



## 5 things

A COMMUNITY ASSOCIATION BOARD OF DIRECTORS

# Should Never Do!

I have represented association boards for more than two decades and served on my own HOA board at one time so understanding the mechanics of a volunteer board comes easy at this point. Part of that understanding, however, is also an acknowledgement that boards often want to undertake certain actions on their own either as a means of cost-savings or because they simply don't understand the repercussions.

While the following is certainly not an all-inclusive list when it comes to ill-advised actions, these five do come with significant and sometimes costly results if a board goes it alone. So what are the five things your board should never do?

**1. Negotiate the Legal Terms of a Contract.** Yes, we all know that you and your fellow board members previously signed legal contracts in your business careers and sign them personally now and again but doing so on behalf of your membership without having those contracts properly reviewed and negotiated by your association attorney is just bad business, period.

Boards can and should discuss with potential vendors what they want the business terms of a contract to look like: how long the project should take, what materials will be used, what it will cost, etc. However, ensuring

that the contract language used actually garners you the results you negotiated is your association attorney's job and not yours.

**2. Fire an employee or vendor without seeking prior legal advice.** I am often asked at social gatherings by family and friends whether or not someone can be sued for this thing or that thing. My answer is always the same "Yes, if an attorney can be found who is willing to file suit (and let's be honest there is usually that attorney out there) then you can and likely will be sued."

Firing employees and terminating contracts with vendors are two areas fraught with the potential for retaliatory lawsuits. Tell people you no longer want them and many do not go quietly into the good night. There are legal issues involved with firing employees, particularly older employees so this is yet another area where expert guidance is absolutely crucial prior to taking action.

**3. Amend the governing documents.** Far too many boards get this one wrong. They either use the retired personal injury attorney from out of state to draft changes to their documents or they task their reluctant manager with doing so.

Granted, if you are looking at an amendment as simple as changing the date of the annual meeting, it can seem like overkill to have your attorney draft a one-sentence

*continued on Page 2*

*continued from Pg 1 Five Things*

change. However, some boards attempt to draft amendments with significant changes such as implementing age and occupancy restrictions which can subject the community to liability if they get it wrong. It is also important to remember that amendments should not be drafted in a vacuum—they must be crafted with an eye towards eliminating any conflict amongst similar provisions in each of the association's governing documents as well as written to ensure statutory compliance.

**4. Threaten Legal Action before doing your due diligence.** If you are going to threaten legal action, it would be prudent to determine beforehand if you actually have the legal authority to do what you wish to do. Threatening and losing often does more harm than not pursuing an action at all. Not only will you lose face, you will also likely wind up paying your opponent's attorney's fees and costs. Check with your attorney first to ensure that your contract, your governing documents or the law allows you to safely take the stance you wish to take.

**5. File an insurance claim for property damage without assistance.** The process of becoming whole after a covered loss seems simple enough, doesn't it? Your association paid a (likely hefty) insurance premium and when you are damaged, you would think filing a claim is the only action needed. You would, of course, be wrong and perhaps a tad naive. In order to level the playing field, boards must acknowledge that the playing field isn't level to begin with and must enlist the assistance of experienced professionals (namely, your association attorney) to file and shepherd their claim through an often artificially complicated process.

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*continued from Pg 4 Perseverance*

In 2013, the Association decided to aggressively push the bank's case. The Association understood that allowing the bank's case to linger not only limited the Association's ultimate recovery on unpaid assessments, but it created potential health and safety concerns, liability issues, depreciation in property values, and an overall decline in the aesthetics of the community. Something had to be done.

We successfully forced the bank to trial where the court scheduled the property for the first available sale date. We fought every attempt to reschedule the bank's sale. The bank was well aware of the condition of the property and intentionally tried to stall the sale while it waited to decide whether to abandon the property and foreclosure action. Ultimately, the bank decided to reduce its bid and the property sold to a third party purchaser **entitling the Association to all of the unpaid assessments** (except those outside the five year statute of limitations).

