The SCA View Journal | MAKING GOOD THINGS BETTEI

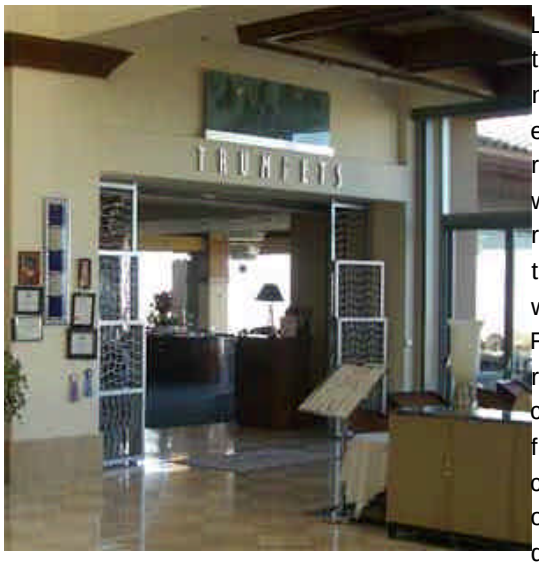
Trumpets

The Business Development Club Seminars

Contents: Seminars, Parts 1 and 2

Part 2, Seminar, Dated 24 July 2006

Intriguing Relevations



Last night's Trumpets lease seminar by the Business Development Club was a most rewarding and enlightening experience. This was the occasion for residents to offer their suggestions on what they would prefer to see in a revised lease or what they would do if they were on the Board. The meeting was well structured and president Bob Frank was particularly adept in responding to and eliciting relevant comments from those wishing to speak, frequently correcting the record, challenging fuzzy thinking, and occasionally playing the role of the devil's advocate. If there was anything detracting about the seminar, it was clearly the clock since there was simply not enough time available to cover all of the tasks that had been planned for the evening. Due to the topic, the two hour meeting went by rather quickly.

The meeting was plagued by a more menacing reality—we were working in the dark without having sufficient information about the nature and scope of the problems at hand. That lack of information, not having the benefit of a historical record on matters pertaining to the administration of the lease, placed those in the audience at a severe disadvantage when attempting to volunteer suggestions for change or improvement. The BDC will be making a detailed seminar report, one that we hope to share with you soon.

More Revelations, as the tale wags the dog

In listening to the residents, one theme surfaced over and over again. The perceived relationship between the landlord and the lessee was viewed as being ass-backwards. Time and time again, and there are numerous examples I could relate to our readers, the Board, whether Developer-controlled or resident-controlled, has walked away from their duty to the community to enforce the terms of the lease, essentially abdicating lease administration to the lessee rather than being retained by the landlord. While some may disagree, the reasons for this failure are essentially immaterial.

If there was one lesson to be learned from the seminar, that lesson would be that a lease must be consistently, if not aggressively, administered and enforced at all times. There is no valid reason for not doing so. Individuals in attendance that have administered or are currently administering leases, including restaurant leases and leases involving large corporations, attested to the need for vigorous and timely enforcement of the terms and conditions of any lease. There are no exceptions or special conditions that would justify any different approach. That the Board has repeatedly failed to do so was found to be most troubling, raising serious questions of ineptness by many of the attendees.

Another important point made concerning lease administration was the absolute need to separate enforcement of the terms of the lease from other issues that may arises during the course of the lease. In other words, one should always be taking the steps necessary to enforce the lease (such as a notice of default for nonpayment of rent, understood to be a very routine administrative first step, etc.) regardless of any other issues in dispute. As conveyed, the threat of a law suit or acquiescing to intimidation are insufficient reasons to abandon a landlord's obligation to enforce the terms of the contract.

A few attendees expressed the view that the lease is replete with serious omissions and vagueness to make effective administration by the Association virtually impossible, again giving the lessee a wide birth to do as they please without our having the means to control the lessee's behavior or practices. Others expressed the need to have persons on the negotiating team who are particularly qualified in lease administration and negotiations. While there were many other suggestions and concerns expressed, they no doubt will be covered in greater detail in the BDC's concluding report.

Some Background

2002-04. The September 2002 Trumpets lease was between the Association (not the Developer) and the lessee, S & D Café V, although at that time the Developer was in control of the Board. To understand the origins of this relationship, we have to go back to the beginning of that lease period when the lessee was not making timely rental payments. That untimely payment period extended over the next two years. While non-default collection efforts were pursued, they were not successful. This dispute was allowed to continue without public disclosure.

2004-05. Then, at a meeting of the Finance Committee in 2004, the Developer's controller announced that the lessee was $100,000 in arrears based on late fees and penalties. In response to that disclosure, Favil West found that amount "unacceptable," a story we have covered in some detail on previous occasions. In 2005, the Board decided to write off as uncollectible any prior unpaid indebtedness, an indebtedness that was conveniently "recalculated" downward from $100,000 to around $25,000. In the end, nothing was paid on that indebtedness.

