

HOA board members must prioritize association

Column

» *By Lauren C. Holmes, YourHub Contributor*

HOA board members come from all walks of life and have a variety of connections or expertise that may overlap with the needs of their associations. Sometimes this works to the association's benefit. It may also work to the board member's benefit.

Any board member who will or may receive a financial benefit or interest from an association transaction needs to proceed with caution.

Every board member has a fiduciary duty to the association. In short, this means that each board member is required to act in good faith, with the care an ordinarily prudent person in a similar situation would exercise, and in a manner the board member reasonably believes to be in the association's best interests.

The moment a person begins serving as a board member, that person must set aside their personal interests, including their financial interests, in favor of the association's interests.

In addition, Colorado law states that all board members must have available to them information related to the association's responsibilities and operations that is obtained by another board member. No board member is allowed to hold information back from the rest of the board. *

Colorado law defines a conflicting interest transaction as a contract, transaction, or other financial relationship between:

- the association and a board member;
- the association and a party related to a board member; or
- the association and an entity in which a board member is a director or officer or has a financial interest.

Spouses, children, grandchildren, parents, grandparents, siblings, nieces and nephews, brothers-in-law, and sisters-in-law are all considered parties related to a board member for these purposes. The definition also extends to any entity in which any of these relatives is a director, officer or has a financial interest.

Most people recognize that there is a conflicting interest transaction if the board member's company, or the board member, is considered for a contract with the association. It is important to recognize that the same conflicting interest transaction exists when a relative or a relative's company is considered for a contract.

A conflicting interest transaction is not illegal. However, if not handled properly, it may lead to legal liability as well as political fallout.

A transaction will not be set aside if:

- the board member discloses the material facts of the relationship or interest to the board and a majority of disinterested board members approve the transaction in good faith; or
- the board member discloses the material facts of the relationship or interest to the association members entitled to vote and the association members approve the transaction in good faith; or
- the transaction is fair to the association.

It is likely that the most important material fact is the benefit (usually financial) the board member, his family member, or his company will receive if the association enters into the transaction.

If a contract is with the board member or family member directly, the interest is generally known and obvious. If the contract is with a company, the benefit may not be as obvious.

Is the board member an employee of the company who receives a bonus or additional compensation for referring business? Even if the board member is not an employee of that company, does the company pay him or his company a referral fee if it is awarded a contract?

If the company is awarded the contract, does it have a side arrangement to return a portion of the funds it receives from the association to that board member (commonly called a kickback)?

If the decision makers have all the facts as to the interested board member's financial interest in a transaction, it can determine whether that transaction is still in the association's best interests and fair to the association.

If the interested board member does not make their interest known in a transaction, they may be in violation of their fiduciary duty, duty of good faith, and duty to provide the rest of the board with information. This may be the case even if the transaction is fair to the association.

Board members would be welladvised to err on the side of caution and fully advise the rest of the board (or the members, if the members are voting) if they, their families, or their businesses have any financial interest or relationship with an association contract.

For more information on this topic, as well as additional resources, visit www.caionline.org. Lauren C. Holmes is co-managing partner at, and one of the founders of, Orten Cavanagh Holmes & Hunt LLC. She has provided general counsel and transactional services to community associations throughout Colorado for more than 20 years.

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