



this issue

Is Snow Blowing Your Budget?	P.1
What is a Board Member's "Fiduciary Duty?"	P.2
News from the Firm	P.3
NJ Tax Treatment of Commercial Condominium Associations	P.4

Is Snow Blowing Your Budget?

by Jules C. Frankel, CPA, MBA

Although variations of this article have appeared in the CPA in the past, we believe that recent weather conditions warrant its repetition. For many Communities, resources budgeted for snow removal have been or will be exceeded as a result of this winter's snowfall. Digging out of a financial hole requires more skill than digging out of a snowstorm. What course of action should your Association take? The most important piece of advice to remember is this: The sooner the issue is addressed, the easier the resolution.

Learning From Past Experience

For most Associations, the guide to an appropriate course of action lies in the experience of previous winters that had greater snow removal costs than anticipated. We learned that as soon as it becomes apparent that snow removal needs will likely exceed budget forecasts, the easier it has been to gain Community acceptance for a special assessment. That is, the special assessment was more "favorably" received by those Communities in which Associations took immediate action, in contrast with those who deferred dealing with the situation until well

after the winter. It is much more difficult to deal with a special assessment for snow when summer has arrived and the snow events have become a distant memory. (NOTE: The following suggestions are based on the assumption that the Association is not covered by, or has elected not to purchase, snow removal insurance.)

Therefore, our recommendations are:

- 1. Assess the status of both actual and anticipated additional (that is-yet to be incurred during this season) costs for snow removal versus the Association's budget.**
- 2. Seek to offset the snow removal budget deficit by determining if there was a surplus from the prior year. This could occur from a number of sources:**
 - A. General Operating Fund
 - B. Working Capital Fund – there may have been a sufficient contribution to allow for a reallocation of excess working capital funds to the snow removal budget

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(Continued on page 3)



What is a Board Member's "Fiduciary Duty?"

by Hubert C. Cutolo, Esq.

All too often, individuals hastily volunteer to become members of the board in their Community Associations. A board member must understand and appreciate that as a board member they are often responsible for substantial assets. Although they should be commended for their effort, enthusiasm and willingness to volunteer, these individuals must be cognizant of the legal responsibilities and obligations that come with the position. All board members must comply with their fiduciary obligations to the whole Association and its individual members.

Definition

A simple definition of a fiduciary relationship is found in "The Restatement of Law, Second, Trusts," which states "a person in a fiduciary relation to another is under a duty to act for the benefit of another as to matters within the scope of the relation". A fiduciary owes duties of good faith, trust, confidence and candor to both the Association and its members. Although it is impossible to identify and enumerate every act which could conceivably constitute a breach of fiduciary duty, a general rule to avoid such a breach is for board members to always act in the best interests of the Association and its members. Stated differently, board members may not act in a way that is detrimental to the Association to benefit a third party, including themselves!

The New Jersey Condominium Act

The overriding scheme of the New Jersey Condominium Act requires the board member of an Association to act as a fiduciary and make decisions for the protection of the whole condominium and each of the constituent owners. The board must not act discriminatorily, arbitrarily or in bad faith. Importantly, to comply with its fiduciary obligations, a board must only take actions that are authorized by the certificate of incorporation, master deed and by-laws of the Association. If the action by the board is authorized then the action must not be fraudulent, self-dealing or unconscionable. Self-dealing must be avoided and corporate opportunity enhanced. Moreover, facts which have a bearing on corporate concerns must be honestly and fully disclosed. If any issue arises which may present an issue of conflict or self-dealing for a board member, the board member must fully disclose all facts to the other board members and should not participate in any board discussion or vote on such issue.

Protection of Common Elements and Assets

In addition to ensuring that its actions are authorized and not fraudulent, self dealing or unconscionable, the board has an obligation to preserve and protect the common elements and Association

assets for the benefit of all its members. Although there is no all-inclusive list which will advise the board of those actions which must be undertaken to fulfill its fiduciary obligations, a board must ensure that its acts are authorized and undertaken in the best interests of the Association.

Business Judgment Rule

Board members must keep in mind that they may be liable for any acts or omissions which breach their fiduciary obligations. As long as board members act in good faith and in a manner which he or she reasonably believes to be in the best interests of the Association, the Association would have an obligation to indemnify the board member in the event a lawsuit arises. It should be noted that an overall defense to claims of breach of fiduciary duty is the business judgment rule. All that is required is that board members act reasonably and in good faith in carrying out their duties. The courts will not second-guess the actions of a board member unless it appears that they are the result of fraud, dishonesty, or incompetence. If any questions or issues arise concerning fiduciary responsibilities, board members may wish to consult the legal professional retained by the Association.

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Snow *(cont. from page 1)*

C. **Deferred Snow Removal Fund** (it is rare for an Association to have established this type of fund)

3. Review other operating fund expense categories for positive or negative variances relative to actual expenditures. The opportunity to reallocate funds based on these variances may help to soften, (or unfortunately exacerbate) the impact on the budget of a shortfall in the snow removal category.

4. Once the “variance analysis” is complete, determine if additional funds will likely still be necessary to cover a snow removal budget deficit. If no shortfall exists, or it appears manageable, it may be possible to defer definitive action. (NOTE: The Association should set timely follow-up budget review dates to be able to validate, or if necessary, to modify its plans.)

5. If the review process provides information indicating that additional monies for snow removal will likely be needed, we recommend that the Association take two actions:

A. Decide between a special assessment (or amending the current year’s budget) and making up the deficit in a future year (usually not a good idea)

B. Communicate to members regarding both the decision and the reasons for the decision

In making the decision, we strongly recommend that the board consider who directly benefited from the snow removal. By having a special assessment occur as soon as possible, it is more likely that the current owners who benefitted from the snow removal will fund the additional expense.

If a special assessment is the chosen course of action, Association’s should consider the following:

Special assessments can be assessed in one payment or over a period of time. Assessing over a period of time or amending the current year’s budget allows the shortfall to be made up with even payments over a definite time period. This assists unit owners in planning their own cash flow needs.

Communication is critical.

As noted above, if the snowfall caused the monetary problems, it is effective to ask for additional funds while the snow is still a vivid image in people’s minds, in contrast with asking for an assessment while people are relaxing in the warm weather by the swimming pool! In addition, clearly communicating the alternatives considered and the reasons for the decision made can help increase the chances of “emotional” acceptance and community harmony.

For Association-specific advice and guidance, please feel free to contact me or your Wilkin & Guttenplan advisor.

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News from the Firm

Employee Anniversaries

24 Years

Sefi Silverstein

23 Years

Michael LoVerde

22 Years

Kristine Flores

17 Years

Carol Koransky

13 Years

William McDevitt

Brian Geissler

11 Years

Len Nitti

Amanda Brady

10 Years

Patty Hernandez

9 Years

Mohammed Salyani

Congratulations

Congratulations to Nicole Krone on passing the CPA exam. Way to go!

Welcome

W&G is hosting an internship program this winter for students from Rutgers University, The College of New Jersey and Rider University.