2005-06. With the "settlement" of that prior indebtedness presumably a closed matter in 2005, the lessee follows up almost immediately thereafter with a proposal to sue the Association just as a new resident-controlled Board assumed control. No lawsuit was filed. While the details of that proposed suit are unknown, the suggestion at that time was that the lessee was unhappy over the failure of the Association to live up to certain terms and conditions of the lease.

Full disclosure? Apart from those parts of the lease that may be in dispute between the lessee and the landlord, there are two unresolved matters that continue to linger. They include:

- Whether there are any post-lease verbal understandings between the lessee and the landlord that affected or were intended to affect the administration of the lease; and
- Whether there were any pre-lease understandings relied upon by the lessee as a possible incentive to enter into the lease that were not met or delivered by the landlord.

Negotiating under threat of a lawsuit! There is a general understanding by many of the participants that the negotiators have been operating under a threat of intimidation, that whatever has been "accomplished" in an attempt to resolve the ongoing dispute has been done under duress, a cloud, or more precisely, under threat of a lawsuit. Is that where we as a community want to be at this stage in our attempt to provide dining services to our residents?

To the extent that a potential lawsuit threatens the outcome of negotiations, how can residents be assured that the results ultimately achieved, whatever they might be, will be in the community's best interests? If the threat of a lawsuit is controlling the outcome of negotiations, what are the prospects that any new lease will truly meet the needs of the community?

Under these extremely clouded circumstances, what kind of outcome should the community anticipate?

Ron Johnson, 25 July 2006

Part 1, Seminar, Dated 12 July 2006

Preface.

Covering and reporting on various meetings has always been a challenge for me on many levels. Whether it's "what" to report or "how" to report, it all comes down to a matter of choice, style and personal preference on what I believe the community would like to know. Of course, what knowledge or information I happen to believe is relevant or important may be different from what you or others believe is important.

In commenting on the subject of knowledge, Francis Bacon suggested that with knowledge one's potential in life will likely increase. Well said. So the acquisition of knowledge should not be viewed with much concern; one's personal knowledge might even prove beneficial for the community of Sun City. Donald Trump, in his *Knowledge is Power* article, tells us that "Staying well-informed is a daily endeavor." He wrote that only when one finds the answers to certain questions will you know that your information is comprehensive and correct. Those questions are What, Why, When, How, Where and Who. Understandably, Trump did not place any limits, restrictions or attempt to control one's ability to acquire information.

So when I am told by the President of the Association that I should not write anything about Trumpets, I found that effort to silence me somewhat disturbing. And subsequently when I was threatened with being sued, based on what I believe a reasonable person might conclude, and having to pay for what I write, I found that especially troubling, as anyone might. One is left with the impression that the answers to What, Why, When, How, Where and Who will not be forthcoming when it comes to questions about Trumpets.

While I do not have the answers about Trumpets, I and many others in the community have some unanswered questions. Instead of sidestepping the issue or simply ignoring the issue based on the delicacy of the negotiations, a term that was used more than a year ago to describe the then state of negotiations, perhaps it's time for members to learn more about the What, Why, When, How, Where and Who **BEFORE** negotiations are concluded.

But that's not included as part of the current plan.

The Business Development Club Seminar.

This past week's Business Development Club topic on the Trumpets lease agreement brought out the curious, the angry, and those in between, filling a packed room, and included three Board members and a number of committee chairpersons.

The able presenters were there only to educate us on the terms of the lease, highlighting with a slide show those areas that were not traditional boilerplate terms, for example, those considered unique to a restaurant and banquet operations within our community center. While the ground rules were simple enough—avoid references to persons, recriminations, and making any judgments or conclusions—many in the audience were clearly frustrated in their inability to obtain answers to their more probing questions.

While one lady, who was clearly looking for something quite different, was overheard saying as she left the meeting, “What a waste,” the overwhelming number of attendees were clearly congratulatory and thankful for the presentation and the opportunity to learn what they did not know. To the disappointment of many who were seeking answers, however, there would be the often repeated refrain from the presenters, “We do not know,” a refrain that was too frequent to satisfy the pressing need for more information from many in the audience.

While we learned about the terms of the lease, usually in more detail than most were interested in hearing, we learned several other things of general interest, thanks to the extensive contracting and negotiating background of the Club’s president, Bob Frank.

Any member wishing a copy of the Club's detailed presentation, **click here**. Those members wishing to obtain a hard copy of the 20+ pages of the complete lease agreement may do so by visiting the Association's administration office during regular office hours and requesting a copy. Copies at no charge are available for the asking.

A Word of Caution.

