

What Every Community Association Board Member Should Know

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Published on www.lorman.com - March 2022

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Written by Hans C. Wahl

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Being a community association board member can be challenging and difficult at times. It is a volunteer position, and those who take on that role provide a valuable and needed service for their communities. There are no specific qualifications required for being a volunteer community association board member. Homeowners from all walks of life can serve in that capacity. As a result, many owners with good intentions join the association's board, but then quickly realize that they are unfamiliar with the applicable laws or how to effectively lead a corporate entity tasked with enforcing covenants and restrictions on property. This blog post will provide some helpful tips to community association board members.

1. **The requirement for board member certification:** The HOA Act and Condominium Act both require that within 90 days after being elected to the board, the new board member shall certify in writing to the secretary of the association that he or she has read the association's declaration of condominium, articles of incorporation, bylaws and written policies; that he or she will work to

uphold such documents and policies; and that he or she will faithfully discharge his or her fiduciary responsibility to the association's members. Or, in lieu of this written certification, the newly elected board member can attend a board member certification class administered by an approved education provider within 90 days of being elected.

- 2. Know the remedies for covenant and restriction violations by owners and tenants:** Both the HOA Act and Condominium Act allow community associations to levy fines and suspend an owner and tenant's use rights to the community amenities. Voting rights may also be suspended for certain reasons. An association can also bring legal action against an owner and tenant for covenant violations, including seeking an injunction order against the owner and tenant to prohibit the continued violations. The associations that use the power granted to it by the Florida Statutes are the associations with less overall problems from their members and tenants. Conversely, those that fail to properly address problems end up dealing with more costly issues in the long run
- 3. There is a way to reinstitute any covenants, rules, and restrictions that went unenforced by prior boards:** Sometimes a prior board will fail to enforce a

certain rule, covenant, or restriction. That inconsistent enforcement of the covenants can lead to a “selective enforcement” defense by owners and tenants. That situation can be avoided, allowing the rules, covenants, and restrictions to be enforced consistently once again if the board follows the proper procedures. In short, the board must send written notice to every member, citing the rule, regulation, or covenant to be enforced and the date in which enforcement will begin uniformly for everyone.

4. **Meet with the association’s attorney to discuss all outstanding legal matters:** Board members must have a thorough understanding of all current legal matters involving the association. A prior board may have taken a hands-off approach to the association’s legal matters. A new board may disagree with the direction the prior board was going with certain legal issues. The board should make it a priority to discuss all current legal matters with their attorney and establish good communication channels at the outset.

5. **Establish a collection policy for addressing past-due accounts before it becomes a financial problem:** Board members have a fiduciary duty to maintain the association’s budget. Unpaid assessments from a few owners become a liability for all other owners in the form

of higher assessments across the community if the delinquent accounts are not timely addressed. The Florida Statutes provide community associations with numerous collection tools and authority for addressing delinquent assessments. Do not let your board procrastinate and fail to act timely, which will ultimately hurt the association's budget. A board should meet with its attorney to develop a formal collection policy and strategy, and then implement it to maximize assessment revenue and maintain the overall budget.

6. **Associations can collect unpaid assessments from a unit's tenants:** It is unfair for an owner to collect rent each month but fail to pay the association's assessments. Both the HOA Act and Condo Act authorize associations to make a demand of tenants for their rent payments until the owner's past-due account is paid in full. If the tenant complies, the owner cannot evict the tenant. However, if the tenant refuses, the association has authority to evict the tenant. This is a powerful collection tool that associations should utilize but oftentimes overlook.

7. **Don't ignore mortgage foreclosure actions:** Associations will get served with a mortgage foreclosure action within their community; however, the foreclosure actions are often ignored by the board. Ignoring mortgage

foreclosure actions of properties within your community can be a costly decision. First, lenders are not always in a hurry to foreclose so the action could linger on for years. This may keep the property vacant with a delinquent owner who has moved away, resulting in no assessment revenue from the property for a prolonged period. Second, once an association appears in a mortgage foreclosure action it has the statutory ability to expedite the foreclosure process. This forces banks to foreclose sooner rather than later, take ownership of the property, and make those assessment payments to the association. Also, by appearing in the mortgage foreclosure action, if there is a foreclosure sale with a third-party purchaser, the association should be able to make a claim for any excess sale proceeds to pay for any past-due assessments owed to the association on that property.

8. **Timely investigate and address any potential construction defect claims either after turnover or after construction activity has been performed at the association:** Do not procrastinate on inspecting and identifying possible construction defect issues and pursuing claims that can be rightfully made against the developer or the contractor for those defects. The statute of limitations on most construction defect issues is four years, with a maximum ten-year limitations period in certain

situations. One of the first things a board should do either after turnover or after construction work is performed at the association is to have an independent person inspect the property for potential construction defects. Failing to timely address defects in construction work can lead to costly damage and repairs in the future.

9. **Understand the law on lender liability for unpaid assessments on foreclosed properties:** The HOA Act and Condo Act both state that a lender who acquires title to a property through foreclosure is only liable for the lesser of the prior 12 months unpaid assessments or one percent of the original mortgage debt. However, there are some exceptions to this protection that could make a lender responsible for the entire debt owed by the prior owner. For example, this protection only applies to a first mortgagee, not a second mortgagee. Moreover, the first mortgagee must have named the association as a defendant in the foreclosure action, and if there has been an assignment of the underlying mortgage along the way it may destroy this protection if not executed properly. A board should have their association attorney analyze the lender's liability before conceding to a reduced payoff.

10. **Amending the association's governing documents can be very beneficial:** The HOA Act and Condo Act have been amended and revised numerous

times over the years to provide associations with more rights, power, and available remedies. However, many declaration and bylaw provisions are outdated and fail to delegate the board with the power it may now have available under the Florida Statutes. Having an experienced association attorney review older declarations and bylaws for possible revisions could end up paying dividends back to the association in the long term.



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