Community Association Management *Insider*®

JULY 2014

INSIDE THIS ISSUE

Fixing Las Vegas HOA Elections Was Gamble That Didn't Pay Off

An alleged homeowner's association election-rigging plot has been uncovered in Nevada, leaving those living in community associations across the Las Vegas Valley feeling vulnerable after being tricked into hiring a certain construction company.

The scheme involved a former construction company boss using his associates to stuff ballots, steal ballots, and steam open ballots to win HOA elections so that the construction company could obtain lucrative construction contracts from "friendly" board members.

Federal prosecutors claim that 11 associations were defrauded of millions of dollars in the takeover scheme, which occurred

(continued on p. 8)

PRODUCED IN CONSULTATION WITH

community ASSOCIATIONS INSTITUTE

FEATURE

Take Two Steps to Ensure Realistic Workload for Managers

Burnout among association managers is not uncommon. While some managers leave their positions, many continue their careers but constantly work beyond their comfort levels, either by extending their workdays or taking work home with them. Manager burnout is a serious issue for both management companies and community associations. A state of emotional, mental, and physical exhaustion will prevent an otherwise excellent community manager from performing her job at the necessary high level, leading to mistakes and turnover, both of which may impact members. And constantly finding competent replacements and training them takes up valuable time and resources. Here's how to avoid the two major sources of burnout that managers within your management company might experience.

Beware of Technology Overload

"One of the major contributors to manager burnout is managing electronic communications," warns Florida attorney Ellen Hirsch de

(continued on p. 2)

Q & A

Determining Whether Home Business Ban Includes Day Care

Q As the manager of a condominium building, I recently discovered that one of the members who lives in the building has been operating a day care for profit in her unit. There have been a few complaints from other members about noise and an increased number of visitors to the building—mostly from pick-ups and drop-offs of children. I checked our governing documents and home businesses are banned. However, some of the board members I talked to about this think that it's unclear whether a day care is a typical home business for our purposes. We don't want to spark a lawsuit by demanding the member give up her business unless we're certain that we can prohibit it. What's the likelihood that we'll be able to enforce the ban?

A That depends on several factors including your state law and the legal precedents that have been set in your state, as well as the specific language used in your governing documents. Your first

(continued on p. 6)

Editor: **Elizabeth Purcell-Gibney, J.D.**

Executive Editor: **Heather Ogilvie**

Director of Production: **Kathryn Homenick**

Director of Operations: **Michael Koplin**

Community Association Management Insider [ISSN 1537-1093 (print), 1938-3088 (online)] is published by Vendome Group, LLC, 216 East 45th St., 6th Fl., New York, NY 10017.

Volume 13, Issue 14

Subscriptions/Customer Service: To subscribe or for assistance with your subscription, call 1-800-519-3692 or go to our Web site, *www.vendomerealestatemedia.com*. Subscription rate: $370 for 12 issues. **To Contact the Editor:** Email *egibney@vendomegrp.com*. Call: Elizabeth Purcell-Gibney at (212) 812-8434. Fax: (212) 228-1308.

To Place an Advertisement, Please email Erin Tyler, *etyler@vendomegrp.com*, or call (216) 373-1217.

Realistic Workload (continued from p. 1)

Haan. She points out that hundreds of email messages can accumulate in a manager's email inbox. Don't let emails overwhelm you. "Set aside a fixed period of time each day to review the emails and let your association board know you will be responding to emails at a certain time each day," Hirsch de Haan suggests. She says that sorting emails into folders, and using them to update your task list is helpful. "Be reasonable about setting deadlines by which you will complete a task," she stresses. "A manager knows what is on her plate already," she points out. "Don't set yourself up to fail."

Hirsch de Haan advises designating a liaison person. "You can require the board to assign one person to contact you with assignments and communications, so you are not trying to please seven masters on one board, or juggle contradictory instructions," she notes. "Specifying one director who is designated to communicate with the manager, and who conveys the board's instructions, is invaluable in saving the manager's mental health," she emphasizes.

Specify Limits on Meetings

You can also help reduce manager burnout within your management company by putting mutually acceptable limits on the number of association meetings a manager must attend. A major source of manager burnout is the number of meetings that a manager is required to go to. Many of these meetings occur after typical work hours, and—particularly for managers who are responsible for several associations—the time commitment involved can have a significant impact on a manager's personal life.

