

A FIELD GUIDE FOR BOARD MEMBERS

Fiduciary Duties of the Board

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This marks the fifth installment of a series for board members about commonly faced questions and issues. Many of these challenges require a combination of legal, political and practical solutions. Hopefully these articles will be useful for board members in determining what is in the best interest of the association.

Community associations are usually formed as corporations under the Georgia Nonprofit Corporation Act (“Act”), and the board is subject to the same duties as the directors for any other type of corporation. The homeowners are like the shareholders who have an interest in the corporation, while the board runs the association on their behalf. The board members are in an important position of trust, and therefore owe a fiduciary duty to the association. More specifically, Georgia law imposes a duty of good faith and a duty of care.

Duty of Good Faith. The Act requires that “A director shall discharge his or her duties ...In a manner the director believes in good faith to be in the best interests of the corporation.” In other words, a board member must act in the best interests of the association as a whole, and not in the board member’s own personal interests or the individual interests of a single homeowner. In a future article we will discuss the conflict of interest that can arise when a board member acts in their own interests.

Good faith calls for fair and equal treatment of all members. Adopting written procedures for the enforcement of covenants, including collection of assessments, can help guard against the board allowing an unfair exception. Without these written guidelines the Board may feel greater pressure to disregard a uniform approach.

Even when a good excuse is offered by a homeowner as to why they deserve special treatment, the board needs to be extremely cautious in granting any exceptions. For example, a homeowner who is delinquent in the payment of their assessments may present a compelling story for being allowed to enter into an extended payment plan. Nevertheless, times are hard for many, and if one owner is allowed to make small installment payments it is going to be hard to justify turning down someone else.

The scenario of catering to the interests of an individual homeowner over the best interests of the association often arises when the board members are trying to be ‘good neighbors’ rather than professionals following a consistent policy.

Duty of Care. The Georgia courts usually interpret the duty of care to mean that the board should use reasonable business judgment in its decisions and actions. The court will want to see that the board had a logical approach in coming to a decision. This is one of the reasons the board’s actions should be well documented in the minutes.

To help make well informed decisions, the board should seek advice when appropriate from property managers, attorneys, accountants, engineers or other knowledgeable persons. The board is not required to be experts in these fields and is not elected to guess at highly complex issues. The Act explicitly allows the board to rely on the information or opinions provided by such experts.

The board is under a fiduciary duty to actively enforce the governing documents (covenants, bylaws, guidelines, rules and regulations). Although the media image of association boards is one of over zealous police, the much more common problem is the board that doesn’t take any action. Although the board will have to make decisions that are not always easy or popular, the association must be run like a business in order to be successful in maintaining the common areas and the curb appeal of the subdivision.