

How Managing Agents Can Help Boards Make Prudent Decisions and Avoid Costly Mistakes

By Alan M. Goldberg



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Some cooperative board members see managing agents as mere maintenance collectors and building employee supervisors. But a manager can have various roles, including gatekeeper, advisor, and as the eyes and ears of the board.

Board members are volunteers with limited time; they often lack experience in running buildings, and may hesitate to make important decisions. Managing agents typically have vast experience dealing with a multitude of building issues. Accordingly, boards should make use of that experience to help make critical decisions.

Enacting New Rules

Board members may overreact to certain conduct in a building and insist on enacting a new rule prohibiting such conduct. But before the board enacts a new rule, the managing agent should explain the pros and cons of doing so. The board must understand that if the rule is violated, they'll need to take steps to enforce it, including commencing a lawsuit — which may be expensive.

Board members cannot arbitrarily decide to enforce some rules and not others, or enforce a certain rule against one shareholder but not another.

For example, enacting a no-pet policy sounds simple enough, but enforcement may have complications.

Enforcing a no-pet policy requires speed, since the New York pet law requires commencement of suit within 90 days of the discovery of the pet, or else the pet stays. The proprietary lease, however, usually requires serving a cure notice and allowing time for the resident to cure the violation prior to suit.

To assist the board, the manager should train building staff to immediately report the existence of

prohibited pets. Once reported, the manager should promptly inform the board and take all preliminary steps necessary for a possible lawsuit.

In enforcing a no-pet rule, the board may encounter a resident who claims to have a statutory disability that requires the use of an emotional support animal. Disregarding a possible disability may violate various discrimination statutes (Fair Housing Act, NY and NYC Human Rights Laws). What was initially deemed a simple matter may turn into lengthy, expensive litigation; with the coop, if it loses the case, having to possibly pay damages, legal fees and penalties.

The manager should explain this to the board and advise it to tread cautiously before enacting a no-pet policy. The manager should also advise the board to refrain from hastily and angrily enacting any new policy.

Enforcing Existing Rules

Noise Disputes: The board may consider a noise dispute to be a petty quarrel between two annoying neighbors; but ignoring the dispute may lead to altercations, violence, and even a lawsuit against the board for breach of fiduciary duty.

Thus, the manager must immediately investigate any noise dispute, report findings to the board, and offer advice as to how the problem should be addressed, including hiring an acoustical expert if necessary.

Odors: Where an unpleasant odor exists, inaction is not an option since the odor may indicate a hoarder, the existence of vermin, and deterioration of the apartment, which may also affect other apartments. The odor must be promptly investigated, and if access to the apartment cannot be obtained, the manager must convince the board to commence suit and obtain a court order allowing access.



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Building Inspections

A manager should be proactive and inspect the building for cleanliness, loud noises, odors, broken locks, etc. The manager should also speak to residents, not just the superintendent, about building problems. Negative observations should be promptly communicated to the board and suggestions made as to how to improve the building.

Hiring Contractors

Although a manager may be familiar with and can offer opinions about various contractors, the manager must insist that board members research, interview, and hire contractors. If the manager selects a contractor, it may later result in accusations of corruption, and even actual corruption, as bid-rigging indictments of managers and contractors in the 1990s revealed.

Board members, not managers, were elected to make decisions for the coop, and have a fiduciary duty to do so. A manager should only assist the board in making those decisions, and not supplant the board.

Other Building Issues

To avoid legal expense, a board may instruct the manager not to contact the general counsel for legal advice. The manager, however, must advise the board that that is an example of being penny wise and pound foolish. The manager, to be effective, should be a liaison between the general counsel and the board, and should elicit legal advice when necessary.

A board president may wish to freeze out certain board members from inspecting the books and records. The manager, however, must advise that all board members have a right and need to inspect the corporate books and records, since they have a fiduciary duty to know the condition of the coop and protect its interests. Even board members who are suspected of passing on confidential information are permitted to review the books and records.

Some boards delay increasing maintenance and enacting assessments, even where the coop's financial situation is dire, in order to remain popular with shareholders. The manager, however, must convince the board to act responsibly concerning the coop's financial condition, and to take all necessary action, even if unpopular.

In summary, the managing agent should be viewed by the board as a trusted advisor on various issues.

Proactive conduct by the manager will be greatly appreciated by board members and will assist them in effectively operating the coop. ▲

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