SUMMARY OF THE DAVIS-STIRLING OPEN MEETING ACT.
(CIVIL CODE SECTIONS 4900 – 4950)
Prepared by Curtis C. Sproul

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One of the key provisions of California's Davis-Stirling Common Interest Development Act (California Civil Code sections 4000-6150) is the Act's Common Interest Open Meeting Act (Civil Code sections 4900-4955; hereinafter, the "Open Meeting Act"), a complete copy of which follows this Summary. This sunshine law parallels, in many respects, the Ralph M. Brown Act (Government Code §§54950–54963) -- the principal law regulating the conduct of meetings by the boards of local governmental agencies and requiring that most meetings of the governing board or council be open to attendance by the public, with published agendas and an opportunity for the "citizens" to address the board on scheduled action items.

Mandating that the boards of common interest owner associations conduct their meetings in much the same fashion as a town council meeting was not always the way that business was conducted in the early years of the Davis-Stirling Act and even to this day it is not what is required of other business and nonprofit corporations. The original version of the Act (adopted in 1985) did not include an open meeting requirement. Furthermore, the Davis-Stirling open meeting rules, which were added to the Act in 200, have evolved and expanded over time. Here is the back story of that evolution:

A Brief History of the Davis-Stirling Common Interest Development Act:

In 1983 the California Legislature appointed a Select Assembly Committee of knowledgeable individuals[1] to assist the Legislature in drafting the original Davis-Stirling Act. Early in the Committee's deliberations the threshold decision was made to focus the new Act primarily on achieving two objectives: (i) the consolidation – in one location in the Civil Code – of all real property statutory provisions pertaining to condominiums, planned developments and other forms of common interest real property ownership and (ii) to conform the statutory rules for forming, operating and managing common interest developments with Regulations of the Department of Real Estate (which at the time had become more progressive than the then existing statutory rules).

[1] The Select Committee included academics (Katharine Rosenberry), several lawyers representing primarily common interest real estate developers, a lawyer representing the perspective of owner associations, title company representatives, bank/lender representatives and property managers, and a senior representative from the California Department of Real Estate. I was a member of the Committee.

Another threshold decision that was made by the Select Assembly Committee was that the new Act *should not* delve too deeply into matters relating to the internal governance of owner associations (such as the conduct of board and member meetings, the required notices for meetings, member discipline, the election and removal of directors, and director and member inspection rights). The judgment call to not expand the original Davis-Stirling Act to include provisions regulating internal association governance was based primarily on the fact that only a few years prior to adoption of the Davis-Stirling Act the Legislature had promulgated a new Nonprofit Mutual Benefit Corporation Law (in 1980) that was considered to be a very progressive and model statute that became the template for similar nonprofit corporate law statues throughout the Nation. Most community associations were formed pursuant to the Nonprofit Mutual Benefit Corporation Law and therefore the trade-off was to give those few associations that were unincorporated the powers of a mutual benefit corporation under section 7140 of the Corporations Code (Civil Code 4805(a)). As signed into law by Governor Deukmejian on September 18, 1985, the original Davis-Stirling Act was only 25 pages long. In contrast, the 2014 version of the Act is now 101 pages long.[2]

Almost before the ink had dried on the original version of the Davis-Stirling Act critics of the concept of private governance and regulation of personal real property rights administered by neighbors began to voice their concerns to their local representatives. The critics of the then new Davis-Stirling Act championed a number of reform proposals which shared a baseline them of a distrust of elected directors and the need to return transparency and governance to the property owners. One of the earliest of the critics' proposals was to advocate for a Homeowners Bill of Rights and other amendments to Davis-Stirling imposing specific constraints on the powers and authority of the elected board members. Like the corporate laws of many states, California's Corporations Code was crafted with input, guidance and recommendations from leaders of the Corporations Committee of the State Bar of California at a time when the composition of that Committee was dominated by lawyers from large corporate firms in California's three major cities (LA, San Francisco, and San Diego). As a result, there is a bias in those provisions of the Corporations Code dealing with corporate governance and decision-making in favor of incumbent boards of directors, rather than the rights and interests of stockholders or members[3].

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[2] Actually, the 2014 Act is about 200 pages long if you count the Commercial and Industrial Common Interest Development Act which, effective January 1, 2014 replaces Civil Code section 1373.

[3] Certainly there have been pro-shareholder reforms over the years, such as cumulative voting in the election of directors under Corporations Code sections 708 (General Corporation Law) and 7615 (Mutual Benefit Corporation Law), however the essentially oligarchic structure of corporate governance and decision-making that is the foundation for laws relating to corporate governance remains the same.

That rather paternalistic foundational principle of the supremacy of the board under corporate law principles is articulated most emphatically in Corporations Code sections 300 (for-profit corporations) and 7210 (nonprofit mutual benefit corporations): "[T]he activities and affairs of a corporation shall be conducted *and all corporate powers shall be exercised* by or under the direction of the board", unless the Code, itself, or the articles or bylaws of the corporation expressly reserve some action or decision for approval by the members or the shareholders[4]. Other provisions of the General Corporation Law (Corporations Code sections 307(a)(6) and 307(b)) and the Mutual Benefit Corporation Law (Corporations Code sections 7211(a)(6) and 7211(b)) permitted boards to conduct their meetings electronically or by the use of conference telephone technology(i.e., without any physical location that could be attended by the members) and even to take action without any meeting, by unanimous written consent of all directors.

Community association activists felt that these statutory biases in favor of the board and management were inappropriate in the context of nonprofit associations that wielded so much power over matters of family, hearth and home. The critics noted that owner associations were not formed as profit-making enterprises, but rather as localized collective organizations formed to accomplish specific tasks more efficiently and economically than any one owner could achieve on his or her own. In the eyes of these reform advocates, owner associations should function and be controlled under a model that was much more akin to the colonial New England Townships, whose virtues and democratic ideals were extolled by James Madison in *Federalist No. 10.*

These critics of the corporate model for doing business – a model that favors management and decision-making by the board --- were successful over the years in introducing amendments to the Davis-Stirling Act that, little-by-little, moved association governance away from the corporate law paradigm and towards a governance model that more closely reflects the rules and protocols that local government governing board must adhere to. The Common Interest Open Meeting Act, which was first added to the Davis-Stirling Act in 2002, was one of those property owner Bill of Rights reforms.

