UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	*	
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GORDON PROPERTIES, LLC, and	*	**Case No. 09-18086-RGM**
CONDOMINIUM SERVICES, INC.,	*	Chapter 11
	*	(Jointly Administered)
Debtors.	*	
GORDON PROPERTIES, LLC,	*	
	*	
Plaintiff,	*	
	*	
v.	*	**Adv. Pro. No. 11-01020-RGM**
	*	
FIRST OWNERS' ASSOCIATION OF FORTY SIX HUNDRED CONDOMINIUM, INC.,	*	(Hearing Date: July 17, 2012, 10 a.m.)
	*	
	*	
	*	
Defendant.	*	

BRIEF OF GORDON PROPERTIES, LLC REGARDING QUALIFICATIONS FOR THE FOA BOARD OF DIRECTORS

Gordon Properties, LLC ("Gordon Properties"), by counsel, submits the following brief pursuant to the Court's order in open court on June 19, 2012, regarding the qualifications for service on the board of directors of the First Owners' Association of Forty Six Hundred Condominium, Inc. ("FOA" or "Association").

PRELIMINARY STATEMENT

The foundation of the democratic process in a condominium association is the vote of the unit owners expressing their desires as to who will sit as their elected representatives on the board of directors. The FOA unit owners are entitled to elect to their Board of Directors ("Board") those candidates who they believe are best suited to govern their Association and who otherwise meet the qualifications established by the condominium instruments. If the membership determines that a husband and wife who own a single unit are the best candidates

for the Board, it is the membership's right to elect those individuals to the Board. Similarly, if the membership does not want co-owners of a single unit to serve on the Board, it is their right to demonstrate that choice with their vote. Assuming the candidates otherwise meet the qualifications established by the condominium instruments, the Court should not interfere with the choices of the membership.

In its Memorandum Opinion of September 29, 2011, this Court held:

> There has not been an annual meeting for five years. [The members] have not had an opportunity to elect a board that will take the direction they would like the board to take or to adopt policies that they believe are beneficial to the association. To stay the order in this case would alter the election results until an appeal is finally heard. It is detrimental to the members of the association. They ought to have a proper vote. It is not important to the court who is elected, only that a proper election be held and <u>that the members have the opportunity to elect the board of their choice.</u>

(Docket No. 95, page 6.) An election was held at the 2011 Annual Meeting and the membership has voted ("2011 Board Election"). The Association now asks the Court to ignore the express vote of the membership and to disqualify several of the elected Board members. This attempt to circumvent the vote of the membership and to abrogate the rights of the members to serve on the Board cannot stand. The democratic process is lost if the vote of the membership is rejected and the membership is denied the "board of their choice."

The FOA Declaration and By-Laws (collectively "Condominium Instruments"), which form the agreement between the parties, establish the qualifications for election to the Board. These qualifications place no limitations upon the ability of co-owners, joint tenants, or officers of a business entity owner to serve on the Board. Nor do the Condominium Instruments preclude an officer of a non-natural unit owner, such as Gordon Properties which owns 39 units in the

Forty Six Hundred Condominium ("Condominium"), from serving on the Board simply because another officer of Gordon Properties has also been elected.

Finally, the Association agreed that Resolution 2009-03, which purportedly imposed restrictions on Board service by affiliated parties, would not apply to the 2011 Board Election. More importantly, Resolution 2009-03 was rescinded by the vote of the membership at the 2011 Annual Meeting, and that membership vote was ratified by the Board at its June 2012 meeting and Resolution 2009-03 was repealed. Consequently, Resolution 2009-03 is no longer of any force or effect. Accordingly, those persons receiving the highest number of votes for election to the Board at the 2011 Annual Meeting should be seated.

ARGUMENT

In its Order of June 15, 2012 (Docket No. 210), the Court certified the results of the 2011 Board Election. The individuals receiving the highest number of votes in the 2011 Board Election should be seated on the Board. These individuals meet the qualifications for service on the FOA Board and were properly elected by the FOA membership.

