

## **Board of Directors: Can the Board exclude an adversarial Board member from Board meetings?**

In certain cases, an individual Board member may oppose some Board action. If the Board has reason to believe the Board member is likely to initiate litigation on the matter, the Board may exclude the Board member from certain Board meetings where the issue is discussed. In addition, the adversarial Board member is not entitled to advice or counsel from the Association's attorney on the matter. If the adversarial Board member threatens or initiates litigation on the matter, Boards may have the additional option of forming a litigation committee, exclusive of the adversarial director, to handle the matter.

### **Exclusion of Adversarial Directors from Board Meetings**

Most Associations are incorporated under either the Nonprofit Corp. Act<sup>1</sup> or the Nonprofit Misc. Mutual Corp. Act.<sup>2</sup> Under these laws, Board members are generally entitled to attend Board meetings and must be notified of each meeting in the manner set forth in the Association's bylaws.<sup>3</sup> However, the Board may exclude a Board member who is both in opposition to the Board on the matter to be discussed in the meeting and likely to initiate litigation against the Associations on the issue.<sup>4</sup> The Board is also entitled to withhold documents related to the matter and prevent the adversarial Board member from conferring with the Association's attorney on the issue.<sup>5</sup>

In a recent unpublished opinion, the Washington Court of Appeals explained that a Board has no right to exclude individual Board members from all Board meetings. However, under certain circumstances, exclusion is appropriate. The court directed

Boards considering exclusion of a Board member to consider the following questions:

- 1) Is the adversarial Board member acting solely in her capacity as an owner rather than her capacity as a Board member?
- 2) Is the adversarial Board member likely to bring litigation against the Association?

If both questions can be answered affirmatively, then the Board is entitled to bar an adversarial Board member from Board meetings that are not open to the membership at large and are related to the subject of potential litigation.

The Court of Appeals found that where a Board member was acting on his own behalf as an owner-member of the Association, not on behalf of the Association as one of its Board members, and was likely to bring litigation against the Association regarding a policy adopted by the Board, the Board could exclude the adversarial Board member from the portions of meetings during which the Board consulted with legal counsel regarding the subject of the potential litigation. The court explained, since the Board member “was acting as an adversarial and in his capacity as owner-member during the times at issue, he was not a Board member entitled to such information.”<sup>6</sup>

Likewise, the court held that the Board member was not entitled to disclosure of documents or other communications from the Association’s attorney on the issue. The court explained that, while a Board member generally has a right to receive such information on request, when the Board member is acting solely in the capacity of owner-member, he forfeits this right.<sup>7</sup>

### **Litigation Committees**

Once an adversarial Board member has threatened a lawsuit against the Associations, the Board may form a committee to

handle the litigation.<sup>8</sup> Forming a litigation committee that does not include the adversarial Board member would effectively ensure the Association could handle the matter without conveying confidential or privileged information to the adversarial Board member. A litigation committee would also benefit the Association by allowing the Board to make quick decisions when necessary, such as when time-sensitive settlement offers are on the table.

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<sup>1</sup> RCW 24.03.

<sup>2</sup> RCW 24.06.

<sup>3</sup> RCW 24.03.120; RCW 24.06.150.

<sup>4</sup> *Hartstene Pointe Maint. Ass'n v. Diehl*, 2015 Wn. App. LEXIS 1350 (a Board member on an HOA Board objected to the Board's newly-enacted hazardous tree policy, which had been imposed over his lone objection pursuant to the Association's Governing Documents).

**Note:** Although *Hartstene* involved an HOA and whether the exclusion of a Board member comported with the HOA Act's open meeting requirements, the case provides persuasive authority for the exclusion of Board members from condo Association Board meetings as well.

<sup>5</sup> *Hartstene*, 2015 Wn. App. LEXIS 1350.

<sup>6</sup> *Hartstene*, 2015 Wn. App. LEXIS 1350 at ¶ 25.

<sup>7</sup> *Hartstene*, 2015 Wn. App. LEXIS 1350 at ¶ 25.

<sup>8</sup> If the Articles of Incorporation or Bylaws allow, a majority of the Board may designate or appoint a committee that includes at least two Board members with powers enumerated in the Articles or Bylaws and not prohibited under RCW 24.03.115 or RCW 24.06.145.