Communicating with the board is key in putting a stop to untenable demands. If your current management contract doesn't impose any sort of limits on the number or times of meetings that require the manager's attendance, you should start communicating the problem to the board members and try to shift meetings to earlier times. Take the following steps:

Emphasize productivity. You can frame the problem in terms of productivity. Like the association manager, many board members have been working all day and by the time evening arrives, board members are tired and not at their productive best. Board members may be more inclined to shift meeting times when they're reminded of the tasks that need to be accomplished and the energy required to sit through a two-hour board meeting, especially after a long day at the office.

Test the concept. To ease the transition, until management contract renewal, test the concept of daytime meetings by conducting one such meeting per quarter. You might want to consider a breakfast board meeting that board members will have time to attend on their way to work. (You can offer to provide a continental breakfast for the members as an incentive.)

Ideally, an association will have warmed up to the idea of meetings held during the day by the time the management contract renewal comes around. You can point to more efficient and productive meetings and the general well-being of the association manager. To help you implement reasonable restrictions, follow the guidelines in our Model Contract Clause: Set Limits on Manager Involvement, to include in your management contracts.

Limit number of meetings requiring attendance. Requiring attendance at four meetings, plus one annual meeting of the entire association membership, per year is reasonable [Clause, par. a]. Of course, your community might have variables that make required attendance at more meetings reasonable. Larger communities might require more frequent meetings, especially if they offer a lot of high-maintenance amenities such as tennis courts and swimming pools that need more oversight. Also, communities that need significant restoration or rehabilitation tend to require more meetings to check restoration progress or select among various bids.

Schedule daytime meetings. Requiring managers to attend night meetings adds to manager burnout. The better approach is to treat association meetings that the manager must attend as you would treat any other business meetings by requiring them to be scheduled during normal business hours [Clause, par. b]. However, you shouldn't require annual meetings to be scheduled during regular business hours. Typical members haven't volunteered for the board, and they should be able to participate in their community without having to leave work too early.

MODEL CONTRACT CLAUSE

Set Limits on Manager Involvement

Use this language, which sets limits on the number and duration of meetings a manager must attend, in your management contracts to help combat manager burnout within your management company. Show this clause to your attorney before adapting it for your own use.

MEETINGS

a. **Number of Meetings:** The manager or other representative of [*insert name of management co.*], collectively, the "Manager," shall attend five (5) Board and/or membership meetings per year, which includes the annual meeting of the members.

b. **Meeting Times:** All meetings that require the Manager's attendance must be held Monday through Thursday and begin no later than 5:30 p.m. The only exception to this is the annual meeting of members, which shall begin no later than 7 p.m.

c. **Duration of Meetings:** All meetings that require the Manager's attendance shall last no longer than two (2) hours each.

d. **Hourly Fee for Meetings that Exceed Parameters of This Contract:** The association agrees to pay an additional fee of $[*insert amt.*] per hour to [*insert name of management co.*] should any of the following occur:

   (i) An additional meeting requiring the Manager's attendance is held in excess of the five (5) meetings provided for herein;

   (ii) A meeting requiring the Manager's attendance begins at any time after 5:30 p.m., other than the annual meeting of members, or is held on a day other than Monday through Thursday, including the annual meeting of members;

   (iii) A meeting requiring the Manager's attendance exceeds two (2) hours in duration, including the annual meeting of members.

Set time limits for meetings. Each meeting requiring the manager's attendance shouldn't last longer than two hours. Some management contracts limit the total number of meetings as well as the total cumulative hours per year that the manager must spend in meetings, rather than just limiting each meeting to two hours. Although the intentions are good, this solution doesn't reflect the personal needs of the manager. It only complicates the record-keeping. Rather than forcing the manager to keep track of the total annual meeting hours, the management contract should simply limit the length of each meeting to two hours [Clause, par. c].

Charge hourly fee for meetings that exceed limits. It's fair for a management company to receive extra compensation for any meeting that exceeds the contract limits. You can supply the details of the fee in the contract clause. A fee has two benefits. First, it encourages a board to weigh the cost of an additional meeting against its need for it. Second, it allows a manager to earn additional income to compensate for her additional work [Clause, par. d]. ♦

Insider Source

Ellen Hirsch de Haan, Esq.: Partner, Wetherington Hamilton, 1010 N. Florida Ave., Tampa, FL 33602; *www.whhlaw.com.*

DEALING WITH CONTRACTORS

Avoid Tax Trouble When Using Third-Party Workers

It may seem like tax season—and the paperwork that accompanies it—has just passed, but remember that as you manage your community year-round, you need to be aware of tax issues that could arise in the future. A common issue to keep your eye on is the use of outside, third-party workers to perform jobs, such as cleaning, in your community. If you don't handle paying these workers properly throughout the year, you could get into tax trouble with the IRS or state and local tax agencies later.

