



AGENDA

BOARD OF DIRECTORS MEETING
EXECUTIVE SESSION - CLOSED
Wednesday, August 24, 2022, Following Special Meeting
West Center, Room 2 / Zoom

Bylaws of Green Valley Recreation, Inc. (Amended by GVR Membership – March 25, 2020) states: **ARTICLE IV-BOARD OF DIRECTORS, Section 5: Open Meetings:** *"All meetings of the Board at which official business of The Corporation is transacted, with the exception of meetings limited to personnel and/or legal matters, shall be open to all members of The Corporation. The time and place of all such meetings shall be made available to the membership of The Corporation."*

Directors: Kathi Bachelor (President), Donna Coon (Vice President), Bart Hillyer (Secretary), Carol Crothers (Treasurer), Laurel Dean (Assistant Secretary), Jim Carden (Assistant Treasurer), Nancy Austin, Barbara Blake, Ted Boyett, Beth Dingman, Steve Gilbert, Bev Lawless, Scott Somers (non-voting)

1. Call to Order / Establish Quorum
2. Approve Agenda
3. Approve Executive Session Minutes: July 6, 2022
4. New Business
 - A. Personnel:
 - 1) Review Employee Climate Survey (Flores)
 - B. Legal:
 - 1) Director Communication (Hazlewood)
 - 2) Tenant Fees (Hazlewood)
 - 3) Artisan Club – Sales to public (Hazlewood)
5. Adjournment



MINUTES

BOARD OF DIRECTORS MEETING IN EXECUTIVE SESSION - CLOSED
Wednesday, July 6, 2022, 10:30am
WEST CENTER – ROOM 2 / ZOOM

Bylaws of Green Valley Recreation, Inc. (Amended by GVR Membership – March 25, 2020) states: **ARTICLE IV-BOARD OF DIRECTORS, Section 5: Open Meetings:** *"All meetings of the Board at which official business of The Corporation is transacted, with the exception of meetings limited to personnel and/or legal matters, shall be open to all members of The Corporation. The time and place of all such meetings shall be made available to the membership of The Corporation."*

Directors: Kathi Bachelor (President), Donna Coon (Vice President) (left before vote on item 4.B), Bart Hillyer (Secretary) (left before vote on item 4.B), Carol Crothers (Treasurer), Jim Carden (Assistant Treasurer), Nancy Austin, Barbara Blake, Ted Boyett, Beth Dingman, Steve Gilbert, Bev Lawless, Scott Somers (non-voting)

Absent: Laurel Dean (Assistant Secretary)

1. Call to Order / Establish Quorum
President Bachelor called the meeting to order at 10:30 MST. Quorum was established.
2. Approve Agenda
MOTION: Director Boyett moved, seconded to amended the Agenda to address C before B under New Business.
Passes: No objections
3. Approve Executive Session Minutes of May 18, 2022
MOTION: Director Bachelor moved, seconded to amend the May 18, 2022, Minutes by deleting the Motion made by Director Gilbert regarding 3.4.1 Paid Time Off.
Passes: unanimous

Approve Executive Session Minutes of May 25, 2022

MOTION: Director Crothers moved, seconded to approve the May 25, 2022, Minutes.

Passes: unanimous

Approve Executive Session Minutes of June 15, 2022

GVR encourages the Board and members to voice concerns and comments in a professional, business-like, and respectful manner.

MOTION: Director Crothers moved, seconded to approve the June 15, 2022, Minutes.

Passes: unanimous

Approve Executive Session Minutes of June 20, 2022

MOTION: Director Crothers moved, seconded to approve the June 20, 2022, Minutes.

Passes: unanimous

4. New Business

A. Personnel – CEO Contract

MOTION: Director Hillyer moved, seconded to approve the new wording of PTO (instead of vacation), and payment of 80 hours of PTO retroactive to January 1, 2022.

Failed: 5 yes (Austin, Crothers, Gilbert, Hillyer, Lawless) / 6 no

MOTION: Director Carden moved, seconded to approve the new wording of PTO (instead of vacation), payment of 80 hours of PTO, for which CEO was unable to use during the prior calendar year and which exceeded the 80-hour maximum rollover allowed under the personnel policy retroactive to CEO's start date with the Corporation (1/4/2021). The CEO shall be allowed to be paid for up to 80 hours of unused PTO, that exceeds the 80-hour maximum rollover in the personnel policy, each year, for future years thereafter.

Passes: 7 yes / 4 no (Austin, Gilbert, Hillyer, Lawless)

MOTION: Director Boyett moved, seconded to approved the new Amended Employment Contract, to be dated July 13, 2022, (title change from Employment Contract) to include the above changes to 3.3.1.

Passes: unanimous

MOTION: Director Blake moved, seconded to approve the CEO's request to reimburse him for \$1,600 in legal fees from 2021 (copies had been provided to Board members, in personal attendance, at the May 25 Executive Session).

Passes: 7 yes / 4 no (Boyett, Dingman, Gilbert, Lawless)

B. Legal – Terminate Current Legal Counsel

MOTION: Director Crothers moved, seconded to send the provided termination letter to Wendy Ehrlich.

Passes: 8 yes / 1 (Boyett)

C. Legal – Carpenter/Hazlewood Engagement Letter

Discussion was held by the Board confirming all attorneys working for GVR were not under a retainer agreement; there were no restrictions to terminate at will for both parties; and Carpenter/Hazlewood can perform all general counsel tasks. GVR will continue to use other attorneys for specific tasks that do not conflict with Carpenter/Hazlewood.

