

From: [Cadi@snha.net](mailto:Cadi@snha.net)

Sent: Friday, October 11, 2019 1:31 PM

To: All Full Owners

Subject: SNHA - Settlement and Easement Update 10-11-19

Dear Homeowners,

**Re: Smugglers' Notch Management Company, Ltd. vs. White - Case Settlement and Easement for access to recreational facilities**

**Questions and Discussion points from the recent teleconferences held by Smugglers' Notch Homeowners' Association, Inc. Board – (SNHA)**

Below you will find summaries of questions and discussion points organized by topics to help you focus on the issues for which you may be seeking clarification. We did not record the calls and the below summaries were drafted by Joe Hester Ingram – Executive Director of SNHA and Jay Kahn – President of SNHA. We have made our best effort to present the information in an objective manner. The decision to accept or reject the settlement and easement is a choice to be made by each homeowner (deed holder) upon examination of the documents and terms.

We will note that the SNHA Board recommends that homeowners accept the settlement and thus make their homes available to receive the grant for Easement to their property deeds for access to the recreational facilities at Smugglers' Resort.

**Two important dates to note:**

- **Opt out deadline – notice to opt out of White case settlement must be submitted in writing postmarked no later than October 21, 2019 – See class notice for details**
- **White case fairness hearing – if you wish to comment on the terms of the settlement, you must NOT opt out, and maintain your standing as a class member. The Court will hold a Fairness Hearing on Tuesday, November 12, 2019 at 3:00 pm at the Lamoille County Courthouse, 154 Main Street, Hyde Park, Vermont in the second floor courtroom. At this hearing the Court will consider whether the settlement is fair, reasonable and adequate. If you wish to make objections, the Court will consider them. See the class notice for details on how to participate in the fairness hearing. After the hearing, the Court will decide whether to approve the settlement.**

**Deeded Rights – Background –** If you feel comfortable that you understand the history and background, you may wish to scroll down to the questions and answers.

The SNHA Board's research has led them to hold that the original property deeds and chains of deeds for core Village properties from the 1960's – 1980's contain covenants, rights and obligations that address both directly and by implication, that there is homeowners access to

common lands and recreational facilities for all full owner properties but deed language varies depending upon when the deeds were written. There is a clear reference to a core Village Map that shows the Courtside Pool and adjacent tennis courts and therefore indicates an intention for those recreational facilities to be available through deeded access. Between 1985 and 2008 rights to access the recreational facilities and a payment formula for services provided by Smugglers' Notch Management Company, Ltd. to the common lands and regime services were included in three contracts by which homeowners in general had agreed to and recognized during that period. The three agreements were available for a homeowner to choose one of the three:

1. Bare bones – included services to common lands and regime properties and an agreed upon fee schedule basis.
2. Associate Club – included the terms found in #1 – bare bones and access to the recreational facilities for the payment of a fee.
3. Village Club – included the terms of #1 and #2 agreements and assigned Smugglers as the exclusive renting agent, and as a renting homeowners recreational access fees were waived. Renting homeowners paid Village and Regime Services Fees based on the same schedule as agreements #1 and #2.

In the years between 2004-2008, as Bill Stritzler prepared to cancel the 1985-88 agreements, primarily because the terms for rental rate increases paid to HO's were out of line with existing economic trends after the 1990's, the SNHA Board and homeowners researched and developed an opinion that access to recreational facilities and rights and obligations for services to regime properties and common lands should be separated from the rental agreement. The Board developed the position that the "deeded rights" (not contracts) should be at the heart of how homeowners access the recreational facilities and how the services for common and regime properties are delivered, not by rental contract which can be terminated and not necessarily renewed at rates favorable to homeowners. Homeowners at annual meetings before and after the new agreements became effective in 2009 have supported the Board's position. During the fall of 2008, Smugglers' offered amendments to the Smugglers' contractual agreements to remove the terms related to common and regime property services. Regimes were then offered a separate agreement for services to their respective properties. The Board and homeowners expected that a separate agreement for Village common property services as well as a resolution with Smugglers for access to the recreational facilities would be forth coming in 2009. While discussions continued between the SNHA Board and Smugglers', no agreements could be reached between 2009 and 2019. The White case, which became a class action case, provided the opportunity to endorse the settlement offered from the case regarding the Village Fee basis allowed for extensive negotiations between Smuggs and SNHA for recreational access, and in a separate negotiations with Smugglers', to have available an easement to be granted to prove homeowner access to recreational facilities at Smugglers' Resort in perpetuity.

