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July 7, 2020

Temple Lofts Homeowners Association Owners

Re: Re-opening of the Association Gym, Spa, Barbeque Area and Recreation Room

Dear Property Owners:

This firm is legal counsel to the Temple Lofts Homeowners Association. The Association's gym, spa, barbeque area and meeting room have been closed in accordance with an Order of the Los Angeles County Health Department in response to the Covid-19 pandemic.

Now that the local governments are gradually allowing the reopening of businesses, including reopening of community spas and gyms and other common facilities within common interest developments such as yours pursuant to published safety guidelines, the Board has been confronted with the decision whether or not to re-open the gym, spa, barbeque area and meeting room facility. As will be discussed below, I have recommended strongly against re-opening of any of these facilities. I have also recommended that the Board adopt an emergency operating rule which requires all residents/occupants to wear masks and maintain social distancing in the common areas of the entire project.

LIABILITY AND RISK ISSUES OF REOPENING

Your association is a corporation and a business enterprise under California law as it relates to premises liability and safety. There are no exemptions from liabilities arising in the operation of a gym or spa facility or other recreational amenities simply because the Association is responsible. Consequently, an important element of protection of the Association and all of its members is the Association's Master Liability Insurance Policy, which provides for a legal defense if the Association or Board is sued for injury or property damage relative to the maintenance, or operation of the common area facilities of the Association. Such policy also generally provides for indemnification of the Association and Board in the event liability is determined and damages are awarded against the Association. Indemnification means that the insurance company will pay the damages or judgment rendered against the Association.

Many insurance policies, including the policy for Temple Lofts, contain an express exclusion of coverage for bodily injury (including wrongful death) directly or indirectly caused by actual, alleged or threatened inhalation of, ingestion of, contact

with, exposure to, existence of or presence of any microorganism, including a virus. In simple terms, if someone claims to have contracted Covid-19 from the spa, gym or meeting room, the Association's policy will not pay to hire legal counsel to defend the claim or pay in the event liability is found to exist on the Association. I have advised the Board that this exposes the Association, and derivatively, the homeowners, to substantial financial obligations. It is very expensive to defend a lawsuit of a generic nature and even more expensive to defend one based on evolving science and technology. It is not inconceivable that multiple claims could be made and multiple defenses would have to be paid for and defense costs easily could run into the hundreds of thousands of dollars or even more. Those costs would be in addition to the everyday operational costs of the Association, meaning that special assessments of substantial size would be necessary. Those costs would be on top of any judgments rendered against the Association. If a judgment were entered against the Association, the Board would be required to levy an emergency special assessment against all owners to pay the judgment. If such an assessment were not paid, the Association would be forced to obtain a judgment against the owner or foreclose on an owner's home. I think it is fairly obvious that subjecting the Association and its members to such a financial risk to allow the spa to reopen is simply not prudent.

We are all aware how deadly this virus has been and can be. We are also aware that many people carrying the virus are asymptomatic and could easily spread the virus while using these facilities. In that context, the Board has asked whether it is feasible to require persons wanting to use the facilities to first execute a blanket waiver and release of claims against the Association for exposure to Covid-19 or sickness resulting from same. While such a waiver form can be prepared and use of the facilities can be conditioned on execution, it is my opinion that such a waiver or release form would not be upheld in a court of law because it violates public policy concerning the duty to maintain safe conditions, including disinfection to protect against Covid-19 exposure. The local governments have issued and amended onerous guidelines which must be complied with in order to theoretically open your gym. However, even diligent compliance with these guidelines will in no way insulate you from exposure from claims and will not guarantee that the Association will not be held responsible. Asking someone to waive their rights to seek compensation in order to use these common area facilities when the Association has a clear obligation to maintain them in a safe condition or not open is not an approach I would ever advocate or recommend.

If the Board were seriously considering re-opening a facility in light of the insurance exclusion and risks attendant thereto, I would highly recommend that a comprehensive and high resolution video surveillance system be set up to monitor and record the areas so that a record of who is present and the activities taking place, including the monitoring and cleaning. This would at least create an evidentiary record which the Association could use to establish that it was complying or attempting to comply with the guidelines in the event of a lawsuit.

ONEROUS CONDITIONS AND EXPENSES TO REOPEN

If you haven't taken the time to review and understand the restrictions in the guidelines which the Association would have to meet, I urge you to do so. To be succinct, they are onerous in the extreme and they create multiple potential sources for failures to maintain safe conditions. The Association would have to arrange for competent persons to carry out the administrative aspects of scheduling specific use times for groups or individuals and monitor the use of the spa, barbeque area, gym and meeting room. Recent amendments indicate that volunteers could be used in this context. However, I question whether the Association should rely upon untrained volunteers to perform these tasks which could impact the Association's liability for claims. These volunteers for monitoring would not be covered under the Association's insurance policy and with that knowledge, what volunteer would sign on for that risk. The health and safety of these volunteers would become the Association's responsibility and that includes potential risks of liability for worker's compensation claims. The guidelines require that specific procedures be followed to ensure safety of workers so there is another layer of supervision of this to consider and to find someone to handle. Even if paid employees were hired, it is doubtful that the labor force available to perform these tasks for a reasonable wage would be other than un-skilled labor and as such, there is significant concern about the abilities/competence of such employees to effectively create a safe environment that the Association could rely on in this context. This concern would increase substantially if the Association attempted to delegate the cleaning responsibility to the individual members of each piece of equipment after each use. Human nature being what it is suggests that full compliance would not be achieved and therefore, greater risk.

