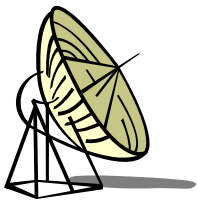


## Operating Under the Radar but Above Board

A couple of years ago, Jim bought a home in an association and promptly replaced the windows. Because Jim didn't read the governing documents of the association, he was not aware that he needed prior approval from the board and that the windows had to be of a certain design and color. The board promptly sent a stern letter demanding that Jim replace the windows in accordance with the CC&Rs. Jim, who felt that the letter was aggressive and insulting, took offense and refused to replace the windows. Jim argued that other owners in the community had replaced their windows resulting in several different styles of windows. The case escalated into an expensive, multi-year legal battle after Jim alleged various acts of wrongdoing, lack of enforcement, and fiscal irresponsibility on the part of the board.



There are several lessons to be learned from this story that can help a board get things done without inviting unhelpful scrutiny from homeowners.

1. A board should welcome and educate new members of the community, owner and non-owner residents alike.

Educate all members. Organize events and establish regular open communication with the members. Members should hear regularly from the board about what's going on in their community. Use newsletters, websites, bulletin boards, e-mails, mailings, and public forums. Pick a method (or two) and use it consistently.

A common mistake is for boards to believe that certain problems will just disappear. However, if a board isn't communicative on everyday issues, there will be little or no trust on the big issues. Those big issues will grow from big to bigger and will easily become insurmountable except through a major change such as a recall of the board, a drastic special assessment, or other seriously disruptive measures.

2. Handle all enforcement matters with kid gloves. Because people are very emotional about their homes, you never know what kind of reaction you will get. Homeowners tend to take issues related to their homes personally. Board members should try to convey an unbiased, neutral stance that belies claims of favoritism and selective enforcement.

Always be sensitive to the fact that perhaps the rudest awakening for homeowners in common interest communities is the rather limited role that association members have under state laws and the association's governing documents. Although board members are elected to office by the members of the association, the structure of corporate governance is essentially a "top down," oligarchical structure, a concept which is very foreign to a lot of homeowners.



From windows to wrongdoing, enforcement can be tricky

**“if a board isn't communicative on everyday issues, there will be little or no trust on the big issues.”**

Most associations are nonprofit corporations which means that the activities and affairs are conducted, and all corporate powers are exercised, by the board of directors. So, unless member approval is specifically required either by the association's governing documents or by statute, members who are not directors have little or no role to play in the day-to-day management of their development. This fact often comes as a surprise to many residents, who believe that they can still be "king of their castles" within a common interest community.

The board alone is specifically empowered to govern and manage the business and affairs of the association, but the trick is being able to run the association without the association running the board.

With the broad powers enjoyed by the board comes a strict fiduciary obligation to act in the best

interests of the association and to consider what is best for the members as a whole. This obligation subjects board members to potential liabilities for their decisions and actions to a much greater degree than individual homeowners. An owner who is not serving on the board does not have a fiduciary duty to act in the best interests of the association, and he or she is free to champion narrow causes or fringe points of view. Because of this, a board must maintain a balancing act, keeping members informed and encouraging participation on one hand, yet being careful not to incite undue owner interference on the other.

**3.** When attempting to enforce a rule or covenant, all board actions tend to come under scrutiny. Solutions to this problem include:

a. Know your governing documents and manage accordingly.

b. Hire and use professionals (accountants, attorneys, property managers, etc.). It may be impossible to figure out on your own what the governing documents say and which state and local laws apply to you. You have the absolute right, even duty, to consult with professionals in order to fulfill your responsibilities as a member of the board.

c. Fulfill your fiduciary duties to the association by trying in good faith to make informed decisions and actions. Make sure those decisions and actions are in what you honestly believe to be the best interest of the association. As a board member, you should always strive to carry out and uphold the governing documents, despite a past board's mistakes, inaction, or inconsistent application of the governing documents. If your governing documents don't mesh with the current realities of your association, then amend the governing documents. For instance, if your governing documents say that the association maintains the decks, when in practice it does not, then properly amend the governing documents to reflect what is actually done or should be done.

**“Drastically raising assessments or levying special assessments also tends to bring all prior board actions under scrutiny.”**

**4.** Drastically raising assessments or levying special assessments also tends to bring all prior board actions under scrutiny.

Solutions include:

a. Raise assessments every year. Costs of labor, fuel, energy, maintenance, and materials all go up each year. Inflation is not an occasional inconvenience, it is a hard and fast reality. Buildings and improvements get older each and every year; they don't get newer. I have seen the result of a board's refusal to increase assessments as needed, and it is invariably devastating to the association members' property, pocket books, and sense of community.

b. Reserves, Reserves, Reserves. It's said all the time, but I can't say it enough, establish and maintain adequate reserve funds to meet the long-term and emergency needs of your association.

Don't let a simple board decision become subject to infinite scrutiny and imagined complexity. Understand your residents and your responsibilities, establish open communication, know the importance of people skills, raise assessments every year, and ensure that you have adequate reserve funds. Doing these things will help a board carry on its day to day business, as well as make larger decisions, without potentially unlimited interference from homeowners (and their attorneys).

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