

Association of Condominium,
Townhouse, and
Homeowners Associations



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July/August 2014

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The EFG's for Association Boards:

Ethical & Fair Governance

By Gabriella Comstock of Keough & Moody, P.C.

We within the community association industry often say that members of a board of managers owe a fiduciary duty to the members of the association. This requires the board of managers to make decisions which are in the best interest of the association as a whole. Though we often forget to remind a board of the importance of doing that which is fair and ethical. It is not always illegal to act in an unethical manner. However, it is just as important for a board of directors to do that which is legal as it is to do that which is right and ethical.

Acting in a manner that is fair and equitable helps to build the credibility of the board of directors. Owners lose faith in the ability of the board when the board treats some members of the association differently than others. Of course this can also give rise to discriminatory issues, as well as a defense of “selective enforcement” by an owner alleged of violating the association’s documents. More importantly, it sends a message to the rest of the community that compliance with the governing documents is not a priority for the association. After all, if the board is not enforcing the restrictions against all owners, it must not be important to have uniformity within the community. This makes it more difficult for the board to enforce the governing documents.

Lack of consistency can also create division within the community. It is difficult for Owners to remember that the members of the board are also homeowners within the community. When the board of directors fails to act in a manner that is fair to all, this becomes even more difficult for the owners. An atmosphere of “the board” versus “the owners” becomes more apparent. Owners are always looking to find something that they can say that the Board has done wrong. In the end, it makes it more difficult for the board to do its job.

Members of the board are not perfect. Mistakes will be made. When a board is known to act in a manner that is fair, the members of the association are much more forgiving when

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TIP OF THE MONTH

By: Joel Davis of CAU / 800-228-1930 x 7184 / jdavis@cauinsure.com / www.cauinsure.com

Key information regarding a condominium association's master policy:

1. The common elements, limited common elements and units are covered.
2. Units are covered up to the unfinished surfaces of the walls, floors and ceilings. Coverage does not include paint, wallpaper, paneling or other finished, coatings and coverings of walls and ceiling, tile, carpet or any floor coverings. However, floor covering does not mean unfinished hardwood or unfinished parquet flooring.
3. Building coverage is limited to original condominium plans and specifications, subject to the limitations described above. If the original fixtures, cabinets, stove, refrigerator, dishwasher, doors and windows are replaced with items of like kind and quality, they are covered.
4. The covered causes of loss include: fire, lightning, windstorm, hail, explosion, riot, aircraft and vehicle damage, smoke, vandals, falling objects, weight of ice, snow or sleet, collapse, sudden and immediate water escape or overflow from plumbing or appliances, frozen pipes, and convector units.
5. No coverage is provided for wear and tear, deterioration, damage by insects or animals, settling or cracking of foundation, walls, basements or roofs. There is no coverage for damage caused by continuous or repeated leakage or seepage from appliances or plumbing. This includes, but is not limited to, leaking from around the shower, bathtub, toilet or sink. These events are properly classified as maintenance items.

Key information regarding a unit owner's insurance needs.

1. One needs a condominium owner's policy, also known as an HO-6, to pick up coverage for personal property, furniture, additional living expenses (in the event a unit is uninhabitable due to a covered claim), all floor, wall and ceiling finishes, improvements and betterments and personal liability.
2. The association master policy carries a deductible. In the event of a claim, the association may seek to recover the deductible from unit owners involved in the claim. One's obligation to pay the deductible may be offset by the HO-6, subject to the owner's deductible, if one adds building coverage. However, owners should consult with their personal insurance agent.

Note: The above is intended to provide a brief summary of insurance issues. In all cases, the declaration, terms, conditions and exclusions of the actual policy will apply.

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a mistake occurs. The board which acts in disregard of the members encourages the members to highlight the mistakes of the board.

Acting in a manner that is fair and equitable also helps to build a sense of responsibility for the community and its goals. When owners see that the expectations for all owners is the same and for the good of the community, they tend to be a part of achieving this goal. They too work to better the community and promote uniformity.

As noted above, acting in an unfair manner can have adverse legal affects on the association. No judge wants to hear from an owner that there are three non-conforming fences and the member before the court is the only one being asked to remove his fence, because he lives next door to the board President. Further, failure to uniformly enforce the governing documents can give rise to the legal doctrine "waiver" which means a volun-

tary relinquishment of one's right. In other words, if the Board has failed to enforce the restrictions of the association, the alleged violator may argue that the association has waived its right to enforce the restriction against him. It can also give rise to an allegation of discrimination.

We have said it many times—running an association is running a corporation. The members of the corporation have to believe that the persons running the corporation are acting and looking out for their best interest. Listening to the members, communicating with the members, and treating all members fairly promotes confidence in the board. Of course the board has to find a balance in being fair and still making difficult decisions that are in the best interest of the entire community. Yet, when a board has a reputation of being fair and doing that which is right, the members tend to be more supportive when difficult decisions are made.

