Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

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FEATURE

Here's what to look for when recommending members to serve on the board of directors.

IN THIS ISSUE

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Gather Best Board Members for Association's Operation

There's always turnover for community association boards. A board member might move, retire, want to travel, or become too busy for some reason to fulfill her responsibilities. When a board member gives up her position, the association has the sometimes difficult task of replacing the outgoing member. There are certain qualities that some people have that make them more suitable for the role than others. Experience, of course, helps too. After all, the more a new board member knows, the more she'll be able to contribute to the association in a meaningful way.

You may be asked to help the board determine who the best replacement for an outgoing board member is. If so, consider whether she has some or all of the following important qualities that make for a successful community association board of directors, or can change the makeup of the board in a meaningful way.

New Member Adds Diversity

Balance is the key to having an efficient board of directors. A board consisting of men and women of varying ages and backgrounds helps keep things interesting and ensures that all members' viewpoints are considered. Older members have experience, and younger members may have insight into fresh new ideas or technology that can help the community.

Diverse professional backgrounds help add hands-on knowledge from many different areas of expertise to the group. For example, having an accountant on the board could be useful when talking about financial issues, while someone with a contractor's background would be knowledgeable about construction projects within the community.

A diverse board of directors helps bring different perspectives to the table and helps ensure that the community is fully represented by all members of the association. So when you're determining which candidate to add to the board, consider how much his background will add some new and useful skill or outlook.

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Board Members

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New Member Has Good Communication Skills

Without effective communication among board directors and between the board and the manager, directors simply can't accomplish what they need to do for their community. And this lack of communication can leave you and your staff frustrated and feeling as if you're not accomplishing anything.

A new board member must be able to utilize all of the communication options available to both the board and the community's homeowners. When a decision is needed from the board, it's crucial that board members can come together and make that decision quickly. A member who has trouble using email, for example, won't be able to communicate about an issue, which can hold up a decision. So make sure that a new board member is qualified in this way. And consider offering a refresher course to help board members who have fallen behind on keeping up with the latest technology.

Conveying what the board wants accomplished to the management company is just as important a skill. If your association works best with an assigned point of contact on the board to communicate with you and your management staff, make sure that this person can communicate effectively with you.

New Member Commits to Active Involvement

This stands alone as the number-one factor in the success of an association board. Like most things in life, you get out of it what you put into it. In order for a community to thrive, it must have an active participation among the leaders.

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Board Members

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So a prospective new board member should be aware that she'll be expected to do these things:

- Attend all possible community-related meetings (stress that if her schedule doesn't allow it, she shouldn't volunteer);
- Give her vote when a decision is needed—after all, making basic community decisions is a main role of being a board member;
- Attend community events that she helps plan—this sends the right community message to other homeowners;
- Obey the deed restrictions—don't be a hypocrite; all rules apply to leaders as well; and
- Maintain financial responsibility.

There's no perfect recipe for a good association board of directors. A well-run community starts with a committed group of community volunteers leading the charge and making wise decisions for the community as a whole. Maintaining core values and fulfilling set responsibilities will lead to a well-run association. But there's also a fine line between being active and involved, and being obsessed with the position. Ask yourself whether a prospective board member seems like she'll treat the position as a volunteer with responsibility, rather than as a career.

New Member Has Common Sense

It's important for a board of directors to have a bit of "street smarts" or common sense when making community decisions. Association documents are written when the community is first established, so if the community has been around for 50 years, over time, things may have changed. If your community has rules or policies that are aged and no longer relevant, it's important for a board to know to reevaluate them and make the appropriate changes.

Having common sense usually means looking at the big picture. For example, let's say you have an insurance claim because a storm took down a portion of your community fence. Your community has a $1,000 deductible. If the damage is $1,850, as a group it would be a wise decision to pay the repairs in cash instead of making the small claim. Why? Because ultimately, the following year the premiums will most likely go up and will quickly eat into the $850 of cash savings that the community experienced over the short term. Is a board member able to stop, stand back, and think about a situation like this in terms of the association's long-term goals?

New Member Is Volunteering for the Right Reasons

Being a director means being a volunteer who represents the entire association in which she lives. There's no room on a community's board of directors for anyone who has an axe to grind. Make sure that a prospective board member seems unbiased. She shouldn't even run for your association board if her only goal is to get her neighbor in trouble for all the years that he's been annoying. Getting elected to the board also doesn't give the new member permission to hire friends as contractors or recommend community improvements that affect only her area of the neighborhood. All decisions need to be made in the interest of the entire community. ♦

RECENT COURT RULINGS

➤ Association's Enforcement Efforts Weren't 'Outrageous'

FACTS: A homeowner in a planned community violated several restrictive covenants by allowing his roof to fall into disrepair and keeping a tree stump and car on his lawn, among other things. The association began sending him warning letters. When the homeowner refused to rectify the situation, the association called him multiple times and then began legal proceedings. Throughout that process, the homeowner complained to the association that he was being harassed by the letters and phone calls.