Evolution of the Common Interest Open Meeting Act:

Generally speaking, prior to the 2012 amendments to the Davis-Stirling Common Interest Development Act, the Act's "Open Meeting Law" applied to "meetings of the board" --- a phrase that was then defined in Civil Code 1363.05(j)). Under that subparagraph (which has now been superseded by Civil Code section 4090), in order to come within the Open Meeting Act requirements and constraints on the ability of common interest owner

[4] And the list of action items requiring member or shareholder approval under the Corporations Code is limited to very significant actions affecting the corporation such as the election of directors, approving amendments to the Articles or Bylaws, approving mergers or the dissolution of the corporation.

association boards to take actions by written consent or in meetings that were not open to attendance by the general membership, the phrase "meeting of the board" was defined to include gatherings and discussions among board members that had these three elements:

(i) "a ***congregation*** of a majority of the members of the board;

(ii) ***at the same time and place;***

(iii) to hear, discuss, or deliberate upon any item of business ***scheduled to be heard by the board***, except those matters that may be discussed in executive session."

Under the original version of the Common Interest Development Open Meeting Act (hereafter, the "Open Meeting Act"), the congregation of a majority of the members of the board need not be in a formal setting, but no violation of the Act occurred unless a majority of the members of the board were gathered together and discussing or deliberating on an item of business scheduled to be heard by the board at a later meeting or at the time the board members got together[5]. As a result of the phrase "scheduled to be heard" most commentators agreed that the pre-2012 Open Meeting Act did not reach discussions among members of the board regarding matters of importance to their association so long as the matter or topic in discussion was not a scheduled item of business or a pending action item at a future meeting of the board.

Prior to the 2012 amendments to the Open Meeting Act the law was also unclear as to whether directors could conduct meetings by written consent or by use of conference phone technology – both of these methods of meeting being sanctioned board meeting methods of conducting board business under the Nonprofit Mutual Benefit Corporation Law (See Corporations Code section 7211[6]). That open issue has now been answered in the negative --- community association boards are no longer permitted to take action by unanimous written consent (see Paragraph 9, below).

Summary of the Common Interest Open Meeting Act As it Exists Today:

Effective January 1, 2014 the California Legislature approved a wholesale revision and recodification of the Davis-Stirling Act that was the result of several years and

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[5] As discussed below, even under the original version of the Open Meeting Act it was permissible for association boards to meet, deliberate, and act on certain enumerated matters in an executive session meeting that was not open to attendance by the general membership. That principle has always been part of the Open Meeting Act.

[6] Under Corporations Code section 7211(b) each director can sign a separate written consent, thus obviating the need to have any of the directors present in the same room while reaching a decision.

numerous public meetings of the California Law Revision Commission[7]. Under the new "recodified" version of the Act, the Open Meeting Act provisions are now found at Civil Code sections 4900-4950. It was not the intention of the Legislature or the Law Revision Commission to implement substantive law changes in the recodification of the original Davis-Stirling Act[8]. Therefore the goals of the Open Meeting Act, as presented in the 2014 Act, remain generally the same, namely requiring community association boards to conduct most of their business in a manner that is open to attendance and participation by the members. What follows is a summary of the principal requirements of the Common Interest Development Open Meeting Act:

1. *Definition of what constitutes a "**Meeting of the Board**":*

Under the 2014 version of the Davis-Stirling Act, Civil Code section 4090 now defines a meeting of the Board of Directors of a community association as follows:

> "Board meeting" means either of the following:
>
> (a) 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*.
>
> (b) A teleconference, where a sufficient number of directors to establish a quorum of the board, in different locations, are connected by electronic means, through audio or video, or both. A teleconference meeting shall be conducted in a manner that protects the rights of members of the association and otherwise complies with the requirements of this Act. Except for a meeting that will be held solely in executive session, the notice of the teleconference meeting shall identify at least one physical location so that members of the association may attend, and at least one director shall be present at that location. Participation by directors in a teleconference meeting constitutes presence at that meeting as long as all directors participating are able to hear one another, as well as members of the association speaking on matters before the board.

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[7] The California Law Revision Commission The California Law Revision Commission is an independent state agency created by statute in 1953. It assists the Legislature and Governor by examining California law and recommending needed reforms. I participated in the deliberations of the Law Revision Commission on the Davis-Stirling Act as the lead representative of the California State Bar Real Property Law Section.

[8] This rather stubborn refusal on the part of the Law Revision Commission to use the opportunity presented to the Commission to actually make important improvements in existing law was characterized by one prominent common interest attorney who declined to actively participate in the revision effort as "simply reorganizing the lounge chairs on the deck of the Titanic." However, as noted later in this article, some substantive changes were made and are now part of the 2014 Davis-Stirling Act.

COMMENT: Unlike the original version of the Open Meeting Act which limited the definition of board meetings to congregations of a majority or more of the board to discuss or deliberate on matters that were scheduled for action, the current Open Meeting Act merely requires that the congregation be for the purposes of hearing, discussing, or deliberating on any "*item of business*" that is "*within the authority of the board*", whether or not the matter is a scheduled action item. Section 4090 of the recodified Davis-Stirling Act also differs from former Civil Code section 1363.05 by saying that the congregation of directors that triggers coverage of the Open Meeting Act rules is any congregation of a quorum of the board, rather than of a "majority of the board". Meetings conducted through the use of electronic technology are not banned entirely but must meet the requirements for the conduct of emergency meetings (as defined in Civil Code section 4923) or in a way that affords the opportunity for member participation in accordance with Civil Code section imposed by Civil Code sections 4090(b) and 4925(a), which is discussed in Paragraph 3, below.

SECOND COMMENT: Although the change in Civil Code section 4090 which expanded the definition of what constitutes a board meeting was probably intended to eliminate the ruse of calling an actual board meeting by some other name, such as a "study group" in order to circumvent the Open Meeting Act, in my opinion the new, expanded definition does not prevent a quorum or more of the board members from participating in a group session pertaining to owner association matters or common interest law, generally, where there to overt or covert plan to do business. Conventional rules of contract interpretation instruct that provisions and terms should not be interpreted so as to render any provision or term superfluous or meaningless and that when the plain meaning of a word lends itself to only one reasonable interpretation, that interpretation should control.

Here, Civil Code section 4090 still restricts a board "meeting" to a (i) congregation [of directors] which has as its purpose, "hearing, discussing, or deliberating" upon "any item of business" that is "within the authority of the board.". The phrase "item of business" is probably of the most importance to that definition. Certainly a congregation of directors that is convened to hear an expert offer a presentation on accounting principles for owner associations or about the fiduciary obligations of directors are matters that are within the authority of the board. However if the conversation remains at an instructional level and never includes any call to action or any decision to place some item on the agenda for a future meeting, I do not see any violation of the Open Meeting Act.

