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Good Governance vs. Litigation

Which came first, good governance or the legal battle? Answer – most likely the legal battle since good governance will typically minimize or eliminate the legal action altogether.

I have always considered my role, whether as a Condominium Manager, VP of Operations or VP of Governance, as one that attempts to minimize conflict between owners, residents and corporations and mitigate the risk of litigation. I believe most of the condominium lawyers that serve our industry would also agree with this approach, although clearly, the advice is not always followed by clients.

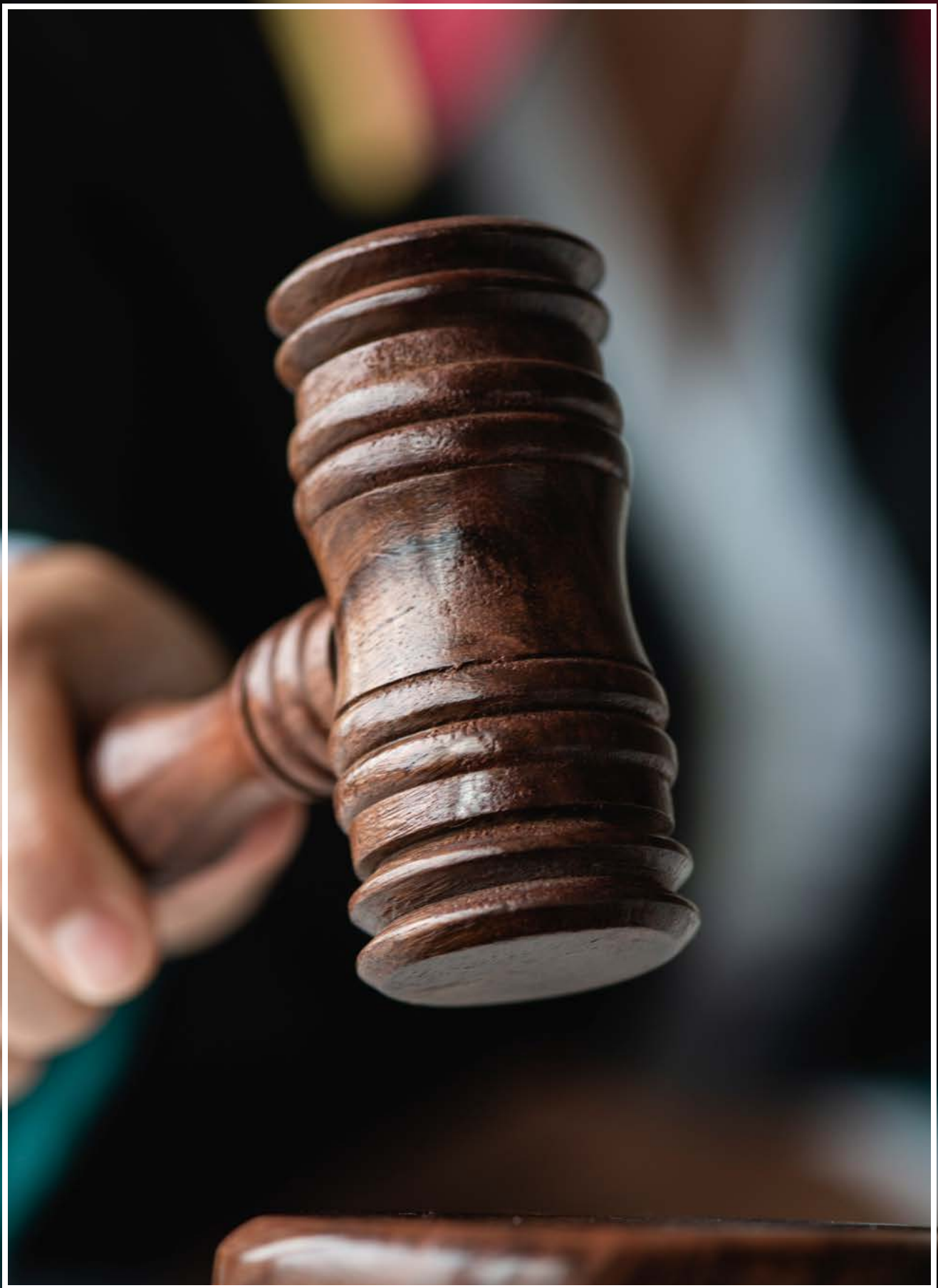
Governance is not always an easy term to explain or understand. Words

found on the internet to define governance include oversight, controls, ethics, compliance, risk management, accountability, processes of governing, rules of order, and the list goes on.

In a condominium setting, boards of directors will generally follow one set of governance principles and condominium managers and companies another. Boards are elected by their fellow owners to manage the corporation's affairs. They do so by following the provisions under the *Condominium Act, 1998*, its regulations, the declaration, bylaws and rules. Some boards might even adopt a code of ethics, although unless enshrined in a bylaw, its enforceability to govern the board member's actions is debatable.

