HISTORY OF THE BOARD CONSIDERING CHARGING A FEE TO THOSE OWNERS WHO SHORT TERM RENT

Originally, the CC&Rs recorded October 23, 1984, provided as follows:

> Section 8.01. Single Family Residences. Section 8.01. Residential Use. Residential elements of the Units shall be used exclusively for residential purposes, subject to the exemption granted Declarant under Article VII of this Declaration. The number of natural Persons residing in any Unit shall not exceed three (3) per bedroom in such Unit. **An Owner may rent his Unit to a single Family provided that the Unit is rented for a term greater than thirty (30) days, subject to all of the provisions of the Declaration.**

Then on December 14, 1984, the First Amendment was recorded. It rewrote Section 8.01 so as to eliminate any restriction on renting:

> Section 8.01. Single Family Residences. Section 8.01. Residential Use. Residential elements of the Units shall be used exclusively for residential purposes, subject to the exemption granted Declarant under Article VII of this Declaration.[First Amendment 12/14/84, Doc. No. 84 1467960.]

The amendment eliminated the restriction on short term renting. The reason this was done, is because the Coastal Commission wanted the public to have access to Hamilton Cove as a condition of the Coastal Development Permit..

On September 11, 2000, the Board wrote to the Association's outside counsel, Richard A. Tinnelly, asking if the Board could charge those Owners who engage in short term renting a fee. On November 2, 2000, Mr. Tinnelly informed the Board that it did not have the right to charge such a fee without the vote of 67% of the Membership amending the CC&Rs to permit such a fee. ATTACHED**.** That such a fee was even considered cause much dissention among the Membership.

At the Annual Meeting of the Membership in December 2002, those Owners who wanted a fee charged to those who rented again raise the issue. Mr. Tinnelly was in attendance and provided the same answer he had provided in his earlier letter. The Board then formally addressed the issue and others to Mr. Tinnelly in a letter dated 12/12/2002. Mr. Tinnelly responded by a letter dated 1/30/2003 setting out the question and his response:

> 3. Short Term Renting. Can HCHOA ban or limit short term renting? What would be the steps to ban or limit short term renting? How feasible is it?
>
> Banning short term rentals of properties within the Hamilton Cove community could prove to be an unachievable objective and at a minimum, in light of the current make up of owners at Hamilton Cove, an extremely expensive endeavor. While the undersigned has not had the opportunity to review all the documentation with regard to the development of Hamilton Cove, he is aware that short term rentals were considered, and specifically authorized, during the development process. Indeed, the Declaration of Restrictions for Hamilton Cove was amended to provide for such a provision prior to the sale of units to the membership. Likewise, owners of property in the State of California have a right to full enjoyment of their property in terms of both occupation and profits. Thus, while an amendment to the Declaration may on the surface appear to be all that is necessary to change the ability for owners to rent units on a short term basis, it is the undersigned's opinion that other constitutional challenges could be brought and possibly defeat an amendment to the Declaration of Restrictions. Accordingly, until such time as an amendment is sought and challenged, it is impossible to determine, based upon the considerations referenced above, whether or not short term rentals could ever be restricted or eliminated at Hamilton Cove.
>
> In addition, just as in the case of eliminating proxy voting discussed above, any amendment to the CC&R's concerning "Leasing of Units" must be approved by the holders of first Mortgages on 75% of all of the Condominiums" (Section 13.02

(g) (7)). Just attempting to identify the holders of first mortgages at any given time is an expensive proposition.

4. Short Term Rental Fees. Can HCHOA charge a fee to those members who rent their units? What would it take to give HCHOA the power to charge such a fee? What laws govern the amount of any such fee? Should such a fee be a percentage or a flat fee? Should there be a limit? Looking at HCHOA's budget, what expenses can be the basis for such a fee? Do you have any suggestions on how HCHOA can get money from those who rent?

With regard to fees for the rental of units, it is our opinion that there is presently no mechanism in place allowing your Association to undertake that endeavor. As we previously discussed with your Board of Directors, and as indicated at your most recent Annual Meeting, we believe that an amendment to your Declaration of Restrictions could be achieved which would authorize the levying of a charge against those owners who rent their units on a short term basis, or long term basis, so long as that the amount of the charges are reasonably related to additional costs actually incurred by the Association as a result of those rentals. We believe the provisions of the California Civil Code referencing homeowner' s assessments and the governing documents for your Association would be controlling with regard to establishing the Board's authority.

