



Board Basics 101: What Every Board Member Needs to Know

Weissman, Nowack, Curry & Wilco, P.C.

I.

OVERVIEW OF THE BASICS

“Community Association” is the generic term for communities that are created pursuant to recorded covenants or other documents that create an association of the unit or homeowners. The term community association includes condominiums, homeowner associations and housing cooperatives. These typically are organized as non-profit corporations.

A. Condominiums. A condominium is a form of property ownership, not architectural style. There are two distinct aspects to a Condominium:

1. They are subject to the Georgia Condominium Act - O.C.G.A. §44-3-70, et seq.
2. The Association does not own land – common areas are owned by all unit owners in common based on a percentage established in documents.

B. Homeowners Associations. Homeowners Associations are generally subdivisions of single-family attached or detached homes. There are three distinct aspects to homeowners associations:

1. They are not automatically subject to any specific real estate laws.
2. They may be, but are not required to be, submitted to the Georgia Property Owners' Association Act, O.C.G.A. §44-3-220, et seq.
3. The association owns the common property, and each owner has an easement to use the property.

C. Cooperatives. In a Cooperative, the members purchase shares of stock in a corporation which owns all property. Stock ownership entitles members to lease a unit.

II.

AUTHORITIES AND RESPONSIBILITIES OF THE BOARD OF DIRECTORS

The governing documents of most community associations provide the following authority, duties, and responsibilities for the Board:

- The Board is elected by the owners/members of the community.
- The Board elects and directs the officers: The Board makes broad policy decisions and the officers are given the authority to carry out these decisions.
- Like a major corporation, the Board of Directors will determine how monies are spent, hire and fire employees and contractors, and take care of a broad range of responsibilities for the community.

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- The Board of Directors is charged with management of the association and this would include:
 - (1) running the business affairs of the association,
 - (2) establishing a budget,
 - (3) establishing a collection policy,
 - (4) establishing and enforcing rules and penalties,
 - (5) employing an accountant,
 - (6) employing an attorney,
 - (7) employing a manager/management company,
 - (8) employing necessary personnel for maintenance and repair,
 - (9) coordinating physical maintenance of the common areas, and
 - (10) other responsibilities.

III.

DOING YOUR JOB – SAFETY NETS

Being on the board of directors of your community association can be both a gratifying and frustrating experience. It also brings a risk of personal liability for your actions and decisions. Often, the only qualification required to be a community association director is that you bought a home in the community some time before the association's annual meeting. However, association directors assume the same responsibilities and liabilities of directors of other corporations. Four different types of "safety nets" can help protect directors and officers from liability.

In a nutshell, the board of directors is charged with managing the community and running the affairs of the association to preserve, protect and enhance the value of the homes in the community.

A. The Business Judgment Rule. In exercising these powers, association directors owe a special two-part duty: a duty of care and a duty of loyalty. The duty of loyalty is a duty to put the interest of the association above your personal interests. This duty forces you to make some hard decisions. It requires you to establish a budget that realistically meets the community's anticipated expenses, even if it would be a burden for you to pay higher assessments. It also requires you to enforce the protective covenants uniformly against all owners, including your friends.

The other party of the board member's duty, the duty of care, requires you to act in good faith, with the diligence, care and skill of the ordinary prudent person in the same or similar circumstances. This standard is commonly known as the business judgment rule. What is important to remember is that this duty of care does not require that you be blessed with unique talents.

Rather, the business judgment rule requires you to make informed decisions. It requires the exercise of common sense. You must have enough information on issues to enable you to act in the association's best interest. This requires attendance at board meetings and a review of

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materials submitted to the board. It also requires you to request and receive enough information on which to base your decisions. If a report does not make sense or is incomplete, you should ask questions and receive additional information. Most importantly, recognizing that no one is an expert in everything, the business judgment rule requires the board of directors to seek help from professionals on issues beyond the scope of your expertise.

Generally, courts will not second-guess the actions of a board of directors if good business judgment procedures are followed. In other words, directors will not be personally liable for decisions that turn out to be mistakes if the directors acted in good faith and with the care that an ordinary person would exercise in the same position. The law allows you to make mistakes, as long as those mistakes were made using good business judgment. To exercise good business judgment, you must attend meetings, be informed of all relevant information when voting on issues, register dissents when you oppose a decision of the board, know the association's governing legal documents, and be diligent in responding to issues in your community.

The business judgment rule recognizes that members of the board of directors of non-profit corporations generally serve as volunteers and may not have the expertise or skill of trained professionals. The business judgment rule protects members of a non-profit board when you make good faith, informed decisions, relying on the recommendations of professionals or experts, such as engineers, public accountants, or attorneys, on matters beyond the scope of your expertise.

