Georgia Community Associations:

The Duty of Care of Association Directors and Officers

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In 1970, there were around 2.1 million Americans living in community associations, based on on-going research of the Community Associations Institute ("CAI"). By 2016, over 67 million Americans live in community associations. The number of Georgians living in community associations, likewise, continues to raise exponentially. For this reason, now more than ever, it is critical for homeowners and volunteer leaders to have a basic understanding of the nature and function of community associations in Georgia.

In Georgia, there are three types of community associations: condominiums, associations submitted to the Georgia Property Owners' Association Act, and common law homeowners associations. Condominiums are governed by the Georgia Condominium Act at O.C.G.A. § 44-3-70, et seq. Homeowner and townhome associations may be governed by the Property Owners' Association Act, O.C.G.A. § 44- 3-220, et seq., if so elected in the recorded governing declaration. All other community associations in Georgia are governed by Georgia common law.

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All community associations in Georgia should be incorporated as a non-profit corporation, and, therefore, are governed by the Georgia Nonprofit Corporation Code at O.C.G.A. § 14-3-101, et seq. The corporation is governed by a board of directors, elected from the association membership. Zogby International and Gallup have both completed years of polling for CAI's Foundation for Community Association Research, and re-affirm again and again that most residents in community associations have a positive view of their association experience. However, associations continue to battle a negative media perception. Some of that is likely tied to a misunderstanding of the role and function of a community association. In particular, there is a common misunderstanding that directors have a fiduciary duty to their members.

This article will discuss what it means to be a fiduciary, examine the four fiduciary duties of community association board members and conclude with an explanation of the standard of conduct for directors.

I. Fiduciary Duty

The word “fiduciary” comes from the Latin word “fidere”, which means “to trust.” But, it is more than trust that establishes a fiduciary relationship. Otherwise, every relationship, every conversation would be fiduciary in nature. Or would it be only those conversations where a person says “I am going to be honest with you” or “Trust me....”?

“Fiduciary” applies to a relationship in which one person with justification expressly places confidence and trust in someone else and that other person accepts that role. Lawyers, CPAs, financial planners are the most obvious fiduciaries. They are persons whose advice and services, usually involving financial matters, are sought by another person. While those fiduciary relationships are consensual, fiduciary relationships can be imposed. That is the situation in a community association.

When you purchase a home in a community association, you consent to the duties and obligations set forth in the recorded declaration. You have no choice, other than not to purchase the home, but to become an automatic member of the association with the concomitant obligation to pay assessments. While paid to the association, the assessments are managed by the persons that are elected to the board of directors. Accordingly, the board members stand in a position of trust in relation to the members and an association’s funds.

That position of trust results in an imposed fiduciary relationship between the members of an association and the members of a board, notwithstanding that the board members are elected.

While it can be assumed that members of an association that cast ballots consented to the development of a fiduciary relationship with those candidates for whom they voted, the same cannot be said for the members of an association that failed to cast a ballot or did not vote in favor of a winning candidate. Their consent to a fiduciary relationship with the persons elected to the board cannot be inferred. It, nevertheless, is imposed due to the corporate structure of a community association’s elected board.

The word “duty” is defined as something a person has to do because it is morally right or is required by law. A breach of duty is never justified. A person in an official position of trust has a duty of loyalty to the person(s) with whom the fiduciary relationship exists. A duty of loyalty and, therefore, a fiduciary duty requires the person, the fiduciary, to always act in the best interest of the persons who have placed their trust in him or her. (See O.C.G.A. § 23-2-58.) A fiduciary’s personal interests and well-being are secondary to those other persons’ best interests.

There are but four duties of loyalty that are recognized as fiduciary duties. They apply to the individual members of the board of directors of community associations. The oft stated “I am just a volunteer and do not get paid to serve on the board” having no effect on each board member’s fiduciary duty.

A. The Duty to Act in the Best Interest of the Association

In accordance with O.C.G.A. § 14-3-830, a director discharges that duty by exercising ordinary and reasonable care in conducting the business affairs of the association. Directors must put the organization’s best interest ahead of any personal interests. The standard of ordinary and reasonable care is discussed in detail later in this article.

B. The Duty to Recognize and Maintain Information That Is of a Confidential Nature

Unlike most other non-profit corporations, the board of directors of a community association is in a position of operating a business; they are also governing the community. Complying with the obligations, duties, responsibilities and liabilities of those two roles are not always the same. Recognizing and preserving the confidences of an association is challenging, complicated by the governmental role of taxation (assessments) and punishment (fines; suspension of use privileges and voting), as well as providing services (maintenance of units/common property), which are not addressed by directors of other non-profit corporations. Now, add to that many members’ beliefs that they are entitled to know everything that is going on and to review all of their association’s books and records. So, what is confidential?

It is possible to provide only a limited list of information that should always be treated as confidential — contract bids/negotiations, lawsuits, hiring/firing discussions, investigation of wrong doing. Otherwise, it is information that the average person would expect to be kept in confidence. The identity of an assessment scofflaw or non-conformist depends on an association's documents and board policy.

C. The Duty to Disclose Any Interest in a Transaction Involving the Association

Contrary to the opinion of most members, an association can do business with a member of its board of directors. It is not a conflict of interest if, and only if, the director discloses his or her interest in the transaction. After the interest is disclosed, the other members of a board, if they want to consider the transaction, should perform the same diligence that it performs for other interested parties. The decision to transact business with a board member requires the approval of the majority of the "disinterested" directors.

D. The Duty Not to Appropriate a Corporate Opportunity

Rarely seen in a community association, this duty of loyalty is best explained as analogous to insider trading. Information obtained as a board member cannot then be used to compete with the association. An example would be if a board discusses purchasing some land to add a swimming pool and a board member then goes and buys the land for him or herself.

II. Standard of Care

With most boards of directors of community associations involved in the operations, not just setting policy, the most prevalent fiduciary duty is for a board member to act in good faith and in the best interest of the association as required by O.C.G.A. § 14-3-830(1)(A). The association officers are subject to the same standards under O.C.G.A. § 14-3-842. The standards are met by following a standard of conduct in arriving at a decision. Known as the good business judgment rule, it requires the exercise of common sense. For example, common sense means the selection of a contractor is not the result of randomly picking a company off the internet.

Decisions must be educated ones. That requires board members to exercise due diligence - meaning to act like the average person possessing the same information when the decision was made, as required by O.C.G.A. §14-3-830(1)(B). For example, for contracts, it means checking references of a contractor, checking insurance, and having a legal review of the contract before signing. It means getting the advice of others on matters on which the board has no experience or expertise. For example, board members appropriately and commonly rely on engineers and construction consultants for advice on common property improvements (as expressly contemplated by O.C.G.A §14-3-830(2)). An educated decision complies with the duty to act in good faith and in the best interest of an association.

The result of a board's decision is not considered in determining if a board acted in good faith and in the best interest of the association. Courts consistently hold they will not second guess a board of directors' decision so long as it was an educated one. If it were otherwise, a director would breach this fiduciary duty if the result of the decision was anything but perfect. Would anyone serve on a board if a director was personally liable for each decision? Of course not.

Recognizing that, Georgia law, as well as most other state law, protects directors from personal liability for the result of a decision. O.C.G.A. § 14-3-830(4) expressly states that a director is not liable to the corporation, any member, or any other person for any action taken or not taken as a director if the director acted in compliance with Section 830, that is, made an informed decision. Corporate officers are shielded from liability under the same standard at O.C.G.A. § 14-3-842(4). The law cannot be any broader or more protective for a board member or association officer: not liable to the association, any member or any other person.