

## HOUSING COUNSEL

## Investing condo association money wisely (and legally)

BY BENNY L. KASS

**Q. The treasurer on our condominium's board of directors is a stockbroker. He has persuaded our board to allow him to invest our condo association's funds with his company. Is this legal?**

**The board votes to approve investments, and the treasurer recuses himself from the vote. Unfortunately, it appears that this stockbroker-treasurer has a powerful impact on the rest of the board.**

**A:** Ethical considerations might not be relevant, depending on where he is investing the money. In a community association, there are two categories of funds: operating and reserve. The operating funds are used for the routine, everyday expenses of the association, such as insurance, utility bills, payroll and taxes.

Reserve funds are used to pay for emergencies or future contingencies, such as replacing a boiler or an elevator. These funds are accumulated yearly.

Unit owners always prefer to pay a few dollars into a reserve account every month rather than be hit with a large assessment when the money is needed. These reserve accounts might have hundreds of thousands of dollars. In some cases, they might even be more than a million dollars.

Board members have a fiduciary duty to the owners who elected them. Typical language found in most association bylaws says: "The directors shall exercise their powers and duties in good faith and with a view to the interests of the association and consistent with the purposes set forth in the declaration."

This means directors of an association have to act in the best interests of the association as a whole. In dealing with association funds, they have to make sure the money is invested in a safe and secure place, and that usually means in government-backed and insured investments, such as FDIC-insured certificates of deposit or federally backed bonds.

Several years ago, such investments carried interest

rates ranging from 5 to 7 percent a year. Today, one is lucky to get even 1 or 2 percent. Indeed, sometimes bank fees cancel out any possible growth of these funds.

What can the board do when interest rates are so low? The first thing is to consult with an independent financial adviser to get suggestions. Usually, the association's property manager makes the initial contacts and suggests how the funds should be invested, but "the buck stops with the board." Where association funds can be invested is a decision that only the board can make, after a thorough investigation. Nevertheless, the funds must be protected by the federal government and should not — must not — lose money.

Can the board invest its funds in stocks? I often get questions such as this: "The stock market appears to be on the rise. Why can't we invest in some good 'blue-chip' companies so we can get a better return for our money?"

The answer is simple: You can invest your own money where you want. You can even go to Las Vegas to try to make a financial killing. But these are not your funds. Unless 100 percent of the owners authorize you to invest in the stock market, you cannot do that.

I do not like the idea that the stockbroker-treasurer of your association is in charge of your funds. No matter how honest he might be, there will always be the perception that he has a selfish, pecuniary interest by investing funds through his own company. He is not the "independent" financial adviser I recommended earlier.

But it is not necessarily a conflict of interest. Most association bylaws contain language dealing with "interested directors." Contracts or investments made by associations in companies associated with a particular

director are valid, if the following conditions exist:

- The board knows of the director's involvement with the company, this fact is reflected in the board minutes of the meeting and the board votes affirmatively to approve the transaction;
- The transaction is commercially reasonable at the time it is authorized by the board.

So the specific answer to your question is that there might not be a conflict of interest, because the board knows the treasurer is a stockbroker.

The real question goes to where he is investing the funds. If they are in secured government-insured securities, that would be considered commercially reasonable. But if he is investing in the stock market, hoping for a large gain

for the association (and himself), that is wrong, and the board should immediately remove him from the office of treasurer and move the association funds to a safe investment.

Board members are elected by the owners, and only the owners can remove a director. But officers — such as president or treasurer — are usually elected by the board, and so the board can remove any officer by majority vote.

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