## **Documents**

There have been two mailings you should have received in September:

1. An email from Hans Huessy, attorney for the class in the Smugglers' vs. White case. This communication includes:
  - a. Cover letter describing the settlement reached by Smugglers' and the White brothers and their attorneys for a new basis for allocation of the cost of services to the common property and other services common to all at the resort (AKA Village Fees). The previous allocation was 10% charged to the Resort and 90% charged to the homeowners. The split found in the settlement is 22.5% for the Resort and 77.5% for the homeowners.
  - b. Court Decision on class certification – court record of how the class was created.
  - c. Court Notification to the Class – details the nature of the case, the settlement of the Village Fee basis, how to respond to accept or reject the settlement, who to contact, and more.
  - d. Settlement language and attachments that if approved will become the heart of the settlement documents.
2. An email from SNHA which included
  - a. letter from Bill Stritzler to Jay Kahn, which summarizes how the Resort and SNHA have arrived at an easement to address access to recreational facilities by full homeowners at the resort. The letter refers to 2 attachments,
  - b. Exhibit A the settlement agreement, and
  - c. Exhibit B the easement. In the email, these documents were incorporated into 1 attachment to the email of 9-20-2019 to homeowners which is a 7-page document regarding the easement.

In reference to the "Easement document" – below is a statement representing the position of the SNHA Board:

In addition to the terms of the White case Village Fee settlement, all full owners, through the efforts of the homeowners' association, have additional settlement benefits available to review and consider, resolving the long-standing issue related to recreational access rights. The letter signed by Bill Stritzler and Jay Kahn represents an escrow agreement and provides that the easement is contingent upon a homeowner's acceptance of the White settlement. This easement will be a real property interest, is not personal only to the current owner, and will be recorded in the Cambridge land records and will be perpetual. Once the easement is granted (January 1, 2020) there are 4 tiers of access that apply to owners and their accompanied guests.

While details are provided in the easement summary document, following are details that were important to the participants in the recent teleconference calls:

1. Homes participating in the Resort rental program will continue to receive the current benefits of recreational access and discounts included in the rental agreement as long as the current rental agreement is in effect. These homes will not be charged the annual recreational access fee described in the Easement, these fees are waived.

2. For homes that elect to NOT be in the Resort rental program, access to the courtside pool and tennis courts (Smuggs Central) will be \$500 annually for access of the homeowner family which includes three generations of the immediate homeowner family and guests who accompany the homeowner to the home. If a homeowner and family anticipate their use of their home does not warrant paying the \$500 fee, they may access these facilities at a daily rate. If a homeowner does not use the facilities there is no annual fee. A decision for participation is required in the fourth quarter each year.
3. In addition to the easement, SNHA has confirmed:
  - a. There will be a buy up to a Smuggs Pass benefit package for the owner who is not in the rental program for an additional \$1050 that will include access as described in #2 above for all recreational facilities of the resort that are not owned privately by any specific entity other than the Resort as outlined in the Smuggs Pass description.
  - b. Self-Renters – For homeowners who elect to rent their home themselves or by an agent other than the Resort, a schedule of fees for access to the facilities for their renters is available as listed in the Resort’s 2019 Benefit Grid.
  - c. These last two items (a. and b.) are not part of the easement. SNHA does not have a contract for these items at this time, but representatives from the SNHA negotiating team and the Resort have signed a negotiation term sheet including these provisions. SNHA will continue to sort out the formal documentation of these items as signed in the term sheet.
4. How does the recording of the easement happen?
  - a. Arline Duffy of SF&B, counsel representing SNHA, will work with the town of Cambridge to execute the recording. The Cambridge records are an old system but we are hoping the town will accept a listing of properties that have the easement granted to amend the deeds. It is possible each deed may need to be amended individually.
  - b. The cost of amending the deed is a homeowner expense, our goal is to minimize the expense as much as possible with a single provided experienced with the actual deeds and as much synergy as possible.

**Questions asked by Homeowners in the recent calls and in emails received by SNHA after the class notice:**

- If the SNHA Board believes we already have deeded rights to common areas and recreational facilities, why should we accept an easement to the Courtside Pool and tennis courts only?
  - SNHA – the rights from the original property deeds are most clearly defensible for the Courtside Pool and tennis courts because these facilities were listed on a map that was filed during the period of these original deeds. Access to facilities as “deeded” which were constructed after the date of the map would have to be sought as “implied” by the deed language and would be more difficult to achieve. Since the Resort has maintained a position that there are NO DEEDED

rights to facilities, a lawsuit would have to be filed and would take time and additional funding with only a chance to have a court recognize the “implied rights”. Even if this effort were to be achieved, there would still be fees attached to any access gained. The variance in deed language would be addressed by the litigation and most likely a different access would result.

