

ETHICS & CONFLICTS OF INTEREST FOR CONSERVATION DISTRICT BOARDS

presented by

Thomas A. Tupitza, Esq.

Knox McLaughlin Gornall & Sennett, P.C.

February 16, 2021

Copyright © 2021 Knox McLaughlin Gornall & Sennett, P.C.



Overview

- Basis for Legal and Ethical Duties of Directors
 - Role of Board and Responsibilities of Directors
 - Governance vs. Support
 - Board as body vs. director as individual
 - Governance vs. Management

Overview, cont.

- Legal and Ethical Duties of Directors
 - Duty of Care
 - Duty of Loyalty
 - Conflicts of Interest
 - Personal Liability and Indemnification

Overview, cont.

- Governance Best Practices in Support of Legal and Ethical Duties
 - Productive Meetings
 - Proper Use of Committees
 - Policies: Approving and Reviewing
 - Board Self-Assessment
- Q & A

Role of the Board of Directors and Responsibilities of Individual Directors

“Building for Tomorrow”

Pennsylvania Conservation Partnership’s
Leadership Development Program for
Pennsylvania's Conservation Districts

Role of the Board of Directors

- Setting and scrutinizing the district's mission and overall strategy to achieve it
- Supporting management and staff, and assuring they function efficiently and responsibly: They represent the district to the community on a day-to-day basis
- Selecting, evaluating and supporting the district manager and making sure a valid selection and evaluation process is in place for other district staff

Role of the Board of Directors, cont.

- Developing and conserving the district's resources – both funds and property
- Serving as a bridge and buffer between the district and its customers and partners; advocating for the district and building support in the community

Responsibilities of Directors

- Be familiar with Pennsylvania's Conservation District Law: Know the powers, authorities, responsibilities and limitations placed upon districts by the law
- Attend all regular and special meetings for the district board
- Accept the responsibilities of any office to which you are appointed within the district board; serve on committees and present reports on committee accomplishments and activities

Responsibilities of Directors, cont.

- Help to enroll landowners as cooperators with the district and encourage citizens to participate in district programs
- Attend regional, state and national conservation district meetings and other meetings on behalf of the district to stay current with conservation issues and programs; when attending meetings on behalf of your district, make an effort to represent the feeling of your board as a whole, not just your personal feelings

Responsibilities of Directors, cont.

- Pursue every avenue for additional funds to support district programs
- Stay informed on conservation issues in your county and be familiar with all laws, policies, and programs important to your district
- Develop a working relationship with county commissioners, state and national legislators, agency officials, and representatives of organizations that do or could cooperate with the conservation district

Responsibilities of Directors, cont.

- Be thoroughly familiar with district programs and activities
- Be positive, innovative and action-oriented

Compare BoardSource, “Ten Basic Responsibilities of Nonprofit Boards”

1. Determine mission and purposes, and advocate for them
2. Select the chief executive
3. Support and evaluate the chief executive
4. Ensure effective planning
5. Monitor and strengthen programs and services
6. Ensure adequate financial resources

BoardSource, “Ten Basic Responsibilities of Nonprofit Boards” (cont.)

7. Protect assets and provide financial oversight
8. Build and sustain a competent board
9. Ensure legal and ethical integrity
10. Enhance the organization’s public standing

***Compare* The Standards for
Excellence®: An Ethics &
Accountability Program for the
Nonprofit Sector**

**(Maryland Association of Nonprofit
Organizations and Pennsylvania Association
of Nonprofit Organizations)**

The Standards for Excellence®

- Mission, Strategy and Evaluation
- Leadership: Board, Staff, and Volunteers
- Legal, Compliance, and Ethics
- Finance and Operations
- Resource Development
- Public Awareness, Engagement, and Advocacy

Governance=Navigation

(a ‘navigator’ charts the course, controls, and guides; a ‘governor’ sets fuel intake and speed)

Governance vs. Support

Jan Masaoka, Blue Avocado

“The Governance/Support Model for Nonprofit Boards”

Governance vs. Support

GOVERNANCE	SUPPORT
The Board acts as body	Board members act as individuals
The Board is the boss	Board members act with and often under the direction of staff
The Board represents the community's interests to the organization	Board members represent the organization's interests to the community
<ul style="list-style-type: none">• Big Decisions• Legal oversight• Financial oversight• CEO• Planning• Efficiency and impact	<ul style="list-style-type: none">• Advice• Supporting the revenue strategy, perhaps by fundraising, perhaps by assisting with earned income, perhaps by working with funders, and so forth• Ambassadors• Volunteering

