

# New River Community Action, Inc. Board Member Training March 23, 2017

# Presenter



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# Director Responsibility

*What you need to know to be an effective Board Member*

# Articles of Incorporation and Bylaws

- What is the purpose of the organization?
- How many Directors does it take to have a quorum?
- What types of actions require the unanimous consent of the Board? Any?

# Responsibilities

- Generally: A Corporation is to be managed under the direction of its Board of Directors (Va. Code 13.1-853, et. seq.)
- Specific Managerial Oversight:
  - Investment of corporate funds
  - Making of grants
  - Appointment/removal of officers
  - Approval of corporation's finances
  - Approval of all major undertakings of the corporation
  - General management of the corporation

# Duties of a Board Member

- Obedience
- Loyalty
- Care

# Duty of Obedience

Directors may only act within the powers conferred upon the corporation by its articles and bylaws

Practically, what does this mean?

# Duty of Loyalty

- A director should not use his/her position to gain a personal advantage
- Prohibits self-dealing by directors
- All dealings with the corporation should be open, fair, honest and done in good faith



# Breaching the Duty of Loyalty

- Failure to disclose
- Operating a competing enterprise
- Unfair advantage in dealing with the corporation
- Usurping opportunities
- Misuse of confidential information
- Secret profits
- Using position for personal benefit
- Improper solicitation of clients and other employees

# Complying with the Duty of Loyalty

## Conflict of Interest

- Direct or indirect personal interest

## Not automatically voidable

- Material facts disclosed or known to the board; or
- Board authorized, approved or ratified the transaction; or
- Transaction was fair to the corporation

Does this decision impact, negatively or positively, my “other” organization?

# Duty of Care

## Business Judgment Rule

- “A director shall discharge his/her duties as a director, including his/her duties as a member of a committee, in accordance with his/her good faith business judgment of the best interests of the corporation.” Va. Code § 13.1-870A

# Duty of Care

The Business Judgment Rule will protect a director from liability for action taken on behalf of the corporation provided the director:

- Acted in good faith
- Was reasonably informed; and
- Believed the action was in the best interests of the corporation

Directors must be attentive and inquiring

- Ignorance of the corporation's affairs is not a defense

# Complying with the Duty of Care

Reliance – A director is entitled to rely on information prepared or presented by:

- Reliable and competent officers or employees of the corporation
- Legal counsel, accountants, etc.
- A committee of the board

As a Board Member, you should make sure to...

- Have and attend regularly scheduled meetings
- Review meeting minutes and agendas
- Review committee reports
- Limit use of written consents



# Director Liability

*What should you be concerned about?*



# Categories of Liability

- Liability for Unlawful Distribution
- Liability for Violation of General Duty
- Liability for Tort
- Liability for Debts and Contracts
- Corporations on the Brink of Insolvency

# Common Liabilities for Non-Profits

- Self-dealing
- Mismanagement
- Improper decision-making
- Failure to comply with corporate formalities

# Charitable Immunity

- Volunteers - Under the doctrine of charitable immunity, a volunteer of a charity is immune from liability to the charity's beneficiaries for negligence while the volunteer was engaged in the charity's work.
- Charity – The doctrine of charitable immunity in Virginia “precludes a charity’s beneficiaries from recovering damages from the charity for the negligent acts of its servants or agents if due care was exercised in the hiring and retention of those servants.”

# A Charity's Activities

- As Moore explained, a charity's activities depend upon the work of its servants, and the Virginia courts have expressed their interest in promoting the worthwhile contributions of charitable institutions to society. To expose the charity's servants to liability while shielding the charitable organization itself would be inconsistent with the charitable immunity doctrine. Moore, at 423, 463 S.E.2d 459.

# Limitations of Director Liability

## Statutory limitations

- Amount specified in Articles; or
- The greater of \$100,000 or amount of cash compensation received by the director in preceding 12 months

## Special Rule - Tax-exempt corporations

- If a director serves without compensation, there is no liability for damages

Exceptions - willful misconduct or knowing violations of law

# Indemnification for Directors

- Indemnity – agreement to assume legal responsibility for another person
- Insurance – contract pursuant to which an insurance company agrees to compensate the policy holder for a specified loss
- Mandatory Indemnification
  - Unless limited by the Articles, a corporation must indemnify a director who entirely prevails in the defense of any proceeding to which he/she was a party because he/she was or is a director of the corporation. Va. Code § 13.1-877.



# Indemnification of Directors

Permissive Indemnification – A corporation may indemnify a director if:

- Director acted in good faith
- Director believed his/her conduct was in the corporation's best interests
- Director had no reasonable cause to believe his/her conduct was unlawful

# Indemnification of Directors

- Further indemnification permitted if authorized by Articles or Bylaws
- Advancement of reasonable expenses
- Insurance

# Indemnification of Directors

Even if the corporation is authorized to indemnify a director, it is of little value if the corporation does not have the financial resources to do so.



# Confidentiality Obligations

*Obligations are applicable to employees and volunteers alike.*

# General Rules of Confidentiality

1. If the document says CONFIDENTIAL, it is confidential.
2. As a member of the Board of Directors, or an executive committee member, you have specific and legal obligations to the organization.
  - status as a parent, community leader, etc. do not get to dictate behavior
3. Employ common sense!

Would I want this in the newspaper or on the news?  
Would I be concerned if people knew I was the “source”  
of information?

# Confidentiality and Personnel

1. Interviewing/hiring/firing should only be discussed with the hiring committee, HR, the employee's supervisor and members of the Board.
2. Personnel matters are “need to know” only.
  - documentation should be locked up
  - policy re: retention guidelines



# To Do

- Demand Accountability.
- Attend, prepare for and contribute to meetings.
- Regularly review the conflict of interest policy.
- Ask the hard questions.

# Thank You!



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