

Primer on Duties and Authority of Association Boards

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Many new board members have asked for a primer that states in one place what are their duties and by what authority do they operate. The following primer discusses general concepts and law related to the powers and duties of association boards.. You should be aware that the law differs between the various States, and therefore a board member should seek legal advice before acting.

Compliance with Governing Documents and Applicable Law

Each board member is obligated to know the applicable law and to faithfully follow the governing documents of the Association. For condominiums, the State statutes on condominiums must be strictly followed. In addition to the express requirements of law, a board member must be familiar with the declaration or covenants, the bylaws, or other controlling documents which form a contract between and among the home owners within the Association. Sometimes the governing documents will conflict with the provisions of the applicable statutes. In general, the condominium or association statutes will prevail over conflicting provisions of the declaration or bylaws (except when the statute specifically authorizes the declaration or bylaws to provide otherwise). The declaration or covenants generally rule over conflicting provisions of the bylaws, and the bylaws generally govern over conflicting provisions of any rules and regulations or house rules adopted by the board. Although at first the concept of following the law and governing documents may appear simple, in practice this can be a difficult and confusing undertaking, and it may require professional assistance.

Maintenance of Common Areas/Building Exteriors

Perhaps the main function of most associations is the repair and maintenance of common areas and building exteriors. The maintenance responsibility for an association is established in the declaration or bylaws. In most associations, those parts of the property that are shared between the home owners are maintained by the association. Responsibility for those portions of the property over which an owner has an exclusive right to use or possess will fall upon the individual owner. In almost every association, there are almost unlimited needs and desires among the membership for repair and maintenance work. The difficult task for the board is to prioritize these tasks and decide how and when the various maintenance tasks are to be performed. This means that the board must become familiar with the property and what is needed. Then, the board must carefully consider what are its budgetary restraints. Finally, the board must develop a plan for meeting its responsibilities. The plan should include periodic inspections of the property, a schedule for

performing various repair and maintenance tasks in an orderly and comprehensive manner, and a plan for emergency expenditures. If the board does not plan adequately, what typically occurs is a breakdown of various components and an onslaught of emergency expenditures. For example, if the board delays replacement of a roof, it may find that it is spending an inordinate amount of money patching a deteriorating roof on an emergency basis. Over time, the cost of patching can become more expensive than the re-roofing job would have been in the first place. A great deal of money could be saved by careful planning.

Budgets

Related to the duty to maintain the property is the duty to adopt budgets and collect assessments from the home owners. In a way, an association is merely a conduit for the homeowners to pay for the various expenses of operating the property. The budget process is not one whereby an arbitrary figure is created that will be the monthly assessment and then the board tries to figure out how to best spend the money. The correct process is a reversal of that. The board must first determine what are the necessary expenses and costs of operation and administration, plus a reasonable reserve, and then the monthly assessment is determined by dividing the annual budget among and between the unit owners. The budget process therefore must involve a careful review of past budgets and the actual costs plus a careful examination of anticipated costs and expenses, including obtaining bids and quotes for various services. Of course, in determining the budget, it is appropriate and necessary for the board to consider the amount of money that can reasonably be collected from the home owners. The amount of the monthly assessment must not be so high that it would adversely affect the property values in relation to other associations in the area or cause economic hardship to the owners. At the same time, the assessment must not be so low that the Association is unable to meet its basic responsibilities for repair and maintenance of the property, to keep the property in good condition, and to have an adequate reserve for emergencies and future repair or replacement.

Reserves

The issue of reserves is often neglected by the board. It is not enough for the board to budget for the existing costs and expenses. It also must establish a reserve for two purposes.

1) Emergencies

Unless the board has a fund from which to handle emergency or unexpected costs, the Association will be vulnerable. The board must assume that some unexpected expenditures will be necessary.

2) Capital expenditures and deferred repair or replacement

The board must find out what the estimated useful life of its structural and mechanical components, surfaces of the buildings and common areas, energy systems and equipment, and then determine a reasonable amount for the owners' monthly contributions to a reserve. Unless this reserve is established, the home owners who use the property will not be contributing towards the replacement of the property in the future. Instead future owners will bear the full cost of major repair or restoration (such as roofing, paving, siding, HVAC, and other major components). The most fair way of handling deferred maintenance (and one that keeps the assessments from going too high) is for the board to divide the cost of future repairs between the current owners (through a reserve or through financing whereby the cost of restoration is spread out over time) and to the future owners (through a special assessment levied at the time of the restoration work).