Association directors are given these protections under the law to encourage people to volunteer on boards of directors. For most people, their home is the largest investment they will make in their lifetime and how well a community is run directly affects that investment. Serving on a community association board of directors, and directly participating in managing your investment, can be a very rewarding experience.

B. The Georgia Nonprofit Corporate Code and Limitations of Liability for Board members. Another safety net that Boards may want to consider is an amendment to the Association's Articles of Incorporation to limit personal liability of directors. In response to uncertainties concerning the personal liability of directors, the Georgia legislature passed an amendment to the nonprofit corporation code which permits the articles of incorporation to eliminate or limit personal liability of a director to the corporation or its members for monetary damages for breach of the director's duty of care or other duty as a director, subject to certain specified exceptions. These exceptions include: (1) appropriation of any business opportunity of the corporation in violation of the director's duties, (2) acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of the law, (3) any transaction from which the director receives an improper personal benefit and (4) certain situations regarding conflicts of interest.

Please note that while an Amendment to the Association's Articles of Incorporation can limit liability of directors from the members of the Association and from the Association itself, the legislation does not allow a director to limit his or her liability to third parties. Therefore, although the Amendment may reduce the risk of liability, we cannot eliminate liability from all

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sources. Additionally, we have contacted several insurance carriers to determine if this amendment will reduce the premiums for directors and officers' liability insurance. We have been advised that as long as the corporation is also covered by the same policy, premiums are not likely to be affected. For example, even though a member of the Association may not be able to successfully sue a director (unless the act falls within one of the specified exceptions), the member may still sue the Association. If the insurance covers the corporation as well as the directors, the same claims are likely to be made against the policy even though the category of defendants should no longer include the directors. Furthermore, the insurance is needed as someone can sue a director and the insurance is there to pay for coverage to prove that the liability exemptions are applicable to the suit.

Finally, we would also point out that the state statute extends protection from liability only to directors, not officers. To protect the officers of the Association, the Board may consider having Association decisions made by the full Board rather than by individual officers. Although a typical directors and officers liability insurance should defend a claim made against a person as an officer (you should confirm this with your carrier), the state statute will only insulate individuals against claims brought against them as directors.

C. Corporate Indemnification. Another potential safety net for the Association's Board of Directors and officers is an indemnification provision. An indemnification provision is often located within the Association's Bylaws. This provision should be checked to assure that it is up to the maximum allowed by state law.

D. Director's and Officer's Insurance. If you serve on your association's board of directors, you know how demanding and rewarding that experience can be. You also know that, despite your best efforts and intentions, decisions are not always well-received by members of your community.

Members constantly threaten lawsuits against associations and the individual members of the board of directors. Typically, the members of a board do not give much concern to such threats because they did not do anything wrong – they just acted to enforce the covenants. Also, they assume all claims that result from a board just doing its job will be covered by the association's directors and officers' liability policy ("D&O"). That is an erroneous assumption which is increasingly causing financial turmoil in associations as suits are filed and associations are forced to defend claims and pay judgments with association funds.

Despite the common misconception of the scope of coverage, D&O insurance does not provide "full coverage" for all claims made against an association and its board of directors. D&O policies cover claims for wrongful acts. The misunderstanding of "full coverage" results, primarily from the definition of a wrongful act. Although not identical, D&O policies generally define a wrongful act as any actual or alleged error, misstatement, misleading statement, act or omission or neglect or breach of duty. Therefore, the goal is to obtain a D&O policy that provides "adequate" coverage – a policy that covers the most common D&O claims.

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If you are currently a member of a community association board of directors or are thinking about running for the board, you should confirm that your association's D&O policy provides adequate coverage. The following checklist will help you determine if your association's coverage is adequate:

- Who is the insured? Does it cover the association, as well as all persons who were, now are, or shall be duly elected or appointed directors, trustees, officers, employees, committee members, volunteers, and spouses of directors or officers?
- Does the policy cover claims for non-monetary damages, including injunctions, temporary restraining orders, breach of contract and interpretation of Declarations and By-Laws?
- Does it cover claims for discrimination, including a violation of the Fair Housing Act? If not, does it pay costs of defense of Fair Housing Act claims?
- Does it cover claims against your property manager and management company? Is coverage limited to actions taken at the direction of the board or does it cover all actions taken in the course of management?
- Does it cover claims for failure to purchase or maintain adequate insurance?
- Does it cover claims for liable, slander, and invasion of privacy?
- If your association is developer controlled, does it cover directors and officers appointed by the developer?

IV.

