

Unity in the Community: It Starts with Effective Board Members

by Nancy T. Polomis, Esq., Hellmuth & Johnson, PLLC

For any newly-elected board member, the responsibilities and obligations of the job can be daunting. Taking those responsibilities and obligations seriously is important, not only because it's the "right thing to do," but also because doing so is in the best interest of the association, and it helps maintain an amicable relationship between the board of directors and the homeowners.

The board members have a great responsibility to the association's members to govern properly and appropriately. The board of directors' legal obligations apply to all boards, regardless of the community's size, or whether it's professionally managed or self-managed. Ignoring those obligations, or simply being unaware of them, can create discord and a lack of trust within a community.

● **Act in Association's Best Interest:**

The responsibility to act in the best interest of the association is paramount in fulfilling the role of board member. In a community association, where homeowners pay assessments – often incorrectly called "dues" – to an organization that is responsible for administering the community and safeguarding property values, the need to put the best interests of the community association in first position should be obvious. Homeowners depend on their community association, through its board of directors, to maintain, protect, preserve and enhance the common areas and exteriors of the property,

which, as a result, safeguards each homeowner's investment.

- Each director *must* put aside personal agendas, remembering the legal obligation to act in the best interest of the association *as a whole*.
- Board members must remember that they must always act as a unit – no individual has the authority to independently make decisions. Homeowners, however, do not always appreciate this fact. Often (particularly when an association is self-managed), homeowners will contact a board member to seek assistance on a particular issue. The director contacted should advise the homeowner to submit issues in writing for board consideration. Board members should avoid telling homeowners that they will "go to bat" for them or otherwise champion their cause. Doing so will only cause discord in the event the board acts in a manner contrary to the homeowner's position, and may call into question whether the board member is in fact acting in the best interest of the *entire* community association.
- **Act Prudently:** Upholding the duty to act in the best interest of the community association is not simply a good idea, it is the law. Most community associations are incorporated under the Minnesota Nonprofit Corporations Act, Minnesota Statutes Chapter 317A, which provides that, "a director shall discharge the duties of the position of director in good faith, in a manner the

director reasonably believes to be in the best interest of the corporation, and with the care an ordinarily prudent person in a like position would exercise under similar circumstances." Minn. Stat. § 317A.251.

- A board member exercises the required "good faith discharge of duties" by seeking the advice and opinions of its professional advisors – including accountants, attorneys, and management agents – as long as the director reasonably believes that the matter is within the advisor's professional or expert competence. Board members must, therefore, take reasonable steps to ensure that their advisors are well-versed in community associations.
- In making a determination as to whether a director acted prudently, many courts and attorneys look to the business judgment rule, which provides that if board members act in what they believe to be the best interests of the association – in an ordinarily prudent manner, after reasonable inquiry – then those directors are not liable for their decision, *even if their decision later proves to be a poor one*. The protection afforded by the business judgment rule highlights the importance



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of documenting the board's actions in conducting a reasonable inquiry.

- If unsure as to whether a proposed action is permitted or advisable, a board should ask for an opinion *before* it acts—not after. It is far easier to avoid a misstep than to correct one already taken.
- “Acting prudently” includes abiding by, and uniformly enforcing the community association’s governing documents. If the board of directors makes a business decision against enforcement of a particular provision in the governing documents (often because it is unpopular or will affect a significant number of homeowners), the board must appreciate the consequences. The board may unintentionally establish a precedent that makes future enforcement difficult, and may open itself to liability for failing to discharge its responsibilities to the community association. Re-

member, the fact that a restriction is unpopular does not absolve the board from its obligation to enforce that restriction.

Consequences of Misconduct

An association entrusts its board of directors with the responsibility to act in the best interests of the association. The members of the association rely upon the board to exercise its discretion and best judgment on behalf of the association—not to exploit their positions for personal gain or advantage. When directors fail to carry out those responsibilities, they may be found to have breached their fiduciary duty to the members of the association.

Clearly, no association can reasonably expect perfection of its board of directors. Directors are volunteers, donating their time, talent and wisdom to the association. Mistakes happen. While many directors assume the association’s insurance will cover any “misstep,” such an assumption

may prove dangerous, and under the right circumstances, financially and/or emotionally ruinous. While insurance and statutory shields offer some protection (see below), a wise board member seeks to avoid errors and breaches in the first place, rather than relying on the availability of insurance and other liability shields. Even if a claim of breach is an insured claim, the emotional cost and time involved in defending the claim are significant.

Board member protections

Community association directors are protected from liability under statutory law, which includes protections afforded under the Minnesota Nonprofit Corporations Act, as discussed above. In addition, *as long as a director does not receive compensation for service* (which includes not only direct payment, but also, for example, a reduction in annual assessment payments during a director’s term of service), the director is not civilly liable for an act or omission that was made in good faith, was within the scope of the person’s responsibilities as a director or officer of the community association, and did not constitute willful or reckless misconduct. (See Minnesota Statutes §317A.257.) While some governing documents include provisions for compensating directors for their service, accepting *any* compensation eliminates the liability shield provided under the statute. (Directors may be reimbursed for out-of-pocket expenses without jeopardizing their liability shield.)

Conclusion

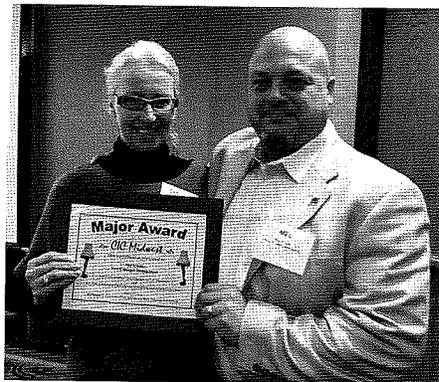
Serving as a member of an association’s board of directors can be overwhelming, especially at the beginning of one’s term. Such service, however, is also rewarding. Armed with reasonable expectations and an awareness of the responsibilities of the job, a director can make his or her term on the board a time of building knowledge and building relationships—all while building a stronger, more effective homeowners association.

Watch for part two of this article in the Fall issue of *CIC Midwest News*. ■

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Good News

- Congratulations to **Matt Lupkes** on his new position. He is now Assistant Property Manager at New Concepts Management. Previously, he was the Maintenance Coordinator at Greensboro Square Condominiums. Matt is also the chair of the CIC Midwest Resources Committee.
- **Mel Schultz**, New Concepts Management, was the recipient of the Major Award at the April CIC Midwest Lunch & Learn. Mel is a long-time active CIC Midwest Planning Committee member, participating in just about every facet of the group. He is the past chair of the CIC Midwest Education Subcommittee. He has been a presenter and moderator at Lunch & Learn meetings. He has answered countless CIC Midwest Email Hotline questions, and Managers Talk Questions in CIC Midwest News, sharing both his expertise and experiences. Mel’s passion for this industry is contagious, and he always inspires the groups he participates in. Plus, he’s just a whole lot of fun! Congratulations to our favorite man in sandals – Mel Schultz!



Mel Schultz receives the Major Award from Cindy Reiter at April's Lunch & Learn..

- CIC Midwest was invited to be a featured presenter at the Brooklyn Park Housing Fair in June. Thank you to these CIC Midwest members for their terrific presentations: CIC Midwest Planning Committee Chair, **Cindy Reiter**, Westport Properties; **Doug Strandness**, Dunbar Strandness; and **Michelle Stephans**, Reserve Advisors.

- **Correction:** In the spring issue, the article *Concrete Inspection* was incorrectly attributed to Peter Tjornhom, TruSeal America. It was written by **Michael Houghtaling**, TruSeal America. ■