

Condo Insights - Lease Fees – Part 1

The legality and rationale behind why some condo associations impose fees on owners that rent their condos. A substantial percentage of condo owners located in coastal communities rent or lease their condos during the summer tourism season. Lease fees are fees that an association imposes on owners that rent or lease their condos. Lease fees are legal. With certain limitations, an association board has the authority to impose such a fee. There are restrictions regarding how the fee is determined.

Courts in New Jersey have ruled that so long as authorized by the association governing documents, an association may impose a lease fee and that fee must be reasonably related to the actual costs incurred by an association because of the rental process. There is an administrative cost to processing the lease, and the fee should cover the administrative costs as well as any other costs that owners impose on the Association when they rent. However, courts in New Jersey have repeatedly held that associations can not impose revenue-raising fees on unit owners that rent and cannot impose fees that deter renting and leasing within the association if the governing documents permit leasing.

Each association's Master Deed has a section regarding Use Restrictions that establish permitted and non-permitted activities and uses of a condominium. If an association permits leasing, the Master Deed typically includes a section specific to leasing, leasing requirements and restrictions. Common lease restrictions in place at many New Jersey condominiums limit frequency and term of leases, require that all leases be in writing with a copy provided to the association, and that the rental guests shall be subject to the provisions of the association's governing documents and rules and regulations.

Assuming the association governing documents permit leasing, the condo association board will have the authority to establish and impose lease fees. Typical language will state that the condo board has the power to assess a reasonable fee to owners that rent for costs and expenses to the Association associated with such units being leased. (The association governing documents may also permit the association to implement a refundable deposit on owners that lease. The deposit is held in escrow by the association and would be used to offset any extra-ordinary expense to the association caused by or fines incurred by the rental guests).

Unit owners commonly challenge why they should pay a lease fee simply because they are renting out their unit. The simple answer is that in most cases, leasing and rental activity costs an association more than if it were a non-rental community and if leasing or rental activity were not permitted. There are legitimate and compelling reasons to control short term leasing for the benefit of the entire community. Homeowner condo fees should not be used to pay for any expense incurred because of the presence of rental guests or because the Association permits leasing. These additional costs should be allocated to the unit owners that benefit.

The association's obligation is to establish a reasonably close relationship between the lease fee and the cost it is intended to offset. It is not fair nor reasonable for the Association to assess these additional costs to all members. When establishing and determining a lease fee, an association must identify and quantify the costs incurred by the association because of leasing activity.

Short-term or transient rental guests tend to be unfamiliar with the property when they arrive and seldom have guidance with respect to the association and property policies, procedures, rules and regulations. They often need and seek help from association entry point staff. If the association maintains an on-site management office, rental guests may perceive the office to be a guest services center and a resource for information about the area. The amount of time to address a rental guest's questions may be nominal as a percentage of daily routine activity, but in the entirety, it represents a significant amount of association staff time that is taken up by responding to rental guests.

Rental guests frequently rely on association staff to familiarize themselves with the location of their building and residence, place to park their vehicle, where to find luggage carts and how to get from the parking area to the elevator to their residence. They must acclimate to their building and residence. Many guests are not familiar with location and hours of operation of the swimming pools and recreational amenities such as spas, exercise rooms, as well as any of the other amenities. Rental guests don't know

where to dispose of trash, where to store or park their bikes or beach gear, nor how to get in and out of the buildings using the entry panels, access codes, keys, or fobs.

A common argument made by condo owners is that the presence of rental guests costs the association more to clean and maintain the common areas. Courts have not upheld this argument as the basis for lease fees. While seasonal staffing or service levels increase significantly to provide services to the increased seasonal population, these additional costs cannot be entirely attributed to rental guests. All owners have the right and potential to maximize occupancy in their condo. Common area expenses such as interior common area cleaning of the hallways, elevators, and restrooms should be budgeted properly and paid for from condo fees. Regardless of how the unit owner chooses to utilize their residence the common area costs to clean and maintain the common areas should be borne by all owners and not subsidized by owners that rent their condos.

Common area costs and expenses are allocated proportionately to each unit's interest in the common elements. Lease fees should not be used to subsidize common expenses that otherwise should be paid for by condo fees. Courts have held that the Association may not charge lease fees for the purpose of generating non-fee income to reduce or offset common expenses, or because of the perception that there is additional common area expense incurred simply because of the presence of rental guests.

In Part 2 of this column, we will discuss ways to identify and quantify expenses directly related or caused by the permitting of rental activity.

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