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Glastonbury Board of Directors

RE: Leo's questions.

Dear Board:

You requested that I review a few questions submitted by Board Member Leo. I reviewed your governing documents and Montana law. The questions are as follows:

1. Does the Board e-mail procedure that automatically sends an e-mail to every Director constitute a meeting, and what criteria should be followed to avoid the appearance of having a closed meeting?
2. Does automatically placing a "CONFIDENTIAL DO NOT SHARE" stamp on every e-mail, which some see as changing them from personal to corporate documents, change the e-mail discussion into a meeting?
3. Is the "*Your participation in this group and the GLA Board of Directors indicates acceptance of these terms of privacy.*" phrase at the bottom of each e-mail legal?
4. What recourse, legal or otherwise, does the Board have if an email is forwarded outside the Board of Directors, either by a Board member or GLA members on a committee etc.?
5. Should GLA keep using THE STAMP on every e-mail, and are there any liability or other issues placing GLA in jeopardy by doing so?
6. With the understanding that Directors can discuss an issue via e-mail, what actions change a discussion, which includes all Directors receiving the same e-mails simultaneously, into a meeting?
7. What problems are created if a Director chooses to "*unsubscribe from this group*"?
8. Since Montana appears not to have any laws or court cases on what constitutes a meeting, either electronically or by personal attendance, what guidelines can you recommend?
9. What makes an e-mail to the Board become a private e-mail for Board use only?
10. Are e-mailed or mailed complaints from landowners private, or are they to be made available to landowners filing a document request?
11. Are all Board actions and/or Director questions and actions, including e-mails, about a landowner complaint confidential?

I will try to address each question in order.

Does the Board e-mail procedure that automatically sends an e-mail to every Director constitute a meeting, and what criteria should be followed to avoid the appearance of having a closed meeting?

This gets to the heart of the matter regarding confidentiality and being transparent. Leaving behind any governing documents, law or what not, the more transparent you can be, the less issues you will typically have. That being said, there are things that must remain confidential. For example, legal advice from your attorneys involving ongoing litigation. Another clear area are employee matters which involve confidential information regard an employee.

The other balance that I see many owners associations struggle with is abuse at meetings and how to balance a board member's right to be free from harassment with being transparent and having open meetings where all can discuss. More and more, friendly discourse and agreeable debate are going out the window. People feel free to disparage the person personally, instead of disagreeing regarding the material issues. Your Board is certainly seeing this, and for many of you, it is getting personal because the members are making it very, very personal.

I have suggested in the past, that you have a third party address, in person or by telephone, all complaints made be members. A third party has no personal interest in the issues. Therefore, their advice is balanced, the members feel heard and hopefully, the member gets pointed in the right direction and does not continue along the wrong course.

Turning to the question, the issue seems to be "what is a meeting under your governing documents." Your governing documents do not define meeting. The bylaws state "All business of the Board other than confidential matters (in the discretion of the Board) shall be conducted in an open meeting." The language goes on to explain that they may be held at any time upon the giving of reasonable notice. The term "open meeting" is not defined.