5. Adjournment

MOTION: Director Carden moved, seconded to adjourn the meeting at 12pm.

Passes: unanimous

DRAFT



REPORT ON WORKPLACE CLIMATE SURVEY - JULY 2022

Report date: July 28, 2022

INTRODUCTION

GVR provided a survey to gather staff input on conditions and concerns in the workplace, as well as to gather insights on areas for improvement, staff knowledge and preferences, and invite commentary and suggestions that might generate positive changes to the workplace.

Overall, each department provided some response. No department or sector of the GVR workplace was comprehensive in number of responses. Specifically, the response rate broke into the following clusters and numbers:

Custodial staff responses – 10
Recreation/Membership responses – 22
Maintenance/Landscaping – 9
Admin/Fin/HR/Communications – 11

Total responses – 52

Issues clustered around some specific concerns as follows:

- Wages need better alignment with market/local market, particularly for group 1. This observation came from more than one group
- Board behaviors, both that directed at staff and comments made in front of staff, has had a corrosive and depressing effect, directly linked to low morale and employee turnover/workplace toxicity
- Generally, CEO is doing a good job, too much of CEO time consumed in Board and member issues/disputes/behaviors, need a Second-in-Command/Operations/COO person with authority to manage operations, projects, tasks and timelines
- Workplace flexibility would go a long way for employee satisfaction, employee retention (schedules, workweek, FT/PT)
- Accountability must get better - depressing that people get away with not completing tasks, projects, people at work but not working/hiding in cars and parking lots, rooms, blatantly sleeping during work shift

SURVEY

Almost all staff have read the GVR mission and understand it. Most staff report enjoying their job and their work. Respondents reported their values include doing their jobs

well/correctly, helping others including members, job security provided by GVR, and the benefits offered.

Not all feel their job duties and expectations been made clear and would benefit from some time spent with someone to update or confirm what their job and job duties are. This was not universal, but it was reported in various ways, and under different questions, enough times to merit mention in this report.

Many reported they are encouraged to suggest improvements in their job or department, but this was coupled with a belief or understanding the suggestions would not be taken or seriously considered. This was not universal but came up often enough to be included here.

Most felt they receive performance feedback from supervisors, but not all did. Some reported feeling sensitive to feedback because it was always negative or corrective. Most staff noted they preferred feedback in person, verbally, and more frequently than once per year. Some cited a desire for feedback closer to an incident – positive or negative – so that it would be more apparently relevant to the concern or issue that is the subject of the feedback.

Not all persons reported they learned new things in their job, but many did feel they could benefit from learning more while in their jobs. Training was mentioned as part of learning while working. Multiple respondents mentioned they would enjoy or benefit from more recent or just more training.

General agreement developed around supervisors being helpful when figuring out what you need to learn for your current job, including some who provided the training themselves. This was not a universal and some specifically noted their supervisors were unhelpful with both training and questions about the job,

Employee rewards generated many responses and a certain amount of consensus around the kind of employee rewards desired. Multiple mentions clustered around monetary rewards, including bonuses and raises, paid time off, employee appreciation events that take place offsite, coffee or lunch with the boss or supervisor

Suggested improvements to the current organizational structure in a department and at GVR were plentiful, but mostly positive. The most prominent concern was staffing and how the approach currently used seems to ignore demand. As an example, some respondents noted when things are slower there can be too many persons working and that leads to standing around, hiding and napping, and general time spent not actually performing work tasks. Some suggested this would be a good place to consider shorter workweeks or reduction in hours scheduled to accommodate seasonal demand.

Many reported working at GVR is helpful for them in their lives, due to the benefits offered, general flexibility in scheduling around personal needs such as appointments and childcare, and a general appreciation for access to the recreation centers for personal use.

Most persons reported co-workers are willing to help each another at work and in work tasks sharing. In some responses, certain jobs could not benefit from co-worker

assistance since they work alone or at night. The same was reported for co-workers and supervisors sharing knowledge.

Very few reported any participation in decision-making beyond that demanded by their individual jobs. Some reported decision-making at GVR is top down and does not consider the effects on staff and how they are required to perform their jobs.

Most believe you have the resources needed (time, material, tools, assistance) to perform their jobs. Some took this question as the opportunity to advocate for staffing flexibility to respond to seasonal fluctuations in staff needs and shifts coverage.

Many responded they believe their work is important for GVR's success, mostly related to the relationships with members and the opportunity to provide positive interaction and customer service to community and recreation center members. This was not universal.

Most reported working for GVR contributes something that improves their life. This was noted primarily as pay and benefits.

Most persons do feel valued and appreciated by their supervisor, but, many reported feeling undervalued by leadership and management. Some noted leadership, including executive leadership, were too distant and out of touch with staff to be able to appreciate staff and the work they do.

Most, but not all, reported a positive relationship with their supervisor. This question did not generate a lot of information beyond yes or no, except for one person who provided a lengthy response.

Responses support generally, GVR does not provide sufficient opportunities for training or knowledge improvement. More would be appreciated, and in some cases it would be a first-time experience, though they have been in their jobs for some time.