Community Association Boards are not legislative bodies, however the Davis-Stirling Act Open Meeting provisions were patterned on the statutes relating to the conduct of community meetings by State and local political bodies. Those statutes are the Bagley-Keene Act of 1967 which mandates open meetings for California agencies, boards, and

commissions (Government Code section 11120 et seq.) and the Ralph M. Brown Act (Government Code 54950 et seq) which imposes similar open meeting rules for city councils, county boards and other local government bodies. Both of those statutes regulating the meetings of elected officials permit a majority of the board of the legislative body to meet at conferences that are open to the general public and involve a discussion of issues that are of interest to the general public so long as the officials do not discuss issues at such a gathering that constitute business of a specified nature that is within the subject matter jurisdiction of the local agency. The California Attorney General has also published an opinion (81 Ops. Cal. Atty. Gen 156) which concluded that under the Brown Act, board members could attend committee meetings provided the board members refrained from asking questions or making statements.

2. *Members have a limited right to participate in Board Meetings that are open to Member attendance:*

Members have the right to attend board meetings, except when the board adjourns to, or meets solely in, executive session, and at open meetings of the board, members must be given an opportunity to speak, subject to reasonable time limitations (applicable to all members) (Civil Code section 4925). The typical practice in the conduct of most common interest association board meetings is to schedule or identify a time on the meeting agenda for member comments or an "open forum" at which members can address the board.

Although as noted in the statute, reasonable time limits can be imposed on the duration of member comments, the board cannot restrict the range of topics that members can raise in open forum so long as the topics are pertinent to the association and its membership (Civil Code section 4930(a)). In other words, although those persons who are serving as directors must, with limited exceptions, stick to a discussion of matters on the published agenda (Civil Code section 4930), members who are not directors are not so constrained, as long as they do not go off on tangents that have no relation to the business of the association or the development. That disconnect between what the Davis-Stirling Act constrains the members of the board to act upon as official business during a board meeting and what attending members can come up to the microphone to comment on, creates an issue relative to the proper preparation of board meeting minutes (see Paragraph 15, below).

Although the Civil Code Open Meeting Act provisions do not expressly use the term "open forum" the principle remains that the meeting of the directors is a *Board meeting* and it becomes extremely difficult to control the conduct of business and to receive input from the elected directors if members who are not directors are permitted to jump into the board meeting discussions at will. Here is what the Adams & Kessler website, "davisstirling.com" says on this subject:

Participation During a Meeting. As stated above, members do not have a right to participate in board discussions and votes. The only legal right for audience participation is during the Open Forum portion of the meeting. Even so, boards can invite comments from the audience on particular items of business if they so choose. This is completely at the discretion of the board. Once a motion and second has been made on an item of business, the president, with the approval of the board, could invite comments from the audience. Once comments have been received, discussion can be closed and a vote taken by the board (or the matter tabled).[9]

3. *Telephone conference meetings of the Board are now expressly sanctioned with one important qualification:*

The Open Meeting Act was amended to include an express authorization for conducting board meetings electronically (by phone or video conference technology; (Civil Code section 4090(b)). The one qualification to that authorization is that the conference meeting must still be conducted in a manner that protects the right of non-director members to participate. To make that happen, Civil Code section 4090 instructs that the notice of a teleconference board meeting must identify one physical location where at least one director will be in attendance so that members can hear the conference call discussion and participate in the meeting. If an executive session is convened during or at the end of a meeting that is otherwise open to member attendance, the executive session portion need not be open to listening by the members who are not directors (Civil Code section 4925(a)). Finally, subparagraph (b) of Civil Code section 4090 parallels similar provisions of the Corporations Code by saying that when a board meeting is conducted as a conference call, the call must be structured so that all participants (directors and members) can hear one another and participate in the discussions.

Mandating that there be at least one physical location for a board meeting that is otherwise conducted electronically in order to protect the rights of members to attend open meetings of the board may sound like an adequate solution, particularly in the context of developments and associations that are comprised primarily of persons who reside in the development as their primary residence. However the "one physical location" requirement may not work as well in the context of resort developments where the homes or units are not primary residences. In that context the principal residence of many members who are interested in actively participating in the affairs of their association may far from the designated physical location for the board meeting, although that would also

[9] Certainly in small owner associations the conduct of board business is often much more informal and it is not uncommon for the board to permit member comments throughout the meeting.

be the case if the board meeting was conducted at the development and in the traditional manner[10].

In my opinion, the "one physical location" requirement means that owner associations are not required to provide non-director/property owners with the telephone conference call number or other dial-in information for the conference call meeting, although that means of participation could be permitted in the discretion of the board (particularly in the context of small associations). In the context of large associations, affording non-director members the opportunity to participate telephonically could make it extremely difficult to control the discourse at the meeting or to prepare a clear an accurate record of what transpired for inclusion in the minutes of the meeting (due to an absence of control by the chair of the meeting, interruptions, and persons speaking over one/another).

Another interesting oversight in the quest for director meeting transparency that is the hallmark of the Open Meeting Act is that when a board meeting is scheduled as a conference call meeting, the one designated located where members can attend (in the presence of at least one board member) need not be anywhere near the development (Civil Code section 4090). So for example, the board meeting for an association located at Lake Tahoe can be conducted in the Bay Area (where most of the directors are domiciled) so long as one of the homes of a Bay Area director is designated in the notice of the open meeting as the location where members can attend and participate.

4. *It is now clear that executive session meetings (to the exclusion of the general membership) can be conducted without first convening the board meeting in open session*.

In the original version of the Open Meeting Act, the statute spoke of the board's right to *adjourn* to executive session to discuss and take action on certain enumerated action items. Use of the word "adjourn" suggested that in all instances a community association board had to begin with an open meeting (even when the only agenda item was a permitted subject for consideration in executive session) and then entertain a motion to adjourn to executive session. That interpretation made little practical sense because there are any number of scenarios that can be imagined in which it might be necessary for a board to convene an executive session in short order to confer with legal counsel or to

10 Wisely, in my view, the Open Meeting Act does not mandate that the physical location for a board meeting always be in or near the development (many boards of resort associations routinely conduct meetings in other regions of the State where a large number of members maintain their principal residence). Nevertheless, that requirement is imposed on new developments by Regulations of the Department of Real Estate (Regulation section 2792.20(b) which states that ordinarily regular meetings of the board shall be conducted within the development unless the board is of the opinion that a larger meeting venue is needed than is available in the development).

address an emergency matter requiring immediate board attention and action (with no other open session action items on the agenda). Recognizing those realities, the Open Meeting Act was amended to state that "the board may adjourn to, or meet solely in, executive session" (Civil Code section 4935(a)). That same section of the Civil Code identifies the following as matters that can be taken up and acted upon in an executive session:

(i) litigation [NOTE: analogous provisions of the Ralph M. Brown Act (the open meeting law for public agencies) have made it clear that this litigation privilege extends to discussions of both pending and threatened litigation]:

(ii) matters relating to the formation of contracts with third parties;

(iii) member discipline [NOTE: the decision to discuss member discipline in executive session is discretionary unless the member who is the subject of the discussion requests that the meeting be conducted in executive session, in which case the board must honor that request and the targeted member has a right to attend the session];

(iv) personnel matters;

(v) to meet with a member, upon the member's request, regarding the member's payment of assessments, as specified in Civil Code Section 5665 (pertaining to requests to meet with the board to discuss a payment plan for delinquent assessments);

(vi) to decide whether to foreclose on an assessment lien pursuant to subdivision (b) of Civil Code Section 5705.

