



kgibson@mwgjlaw.com
www.mwgjlaw.com
(805) 644-7188



The Management Trust

gordon.goetz@managementtrust.com
managementtrust.com
(805) 938-3131

**Board Members, Owners, Tenants and Even Managers Gone
Rogue, Rules Enforcement on Steroids, Cool New CC&R
Provisions and Protecting Your HOA and Management**

Presented for
South Coast Homeowners Association

by

Kelton Lee Gibson, Esq.

Myers, Widders, Gibson, Jones & Feingold, LLP

and Gordon Goetz, CCAM, PRA

The Management Trust

March 30, 2016

Encina Royale Clubhouse
Santa Barbara, CA

I. Introduction

- a. The rogue board member
- b. Makes offensive comments
- c. Sets “his/her own policy”
- d. Harassment of managers by board members
- e. The board member who comes to the meeting drunk.
- f. Tools to deal with them
- g. YOUR SITUATIONS, TOO!

II. Our Tool Box

- a. Board Tools
- b. Management’s Role
- c. Member’s ability to intervene
- d. Legal Remedies
- e. Code of Conduct

III. Situation 1- Newly elected directors floundering and not knowing how to begin operating an association.

- a. Educating Directors
- b. Training of board members

IV. Situation 2— Director overstepping their authority

- a. The difference between seeking out violations and reacting to complaints.

V. Situation 3- Board meeting etiquette: The board member who comes to the meeting drunk or late or dominates a conversation.

VI. Situation 4- Manager recommends board seek a professional opinion as to maintenance question and demand for repair from a member; board refuses due to costs.

General rules regarding maintenance responsibility

VII. Situation 5--Management styles: Board tends to micro manage

VIII. Situation 6--Management does not fulfill terms of contract. Management sets their own policy

IX. Situation 7- The chronic offender

7 Step Approach to Rule Enforcement Step-by-step enforcement

1. Phone call or nice manager letter
2. Strong manager letter
3. Monetary penalties
4. Nasty lawyer letter
5. Internal Dispute Resolution (IDR) – Civil Code §5900
6. Alternative Dispute Resolution (ADR) - Civil Code §5925
7. Civil Lawsuit

X. Situation 8- Owner- “I’ve called my lawyer, and as soon as he is through with his murder trial he is going to sue the _____ out of you no good board members!”

a. Liability of Volunteer Board Members

i. Business judgment rule and reliance upon or ignoring professional advice.

1. No monetary liability or cause of action provided board members

a. Acted in good faith

b. Acted in manner believed to be in best interest of association

- c. Acted with such care, including reasonable inquiry, as an ordinary prudent person in a like position would use, under similar circumstances
- d. Can act in reliance on professional advice

XI. Situation 9-- The Tenants From Hell

New CC&R provisions- see attached

XII. Situation 10--Owner harassment of Director or Manager and protecting your Manager

XIII. Cool CC&R Provisions - (See Attachments)

- a. Right to evict – Tenants and Leases
- b. Amendment by deemed consent
- c. Owner Insurance

XIV. Q&A

BOARD MEMBER CODE OF CONDUCT

The Board Member Code of Conduct has been adopted to guide individual board members in a direction that is best for the organization. Accordingly, individual board members should:

- Understand, power resides with the “board” not individual board members
- One voice
- Maintain the confidentiality of executive session information
- Put personal interests aside and advance the best interests of the association
- Respect, abide by, and carry out the decisions of the majority of the board
 - The expertise of individual board members will be used to enhance the board’s understanding of issues but will not be substituted for the judgment of the board
- Treat fellow directors, homeowners, management and vendors with respect
- Become familiar with the governing documents
- Be fully prepared for board meetings
 - Engage in board discussions prepared and with an objective, open mind
 - Allow actions that are required by the governing documents or law
- Monitor appropriately by internal and external reports as well as observation to ensure policies are being met
- Subscribe to the Business Judgment Rule
 - Duties are performed in good faith
 - Duties are performed in a manner believed to be in the best interests of the association
 - Duties are performed with such care, including reasonable inquiry as an ordinary prudent person in a like position would use under similar circumstances
- Maintain current assessment payments and comply with the rules and regulations so as to remain in good standing
- Avoid any conflict of interest
 - If licensed and bidding on a job said board member shall recues him or herself from discussions and decision

Additionally, the board as an entity shall:

- Be as open as possible in the process of conducting its business
- Not allow any individual member, managing agent or vendor to be harassed by any individual member of the board or membership
- Allow no officer, individual or board committee to prevent the board from fulfilling its commitments
- Not allow any provision of law or the governing documents to be unfulfilled

Great Boards focus on macro-issues.

