MERCERTRIGIANI

USE OF CAMERAS

If a Board determines it is in the best interest of the Association to install cameras to monitor common area, the Board should take certain precautions and steps to help mitigate exposure to risks and liability that may result from camera installation on common area.

The primary concern about camera installation is that installation may create an expectation of increased security – owners, residents and guests may rely on the cameras (to their detriment) for safety and security. The Association is not responsible for the safety or security of owners and residents and it is important that the Association make clear that installation of cameras is not intended to ensure the safety and security of persons using and enjoying common area.

SIGNAGE

We recommend that installation of cameras be coupled with installation of appropriate signage. We suggest the following wording be included on signage placed near cameras:

Area under video surveillance. Activities recorded to aid in the prosecution of any crime committed on Association common area.

It is important to establish clear limitations on owner and resident expectations in order to avoid liability. The sample language seeks to alert the public (here – owners, residents and guests) that cameras record actions without suggesting that owners and residents may rely on the cameras as an added security measure.

Signage may also describe operation of the camera system, including whether recordings are continuous, motion-activated or actively monitored. If cameras installed on common area are actively monitored in real time (which is generally not recommended), the Board should prepare appropriate language for signage. Signage should not suggest that cameras provide continuous surveillance, immediate response or crime prevention if those services are not provided.

The Board should also ensure that the cameras capture actions occurring only on common area and not in areas where residents have a reasonable expectation of privacy, such as bathrooms, locker rooms or the interior of private homes. Recording actions in such areas, even if inadvertent, could subject the Association to liability. It is therefore important that the Board make sure that Association cameras are focused solely on common area.

AUDIO-RECORDING CAPABILITY

Installation of video recording equipment with *audio* recording capability is not recommended. Use of audio recording devices associated with video monitoring may subject the Association to potential criminal and civil liability. Both Virginia law and federal law make the interception of oral communication without the consent of at least one party to the communication a violation of law. The Association, through the use of audio recording equipment, may inadvertently violate these laws with the capture of audio recordings.

Section 19.2-62 of the Virginia Code

Section 19.2-62.A.1 of the Virginia Code provides that any person who "*[i]ntentionally intercepts, endeavors to intercept or procures any other person to intercept or endeavor to intercept, any wire, electronic or oral communication … shall be guilty of a Class 6 felony.*"

Section 19.2-62.B of the Virginia Code includes three exemptions, one of which may be used by the Association to conduct audio recording. Section 19.2-62.B.2 of the Virginia Code provides that:

> *It shall not be a criminal offense under this chapter for a person to intercept a wire, electronic or oral communication,* ***where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception****. (Emphasis added).*

Nevertheless, signage or notice of recording does not necessarily establish the consent required to record private conversations. Therefore, audio recording is not recommended.

Federal Wiretap Act

The Federal Wiretap Act ("Wiretap Act") prohibits the acquisition of the content of a wire, oral or electronic communication using an electronic, mechanical or other device. The Wiretap Act also prohibits the use or disclosure of unlawfully intercepted communications. Although some courts have interpreted the Wiretap Act to apply only to oral communications intercepted and reviewed in "*real-time*," courts are split on this issue. Like Section 19.2-62.B.2 of the Virginia Code, the Wiretap Act also includes a "*consent exception*," which permits monitoring of oral communication with the consent of one party to the communication.

The Wiretap Act is a federal criminal statute and has been used to subject corporate employees to imprisonment and companies to a criminal fine for unlawful monitoring. The Wiretap Act, although a criminal statute, permits significant civil penalties, even without proof of actual damages. Under 18 U.S.C. §2520, a court may order that unlawful recording stop, as well as award monetary damages calculated at the ***greater*** of:

- Actual damages suffered and any profits attributable to the violation; or
- Statutory damages calculated at the ***greater*** of $100 per day of violation or $10,000.00.

Punitive damages may also be available in appropriate cases, as well as reasonable attorneys' fees to a prevailing plaintiff.

CAMERA FOOTAGE AS A BOOK & RECORD OF THE ASSOCIATION

The Board should keep in mind that footage maintained in the camera system is considered a book and record of the Association. Section 55.1-1945 of the Virginia Condominium Act and Section 55.1-1815 of the Virginia Property Owners' Association Act require that all books and records kept by or on behalf of the Association be made available for examination and copying by an owner in good standing.

If camera footage is maintained by the Association, the Association must provide that camera footage to an owner who requests to review the recording, unless an exemption to the statutory rule applies. That being said, the Association is only required to provide records that are retained. Therefore, if camera footage is no longer retained by the Association (i.e., if the data has been deleted or filmed over), there is no obligation to produce the camera footage. The Board should consider record retention when deciding which type of camera system to install on common area.

POLICIES & RESOLUTIONS

The Board should ensure that camera footage is addressed in existing record retention policies or adopt and implement a separate policy regarding camera footage, including:

- Retention of footage - storage and deletion practices
- Handling third-party requests – law enforcement, insurance agents, etc.
- Access restrictions - password protections, persons authorized to review footage, etc.

If recordings are maintained by a third-party on cloud-based systems, the policy should also reflect the system currently in use. Before entering into any agreement with a third-party to maintain footage on behalf of the Association, the Board should carefully review provisions establishing access permissions and procedures and timelines for retrieving recordings, as well as provisions addressing security updates and storage and deletion practices.

Law enforcement officials and security professionals may also have recommendations on the length of time recordings should be retained. Footage identified as relevant to a reported incident, claim or litigation should be preserved as required.

FURTHER RECOMMENDATIONS

Even though it is well-established that the Association is not responsible for the safety or security of owners and residents, the Association should take steps to inform Association residents of security concerns, advise residents and owners that the Association is not responsible for the safety or security of owners and residents and continue to engage local law enforcement in a meaningful dialogue about security concerns (at Board and membership meetings).

Specific incidents of crime, such as vandalism and trespassing, should be addressed at the time of the occurrence with local law enforcement officials. At any time potential criminal action is being displayed, the police should be called to intervene. Law enforcement is best equipped to curtail the conduct and prevent future incidents.

The Board should consider distributing a written communication to all owners and residents as a reminder that the Association is not responsible for the safety or security of owners, residents and guests. Owners and residents should be regularly reminded that they are responsible for their own safety and that they should call the police when they see unusual behavior. Such reminders can be placed periodically in the Association newsletter or posted on the Association website.

The Board may also wish to engage in a dialogue with the local law enforcement agencies. The local Police Department may be able to provide a community liaison to attend the Association annual or Board meetings and walk-through common area to discuss potential areas of concern.

A walk-through could be done as part of an annual security review in which the Board:

- Reviews criminal incidents in and around the community;
- Walks common area to evaluate potential access points to lots and the interior common area; and
- Inspects lighting, door locks and any key fob access.

Based on the walk-through, the Board should be in a position to address potential security measures.

Additionally, Association insurance carriers should be notified that the Association intends to utilize cameras and advise the carrier of procedures and safeguards that will be taken. The Board or Association management should confirm with the Association insurance carrier that the use of cameras is covered under the Association insurance policies and, further, that the Association has adequate general liability insurance as well as directors and officers insurance. Cameras and related equipment should be covered by insurance maintained by the Association. The Board should request all insurance carrier responses and recommendations to be in writing.