Eventually, the association sued the homeowner, asking a trial court for a judgment in its favor without a trial. The homeowner claimed that the association's actions amounted to "intentional infliction of emotional distress (IIED)." The trial court ruled in the homeowner's favor. The association appealed.

DECISION: A Texas appeals court reversed.

REASONING: The appeals court noted that to prevail on a claim for intentional infliction of emotional distress, the homeowner must prove that: (1) the association acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the actions of the association caused the homeowner emotional distress; and (4) the resulting emotional distress was severe.

Moreover, the emotional distress must be the "intended or primary consequence of the association's conduct." In other words, the association specifically tried to upset the homeowner.

The appeals court also pointed out that to be extreme and outrageous, conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

Meritorious claims for IIED are "relatively rare" because "most human conduct, even that which causes injury to others, cannot be fairly characterized as extreme and outrageous," the appeals court added. The trial court had determined that the letters and phone calls, which allegedly caused the homeowner to suffer from depression, were sufficient to cause emotional distress. But the appeals court didn't side with the trial court.

It said that, in fact, sending letters and making phone calls in order to enforce restrictions in documents that the homeowner had signed when buying his property was reasonable behavior. The owner knew that the association had the right to enforce the restrictions through those methods. So, it shouldn't have caused distress that is so severe that no reasonable person could be expected to endure it.

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Recent Court Rulings

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Additionally, the appeals court noted that the homeowner had a different claim for "unreasonable collection efforts" available to him as a remedy, and so an IIED claim wasn't proper in any event; he couldn't recover for IIED as a matter of law when the behavior he complained about would have fallen under a different claim.

Accordingly, the appeals court held that the evidence was legally insufficient to support the trial court's judgment and it reversed the decision, ordering the homeowner to reimburse the association for the monetary award he had received.

- Landing Community Improvement Association v. Young, June 2018

➤ Management Company Wasn't 'Debt Collector' for Association

FACTS: A community association hired a management company to handle all aspects of maintaining the community, including notifying members of delinquencies and other assessment and dues issues.

A member was late with assessments. As a result, the management company followed the procedures in the governing documents for recouping the money. The member argued that the management's actions constituted "the practice of debt collection." He sued the association and management company. Both parties asked a trial court for a judgment in their favor without a trial. They asserted that sending letters regarding unpaid assessments was a part of the management of the community and not debt collection.

DECISION: A Maryland trial court ruled in favor of the association and management company.

REASONING: The management company argued that it isn't a "debt collector" and therefore isn't subject to the Fair Debt Collection Practices Act (FDCPA). It said that it's a property management company and that its alleged involvement in debt collection—that is, the collection of community assessments—is "incidental to its fiduciary duties as the association's property management company."

The homeowner asserted that when a property management company uses "deceptive collection letters under a different name to collect late dues," it becomes a "debt collector" under the FDCPA. He said that he was misled, not realizing that the letters were actually from the association until he reviewed them more closely. He also contends that the debt amounts stated in the letters were "shockingly inaccurate." He also said that some of his alleged debts were incurred in 2012, and the management company doesn't have "a fiduciary duty to collect alleged debts that were already in default." According to the homeowner, if the "volume" of an entity's debt collection activities is "high enough," it may be a debt collector even if debt collection is not the entity's principal business. Based on that argument, he claimed that he needed more

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Recent Court Rulings

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time to conduct discovery regarding the percentage of time that the management company devoted to collecting late assessments versus maintaining the community.

The trial court determined that the "false name" argument didn't apply to this case. The letters alerted the homeowner that the management company was acting "through its agent," the association. And they directed the homeowner to address questions to the association and instructed him to go to the association's website to make an online payment.

The "false name" exception has three distinct elements: (1) the creditor is collecting its own debts; (2) the creditor uses a name other than its own; and (3) the creditor's use of that name falsely indicates that a third person is collecting or attempting to collect the debts that the creditor is collecting.

The trial court concluded that the homeowner didn't make any showing that the management company was a creditor collecting its own debts, rather than collecting amounts ultimately owed to the association, as is clearly contemplated by the management agreement. Furthermore, the FDCPA is directed at the conduct of debt collectors, who may have "no future contact with the consumer and often are unconcerned with the consumer's opinion of them," rather than creditors, who are generally "restrained by the desire to protect their good will when collecting past due accounts," said the trial court. The management company fell into the latter category as it would continue being in contact with all homeowners in the association.

