

## Ask the Experts

### Generous donations

By Corey Auerbach

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**Q:** Some of our homeowners want to leave the association money in their will. Can the association accept these sorts of gifts? Does it need to be set up through a trust or used for a specific purpose? —*New York*

**A:** Unless inconsistent with the terms of an association's governing documents or any certificate of incorporation, there is nothing that would restrict an association from accepting a monetary gift, be it during the life of the donor or as part of testamentary bequest. Similarly, a donor could establish a trust for the benefit of the association. If the association is aware that a donor desires to provide for the association in a will or trust, it may be beneficial to meet with the donor to ensure the intent and purpose of the donation can be satisfied.

While a general gift could be used by the association for any authorized purpose, a gift also may be directed by the donor for a specific purpose, such as common area improvements or capital projects. To the extent a gift is designated for a particular purpose requiring prior approval under the association's governing documents, the donor's directive does not excuse strict compliance with applicable procedures.

If a directed gift cannot be used for a purpose authorized by the governing documents, the gift may need to be returned. If the donor is alive, the association could request that any restriction be removed or modified. However, if the gift is testamentary, the association may be required to petition the surrogate court to redirect the gift to another recipient who can better fulfill the donor's intent.

Both the donor and the association should be mindful of associated tax implications. For the donor, gifts to an association generally cannot be deducted on personal tax returns. Even if an association is tax-exempt or a nonprofit corporation, it is not a qualified charitable organization. Only donations to qualified organizations defined by the Internal Revenue Service are deductible as charitable contributions.

For the association, donations may be considered taxable income, so board members should consult with the association accountant and attorney.

Finally, while associations should not rely on donations to balance their budget, the generosity of owners can provide community benefits to be enjoyed during their life or as lasting legacies.

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### Conflict of interest

By Corey A. Auerbach, Esq.

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Q: A homeowner who is an active real estate agent in the community is a candidate in our upcoming election. The current board has concerns that this person would pose a conflict of interest if elected. The board feels fiduciary duties to the association would be compromised by the opportunity for “self-dealing.” How should the board proceed? —*New York*

A: While you should review your association’s governing documents regarding board member eligibility, it is unlikely that an owner’s occupation would act as a disqualification, standing alone. Of course, serving on the board carries great responsibility, including making decisions based on the best interest of the association, not for personal gain. Engaging in self-dealing or using one’s position on the board for a professional advantage would undeniably be a breach of fiduciary duty. However, the mere opportunity for self-dealing likely would not.

To avoid conflicts of interest arising from a board member’s occupation, the association should adopt a conflict of interest policy. Associations incorporated under a set of statutes known as the New York Not-for-Profit Corporation Law are required to have a conflict of interest policy. The policy must include:

- A definition of the circumstances that constitute a conflict of interest
- Procedures for disclosing a conflict of interest or possible conflict of interest to the board and procedures for the board to determine whether a conflict exists
- A requirement that the person with the conflict of interest not be present at or participate in board deliberation or vote on the matter giving rise to such conflict
- A prohibition against any attempt by the person with the conflict to influence improperly the deliberation or voting on the matter giving rise to such conflict
- A requirement that the existence and resolution of the conflict be documented in the minutes
- A procedure for disclosing, addressing, and documenting related transactions

Your conflict of interest policy also could prohibit board members from receiving any economic benefit, including gifts from persons or entities dealing with the association unless disclosed and approved by the board in advance. More specifically, the board could include a restriction prohibiting members who are real estate brokers or salespersons from engaging in selling units within the association or participating in such sales, either directly or indirectly, as listing broker or co-broker.

While it is unlikely that the board could prohibit an eligible candidate from serving on the board based on his or her occupation, I recommend adopting specific language in your association's conflict of interest policy to help avoid situations that could compromise a board member's fiduciary obligations.

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