

Living Up to Your Fiduciary Duty as an HOA Board Member

Though this may be news to many homeowners diligently serving on association boards throughout the country, by stepping up to the plate and agreeing to volunteer your time and effort, you're agreeing to act as a fiduciary on behalf of your fellow owners. That's not just a big word. It carries legal consequences if you—even unknowingly—breach that duty. Here's what you need to know about fulfilling your fiduciary duty as an association board member.

1. What Fiduciary Means

"Being a fiduciary means that you have an obligation to take off your hat as a homeowner and put on your hat as an officer of a corporate board and use your best business judgment," explains Sima L. Kirsch, a principal at the Law Office of Sima L. Kirsch P.C. in Chicago. "That's the judgment that best applies to the facts you're dealing with and protects the fiscal and structural security of the building and the association and the well-being of its inhabitants."

2. HOA Board Members and Fiduciary Duties:

What You Must Know to Fulfill Your Duty to Your Association and Protect Yourself from Personal Liability

When you volunteered to serve your community association as a board member, did you realize you were agreeing to set aside your own interests and act as a fiduciary on behalf of the entire association? Are

you confident you know every scenario where you might trip up and expose yourself to personal liability by failing to live up to this important duty?

"When you're acting as a fiduciary, you're serving in a representative capacity, and you must put the interest of the association's homeowners collectively first," says Michael S. Hunter, an attorney and partner at Horack Talley in Charlotte, N.C. "You must also exercise sound business judgment and a healthy dose of common sense."

There's also a confidentiality aspect of being a fiduciary. "For example, if there's an attorney-client privileged communication between the board and its attorney, by telling a third party that you were in a meeting with an attorney and this is what was said, you've just blown the confidentiality of that conversation," explains Justin D. Park, an attorney at Romero Park & Wiggins P.S. in Bellevue, Wash. "Or a lot of times boards want to keep initial discussions on dues and contractual obligations confidential. If the board says those things must be kept confidential, board members have an obligation to abide by that."

Park has encountered confidentiality issues first-hand while representing an association that had been sued by a homeowner. "The association split into a couple of factions. One group supported the homeowner, and the other didn't," he explains. "I had to explain to board members that they were the opposing party in the lawsuit brought by the homeowner and that regardless of how they felt about that homeowner, if they were at a meeting at which the lawsuit was discussed, they couldn't tell the homeowner about the discussions. One board member recused himself

from the discussions saying, 'I can't tell you that I'm not going to talk to this homeowner.' We were glad he did. It was the responsible thing to do."

3. Beware Other Breaches

A conflict of interest can also become a breach of your fiduciary duty. "If there's a matter before the board in which you or a family member has an interest," advises Hunter, "you should recuse yourself. You need to avoid even the appearance of impropriety."

You can also breach your fiduciary duty by failing to do the regular tasks that are involved in overseeing an association. "Board members can breach their duty when they don't hold regular meetings, don't pass their budgets properly, or treat some owners differently than others," says Kirsch. "There could be one owner that the board lets slide on assessments, while another is sent a late notice."

Though the term "fiduciary duty" sounds amorphous, it's not that hard to apply in everyday association management. You'll be safe if—regardless of the task you're performing as a board member—you execute your responsibility in good faith, with good judgment, without conflict, and by always putting the association's interest above your own.