

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re: *
*
GORDON PROPERTIES, LLC, * **Case No. 09-18086-RGM**
* **Chapter 11**
Debtor. *

DEBTOR'S OBJECTION TO CLAIM OF FIRST OWNERS' ASSOCIATION

The debtor, Gordon Properties, LLC, by counsel, pursuant to Rule 3007 of the Federal Rules of Bankruptcy Procedure and Rule 3007-1 of this Court's Local Bankruptcy Rules, objects to claim number 2-1 filed herein by First Owners' Association of Forty-Six Hundred Condominium, Inc., and in support of this objection states as follows:

1. The Forty Six Hundred Condominium (the "Condominium") is a mixed-use high-rise condominium project located on Duke Street in Alexandria, Virginia. The Condominium consists of one sixteen-story multi-family structure containing residential and commercial condominium units and two street-front commercial units.

2. The Condominium was established by the recordation of condominium instruments, including a Declaration, on November 16, 1975, in Deed Book 811, Pages 317, *et seq.*, among the land records of the City of Alexandria, Virginia.

3. Section XV of the Declaration provides that the "[a]dministration of the Condominium Project shall be vested in the Owners' Association in accordance with this Declaration, the By-Laws, Exhibits and amendments thereto. The Owners' Association

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shall consist of all Unit Owners in Accordance with the By-Laws attached hereto as Exhibit E and made a part hereof.”

4. The bylaws of the unit owners’ association (the “**Bylaws**”) were attached to the Declaration as Exhibit E and recorded among the land records of the City of Alexandria, Virginia, at Deed Book 811, Pages 420, et seq.

5. The First Owners’ Association of Forty Six Hundred Condominium, Inc. (“**FOA**”) is a Virginia non-stock corporation, incorporated on May 17, 1977, to serve as the “Owners’ Association” required by the Declaration and By-Laws of the Condominium.

6. The board of directors of FOA (the “**Board**”) is the board of directors required by Va. Code Ann. §13.1-853.A and Article V, Section 1 of the Bylaws.

7. The Bylaws, together with the Virginia Condominium Act and the Virginia Nonstock Corporation Act, establish and delimit the Board’s powers and duties as the executive organ of FOA.

8. The debtor herein, Gordon Properties, LLC (“**Gordon Properties**”), is a Virginia limited liability company.

9. Gordon Properties commenced this chapter 11 case with the filing of a voluntary petition on October 2, 2009 (the “**Petition Date**”).

10. As of the Petition Date, Gordon Properties owned 41 units in the Condominium, including one street-front commercial unit (the “**Street-Front Commercial Unit**”) that is currently leased to the operator of a restaurant known as Mango Mike’s.

11. FOA filed a proof of claim in this case on January 29, 2010, designated as claim number 2-1, in the amount of \$315,673.36 (the “**Claim**”).

12. FOA’s Claim consists of (1) assessments purportedly levied against the Street-Front Commercial Unit for the years 2003 through 2008 (the “**Assessments**”), (2) interest on the Assessments, and (3) the unpaid balance (including late charges and interest) of assessments levied against the Street-Front Commercial Unit for 2009.

13. On or about May 13, 2009, Gordon Properties submitted a petition for a special meeting of FOA for the purpose of electing directors.

14. One week later, on May 20, 2009, Gordon Properties received notice of the Assessments in a letter from Dewanda F. Cuadros, President of FOA and a member of the Board (the “**Notice**”).

I. The Assessments were not duly adopted by the Board.

15. The adoption of the Assessments is not reflected in the minutes of any regular or special meeting of the Board duly held, or in any written consents to action in lieu of a meeting of the Board, at any time before the Petition Date.

16. The Assessments were not duly adopted by the Board. The Assessments are, therefore, null and void, and the Claim should not be allowed.

II. The Board may not levy retroactive assessments.

17. Assuming, *arguendo*, that the Board attempted to adopt the Assessments at a duly-held meeting or through written consents in lieu of a meeting, the Board nonetheless lacked the power to do so.

