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February 28, 2014

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***Via File & ServeXpress
and First Class Mail***
Ms. Michele A. Higgins
Mr. Terrence J. 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: November 7, 2013

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

Disputes between a condominium council and a few unit owners are all-too-often counterproductive and expensive. This dispute is about access to address a possible mold problem. If there is mold, it may spread during the delay occasioned by this litigation. That would increase costs, not only to the condominium council and the unit owners contesting the council's proposed course of conduct, but also possibly for the unit owners whose units were free of mold at the time the council sought to act. With its common elements, a condominium is not readily

subdivided into isolated component parts—some parts are owned individually by the unit owners, and some common elements fall under shared ownership.

Yet, there are important private property concepts at work. The unit owners do own their units, but their rights may be subject to statute and to the terms of the condominium declaration. Indeed, as a practical matter, access to some common elements may effectively be achieved only through a particular unit. The right of the condominium council to gain access to a common element through a private unit also may be limited or conditioned. Ultimately, when the unit owner objects to the council's request for access, the analysis of whether the objection is appropriate begins with the condominium declaration, which must be interpreted in the particular factual context.

A condominium benefits from a cooperative relationship among the condominium council and the individual unit owners. Unfortunately, when there is hostility or resentment or disagreement, the benefits of the condominium model can be diminished. This case—regardless of how it eventually turns out—is an unfortunate example of what can happen.

This is a review, under Court of Chancery Rule 144, of a Master's Final Report.¹ The standard of review is *de novo*.² Because the Master's decision was made in response to a motion for summary judgment, the parties agreed that the Court could conduct its analysis based on the record that was before the Master. Summary judgment, of course, may be granted only if no material fact is in dispute and the moving party is entitled to judgment as a matter of law.³

Plaintiff The Council of The Pointe at Bethany Bay Condominiums (the "Council") seeks access to the unit owned by Defendants Michele A. Higgins and Terrence S. Higgins (the "Owners") to inspect for and, if appropriate, to remediate mold.⁴ The Owners have resisted that effort for several reasons: (1) they have already complied with the Declaration;⁵ (2) they are being harassed by the Council because they have complained about one of the Council's contractors; and (3) there is no reliable or credible evidence of mold that would support the remediation

¹ *Council of the Pointe at Bethany Bay Condos. v. Higgins*, 2013 WL 5435631 (Del. Ch. Sept. 30, 2013).

² See, e.g., *DiGiacobbe v. Sestak*, 743 A.2d 180, 184 (Del. 1999).

³ Ct. Ch. R. 56(c).

⁴ The Owners own Unit 3401 of The Pointe at Bethany Bay Condominiums.

⁵ Aff. of Robert J. Valihura, Jr., Esq., Ex. A (Declaration for The Pointe at Bethany Bay Condominiums) (the "Declaration").

contemplated by the Council, which may cause substantial and unnecessary damage to their uniquely decorated unit.

During the course of the proceedings before the Master, the Council conceded that there are material factual disputes about the mold and the testing. The Council, however, asserts that it has access rights to the Owners' unit that would allow performance of the work it deems necessary.

Two provisions of the Declaration are relevant:

The Council shall maintain, repair, replace, and manage, and make any additions or improvements to, the Common Elements and the Limited Common Elements as provided in the Code of Regulations;⁶

The Council shall have an easement to enter any Unit at any time to make emergency repairs necessary to protect any part of the Property from damage or further damage, and shall have the right to enter any Unit on reasonable notice to the respective Owner to perform such routine maintenance or other action as may be necessary to preserve any part of the Property.⁷

⁶ *Id.* Art. 6 ¶ C.

⁷ *Id.* Art. 6 ¶ F.

The Declaration's grant of access to the units is consistent with Delaware's Unit Property Act:

The council shall have an easement to enter any unit to maintain, repair or replace the common elements, as well as to make repairs to units if such repairs are reasonably necessary for public safety or to prevent damage to other units or to the common elements.⁸

The Council moved for summary judgment on Count I and Count II of its Complaint. Through Count I, it sought access to the Owners' unit (a) to assess the cost and scope of work necessary to address the mold and to rehabilitate the damage that the mold has caused; and (b) to carry out such repairs as might involve the Owners' unit. By Count II, more generally, it asked for an order confirming the Council's right to enter the Owners' unit under the terms of the Declaration.