It's the Big Picture that counts for Boards. Boards should be spending their time continually reviewing and refining the Big Picture (Vision Statement) for the community. To do that effectively, the Board must have a Mission Statement and then set clear policy for all aspects of community administration – and stand back and observe if that policy is being carried out through management and on down to the vendors and the community at large. For example, the Board may set a policy of “continual esthetically pleasing landscape conditions within budgeted figures.” This is a broad statement which gives management direction and authority to carry out that policy administratively and financially. The Board who adopts this type of stance does not worry itself with the exact number of flats of flowers, or their color, nor how they are planted. Esthetically pleasing? Within budget? THAT is what a macro-focused Board thinks about.

Most Board members come in to their “jobs” by accident or through coercion by an existing Board member, and they really have no idea what they got themselves in to. The Great Board brings the new Board members up to speed through corporate memory, helping them recognize what Vision Statement, Mission Statement and Policy has been set in place. This gives the new Board Member a foothold on established process so they may embrace the Big Picture rather than minutia

Great Boards hold productive meetings.

Great Boards always read relevant materials before the meeting. Great Boards come to meetings having read the agenda and Board packet beforehand, ready to make decisions based on solid information. These Board members are not wasting their time or that of other Board members or staff. They know being prepared develops the community's trust in them as leaders, and gives them the ability to make decisions on the community's behalf in a timely manner. These prepared Board Members have their questions on the packet information answered by staff, vendors or each other before the meeting so the business of the community can be conducted with expedience, efficiency and thus productively.

Great Boards focus on matters at hand and don't enable philosophers or pontificators. Unfortunately, many people become Board members because they need to feed their ego. The ego-driven, though often well-intentioned, are usually the pontificators and philosophers who drag meetings out in to space for hour after unproductive hour, completely unaware of the eye-rolling and under-the-table-kicking going on around them.

Great Boards don't wander off the agenda by bringing up new business that isn't on that agenda. They stay focused on the matters at hand, carefully considering the information and moving forward as they are trusted to do by the membership. Focus, enforced through adopted parliamentary procedures, brings clarity of thought and purpose and the result is credibility in the eyes of the membership.

MYERS, WIDDERS, GIBSON, JONES & FEINGOLD, L.L.P.

KELTON LEE GIBSON
DENNIS NEIL JONES*
ERIK B. FEINGOLD
STEVEN P. LEE
DOUGLAS A. BORDNER**
JILL L. FRIEDMAN***
MICHAEL S. MARTIN

ATTORNEYS AT LAW
P.O. Box 7209
5425 EVERGLADES STREET
VENTURA, CA 93006-7209
(805) 644-7188
TOLL FREE (800) 711-2611
FACSIMILE (805) 644-7390

J. ROGER MYERS
MONTE L. WIDDERS

DAVID S. BAUMWOHL, P.C.
RANDALL H. GEORGE
JAMES E. PERERO
CARI ANN POTTS
WILLIAM D. RAYMOND, JR.****
JACQUELYN D. RUFFIN

*ALSO ADMITTED TO THE NEVADA BAR

**ALSO ADMITTED TO THE DISTRICT OF
COLUMBIA BAR

***MEMBER OF AMERICAN BOARD OF
TRIAL ADVOCATES

EMAIL: MWGJ@MWGJLAW.COM
WWW.MWGJLAW.COM

****CERTIFIED SPECIALIST - ESTATE PLANNING,
TRUST & PROBATE LAW
STATE BAR OF CALIFORNIA
BOARD OF LEGAL SPECIALIZATION

March 30, 2016

7 Steps to Effective Rule Enforcement

By Kelton Lee Gibson

1. Phone call or nice manager letter.
2. Strong manager letter with fine threat.
3. Assess Fines following proper Civil Code procedures.
 - A. 10-days' notice to member containing date, time and place of meeting along with nature of violation. Suggestion: include potential penalties being considered.
 - B. Notice need to advise that member has right to attend and address the board, and if requested, board is to meet in executive session.
 - C. Written notice of action within 15 days.
4. Internal Dispute Resolution (IDR) - a "fair, reasonable, and expeditious procedure".
5. Nasty lawyer letter, often combined with No. 6.
6. Notice of Right to and Alternative Dispute Resolution (ADR) - Required to as a prerequisite to No. 7.
7. Civil Lawsuit to collect monetary penalties and obtain court order prohibiting or ordering conduct along with attorney's fees.