What You Need to Know

Tax law classifies workers as either "independent contractors" or "employees." Independent contractors pay their own employment taxes. Employers are responsible for their employees' employment taxes. The IRS can audit employers to find out if the workers they call independent contractors are really employees. Some employers call workers "independent contractors" in order to avoid taxes. But if the IRS audits your association and decides to reclassify an employee that you treated as an independent contractor, you might have to come up with big tax payments, interest, and penalties.

Here are some of the factors the IRS—and state and local tax agencies—use to distinguish employees from independent contractors. Use our Independent Contractor Questionnaire based on those factors to help you decide whether to treat an individual worker as an employee or independent contractor.

Control. Basically, if you have the right to control and direct how a worker performs the job, the IRS says the worker is an employee, even if you and the worker have agreed otherwise.

Amount of training. The more you train workers, the more likely they will be considered employees. An independent contractor should have the necessary skills, expertise, and experience to get the job done without the need for training. In answering this question on the questionnaire, keep in mind that requiring workers to attend regular company meetings that you hold for other employees is considered training.

Amount of supervision. The more you supervise workers, the more they will be considered employees. Supervision involves the right to control the details of how and when work is done. Unlike employees, independent contractors generally make their own decisions about how to tackle a job.

Control over assistants. If a worker uses assistants, look at who hired, supervised, and paid them. If you did, the worker is likely to be considered an employee. Independent contractors perform these functions themselves. For example, suppose the painter you have hired falls behind schedule. If you hire and pay assistants to help the painter catch up, you are treating the painter more as an employee than as an independent contractor. A better alternative may be to have the painter hire, supervise, and pay his own assistants.

Setting schedules. If you establish routines for workers, direct the sequence for performing job tasks, or set workers' schedules, you are treating them as employees. Independent contractors set their own schedules, priorities, and work patterns.

Setting work hours. If you set a worker's hours, you are treating the worker more as an employee than as an independent contractor. While associations often schedule appointments with independent contractors, they usually do not require them to work set hours.

Compensation method. Independent contractors usually get paid by the job, not by the hour. Employees, on the other hand, are generally paid according to how much time they put in. Get a written invoice from independent contractors before you pay them. An invoice with the worker's business name, address, and telephone number is important proof that an independent contractor is not your employee.

Expense reimbursements. Employers often pay business and travel expenses for employees, and have control over how much they spend. Independent contractors take care of their own business and travel expenses.

Furnishing tools, materials, and equipment. Workers who use your tools, materials, and equipment to get the job done are more likely to be viewed as employees. If you supply the ladder, painting tools, and paint, a painter you hire would probably be classified

as your employee. Independent contractors usually own their own tools and equipment and supply the necessary material.

Where work is done. Workers who perform all of their work in an office or workshop that is located within your community are usually considered by the IRS to be employees, because they are more likely to be under your control. A true independent contractor works at other places, too.

Financial risk. Employees generally do not lose money or earn a profit based on their job performance. They are paid the same amount no matter how the job turns out, although they can, of course, be fired. Independent contractors, on the other hand, have a financial stake in the jobs they do. They risk losing money on jobs that do not come out right the first time or take too long to complete.

Other clients. Requiring workers to report to you on a full-time or exclusive basis makes them appear to the IRS as employees. Independent contractors make their services available to the general public, advertise, and usually work at other communities, too.

Rehiring laid-off employees. Some associations think it's okay to lay off employees to shrink the payroll, and then hire them back to do their old jobs as "independent contractors." This is a big mistake; tax authorities are quick to reclassify such workers as employees.

Impact on day-to-day operations. A worker who performs day-to-day operations at your community is more likely to be considered an employee than an independent contractor.

INDEPENDENT CONTRACTOR QUESTIONNAIRE

The answers to the following questions should help you narrow down whether someone should be classified as an employee or an independent contractor.

