Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

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FEATURE

You can use your managerial role—to an appropriate degree—to help fill board vacancies.

IN THIS ISSUE

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Encourage Hesitant Community Members to Fill Vacant Board Seats

Whether you manage a planned community or a condominium building, issues with the board can take up your time and create frustration among owners who just want things to run smoothly. One of those issues could be assembling a board to begin with. In some scenarios, owners may be clamoring to serve on the board. That's good news: It indicates that members of the community are invested in and want to be involved in the successful operation of the association. But if you're facing the opposite situation, where it's difficult to fill vacant seats on the association's board, it could be stressful. That's because, although it's important to have a productive board, a community manager or management company can't really take control of the situation and unilaterally decide association matters. And open seats can create significant problems for the association in the short and long term; it's important to be able to seat at least a quorum of directors, or no business can be conducted.

The good news is that you can use your managerial role to an appropriate degree to help fill board vacancies.

The Origins of the Problem

A shortage of volunteers who want to run for open board seats isn't necessarily a common problem for all associations, but when it happens it can be a challenge, says Tampa, Fla., community association attorney Ellen Hirsch de Haan. To understand how to try to fix the problem, it's important for managers to understand why board vacancies occur. There are certain circumstances that could trigger hesitation to serve on the board, so you should watch out for warning signs.

"Hesitation can occur when there are confrontational individuals in the community or when there is dissention among board members," says Hirsch de Haan. She notes that there are also situations in which there may be a scarcity of qualified candidates who are able to handle the job. "This is a particular issue in retirement communities, where there may be a number of widows who have little experience in or desire for running a business," she says.

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Vacant Board Seats

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Simplify Operations to Assuage Commitment Fears

So what are the steps you should take when it becomes apparent that no one wants to run for an open seat? First, identify and approach likely candidates, Hirsch de Haan suggests. "People are hesitant to serve if they think it will take up too much time, but board meetings are only necessary if there is business to conduct—it's not necessary or recommended that there be monthly board meetings, just for the sake of having a meeting," she points out. So work with the board to see how it can cut back on extraneous meetings or other obligations that aren't truly necessary but that take up time. If you can streamline what's necessary for a potential board member to participate in, you can emphasize to her that serving on the board won't be an overwhelming commitment.

And to make things easier for yourself or staff who are helping you with the search, you shouldn't worry about addressing the exact duties of a vacant seat when approaching likely candidates, such as trying to get specific members to fill specific roles. The way the board responds to this problem doesn't vary depending upon the exact seat that is hard to fill, such as the treasurer versus a regular board member. "Some governing documents allow the treasurer to be a non-board member anyway," Hirsch de Haan says. "If the association has professional management, there isn't a problem because the manager handles the functions of the treasurer anyway," she points out. So don't waste time and efforts trying to identify, say, an accountant or business person by career, to fill a seat like the treasurer's.

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Vacant Board Seats

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Use Honest Efforts to Get Volunteers

No matter how much you want to help fill vacant seats, don't stoop to unethical methods. You absolutely can't force an owner to serve on the board. And it's a bad idea to offer incentives to owners to persuade them to serve. "Most state laws provide that a board member can be paid only if that's specifically authorized in the bylaws and, realistically, paying board members would attract people to the board for all kinds of reasons, not all of them for the good of the community," says Hirsch de Haan.

Scout Board Volunteers from Committees

Focus on your specific role as manager in remedying the situation: See if you can identify a likely candidate for the board members to consider based on your exposure to the owners in the community. For example, an owner who is enthusiastically involved in community life or has lived in the community for a long time may be a better choice than an owner who seems disinterested in life in the community or who lives there for only a portion of the year.

"Ultimately, the task belongs to the board members, and not the manager," says Hirsch de Haan. But you can prepare the association—and yourself and your staff—to deal with this type of situation in the future by using committees to be the training ground for potential future board members. "Some people are nervous about public service, but feel okay about working on a committee; once they have done that, they may be ready to serve on the board," she says. "And limiting the number of board meetings will help committee participants to make the jump to the board, particularly in communities in which the members are actively working or have young families and are pressed for time, she notes. ♦

Insider Source

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DEALING WITH MEMBERS

Help Members Avoid Improving Prohibited Areas

Members sometimes build improvements on common areas or limited common areas without first getting the association's consent, because they mistakenly believe the area belongs to them. This can lead to an unpleasant dispute between a member and the association, especially when the association tells the member to remove the improvement.

One way to head off this type of problem is by sending all members a letter explaining what property belongs to the association and telling members that building improvements on such property without consent is a violation of the association's governing documents.