TENANTS, LEASING AND EVICTIONS

Tenants; Contract Purchasers. Each *Owner shall notify* in writing the secretary of the *Association* or the Association's managing agent of *the names of any Tenants* or contract purchasers of the Owner's Unit. Each Owner shall also notify in writing the secretary of the Association or managing agent of the names of all persons who have been delegated any rights of use and enjoyment in the Project and the relationship that each such person bears to the Owner. Any delegated rights of use and enjoyment are subject to suspension to the same extent as are the rights of Owners. No *delegation of rights of use* and enjoyment by an Owner *shall relieve an Owner from liability for payment of assessments*, or other monetary obligations to the Association, *or compliance with the Governing Documents*. Any *Lease* or contract of sale shall be in writing and shall *require performance and compliance with the Governing Documents*, which provision shall be for the express benefit of the Association and each Owner as third party beneficiaries. *The Association and each Owner shall have a right of action directly against any Tenant* or contract purchaser of an Owner, *as well as against the Owner*, for *non-performance* of any of the provisions of the Governing Documents, to the same extent that such right of action exists against such Owner. *Failure by an Owner to take legal action against Tenants* or contract purchasers, including the institution of proceedings in unlawful detainer for violation of the Governing Documents within ten (10) days after receipt of written demand to do so from the Association, *shall entitle the Association to pursue any and all remedies* against the Tenant or contract purchaser that such Owner may take, *including the right to evict*. Any expenses incurred by the Association, including attorneys' fees and costs of suit, shall be paid by the Owner.

(Emphasis added.)

Leasing. The Board *may adopt reasonable* rules and regulations limiting and *restricting*, but not prohibiting (except as provided herein), the *Leasing* of Units. The restrictions may include establishing a minimum length of the Lease, establishing a *maximum number* of persons residing on a Unit and other restrictions to be determined. Owners may expressly consent to be subject to a restriction or amendment to the Governing Documents that prohibits the Leasing of his or her Unit. Prior to leasing a Unit, an Owner shall provide the Association with verification of the date the Owner acquired title to the Unit and the name and contact information of the prospective Tenant or the prospective Tenant's representative. *A copy of any lease*, and any modification or extension thereof, *shall be provided to the Association* prior to occupancy of a Unit by any Tenant, *along with an executed abidance agreement* in a form approved by and/or acceptable to the Board.

(Emphasis added.)

Eviction of Tenant. Members shall immediately evict any Tenant who commits criminal acts in the Project such as drug-related activity, vandalism, violence or threats of violence against others; becomes a nuisance; or the like. If a Member fails to immediately evict a Tenant for violations enumerated in this Article or other violations of the Governing

Documents, the Association, as an express assignee of the Member and as a third party beneficiary of any rental agreement, is authorized to pursue eviction on its own and on the Member's behalf. The Member upon whose behalf eviction is proceeded agrees to defend and indemnify the Association from any cost, attorneys' fees, and liability incurred in doing so. Any attorneys' fees and costs incurred by the Association in doing so shall immediately be reimbursed to the Association by the Member and, if not paid, shall be subject to a Special Individual Assessment against the Member.

**AMENDMENTS AND
DEEMED CONSENT**

Amendments, Generally. This Declaration may be amended in any respect or revoked only upon the approval or the deemed consent (as approved by *Fourth La Costa Owners Association v. Seith* (2008) 159 Cal.App.4th 563), as described below, of Owners constituting more than fifty percent (50%) of the Owners. If the consent or approval of any governmental authority, Mortgagee or other person, firm, agency or entity is required under this Declaration with respect to any amendment or revocation of any provision of this Declaration, no such amendment or revocation shall be valid unless such consent or approval is obtained, as described below. Any amendment or revocation of this Declaration shall be effective after (i) the approval or consent of the percentage of Owners and of any governmental authority, Mortgagees or other persons, firms, agencies or entities required by this Declaration has been obtained or given; (ii) that requisite vote has been certified in a writing executed and acknowledged by the president, secretary or other duly-authorized officer of the Association; and (iii) that writing has been recorded in the office of the County Recorder.

For the purposes of this Section, an addition or amendment shall not be considered material if it is for the purpose of correcting technical errors or for clarification only. Any Member or institutional First Mortgagee who receives a written request delivered by certified or registered mail, with a "return receipt" requested, to consent to or approve actions, additions or amendments requiring consent or approval under this Section who does not submit a written negative response to the requesting party within thirty (30) days after such receipt will be deemed consented to or approved such request.

(Emphasis added.)

INSURANCE

Failure to Carry Insurance. An Owner's failure to carry and maintain such insurance shall relieve the Association from any responsibility to pay for or reimburse the Owner for any damage or obligation that otherwise would have been covered by the Owner's insurance, had it been in effect.

Payment Of Deductible. If a loss occurs as a result of the negligence or breach of this Declaration by a Member or Member's family, guests, invitees, Tenants, or pets, or as a result of a failure of a portion of the Unit or its Improvements within a Member's care, custody, or control, and the loss results in a payment by the Association's insurance, that Member shall pay the Association's deductible, if any.

s:\wpdocs\1personal folders\mem\misc\lee.doc