A Brief History: Open Meetings

by Ed Hannaman, C-IHC President

In 2017 New Jersey enacted an election law (effective November 1 of that year for associations recognizing that they exercise governance over owners and must adhere to American democratic values (NJSA 45:22A-45.1 et seq.). The New Jersey Condominium Act, NJSA 46:8B-13(a) and Planned Real Estate Development Full Disclosure Act, NJSA 45:22A-45a) recognized that associations need to have meetings open to owners. How do these impact the principal of voting at open meetings. Without open voting, an open meeting is ineffective for providing transparency when there are matters that merit a board's discussion in closed sessions. Without open voting, there is no notice of actions taken to owners and no minutes of the actions available to owners. An open meeting without full open voting is a superficial exercise that merely serves to cover up corrupt actions.

For over 28 years, the New Jersey's Bureau of Homeowner Protection of the Department of Community Affairs (DCA) held that the statutory authorization for boards to deal with specified matters in closed meetings did not authorize boards to ignore the obligation to vote on such matters in an open meeting. The law was clear that to be "binding," a vote had to be taken at an open meeting. The agency's position was straightforward that this applied to voting on matters that a board could discuss in closed/executive session.

Notably, there is no necessity to disclose any confidential information at the open meeting when voting, and the agency acknowledged that on such matters as litigation the vote may need to be delayed until after the action to avoid alerting adversaries. (Experience has shown that even many months after filings that are public record, associations have failed to inform owners of the action.)

In 2020 the DCA enacted regulations in response to the election law and incorporated existing open meeting regulations (which had been located in a Code Section, NJAC 5:20, not part of the PREDFDA Reg., NJAC 5:26). When it did so, it also formalized the long-standing open voting requirement. The Agency's Regulations (NJAC 5:26-8.12(e)2) expressly stated that *a vote in a closed session (to which owners are not admitted) could not be binding.* Thus, the board would have to both vote at an open meeting and reflect the vote in its meeting minutes.

The Community Association Institute (CAI) brought a case challenging many of the owner protections in the regulations, including specifically the necessity of an

open vote in all cases. It argued that a board need not vote at an open meeting on any matters the PREDFDA permitted to be dealt with in a closed session. In February 2024, the Appellate Court parsed statutory language to assume that the legislature made a conscious decision to distinguish a closed conference or working session, in which the board "discusses" matters from a non-open session in which it "dealt with" matters.

The open meeting statute allows several specific matters such as contract negotiations, personnel matters or legal issues to be dealt with in an executive session. The court decided that the phrase "deal with" allowed a private vote although that eliminated all the benefits of requiring open meetings by creating a loophole that allows the exceptions to swallow the rule. (In the Matter of the Challenge of the Community Associations Institute-New Jersey Chapter, Inc., to Amendments to N.J.A.C. 5:26 App Div. Feb 23, 2024, Doc No A-2241-21 (as of September 30 the Committee on Publications had not approved its publication making it a reported case establishing precedent-highly unusual considering that it reversed State Regulations. It remains an unpublished decision.) That decision steamrolled over established judicial precedent that courts will defer to the position of an Executive agency charged with administering the law. Similarly, the court ignored legislative intent to provide openness for board actions and the fact that legislators saw no distinction between "discussing" and dealing with" in the context of closed meetings. They saw the terms as interchangeable the same way people use them in everyday speech and that is exactly how the executive agency applied the law in consideration of the fact that open voting was essential to the point of open meetings.

There are a number of important lessons here: First, the CAI can be counted on to be an opponent of everything which could impede a board from acting without restraint. Thus, one can expect the CAI to support the expansion of board power and limitations on owner rights. It does this to benefit its members, knowing full well that many board actions would not do well in the antiseptic sunlight openness provides (it always resists disclosing attorney bills to owners and only does so reluctantly with loads of redactions making disclosed bills effectively useless as to actual services provided.) Secret votes that never have to be disclosed are perfect to allow all sorts of corruption safe from the knowledge of owners.

Second, when a State recognizes the need to require boards to have open meetings, it must carefully draft its statutes being conscious that there will be attempts to undermine the law from groups hostile to owner rights. Any statutory provision must be extraordinarily clear, direct and "bullet-proof" to avoid any attempts to misconstrue and undermine it. It is fundamental that, although there are some matters, which obviously require confidentiality in discussions to protect the association or its members, that fact does not thereby require that the vote to take the action be held secret. This ensures unjustified secrecy that facilitates corruption. Moreover, as a purely practical matter, the failure to vote openly excludes the action from inclusion in official association minutes. Association Meeting Minutes are an important and fundamental record and should not be undermined through exclusions of binding actions.

Third, requiring open meetings, although necessary and important, is not sufficient to protect owners. Owners need: 1. Guaranteed access to and a right to copy all association business records; 2. The right to access and copy all association financial records; 3. Specific election rules to ensure fairness; 4. A user friendly, truly impartial dispute resolution option, and, if the need for litigation arises, the right to counsel fees if successful; 5. A statute regulating property managers; 5. Mandatory training for Board members; And, of overriding importance; 6. An adequately staffed state enforcing agency with full legal powers over associations to ensure compliance.