Governance vs. Management

“Leadership Roles in Management and Governance”

Standards for Excellence® Institute

- The Board and the executive share responsibility for almost every organization function
- There is no clear division on most responsibilities and there can be a lot of cross-over
- For each organization, the division between governance and management is a negotiated choice
- That’s why **LEADERSHIP** is primary and the role or responsibility is secondary

John Carver: Policy Governance

- Board determines *ends* of the organization (the “what”)
- Manager determines *means* to achieve the ends, within limitations set by Board (the “how”)
- Only Manager reports to Board; all other staff report to Manager
- Board as a body is responsible for oversight of directors as individuals

Board and Executive Partnership

Standards for Excellence®: An Ethics and Accountability Code for the Nonprofit Sector

- The board should appoint the chief executive, set the executive's compensation, and annually evaluate the executive's performance. In cases where a designated committee performs one of these responsibilities, the decision should be ratified by the full board

Board and Executive Partnership, cont.

- The board is responsible for supporting the functions of the executive, granting sufficient authority, and helping to ensure his or her success in managing the organization
- The executive is responsible for the day-to-day management and operations of the organization. The executive should be committed to the mission of the organization and have the skills necessary to manage the paid and volunteer talent, and financial resources of the organization
- The executive should support the board's policy and oversight function by providing accurate and timely information and resources to the board

Board and Executive Partnership

Key Responsibilities	Governance	Management
Ensure positive external relationships (public policy, media/communications, partnerships)	X	X
Hiring, coaching, overseeing, evaluating, firing of CEO	X	
Follow procedures for election, recruitment, and adequate onboarding of board members	X	
Program development and implementation (part of the annual and strategic plans, typically)		X
Day-to-day management, including execution of all contracts and agreements, accounts, and first media contact		X
Hiring, coaching, overseeing, evaluation, firing of staff		X
Overseeing program evaluation and outcome measurement (part of the annual and strategic plans, typically)	X	X

Board and Executive Partnership

Key Responsibilities	Governance	Management
Advance the vision, mission, strategy, and desired results	X	X – The CEO and staff are involved in an organization’s planning process
Plans: Strategic, Annual and Contingency	X – Approve	X – Implement
Policy (Fiscal/Finance, Personnel, Resources Development, etc.)	X – Approve	X – Develop and implement
Legal compliance	X	X
Provide fiscal oversight	X	
Develop organizational budget and determine specific expenditures		X
Approve budget(s)	X	
Ensure a resource development plan	X	
Implement the resource development plan, including preparation of an annual report	X – Board Members have roles	X – Staff have roles

Board-Manager Relationship

- Partnership
- Board selects, supports, evaluates Manager
- Communication and roles must be clear; conflicts should be resolved directly (no surprises)
- Board Chair-Manager relationship is important (set expectations regarding communication)
- Buck stops with the Board, not the Manager

Legal and Ethical Duties

- Legal duties of directors of nonprofit organizations under Pennsylvania law, though not directly binding on public officials and boards, are good models

Duty of Care

- A director shall perform his or her duties as a director, committee member, or officer:
 - in good faith
 - in a manner reasonably believed to be in the best interests of the organization
 - with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use in similar circumstances

Duty of Care, cont.

- A director may consider:
 - The effects of any action on any or all affected groups, including members, employees, suppliers, customers and creditors of the organization and on the community in which the organization is located, and all other pertinent factors.

Duty of Care, cont.

- A director may rely on information and opinions presented by:
 - officers or employees reasonably believed to be reliable and competent
 - lawyers, accountants, other professionals and experts within their areas of competence
 - committees, within their designated authority, if the director reasonably believes that they merit confidence

Business Judgment Rule

- Affirmative steps to support presumption:
 - attend and participate in all board and committee meetings
 - be familiar with policies and other relevant documents
 - insist that materials be distributed in advance; review them
 - ask questions, use independent judgment

Duty of Loyalty

- A director must act in the best interests of the organization, not in self-interest or to advance other conflicting interests
 - issues:
 - confidentiality (matters discussed in executive sessions)
 - corporate opportunities and duality of interest
 - conflicts of interest (statutory standards)

Public Official and Employee Ethics Act

- Complete Statement of Financial Interest
- Do not accept anything of value intended to influence your vote or action
- Cannot enter into a contract for \$500 or more between the district (or its general contractor) and you (or your spouse, child, or any business in which you or any member of your immediate family is associated) without public award

Public Official and Employee Ethics Act, cont.

