

**Colorado Supreme Court
Judicial Ethics Advisory Board (C.J.E.A.B.)**

**C.J.E.A.B. ADVISORY OPINION 2005-03
(Finalized and effective June 3, 2005; amended June 21, 2005)**

ISSUE PRESENTED

Judges who live in residential communities that are managed and controlled by homeowners associations are confronted with judicial conduct questions if they participate in the management of the association. The following facts are assumed.

A judge has been asked to be a candidate to serve as either a general member or officer of the volunteer board of directors (“the BOD”) of the residential association (“the association”) in which the judge resides. The association is a non-profit corporation that manages the affairs of the homeowners. The BOD itself consists of nine owners in three classes of three members each, and it has an executive committee. Neither general board members nor those who serve on the executive committee receive compensation for their service. The BOD conducts regular monthly meetings, along with special meetings as needed.

The residential complex occupies four blocks and includes 185 units owned by 184 owners; one unit is owned in common and is used as a residence for the Resident Manager. In addition to the residences, the complex includes common elements such as tennis courts, a swimming pool, a clubhouse, parking lots, ponds, streams, and streets. The association’s annual operating budget is in excess of \$900,000, and the reserves exceed \$1 million. The association employs the Resident Manager, as well as an Office Manager and miscellaneous casual employees; it also contracts with a professional management company to oversee its daily operations and advise the BOD. Additionally, the association contracts with vendors for security services, landscaping and lawn maintenance (\$115,000 for the last year), insurance, snow removal, as well as for matters on an as-needed basis, such as street repair and capital improvements (including, for example, an expenditure of \$2,500,000 to replace all roofs).

In addition to overseeing the association’s contracts with service providers, the BOD guides the investment policy of the association, and it enforces the association’s rules, regulations, and covenants against resident owners. The association has in the past been involved in minor litigation, but never in the judge’s court. No litigation is currently pending or has been threatened. Outside General Counsel is retained, and other specialized counsel are employed on an as-needed basis.

Initially it is noted that recusal would be necessary if any association matter came before the judge’s court, regardless of whether the judge was merely a resident owner/member of the association or served on the board of directors. Moreover, if the judge is permitted to serve on the BOD, the judge would not be permitted to offer legal or investment advice to the association.

Given these parameters, and in light of the association's size and activities, may the judge serve on the volunteer board of directors of his homeowners' association?

CONCLUSIONS

Whether a judge may sit on the board of directors of his or her homeowners association is to be determined on a case-by-case basis. Where, as here, the association is large and substantial, maintains significant cash reserves, operates under a sizable budget, and engages in substantial business-type contacts with outside enterprises of the kind that might involve the association in litigation, it would be inappropriate for a judge to serve on the association's board.

APPLICABLE CANONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

Canon 5(B) encourages judges to participate in civic and charitable activities, provided that those activities do not reflect adversely on the judge's impartiality or interfere with performance of the judge's duties. Specifically, the Canon states that "[a] judge may serve as an officer, director, trustee, or nonlegal advisor of an educational, religious, charitable, fraternal, social or civic organization if not conducted for economic or political advantage of its members" but cautions that the judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before that judge or will be regularly engaged in adversary proceedings in any court.

Canon 5(C)(2) permits a judge to hold and manage his or her own investments, or those of a family member, including real estate, but disallows judges from serving as an officer, director, manager, advisor, or employee of any business.

Canon 2 generally provides that a judge should avoid the appearance of impropriety in all activities.

DISCUSSION

A number of ethical advisory boards from other jurisdictions have confronted the same question that is raised here and generally have concluded that whether a judge may serve on his or her nonprofit homeowners' association board is a question to be decided on a case-by-case basis. *See, e.g.*, Massachusetts Advisory Opinion 01-6; U.S. Advisory Opinion 29; Illinois Advisory Opinion 95-13; New Hampshire Advisory opinion 78-1; New York Advisory Opinion 88-98; Ohio Advisory Opinion 04-3; Virginia Advisory Opinion 00-9; *but see* Florida Advisory Opinions 81-7, 81-10, 84-1 and 04-10. We find the Massachusetts and Federal Advisory Opinions particularly instructive, and draw guidance from them here.

