

## Directors and Officers Responsibilities

### ASSOCIATIONS ARE CORPORATIONS

All common interest communities, including condominium associations, are corporations or have all of the rights, powers, and duties of a corporation. The Illinois Condominium Property Act imposes all of the powers, duties, and obligations of an Illinois corporation on all condominium associations. Corporations are operated by their directors and officers. In associations, generally the directors do even more than is done by other corporate directors. They perform all of the functions on behalf of the association, although they may delegate specific tasks to the officers or to others. Association members are like shareholders. They have an interest in the corporation as a result of their ownership. They do not run the association. They do not conduct the association affairs. They cannot control the association's activities.

In Illinois and generally, fiduciary duties imposed upon board members include two (2) components. The first component is undivided loyalty. The second component is reasonable business judgment in conducting the business affairs of the association.

Undivided loyalty means that each board member must view what is needed by the association and/or in the best interest of the association. They cannot look at their own needs, perceptions, or beliefs. They cannot look at the needs, perceptions, or beliefs of other owners. They are required to look at the needs and requirements of the association, as set forth in its documents, as set forth by statute, or as necessary in order for the association to continue to accomplish its purpose. Undivided loyalty may mean that a board member votes for an increase in assessment or for greater reserves even though the board member personally cannot afford to pay the increased assessment. Similarly, a board member must vote on matters where the board member believes it is necessary or appropriate, even though many, and sometimes all, owners do not wish to see the association proceed with that which is being voted on.

#### Fiduciary Duties

Reasonable business judgment in conducting the business and functions of the association is the second requirement of fiduciary duty of directors. Each director must understand the association business and must actively participate in that business. Each director must analyze each activity of the association, determine what is necessary or required for the association to operate, and then must vote with other directors to perform that function. Each director must exercise independent judgment and knowledge in performing each and every activity. That means they must understand the activity to be performed, must understand the choices and options available with respect to that activity, and then must use reasonable business judgment in determining which choice or selection is appropriate with respect to each activity. For example, securing three (3) bids from three (3) separate contractors on specific work is not mandated anywhere in any law. However, it is a reasonable approach by a director to determining what is a fair price to pay for work. Of course, the director must be certain that all three (3) bids are based upon the same work. The director must understand that the specifications for the work are the same or substantially the same. The director must carefully review each bid and submission to confirm they are the same and that the director is making an equal comparison. That is acting in a reasonable and business like fashion. Each director should understand that when they are representing an association, they cannot summarily choose a course of action or hire someone based upon their sense that they like someone. They cannot summarily sign a quotation, which obligates them to pay for something but may not



impose any obligations on a seller. They must have a review of the documents by their attorney. They must contract using contracts that protect the association adequately, and they must utilize all resources available including management, lawyers, accountants, engineers, and architects to provide input and assistance that is necessary in order to effectively make business judgments. They cannot delay excessively or ignore obligations. The fact that these matters may cost money does not change or eliminate the need to perform those functions. The operation of an association by its directors is not something that is accomplished using only the sweat equity of the directors, or by the seat of the pants of the directors, or by doing nothing. To do so exposes the directors to charges of breach of fiduciary duty, and to liability for failing to adequately act in the interest of the association.

### **CONDOMINIUM PROPERTY ACT SETS FORTH SPECIFIC DUTIES**

In addition to the general standards and requirements set forth above, the Condominium Property Act, the corporation act, and most declarations set forth specific duties to be performed by the association through the board of directors. The Condominium Property Act (CPA) sets these duties out specifically at Section 9, Section 18, and Section 18.4 of the Act, although some duties are set forth at other portions of the Act. Common interest communities have some specific duties set out in the Illinois Common Interest Community Association Act (CICA). In addition of course, all declarations set forth specific duties to be performed by the board. Section 18.4 (a) through (q) of the Condominium Property Act is a good listing of the duties and is restated in part as follows:

1. To provide for the operation, care, upkeep, maintenance replacement, and improvement of the common elements.
2. To prepare, adopt, and distribute the annual budget.
3. To levy and expend assessments.
4. To collect assessments from unit owners.
5. To provide for the employment and dismissal of personnel necessary or advisable for the maintenance and operation of the property.
6. To obtain adequate or appropriate kinds of insurance.
7. To own convey or otherwise deal with the units or lots.
8. To adopt rules and regulations regarding the use of the property.
9. To keep detailed accurate records of the receipts and expenditures affecting the use and operation of the property.
10. To have access to each unit from time to time as necessary for repair and maintenance of the common elements.
11. To pay taxes or other special assessments.
12. To impose charges for late payment and to levy fines for violations of the declaration, by-laws, rules and regulations of the association.