It is curious that the Open Meeting Act's enumeration of matters that are appropriate and legal for consideration by a community association board in executive session fails to mention the right of the board to meet in executive session to receive advice from the association's legal counsel under circumstances where it is necessary to protect the attorney-client privilege. In the opinion of this writer, that privilege exists by virtue of Evidence Code sections 950-962 regardless of whether it is expressly stated in the Open Meeting Act's discussion of executive session meetings. Perhaps the right to confer with counsel in executive session was not separately identified in the Open Meeting Act since most attorney-client privileged conferences in a community association context are likely to involve discussions of threatened or pending litigation, the formation of contracts with third parties, or personnel matters --- all of which are identified as legitimate executive session discussions.

5. *Member notification rights and time periods for the provision of notice to Members of board meetings.*

With the exception of "emergency meetings" (see paragraph 13, below), members of common interest owner associations who are not directors are entitled to receive at least **four days** prior notice of the time, place, and the agenda for all open board meetings (Civil Code section 4920). If an open meeting is agendized to include an executive session, then that four day notice rule also applies to the executive session portion of the meeting. If an executive session meeting is called as a stand-alone executive session the members who are not directors still have the right to prior notice of the meeting, however the minimum prior notice requirement applicable to such stand-alone executive session meetings is **two days, rather than four** (Civil Code section 4920((b)(2)).

If member disciplinary action is on the agenda for the Board meeting, the member who is the subject of the possible action is entitled to written notice, delivered personally or by first-class mail, of the meeting at least **10 days prior to the scheduled date of the meeting** and that notice must include the date, time and location of the meeting, the nature of the alleged violation for which discipline is being proposed, and a statement that the member has the right to attend the meeting and to address the board if the member so desires. Civil Code section 5855.

The requirements for prior notice to directors remains as stated in the Nonprofit Mutual Benefit Corporation Law (subject to any more liberal requirements (i.e., requirements for more extended prior notice) that may be stated in the Bylaws or other governing documents of the association). Those notice requirements are stated in Corporations Code section 7211[11]. Regulations of the California Department of Real Estate (Regulation section 2792.20) state that directors are to receive at least **four days** prior to the date of any regular meeting unless the time and place of the meeting are fixed in the Bylaws. Those same Regulations (which govern the content of association governing documents prepared by the project developer) require associations to provide to their directors at least 72 hours' prior notice of special meetings (although directors are permitted to sign a waiver of this special notice requirement). As noted in Paragraph 13 of

11 Corporations Code section 7211(a)(2) says that regular meetings of the board of a mutual benefit corporation may be held without notice if the time or place of the meetings are fixed by the bylaws of the board and that special meetings of the board require four days' prior notice if the notice is sent by first=class mail or 48 hours notice if the notice is delivered by telephone or personally (including a voice mail or email notice). Section 7211(a)(2) further provides that neither the articles nor the bylaws may dispense with notice of a special meeting, although directors are permitted by subparagraph (a)(3) of Section 7211 to sign a waiver of notice. These notice rules in the Corporations Code are trumped by the Department of Real Estate Regulation that is cited in the body of this Memorandum since developer-drafted governing documents must adhere to the DRE Regulations and therefore three days (72 hours) of prior notice must be given to directors for special meetings unless a director signs a waiver of the notice requirement or a consent to the meeting. That rule would, in my view, apply to Open Meeting Act emergency meetings.

this Memorandum, it is my view that an emergency meeting is tantamount to a special meeting of the board and is therefore subject to the 72 hour prior notice rule (notices to directors) and to the right of directors to waive that prior notice requirement. The Open Meeting Act states that "the association is not required to give notice of the time and place of [an emergency] meeting" (Civil Code section 4920(b)(1)), however the statutory provision is unclear as to whether this absence of notice requirement is intended to apply solely to notices to the general membership or also to the directors, themselves. Obviously if a meeting is to be held on an emergency basis, the directors need some prior notice. Also, if an association's governing documents require a longer period of notice than is required by the Open Meeting Act's notice provisions, the association must comply with the requirements stated in the governing documents. Civil Code section 4920(b)(3).

6. *An agenda is to be included with the notice of the board meeting.*

This principle is stated in Civil Code section 4930(a) and that requirement applies to both open and executive session meetings. However, because the discussions that happen in an executive session are not open to attendance or participation by the general membership, the agenda for an executive session ought to be very general in nature.

Minutes of executive sessions should not be distributed to the members who are not directors. See Civil Code section 4950(a). Civil Code section 4930(a) only imposes a requirement that members receive "the agenda for the meeting" as part of the notice materials. There is no requirement to provide members who are not directors with any supporting documentation that might be under discussing during an item that is noted for discussion and action on the published agenda.

7. *Under most circumstances as to meetings that members have a right to attend, the board must stick to the published agenda.*

With limited exceptions, the board is required to address and to take actions at board meetings solely with respect to matters that have been listed in the published agenda for the meetings and directors are prohibited from discussing or taking action on any item that was not on the agenda which was published to the members (Civil Code section 4930(a). That subparagraph includes a carve-out for actions taken by the board at an "emergency meeting" as defined in the Act (see Paragraph 13, below). In addition, the limitation applies only to the board and does not prohibit a resident who is not a member of the board from speaking on issues during an open meeting that are not on the agenda (Civil Code section 4930(a)).

The permitted exceptions in which the board can depart from the published agenda are as follows (Civil Code section 4930, subparagraphs (b) and (c)):

- Directors, the manager, and other association agents are permitted to briefly respond to statements made or questions posed by any person speaking at a meeting.

- Directors are permitted to ask a question, make brief announcements or brief reports on the director's own activities, whether in response to questions posed by an attending member at the director's own initiative.

- Subject to any rules or procedures for the conduct of the meeting, directors are permitted to (i) provide a reference to, or provide other resources for factual information to, its managing agent or other agents or staff; (ii) request the association's managing agent or other agents or staff to report back to the board of directors at a subsequent meeting concerning any matter, or take action to direct its managing agent or other agents or staff to place a matter of business on a future agenda; or (iii) to direct the association's managing agent or other agents or staff to perform administrative tasks that are necessary to carry out the business of the association.

