

A Legal Primer for Board Members

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GOALS

- ◆ General working knowledge of a variety of community association issues
- ◆ Decision making and avoiding liability – Standard of Care
- ◆ Be more versed in when to say Hmmmmm!
- ◆ Know where to look for answers
- ◆ How to understand the issues
- ◆ Know when you should and should not take action



Standard of Care



GOALS

- ◆ What is Standard of Care?
- ◆ How can I assist volunteers to perform their duties without having any personal liability?
- ◆ If volunteers are accused of wrongdoing who pays for any damages?
- ◆ What are risks associated with volunteering?



APPLICABLE LAW

- ◆ Discussed
 - Texas Property Code
 - Business Organizations Code
 - Charitable Immunity and Liability Act of 1987, Tex. Civ. Prac. & Rem. Code § 84



BUSINESS ORGANIZATIONS CODE

- ◆ § 22.221 – General Standards for Directors
 - Directors shall discharge his/her duties:
 - In good faith
 - With ordinary care
 - In a manner the director reasonable believes to be in the best interest of the corporation



BUSINESS ORGANIZATIONS CODE

- ◆ § 22.221 – General Standards for Directors
 - Directors are not liable for actions taken as a director if:
 - The actions were taken in good faith
 - With ordinary care
 - In a manner the director reasonably believed to be in the best interest of the corporation



BUSINESS ORGANIZATIONS CODE

◆ § 22.235 – Officer Liability

– An officer is not liable to the corporation or any other person for an action taken or omission made by the officer in the person's capacity so long as the officer's conduct was exercised:

- In good faith;
- With ordinary care; and
- In a manner the officer reasonably believes to be in the best interest of the corporation



BUSINESS ORGANIZATIONS CODE

- ◆ Establishing good faith
 - A volunteer may rely on information, opinions, reports, or statements prepared or presented by:
 - Officer/employee of the entity
 - Legal counsel
 - Certified Public Accountant
 - Investment banker
 - Person the governing person believes to possess professional expertise
 - Committee of the governing authority which the governing person is not a member
 - A volunteer may not rely on above information if he/she has knowledge that make reliance unwarranted



BUSINESS ORGANIZATIONS CODE

- ◆ § 22.223 – Not a Trustee
 - Director is not considered to have the duties of a trustee with respect to the corporation or with respect to property held or administered by the corporation



CHARITABLE IMMUNITY AND LIABILITY ACT OF 1987

- ◆ Texas Civil Practice and Remedies Code Chapter 84
- ◆ Only protects directors from third party (non-member) challenges
- ◆ Potentially caps damages against employees and the organization



CHARITABLE IMMUNITY AND LIABILITY ACT OF 1987

◆ § 84.003 - Definitions

- Homeowners associations are included in the definition of “charitable organization” (must be HOA per IRS code § 528(c) and file a 1020H)
- Volunteer is a person acting in their course and scope who does not receive compensation in excess of reimbursement for expenses
 - Includes directors, officers, etc.
- Good faith is honest, conscientious pursuit of activities and purposes that the organization is organized and operated to provide



CHARITABLE IMMUNITY AND LIABILITY ACT OF 1987

- ◆ § 84.004 – Volunteer Liability
 - (a) Volunteer serving as a director, officer, etc. of a charitable organization is immune from civil liability for acts/omissions resulting in death, damage, or injury if the volunteer was acting in the course and scope of his duties or functions as an officer, director, etc. within the organization
 - (e) Immunity does not apply to liability of organization, however, there are potentially some caps in place



CHARITABLE IMMUNITY AND LIABILITY ACT OF 1987

◆ § 84.007 – Applicability

- (a) Does not apply to an act that is intentional, willfully or wantonly negligent or done with conscious indifference or reckless disregard for the safety of others
- (b) Does not modify the duties or liabilities of a director or officer to the organization or its members and shareholders
- (c) Does not apply if the organization was formed substantially to limit its liability under this chapter



TEXAS PROPERTY CODE

- ◆ § 202.004. Enforcement of Restrictive Covenants
 - (a) An exercise of discretionary authority by a property owners' association or other representative designated by an owner of real property concerning a restrictive covenant is **presumed reasonable** unless the court determines by a preponderance of the evidence that the exercise of discretionary authority was arbitrary, capricious, or discriminatory



REASONABLENESS STANDARD

- ◆ Allows the court to examine the “reasonableness” of the director’s decision



REASONABLENESS STANDARD: SINGLE FAMILY HOME ASSOCIATIONS

Mitchell's Inc. v. Nelms, 454 S.W.2d 809, 814 (Tex.Civ.App.—Dallas 1970, writ ref'd n.r.e.)

- ◆ “Unreasonable” defined as “not conformable to reason; irrational; also, not governed or influenced by reason; Beyond the bounds of reason or moderation; immoderate; exorbitant”
 - Conveyed same idea as irrational, foolish, unwise, absurd, silly, preposterous, senseless, and stupid



INTEGRITY OF PROCESS

Candlelight Hills Civic Association v. Goodwin, 763 S.W.2d 474, 478 (Tex.App.—Houston [14th Dist] 1989, writ denied)

- ◆ Prudent approach is to adhere strictly to process established in dedicatory instruments
- ◆ Association is vested with powers and purposes enumerated in its articles of incorporation (certificate of formation) and bylaws
- ◆ When a director acts within the power granted and for the purposes enumerated, the court will recognize the presumption of good faith created in § 202.004 of the Property Code



DIRECTORS AND OFFICERS INSURANCE

- ◆ If a claim is made against a director
- ◆ If a suit is filed against a director
- ◆ If a suit is filed against an association
- ◆ Than be sure in advance that good insurance is available
- ◆ Not just sufficient under the immunity statute
- ◆ Largest single cost in extracting an individual from a suit or claim is attorneys fees
- ◆ Be sure you shop for coverage and not for price when selecting your insurance



CONCLUSION

- ◆ Dedicatory instruments outline the scope of director's authority and the process that must be followed in decision making
- ◆ The law sets forth the standard of care
- ◆ By maintaining the integrity of the process of decisions, the directors increase their insulation from liability for their decisions
- ◆ Have an insurance safety net