With respect to whether or not the fees should be a percentage or flat fee, we have no opinion as we render our opinions based upon legal considerations. We do, however, believe that the fee established by an amendment to your documents not be a specific amount. Fees should either be a percentage or a portion of a greater number which can be modified as expenses incurred either increase or decrease. The Association shonld be careful not to adopt an amendment that needs to be changed each time there is a desire to modify rental fees. The recently proposed amendment which was rejected at the Ammal Meeting is the type of provision that would meet this criteria.

> With regard to the type of costs that would support such a surcharge, those who rent cannot be charged for costs already included in the monthly assessment such as wear and tear to the facilities. Items like additional security costs as a result of short term rentals might be a basis for a surcharge, as an example. It is impossible, however, to render a definitive opinion as to what costs might support such a surcharge because there is no case law interpreting the applicable statutes. (ATTACHED.)

Subsequent to receiving this response the Board drafted an amendment to the CC&Rs allowing for a fee to be charged for short term renting. A poll was taken of the membership, and it was determined that there was insufficient support to put it to a vote of the membership.

In November of 2008, the Board received a petition proposing that Owners who rent be charged a resort fee. It was signed by 35 Owners. In 2008, 103 Owners were engaged in short term renting. There was no chance that any amendment to the CC&Rs would obtain sufficient support.

Norris Bishton
7/29/2022

HAMILTON COVE
HOMEOWNERS ASSOCIATION

FILE

Norris J. Bishton, Jr., Treasurer
6701 Center Drive West, Suite 925
Los Angeles, California 90045
310-337-4866 * 310-337-4860 Facsimile

September 11, 2000

Richard A. Tinnelly, Esq.
85 Argonaut, Suite 100
Aliso Viejo, CA 92656

Dear Richard:

The Board requests a written opinion from you regarding the following issues:

1. Under the CC&Rs and applicable law, what steps should the Board take to collect the recently approved special assessment from those homeowners who do not pay the two installments on the due dates?

2. The following situations exist at Hamilton Cove:

- Some homeowners rent their units through rental agencies located in Avalon. The Association is aware of when these units are occupied by renters because of the paperwork required from the rental agencies.
- Some homeowners rent their units directly without the knowledge of the Association. Short term renters enter simply as guests of the homeowner. In addition, some homeowners rent their units to full time renters.
- Some homeowners permit guests to use their units when they are not present, without charge.
- Approximately 10-15% of the units are occupied full time by homeowners.
- Some homeowners never rent their units and only use them for themselves and their guests when they, themselves, are present.

The use of the recreational and other facilities by people renting through rental agents is a constant source of tension among the various members of the Association. Homeowners who do not rent, or simply let their guests use the facilities free of charge, feel that those who do rent, either through agencies or surreptitiously, are taking advantage of those who do not rent.

There is no question that the renters tax the facilities and staff. They do not know where things are and many times act in total disregard of the rules. Extra staff has to be maintained in the summertime, primarily to deal with renter issues.

What can the Association do under the CC&Rs and applicable law to deal with this situation? The rental agencies maintain that they cannot be surcharged for use of the units by renters because it would be discriminatory. They base this upon the fact that some owners surreptitiously rent their units and would not be charged and also on the fact that some units are occupied year round and, as a consequence, tax the facilities and staff much more than someone who rents his unit only part time.

If you have any knowledge on how other associations have dealt with similar problems, please let me know.

Very truly yours,

HAMILTON COVE
HOMEOWNERS ASSOCIATION

By: Norris J. Bishton, Jr.
Treasurer

NJB:cab
cc: Bart M. Glass, President
Ann Poyas, Vice President
Michael Flynn, Vice President
Brad Thomas, Secretary

FILE

THE LAW OFFICES OF
RICHARD A. TINNELLY

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Specialized Areas of Practice:

General Counsel

CC&R Enforcement

CC&R Interpretation

Reconstruction

FAX TRANSMITTAL

TO: Bart Glass (310) 510-9572
Norris Bishton (310) 337-4860

FROM: Jeffrey M. Hylton

DATE: November 2, 2000

TOTAL NUMBER OF PAGES 3 [including cover sheet]

RE: Hamilton Cove Homeowners Association
Letter Re: Facilities Usage Fees

If an error occurs in the transmission of this facsimile, please call (949) 588-0866. Thank you.

RICHARD A. TINNELLY

JEFFREY M. HYLTON
BRUCE R. KERMOTT

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REPLY TO ALISO VIEJO ADDRESS

November 2, 2000

Attorney/Client Privileged
Via Facsimile (310) 510-9572 and U.S. Mail

Board of Directors
Hamilton Cove Homeowners Association
Post Office Box 1573
Avalon, California 90704

Attention: Bart Glass

RE: FACILITIES USAGE FEES

Dear Board Members:

It is our understanding that you wish an opinion regarding the authority of the Board of Directors to adopt a usage fee. Our understanding is that many owners rent their units several weeks of the year, and that the tenants, therefore, use the facilities of the Association more than full time owners. In addition, the Board feels that the type of use and level of care to avoid damage to Association property may vary greatly with guests and tenants. With the above in mind, the Board would like to consider adopting a $25.00 per week use fee.

