

## Embracing the New Board Meeting Agenda Law

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California law requires the disclosure and publication of a great deal of information relating to the finances and operations of homeowner associations. A catalogue of the key disclosure laws is available on our Community Association Disclosure Checklist at [www.berding-weil.net/pdf/disclosure\\_checklist\\_2008.pdf](http://www.berding-weil.net/pdf/disclosure_checklist_2008.pdf).

For 2008, California law has been amended to add a new disclosure obligation that requires the posting of meeting agendas at least four days prior to board meetings. We believe managers, directors and owners will find this law to be easy for boards to comply with and very helpful. This article discusses the nuts and bolts of the new law, areas of risk and uncertainty, and how best to use the law to improve association operations.

### WHAT'S CHANGED?

Prior law required a board to provide notice stating the date, time and place of board meetings at least four days before they occurred. Such notices had to be posted on common area and distributed to those who requested their own copy. An agenda was required by statute only if the board planned to borrow from reserves or delay repayment of monies previously borrowed from reserves. Those items had to be specifically included in the notice provided at least four days prior to the meeting.

Except for this one agenda requirement in prior law, a board could discuss and act on whatever issues arose at its meeting, whether from members during the open comment period, arising out of the management report, based on committee reports, or otherwise. There were no other limitations

on the board's ability to raise, discuss and decide issues at its meetings.

New amendments to the Common Interest Development Open Meeting Act (Civil Code §1363.05) now reverse this rule – now, unless an action item is formally agendized in the pre-meeting notice, it cannot (with important exceptions) be discussed or acted upon. We've recreated the statute showing the additions and deletions to it. To see the new statute, hit the link to [www.berding-weil.net/2008cid-open\\_meeting\\_act.shtml](http://www.berding-weil.net/2008cid-open_meeting_act.shtml).

### KEY POINTS

Here are the key points of the new agenda law:

**Agenda:** The notice of the date, time and place of a board meeting must now also contain the board's agenda for that meeting. An agenda is a list of items that the board intends to act upon or discuss.

**Timing:** The notice, with agenda, must be posted in the common area and distributed (to members who have requested separate written notice) at least four days prior to the board meeting.

**Limits discussion by members?** There is no new limitation on issues that members who attend open board meetings can raise with the board. All members can attend open meetings of the board and can discuss or raise any issue they want during the portion of the meeting devoted to member comment. This remains true whether or not their issue is included in the board's meeting agenda.

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**Limits basic discussion by directors?** Directors, however, are now *prohibited* from discussing issues not on the board's formal agenda, except to "briefly respond" to comments made by members during the open forum period of the meeting (e.g., to thank them for their comment or to ask a brief clarifying question) or to make a "brief report" of their own activities or to make "brief announcements."

**Slightly looser limits on director comments relating to reports and future action items for management:** Even if not on its agenda, the board or an individual director can provide information to or ask that actions be taken by *committees or management* (including adding new agenda items for a future board meeting). This key exception to the agenda requirement allows boards to request that information be gathered after a meeting to use for future decision making.

**Exceptions for board discussion and/or action on items not included on an agenda:** There are three exceptions to the new rule prohibiting discussion and/or action on items not included in the notice of a board meeting. Action can be taken:

- To address emergencies (if a majority of directors present at the meeting agree an unforeseeable emergency - as defined in the law - exists)
- To address late-breaking situations that require immediate action but that do not come up until after the agenda prepared for the meeting is posted and distributed (if authorized by 2/3rds of the directors present or all directors if less than 2/3rds of all directors attend the meeting)
- If the discussion and/or action was included in the agenda for a prior meeting, if that earlier meeting was held within the last 30 days and the item was specifically deferred at that earlier meeting.

**Enforcement:** The new law can be enforced in court if a board ignores it, but certain procedures that have developed in the law now exist to facilitate easier resolution. Before a suit can be filed, a member who disagrees that the board has met the requirements of the statute in making a decision must first propose that the board agree to mediate or arbitrate the dispute. A member can also request

that the board or a board representative meet to discuss the dispute using the association's meet-and-confer program. Using these methods, the agenda law will likely be readily self-enforcing with limited legal intervention.

### A GOOD LAW, REALLY

Is the new law "good" or "bad," hard or easy to implement? Over the years, we've all faced legislation that was complicated, unclear and, even if well-meaning, difficult to implement (laws concerning association elections are a good example). This time, though, we think the legislature got it right. The changes to the CID Open Meeting Act are beneficial and are not hard to implement. With careful planning, they should result in better decision-making by boards, greater involvement and input from members, fewer opportunities for disputes, and more efficiently-run meetings. Here's how:

**Pre-Meeting Planning:** All discussion or action items to be addressed by the board must now be contained in an agenda posted (and distributed on written request) at least four days prior to the meeting. This encourages managers to start thinking about agendas and planning ahead for future meetings during and following each board meeting. Very few items are considered a true emergency, and the rhythm of posting agendas will help with planning.

**Who Adopts the Agenda and When?** In some associations, the agenda for future meetings may be adopted by the board at a meeting (which will no longer work very well). At others, the president and/or often the manager is authorized to set agendas between meetings, since they are most familiar with the day-to-day workings of the association, its annual calendar, and what the board might need to discuss. The law does not address this issue, and each community will develop its own method of setting agendas depending on its needs, governing documents, calendar and pending issues. We recommend in associations that operate more formally that the board adopt a preliminary agenda and authorize the president to add to it should the

need arise. Management (and perhaps committee chairs) should also be consulted since their input is frequently necessary for timely decision-making at board meetings.

