

## Kansas Homeowner Associations

- “Kansas Uniform Common Interest Owners Bill of Rights”
- HB 2472
- Codified at K.S.A. §58-4601 et seq.
- Applies to communities of 12 or more residential units

Effective Date:

January 1, 2011

## DISCLAIMER

- The materials presented here are for general informational purposes only. Nothing contained within this presentation may be construed as legal advice. Laws, regulations and policies change frequently and the information presented in this briefing is not intended to be a comprehensive review.
- Legal advice can be provided only in the course of an attorney-client relationship with reference to all of the facts of a specific situation. This information, therefore, must not be relied on as a substitute for obtaining legal advice from a licensed attorney.

## Intent

- Increase accountability of home owner associations
- Give residents clear rights
- Define powers, duties, and limits of board
- Address current and potential areas of conflict and tension between home owners, associations, and boards

## Construction

- 3 kinds of governing provisions
  - **mandatory**, apply to all communities without regard to their existing declarations, bylaws or rules (*must*)
  - **enabling**, permit, but do not require, communities to engage in the covered conduct so long as they follow the statutory scheme (*may*)
  - **default**, apply if the community has no declaration, bylaw, or rule applying to the covered conduct (*unless otherwise provided*)

## General Provisions

- **Homeowner associations' budgets.** The law requires the board of directors to propose and adopt a budget at least annually, and that "unit owners" be given a reasonable opportunity to comment on the proposed budget prior to the board taking action to approve the budget.
- **Bylaws requirements.** The law requires certain content be included in the by-laws of associations, such as notices of annual meetings, notices for legal proceedings and communication throughout associations.
- **Notice and Comment.** Notice of meetings must be given at least 10 days and no more than 60 days beforehand.
- **Good Faith.** Every contract or duty governed by the act imposes an obligation of good faith in its performance or enforcement.

## Key Provisions

- **Rules.** Before the board can amend or adopt any rules, the board must notify owners of its intent and the date on which the proposed action will be conducted. After adopting, the board must provide owners a copy of the change. K.S.A. § 58-4616.
- **Voting provisions.** May suspend certain voting rights for failure to pay dues.
  - May only suspend right to vote on issues of assessments or fees.
  - May not withhold services if doing so endangers the health, safety, or property of person.  
K.S.A. § 58-4608(a).
- **Open Meetings.** Meetings must be open to homeowners, unless an Executive Session (for one of the 5 listed purposes) is called during a regular or special meeting. K.S.A. § 58-4612(a).  
(attorney consultation, litigation, personnel, contracts, privacy rights)
  - No final votes may be taken at an Executive Session

## Key Provisions

- **Copies.** Copies of any materials distributed to the Board before a meeting must be made available to home owners. K.S.A. § 58-4612(f).
- **Comment.** *Owners must be given reasonable opportunity to comment during any meeting (annual or regular).* K.S.A. §§ 58-4611(e) and 4612(d).
- **Retention of records.** The law requires that certain association records be retained for up to 5 years and available for the association's members to view and copy. K.S.A. § 58-4615.
- **Reasonableness.** Every rule must be reasonable. K.S.A. § 58-4616(h).

## Key Provisions

- **Dispute resolution.** In the event of a dispute, associations may require disputes between the association and unit owners or between two or more unit owners regarding the common interest community be submitted to nonbinding alternative dispute resolution (as a precondition to initiation of a judicial proceeding). K.S.A. § 58-4608(a)(3).
- **Board limitations.** The Board **may not**:
  - amend the declaration, except as provided by law;
  - amend the bylaws;
  - terminate the community;
  - elect directors other than filling vacancies until the next election; or
  - determine their own qualifications, powers, duties, or terms of office.
 K.S.A. § 58-4609(c).
- **Board Conduct.** The law establishes that the standards of performance of associations' officers and board will be equivalent to that of a trustee (care and loyalty). K.S.A. § 58-4609(a).

## Trustee (Fiduciary) Duties

- The concept of a Trustee refers to **Fiduciary Duty**
  - increasingly being used in the non-profit world.
- Each member of the board is a **fiduciary** and certain duties are imposed by law.

## Fiduciary Duties

- Fiduciary from the Latin *fides* – Faith – A fiduciary must always act in good faith in his/her relation to the organization.
- Officers and Directors have an obligation to act primarily in the interest of the organization rather than personal interests or the interests of a particular constituency.
- Three Specific Duties: Care; Loyalty; Obedience (or Fidelity to Purpose).
- Comprise the legal doctrine of the Business Judgment Rule.

## Business Judgment Rule

- Applies to the “business” of decision-making by boards of nonprofit associations.
- Related to all three fiduciary duties.
- It is based on the presumption that in making a decision affecting the association, the members of the board have acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the association.
- If all three aspects of this presumption are correct, any “business” decision made by the board members is accorded a high degree of respect.

## Duty of Care

- Duty to Exercise Due Diligence in managing the organization’s affairs.
- Three Elements:
  - Must act in Good Faith – Intellectual Honesty – Can’t ignore or hide important facts – Duty to Inquire.
  - Must act with the same care that an ordinarily prudent person would use in a similar position under similar circumstances.
  - Must act in what you reasonably believe is the organization’s interest.

