Q&A: Your Most Common Questions, and the Answers

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BOARD AND ATTORNEY ISSUES

Q: Although I am a board member in good standing, the board excludes me from its planning meetings and generally shuts me out on its discussions held outside of open meetings, what can I do?

There have been many complaints to the Association Regulation Unit (ARU) by those elected to the board that they weren't included in board discussions because they weren't in lock step with the pre-existing board or board president. In response, State law was amended to require that all board members be provided an equal opportunity to participate in any meetings of board members. (NJAC 5:26-8.12(d)) Additionally, again in response to complaints, the law prohibits removal of board members except "...in accordance with the bylaws or by the board for good cause directly impacting the member's ability to serve" (NJAC 5:26-8.11b). Based on complaints, that law also specifically prohibits a board from removing a member for disagreeing with the majority or for violating a confidentiality agreement without an ADR providing substantial credible evidence that the violation adversely affected the interests of the association members.

If your exclusion was violative of law and thus improper, you can start with a demand for Alternate Dispute Resolution (ADR) but also can files a complaint with the New Jersey Department of Community Affairs' Association Regulation Unit (ARU) and request their action. However, consider this: Was the association attorney aware that the board members deliberately excluded you from meetings of its members? There is a possibility that no one on the board mentioned this violation to the association attorney. An excluded board member should notify the board and attorney in writing. Even if one suspects that the association attorney always supports the board,

it is advisable to mention the law and put the attorney on notice. One would expect a responsible attorney to make appropriate inquiries of the board and take appropriate action.

Many people elected to the board in response to owners objections to board failures have discovered the frustration of being in the minority. Those wishing to turn around boards not acting fairly or in the best interests of the community should consider running for election as part of a slate dedicated to making improvements. Only by having a majority vote on a board can members make a formal difference. (That is not to say that dissenting at meetings and placing objections on

Q: Our board records our association meetings. I have requested twice via email for the copy of the recorded transcript. No reply. Is the recorded transcript considered a part of the meeting minutes? Should they be fulfilling my request of the transcript?

A: NJAC 5:26-8.12 (f) requires that "…minutes shall be made available to association members in a timely manner before the next meeting…" Your board is obligated to make "minutes" available. If the association uses a recording as its minutes, the recording must be made available. This is probably rare as would be a board actually transcribing a recording in the manner of a court transcript. In all likelihood, the board has minutes made from the recording. By their very nature, minutes are NOT a transcript.

Even if the board drafts written minutes from a recording, it may retain the recording for a period. Whether it makes the recording available in addition to written minutes is for board discretion in the absence of a governing document specifying such. The law is silent on the matter. This is yet another in the long list of issues that should be addressed in the association's bylaws. Owners may wish to consider having a bylaw that compels the association to record open meetings and retain that recording (which can be beneficial to understanding what went on at a meeting) for a reasonable period, for example, six months, and make it available to any owner upon request.

Q: I and others in my community have received threatening letters from our Association's attorney. Isn't the attorney supposed to represent all of us? How does the attorney's fiduciary duty to my association and its members fit in? How can the attorney reconcile what's in the best interest of the Association vs. what's in the best interest of the community and its owners?

A: Rules of Professional Conduct (R 1.13) require lawyers engaged by entities are obligated to represent *the association's interests*; specifically, not those of the governing board. Unfortunately, as many owners have observed, the association attorney too often appears in lockstep with the board – even in opposition to clear governing documents or state demands to act in good faith, complying with laws granting owners' rights. But remember, even if there is legal support for a

board action or position owners do not agree with, that is *not* evidence that the action not in the best interests of the association.

One argument attorneys make to justify support for what a board does is their contention that the board *is* essentially the association. Thus, "whatever the board does is in the best interests of the association." That is obviously absurd, but it provides a fig leaf for their support of what the board wants. Many owners can verify that their association attorney too often supports whatever the board wants.