- Announce the conflict, abstain from vote, and file written notice of your interest
- May vote, after disclosure, only if action could not otherwise be taken by the Board
- Do not represent anyone for compensation before the district for one year after leaving the district

Personal Liability and Indemnification

- Delegated programs: directors, associate directors and employees must be defended and indemnified by the Commonwealth if acting reasonably within the scope of duties under the Conservation District Law
 - Not applicable to willful, malicious, fraudulent, or criminal actions
- Non-delegated programs: directors and district staff are protected under the Political Subdivision Tort Claims Act, but here the protection is supplied by the district (insurance can be obtained)

If You Are Sued...

1. Notify your district solicitor immediately
2. *Delegated program*: Immediately notify the State Conservation Commission and depending on the program, either the DEP or Department of Agriculture legal offices. This begins the process of evaluating the case to see if you qualify for assistance by the Commonwealth. In the unlikely instance that you are sued for work done for the district, one of these offices will likely defend you in that suit
3. *Non-delegated program*: Work with your solicitor in the defense of that lawsuit. Also, check your insurance policy because there may be notification requirements in the policy

Governance Best Practices

Productive Meetings

1. Strategic agendas, not routine agendas
(Board Chair and Manager cooperate in drafting)
 - Seek ways to minimize large information downloads and routine reporting
 - Utilize a consent agenda for approval of routine items such as minutes, contracts, etc.
 - Limit the amount of time for committees reporting out orally (in some cases written reports or committee meeting minutes may be appropriate to provide in the board packet)
 - When compiling the consent agenda, always include contact information for the staff or board member who can best respond to inquiries about each consent agenda item

Governance Best Practices, cont.

Productive Meetings: Strategic Agendas, cont.

- If there is an item that would traditionally be part of a consent agenda (such as meeting minutes) and board discussion is anticipated, you will want to pull the item from the consent agenda (either before or during the meeting) so that the item can be discussed and addressed appropriately
- Focus on committees bringing recommendations for action items to the board
- Indicate which items are for discussion and which are for information
- Most important items first; set time limits

Governance Best Practices, cont.

Productive Meetings, cont.

2. Effective Manager reports

- Provide in writing before meeting
- Tie to progress on goals (dashboards)
- Keep Board informed of staffing changes, grants, other significant matters (no surprises)

3. Frequent educational opportunities

4. Periodic evaluation of meetings

Committees

1. Consider forming a Governance or Board Development Committee
2. A few of the traditional purposes of all committees are to:
 - Analyze and recommend courses of action (new programs or changes in focus or strategy)
 - Deliberate over and recommend solutions to problems
 - Monitor implementation and serve as an informal advisory resource to staff

Some Characteristics of Effective Committees

- They have a clear purpose – everyone knows why they are there
- They include members with appropriate expertise and seek outside expertise when needed
- They set annual goals, objectives, and timelines for their work
- They have the supporting resources needed to do their work
- They use agendas at each meeting

Some Characteristics of Effective Committees, cont.

- They keep clear minutes, including attendance, items discussed, actions taken, and next steps
- They establish a regular meeting schedule (and only meet when there is real work to be done)
- They report regularly to the Board to ensure their work is meeting Board expectations and current needs
- Each member takes responsibility for facilitating the work of the group
- They increase the efficiency and effectiveness of the Board, and do not substitute for the Board with regard to the making of organizational policy

Policies

Examples

- Delegation to the Manager
- Manager performance review
- Succession plan (emergency and long-term)
- Organizational chart
- Mission statement and statement of values
- Strategic planning and annual planning
- Resource development plan

Policies, cont.

- Financial policies
- Grievance procedures – employees and the public
- Human Resource Policies and Procedures (Employee Handbook)
- Volunteer Handbook
- Crisis or disaster plan
- Administrative policies: technology, communications and social media, sponsorships, fundraising, compensation, remote work

Policies, cont.

It may also be helpful for the board to establish a “policy on policies” that includes information such as:

- Statement of philosophy, principles, or purposes for organization policies
- Process for preparation, adoption, implementation, preservation, and review

Policies, cont.

