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Questions should be directed to an attorney.

Welcome to the Board of Directors

The pay is great and so are the fringe benefits.

- I. **INTRODUCTION** – Being on a Board of Directors of a 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 a board member has is that he or she owns a home or condominium unit in the community. However, community association board members assume the same responsibilities and liabilities of directors of other corporations.

- II. **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. **CONDOMINIUM** – a form of property ownership, not architectural style.
 - 1. Subject to the Georgia Condominium Act – O.C.G.A. §44-3-70, et seq.
 - 2. Association does not own land; common areas are owned by all unit owners in common based on a percentage established in documents.

 - B. **HOMEOWNERS ASSOCIATION** – generally subdivisions of single-family attached or detached homes.
 - 1. Not automatically subject to any specific real estate laws.
 - 2. May be, but not required to be, submitted to the Georgia Property Owners' Association Act, O.C.G.A. §44-3-220, et seq.
 - 3. Association owns the common property, and each owner has an easement to use the property.

 - C. **GOVERNING DOCUMENTS** – certain documents are common to community associations:
 - 1. Declaration – contains the restrictive covenants that regulate use of the land.
 - 2. By-Laws – written document which establishes the governing structure and procedural operation of the association/corporation.
 - 3. Articles of Incorporation – required by state statute to create a corporation. They establish the basic purpose of the corporation.
 - 4. Rules and Regulations – generally administrative in nature, they deal with the use of the property – pets, pool, tennis courts, parking, etc.

III. WITH GREAT POWER COMES GREAT RESPONSIBILITIES

- A. OPERATES AS A CORPORATION – An association is organized as a non-profit corporation under the Georgia Non-Profit Code, O.C.G.A. §14-3-101, et seq. The Board must conduct itself in accordance with corporate code – annual corporate registration, annual meetings, board meetings, elections, etc.
- B. OPERATES AS A GOVERNMENT – Associations provide many of the same services provided by a municipal government – utilities, road maintenance, refuse removal, recreational facilities, life safety. Associations also resemble a government in powers to levy taxes (assessments), establish laws (rules), and punish violators (fine, suspend use privileges, tow, etc.)
- C. ASSOCIATION TYPICALLY IS RESPONSIBLE FOR:
 - 1. Physical maintenance of common areas.
 - 2. Sound financial policy.
 - 3. Collection of assessments.
 - 4. Insuring the property in accordance with the documents.
 - 5. Enforcement
- D. BOARD OF DIRECTORS IS CHARGED WITH MANAGEMENT OF THE ASSOCIATION:
 - 1. Runs the business affairs of the association.
 - 2. General responsibilities of Board Members:
 - a. Establish the budget.
 - b. Establish collection policy.
 - c. Establish and enforce rules and penalties.
 - d. Employ professionals (accountant, attorney).
 - e. Employ necessary administrative/maintenance personnel.
 - f. Employ a manager/management company.

IV. BOARD MEMBER DUTIES – STANDARD OF CARE

- A. GENERAL
 - 1. Georgia Statute – Standards of Conduct for Directors, O.C.G.A. §14-3-830.
 - 2. Before taking any action, Board must make sure it has the authority to act. (Declaration, By-Laws, Rules and Regulations).
 - 3. Do not assume anything.
- B. FIDUCIARY DUTY – What is a fiduciary? It is a person who because of his or her position owes a duty of good faith and undivided loyalty.

A fiduciary duty:

- 1. Is a duty imposed by the courts to prevent one in whom special trust or confidence is placed from representing his own interests over those of his charges. It is an obligation of loyalty not to compete with the association, not to usurp an association's opportunity, and to avoid conflicts of interest.
- 2. Arises from the power of control vested in the Board and the mandatory nature of an association. As such, Board members are held to high standards of conduct (particularly with the funds of the association).
- 3. Confidentiality is an important facet of the duty of loyalty. A fiduciary cannot disclose information obtained in the course of his/her duty.

C. GOOD BUSINESS JUDGEMENT

1. It is the duty of **care** – it requires the exercise of ordinary and reasonable care in the discharge of the directors' duties.
 - a. Must act in good faith, with the diligence, care and skill of the ordinarily prudent person in the same or similar circumstances and does not require that the officer or director be blessed with unique talents found only in the boardrooms of the largest corporations.
 - b. Duty includes the obligation to make, or cause to be made, such inquiry as the director or officer reasonably believes to be appropriate under the circumstances – decisions must be informed decisions.
 - c. Must rationally believe that the decision is in the best interest of the association.
 - d. Generally, courts will not second-guess the actions of a Board if business judgment is followed. The law will not hold directors liable for honest mistakes of judgment, when they act in good faith. Absent a showing of fraud, dishonesty, or incompetence, it is not the court's job to second-guess the action of directors.
2. To exercise good business judgment, a Board member must be informed, attend meetings, register dissents, know the association documents, act when required.