As you know, members already pay for the right to use the Association common area facilities through their monthly assessment. Further, your governing documents establish the easement rights of members for use of the common property and their ability to delegate those rights to guests and tenants "subject to reasonable regulation of the Board."

A review of your governing documents confirmed that the Board of Directors does not have any express right to adopt a use fee of the type being considered by the Board. While the Board does have the power to adopt rules regarding the use of the common property, such rules must be consistent with the Association's Declaration, and may not amend same.

With the above in mind, we do not believe the Board of Directors has the power and authority, without a membership vote amending the Declaration, to adopt such a use fee. Please note that the written consent of 67% of the voting power of the Association members would be necessary to amend the Declaration.

Hopefully the above confirms our opinion regarding the above-referenced matter. Should you have further questions, please contact the undersigned.

Very truly yours,

Law Offices of
RICHARD A. TINNELLY

JEFFREY M. HYLTON

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REPLY TO ALISO VIEJO ADDRESS

January 30, 2003

Attorney/Client Privileged
Via Facsimile (310) 337-4860 and U.S. Mail

Board of Directors
Hamilton Cove Homeowners Association
c/o Norris J. Bishton, Jr., President
6701 Center Drive West, Suite 925
Los Angeles, California 90045

RE: RESPONSE TO QUESTIONS RAISED IN DECEMBER 12, 2002 LETTER

Dear Board Members:

This letter is to respond to the questions set forth in Mr. Norris Bishton's December 12, 2002 letter. Some of the information has already been provided to the members in attendance at the Annual Meeting and to the Board during my recent visit. However, we will address each question by number as set forth in Mr. Bishton's letter, as follows:

1. **Proxy Voting**. Is proxy voting a good thing? Can the Hamilton Cove Homeowners Association ("HCHOA") ban proxy voting? Should proxy voting be banned? If it can be banned, how should the members who want proxy voting banned go about banning it?

Yes, proxy voting is a good procedure. It provides owners with an alternative method of casting their ballot, similar to absentee ballots used in government elections. Proxy voting is provided for in your Bylaws regarding voting on all membership matters. Further, we know of no reason why members or the Board should consider banning proxy voting. All efforts should be made to solicit, gather, and accurately count member votes within the parameters of your governing documents and as provided in California Corporations Code. We also believe that the California Corporations Code encourages the use of proxies. I noted that approximately 86% of the membership participated in the election at the Annual Meeting either in person or by proxy. This is excellent participation and much greater than the norm for most associations.

The CC&R's provide in Section 13.02 that they can be amended by a vote of 67 % of the members "in person or by proxy." Section 2.06 references co-owners present at a meeting "in person or by proxy." Section 2.04 of the By Laws attached to the CC&R's as Exhibit B provides for voting by proxy. It appears that the right to vote by proxy was clearly intended by the Association's governing documents. Any amendment of the CC&R's to eliminate the references to proxy voting would require the vote of 75 % of the holders of "first Mortgages on all of the Condominiums," as required by Section 13.02 (g) (1) because such an amendment "concerns Voting rights." While this is theoretically possible, such a vote is very difficult to obtain.

2. **Board Size**. From your experience representing homeowners associations, what is the ideal size board? What are the problems with a seven person board? If the members wish to increase the size of the board, how is it done?

We recommend a five (5) person Board of Directors. A Board consisting of three may well be too small in that, unless all three are consistently available, many final votes on issues may be impossible to obtain as a result of a stalemate, or one-to-one votes. A Board of seven poses the problem of obtaining a quorum requiring at least four Board members at all times, and has, in the past, proven to be disruptive as a result of too many opinions with regard to various matters. A majority vote of the membership is necessary to amend Bylaw Article IV, Section 4.01 as to the number of authorized directors.

3. **Short Term Renting**. Can HCHOA ban or limit short term renting? What would be the steps to ban or limit short term renting? How feasible is it?