- Policy changes or additions are prepared by staff and presented to the board or designated committee for action
- A majority (or super-majority) vote of the Board is required to approve policies
- Implementation of the policies is the responsibility of the Manager or his/her staff designee
- Put in a manual (can be electronic) for easy reference
- Review cycle/schedule (one, two, three years)

Board Self-Assessment

- Every year/at least every other year
- Consider personal interviews in some years
- Sample tool is a good summary of Board and Director responsibilities, duties, and governance best practices

Sample Board Self-Assessment Tool

Intended for: Boards seeking to assess their own performance.

Objective: Examine both performance and priority of Board activities.

Time Required: 30-60 minutes

Comments: Board members can complete individually or discuss as a group. Works well with a facilitator.

Sample Board Self-Assessment Tool

PRESENT PERFORMANCE

For each item, circle one number on the left-hand side of the page to indicate your assessment of the level of effectiveness with which the board is presently carrying out that activity.

SIGNIFICANCE

For each item, circle one number on the right-hand side of the page to indicate your assessment of the relative importance of this activity in contributing to the board's overall effectiveness.

Ratings used are:

1 - Very low

2 - Low

3 - Satisfactory

4 - High

5 - Very high

1 - Not significant

2 - Low significance

3 - Moderate significance

4 - High significance

5 - Very high significance

A. Governance

1	2	3	4	5	The Board meets in a suitable room, with adequate facilities for visitors	1	2	2	3	5
1	2	3	4	5	Board members come to meetings familiar with the agenda, backup reports and other materials	1	2	3	4	5
1	2	3	4	5	Except when unavoidable, late items are not added to the agenda after it has been circulated to board members.	1	2	3	4	5
1	2	3	4	5	The board selects its chair on the basis of the ability to provide leadership, to conduct meetings and to participate effectively in all aspects board activity.	1	2	3	4	5
1	2	3	4	5	The chair ensures that meetings proceed in a business-like manner, while allowing opportunity for full discussion.	1	2	3	4	5
1	2	3	4	5	The board refers business that requires prolonged or detailed study to the manager or to a committee for review and recommendations.	1	2	3	4	5
1	2	3	4	5	The board avoids voting cliques and does not allow personal conflict to affect its actions, but reaches decisions solely on the merits of the issue.	1	2	3	4	5

A. Governance (cont.)

1	2	3	4	5	Board members abide by board decisions and do not make individual decisions or commitments on the board's behalf.	1	2	2	3	5
1	2	3	4	5	The board seeks input from staff and community in establishing policies, goals and objectives.	1	2	3	4	5
1	2	3	4	5	The board has an ongoing procedure for the review and revision of its goals, objectives, and policies.	1	2	3	4	5
1	2	3	4	5	Individual members of the board treat other members and the staff with respect.	1	2	3	4	5
1	2	3	4	5	Board members pursue opportunities for further training in effective boardsmanship.	1	2	3	4	5
1	2	3	4	5	New board members have opportunities for systematic orientation to their responsibilities and to board policies and operating procedures.	1	2	3	4	5
1	2	3	4	5	The board focuses its efforts primarily on the development of policy and relies on staff to implement board policies.	1	2	3	4	5

B. Liaison and Communication

1	2	3	4	5	Agendas of board meetings are issued in advance of the meetings.	1	2	2	3	5
1	2	3	4	5	There is an established procedure whereby members of the public may speak regarding items, on or not on the agenda, at board meetings.	1	2	3	4	5
1	2	3	4	5	The board advises individuals or groups who have made presentations of any decisions made concerning their presentations and gives reasons for its decisions.	1	2	3	4	5
1	2	3	4	5	A summary of important business conducted at each board meeting is circulated to staff and media.	1	2	3	4	5
1	2	3	4	5	The minutes of open regular and special board meetings are available to staff and the public.	1	2	3	4	5
1	2	3	4	5	Members of the board take specific actions to secure maximum support for a good district program.	1	2	3	4	5
1	2	3	4	5	The board informs citizens regarding matter of vital concern to them, through such means as advertisements in the press and letters to editor.	1	2	3	4	5

B. Liaison and Communication (cont.)

1	2	3	4	5	There is an ongoing, planned program of information about district programs.	1	2	2	3	5
1	2	3	4	5	The board seeks others' opinions through surveys, public meetings, advisory committees or (fair appropriate means) before making major policy decisions.	1	2	3	4	5
1	2	3	4	5	The board actively seeks to maintain positive working relationships between board members and district staff.	1	2	3	4	5
1	2	3	4	5	Board policy outlines a procedure by which the board deals with complaints.	1	2	3	4	5
1	2	3	4	5	The board communicates effectively with its manager and staff.	1	2	3	4	5
1	2	3	4	5	Copies of current board policies and administrative regulations are compiled and are available to all staff.	1	2	3	4	5
1	2	3	4	5	Members of the boar attend district functions when feasible.	1	2	3	4	5