- Finally, the board of directors is permitted to depart from the published agenda under any of the following conditions (Civil Code section 4930(d)):

  (i) if the board, by a majority of the directors present, determines that an emergency situation exists which could not have been reasonably foreseen and which requires immediate attention and possible action by the board and which of necessity makes it impracticable to provide prior notice to the members;

  (ii) if two-thirds of the directors present or by the unanimous vote of the attending directors if less than two-thirds of the board , that there is a need to take immediate action and that the need for action came to the attention of the board after the agenda was posted and distributed pursuant to Civil Code section 4920(a); or

  (iii) when the item appeared on an agenda that was posted and distributed to the members pursuant to Civil Code section 4920(a) for a prior meeting of the board of directors that occurred not more than 30 calendar days before the date that action is taken on the item and, at the prior meeting, action on the item was continued to the meeting at which the action is taken.

Before discussing any item that was not on the agenda pursuant to the authority conferred by any of the methods stated in this final bullet point, the board of directors shall openly identify the item to the members in attendance at the meeting. Civil Code section 4930(e).

8. *The Open Meeting Act permits members to receive notice of Board meetings electronically, but only if they consent to that mode of notice.*

Civil Code section 4920(c) says that members can be given notice of meetings by ***general delivery*** pursuant to Civil Code section 4045. "General Delivery" is broadly defined in Civil Code Section 4045 to include any form of delivery permitted for notices that have to be sent by "***individual notice***" (which includes first class mail, overnight mail, or email or FAX (if the recipient has consented to receiving email or FAX notices)), inclusion in a billing statement, newsletter or other document that is delivered to the members, or by posting the notice in a prominent location that is identified in the annual policy statement that is given to the members pursuant to Civil Code section 5310. If the association broadcasts television programming for the purpose of distributing information on association business, the notice of board meetings can also be provided in that broadcast (Civil Code section 4045(a)(4)).

It is recommended that associations (particularly larger associations) be proactive in communicating this right to their members and that associations have an electronic notice authorization and consent prepared in advance for use in responding to members who are interested in receiving notices electronically (typically email or FAX), rather than by "snail-mail".

9. *Community Association Boards Are Prohibited from taking action by unanimous written consent.*

At Civil Code section 4910(a) the Davis-Stirling Open Meeting Act provides: "The board of directors shall not take action on any *item of business* [as defined] outside of a *meeting* [as defined]". Written consents can still be given by directors for the sole purpose of agreeing to conduct an emergency meeting by email or other electronic means (Civil Code section 4910(b)(2)).

10. *Email meetings of the board are also prohibited with one exception.*

Civil Code section 4910(b)(1) prohibits the conduct of board meetings "via a series of electronic transmissions, including email" except if all directors have agreed by written consent to conduct an emergency meeting in that manner (Civil Code section 4910(b)(2)). The written consents to conduct an emergency meeting by use of an exchange of emails can also be transmitted electronically, so long as the email consents are filed with the minutes of the meeting. This Open Meeting Act rule is more restrictive than the rules applicable to other nonprofit mutual benefit corporations under the California Corporations Code. Section 7211(a)(6)) of that Code permits other mutual benefit corporations to conduct meetings electronically.

An email exchange among fewer than a majority of the board can still occur to discuss or comment on an "item of business", so long as the email exchange does not become a "series" of emails involving both a majority of the board and a topic that falls within the broad definition of an "item of business" of the association. This is implied by Civil Code section 4910(b)(1) which says that meetings may not be conducted by use of a series of electronic transmissions, such as emails. Given human nature and the number of times that everyone has said in an email: "please don't share this with anyone else", my guess is that this is a limitation that is often breached, but the consequences can be significant.

11. *The definition of what constitutes a "meeting" of the board for purposes of the Open Meeting Act rules has been amended and expanded.*

Prior to the 2012 amendments to the Open Meeting Act, a meeting was defined by the Act to mean a congregation of a majority or more of the directors "to hear, discuss, or deliberate upon any item of business ***scheduled to be heard*** by the board, except those matters that may be discussed in executive session." As a result of the 2012 amendments to the Act, no longer is the Act restricted to meetings. Instead, association boards are now prohibited from taking "action" outside of a meeting (as defined in the Act) on any "item of business that is within the authority of the board" (Civil Code sections 4090(a) and 4910(a)).

Furthermore the "***item of business***" need not even be scheduled for action, but rather includes any item of business that is "within the authority of the board, except those actions that the board has validly delegated to any other person or persons, managing agent, officer of the association or committee of the board that is comprised of less than a majority of the directors" (Civil Code section 4155).

Is there still a grey area about what is an "action" of the board? To be an "item of business" the matter has to be "***an action within the authority of the board***". That wording would suggest that the purpose of the communication must be to propose something (i.e., ***an action*** that the board might want to consider taking). Under that view, even a majority of directors could exchange emails, for example, to discuss the implications of these 2014 changes in the Davis-Stirling Act or to discuss the deteriorating quality of food at the clubhouse restaurant. Arguably that sort of discussion is not at the level of an "item of business" because no action is being proposed or contemplated. The over used hypothetical situation is one in which a majority of the directors get together to play a round of golf. Is that an illegal meeting?? In my view the answer is NO so long as they do not use the "gathering-on-the-green" as an opportunity to discuss matters that might later become an action by the board.

12. *The "delegation exception" is a significant out to the Open Meeting Act's coverage.* Note that if some action that is otherwise within the "authority of the board" and yet that action is duly delegated to another person, management company or body, then action on that item of association business by the delegee or delegees is not subject to the Open Meeting Act. Specifically, Civil Code section 4155 provides that an "item of business" means any action within the authority of the board, ***except for those actions that the board has validly delegated*** to any other person or persons, managing agent, officer of the association, or committee of the board comprising less than a quorum of the board."

13. *The definition of what constitutes an "emergency meeting" remains unchanged by the 2012 Amendments.*

The Open Meeting Act still defines an "emergency meeting" as one that is called by the president of the association or by any two directors under circumstances (i) that could not reasonably have been foreseen that require immediate attention and possible action by the board and (ii) which [circumstances] make it impracticable to provide notice to the members within the time constraints and in the manner contemplated by the Open Meeting Act (Civil Code section 4923). The term "emergency meeting" is not found in the Nonprofit Mutual Benefit Corporation Law, but rather is a term that was coined solely for use in the context of the Davis-Stirling Open Meeting Act to refer to meetings that have to be called and conducted under circumstance in which the normal notice requirements to members cannot be met. The Mutual Benefit Corporation Law speaks only of regular and special meetings of the board and in my opinion an emergency meeting is simply a sub-set of the more general category of special meetings under the Corporations Code and therefore such meetings are subject to the notice rules applicable to special meetings (See Paragraph 5, above).

