

PROBLEM BOARD MEMBERS, WHAT CAN LEGALLY BE DONE?

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One of our first Ombudsman's for the State of Nevada stated that there are no problem owners or problem Board Members, there are just people with a different point of view.

At the time, my first thought was "how naïve". My second through was, "how naïve." Having managed for almost 20 years, I really tried to get with her thoughts and to see if I could go there. Yes, there are differences of opinions and a reasonable person will at least try to see the other person's point of view. As a past mediator for the Clark County Neighborhood Justice Center, I do understand that Management and the Board may be dealing with an issue with an Owner or another Board Member that is REALLY not the issue at hand.

Many members of the Board have an "agenda" when they seek election to the Board. I am somewhat embarrassed to state that I had an agenda when I served on my Master Association's Board of Directors. My agenda you ask? The landscaping was falling into disrepair and the Board didn't seem to share my concerns. I tried serving on the Landscape Committee first, but the Board didn't take the Committee's recommendations seriously and ultimately ended in a law suit with the company they picked when the service was put out to bid. They took the lowest bidder vs. at least considering the recommendation of the Committee; thus my decision to get on the Board.

Had I demanded that my sub-association community be renovated first and made my self-interests my priority, the Board would have had good cause to object and work against me. That is not what happened as I put the Community as a whole first in any decisions that were made or ideas that were proposed. My Community was actually put among the last when making decisions as the best thing for the Association was to consider the older communities first.

Many directors don't think this way nor want to try to think this way. They feel that people voted for them based on what they put in their candidate statement and they have the responsibility to move towards that position regardless of what they learn after getting on the Board and hearing otherwise.

A reasonable person, unless something is against the law, will look at the materials and the evidence presented by the opposing Directors and at least listen to their position(s). If they still don't agree, they vote against the issue when a formal vote is taken by the Board. As Nevada law clearly requires that the minutes show how each Director votes, their *no* vote is part of the minutes and those people who think that the owners position has not been taken into consideration will clearly see that the Director voted against certain ideas.

As Directors in a Nevada non-profit or Not for Profit Corporation, they are fiduciaries, which has the highest duty of care for another's property that there is in our law. Any decisions made must take that duty into consideration. Directors in common interest communities forget this duty quite often.

Nevada law provides for removal of directors who are not taking this duty seriously or causing problems for the community and owners. It does not require "cause" to be shown, just a vote of the owners.

2009 law changed the removal of a Director to be a lot easier than in the past few years. The below section details the process. (Remember that Notwithstanding means – Regardless of what your documents say).

NRS 116.31036 Removal of member of executive board; indemnification and defense of member of executive board.

1. Notwithstanding any provision of the declaration or bylaws to the contrary, any member of the executive board, other than a member appointed by the declarant, may be removed from the executive board, with or without cause, if at a removal election held pursuant to this section:

(a) The number of votes cast constitutes at least 35 percent of the total number of voting members of the association; and

(b) At least a majority of all votes cast in that removal election are cast in favor of removal.

2. Except as otherwise provided in NRS 116.31105, the removal of any member of the executive board must be conducted by secret written ballot in the following manner:

(a) The secretary or other officer specified in the bylaws of the association shall cause a secret ballot and a return envelope to be sent, prepaid by United States mail, to the mailing address of each unit within the common-interest community or to any other mailing address designated in writing by the unit's owner.

(b) Each unit's owner must be provided with at least 15 days after the date the secret written ballot is mailed to the unit's owner to return the secret written ballot to the association.

(c) Only the secret written ballots that are returned to the association may be counted to determine the outcome.

(d) The secret written ballots must be opened and counted at a meeting of the association. A quorum is not required to be present when the secret written ballots are opened and counted at the meeting.

(e) The incumbent members of the executive board, including, without limitation, the member who is subject to the removal, may not possess, be given access to or participate in the opening or counting of the secret written ballots that are returned to the association before those secret written ballots have been opened and counted at a meeting of the association.

3. If a member of an executive board is named as a respondent or sued for liability for actions undertaken in his or her role as a member of the board, the association shall indemnify the member for his or her losses or claims, and undertake all costs of defense, unless it is proven that the member acted with willful or wanton misfeasance or with gross negligence. After such proof, the association is no longer liable for the cost of defense, and may recover costs already expended from the member of the executive board who so acted. Members of the executive board are not personally liable to the victims of crimes occurring on the property. Punitive damages may not be recovered against:

(a) The association;

(b) The members of the executive board for acts or omissions that occur in their official capacity as members of the executive board; or

(c) The officers of the association for acts or omissions that occur in their capacity as officers of the association.

4. The provisions of this section do not prohibit the Commission from taking any disciplinary action against a member of an executive board pursuant to NRS 116.745 to 116.795, inclusive. (Added to NRS by 1993, 2354; A 2003, 2231; 2005, 2596; 2009, 2799, 2885, 2917)

What if the vote is taken and the members decide to keep the Director under consideration? A message has been sent by the owners. Either owners don't care one way or another and decided not to vote *or* they agree with the position of the Director or Directors who was/were not removed.

Is the Director harassing Management? Is the Director representing the Association on his own without authority from the Board? There could be a ton of issues that may be addressed here, but regardless of what it is, the Board needs to work together towards the best interest of the Nevada Corporation.

Neighborhood Justice Center is there to help with disputes. Their Mediators are trained to get to the bottom of the difference or differences and help the parties come to a written agreement on how they will act or what they will do. This agreement can be used in court if one party violates the agreement. Give them a try.

One other way is to have the Association's attorney take a look at the matter and if the Director is violating Nevada law or acting independently, the attorney can write the Director a letter explaining that his personal liability is at stake should he or she continue to act outside the authority of the Board. If the Director is correct in what he or she is doing, the attorney will bring this to the whole Board's attention and decisions can be made accordingly.

To just continue on with in fighting or a Director out of control will ultimately hurt the property values of the Association as word does get around and potential purchasers will not want to be involved in the drama and you may lose a really good manager and/or management company in the process. There are communities out there where a good management company will not touch them with a 10 foot pole as their reputation is so bad.

There have been Boards who have Team Building workshops as well, which works about 50% – 60% of the time. An outside person comes to a workshop and is going to listen to the issues. They will try to help the Board work through the issues so that they can move on towards protecting, preserving and enhancing the assets of the Nevada Corporation.