

Contacting Counsel

MOST COMMUNITY association boards don't like to call their attorney when times are good, let alone when they're tough and money is tight. Boards should heed the "don't be penny wise and dollar foolish" proverb, but there are times when contacting the association attorney is a must.

Before knowing when to call, a board must first decide who should call. Every board should decide at its organizational meeting which members will be authorized contacts with the attorney and other vendors. This must be done to control costs, eliminate duplicate or conflicting work requests and to set the right tone for association operations.

However, authorized contacts must understand that the only requests and queries that should be made to the attorney are those at the direction of the board and not any that concern personal issues or agendas. An experienced association attorney usually knows when a work request or question may not be supported by the entire board. This happens most often when there are board recalls. If that ever occurs, the attorney should insist on polling the board to determine that the request was made at the group's direction.

Some boards are overly cautious and call at the drop of a hat, but unusually high legal bills often lead to membership scrutiny and, in the most egregious cases, can be the basis for board recalls. More often than not, however, boards don't consult legal counsel enough. It's a dangerous way to do business since every board action is viewed through a prism of reasonableness. Failing to obtain professional advice on subjects outside a board's expertise might throw an action into unreasonableness territory.

Here are a few situations that should



require a call or meeting with the association attorney:

- **Entering into a contract.** If a vendor gives you a contract, that agreement was drafted with their protection in mind, not yours. Vital provisions, such as ensuring that the work is under warranty, that the contractor will finish on time and that the association will not pay for the contractor's gross negligence, need to be included. In addition to adding protective language, harmful language needs to be removed; automatic renewal clauses, for example, can trap the association into an endless cycle of bad service.
- **Hiring or firing an employee.** Associations need to protect themselves from a negligent hire if the employee goes on to do harm. They also need protection from possible discrimination and other claims from fired employees. If your state, like Florida, is an employment-at-will state, an employer can terminate an employee for any reason other than discrimination. However, there are myriad sensitive issues that must be addressed, including whether or not the personnel file properly documents employee infractions or other problems. In fact, if the association has any employees or independent contractors, it should consult with legal counsel to ensure that its employment manual complies with all fed-

eral and local labor laws, that employees are properly classified as exempt or hourly and that background checks are being conducted with proper advance notice and consent.

- **Rejecting a proposed lease or purchase application.** This is another area fraught with potential liability. The board must ensure it has proper authority. Standards must be applied uniformly and routinely. In this real estate market, a lost sale or lease will be met almost certainly with some form of consternation from the owner or real estate agent.

- **Getting served with a lawsuit, state complaint or code violation.** The law firm should serve as the association's registered agent to avoid any delay in sending time-sensitive matters. Your attorney will map out a strategy for defending the association.

- **Considering a community remodeling project.** Changes that may seem absolutely necessary and advisable to the board might actually be a material alteration of the common elements or areas, which requires a membership vote. Nothing riles up owners more than the thought of a board spending money on unnecessary projects. Responding to a complaint from an owner after a project is complete puts you in a defensive posture and, depending on the outcome of

that complaint, might put you in breach of contract with your vendors.

■ **Amending documents.** Prime examples of controversial amendments include implementing “55 and over” age restrictions, leasing and sale restrictions, vehicle and pet restrictions, mandatory club membership and guest occupancy restrictions. Any time you tell owners what they can and can’t do with their property and the common areas,

expect pushback. Consulting your attorney first will help you consider how much pushback to expect and what the board’s stance should be. Almost all restrictions have been tried before; there are usually cases attorneys can reference. Before proceeding down the same path as another, attorneys can review those past experiences to save your association money and potential headaches.

■ **Purchasing or selling property on be-**

half of the association. All of these matters, including changing parking space designations or boat slip assignments, are sensitive to owners. Real property conveyances should be handled by an attorney who can prepare the proper documentation and review title concerns.

■ **Pursuing an owner for a violation.** Before threatening certain action in a demand letter, ensure the board has authority. You also might have more tools at your disposal to resolve the violation; those tools should be mentioned in the demand. Sending a premature or incorrect demand letter puts the association in an inferior posture.

■ **Purchasing insurance coverage and submitting claims.** Many boards think they know all when their community suffers damage from a fire, flood, tropical storm, hurricane or other disasters. In fact, the cards are stacked against a board trying to maximize its recovery on an insurance claim. Most boards fall prey to common industry myths that insurance policies will be canceled or rates will rise if a claim is made. In fact, coverage cannot be canceled for those reasons. A board’s primary function is to maintain, repair, replace and insure the common areas and association property. Not only should a board consult with its attorney immediately after suffering a loss, it should consult with him or her prior to placing coverage; the coverage limits and true cost to owners need to be understood.

■ **Getting served with a recall petition.** You might not have followed the advice above if you find yourself on the receiving end of one of these. There are certain statutory and documentary procedures that must be strictly followed to properly effectuate recall.

If the association’s problem doesn’t fit into one of the scenarios above, board members should come to a consensus decision. You may not want to have a high legal bill, but you also don’t want to find yourself in over your head. **CG**

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