

Fiduciary Responsibilities of the HOA Director

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Typical Purposes of Owners' Association

1. Manage, maintain, repair, replace common areas/elements
2. Enforce governing documents

Board of Directors

- Exercise Association powers
- Manage Association affairs
- Articles and bylaws – specify, limit role and function
- Can be elected by members, appointed, designated, or self-perpetuating by election by directors (if no members entitled to vote)

Standards of Conduct

- Chapter 55A North Carolina Nonprofit Corporation Act governs the actions of directors of Associations and sets forth the duties a director must follow in serving on the board.
 - Good Faith
 - Due Care
 - Loyalty



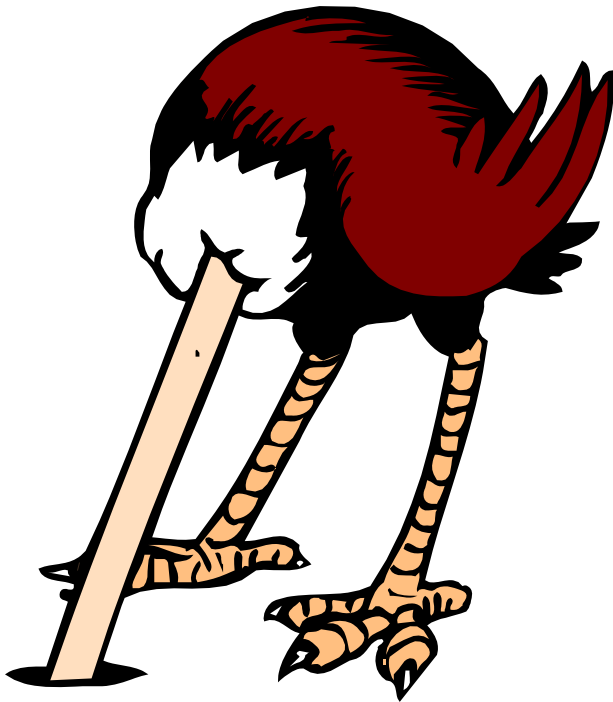
Good Faith

- Act honestly
- Act conscientiously
- Act fairly
- Decisions made for the best interest of the Association as an entity

Trouble With Acting in Good Faith

- Deliver bad news – avoid
- Say no to member requests – delay
- Misleading information – to avoid falling out of favor or upsetting members and other directors
- Personality conflicts
- Okay to be a lone dissenter

Duty of Due Care



- Affirmative duty to direct and supervise the affairs of the Association with diligence and care
- "With the care an ordinarily prudent person in a like position would exercise under similar circumstances"
- Make "responsible inquiries" to inform themselves as to condition of the Association and the conduct of its affairs

Trouble With Due Care

- "I didn't know."
- "I was too busy to focus on the issue."
- "I didn't attend that meeting."
- If reasonable attention to facts or reasonable inquiry into affairs of the corporation would have disclosed mismanagement or fraud, the director may have breached duty of due care.



Source: <http://www.barry-bonds.net/pictures.php>

Duty of Loyalty



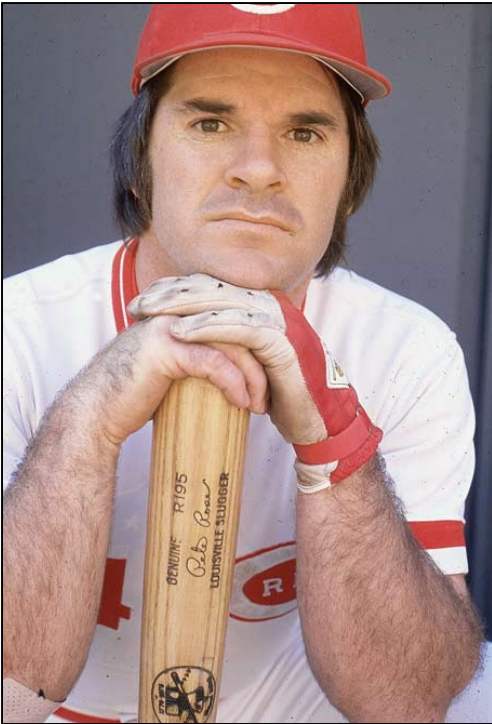
- Act "in a manner the director reasonably believes to be in the best interests of the Association"
- Prohibits director from using position on board for personal gain and to the detriment of the Association

Trouble With Loyalty

- Renting out the penthouse of a hotel, when more modest accommodations would suffice
- Solicitation of bids for the construction of a new facility – insider information
 - Not cured by the submission of lowest bid. The breach was use of the information.
 - Bid may have been even lower



Conflict of Interest



Source: www.sportsillustrated.cnn.com

- Transaction with corporation in which the director has a direct or indirect interest
- Direct interest – not defined in NC statutes. If he/she or a member of immediate family (in common use of the term) has either a material financial interest in the transaction or a relationship with other parties to the transaction that reasonably might be expected to affect judgment in a manner adverse to the Association.

Indirect Interest

- Another entity in which he/she has a material financial interest or in which he/she is a general partner is a party to the transaction; or
- Another entity of which he/she is a director, officer, or trustee is a party to the transaction and the transaction is or should be considered by the board of directors of the Association



Taking Action Despite Conflict of Interest

- A conflict of interest transaction is not voidable by the Association solely because of the director's interest in the transaction if any of the following are true:
 - Conflict was disclosed to the board and disinterested directors (but not by a single director) authorized, approved, or ratified the transaction; or
 - Conflict was disclosed to members and members voted to approve or ratify the transaction; or
 - The transaction was fair to the corporation
- Always recommend all interested directors refrain from participating in the deliberations and vote regarding such transactions

A Director Does Not Have to be "Right"

- Despite the duties discussed previously, it is important to understand that Chapter 55A focuses on the manner in which a director performs the director's duties on behalf of the corporation, rather than on correctness or ultimate result of directors decisions
 - Director and officer liability insurance coverage
 - Indemnification and liability – not personally liable for any action or inaction as a director as long as the director has performed the duties of the director in compliance with the standards of conduct

Questions



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