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WHO SAYS IT'S AN EXECUTIVE SESSION?

By Jay W. Hansen, Esq.

How well do you follow the law when your board meets in "executive session?" This article will provide you suggestions to help to make sure that you do follow the law.

In 1992, the California Legislature first adopted criteria for holding executive sessions. Before January 1, 1996, those requirements were found in Civil Code §1363. Now they are part of Civil Code §1363.05, in their own section of the Davis-Stirling Act called the "Common Interest Development Open Meeting Act."

Section 1363.05 contains a broad definition of a board "meeting," specifically "*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*" [emphasis added]. Thus, under the law, the Board may meet in 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... .*" The Board must meet in executive session, if a member who is subject to some potential form of discipline requests it, and that member is entitled to attend the executive session.

Some later amendments to the Davis-Stirling Act added other provisions concerning

executive sessions. Civil Code §1367.1(c)(3) requires a board to meet with an owner in executive session to discuss a possible payment plan about delinquent assessments. This would occur only after the Association sends the owner at least 30 days prior notice of its intent to file a lien, and the notice must include a notice of the owner's right to a hearing with the Board. This is really just a more specific category under Civil Code §1363.05 for meeting with a member, at the member's request, about the member's payment of assessments. [Note: There are other specifics about timing and the right to meet not really relevant to the issue of what matters may be conducted in executive session for which you should read the statute.]

Another specific issue that must be addressed in executive session is the Board's decision to initiate foreclosure of a lien for delinquent assessments. Civil Code §1367.4(c)(2) states that the Board may not delegate this decision to an agent of the Association, and it requires a majority vote of the Board.

We see the Common Interest Development Open Meeting Act and the other more specific provisions about executive sessions as part of a continuing trend toward limiting the circumstances under which a board can discuss or deliberate about association issues in meetings that are not open to the members. We believe that, if boards are not careful to observe the requirements of the law, there will be more complaints from

homeowners, and possibly further action from the Legislature. Thus, it is important for association managers and boards to get in the habit of following the law.

At least for now, the law does not require executive session minutes to contain a written statement of why the topic discussed is appropriate for executive session. It does say, however, that *“any matter discussed in executive session shall be generally noted in the [regular meeting] minutes of the Board.”* Since the law seems to be moving in the direction of greater restrictions on meetings that are closed to members, it is advisable both for managers and boards to discipline themselves to perform a specific “drill” each time the Board holds an executive session.

First, if the executive meeting follows a regular board meeting, the Board should note in the regular session minutes that it will be holding an executive session and should identify in the minutes the exception or exceptions from the items listed above that apply to what will be discussed in executive session.

Second, if an executive session occurs between regular open board meetings, the Board should mention, probably near the beginning of the next open meeting, that an executive session had been held so that the reasons for the executive session will appear in the minutes of the current regular meeting.

Third, it is important to develop the following custom and practice during executive sessions. Begin each item of business in an executive session with a verbal discussion of why that item is appropriate for executive session. When the members agree that the issue falls into one or more proper categories, note that category or categories in the executive session minutes for that issue. Using this drill (1) will force board members to determine in advance that the matter is appropriate for executive session, and (2) will

add a specific finding to the executive session minutes that the discussion falls within a category permitted by the law. Of course, you should also be careful to observe any additional criteria contained in your association governing documents that may be stricter than the requirements of the law.

Civil Code Sec. 1363.05(c) says that you must “generally note” in the minutes of the next open board meeting to occur “any matter discussed in executive session.” Thus, whenever there is something that was discussed or done in executive session either before a regular board meeting began or after the last regular board meeting ended, you can put into the minutes the following sentence, essentially verbatim, and modified as appropriate. “The Board held an executive session on [X date] to consider matters pertaining to litigation or potential litigation, matters relating to the formation of contracts, matters relating to member discipline, personnel matters and/or to meet with a member at the member’s request regarding the payment of assessments.” Modify that sentence, as needed, so that you include just the category or categories that apply, eliminate any that do not apply and write it in sentence format for the minutes. That should satisfy the requirements of Civil Code Sec. 1363.05(c).

The above actions may be appropriate for an executive session of the Board, but do the requirements concerning open meetings versus executive sessions apply (1) to meetings between the Association’s attorney and the Board or (2) to board discussions of its attorney’s letters and communications? We believe those types of communications qualify as executive sessions. If the Board meets with the Association’s attorney regarding legal issues affecting the Association’s business, we consider the meeting protected by the attorney-client privilege, and attorney-client privilege would be meaningless, if the discussions were required to be held in an open meeting. When an attorney is discussing legal issues with

the Board, the Board must be able to discuss, openly and candidly with its attorney, the legal effect of one course of action compared with another course of action. Even if it is not stated expressly at the time, all such discussions concern the potential for litigation and the risks versus the benefits to the Association for every option the Board might consider. Thus, even if the attorney-client privilege were not applicable to the discussions, we believe that the discussions should still qualify to be heard in executive session, because the Board does consider the prospect of litigation in the courses of action it is discussing.

A similar rationale applies to any discussion of written or telephonic communications from the Association's attorney. Attorneys are required to protect the confidences of their clients and thus consider any expression of legal analysis or opinion with their clients to be protected by the attorney-client privilege, whether it is given in person, or in writing or over the phone. Even if there is no present litigation, these communications affect the course of action the Board chooses to take in leading the Association, and the Board's course of action may increase or decrease the Association's chances of being a party to litigation and its prospects for success or failure in that litigation. As such, we believe that discussions of written or telephonic communications to or from the Association's attorney, like face-to-face meetings, also may be held in executive session.

Some owners who are not on the Board may take issue with the above analysis. They believe that they are the client, not the Board, since they pay the assessments that enable the Association to function. However, to use an analogy, citizens neither have access to privileged communications between attorneys for the government and governmental bodies just because they are taxpayers, nor do shareholders of a corporation have access to privileged communications between a corporation's management and the corporation's attorneys just because they own

stock. Like governmental bodies and corporate management, an association's board has the duty to manage the Association, and it must keep itself informed of the risks so that the Association can avoid unnecessary liabilities. Consequently, the Board must consult with the Association's attorneys and vice-versa, and if the communications were not protected, either the communication will not be open and objective, or the public disclosure of certain risks may encourage litigation or at least expose the Association to otherwise unnecessary liability.

A board should realize that the Board's goal is not to see how many things can be discussed in executive session. Instead, it should be to take actions to minimize the legal risks and to maximize the benefits to the Association. Of course, the purpose of an executive session is to address issues that are sensitive or may be too sensitive to discuss in a regular open meeting of the Board, so the board members should keep the results of an executive session confidential. The minutes should be written up in a separate document from open session minutes, and the minutes should be maintained in an executive session minute book that is separate from open session minutes, so that executive session minutes are not inadvertently made available for review by non-board members.

By following the suggestions outlined above, we trust that each board will comply with the law when it does meet in executive session and help to curtail any complaints about acting improperly.