**Must Executive Sessions be Agendized?** In our judgment, the new law does not require publication of an **agenda** for a board to meet in executive session. This is consistent with our view of the wording of the statute that the Open Meeting Act does not require *prior notice* of executive sessions (other than to directors). In addition, we doubt the legislature newly intended either to limit a board's ability to go into executive session when it needs to in the event notice was inadvertently not included or to change its requirement that boards generally note items discussed in executive session in the next open meeting minutes of the board. Executive session subjects include sensitive issues such as personnel actions, member discipline, payment plans or foreclosures.

#### **"EVERY PROBLEM CREATES AN OPPORTUNITY!"**

Marketing guru Tom Peters said this, and we think it's especially true of this new law. While in the past it might not have been common for a board to be limited by an agenda, doing so has many benefits - members, receiving a copy of the agenda, will be given the chance to provide valuable input prior to or at the meeting; board decision-making will be easier to defend if based on agendized notices for board meetings; by sticking to a specific agenda, a board cannot be pressured into making hasty decisions and without regard to practical or community-wide considerations; by sticking to its agenda, board meetings can be fairly and efficiently commenced, managed and concluded.

## **TAKE OUR AGENDA LAW QUIZ!!!**

Some real life examples illustrate how the new agenda law works. Assume in each case that, two weeks before each of the following board meetings, an agenda was posted but it did not relate to any of the items identified except as indicated. Try it for yourself, imagining the meeting before it actually occurred. Then check your answers by clicking on the link at the bottom of the page.

Q1: The agenda listed "Common Area Maintenance" for general discussion. Two days before the board meeting, reports of roof leaks were called in to the on-site manager's office. Can we discuss the leaks at the meeting? Can we take action?

Yes  No

Q2: Walking to the meeting, a director noticed that Fred's car is parked in "guest parking" again. Can the board discuss of a new parking rule?

Yes  No

Q3: At the meeting, a disgruntled association member in the audience hands the manager a petition to recall the board signed by at least 5% of the members. Can this be discussed at the meeting?

Yes  No

Q4: Someone threw red dye into the pool this afternoon and we think we know who. We're meeting tonight and want to levy a reimbursement assessment and a stiff fine. A: can we talk about levying the fine? B: can we authorize management to contact the pool service company to address the problem?

A.  Yes  No

B.  Yes  No

Q5: Rats! We forgot to include lien approvals on the agenda. Can we authorize our attorney to record liens anyway?

Yes  No

Q6: We want to approve minutes as a consent item, but consent items aren't on the agenda. Can we approve them anyway?

Yes  No

Q7 The budget's not on the agenda but it has to be approved tonight or we'll lose the ability to increase assessments without submitting the issue to the members for a vote (which will take time, money and have an uncertain outcome). Can we approve the budget anyway?

Yes  No

Q8: The \$5 million construction contract and bank loan need to be approved tonight because the board can't get back together again for at least another week. Can we talk about it?

Yes  No

**Now check out the the answers.  
Go to: [www.berding-weil.net/agendaquiz/](http://www.berding-weil.net/agendaquiz/)**

## WHEN IS B&W'S ANNUAL COMMUNITY ASSOCIATION SEMINAR?

### Don't worry, it's coming!

We're celebrating our 20th anniversary (!!), and we've decided to do something different in 2008!

**FOR MANAGERS,** Instead of one big seminar, we're planning to conduct a series of "roll up your sleeves" workshops in different Bay Area venues. Some will be advanced classes for managers based on important topics that will be generally introduced this month at CACM's Law Seminar in Oakland. Others will be based on manager requests and on the virtually limitless legal topics that surround association management.

Our workshops – with hands-on exercises and using real experiences – will include foreclosure fallout, applications of new legislation (including practical ways of dealing with the new agenda law to use at every meeting), and talking about how court opinions really do affect what managers do every day.

We'll explore "lab work" – everyday issues in the law and using our internally-developed forms and lists, important statutes that come up all the time but don't get much attention after they're no longer new, and discussing questions our clients and their managers have raised with us in the last year. (We haven't decided yet whether to give out homework! Managers get plenty of at-work practice already!)

**FOR BOARD MEMBERS:** Director education is very important to us, and we plan to conduct at least two workshops this year just for you!

If you find you can't attend one of our director workshops, however, or if you want additional learning opportunities,

organizations like ECHO and individual companies like Levy Erlanger CPAs put on tremendous programs with board member tracks.

ECHO's renowned Annual Seminar and Trade Show is held in June of each year, at the Santa Clara Convention Center, with educational programs running all day long and more than 180 vendor booths filled with specialists having just the know-how you need (including us)! The Levy Erlanger program is entering its 22nd year of offering director-specific training in a full-day session each September in Berkeley (just as the governor is signing the year's new slew of bills).

As much as we've loved the large theater setting, this year we wanted to bring our clients and their managers programs that are lively, educational, and intimate enough to invite the kind of personal dialogue and feedback that comes only in smaller venues. We trust our workshops will really enhance how community decision-making is made and implemented. Just be mindful that, to keep our programs intimate, attendance will be limited.

Think a colleague or fellow director like to be on our invitation list? Please have them send us their email address. In addition to invitations, we will also send them a copy of our latest E-Alert – it's on the new agenda law, with an article and practical learning tools for managing it successfully.

Thank you for helping make the last 20 years so memorable for us, by attending our annual programs and calling on us when needed. We appreciate your continuing confidence and trust you will come see us in 2008 in our new workshop settings.

For past issues of the *Community Association ALERT* please visit: [www.berding-weil.com](http://www.berding-weil.com)

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