Most people reported feeling their schedules were fine and worked for them in their lives well. This question elicited some suggestions for more flexibility with work schedules, shorter work weeks (4/10, Mon- Thu, etc.), reducing hours overall during the slow months, and modifying staffing levels on a seasonal basis.

Almost all reported their work shift was long enough to complete their work. None responded they had too much time but the multiple mentions of staff members not having enough work to do during a shift, work assignment inefficiencies, sneak ways for naps and extended conversations with co-workers, long or extended lunch breaks, there is sufficient reporting of those things that indicate scheduling could bear with some scrutiny.

All but one person responded they have never been asked to perform work or duties that are not part of their job. Some reported they were happy to perform work other than their job to help others when there is a staffing shortage or an unexpected turn of events.

Comments offered at the end were reasonably abundant:

- The CEO needs a second-in-command/Operations Director to address and oversee operations and accountability for timelines and deliverables, because

the CEO must spend most of their time with Board and member issues, disputes and resolutions.

- CEO is noted as doing a good to great job, but taken off task too much by Board issues
- Custodial staff schedules are not available to them in a timely way, sometimes with only a few days of notice and that is unfair to them, does not allow those staff members to plan for their life needs like appointments.
- Accountability needs to improve across the organization
- Incentives and career ladders are needed and would be welcome
- Widely held belief and experiences that support that GVR Board members have been challenging, rude, bullying, disrespectful and have contributed to low morale and employee turnover.
- Wages are out of alignment with same or similar jobs in the community, with GVR paying less to significantly less than other community or regional employers. This was also cited as contributing to worsening employee morale.

Suggestions

1. GVR should explore wages evaluation and improvement immediately, using an external compensation and classification professional to ensure the market and the individual job descriptions are in alignment for wages and the knowledge, skills and abilities needed to qualify for them. Should the research support wage improvements, GVR should implement them as advised by the external provider and based on job descriptions and the qualifications included in them.
2. The suggestion about the COO/Operations Director should be seriously considered. This is a normal arrangement in an executive leadership configuration and allows the CEO to attend to the organization externally facing demands, including the Board and member relations, while the COO is responsible for the internal facing demands and accountability in a regular, ongoing and reliable way that benefits the staff, performance expectations and evaluations, and timely deliverables on important organizational needs.
3. Policies review should commence immediately, followed by a department by department, analysis of operations and procedures applicable to department function. This may include reorganization, scheduling practices reformation, establishing training and knowledge baselines, and update to operations procedures.
4. Responses provided support consideration of organizational reorganization that capitalizes on lessons learned during COVID adaptations, current market and seasonal needs, and addressing past practices and arrangements that are no longer functional or efficient for the organization.



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MEMORANDUM

DATE: August 16, 2022

TO: Scott Somers, CEO, Green Valley Recreation, Inc., for Board of Directors

EMAIL: SSomers@gvrec.org

FROM: James H. Hazlewood, Esq.

RE: Opinion on Director Communication about Board Decisions – ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

You have asked our opinion, based on the law and your governing documents, whether an individual director can express their opinion to members (or the public) on a decision already voted on and made by the Board, while still generally supporting the Board's decision(s). It is our understanding that attorney Wendy Erlich had answered questions about this in the past, but there is still disagreement about this issue.

The short answer, more fully addressed below, is that any director **can** express their opinion about a Board decision or reasons for voting a certain way. However, for a variety of reasons, we cannot recommend that a director **should** speak out in this way, and especially not in an extreme or offensive manner. The objective is board holism and group decisions. In some instances, individual director communications about Board decisions could be considered not to be "in the best interests of the corporation", the statutory "duty of loyalty" standard that is the opposite of "self-interest". Admittedly, the statutory standard is not black and white. However, such communications could also violate Board policies. The GVR Board **can** self-regulate very specific director actions by adopting policies if it chooses, but the Board has to decide if it **should**. Enforcing what may be valid policies against specific conduct, when the policies appear to limit "free speech" of elected directors, can be difficult and potentially divisive, the opposite of promoting board holism.

THIS MEMORANDUM IS CONFIDENTIAL AND MAY BE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR AN AGENT OF THE INTENDED RECIPIENT, EXAMINATION OR DISSEMINATION OF ITS MESSAGE IS PROHIBITED. IF YOU HAVE RECEIVED THIS MEMORANDUM IN ERROR, PLEASE NOTIFY THE SENDER IMMEDIATELY BY CALLING 1-800-743-9324 AND RETURN THE MEMORANDUM TO THE SENDER VIA THE U.S. MAIL.

This opinion is based on the perspective that a director expressing an opinion about a Board decision is in the situation where the decision is already made, i.e., the director already had an opportunity to speak in open (or closed) meetings before the vote, addressing both the Board and the constituents. We will generally assume that the director expresses the opinion (or wants to do so) through a method that reaches the general membership, such as a newsletter, or social media, or emails, whether as a director or “as an owner”. We will then go through the governmental restrictions and your own governing documents and policies.

First Amendment. Briefly, the U.S. Constitution’s First Amendment that ensures “freedom of speech” applies only to government (public) actors, not private actors, like private nonprofit corporations. Governments cannot make laws abridging free speech (including state and local governments because of the Fourteenth Amendment). We will review corporate law below, where you will see that it does not contain language stating that “a director shall not express his or her opinion outside of a meeting about the decisions of the Board as a whole”.