The question presented is governed primarily by Canon 5. As noted above, Canon 5(B) permits service as an officer or director of an educational, religious, charitable, fraternal or civic organization not conducted for the economic advantage of its members. Canon 5(C)(2), alternately, permits a judge to hold and manage the judge's own investments, including real estate, but prohibits him or her from serving as an officer, director, manager, advisor, or employee of any business. As both the Massachusetts and Federal Advisory Opinions observe, however, service as a member or officer of a homeowners board of directors does not fall neatly into either category and, indeed, shares attributes of both categories "in that, on the one hand, this endeavor possesses certain commercial features, but on the other hand closely approximates a real estate investment not forbidden to [a] judge under Canon 5(C)(2). It is, moreover, directed at the saving of expense and at the wise expenditure of funds rather than to the realization or earning of income." Federal Advisory Opinion No. 29; *see also* Massachusetts Advisory Opinion 01-6.

The Massachusetts opinion goes on to note that where duties of a homeowners' board of directors generally relate to the management, maintenance, protection, and preservation of the judge's own residence and the facility in which that residence is located, service on the board of directors does not fall afoul of the judicial conduct canons. The judge's activities as a board member, while done in part on behalf of other unit holders, protects the judge's investment much like the maintenance, protection, and preservation activities of a judge living in a single-family residence protects his or her interests therein. Should the activities of the homeowners association involve substantial business dealings, however, then the prohibition contained in Canon 5(C)(2) comes into play.

Like the Massachusetts advisory board, we adopt the following guidance from the Federal Advisory Opinion on the question of when a judge's duties on a homeowners association board of directors become problematic under the Canons:

If the cooperative is not a large and substantial one, and if the duties entailed are routine and primarily internal (allocating responsibilities; employing maintenance, security, and essential personnel; providing for services; . . . formulating . . . rules and the like), such activity would not appear to violate the provisions of the . . . canons. If, however, the duties entail business-type contacts, substantial in number or character, with outside enterprises particularly of the kind that could result in litigation, a judge's indulgence in the activity becomes questionable, and he or she should then give consideration to leaving those responsibilities to others. [Federal Advisory Opinion No. 29.]

Because the condominium association in the Massachusetts matter involved only a single four-story building where management was delegated to an outside company and no litigation had been engaged in or threatened, the judge's participation in the association was not automatically proscribed. The advisory board encouraged the judge,

however, to examine other factors unknown to them, such as the size of the annual budget, the amount of reserve funds, the likelihood of substantial capital improvements being made, and the likelihood of the acquisition of abutting properties or buildings. Moreover, the advisory board encouraged the judge to consider whether service as an officer on the board would entail more business-type contacts than service on the board as a member only. Further, the advisory board observed that the judge would not be permitted to give investment advice, pursuant to Canon 5(B)(3); act as a mediator or arbitrator in resolving internal disputes among unit owners, pursuant to Canon 5(E); or act as the organization's legal advisor, pursuant to Canon 5(F).

Although the question of whether the judge in the factual case assumed here may serve on his or her association's board is not clear cut, we believe that under these facts, the more prudent course would be for the judge to refrain from this type of service. Our conclusion is informed by many of the same factors animating our sister jurisdictions' analyses, including the size and breadth of the association's operations, the depth and number of the board's business dealings, and the prospect that those dealings might spawn litigation. Specifically, in this matter, the residential complex is quite large, spanning four city blocks and containing 185 units that share numerous common elements, such as the swimming pool and parking lots. Both the association's annual budget and its reserves are substantial, with each approaching or exceeding the \$1 million mark. Moreover, the board anticipates engaging in significant capital improvements, such as the \$2.5 million roof repair project. Although management of the association is delegated to an outside company and many of the BOD's duties in overseeing the association are routine, the board engages in numerous and significant business-type contacts with outside vendors. The number and depth of these business-type contacts increase the risk that the association will be involved in litigation, and, indeed, the association has been involved in lawsuits, albeit over minor matters. Under these facts, then, we believe that the judge should not seek a seat on his or her homeowners association's board of directors.

We note that, although service on the BOD would be inappropriate under the assumed facts, such service might be appropriate in a different case where the association at issue was not large or substantial, did not engage in substantial business-type contacts with outside vendors that presented a threat of litigation, and where the association's budget and reserves were small. In such a case, however, the judge would still be forbidden from offering investment or legal advice to the association, pursuant to Canon 5(B)(3). Even if the association meets the criteria outlined above suggesting that service on the BOD may be appropriate, the judge should carefully consider whether service on the executive committee or higher governing board would comport with the Code of Judicial Conduct in light of the discussion above and in light of the general directive of Canon 2 that a judge should avoid impropriety and the appearance of impropriety in all of his or her activities.

RESOLUTION AND OPINION

The judge should refrain from serving on his or her homeowners association's board of directors.

FORMALLY FINALIZED AND EFFECTIVE this 3rd day of June, 2005, by the Colorado Judicial Ethics Advisory Board, as amended on June 21, 2005.