Banning short term rentals of properties within the Hamilton Cove community could prove to be an unachievable objective and at a minium, in light of the current make up of owners at Hamilton Cove, an extremely expensive endeavor. While the undersigned has not had the opportunity to review all the documentation with regard to the development of Hamilton Cove, he is aware that short term rentals were considered, and specifically authorized, during the development process. Indeed, the Declaration of Restrictions for Hamilton Cove was amended to provide for such a provision prior to the sale of units to the membership. Likewise, owners of property in the State of California have a right to full enjoyment of their property in terms of both occupation and profits. Thus, while an amendment to the Declaration may on the surface appear to be all that is necessary to change the ability for owners to rent units on a short term basis, it is the undersigned's opinion that other constitutional challenges could be brought and possibly defeat an amendment to the Declaration of Restrictions. Accordingly, until such time as an amendment is sought and challenged, it is impossible to determine, based upon the considerations referenced above, whether or not short term rentals could ever be restricted or eliminated at Hamilton Cove.

In addition, just as in the case of eliminating proxy voting discussed above, any amendment to the CC&R's concerning "Leasing of Units" must be approved by the holders of "first Mortgages on 75% of all of the Condominiums" (Section 13.02 (g) (7)). Just attempting to identify the holders of first mortgages at any given time is an expensive proposition.

4. **Short Term Rental Fees**. Can HCHOA charge a fee to those members who rent their units? What would it take to give HCHOA the power to charge such a fee? What laws govern the amount of any such fee? Should such a fee be a percentage or a flat fee? Should there be a limit? Looking at HCHOA's budget, what expenses can be the basis for such a fee? Do you have any suggestions on how HCHOA can get money from those who rent?

With regard to fees for the rental of units, it is our opinion that there is presently no mechanism in place allowing your Association to undertake that endeavor. As we previously discussed with your Board of Directors, and as indicated at your most recent Annual Meeting, we believe that an amendment to your Declaration of Restrictions could be achieved which would authorize the levying of a charge against those

owners who rent their units on a short term basis, or long term basis, so long as that the amount of the charges are reasonably related to additional costs actually incurred by the Association as a result of those rentals. We believe the provisions of the California Civil Code referencing homeowner's assessments and the governing documents for your Association would be controlling with regard to establishing the Board's authority.

With respect to whether or not the fees should be a percentage or flat fee, we have no opinion as we render our opinions based upon legal considerations. We do, however, believe that the fee established by an amendment to your documents not be a specific amount. Fees should either be a percentage or a portion of a greater number which can be modified as expenses incurred either increase or decrease. The Association should be careful not to adopt an amendment that needs to be changed each time there is a desire to modify rental fees. The recently proposed amendment which was rejected at the Annual Meeting is the type of provision that would meet this criteria.

With regard to the type of costs that would support such a surcharge, those who rent cannot be charged for costs already included in the monthly assessment such as wear and tear to the facilities. Items like additional security costs as a result of short term rentals might be a basis for a surcharge, as an example. It is impossible, however, to render a definitive opinion as to what costs might support such a surcharge because there is no case law interpreting the applicable statutes.

5. **Boat Yard Fees**. HCHOA rents space to some of the Homeowners to allow them to store their boats. In the past, the charge has been $100 per year and the Association is considering raising the fee to $120 per year for a rack and $300 per year for a boat storage slot. If fees are collected for all the available spaces, it would produce $14,160. The boat yard was constructed by HCHOA and HCHOA incurs expenses in maintaining it. HCHOA is going to incur additional expenses removing derelict boats. Is it permissible to charge Homeowners for storing their boats?

We find no prohibition against the Association charging homeowners for storing their boats. The Board of Directors is entitled to institute fees directly related to expenses incurred by the Association, and in this case, storage racks and other direct expenses, charging owners who are directly receiving the benefit for those expenses seems appropriate. Our review of your governing documents reveals no prohibition against this practice. Further, absent a budget line item to offset such an expense, it appears particularly appropriate that the owners receiving the benefit assume the expense.

6. **Parking Fees**. Each Homeowner is permitted one golf cart parking space. Some Homeowners have two golf carts. There are a few spaces available for second golf carts. In addition, some Homeowners have full size vehicles for which there are limited parking spaces. The Association is considering charging a $360 per year fee to those Homeowners who are assigned a second golf cart space and a $600 per year fee for those assigned a full size vehicle space. If all of the fees budgeted are collected, it would total $12,960. The Association incurs expenses in monitoring the use of the additional spaces as well for removing derelict golf carts in the additional spaces. In addition, the Association maintains the roads within Hamilton Cove and the road leading from Hamilton Cove to the base of the hill where the road turns

towards Descanso Beach. Is it permissible for the Association to charge Homeowners for parking their second golf carts and full size vehicles?

