

HOA EMERGENCY PLANNING: A LIABILITY DISCUSSION

In my work with various homeowners associations and boards one question that I regularly get is whether or not adopting an emergency plan increases an association's risk for litigation and liability. As a matter of fact, the fear of litigation tends to dissuade many associations from emergency planning altogether! Although I have been unable to find any documented litigation relative to a community's emergency planning (successful or not), we do live in an increasingly litigious society. As a result, I suppose that there could be risk of an association being sued for some reason relative to their emergency plan. I believe that the likelihood of a plaintiff being successful against an association, absent some level of negligence, malice or undue care, is very remote, however.

In fact, the California Civil Code provides for the protection of volunteer directors of residential common interest developments against liability and judgments in the general sense. The Civil Code states that directors shall not be personally liable, beyond certain liability insurance coverage limits, to any person who has suffered certain losses when certain criteria are met. Those criteria include: 1) when the act or omission in question was performed within the scope of the director's association duties, 2) the act or omission was made or performed in good faith, 3) the act or omission was not willful, wanton or grossly negligent, and 4) certain minimum insurance requirements are met (refer to Civil Code Section 5800 for complete language). I presume that the broad nature of these protections would extend to any litigation or cause of action against a board relative to emergency and disaster plans and procedures.

With this in mind, let's analyze a few circumstances that might potentially expose a homeowners' association or board to liability. In these circumstances, I presume that the motivating factors causing an association or board to develop a formal emergency and disaster plan are always going to be noble and well-intended, like enhancing the safety and security of the community when a disaster event occurs or responding more effectively to minimize the impacts of an emergency on the community (lifestyle and financial considerations). In no way should any litigant ever be able to successfully prove that the board or association had any malicious intent when they embarked upon their journey to develop an emergency plan!

So, some circumstances that might create an opportunity for someone to pursue litigation relative to an emergency plan within the framework of the Civil Code might include:

- Promising more support or intervention than the association or community can actually provide (resource allocation);
- Willful, wanton or gross negligence;
- Failure to deliver what the emergency plan has set as reasonable services or outcomes;
- Assuming more responsibility than the board is trained or prepared to reasonably provide;
- Failure to train and conduct periodic plan review;
- Deliberate indifference;

These are just a few circumstances that could lead to liability and exposure. Obviously, these scenarios should be proactively considered and avoided during the development of any emergency and disaster plan.

For the purpose of our continued discussion let's focus on the things a board can do to minimize or eliminate the potential for litigation or liability stemming from their emergency planning efforts.

WHAT SHOULD A BOARD DO?

As with any board action or decision, a continual process of risk analysis and mitigation must be employed while developing the emergency plan for their community. Through this risk management process the board's decisions should incorporate adequate safeguards to avoid legal challenges and exposure to litigation.

To help you in this endeavor, I have identified seven basic guidelines for boards to follow during the emergency planning process.

SEVEN GUIDELINES FOR DEVELOPING A SAFE AND DEFENSIBLE EMERGENCY PLAN:

1. **Remember, YOU are not a professional emergency manager.** As a board member for your HOA you have most likely demonstrated that you are willing to assume a higher level of responsibility than most to ensure that the community remains appealing, viable, fiscally sound and well managed, without being compensated. But, you do not have the training and experience that a professional emergency manager has. Your community should not expect you to perform at the level of a professional emergency manager in disaster or emergency events. No one could ever reasonably expect this, including a judge and/or jury!
2. **K.I.S.S. (Keep It Simple and Straight-forward).** This mantra stems from step #1. Since you are not a professional emergency manager and no one should have an expectation that you will ever function as one in your leadership role as an HOA board member, it is best to keep the emergency plan simple. Consider a few things that the board can do to better prepare the community for disaster or emergency events. I normally recommend that boards consider a simple communications and information dissemination plan, combined with sheltering and evacuation protocols. In combination, these build a great and simple foundation for any community's emergency plan. Remember also that developing the plan is only part of the process. The plan must be reviewed periodically to ensure that the content is still applicable and contemporary. The board must also conduct periodic training and disaster drills to better understand and practice their roles and responsibilities when a disaster or emergency occurs. Consider too that keeping the plan simple and basic with clear expectations helps to keep the training and review phases simple.
3. **Make sure to keep owners' and residents' best interests in mind.** This should be prominently documented in the policy statement of your emergency plan. Although it seems ridiculous that you would need to address this, you cannot assume that everyone will understand that this was the board's intent when developing their community's emergency plan. If it is written into the policy statement that the board's intent is to enhance the safety of homeowners and residents through the development and adoption of a community emergency plan, then the board's position and actions should be more defensible when a litigant attempts to show otherwise.
4. **Do not promise what you cannot or are not prepared to deliver.** This could be the one area that would most likely expose a board or HOA to liability! An emergency plan sets response and support levels that homeowners and residents will expect the HOA/board to provide. If the board fails to meet these expectations and someone suffers an injury or other loss as a result, then there could be liability. For example, let's assume that an emergency plan includes language that the board will ensure that damaged properties are secured after any disaster or emergency event. However, prior to the property being secured, it is burglarized and property is stolen, or someone gains access and injures themselves while inside. Given this scenario, there may be legitimate cause of action and resulting liability as the board failed to do what was promised based upon the community's expectations. Refer to the K.I.S.S. principle for further clarification on this.
5. **Don't overextend; stay within your capabilities.** Remember, you are not a full-time board member. You are not compensated for your valuable time and you are not a professional emergency manager. Your community should not have any expectation that you are able to commit unreasonable amounts of time to respond to and handle any emergency or disaster event, to the detriment of your professional, personal and other adult responsibilities! Keep this in mind when you're developing the emergency plan. If you can't guarantee 100% that you will be able to commit adequate time, resources and energy to a specific responsibility or expectation, then don't say you will! If the board is incapable of fulfilling some function that it's considering for the emergency plan (for whatever reason), then don't include that in the plan.

6. **Don't be negligent.** A finding of negligence, particularly gross negligence, could create liability for an HOA board, or individual board member, during an emergency or disaster event. Negligence comes in many forms and is typically determined by a judge or jury. In order to avoid the negligence trap follow the simple mantra: "Do What You Say You Will Do!" If you fail to plan or participate in training, or if the board does not review their emergency plan regularly to ensure that it is contemporary and that all of the expectations that have been set are attainable, then a finding of negligence might occur. Additionally, if board members take action, or promise action, that is beyond of the capabilities, training or resources of the HOA and are not included in the emergency plan, then failure to fulfil that promise and/or resulting damages could be deemed to be negligent, and possibly a failure to fulfill a contract.
7. **Formalize the plan in writing and disseminate it to all stakeholders within the community.** A good emergency plan outlines the board policy and intent for the emergency plan along with the processes and procedures that the board feels best protects their specific community. The plan will also contain specific language relative to the minimal amount of training (I recommend a minimum of a half day of training and drill exercises annually) that board members must complete and how often the plan must be reviewed for applicability and to ensure it remains contemporary with the community's needs and resources. The entire community should have access to the plan so that there is a clear and common understanding of community expectations, response capabilities and board member roles when a disaster event occurs.

Employing these concepts and guidelines as you develop and work with your emergency plan should ensure that you as a board member, the HOA and your entire community are adequately insulated from liability. Notice that I didn't say that you would be insulated from litigation, but I do believe that negative sanctions resulting from any litigation would be highly unlikely.

At this point it might be best to start asking whether or not a board assumes an elevated level of risk and exposure to litigation for failing to consider and adopt a plan for responding to disasters or emergencies within your community. I don't know the answer to this one, but the concept is interesting!

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