

**... 40 DAYS AND 40 NIGHTS ...
THE LIFE CYCLE OF
ASSOCIATION MEETINGS**



BEFORE THE MEETING

Who is responsible for drafting the agenda?

Typically that would be the President and/or manager. There is no authority that specifically assigns the task. In the “old days” it didn’t make much difference because at the beginning of each meeting, the Board itself could expand or contract the agenda. Now with the requirement of a formal agenda being published with the notice (minimum four days), an appropriate agenda has the potential to be one of those “mid-cycle” problems. In a perfect world, at the end of each Board meeting, the Board would adopt the agenda for the next Board meeting. Authority to add or subtract could be given to the President and/or manager. My suggestion is that before there is a problem, designate who has the authority and what the protocol is.

When the statute requires four day notice, does that mean to the exact hour between the posting and commencement of the meeting?

The four day requirement is contained in Civil Code Section 1363.05(f) but that does not specify timing beyond the four day reference. We can say that Code of Civil Procedure Section 12 provides that “the time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless, the last day is a holiday, then it is also excluded..” If you are challenged based on the number of hours (i.e 4 x 24), a judge would likely want to see a good faith effort in the posting and whether or not there was some prejudice to the complaining individual.

DURING THE MEETING

What happens when you have a disruptive owner interfering with the Board meeting?

There is no single best solution to mitigate the disruption that can be caused by an antagonistic owner. Consider appointing a separate “Sergeant at Arms” to address such unruly owners thereby keeping the Directors from having to mix it up with a troublemaker. A meeting can be adjourned and reconvened. If it’s a matter of “taking a break” that may be enough. If it’s to a different time and date, I suggest starting over with four day notice. If you anticipate a problem, you may want to set up a video camera with an angle that will include the disruptive owner(s). Video generally tends to dampen theatrics. It may also lay a record to defend barring the person from a meeting or even procuring a restraining order.

In the owner forum, when an owner starts to cross-examine Directors, is the Board required to respond?

Civil Code Section 1363.05(h) gives the owner a right to “speak” at a regular meeting. A reasonable time limit can be set, preferably in advance of the comment period. Typically owner comments are put on the agenda for the beginning or end of the Board meeting. There is no requirement that the Board respond or be cross-examined. As a general proposition if owners are concerned enough to come to a meeting, most Directors will honor their concern and respond to normal questions. In a hostile environment the best course of action may be to make clear that there will be no debate and you will simply listen.

What if the Board meeting started with a bare quorum but a Director had to leave before a vote is taken? Can the remaining Directors continue the meeting and make decisions by vote?

Yes. Corporations Code section 7211(a)(8) provides that the Board can still conduct business so long as the number of approving Directors is equal to or greater than the number required to pass the matter if the departed Director had remained.

On of our Directors will be on vacation during a critical vote. Can that Director still vote by giving her proxy to another person?

No. Fundamental to Director decision-making is the ability to collaborate simultaneously and directly. Directors cannot conduct Board business by proxy.

Is it alright for a Director to participate in a meeting via the speaker function on a cell phone?

Yes, if those participating in the meeting can concurrently communicate such that anyone can propose, interpose or object to a specific action. [Corporations Code Section 7211(a)(6)]

I am confused by references to different numbers of Directors constituting a quorum. Is it as simple as saying it is a majority?

That may be a good rule of thumb but to be sure you should check your Bylaws. In the unlikely event your Bylaws are silent, it is a majority of the total number of authorized Directors (sitting plus vacancies).

One of our Directors insists that we are required to conduct Board meetings in accordance with Roberts Rules of Order. Is this true?

The Davis-Stirling Act requires a parliamentary procedure be adopted for managing meetings of the members [Civil Code Section 1363(d)]. Sometimes Bylaws refer to Roberts Rules as the standard for member meetings. The rules are intended for use in large congregations. They are also long and complex and come in quite a few different versions and editions. We recommend against reference to the entire work even at member meetings. Next time you are at a large bookstore, take a look at *Roberts Rules for Dummies*, *The Idiots Guide to Roberts Rules* and the more conventional *Roberts Rules of Order*. Summaries or charts may be useful but again, this is in the context of a member meeting not a Board meeting. It would be rare (and ill advised) to require that “Roberts Rules” be applied to a Board meeting.

What is the effect of a Director abstaining in a particular vote?

As a general proposition, Directors should be educating themselves, participating in the decision-making process and voting yes or no on motions presented. Occasionally where there may be “the appearance of impropriety” or if an actual conflict of interest occurs, abstention is appropriate. Note that an abstaining Director’s presence may count towards a quorum [Corporations Code section 7234] and an abstention usually amounts to the equivalent of a no vote.

