What should board members do when threatened with litigation from a homeowner?

EVALUATE THE LEGITIMACY

Though threats may be considered empty, they should always be taken seriously and promptly addressed.

Anyone can sue anyone for anything. The real question is “Can the HOA be held liable for” whatever the resident is alleging.

Serious threats from a resident usually center around a breach of fiduciary duty., or the board failing to act in the best interest of the association. Directors are required to act in good faith, exercise business judgement and prudent care, and always act in the best interest of the association.

IF THE RESIDENT HAS CONSULTED AN ATTORNEY

If a resident tells a board member or other responsible party that they have taken the issue to a lawyer, you should say “if you’ve gotten an attorney involved, I can no longer speak on this matter." If that ends the conversation, the threat to sue was probably not legitimate.

Anytime a board member learns that a resident has consulted an attorney, the board member should notify the board President. The President should immediately contact the community manager and the association’s attorney.

IF THE ASSOCIATION IS SERVED WITH A LAWSUIT

If there is further action on the part of the homeowner or their attorney, the President must inform the insurance company because the association’s Directors and Officers Liability Insurance Policy may need to respond.

The board, in conjunction with its attorney and insurance company, must evaluate its defenses and potential counterclaims. As a result, the board members and the community manager should immediately start gathering information relevant to the litigation. An officer of the board should lead gathering information, typically to include the governing documents, correspondence and communication between the association and the resident, transaction history of the resident, and any other relevant documents.

Boards in a litigious situation should confirm they have acted in good faith and in the best interest of the association. Insurance companies only cover the legal costs associated with being sued if the board member has acted in good faith.

It is important to document everything that went into making decisions and to ensure consistency when enforcing association policies.

NEGOTIATING WITH THE CLAIMANT

Only the Board President, or in rare cases their delegate, is authorized to negotiate a settlement with the claimant. This does not give the President or their delegate the ability to enter into a final settlement, it only gives them the authority to conduct the negotiating sessions. Only the full board, with legal advice and approval, is authorized to enter into a final settlement. Having a single point of contact with the claimant avoids playing one board member against another, and avoids miscommunication and misinterpretation.

DURING THE LAWSUIT

Board members must put on a united front regardless of the opinions of individual board members. Publicly expressed dissent can lead to dissension in the membership which can open the door to allegations of breach of duty.

After being served, any communication between board members—especially email and texts—are subject to discovery and may be used as evidence in a lawsuit. This doesn't apply to communications with legal counsel or communications made in the presence of counsel. When writing emails related to pending litigation, and to all association business, board members should write under the assumption that the email could be read by anyone.

When communicating with residents, stick to the facts and remain professional – failing to do this could lead to liability issues, especially if it seems the board is acting vengefully or has a grudge against a particular homeowner.

Board members should also be very careful about what is said at meetings – whispering to another board member or speaking under your breath could be heard by anyone and lead to a host of issues.