

When Differences turn into Dysfunction: Why Your Board of Directors Needs a Code of Conduct

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The role of board members in a community association is fairly straightforward: keep informed on the association's business operations; be familiar with and come prepared to discuss the agenda items for upcoming board meetings; encourage and participate in constructive, businesslike discussions of those agenda items; and use your judgement to represent the community and its members in the way you conduct yourself as a board member and in the way you decide the issues that come before the Board. Unfortunately, some community

association board members do not follow these guidelines and some create a level of dysfunction that is highly unproductive. The result is usually a community which devotes a disproportionate amount of time and resources to argument and personal attack rather than to constructive action for the good of the community. A certain amount of discourse and debate amongst board members is not only healthy, it can be productive when crafting policies and protocols resulting from differing viewpoints.

What happens, however, when differences turn into dysfunction?

Naturally, it is counterproductive when board members find themselves at odds with each other. In some communities these power struggles can manifest in any of the following ways:

- A Board Member demanding frequent and heightened access to the association's books and records including privileged information for his or her own nefarious purposes;
- A Board Member disclosing privileged information including, at times, even disclosing litigation strategy to adverse parties;
- A Board Member refusing to attend meetings if doing so prevents a quorum

from being achieved;

- A Board Member refusing to cast his or her vote;
- A Board Member refusing to turn over association books and records in his or her possession either while serving on the Board or after his or her term expires;
- A Board Member slandering fellow board members or the manager or unit owners who express contrary opinions;
- A Board Member filing a complaint with the DBPR; and
- A Board Member inciting and encouraging a recall of fellow directors.

Some of the foregoing director actions (such as a DBPR complaint and a recall action) may be justified if the board as a whole is dysfunctional and the dissenting voice on the board is attempting to steer the board in a better direction. However, some directors fail to understand that being part of the board means accepting that decisions are often made by consensus and not by unanimity; gracefully accepting that your fellow directors may not always (or ever) agree with you should be a job requirement for service on the board. Some directors who are at odds with their fellow board members use tactics which are not designed to resolve the issues but rather to inflame them. ***More importantly, a fractured board more often than not leads to a fractured community.***

For directors who believe they are entitled to greater access to the association documents, the answer is “No”, a director is not entitled to any greater access to the association records than an ordinary association member unless that director has been tasked by the Board with certain duties which require such access. For example, a director serving on the Screening Committee should have access to the rental and sales applications.

I am often asked by boards dealing with one or more directors who have a personal agenda which conflicts with the board’s goals if that director can be removed from the Board. Again, the answer is “No”, a director cannot be removed from the board by his or her fellow directors; only the members in a Florida community association can remove a duly elected or appointed director unless one of the limited statutory disqualifiers applies. However, a board can, by majority vote, remove a director from holding a particular office such a President, Vice President, Treasurer or Secretary. Doing so may not solve the problem but it can prevent a rogue director from convincing vendors and other third parties that he or she has authority that simply does not exist by virtue of no longer having a title.

Many association governing documents define the scope of board authority as a whole but do not address the mechanics of how a board comprised of different individuals can work together successfully for the betterment of the community. This is where a thoughtful Code of Conduct can fill in the gaps.

A Code of Conduct should address the following areas for your Board Members:

- Confirming how conflicts of interest can be identified and avoided and which conflicts must be disclosed;
- Confirming which directors have authority to sign contracts and negotiate and otherwise deal with vendors and professional service providers;
- Outlining respective officer and director roles;
- Creating a communication policy and email protocol both internal and external; and
- Creating basic expectations for board member service and professional decorum.

In the aftermath of Florida's 2017 Legislative Session which created heightened potential liability for directors in connection with certain basic association operations, according to insurance expert Lou Meskin, some insurance companies are already discussing whether or not a Board Member Code of Conduct should become mandatory or, at a minimum, preferred for the issuance of Directors and Officers coverage. While a Code of Conduct won't be the panacea some boards are seeking, it can lay the groundwork for more successful association operations.

If you'd like more information about creating a Code of Conduct for your Florida Board of Directors, please email me at dberger@beckerlawyers.com.