The Master, treating the Council's requested relief as a permanent injunction⁹ providing for access to the Owners' unit, recommended that summary judgment be denied, based in part on the perception that the Council's hostility toward (or harassment of) the Owners called into question its exercise of business

⁸ 25 *Del. C.* § 2215.

⁹ To earn a permanent injunction, the Council would have to show success on the merits, a favorable balancing of the equities, and the threat of irreparable harm in the absence of injunctive relief. *See Sierra Club v. DNREC*, 2006 WL 1716913, at *3 (Del. Ch. June 19, 2006).

judgment.¹⁰ These concerns overlapped to an extent with issues about whether the mold abatement furthered the proper interests of the Council or whether the mold remediation project was focused on harming the Owners.¹¹

The Court agrees that summary judgment on Count I to authorize the Council to identify the necessary remediation work and to carry it out is not appropriate, but for somewhat different reasons. The Owners' claims of harassment are insufficient to overcome the presumption that the members of the Council were acting in good faith and not out of personal animosity.¹² Unfortunately, there has been disquieting conduct on both sides that, in retrospect, may be perceived as excessive. The underlying facts, however, do not demonstrate the degree of hostility necessary to call into question the Council's motives. A condominium council cannot lose its ability to act to protect the condominium and its unit owners simply because some unit owners may have vehement disagreements with it.

¹⁰ The Owners' allegations ranged from harassment during Council meetings, being accused of "terrorist activities" by a member of Council, and a forced entry of their unit by an unfamiliar locksmith at the instance of Council, to their perception that an inadequate mold inspector was motivated by prejudice to find a mold problem with their unit.

¹¹ As to Count II, which raised a broader question of access, the Master concluded that the dispute was not ripe and that the Council was merely seeking an advisory opinion.

¹² 15B Am. Jur. 2d Condominium and Cooperative Apartments § 23 (citing *Quinones v. Bd. of Managers of Regalwalk Condo. I*, 242 A.D. 2d 52, 54 (N.Y. App. Div. 1998)).

The Council, by the terms of the Declaration, is generally entitled to access to the Owners' unit to perform work necessary to protect the condominium. If there is a significant presence of mold, then remediation work may be necessary. Damages would likely result because the mold, in time, would likely spread. Moreover, if the mold is likely to spread, without intervention, the irreparable harm is also likely.

In many circumstances, a condominium council, with a proper expert mold study and analysis, could make its decision and, under terms similar to those of the Declaration, be entitled to proceed to remediate the property in accordance with its best judgment. This case, however, is different. Although not controlling, tension between the Council and the Owners does exist. Moreover, there is substantial disagreement—credibly supported through affidavits submitted by the Owners¹³—as to the nature and extent of the mold. Perhaps more importantly, the mold studies have some age to them. For example, the Council relies upon mold studies from 2011.

¹³ Aff. of Terrence S. Higgins, Ex. Q; Aff. of Caoimhin P. Connell at 7.

As noted, if mold is present to a troubling extent, remediation may be necessary and, without remediation, irreparable harm is likely to result. If the mold is present to a significant extent, the Owners' claims of being treated unfairly are diminished.

Thus, the Council, if it establishes that there is mold that requires remediation, is otherwise entitled to summary judgment on Count I.¹⁴ There is, at least for now, a residual dispute of material fact with respect to the existence of mold. The Council may either conduct a proper study or choose to proceed to trial based on the investigation that it has performed. If it chooses to pursue additional study, the Owners shall cooperate in making their unit available for such efforts on a reasonable basis. If the Court, unfortunately, needs to be involved in the scheduling of any additional study, it will be available.¹⁵

¹⁴ The Council has established that the Declaration empowers it to take necessary steps involving the Owners' unit at its own expense. The Owners have not rebutted the presumption that the Council is acting in good faith.

¹⁵ This narrowing of the issues to be resolved works to sustain the Master's conclusion that the discovery motions need not be addressed at this point. Whether further discovery will be necessary may depend upon the path selected by the Council. The Court also is reluctant to consider the Council's request for a broad advisory confirmation of its right, on an ongoing basis, to enter the Owners' unit. Entry regarding the current issue is best addressed through Count I.

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Accordingly, the Court, as did the Master, denies the Council's motion for summary judgment, for the reasons set forth above.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc: The Hon. Kim Ayvazian
Register in Chancery-K