

## **CHAPTER 2: BOARDS OF DIRECTORS AND MANAGEMENT COMMITTEES**

**By Scott Welker**

The vast majority of community associations in Utah are or should be incorporated as a nonprofit corporation. Pursuant to the Utah Revised Nonprofit Corporation Act (the “Nonprofit Act”) at § 16-6a-801(1), “A nonprofit corporation shall have a board of directors.” Similarly, Section 57-8a-502(3) of the Community Association Act requires that, after the declarant control period has expired, “the lot owners shall elect a board...” The Condominium Ownership Act (the “Condo Act”) does not specifically direct the members of a condominium association to elect a board<sup>1</sup> but several provisions of the Condominium Ownership Act assume that a board has been elected or imply that one should be. Regardless, any condominium association that is incorporated as a nonprofit corporation is subject to the Utah Revised Nonprofit Corporation Act where the directive for electing a board is clear.

### **Delegation of Board Authority and Duties**

Notably, although the Nonprofit Act requires a board to be elected, it also provides a method for delegating board authority to another, effectively eliminating the need for a board. § 16-6a-801(2)(b) of the Nonprofit Act provides that the HOA’s articles of incorporation “may authorize one or more persons to exercise some or all of the powers that would otherwise be exercised by the board of directors.” If an HOA exercises this option to any degree, “...the directors shall be relieved to that extent from such authority and duty.” *Id.* So, an HOA that delegates all of the board’s authority to another (as authorized by its articles of incorporation) relieves any potential directors from any authority or duty.

The Nonprofit Act defines a “person” as an individual or an entity<sup>2</sup>. This means that the authority to delegate board authority pursuant to § 16-6a-801(2)(b) can be exercised by delegating authority to a natural person or to a business entity. This can be a useful tool for homebuilders and developers during the declarant control period. In fact, non-condominium HOAs should only use it with extreme caution after the declarant control period because, notwithstanding the delegation provisions contained in the Nonprofit Act, HOAs subject to the Community Association Act are still required to elect a board after the period of declarant control<sup>3</sup>.

### **Composition of the Board**

The association’s bylaws will typically provide details regarding the board’s composition including the number of directors to serve. However, the Community Association Act and the Nonprofit Act each provide parameters. Each Act requires boards to consist of at least 3 directors. The Community Association Act further requires non-condominium boards to consist of an odd number

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<sup>1</sup> The Condominium Ownership Act uses the term “management committee” which is the exact equivalent of a board of directors. Throughout this chapter, the terms “board” will be used to describe the governing bodies of both community associations and condominium associations.

<sup>2</sup> Utah Code Ann. § 16-6a-102(39)

<sup>3</sup> § 57-8a-228(5) provides that the Community Association Act controls over the Nonprofit Act and, therefore, the Community Association Act’s directive for an HOA to elect a board after the declarant control period (§ 57-8a-502(3)) controls over the Nonprofit Act’s authorization to delegate board authority in its entirety.

of directors, the majority of which are required to be lot owners. If an HOA's bylaws only provide a range instead of specifying exactly how many members are to serve on the board, the number of directors may be fixed or changed by either the members or the board of directors<sup>4</sup>.

The Nonprofit Act, the Community Association Act, and the Condo Act each require a board member to be a natural person at least 18 years of age<sup>5</sup>. A board member need not be a resident of Utah<sup>6</sup>. An HOA's bylaws may contain additional qualifications for a board member including disqualification based on an individual's felony record or criminal sex offenses<sup>7</sup>.

## **Board Authority**

Except as otherwise limited by an HOA's governing documents or by the Community Association Act or the Condo Act, "a board acts in all instances on behalf of the association"<sup>8</sup>. In other words, if an HOA has authority to do something and neither the governing documents, the Community Association Act, nor the Condo Act specifically delegate that authority to the members, then the Board is the body authorized to exercise the authority. When analyzing whether the board is authorized to perform a function on behalf of the HOA, the question will be whether the governing documents or the law specifically prohibit the board from performing the function (whether by an express prohibition or by requiring the members or another body to perform the function instead), not necessarily whether those instruments grant specific permission to the board for the function.

