

# WHAT IT MEANS TO BE A MEMBER OF THE BOARD: An Onboarding Guide

## Congratulations! You're a board member! Now what?

Being a board member of your condominium, cooperative, homeowner or community association (the "association") means taking on real responsibilities that go beyond planning events or picking new furniture for the common areas. It is a serious role and one which you should be proud to have! However, you must consider the responsibilities that come with it.

## The Covenants, Conditions And Restrictions

Being on the board means that you are a leader (and as an owner, a member yourself) of a community of property owners that are bound by a set of established rules memorialized in the association's governing documents. The governing documents include the covenants, conditions and restrictions (the CC&Rs). The CC&Rs operate as a legal contract binding owners to one another in their care and maintenance of the community. Most community associations' governing documents also include articles of incorporation, which typically establish the association as a non-profit corporation. Because of its status as a corporation, the association's board of directors has certain duties to the association and its owners due to its position of trust and authority. It is out of this relationship that the board members' fiduciary duties arise.

## Your Fiduciary Duties

The governing documents and applicable law will outline your fiduciary duties to the association and your fellow owners that make up your community. The fiduciary duty encompasses the duty of loyalty, duty of care, and duty to act within the scope of your authority as a board member.

The duty of loyalty requires association board members to act in good faith. This requires you to put the interests of the association above your own as an individual and as an owner. It also requires that you avoid conflicts of interest. This comes up, for example, when the community has repairs that need to be done and a family member of yours has experience in construction. You should not choose the family member to perform the repairs solely because they are family. You should do your due diligence and choose the best vendor for the job.

The duty of care requires a board member to act reasonably when making a decision on behalf of the community. This means that a board member should use reasonable business judgment and act in good faith with the intent to serve the best interests of the community. Making informed decisions may require conducting research before acting. It also means

acting consistently, and applying the rules as provided in the CC&Rs objectively despite your own personal opinion. For example, one homeowner should not be permitted to install a pool in their backyard while another homeowner's request is denied if the bylaws permit homeowners to do so. Or, if a no pet rule is not enforced for one homeowner but then some time later is enforced against another, you run the risk of a homeowner saying the board waived its rights to enforce the no pet rule or acted in a discriminatory manner. Rules should not be selectively enforced.

The duty to act within the scope of authority means that as a board member your decisions should be within your authority as outlined in the association's governing documents. An example of acting outside the scope of your authority would be to set a new rule about how high the hedges of a homeowner's home can be when the bylaws do not permit the board to set new rules.

## How Do Your Fiduciary Duties Relate To Your Role As A Board Member?

Your duties are the foundation of your responsibilities and should guide your actions as a board member. If you think of your community as a business that you, as a board member, are responsible for making sure runs as smoothly as possible, and focus on the association being a wonderful place to live, you and the community will benefit!

*Example: Homeowners filed a lawsuit against the board which alleged that the board breached its fiduciary duty of care to maintain a safe and pleasant community by failing to hold an election within 90 days of the resignation of one of its board members (as required by the association's CC&Rs). As a result, only ten people remained on the board, creating the possibility that a quorum could not be reached which would create a voting deadlock. As such, the board delayed voting on important issues affecting the community. One such delayed decision was whether to renew the association's contract with the community's landscaper. As a result, the contract expired, and the grounds of the community were not maintained, causing homeowners to be concerned that their properties would decrease in value. Homeowners were also concerned that dangerous conditions could develop, such as branches falling from trees, if the community was not properly maintained.*

*In addition, it was discovered by the homeowners that the landscaper that the association had been using for years was hired because it was owned by one of the board member's sisters and that the board member was also an investor in his sister's landscaping business. The homeowners believed that the board breached its duty of loyalty by not addressing the conflict of interest and failing to look into other landscaping companies that charged a lesser amount for the same, if not better, services.*

**Result:** *The homeowners had trouble selling their homes, potentially unsafe conditions were created, and the community was in discord. In addition, the association incurred \$60,000 in defense costs. Litigation ensued and consumed the community for months until the board took action by holding an election and by choosing another landscaper by a board vote after vetting a number of potential options.*

### Know Your Governing Documents

You should familiarize yourself with the governing documents so that you know the rules of the association. It is important for you to follow those rules, and not act outside of the authority given to you. You must also keep in mind that any rules created by the association in its governing documents must comply with federal, state, and local laws. Consultation with an attorney can help you to understand the relevant law. In addition, an attorney should periodically review and update the governing documents to ensure that they comply with the ever changing state and local laws.