To determine whether an individual director of GVR can express a different or opposing opinion about a Board decision (already made), while still arguably “supporting” the Board’s decision in some fashion, we need to review the general corporation law from which a director’s duties arise. As you will be able to tell, the “duty of loyalty” is nuanced, not black and white. However, it flows from the expectations of boards as a whole, and individual directors who serve on those boards, whether business or nonprofit. That is why we started by saying directors “can” speak out, but “should” they. The “duty of loyalty” discussed below is somewhat aspirational, and points the corporation toward effective operation and cooperation.

The Arizona Nonprofit Corporation Act states the general proposition that a board must manage the affairs of the nonprofit corporation, and the general standards (duties) for directors are as set forth following (**emphasis added**):

10-3801. Requirement for and duties of board

A. Each corporation shall have a board of directors.

B. All corporate powers shall be exercised by or under the authority of and the affairs of the corporation shall be managed under the direction of its board of directors, subject to any limitation set forth in the articles of incorporation.

10-3830. General standards for directors

A. A director's duties, including duties as a member of a committee, shall be discharged:

1. In good faith.
2. With the care an ordinarily prudent person in a like position would exercise under similar circumstances.

3. In a manner the director reasonably believes to be in the best interests of the corporation. [*This is the “duty of loyalty”.*]

The Model Business Corporation Act (2016 Revision) (December 9, 2016) contains Section 8.30(a), which **has the same standard about the “best interests of the corporation”** as the Arizona statute:

§ 8.30 Standards of Conduct for Directors (a) Each member of the board of directors, when discharging the duties of a director, shall act: (i) in good faith, and (ii) **in a manner the director reasonably believes to be in the best interests of the corporation.**

.....

The **American Bar Association** then offers Official Comment about this section, stated here in part.

Section 8.30 sets standards of conduct for directors that focus on the manner in which directors make their decisions, not the correctness of the decisions made. Section 8.30 should be read in light of the basic role of directors set forth in section 8.01(b), which provides that the “business and affairs of a corporation shall be managed by or under the direction and subject to the oversight of the board of directors,” as supplemented by various provisions of the Act assigning specific powers or responsibilities to the board. The standards of conduct for directors established by section 8.30 are analogous to those generally articulated by courts in evaluating director conduct, often referred to as the duties of care and loyalty. **Section 8.30 addresses standards of conduct—the level of performance expected of directors undertaking the role and responsibilities of the office of director**..... Directors act both individually and collectively as a board in performing their functions and discharging their duties. Section 8.30 addresses actions in both capacities.

Section 8.30(a) establishes the basic standards of conduct for all directors and its mandate governs all aspects of directors' conduct, including the requirements in other subsections. It includes concepts courts have used in defining the duty of loyalty. Two of the phrases used in section 8.30(a) deserve further comment:

- The phrase “reasonably believes” is both subjective and objective in character.....

- **The phrase “best interests of the corporation” is key to an understanding of a director’s duties.** The term “corporation” is a surrogate for the business enterprise as well as a frame of reference encompassing the shareholder body. **In determining the corporation’s “best interests,” the director has wide discretion** in deciding how to weigh near-term opportunities versus long-term benefits as well as **in making judgments where the interests of various groups of shareholders or other corporate constituencies may differ.**

Section 8.30 operates as a “baseline” principle governing director conduct in circumstances uncomplicated by self-interest.

The American Bar Association Comment then goes on to discuss *conflicts of interest* as one of the more important tenets of the “duty of loyalty”. In fact, most of the discussion of duty of loyalty centers on conflicts of interest, where the director cannot put their *self-interest* ahead of the corporation’s. The Arizona Nonprofit Act has a whole Article 6 (Sections 10-3860 through 10-3864) concerning “conflicting interest transactions”. However, there is nothing specific about the issue of directors expressing contrary opinions about corporate decisions once made. Unlike conflicts of interest, the issue of whether a director can express an opinion about a decision/vote already made by a board is more nuanced, and there is virtually no case law to guide us. The issue, like conflicts of interest, appears to be tied to “self-interest” (i.e., espousing one’s own view to the membership) versus “best interests of the corporation”.

The Arizona statutes (like other corporate laws) provide an somewhat aspirational framework that enables a private nonprofit corporation like GVR to adopt its own rules and policies that *can* expressly restrict a director’s speech conduct based on the corporation’s interpretation of the law.¹

¹ The January 27, 2020 opinion from DeConcini McDonald Yetwin & Yancy addressed the First Amendment in discussing whether GVR could implement policies and rules limiting the distribution of materials and solicitation of support for public and GVR candidates. They cited case law about how an entity like GVR might be called a “state actor” subject to the Constitution. It would have to perform a

Although they can limit speech, GVR and other nonprofit corporations are limited in policy-making in other ways. For instance, they cannot prevent a director from carrying out required director duties, such as participating in meetings, voting, and discussing items up for vote, or otherwise to participate in managing the affairs of the corporation. In McNally v. Sun Lakes Homeowners Association #1, 240 Ariz. 534, 382 P.3d 1216 (Ct. App. 2016), an association board tried to exclude a director from participating in executive sessions for revealing confidential information (in violation of the duties of confidentiality and loyalty). After she was re-elected, Ms. McNally sued the Board to compel it to allow her to participate in executive sessions. In holding that a duly-elected director could not be excluded from executive sessions by Board action, the Court in part relied on ARS 33-1801(B), to state that the law provides that a director has a legal duty and obligation to manage the affairs of the corporation. The Association's remedy would be to go to court and seek injunctive relief (like an order preventing her from disclosing confidential information) or other relief (such as removal). Or, the Board could have asked her to recuse herself (which it did but she refused).

