

As always, we love to hear from community managers and board members regarding potential topics for upcoming issues of this newsletter. What topics do you want to read about or see discussed? Please contact attorney Greg Stein at (480) 427-2843 or greg@carpenterhazlewood.com with any suggested topics for upcoming issues.

We've been sending out updates on COVID-19 and how it can affect Community Associations. [Check out the compilation of those updates.](#)

Fiduciary Duties Owed by a Board of Directors to its Community Association

by [Jeff Solloway, Esq.](#)

The relationships between a board of directors, a nonprofit community association, and its member homeowners can be complicated to comprehend. The recent outbreak of the coronavirus (COVID-19) pandemic has complicated matters even further related to what fiduciary duty compliance means in the current landscape. In making decisions on behalf of a community association in response to COVID-19, directors should carefully consider the duties imposed on them by law to ensure compliance and limit their potential liability.

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Application of the 2020 Assistance Animal Notice to Community Associations

by [Lydia Peirce Linsmeier, Esq.](#)

Our state is facing a health crisis of unimagined proportions. Arizona's community managers are on the front lines, acting with dignity and compassion to make certain all residents are safe in their homes and neighborhoods. At the same time, the Department of Housing and Urban Development issued FHEO-2020-01 on January 28, 2020, which is effective immediately. A copy of FHEO-2020-01 may be accessed using the following link: <https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf>.

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Sign up for our upcoming seminars!

May 5 - The HOA Today Show "Cinco de Drinko" Edition (Tempe)

May 29 - Legislative Update (Prescott)

June 2 - Legislative Update (Tempe)

Please visit our [website](#) to register for any of our upcoming seminars.

We also offer in-house training for new managers and board members.

For more information contact Andrea Rizen at 480.427.2880 or andrea.rizen@carpenterhazlewood.com



IN OTHER NEWS:

Potential new regulations impacting use of small drones - "New FAA Drone Rule is a Giant Middle Finger to Aviation Hobbyists" - ARS Technica [READ STORY](#) Please feel free to contact Javier Delgado to discuss any drone issues you may be experiencing within your Association.

Recent email scams demonstrate continuing need to remain vigilant in combating cyberattacks -

"Shark Tank Host Loses \$400,000 in a Scam" - CNN [READ STORY](#)

"Scammer Tricked Top Tampa Law Firm Into Wiring Money to Wrong Account, Lawsuit Says" - Tampa Bay Times [READ STORY](#)

"Hackers are Sending Fake HIV Results and Coronavirus Emails to Infect People's Computers" - BuzzFeed News [READ STORY](#)

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Fiduciary Duties Owed by a Board of Directors to its Community Association

Cont.

In accordance with the Arizona Nonprofit Corporation Act, individual directors owe the following fiduciary duties to their community associations: (1) a duty to act in good faith, (2) a duty to act with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and (3) a duty to act in a manner the director reasonably believes to be in the best interests of the corporation. See A.R.S. § 10-3830(A). A.R.S. § 10-3830(B) permits a director, in discharging his or her duties, to rely on information, opinions, reports, or statements prepared by certain qualified individuals. These qualified individuals include, for example, legal counsel or public accountants. This provision is commonly referred to as the “Safe Harbor” provision and is intended to shield directors from liability when making decisions outside their expertise or common knowledge.

The duty of good faith is a subjective standard. Each director must actually believe that they are “doing the right thing” and acting in the best interests of the association. A director does not act in good faith if, for example, the director has knowledge concerning the matter in question that makes reliance on information otherwise permitted by A.R.S. § 10-3830(B) unwarranted. For instance, if a director does not reasonably believe that an individual possesses professional or expert competence to prepare financial data, but still takes action based on financial data prepared by that individual, the director has likely breached his or her duty of good faith.

In order to satisfy the duty of care, directors must make an honest effort to make informed decisions with respect to each issue that comes before the board. This is an objective standard, as each director must exercise the same level of care that an “ordinarily prudent person in a like position would exercise under similar circumstances.” As a starting point, each director should be familiar with the association’s governing documents and procedures and should make a reasonable attempt to understand the issues and options brought before the board. If a director does not feel that he or she has sufficient information to make an informed decision, such director should seek to table any pending vote and obtain additional information before making a final decision. In cases where specific expertise or skills are required, directors should request (and are entitled to rely upon) the advice and assistance of competent experts or practitioners as stated in A.R.S. § 103830(B), such as attorneys, accountants, etc.