Failure to perform these functions adequately or timely in a reasonable and business like fashion would be a breach of duty by the board members as a matter of law. These are also good guidelines for Common interest communities.

**Directors** have a special duty to the association that they operate. In Illinois the directors have a fiduciary duty to comply with specific requirements in the declaration. If the board members fail to comply with the clear declaration requirements, they can be held in breach of their fiduciary duty. This principal was stated in a case dealing with an association's alleged failure to proceed in



accordance with the first purchase option requirements in the declaration. Illinois law requires that directors cannot do anything that would interfere with the ability of the association to accomplish its purpose. Doing anything which interferes with the association's ability to accomplish its purpose is a violation of the directors' obligations as a matter of law. This principal was set forth in a case where the developer board did not adequately reserve on behalf of the association.



### **DIRECTORS - - - OFFICERS ARE THEY THE SAME**

In all associations, there are officers in addition to directors. Generally, the officers are elected by the directors. The directors, by vote at board meetings, vote on substantially all activities of the association. The officers carry out their specifically authorized duties, and also see to the day to day functions of the association as directed by the board or as necessary to continue to operate the association. In a condominium association, they are elected only from among the directors so that each officer is also a director. Each association should have at least a president, secretary, and treasurer.

The **president** conducts board meetings and annual meetings. That does not mean that the president controls the meeting. The entire board, including the president, functions at a meeting. The president handles the day to day activities of the association dealing with management, vendors, other officers and directors. The president's function includes signing contracts as directed by the board and overseeing or supervising all business activities.

The **secretary's** duty is to maintain the business records of the association. The secretary may take minutes or may have them taken by another. However, the secretary keeps the minutes, other business records, and documents and maintains them for the association. This would include, in addition to minutes, all other corporate papers, all contracts, correspondence, communications, insurance, unit owner files. Basically, every association document is kept by the secretary. Of course, these documents are, more often than not, maintained by management. However, the secretary has responsibility for them and for directing management with respect to maintaining all business records of the association.

The **treasurer** maintains all of the financial records and documents of the association. Again, most often these documents are maintained by management. However, the treasurer does have authority over all financial records of the association. The treasurer may or may not have signatory on financial accounts of the association. The treasurer may or may not have signatory authority alone or in conjunction with one or more other officers or directors, including the president. The treasurer may have signatory authority along with other officers and/or management. Whether the treasurer has signatory authority or not, the treasurer is responsible for those accounts. Similarly, the treasurer is responsible for any other savings accounts, certificates, or any and all funds of the association. The treasurer's function is to keep track of and report on the financial condition of the association at each board meeting and at the annual meeting. The treasurer reports income, expenses, balance sheets, and all other financial information. The treasurer reports transfers in financial resources. The treasurer presents to the board options and alternatives with respect to investment of funds, and acts at the direction of the board with respect to investment of association

funds, but within the parameters that are allowed by investing on behalf of associations. The treasurer oversees all financial books, records, all accounts receivable, all accounts payable, the general ledger, all income, and all expenses. It supervises management, if any, or any other personnel in these activities and reports on these activities to the board.

In summary, the board of directors run the association on behalf of its members. The officers conduct certain activities and functions at the direction of and on behalf of the board and report to the board. Board members have fiduciary duties to the association which cannot be avoided. The board members must always act in a manor that is in the best interest of the association. The board members cannot do anything which would interfere with the ability of the association to perform its function. Each board member must perform their functions and duties as a board member with undivided loyalty and a reasonable, prudent, and business like fashion.

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A GENERAL PRACTICE LAW FIRM CONCENTRATING IN **CONDOMINIUM & HOMEOWNERS ASSOCIATION LAW** INCLUDING:

- Covenant and By-law Amendments
- Rules Preparation
- Covenant and Rules Enforcement
- Assessment Collection
- Covenants - explanation/application
- Contract Preparation and Enforcement
- Condominium Property Act - Explanation/Application
- Common Interest Community Association Act Explanation/Application
- Owner or Contractor Suits
- Labor and Union Issues in Associations
- Lien Preparation and Foreclosure
- Developer Turnover, Disputes and Suits
- Unit Owner Bankruptcy and Mortgage Foreclosure
- Real Estate Sales and Closings
- Real Estate Tax Reduction for all units/properties