1. **The Condominium Instruments Establish the Qualifications for Service on the Board of Directors.**

    a. The Condominium Instruments do not limit the number of officers of a business entity owner who may run for or serve on the Board.

The Condominium Instruments constitute "the contract collectively entered into by all the unit owners in the subdivision." *White v. Boundary Association, Inc.*, 271 Va. 50, 55, 624 S.E.2d 5, 7-8 (2006). *See also Sully Station II Community Association, Inc. v. Dye*, 259 Va. 282, 284, 525 S.E.2d. 555, 556 (2000). These Condominium Instruments establish the rights and obligations of the parties.

The Condominium Instruments address the qualifications necessary to run for and serve upon the Board. Specifically, Article V, Section 1 of the By-Laws provides that the Board is to be comprised of:

- at least seven (7) natural persons,
- who shall be members of the Association, and
- at least one of the Directors, but not more than two, shall be owners of commercial condominium units.

There are no other qualifications, restrictions or limitations in the By-Laws.

Despite the lack of support in the By-Laws, FOA argues that Article V, Section 1 of the By-Laws should be read as: at least seven (7) natural persons, who shall be seven (7) different members of the Association. The additional qualification that the Association seeks to have inserted into the By-Laws is simply not there.[1] The By-Laws do not restrict which natural persons may serve on the Board. The By-Laws do not limit service on the Board to one Board member per unit. Nowhere in the By-Laws is it stated that a husband and wife cannot serve together on the Board or that joint owners are disqualified from serving on the Board.

The Virginia Supreme Court has ruled that the meaning of association documents is determined in the same manner as other contracts. "We determine the meaning of the contract from its related provisions that reflect the unitary expression of the parties' agreement. . . . When contract language is plain and unambiguous, as it is in the present Declaration, we determine the intent of the parties from the words they actually expressed." *White v. Boundary Association, Inc.*, 271 Va. 50, 55, 624 S.E.2d 5, 7-8 (2006). *See also Sully Station II*, 259 Va. at

[1] To change the qualifications to meet the Association's desired meaning requires that the By-Laws be amended. Article XV of the By-Laws requires the affirmative vote of 80% of the members to amend the By-Laws. *See also* Va. Code § 55-79.71(B) of the Virginia Condominium Act ("Condominium Act"), which requires the agreement of the membership to amend the By-Laws. There has been no such By-Law amendment.

284, 525 S.E.2d at 556. Other than limiting the Board to two commercial owners, the words actually expressed in the FOA By-Laws do not preclude joint owners or officers of a business entity owner, if elected by the membership, from serving on the Board.

Article III, Section 1 of the By-Laws defines the members of the Association. "Every person, group of persons, corporation, trust or other legal entity, or any combination thereof, which owns a Condominium Unit within the Condominium Project shall be a member of the Owners' Association." Where, as here, the Condominium Instruments require the officers of the Association to be unit owners,[2] the Condominium Act provides that "the term 'unit owner' in such context shall include, without limitation, **any** director, officer, partner in, or trustee of any person which is, either alone or in conjunction with another person or persons a unit owner." § 55-79.78B of the Condominium Act (emphasis added). Therefore, under the By-Laws and the Condominium Act, any officer of a business entity that owns a unit in the Condominium is deemed to be a unit owner and, therefore, a member of the Association. The statute does not restrict the definition of a unit owner to "any officer, but not more than one," nor does the statute

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[2] Article VI, Section 1 of the By-Laws:

> The principal officers of the Owners' Association shall be a President, a Vice-President, a Secretary and a Treasurer, all of whom shall be elected by the Board of Directors. *The President and Vice President shall be members of the Owners' Association.* If the owner of a Commercial Condominium Unit who is serving as President or Vice President of the Owners' Association disposes of his Unit for a term greater than 6 months he may continue to serve as such officer. The owner of either a Residential or Commercial Condominium who conveys his Unit in fee automatically terminates his position as President or Vice President. *A President or Vice President of the Owners' Association who is a Director, officer, trustee or partner of an owner of a Unit who is not a natural person* and ceases such relationship with the unit owner shall automatically be terminated as President or Vice President of the Owners' Association. (Emphasis added.)