Attorneys are ultimately subject to ethics regulations issued by and enforced by the New Jersey Supreme Court. Most disciplinary actions are initiated in the various district ethics committees composed of attorneys, with a public member on any hearing panel. Owners who can document a clear violation of R1.13, which is not an easy task, can file a complaint with the ethics committee in their area. (Go to www.njcourts.org for more information on attorney ethics and discipline, and for forms and information on filing.) Mere allegations are insufficient. You will need to have to have written proof of an action that is not in the best interest of the association such as support for noncompliance with governing documents or law. Once owners start to file successful ethics complaints, attorney conduct will change their tune as a matter of self-protection. Naturally, another (simpler) means of changing attorneys is to change the board membership and hire a different attorney with clear instruction to act solely in the best interests of the association despite what the board may desire.

Q: We petitioned to recall a board member. This petition has been ignored.

The law permits owners to remove a board member by a petition to the board (not to the property manager or the association attorney) signed by 51 percent of members. (Although not specified, it is highly advisable that the members signing should be in good standing and thus eligible to vote.) The law requires that a special election be held within 60 days of submission (NJAC 5:26-8.11d). Notably, the law does not prohibit the member removed from standing for election at the special meeting. The remedies if the board ignores the petition are to either bring a court action to enforce the petition or file a complaint with the Association Regulation Unit. (NJAC 5:26-8.14-which includes the address for the ARU).

Q: Our board has issued multiple homeowner rules that seem to conflict with our bylaws and state law. How do we deal with this?

A: Initially it's good to remember the hierarchy of the governing documents. The foundational document is a master deed or declaration of covenants and restrictions (some have a master declaration or indenture and co-ops have a cooperative agreement.) Next in line are the bylaws and under them are formally passed rules. Above all of these are state laws.

The key issue here is whether the rules conflict with (as opposed to, e.g., "flesh-out" the intent of) the declaration or the bylaws. That is likely going to be a contested issue requiring a hearing. If the rules are in conflict with law or superior governing documents they are invalid. Essentially, such a rule can be alleged to constitute an improper amendment. In accordance with NJSA 45:22A-46d (5), there are only two bases for a board to unilaterally change bylaws: if necessary to comply with law, or IF it supplies all owners with a proposal and 10% of the owners do not vote to reject it. You may wish to request alternative dispute resolution (ADR), which will probably not result in a change but that will highlight specific conflicts and establish a basis for your contention.

An ADR proceeding can provide a foundation to inspire other owners to demand a change, which may force the board to eliminate conflicting rules. (One must always remember that the board has an attorney to support what it desires, daring owners to take formal legal action.) If the ADR outcome suggests that the board's ruled do conflict with one another or the bylaws, you may wish to consider filing a complaint with the New Jersey Department of Community Affairs (DCA) Homeowner Protection Bureau to see if it will address this matter.

Unfortunately, unless the conflicting rule also conflicts with a law administered by the State, the State will not intervene As with most matters such as this, it is community interest which will control. IF you can convince sufficient owners these changes are violative of governing documents to their detriment, you can petition to remove existing board members (see NJAC 5:26-8.11(d)) and elect new ones who will be more responsive to owner interests and act more transparently with owner input. Owners are also empowered by the law to amend bylaws to clarify the matter (NJSA 45:22A-46d; NJAC 5:26-8.13e)

Q: Our board has been engaging in biased, unsavory activity against certain owners and acts in a way that I believe is unfair and illegal. How can we amend our bylaws to reign them in?

