



Armstrong
Teasdale

AT Academy: Co-op and Condo Law Series *Rights and Responsibilities of Board Members*

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The Framework

- “The cooperative or condominium association is a quasi-government: a little democratic sub-society of necessity. The proprietary lessees or condominium owners consent to be governed in certain respects, by the decisions of a board. Like a municipal government, such governing boards are responsible for running the day-to-day affairs of the cooperative and, to that end, often have broad powers in areas that range from financial decision-making to promulgating regulations regarding pets and parking spaces...”

Bowers v. Riverview Tenants Corp.

The Framework (con't)

- A. BCL Section 717 (attached) says the member must act “in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances.”
- B. Fiduciary Obligations:
1. “due care”
 2. “reasonable care”
 3. “undivided loyalty to the corporation”
 4. Leterman v. Pink – A director is chargeable with knowledge of the general condition, progress and finance situation of a corporation. A director is presumed to know everything concerning corporate affairs that he/she might have learned by the exercise of reasonable care and diligence.
 5. Brecher v. Greg – Directors are bound by all those rules of conscientious fairness, morality and honesty in purpose, which the law imposes as guides for those who are under the fiduciary obligations and responsibility, and they are held, in official action, to the extreme measure of candor, unselfishness and good faith.

The Framework (con't)

- C.** A breach of duty has been found in the following:
- 1.** A custom or practice of nonattendance by directors at board meetings is not an excuse, and does not prevent a director from liability for failing to meet their duties of care and diligence.
 - 2.** Directors are expected to become familiar with the general business area in which the corporation operates and the business of the corporation itself. They can delegate others to execute the corporate policies of the Board, and they are not insurers of the conduct of those designated. However, they are liable for losses that result from the failure to exercise due care in appointing such people, and for failure to supervise their activities.
 - 3.** Acquiescence in bad or inept management by inaction when action was required (one case involved lack of competitive bids).
 - 4.** When the directors have acted in a wantonly negligent and reckless manner.

The Framework (con't)

D. Business Judgment Rule

Board decisions will not be second guessed by the courts, and will stand, when made in the proper exercise of the Board's business judgment.

Levandusky held that discretionary board actions are subject to such deference by the courts unless it can be shown that the board acted in bad faith, outside of its authority, or not in furtherance of the corporation's legitimate interests. The shareholder complaining must prove that the Board failed one of these tests. The decision does not have to be "reasonable" or even "correct," as long as it meets the three prong test.

1. If the Board acts recklessly or in wanton disregard to the facts, it may be held that they did not act in good faith.
2. Does not apply if there is a breach of contract by the Board or when the Board is required to be reasonable (ex. consent to an alteration).

Rights of the Board Members

- A. Right to Set and Communicate Corporate Policy**
- B. Right to Manage the Corporation/Condominium**
 - 1. Free of Shareholder/Unit Owner interference
 - 2. Non-delegable
- C. Right to Consult with Professionals**
- D. Indemnification/Insurance**

Responsibility of the Board

A. Review organizational documents

1. Co-op Proprietary Lease

- a) Topics to review: Alterations, subletting and transfers, use of unit, repairs, House Rules

2. By-laws of Co-op

3. Condo Declaration

4. Condo By-laws

- a) Topics to review: Alterations, leasing, transfers (right of first refusal), use, restrictions on Board's expenditures, repairs, insurance and House Rules

B. Review (or create) Code of Ethics/Confidentiality/Conflict Policy

C. Review of monthly management and financial reports

1. Board must review arrears and accounts payable

2. Board must review all paid bills

3. Buildings cash position and budget

4. Operating vs. Capital Reserves

Responsibility of the Board (con't)

D. Meetings

1. Regular meetings must be established at first meeting
2. Establish Board procedures
 - a) Agenda
 - b) Use of phones and emails

E. Set and Communicate Corporate Policy

F. Exercise Good Faith Business Judgment

G. Avoid Conflicts and Even the Appearance of Impropriety

H. Maintain the Physical Plant and the Value of the Units

Responsibility of the Board (con't)

I. Handle the Finances

1. Establish Responsibilities

- a) Who will work with the CPA?
- b) Who will approve invoices to be paid?
- c) Who will be on the bank account signature cards?

2. Investment of reserves

- a) Invest in conservative instrument with no possibility of loss

Transfers/ Sales

- A.** Establish procedures for reviewing applications
 - 1.** Handling copies
 - 2.** Disposal and retention
- B.** Establish procedures for interviews
 - 1.** Board v. Committee

Working with the Professionals

- A.** Establishing the roles of the President, Board Member (especially Treasurer) and the Professional
- B.** Understanding the roll of the professionals
 - 1.** Experience
 - 2.** No agenda
 - 3.** “Insurance” against second guessing as provided in BCL
- C.** Attorney
 - 1.** Review of contracts
 - 2.** Legal matters
 - 3.** Role at meetings
 - 4.** Updating corporate documents and polices

Working with the Professionals

D. Management

1. Visit the building regularly
2. Alert Board as to maintenance, repairs and replacements issue
3. Coordinate hiring of engineer/architect/contractor/vendor
4. Determine insurance needs of co-op/condo
 - a) In condo, careful review of Declaration is essential

E. Accountant

1. Help create budget with management and the Board
2. Board should establish the regularity of reports
3. Should review with Board financial issues on a regular basis

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