

Executive Sessions

What you need to know but didn't know to ask

BY JEFFREY A. BEAUMONT

The Common Interest Development Open Meeting Act ("Act") provides that all members are permitted to attend and speak at meetings unless the board "adjourns to executive session."

While this appears to be clear and unambiguous, the Act is replete with open questions. This article clarifies some of the issues boards frequently face when adjourning its meetings to executive session.

Civil Code Section

1363.05 allows boards to meet in executive session, outside the presence of members. However, all such meetings must follow open, duly noticed meetings. Section 1363 specifically states that members may attend and speak at meetings unless the board "adjourns to executive session." Thus, boards must notice and conduct an open meeting in order to "adjourn into executive session," outside the presence of members.

Section 1363.05(b) presents the limited parameters for when a board may meet in executive session. However, §1363.05(b)'s parameters are not exclusionary towards other situations or matters, such as to meet with an attorney to discuss attorney-client privileged information.

Commonly overlooked is Civil Code Section 1367.1(c)(3)'s requirement that a board meet with a member in executive session where a member requests a

payment plan.

Such requests must be in writing and the meeting must be held within 45 days of the postmark of the request, unless there is no regularly scheduled board meeting within that period. This provision can be extended to allow a board to meet in executive session to discuss any matter related to the member's assessment payments.

There are two exceptions to a board's ability to meet in executive session regarding a member's payment of assessments. First, Section 1367.1(c)(2) requires decisions to record a lien to be made by the board in an open meeting.

Second, §1363.05(b) requires a board to meet in executive session regarding the payment of assessments "upon the member's request." Where a member does not request an executive session meeting, the board may meet in open session.

Section 1363.05(b) similarly permits a board to meet in executive session to discuss member discipline, whether or not at the member's request. In fact, meeting in executive session is required by Section



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1363(h) prior to imposing discipline upon a member, but only if requested by the member. Interestingly, member discipline includes decisions to impose a monetary penalty or to levy a reimbursement assessment for damage to common area. Civil Code Section 1367.1(d).

Frequently, members will demand to meet with the board to discuss discipline in an open meeting. In disciplinary cases, the board has the discretion to refuse

such a request. However, there is no "black and white" rule as to when a board should succumb to such a demand. If meeting in open is acceptable, which it is in limited circumstances, the member's request should be in writing to protect the directors and association from any claims arising from conducting the meeting in open session.

All boards should adopt hearing policies to address this issue and all other hearing issues.

There exists one final, yet controversial, situation where boards may meet in private, without notice to members or without adjourning from an open meeting. It's not for every community or board, but it is a tool that, if necessary to use, can be effective.

Civil Code Section 1363.05(f) defines a "board meeting" as: any gathering of at least a majority of the board to discuss or deliberate; upon any item of business "scheduled to be heard by the board." Boards must allow members to attend and speak at such gatherings, for which notice must be provided.

Conversely, boards need not allow members to attend: 1) gatherings of less than a majority of the board; or 2) gatherings of at

least a majority of the board at which items not "scheduled to be heard" are discussed. Scheduled to be heard presumably means not yet set by agenda.

In sum, whether the board must allow members to attend a meeting depends on the topics to be discussed and whether the gathering is in fact a "meeting." Topics qualifying for executive session are limited; neither "convenience of the board" nor the "desire to avoid confrontation" qualify.

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