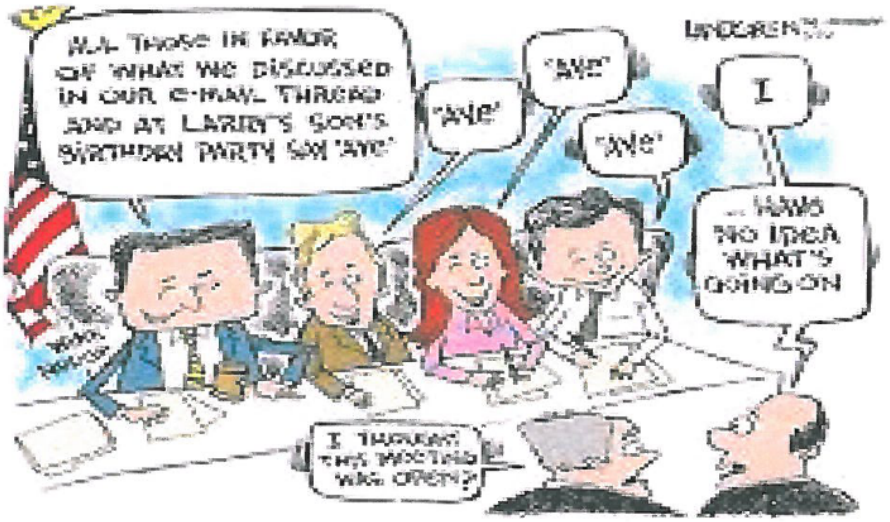
Open meeting can mean a number of things. It can mean an "open meeting statute applying to a government which requires the agency or government to open its meetings and/or its documents to the public." Black's Law Dictionary. However, this is not a statute that applies to a government. Those statutes are long and arduous. This is a simple use of the phrase, "open meeting" without a definition. Since it is not defined, it is hard for me to define. Typically, a court would look at the common meaning to the phrase, which would probably be a meeting that is open to other people, maybe members. However, the Court would read it along with the other portions of the Bylaws.

For example, reasonable notice is defined. "Notice of meeting shall be mailed, delivered personally or faxed by the Secretary, or other person designated by the President, to each Director to be received not less than three (3) days before any such meeting." The notice provision continues to state how to notice special meetings of the Board of Directors. What I find interesting is that reasonable notice of the Board meetings does not need to be provided to the members. I believe a Court might to. A court could conclude that the meeting must be open to members, but there is no requirement to give notice to the members. Once again, I am not sure. There is no black and while answer to this.

You asked if by discussing things in email, you were conducting a meeting. However, it seems that your bylaws actually are okay with having meetings by email: "Action by Written Consent. Any action required or permitted to be taken by the Board of Directors may be taken without meeting if all members of the Board are contacted and a two-thirds majority of the Board

members shall individually or collectively consent in writing to such action." If this occurs, a record of the vote must be filed in the minutes. Once again, there is no requirement that the Board include all members in the vote, notice members of the vote, or otherwise tell members that the vote is happening.

That being said, when things happen behind closed doors, or there is an appearance of hiding something, people start to question you. Basically, you want to avoid the below:



Yes, this is a cartoon, but satire is based on reality. It is funny because it is true. What I tell my Boards is to try not to talk too much about matters in emails. There are times in this day and age when email saves time, money and is useful. But don't make decisions in email. Make sure to fully discuss any issue in the meetings. There is no law with regards to owners associations, but once again, transparency is key to avoiding lawsuits. While you can have a vote by email, I would avoid doing so in your current climate. This; however, is just my advice. The Bylaws clearly allow you to do so.

2. Does automatically placing a "CONFIDENTIAL DO NOT SHARE" stamp on every e-mail, which some see as changing them from personal to corporate documents, change the e-mail discussion into a meeting?

No, I do not believe so. Remember, you are not bound by the state's open meeting laws. Therefore, there are no rules regarding what you must share with the members, outside of the specific language in your government documents. That being said, most attorneys (myself included) would say to try to limit what is confidential. Only certain matters are confidential. If

you label everything confidential, you risk losing your confidentiality, much like the boy who cried wolf.

That being said, I understand the reasoning behind the Stamp. But, it may be time to remove it.

3. Is the "*Your participation in this group and the GLA Board of Directors indicates acceptance of these terms of privacy.*" phrase at the bottom of each e-mail legal?

I'm not sure I understand the question. I know of no law that would state this is illegal in anyway.

4. What recourse, legal or otherwise, does the Board have if an email is forwarded outside the Board of Directors, either by a Board member or GLA members on a committee etc.?

It depends. If the email chain truly contained confidential information, then the member can be individually liable for any damaged caused by forwarding or otherwise disseminating the email. Depending on the circumstances of the send (accidental or on purpose), the E & O insurance may not cover the person. If the email does not contain information that a reasonable person in the same or similar circumstances would find confidential, then there is really no recourse because there is no damage.