CONFLICTS OF INTEREST

Under Georgia law, a director of a community association has a conflict of interest if the director or a related person:

(1) is a party to a transaction with the community association (such as when the association contracts with an individual director, who happens to build and paint houses for a living, to do certain repairs to the common elements or common property); or

(2) has a beneficial financial interest in the transaction (such as when the association contracts with a landscaping company that is owned and operated by one of the directors); or

(3) is so closely linked to the transaction and it is of such financial significance to the director or a related person that it would reasonably be expected to exert an influence on the director's judgment if the director were called upon to vote on the transaction (such as when a director is a real estate agent with listing agreements for certain homes in the community, the board is setting maintenance priorities and the board's decisions could impact the ability to sell of one of the agent's listings in the community).

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Additionally, a conflict of interest exists if the party with which the association is contracting is:

- (1) an entity of which the association director also is a director (such as when a developer-controlled board contracts with the developer's company to provide management services to the community association); or
- (2) a person who controls an entity of which the association director also is a director (such as when a contracting and repair company is owned and controlled by an individual and the board desires to hire such individual to provide services to the association); or
- (3) an entity that is controlled by or is under common control with one or more entities of which the association director also is a director (such as when the developer-controlled board contracts with an affiliate or subsidiary of the developer's company for management services); or
- (4) an individual who is a general partner, principal or employer of the director.

Certain conflicts of interest are easy to identify and remedy while others are not as simple. Most of the examples used above are "easy conflicts." The following are examples of "hard conflicts." Is there a conflict of interest if a director votes to approve a deck enclosure of a neighbor when the director is thinking about making a similar change to his/her property? What about when the directors are establishing a roof repair schedule for the community because the roofs on four of the ten buildings in the condominium need to be replaced and a director lives in one of those four buildings? Although these examples may seem like conflicts of interest, they probably do not rise to such a level.

In the first example, unless the neighbor is a "related person" to the director or the neighbor is giving the director money if the director approves the deck, there really is no conflict. The director himself/herself still must submit plans and specifications for his/her own proposed deck, in which case the director would then have a conflict of interest, and the transaction is of no financial significance to the director.

In the second example the director seems to have a conflict of interest because he/she lives in one of the buildings that need a new roof. Maybe the director will try to steer the board to put his building at the top of the maintenance list. Conversely, maybe the director will try to steer the board away from scheduling his building first in order to avoid the appearance of a conflict, but what if the director's building really should be first, because it is most in need of repairs? Although this situation appears to create a conflict of interest for the director, an actual conflict of interest probably does not exist. Just because a director may be affected by a decision being made by the board does not mean the director has a conflict of interest in participating in such decision. However, if the director is uncomfortable with the situation and feels that the best way to handle the issue is to treat it as if a conflict of interest does exist, the following paragraph explains what the director should do to avoid such conflict.

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If a conflict of interest exists, the transaction may not be prevented by the members or set aside after-the-fact, nor will the transaction give rise to damages or other sanctions if: (1) the director with the conflict of interest discloses such conflict to the other board members, and (2) after the required disclosures the transaction receives the affirmative vote of a majority (but not less than two) of the qualified directors or a duly empowered committee who voted on the transaction. If the director with the conflict of interest cannot disclose the details of the conflict because of some professional canon or duty of confidentiality to another person, the director must disclose to the qualified directors the nature of the conflict and the limitations imposed on him/her. After such disclosure, the conflicted director, who cannot disclose the details of the conflict can play no part, directly or indirectly, in any deliberations or vote on the issue.

For purposes of voting on a transaction with which a director has a conflict of interest, a majority of the qualified directors constitutes a quorum of the board of directors (so long as such majority equals two or more people).

After the vote takes place, the entire board of directors should execute a resolution describing what actions were taken by the conflicted director and the other qualified directors to avoid such conflict.

V.

PARLIAMENTARY PROCEDURE

1. Notice of Board Meetings. Pursuant to the Non-Profit Corporate Code, unless the association's legal instruments state otherwise, regular meetings of the board can take place without notice of the date, time, place and purpose of the meeting. This is true only if an association has a regular, or pre-determined board meeting scheduled (such as the first Tuesday of each month, or the fifteenth of every month). If the board meetings are not pre-arranged, there must be at least two days notice to each director. The notice must provide the date, time and location of the meeting. The purpose of a board meeting does not have to be stated in the notice.

So long as the association's legal instruments provide, the association is permitted to send notice of board meetings in writing (via mail, courier or facsimile), by electronic mail or by leaving a telephone message for the board member. A director may waive the notice requirement if he/she executes a written statement which is included in the minutes of the meeting or is filed in the association's records. A director automatically waives notice by attending or participating in the subject board meeting, unless he/she objects to the holding of the meeting and does not vote or assent to any action taken at such meeting.