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The Board could have decided that disclosure of the pending suit to owners was not necessary, appropriate or even a good idea for a number of reasons. For example, the possible consequences of a suit seeking only nominal damages might be considered to have no possible material effect on the Association. Or the suit might be fully covered by Association's insurance and not considered likely to have a material effect on future insurance premiums. Another example might be the conclusion of the directors that there was no reasonable chance that the suit would be successful. The directors could also have concluded that disclosure of the suit at a particular time might adversely affect the Association's negotiating posture with the plaintiff in the suit.

tion's negotiating posture with the plaintiff in the suit.

The duty of the Board to notify unit owners of a pending suit must be distinguished from the Board's specific duty under section 22.1 of the "Act" to provide certain information to a prospective purchaser of a condominium unit. Section 22.1 provides a specific requirement that upon demand of the prospective purchaser, the Board "shall make available for inspection... a statement of the status of any pending suits or judgment in which the unit owner's association is a party." Section 22.1's specific requirement thus trumps the directors' discretion as to disclosure of a pending suit, in this specific situation.



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ACTHA'S FALL EXPOs

South Expo: Sat., Sept. 13, Tinley Park Convention Center

North Expo: Sat., Oct. 25, Westin North Shore in Wheeling

(for detailed info on the North Expo's programs and speakers, visit www.actha.org/NorthExpo or see our next newsletter)

South Expo Educational Programs

8:00 - 9:30 a.m. Choose from one of two seminars

10 Things Non-Condos Need to Know: It can be surprising what you don't know—especially if you don't know you didn't know it! This program will provide top tips on what non-condos most often overlook and what professionals most often encounter. *Presenters: Bob Prince of Keough and Moody and Mike Carnahan of Red Brick Property Mgmt*

Palm: Board, Owner and Manager Relationship Effects: Everyone talks about Palm, but this seminar will delve into just one aspect of the ruling: its impact and affect on relationships between the board and their manager, the board and the owners, and between board members, as well as the board's vendors and partners. *Presenters: Rob Kogen of Kovitz Shifrin Nesbit and Jory Carrick of Williamson Management*

11:30 - 1:00 p.m. Choose from one of two seminars

Understanding Budgets and Financial Statements: This session begins with an explanation of the budget process, how to use it as a tool to guide the association through its projects and maintenance, and how the details carry over to the financial reports. A review of the various statements a Board should review will be discussed including spotting red flags. *Presenters: Amanda Paton and Steve Silberberg of Frost Ruttberg Rothblatt PC and Diana Larson of Alma Property Management Services*

New Law: Electronic Voting: Newly signed into law, associations now may conduct elections using electronic voting. This seminar will brief on the legal requirements, the unanswered questions and unintended consequences of what passed and the practical aspects for implementation. *Presenters: Doug Sury of Keay and Costello and Matt Hohl of Legum and Norman*

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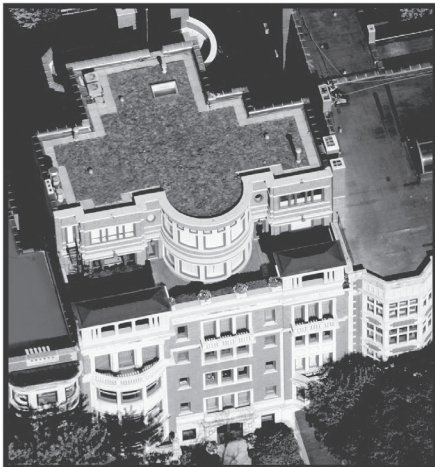
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Question of the Month

By: Barry Kreisler of Kreisler Law, P.C. / 2846 N. Milwaukee, Chicago 60618
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Q. Recently a wrongful death lawsuit was filed against our association and the management company. I learned of this through social media weeks after the manager received the summons. The social media postings summarized the complaint through an online legal journal and I confirmed it by searching the county clerk's website. The manager notified the Board President and the Association's insurance company of the lawsuit. Does the Board have a duty to notify members of the Association that a lawsuit has been filed? I know pending litigation is appropriate to discuss in a closed session by the Board but it seems the owners should be notified of the situation since it will most likely impact the association's financial condition (i.e. higher insurance premiums, legal fees leading to higher assessments). Pending litigation that impacts the Association's financial condition also has to be disclosed to a lender during the mortgage process which in turn affects an owner's ability to refinance or sell. Shouldn't owners be informed of the lawsuit basics?

A. There is no hard and fast answer to your questions, as any duty of an Association Board to notify owners of the pendency of a suit against the Association is governed by what is commonly referred to as the Business Judgment Rule." Under this rule, which has been developed by case law decisions over the years, the directors of a not for profit corporation (or for that matter, a for profit corporation) are given broad discretion in making decisions about the operation of the corporation. This would include whether and how to notify owners of the pendency of a suit against the Association. If the directors acted in good faith and in a manner the directors reasonably believed to be in the best interest of the Association and exercise the care which a reasonably prudent person would in making their decision, a court would not disturb their decision. This is especially true in the case of decisions regarding pending litigation, which as pointed out, are specifically excepted from the provisions of the open meetings requirement of the Illinois Condominium Property Act (section 18(a)(9)) of that Act (hereinafter referred to as "Act"), thereby indicating a legislative deferral to the judgment of the Board as to disclosure of litigation.

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