Based on the foregoing, we need to look to what restrictions, rules and policies the Corporation/Board has concerning the issue of individual directors communicating to the membership or public on decisions the Board has already made, and/or *in a way that appears they are not supporting the decision(s) of the Board, i.e., not acting in the best interests of the corporation.*

The **GVR Amended and Restated Bylaws** as amended March 25, 2020 simply state at Article VI, Section 1(D) that the Board has the power to exercise all powers, duties and authority vested in or delegated to the Corporation except those reserved to the members.

Policy Governance Manual (September 30, 2020)

The Corporation follows Policy Governance, which is at its heart broad and *aspirational*, designed to be a “source”, a “fundamental document or record on which subsequent writing, compositions, opinions, beliefs, or practices are based.”

Under Principles of Policy Governance:

3. Board Holism: The Board makes authoritative decisions directed toward management and toward itself, its individual directors, and

“traditional, exclusive public function”. They stated that merely hosting candidates was not enough. Likewise, we do not think having Board meetings and votes would make GVR a state actor. Therefore, it is able to regulate the speech-related activities of current directors.

committees only as a total group. That is, the Board’s authority is a group authority rather than a summation of individual authorities.

G.P. 3.2.(Board Job Description)

3.2 Specific job outputs of the Board, as an informed agent and voice of the membership, are those that ensure appropriate organizational performance. Accordingly, the Board has direct responsibility to create:

.....

3.2.2 Written governing policies that address the broadest levels of all organizational decisions and situations.

Therefore, the general policies of the Corporation and the Board point the Board toward holism and group authority rather than individual authorities. The Board can create governing policies consistent with that. Thus, the following Policy Manual, and the Code of Conduct in it, form the crux of the issue here – the extent of the Board’s authority to interpret the law, make policies prohibiting specific conduct, and adopt remedies that do not require court intervention.

The GVR Corporation Policy Manual (Version 2022.01):

2.3.2 (Protocol and Conduct for Board Meetings) shows at subsection E that each Director may speak for no more than 10 minutes per topic. Informal discussion is allowed on non-motion topics. Thus, the Directors have an opportunity to express their opinions in the meeting context.

2.1.1 (Responsibilities) In the spirit of strategic leadership, the Board will establish policies which address...(5)(c) Board roles and responsibilities

2.4.1 (Board Code of Conduct).

A. Directors must abide by the following:

1. **Directors must act in the best interests of GVR without self-interest** or personal bias for or against any individual or group of individuals.

2. Directors must conduct themselves in a courteous, professional and businesslike manner at meetings and in their personal interactions with each other, GVR Members and staff.

.....

5. Except as expressly authorized by the Board, Directors shall not attempt to exercise individual authority over GVR matters by doing any of the following:

a. Interfering with the duties of GVR staff or contractors or giving direction to any GVR employee or contractor.

b. Communicating with the press concerning a GVR matter for or on behalf of GVR.

c. Communicating with GVR Members in violation of the Email Policy set forth in the CPM.

d. Directors must not disclose confidential information addressed in an Executive Session or in a communication with legal counsel without the express authorization of the Board.

e. Directors must be respectful of differing opinions of fellow Directors. Directors are expected to support duly-adopted Board decisions despite any personal disagreement therewith.

All of the foregoing are consistent with the statute and are either based on statute (like revealing confidential information), or general Board authority (like a and b), or the *aspirational aspect* of the duty of loyalty (as in e).

However, subsection c, referring to 7.3.6, is problematic, not because it violates “free speech”, but because it attempts to regulate behavior not specifically prohibited by statute. Prohibiting specific communication like emails with members appears similar to the Board in the McNally case prohibiting Board member participation (with the membership) without a judicial decision.

7.3.6 (Board of Directors Email Policy (updated 10/25/2016))

.....

It is the policy of the Board that individual Directors shall not use email to discuss, debate, or make policy or operational practice statements related to GVR whether in response to a member’s comments or for any other purpose except as may be specifically authorized by the Board.

2.4.2 (Code Enforcement Procedure) – sets forth how Code violations are handled. Subsection A.4 then lists possible “sanctions to impose” if the Board determines there is a violation of the Code of Conduct:

a. Written admonishment

-
- b. Removal from office per A.R.S. Section 10-3843(B)
 - c. Public censure (in an open meeting)
 - d. Request for Director's resignation
 - e. Election to recall Director

The foregoing subsections a through d appear to be within the Board's power. As to e, I do not find a procedure for an "election to recall Director" in the Bylaws, although there is a procedure for removal by the membership under A.R.S. Section 10-3808(B). The Board could also seek court action as the Court of Appeals stated in the McNally case, if the facts warrant it.

Based on the foregoing, having the email policy 7.3.6 and 2.4.1(A)(5)(c) appears to be too narrow and specific in regulating Board conduct. However, this is not because it violates "free speech" principles. A Code of Conduct exists to support unified Board action and "best interests of the corporation". It tries to tame the discretionary conduct of individual directors, but forces the Board as a body to make discretionary decisions about conduct that goes "too far". Subsection 2.4.1(A)(5)(second sentence) is better in that regard as it promotes positive conduct – supporting Board decisions. The first sentence about being respectful of differing opinions is aspirational and cuts both ways – both the minority and the majority can be respectful of opinions, both in meetings before decisions are made, and after meetings and decisions.

