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***Via File & ServeXpress
and First Class Mail***

Robert J. Valihura, Jr., Esquire
The Law Office of Robert J. Valihura, Jr.
1203 North Orange Street
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Ms. Michele A. Higgins
Mr. Terrence S. Higgins
44208 Riverpoint Drive
Leesburg, VA 20176

Re: *The Council of The Pointe at Bethany Bay Condominiums v. Higgins*
C.A. No. 7543-VCN
Date Submitted: July 8, 2014

Dear Ms. Higgins, Mr. Higgins, and Mr. Valihura:

This is the unfortunate continuation of a long-running dispute between Plaintiff The Council of The Pointe at Bethany Bay Condominiums (the “Council”) and Defendants Michele A. Higgins and Terrence S. Higgins, who own a unit at The Pointe at Bethany Bay Condominiums (the “Condominium”). The question is whether there is mold that needs remediation in the common elements of the Condominium’s structure adjacent to Defendants’ unit. By its letter opinion

of February 28, 2014,¹ the Court concluded that if, through a proper and current study, the Council established that there is mold that requires remediation, the Council would be entitled to summary judgment and access to the Defendants' unit in the course of performing necessary scope of work analysis and remediation.²

The Council arranged for yet another study by an independent and competent industrial hygienist who reported:

It is the professional opinion of Sussex Environmental that the recent results and the change in mold spore concentrations from previous results substantiates the conditions in the condo unit and adjacent units is not improving but may be deteriorating. This requires immediate attention to further assess the extent of the microbial growth in the wall cavities along exterior wall and between the units in order to prevent further damage to structural materials and to health of occupants.³

¹ See *The Council of The Pointe at Bethany Bay Condos. v. Higgins*, 2014 WL 806863 (Del. Ch. Feb. 28, 2014). The Council elected to follow one of the options identified in that letter opinion, *i.e.*, conduct a proper study or proceed to trial based on the investigation that it had already performed.

² Summary judgment is appropriate if no material facts are in dispute and the moving party is entitled to judgment as a matter of law. Ct. Ch. R. 56.

³ Letter of Susan E. White, Ph.D., CMC, dated April 27, 2014 (setting forth summary of findings and recommendations). The evaluation and sample results are included in an attachment to that letter.

Those conclusions were based in part on the evaluation and sampling of the property performed by Sussex Environmental on April 7, 2014.

The Defendants have not identified a viable basis for claiming that mold is not present or that remediation (or at least more detailed study in the areas behind the unit walls) is unnecessary. Instead, they criticize the recent study (and other studies) performed at the Council's behest. Their criticism of Sussex Environmental's efforts fall short of calling into question its conclusions. More importantly, they offer no reason, not previously presented in substance, for the Court to substitute its judgment for that of the Council or to question the independent and objective study of Sussex Environmental which performed the assessment.

Defendants have failed to identify and present a dispute of fact about the appropriateness of the Council's chosen pathway. Mold is present; remediation work may be necessary, but in order to determine the scope of any work, an inspection behind the walls is unavoidable.

Accordingly, summary judgment in favor of the Council is granted and Defendants must cooperate with the Council in allowing it and its contractors reasonable access to the unit for remediation of the mold in the common areas surrounding their unit and their neighbor's units.⁴ The final scope of the remediation work cannot be determined without a further inspection of the otherwise inaccessible common areas between the units, and that access is also confirmed by this decision.⁵

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc: Register in Chancery-K

⁴ The burden on the Defendants (or perhaps more accurately their tenants) of providing access is minimal when compared to the potential risks of not controlling the mold.

⁵ For these reasons, Defendants' continuing motion to obtain summary judgment in their favor is also denied. With this conclusion, it is not necessary to address squarely the Council's Motion to Strike Defendants' Motion for Summary Judgment. The Defendants raise no new issues that were not resolved earlier or that somehow overcome the conclusions in the February letter opinion. Although purportedly tied to the most recent mold study, their contentions are generally in the nature of reargument.