14. *The scope of permissible executive session meetings remains unchanged.*

The Open Meeting Act and other provisions of applicable law still restrict permissible executive session meetings of community association boards to the following six action items:

(i) Meetings Convened to discuss or act on legal issues or to receive legal advice from counsel. The discussion of litigation that involves or may involve the association (including a discussion of litigation strategy, the pros and cons of initiating a lawsuit on behalf of the association or settlement strategies for pending

disputes or litigation[12]. The association's attorney does not need to be present either in person or by phone for the board to meet in executive session to discuss legal issues.

(ii) Meetings Convened to discuss or act on matters related to the formation of contracts. Boards may consider matters relating to the formation of contracts with third parties. This executive session exception affords governing boards the opportunity to candidly discuss the terms of a contract proposal or the pros and cons of competing proposals without the risk of having those deliberations falling into the hands of other competing potential contractors who have submitted bids or proposals. However, once an agreement is reached, the announcement of that fact should be made in an open meeting of the Board. Civil Code section 5200 (which is part of the Davis-Stirling Act) encompasses within the scope of documents that are available to inspection by member "contracts that are not otherwise privileged under law (subparagraph (a)(4) of section 5200).

(iii) Member disciplinary hearings. Boards should meet in executive session for all disciplinary hearings, although the Open Meeting Act does not mandate that the hearing be conducted as an executive session unless the member who is the subject of the hearing requests an executive session. Civil Code section 4935(b) and Civil Code section 5855(b) both obligate homeowner association boards to conduct a disciplinary hearing in executive session, if requested by a member who may be subject to a fine, penalty, or other form of discipline. The law also instructs that the member who is the subject of the proposed disciplinary actions has the right to attend that portion of the meeting dealing with member's

[12] Attorney-client communications are privileged and cannot be discovered by an opposing party in litigation unless a waiver has occurred. The purpose of the privilege is to encourage full and frank communications between the board and the association's attorney (see ***Upjohn Company v. United States***, 449 U.S. 383, 389). The privilege is held by the association through its board of directors (***Smith v Laguna Sur Villas*** (2000) 79 Cal App 4th 639). The attorney-client privilege is held by the board as a whole and not by individual directors. The privilege may be lost if one or more directors do any of the following: (i) discuss matters with non-directors outside of executive session; (ii) allow non-directors to attend executive session who have no legitimate purpose for attending; or (iii) distribute executive session minutes or privileged documents to non-directors.

disciplinary hearing. Section 5855(b) suggests disciplinary hearings should be held in open session subject to an owner's right to insist on closed session. It is appropriate for the board, after the hearing, to exclude the member who is the subject of the proposed disciplinary action and deliberate and take action in closed session. See ***Bollinger v. San Diego Civil Serv. Comm***. (1999) 71 CA4th 568. If the decision is made to impose discipline, Civil Code section 5855(c) says that the Board must notify the member of the disciplinary action by personal delivery or Individual Delivery within 15 days following the meeting at which the decision is made (Civil Code section 5855(c)). A disciplinary action or the imposition of a monetary charge for damage to the common area shall not be effective against a member unless the board fulfills the requirements of section 5855..

(iv) Meetings called to discuss or to act on personnel issues. Personnel matters which include, but are not limited to, hiring, firing, raises, disciplinary matters and performance reviews. Addressing these personnel matters in executive session protects the employee's right of privacy and, under certain circumstances there could be a potential for litigation relating to the personnel matter which is an independent justification for considering the matter in executive session.

(v) Meetings with a member to discuss delinquent assessment payment plans. The board may meet with members in executive session to discuss requests by delinquent members for delinquent assessment payment plans (Civil Code section 4935(c)).

(vi) Meetings called to consider and possibly act to initiated foreclosure proceedings against a delinquent owner. The decision to initiate foreclosure with respect to the home or unit of a delinquent owner must be made only by the vote of the board of Directors of the association. That is a decision and action that the board is prohibited from delegating to any other agent of the association. The board must approve the decision by a majority vote of the directors in executive session. This rule is found in Civil Code section 5665.

15. *Minutes of Board Meetings Must Be Maintained.*

Association boards must maintain minutes of their meetings and that obligation extends to open meetings, emergency meetings and executive session meetings. The

maintenance of minutes of meetings is mandated by Corporations Code section 8320(a) as well as by the Davis-Stirling Open Meeting Act (Civil Code section 4950(a)). In preparing minutes of any meeting (whether of the board or the general membership) an excellent guiding principle is that the minutes are intended to serve as the official record of what the board of directors (or the members) did in the meeting --- what actions were proposed by proper resolution and then either approved or disapproved. Minutes are not supposed to be a verbatim transcript of every word said or angry exchange that occurred. At times it is important and appropriate to precede a statement in the minutes of the actual action taken with a brief summary of the debate, pro and con, that preceded the call of the question on the proposal, so as to serve as a record for future reference of why a particular action was approved (or disapproved) or decision made.

Executive session minutes (which should be prepared and maintained separate and apart from the Association's open session minutes of board and membership meetings) should reflect the deliberations and reasoning behind actions taken by the board in executive session, as well as the decision(s) that were ultimately made. For example, if the board were to give the manager a warning relating to substandard performance, executive session minutes of that meeting should be written to reflect what occurred so that a record exists in the event that an employment dispute erupts at a future time. The minutes might state that "The board expressed dissatisfaction with the manager's performance and gave the manager a written warning that failure to resolve tardiness and absenteeism would result in her dismissal. The board voted not to renew the manager's one-year contract and made the manager's employment an at-will employment relationship."

If the executive session has been convened to discuss matters that require the presence of legal counsel, consideration should be given to requesting that the attorney maintain the official minutes of the executive session meeting and that those minutes remain in the files of the attorney. That could be particularly wise and appropriate if it is known that there are divided factions on the board and, in the same or other contexts, it has become apparent that confidential information --- disclosed and known only to the members of the board in executive session or via other confidential disclosures – has been disseminated to others who are outside the circle of confidentiality and fiduciary obligation.

The Open Meeting Act does state, however, that in the next open board meeting following an executive session the minutes of the open meeting must include a disclosure, in general terms, of the matters addressed in the executive session (Civil Code section 4935(e). To explain the distinction between the formal minutes of the executive session and the subsequent summary disclosure to the general membership that the law requires regarding matters discussed in executive session, consider a hypothetical executive session

called to hear and possibly take action regarding an owner's violation of some restriction in the development's CC&Rs. The actual minutes of the executive session would probably include a brief description of the allegations or facts supporting the claim that the CC&Rs had been violated, a summary of any rebuttal offered by the accused owner (if present), and a report on the board's final decision to either authorize disciplinary action or, in the alternative, to decline to take any action.