2. Quorum and Proxies for Board Meetings. Unless stated otherwise in the association's legal instruments, a majority of the directors must be present at the beginning of the meeting in order to call the meeting to order. According to the GCA and the Georgia Property Association Act (POAA), in order to transact any business at a board meeting, a quorum must be present. Accordingly, if a quorum is present at the beginning of a board meeting and some of the board members leave during the meeting, the one or two remaining board members cannot transact association business alone (unless the two remaining board members constitute a majority of the board).

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As discussed above, at a membership meeting, a quorum is established by the total number of eligible voting members present in person or by proxy at the beginning of the meeting. However, a board member cannot give his/her proxy to anyone (even another board member) for a board meeting. There is no such thing as a proxy for a board meeting. With few exceptions, if a board member cannot attend the board meeting, that director simply cannot participate or vote.

One of the few exceptions to this rule is that a board member is considered “present” if they are participating in the meeting through a form of communication by which all directors at the meeting can simultaneously hear each other during the meeting, such as by speaker phone, conference calling or video conferencing.

What to Do
MINUTES
THE BEST HOMEOWNERS ASSOCIATION, INC.

BOARD MEETING – February 10, 2008

Meeting called to order at 7:30 p.m. at The Best Clubhouse meeting room. Quorum established.

Attendees: Suzy Homeowner, President James Brown, Secretary
 Elvis Green, Vice President Lotta Money, Treasurer
 George Nowack, Exceptional Association Attorney
 Darla Diligent, Managing Agent

Absent: Dapper Dan, member, excused.

Approval of Minutes:

Motion: Approve Minutes from January 9, 2008 Board meeting, as corrected.

Vote: Unanimous approval

Resolved: The minutes of the January 9, 2008 meeting are approved as corrected and entered into the Association records.

Reports:

Treasurer's report given by Lotta Money. Management report given by Darla Diligent. Written reports presented and maintained in Association records. Collections report given by attorney Nowack.

Business:

Motion: Hire XYZ Landscaping to plant azaleas at the clubhouse for a price of \$1,500.00.

Vote: Motion Disapproved – One in Favor, two opposed, one abstaining.

Motion: Have Darla Diligent contact WNCW to amend The Best Declaration to restrict leasing in the community.

Vote: Motion Approved Unanimously

Resolved: That the Association contact WNCW to amend The Best Declaration to restrict leasing in the community.

Motion: Accept ABC Pool Company's written proposal (maintained in the Association's records) to maintain the Association pool and to provide lifeguard services, subject to the Association attorney's review of the contract.

Vote: Motion approved - three in favor, one opposed. Discussion of recognition that BC was the highest bidder, but the consensus is that our good history with ABC justifies renewing with ABC.

Resolved: That the Association accept ABC Pool Company's written proposal to maintain the Association pool and to provide lifeguard services in accordance with the terms of the proposed contract, subject to the Association attorney's review of contract.

Meeting adjourned at 8:40 p.m.

What Not To Do

MINUTES

STINKING SPRINGS HOMEOWNERS ASSOCIATION, INC.

BOARD MEETING – February 10, 2008

Meeting called to order at 7:30 p.m. at The Stinking Springs Clubhouse meeting room.

Attendees: Suzy Homeowner, President James Brown, Secretary
 Elvis Green, Vice President Lotta Money, Treasurer

Also in attendance: John Troublemaker, Homeowner

Reports:

Treasurer's report given by Lotta Money. We discussed delinquent accounts. Sally Slow is up to \$650. Lotta said that she talked to Sally and that Sally is having financial trouble. Sally asked to pay over 12 months. The Board voted to allow this.

Lotta said that John Troublemaker is now up to \$500. John came to the meeting and said that he didn't like the way the Board was running the Association, but that he couldn't afford to pay \$500 right now, but will be able to pay in 30-60 days when he gets his tax refund. The Board discussed the issue and decided that we didn't trust John to make payment, so the Board voted to deny John's request and suspend his privileges to use the amenities.

James Brown then gave a report as chairman of the maintenance committee. He said that we replaced roofs on 2 units last month, but we have received requests from those owners to fix their damaged ceilings and walls. James said the roofs were replaced within a week or so of receiving notice of the leaks and that the Association attorney told him that the Association is not responsible for fixing the inside of a unit unless we were negligent in some way in fixing the roof, which didn't seem to be the case here. Elvis said that he thinks we should always fix the inside of a unit after a leak because we should be more diligent in preventing leaks. The Board voted to ignore Elvis.

Business:

The Board asked John Troublemaker to leave for this portion of the meeting.

The Board voted to accept ABC Pool Company's contract. It was the most expensive of the bids, but Elvis checked the referrals given by both Clear Pool Company and Clean Pool Company, and they all looked terrible. ABC also said that they would keep the deadbeats out of the pool for us.

Meeting adjourned at 8:40 p.m.