The final duty—often referred to as the duty of loyalty—requires that directors refrain from taking actions, particularly undisclosed actions, that: (i) will benefit the director or a “related person” as defined in A.R.S. § 10-3860(3); and (ii) are of such significance that the director’s judgment could reasonably be influenced. A director is required to act “in a manner the director reasonably believes to be in the best interests of the

corporation” at all times. This standard has both objective and subjective components. An effective test for a director to use in evaluating whether or not he or she is acting properly is to ask, “Am I placing my own personal interests ahead of those of the association?” and/or “Could others reasonably believe that I am placing my own personal interests ahead of those of the association?”

The duty of loyalty owed by a director to the association also includes maintaining confidential information and avoiding (or properly disclosing) conflicts of interest. The duty of loyalty, however, does not prohibit a director from benefiting from a transaction that involves the association – the key issue is whether the transaction was fair and reasonable to the association at the time (and in many cases whether the director fully disclosed his or her interest). For instance, it is permissible for a board member to own a company that contracts with the association if the terms of the contract are commercially reasonable, negotiated by the parties, and fully disclosed. It is a breach of the duty of loyalty, however, to hide pecuniary relationships, charge unreasonable fees for services, etc.

Although there will certainly be “close calls” and tough decisions, board members can generally satisfy their fiduciary duties if they: (a) make decisions that they reasonably believe are in the best interests of the association; (b) familiarize themselves with the association’s governing documents; (c) refrain from making decisions without sufficient information (seek additional data, ask questions, etc.); (d) seek professional guidance when necessary or appropriate; (e) keep the association’s confidential information confidential; (f) put the association’s interests above their own; and (g) freely disclose facts or circumstances necessary to evaluate any

potential conflicts of interest.

Finally, the Court of Appeals previously held in *Rohde v. Beztak of Ariz., Inc.*, 164 Ariz. 383, 793 P.2d 140 (App. 1990) that neither a community association nor its board of directors owe fiduciary duties to member homeowners. While a board of directors does not owe fiduciary duties to individual homeowners, the Arizona Court of Appeals in *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007) held that, in addition to duties imposed by statute and the governing documents, an association has a duty to the members: (i) to use ordinary care and prudence in managing the property and financial affairs of the community that are subject to its control; (ii) to treat members fairly; (iii) to act reasonably in the exercise of its discretionary powers including rulemaking, enforcement, and design-control powers; and (iv) to provide members reasonable access to information about the association, the common property, and the financial affairs of the association. Directors should also ensure their compliance with the *Tierra Ranchos* standards in relation to their association's member homeowners.



Jeff Solloway is an associate attorney who first joined the firm as a summer associate during law school in 2018 before being admitted to the bar in 2019. Jeff practices in our Tempe office and is happy to answer any fiduciary duty (or any other legal) questions you may have. You can reach Jeff at (480) 534-4422 or jeff.solloway@carpenterhazlewood.com.

Application of the 2020 Assistance Animal Notice to Community Associations *Cont.*

FHEO2020-01, or the Assistance Animal Notice ("AAN"), was intended to outline best practices for housing providers to determine when to provide an assistance animal accommodation. The AAN was drafted partially in response to a national concern regarding 'fake' service and assistance animals, and the serious problems caused by individuals who were gaming the system to avoid restrictions and fees/deposits. Unfortunately, the AAN was issued at the start of a pandemic, which has prevented stakeholders from engaging in meaningful training and discussion.

The AAN was also intended to assist disabled individuals who must make a request for accommodation. Disabled individuals who request an accommodation for their service or assistance animal *must* have the animal in order to use and enjoy their housing. The pandemic response is triggering multiple serious civil rights concerns across protected classes. Thoughtful application of the AAN by community managers now will alleviate uncertainty for both disabled individuals and associations, and help keep housing fair. Keep in mind civil rights violations today could easily turn into expensive claims in the future. Let's discuss some key points from the AAN to use the next time you get a request for a comfort chicken.