## Practical Steps to Satisfy Duty of Care

- **Retain Competent Help.**
  - You don't have to be an expert in everything, so rely on others.
  - Get recommendations from County and State staff.
- **Use Committees.**
  - Allow committees to gather information and make recommendations.
- **Create a Record of the decision-making process.**
  - Detailed minutes of meetings can be helpful.
- **Promote open debate and record dissent.**
  - Let the minutes reflect dissenting views.

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## The Case of the Bullish Boards

- Example 1

*The Executive Board of the Instant Gratification Association ("IGA"), a nonprofit association, determines, based on their estimate of the Association's income and assets, that it should start investing in the stock market.*

*At the suggestion of one headstrong Board member who asserts that there is no need to study everything to death ("We know what we want"), the Board determines to authorize the purchase of \$2,000,000 worth of stock in Enron Corporation.*

## The Case of the Bullish Boards

- *Example 2*

*The Executive Board of the Very Methodical Association, based on a report of management projecting the income assets and investments of the association, establishes a committee of the Board, and this committee contracts with a qualified independent investment consultant who reviews with them the stock market and the performance of various stocks.*

*After considering the consultant's written recommendations, and the views of the national office staff, the committee recommends to the Board that the Association purchase stock of Enron Corporation. The Board discusses the committee's recommendation and decides to purchase the stock.*

## ANALYSIS

- *Both Boards reached the same decision by different routes.*
- *Now assume that stock's value suddenly plummets; both Associations have lost their investment. The members of the Executive Board of both Associations are then sued for entering into a patently unfavorable investment.*
- *Although the Boards reached the same decision, only the Very Methodical Board is likely to be shielded by the Business Judgment Rule. Their decision, although clearly wrong, was made on an informed basis with advice from an independent consultant, in good faith, and in the honest belief that it was in the Association's best interest. The Instant Gratification Board clearly did not make their decision "on an informed basis" because they failed to seek competent advice, and they failed to consider a range of options. These failures constitute a failure of the duty of care, and their action will not be protected by the Business Judgment Rule.*
- *Moral: If you are going to be wrong, do it after careful consideration.*



## Duty of Loyalty

- Act with undivided loyalty to the organization and in the organization's interest rather than any personal interest or interest of some other person or organization.
- Prohibits Conflict of Interest.
- Absolute Duty to Disclose Financial Benefit from a transaction.
  - Sitting quietly and/or abstaining is not enough.
- Best to avoid even the perception of impropriety.

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## Practical Steps to Satisfy Duty of Loyalty

- What's in it for me?
  - Consider if you will personally benefit from a decision.
- Disclose potential conflicts of interest.
  - Is your gain a loss to the organization?
- Abstain from votes if there could be a conflict.
  - If the conflict is strong enough to influence you, or may reasonably appear to look that way, abstain.
- Seek counsel.
  - Getting advice from Committees or outside counsel can be helpful and demonstrates good faith in resolving the conflict.

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## A Learning Curve

- Greg was the President of Educational Housing Services, Inc. (“EHS”), a nonprofit association dedicated to helping with housing for those who study or work in institutions of higher learning in his town.
- Greg was also the founder of Student Services Inc. (“SSI”) a for-profit entity that provided telecom services to EHS through a third-party. The Directors of the Board of EHS knew that Greg had an interest in SSI and would benefit from agreements between SSI and EHS. The Directors asked Greg to obtain legal advice on any potential conflict.
- Greg reported back that he did, and all was well; Greg told the Directors, “my lawyer said he’s comfortable with any arrangement---we can move forward.”

## ANALYSIS

- The permissible level of participation by “interested” Board members like Greg will depend on the circumstances.
  - One question will be whether Greg used his position to enrich himself.
  - Another is whether the Directors were acting with loyalty to EHS.
- Greg used his position to influence the Directors with a “wink and a nod.” The Directors allowed Greg to pressure them without any real scrutiny.
- The best course for Sam should be to disclose his interest in the decision and abstain from any deliberations, as well as the final vote.
- The best course of action for the Directors, given Greg’s position and action, was to demand that he recuse himself and look only to the best interest of EHS.

## Analysis, continued

- Held: Members of the Board of Directors of EHS were ordered to pay \$1 million to the EHS for harm caused by their allowing the conflict of interest by the President.
- In the Matter of Educational Housing Services, Inc., Assurance No. 12-121
  - [www.ag.ny.gov/pdfs/EHS\\_AOD.pdf](http://www.ag.ny.gov/pdfs/EHS_AOD.pdf)

## Fiduciary Duties Conclusion

- **Common Sense Rule** – In accepting a position of leadership on the Board, you understand that you must:
  - Always be thinking about, and focusing on, priorities of the association, and not that of yourselves or another organization.
  - Represent the association in a favorable light.
  - Use good judgment in handling the association's business.
  - Act in the interests of the association as a whole and not your own self interests.
  - Follow the rules if you expect others to follow the rules.

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## Action Items

- Prepare more detailed agenda
- Give more detailed notice of actual agenda items
- Provide homeowner opportunity to comment on any matter of interest to the community
- Make copies of materials available
- Ensure Board acts as a Trustee
- Get help through establishment of committees