

“Lawyer Up,” Common Ground Magazine

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Some boards only engage legal counsel when a situation has become dire. Others are overly cautious and all the attorney at the drop of a hat, but unusually high legal bills often lead to membership scrutiny.

More often than not, however, boards don't consult legal counsel enough. It's a dangerous way to do business since every board action is viewed through a prism of reasonableness. Failing to obtain legal advice on subjects outside a board's expertise might cast it as unreasonable in the eyes of a judge or mediator.

Before knowing when to call, every board should decide at its organizational meeting which members will be authorized to contact the attorney and other service providers to control costs, eliminate duplicate or conflicting requests, and set the right tone for operations.

Authorized contacts must understand that the only requests and queries made to the attorney are those at the direction of the board, not ones that concern personal issues or agendas. An experienced attorney usually knows when a request or question may be driven by one director and not supported by the entire board. If that occurs, the attorney should insist on polling the board to determine that the request was made with the group's direction.

Here are a few situations that should require a call or meeting with the association's attorney:

Entering into a contract. Vital provisions to protect the association must be included in a service contract, such as ensuring that the work is under warranty, that it will be finished on time, and that the board will not pay for the provider's gross negligence. In addition, harmful language needs to be removed; automatic renewal clauses, for example, can trap the association in an endless cycle of subpar service.

Since associations are still dealing with the COVID-19 pandemic, protections should be written into service contracts to ensure that on-site workers wear

protective gear and the provider is taking precautions to ensure that sick or exposed workers are not on the property.

Hiring or firing an employee. Associations must protect themselves from a bad hire and from possible discrimination claims or other accusations from fired employees. If the association is in an employment-at-will state, an employee can be terminated for any reason other than discrimination. However, there are myriad sensitive issues that must be addressed, including whether the personnel file properly documents employee infractions or other problems.

If the association has any employees or independent contractors, it should consult with legal counsel to ensure that the employment manual complies with all federal and local labor laws, that employees are properly classified as exempt or hourly, and that background checks are being conducted with proper consent.

Moreover, labor concerns during the pandemic have only heightened. Speak with association counsel prior to creating protocols related to testing, temperature checks, contact tracing, and notifications to the residents of sick employees.

Rejecting a proposed lease or purchase application. This is another area fraught with potential liability where the board must ensure it has proper authority and apply standards uniformly and routinely. A lost sale or lease will almost certainly be met with some form of consternation from the owner or real estate agent. In addition, if the board placed a hold on new move-ins as part of its COVID-19 protocols, be sure to speak with association counsel prior to impacting sales and leasing activity in the coming months.

Considering a remodeling project. Changes that may seem absolutely necessary and advisable might actually be a material alteration of the common elements, which requires a membership vote. Nothing riles up owners more than the thought of spending money on projects they consider to be unnecessary or frivolous. Responding to a complaint from an owner after a project is complete puts the board on the defense and, depending on the outcome, might be in breach of contract with service providers.

Amending documents. Prime examples of controversial amendments that can lead to homeowner pushback include implementing 55-and-over age limits and restrictions on leasing and sales, number of vehicles and pets, mandatory club membership, and guest occupancy. Consulting the attorney first will help the board know how much resistance to expect and what its stance should be. Almost all restrictions have been tried before; there usually are cases attorneys can reference to save your association money and headaches.

Purchasing or selling property on behalf of the association. All of these matters, including changing parking space designations or boat slip assignments, are sensitive to owners. Real property conveyances should be

handled by an attorney who can prepare the proper documentation and review title concerns.

Pursing an owner violation. Before threatening certain action in a demand letter, ensure the board has authority. If there are more tools at its disposal to resolve the violation, they should be mentioned in the demand. Sending a premature or incorrect demand letter puts the association in an inferior position.

Purchasing insurance coverage and submitting claims. Some boards think they know how to proceed if the community suffers damage from a disaster, but the cards are stacked against a board trying to maximize its recovery on an insurance claim. Most boards fall prey to common industry myths that insurance policies will be canceled or rates will rise if a claim is made, but coverage cannot be diminished or revoked for those reasons.

A board's primary function is to maintain, repair, replace, and insure the common areas. Not only should a board consult with its attorney immediately after suffering a loss but also prior to placing coverage so that the limits and true cost are understood.

Exercising emergency powers. Many boards around the country found themselves in uncharted waters when the COVID-19 pandemic hit. Some created restrictions and protocols in accordance with local or state emergency orders to safeguard residents. In state like Florida, volunteer boards have special statutory emergency powers that apply. Guidance from association counsel about the scope of what boards can do and properly adopting and disseminating protocols will remain essential.

Getting served with a recall petition. There are certain statutory and documentary procedures that must be strictly followed to properly effectuate recall but heeding eh advice above can help the board avoid this scenario.

If the association's proposed action doesn't fit within one of these situations, board members will still want to make informed and deliberate decisions. A board may not want to incur large legal bills, but they also want to avoid being in over their heads.

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