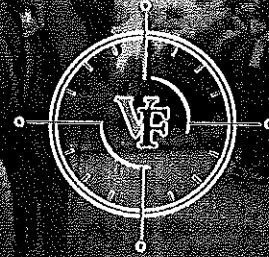


# BOARD OF DIRECTORS

Presented by: Gregory B. Coxey and Tom Johnson



## HOW TO KEEP FROM BEING SUED\*

Presented by  
Tom Johnson

1. **Adherence to sound business practice.** The Board of Directors must act like a business to the extent that it uses sound fiscal and other policy management. The items which are normally looked at by any court, called upon to review the activities of a board with respect to these matters, include such practices, promulgation of reasonable and consistent guidelines for activities and the requirement that the board at least take upon itself the responsibilities required of it.

2. **The exercise of diligence in administering the affairs of the association.** Probably one of the most dangerous of all pitfalls for a Board of Directors to fall into is the failure to perform some act required by it. Such a failure will result in liability in many more circumstances than an honest mistake of the Board of Directors.

It is interesting to note that in the most common and popular insurance policies cover the activities of Community Association Board of Directors, that the only exception from coverage is failure by the Board of Directors to take action to correct defects in the common elements caused by the developer of the facilities. This, of course, probably arises out of at least one significant court case which stated that part of the responsibility of the board was to foresee future problems and act to prevent those from becoming major problems for the association.

3. **Take actions with deliberateness.** The Board of Directors must be prepared to have confidence in its ability to take action. Often the first step toward gaining this confidence is to have the Board of Directors guideline for activities reviewed by competent legal counsel so that the board is assured that they are acting within the limits of their documents and the statute relating to government of their association. If the board appears to change its mind often or fails to be consistent in application of its guidelines, a loss of credibility will be the result and increase the chaotic nature of the association.

4. **Provide due notice of decisions.** The board must recognize that it represents not only owners who may show up at meetings, but also all of the owners involved in an association. Often, boards are sloppy or lazy about giving notice to the community at large concerning decisions that have been made by the board. Sometimes it is assumed by the board that no one will be interested in decisions, or that the decisions will affect only a few.

However, because homeowner associations almost always include some sort of commonality of owners, it can be safely assumed by the Board of Directors that nearly any decision made by them will affect everyone. For this reason, it is important to keep careful records of Board of Directors meetings and publish minutes of those meetings in such a manner so as to insure that each member of the community is made aware of the board's activities.

5. **Provide for due process.** The board must recognize the fact that courts have universally required people to be given an opportunity to be heard and to challenge any decision which may adversely affect them. This "constitutional" provision in almost all court cases dealing with actions of the board as they relate to members of the association, means that each member is given ample opportunity to exercise his or her democratic power in the mini-government process.

Because it is often a highly emotional and sometimes intense confrontation which brings about the needs for such due process, it is very important that the board establish concrete guidelines and operational rules so that inappropriate decisions are not made in the "heat of battle."

6. **The association must be administered in a fair and equitable manner.** Because members of the Board of Directors are not paid, they often feel that their only compensation for serving in this position is some degree of power. Power derived solely from the position is in fact nonexistent in community associations. While there may be some "artificial" power by virtue of an ability to make proposals and influence the votes of members as to their adoption, it is imperative that the Board of Directors act with extra care to administer the association in a fair and reasonable manner.

A CAI official recently related the story of a town in northern California which was experiencing difficulty in having library books returned. The town enacted an ordinance which stated that after a certain period of time, if a person failed to return a library book, they would be given a mandatory six month jail sentence. I think this points out the test of fair and equitable that we are dealing with in community associations.

7. **Promulgate standards according to which decisions may be made.** This relates to almost all of the other concepts discussed herein. It is important and, in fact, mandatory that the Board of Directors prepare standards and guidelines according to which their decisions may be made.

If no such standards and guidelines are enacted, the great risk is that inconsistency will result which will provide the board with the greatest exposure to a successful lawsuit. If, however, consistency is maintained and the board is sued, it can generally rest assured that if the standards were reasonable in their initial adoption, they will be supported by a court.

8. **Involve the community at large in developing policy.** The Board of Directors must take extra care to recognize the difference between policy oriented action and administration actions. While the board is called upon to administer the business affairs of the community, it nonetheless should recognize that the social atmosphere is one in which all association members must reside, and which requires the input of the association to guide the board in its activities.

If the board is consistent in providing a forum and opportunity for members of the association to express their feelings concerning policy oriented decisions, it is unlikely that suits will be brought. If, however, the board makes decisions without giving everyone an opportunity to be heard, the chances are much greater that a member of the association, feeling that he or she has been wronged without an opportunity to state his or her position, will bring a lawsuit.

9. **Reporting actions and events leading to actions.** Probably the most important of all things which can be done by the Board of Directors to avoid being sued is to make sure and provide for proper communication between the board and members of the association. Proper communication will allow those who are concerned about different issues to speak up when the problem is still small and avoid confrontational attitudes.

The items set forth above, if followed by the Board of Directors, will minimize the possibility that the board will get sued. However, if the board does get sued, it should remember the following things:

A. Immediately contact counsel for the association so that he or she may determine what legal action is necessary to protect the interests of the Board of Directors.

B. Contact the insurance carrier so that the proper notices are given pursuant to the insurance contract.

C. Assign one or more persons on the Board of Directors to be responsible for day to day liaison with legal counsel concerning issues raised in the litigation.

D. Accumulate all written data regarding the issue raised in the litigation and be prepared to present this in an orderly fashion to legal counsel.

E. If the lawsuit has not yet been filed, do not immediately become convinced that no solution other than legal action can solve the problem and act in a reasonable and calm manner to attempt to avoid suit.

The best defense to any lawsuit brought against a Board of Directors is a well documented showing that the items set forth in the first section above were complied with by the board. An ability by legal counsel to document that, if fact, the board acted within its power and was consistent in its application of any of its decisions, will prevent almost any Board of Directors from losing a lawsuit.

The importance of attempting to negotiate through any legal action is often understated. Because of the cost to the association and because of the incredible amount of time that it takes to administer a lawsuit, it is almost invariably better to concede some minor points to avoid lengthy litigation. It must be remembered, however, that the necessity of continuing to operate the association in a consistent manner does not end even though the board may be sued.

It is hoped that the above comments will help a board to consider some steps that it should take to avoid being sued and if the board is sued, it is to be remembered that the best of boards have been sued and that no one can avoid the disgruntled owner from taking what he or she perceives as legitimate legal action.

\* *The above suggestions were initially presented by A. Richard Vial with the following comment:*

*A few years ago I gave a speech at a national conference on board fiduciary responsibility and how to keep from being sued. It had sort of a long preamble and a lot of flowery language at the beginning, but essentially it boiled down to nine items which my experience had taught would assist boards in preventing lawsuits. In the hopes that they may be helpful to avoid the expense and headaches of litigation, here are some suggestions."*