This provision confirms that "a Director, officer, trustee or partner of an owner of a Unit who is not a natural person" is a member of the Association. This provision contains no qualification limiting membership to one "Director, officer, trustee or partner of an owner of a Unit who is not a natural person" per business entity owner.

say "any officer designated by the board of directors," or even "any officer designated by the business entity owner." The statute provides that any officer, "without limitation," is considered a unit owner for purposes of holding office in a condominium association. (Emphasis added.)

The Association conceded this fact when it properly accepted the Petitions for Nomination, included the nominees in the Proxy Form, and placed the nominees on the Ballot for election to the Board.[3] (Copies of the September 6, 2011 Annual Meeting Notice Package, a Proxy Form and a Ballot are attached as Exhibits 1, 2 and 3 respectively.) Neither the Notice Package, the Proxy Form, nor the Ballot contained any restrictions or limitations on the capacity of any nominee to serve if elected or provided any notice to the voters that certain candidates may be disqualified if elected. Similarly, there is nothing in the Condominium Act or the Condominium Instruments that prohibits these individuals from serving if elected.

Nonetheless, FOA contends that regardless of who is elected, only one officer of Gordon Properties or one officer of Gordon Residential may serve on the Board. The Association contends that it is unfair for more than one officer of a business entity owner to be seated on the Board and that it gives one owner an advantage over other owners. To the contrary, the number of candidates does not provide an unfair advantage for the business entity owner. In fact, every candidate has an equal chance of being elected by the unit owners if they are their candidate of choice. Moreover, regardless of who is seated on the Board, as a member of the Board each individual will owe a fiduciary duty to the Association. There has been no argument and there is absolutely no evidence that any individual elected to the Board will not act in accordance with

[3] The candidates included several officers of Gordon Residential Holdings LLC ("Gordon Residential"). These candidates were not, however, nominated by Gordon Residential as the Association frequently suggests. Each Petition for Nomination was endorsed by three owners of units unrelated to Gordon Residential or Gordon Properties. None of the endorsements were by Mr. Sells, Gordon Properties, or Gordon Residential.

his or her responsibilities. Therefore, FOA's assertion that the election of more than one officer of a business entity presents an unfair advantage for that entity is without merit. Rather, the number of candidates provides a benefit for the Association. A larger candidate pool increases the potential for quality candidates and provides a better opportunity for the members to elect quality directors. There is nothing "unfair" about giving an association's members a larger pool of candidates from which to choose.

Two officers of Gordon Properties – Lindsay Wilson and Dennis Howland – and three officers of Gordon Residential – Elizabeth Greenwell, Nicholas Greenwell, and Deneta Sells – were among the top seven individuals receiving votes in the 2011 Board Election. Each of these individuals meets the qualifications set out in the By-Laws. Each should be seated on the Board.

b. Gordon Properties, which owns 39 units, is not limited to one officer on the Board

Gordon Properties owns a total of 39 units in the Condominium – four residential units, thirty-four commercial units, and one of the free-standing Street Front Units. Gordon Properties pays separate assessments for each of these units, and each of these units is entitled to an independent vote in all membership votes.

Two officers of Gordon Properties were elected to the Board by the unit owners – Dennis Howland and Lindsay Wilson. Mr. Howland was a write in candidate as an owner of Unit 331.[4] Ms. Wilson submitted her Petition for Nomination as an owner of Unit 328. Ms. Wilson was not nominated by Gordon Properties. Rather, Ms. Wilson's Petition for Nomination was endorsed by three unit owners unrelated to Gordon Properties or Gordon Residential. (See Petition for Nomination attached as Exhibit 4, a copy of which is also included in Exhibit 1.)

[4] Under § 55-79.78B of the Condominium Act, with respect to a business entity owner, any officer is considered to be the unit owner.