While money was an important factor, transferring title to a responsible unit owner was even more important. At Becker & Poliakoff our attorneys analyze each delinquency individually taking into consideration the Association's budget, desired outcome, and external factors such as pending bank foreclosures, bankruptcies, and probate actions. We understand that sometimes money isn't everything.

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# CREDIT

## Condos & HOA's Must Comply with The Fair Credit Reporting Act

Does your condominium or homeowners association screen prospective purchasers or tenants? While not every association has the authority to approve transfers, many associations do and typically part of the investigation includes a background check. Background checks obtained from a Consumer Reporting Agency ("CRA") are considered consumer reports. The use of a consumer report is regulated by federal law.

The Federal Trade Commission (FTC) describes a consumer report as a report that contains information about a person's credit characteristics, character, general reputation, and lifestyle. It may also include information about someone's rental history or any information gleaned from public records such as a criminal history search. The most recognized national companies are Equifax, Experian and TransUnion and their reports contain:

- Payment history information submitted by credit card companies, mortgage lenders, auto financiers and other creditors.
- Available credit.
- The extent of use of credit.
- Information from debt collectors.
- Public information, like bankruptcies, liens and judgments.

If the association bases its decision to reject a sale or lease transaction on the results of the consumer credit report, it must handle rejection of the transaction in compliance with the Fair Credit Reporting Act. Note, however, that rejection of a transaction often spurs a legal controversy and the association's actions are highly scrutinized. You will need to consult with counsel to determine what actions are appropriate for your association with respect to specific transactions.

According to the Federal Trade Commission, when an adverse action is taken that is based solely or partly on information in a consumer report, the law requires you to provide a notice of the adverse action to the consumer. The notice **must** include:

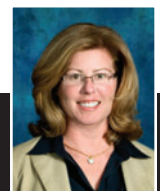
1. the name, address and telephone number of the Consumer Reporting Agency ("CRA") that supplied the consumer report, including a toll-free telephone number for the CRA that maintain files nationwide;
2. a statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give the specific reasons for it; and
3. a notice of the individual's right to dispute the accuracy or completeness of any information the CRA furnished, and the consumer's right to a free report from the CRA upon request within 60 days.

Disclosure of this information is important because some consumer reports contain errors. Failure to provide the required disclosure notices may cause the association to face legal consequences. The law allows individuals to sue for damages in federal court.

As indicated above, associations do not automatically have the right or authority to conduct background investigations, review, approve or reject sale or lease transactions. The governing documents of the community must contain some pretty specific language. In some cases the association only has a right of first refusal, rather than a right of approval. In other cases, the right to conduct these investigations is limited to specific circumstances. Even if the association has the authority to conduct background checks and issue denials, rejection of a transaction based upon a consumer credit report may trigger the obligation to buy the unit or to substitute a purchaser. This process is highly likely to expose the association to liability and therefore we recommend extreme caution, as well as consultation with counsel.



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# Perseverance Pays Off

Sometimes foreclosing on a unit is either too costly for an Association or the property is simply not habitable. In those situations, pushing a stalled bank foreclosure action may be the Association's best option.

Consider a recent case involving a Homeowner's Association in Broward County. One of its townhomes was ravaged following Hurricane Wilma. Rather than repairing the unit the owners simply walked away from the property in late 2008. The first mortgagee (bank) promptly filed suit in 2009, but the case stalled for several years. In the interim, the property continued to deteriorate.

The roof of the townhome had torn off during the hurricane and the bank, over the course of several years, had haphazardly attempted to cover it with a series of three plastic tarps. The tarps ultimately failed and, as a result, mold now covered the ceilings and walls. Vandals broke the front window to gain entry to the unit, which the bank replaced with a plywood board. A toilet sat on the rear patio. The Association was desperate to see the property turned over to a new owner. Foreclosing and renting was not an option for this Association.

*continued on Page 2*



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