MONTGOMERY COUNTY, STATE OF MARYLAND

Norbeck Grove Condominium Association, Inc.,	:
	:
	: COMMISSION ON COMMON
Complainant	: OWNERSHIP COMMUNITIES
	:
vs.	: Case No. 32-06
	:
Norbeck Grove Community Association, Inc.,	: Panel Hearing Date: December 20, 2006
	:
Respondent	: Decision Issued: February 7, 2007 (Panel: McCabe, Gelfound, Vergagni)
	:
	:
Panel Chair Memorandum By: John F. McCabe, Jr.	:

MEMORANDUM DECISION AND ORDER

The above captioned case came before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing pursuant to Chapter 10B of the Montgomery County Code, 1994, as amended. The duly appointed Hearing Panel considered the testimony and evidence of record, and finds, determines and orders as follows:

BACKGROUND

This is a complaint filed by the Norbeck Grove Condominium Association (hereinafter, "the condominium") against the Norbeck Grove Community Association (hereinafter "the homeowners association") which challenges certain assessments levied against the condominium by the homeowners association. Complainant requests that the panel enter an order barring Respondent from collecting certain assessments

due from the condominium to the umbrella homeowners association, restoring community privileges for all condominium unit owners in good standing, entering a judgment for certain operation management maintenance and other expenses regarding the suspension of those privileges, and for attorney's fees. The homeowners association is an umbrella or master association for the condominium. The unit owners of the Complainant condominium also are members of the Respondent homeowners association. As such, the condominium unit owners are obligated to pay assessments to the homeowners association in addition to assessments that they pay to their condominium. Although it is unusual for such a case to come before the Commission, both associations are "parties" under Section 10B-8(7) of the Montgomery County Code, and the Commission has jurisdiction over this type of dispute because it alleges the disputed assessments are invalid (see Section 10B-8(A)(ii) of the Montgomery County Code).

The Respondent homeowners association operates under a Declaration of Covenants, Conditions and Restrictions recorded at Liber 14139, folio 073 among the Land Records of Montgomery County, Maryland. The provision of the Declaration involved in this case is Section 5.9, which states:

> "With respect to any Annual Assessments or Special Assessments provided for herein which are payable by the Owners of Lots which have been subjected to a Subassociation, the Board of Directors may elect by resolution to collect such Assessments directly from the governing body of the Subassociation, provided that the governing body of such Subassociation elects by resolution to collect such Assessments from its members on behalf of the Association. In such event, payment of the Annual Assessments and Special Assessments provided for herein shall be an obligation of such Subassociation; provided, however, that each Owner shall remain personally liable for

> all Assessments against such Owner's Lot and each such Lot shall remain subject to the lien for the Assessments established by this Declaration. If the Board of Directors elects to collect Assessments from the Subassociation, then all notices regarding Assessments against such Lots shall be sent to the governing body of the Subassociation; provided, however, that notice of any action to enforce an Owner's personal obligation to pay Assessments or to foreclose the lien against such Owner's Lot shall also be sent to the Owner of the Lot. This Section shall not be deemed to limit or waive, and shall be without prejudice to, any rights, remedies, or resources available to the Association for non-payment of Assessments."

The Complainant condominium is a "Subassociation" within the meaning of Section 5.9.

FINDINGS OF FACT

1. Complainant Norbeck Grove Condominium Association, Inc. is the governing body of a Maryland condominium within the meaning of the Maryland Condominium Act Section 11-101 et seq., Annotated Code of Maryland. It consists of 36 townhouse condominium units. The condominium is currently self-managed although it was not self-managed during the entire time at issue in this case.

2. Respondent Norbeck Grove Community Association, Inc. is a homeowners association within the meaning of the Maryland Homeowners Association Act, Real Property, Section 11B-101 et seq., Annotated Code of Maryland.

3. The relationship between the condominium and the homeowners

association

described in the Background section above is governed by the Declaration of Covenants, Conditions and Restrictions referenced above. The covenant for maintenance assessments is contained in Article V of that Declaration.

