

# HOA Homefront

## Limitations On The Business Judgment Rule

By: Kelly G. Richardson

The Business Judgment Rule (hereafter, the “BJR” for brevity) protects directors from personal liability if a board decision turns out to be error. Courts have also ruled that they will be deferential to association board decisions made within the BJR. However, that deference is not unlimited.

### Termites and Discretion

Appellate courts normally defer to boards so long as the BJR is followed. The State Supreme Court said so in 1999, while deciding *Lambden v. La Jolla Shores*. Lambden contended the board, in responding to a termite problem, should have fumigated the property instead of using spot treatment. The court held that so long as the board follows the BJR, “. . . courts should defer to the board’s authority and presumed expertise.”

This judicial deference, essential for boards to be able to govern their properties without being continually in litigation whenever a neighbor disagrees, includes the decision regarding whether to pursue enforcement litigation. This was confirmed in the 1977 *Beehan v. Lido Isle* decision, in which the appellate court supported the board’s discretion, after a BJR deliberation, to decide not to sue a member who had violated an architectural rule.

### Discretion is NOT Absolute

Boards cannot use the BJR to justify every association action. In each of the following cases, the board argued the court should be deferential in

its review of a decision, but the court found each time that the BJR did not apply.

### The Law Controls, not what the Board Says

In 2010’s *Dover Village v. Jennison*, the board had decided a leaky sewer pipe under a condominium was “exclusive use” area, and thus the member’s repair responsibility (under its CC&Rs), arguing that the court, under *Lambden*, must defer to its decision. However, the court disagreed, saying, “(t)here is an obvious difference between a legal issue over who precisely has the responsibility for a sewer line and how a board should go about making a repair that is clearly within its responsibility.”

*The Law Controls, Not  
What The Board Says*

### Board Discretion Is Not To Ignore CC&Rs

In 2002, a dispute arose in the Marquesa at Monarch Beach HOA. The CC&R’s had a height limit on trees, and the board invoked the BJR to defend exempting some palm trees from the limit. The appellate court in 2008 concluded: “The Board’s interpretation of the CC&Rs was inconsistent with the plain meaning of the document and thus not entitled to judicial deference.”

### Board Discretion Is Not To Ignore Law

In *Ritter & Ritter v. Churchill Condominiums*, the board argued the BJR protected its attempt to force a homeowner to repair a building code violation (a previously undiscovered hole in the floor separating levels of a high-rise residential tower). The higher court in 2008 disagreed, quickly upholding the trial court’s findings against the HOA.

---

### Board Discretion Is Not Inaction

Over a six year period, a condominium owner suffered repeated sewage floods coming from common plumbing. Each time, the HOA repaired the damage but never tried to determine and repair the cause. When *Affan* finally sued, the HOA argued the BJR protected it. In 2011's *Affan v. Portofino Cove*, the appellate court rejected the argument, noting that while sometimes inaction may deserve deference, here "the Association's inaction was not the result of any deliberative process."

### Boundaries

The BJR's protection is not unlimited. Boards cannot ignore the law, its documents, or the problem. That kind of judgment is NOT reasonable.

All rights reserved© 2013.

---

*Kelly G. Richardson is Managing Partner of Richardson Harman Ober PC, a California law firm known for real estate and Community association advice. Direct questions to [KRichardson@RHOPC.com](mailto:KRichardson@RHOPC.com). For past columns, visit [www.HOAHomefront.com](http://www.HOAHomefront.com).*

*For more information see [HOAHomefront@Facebook.com](https://www.facebook.com/HOAHomefront) or [twitter.com/HOAHomefront](https://twitter.com/HOAHomefront).*