Service, Support, Assistance, ESA, and Therapy Animals – what is going on?

For the purpose of the federal Fair Housing Act ("FHA"), all animals used

by a disabled individual in housing are assistance animals. There are two types of assistance animals: 1) **service animals**, as defined by the Americans with Disabilities Act ("ADA") and 2) **support animals**, which have no training requirement.

Laypeople and housing attorneys alike have a tendency to use the above terms interchangeably, and there are no 'magic words' to request an animal accommodation. Associations should listen carefully and make certain a request is not accidentally denied because the wrong terminology is used.

Service Animals

The AAN recommends housing providers begin their inquiry by determining if the animal is a service animal. Remember, only a dog can be a service animal (with a miniature horse exception). Sometimes it is readily apparent a dog has been trained to do work or perform tasks for the benefit of a person with a disability, for example a guide dog or a dog providing mobility assistance. However, if you cannot tell if the dog is a service animal, the association may ask two questions:

1. Is the animal required because of a disability?
2. What work or task has the animal been trained to perform?

If the answers to the questions are 'yes' and work or a task is identified, the association should permit the animal if the accommodation is otherwise reasonable, because the dog is a service animal. Keep in mind the ADA does not apply to most housing providers, but the AAN uses the ADA's definition of a service animal.

If the answer to either question is

'no' or 'none,' the dog is not a service animal.

Support Animals

We do not have enough space in this article to discuss how to verify a disability or the nexus between the disability and requested accommodation. Professional community managers routinely receive and process requests for accommodation for issues from wheelchair ramps to parking. The AAN details certain changes to the types of animals that may now be requested as an accommodation.



There are now two classes of support animals: 1) animals commonly kept in households and 2) unique animals. **Animals commonly kept in households** include: dogs, cats, small birds, rabbits, hamsters/gerbils/other rodents, fish, turtles and any other small, domesticated animal that is traditionally kept in the home for pleasure. Barnyard animals, monkeys, kangaroos, any reptiles other than turtles, and any other non-domesticated animal fall into the **unique category**. I personally have never seen a request for a kangaroo in Arizona, but there is a kangaroo named Jimmy who lives with a family in Wisconsin.

If the requested animal is one commonly kept in households, for example a cat, the association should generally permit the accommodation so long as the request is otherwise reasonable.

However, if a unique animal is requested, the requesting individual now has, "the substantial burden of demonstrating a disability-related therapeutic need for the specific animal or specific type of animal." The requester is encouraged to submit documentation from a health care professional that confirms the unique animal is needed. The association may deny the request if the requesting individual cannot provide adequate documentation.

Quick Tips and Best Practices

- The association's accommodation forms should be updated to reflect the AAN. We also recommend attaching the final three pages of the AAN, entitled "Guidance on Documenting an Individual's Need for Assistance Animals in Housing" ("Guidance"), to any form and provided to the requester. The Guidance gives detailed information regarding disability and how to best document the need for an assistance animal in housing.
- The association should generally respond back to the requesting individual within **ten days**.
- If an association makes a mistake and does not perfectly implement the AAN guidance, the mistake is not an automatic violation of the FHA.
- Please do not ask for details of an individual's diagnosis, medical records, require a medical exam, or request that the individual or their health provider explain the severity of the disability. If an individual *voluntarily* provides such information, the association may review - but make certain all information is kept completely confidential!

If you have any questions or concerns about successfully implementing the

AAN, your legal team is available to help. CHDB provided a remote comprehensive manager training on April 15. You may access a video of the April 15th training using the following link: <https://www.carpenterhazlewood.com/fhaseminar/>. CHDB will also be scheduling an in-person manager training in the future to address any additional questions regarding implementation. Thank you for your kindness, your professionalism, and your hard work. We appreciate you.



Lydia Peirce Linsmeir is a partner who joined the firm in 2015. Lydia practices in our Tempe office and is passionate about fair housing, disability, and assistance animal issues. You can reach Lydia at (480) 427-2866 or lydia@carpenterhazlewood.com.