A: Before making such a claim you must objectively examine the conduct on both sides, which requires access to all the facts. This may not be possible because violation matters will probably be held confidential with the board. No known bylaws would authorize biased or illegal action. Before working to change bylaws, you must carefully read them as well as the provisions of the law giving great powers to an association board (see e.g., NJSA 46:8B-15

If board members are consistently acting in an unprofessional manner, the answer is to change the board. Currently, there is no specific ethical standard for association board members. As a nonprofit corporate entity they have general fiduciary obligations that owners would have to enforce through a lawsuit. Alternatively, if a sufficient number of owners are concerned, 51% can file a petition with the board to remove member(s). As you might expect, the main concern for board members is staying on the board-this is especially true for the board president. There will

also be an opportunity for concerned owners to run for election and change the board's composition to be more concerned about issues affecting owners. Thus it is important to check governing documents concerning elections. The law requires elections either every two years or in accordance with association governing documents but in no event less that every four years.

It is doubtful that standard bylaw provisions, such as those requiring that board members act fairly and avoid conflicts of interest, would prevent bad conduct. But, owners can demand bylaws that do specific things to limit board authority, such as by limiting fining power and requiring owner votes on large expenditures (for example, any expense totaling 5% or more of the annual budget). You can refer to your governing documents for information about how owners can amend bylaws. If there are none, or it requires approval by more than 2/3 of the owners, be aware that state law empowers owners to do it by majority vote. If there is no procedure, 15 percent of the owners can petition the board for a special meeting to vote on an amendment to the bylaws. (See the NJ Admin Code, NJAC 5:26-8.13 for details.) That petition triggers a special meeting of the membership to be held within 60 days. As you might expect, the proposed amendment must be in clear language and consistent with both governing docs and the law.

IF the board refuses to act on the petition you can request alternative dispute resolution (ADR). If ADR doesn't work to convince the board to comply, file a complaint with the State's Association Regulation Unit it (ARU) in Dept of Community Affairs (DCA). If the board simply refuses to comply with its own bylaws and ADR doesn't work, you and your like-minded neighbors may have to file a complaint in Superior Court to compel compliance.

Note there is no specific ethical standard for board members-as a nonprofit corporate entity they have general fiduciary obligations that owners would have to enforce through a lawsuit. Alternatively if a sufficient number of owners are concerned, 51% can file a petition with the board to remove member(s). As you might expect, the main concern for board members is staying on the board-this is especially true for the Bd Pres. There will also be an opportunity for concerned owners to run for election and change the board's composition to be more concerned about issues affecting owners. Thus it is important to check governing documents concerning elections. The law requires elections either every two years or in accordance with association governing documents but in no event less that every four years.

DISPUTE RESOLUTION

Q: Given that HOAs are required to have an Alternative Dispute Resolution (ADR) process, are they obliged to address disputes between lot owners or just between the board and one or more lot owners?

A: The Condo Act in NJSA 48:8B-13-14(k) requires each association to have a "fair and efficient" ADR procedure for the resolution of housing-related issues between owners and the association and between unit owners. ("Housing-related" is broadly interpreted to encompass virtually all association-related issues and is only inapplicable to things like auto accidents and purely personal disputes having nothing to do with association living). That provision applies equally to all homeowner associations. No association officers or board members can comprise the method of providing ADR.

You can request ADR to contest the basis for the fine or that the fine itself is unreasonable or unnecessary to gain compliance. Along with requesting ADR, you should ask for a copy of your association's ADR procedure, which is required by law.

At this point, the "between unit owners" requires the assent of both parties (unlike a dispute with the association in which the board must participate). You would expect that a board would encourage owners to engage in an ADR procedure to settle neighbor to neighbor disputes in the interests of general harmony. The alternative is the owner feeling offended going to court and making it a formal expensive matter for both parties. Unlike ADR, which is a common expense, court proceeding are expensive.

If ADR is not successful, the only remedy is a court proceeding. You must pay for a private attorney or go *pro se* (represent yourself) unless you are low income and qualify for legal services from the State Civil Rights Division (such as by being handicapped) or have a case that the ACLU is interested in pursuing. Be aware that finding a private attorney to take an owner's case can be difficult, even if you can pay. You can contact your county bar association for references to local attorneys who take association cases (essentially real estate or corporate litigators). If your association does not have an ADR procedure or refuses to provide it to you, you may file a complaint with the Association Regulation Unit (ARU) of the New Jersey Department of Community Affairs (DCA).

