

## RESPONSIBILITIES OF THE BOARD OF DIRECTORS

As we enter into the new year, many community associations are welcoming new members to their board of directors. Serving on a board of directors for an association is often no small task and the obligations that come with it should not be taken lightly. It is important for all directors to be aware of the nature and extent of their authority and responsibilities so that each director can fulfill his or her duty to the association and its membership.

Community associations in Georgia are typically non-profit corporations, and the board of directors is charged with the day to day operation of the corporation, including, but not limited to, the following:

- running the business affairs of the association;
- creating a budget and reserves;
- assessing and collecting assessments;
- developing and enforcing rules and penalties;
- hiring the necessary contractors and professionals to serve the needs of the association and the community;
- coordinating physical maintenance of the common areas; and
- enforcing the existing covenants.

The specific duties and obligations of the board of directors are typically set forth in the bylaws of the association. The articles of incorporation for the association will sometimes also contain provisions setting forth the obligations of the board. No particular board member carries the sole authority or shoulders the burden of taking on these tasks on his or her own. Instead, any decision that is made on behalf of the association or any approved action

to be taken by the association must be taken by a majority approval of the board.

Board members for a community association have two essential duties to the association: the duty of loyalty and the duty of care.

- Duty of Care. The duty of care requires that each board member simply exercise ordinary and reasonable care in discharging his or her duties. Each board member must act in good faith with the diligence, care, and skill of an ordinarily prudent person in the same or similar circumstances.

Fulfilling the duty of care requires directors to:

- 1) make rational and informed decisions that are in the best interest of the corporation;
- 2) review matters;
- 3) ask questions;
- 4) investigate in a manner appropriate to the issue at hand; and 5) be informed, attend meetings, know and understand the association's documents, and to act on issues when necessary.

The law and courts, as a general rule, do not hold directors liable for honest mistakes of judgment, as long as they act in good faith and with care. However, as part of the duty of care, it is imperative for directors to be aware of, and to have read, the governing documents for the community, which includes an association's declaration, bylaws, articles of incorporation and any published rules and regulations or design standards. Failure to familiarize oneself with the framework within which

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the association and its members are obligated to operate not only inhibits the ability of a director to be effective, but can lead to a violation of the director's duty of care.

- **Duty of Loyalty.** In addition to the duty of care, each board member has a duty of loyalty to the association, which requires a board member to place the interests of the corporation above his or her own personal interests. Specifically, a director may not use his or her position on the board for personal gain, nor should a director make any decisions on behalf of the association that are routed solely in self-interest.

As part of the duty of loyalty to the association, directors have an obligation to disclose any transaction which presents a conflict of interest. Under Georgia law, a director has a conflict of interest if the director or a "related person" to the director:

- is a party to a transaction with the corporation;
- has a beneficial financial interest in the transaction with the corporation; or
- 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 and vote.

Related persons will include the director's spouse, parent, sibling, child or grandchild, or any person living with the director. For example, if a board is considering hiring a landscaping company owned by the husband of the board president, it is a conflict of interest.

Just because a conflict of interest exists, however, does not mean that the transaction cannot take place. In order to properly navigate a conflict of interest transaction, the director with the conflict of interest **must** disclose the conflict to the other board members, and the transaction must be approved by a majority (but not less than two), of qualified directors. A "qualified director" is one who does not have a conflict of interest and who does not have a familial, financial, professional or employment relationship with the conflicted director.

Unless he/she cannot disclose the nature of the conflict for any reason, the director with the conflict of interest can participate in the discussion and even in the vote on the matter. However, the transaction would not be approved unless and until it is approved by a majority of the qualified directors. In most cases, however, it is easier for the remaining board members to ask the conflicted director to recuse himself/herself from the discussion and the vote.

In a perfect world, all directors on a board would work together harmoniously and share the same vision for the community. However, as with any process where a group of people are charged with the obligation of making decisions, not everyone is going to see eye to eye. Having different viewpoints and a holding a healthy debate on matters is usually a good thing for a board of directors. Unfortunately, some boards have faced situations where emotions have gotten the better hand and a director begins to act out. Common examples are when a director attempts to undermine the board's decision by distributing selective information to the community to try to incite the community or when a director becomes so disruptive or threatening at a meeting that no additional action or decision can be made.

These are unfortunate situations that do occur from time to time. The best course of action is to address the matter as openly and frankly with the dissenting director. The director should be informed of his or her statutory duty of care and that there are potential consequences to the director's actions. A director who is informed of his or her obligations to the association will often refrain from taking further steps to disrupt the decisions of the majority.

One way to circumvent tough situations where emotions may lead to violations of the duty of care and loyalty is to ensure that all directors agree to a set of rules by which the board will operate, commonly called a code of ethics. A code of ethics requires that directors comply with certain minimum standards of conduct and to keep confidential any privileged information obtained as a director. The code can also provide for remedies or sanctions against any director who refuses to abide by the code. A code of ethics can be adopted by amendment to the association's bylaws or by a resolution of the board. If adopted by resolution, each director or officer should sign the code of ethics to be bound by it.

If an association does not have a code of ethics, or if a director continues to take actions contrary to the majority decision of the board or which otherwise violate the director's duty of care and loyalty to the corporation, it may become necessary to pursue any remedies afforded under the bylaws or Georgia law, such as removal of the director or, in particularly egregious situations involving personal threats, seeking an order of restraint. The bottom line is that a board should not turn a blind eye or seemingly condone actions which violate the duty of care and loyalty as it can lead to liability on the part of the association and/or the directors individually.