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Decisions, Decisions: When Co-Op Boards Must Bite the Bullet

By Alan M. Goldberg

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Decision making is the quintessential feature of board membership. Cooperative and condominium boards routinely make decisions on mundane issues such as arrears, repairs, and cleanliness of buildings. But when they least expect it, directors will be confronted with more complex issues that force them to make more careful, analytical, and time-consuming decisions. Board members have a fiduciary duty to confront rather than avoid these thorny decisions, to engage in a deliberate thought process, and to exercise independent judgment in making their determinations.

Enact New Rules?

Directors sometimes hastily enact rules to prevent objectionable behavior. Such hastiness, however, can lead to complications. For example: A co-op institutes a no-pet policy. A resident is seen with a dog. The board must determine when the dog was discovered, and whether the resident owns the dog or is temporarily watching it for someone else. A lawsuit to enforce the policy must be commenced within 90 days of the dog's discovery. That lawsuit can become complicated, as the resident may claim a disability necessitating an emotional support animal. If the board rejects that claim, it may face a judgment for discrimination.

Boards must consider the impact of a new policy, rather than later wonder whether it was even necessary.

Enforce Existing Rules?

A board may decide not to enforce certain rules. This is nearly always problematic. For example: A noticeable odor extends from an apartment into the hallway. Though the lease prohibits such emanations, the board chooses to do nothing. However, this may only exacerbate the problem, since odors signal other problems, such as insects and rodents, which can spread to other apartments, and hoarding. If, on the other hand, the board chooses to take action, it may need a court order to gain access to the apartment, as hoarders typically refuse access.

Another example: A resident complains of excessive noise, which the lease prohibits. The noisy neighbor claims it is normal everyday noise. The board leaves it to the residents to resolve. This decision is problematic, however, as the dispute could turn

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violent. The board must investigate, and may need to hire an acoustical expert to perform noise tests. The board will have to side with one resident or the other, and may have to commence suit.

Ignore Renovations?

A board may be reluctant to evaluate a proposed apartment renovation and pay an engineer to review the plans. Avoiding such expense may have dire consequences for the co-op, however. Biting the bullet may cause conflict, but it's the right course.

One case that came to our attention illustrates this. A shareholder sought to build a bathroom over someone's living room. Generally, bathrooms exist over bathrooms. A bathroom leak into a living room below can damage valuable carpets, furniture and artwork. The board rejected the proposal because a bathroom shouldn't exist over a living room, and because an engineer advised that new pipes would have to be connected to old fragile pipes, which could cause leaks. Ignoring the proposal would have led to major problems.

Another example: A director installed a Jacuzzi without board consent. After an engineer warned of noise, structural damage, and possible leaks, the board demanded the Jacuzzi's removal. In the ensuing lawsuit, the court, noting the board's proper actions, ordered the Jacuzzi be removed.

Win Elections With Low Maintenance?

No one likes maintenance fee hikes, but like death and taxes, they are inevitable. In one case we know of, a board kept maintenance fees low for years, although money was badly needed. The directors were constantly re-elected. When the board had no choice but to raise maintenance, the increases were staggering, angering residents.

The best course: address financial problems honestly when they arise, rather than hiding or deferring them.

Settle or Fight On?

A board that is considering settling a lawsuit may worry that doing so will set a bad precedent. That worry is almost always misplaced.

Settling a case is within the board's discretion, is protected by the business judgment rule, and should not be understood to set a precedent, as every case is generally handled on its merits. The board must decide what is best for the co-op, rather than allow a lawsuit to become a runaway train.

Defamation Anyone?

A board that obtains judgment against a shareholder may be tempted to advise shareholders of the victory and criticize the shareholder. This would be a big mistake, as such criticism could lead to a new lawsuit for defamation.

Boards are periodically faced with decisions that will provoke complaints, and in some cases, conflict. That comes with the territory. A steady focus on the interests of the whole community -- its financial health, its structural soundness, and its protection against liability -- is the only compass that board members should steer by. The best approach: state the facts and avoid negative, subjective comments about the shareholder.

Directors Cannot Avoid Decision Making

Example: A shareholder joins the board only to push his sole agenda — paint the hallway blue — and then lets the other directors make all of the other important decisions. This is a major mistake.

Directors must know what issues concern the co-op, and must act for the benefit of the co-op. Ignoring important issues is a breach of the director's fiduciary duty.

In one co-op, indifferent directors allowed the president to make all co-op decisions, and never questioned anything he did. The president claimed to have made repairs, but there were no records showing this, and most of the co-op's funds were missing. Shareholders sued not only the president, but also the lazy directors for breaching their fiduciary duties.

Because of the fiduciary duty that each director has, a board cannot prevent a troublesome director from inspecting corporate records.

One board believed that a director had disclosed confidential information to non-board members, and prevented him from inspecting corporate records. The member sued, and the court directed that access to all records be provided, since directors must inspect the records in order to make important decisions.

Conclusion

Although they may be volunteers, and in the majority of cases amateurs, board members have a fiduciary duty to approach their decision-making function in a deliberate manner. They must affirmatively inform themselves of the issues confronting their building. This can be accomplished through consulting the appropriate professionals, conducting internet research, reading industry publications, such as *Habitat* and *The Co-operator*, and attending industry forums, such as the annual CNYC Housing Conference & Expo. In short, they must do their homework so that they cast informed votes. And they must make decisions that are in the *building's* best interests, even when those decisions are contrary to their own personal interests. They must exercise independent judgment instead of blindly following a colleague's lead on any given issue.

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