4. Article III of the Declaration, Section 3.1 establishes the right and easement of

enjoyment of every owner to the common area and community facilities of the homeowners association. The owner's right and easement of enjoyment is subject to:

> "...the right of the Association to suspend an Owner's voting rights and right to use the Common Area or Community Facilities (i) for any period during which any Assessment against such Owner's Lot remains unpaid,...." Section 3.1(b)

5. The parties were unable to produce a written resolution or other written agreement

memorializing the procedure for collection of assessments pursuant to Section 5.9 quoted above whereby the homeowners association collects assessments directly from the governing body of the condominium as a Subassociation. The evidence and testimony did not establish any express agreement between the parties to initiate or continue this procedure. However, the procedure whereby the Respondent homeowners association collected assessments directly from the Complainant condominium, and not from the individual owners of the condominium seems to have been in effect dating from 1999 when control of the condominium was turned over to the individual owners by the developer until January 1, 2006, when the Respondent homeowners association unilaterally discontinued that arrangement.

6. As of January 1, 2006, the Respondent homeowners association collects the

assessments provided for under Article V of the Declaration directly from the individual unit owners of the Complainant condominium.

7. In fiscal year 2003 the management agent for the Respondent homeowners

association committed a billing error as a result of which the Complainant condominium was not billed for approximately $8,521.50 in assessments. The billing error was discovered in 2003 and the condominium was notified of the billing error on December 15, 2003. The representative of the management agent, Todd Hassett, testified at the hearing. He freely admitted that an error had been made and he described the efforts thereafter between the parties to correct that error once it was discovered.

8. During the entire time period that the above delinquency remained outstanding,

the homeowners association did not assess interest or late fees on the delinquent amount.

9. The efforts of the parties to negotiate an amicable resolution to the delinquency

were hindered by the existence of other disputes between the parties involving such matters as

costs for maintenance of common areas in the community. While the Complainant condominium

continued to make some payments, the delinquency was apparently never completely cured; as of December 31, 2005 there still remained a delinquency of $8,521.50. Finally, on January 1, 2006, the homeowners association exercised its right to collect the delinquent amounts directly from the individual condominium unit owners. The homeowners association also exercised its rights pursuant to Section 3.1(b) of the Declaration to suspend the rights and privileges of the individual condominium unit owners who were delinquent. The homeowners association divided the delinquent amount into thirty-six parts and assessed each condominium unit owner $136.00. The testimony presented at the hearing was that the Association has restored the privileges for those condominium unit owners who have paid the $236.71 and who are otherwise current in their assessments. It has pursued collection action and suspended privilege for those who have not paid the $236.71.

10. The Complainant condominium gave as one reason for not resolving the delinquency amount after the billing mistake was discovered that two unit owners of the

condominium who owed assessments had filed for bankruptcy and had their obligations to pay assessments discharged. As a result the condominium could not collect the delinquent amount from its bankrupt unit owners and the condominium therefore wanted a corresponding credit from the homeowners association. The homeowners association however would not agree to give such a credit.

11. On the transaction histories for the condominium unit owners the Respondent homeowners association showed the $236.71 of the delinquency as “assmts.” The Complainant condominium has argued that this was therefore an improperly assessed “special assessment” under the Declaration. The Respondent homeowners association testified that the designation “assmts” was a function of the computer program used. It was not intended to describe “special assessments” within the meaning of the Declaration under the specific procedures for assessing a “special assessment” in Article V, Section 5.4.

12. There is no evidence or testimony in the record that the developer of the condominium and of the homeowners association, the condominium and the homeowners association themselves, or any of the managers of either of the entities ever attempted to comply with the formal requirements of Section 5.9 to establish a

procedure whereby the homeowners association collected assessments directly from the governing body of the condominium. There is also no evidence that any party ever objected to this procedure once it was put in place. The dispute between the parties involved the 2003 fiscal year billing error, the cost for maintenance issues that were in dispute and the efforts to obtain a credit for the condominium unit owners who had had their obligations discharged in bankruptcy.