3) Bad debt

The Association does not have "deep pockets." The only money it generally receives is the assessment payments of the owners. If some of the home owners go into bankruptcy or simply cannot make payment, there will be a budgetary shortfall. Because the budget is determined and then divided amongst the home owners, bad debt will cause a shortfall. It is necessary for the board to determine the anticipated shortfall from bad debt, and to budget accordingly. The past history regarding bad debt can be useful in determining the expected shortfall, but other factors such as the number of cases in collections and the general condition of the economy also may be considered.

Assessment Collection

Once one understands that an association budget is nothing more than dividing up the expenses between the home owners, it becomes readily apparent that the failure of one homeowner to pay his or her fair share of the expenses means that his or her neighbors are the ones paying the delinquent owners bills. This is not an acceptable situation. Therefore, the board has a duty to take every reasonable action to collect the assessments. The board may not waive or excuse, or otherwise forbear the payment of assessments. Those home owners who refuse to pay their assessments should be pursued in court, and every reasonable action should be taken to compel payment. Most associations have lien rights in the unit and can foreclose, take ownership or possession of the property, or garnish the wages or bank accounts of the delinquent owners. Most associations have the ability to recover from the delinquent owner, the costs of collection, including attorneys' fees and legal costs. In addition, because it is unfair for some owners to pay on time, and others to cause the Association to incur expense from late payment, it is appropriate for the board to charge a reasonable late charge (in accordance with its governing documents and applicable law).

Business Judgment

The board members owe a fiduciary duty to the home owners to manage and operate the Association using the care that an ordinarily prudent person would use under the same or similar circumstances. This means that the board must exercise business judgment in making decisions while operating or managing the Association. Business judgment involves making rational, informed decisions in good faith. The board must strictly follow the law and its governing documents and apply and enforce them in a fair and uniform manner. The board must obtain and consider all of the relevant facts and circumstances, identify the various options available to the board, and carefully weigh which course of action would be in the best interests of the Association and its membership as a whole. The board members cannot act out of passion or prejudice, personal self-interest or gain, or through revenge or other negative motivations. The rational basis for all decisions must be the best interests of the Association consistent with its purposes. This fiduciary duty owed by each board member to the home owners is the same one that directors of publicly traded corporations owe to their shareholders. Of course, the directors of major corporations are sophisticated and experienced business persons and they have professional executives, accountants, and attorneys to assist them at every step. Although the extent and scope of activity of an Association board is much more limited than the activities of a major corporate board, it still behooves the board to engage professionals to some extent before making major decisions. Most associations retain professional managing agents to operate the day to day affairs of the Association and to guide and assist the board in setting policy and establishing procedures to meet its responsibilities. In addition, every Association should have an accountant and an attorney, and consult them when appropriate. In addition, tax and financial advisors are necessary with respect to the handling and investment of funds.

Adoption and Enforcement of Rules

The board has a duty to uniformly enforce the governing documents against the owners and other residents of the property. A board does not have the authority to waive or excuse compliance with the requirements of the covenants. Of course, it is not always clear whether specific actions violate the covenants. It is up to the board to reasonably interpret its governing documents, and to adopt rules and regulations to supplement, explain and administer the enforcement of the basic rules of the Association. In deciding how to enforce the governing documents, the board must carefully consider the nature and scope of an infraction and try to address the situation in a manner that is reasonably related to the severity of the violation. In general, the board should first try informal approaches to obtain compliance, and then increase the severity of the consequences to an owner who continues to violate the rules. The purpose of all enforcement activity is not to punish the violator but only to encourage and obtain full and permanent compliance. Where the violation threatens the safety of person or property, or when there is a flagrant violation, the board may have no choice except to take the violator to court and seek a court order requiring compliance.

Annual Elections, Politics, Board Meetings and Appointment of Officers

One of the most important aspects of Association membership is the need for the home owners to organize politically and to elect their representatives to the board. It is the duty of the board to ensure a fair and free board election on an annual basis. The board must establish procedures necessary to be sure that there are qualified candidates and that each home owner has the opportunity to vote and participate in the political process. The board should share with the home owners all of the information and facts of the problems and issues that face the Association, and patiently explain the rationale and reasoning behind board decisions. The homeowners are entitled to be fully informed about the conduct of the board, and to exercise oversight through the political process. Most associations allow the home owners to address the board at the regular meetings of the board and at the annual meeting. These meetings are a great opportunity for the board to communicate with the home owners and to obtain input and advice from the members. Another duty of the board is to appoint board officers, such as the president, secretary or treasurer of the Association. It is important for the board to exercise careful oversight of the actions of the officers between meetings of the board. The officers should account to the board for any decisions or actions taken on behalf of the Association. It is necessary for the board to hold regular meetings in sufficient frequency to properly and efficiently handle the affairs of the Association. Most boards meet monthly or quarterly.