Q: Is either party to a dispute permitted to skip the ADR process altogether and take the issue to a court of competent jurisdiction? If either party disagrees with the outcome of the ADR process, can it take the matter to a court.

ELECTIONS

Q: Our board recently postponed a trustee election indefinitely. We petitioned them to hold it, but our petition has been ignored. What can be done?

A: State law (NJAC 5:26-8.11(d) requires a new election within 60 days of the petition's receipt unless there is an annual meeting within 60 days. There is no "decision" required if the petition is valid – the board must schedule and conduct the election. NJAC 5:26-8.11(c) 3 requires that appointed members stand for election within one year of their appointment. This does not mean the board is absolved from complying with governing documents requiring elections be held sooner. That is a matter to raise in ADR or court.

The law requires boards to hold elections every two years unless the bylaws have a different interval, which cannot exceed four years (NJAC 5:26-8.9b). It also provides that if the association has not held an election in accordance with the interval in the bylaws 25% of the owners can petition the board to hold the election. The election must be held within 90 days of receipt of the petition.

A board that violates the 90-day provision is in violation of the law. This does not mean the board can wait 90 days to decide to do anything in furtherance of holding an election. The notice time constraints in NJAC 5:26-8.9(l) provide that notices of the nominations must be sent out between 30 to 60 days before the notice of election, which notice must be 14 to 60 days prior to the election date Thus, applying minimum advance notice times, if the board has failed to send out nomination notices 45 days after receiving the petition it is in violation by not being able to comply with the notice date requirements. Thus, technically one need not wait for the expiration of 90 days from receipt of the petition to find the board in violation.

If there still is no movement by the board, owners can request alternative dispute resolution (ADR) or file a complaint with the State Association Regulation Unit (ARU) in the Department of Community Affairs. It may be productive to start with an ADR demand after the expiration of 30 days from the petition with no action to force the Board to confront its pending violation and provide it with a chance to avoid the violation If one were to wait for ADR until 45 days after the petition is filed, the board could not comply with the notice time constraints.

FINES

Q: Our association has assigned an exorbitant fine against our condo unit. We believe this is in violation of the bylaws and New Jersey Condo Act. What can we do?

A: To be considered exorbitant, the fine would have to exceed the amount authorized by law. The law permits fines of between $50 and $500 per violation, and they can be imposed on a daily basis. (This is based on the State's fine authority for profit-making multifamily homes, and should be lowered through new legislation in recognition that associations are not profit-making entities. If your governing documents limit the amount of fines, that limit would apply. However, in any circumstances fines cannot exceed the legal standard.

A: Technically, neither an owner nor the board is required to use ADR before going to court. However, except in extraordinary cases, such as involving imminent or severe harm, one can expect that courts will remand a matter for ADR if one has not been held. As to an owner going directly to court, there are two considerations, The first is the nature of the remedy: if it is one requiring court action that could be justified. The other is pure practicality. The law favors resolution of disputes at the lowest level possible. Thus, unless you can demonstrate a compelling reason not to use the association ADR, you should use it, even if merely as a formality.

Additionally, if you request ADR with the association, as opposed to with a fellow unit owner, the association must participate, except as noted above. Unless governing documents or a court require owners to participate in ADR when having a dispute with another owner regarding an association matter, the participation is voluntary. In the interests of encouraging resolution of disputes one would expect associations to at least encourage owners with disputes to use ADR.

NJSA 46:8B-15(f)-which deals with fines, provides that an owner who does not believe that ADR resolved the matter is *not* prevented from seeking a judicial remedy. Therefore, it's unlikely that a court would refuse a lawsuit in a non-fine ADR case. Thus far, an ADR outcome is not considered binding on the association

FINANCIAL

Q: I suspect that our board is not spending our money properly. What can be done?