While knowing what the lease states may be helpful in providing one with an understanding of the terms and conditions as they exist on paper, knowing how that lease operates in the real world may give one an entirely different picture. That is why one should be cautioned when attempting to draw any conclusions about what has or is occurring with respect to an issue of compliance with the terms of the lease.

Let us look at a very simple example to illustrate this point. Say, hypothetically, all other things being equal, normal and not in dispute, the lessee has not paid their rent in six months. A cursory look at the lease (a contract) might lead one to readily conclude that the lessee is necessarily in default on the contract. And, as most of us understand, being in “default” has certain legal ramifications for both the landlord and the lessee. After all, what is a “default” on a contract if not the failure to pay? Ordinarily, that “default” question should be a simple one to answer.

But is that true, is the lessee in our hypothetical case actually in default? The correct answer should be, “We do not know.” The reason we do not know is because we may not have enough information to make that determination. To make that determination, we need to know what the lease has to say about this event and what, if any, actions are mandated on the landlord in the event of nonpayment. For example, at what point in time does the lessee become in default? Another, even more critical question to resolve is whether the landlord is required to notify the lessee that they are in default. For example, if the landlord does not exercise due diligence and does not notify the lessee they are in default, does not mean the lessee is not in default on the contract? Maybe. And, along with that notification, was that notification timely? What is the affect of the landlord’s notification if that notification was not made timely? We can go on and on about what might appear to the more naive observer on initial

examination to be a simple, easily arrived at determination—when in fact it may be a more complicated determination to make.

Forgetting about all of the possible ponderables that one might consider, in the end, when push comes to shove, the written terms and conditions of the lease, as commonly understood, normally prevail.

Some Lessons Learned.

Here are some things I learned from attending this summer seminar on leasing. While the terms of the Trumpets lease was the vehicle for the seminar, it's my take that the real lessons to be learned from the presentation were not so much about the terms and conditions of the lease, as interesting as they might be to those who have not read the lease, but the nature of lease agreements in general. For example:

- I believe one of the more important disclosures was that a lease is essentially a living document. By a living document, I mean that the lease is not merely subject to interpretation, but it may be adjusted, revised or modified in any manner to suit the ongoing needs and desires of either party during the terms of the lease.
- Any such agreed upon adjustments, modification, etc., may or may not be in writing as the parties determine appropriate, notwithstanding what language the lease provides.
- That any provision of the lease may be essentially ignored or waived at the discretion and agreement of the parties.
- Say, for example, "X" is the landlord and "Y" is the lessee, or the other way around—it makes no difference for this purpose. While the lease may say that "X" is entitled to "a", "b" and "c" from "Y", whether in fact "X" actually receives "a", "b" and "c" from "Y" is an entirely different matter.
- Whether "X" and the extent to which "X" even cares whether they receive "a", "b" and "c" is at the discretion of "X", regardless of the language in the agreement.
- Moreover, there may be disputes about what "a", "b" and "c" mean, at least to the extent that the lease does not adequately define these terms.
- Furthermore, the parties may agree to ignore "b" altogether, while non-parties to the agreement are unaware.
- And "X" may even lose their right to enforce their entitlement to "a" if "X' does not exercise due diligence in pursuing their rights. So the fact that "a" is an entitlement of "X" under the terms of the lease, whether or not "X" can secure or otherwise enforce their right to "a" may depend on how "X" responded in the past to the absence of "a" as an entitlement.

Some Important Caveats.

- Given the nature of the Association and the Board's fiduciary duties and responsibilities to the membership, it is vitally important that any oral agreement modifying the terms and conditions of the lease, whether made prior to or following the execution of the lease, be (a) reduced to writing and (b) appended to the contract, since any such

oral agreement stands in the same place as the written lease. Any such oral agreement can have an impact on income, use and, or other matters related to the application of the lease.

- **To the extent there were any oral or undisclosed agreements between the Association, Executive Director, or members of the Board, on the one hand, and the lessee, they must be disclosed to the members in the same manner that the lease is freely available to the membership pursuant to NRS.** There is no provision under law for keeping such oral agreements secret!
- It's unclear to what extent any oral agreement not ratified by the Board that is charged with the responsibility of executing contracts has legal standing insofar as the Association is concerned.

Too frequently, the appearance of certainty in the language of a contract is an illusion. Without knowing how the contract actually works in practice, a third party may not be able to rely on the written terms of the contract to know and understand how the contract is actually operating in practice.

On the Trumpets Lease Agreement.

Since the Club's two presenters were keen on adhering to the rules of the road, judgments and conclusions were not forthcoming. That being the case, members of the audience were not reluctant to ask questions, questions that for the most part remained unanswered or answered with that usual refrain, "We do not know." Some of those questions, asked and not asked, included the following.

