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## **10 THINGS I HATE ABOUT YOU: HOW TO TAME THE BOARD OF DIRECTORS**

**November 14, 2023**

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**SUMMARY:** This seminar is loosely adapted from the 1999 movie Ten Things I Hate About You. The various personalities of the fictitious board of directors and homeowners living in Padua Homeowners Association present challenges that are not unique. The typical cast includes the overworked community manager, the newbie, the former board member, the bully, and the rogue director. The stage is set for a thoughtful presentation and discussion about managing chaotic meetings, conflicts of interest, secret discussions, removal elections, and conflict resolution.

### **OUTLINE:**

#### **1. Hypothetical Plot**

Cameron, a new homeowner in Padua HOA, recently joined the Board and is getting to know everyone. He has never served on the Board and doesn't even know what the CC&Rs or governing documents are. Cameron is offered little guidance from Ms. Perky, the community manager. She is too busy with writing violation notices and managing her other properties. Cameron's new best friend and former director, Michael, is there to warn Cameron about the other directors, particularly, the popular and know-it-all Board President, Bianca. Bianca often holds parties with a couple of the directors where they discuss the HOA's business. Michael has been ostracized from Bianca's social group of homeowners and removed from the Board after several rants about pending litigation on Facebook and Next Door. Bianca's sister, Kat, is also on the Board. The homeowners do not like Kat because she is "rogue" and always disagrees with the majority of the Board. Kat hates Joey, who served on the Board since the community transitioned from developer control. Joey is a bully, scheming behind the scenes to hire his friends and win over Kat's sister, Bianca. Meanwhile, the other senior director, Patrick, is caught up in the middle. Patrick understands why Kat doesn't want to be a director anymore and tries to bribe her into staying on the Board by buying her a guitar.

#### **2. The Cast of Bad Actors**

- A. **Cameron** – the Newbie Directors - fiduciary duty
- B. **Ms. Perky** – the Overworked Community Manager – selective enforcement
- C. **Bianca** – Popular President – secret meetings
- D. **Michael** – Former Director – disclosure of confidential information and social media
- E. **Kat** – Rogue Director – unprofessional, security, removal
- F. **Joey** – Bully Director – conflicts of interest, pot stirring, soapboxes, paper tigers
- G. **Patrick** – Director – caught in the middle, peacemaker

### 3. Fiduciary Duty

- a. What is it? The legal obligation for Board members to act in the best interest of the Association. Duty of Care and Duty of Loyalty. (ARS § 10-3830)
- b. Why important?
  - i. Sets the framework and standard for Board member conduct.
  - ii. If this duty breached, not only would the Association be harmed, but the breaching Board member could be personally liable.
  - iii. Nonprofit Corporation Act: A director's duties must be discharged:
    - 1. in good faith;
    - 2. with the care an ordinary prudent person in a like position would exercise under similar circumstances;
    - 3. in a manner the director reasonably believes to be in the best interest of the corporation.
- c. What does this mean in practical terms?
  - i. It's not about what you want. It's about what's in the best interest of the entire community;
  - ii. Your actions must not exceed your authority as a Board member;
  - iii. You must protect confidential information and avoid making statements that could damage the Association;
  - iv. You must treat all homeowners fairly and equally. Avoid selective enforcement.
- d. Nonprofit Corporation Act provides:
  - i. Board members are entitled to rely on opinions of experts (lawyers, accountants, property management companies, and other you reasonably believe to be competent);
  - ii. Presumed to act in accordance with your fiduciary duty and in good faith;
  - iii. Burden is on party challenging the action (need clear and convincing evidence).

### 4. Board Meetings

- a. Practical Duties
  - i. *Notice to Members*: "48 hours" notice can be given by:
    - 1. Newsletter or other mailing;
    - 2. conspicuous posting; or
    - 3. any reasonable means as determined by the Board.
  - ii. *Agenda*
  - iii. *Videotaping/Audiotaping*
    - 1. Association's own video or audiotape.
  - iv. *Emergency Meetings*
    - 1. 48-hour rule
  - v. *Telephone conference*
  - vi. *Location of Meetings*