### Understand And Follow Election Guidelines As Laid Out In The Governing Documents

State law may require that homeowner associations implement rules for their elections. Election guidelines should be provided in the association's governing documents (the CC&Rs), and/or its bylaws. It is important to consider your state laws when drafting election guidelines. Consider retaining an attorney to not only assist in drafting election guidelines but to also periodically review them to ensure compliance with state law that will likely change over time. This will help to ensure fairness in the election process. Remember to follow the election rules as outlined in the association's governing documents! Disregarding the rules may cause homeowners to question the election process and its outcome, leading homeowners to challenge election results by filing lawsuits.

Though election rules may vary state to state, there are general guidelines a board should follow. In reviewing your association's election rules, look to see that the bylaws provide a list of qualifications candidates must meet, such as requiring that the candidate be a member of the association or that they not be in violation of the governing documents or involved in litigation with the association. Your CC&Rs or bylaws should also provide election procedures such as how nominations are made.

Familiarize yourself with campaigning rules which may require that you consider what is defined as fair to all candidates under your state's law. Some states, such as California, have enacted statutes that mandate specific procedures the association must follow. For example, if you provide one candidate access to the association's media platform, you should provide it to all. This may also be true for access to common areas for campaigning purposes. If the bylaws or state laws are not followed, mistrust amongst homeowners can easily develop. Homeowners may question the validity of an election, and/or the reason for the association's selective enforcement, and may sue the association and/or the board members. This is why it is important to consult with an attorney to understand the applicable state law.

Voting procedures must also be addressed. Consider what qualifies one to be able to vote, the time period voting is open, use of a voter list, candidate registration, and rules for ballot distribution. Keep in mind that there may be specific state requirements for each of these procedural issues. State law may also require the use of election inspectors, another voting procedure which should be addressed in your bylaws.

### Understand Your Financial Responsibilities As A Board Member

Just like any other corporation, an association is a business which collects money but also has to spend money to run it. It is the responsibility of the board to oversee the running of the community. Associations may be aware of this obligation but may not consider the need to plan for future expenses, nor know how to do so. It is a good idea to obtain the help of an outside accountant to assist with the association's financial obligations.

One option to help a board determine the financial health of the association is to conduct a reserve study. Reserve studies are a great way to help a board figure out just how much money needs to be set aside (the reserve) for more than the day to day expenses. A reserve study is conducted by a licensed engineer or architect. This expert will survey the building structure(s) and systems, estimate their remaining useful life, and determine any major repairs necessary to extend the life of these systems. The expert will look at the common areas, assess the condition of its components, and evaluate what repairs need to be done and what may be needed in the future. In the financial analysis provided to the association, the expert will focus on the status of the community's reserves by assessing the balance and reserve status. The goal is for the expert to provide a recommendation regarding how much more each homeowner needs to contribute to the fund to increase the reserve amount to a level that matches what is needed to cover the cost of current and future repairs. In this way, a community not only can be sure that its day to day needs are met, but also that funds are available when larger repairs need to be made.

(For additional information regarding reserving and the use of reserve studies, [click here](#).)