Ms. Wilson and Mr. Howland were elected to the Board as owners of separate units. Yet, according to FOA, only one of them is entitled to serve on the Board. There is no support for this contention. Taken to its logical conclusion, under FOA's position, if a business entity owned 95% of the units, only one officer of that entity could be seated as a Board member, while the other 5% of the units would be entitled to occupy six seats on the Board. If there were not six other owners willing to serve, the seven-member Board required by the By-Laws could not be seated. Neither the Condominium Instruments nor the Condominium Act support this result.

Rather, when units are owned by business entities, the method established in the Condominium Instruments and the Condominium Act is that any officer, without limitation, may run for the Board and serve if elected.[5] This leaves the choice of who will serve on the Board to the members.

2. **The Members are Entitled to Elect the Board of Their Choice**.

Election of the Board of Directors is a fundamental right of the members of the Association.

> [T]he annual meetings of the members of the Owners' Association shall be held on the first Wednesday of October each succeeding year. At such meeting, **there shall be elected by ballot of the members a Board of Directors** in accordance with the requirements of Section 5 of ARTICLE V of these By-Laws.

By-Laws, Article IV, Section 2 (emphasis added). The members' right to elect the individuals who will govern their association and to be governed by those so elected is the primary principle upon which corporate governance is founded. "If a corporation has members with voting privileges, directors shall be elected at the first annual members' meeting and at each annual meeting thereafter unless their terms are staggered under §13.1-858." Section 13.1-855.D of the Nonstock Act (emphasis added).

[5] As stated above, the only limitation in the Condominium Instruments regarding an elected member is the limit to two commercial unit owners. By-Laws, Article V, Section 1.

The Condominium Act recognizes that a unit may be owned by more than one person and specifies that more than one person may be considered the unit owner. With respect to voting, the Act provides: "[s]ince a unit owner may be more than one person," the vote of the unit owners must be unanimous; and "[s]ince a person need not be a natural person, the word 'person' shall be deemed for the purposes of this subsection to include, **without limitation,** any natural person having the authority to execute deeds" on behalf of the business entity. *See* §55-79.77C of the Condominium Act (emphasis added).

Requiring unanimity in voting, however, does not equate to limiting the Board to one member per unit. As set forth above, § 55-79.78B of the Condominium Act provides:

> the term "unit owner" in such context shall include, **without limitation**, any director, officer, partner in, or trustee of any person which is, either alone or in conjunction with another person or persons is a unit owner. (Emphasis added.)

Under longstanding Virginia law, a statute must be given its plain meaning. *Alcoy v. Valley Nursing Homes Inc.*, 272 Va. 37, 41, 630 S.E.2d 301, 303 (2006). With respect to the Condominium Act, the Virginia Supreme Court approved a broad application of the plain meaning of the phrase "without limitation" and held:

> We believe that the plain meaning of the terms used in Code § 55-79.84(A) and (E) answer this question. Thus, in interpreting those subsections, we look no further than the words utilized by the General Assembly. *Supinger v. Stakes*, 255 Va. 198, 205-06, 495 S.E.2d 813, 817 (1998) (citing *City of Winchester v. American Woodmark Corp.*, 250 Va. 451, 457, 464 S.E.2d 148, 152 (1995)). "We must . . . assume that the legislature chose, with care, the words it used when it enacted the relevant statute, and we are bound by those words as we interpret the statute." *Barr v. Town & Country Properties, Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990). "The manifest intention of the legislature, clearly disclosed by its language, must be applied." *Anderson v. Commonwealth*, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944).

Homeside Lending, Inc. v. Unit Owners Association of Antietam Square Condominium, 261 Va. 161, 166, 540 S.E.2d 894 896 (2001).

Accordingly, pursuant to § 55-79.78B of the Condominium Act, any officer of a business entity, without limitation, is considered the unit owner and may seek election to an association board of directors. FOA concedes that there is no limit on the number of officers of either Gordon Residential or Gordon Properties who may run for election to the Board. As stated above, the officers of Gordon Residential and Gordon Properties were included in the Proxy Form and on the Ballot prepared by the Association.[6] Neither gave any indication that there was any limitation or prohibition on the ability of those elected to serve if elected.