What does “recusal” mean?

Recusal generally refers to the disqualification of a decision-maker due to a conflict of interest or prejudice. Typically it is in the context of a Director voluntarily opting not to participate in both the deliberation process and the voting. Contrast that with the term “abstention” where the Director may participate in the discussions but opt not to vote. If you find yourself considering forcing a Director to recuse himself/herself, you should consult with counsel.

I learned that an owner attending the Board meeting secretly recorded the proceedings. Isn’t that illegal?

First of all, we suggest that when you revise your Bylaws, a section should be included giving whoever conducts the meeting to make the decision whether or not recordings will be permitted. As to illegality, that is unlikely. That turns on whether or not there is an expectation of confidentiality to the proceeding. You’ll have a tough argument that in an open member meeting there is an expectation of confidentiality. Indeed the applicable statute says there can be no expectation of confidentiality if the communication made in a “public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.” See generally Penal Code Section 630 et. seq.

In the event of a tie vote, does the motion pass or fail?

A motion does not pass on a tie vote. However, think carefully about status quo and how the motion is framed. Sometimes how you ask the question or word the motion will favor one outcome or the other.

Can a Board reverse a decision once it is made?

Yes, but there may be consequences. For example, if a contract was entered into, a reversal of the decision to enter into the agreement may constitute a breach of the contract with dollar consequences. There may be the potential for “gamesmanship” if the Board is divided and depending on who attends which meeting the “teeter totter” tips one way or the other. Hopefully if a decision is reversed it is done by consensus with a rational basis.

AFTER THE MEETING

We have an unhappy owner who routinely demands copies of the rough drafts of minutes. Do we have to provide those as well as the revised and approved minutes?

Not automatically. The Davis Stirling Act at Civil Code Section 1363.05(d) provides that “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 of an association, 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 of the association upon request and upon reimbursement of the association's costs for making that distribution.” If an owner wants drafts, you get the choice of providing “minutes, proposed minutes, or summary minutes” within the thirty days after a meeting. If this becomes an issue, consider distributing a draft to Directors well before your next meeting and having the preparer integrate edits and polish the document as much as possible *before* the next meeting.

Does it really matter if the minutes are signed?

When the Secretary or other authorized person certifies the minutes, there is a presumption that the meeting and decisions are as represented by the official minutes. Attorneys call this “prima facie” evidence. It is important and should be part of your routine. Consider that a year or two later, when memories have faded, a signed set of minutes may be the key to proving that Directors met the standard of care in their decision-making. [Corporations Code Section 7215]. You should formally adopt the minutes and have them signed by the Secretary or Acting Secretary.

MID-CYCLE (BETWEEN MEETINGS)

Sometimes decisions have to be made between regular meetings. How do we accomplish this and still stay in compliance with the Open Meeting Act?

One purpose of the Open Meeting Act is to avoid such decisions. As a practical matter, if decisions are routinely made outside of formal meetings, the practice can undermine the members’ perception of integrity of Board process.

If you see it coming, address your expectation in an open meeting. Consider delegating the authority to act to an individual Director. Put limits on the delegation. Some Boards delegate authority to an individual so long as the proposed final act is circulated by email and no Director vetoes the intended act. If a veto is exercised, the next step would be an emergency meeting or for the matter to be put on the agenda of the next meeting. Otherwise the Director with the delegated authority can act in a manner consistent with the decision at the prior Board meeting. I strongly suggest that at the next regular meeting of the Board, the activity should be noted and the act of the one Director should be ratified by the Board.

The Open Meeting Act at Civil Code Section 1363.05(g) does provide for emergency meetings. If you must use an emergency meeting you should factually document the reason why it could not wait until the next noticed meeting. Keep in mind that the emergency may mean something that can't wait for the four day notice of a special Board meeting.

We are an unincorporated association. Does the Corporations Code still apply to us?

Civil Code Section 1351(a) provides that the Davis-Stirling Act applies to associations without regard to the corporate or unincorporated status. Also, there are several references throughout the Davis-Stirling Act which have provisions that apply "whether incorporated or unincorporated." Even though the Davis-Stirling Act may apply, does the Corporations Code apply in areas not covered by the Davis-Stirling Act? "Sort of." Consider that many provisions of the Corporations Code are typically included in the Bylaws of an association even if it is unincorporated. Check the Bylaws for procedures. Also, be aware that oddly enough the Corporations Code has a separate section governing unincorporated organizations. [Corporations Code Section 18000 et. seq.] Check there as well if there is an issue.

How much detail should be included in the minutes?