C. Personnel

1	2	3	4	5	The board has a written procedure for dealing with employee concerns, complaints and grievances.	1	2	2	3	5
1	2	3	4	5	Board members try to become acquainted with as many of the district's employees as possible.	1	2	3	4	5
1	2	3	4	5	Board members do not allow personal friendships with district personnel to affect board decisions.	1	2	3	4	5
1	2	3	4	5	There is a climate of mutual respect and trust between the board and its staff.	1	2	3	4	5
1	2	3	4	5	Any board member criticism of a staff member is offered tactfully and privately to the manager.	1	2	3	4	5
1	2	3	4	5	The board provides its staff with encouragement and opportunities for growth through a program of in-service training and professional development.	1	2	3	4	5
1	2	3	4	5	There is a clear understanding of the board's expectations for the performance and personal qualities of the manager and other senior staff members.	1	2	3	4	5
1	2	3	4	5	The board is willing to defend staff members from unjust and unfounded criticism.	1	2	3	4	5

D. Administration

1	2	3	4	5	The board recognizes the manager as its chief executive officer and seeks his/her recommendations on all important matters.	1	2	2	3	5
1	2	3	4	5	The board delegates to the manager the responsibilities for administering board policy and implementing board decisions.	1	2	3	4	5
1	2	3	4	5	The board requires the manager and staff to establish performance objectives, periodically review progress and recommend new goals annually.	1	2	3	4	5
1	2	3	4	5	The board is well informed about district projects.	1	2	3	4	5
1	2	3	4	5	Individual board members and the board as a whole avoid dealing with matters related to day-to-day operation of the district.	1	2	3	4	5
1	2	3	4	5	The board requires that staff and committee recommendations clearly outline the options and alternative courses of action open to the board.	1	2	3	4	5

E. Business Operations

1	2	3	4	5	In preparing the annual budget, the board attempts to strike a reasonable balance between its financial resources and the need to provide a comprehensive district program.	1	2	2	3	5
1	2	3	4	5	The board seeks input from staff members in establishing priorities for budgeting purposes.	1	2	3	4	5
1	2	3	4	5	The budget is presented to the board in a clear and concise manner.	1	2	3	4	5
1	2	3	4	5	Members of the board participate in the presentation of the annual budget to the county government.	1	2	3	4	5
1	2	3	4	5	Written board policies ensure efficient administration of the budget and proper accountability for the expenditure of funds.	1	2	3	4	5
1	2	3	4	5	A complete annual audit and systematic process ensure that financial operations are performed efficiently.	1	2	3	4	5

F. Facilities

	2	3	4	5	The board regularly reviews the suitability of district facilities for current district needs.	1	2	2	3	5
	2	3	4	5	There is a long-term plan for district growth and the acquisition of suitable facilities and resources.	1	2	3	4	5

Finally...

- Bring a *sense of humor* to service on the Board and in Board meetings
- Build mutual *trust* (George Shultz (1921-2021) in the Washington Post, Dec. 11, 2020):

Dec. 13 marks my turning 100 years young. I've learned much over that time, but looking back, I'm struck that there is one lesson I learned early and then relearned over and over: *Trust is the coin of the realm*. When trust was in the room, whatever room that was – the family room, the schoolroom, the locker room, the office room, the government room or the military room – good things happened. When trust was not in the room, good things did not happen. Everything else is details.

Thank You!

Knox McLaughlin Gornall & Sennett, P.C.

Thomas A. Tupitza, Esq.
ttupitza@kmgslaw.com
(814) 459-2800

Disclaimer

These materials should not be considered as, or as a substitute for, legal advice and they are not intended nor do they create an attorney-client relationship. Because the materials included here are general, they may not apply to your individual legal or factual circumstances. You should not take (or refrain from taking) any action based on the information you obtain from these materials without first obtaining professional counsel. The views expressed do not necessarily reflect those of the firm, its lawyers, or clients.

Copyright Notice

Copyright © 2021

Knox McLaughlin Gornall & Sennett, P.C.

All materials contained here are protected by United States copyright law and may not be reproduced, distributed, transmitted, displayed, published or broadcast without the prior written permission of Knox McLaughlin Gornall & Sennett, P.C.