Attorney Wendy Erlich expressed the opinion that perhaps a director answering a question about which way a director voted is ok, but voicing an opposing opinion on a Board decision after-the-fact could be viewed as a violation of the statute and Code of Conduct. (We do not know any specifics about any communications that might have been at issue.) She basically said it implies a lack of support for the decision. It is an arguable position to take based on the existing Code of Conduct. However, as stated before, the statute is not black and white, and without the specific email policies, the Code of Conduct is fairly aspirational like the statute.

As we summarized in the beginning, directors "*can*" express their opinions, but there is some potential risk in doing so. However, this is not a "free speech" issue. This is a corporate governance issue. The corporate law about "best interests of the corporation" is not that specific except in the area of "conflicts of interest". Under the comments to the model corporate law, and in the Policy Governance model, the corporation and directors should speak with one voice. Therefore, "*should*" directors speak "out of school" to the members in a manner contrary to board decisions? Generally not, but context and matter of

degree matter. What is “too much”? The Board can legally make policies to self-govern. Policies provide the framework for the Board deciding if a director has gone too far and whether Board sanctions are warranted. It can decide if the ultimate remedy, court action, is needed. Ultimately, facts matter. What is actually said and how it is communicated matter. Limiting all director emails about Board practices or decisions, even innocuous ones, may be overreaching. In our opinion, it may be better to leave the policies more general and aspirational, rather than trying to limit the specific conduct of talking (or emailing or publishing) against Board decisions after they are made.

We hope you find this helpful.



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August 16, 2022

SENT VIA MAIL
(ssomers@gvrec.org)

Board of Directors
c/o Scott Somers
Green Valley Recreation, Inc.
1070 S. Calle de las Casitas
Green Valley, AZ 85614

RE: Opinion on Legality of Tenant Fees
ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

Dear Board members:

We have been asked to give an opinion on whether the Tenant Fees charged by GVR are legally permissible. This question came from a member recently, but we understand it may have been raised sometime in the past as well. In summary, we find that there is nothing illegal or improper with charging a fee for use of the GVR facilities by Members' tenants. The Corporation has authority to adopt such fees.

Green Valley Recreation, Inc. is a 501c4 entity and Arizona nonprofit corporation. It was incorporated in Arizona on November 13, 1973. If GVR was ever considered a "planned community association" under Title 33 of the Arizona Revised Statutes, it is not one now. That is because the Legislature amended the definition of "Association" in A.R.S. Section 33-1802 of the planned community statutes, effective August 27, 2019. The definition now does not include nonprofit corporations incorporated before January 1, 1974 that do not have authority to enforce covenants, conditions or restrictions related to the use, occupancy or appearance of separately owned lots, parcels or units, unless the corporation elects to be subject to the statutes. GVR fits under this exclusion and it has not elected to be subject to the planned community association statutes.

We will therefore review the governing documents of GVR as well as applicable Arizona Nonprofit Corporation statutes.

The Master Deed Restriction for GVR was recorded November 9, 1978 in Pima County in Book 5900, Page 0894, and the Amended Master Deed Restriction was recorded August 28, 2000 in Docket 11371, Page 2595, at No. 20001670674. The 1978 Restriction was adopted shortly after the September, 1978 merger of Community Recreation Association of Green Valley (“CRAGV”), and GVR, where CRAGV merged into GVR. The **Amended Master Deed Restriction (“MDR”)** states that each owner of real property that is not a membership property by virtue of a subdivision Declaration, by executing and recording a document referring to the MDR, agrees to become a member of GVR, and the owner’s property thereafter remains a property in GVR. It recites that the purpose of GVR is for “establishing and maintaining facilities and services for recreational activities and the preservation and promotion of health, safety and welfare in the Green Valley area”. The owners/members agree to pay dues and assessments (*including but not limited to* initial fees, new member capital fees, dues, membership assessments, *and other fees*) established by GVR. Any delinquent fees are a lien on the owner’s property.

Consistent with the MDR, GVR has each individual owner that wishes to be a member of GVR, but with property not in a subdivision-wide Declaration, complete and execute a form of **Declaration, Covenant, and Restrictions for Green Valley Recreation, Inc. Membership (“Membership Declaration”)**. This document reiterates what is in the MDR concerning the obligation to pay *Dues* as defined, *including dues, fines, late charges, interest, and other charges*, all according to the governing documents of the corporation.

The **Bylaws (March 25, 2020)** of GVR at Article V, Section 1 (Powers and Duties of the Board), state:

The Board of Directors shall have power:

- B. To take the following actions with the approval of a majority of directors in office:
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 - 2. Establish initial fees, dues, and assessments and collect same; and
 - 3. Adopt annual operating and capital budgets...
- C. To adopt and publish rules and regulations governing the use of the property and facilities owned by The Corporation and the personal conduct of all persons thereon.

Therefore, the Board has broad power to establish “dues”, and to adopt operating budgets. Tenant Fees are part of the operating budget.

In addition, the Bylaws at Article II, Section 2.B state:

GVR Members may surrender their right to use GVR's facilities and assign such right to occupants of their GVR Properties ("Assigned Members" and "Tenants").