Board of Directors Governance

There are many excellent board members that clearly understand their role and who they represent. They know it is best to avoid escalating situations with owners that can and do lead directly to the Condominium Authority Tribunal (CAT), mediation & arbitration and court proceedings. All three of those avenues can be costly and do nothing to foster a harmonious community. Boards look to management to guide how they can best carry out their duties when managing the corporation. Good governance would ensure that all met key deadlines such as AGMs, budgets, CAO filings, CAT participation, collections, directors' training, disclosures, insur-





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ance claims and reserve fund studies. In addition, boards must proactively ensure maintenance and repairs are carried out in accordance with the declaration and that owner's communications are dealt with promptly and effectively. When a board engages a manager, the manager usually handles these duties. This is where the saying "directors direct and managers manage" comes in. Boards are volunteers and typically do not have the time or experience to manage effectively. Therefore, the board hires management as their agent to carry out the day-to-day duties, and they provide oversight and make key decisions, which they instruct management to carry out.

Management Governance

When providing condominium management services, several resources offer the necessary means and guidance to the manager. These include legislation such as the *Condominium Management Services Act, 2015* (CMSA); the regulations, including the all-important code of ethics under O.Reg 3/18, the management agreement and a company's own policies and procedures. If a manager or company holds membership in ACMO, they will also be bound by the applicable code of ethics referenced on the website. If a company holds the ACMO 2000 Certification, its policies and procedures must conform to the ACMO 2000 Certification manual requirements.

Management Agreement

This document may be the most important when it comes to providing governance to managers since it serves as the basis for what they must do for the client. Every management provider will have their own agreement; however, for the most part, they cover the same basic concepts. These include; parties to the agreement, term, fees, roles and responsibilities, manager's duties, awareness and requirements to follow applicable legislation, handling of funds, financial reporting and collections, records management, maintenance and repairs, enforcement of the corporation's declaration, bylaws and rules, budgets, termination rights and indemnification.

It is safe to say that most condominium disputes involve one or more of the above items addressed in the management contract. Therefore, good

governance must start with reading and understanding every single item in the management contract. It is, after all, a commitment by the management provider to deliver their services per the agreed-upon terms. Other vital documents that every manager should read and understand at least once early in their career include an entire insurance policy, a CCDC contract, a comprehensive reserve fund study, the *Condominium Act, 1998* and the *Condominium Management Services Act, 2015*.

Good Governance

Delivering good governance is a team effort, and supervisory staff must also do their part. One of the most important documents is the management report. It is a company report. By reviewing the document three to five business days before the board meeting, the supervisor has a chance to ensure that the content is accurate and complies with the legislation. Since this is the management's report, the board does not have the authority to change

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it. Therefore if an item is of significant importance, management can ensure that the corporation has a written record of its opinion. For example, let's say the board wants to use reserve funds to pay for operating expenses. Management can state for the record that this contravenes the *Condominium Act*.

A management company must ultimately take the lead on governance. They do this by having a comprehensive set of policies and procedures. These inform the manager on how they expect them to represent their company. Procedures typically regulate accounting, administration, corporate, human resources and property management functions. They are meant to guide the manager in performing their activities to mitigate the risk of legal issues burdening the client. Of equal importance is to ensure necessary resources are in place to ensure the procedures are followed. This includes implementing checks and balances to ensure adherence.

A prudent manager will think ahead and prepare in advance if a matter

escalates to the point where a defence may be required. A manager needs to develop a sixth sense, an awareness that an issue they are currently dealing with has the potential to escalate to legal in the future. Those managers will always document everything, including conversations with people, their names, date and time and details of what was discussed. Letters and emails are also used to create backup materials. Managers should always save these in chronological order. Sometimes, a board may direct a manager to obtain an opinion from the lawyer or ask for enforcement. If you do not provide the lawyer with a detailed summary of what is happening, you should not expect a helpful report back. There is an old saying, "garbage in, garbage out." If you have excellent record keeping and can articulate the issue clearly, you may control the legal costs spent.

An example of this could be a slip and fall incident. As soon as it is reported, the manager must create a detailed incident report, take pictures and/or videos, interview witnesses, etc. It can

take 3-5 years for a case to go to court and the reporting manager is often no longer assigned to that property. If you leave the proper records, there is a much better chance of success once it gets to court.

It is not easy to do everything correctly, and good governance takes practice. However, knowing your legislation and following well-crafted policies and procedures can minimize the risk of ending up before the CAT or a judge. ■

John Damaren, RCM, is Vice President of Community Development & Governance for FirstService Residential and has more than 32 years of leadership experience in the industry. John has been awarded ACMO's highest recognitions: Manager of the Year and the President's Award. He also led the company in achieving the prestigious ACMO 2000 Certification and is always striving to achieve higher standards for the company, associates and clients. John served six years on ACMO's Board of Directors, serving two years as Board President. fsresidential.com



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