1. Do you train the worker or require the worker's attendance at meetings? ❑ yes ❑ no
2. Do you have the right to supervise the worker or require the worker to submit regular reports? ❑ yes ❑ no
3. Do you hire, supervise, and pay for the worker's assistants? ❑ yes ❑ no
4. Do you establish work routines and schedules, or set the sequence of job tasks for the worker? ❑ yes ❑ no
5. Do you set the worker's hours? ❑ yes ❑ no
6. Do you pay the worker by the hour, week, or month? ❑ yes ❑ no
7. Do you reimburse the worker's business and travel expenses? ❑ yes ❑ no
8. Do you own the tools, materials, and equipment the worker uses to do the job? ❑ yes ❑ no
9. Does the worker perform all of his or her work in an office or workshop located within your community? ❑ yes ❑ no
10. Does the worker work for you on a full-time basis, or report exclusively to your community? ❑ yes ❑ no
11. Is the worker paid the same amount, regardless of how the job comes out? ❑ yes ❑ no
12. Did you rehire this worker after laying him or her off of previous employment with you? ❑ yes ❑ no
13. Are the worker's services vital to your community's day-to-day operations? ❑ yes ❑ no
14. Can you discharge the worker at will? ❑ yes ❑ no
15. Can the worker walk away from the job before it's done without being subject to damages or penalties? ❑ yes ❑ no

Right to terminate. Associations can usually fire employees at will. But independent contractors cannot get fired as long as they live up to their contractual obligations. They usually have a right to collect damages or a penalty if they are fired without cause.

Right to quit. A worker who can quit and walk away from your community without any liability is usually an employee. Independent contractors usually agree to complete a certain job. If they walk out on a job, they are usually on the hook to the association for damages. ♦

Q&A (continued from p. 1)

move should be to consult the condominium's attorney, who can advise you based on your specific circumstance. But be aware that, at least in New York State, courts have been lenient about day cares in residential condominium buildings—carving out exceptions for this particular type of business even when home businesses have been banned by governing documents.

In a recent New York case, a housing court ruled that a provision in a co-op's proprietary lease banning child care centers from the building is unenforceable because the state law creates a "strong public policy" favoring day care. There, it was determined that a co-op complex shareholder couldn't be evicted for operating a group child care center in her unit. Initially, the co-op demanded that the shareholder stop running her day care, arguing that the day care violated the proprietary lease that specified that the building's units were to be only residential in nature. Each party—the shareholder and the co-op—asked a court for a judgment in its favor without a trial.

The court ruled in favor of the shareholder. The judge noted that courts typically enforce provisions restricting residential premises to residential use, but she followed precedent set by other courts that have made an exception to such restrictions based upon public policy considerations. (While past cases dealt with condominiums, the court decided that they also could be applied to co-ops.)

The court ultimately ruled that the use of a licensed day care in residential premises doesn't violate a substantial obligation of the tenancy in the case of "group family day care homes," defined by state law as day care facilities run out of private homes.

The court pointed out that "both condominium owners and cooperators relinquish a degree of freedom and rights for the greater good of the building," but public policy considerations preempt restrictive covenants in condominiums, and courts have applied public policy considerations to preempt restrictive covenants in cooperatives in past cases [Waldo Gardens v. Burns, June 2014]. ♦

RECENT COURT RULINGS

➤ Request for Service Animal Explanation Violated FHA

Facts: A disabled homeowner sued her community association over the right to bring her service animal, a Chihuahua, into the community's clubhouse. On three occasions, the homeowner was asked when she entered the clubhouse to produce documentation that she is disabled and that the dog is a service animal. She was also asked why the dog was necessary for her to be able to use the clubhouse. When the manager wasn't satisfied with her responses, she ordered the homeowner to leave.

The homeowner previously had sent documentation regarding her disability and the service animal directly to the association, including an explanation that the service animal is necessary because it's trained to fetch her walker if it rolls away and to fetch her cell phone in case of an emergency.

The homeowner brought discrimination claims under the Americans With Disabilities Act (ADA) and the Fair Housing Act (FHA). A trial court dismissed the homeowner's claims. She appealed. An appeals court ruled that the clubhouse is a "public place" under the ADA and vacated the trial court's decision. The association appealed.

Decision: A Nevada district court ruled against the association.