- There is confusion and a misunderstanding the recreational facilities are common, they are not, they are private property of the resort. There is also confusion of what is common land, the common land is the unimproved land around private property, mostly the village green and road but a full listing is in the documents.
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- If the 2020 easement access fee for Non renter homes will cost \$500, can the fee go up in price each year?
  - The future increases for the easement fee are defined and connected to economic index for CPI-U. Increases cannot become arbitrary.
- If we don't want to use the right to access those two places, how do we avoid paying the fee? If we do not pay the fee, does the easement remain in effect?
  - There is a required deadline designated to let Smugglers' know that you do not wish to pay the fee for any year. Once the easement is secured and filed, it will remain regardless of a home electing to pay the fee or not.
- Are the full owner benefits that owners in the current rental program have “up in the air” or will they be the same as always (meaning that we have access to all common areas including the court side pool? Without paying a fee? Forever?)
  - The benefits to the home participating in the Resort rental program will not change under the current agreement. The Easement access fee is waived. When the rental program agreement changes, access to facilities would be subject to changes with any new agreement. The easement and fee schedule will remain in effect under the terms of the easement and continue to be available to homes that file the easement.
- When will we know if the Settlement and the easement will be effective? Do we stand to lose any benefits over all of this? When will rental contract be finalized?
  - If you do nothing and do not opt out of the class, you will automatically opt in. If you wish to opt out the deadline is October 21. A written notice must be filed and postmarked no later than October 21, 2019. Please see the Class Notice for all details for opting out.
  - If you do nothing and the Court approves the settlement terms, you will not be able to sue, or continue to sue Smugglers' in this lawsuit since your status is opt in or any other about the same legal claims that are the subject of the Smugglers' vs. White lawsuit. You will also be legally bound by the orders the Court issues and judgments the Court makes in this lawsuit.
  - The SNHA Board recommends accepting the settlement and filing the easement. Because this is an individual choice to be made by each homeowner (deed holder) you should study the issues and arrive at the choice that works best for you.

- My head hurts! I'm not sure if I will be able to call in on Oct 1 or 3rd. Will it be recorded to view or listen to later?
  - The calls were not recorded. If you continue to have questions, contact SNHA via email to [joe@snha.net](mailto:joe@snha.net) Also available for communication among homeowners is a Facebook group. Several homeowners have also started a Smugglers' Full Ownership Facebook group last summer. See "Smugglers Notch Full Owners" on Facebook to join.

### **Following are more comments and questions from HO's grouped according to topics**

#### **Village Fee Settlement**

- Is it true that Smuggs will be paying a little more of the village fees and owners a little less? Can homeowners ask for an audit to achieve transparency?
  - If the settlement is approved, Smugglers will pay 22.5% instead of the current 10%
  - Yes, homeowners will have a right to audit the Village Fee accounts. The terms of the audit are described in the settlement.
- Will an owner who has only owned since 2016 receive a credit from the Resort? Will it be a pro-rated amount for their period of ownership?
  - Yes – a prorated credit will go to all homeowners who owned since 2009, including those who sold and those who purchased during the period between 2009 and the present.
- Who is checking that the calculations and credits are correct?
  - A calculation of the quarterly payments for folks who owned throughout the time period will be circulated for review prior to the first payment. Pro rata shares can be deduced from that calculation. After deduction of all the fees to class counsel and class representatives, the net will be assigned to each whole ownership unit and paid out quarterly for each quarter from January 2009 for 24 quarters; current owners will get a credit, former owners get paid the quarterly amount each quarter of ownership from 2009 to 2019.
- What happens to that amount of money (for previous owner) if the Resort can't "find" that person (email is undeliverable or no forwarding address)?
  - If not payable to an owner, it will be unclaimed property forwarded to the State of Vermont and held for that owner to claim.
- Who is monitoring to make sure the Resort is really paying the previous owners?
  - The Resort will provide a list of quarterly payments on request.

#### **Locations of Facilities**

- The easement document references access to the tennis courts adjacent to Courtside, but makes no mention of the 2 north hill courts. Will owners have access to these per this agreement?
  - SNHA or homeowners will have to inquire of Smugglers for a clarification.

- If a HO buys up with the additional \$1050 fee, what locations are included? Would they be the same as the Daycation facilities? If not, why not?
  - They are the facilities identified by a Smuggs Pass.
- The document concerning access to the "easement facilities" defines "other recreational facilities" such as Mountainside pool, Notchville, etc. but does not seem to address rights of access to these other facilities or anything other than the easement facilities. Is there a guarantee or grant of access to these other facilities besides the easement facilities in this agreement?
  - The "buy up" to access to other recreational facilities are not a part of the easement. There is a negotiating term sheet that was agreed upon and signed by Smugglers and SNHA to implement the legal agreement in the near future.
- Can you forecast for how crowded the Courtside Pool will get once the easement is awarded-we as homeowners will not have exclusive rights-what will the increase (use of the pool) be?
  - The pools as with other facilities are monitored by staff for capacity. Smugglers has practiced routing users to other pools when capacities have been reached. We would anticipate that if Courtside Pools exceeded capacity, users would be routed to other facilities that would be opened for the overflow.

