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Fiduciary Duty— What It Is, And is NOT

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The term "fiduciary duty" is often used, but with a misunderstanding of what it means. HOA Directors are considered "fiduciaries" because they care for the community's property and finances and are therefore in a position of trust.

The basic fiduciary duties are care, loyalty and good faith. A fiduciary is expected to exercise due care, to put the other's interests ahead of their own, and to work in good faith for the other's best interests.

Much confusion exists regarding where the HOA director's fiduciary duties are owed. Homeowners often contend directors personally owe them fiduciary duties, but those duties are owed to the association and not its individual members. The director controls association assets and funds, and therefore is a fiduciary to the association. The HOA director does not control an individual homeowner's funds. HOA directors cannot be a fiduciary to each individual member because directors periodically must pursue homeowners for assessment delinquencies or rules violations. If the director were a fiduciary to the individual member, that pursuit of delinquency or violation would breach the duty of loyalty toward that member, but the loyalty is to the corporation.

After being outvoted by the board majority, a director strongly believing the decision is in error can be tempted to believe their "fiduciary" duty requires them to continue arguing the issue after the decision, even taking the issue to the membership at large. However, the director's loyalty is to the corporation, and the corporation has decided. Even though the director believes the decision is a poor one, the director's loyalty to the corporation compels the director to support and not frustrate the board's decision.

The duty of loyalty to the corporation means the director will avoid conflicts of interest. The director never should individually receive benefit which other homeowners do not. When there is a conflict of interest, the director should disclose that conflict and then not participate in any discussion of the topic.

Loyalty requires the director protect confidential information (normally executive session items), even after leaving the board. That loyalty also means a director must account to the corporation for any funds handled by the director.

The duty of care is often called "due diligence." This means that directors will make decisions based on the appropriate competent information. Most of the time, the association's manager is that resource. However, some decisions require extra expertise such as from contractors, engineers, arborists or lawyers. The duty of care requires directors to have sufficient information from qualified persons to make the decision. Sometimes the cost of this expertise is not anticipated and not budgeted, and the temptation is to try to avoid the expense. Reasonable care requires the use of appropriate necessary expertise, not just when it is budgeted. Sometimes a director will have specific expertise in a topic at hand and want to advise the board. When this happens, the director is not acting as a director but is an unpaid consultant and could be held liable for their advice. Savvy directors know their role as directors is to make good decisions and not to advise, and so support hiring outside experts for advice.

Wise directors also ensure the HOA has adequate directors and officers insurance in place, just in case.

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