- Raburn v. Wiener, Weiss & Madison, June 2018

➤ Condo Renter Claims Request for Assistance Animal Was Met with Threats to Evict Her

FACTS: A resident rented a condo unit for three years from its owner, who was a member of the community's homeowners association. She lived there with her minor daughter under a month-to-month tenancy. Allegedly, the resident was under medical supervision for post-traumatic stress disorder (PTSD).

In early 2017, the resident claimed that her doctors suggested that she get an emotional support animal. Some months later, she said she discussed it with the condo owner and submitted a written accommodation request, along with a letter from her healthcare provider stating that she needed a service dog due to her PTSD. At that time, the resident said that the unit owner didn't raise any objections, telling her only to "pick up after" the dog.

Soon after, however, the resident received a letter from the unit owner, informing her that she couldn't have a dog in the unit because dogs weren't allowed at the community. Allegedly, the unit owner stated that she had spoken to the HOA manager, who she said was sure to "fight it." The resident believed that the unit owner was referring to the HOA's treasurer, who is also its registered agent.

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Recent Court Rulings

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A short time later, the resident claimed that the unit owner sent her a text in which she was threatened with eviction. In response, the resident said she gave the unit owner a second letter from her doctor stating her medical need for an emotional support dog. About a week later, the unit owner allegedly sent the resident a notice to vacate, indicating that her month-to-month tenancy was terminated as of the end of the month.

The resident hired a lawyer, who contacted the HOA manager to request information about the community's reasonable accommodation policy. Allegedly, the manager refused the request and referred the lawyer to the HOA's counsel, whom the lawyer contacted to request a reasonable accommodation.

According to the complaint, it was a day or so later—on the day before the resident's tenancy was to terminate—that the HOA's attorney notified the resident that her reasonable accommodation request for an emotional support dog was granted. Nevertheless, the resident sued the HOA, its manager, and the unit owner for discriminating against her because of her disability and unlawfully denying her reasonable accommodation request.

The community asked the court to dismiss the case, arguing that the resident couldn't sue because the community had already granted her accommodation request and she still lived there with the dog.

DECISION: The court allowed the resident to pursue most of her fair housing claims but dismissed any claim that she was treated differently than other residents because of her disability.

REASONING: The court refused to dismiss the resident's claim that the community discriminated against her because of her disability. The complaint alleged that the community attempted to evict her, served her with termination notices, and harassed her after she made a disability-related reasonable accommodation request to keep an emotional support animal.

The court said she could pursue the claim even though she wasn't actually evicted—and was allowed to live there with her assistance animal—when the community granted her accommodation request just before her tenancy was to end. Fair housing law protects renters not only from eviction, but also from discriminatory actions that would lead to eviction but for an intervening cause.

The resident could also pursue her failure-to-accommodate claim. Even though the community ultimately granted her request, the resident alleged that the nearly two-month delay between her initial request to her landlord and the attorney's letter granting her request was unreasonable, and in essence amounted to the same thing as an outright denial. ♦

- Carlson v. Sunshine Villas HOA Inc., May 2018

IN THE NEWS

➤ Members Sue New York Association for Religious Discrimination

A New York community association is facing a discrimination lawsuit brought in federal court by Jewish members of the community who say that the association is hostile to their religious practices. According to the members, the association has adopted rules that are "expressly designed to harass Hasidic Jews."

The community is home to 15 Hasidic families who say that members of the association board have amended bylaws that make life in the community difficult for them. Last September, the association amended bylaws to designate Sunday as a "home and family day of tranquility" and to prohibit commercial transactions. Hasidic Jews observe the Sabbath on Saturdays and customarily conduct commercial activities on Sundays. The new rules, the lawsuit contends, are meant to prevent real estate brokers from showing properties to Hasidic clients.

The board allegedly adopted bylaws that disallow the use of eruvs, markers that are significant to practicing their religion. One member was fined more than $10,000 for installing them and was required to remove them. Jewish holiday decorations have also been removed, while Christian families, the lawsuit states, are allowed to put up outdoor Christmas displays and adornments on their properties.

Jewish members of the community have also been fined for renting their homes to other Jewish families, while residents who are not Hasidic and who rented homes to people who are not Hasidic were not fined, the complaint claims. The lawsuit cites violations of the federal Fair Housing Act and other federal and state laws. The association hasn't commented on the lawsuit as of now.

➤ New Association Board Demands Removal of Playground Equipment

A family who has installed a playground in the backyard of their home in a planned community is embroiled in a fight with the association over the structure, which was installed as a gift for their daughter who had a kidney transplant and will be returning home soon. The family moved to the community to be closer to medical care.

The family owns two lots in the neighborhood. Their home is on one lot and a playground with trees surrounding the property is on the other. The former homeowners' association president approved of the playground and the trees, which has fueled the family's assertion that it's not breaking codes, because those items were permitted.