A: As an owner in a common-interest community you have the right to inspect financial records under the New Jersey Condo Act (N.J.S.A. 46:8B-16(d). It requires condominium associations to maintain accounting records, "in accordance with generally accepted accounting principles (GAAP), open to inspection at reasonable times by unit owners." According to the Condominium Act, such records include "(i) a record of all receipts and expenditures and (ii) an account for each unit setting forth any shares of common expenses or other charges due, the due dates thereof, the present balance due, and any interest in common surplus." The New Jersey Department of Community Affairs (DCA) logically has taken the position that the right of inspection includes the

right to copies of those documents. Thus, it supports an owner's right to make copies of GAAP financial records that are required to be open to inspection. The classification of what records must be kept pursuant to GAAP is a matter for determination by financial professionals. Some associations do not object to owners making the copies, though they may charge the cost for the copying (unless your bylaws provide otherwise). Those costs must be reasonable, or it constitutes interference with the owner's right. If you believe the charges are excessive, you can file a complaint with the DCA.

You should make your request for access to available financial information in writing to the board, copying the association manager (if there is one). In the event the association ignores the writing or refuses access, your writing will serve as evidence when you file a complaint to the Association Regulation Unit in DCA's Bureau of Homeowner Protection. A frequent mistake owners make is to demand that the association send or provide them with the records. An association may choose to do so but it has no such obligation. The legal right is for owners' access.

Whether or not the budget is an item required to be kept in accordance with GAAP, the budget is a document the board has the power to determine. The budget is an item that must be voted on by the board at an open public meeting and thus is already accessible to owners as part of the meeting minutes. As the members elected to run the association, those constituting the board have the right to make financial decisions for the association such as determining amounts and timing of assessments or whether to take out loans or a mortgage, as long as there are no restrictions in the association bylaws.

Owners who disagree with financial decisions have the opportunity, pursuant to the election law (sometimes referred to as the Radburn Law), to run for the board or support candidates who share their view regarding operations. If you believe, based on facts, that there is either poor or corrupt financial decision making, you should consider banding together with other owners, educating them about the concerns. It is a fundamental principle that merely making claims about abuse will not be persuasive in enlisting the support of fellow owners. Effective action to enlist others requires gathering facts, starting with information in existing financial reports.

As with many homeowner association issues, if you cannot convince others of a sound basis to demand reform, that person must decide if they have the resources to take on the association alone. Neither the State nor courts will judge the financial acumen of boards. Boards can make ill- advised decisions and spend profligately. Alternatively if facts can show things such as embezzlement or fraud, that is a matter to bring to the attention of law enforcement. Be advised, it would be exceedingly rare for a prosecutor's office to do any investigation without documentation of wrongdoing – it is up to you and fellow owners to provide the factual underpinning for a criminal case.

Q: Are association audits legally required? (We haven't had one for over six years.)

A: As long as the developer maintains a majority of the board, the law requires an annual audit delivered to each unit owner. Once owners elect a majority of their own to the board this provision no longer applies. Owners should review their association governing documents to determine if audits are required when under owner control. This is not typical. For larger associations with significant funds, one might expect the association's accountant to recommend an audit by an independent firm. If you are in an association that has significant funds (e.g. takes in $250,000 or more per year) and expenses seem excessive for that amount, you may wish to join with other owners and use your authority to propose a bylaw revision requiring an annual audit. It would be best to first ascertain probable costs because the owners will have to pay so be prepared for a cost benefit analysis. Associations with lesser incomes may opt for periodic audits, e.g. every three or five years. If your association's governing documents *do* require an audit and the board does not comply, you can request alternate dispute resolution (ADR) to attempt to gain compliance but at least point out the violation. Although an association must make ADR available upon request, its outcome is not enforceable. The unfortunate reality is that associations rarely abide by any ADR outcome unfavorable to the board's wishes. Ultimately you may have to go to court at your own expense, unless the court grants you counsel fees – which is discretionary and not common.