The board's financial responsibilities include the collection of dues to fund the reserve. Paying dues is part of a homeowner's responsibility, and when they do not meet this obligation, the association can take action. It is recommended that the association have a plan as to how to collect dues and what to do when a homeowner fails to pay. Guidelines should be set forth in the association's governing documents, but the board should also be aware of relevant state law in addition to applicable federal law that pertain to the collection of a debt. When an owner is delinquent, they should be notified not only because it is an opportunity to have the homeowner rectify the situation but also because it may be required under applicable federal, state or local laws such as the Fair Debt Collection Practices Act (FDCPA). Some experts advise starting with a friendly phone call as a way to get a homeowner to pay the delinquent amount. Others recommend that board members do not call a homeowner, instead recommending that the board send a letter providing notice to the homeowner that dues are owed. It is important to determine what is required under applicable law and consultation with an attorney should help to clarify the association's legal obligations in this regard. The governing documents should lay out what the board should do when a homeowner is delinquent, when they can start charging a late fee, and how the late fee is calculated. The board may also consider setting up a payment plan with the homeowner if the governing documents permit. Another step to consider is whether or not the delinquent fees should be reported to a collection agency. If that is done, and if the delinquency is not paid, the association may obtain a judgment against the homeowner. The association can then also file a lien (a claim for money) against the property of the homeowner. By recording the lien, the association will have the right to recover the sum should the homeowner try to sell the property. Finally, an association has the right to enforce a lien by foreclosing on the property.

Foreclosure allows the association to ask that the property be sold to satisfy the debt owed by the homeowner of the unpaid dues. Typically, in a judicial foreclosure, the association files a lawsuit asking the court to direct the sale of the property. In some states, and depending on the specific contents of the applicable CC&Rs and other contracts, non-judicial foreclosures may also be available. In a non-judicial foreclosure, instead of filing a lawsuit, a trustee is appointed to handle the sale of the property in accordance with foreclosure procedures. As non-judicial foreclosures are not overseen by the court, the homeowner may question the validity of the association's actions. If that is the case, the homeowner may file a lawsuit against the association and raise defenses to the foreclosure. Thus, although a non-judicial foreclosure may appear on its face to be easier and quicker, in practice, the costs incurred and time spent in litigation may diminish or even eliminate its perceived advantages. In either case, it is necessary to be aware of your state's laws and to seek the advice of counsel. Consideration should always be given as to whether it makes financial sense to go through the foreclosure process.

(For additional information regarding foreclosures, [click here](#))

## Be Familiar With Insurance Obligations

Do you know what is considered a claim under the association's insurance policies? As a board member, you should familiarize yourself with the association's policies. Consider discussing with your broker the association's policies and what is covered under them. Your broker can help provide guidance as to how and when to notify your carrier of a claim or potential claim. In addition, receiving legal documents, such as a lawsuit, requires prompt action. Should you receive any such items, contact your broker as soon as possible who will notify your carrier if appropriate. Note that under some policies, something less than a lawsuit, such as a letter from an attorney or claimant, may constitute a claim. It is always best to contact your broker and provide documents to the carrier rather than risk the possibility of failing to comply with the policy's notice provisions.

## Communicate With Owners To Help Mitigate Problems

When communication between the board and the homeowners is poor, problems may arise. Homeowners may become upset if they feel the board is not communicating to them about issues and/or problems that arise within the community. Lack of communication and transparency can lead to lawsuits. One way to decrease the likelihood of discord is to keep the community engaged and informed regarding any decisions being made and communicating decisions once finalized. Holding an annual meeting is an opportunity for a board to communicate with homeowners and is one that is considered standard by industry leaders. In some states, the law requires that a board hold an annual meeting and if the board fails to do so, provides homeowners with legal recourse. Annual meetings provide an opportunity for the board and homeowners to have a conversation and to hear one another's concerns. Often, the annual meeting is when elections take place, the budget is shared and homeowners have a chance to express their concerns and ask questions. As such, annual meetings provide an important and often beneficial chance for communication between the board and homeowners that may prevent problems from arising within the community.

Another issue that can lead to lawsuits is when there are disagreements between the board and certain members of the community. It is likely that there will be members of a community that do not get along or that issues will arise regarding community guidelines or decisions made by the board. If possible, it is best to see if there are ways to resolve disputes other than through litigation, such as through discussions or, if a more formal process is needed, through mediation. It is important to consider the impact of litigation on the community as it can affect property value and the community's overall sense of well-being.

