

**SERVING ON THE BOARD OF DIRECTORS
OF COMMON INTEREST COMMUNITIES --
IT'S NOT ALL FUN AND GAMES¹**

All too often individuals hastily volunteer to become a member of the Board of Directors in a condominium, property owners association, home owners association, and other similar type master planned communities (hereinafter "Associations"). Although they should be commended for their effort and enthusiasm, lost upon the typical Board member of such an Association is the complex responsibilities and potential liability inherent in the position.

The most important principle for a Board member to keep in mind when considering the potential liability arising from the business role or function of the Association is simply that there is a business role or function. "Too often Board members approach their Association responsibility as if they were on the committee of a social club, religious group, or other similar organization."²

The Board Member must understand and appreciate that they head an organization often times responsible for hundreds of million of dollars of assets, and while they should be commended for assuming this sometimes thankless task, their most important responsibilities lie not in ensuring the sociability of the Association's members but rather in upholding the character and the use and occupancy of such a residential community. Perhaps most important, each potential Board member must come to respect the concomitant potential for substantial liability that is inherently ancillary to any position of such broad power and scope.

¹ This article, authored by Nativ Winiarsky, Esq., a member of the Kucker & Bruh, LLP law firm, was printed in the New York Law Journal on July 31, 2002.

² Hyatt and Rhoades, *Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations* (1976), 12 Wake Forest Law Review at page 944.

This article seeks to address the critical roles and duties expected of members of a Board of Directors of an Association and the potential significant pitfalls that arise from the Association and individual member's failure to fulfil his/her role. When considering the dearth of authoritative case law on this topic in this State, and the ever growing rise of such Associations in our region, this is an area of law fraught with uncertainty which will inevitably be addressed by our judiciary whose decisions will greatly impact a large number of individuals both residing and sitting on the governing bodies of such Associations.³

Enforcement of the Association's Governing Documents

There is perhaps no greater insurance towards the preservation of an Association's character than strict enforcement of the governing documents of the Association which typically include the by-laws, covenants, and restrictions designated to regulate and govern the use of the property.

Enforcement of a community association's use restrictions is vital to the protection of the interests of owners and foster a stable planned environment. Many owners depend upon them for the integrity of the communities. They require that the community remain stable and that the members of the community retain a sense of control over their living arrangements. The enforcement of use

³ The reader will note that this article cites to a great deal of cases from other jurisdictions with oftentimes few references to New York State cases. The reasons for this is the rate in which common interest communities proliferated in other parts of the country, and the geographic regions where such proliferation came about naturally. Specifically, while there were fewer than five hundred homeowners association in 1950, in 1990 there were 11.6 million common interest development housing units constituting more than 11 percent of American housing. By 2000, there were a total of 225,000 homeowner associations in the Country. Community Associations Institute, *Community Associations Fact Book*, 2000 (Alexandria, Va.: Community Associations Institute, 2000). As for geographical location, in a 1989 national survey, the Advisory Commission on Intergovernmental Relations (ACIR) found that common interest developments were most common in California, Florida, and Texas. A second group of states in which common interest developments are becoming an important sector included New York, New Jersey, Virginia Pennsylvania, Maryland, and Hawaii. See, McKenzie, *Privatopia*, pg. 11 (Yale University Press, 1994).

restrictions protects the property from deteriorating, increases its value, enhances the desirability of living in the unit, provides personal security, avoids property damage, and maintains an essential harmony and attractiveness for both the economic and personal well-being of the owners.

When considering both the Association's duty to enforce its own governing documents and the individual member's duty to abide by same, it is imperative to remember that said documents are a contract that govern the legal rights between the Association and the lot owners.⁴ Through the acquisition of their respective lots, members of this Association were to have made a commitment to abide by the requirements of the governing documents and the restrictions contained in the covenants. "Such a commitment is fundamental to the protection of both the community and the individual members. If this commitment is ignored or breached, then the very fabric of the community is threatened with unraveling"⁵

Notwithstanding the grave importance of the proper administration and enforcement of the Association's governing documents, all too often Boards are reluctant to address sensitive issues and feel that, as volunteers, they have less of a duty to require compliance with the Association's governing rules and regulations. In failing to enforce its covenants, the Board is in conflict with the desired constraints of the community and, even more broadly, the essential nature of the common interest community lifestyle. Such particularized or generalized incompatibility is essentially adverse to the community itself.

⁴ Hellenberg v. Independent Order B'nai B'rith, District No. 1, 94 N.Y. 580 (1884).

⁵ Kim, *Involuntary Sale: Banishing an Owner from the Condominium Community*, 31 J. Marshall L. Rev. 429.

From a liability standpoint, failure of the Board to heed the guidelines for rule enforcement will clearly result in expense, delay, ill will, and potential liability on behalf of the Association, the Board, and perhaps even the individual members themselves.

Board's Fiduciary Duty

The immense responsibility latent within every Board of an Association, and the Board's special relationship to its members, has manifested itself in the requirements of fiduciary duties and the requirements of due process, equal protection, and fair dealing.⁶

In furtherance of these fiduciary duties, the Not-For-Profit Corporation Law of the State of New York (hereinafter "N-P.C.L."), upon which most Association's are subject to, state in relevant part:

the directors and officers shall discharge the duties of their respective positions in good-faith and with the degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions.

