Memo

To: Hot Springs Village Board of Directors
From: Governance Committee
Date: December 20, 2017
Re: Motion – Approve Proposed Revision to Bylaws Article IX, Section 3. Board Accountability

Motion

1. I move to approve the below additions to Bylaws Article IX, Section 3. Board Accountability, which further defines a Board member’s duties of loyalty and care to Hot Springs Village POA, Inc.
2. I move to transfer Article 24 of the Administrative policies to the recently adopted Governance Policy Section 8 and to update verbiage to that which matches these Bylaw revisions.

Background

In fulfilling its fiduciary duties, Board members are held to certain legal duties, with respect to the entities they govern. In making its bylaws recommendations to the Board, the Governance Committee has evaluated various resources, including the Arkansas Nonprofit Corporation Act of 1963, under which Hot Spring Village POA, Inc. was established. In order to clarify those duties, the below revisions are re-submitted as originally offered in the November Board meeting discussion.

It is important to note four things:

1. Section II.b.1 contains direction on executive sessions, the large majority of which originated from existing verbiage in Article 24 of the Administrative Policies. This article was adopted in 2012. Executive sessions are not new to Hot Springs Village nor are they improper while conducting business, professionally, and with the highest duties of care and loyalty.
2. Two changes were made to previous policies, not necessarily to previous practices.
   a. An additional reason for executive session was added: discussions regarding board member conduct and conflicts of interest. For example, deliberations surrounding suspected self-dealing.
b. Voting while in executive session is also clarified. For example, the deliberations and decisions revolving around a chief executive’s performance or employment.

c. In each of the two items above, public deliberations would be inappropriate and potentially put the corporation in legal jeopardy.

3. Executive sessions are not intended to, nor should they be used to hide important and appropriate information from the property owners, but to protect the innocent, assure confidentiality about sensitive matters, and avoid unnecessary legal expense or action.

4. Your current Board believes the use of executive session should be used judiciously and wisely as a necessary tool in fulfilling our fiduciary duties.

The Governance Committee recommends approval of the proposed revisions per the attached redlined copy of Bylaws Article IX, Section 3.

This was discussed at the November 15 regular meeting and reported by the *Voice*. 
Section 3. Board Accountability

The Board is accountable to the property owners and to one another for enforcing all rights, covenants, restrictions, and agreements applicable to the Properties and the owners thereof, and to Common Properties, as provided for in the Declaration or which now or may hereafter be contained in or authorized by the Articles of Incorporation, the Bylaws, or laws of the state of Arkansas.

I. Duty of Loyalty

Among the fiduciary obligations of an officer, director, staff member, or committee member of a community association and not for profit corporation is a duty of loyalty. This includes supporting, and not opposing directly or indirectly or taking any other stance against the policies and positions duly adopted by HSVPOA’s Board of Directors. As representatives of HSVPOA, officers, directors, staff, and committee members are obligated to maintain this duty of loyalty in all manner of activities during their terms of office.

This duty of loyalty is not intended to, nor should it, discourage debate. Informed debate is encouraged and is part of the individual’s responsibility in the deliberation process.

II. Duty of Care

The duty of care requires performing responsibilities, in a manner each director, officer, staff member, or committee member believes to be in the best interest of the association and with such care, including reasonable inquiry, as a prudent person in a like position would ordinarily use under similar circumstances. This standard of care has also been adopted in most jurisdictions and is often cited as the "prudent person standard" or the “business judgment rule.” Stated succinctly directors owe a duty of care to the association and its members and will not be liable for mere mistakes in judgment so long as they were acting in good faith and had a rational basis for their decision.

a) Conflicts of Interest. A “conflicting interest transaction” could be a contract, transaction or other financial relationship between the association and (a) a board member, (b) a party related to a board member, or (c) an individual or entity in which the board member has an interest. A board member need not own a company or receive direct benefit for there to be a conflicting interest transaction and should therefore exercise their powers for the good of all members rather than individual gain.

Board members are expected to disclose any conflict, or appearance of a conflict of interest to fellow board members. If the board then determines that a board member has a conflict of interest, the association may still enter into arrangement if the details between
the association and the conflicted board member are disclosed to the board, a majority of the disinterested board members vote in good faith to accept the arrangement, and all of the following criteria are met:

1. The conflict of interest results in better overall value when weighted against competitive bidding submitted by like contractors for the same work.
2. The Board shall disclose all the details and carefully document the conflict disclosure in the minutes.
3. Once the conflict has been disclosed and while the board is discussing whether the contract should be adopted, the conflicted board member shall be available to answer questions about the conflict and the contract.
4. The conflicted board member shall recuse him/herself from voting, and the conflicted board member shall leave the meeting during the remaining discussion and vote.

b) Confidentiality and Transparency. As further described in Chapter 8, Article 3 of the Board of Directors policies, both confidentiality and transparency must be balanced to prevent harm to HSVPOA or frustrate the deliberations of those individuals elected to govern the organization.

1. Private board deliberations are permitted and their confidentiality required in these matters:
   
   i. Discussions regarding employment, appointment, promotion, demotion, disciplining, or resignation of the CEO, as well as all other personnel authority delegated to the CEO;
   ii. Discussions regarding board member conduct and conflicts of interest;
   iii. Discussions regarding legal matters;
   iv. Discussions regarding the purchase, lease, exchange, or value of real property;
   v. Discussions regarding prospective gifts to HSVPOA;
   vi. Discussions regarding security issues;
   vii. Discussions regarding economic development negotiations;
   viii. Discussions of other confidential matters as reasonably expected to protect the organization and its interests.

2. Public deliberation is otherwise recommended to build property owner trust and support. Board members should not use private deliberations for the sole purpose of circumventing prudent transparency.

3. A Board vote, whether taken privately or publicly and as documented and allowed within these bylaws, shall be binding on the organization. Board actions taken privately shall be communicated during the next public board meeting.

Individual board members shall use their professional experiences and personal circles of influence to
equip themselves prior to deliberations and refrain from undermining board actions following a vote. Each individual shall uphold the spirit of Board member deliberation and decision-making processes, along with their resulting duties of care and loyalty.