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January 14, 2010

**VIA EMAIL &
FIRST CLASS MAIL**

Board of Trustees
High Bar Harbor Yacht Club Condominium Association, Inc.
c/o Patrick C. English, Esq.
Dines and English, L.L.C.
685 Van Houten Avenue
Clifton, NJ 07013

**Re: High Bar Harbor Yacht Club Condominium Association, Inc.
Exclusive Use of Common Elements by Unit Owners**

Dear Mr. English:

This acknowledges receipt of your letter dated December 17, 2009 in which, on behalf of the Board of Trustees of the High Bar Harbor Yacht Club Condominium Association, Inc., you ask our opinion relative to the proposed modification of Units in the Condominium to accommodate the needs of the Owners.

You propose the following scenarios:

Proposal "A". A Unit Owner wishes to remove certain finger piers on the E dock so that a vessel may lie parallel, rather than perpendicular, to the dock. The Unit Owner owns all of the Units in which the Finger Piers are located.

Proposal "B". A Unit Owner, who owns two contiguous outside Units at the head of a dock (the "T Head"), wishes to place the vessel along the T Head; however, the placement of the vessel as desired by the Unit Owner will result in the vessel being situated in the two Units owned by the Unit Owner, as well as a 6' wide area, consisting entirely of water, situated between the two Units that is not part of either of the two Units. For the purposes of this discussion, the subject 6' wide area of water will be referred to as the "T Head Area".

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For convenient reference, the two arrangements that are the subject of the Board's inquiry will be referred to herein as "Proposal A" and "Proposal B".

At the outset, neither Proposal requires an amendment to the Master Deed or modification of the Deed(s) by which Units were conveyed to the Unit Owner. The legal description and identification of the Units will not change as a result of implementing either Proposal pursuant to the discussion below; rather, under each of the Proposals, the rights of the Unit Owners to use the Units and Common Elements are being modified. Either Proposal may be accomplished by the grant of interests or rights in the Common Elements, which the Board has authority to make subject to the required assent of the membership of the Association.

I. Compliance under Either Proposal

A. Requirements of Governmental Entities Having Jurisdiction Over the Condominium.

Any modification of the Units, including the removal of the Finger Piers and the use of the Condominium facilities, must comply with the requirements of the governmental entities having jurisdiction over the Condominium. This compliance would require the Board to determine the approvals and permits, if any, that will be required by the Township of Long Beach and the State of New Jersey. Regulations promulgated by the New Jersey Department of Environmental Protection ("NJDEP") govern the Condominium, as well as any potential modification of the existing improvements. Any modifications, including the removal of the Finger Piers and the manner in which vessels are situated within the Condominium, are likely to require NJDEP approval and permits in order to perform such modifications.

Accordingly, the first step is to determine whether the proposed changes in the improvements or use of the amenities comply with NJDEP requirements. Any costs incurred in making that determination should be borne by the Unit Owner.

B. Assessment by Professionals of the Impact of any Modification. At the sole cost of the Unit Owner, the Board should engage the appropriate professionals, e.g. an engineer to render reports, at a minimum, of the effect that any permitted modification might have on the physical structures within the Condominium and the current use of the improvements by the membership. There may be other concerns of which the Board may not currently be aware that necessitate the engagement of an expert in marinas, or in other areas. For example the Proposals may affect the operating expenses, and/or the repair and replacement costs, of the Association.

Only upon a determination that there will be no encroachment upon the rights of other Unit Owners including, but not limited to, potential damage to the existing improvements in the Condominium and the current use and enjoyment of the Units and Common Elements should the Board proceed.

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C. Reasonable Rules and Regulation. Under either proposal, the right of the Board to promulgate reasonable rules and regulations governing the modified use should be agreed to in writing by the benefitting Unit Owner.

II. Implementing Proposal "A" -- Removal of Finger Piers for Placement of Vessel Parallel to Dock.

A. Finger Piers are Part of the Common Elements (or Limited Common Elements). The Master Deed for High Bar Harbor Yacht Club Condominium (the "Master Deed") defines at Paragraph 5(a) the Common Elements to include the Finger Piers. While the plans appearing as Exhibit "C" do not graphically identify the Finger Piers as Limited Common Elements, Paragraph 5.(b) defines the Limited Common Elements to include those parts of the Finger Piers "which are for the use of one or more specified Units to the exclusion of the other Units." Although Exhibit "C" does not graphically identify any Limited Common Elements, Paragraph 5.(b) does allow the designation of those Finger Piers for exclusive use of certain Units to the exclusion of others as Limited Common Elements.

B. Right of All Unit Owners to Use Common Elements and Obligation to Pay Common Expenses. As your letter points out, Paragraph 8(b) of the Master Deed does grant each owner a perpetual easement "to use common elements." Furthermore, it is correct that the Common Expense assessments imposed by the Association are for the purpose of maintaining, repairing and replacing the Common Elements of the Condominium. However, neither of these provisions in the Master Deed operate to bar the ability of the Board to implement Proposal "A".