Representation of Home Owners/Insurance/Property Rights

The purpose of the board is to represent the interests of the unit owners as a whole, as these interests relate to the property. Therefore, the board is the appropriate entity to pursue claims and rights of the unit owners with respect to the entire property (such as claims against the developer for defects, tax relief, and dealing with third parties related to real property rights). In general, any matter that affects the collective interests of the unit owners (as opposed to the individual rights of an owner) is appropriately handled by the board. All amendments to the governing documents, easements, concessions, licenses, and dedication of the property must be handled by the board (although the approval of the owners may be necessary). In addition, the board must ensure that all tax obligations of the property as a whole have been met, and that the property has the necessary and required insurance. The requirements for insurance will be set forth in the declaration and applicable statutes. On behalf of the Association and its members, the board should insure the property against casualty and loss, and should obtain liability coverage including directors and officers' liability insurance, and bonding. In addition, the board should hold the proceeds of insurance in trust on behalf of the owners to ensure the proper restoration of damaged property.

Books and Records

Although the board is the entity responsible for making the decisions on behalf of the owners, the Association still belongs to the home owners and they have a right to be fully informed about the Association. The board must keep detailed and accurate records. This includes accurate copies of the , association's declaration, articles of incorporation (or charter) bylaws, plats of survey, rules and regulations (and all amendments of these), minutes of all board and owner meetings, insurance policies, contracts, leases, and other agreements in effect, a listing of the names and addresses of the members, copies of ballots and proxies for past elections, and including the books and records of account (including an itemized accounting of the budgeted and actual receipts and expenditures of the Association with supporting budgetary and financial documents. Home owners should have reasonable access to these books and records for a proper purpose and consistent with the requirements of applicable law.

Emergencies

The board is not the insurer of the property and is not a police force. It need not undertake to protect the owners from criminal conduct or casualty. However, in emergency situations, the Association may be in the best position to minimize damage and to correct any problems. Most declarations authorize the board to enter the individual dwelling units for emergency purposes to protect the property or residents from harmful conditions. When acting under emergency authority, the board should limit its actions to only those made necessary by the emergency at hand. and defer all other actions. For example, if the plumbing in a unit fails, the board may enter the unit and stop the water incursion and to take action to minimize the water damage to the unit and other property. Beyond what is reasonably necessary to alleviate the emergency at hand, the board should not infringe upon the authority of the individual owner to repair or maintain his or her unit. Emergency actions should be measured responses to the circumstances of a particular crisis, and the board should take care to limit its involvement to only what is absolutely necessary.

Human Rights and Accommodations

The law requires that housing, and all associated services and facilities, must be available to persons without discrimination on the basis of race, color, religion, gender, familial status (children under 18), disability, or national origin. The board is the entity responsible for making sure that the Association operates in a manner that does not unlawfully discriminate. The language of Association rules and enforcement must be neutral as to the protected classes. Typical problem areas are rules and facilities that discriminate against children and families, or facilities or rules that fail to reasonably accommodate the needs of disabled persons (in rules, policies, practices, or services to afford a person with a disability equal opportunity to use and enjoy a dwelling). Other issues that arise are subtle forms of racial and ethnic discrimination as it relates to extended family living in a unit, celebration of holidays, or unequal treatment in making appointments to office, granting of

privileges, or enforcement. In addition, depending upon the facts and circumstances, the board may have a duty to address and stop unlawful discrimination committed by the individual owners, residents, or vendors of the Association. This area is one ripe for litigation and therefore the board should consult with competent counsel when addressing these issues.

We have attempted to comprehensively explore the duties and authority of an association board. It should be realized that the operation of an association is a complex task that requires a great deal of knowledge and information. Being a board member is not a casual undertaking. Although this primer does explore the basic responsibilities of the board, it should be noted that in practice the issues touched upon here are much more complex than they appear. In addition, the laws of your locality and the specific facts and circumstances of your board's situation will have an impact upon what are the board's duties and how to meet them.