Section 1.14 of your Declaration confirms that the Common Area includes "parking areas . . . on those areas of the Project which are not defined as part of the Units." "Unit" is defined in Section 1.51 and makes no reference to parking areas. We have not received or reviewed a Condominium Plan which may or may not reflect parking areas as included in the description of a Unit. Section 2.01 confirms that, "the Association shall maintain, repair and replace, as necessary, all streets, common ownership parkways, parking areas," unless undertaken by a government entity or public utility. Based upon the above information, the Association's financial responsibility for the parking areas is clear. Further, your letter confirms that all owners are assigned one golf cart parking space. While members are entitled to use the Common Area, and although certain members may challenge same, we believe the Board is authorized to charge a reasonable fee if additional golfcart or vehicle parking spaces are available and are assigned to individual members. However, the Board is cautioned that, since owners are probably already utilizing the secondary spaces on a free basis, they should be given a reasonable amount of time to make arrangements to remove their second vehicles if they so desire, prior to the institution of any such fee. Also, the rental policy must be published to all members.

7. **Rental Business**. Can HCHOA engage in a commercial activity, such as operating a rental agency, in competition with the other rental agencies? How can this be achieved? Can HCHOA require its members to use only HCHOA's rental agency? Can HCHOA approve only one rental agency to operate in Hamilton Cove and charge a fee for doing so?

As indicated at the most recent Annual Meeting, it is the undersigned's opinion that the Hamilton Cove community was not established to conduct commercial activities or to operate a rental agency on behalf of its members. This is not to say that the appropriate amendment to your Association's governing documents could not establish the right for Hamilton Cove to do so. It is, however, believed that the governing documents in their present form do not grant the Association such authority. In addition, were your Association to undertake commercial activities, such as a rental agency, there are licensing requirements that must be met, and the activity itself may affect your Association's status as a Nonprofit Mutual Benefit Corporation, and may impose upon the Association certain tax obligations and liabilities. Before developing a plan to undertake such an activity, the undersigned would recommend that the Association meet and confer with its financial advisors and accountant to determine what effect the proposed activity would have on the Association in terms of taxes, and the effect upon your status as a Nonprofit Mutual Benefit Corporation.

With regard to allowing one rental agency to operate in Hamilton Cove, we believe this is an unwise and potentially unauthorized activity. We enclose herewith a copy of California Civil Code section 1368.1 effective January 1, 2003. The new Civil Code section effectively prohibits rules restricting the marketing of properties by owners. More specifically, section (b) of said statute provides that an Association cannot adopt, enforce, or otherwise impose any rule or regulation that:

> "(b) (2) Establishes an exclusive relationship with a real estate broker through which the sale or marketing of interests in the development is required to occur. . . (c) For purposes of this section, 'market' and 'marketing' mean listing, advertising, or obtaining or providing access to show the owner's interest in the development."

While the statute has yet to be tested, it is our opinion that establishing an exclusive relationship with a realtor to whom an owner must market his property for leasing purposes may be in violation of this statute.

8. **Conflict of Interest.** What are the laws regarding conflict of interest applicable to associations? Is it permissible for a person who is both an owner of a rental agency that rents members' units and a real estate broker who sells units to be on HCHOA's board? What rules govern his conduct on the board?

With regard to conflicts of interest, we enclose for you a copy of California Corporations Code section 7233. This section addresses the validity of a contract entered into between the Association and a member of its Board of Directors, and the acts or actions which must be taken to maintain same as enforceable.

In the question posed, inquiry was made as to whether or not a member of the Board of Directors can act as a real estate broker selling and/or leasing units within the Hamilton Cove community. It is our opinion, that such activities are neither prohibited by the governing documents for your Association nor the California Corporations Code. That being the case, so long as the relationship is known to the Board, and disclosed as provided for by law, there is no violation of your documents or conflict of interest which exists prohibiting such activity.

9. **Officers.** Is there any prohibition against a person holding two offices, such as president and secretary or president and treasurer?

Your Bylaws, in Section 5.01, designate that the officers of the Association "shall be a President, a Vice President, a Secretary, and a Treasurer, all of whom shall be elected by the Board of Directors." Section 5.02 references "each officer" The above referenced language of your Bylaws would imply to the reader that officers hold separate offices. However, there is no express language within your governing documents specifying that this be so.

The better practice would seem to be that a person should hold joint offices only if absolutely necessary. This may occur when there is no one available to hold a particular office. In addition, we caution the Board on combining the Secretary/Treasurer position in that, should that person then resign, the Board is placed in the immediate position of having to find two new officers instead of one if no qualified person is available to hold both offices.

Hopefully the above responds appropriately to your questions. Of course, should you request additional information, please contact the undersigned.

Very truly yours,

Law Offices of
RICHARD A. TINNELLY

RICHARD A. TINNELLY

RAT:dmr
Enclosure
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