

CONFIDENTIALITY REQUIREMENTS

OF THE BOARD OF DIRECTORS IN A COMMON-INTEREST COMMUNITY

Did you know that a member of the Board's requirement to keep confidential matters confidential lasts for ever? As tempting as it may be at times to tell your friends, family and neighbor about some of the unique or weird issues that are discussed in Executive Session, your duty as a member of a community association board in Nevada requires that these matters not be discussed outside of that meeting with anyone other than those authorized by the board which can include legal counsel and/or manager when applicable.

Owners in Community Association's have a right to certain association records as detailed in NRS 116.31175, NRS 116.31177, NRS 116.3118 and NRS.116.31085.

As NRS 116.31175 states that, "Except as otherwise provided in this subsection, the executive board of an association shall, upon the written request of a unit's owner, make available the books, records and other papers of the association for review during the regular working hours of the association..." there is some confusion on what may and may not be disclosed at the written request of an owner.

The provisions of the above section do not apply to personnel records of the employees of the association and the records of the association relating to another unit's owner. This provision does not apply to the management contract unless the manager is an employee of the association.

All Owners Not Entitled to Attend

As the Board of Directors is allowed in NRS 116.31085 to meet in executive session to, "... (a) Consult with the attorney for the association on matters relating to proposed or pending litigation if the contents of the discussion would otherwise be governed by the privilege set forth in NRS 49.035 to 49.115, inclusive; (b) Discuss matters relating to personnel; or (c) Discuss a violation of the governing documents alleged to have been committed by a unit's owner including, without limitation, the failure to pay an assessment, except as otherwise provided in subsection 3." These issues are not privy to owner scrutiny and review.

Section 3 continues on to state the rights of the owner and the board with regards to any hearing that is held. An owner who is not requested to attend an executive session hearing **by either** the community association **or** the unit's owner, is not entitle to attend or speak at a meeting of the board held in executive session.

As all owners are not automatically allowed into the executive session meeting as detailed above, any discussions held at that meeting are not to be disclosed to anyone other than those allowed into that particular part of the meeting.

A copy of the decision of the portion of the meeting where a decision was made regarding a particular unit's owner is allowed to be given to that owner, but not a copy of the entire executive session meeting.

Temptation to Tell Others

It is always tempting for a member of the board to let other owners know about issues that they as individuals have privy to because of their position on the Board. At times, it is almost more than the director can do to keep matters confidential as required by law.

When volunteering to serve as a member of the Board of Directors and being voted into office by the owners by secret ballot, many members of the Board fail to realize their confidentiality responsibilities. These responsibilities continue on even after the owner is no longer serving on the Board or residing in the community. Resigning from the board does not change any of the fiduciary and confidentiality responsibilities of that person.

Black's Law Dictionary defines Confidential as,

“Entrusted with the confidence of another or with his secret affairs or purposes; intended to be held in confidence or kept secret; done in confidence.”

This confidentiality requirement extends even to written communication between legal counsel and the board and/or any document marked as privileged and/or confidential.

Members of the Board may be held personally responsible for any action filed by an owner for violation of this requirement.

Personal Protections

Serving as a Director of a Nevada Non-Profit Corporation carries certain protections, however, if specific requirements are met.

NRS 116.3103 states, “Except as otherwise provided in the declaration, the bylaws, this section or other provisions of this chapter, the executive board may act in all instances on behalf of the association. In the performance of their duties, the officers and members of the executive board are fiduciaries and are subject to the insulation from liability provided for directors of corporations by the laws of this state. The members of the executive board are required to exercise the ordinary and reasonable care of directors of a corporation, subject to the business-judgment rule.” [Emphasis added].

Business Judgment Rule Defined

The Business Judgment Rule is defined in Black's Law Dictionary as:

“Such care, including reasonable inquiry, as an ordinary prudent person in a like position would use under similar circumstances.”

Each community association should carry Directors and Officers insurance to cover any actions taken by the Board of Directors as a whole, but this coverage will not extend to any actions where individual members of the board do not act in accordance with the above provisions. The insurance carrier may not even defend an individual's actions when acting outside of corporate protections, let alone pay any judgments.

Care should be given by each director to treat his or her position on the board with the respect required and act as a competent fiduciary.

(For further information on Fiduciary Duty, see our Nevada Real Estates Division Ombudsman's publication on **Fiduciary Duty**.)