Moreover, FOA's position ignores the rights of the candidates. Each of the duly elected Board members has the right to serve on the Board. Neither the Condominium Instruments nor the Condominium Act takes that right away from the elected Board members.[7] The FOA membership was entitled to vote for the best candidates available and those elected are entitled to serve. The individuals who received the highest number of votes at the 2011 Board Election should be seated.

3. **Resolution 2009-03 has No Force or Effect**.

In March 2009, the Board adopted Resolution 2009-03 ("Resolution") that purported to preclude joint owners and officers of entity owners from serving on the Board and prohibit "affiliated or related unit owners" (i.e., husband and wife, tenants in common, or corporations or entities with common or overlapping ownership) from serving together on the Board, regardless

[6] Dennis Howland, also an officer of Gordon Properties, was a write-in candidate.

[7] As stated above, the only limitation in the Condominium Instruments regarding an elected member is the limit to two commercial unit owners. By-Laws, Article V, Section 1.

of how many separate unit owners are involved.[8] These "affiliated or related unit owners" are separate legal entities and individuals.

Nothing in the Condominium Act or the By-Laws precludes "affiliated or related unit owners" from serving on the Board at the same time. The purported restriction on "affiliated or related unit owners" appears only in the Resolution. The By-Laws make no mention of "affiliated or related unit owners" much less prohibit them from serving on the Board as stated above. Article V, Section 1 of the By-Laws contains one limitation on elected members who may serve on the Board: "at least one of the Directors, but not more than two, shall be owners of commercial condominium units." This restriction is in the By-Laws. It was part of the agreement accepted by the unit owners. Any other restrictions on the ability of duly elected members to serve on the Board must also be in the By-Laws. Here, there are none.[9]

At the October 5, 2011 Annual Meeting, a point of order was raised under Roberts Rules of Order that Resolution 2009-03 violated the Association's By-Laws and was therefore improper. The Court-appointed Parliamentarian put the question to a vote of the membership, determining that it was a proper motion, and the motion passed by a significant majority.

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[8] Resolution 2009-03, paragraph 6, provides: "A group of affiliated or related unit owners may hold no more than one seat on the Board of Directors. For example, if several companies owned or controlled by the same person or group of persons owned several units, then that entire group of companies or persons could be represented by only one director. An additional example would be a husband and wife each owning one unit or jointly owning more than one unit; in that case, only one of them could serve on the Board at a time."

[9] Pursuant to the Court's Order of January 3, 2012, the Association agreed and the Court ruled "that any portion of the Policy Resolution that purports to limit an affiliated group of FOA members to one seat on the Board at any given time shall not be enforced with respect to the election conducted during FOA's 2011 annual meeting." (See Order of January 3, 2012, Case No. 09-18086-RGM, Docket No. 313, attached as Exhibit 6.) Accordingly, there was no limitation on the "affiliated or related unit owners" who could serve on the Board as a result of the 2011 Board Election. Nonetheless, as explained infra, the Resolution was later rescinded by the vote of the unit owners at the 2011 Annual Meeting, and that vote was ratified by FOA's Board at its June 19, 2012 meeting. Consequently, the Resolution not only was not in effect for the 2011 Board Election, it no longer will be in effect for any future Board election.

Thereafter, the vote of the unit owners was ratified by FOA's Board at its June 2012 Board meeting and the Resolution was rescinded. (A copy of the meeting minutes from the June 17 Board Meeting is attached as Exhibit 5.) Consequently, the Resolution had no force or effect as to the 2011 Board Election and will have no force or effect as to any future election.

CONCLUSION

For these reasons, Gordon Properties, LLC respectfully requests that the individuals who received the highest number of votes at the 2011 Annual Meeting be seated on the Association Board of Directors.

Date: July 13, 2012

Respectfully submitted,

GORDON PROPERTIES, LLC
By counsel

By: /s/ *Donald F. King*

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CERTIFICATE OF SERVICE

The undersigned certifies that this Brief was served electronically on July 13, 2012, upon Jennifer L. Sarvadi, Esquire, Counsel for FOA, pursuant to this Court's CM/ECF procedures.

/s/ Donald F. King
DONALD F. KING