The later report in the minutes of the following open meeting of the board regarding what transpired at that executive session would simply state that on such-and-such a date the board met in executive session to deliberate and possibly take action involving an owner's alleged violation of the development's covenants and restrictions. In other words, the required summary disclosure to the general membership of what transpired in an executive session is not intended to be a republication of the actual minutes of the executive session and the nature and scope of the summary may vary depending on the sensitivity (or lack thereof) of the matters addressed in the executive session. To provide more information regarding the discussions that took place during an executive session meeting of the Board in a summary disclosure to the members vitiates the meritorious policy justifications for conducting the meeting as an executive session.

The actual minutes of the executive session should remain confidential *unless the Board* for good reason decides to provide a more detailed disclosure to the members of the Board's actions and/or deliberations in executive session. Although members of nonprofit owners' associations have much broader rights of inspection and access to information than do shareholders or members of other California corporations as a result of Civil Code sections 5200-5240, that Code section specifically states that members who are not directors have no right to access "minutes and other information from executive sessions of the board of directors" (Civil Code section 5215(a)(5)(D)).

16. *Minutes of Meetings of the Board Must be "Available" to the Members*.

The minutes, minutes proposed for adoption that are marked to indicate draft status, or a summary of the minutes of any meeting of the board of directors, other than executive session meetings, must be made available to the general membership within **30 days** of the date of the meeting. The minutes, draft minutes or summary of the minutes must be provided to any member upon request and upon reimbursement of the association's costs of making that distribution. Civil Code section 4850(a). Subparagraph (a) does not offer any further clarification of the phrase "must be made available" however the phrase probably requires nothing more than that the document be in existence and available for distribution if a request is received from a member. Some associations that maintain a website that has a secure "members only" area with a pass word system often post minutes of Board meetings at that site.

Civil Code section 4950(b) instructs that the annual policy statement that is distributed to the members of an owners' association pursuant to Civil Code section 5310 must inform the members of their right to obtain copies of board meeting minutes and of how and where to do so. That annual policy statement must be distributed to the members within 30 to 90 days prior to the end of an association's fiscal year and that distribution must be done by individual delivery (Civil Code section 5310(b), 5320, and 4040).[13]

17. *Are Members Entitled to Record Open Board Meeting Sessions?* In my opinion, which is shared by most of the respected commentators that I know, the answer is that members have no legal or constitutional right to record board meetings. Association meetings are not public gatherings. Under the Open Meeting Act association members (not the general public) can attend board meetings and address the board. (Civ. Code section 4925(a).) Moreover, boards have the authority to set its meeting practices and govern the community's business and affairs. (See, Corporations Code section 7210; Civil Code section 4925; and *SB Liberty v. Isla Verde Assn*. (2013) 217 Cal. App. 4th 272.) That means boards of directors can adopt rules that include restrictions on recording their meetings.

The Davis-Stirling Open Meeting Act, which governs owner association board meetings, is separate from the Ralph M. Brown Act which applies to the conduct of meetings of local agencies and governing bodies. There is no statute or reported court decision that converts board meetings of common interest development owner associations into a public gathering and permits the unauthorized recording of those meetings. Civil Code section 4925 allows only two things: (i) a member's right to attend an open meeting and (ii) their right to speak during an open meeting. There is nothing in the statute that allows members to record HOA meetings. The Brown Act expressly permits recording of the open meetings that are subject to that Act (Government Code 54953.5(a)). There is such right in the Davis-Stirling Act. While parts of the Davis-Stirling Act are similar to the Brown Act, the fact that the legislature deleted that point from the Davis-Stirling Act makes it clear they were dealing with private not public meetings.

The First Amendment is frequently cited by people (including some lawyers) in support of the right of members to make private recordings of association meetings. The First Amendment to the U.S. Constitution does not give owners the right to record private meetings. The First Amendment applies to governmental restrictions on free speech and does not apply to private meetings.

[13] "Individual delivery" is defined in Civil Code section 4040 to include delivery by: (i) first-class, registered, or certified mail; or (ii) by email or facsimile transmission, but only if the recipient has consented to that manner of transmission or delivery.

2014 DAVIS-STIRLING OPEN MEETING ACT.
(CIVIL CODE SECTIONS 4900 – 4950)

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ARTICLE 2. BOARD MEETINGS AND THE OPEN MEETING ACT

4900. DESIGNATION AS "THE COMMON INTEREST DEVELOPMENT OPEN MEETING ACT".

This article shall be known and may be cited as the Common Interest Development Open Meeting Act.

4910. GENERAL STATEMENT PROHIBITING BOARD ACTONS OUTSIDE OF A "BOARD MEETING" AS DEFINED.

(a) General Prohibition of Actions Outside of a Board Meeting. The board shall not take action on any item of business outside of a board meeting.

(b) General Prohibition Against Conducting Meetings by Email or Written Consent.

(1) Generally. Notwithstanding Section 7211 of the Corporations Code, the board shall not conduct a meeting via a series of electronic transmissions, including, but not limited to, electronic mail, except as specified in paragraph (2).

(2) Exception for Consent Action in an Emergency. Electronic transmissions may be used as a method of conducting an emergency board meeting if all directors, individually or collectively, consent in writing to that action, and if the written consent or consents are filed with the minutes of the board meeting. These written consents may be transmitted electronically.

4920. REQUIREMENTS OF BOARDS TO PROVIDE NOTICE OF MEETINGS (Open and Executive).

(a) General Rules of Four Days' Notice. Except as provided in subdivision (b), the association shall give notice of the time and place of a board meeting at least **four days** before the meeting.

(b) Other Situations Where Less or Other Notice is Required.

(1) No Notice Required of Emergency Meetings [Although not stated, these are probably MEMBER notice requirements]. If a board meeting is an emergency meeting held pursuant to Section 4923, the association is not required to give notice of the time and place of the meeting.

(2) Two Days Notice of Non-Emergency, Stand-Alone Executive Sessions. If a nonemergency board meeting is held solely in executive session, the association shall give notice of the time and place of the meeting at least two days prior to the meeting.

(3) Governing Documents Can Call for Longer Notice and if so, That Notice Must be Followed. If the association's governing documents require a longer period of

notice than is required by this section, the association shall comply with the period stated in its governing documents.

(c) Method of Providing Notice is "General Delivery". Notice of a board meeting shall be given by general delivery pursuant to Section 4045. [This means by first-class, certified or registered mail; email or FAX (if the recipient has consented); on an association television channel; or posting is a prominent location in the development that has been designated for posting in a general notice)] . I a member specifically asks for individual delivery then "general delivery" means individual delivery.

