

Inspection of Board Minutes: How We Can Prevent the Minutes From Becoming Hours, Days, Months and Even Years in Legal Battles

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Frequently we are contacted to inquire about whether a proposed purchaser can inspect the minutes of a co-op's Board of Directors. While there are many co-ops that permit inspections by prospective purchasers, co-op Boards do not have to (and, in our opinion, should not) permit inspection of the Board minutes.

In order to determine whether you are required to disclose the Board minutes, you must review the co-op's Governing Documents (Proprietary Lease, By-Laws, and Certificate of Incorporation) as well as the New York State Business Corporation Law ("BCL").

A Co-op's By-Laws and Certificate of Incorporation will not usually contain any provisions regarding what corporate documents you have to disclose and a Shareholder's right to inspect same. While the By-Laws typically indicate the co-op's Secretary should keep or take the Board minutes, they usually do not contain anything regarding who is entitled to view them. On the other hand, the Proprietary Lease usually includes a provision that "books of account" should be kept and that same shall be "open during all reasonable hours to inspection by the Lessee or a representative of the Lessee." Board minutes are not part of a co-op's "books of account", but even if they were, there is usually no obligation for Boards to disclose the "books of account" to anyone other than Shareholders and their representative; not a purchaser or purchaser's attorney.

Additionally, BCL § 624(a) imposes a requirement to "keep correct and complete books and records of account and shall keep minutes of the proceedings of its shareholders, board and executive committee. . . ". However, this provision only states what a co-op has to keep. On the other hand, BCL § 624(b) states what corporate documents you must disclose and to whom. Under BCL § 624(b), Shareholders (or their agents/attorneys) are entitled to inspect the "minutes of the proceedings of its shareholders and record of shareholders". As you can see, while BCL § 624(a) requires you to keep Board minutes and Shareholder minutes, BCL § 624(b) only requires you to permit inspection of Shareholder meeting minutes; not Board meeting minutes.

As a result of the foregoing, typically co-op Boards have no requirement to disclose Board minutes to a prospective purchaser (unless your co-op's governing documents specifically require same).

There is much logic to this as board minutes often disclose personal information and also can expose the corporation to potential claims and lawsuits. The fact that there is not requirement to permit the inspection of board minutes is commonly overlooked and probably the biggest misconception when it comes to what documents a Shareholder or purchaser can see. Many times this is because a buyer may not be willing to purchase an apartment if they cannot do their due diligence concerning the affairs of the co-op. However, a board should weigh this concern with the detriment of revealing co-op affairs to "outsiders", let alone Shareholders. The safest approach is to not permit board minutes be disclosed to anyone other than board members, the Managing Agent, or the co-op's attorneys.

Even though co-ops do not have to disclose board minutes, it is common practice for some co-op boards to permit these inspections. This is largely due to the fact that many co-op boards grant these requests because they want to err on the side of transparency and show that the board has nothing to hide. If you choose to do this, make sure you do the following:

- Obtain an executed affidavit under § 624(c) of the BCL
- Always require in person inspections and never distribute corporate documents via mail, e-mail, or fax, except for, of course, the annual financial statements
- Do not allow cell phones in the room where the inspection will take place
- Monitor the inspection closely. The inspector should never be left alone with the documents. It only takes a second to take a picture with another cell phone or another picture-taking device!
- Redact all personal shareholder information from board Minutes

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