This is really a question of preference. At a minimum, minutes should contain the date, time and place of the meeting as well as identification of those who participated. Motions should be stated along with each Director's vote on the motion. Track the agenda. You may briefly want to reflect the deliberations process leading up to significant decisions. Lay a record to keep you in the "safe harbor" of Corporations Code Section 7231.5. If there is no newsletter and minutes are a primary method of communicating with members, you may want to include a little more detail so there is context and the business can be better understood by members who were not there. If there is a newsletter or other means of less formal communication, I would expect the minutes to be more brief and to the point. They should never be a running commentary of "he said... she said....." Occasionally you may find it appropriate to attach a key document as an exhibit. More often, specifically identifying the relevant document should be sufficient

We are self managed and the Directors keep their own sets of minutes and notes. Is this OK?

Keep in mind that the organization itself needs to keep a formal set of clean, signed minutes. Often the manager will be the custodian of the formal set. If you don't have a manager, the Secretary should keep the organization's set of minutes. That means that at the end of the Secretary's term, that set of records should be passed on to the new Secretary, not held as part of the retiring Secretary's personal records. If the Secretary wants to keep a set personally, that should be a copy. Keep in mind that all personal records kept may not be Association records that must be made available for member review; they are, however, discoverable if there is a lawsuit.

Our Board likes to use “work sessions” where we don’t make decisions but we can educate ourselves and debate issues without upsetting owners. Isn’t this legal as long as we don’t make a decision and the subject gets addressed later at a formal meeting?

A “Board Meeting” is defined as “any congregation of a majority of the members of the board at the same time and place to hear, discuss, or deliberate upon any item of business scheduled to be heard by the board.” So regardless of the label, if the work session meets those criteria, there must be notice, an agenda and the meeting must be open to members.

We hold executive sessions at times different from our regular open board meetings. Are we required to post an agenda and take minutes even though owners cannot attend?

Whether or not four day notice of an independent executive session is required could be debated. If you have a place to post notices, in my experience it is good practice. The perception of “secret meetings” can undermine members’ confidence in the Board. Whether or not there must be an executive session agenda (without providing confidential detail) along with such a notice might also be debated. A bill in the legislature this year may clean up this issue by providing that any notice of an executive session need not include an agenda available to members at large.

One of our Directors is very upset with a decision that the Board made. He demands that his letter of objection be formally attached to the minutes. Are we required to do so?

The final decision of what goes into the minutes is made by vote of a majority of a quorum of Directors. While this may not include exhibits urged by an individual, if that Director voted against a motion, that Director has a right to be sure the minutes reflect the no vote. Keep in mind that whenever there is a vote, the Directors voting for or against the motion or abstaining should be routinely reflected in the minutes.

COMMON INTEREST OPEN MEETING ACT[®]

Civil Code §1363.05

	<p>1363.05(a) This section shall be known and may be cited as the Common Interest Development Open Meeting Act.</p>
<p>ALL BOARD MEETINGS OPEN TO MEMBERS; EXECUTIVE SESSION EXCEPTION</p>	<p>1363.05(b) Any member of the association may attend meetings of the board of directors of the association, except when the board adjourns to executive session to consider litigation, matters relating to the formation of contracts with third parties, member discipline, personnel matters, or to meet with a member, upon the member's request, regarding the member's payment of assessments, as specified in Section 1367 or 1367.1. The board of directors of the association shall meet in executive session, if requested by a member who may be subject to a fine, penalty, or other form of discipline, and the member shall be entitled to attend the executive session.</p>
<p>REFERENCE TO EXECUTIVE SESSION IN MINUTES</p>	<p>1363.05(c) 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.</p>
<p>MINUTES AVAILABLE TO MEMBERS WITHIN 30 DAYS</p>	<p>1363.05(d) 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 of an association, 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 of the association upon request and upon reimbursement of the association's costs for making that distribution.</p>
<p>NOTICE TO MEMBERS OF RIGHT TO MINUTES</p>	<p>1363.05(e) Members of the association shall be notified in writing at the time that the pro forma budget required in Section 1365 is distributed, or at the time of any general mailing to the entire membership of the association, of their right to have copies of the minutes of meetings of the board of directors, and how and where those minutes may be obtained.</p>
<p>MINIMUM FOUR DAY NOTICE</p>	<p>1363.05(f) Unless the time and place of meeting is fixed by the bylaws, or unless the bylaws provide for a longer period of notice, members shall be given notice of the time and place of a meeting as defined in subdivision (j), except for an emergency meeting, at least four days prior to the meeting. Notice shall be given by posting the notice in a prominent place or places within the common area and by mail to any owner who had requested notification of board meetings by mail, at the address requested by the owner. Notice may also be given,</p>