Note that landlord Members are surrendering their rights to use GVR facilities, not all Membership rights or obligations. Tenants, like Members, Assigned Members, Life Care Members, and CRCF (Commercial Residential/Care Facility) Residents, then receive identification cards. This allows them to use GVR facilities. (Article II, Section 4.) Tenants may also have the benefit of inviting temporary Guests (see **GVR Corporate Policy Manual (Version 2022.01)** ("CPM"), Section 1.2.2(A)) by having the ability to purchase daily Guest passes (see CPM Section 1.2.2(C)) for those guests.

The CPM, which contains polices and rules adopted by the Board, at paragraph 1.1.7, also describes "**Other Fees**" as stated in the MDR, **including a "fee for service"**:

A. A fee for service is payment for the work involved in an operation that benefits individual members, as distinct from the entire membership.

1. The Board has established fees for services:

a. Transfer Fees: There shall be a charge for the processing of the documents upon a change in the title of a membership property.

b. Tenant Fees: Upon application, tenant cards shall be issued to a person leasing GVR membership property. There will be a charge for a tenant card. (Emphasis added.)

GVR requires a Tenant Card Request Form to be filled out for Tenant facility use and identification. The Owner is required to provide information about themselves, and the Tenant(s). The Owner or property manager signs the form. The Form shows the Tenant Fees set by GVR for daily, two-week, and various monthly types of passes, derived from the Board-made budget and facility use rules. The cards are issued for up to one year at a time. The Tenant Fees are non-refundable and non-transferable. The Owner's membership (i.e., facility use privileges) is suspended while there is a Tenant(s) with a card.

An Owner/Member has complained that GVR is "double-dipping" by collecting dues from the Member and Tenant Fees. The Member speculates that this is not fair and/or not legal. However, it is both fair and legal, as explained above.

The Member signs the Tenant Card Request form, and the MDR, Bylaws and policies make Members liable for any dues or fees imposed, including Tenant Fees. However, almost certainly most Owners would have their Tenants that want to use the

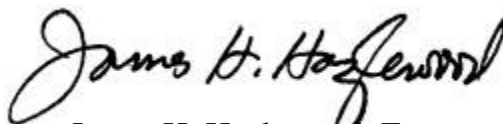
facilities to pay the Tenant Fees. That is logical. It is also fair because Members pay dues not just to use the facilities. Members support the purpose of GVR found in the MDR – establishing and maintaining facilities and services for recreational activities, and the preservation and promotion of health, safety and welfare of the Green Valley area. Members commit to supporting a vital nonprofit corporation than runs many facilities, has run them for years, and will continue to run them.

Tenants, on the other hand, just want temporary use. Allowing tenant use also creates administrative work for GVR associated with a tenant use program, necessitating a fee for service. That tenant use program benefits only certain landlord Members, and their tenants. A Tenant Fee therefore does not constitute “double-dipping”, with its negative connotation. It is a good business practice for the nonprofit corporation. Moreover, it gives the landlords and Tenants what they want.

In conclusion, the legal authority for the Tenant Fees is found in the foregoing governing documents. As seen in the MDR, there is no limitation on the types of fees that GVR and its Board may impose. Moreover, the Arizona Nonprofit Act supports the availability of such fees. A.R.S. Section 10-3613 (Member’s liability for dues, assessments and fees) states that members are deemed to have agreed to liability for these charges *if there is a provision in the articles, bylaws, or a resolution authorizing or imposing fees*. GVR has provisions in the Bylaws and Board-adopted policies/rules, and even more – recorded restrictions and agreements. If the Association and Board wanted to change the requirement for tenants to pay fees for facility use and/or the requirement of assignment of facility use rights from landlord Members to tenants, it would require amendments to the Bylaws and CPM.

Based on the foregoing, there is nothing illegal, improper or unfair about the imposition of Tenant Fees by GVR. .

Sincerely,



James H. Hazlewood, Esq.

for

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MEMORANDUM

DATE: August 16, 2022

TO: Scott Somers, CEO, Green Valley Recreation, Inc., for Board of Directors

EMAIL: SSomers@gvrec.org

FROM: Michelle Wellnitz, Esq.; James H. Hazlewood, Esq.

RE: Opinion re: GVR Artisans' Shop-Sales to Public; 501(c)(4) Issues
 ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

We have been asked to analyze whether GVR Artisans' Shop is precluded, because of its 501(c)(4) tax-exempt status, from selling goods in its shop to the general public? The inquiry came from the current president, Priscilla Spurgeon. As we understand its operation, the shop operates essentially like a consignment shop for its members that make their products elsewhere. The organization also collects the sales taxes. Current GVR policies prohibit the shop from selling to anyone but GVR members.

GVR Artisans' Shop ("Artisans' Shop") is organized as an IRC 501(c)(4) tax-exempt entity, just like GVR. IRC 501(c)(4) provides for exemption of social welfare organizations and local associations of employees. GVR Artisans' Shop would fall into the social welfare classification, under which the IRS provides an exemption for organizations not organized for profit but operated exclusively for the promotion of social welfare. An organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the community. Reg. 1. 501(c)(4)-1(a)(2)(i).