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Dealing with Members

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Your letter, like our *Model Letter: Inform Members About Improvements on Association-Owned Areas,* should warn members not to build improvements on common areas or limited common areas, without the association's prior written consent. The letter should explain "common areas" and "limited common areas" and give examples of both. (Tailor your letter so that it reflects the specific terms your association uses, like "common elements" or "limited common elements.") Explain the problems that can arise when members build improvements on such areas, and emphasize that the association will take necessary steps to enforce its governing documents should any members violate them in this way. Finally, invite members to contact the association for more information. ♦

MODEL LETTER

Inform Members About Improvements on Association-Owned Areas

Dear Members:

Because of some misunderstandings that have recently occurred, we would like to remind all members that it is a violation of Shady Acres Community Association's governing documents to build improvements on common areas or limited common areas without the association's prior written approval. We are taking this opportunity to urge all of you to please keep this in mind because we do not want members to find themselves in an unpleasant, potentially expensive situation.

"Common areas" are areas that all members can use and that belong to the association. "Limited common areas" are areas that can be used only by members whose units are attached to the limited common areas, but that belong to the association—not to any member or members.

Examples of our common areas include [*insert examples appropriate to your community*] and examples of our limited common areas include [*insert examples appropriate to your community*]. But this list is not exhaustive. For a complete list, refer to Shady Acres' [*insert appropriate governing document*].

Section [*insert #*] of our [*insert appropriate governing document*] prohibits members from building improvements on common areas and limited common areas without the association's prior written consent.

There are important reasons for this. The association is responsible for maintaining the common areas and limited common areas. Improvements to these areas may hinder the association from carrying out its maintenance responsibilities. For example, a garden planted in a common area may prevent the association from gaining access to an underground pipe when it needs maintenance. In such a case, the association would need to remove the garden to fulfill its responsibility, and would not accept responsibility for any damage done to it. Also, the association can be held liable for incidents that occur on common areas or limited common areas.

Because of these obligations, the association will do whatever is necessary to enforce its governing documents, which includes imposing fines, and/or restoring the area to its original condition and charging you for the expense.

We understand that the intention of members who want to build improvements to common areas and limited common areas is to improve the community, and not to cause harm. We hope that this letter has helped to explain why it's not a good idea, and why it's important for members who want to build such improvements to first request the association's permission to do so. If you would like to discuss this at greater length, please feel free to call me at [*insert tel. #*]. Thank you for your time and consideration.

Yours truly,
Jane Manager

IN THE NEWS

NY Congressman's FEMA Efforts Help Post-Disaster HOAs

Community Associations Institute (CAI) recently presented the 2015 Hero of Associations award to Rep. Steve Israel (D-NY) for his tireless efforts in helping constituents living in condominiums, cooperatives, and community associations become eligible for federal disaster relief. Israel began working on disaster relief fairness to help constituents affected by Superstorm Sandy in 2012.

Since then, he has continued his efforts to ensure equitable treatment of community associations by the Federal Emergency Management Agency (FEMA). Israel's efforts have included introducing legislation and offering amendments that would allow community associations to qualify for federal disaster assistance and relief services.

CAI has pointed out that rapid debris removal and cleanup after a disaster is a critical public safety task because it ensures that police, fire, EMS, and other emergency services can reach all citizens. Israel introduced H.R. 3863, the Disaster Assistance Equity Act of 2015, in October. Currently, FEMA classifies community associations as businesses, making these types of communities ineligible for federal recovery assistance when disaster strikes. Israel's bill amends the Stafford Act and requires FEMA to provide assistance to community associations when they are affected by a major disaster.

Rep. Israel has said that "a storm does not discriminate where it hits, and FEMA should not be discriminating against what type of homeowners it helps." He adds that "it is disgraceful that co-ops, condos, and common-interest communities still do not qualify for critical storm recovery grants." He has vowed to continue fighting for passage of legislation to allow these communities to apply for federal grants from FEMA so their homeowners are eligible to receive the vital assistance they deserve.

"Rep. Israel has consistently fought to help neighborhoods, families, and homeowners recover from devastation," said CAI Chief Executive Officer Thomas M. Skiba, CAE. "Association homeowners fund federal disaster assistance through taxes at the same rate as every other American. It stands to reason that community association homeowners be treated fairly by FEMA and have the right to receive disaster assistance."

Israel is actively recruiting co-sponsors for the bill in the House of Representatives and the Senate. CAI encourages residents of community associations to express the importance of this legislation to their elected representatives. CAI and Israel are urging legislators to co-sponsor the bill. ♦

RECENT COURT RULINGS

➤ Trial Needed to Determine Responsibility for Condominium Easement

FACTS: A unit owner slipped and fell on a driveway leading to his condominium complex. He sued the association, seeking damages for injuries he suffered. The driveway, also known as the "east access road," is located on property owned by a third party. The association has an easement for ingress and egress—that is, the right to use the driveway to come and go—in common with the third party. The third party asked a New York court for a judgment in its favor without a trial. It argued that it was a "servient" owner of the driveway, and as such it owed no duty to maintain the easement in a safe condition. It asserted that the association was responsible for the safety of the driveway. But there was evidence that the third party made use of the easement for its own purposes; this raised the question of whether it retained a duty as a landowner to maintain the easement in a reasonably safe condition, the court determined. It denied the third party's request to dismiss the complaint, and granted the association's request for a judgment in its favor. The third party appealed.