## Easement and Fees

- **\$500** – who is required to pay?
  - Homeowners that want to use the Smuggs Central facilities (Courtside Pool, 6 tennis courts and miniature golf. Homes participating in the current Resort Rental program have these fees waived.
- Does it cover self-renter's guests?
  - No – See the Smugglers' Benefit Grid for 2019 for fees that will provide access to a self-renter's paying guests.
- Is the \$500 fee and \$1050 up a one time or annual?
  - They are annual.
- What if a HO does not pay?
  - The non-renting homeowner who does not pay the easement fee will not have access to the facilities for the year. If the home has accepted and filed the easement, the easement will remain in effect.
- Would it make more sense to purchase a "Daycation" pass? Or does the \$1050 upgrade get the HO family the Daycation benefits?
  - The decision for what fee to pay or not is a decision that each home must decide based on how they use the resort.
- What value is the Easement if I never use it?
  - Having an easement that is an agreed upon deeded right and is perpetual adds a "value" to the home. It is hard to quantify precisely the value, but it is certainly

better than a home at the resort without any “rights” to access. The easement will survive any resort ownership (asset) change.

- Is the \$500 fee negotiable? Will it change? How was it determined? Were non-renters and self-renters on the negotiating team?
  - The \$500 fee is not negotiable under the easement as it exists today.
  - It is subject to increases relative to recognized economic indexes
  - The fee was negotiated. It was a number that was deemed acceptable by the negotiators from the SNHA Board.
  - Non-renters and Self-renters are represented on the SNHA Board. They provided input to the negotiating team.
- Please explain why non-renters are paying an additional fee just to use the pool and tennis courts where we are already paying for the upkeep and maintenance through the village fees of 77.5% as per the settlement.
  - Smugglers has claimed that the pools and tennis courts are not funded by the Village Fees. They have always claimed the recreational facilities are funded through their portion of rental income from their Smugglers’ rental guests. While homeowners have had no way to verify that claim in the past, the right to audit the Village Fee accounts in the future will offer that opportunity.
- We pay for the use of the beach and pool at our hometown \$75 for a family from Memorial Day to Labor Day that is approximately 90 days. Asking \$500 for an annual fee is very high since we are only at Smuggs approximately 7 days a year and during that 7 days probably use the pool maybe 4 to 8 hours. It seems kind of high to spend \$500 for that time period. Are there other options to have the easement and pay a smaller daily use fee?
  - Yes. A per day fee is available.
- Will a smaller fee (than the \$500) ever be available if I only use the pool and never use the tennis courts?
  - No. The base annual fee for the easement is not adjustable if you only use one or the other of the pool or the tennis courts.
- We have multiple homes and fractional ownership.
  - The fractional ownership rights are by contract that you have with SNMCo. We do not have the details of these contracts
  - The multiple home deed will be granted the easement assuming opt in and the settlement is completed/enforced.

## **Principals of the Easement and the Settlement**

Why it is incumbent upon the whole owners to pay a fee when Smugglers’ is granting easement rights at no direct cost to Smugg’s for it to generate profits?

- The SNHA has never believed that use of the facilities would be at no cost to the homeowners. The easement resolves the long-standing difference in opinions



held by Smugglers and the SNHA respectively for many years. While the easement and the settlement represent a negotiated compromise, their terms are supported by the SNHA Board as a reasonable solution with sufficient value achieved without having to invest further time, energy and funds to pursue additional legal solutions that may or may not result in greater benefits to the full owners.

- Can I accept the White case settlement and not take the easement?
  - Yes, but not sure what would be the value of that choice.
- Will you support the making of a membership directory with an opt out option for owners if they wish?
  - SNHA statutory requirement is to provide a mailing list with the names and mailing addresses for deeded homeowners which will be provided upon request. SNHA does not currently share email addresses or phone numbers for homeowners. There is a Smugglers' Full Owner Facebook group that was created by several homeowners last summer that a homeowner can join and use for communication with other homeowners.
- At one point (not all that long ago), all homeowners were able to use Smugg's housekeeping and maintenance services, both at a fee. Then a few years ago a policy was announced that *only* renting owners could use housekeeping at any price, and that they would be lowest priority when it came to using maintenance services. Does this easement agreement address or have anything to do with this kind of discrimination between types of owners in terms of ability to pay for and/or use Smuggs' services?
  - Access to Housekeeping and Maintenance was not included in the negotiations or easement language.

END of Notes