THIS MEMORANDUM IS CONFIDENTIAL AND MAY BE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR AN AGENT OF THE INTENDED RECIPIENT, EXAMINATION OR DISSEMINATION OF ITS MESSAGE IS PROHIBITED. IF YOU HAVE RECEIVED THIS MEMORANDUM IN ERROR, PLEASE NOTIFY THE SENDER IMMEDIATELY BY CALLING 1-800-743-9324 AND RETURN THE MEMORANDUM TO THE SENDER VIA THE U.S. MAIL.

As a preliminary matter, social welfare organizations are not precluded from engaging in business activities as a means of financing their social welfare programs. More specifically, there is no statutory provision within the IRC or the IRS's regulations that precludes a 501(c)(4) organization from selling goods to the general public solely because of its 501(c)(4) status. Indeed, nonprofits must generate revenue to support their operating costs in order to keep the organization operating to support its underlying 501(c)(4) purposes. As such, the GVR Artisans' Shop's single act of selling goods to members of the general public will not jeopardize its tax-exempt status.

However, we are concerned about the Artisans' Shop's operation in general. IRS regulations provide that an organization is not operated exclusively for the promotion of social welfare if its primary activity is carrying on a business. Doing other than promoting social welfare risks jeopardizing an organization's 501(c)(4) status. A determination whether business activity is the "primary activity" of an organization claiming exemption under IRC 501(c)(4) depends on all the facts and circumstances of the particular case.

Priscilla Spurgeon, president of the Artisans' Shop, states in her email to the GVR Board of Directors and Board of Affairs Committee members that GVR Artisans' Shop's goal is twofold: "first we provide an avenue for members to sell the items they make and recoup their costs to continue funding their hobby, and second, we want to be the first place residents of Green Valley and neighboring communities stop to purchase unique, handcrafted gifts and home decorations." Ms. Spurgeon further provides: "Our club, the GVR Artisans' Shop, is a unique GVR club because we are a retail shop. Our members work in the shop to sell their items. The shop keeps 10% of the sale price and 90% goes to members." The club's purpose on the GVR website is: "To provide an outlet for GVR artisans to sell their hand crafted, one-of-a-kind creations."

Here, the Artisans' Shop's principal purpose and primary activity is the operation of a retail store for the sale of goods. With all the information we have been given regarding GVR Artisans' Shop's purpose, operations, and activities we are concerned that it is neither operating as nor meets the requirements of a 501(c)(4) organization. A particularly concerning fact is that 90% of the income from the sale of goods goes back to the members who made the craft/art. We are informed that this is so the members may recoup their costs to continue their hobby and that this is a purpose of the

Artisans' Shop. However, the purpose of any 501(c)(4) may not be to inure to the benefit of a private party – its purpose must serve social welfare. That fact that funds are generated under the 501(c)(4) and then given to members for private, non-charitable purposes is not social welfare activity. It appears more like promoting sales for members that could be done on Etsy.com. In fact, that IRS has specifically ruled on a case similar to Artisans' Shop: In Rev. Rul. 61-158, 1961-2 C.B. 115, a nonprofit organization, created exclusively for the promotion of social welfare, that conducted weekly drawings among members of the general public as its principal activity and used the profits therefrom primarily for the payment of its own general expenses was not entitled to exemption as an organization described in IRC 501(c)(4).

To conclude, GVR's 501(c)(4) organizations are not precluded from engaging in business activities with the general public as a means of financing their social welfare programs/purpose. However, because GVR Artisans' Shop's primary purpose is to engage in business activities, we are concerned that it fails to meet the requirements of a 501(c)(4) and it may not currently be operating as one, regardless of whether it sells to the general public or not. Possible options might include the artisans in the club/shop forming a for-profit business, but that might require leasing the shop space from GVR. Alternatively, GVR could run the shop, if the artisans would donate their goods to be sold by GVR so the revenue could go to GVR to support its social welfare purposes.

Please note, in an earlier separate email opinion, we raised the issue of the Lapidary & Silversmith Club possibly violating IRC 501(c)(4) in passing (when answering a question about their 10% commission). Now that we have focused more on the issue and reviewed Revenue Rulings, it appeared at first that the Lapidary & Silversmith Club might be operating in a similar manner to the Artisans' Shop. Its site says that the Club operates three facilities to provide instruction (even of beginners) and workshops, but each with a "retail sales display for members' handcrafted jewelry", called a Gift Shop on the Club's website. They also, as we know, take a 10% commission on sales of products made on Club equipment. Therefore, 90% goes to the members selling goods like the Artisans' Shop. However, members use facilities and equipment and interact with each other in their processes. Members of the Lapidary Club, as part of membership, are also required to volunteer their time to teach other members, work in the shop, etc. It also appears they also have other fundraisers. The Club's purpose is: "To provide instruction, workshops, and

an atmosphere conducive to the development and expansion of members' talents and to attract new members”, As well as “promoting interest and education in lapidary, silversmith and other jewelry crafts for GVR members”. Its primary activity is broader than the retail sales component. In contrast, the Artisans' Shop only has a shop for sales of artist members where 90% goes to those members. Therefore, without other information, we conclude that the Lapidary & Silversmith Club is not likely to be in violation of the requirements of IRC 501(c)(4).

Please let us know if you have any questions. Please know that neither of the two attorneys involved here are tax attorneys. Michelle Wellnitz is a CPA, but not a practicing CPA. If you want further advice, GVR may want to go to its own CPA, or obtain a specialized tax attorney.