



Board Powers, Duties, Procedures and Liabilities... in the Real World

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Board Powers and Duties: Overview

- Core Concepts
- What Directors Do
- Director Responsibilities
- Director Protections
- Making Hard Decisions
- Board Communication and Openness



Core Concepts

- How do I prevent myself from being sued?
- HOAs are peculiar legal entities, with some attributes of:
 - A municipal government (ie records disclosure, notice requirements and open meetings)
 - A for-profit corporation (shareholders, annual meetings, directors and officers, liability shield).
- HOAs are miniature democracies.
 - When in doubt about a particular decision – does it pass the smell test?
Are we acting in a reasonable manner? Are we acting with due process?



What's My Job?

- **Director:** an elected representative charged with administering the affairs of the Association in what he/she reasonably believes to be the best interests of the Association as a whole.
 - You represent the owners' collective interest. Not the interest of any one owner, a group of owners, or the Board.
- **Officer:** an elected representative (although often appointed by fellow Board members) with a specific scope of tasks.
 - Chairperson/President
 - Vice Chair/Vice President
 - Secretary
 - Treasurer



What's My Job?

- Committee Member: member of either a standing or *ad hoc* body that serves at the pleasure of the Board of Directors
 - may or may not have a limited scope of decision-making authority delegated to it by the Board in either the governing documents or by resolution. See ORS 65.354 , RCW 24.03A.575
 - ARC Committee
 - Rules Committee
 - Parking Committee
 - Nominating Committee
 - Project-Specific Committees
- Manager: an independent contractor that works to implement the decisions of the Board of Directors and serves as an advisor to the elected representatives of the Association.



Who Makes Decisions?

- The Board of Directors, as a group, by majority vote, in an open meeting, EXCEPT:
 - If a particular decision is specifically reserved for an owner vote.
 - If it is a bona fide emergency and a manager or individual Board member must act to preserve Association property or safety of some person.
 - Board has specifically delegated a particular decision to a committee or officer (which would have required an earlier decision in an open meeting anyway).



What Are My Responsibilities as a Director?

- ORS 65.357, RCW 24.03A.495
 - Act in good faith.
 - Act with the same care that an ordinarily prudent person in a like position would exercise under similar circumstances.
 - Act in what you reasonably believe to be the best interest of the Association.
- Comply with the Board Code of Conduct.
 - Do you have one? CAI does.



What Are My Responsibilities as a Director?

- Disclose conflicts of interest (ORS 65.361, RCW 24.03A.890, RCW 64.90.410).
 - Definition: A transaction with the corporation in which the director of the corporation has a direct or indirect interest in the outcome of the transaction or decision.
 - How do I deal with an conflict of interest *legally*?
 - Disclosure and Recusal – 99% of the time.
 - Disclosure and Approval (by vote of Board, approval of Attorney General, sue for approval and join the Attorney General in the suit) – less than 1% of the time.
 - How do I deal with a conflict of interest *practically* and in 99% of cases?
 - Disclosure and Recusal.
 - Remember the “smell test.”



What Are My Protections as a Director?

- Court deference to Board and committee decision-making in Oregon—*Valenti v. Hopkins*.
 - Exception: “Fraud, bad faith, failure to exercise honest judgment.” Then the Board will second-guess your decision.
- NO Court deference in Washington - *Wilkinson v. Chivawa Cmtys. Ass’n*
 - Relation to existing covenants, reasonableness, relation to original plan of development.
- Business Judgment Rule: presumptive reasonableness of decision made based on the reliance of experts.
- Indemnification from the Association.
- Qualified Indemnity under ORS 65.357. Must be stated in governing docs in Washington.
- Directors and Officers insurance.
- Doing things right! Following your own rules and maintaining the moral high ground.



What Does this Mean in the Real World?

- Directors have a responsibility to be prudent stewards of the Association's finances. Yes – sometimes that means raising assessments or doing a special assessment.
- Directors have a responsibility to maintain common areas/common elements with due care.
- Act in the best interest of the Association, not themselves or the angriest owner in the room.
- Sometimes, decide between bad and worse.
- Rely on experts when making a decision that requires special advice (legal, accounting, reserve funding, construction).



How do I Make Hard Decisions in the Real World?

- Examples and War Stories.
 - Absolutely necessary repair vs. Absolutely unattainable voting threshold to authorize assessment necessary to pay for repair.
 - Lawsuit that needs to be filed vs. Absolutely unattainable voting threshold.
 - Culpable or possibly malicious director who won't resign.
 - Well-meaning director who has become so invested in his or her position that he or she cannot act with the care of an ordinarily prudent person.
 - Two rival warring factions on the Board.
 - Spontaneous resignation of entire Board.



Money Problems: the Frequent Causes

- Deferred Maintenance
- Defective Construction
- Non-paying Owners (Collections)
- Rising Costs (Inflation)
- Uncovered Insurance Loss
- Legal Bills
- Judgment against the Association
- Failure to Budget Prudently
- Failure to Adequately Fund Reserves



Major Construction Projects, Loans, Special Assessments: How do we get this done without losing our minds?



- Identify the Problem
- Identify who makes what decisions
- Make Decisions about the scope of work
- Zero in on an Aggregate Project Budget
- Communicate with Homeowners
- Do the work

And.... While doing all of this – build support in community for the project by communicating effectively with homeowners



Board Communication and Openness

- Email can be used to disseminate information but not to have substantive conversations about Association business.
- Careful use of Executive Session.



Parting Thoughts and Questions

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