18. Nothing in the Bylaws, the Virginia Condominium Act, or the Virginia Nonstock Corporation Act gives the Board the power to levy assessments retroactively,

to retroactively re-set the total amount of the assessments on all unit owners, or to retroactively re-determine the amount of the assessment on any particular unit for any prior assessment period.

19. As a result, the Assessments are *ultra vires* and, therefore, null and void, and the Claim should be disallowed.

III. The Board may not assess some unit owners but not others.

20. The Notice states that “Gordon Properties is now being assessed for the payment of general common expense for the years 2003 through 2008.”

21. Gordon Residential Holdings, LLC, is a Virginia limited liability company that owns one residential unit at the Condominium. It did not receive a notice of assessment for the years 2003 through 2008 on or about May 21, 2009, or at any time prior to the Petition Date.

22. Upon information and belief, Gordon Properties was the only unit owner of the Condominium purportedly assessed for the years 2003 through 2008 at the time Gordon Properties received the Assessment.

23. Article IX, Section 2 of the Bylaws authorizes FOA to levy a special assessment on less than all unit owners “provided that any such Assessment shall have the assent of the members representing two-thirds (2/3rds) of the total votes of those unit owners who will be assessed.” The vote on a special assessment can only take place at a meeting of the members duly called for that purpose, written notice of which must be sent to all members at least seven days in advance of the meeting.

24. FOA held no such meeting and took no such vote prior to levying an assessment on Gordon Properties.

25. Gordon Properties would have voted against the assessment if it had been put to a vote.

26. Nothing in the Bylaws, the Virginia Condominium Act, or the Virginia Nonstock Corporation Act gives the Board the power to levy assessments on some unit owners but not others.

27. As a result, the Assessments are *ultra vires* and, therefore, null and void, and the Claim should be disallowed.

IV. *FOA has failed to credit Gordon Properties for overassessment on its other units.*

28. The Notice claims that FOA “had been underassessing the street-front units” in the Condominium for many years and explains that the Assessments represent FOA’s attempt to correct for the alleged underassessment.

29. If FOA has been underassessing the street-front commercial units, then FOA must necessarily have been overassessing the other residential and commercial unit owners, in the aggregate, by the same amount.

30. FOA has failed to credit Gordon Properties for the overassessment of its residential and commercial units from 2003 to 2008.

31. As a result, Gordon Properties is entitled to a setoff against the Claim for the amount of the overassessment of Gordon Properties’ residential and commercial units during the same period.

V. *The Board has no authority to levy annual assessments on the street-front commercial units.*

32. According to the Declaration, the Condominium consists of three (3) types of condominium units, Commercial Units, Residential Units, and Street-Front Commercial Units.

33. "**Commercial Units**" are units located on either the third or fourth floor of the Condominium building.

34. "**Residential Units**" are units located on the fifth through sixteenth floors of the Condominium building.

35. "**Street-Front Commercial Units**" are those units fronting Duke Street as set forth in Exhibit B to the Declaration. There are two (2) such Street-Front Commercial Units, presently consisting of a restaurant site and a gas station site (the restaurant site being owned by Gordon Properties).

36. Under Article VIII, Section 3 of the Bylaws, FOA is under no obligation to maintain the Street-Front Commercial Units. Street-Front Commercial Units do not have any right to use the limited common elements of the Condominium, no limited common elements are appurtenant to the Street-Front Commercial Units, and Street-Front Commercial Units are separately metered for utilities and not covered by FOA's master insurance policy.

37. Article IX, Section 1 of the Bylaws authorizes the Board to levy annual assessments for Common Expenses only against each "Residential and Commercial member."

38. Section V. B of the Declaration further provides that “each Residential and Commercial Unit Owner shall share in the expense and maintenance of the limited common elements.”