Reasoning: The homeowner argued that the association is prohibited by federal law from demanding documents or other proof when she enters the clubhouse with her service animal. To prevail on her FHA claim, the homeowner had to prove that: (1) she is handicapped within the meaning of the law; (2) the association knew or should reasonably be expected to know of the handicap; (3) accommodation of the handicap may be necessary to afford her an equal opportunity to use and enjoy the dwelling; (4) the accommodation is reasonable; and (5) the association refused to make the requested accommodation.

The district court pointed out that the homeowner had notified the association that she was disabled and it knew or reasonably should have known of the handicap: She noticeably can't walk without the assistance of a walker and a leg brace. Because the asso-

ciation knew or should have known of her handicap, the question is whether the service animal may be necessary for her enjoyment of the clubhouse.

The district court determined that the association already had adequate information regarding the service animal's training as an assistance animal and how the dog provided a service or benefit necessary for the homeowner to enjoy the clubhouse. Moreover, during the second and third incidents, the homeowner specifically explained to the community managers how the service animal was trained to assist her.

- Sanzaro v. Ardiente Homeowners Assn. LLC, May 2014

➤ Expansion Plans Aren't Violation of Deed Restrictions

Facts: Two homeowners who owned a single lot purchased the lot next to theirs for the purpose of expanding their home. After they had purchased the second lot, they asked their community association to approve their plans to expand their home by converting their existing garage into livable space and building a new garage onto the house. To do this, they would annex a portion of the second lot into their lot, construct the new garage over the original property line and onto the annexed portion, and then sell the remainder of the second lot as a separate home site.

After a protracted dispute, the association finally approved some of the construction plans. But it later backtracked and said that the expansion wasn't approved and was prohibited by the association's deed restrictions. The homeowners sued the association. A trial court ruled in their favor and granted them attorney's fees and other monetary damages. The association appealed.

Decision: A Texas appeals court upheld in part and reversed in part the decision of the trial court.

Reasoning: On appeal, the association argued that the originally platted lot lines were part of the deed restrictions and the homeowners' plan would result in two residences on a single lot, violating the deed restrictions. It also asserted that the homeowners weren't entitled to attorney's fees.

The appeals court concluded that the homeowners' expansion plans are expressly permitted by the deed restrictions. But the appeals court also pointed out that the homeowners' argument that they should receive attorney's fees and other costs was based on a statute that didn't actually allow for that. ♦

- Tanglewood Homes Assn. v. Feldman, April 2014

DOS & DON'TS

✓ *Check Insurance Before Fighting FDCPA Claim*

If you're threatened with a lawsuit by a member who claims that her consumer protection rights under the Fair Debt Collections Practices Act (FDCPA) have been violated by you or your staff, your association's master policy carrier may consider settling the case rather than face the enormous burdens of time and costs required to defend a lawsuit—even if it's frivolous.

To help you decide whether to fight or settle the claim, check with your association's insurer at the outset. "Although it's usually the case that the association and the manager will be defended by the association's D&O policy (albeit under a reservation of rights), this may not be true if proper notice of a possible claim wasn't given to the carrier or if the claim is made in a different policy year and there is no "prior acts" coverage," warns Nagle. "And, even though the carrier may defend the lawsuit, there's no guarantee that it will pay any judgment awarded, especially if violations are proven," he says. Moreover, in that case, the carrier may even ask for its litigation costs (including attorney's fees) to be repaid, he stresses.

Nagle emphasizes that managers, like attorneys, need to follow the FDCPA—as well their state's collection laws—to the letter to avoid trumped-up lawsuits. For more precautions managers should take when collection efforts become necessary for a delinquent member, see "Avoid Liability When Enforcing Debt Collection Policy," available on our website. ♦

Insider Source

P. Michael Nagle, Esq.: Nagle & Zaller, P.C., 7226 Lee Deforest Dr., Ste. 102, Columbia, MD 21046.

Fixing Las Vegas HOA

(continued from p. 1)

between 2003 and 2009. The investigation is thought to be the largest public corruption case federal authorities have brought in Southern Nevada.

A total of 36 defendants now have pleaded guilty to various crimes related to the scheme; several are accused of conspiring to pack association boards to gain legal and construction defect contracts. Straw buyers were recruited to purchase condominiums at developments and then get elected to the HOA boards through bribery and racketeering.

There have also been accusations that an "enforcer" for the construction boss was instructed to go to board meetings to intimidate board members not friendly with him and once went to a board member's home for that purpose. The enforcer's reputation as a ranking kung fu grandmaster led the FBI to name the long-running federal investigation "Operation Grandmaster." ♦