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E-Mail – Use With Caution

Lella Amiss E. Pape, Esquire

In recent months, many Boards have asked the question of whether the use of electronic mail (“e-mail”) for communication between Board members constitutes a meeting for the purposes of the Virginia Property Owners’ Association Act and the Virginia Condominium Act.

On March 5, 2004, the Virginia Supreme Court in the case of Beck v. Sheldon, determined that the use of e-mail for communication between public officials did not constitute a public meeting under application of the Virginia Freedom of Information Act. The Virginia Freedom of Information Act (which is also known as “FOIA”) governs the meetings of public bodies in Virginia.

The Beck decision is significant to Virginia community associations because the open meeting and access to books and records provisions of both the Virginia Condominium Act and the Virginia Property Owners’ Association Act are based upon FOIA. The decision is also instructive for community association in Maryland and the District of Columbia.

Beck v. Sheldon involved an injunction action against the Mayor of the City of Fredericksburg, William M. Beck, the Vice-Mayor and three councilmen. The complaint alleged that the Mayor and his councilmen deliberately e-mailed each other in a knowing, willful and deliberate attempt to hold secret meetings and to avoid public scrutiny. On several occasions, more than three members of the City Council corresponded with each other concerning specific items of public business by use of e-mail. The Court examined whether the exchange of e-mails between members of a public body constituted a “meeting” which would be subject to the open meeting provisions of FOIA.

The Court concluded that the use of computers for textual communication has become commonplace around the world. It held that e-mail communication is not the same as the simultaneous communication that would occur at a meeting where members are present and discussing topics. Since e-mail communication generally does not involve “virtuously simultaneous

interaction,” the Supreme Court held that the communication did not rise to the level of a meeting, and that the exchange of e-mails would not trigger the meeting requirements of FOIA. Whether there was an assemblage of participants was the key factor in the Court’s conclusion. The Court said that the term “assemblage” means to bring together, and that “together” entails the quality of simultaneity.

The Court did determine that there is such simultaneity when e-mail technology is used in a “chat room” or as “instant messaging,” but that same simultaneity was not present when e-mails are used as the functional equivalent of letter communication by ordinary mail, courier or facsimile transmission. The Court held that transmitting messages through an electronic mail system is essentially a form of written communication, and that written communication, in keeping with a prior Attorney General opinion, does not constitute a meeting under FOIA. The Court did, however, affirm that the e-mails would be considered a record maintained by the public body.

The trend seems clear that e-mail is expanding the literal definition of a “meeting”. Association Boards must exercise caution when communicating by e-mail and use the electronic medium for information purposes only, not for purposeful deliberation, discussion or decision making.

While the decision is helpful in providing some level of certainty that e-mail communications are not meetings, our clients must still exercise care in the following areas:

?? **“Simultaneous”**. In Beck, the e-mail communications were determined to have occurred over a number of hours and over a number of days. The Court indicated that this time span made these communications more like written letters than the simultaneous communication that occurs in electronic chat rooms. Boards should be careful if they have virtually simultaneous communications by e-mail because under Beck these communication may still constitute a meeting and as such would be in violation of the open meeting requirements of both the Virginia Property Owners Association and Virginia Condominium Acts. Boards should also try and keep actual decisions or votes on a particular issue, which is the subject of e-mail discussions, confined to traditional meetings. In this fashion, even if a challenge to the e-mail discussion is lodged, the resulting decision may be insulated from the challenge on the same grounds.

?? **“Quorum”** In the Beck case, the Supreme Court did not decide the issue of whether a quorum had been satisfied to constitute a meeting under FOIA. Because a number of the alleged meetings occurred with members-elect and not members of the public body, the

threshold requirement of an assemblage of three members requiring an open public forum was not satisfied and therefore was not addressed by the Court.

Even with the Beck decision, the question remains whether the Courts would find that the open meeting provisions of FOIA (or by comparison the Virginia Property Owners Association or Condominium Acts) had been violated if, for example, there was e-mail communication that was virtually simultaneous between members of a Board of Directors that amounted to quorum under that Association's governing documents.

Of greater concern to our community association clients may be the definition of "books and records" under the FOIA, which provides that e-mail communications may be considered a "book or record" when the e-mail correspondence is routinely filed and stored by the governing body. Since the books and records provisions of the Virginia Property Owners Association and Condominium Acts are based upon the FOIA, e-mail correspondence that is routinely maintained by and within the custody of the Association may be considered a record of the Association. In all cases the e-mail correspondence maintained by a community association may be discoverable in the event that an issue or claim addressed in the e-mail correspondence is litigated in the Courts. Therefore, in light of these considerations, we strongly suggest that our community association clients adopt a record retention

resolution that identifies specifically what items are and what items are not considered records of the Association.

In closing, we do counsel our associations to use e-mail communications wisely and to be aware that e-mail communications could be used against the Board or the Association if a claim is litigated. Clearly, it is as the Supreme Court in Beck said, "[t]extual communication has become commonplace around the world." We caution our clients against using e-mail as a method to: a) avoid an open meeting with the members of your community; or b) deliberate towards a decision or take action on any matter that affects your association's members. If you would like additional information concerning the Beck decision or the open meeting requirements of both the Virginia Property Owners Association Act and the Virginia Condominium Act, please contact any one of our community association attorneys.