V. CONFLICT OF INTEREST

A. GENERAL

1. It is a situation in which an individual's duty to one leads to the disregard of a duty to another.
2. It exists when an outside influence affects one's ability to make an unimpeded, independent decision or when an individual owes duties to separate entities with different interests.

B. BUSINESS CONFLICTS

1. Board member has a financial interest in a contract or other transaction involving the association.
2. Board members uses information obtained as a Board member and usurps a business opportunity that is available to the association.

C. DEALING WITH BUSINESS CONFLICTS

1. O.C.G.A. § 14-3-860 et. seq – Conflicting Interest Transactions
2. Duty of Disclosure – a director has a duty to disclose (A) the existence and notice of the director's conflicting interest; and (B) all facts known to the director respecting the subject matter of the transaction (O.C.G.A. §14-3-862).
3. Transaction must be approved by a majority, but not less than two (2), of the disinterested directors.

D. POLITICAL CONFLICTS

1. Exists because of the elected positions of directors (political) and the governmental rule of the association (politics).
2. Does not exist with other non-profit Boards. Duty of loyalty to the corporation, not constituents.
3. Duty of loyalty is to support the Board's decision. The majority of directors have determined the decision is in the best interest of the association. Board members cannot work to undermine the decision – duty to support the decision.
4. But, as an elected representative in the minority vote on an issue, political nature of representation encourages director to speak out and attempt to change the decision, or at least to disassociate with the decision.

5. Duty of confidentiality and loyalty precludes director from discussing disagreements with constituents. Board member can disclose vote against the decision, but cannot work to undermine the decision by influencing public opinion. Board member actions can create liability for association.
6. Director's actions to change decision is with other Board members since it is the Board members, not the constituents that make the decision.

VI. WHO MAKES THE DECISIONS?

A. GENERAL

1. Board of Directors charged with operating the Association.
2. Board sets policy to be implemented by management.
3. Board sets parameters of managers' authority:
 - a. Too little, Board manages
 - b. Too much, manager autonomous

B. BOARD DECISIONS

1. In addition to setting policy, decisions are made by a majority vote of the members of the Board.
2. President of the Board is an elected member of the Board and votes on every matter. Otherwise, the Board is short a member.
3. Practical issues – Boards cannot approve every decision that binds the Association.
4. President must have authority to make some decisions without a vote – Board must decide president's authority.
5. Generally, Boards approve contracts, hiring/firing general manager, approve budgets, approve agreements with Developer, adopt rules and regulations, and appoint committees.

VII. THE THREE "F'S"

A. FISCAL

1. Duty to develop and adopt an accurate budget and annual assessment.
2. Failure to adopt a budget and assessment in accordance with the Declaration can invalidate the assessment and subject Association to paying attorney's fees.
3. Transfer Fees/Initiation Fees must be in the recorded documents (O.C.G.A. §44-14-15).
4. Must obtain and maintain insurance as required by documents (O.C.G.A. §44-3-107). If a condominium, must insure the units and common elements, with coverage sufficient to return Unit to its original condition; no coverage for betterments and improvements made after initial sale from developer.
5. 4 year statute of limitations (O.C.G.A. §9-3-29)

B. PHYSICAL

1. Duty to maintain the community – buildings and amenities.
2. Maintenance of units depends on the definition of the boundaries and the express maintenance duties. Do not assume anything about the units.
3. Capital Reserve Study is the only way to exercise good business judgment to predict the \$\$ needs of an association.

C. FUNCTIONAL

1. Annual Meetings
 - a. It is the members meeting
 - b. Notice – at least 21 days
 - c. Reports of directors and officers
 - d. Election of directors
 - e. Budget – most automatically approved unless disapproved.

2. Board Meetings
 - a. It is a board meeting, not a members meeting
 - b. Open or closed depends on Bylaws. No Georgia law requires open meetings.
 - c. Notice depends on Bylaws.
 - d. No proxies
 - e. Attendance “electronically” requires a means of communication by which all may simultaneously hear each other. (O.C.G.A. §14-3-820)
 - f. Action without a meeting requires vote of all or a majority depending on Bylaws (O.C.G.A. §14-3-821); must be evidenced in writing.

3. Enforcement
 - a. Depends totally on Declaration or Bylaws
 - b. If authorized, may impose fine, suspend right to vote, suspend right to use amenities, suspend right to use common property.
 - c. If fines authorized, usually must follow a procedure that gives notice and the opportunity to have a hearing.
 - d. 2 year statute of limitations from date violation commenced, not when discovered (O.C.G.A. §9-3-29).