39. The condominium instruments do not authorize the Board to levy annual assessments against Gordon Properties as the owner of a “Street-Front Commercial Unit.”

40. The order of the Alexandria Circuit court upon which FOA relies as authority for the Assessments was later vacated by the court during the trial of the case.

41. All assessments imposed by the Board on the Street-Front Commercial Units are *ultra vires*, unauthorized, and void.

42. As a result, the Claim is invalid in its entirety, and FOA must credit Gordon Properties for all monies paid for invalid assessments on its Street-Front Commercial Unit and Gordon Properties should be permitted to setoff any such amounts against the Claim.

V. *The Assessments do not comply with the methodology set forth in the condominium instruments or in decisions of the Alexandria Circuit Court.*

43. The condominium instruments set forth a detailed methodology for calculating the amount of the annual assessment on each unit at the Condominium.

44. The Declaration identifies six (6) types of common elements: "Parking Garage Limited Common Elements", "Storage Area Limited Common Elements", "Residential Limited Common Elements", "Commercial Limited Common Elements", "Residential/Commercial Limited Common Elements", and "General Common Elements."

45. **"Parking Garage Limited Common Elements"** are expressly defined in the Declaration as the parking garage and the ramps giving access thereto. Trash rooms, storage rooms, electrical and mechanical rooms, stairways, elevator shafts and utility lines are expressly excluded from the definition of Parking Garage Limited Common Elements. Responsibility for maintenance and operation of the Parking Garage Limited Common Elements is shared by the owners of the Condominium units to which each of the parking spaces is assigned.

46. **"Storage Area Limited Common Elements"** are expressly defined in the Declaration as the storage area and hallway giving access thereto as particularly described and designated in Exhibit C to the Declaration. Trash rooms, electrical and mechanical rooms, stairways, elevator shafts, utility lines and storage rooms not specifically assigned by Exhibit C to the Declaration are expressly excluded from the definition of Storage Area Limited Common Elements. Responsibility for maintenance and operation of the Storage Area Limited Common Elements is shared by each Residential and Commercial Unit owner so long as they remain the owner of the storage space assigned to them.

47. **"Residential Limited Common Elements"** are expressly defined in the Declaration as the elevators, elevator shafts and all equipment comprising the operation of the elevators not including the freight elevator, as well as the halls, storage rooms, laundry rooms, mechanical rooms, carpets, light fixtures, trash disposal rooms, and all other components on the interior structure of the Building which constitutes the fifth through sixteenth floors, not including the units on those floors. The residential units owners, defined as the owners of units on the fifth through sixteenth floors, bear

responsibility for the maintenance and operation of the Residential Limited Common Elements as allocated in Table C of Exhibit D to the Declaration.

48. **"Commercial Limited Common Elements"** are expressly defined in the Declaration as the parking designated in Exhibit C to the Declaration, the halls, storage rooms, laundry rooms, mechanical rooms, carpets, light fixtures, trash disposal rooms, and all other components of the interior structure of the Condominium building which constitute the third and fourth floors, excluding the units. The commercial unit owners, defined as the owners of units on the third and fourth floors of the Condominium building, bear responsibility for maintenance and operation of the Commercial Limited Common Elements as set forth in Table D of Exhibit D to the Declaration.

49. **"Residential/Commercial Limited Common Elements"** are expressly defined in the Declaration as all improvements to the Condominium except improvements to the Street-Front Commercial Units and improvements designated as a residential, commercial, parking garage or storage area limited common elements. Residential/Commercial Limited Common Elements include the pool area and bathhouse, the freight elevator, the health spa, sauna rooms and structural components of the Condominium building. The owners of Residential and Commercial Units bear responsibility for maintenance and operation of the Residential/Commercial Limited Common Elements as allocated in Table B of Exhibit D to the Declaration.

50. **"General Common Elements"** are expressly defined in the Declaration as all portions of the Condominium Project not described as a Limited Common Element or set out in Exhibit C to the Declaration. The ground upon which the Building and all other improvements rest is the only General Common Element.

