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OPEN MEETINGS AND EMAIL COMMUNICATIONS

Section 55.1-1949 of the Virginia Condominium Act and Section 55.1-1816 of the Virginia Property Owners' Association Act establish requirements for the conduct of board and committee meetings providing that all meetings of the board, including any subcommittee or other committee, shall be open to all members of record. Additionally, Section 55.1-1949.B.1. of the Condominium Act and Section 55.1-1816A of the Property Owners' Association Act provide that the board shall not use work sessions or other informal gatherings to circumvent open meeting requirements. The statutes define "meeting" as a "formal gathering of the board of directors where the business of the association is discussed or transacted." The statutes are clear – discussion and decision making must occur at a properly convened meeting.

Various courts, including the Virginia Supreme Court, have examined the use of email among board members in light of open meeting requirements established in the Virginia Freedom of Information Act ("FOIA"). While FOIA does not apply to common interest community associations, the Condominium Act and Property Owners' Association Act, particularly the open meeting requirements, are modeled after similar provisions in FOIA. Accordingly, cases construing FOIA are instructive to common interest community associations.

In *Hill v. Fairfax County School Board*, 284 Va. 306, 727 S.E.2d 75 (2012), the Virginia Supreme Court considered whether certain email exchanges between members of the Fairfax County School Board did *not* constitute a "meeting" within the meaning of FOIA and therefore did not violate the open meeting requirement of FOIA. The Court looked at several factors to determine whether the open meeting requirement had been violated – volume of emails, interval of time between emails, whether the emails involved a back and forth exchange and not simply a unilateral distribution of information and whether the emails were among two Board members or more than two. *Hill*, 284 Va. at 314, 727 S.E.2d at 79.

Applying these factors, the circuit court and Supreme Court found that the emails sent by Board members "did not involve sufficient simultaneity to constitute a meeting, that the Board members' emails that involved some sort of back and forth exchange were between only two members at a time, rather than three [or more], and that emails sent to more than two Board members...conveyed information unilaterally." *Id.* Accordingly, Board members did not violate the open meeting requirement of FOIA.

The factors considered by the Court in *Hill* should be considered in determining the appropriateness of use of email by community association boards and committees. Email may be used in limited circumstances – to communicate about non-substantive matters such as scheduling meetings and for the unilateral dissemination of information. However, care must be taken to limit the amount and substance of back and forth email exchanges among board and committee members. While the use of email is a helpful tool, particularly when the board or a committee does not regularly or frequently use email for discussion of substantive matters does not comply with the open meeting requirements of Section 55.1-1949 of the Condominium Act and Section 55.1-1816 of the Property Owners' Association Act.

Section 55.1-1949.C of the Condominium Act and Section 55.1-1816C of the Property Owners' Association Act address voting at a Board meeting: the board or a committee may only vote on an issue in open meeting, even if the matter was discussed in executive session. Accordingly, a board or a committee cannot conduct a vote on a matter by email. To the extent that an emergency arises or where an important opportunity may be missed unless acted upon immediately, a poll by email may be taken to determine if unanimous consent exists related to the particular matter. After the poll has been taken, if unanimous consent exists, the board should document the decision in a unanimous written consent in lieu of meeting which sets forth the action taken and which is signed by all board or committee members.

Care should be taken, however, to ensure that action by consent in lieu of meeting does not replace meeting discussion and action taken in open meeting. Legislation to limit the authority of associations to act by consent in lieu of meeting has been introduced in the recent sessions of the Virginia General Assembly – due to perceived abuses.

CONCLUSION AND RECOMMENDATION

A community association board or a committee may only use email in limited circumstances and may not use email to circumvent the open meeting requirements established in the Act. Generally speaking, the Board may only use email for administrative matters such as the scheduling of meetings and distribution of minutes or other information. Use of email to discuss substantive matters is a violation of the open meeting requirements and should be discontinued. If the Board cannot accomplish business at currently scheduled board or committee meetings, the board or committee should consider changing the meeting schedule to meet monthly or every other month, or a special meeting may be convened to discuss pressing matters.

A board and committee should also take care in the content of email communications for another reason. Email communications among board or committee members concerning association business may be considered part of the books and records of the association. Accordingly, the emails are subject to review upon proper request.