

VIRTUAL MEETINGS (SB 391)

Newly enacted emergency legislation requires that certain conditions be met before an open meeting may be conducted by teleconference or videoconference. If a board chooses to conduct an open meeting during a State of Emergency and without providing a physical location for the members to attend the meeting, the association must follow additional notice requirements, minute requirements, and technical support requirements to avoid potential lawsuits and civil penalties.

The COVID-19 pandemic has resulted in losses, hardships, and inconveniences for almost every person on Earth. When the Stay-at-Home orders were initially mandated, lawyers struggled to advise Boards on how to make difficult decisions to continue to operate without violating the order and without eliminating essential lines of communication between the volunteer directors and owners. Municipalities had similar issues regarding their public meetings, but emergency legislation was enacted to provide guidance so that governments could hold virtual meetings. No such emergency legislation was enacted for homeowners associations. Senate Bill (SB) 391 addresses this issue, but unfortunately it has come a little late, makes virtual meetings more (not less) complicated, and fails to recognize what we have learned during the pandemic – that virtual meetings work better than in-person meetings for many homeowners associations.



Application of the New Law:

SB 391 has created a new addition to Section 5450 of the *Civil Code* effective immediately. It allows for virtual meetings but has limited applicability. First, the new law only applies if gathering in person is unsafe or impossible because the common interest development is in an area affected by (1) a state of disaster or emergency declared by the federal government, (2) a state of emergency proclaimed by the Governor under Section 8625 of the *Government Code*, or (3) a local emergency proclaimed by a local governing body or official under Section 8630 of the *Government Code*.

(3) Directors and members must have the ability to participate in the meeting in the same manner as if the meeting were held in person. In other words, members are entitled to make comments during homeowner forum and listen to the other portions of the open meeting.

(4) Director resolutions must be made by **roll call vote**.

(5) If the meeting is conducted by videoconference, attendees must be given the option of participating by phone.

No Physical Location Required if Conditions are Met:

Civil Code section 4090 requires that a notice of a meeting must identify at least one physical location for members to attend the meeting, and at least one person designated by the board must be present at that location. Assuming that there is an applicable emergency order in place, the law provides an exception whereby the meeting may be held virtually without any physical location being identified if the following conditions are satisfied:

(1) Notice of the *first virtual meeting* for a particular disaster or emergency affecting the association must be delivered to members by individual delivery. This means the notice cannot be posted.

(2) In addition to other required content for meeting notices, the notices for each virtual meeting must include (a) clear technical instructions on how to participate by teleconference, (b) a telephone number and e-mail address of a person who can provide technical assistance with the teleconference process, both before and during the meeting, and (c) a reminder that a member may request individual delivery of meeting notices, with instructions on how to do so.

(3) Directors and members must have the ability to participate in the meeting in the same manner as if the meeting were held in person. In other words, members are entitled to make comments during homeowner forum and listen to the other portions of the open meeting.

(4) Director resolutions must be made by **roll call vote**.

(5) If the meeting is conducted by videoconference, attendees must be given the option of participating by phone.

Ballot Tabulation:

When ballots are tabulated on a videoconference, the meeting the camera must be placed in a location such that members can observe the inspector of elections counting and tabulating the votes.



Penalties:

To add insult to injury, the law also allows a member to seek the remedies set forth in Civil Code section 4955 for violations. These remedies include lawsuits in which attorney's fees, costs, and penalties of \$500 for each violation may be awarded by the court.

Our Take:

This new law is not helpful. Although it does legitimize the way in which boards have been conducting their meetings during the pandemic, the new law creates large burdens and may subject boards to criticism and legal challenges from members.

A board that wishes to continue to use virtual meetings can follow the new procedures and conduct the meeting 100% virtually. Some boards might also consider whether it is more efficient to use the new procedures for open meetings and to continue to use virtual meetings for separate closed session (executive) meetings.

Alternatively, the board may choose to use the procedures set forth in the original law, which require that a location be designated where members can attend the meeting in-person and that a designated person be at that location during the meeting. Those not physically in attendance would participate by phone or videoconference. Management companies may consider establishing dedicated space (with a speaker and/or video camera) to meet the physical location criteria for meetings in which most meeting attendees are expected to participate by video or phone, and may go as far as to dedicate a staff member to act as the administrator of all videoconference so that the same contact information can be provided for technical assistance for all of the management company's clients.

While perhaps not an ideal scenario for robust participation, this hybrid approach would comply with California law and allow nearly all participants to attend virtually. Note, the association's governing documents may dictate the location of the physical meeting (e.g., on-site or within the county) and should be reviewed.

Boards wishing to continue conducting open meetings without a designated physical location for attendance should consult with legal counsel to create appropriate meeting notices that will fulfill the new legal requirements.