

Working with a Divided Board

- EJF Real Estate
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Board Dynamics

Ideal
v.
Reality

**Problems
caused by
Divided
Board**

Minority of Directors
acting to undermine vote
of majority


Majority marginalizing
Minority

Membership losing faith
in Board

Three wooden pawns are arranged on a white surface. The central pawn is red, while the two flanking pawns are white. The background is a soft, out-of-focus light blue.

Results of Split Vote

- Board members, as fiduciaries, can disagree on policy while still working together for a common goal.
- Important for Board members to respect decision of majority of Board



Fiduciary Duty

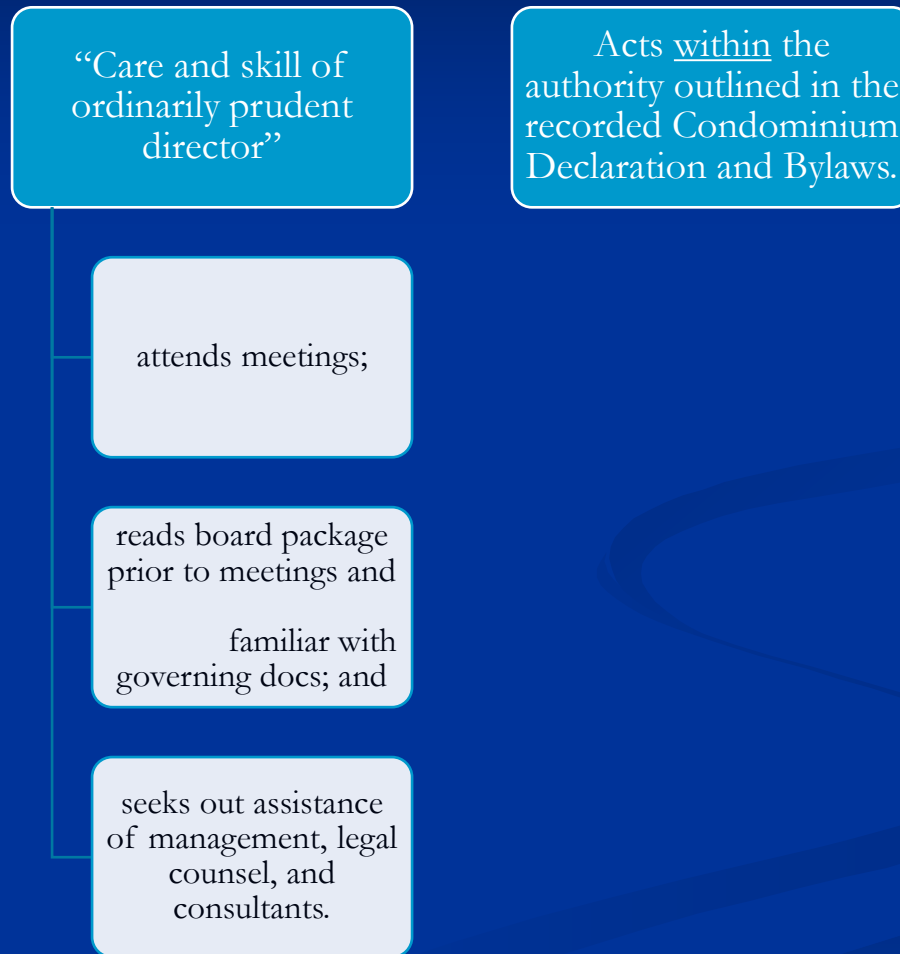
- Imposed on Board members by either statute or common law
- Understand it - don't fear it
- Elements -
- Take no advantage
- Disclose interests
- Don't do it; don't tolerate it – inappropriate behavior and violations of each director's duty of loyalty.

A close-up photograph of a hand holding a set of keys. The hand is positioned in the center-left of the frame, with the keys hanging from the fingers. The background is a soft, out-of-focus indoor setting with warm lighting, suggesting a home or office environment. The overall tone is professional and trustworthy.

Fiduciary Duty cont.

- Based upon *Agency Law*
- Entrusted with Control
- Good faith
- Undivided Duty of Loyalty to Association
- Relationship of Trust
- Get the Facts – Make informed decisions
- Protect Confidential Information

Business Judgement Rule



Vicarious Liability

Board and Committee members create vicarious liability for the Association

Can bind the Principal as further defined in Bylaws and Policies

Indemnification

Officers and Directors
Typically Indemnified under
Bylaws and Potentially by
Statute

No indemnification for

- intentional misconduct or knowing violation of the law;
- criminal acts.
- receipt of an improper personal benefit.


Common Insurance Exclusions

- Defamation
- Criminal acts
- Claims for Non-Monetary Damages
- Particulates and Pathogens



Managing Board Member Conduct

Many Board adopts
a Code of Ethics
or Conduct



Common Elements of a Code of Conduct

- General Conduct and Decorum
 - Attend Meetings and arrive on time;
 - Review Board materials in advance
 - Silence Devices
 - Avoid interruptions while others speak
 - No use of derogatory or insulting language
 - Directors owe duty of respect to Board, Association, their colleagues and membership

Conduct of Meetings

President Chairs

Use Robert's Rules of Order

- Speak only when recognized by Chair;
- Formal motions and votes thereon
- Adhere to agenda, which should include
 - Adopting agenda;
 - Reading and approval of minutes
 - Open Forum
 - Officer, committee and management reports
 - Agenda action items
 - Unfinished Business
 - New Business

Rules Governing Meeting and Agenda

- Once agenda is adopted, can only deviate by a vote of 2/3 of Directors
- Any matter that has been voted on previously by the Board or Committee may only be reconsidered if a director makes a formal motion to rescind the prior vote and the motion passes by a two-thirds vote of the Board or Committee.

Dualities and Conflicts of Interest

- As Fiduciaries, all directors owe an undivided duty of loyalty to the Association.
- Must strive to avoid personal conflicts of interest, nepotism, or personal benefits.
- If a potential conflict exists, director must disclose to other directors the potential conflict.
- If the director believes that such interest does not rise to the level of a conflict of interest and does not impede their ability to exercise their fiduciary duty, the director must state their reasons on the record and their intent to participate in the discussion and vote on the motion.
- If it is determined that a conflict exists, the directors must recuse themselves from the discussion and vote on the issue upon which they are conflicted.
- If Director refuses to recuse themselves, then they expose themselves to claims of possible breach of duty and personal liability

Conflicts of Interest

- Examples include:
 - When the Board intends to review a case involving the compliance of a Board member with the Association's legal requirements.
 - When the Board intends to review a contract or expenditure of funds involving the direct pecuniary interest of a Board member.
- No Board member should vote to approve the expenditure of funds for the acquisition of services or goods from any member, relative of a Board member, or entity which is affiliated with any of the members or their relatives, unless the Board member with such relationship discloses the relationship on the record and there is convincing reason to believe that a vote in favor of such an expenditure would be in the best interests of the Association. Under such circumstances, the vote must pass by at least a two-thirds majority of a quorum of Board members.

Enforcement

- Private reprimand
- Public censure (notification of the name of the Board member and cited behavior in the association communications platforms); and
- Request to resign
- Suspend the Board Member's privileges and rights as a member of the Board (such as receiving confidential information);
- Impose fines for violations; after notice and an opportunity for a hearing
- Initiate removal process in accordance with Bylaws

Best Practices

- Adopt Code of Conduct
- Conduct annual Board training
- Minimize email debate
- CAI Civility Pledge
- Attend industry educational sessions
- 3rd party mediation in egregious cases



Questions?