Although the general membership's authority is typically quite limited in an HOA, most HOA's governing documents assign some rights to the members, precluding boards from acting unilaterally in those instances. Following is a non-exclusive list of functions that commonly require approval from the members under an HOA's governing documents:

- Electing members to the board<sup>9</sup>
- Removing members from the board<sup>10</sup>
- Amending the HOA's governing documents
- Approving special assessments

Additionally, Utah's Municipal Land Use, Development, and Management Act requires at least 67% of an HOA's general membership to approve any modification to the size or location of common area owned by the HOA<sup>11</sup>.

## **Fiduciary Duties**

### **I. Boards Generally**

HOA board members in Utah owe fiduciary duties to the HOA. These duties are codified in the Nonprofit Act at § 16-6a-822. The Nonprofit Act specifies that a board member is obligated to discharge his or her duties "(a) in good faith; (b) with the care an ordinarily prudent person in a

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<sup>4</sup> Utah Code § 16-6a-803(2)(b)

<sup>5</sup> Utah Code §§ 16-6a-802, 57-8-59, 57-8a-501

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Utah Code § 57-8a-501(5); *See also* Utah Code § 57-8-59

<sup>9</sup> Utah Code § 16-6a-804 and 808 provide default provisions for election and removal of board members, giving this authority to the general membership, but expressly permit the HOA to deviate from several of these provisions in the HOA's bylaws.

<sup>10</sup> *See Id.*

<sup>11</sup> Utah Code § 10-9a-606(5)

like position would exercise under similar circumstances; and (c) in a manner the director or officer reasonably believes to be in the best interests of the nonprofit corporation.” Importantly, in undertaking these duties, the Nonprofit Act entitles board members to rely on information, opinions, reports, statements, and data presented by: (a) agents of the HOA that the board member reasonably believes to be reliable and competent in the matters presented; (b) attorneys, CPAs, and other persons the board member reasonably believes to have expertise or competence on the matter at hand; and (c) HOA committees that the board member is not a member of but reasonably believes merit confidence<sup>12</sup>. In a sense, then, reliance on qualified 3<sup>rd</sup> parties can act as a shield against liability for a board member. However, if the board member has knowledge that reliance on the information, opinions, reports, statements, or data presented by any of the foregoing is unwarranted, it is a breach of the board member’s duties to rely on the same<sup>13</sup>.

Notwithstanding the fiduciary duties outlined in the Nonprofit Act, any act or omissions constituting a simple breach of these duties is not alone enough to hold a board member liable to the HOA or its members. In order to be liable, the board member’s breach must constitute willful misconduct, intentional infliction of harm on the HOA or its members, or gross negligence<sup>14</sup>. Additionally, the HOA’s governing documents may further limit a board member’s liability to the HOA and its members consistent with the Nonprofit Act at § 16-6a-823.

## II. Declarant Boards

During the period of declarant control, the developer will often act in place of an HOA board or will appoint a board from among its own ranks. However, a declarant is not held to the same standard as a typical board. The Utah Supreme Court has held that, in consideration of a declarant’s unique position and interests, until it relinquishes control of the HOA to the members, it only owes limited fiduciary duties to the HOA. Its duties are:

- To use reasonable care and prudence in managing and maintaining the common property;
- To establish a sound fiscal basis for the association by imposing and collecting assessments and establishing reserves for the maintenance and replacement of common property;
- To disclose the amount by which the developer is providing or subsidizing services that the association is or will be obligated to provide;
- To maintain records and to account for the financial affairs of the association from its inception;
- To comply with and enforce the terms of the governing documents, including design controls, land-use restrictions, and the payment of assessments;
- To disclose all material facts and circumstances affecting the condition of the property that the association is responsible for maintaining; and

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<sup>12</sup> Utah Code § 16-6a-822(3)

<sup>13</sup> Utah Code § 16-6a-822(4)

<sup>14</sup> Utah Code § 16-6a-822(6)

- To disclose all material facts and circumstances affecting the financial condition of the association, including the interest of the developer and the developer's affiliates in any contract, lease, or other agreement entered into by the association<sup>15</sup>.

### III. Conflicts of Interest

Conflicts of Interest are one of the most common dilemmas implicating an HOA board member's fiduciary duties. When a board member has a conflict of interest in a matter before the board, the board may still proceed to deliberate on and take action regarding the matter. First, though, the Nonprofit Act requires that the material facts of the conflict are disclosed to or known by the board. Then, as long as the conflicted board member recuses himself or herself, the remaining board members, in good faith, may authorize, approve, or ratify the matter, even if the remaining board members are less than a quorum<sup>16</sup>.

