



STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
REAL ESTATE DIVISION
ADVISORY OPINION

Subject: Executive Board Meetings and Methods of Voting by Board Members	Advisory No.	11-01	1 of 3 pages
	Issued By:	Real Estate Division	
	Amends/ Supersedes	N/A	
Reference(s): NRS 116.31085; NRS 116.3103	Effective Date:		June 14, 2011

QUESTION 1: WHAT CONSTITUTES A MEETING OF THE BOARD?

Can a majority of an executive board meet for the purpose of discussing association business without notifying units' owners and allowing them to attend and speak, with the specific exception of those items listed under executive session as detailed in NRS 116.31085?

ANALYSIS OF THE ISSUE:

NRS 116.31085(1) states that a unit's owner may attend any meeting of the units' owners or of the executive board and speak at any such meeting. This section further provides that for certain items an executive board may enter an executive session and absent certain exceptions, a unit's owner is not entitled to attend or speak at a meeting of the executive board held in executive session. NRS 116.31085(3) states that the board may enter into an executive session for the following items:

(a) Consult with the attorney for the association on matters relating to proposed or pending litigation if the contents of the discussion would otherwise be governed by the privilege set forth in NRS 49.035 to 49.115, inclusive.

(b) Discuss the character, alleged misconduct, professional competence, or physical or mental health of a community manager or an employee of the association.

(c) Discuss a violation of the governing documents, including the failure to pay an assessment.

(d) Discuss construction penalties for the alleged failure of a unit's owner to adhere to a construction schedule.

The statements in this advisory opinion represent the views of the Division and its general interpretation of the provisions addressed. It is issued to assist those involved with common interest communities with questions that arise frequently. It is not a rule, regulation, or final legal determination. The facts in a specific case could cause a different outcome.

However, NRS 116.3103 imposes a duty on the executive board to act in all instances on behalf of the association as fiduciaries and act on an informed basis, in good faith and in the honest belief that their actions are in the best interest of the association. Conversely, NRS 116.31085(2) places restrictions on the executive board in that it may not meet in executive session to open or consider bids for an association project or to enter into, renew, modify, terminate or take any other action regarding a contract.

There is no definition of “meeting” within NRS 116. A bill that would subject Common interest communities to the Open Meeting Law did not pass this legislative session. Therefore, the definitions contained therein do not apply. The governing documents of an association detail the procedural rules for meetings and a unit owner should also look to those to determine whether a simple majority of an executive board constitutes a quorum in order for the board to act or make decisions. The governing documents may also contain further restrictions on the executive boards’ power.

ADVISORY CONCLUSION:

NRS 116.31083(4) requires the board to notify the unit owners with the time and place of its executive meetings and further permit unit owners to attend and speak, but the board may establish reasonable limits on unit owners’ comments. Although an executive board may meet in executive session without permitting unit owners to attend or speak, the subject of the executive session is limited to the items set forth in NRS 116.31085. The board may not meet in executive session to open or consider bids for an association project or to take any action regarding a contract. Therefore the propriety of the executive session would depend upon the subjects discussed.

Absent any definition of “meeting” in Chapter 116, and absent definitions or procedural rules in the governing documents of an association, the requirements for meetings referenced in NRS 116.31085 apply to any noticed and agendized meeting of the executive board.

QUESTION 2: METHODS OF EXECUTIVE BOARD MEMBER VOTING.

Can an executive board vote via either telephone, email or any other private method on items regarding their association business?

ANALYSIS OF THE ISSUE:

NRS 116.3103 states that the executive board is to act in all instances on behalf of the association as fiduciaries and act on an informed basis, in good faith and in the honest belief that their actions are in the best interest of the association. Therefore, the officers and members of the executive board are fiduciaries. Board members and officers will be judged by the Business Judgment Rule. See NRS 116.3103(1).

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NRS 116 does not address participation via telephone. Because community associations are usually non-profit organizations, NRS chapter 82 governs the non-profit corporations and it may be useful here. NRS 82.271 provides that unless restricted by the articles or bylaws, directors may participate in a meeting by telephone or other means, so long as all persons participating can hear each other. More importantly, NRS 82.271(3) specifically states that when a director participates in a meeting by this method, his or her participation “constitutes presence in person.” Thus, even community association boards have permitted executive directors to participate in meetings through use of telephone conferencing. The statute has the provision for an association’s governing documents to require otherwise and it would be helpful to look there as well.

The members of the executive board are fiduciaries and act on an informed basis, in good faith and in the honest belief that their actions are in the best interest of the association, thus the member should participate in the decision making process and then vote accordingly. The provision of the telephone conference can satisfy a board member’s duty to act on an informed basis. Any other methods may not do so and in fact hinder a board member in fulfilling the requirements of the position. An association’s governing documents may also address the issues of how a member of the executive board may vote.

ADVISORY CONCLUSION:

NRS 116 is silent regarding whether a member of the executive board may vote via telephone, email or some other method. Generally, a vote via email or possibly another method may not satisfy the fiduciary duty of a board member, thus these methods of voting for members of an executive board is greatly disfavored. Under NRS chapter 82, the statute that addresses non-profit organizations, this statute permits executive members to participate via telephone conferencing that has the same effect as if the member were present. However, both NRS 116 and NRS 82 include a provision for an association’s governing documents to address the issues of how a member of the executive board may vote.

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