matter through emails, then a subsequent vote during the open meeting becomes a mere formality. Members are removed from the deliberations and the substance and reason for the board's decisions. In some circumstances, individual directors may even be excluded from the process if the emails do not include the full board.

The problems of minimal transparency are compounded by the fact that board member communications are not included in the categories of association records that homeowners are entitled to review under Civil Code § 5200. This means that the only way that members can require review of email deliberations is if they file a lawsuit. Despite the ruling in this case, members may still argue that decisions were made during email deliberations instead of at noticed board meetings. This case is a prime example of how costly litigation over such issues may become. The association incurred more than $400,000 in legal fees over the course of at least five years, and the Court ultimately decided that this was not the type of matter where the prevailing party was entitled to fee recovery.

Instead, board members should be as transparent as possible in their decision-making activities so that members have no cause to believe that any impropriety exists. Boards should consider using emails only to relay information and save discussions for board meetings where members have an opportunity to observe. To the extent that email deliberations occur, all directors and managers should be included in the discussions.

Remember that Email Deliberations are Still Discoverable

Boards should also keep in mind that emails and other forms of written discussions, unlike oral remarks made during board meetings, can be archived and retrieved and, therefore, should be considered a permanent record of what someone says. While members are not able to ask for copies of email conversations under Civil Code § 5200, they can be forced to be produced in response to a subpoena or as part of a litigation discovery demand.

Board member emails are not privileged unless legal counsel is involved, and even then, a communication is only privileged if the primary purpose of the communication is to further the objectives of the attorney-client relationship (2022 Ranch LLC v. Sup. Ct. (2003) 113 Cal.App.4th 1377, 1390), which would not include most topics that are commonly discussed by the board in transacting association business. As a result, these emails could easily become evidence in a lawsuit, where they would be projected onto screens or read to the judge and juries in open court.

It is easy to forget to be restrained when communicating through informal emails, where discussion threads can morph from one topic to another and become long and convoluted. Statements can be taken out of context. Or even worse, directors will simply respond in the moment without carefully considering the potential implications of their statements should they be used as evidence later on. This is what happened in the LNSU #1 LLC case, as the decision itself included various comments made by certain board members and quoted them by name. For example, one director wrote how he would "like to get [plaintiff] out of everyone's hair." (Id. at 1061.) Another part of the decision quoted a director as stating: "We need to get rid of [plaintiff]. He is not part of our community." (Id.)

One potential method to try to limit the potential negative impacts from director email deliberations is for associations to set up dedicated email accounts for their board members. Board members should be discouraged from using their personal accounts for association business regardless of whether they choose to participate in email deliberations outside of noticed board meetings. This prevents their personal emails from becoming the subject of any discovery request or subpoena. However, if directors know that their email accounts are retained by the association, it should encourage them to be more cautious in the communications that they send.

While the LNSU #1 LLC decision appears to benefit associations by potentially reducing restrictions imposed on director communications, boards are urged to consult legal counsel regarding the current status of the case, as well as keep in mind the practical implications that email discussions might have on how the membership perceives the board, issues of transparency, and how the association is governed. The question should not only be whether board members can hold email discussions about association business, but also whether they should.

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