. See Article I, Section 1 and 2. § 717 of the N-P.C.L.

In defining this duty, the courts of this state have consistently held that the directors of a corporation under the N-P.C.L. act are charged with the duties of a trustee and bound to care for its property and manage its affairs in good faith, and for violation of that duty resulting in waste of its assets, injury to its property, or unlawful gain to themselves, they are liable to account in equity as ordinary trustees.⁷ Thus, corporate directors are bound by all rules of conscientious fairness, morality and honesty of purpose which the law imposes as guides for those under fiduciary

⁶ See, Hyatt supra note 2 at pg. 921.

⁷ Bosworth v. Allen, 168 N.Y. 157, 61 N.E. 163 (1901).

obligations.⁸ Accordingly, directors of an Association act in a fiduciary capacity and are generally regarded as trustees for the corporation.⁹

Moreover, this duty is not only statutory in form, but the common law has similarly held that the relation between the directors of an Association and its members is fiduciary in nature.¹⁰

Thus, because the Association officers and Board members of an Association owe a fiduciary duty to the members of the Association, they must act in a manner reasonably related to the exercise of that duty, and the failure to do so will result in liability not only for the Association, *but also for the individuals themselves*.¹¹

The assets of the corporation are exposed and the director is personally liable for improper decisions made in the areas of rule enforcement. In that respect, many courts across this country have set their firm imprimatur on the well-settled almost proverbial rule of law that a Board's proper exercise of its fiduciary or quasi-fiduciary duty requires strict compliance with the Association's bylaws, covenants and restrictions.¹² Each individual Board member is also responsible for failure

⁸ Baker v. Cohn, 42 N.Y.S.2d 159, *modified on other grounds*, 266 A.D. 715, 40 N.Y.S.2d 623 (1st Dept. 1943), *motion denied*, 291 N.Y. 762, 52 N.E.2d 965 (1943), *aff'd*, 292 N.Y. 570, 54 N.E.2d 689 (1944).

⁹ Billings v. Shaw, 209 N.Y. 265, 103 N.E. 142 (1913).

¹⁰ Aronson v. Crane, 145 A.D.2d 455, 535 N.Y.S.2d 417 (2nd Dept. 1988).

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Cohen v. Kite Hill Community Association, 142 Cal. App. 3d 642, 191 Cal. Rptr. 209 (Cal. App. Dept. Super. Ct. 1983).

¹² Wolinsky v. Kadison, 114 Ill. App.3d 527, 449 N.E.2d 151, 70 Ill. Dec. 277 (Ill. App. Ct. 1983); California Rivera Homeowners Association v. The Superior Court of Los Angeles County, 37 Cal. App.4th 1599, 44 Cal. Rptr.2d 595 (Cal. App. Dept. Super. Ct. 1995); Conestoga Pines Homeowners' Association v. Black, 689 P.2d 1176 (Colo. At. App. 1984); Apple Valley Property Owners Assoc. v. Apple Valley Sales Inc., (1988 Ohio App. LEXIS 3166); Greenwood Estates Assoc. v. King, 15 Va. Cir. 199 (Cir. Ct., Va. 1988); Goldberg, *Community Association Use Restrictions: Applying the Business Judgment Doctrine*, 64 Chi.-Kent. L. Rev. 653.

to act in discharge of his duty to properly administer the rules of the Association under the well-settled principal that one who is under a duty to act and fails to do so is liable for the consequence of their malfeasance to those whom the duty was owed.

The Board's failure to act can take many forms and so can the ensuing damages and liability that result therefrom. Potential liability is a direct by-product of the fact that the very fabric of an Association can be destroyed by a Board's refusal, inability, or failure to enforce its covenants. Specifically, the value of the properties within the Association will likely tumble if the Board of the Association fails in its duty to enforce the covenants and restrictions. It is axiomatic that a well-anchored system that enforces its restrictive covenants greatly enhances the value of the restricted lands.¹³

The right, if it has been acquired, to, e.g., live in a district uninvaded by business and where alterations to the external appearance of homes must be approved by the Board, should be highly guarded and remains a valuable right. How much enforcement of the covenants is worth in dollars, or how much the violation of the governing documents would diminish the value of a member's property has yet to be established within decisional authority; but it is clear that restrictions in covenants generally constitute a property right of distinct worth.

Accordingly, the developer, officer, director, manager, and attorney involved in the creation, administration, and operation of a Association must deeply respect and appreciate this aspect of the liability concept. For unless each member of the Board of the Association clearly understands the responsibilities inherent in their position, and acts in accord with that responsibility, the millions of

¹³ Welitoff v. Kohl, 105 N.J. Eq. 181, 147 A. 390 (N.J. Eq. 1929); In re Rofe, Brooks, Law, Avram, 415 Mich. 345, 329 N.W. 704 (Mich. 1981); Adult Group Properties Ltd. v. Imler, 505 N.E.2d 549 (Ind. Ct. App. 1987).

dollars in assets that said Boards generally govern can be seriously compromised. Once such assets and savings are put at risk, Board members can be sure that litigation will quickly ensue.