(d) Notice of the Board Meeting Must Include an Agenda. Notice of a board meeting shall contain the agenda for the meeting.

4923. WHO CAN CALL AN EMERGENCY MEETING? DEFINITION OF WHAT IS AN "EMERGENCY".

An emergency board meeting may be called by the president of the association, or by any two directors other than the president, if there are circumstances that could not have been reasonably foreseen which require immediate attention and possible action by the board, and which of necessity make it impracticable to provide notice as required by Section 4920.

4925. RIGHT OF MEMBERS TO ATTEND OPEN MEETINGS OF THE BOARD.

(a) Right to Attend Open Meetings; Conference Call Meetings. Any member may attend board meetings, except when the board adjourns to, or meets solely in, executive session. As specified in subdivision (b) of Section 4090, a member of the association shall be entitled to attend a teleconference meeting or the portion of a teleconference meeting that is open to members, and that meeting or portion of the meeting shall be audible to the members in a location specified in the notice of the meeting.

(b) Right of Members to Speak at Open Meetings. Reasonable Time Limits are OK. The board shall permit any member to speak at any meeting of the association or the board, except for meetings of the board held in executive session. A reasonable time limit for all members of the association to speak to the board or before a meeting of the association shall be established by the board.

4930. WITH LIMITED EXCEPTIONS, BOARDS MUST STICK TO THE PUBLISHED AGENDA.

(a) General Rule; Members' Rights to Raise Other Issues. Except as described in subdivisions (b) to (e), inclusive, the board may not discuss or take action on any item at a nonemergency meeting unless the item was placed on the agenda included in the notice that was distributed pursuant to subdivision (a) of Section 4920. This subdivision does not prohibit a member or resident who is not a director from speaking on issues not on the agenda.

(b) Brief Responses to Statements; Requests for Clarification. Notwithstanding subdivision (a), a director, a managing agent or other agent of the board, or a member of the staff of the board, may do any of the following:

(1) Briefly respond to statements made or questions posed by a person speaking at a meeting as described in subdivision (b) of Section 4925.

(2) Ask a question for clarification, make a brief announcement, or make a brief report on the person's own activities, whether in response to questions posed by a member or based upon the person's own initiative.

(c) Other Permitted Off-Agenda Responses. Notwithstanding subdivision (a), the board or a director, subject to rules or procedures of the board, may do any of the following:

(1) Providing References or Resources for Factual Information. Provide a reference to, or provide other resources for factual information to, its managing agent or other agents or staff.

(2) Requests to Management to Investigate and Report Back at a Later Meeting. Request its managing agent or other agents or staff to report back to the board at a subsequent meeting concerning any matter, or take action to direct its managing agent or other agents or staff to place a matter of business on a future agenda.

(3) Request to Management to Perform Administrative Actions. Direct its t or other agents or staff to perform administrative tasks that are necessary to carry out this section.

(d) Need to Take Emergency or Immediate Actions That Could Not Make the Agenda; Old Business. Notwithstanding subdivision (a), the board may take action on any item of business not appearing on the agenda distributed pursuant to subdivision (a) of Section 4920 under any of the following conditions:

(1) Emergency Situations. Upon a determination made by a majority of the board present at the meeting that an emergency situation exists. An emergency situation exists if there are circumstances that could not have been reasonably foreseen by the board, that require immediate attention and possible action by the board, and that, of necessity, make it impracticable to provide notice.

(2) Need for Immediate Action. Upon a determination made by the board by a vote of two-thirds of the directors present at the meeting, or, if less than two-thirds of total membership of the board is present at the meeting, by a unanimous vote of the directors present, that there is a need to take immediate action and that the need for action came to the attention of the board after the agenda was distributed pursuant to subdivision (a) of Section 4920.

(3) Business That Was On the Agenda for the Last Meeting and Continued. The item appeared on an agenda that was distributed pursuant to subdivision (a) of Section 4920 for a prior meeting of the board that occurred not more than 30 calendar days before the date that action is taken on the item and, at the prior meeting, action on the item was continued to the meeting at which the action is taken.

(e) Obligation to Identify Subparagraph (d) Action Items to the Members. Before discussing any item pursuant to subdivision (d), the board shall openly identify the item to the members in attendance at the meeting.

4935. PURPOSES FOR WHICH EXECUTIVE SESSION MEETINGS ARE PROPER.

(a) The board may adjourn to, or meet solely in, executive session to consider : (I) litigation, (II) matters relating to the formation of contracts with third parties, (III) member discipline, (iv) personnel matters, or (v) to meet with a member, upon the member's request, regarding the member's payment of assessments, as specified in Section 5665.

(b) The board shall adjourn to, or meet solely in, executive session to discuss member discipline, if requested by the member who is the subject of the discussion. That member shall be entitled to attend the executive session.

(c) The board shall adjourn to, or meet solely in, executive session to discuss a payment plan pursuant to Section 5665.

(d) The board shall adjourn to, or meet solely in, executive session to decide whether to foreclose on a lien pursuant to subdivision (b) of Section 5705.

(e) Any matter discussed in executive session shall be generally noted in the minutes of the immediately following meeting that is open to the entire membership.

4950. MINUTES TO BE MADE AVAILABLE TO THE MEMBERS WITHIN 30 DAYS.

(a) General Statement of the Obligation to Prepare Minutes or Draft Minutes Within 30 Days. The minutes, minutes proposed for adoption that are marked to indicate draft status, or a summary of the minutes, of any board meeting, other than an executive session, shall be available to members within 30 days of the meeting. The minutes, proposed minutes, or summary minutes shall be distributed to any member upon request and upon reimbursement of the association's costs for making that distribution.

(b) Obligation to Notify Members of Right to Minutes in the Annual Policy Statement. The annual policy statement, prepared pursuant to Section 5310, shall inform the members of their right to obtain copies of board meeting minutes and of how and where to do so.

4955. MEMBER ENFORCEMENT RIGHTS (ONE YEAR STATUTE OF LIMITATIONS); ATTORNEYS' FEES.

(a) A member of an association may bring a civil action for declaratory or equitable relief for a violation of this article by the association, including, but not limited to, injunctive relief, restitution, or a combination thereof, within one year of the date the cause of action accrues.

(b) A member who prevails in a civil action to enforce the member's rights pursuant to this article shall be entitled to reasonable attorney's fees and court costs, and the court may impose a civil penalty of up to five hundred dollars ($500) for each violation, except that each identical violation shall be subject to only one penalty if the violation affects each member equally. A prevailing association shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.