A reservation system will be required and signs would need to be generated and posted which list all the guidelines for use. Gym equipment would have to be spread out without regard to space limitations and wiped down after each use. Spa surfaces would have to be sanitized frequently as would the meeting room and barbeque area. Water fountains will be turned off. Restrooms would have to be sanitized frequently. Towels and furniture cannot be shared. Maximum occupancy would be limited. All of this would require constant on-site monitoring if there would be any hope of meaningful compliance. This means that only a fraction of the members will be able to use the facilities at one time. Notably, none of these potential expenses are currently part of the Association budget and those expenses will have to be passed on to all owners, not just those that use or want to use the respective facility.

And this doesn't even address the requirements of frequent cleaning (whatever that means) of frequently touched surfaces, including handrails, furniture, door and gate handles, restrooms, handwashing stations and the actual gym equipment and other common area facilities. Because constant supervision of the social distancing is required, anytime a monitor is required to conduct cleaning, depending on staffing, the gym areas may have to be cleared until the monitor returns. This would apply as well when the volunteer monitors take required lunch or other breaks. The probable

interruptions in use to accommodate cleaning are significant. Consequently, it is unrealistic to believe that a single person can effectively monitor the facilities. These expenses to have proper monitoring to at least give the Association a potential defense that it had complied would have to be addressed through emergency assessments against all members, not just those that use the facility because the expense of operation of the common area facilities would be funded through normal operating funds.

With all these restrictions and limitations there is a legitimate question as to how many members are actually going to want to subject themselves to this type of routine for a scheduled appointment that requires social distancing with limited people and activities based on social distancing. Similarly, there is an equally legitimate question whether it would be a prudent use of Association funds to operate the gym, spa, barbeque area and meeting room under such conditions and significant expense for a small percentage of the community, even if the risk of exposure or liability were not a factor as discussed above.

REDUCTION OF ASSESSMENTS BASED ON CLOSURE

The question will certainly be asked by members about why assessments cannot be lowered if the facilities remain closed. The simple fact is that whether or not the facilities are open for use, these common area assets require regular maintenance and repairs to keep them in good operating condition for the eventual reopening. The Association's operating budget includes an allocation of expenses for regular maintenance and service to keep the facilities in good condition and that should not change in this context any more than the Association should suspend its insurance coverage during closure or because of the virus exclusion. The larger picture must always be kept in focus and maintaining the status quo of maintaining facilities in safe operating condition should not be altered as a result of this temporary situation.

RISK VERSUS BENEFIT

As it stands right now, there is likely more that is not known about the virus and controlling it than there is known and that translates into the conclusion that even if the association is hyper-vigilant in monitoring and cleaning and scheduling, there is still a strong possibility that exposure could occur and someone could get sick or worse. A single asymptomatic person with the virus could undermine all the expensive efforts to comply with the guidelines and end up putting the Association in the role of a defendant in a lawsuit. Even testing negative or with anti-bodies does not eliminate the risk associated with promoting activities where people gather in limited numbers on Association property. Consequently, in my professional opinion, the benefit clearly does not come close to outweighing the risk to justify opening the facilities at this time.

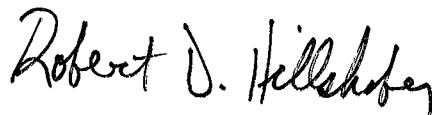
LIABILITY OF BOARD FOR CONTINUING CLOSURE

Based on all the matters discussed above, including the risks of having claims be uninsured, the Board of Directors would be well within its discretion, particularly in consideration of the advice of legal counsel, to exercise its authority to decide not to reopen the gym or spa facilities at this time. Under the controlling California Supreme Court Case of Lamden v. La Jolla Shores Clubdominium Association (1999) 21 Cal. 4th 249, Courts will defer to a Board's authority and presumed expertise in discretionary decisions regarding the maintenance and repair of a common interest development provided that the decisions are based upon reasonable investigation, made in good faith and with regard to the best interest of the Association and within the scope of authority under the CCRs and governing statutes. The Board has consulted legal counsel and reviewed carefully and in good faith all the matters discussed in this letter and determined that the most prudent approach would be to not reopen the facilities at this time. By keeping the facilities closed the Association will avoid liability and will ensure that members and their families will not be exposed to danger from Covid-19 exposure while using the Association's common area facilities. That is an entirely proper and defensible legal position to take and owners who believe otherwise could be left responsible for the Association's attorney fees and costs incurred in defending a legal action brought which challenges the Board's exercise of prudence in this context.

CONCLUSION

Your Board has every intention of monitoring developments concerning safe reopening of the Association's gym, spa, barbeque area and meeting room so that when the substantial risks addressed above can be mitigated, they can prudently make the decision to re-open. It is my hope that the members of the Association will review and appreciate this analysis and have a better understanding as to why the Board has made the decision not to reopen at this time. The Board, like you, are members of the Association and want all members to realize the benefits of this Association.

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