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	by mail or delivery of the notice to each unit in the development or by newsletter or similar means of communication. The notice shall contain the agenda for the meeting.
EMERGENCY BOARD MEETING	1363.05(g) An emergency meeting of the board may be called by the president of the association, or by any two members of the governing body 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 this section.
MEMBERS PERMITTED TO SPEAK AT MEETING	1363.05(h) The board of directors of the association shall permit any member of the association to speak at any meeting of the association or the board of directors, 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 of directors or before a meeting of the association shall be established by the board of directors.
ONLY DISCUSSION & ACTION ON AGENDA ITEMS	1363.05(i)(1) Except as described in paragraphs (2) to (4), inclusive, the board of directors of the association 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 posted and distributed pursuant to subdivision (f). This subdivision does not prohibit a resident who is not a member of the board from speaking on issues not on the agenda.
EXCEPTIONS TO AGENDA RESTRICTION:	1363.05(i)(2) Notwithstanding paragraph (1), a member of the board of directors, a managing agent or other agent of the board of directors, or a member of the staff of the board of directors, may do any of the following:
BOARD/MANAGER BRIEF RESPONSE	1363.05(i)(2)(A) Briefly respond to statements made or questions posed by a person speaking at a meeting as described in subdivision (h).
QUESTION, ANNOUNCE OR REPORT	1363.05(i)(2)(B) Ask a question for clarification, make a brief announcement, or make a brief report on his or her own activities, whether in response to questions posed by a member of the association or based upon his or her own initiative.
REFERENCE,	1363.05(i)(3) Notwithstanding paragraph (1), the board of directors or a member of the board of directors, subject to rules or procedures of the board of directors, may do any of the following: 1363.05(i)(3)(A) Provide a reference to, or provide other resources for factual information to, its managing agent or other agents or staff.

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ECHO Marin County Seminar

January 30, 2010

<p>REQUEST REPORT, ADMINISTRATIVE DIRECTION,</p>	<p>1363.05(i)(3)(B) Request its 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. 1363.05(i)(3)(C) Direct its managing agent or other agents or staff to perform administrative tasks that are necessary to carry out this subdivision.</p>
	<p>1363.05(i)(4)(A) Notwithstanding paragraph (1), the board of directors may take action on any item of business not appearing on the agenda posted and distributed pursuant to subdivision (f) under any of the following conditions:</p>
<p>DETERMINE EMERGENCY SITUATION, 2/3 MEMBERS VOTE TO TAKE IMMEDIATE ACTION, ACTION WAS CONTINUED FROM PRIOR MEETING</p>	<p>1363.05(i)(4)(A)(i) Upon a determination made by a majority of the board of directors 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. 1363.05(i)(4)(A)(ii) Upon a determination made by the board by a vote of two-thirds of the members 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 members 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 posted and distributed pursuant to subdivision (f). 1363.05(i)(4)(A)(iii) The item appeared on an agenda that was posted and distributed pursuant to subdivision (f) 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.</p>
<p>ITEM TO BE IDENTIFIED BEFORE DISCUSSION</p>	<p>1363.05(i)(4)(B) Before discussing any item pursuant to this paragraph, the board of directors shall openly identify the item to the members in attendance at the meeting.</p>
<p>DEFINITION OF BOARD MEETING</p>	<p>1363.05(j) As used in this section, "meeting" includes any congregation of a majority of the members of the board at the same time and place 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. <i>[dlr: 2008]</i></p>