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In the News

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However, the new association board wants the family to take everything down "in order to obtain and maintain harmony in appearance." Neighbors have said they did not have any issues with the playground, with one family noting that they think the playground increases property values.

The new association president hasn't commented, but attorneys have recently become involved for both parties.

➤ Association Hatches Plan for Removing Pet Chickens from Community

A Michigan family has been told by their homeowners association that they can't raise chickens at their home in a planned community. In a letter to the family, the association demanded that the family comply with "applicable covenants" and remove the chickens they were keeping in their backyard as pets. But a lawyer for the family clarified that there was no regulation in the homeowners' association rules prohibiting them from keeping chickens. However, the association changed its bylaws shortly thereafter; its rules now prohibit chickens. The family's lawyer argued that because the family already had chickens, the new bylaws would not apply to them retroactively.

The association then asked the town to consider changing its rules to prohibit farm animals in residential areas of the town. A board member has said that the association suggested the town update its rules to reflect what some other localities do to restrict farm animals, not because they are targeting the family.

"The idea is to prohibit farm animals, including chickens, in high-density, residential developments. These specific residential zones have small acreages around the homes and it would be inappropriate to have farm animals in these developments," the board member said in a comment to local news media.

The family is concerned that a restrictive covenant attached to the property in the development might affect their case, as it says any animals other than household pets are allowed, although 'household pets' doesn't specify chickens.

Because the covenant is subject to interpretation, the association has said it will sue the family if they don't comply and the matter will be decided in court. For now, the family continues to keep the chickens in their backyard, where they say the pets don't cause a nuisance. Meanwhile, the town has scheduled a public hearing on the issue of restricting farm animals. ♦

RISK MANAGEMENT

Take Four Factors into Account When Deciding Whether to Use Electronic Recordkeeping

You know that organization is one of the keys to association management success, especially if you're in charge of a larger community or one with many members. If you did an annual spring cleaning this year, you might also have realized that you need to cut down on clutter in your office, which might include boxes of association records—which can get sizable if they include accounting records, membership lists, meeting minutes, and other important papers—that the association has accumulated over the years.

So what can you do to be more efficient and environmentally friendly? An electronic recordkeeping system has the potential to save a community association and its manager time, money, and storage space—so long as you take the proper precautions when implementing and maintaining it.

Here's what you need to know about electronic recordkeeping to help the association defend itself against legal action, and keep members who need to inspect association records happy.

Factor #1: State Laws Govern Tech Solution

Proper association recordkeeping is important not only because accurate records can settle disputes or head off legal trouble from members, but also because it's required by law in many states—such as states that require incorporation for community associations. It can be required for community associations that are nonprofit corporations in some states, too.

Like the rules that apply to associations that save paper records, the form of electronic record retention is also state specific. For example, in Arizona, most associations are nonprofit corporations that are subject to the Arizona Non-Profit Corporations Act, which influences how records may be stored electronically. There, associations that are nonprofit corporations must maintain records in written form or in another form capable of conversion into written form within a reasonable time. That is, if an association decides to keep electronic records, it must be able to produce those records in paper form if there's a request for inspection.

Factor #2: Creation of Records Counts

If you determine that your association is eligible for electronic recordkeeping, you might be nervous about switching entirely to a digital format. While it isn't a mistake to keep only electronic copies of records, you need to be careful about how the electronic records are created.

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Risk Management

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For example, you should take care that all of the record is copied and retained. And you should make decisions about whether an electronic copy of a document is sufficient. For instance, an original document with different colors might provide important information that may be lost with a black and white scan.

Factor #3: Possibility of Records Inspection

Keep in mind that you'll still have to follow the proper procedures when a community member wants to inspect association records, and consider whether electronic records could make this more difficult or even easier for you and your management team. For example, when allowing a member to see records, what format should they be provided in—an electronic copy or a paper copy sent directly to the member? Or, should the member be allowed to inspect the records only at a specific location?

In part, this will be determined by what has been requested by the member—that is, if the member wants to see the original of a record and he's entitled to see it, you'll have to have the member inspect the records in the association's or the manager's office, normally with someone present to ensure that the records are not modified, taken, or damaged. If the member would be satisfied with electronic copies and you can readily provide them, that may be acceptable.

Factor #4: Tailoring Is Necessary

There's no such thing as "one size fits all" when it comes to electronic association record retention. It depends on several factors including the size of the association, the association's policy, the manager's software, and the board's preference. Managers should retain the two previous years of relevant records in paper form and scan and save in electronic form the remaining records that they're required to keep, or want to keep even if they're not required to by law. Also, keep in mind that, if the association hasn't implemented a policy regarding this process and the cost isn't part of the contractual agreement with the management company, the manager may have to bill the association for the clerical hours spent to complete the new project of scanning and saving relevant records electronically. ♦