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ASSOCIATIONS

Feel free to hit the 'record' button at board meetings

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Question: Because the minutes our homeowner association board distributes do not accurately reflect what is said at board meetings or executive sessions, several owners decided to tape the meetings for a record.

The board then issued a memo telling us not to record meetings — or risk being sued by the board. It said that owners who tape board meetings are violating Penal Code Section 632 and offered as "evidence" a case titled *People vs. Suite*.

The board wants to adopt rules prohibiting audio and video tapings of meetings and begin fining owners who violate the rule. To ensure that no recording devices are brought into meetings, the board decided to meet in the private residences of individual board members and said owners entering the meeting room would be searched.

Some owners have decided to defy the board's orders and surreptitiously tape meetings. Do homeowners have the right to tape record meetings?

Answer: Yes. Homeowner association titleholders and members, regardless of the form of common-interest development, do have the right to tape record meetings. No law prevents titleholders or members from taping association board of director meetings whether openly or surreptitiously.

California Penal Code section 632 was originally enacted to prevent taping telephone conversations without consent of all parties for later use against one of the parties in that conversation.

Some association attorneys are using the case of *People vs. Suite* as the basis for denying owners the right to tape record board meetings. However, that case is no longer the law in California.

Two recent cases helped define the meaning of PC 632 as it relates to the expectation of confidentiality. As a result of those decisions, boards do not have the right to prevent the taping of association board meetings by a titleholder or member.

The test of what is confidential was decided by the California Supreme Court in *Frio vs. Superior Court*. The case determined that a conversation is confidential if a party to that conversation has an "objectively reasonable expectation" that the discussion is not being overheard or recorded. This is the standard that applies in California.

The other case, *Ribas vs. Clark*, approves recording of meetings by acknowledging the distinction between "secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor — whether that auditor be a person or a mechanical device." By focusing on "simultaneous dissemination," PC 632 protects against recording and eavesdropping only if a party seeks to keep the content of a conversation secret by not holding that conversation where it might be overheard, either

intentionally or unintentionally.

PC 632 specifically excludes from the definition of "confidential communication" statements 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."

Recording is permissible, whether announced or surreptitious, because those discussions are not confidential communications within the definition of that term in PC 632.

Under the Common Interest Open Meetings Act, board meetings are required to be held in public, meaning there can be no expectation that any statements made during those meetings are confidential. Any conversations among board members during the course of a meeting are expected to be overheard by anyone in attendance.

It makes no difference where meetings are held, whether in the president's home or another board member's unit. All are subject to the act — meaning those meetings are open to the public even if the public consists of owners or if no owners attend.

This also applies when management company representatives, guest speakers or vendors are present. Their presence indicates the board intends its conversations to be overheard — meaning they can be recorded.

An executive session by definition is not a meeting. It is a session adjourned to from a regularly convened board meeting, of which owners have been notified, for a limited purpose pursuant to Civil Code section 1363.05(c). This session can be confidential and closed to titleholders, but discussion must be generally noted in the minutes distributed from that board meeting.

If desired, the board can tape executive sessions. If outsiders such as management company representatives attend the executive session, expectations of confidentiality are waived and those sessions could be tape recorded by anyone in attendance. If only the association's attorney of record attends an executive session, the attorney-client privilege is not waived and the expectation of confidentiality is preserved.

Resolutions or motions to prevent tape recordings are illegal and have no force or effect because they violate both statute and case law.

Efforts to search owners attending association board meetings without consent of those owners are a violation of 4th Amendment rights against unreasonable searches and constitute battery (legally defined as an unconsented touching). Owners may bring suit against the searchers for damages.

Because their assets are at risk, titleholders have an interest in ensuring that board decisions and actions are accurately documented in the minutes. Minutes are prima facie evidence of board decision-making activities during association meetings.

If a board deliberately or negligently fails to produce an accurate accounting of decisions entered into during those meetings, it can be held liable for damages that may ultimately be passed on to individual titleholders or the association as a body.

Aside from creating a liability for all owners, boards that conduct meetings in secret or try to hide their actions from titleholders by creating false minutes deserve to be removed and — if damages occur — be forced to pay those damages individually. For these reasons, it is acceptable to tape record all association meetings, especially those of boards who ignore or disrespect their duty to produce accurate minutes.

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