You can also ask the person who received the information to delete it, but once it is out there, it is out there. I am also unware of any policy in your governing documents that would allow the Board to remove a member for revealing confidential information. However, the members could remove the Board member upon a vote equally what it would take to seat the member, or the Association can ask a judge to remove a Board Member for cause. It is a fairly detailed process that I don't believe is warranted a discussion at this time. Just know it can happen.

5. Should GLA keep using THE STAMP on every e-mail, and are there any liability or other issues placing GLA in jeopardy by doing so?

I believe I answered this already. You should only use it if the information is truly confidential.

6. With the understanding that Directors can discuss an issue via e-mail, what actions change a discussion, which includes all Directors receiving the same e-mails simultaneously, into a meeting?

Since your governing document do not define open meeting, I can only give you the best advice. There seems to be some inherent idea that an open meeting must include the members. Reading your governing documents closely, members are not mentioned in the notice provisions for noticing a Board meeting, Furthermore, the action by writing section also does not refer to

members. It seems that everyone simply assumes that because "open meeting" is used, this mean members must be notice and included. However, the notice provisions don't include members. Therefore, it could be that open meeting has nothing to do with members being present.

Based on your governing documents, you can have meetings in writing. What seems to trigger a meeting is a request for a vote. (See Action by Written Consent.)

That being said, you should do your best to include members for transparency.

7. What problems are created if a Director chooses to "*unsubscribe from this group*"?

I don't know what practical problems there would be. There are no legal problems except that you would not be able to use the group for Actions by Written Consent since all Directors must be included in the request for a vote.

8. Since Montana appears not to have any laws or court cases on what constitutes a meeting, either electronically or by personal attendance, what guidelines can you recommend?

I would recommend as much transparency as possible, balancing it with care of truly confidential information and your own emotional needs. Once again, a third party buffer may be the best thing for the Board right now.

9. What makes an e-mail to the Board become a private e-mail for Board use only?

If it contains truly confidential information that a reasonable person in the same or similar situation would agree is confidential. That being said, the Board has the "discretion" to determine something is confidential. But, keep in mind that all contracts have the duty of good faith and fair dealing. In other words, that determination must be reasonable.

10. Are e-mailed or mailed complaints from landowners private, or are they to be made available to landowners filing a document request?

Good question. This depends on the email and how the Board wishes to treat it. For example, many Boards struggle with the issue of member complaints. Can those complaint be anonymous? In your case, your Bylaws Article XI, Section C contains a due process section. You are required to provide reasonable notice to affected persons in an enforcement action, and provide a reasonable opportunity for any such Member to be heard and to give written or oral comment to the Board. "Enforcement actions shall also include a reasonable fact-finding process whereby relevant information related to all sides of the issue with be gathered and evaluated." While it does not say that you must provide the name of the accuser that would seem to be relevant to the person who the enforcement action is against. However, you could make a rule to keep the accuser's name private upon their request, must then you would not use any information provided

by them in the enforcement action. You would have to have information outside of the complaint. That rule make a lot of the nuisance complainer go away, but people who are serious allow you to use their names.

11. Are all Board actions and/or Director questions and actions, including e-mails, about a landowner complaint confidential?

It depends on what open meeting means. Since there is no judge order on it, then I can only guess. That brings up an interesting issue. You could ask the judge for a declaratory judgment on the issue. You would need an opposing party with a different view of what "open meeting" meant. But, if it is truly causing issues, it may be best to go to Court and ask the judge to give you a definition.

The action must be on the record. Any Board action must be in the minutes, minus confidential information. However, the investigation could be confidential, but once again, it is best if the results are not.

Overall, the more you can share, the better. You should develop a policy regarding complaints and what you keep confidential, what you will disclose, and how you use the information provided by someone who is allowed to remain confidential.

Let me know if you have any questions.

Sincerely,

Alanah Griffith