Viewpoint

Do Condominium Directors Risk Personal Liability?

The short answer to this question is "yes", condominium directors do run risks of personal liability. However, in my view, these are small risks, and there are things that condominium directors can do to minimize these risks.

James Davidson

First and foremost, non-profit corporate representatives generally have personal liability only for their own acts or omissions taken outside of their roles as representatives of the corporation.

In the condominium context, this essentially means that directors and officers generally can't be personally liable for actions or decisions of the board taken at board meetings pursuant to Section 32 of the *Condominium Act, 1998* (the Act).

This principle was nicely expressed in a recent decision of the Ontario Superior Court. In the case of Matlock v. OCSCC 815, one of the owners had asserted various claims against the condominium corporation. The owner had also asserted claims against the condominium's directors personally. The Court dismissed the claims against the directors and gave the following reason:

> *A plain reading of these allegations reveals that these complaints are directed against the individual board members in their role as the directing minds of the condominium corporation.*

So again: As long as directors are acting pursuant to the board's direction, they generally won't have personal liability. Furthermore, directors and officers can be protected against risks of personal liability by ensuring that the corporation has a by-law stating that the corporation will indemnify the directors and officers and by also ensuring that the corporation has Directors and Officers Liability Insurance on suitable terms. [See Sections 38 and 39 of the Act.]

There is, however, one important exception to this principle. In particular, condominium directors and officers can be personally liable for their dishonesty or bad faith. We know this because the Act specifically says that directors and officers are not to be indemnified by the corporation or protected by D & O insurance if they act dishonestly or in bad faith. There is also a leading Court decision, in Ontario, on this point.

In the case of Ballingall v. CCC 111, one of the owners asserted a claim against the corporation and against one of the directors personally for the corporation's failure to properly enforce a single-family restriction in the corporation's Declaration. The one director had campaigned against a Rule which had been recommended by the corporation's legal counsel to help with enforcement of the single-family restriction. The Court said that this director was acting in bad faith because the director's actions were based upon his personal interest rather than upon the corporation's best interests. Therefore, the director was found personally liable for some of the costs of the Court Application.

I should add that directors and officers having a personal interest in a matter may have obligations under Sections 40 or 41 of the Act (respecting disclosure of conflicts of interest and avoiding participation in related decisions) and/or under Section 29 of the Act and Section 11.6 of Regulation 48/01 (respecting disclosure of certain lawsuits and contracts or transactions involving a director or the director's family).

If directors and officers are careful to fulfill these obligations and to avoid dishonesty and bad faith, and if they then only act in accordance with the direction and authorization of the board, I believe that they will have minimal risks of personal liability. ■

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