- While the 2002 lease agreement may have met the needs of a developer controlled Board, will a future new or revised lease agreement better reflect the needs of an Association under resident control?
- That first one sort of puts the cart before the horse. The community has absolutely no understanding, as I believe it should, of what's on the negotiating table. For the community to have more detailed knowledge about the sections of the lease at issue or under consideration for revision should not preclude or limit the ability of the negotiators to negotiate in secret over those particular terms and conditions.
- Will any new or revised lease agreement avoid the appearance of being a sweetheart agreement? A sweetheart agreement is an arrangement arrived at secretly to benefit one party at the expense of the other party. This issue has received some prominence since the contract was let back in 2002 and has been a frequently heard complaint from certain more vocal elements of the community, with some alleging that the current arrangement represents the outcome of an agreement that largely benefits the lessee to the detriment of the Association. To the extent that our current arrangement with the lessee is viewed as a sweetheart agreement, what are the prospects that our ongoing negotiations will secure even more favorable terms for the lessee or, on the other hand, more equitable terms for the landlord?

- What obligations does the Board have to accurately and fully communicate to members how the lease is being monitored and enforced when the terms and conditions are not being met?
- Should the Association seek the services of a consultant for the purpose of obtaining an independent evaluation of the leasing potential for Trumpets? Without such an evaluation, how do we know whether we are receiving market value for the lease?
- Given that the Association is currently paying for all utilities used by the lessee, it might be instructive for the Association to have some understanding of the net rental income from the lease, factoring in an amount to cover the cost of landlord-paid utilities. Is the Association receiving fair market return when the cost of utilities, metered or not, are taken into account?
- Should we assume that ongoing contract negotiations are better off without the active participation of experienced contract negotiators, rather than relying on the experience of Board members whose primary experience may be in areas unrelated to the practice of contract negotiations?
- Too often the threat of a lawsuit is merely a tactic, frequently understood as a sign of weakness, to resolve disputes or to counter claims. How equipped is the negotiating team in evaluating such threats?
- Should not the members of the Association be told the results of the forensics accounting audit, along with the basis for the auditor's findings, assumptions and the extent of the documentation relied upon, **prior to** finalizing any agreement with the lessee?
- Given the acknowledge and widespread uncertainties at all levels concerning the extent of the lessee's banquet operations elsewhere, to what extent will the auditors findings be able to address and allay those concerns insofar as the gross receipts test are concerned?

Possible Areas in Dispute.

There are a few areas known to be in potential dispute or the focus of inquiry. I believe they include the following:

- **Revenue sharing.** One item known to be on the table is whether the Association has been receiving all monies owed under the revenue sharing provisions of the lease. We understand that a recently retained accounting firm is currently in the process of auditing the lessee's records to determine compliance with this particular provision of the lease. There is no allegation of wrong doing or of any amount believed to be owed. The Association is only conducting an accounting of the records to verify what was due over the contract period based on the terms of the lease. The lease itself contemplates that all income resulting from the operations of the lessee, consisting of up to five separate companies, however named or organized, **conducted on our premises** must be included in the gross receipts amount for revenue sharing purposes.

  Whether the accountant has secured all of the

documentation necessary to make that determination is unknown. But I would suggest that our knowing the answer to that question prior to and not following efforts to reach an agreement is important to know, although our negotiators may suggest to us they are unable to share that information based on a pledge of confidentially.

Income from operations not conducted on our premises need not be included in determining the amount of the lessee's gross receipts. It is reasonable to conclude that the burden is on the lessee to document that any claimed income from non-premises operations are separately accounted for in some mutually acceptable manner. This provision of the lease can raise a number of related issues to the extent that certain terms need defining or clarification.

- **Rent payment.** To the extent the lessee had failed to pay their monthly rental obligation, all unpaid rent in arrears could be due.
- **Late Fees and Penalties.** To the extent the lessee had failed to pay their monthly rental obligations in a timely manner, late fees and penalties could be applied.
- **Unknown.** We understand there are other areas under discussion. Beyond the above items, however, the question of "What's on the negotiating table" is a complete mystery, which some find troubling. Without knowing the scope of the negotiations, is the community being better or ill served?

Should the Board be Looking for a Replacement?

With more than a year to go on the current lease, should the Association do what's required and start looking for a replacement lessee? Clearly, based on what the Board has openly disclosed about the lessee's non-payment practices, no one should disagree that the lessee is not at all happy to be here. Some are openly questioning the ongoing efforts to retain a lessee who does not appear at all eager to meet our demands, does not pay rent when due, and is very unhappy with us at the same time.

Try to answer this question. Do the forgoing hostile payment actions and apparent negative feelings define a positive relationship that is designed to benefit the Association and its members?

Ron Johnson 17 July 2006

Donald Trump: **http://www.trumpuniversity.com/connect/newsletters/itt/issue04.cfm**