- b. 2 Types of Board Meetings: - Open and Closed (ARS §§ 33-1804 & 33-1248)
- i. *Open (Regular Session) Meetings:* Open meetings are open to the membership or their representatives designated in writing.
    - 1. Members (or their representatives) must be allowed to speak at an appropriate time;
    - 2. Board may place reasonable time restrictions on those speaking but shall permit a reasonable number of people to speak on each side before Board takes formal action on the issue.
  - ii. *Closed (Executive Session) Meetings:* All meetings must be open, except for discussion about the following, which can be held in a closed session:
    - 1. Privileged communications between attorney and the HOA
    - 2. Pending or contemplated litigation
    - 3. Personal, health or financial information and records regarding a member, an employee of the HOA or an employee of a contractor for the HOA.
    - 4. Matters relating to the job performance, compensation, health, or complaints against an employee of the HOA or an employee of a contractor of the HOA who works under the direction of the HOA (e.g., management company employee)
    - 5. Discussion of a member's appeal of any violation cited or penalty imposed by the Association, except on the request of the affected member that the meeting be held in open session.
  - iii. Before entering into executive session, the Board is required to identify either during the open meeting or on the meeting notice the specific reasons as set forth in the law allowing for the holding of the executive meeting.
  - iv. Note that the Board has the *right* to go into executive session to discuss these items, not the *obligation*.
    - 1. The Board should *always* hold discussions on attorney/client privileged advice and personal information of an owner in executive session
  - v. Board Confidentiality – this is extremely important both legally and practically. Confidential information must be kept confidential, whether you are a current or former Board member.
    - 1. Legally:
      - a. Disclosure could harm the Association by waiving the attorney-client privilege;
      - b. Disclosure would be a breach of the Director's fiduciary duty to the Association.
    - 2. Practically: It hurts the Association because it's divisive. It can create rumors and innuendo without a fair presentation of the issue.
    - 3. Board members need to be especially careful when engaging in social media and discussing Association issues thereon.

c. Types of Invalid Meetings – Email Meetings and Informal Meetings

- i. *E-mail meetings.* They are inappropriate because:
  - 1. Not open to the members;
  - 2. No notice is given;
  - 3. Remember: Most e-mails are discoverable in litigation.
- ii. *Informal/Impromptu Meetings.* Whenever a quorum of the Board is present together discussing Association business, even if it is an informal or impromptu gathering, State Attorney General has taken the position that a quorum represents a Board meeting.
  - 1. Must be open to members;
  - 2. Must have proper notice to members;
  - 3. This includes “workshops,” “work/study sessions,” etc.
- iii. What about committee meetings?

d. Keeping Meeting Minutes

- i. *Tips for Minute keeping:*
  - 1. Boards should keep executive session minutes separate from open meeting minutes, to help avoid inadvertent disclosure;
  - 2. Minutes should only include the agenda items, the motions made, and whether the motion passed;
  - 3. Minutes should not contain significant discussion about items.
- ii. Closed Session Minutes: Should be drafted very carefully. Just because the Board is in executive session does not mean that the minutes from the meeting are not discoverable in court (except attorney-client privileged information).

e. Taking Action without a Meeting

- i. Nonprofit Corporation Act allows Board to take action without a meeting by unanimous written consent.
  - 1. Must be unanimous;
  - 2. Must be in writing (e-mail is fine);
  - 3. Written consents must be gathered together. Ideally, they should be attached to minutes of next Board meeting.
- ii. There is some risk in this method. Someone could argue that the Open Meeting laws requires an actual meeting, so that members have an opportunity to speak before an action is taken. Furthermore, the legislature added “intent” language to the law clearly favoring open meetings.
- iii. We advise Associations to limit actions by unanimous written consent to either:
  - 1. Emergency issues (imminent threat to life, health, safety or property that could not wait for the 48-hour notice timeframe to be addressed);

## **5. Conflict of Interest (ARS §§ 33-1811 & 33-1243)**

- a. If any action would benefit a Board member or close family member, the Board member must declare the conflict of interest.
- b. Must be done in open meeting before discussion or action on the matter;
- c. Conflicted Board member may then vote, but we suggest they abstain to avoid any appearance of impropriety;
- d. Contract entered into in violation of this procedure is void.

## **6. Rogue Board Members**

- a. What is a rogue board member?
  - i. One who acts outside the scope of their authority as a Board member, or in a manner that is in opposition to current Board policies or decisions.
    1. Examples:
      - a. Interfering with Association vendors
      - b. Spreading rumors in community to undermine Board
      - c. Distributing attorney/client information
      - d. Creating disruptions at Board meetings
      - e. Defamatory statements about other Board members
      - f. Misrepresentations
      - g. Actions beyond authority and duties.
- b. How do you handle a rogue board member?
  - i. Code of Conduct
    1. Content
      - a. Can attempt to address conduct, role, and duties of the Board members and the consequences for failing to abide by the policy.
    2. Enforceability
  - ii. Resignation
  - iii. Attorney Involvement
  - iv. Removal
    1. Qualifications to serve on the board
    2. Forced removal from the board (ARS §§ 33-1813 & 33-1243)
      - a. Board members may be removed by a majority of owners voting a special meeting of the members after an application has been submitted signed by a certain number of owners depending on the size of the community.
      - b. Take note that if a properly signed removal petition is received by the Board and the Board fails to hold the required meeting within 30 days of receipt of the petition, the entire board will be removed on the 31<sup>st</sup> day from receipt of the petition.

**7. Ways Board Members Get Into Trouble**

- a. **Not knowing their governing documents**
- b. **Thinking that they know the law**
- c. **Thinking they don't need experts**
- d. **Micro-managing/not knowing proper role**
- e. **Not cooperating with other Board members**
- f. **Not preparing for meetings/not showing up**
- g. **Not conducting professional meetings**
- h. **Failing to maintain confidences**
- i. **Making decisions based on principles; winning the battle, but losing the war**
- j. **Failing to Enforce or Consistently Enforce the Governing Documents**