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May 20, 2022

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Norris J. Bishton, Esq.
Jeffrey S. Gubernick, Esq.
Bishton | Gubernick
c/o Hamilton Cove Homeowners Association
6701 Center Drive West, Suite 925
Los Angeles, CA 90045

Re: **Forbush v. Hamilton Cove Homeowners Association**
Subject Property: 81 and 82 Playa Azul, Avalon, California 90704

Dear Mr. Bishton and Mr. Gubernick:

My law firm has been retained to represent Mr. and Mrs. Forbush (“Forbushes”) in connection with their architectural application to Hamilton Cove Homeowners Association (“Association”) regarding Units 81 and 82.

My understanding is that the Forbushes submitted to the Association four (4) prior architectural applications, which were rejected by the Association.

With each rejection, the Forbushes attempted to address the basis for the prior rejection with the subsequent architectural application. More details concerning each architectural application and each rejection are contained in EXHIBIT “A.”

Civil Code Section 4765 is entitled Architectural Review and Decision Making. This statute states:

“(a) This section applies if the governing documents require association approval before a member may make a physical change to the member’s separate interest or to the common area. In reviewing and approving or disapproving a proposed change, the association shall satisfy the following requirements:

(1) The association shall provide a fair, reasonable, and expeditious procedure for making its decision. The procedure shall be included in the association’s governing documents. The procedure shall provide for prompt deadlines. The procedure shall state the maximum time for response to an application or a request

for reconsideration by the board.

(2) A decision on a proposed change shall be made in good faith and may not be unreasonable, arbitrary, or capricious.

(3) Notwithstanding a contrary provision of the governing documents, a decision on a proposed change may not violate any governing provision of law, including, but not limited to, the Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), or a building code or other applicable law governing land use or public safety.

(4) A decision on a proposed change shall be in writing. If a proposed change is disapproved, the written decision shall include both an explanation of why the proposed change is disapproved and a description of the procedure for reconsideration of the decision by the board.

(5) If a proposed change is disapproved, the applicant is entitled to reconsideration by the board, at an open meeting of the board. This paragraph does not require reconsideration of a decision that is made by the board or a body that has the same membership as the board, at a meeting that satisfies the requirements of Article 2 (commencing with Section 4900) of Chapter 6. Reconsideration by the board does not constitute dispute resolution within the meaning of Section 5905.

(b) Nothing in this section authorizes a physical change to the common area in a manner that is inconsistent with an association's governing documents, unless the change is required by law.

(c) An association shall annually provide its members with notice of any requirements for association approval of physical changes to property. The notice shall describe the types of changes that require association approval and shall include a copy of the procedure used to review and approve or disapprove a proposed change."

The Association has violated several sections of Civil Code Section 4765, including subsections(a)(1) ("a fair, reasonable, and expeditious procedure for making its decision."), (a)(2) (a decision made "in good faith and may not be unreasonable, arbitrary or capricious"), (a)(3) (violation of the "Fair Employment and Housing Act"), and (a)(4) (a decision must provide "both an explanation of why the proposed change is disapproved

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and a description of the procedure for reconsideration of the decision by the board.”)

California case law is helpful.

The Association must have reasonable standards for architectural review. Palos Verdes Homes Association v. Rodman (1986) 182 Cal.App.3d 324.

The Association must adopt and follow reasonable architectural procedures with “due process.” Ironwood Owners Association XI v. Solomon (1986) 178 Cal.App.3d 766.

The Association must not exceed the scope of its authority based on its governing documents. Ticor Title Insurance Co. v. Rancho Santa Fe Association (1986) 177 Cal.App.3d 726.

The Association owes a fiduciary duty to its members to act in good faith and avoid arbitrary action with regard to architectural decisions. Cohen v. Kite Hill Community Association (1983) 142 Cal.App.3d 642.

For the reason described in EXHIBIT “A,” I request the Board members identified as having a conflict of interest recuse themselves from participating in this hearing. My understanding is that none of the identified Board members will recuse themselves. The Forbushes participation in this hearing is not a waiver of their right to contend that the decision of the Board is invalid due to a conflict of interest.

EXHIBIT “A” is incorporated herein.

In addition to Association’s violation of several sections of Civil Code Section 4765, Association failed to meaningfully investigate Forbush’s assertion of and concerns regarding trespassing common area pipes into their separate interest Unit space. Also, Association either intentionally or negligently, and improperly, granted private exclusive use of common area detached laundry closets in such a way as to cause some homeowners to believe they own those spaces. Finally, all construction and aesthetic variances contained in Class III projects that have now been incorporated into the Association, are now part of Hamilton Cove’s construction and aesthetic standards, available to all members.

California case law:

Enforcement of the Condominium Plan and Interpretation of the CC&Rs

Association has a duty to enforce its governing documents. Nahrstedt v. Lakeside Village Condominium Assn. (1994) 8 Cal.4th 361, 373-374, 380-383.

Enforcement of CC&Rs must be “in good faith, not arbitrary or capricious, and by procedures which are fair and uniformly applied.” Liebler v. Point Loma Tennis Club

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(1995) 40 Cal.App.4th 1600, 1610.

Homeowner can sue for damages and an injunction to compel Association to enforce the CC&Rs. Posey v. Leavitt (1991) 229 Cal.App.3d 1236, 1246. Physical damage or financial harm need not be shown in the enforcement action. Biagini v. Hyde (1970) 3 Cal.App.3d 877.

The courts do not defer to the Board's interpretation of the CC&Rs because interpretation is a legal question to be decided by the courts, not the board. And, judicial deference does not encompass legal questions that may involve the interpretation of the CC&Rs. Eith v. Ketelhut (2018) 31 Cal.App.5th 1.

Courts must consider the CC&Rs as a whole and construe the language in context rather than interpret a provision in isolation. If the contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs. Starlight Ridge v. Hunter-Bloor (2009) 177 Cal.App.4th 440, 447.

Forbush's Concerns Regarding Trespassing Pipes

The judicial deference doctrine does not shield an association from liability for ignoring problems; instead, it protects Association's good faith decisions to maintain and repair common areas. Affan v. Portofino Cove Homeowners Assn. (2010) 189 Cal.App.4th 930.

Associations have a duty to investigate complaints by residents. Ekstrom v. Marquesa at Monarch Beach Homeowners Assn. (2008) 168 Cal.App.4th 1111, 1121-25.

Association's slab penetrations [openings in the slab for pipes] which deviated from the original architectural plans constituted a liability for Association. Ritter & Ritter v. Churchill Condominium Association (2008) 166 Cal.App.4th 103.

Laundry Closets

Association may not adopt rules that are in conflict with the CC&Rs. Ekstrom v. Marquesa at Monarch Beach Homeowners Association (2008) 168 Cal.App.4th 1111.

Very truly yours,
BARRY A. ROSS, APC



BARRY A. ROSS

BAR/kj

Enclosures as stated

CC: Mr. and Mrs. Forbush

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