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Board of Directors: What is a Board member's duty of care?

Board members and officers of both HOAs and condo Associations owe a duty of care to their Associations and to individual owners. They also owe a lesser duty of care to members of the general public.

HOA Boards are generally incorporated under and governed by either the Nonprofit Corp. Act¹ or the Nonprofit Misc. Mutual Corp. Act.² Under each of these statutes, Board members and officers owe a duty to discharge their duties:

- A) in good faith;
- B) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
- C) in a manner the Board member or officer reasonably believes to be in the best interests of the corporation.³

Condo Associations are bound by a statutory duty of care, set forth at RCW 64.34.308(1).⁴ The statute requires Board members to exercise reasonable and ordinary care if they are elected by the unit owners. Declarant-appointed Board members have a heightened standard requiring them to act with the care required of *fiduciaries*⁵ of the unit owners.⁶

While the governing statutes and at least one Washington Supreme Court case imply that Board members are protected from liability from innocent mistakes and errors of judgment, the duty imposed by statute still requires that decisions and exercises of discretion be "reasonable."⁷ Board member actions are likely to be considered unreasonable and in breach of the duty of care if Board members fail to adequately investigate before acting or make decisions based on inaccurate or unreliable information.⁸

Board members' duty of care is owed to the Association itself and to individual homeowners. It does not extend to future purchasers or to members of the general public, to whom a Board member owes only the duty to avoid gross negligence.⁹

¹ RCW 24.03.

² RCW 24.06. Most HOAs are incorporated as nonprofit corporations under one of these two statutes. However, they need not be incorporated and can also take the form of some other legal entity.

³ RCW 24.06.153(1) (Duties of director or officer-Standards-Liability); RCW 64.38.025(1) (Board of directors-Standard of care-Restrictions-Budget-Removal from Board) (citing RCW 24.03).

⁴ This provision is applicable to Old Act condo Associations. See RCW 64.34.010(1).

⁵ A fiduciary is one who has the power and obligation to act for another under circumstances which require total trust, good faith and honesty. If you are appointed to a Board by the declarant of a condominium project, you should be aware of this heightened standard and adjust your policies and decision-making process accordingly. In all things, you must act with the care that a fiduciary of the unit owners would take.

⁶ For additional discussion of the duty of care owed by condo Association and HOA Board members, See blog post entitled "Standard of Care for Boards" at: <http://www.condolawgroup.com/2010/10/16/161/>.

⁷ *Riss v. Angel*, 131 Wn.2d 612, 6801-81 (1997) (the Washington Supreme Court sided with homeowners who challenged an HOAs denial of their building plans, noting that the HOA's decision, made without investigation and based on incorrect information, was an unreasonable exercise of discretion).

⁸ *Riss*, 131 Wn.2d at 681.

Note: This standard allows a Board member to rely on the information or opinions presented by:

- A) Other officers whom the Board member believes to be reliable and competent in the specific matter;

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- B) Counsel, public accountants, or others if the Board member believes the matter to be within the person's professional/expert competence;
 - C) A committee of the Board on which the Board member does not serve if the matter is within the committee's authority (and the Board member acts in good faith, after reasonable inquiry, and without knowledge that reliance is undeserved.)

⁹ *Alexander v. Sanford*, 181 Wn. App. 135, 169-70 (2014) (denying unit owners' breach of fiduciary duty claims against Board members because, at the time of the alleged breaches, owners had not yet purchased property within the community); *Waltz v. Tanager*, 183 Wn. App. 85, 91 (2014) (noting that Board members are only liable to parties other than the Association and its members in instances of gross negligence).