### The Business Judgment Rule

The business judgment rule is a legal doctrine granting a degree of deference to a board's decisions. Rather than substituting a board's judgment with the court's, the law will generally defer to a board that has acted within its authority and pursuant to its fiduciary duties. In Utah, the business judgment standard for HOA boards determining whether and how to enforce its governing documents is defined in the Community Association Act and the Condo Act. The Acts provide that a board "may not be required to take enforcement action if it determines, after fair review and acting in good faith and without conflict of interest, that under the particular circumstances: (i) the association's legal position does not justify taking any or further enforcement action; (ii) the covenant, restriction, or rule in the governing documents is likely to be construed as inconsistent with current law; (iii) (A) a technical violation has or may have occurred; and (B) the violation is not material as to a reasonable person or does not justify expending the association's resources; or (iv) it is not in the association's best interests to pursue an enforcement action, based upon hardship, expense, or other reasonable criteria."<sup>17</sup>

Note that this standard is only effective to the extent that it is applied "after fair review" and "under the particular circumstances" at hand. It does not provide justification for a board to generally neglect to enforce any provision of the governing documents. That kind of neglect could result in waiver of the HOA's authority and liability. However, this provision does allow a board, on a case-by-case basis, to determine that it is not in the best interests of the HOA for the board to strictly enforce against a particular instance of a violation.

### Board Meetings

The Community Association Act requires that, during the period of declarant control, non-condominium HOAs shall hold an open board meeting at least once a year and each time the HOA

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<sup>15</sup> *Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 2009 U.T. 65, 221 P.3d 234

<sup>16</sup> Utah Code § 16-6a-825

<sup>17</sup> Utah Code §§ 57-8-10.7 and 57-8a-213

increases a fee or raises an assessment<sup>18</sup>. Other than that, neither the Nonprofit Act, the Community Association Act, nor the Condo Act dictate how many meetings a board should have each year. In fact, other than the requirement for declarant controlled HOAs, the Acts do not specifically require a board to meet at all. Sometimes, the HOA's governing documents will not specifically require the board to meet either. Regardless, a board that never gathers for any meetings is likely in breach of its fiduciary duties. Additionally, a failure to hold any meetings could be viewed as illegal avoidance or obstruction of Utah's open meeting laws<sup>19</sup>.

Board meetings must be open to all HOA members and their representatives if the representative has been designated in writing.<sup>20</sup> At least 48 hours before a board meeting is held, the HOA is required to give written notice, by email, to each HOA member who has requested notice of board meetings. However, this notice requirement is waived if notice of the board meeting was included in a board meeting schedule previously provided to the lot owner or if the meeting was called to address an emergency and each board member received notice less than 48 hours before the meeting.<sup>21</sup> Although not specified in Utah Code, when emergency meetings are called, the best practice is to provide notice to any member who has requested notice of board meetings, although the notice will be less than 48 hours prior to the meeting.

At each board meeting, the board is required to provide each HOA member a reasonable opportunity to offer comments<sup>22</sup>. However, it is appropriate to designate a specific comment period during the meeting and otherwise prohibit comments<sup>23</sup>. It is also appropriate for the board to close the meeting and go into private session in order to do any of the following:

- Consult with an attorney for the purpose of obtaining legal advice;
- Discuss ongoing or potential litigation, mediation, arbitration, or administrative proceedings;
- Discuss a personnel matter;
- Discuss a matter relating to contract negotiations, including review of a bid or proposal;
- Discuss a matter that involves an individual if the discussion is likely to cause the individual undue embarrassment or violate the individual's reasonable expectation of privacy; or
- Discuss a delinquent assessment or fine.<sup>24</sup>

Note that the items justifying a closed session only include consultations and discussions. They do not include voting or otherwise taking action. Although a meeting may be closed in order to consult with an attorney or discuss a sensitive matter, the meeting should be opened to the general membership again before any vote or action is taken. In order to preserve confidentiality, it is

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<sup>18</sup> Utah Code §§ 57-8a-226

<sup>19</sup> See Utah Code §§ 57-8-57(5) and 57-8a-226(5)

<sup>20</sup> *Id.* at subsection (3)

<sup>21</sup> *Id.* at subsection (2)

<sup>22</sup> *Id.* at subsection (4)

<sup>23</sup> See *Id.*

<sup>24</sup> *Id.* at subsection (3)(b)

appropriate to provide very limited details regarding the matter when the board refers to it in the open session.