51. Article IX, Section 1 of the Bylaws provides that FOA's annual expenses, known as "Common Expenses" and defined in Article VIII, Section 1 of the Bylaws, are to be funded by assessments imposed upon "[e]ach Residential and Commercial member."

52. That section provides that "Assessments shall be based on percentages of responsibility set forth in Exhibit D to the Declaration".

53. Exhibit D to the Declaration contains four different sets of percentages: "percentage of ownership" of Common Elements; "percentage of responsibility" in Residential-Commercial Limited Common Elements; "percentage of responsibility" in Residential Limited Common Elements; and "percentage of responsibility" in Commercial Limited Common Elements.

54. On February 23, 2009, and April 3, 2009, the Circuit Court for the City of Alexandria issued letter opinions in *Gordon Properties v. FOA*, Case No. CL08-001432, which purported to clarify the methodology for levying assessments under the condominium instruments and the Virginia Condominium Act. True and correct copies of each opinion are attached hereto and incorporated herein as **Exhibit 1** and **Exhibit 2**, respectively. The findings contained in those letter opinions were expressly incorporated into the final order in the case, a true and correct copy of which is attached hereto and incorporated herein as **Exhibit 3**.

55. None of the assessments which form the basis of the Claim were levied in accordance with the condominium instruments or the opinions of the Alexandria Circuit Court. For example, expenses that should have been allocated to owners of residential unit owners were instead allocated to residential and commercial unit owners, and

income that should have been allocated to all unit owners was instead allocated to a smaller subset of unit owners.

56. The Board's failure to levy assessments in accordance with the Bylaws or the opinions of the Alexandria Circuit Court continued in 2010 and, upon information and belief, will continue in future years unless corrected.

57. The result of the Board's failure to levy assessments in accordance with the Bylaws and the opinions of the Alexandria Circuit Court is that Gordon Properties has been overassessed.

58. The amount of these overassessments should be credited to Gordon Properties and Gordon Properties should be permitted to setoff any such amounts against the Claim.

VI. Other Objections.

59. The portion of the Claim arising from the Assessments and the interest thereon is barred by the statute of limitations.

60. The portion of the Claim arising from the Assessments and the interest thereon is barred by the doctrine of laches.

61. FOA waived its claim to any underassessments for 2003 through 2008 by failing to correct those assessments before the expiration of the respective assessment period.

VII. Set-Offs.

A. User Fees on Single-User Limited Common Elements.

62. An amendment to the Declaration, recorded in Deed Book 883, Pages 761 *et seq.*, among the land records of the City of Alexandria, Virginia, converted seven (7)

convertible spaces in the below-grade floors of the Condominium to Residential/Commercial Limited Common Elements (single-user).

63. Gordon Properties owns six (6) Residential/Commercial Limited Common Elements (single user) (known as storage areas 1B1, 1B2, 1C1, 2B1, 2B2, and 2C1) which have been assigned to one of Gordon Properties' units (the "*Storage Areas*").

64. Gordon Properties uses one of the Storage Areas for general storage and makes the remaining Storage Areas available for rent.

65. Gordon Properties has never received more than \$250 per month in total rental income from the Storage Areas.

66. FOA owns the seventh Residential/Commercial Limited Common Element (single user) (known as storage area 1C2), which has been assigned to a unit owned by FOA.

67. Section 55-79.83.A of the Condominium Act provides in part that "Except to the extent that the condominium instruments provide otherwise, any common expenses associated with the maintenance, repair, renovation, restoration, or replacement of any limited common element shall be specially assessed against the condominium unit to which that limited common element was assigned at the time such expenses were made or incurred."

68. The condominium instruments of the Condominium do not provide for the assessment of the seven Residential/Commercial Limited Common Elements (single user) known as storage areas 1B1, 1B2, 1C1, 1C2, 2B1, 2B2, and 2C1.