## Understand Anti-Discrimination Laws

It is not uncommon for an association to face a charge of discrimination filed against them for an alleged violation of The Fair Housing Act (FHA) or the state equivalent of this law. The claims that arise may result from the association enforcing a

restriction or rule that exists in the governing documents and therefore it may not be obvious that following the governing documents may actually be a form of discrimination.

The FHA was enacted to prevent those that provide housing from discriminating on the basis of race, color, religion, sex, sexual harassment, and national origin. It also prohibits not providing housing due to discrimination based on familial status or disability. The FHA is enforced by the U.S. Department of Housing and Urban Development (HUD). The FHA prohibits denying or limiting housing to individuals with disabilities or from refusing to provide reasonable accommodations to them. Though allegations of other types of discrimination based on race, color, national origin, religion, gender, sexual orientation and familial status also occur, a large number of claims are based on alleged disability discrimination. As these requests involve an understanding of intricate legal issues and the law, it is best to seek the advice of outside counsel before taking action.

*Example: A hearing and visually impaired homeowner requested a reasonable accommodation with respect to the association's "no pet" policy so that she could use her prescribed assistance animal as necessary on the premises. Although the association waived its "no pet" policy, it refused to modify parts of the policy that required the resident to keep the dog in a cage when in the common areas and to use a separate entrance*

*when entering and exiting the building while the dog was with her. HUD issued an order settling the claim of discrimination for \$30,000. In addition, the association was required to provide FHA training to certain employees and board members, and was required to adopt and implement a reasonable accommodation policy approved by HUD.*

## Conclusion

Being a board member is an honor and an important role within your community. You are a leader and with that, comes responsibility. While much of the responsibility is about making the community a place in which people are happy to live, it also is about the obligations you promise to take on. As a board member, you are part of a business and as such are tasked with making many business decisions. Whether it be making financial decisions, making sure the community is well maintained and kept safe, holding fair elections, or planning social events, all are equally important and are part of the job. We hope that this guide will assist you in your position as a board member and help you lead with knowledge. Good luck!



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### Additional Resources

<sup>1</sup> Brendan Farrington, *Florida Gov Signs Condo Safety Bill After Building Collapse*, Associated Press (May 26, 2022), <https://www.usnews.com/news/us/articles/2022-05-26/desantis-signs-bill-addressing-safety-after-condo-collapse>

<sup>2</sup> SB 4D – Building Safety Act, Florida Statute, Section 553.899 Section 3.

<sup>3</sup> SB 4D – Building Safety Act, Florida Statute 718.112 Section 6.(g)1, line 1050.

<sup>4</sup> See *Reserve Article* (insert link here).

<sup>5</sup> Dawn Bauman, *Florida Lawmakers Pass Condominium Safety Legislation* (May 27, 2022), <https://advocacy.caionline.org/florida-lawmakers-pass-condominium-safety-legislation/>

<sup>6</sup> [https://mgaleg.maryland.gov/2022RS/Chapters\\_noln/CH\\_664\\_hb0107e.pdf](https://mgaleg.maryland.gov/2022RS/Chapters_noln/CH_664_hb0107e.pdf)

<sup>7</sup> Raymond D. Burke, *Maryland General Assembly Passes Bill Requiring Reserve Studies* (April 22, 2022), <https://www.marylandcondolaw.com/maryland-general-assembly-passes-bill-requiring-reserve-studies/>.

<sup>8</sup> Phoebe E. Neseth, Esq., *Condominium Safety State Legislative Mid-Year Update*, Community Associations Institute (June 2, 2022).

<sup>9</sup> Id.

<sup>10</sup> Brendan Farrington, *Florida Gov Signs Condo Safety Bill After Building Collapse*, Associated Press (May 26, 2022), <https://www.usnews.com/news/us/articles/2022-05-26/desantis-signs-bill-addressing-safety-after-condo-collapse>

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