### **Action without a Meeting**

Utah law permits an HOA board to take formal action without holding a meeting unless the HOA's bylaws prohibit it<sup>25</sup>. The law provides two methods for taking action without a meeting. For each method, emails will satisfy the requirements for a "writing.:

1. If every board member consents to an action in writing or signs a writing against such action, the board's unanimous consent or unanimous lack of consent is enforceable, regardless of whether a meeting was held.

2. Board action is enforceable if proper notice of the proposed action is transmitted to each board member in writing and, by the deadline stated in the notice, the affirmative votes cast in writing for the action equal or exceed the minimum number of votes that would have been necessary to take such action at a meeting at which all of the board members were present and voted. This is true even if some of the board members expressly abstain from voting or simply fail to respond. However, prior to the voting deadline stated in the notice, if any board member demands in writing that the proposed action not be taken without a meeting, then the vote cannot proceed further unless and until it is raised at a meeting. Any board member who has, in writing, responded to notice of a proposed action by voting, abstaining, or demanding that the action not be taken without a meeting, may revoke their response if done in writing prior to the voting deadline stated in the notice.

Under this method, for notice to be proper, it must state (i) the action to be taken; (ii) the time by which a director must respond to the notice; (iii) that failure to respond by the time stated in the notice will have the same effect as: (A) abstaining in writing by the time stated in the notice; and (B) failing to demand in writing by the time stated in the notice that action not be taken without a meeting<sup>26</sup>.

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<sup>i</sup> Ownership of common area differs in different types of associations. This will be addressed in depth later in the book.

<sup>ii</sup> Utah Code Ann. § 57-8-1 *et seq.*

<sup>iii</sup> Utah Code Ann. § 57-8a-101 *et seq.*

<sup>iv</sup> Both the Community Association Act and Condominium Ownership Act use the term declaration.

<sup>v</sup> Utah Code Ann. 57-8a-105(7).

<sup>vi</sup> Registration is done at: <https://secure.utah.gov/hoa/index.html>.

<sup>vii</sup> Utah Code Ann. 57-8a-105(5)

<sup>viii</sup> *Swan Creek Village Homeowners Association v. Warne*, 2006 UT 22, ¶ 44, 134 P.3d 1122. See also *Kelly v. Timber Lakes Prop. Owners Ass'n*, 2022 UT App 23, ¶58 507 P.3d 357 ("The governing documents of a homeowners association, including the recorded CC&Rs and bylaws, 'constitute a contract between the association and the property owners.'")

<sup>ix</sup> *Swan Creek Village Homeowners v. Warne*, 2006 UT 22 ¶ 48, 134 P.3d 1122 ("When [the owner] acquired her lots, she bound herself to the terms of the Declaration.").

<sup>x</sup> *Swan Creek Village Homeowners Association v. Warne*, 2006 UT 22, ¶ 36 and 37.

<sup>xi</sup> *Hi-Country estates v. Frank*, 2023 UT 7, ¶ 69.

<sup>xii</sup> *Verna v. The Links at Valleybrook Neighborhood Association* (2004) 371 N.J.Super. 77, 88.

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<sup>25</sup> Utah Code § 16-6a-813

<sup>26</sup> *Id.* at subsection (2)(b)

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<sup>xiii</sup> *Swan Creek Village Homeowners Association v. Warne*, 2006 UT 22, ¶ 44, 134 P.3d 1122. See also *Kelly v. Timber Lakes Prop. Owners Ass'n*, 2022 UT App 23, ¶58 507 P.3d 357 (“The governing documents of a homeowners association, including the recorded CC&Rs and bylaws, ‘constitute a contract between the association and the property owners.’”).

<sup>xiv</sup> See *Cecala v. Thorley*, 764 P.2d 643, 644 (Utah Ct. App. 1988).

<sup>xv</sup> *Huck v. Kenmare Commons Homes Association, Inc.*, 48 Fla. L. Weekly D 1428 (Fla. 1<sup>st</sup> DCA, July 19, 2023).

<sup>xvi</sup> Utah Code Ann. 57-8-40(2) and Utah Code Ann. 57-8a-228(2).

<sup>xvii</sup> Utah Code Ann. 16-6a-101 et seq.

<sup>xviii</sup> This section reference of incorporation does not have a corollary in the Condominium Ownership Act.

<sup>xix</sup> Utah Code Ann. 16-6a-822.

<sup>xx</sup> Utah Code Ann. 16-6a-822(2).