While all Unit Owners have use of the Common Elements to largely the same extent, all Unit Owners generally do not use all Common Elements by virtue of the fact that all Units Owners pay Common Expense assessments. By analogy, in a condominium consisting of residential dwellings, circumstances might be that some owners use facilities, such as storage and parking areas, to different degrees. I surmise that, at the Condominium, each Unit Owner does not, in fact, make use of each Finger Pier within the Condominium; rather, use is limited to those Finger Piers adjacent to the Owner's Unit, unless invited to the Finger Pier adjacent to another Unit.

Accordingly, the facts that the Finger Piers are part of the Common Elements (or described as Limited Common Elements) and the associated costs are paid by all Unit Owners do not prohibit the removal of certain Finger Piers as contemplated under Proposal "A".

C. Power of the Board to Implement Proposal "A". Notwithstanding the concept that the Common Elements are generally available for use by all Unit Owners and are subject to further description as Limited Common Elements, the Board of the Condominium has been granted powers at Article 5, Paragraph 5.1 to administer and manage the property forming the Condominium. Specifically, at subparagraph (l), the Board has the power to:

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(l) To transfer, grant or obtain easements, license, leases, and other property rights with respect to the Common Elements in a manner not inconsistent with the rights of Unit Owners subject to the assent of two thirds (2/3) of all votes eligible to be cast and present at a special meeting of the Unit Owners duly called for such purpose

Any decision of the Board to afford the Unit Owner the right to remove the Finger Piers will give rise to the grant of property rights to the Unit Owner in the Common Elements which the Unit Owner did not have previously. The conclusion that the grant of permission to the Unit Owner to remove the Finger Piers is permitted under Article 5, Paragraph 5.1 presumes that the vessel will be situated in its entirety within that area containing the multiple Units owned by the Unit Owner. It further presumes that the manner in which the vessel will lie parallel to the dock will not adversely affect the use and enjoyment of the Condominium Units and Common Elements by other Unit Owners.

D. Vote to Remove the Finger Piers Must Be Obtained at a Special Meeting of the Association. A Special Meeting of the Association must be conducted in accordance with Article 3, Paragraph 3.3 of the By-Laws to secure the requisite assent of two thirds (2/3) of all votes eligible to be cast. In calling and giving notice of the Special Meeting, the notice of the meeting should be accompanied by a detailed statement of the request on which the Unit Owners will be voting, together with drafts of the agreements which are proposed to be executed. The appendage of the documents to the notice, the Unit Owners will be able to become fully informed of the action contemplated to be taken by the Board. This is particularly important since voting by proxy is authorized at Section 3.7 of the By-Laws and Unit Owners may elect to vote by proxy without the benefit of submit a proxy

E. Documentation of Unit Owner's Removal of Finger Piers and Placement of Vessels. Upon obtaining the required vote of the Unit Owners at the Special Meeting, the agreement with the Unit Owner must be documented. Salient provisions of the document should include: (1) the Unit Owner will obtain all approvals and permits at his or her sole expense and provide same to the Board; (2) the Unit Owner will obtain proposals for and perform the work subject to the approval of the Board and any professionals the Board may choose to retain, which retention will be at the Unit Owner's expense; (3) in the alternative, the Association will perform the work at the cost of the Unit Owner; (4) the Unit Owner will sign an agreement to be recorded in the Ocean County Clerk's office which memorializes the arrangement agreed to by the Board for the removal of the Finger Piers and the placement of the vessel; (4) the transfer of any of the Units by the Unit Owner will require the reconstruction of the Finger Piers; and (5) upon the transfer of any of the Units, the agreement will terminate;.

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III. Implementing Proposal "B" -- Placement of Vessel in T Head Area.

A. The T Head Area is part of the Common Elements. The Master Deed, at Paragraph 5(a) includes the T Head Area as part of the Common Elements.

B. Right of All Unit Owners to Use Common Elements and Obligation to Pay Common Expenses. As in the above discussion of the removal of the Finger Piers, Paragraph 8(b) of the Master Deed does grant each owner a perpetual easement "to use common elements." Furthermore, it is correct that the Common Expense assessments imposed by the Association are for the purpose of maintaining, repairing and replacing the Common Elements of the Condominium. However, neither of these facts operate to bar the ability of the Board to implement the Proposal "B". The analysis at Section II.B. above, regarding the Finger Piers, also applies to the ability of the Board to grant to the Unit Owner of the Units adjacent to the T Head the right to place a vessel in the T Head Area.

