ASK THE EXPERTS

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Common Ground
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Daycare rights. Good standing. Criminal disclosure.

CARE RESTRICTIONS

Q: An owner running a licensed daycare from her home frequently alters common areas without permission. Does a home childcare specialist have certain rights that are protected and that trump association rules? —Massachusetts

A: The thrust of the question seems to be whether Massachusetts law would protect this daycare business operating in a residential community because it deals with children who would be part of a protected class under antidiscrimination laws. It's my opinion that it wouldn't be entitled to any greater protection from association restrictions than if it was a business selling hamburgers.

The 1988 federal Fair Housing Amendments Act has a provision whereby the federal government will subordinate its enforcement activities to any state with a fair housing act that is more stringent than the federal act. Massachusetts has such an act, and any claims of discrimination that involve children would be handled by the state Commission Against Discrimination. There are several cases and decisions that guide the thinking of this agency and ultimately state courts.

The Massachusetts statute prohibits policies or actions that would inhibit or prevent children from residing in housing. Restrictions on the operation of a daycare center in a condominium, even a predominantly residential community, don't inhibit a child from residing there. State law also prohibits discrimination based on familial relationships, but the daycare center has no familial relationship with the children under its care.

Therefore, if the daycare owner is violating condominium documents by altering the common areas, the owner or the business would be subject to the association's restrictions. Those restrictions can be enforced by levying fines and seeking an injunction. The association may be able to collect any legal fees and court costs too.

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GOOD THINKING

Q: What does "good standing" mean? Can our community association prevent owners who aren't in "good standing" from attending board meetings and running for board seats? —Hawaii

A: Neither the Hawaii Condominium Act nor the Hawaii Planned Community Associations Act addresses whether members must be in "good standing" to vote or serve on an association board. An association's governing documents, however, may contain such a restriction. Note, however, that if the Hawaii Nonprofit Corporation Act applies to your community, it would require any voting restriction to be stated in the articles of incorporation. Therefore, be sure to check all of your association's governing documents for any "good standing" requirements.

Some associations require that members be in "good standing" to serve on the board. Beyond serving important administrative and governance roles, board members are visible community members. Holding board members to community expectations sets an important standard. In addition, a board member who is already at odds with the association may run into conflicts of interest when considering similar issues facing other owners.

Restricting voting rights is less common. Understandably, some associations may be reluctant to do so because voting gives owners an important voice in the management and operation of their community. Voting restrictions are more often seen in planned community associations than condominiums.

The definition of "good standing" varies and should be specifically stated in the governing documents. Commonly, it means that the owner's account is current with no unpaid delinquencies. Questions can arise whether adherence to a payment plan for past delinquencies brings an owner into "good standing." In addition, some associations adopt a broader definition to include covenant compliance.

If your governing documents don't contain a "good standing" requirement for either voting or board membership, you may wish to consider amending them to include one or both. Important considerations include defining "good standing" and the impact of the restriction. Does "good standing" require that fees and assessments be paid in full? Is covenant compliance included? As to the practical impacts, consider whether the restriction will serve as a powerful incentive for members or unduly hamper the association's ability to obtain the necessary votes.

Of course, you should consult with your association's attorney about drafting an amendment or locating any existing restrictions in your governing documents.

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CRIMINAL HISTORY

Q: Does a condominium association board have an obligation to disclose information to an owner about an individual who is leasing a unit? If the lessee has a permanent guest with a criminal background does the board have an obligation to disclose this to the owner? —New Jersey

A: Typically, a New Jersey condominium association wouldn't have an obligation to disclose information to an owner about another resident who is renting a unit or is a guest in a unit. The New Jersey Condominium Act sets forth the duties of a condominium association board. With respect to disclosures, the Act specifically requires the association to maintain accounting records in accordance with generally accepted accounting principles and make them available for inspection at reasonable times by unit owners. Such records include all receipts, expenditures, and an account for each unit for any shares of common expenses or other charges. The board may have other duties as set forth in the association's master deed or bylaws. Therefore, unless the master deed or bylaws require additional disclosures, there would be no duty to disclose information with respect to tenants.

Nevertheless, the Act still requires the board to exercise its power and discharge its functions in a manner that protects and furthers—or is not inconsistent with—the health, safety, and general welfare of residents. If there is a risk of foreseeable criminal harm, an association has an obligation to take reasonable action. The board must balance the possibility that any specific notice regarding a resident may result in that person being harassed and thus create a potential liability for the association. This is a very complex balancing act, and no decisions should be made without the advice of the association's attorney.

It would be rare for an association to report the past criminal history of a resident to the community. The association must consider the type of crime committed, the age of the person when the crime was committed, the length of time since the crime was committed, and the amount of time during which the person hasn't been subject to incarceration and hasn't committed another crime. If the association decides to disclose the information, the board should ensure that the notice is limited to purely factual matters.

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