MISCELLANEOUS STATUTORY REFERENCES

<p>Board member can participate in meeting via teleconference</p> <p>... provided everyone can interact with other Directors</p>	<p>Corporations Code Section 7211(a)(6) Members of the board may participate in a meeting through use of conference telephone, electronic video screen communication, or electronic transmission by and to the corporation ... Participation in a meeting through use of conference telephone or electronic video screen communication pursuant to this subdivision constitutes presence in person at that meeting as long as all members participating in the meeting are able to hear one another. Participation in a meeting through use of electronic transmission by and to the corporation, other than conference telephone and electronic video screen communication, pursuant to this subdivision constitutes presence in person at that meeting if both of the following apply (A) Each member participating in the meeting can communicate with all of the other members concurrently. (B) Each member is provided the means of participating in all matters before the board, including, without limitation, the capacity to propose, or to interpose an objection to, a specific action to be taken by the corporation.</p>
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<p>Quorum established;</p> <p>Director leaves;</p> <p>continued business</p>	<p>(8) Subject to the provisions of Sections 7212, 7233, 7234, and subdivision (e) of Section 7237 and Section 5233, insofar as it is made applicable pursuant to Section 7238, an act or decision done or made by a majority of the directors present at a meeting duly held at which a quorum is present is the act of the board. The articles or bylaws may not provide that a lesser vote than a majority of the directors present at a meeting is the act of the board. A meeting at which a quorum is initially present may continue to transact business notwithstanding the withdrawal of directors, if any action taken is approved by at least a majority of the required quorum for that meeting, or a greater number required by this division, the articles or the bylaws.</p>
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<p>Signed copy of minutes evidence of duly held meeting</p>	<p>Corporations Code Section 7215: The original or a copy in writing or in any other form capable of being converted into clearly legible tangible form of... the minutes of any... members', directors, committee or other meeting ... certified to be a true copy by a person purporting to be the secretary ... of the corporation, is prima facie evidence of the ... due holding of such meeting and of the matters stated therein.</p>
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<p>Limitation on Liability of volunteer Director if duties performed to specific standards</p>	<p>Corporations Code 7231.5: (a) Except as provided in Section 7233 or 7236, there is no monetary liability on the part of, and no cause of action for damages shall arise against, any volunteer director or volunteer executive officer of a nonprofit corporation subject to this part based upon any alleged failure to discharge the person's duties as a director or officer if the duties are performed in a manner that meets all of the following criteria: (1) The duties are performed in good faith. (2) The duties are performed in a manner such director or officer believes to be in the best interests of the corporation. (3) The duties are performed with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances. (b) "Volunteer" means the rendering of services without compensation. "Compensation" means remuneration whether by way of salary, fee, or other consideration for services rendered. However, the payment of per diem, mileage, or other reimbursement expenses to a director or executive officer does not affect that person's status as a volunteer within the meaning of this section. (c) "Executive officer" means the president, vice president, secretary, or treasurer of a corporation or other individual serving in like capacity who assists in establishing the policy of the corporation. (d) This section shall apply only to trade, professional, and labor organizations incorporated pursuant to this part which operate exclusively for fraternal, educational, and other nonprofit purposes, and under the provisions of Section 501(c) of the United States Internal Revenue Code. (e) This section shall not be construed to limit the provisions of Section 7231.</p>
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<p>Quorum includes Director w/ interest</p>	<p>Corporations Code section 7234 Interested or common directors may be counted in determining the presence of a quorum at a meeting of the board or a committee thereof which authorizes, approves or ratifies a contract or transaction as provided in Section 7233.</p>
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<p>Membership meetings = parliamentary procedure</p>	<p>Civil Code Section 1363(d) Meetings of the membership of the association shall be conducted in accordance with a recognized system of parliamentary procedure or any parliamentary procedures the association may adopt.</p>
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<p>Minutes provided upon request</p>	<p>Civil Code Section 1363.05(d) 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 of an association, 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 of the association upon request and upon reimbursement of the association's costs for making that distribution.</p>
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And why do you think you could discuss those items not on your agenda?©



- It was on the agenda, just not with those exact words. (CC § 1363.05(i)(1))
- An owner brought it up in open forum and we were only responding - briefly. (CC § 1363.05(i)(2)(A))
- The discussion digressed when we were asked to clarify a point. (CC § 1363.05(i)(2)(B))
- It was just a brief announcement. (CC § 1363.05(i)(2)(B))
- It was a brief report from one of the directors and not a subject for discussion or decision. (CC § 1363.05(i)(2)(B))
- A director was providing a reference or facts to the manager. (CC § 1363.05(i)(3)(A))
- The Board was providing information to the manager so that the manager could report back at a future meeting. (CC § 1363.05(i)(3)(B))
- The Board was directing the manager with respect to future agenda content or compliance. (CC § 1363.05(i)(3)(C))
- The Board voted and approved a finding that there was an emergency circumstance that (1) could not have been reasonably foreseen, (2) required immediate attention and (3) could not have been included in the notice and agenda. (CC § 1363.05(i)(4)(A)(i))
- By a 2/3 vote of directors (or unanimous if a quorum is less than 2/3) the Board found the need for immediate action because the matter came to the Board's attention after the agenda was posted. (CC § 1363.05(i)(4)(A)(ii))
- The dog ate the official agenda so we had to play it by ear. (Good Luck!)

THE BOTTOM LINE IS THAT YOU SHOULD DO EVERYTHING REASONABLY POSSIBLE TO LET THOSE WHO READ THE AGENDA KNOW WHAT BUSINESS THE BOARD WILL BE ADDRESSING AT ITS MEETING. ANYTHING LESS IS AN EXCUSE, WHETHER STATUTORY OR NOT.