C. Power of the Board to Implement Proposal "B". As with the discussion of the removal of the Finger Piers, notwithstanding the general concept that the Common Elements are available for use by all Unit Owners and are subject to further description as Limited Common Elements, the Board of the Condominium has been granted powers at Article 5, Paragraph 5.1 to administer and manage the property forming the Condominium. Specifically, at subparagraph (I), the Board has the power to:

- (I) To transfer, grant or obtain easements, license, leases, and other property rights with respect to the Common Elements in a manner not inconsistent with the rights of Unit Owners subject to the assent of two thirds (2/3) of all votes eligible to be cast and present at a special meeting of the Unit Owners duly called for such purpose

Any decision of the Board to afford the Unit Owner the right to place a vessel in the T Head Area would require the grant of an easement to the Unit Owner over the T Head Area.

D. Vote to Approve the Grant of an Easement over the T Head Area Must Be Obtained at a Special Meeting of the Association. A Special Meeting of the Association must be conducted in accordance with Article 3, Paragraph 3.3 of the By-Laws to secure the requisite assent of two thirds (2/3) of all votes eligible to cast.

E. Documentation of Unit Owner's Easement Over the T Head Area. As discussed previously at Section I, the Unit Owner should be obligated, at its own expense, to obtain any necessary approvals. Upon obtaining the required vote of the Unit Owners at the Special Meeting, an Easement Agreement should be made by and between the Association and the Unit Owner. Salient provisions of the Easement Agreement include the following: (1) the grant to the Unit Owner the right to place a vessel in the T Head Area; (2) any restrictions on the use of

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the T Head Area; (3) any consideration to be paid by the Unit Owner to continue to have the right to use the T Head Area; and (4) the termination of the Easement Agreement upon the transfer of either Unit owned by the Unit Owner.

IV. Rights Granted Under Either Proposal May Be Subject to a 100% Approval.

In proceeding with the implementation of either Proposal, the Board should be aware that the position may be taken that the agreement of all Unit Owners must be obtained to the proposal. In Fox vs. Kings Grant Maintenance Assn, Inc., 167 N.J. 208 (2001), the court stated:

That each individual unit owner has an ownership interest in the condominium community's common elements means that the unit owner may use the common areas and facilities only in accordance with the purpose for which they were intended, without hindering or encroaching upon the rights of other unit owners. *15A Am.Jur.2d Condominiums and Cooperative Apartments § 32 (2000)* Accordingly, "Although a declaration may reflect a clear intent that a board of managers has the broad authority to manage and administer the property, including the common elements and limited common elements, a board cannot grant an individual unit owner the exclusive use of any part of the common elements without the required vote of all unit owners." *Ibid.* Thus, in a condominium, the common elements are not subject to partition and "any purported conveyance [or] encumbrance ... of an undivided interest in the common elements made without the unit to which that interest is allocated is void." See *Unif. Common Interest Ownership Act § 2-107(f)*, 7 U.S.A. 530 (1994).

Furthermore, in determining the extent to which a challenge to implementing either Proposal "A" or Proposal "B" might be successful, the New Jersey Condominium Act at N.J.S.A. 46:8B-6 provides in pertinent part, at follows:

"The common elements shall remain undivided and shall not be the object of an action for partition or division. The right of any unit owner to the use of the common elements shall be a right in common with all other unit owners (except to the extent that the master deed provides for limited common elements) to use such common elements in accordance with the reasonable purposes for which they are intended without encroaching upon the lawful rights of the other unit owners."

The rights granted under Article 5, Paragraph 5.1 are clear in permitting the Board to exercise its power to grant rights in the Common Elements upon with the requisite 2/3rd assent. The due diligence to be conducted under Section I, above, will serve to support the decision of the Board and evidence that the other concerns, such as whether the implementation of either Proposal

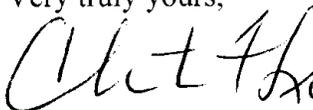
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hinders or encroaches upon the reasonable purposes for which the Common Elements are intended, are unfounded.

Assuming that the Board's due diligence under Section I above is satisfactory, the Board would support its decision to proceed based upon the following distinctions: (1) The rights in the Common Elements under Proposal "A" would continue to be allocated to the Unit Owner of the multiple Units subject of the modification. No rights of other Unit Owners would be affected; (2) No Common Elements are being legally or physically partitioned and/or transferred to any Unit Owner, and are not being made appurtenant to any Unit Owned by their Unit Owner. Rather, Proposals are limited to the manner in which the Unit Owners may use the Common Elements in the Condominium; and (3) The implementation of the Proposals are means to accommodate the use desired by either Unit Owner and is limited to the existing Unit Owner. Upon the transfer of one or more subject Units, the Common Elements are to be restored, if applicable, to their original configuration and the permitted use is to cease. The permitted use will be subject to recorded instruments memorializing the arrangement to which the Board agrees. The permitted physical changes, e.g., the removal of the Finger Piers, will not "run with title" to any Units.

Please contact me if you or the Board have any questions or wish to discuss this matter. Thank you.

Very truly yours,



CHRISTINE F. LI

CFL:kmr

cc: Board of Trustees, High Bar Harbor Yacht Club Condominium Association, Inc.