DECISION: A New York appeals court reversed the lower court's decision.

REASONING: The appeals court decided that the association had failed to meet its burden of establishing that the use of the easement by the third party relieved the association of the duty it would otherwise owe to maintain the east access road in a reasonably safe condition. And the appeals court said that the third party had met its burden of establishing that it did not create the dangerous condition or have "actual notice" of it, and the association hadn't produced any evidence suggesting otherwise. However, the lower court had properly determined that there was an issue concerning the third party's lack of "constructive notice" of the dangerous condition. Because it was unclear whether the ice existed for a sufficient period of time to permit the discovery and corrective action by the third party, a trial was necessary.

- Case v. Hazelton Ct. Homeowners Assn., Inc., October 2015

➤ Board of Directors Not Liable for Maintenance Decisions

FACTS: The association and its management company were responsible under the association's governing documents for maintaining the common areas of a condominium building. But the management company failed to waterproof areas of the building, leading to water intrusion and deterioration. The board of directors spent reserve funds for purposes other than the repair, restoration, replacement, or maintenance of the common areas.

A unit owner notified the association that damage to her unit had been done due to the improper maintenance or repair of the common areas. She requested

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Recent Court Rulings

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repairs to her unit and the common areas. The association, through its board of directors, refused to repair the damage and disclaimed responsibility. The owner sued the association and its board of directors for breach of fiduciary duty. The trial court dismissed the owner's breach of fiduciary duty claim against the directors, but allowed her to proceed with her claims against the association. The owner appealed.

DECISION: A California appeals court upheld the trial court's decision.

REASONING: The appeals court noted that a homeowners' association is responsible for the management and maintenance of common areas, through its board of directors. California follows "a rule of judicial deference to community association board decisionmaking that applies…when owners in common interest developments seek to litigate ordinary maintenance decisions entrusted to the discretion of their associations' boards of directors," said the appeals court. Generally, the business judgment rule shields individual directors of nonprofit mutual benefit corporations, such as homeowners associations, from liability, the appeals court pointed out.

"A director must perform duties in good faith and in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances," said the appeals court. And a director is entitled to rely upon information or reports from those he believes to be reliable and competent within her profession, here, the management company.

While a condominium association may be liable for its negligence, a greater degree of fault, such as fraud, is necessary to hold unpaid individual condominium board members liable for their actions on behalf of condominium associations, the appeals court concluded. It noted that directors' liability must stem from their own illegal conduct, not from their "status as directors or officers of the enterprise." In this case, the owner hadn't made a claim that the directors, as individuals, breached a common law duty "to refrain from conduct that imposes an unreasonable risk of injury on third parties."

The appeals court pointed out that the owner sought to litigate ordinary maintenance decisions entrusted to the discretion of the association's directors, but they were shielded from liability because the presumption that their decisions were based on sound business judgment was not rebutted by any facts showing fraud or bad faith. ♦

- Brenner v. Peet-Thompson, December 2015

Q&A

Recovering Attorneys' Fees for Case Against Law Firm

Q The homeowners association I manage is in a dispute with our prior law firm regarding the payment of legal fees. We haven't been able to come to a settlement and are currently scheduled to go to trial later this year. If we win, can we recover attorneys' fees and costs for such a dispute?

A Possibly. In this country, there is no inherent right for the winning party in a lawsuit to recover their attorneys' fees from the loser. Rather, the right to recover attorneys' fees must arise either from the terms of a contract or be granted by statute. For example, under certain Florida state laws, a homeowners association that's the prevailing party in a dispute with an owner can recover its reasonable attorneys' fees and costs. Further, most governing documents for community associations also provide that the prevailing party in a dispute between the association and an owner is entitled to recover its attorneys' fees and costs. However, the statutes do not generally grant an association the right to recover attorneys' fees and costs in disputes that do not involve an owner.

"In your association's dispute with its former law firm, the written contract between the parties will control whether there is a right for the winning party to recover its attorneys' fees," says Fort Myers and Naples, Fla., attorney Joseph E. Adams. He specifies that, in the absence of such language in the contract for services, "the winning party would not have the right to recover its attorneys' fees, and each party would bear its own legal fees."

There is also a procedure when a case is in litigation where one party can make a written offer to the other for a settlement, Adams points out. In that scenario, if the other party does not accept the settlement and does no better at trial, with some leeway for percentages, the party who offered to settle the case can recover attorneys' fees. ♦

Insider Source

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