69. In 1989, the Board adopted a resolution purporting to levy an assessment on the Residential/Commercial Limited Common Elements (single user) owned by a

predecessor to Gordon Properties. The amount of the assessment was fixed on a square-footage basis without regard to and far in excess of any actual or projected expenses associated with the maintenance, repair, renovation, restoration, or replacement of those limited common elements. The purported assessment contained an automatic escalator clause.

70. The total assessment on the Storage Areas owned by Gordon Properties has ranged from \$12,000 per year in 1978 to more than \$21,000 per year in 2010.

71. Gordon Properties has paid more than \$100,000 in assessments on its Storage Areas since 2002.

72. FOA uses the income from the assessments on Gordon Properties' Storage Areas to subsidize assessments on other unit owners.

73. In 2010, FOA is not charging itself any assessment on the storage area that it owns.

74. Upon information and belief, FOA has never charged itself an assessment on its storage area.

75. At the trial in *Gordon Properties v. FOA*, Case No. CL08-001432, FOA took the position that the 1989 assessment resolution did not impose an "assessment" but instead created a "user fee" authorized by Section 55-79.83(A) of the Virginia Condominium Act.

76. Although the Alexandria Circuit Court initially ruled that FOA could not impose a user fee on the storage areas, it reconsidered that ruling after the trial, concluding that FOA may impose reasonable user fees on single-user limited common elements, including the storage areas.

77. To the extent that the “assessments” levied on the Storage Areas owned by Gordon Properties are actually user fees, they are unreasonable both in amount and because they are not levied equally on FOA’s storage area.

78. Section 55-79.83 of the Virginia Condominium Act does not allow an association to impose user fees without authorization in the condominium instruments.

79. The condominium instruments of the Condominium do not authorize FOA to impose any user fees.

80. To the extent that the “assessments” levied on the Storage Areas owned by Gordon Properties are actually assessments, they are unauthorized, *ultra vires*, and void.

81. All of the amounts paid by Gordon Properties for assessments or user fees on its Storage Areas should be credited to Gordon Properties’ account and Gordon Properties should be permitted to setoff any such amounts against the Claim.

B. Unauthorized Off-Site Owner Fees.

82. FOA charges non-resident unit owners an “off-site owner fee.”

83. FOA has required Gordon Properties to pay an off-site user owner fee even though Gordon Properties is not an off-site owner.

84. Nothing in the condominium instruments, the Virginia Condominium Act, or the Virginia Nonstock Corporation Act authorizes the Board to levy an off-site owner fee.

85. Gordon Properties has paid more than \$15,000 in off-site owner fees since 2002.

86. All off-site owner fees are unauthorized, *ultra-vires*, and void.

87. The total amount of off-site owner fees paid by Gordon Properties should be credited to Gordon Properties' account and Gordon Properties should be permitted to setoff any such amounts against the Claim.

C. Late Fees.

88. Article IX, Section 5 of the Bylaws prescribes FOA's remedies for nonpayment of assessments.

89. The remedies allowed by Article IX, Section 5 of the Bylaws do not include late fees.

90. Nothing in the condominium instruments, the Virginia Condominium Act, or the Virginia Nonstock Corporation Act authorize the Board to impose late fees as a remedy for nonpayment of assessments.

91. FOA has charged, and Gordon Properties has paid, thousands of dollars in unauthorized late fees since 2002.

92. All late fees are unauthorized, *ultra-vires*, and void.

93. The total amount of late fees paid by Gordon Properties should be credited to Gordon Properties' account and Gordon Properties should be permitted to setoff any such amounts against the Claim.

WHEREFORE, the Debtor respectfully requests for the foregoing reasons that the Claim be disallowed and that any overassessments or improper assessments be credited to Gordon Properties' account and that Gordon Properties be permitted to setoff such amounts against the Claim.

Respectfully submitted,
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By counsel

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