

Knowing and Protecting Board Immunity

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I had a habit for many years of sending condolence letters to recently elected association presidents and congratulations to the outgoing president—with tongue only partly in cheek. A community association director's role is often stress-filled and gratitude-empty, and it seems there is always at least one member who is threatening a lawsuit about something.

A community association director is essentially a trustee (*Lynch v. Redfield Foundation*, 9 Cal.App.3d 293 [1970]). That role carries many responsibilities and potential liabilities. However, the California Civil and Corporations Codes give significant guidance and protection to community association directors. The law sets reasonable standards, and gives immunity to those that follow those guidelines. Ignorance is not always bliss - in this case you may lower your stress levels substantially by being informed.

Protection from Personal Liability

If a director is acting: 1) as a volunteer; 2) within the scope of the director's authority; 3) within the bounds of good faith; and 4) not willfully, wantonly or with gross negligence; and the association has both general liability and directors'/officers' insurance coverage (\$500,000 minimum of 100 units or less and \$1 million minimum if over 100 units); then the director cannot be held personally liable (Civil Code Section 1365.7). The claimant still can sue the director, but he/she will only collect to the extent of the insurance coverage. However, the statute does not limit the association's liability.

Another source of immunity is found in the Corporations Code. A volunteer director is immune from suit so long as the director discharges duties: 1) in good faith; 2) in the way the director believes is in the best interests of the corporation; 3) in accord with the business judgment rule; and 4) without pay (Corporations Code Section 7231.5).

Loss of Immunity

The immunities are not absolute - various factors can remove immunity.

Paid "Volunteers"

Under both the Corporations and Civil Code, immunity is waived if the director receives compensation. In such a case, the director is no longer a volunteer. Compensation is not reimbursement of out-of-pocket costs. There are still some associations that persist in compensating directors through dues credits or even outright payments. Don't participate in it, and don't allow it. The small amount of money is absolutely not worth the cost of lost immunity.

Too Many Hats

Directors who are also the developers (or employees of the developers) of the project are not entitled to immunity. Members who own more than two units are not entitled to immunity. Members who are also salaried employees of the association for other reasons are probably not immune. Occasionally an association will elect its property manager to the board (usually in the instance of an on-site manager), but this is simply not worth it to the manager or the board. The property manager takes on additional exposure to liability and to conflicts of interest, yet at the same time is not entitled to the immunity which the rest of the board has. Wear one hat at a time - that of the volunteer director.

The Lone Ranger

Directors must stay within the scope of their authority (Civ. Code §1365.7[1]). Occasionally, one or two directors are far more active than the others, making decisions and taking action outside of board meetings. Unless the director's permission to act has been authorized by the governing documents or board action, such a director is on dangerous ground. Activist members must be careful to stay within their personal authority and make sure the minutes reflect board approval on

all actions. Boards should explicitly and clearly delegate (or limit) individual authority - to protect the activist and the association.

The Volunteer Expert

Boards are entitled, and in many circumstances required, to rely upon expert input. It is often tempting to try to save money and time by relying on a non-expert to venture an important opinion. For example, property managers are often called upon to discuss legal matters. The prudent manager refuses, suggesting instead that the board obtain qualified advice. The prudent manager knows that if he/she gives legal advice that turns out to be wrong, both the manager and the directors may be exposed. Rely only on true experts for expert opinions.

The Listening Impaired

When the board receives qualified expert advice, it should not be disregarded simply because the board disagrees. Without further justification, such conduct could be considered willful and therefore outside of immunity protection. Don't refuse to listen. Get a second opinion. Investigate further. If a second opinion is the same as the first, stop arguing, it's over.

Personalities

Never let personality conflicts cause the board to treat one particular member differently than other members, or to make decisions in which ill will is the cause. Make decisions based upon what is fair and in the best interests of the association--period.

The "Willful Blindness" Problem

Several members complain of the same kind of problem, and one of them claims a construction problem is at fault. Can the board only deal with the "proven" problem and then disregard the possibility of something more widespread? No. A director must follow the "business judgment rule," by exercising the care that an ordinarily careful person would exercise in the same circumstance (Corporations Code Section 7231[a]). This care includes the duty of reasonable inquiry, meaning that one cannot ignore indications of a problem simply because the problem is not yet "known." The board may be required to investigate the issue further, and to take reasonable action

to respond to the concern. A failure to take any action after receiving notice of a potential problem might constitute willful lack of care, which is outside of director immunity.

Stay In Bounds

As long as a director stays within standards of conduct qualifying for immunity, the personal sacrifices of board members need not include jeopardizing one's own family assets to liability. Be aware of these standards, and remember the "business judgment rule." Then, if you receive one of my congratulatory letters upon leaving the board, you'll be better able to appreciate its humor.

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