13. In the course of the testimony it became apparent that the condominium board of

directors was not conducting its procedures in accordance with applicable law. Specifically, there appear to be instances where the board or several of the board members spontaneously convened closed meetings; there was at least one instance when a board member could not attend a meeting and therefore the board member's spouse attended and participated on behalf of the absent board member; apparently there were decisions made by telephone vote; the recording of the aforementioned actions by written minutes was lax. These several violations of law by the condominium, as it turns out, do not figure in the ultimate decision in this case, but they reflect the inattention of the parties to the business of their respective community associations. The homeowners association apparently never attempted to implement Section 5.9 properly. In view of the confusion arising from the billing error on the part of the homeowners association, it seems to the panel that the homeowners association was too quick to deprive condominium unit owners of their right and easement of enjoyment in the common areas. This inattention to detail may seem insignificant at one level, but

the unit owners of the 36 condominium units and the members of the homeowners association are entitled to better.

14. The condominium never apparently advised its individual unit owners that they had the option of paying the homeowners association assessments directly, while the condominium was negotiating the issue of the delinquency that resulted from the billing error. Complainant condominium apparently attempted to use the billing error, the amount of which was never in dispute, as leverage to obtain other concessions, primarily involving maintenance issues, from the homeowners association. During this time the individual unit owners of the condominium were losing their rights to the use of the common areas and common facilities.

CONCLUSIONS OF LAW

1. The Complainant condominium and Respondent homeowners association never formally implemented the procedure under Section 5.9 of the Declaration to allow the homeowners association assessments to be collected directly from the governing body of the condominium. That election must be made by formal written resolution and the parties candidly admitted that there is no such formal written resolution.

2. Notwithstanding the failure to implement formally the procedures of Section 5.9,

by the pattern of their conduct over a period of six and one-half years the parties followed that

procedure. Therefore, neither party can now complain that it was inapplicable. Neither party

appears seriously to make such a contention and in any event beginning in January 1, 2006 that

procedure is no longer followed. Therefore the issue of what procedure was in place from 1999

to 2006 may be moot except for certain specific consequences of that *de facto* procedure.

3. The panel believes that there are at least two consequences of acquiescing in the

procedure under Section 5.9. First, by allowing the homeowners association to collect the assessment directly from the governing body of the condominium, the condominium assumed responsibility for the payment of that assessment, and more importantly for the failure of any of its members, whether by delinquency, bankruptcy, foreclosure or otherwise, to stay current in their own assessments, including that portion that was to go to the homeowners association. The Panel finds this arrangement to be intended by the language of the governing documents of the homeowners association. Article V, Section 5.9 of the Norbeck Grove Community Association, Inc. Declaration of Covenants, Conditions and Restrictions provides that if

a subassociation elects to collect assessments from its members on behalf of the homeowners association, payment of such assessments "shall become an obligation of such Subassociation...." The condominium is therefore not entitled to a credit from the homeowners association for assessments not paid by condominium unit owners as a result of bankruptcies. Second, the obligation to pay the homeowners association assessments is an independent obligation undertaken by the condominium. Pooser v. The Lovett Square Townhomes Owners Association, 702 S.W.2d 226 (Tex. App 1 Dist. 1985); Rivers Edge Condominium v. Rere, Inc. 568 A2d 261 (Pa Super. 1990); Forest Villas Condominium v. Camerio, 205 Ga. App. 617, 422 S.E. 2d 884 (1992). It cannot be tied to or used as leverage with respect to any other obligations running between the parties. Specifically, the condominium, to the detriment of its individual members who were paying their assessments, should not have tried to use the delinquency in the homeowners association assessment as leverage to obtain other concessions from the homeowners association. The homeowners association's obligations with respect to maintenance are a separate covenant. The failure to maintain common areas, if that occurred, does not give the condominium the right to unilaterally exercise self-help by suspending payment of homeowners association assessments. The billing error that led to this dispute is unfortunate, but it appears that the management company did not attempt to hide that error, and that error occurred three years ago.

4. One purpose of the creation by Montgomery County Council of the Commission on Common Ownership Communities was to promote "an equitable balance between the powers of governing bodies, owners and residents." Section 10B-

1, Montgomery County Code. Another purpose was to provide education sources to those parties. The panel therefore feels that it must mention the irregularities in the manner in which the members of the board of directors of the Complainant condominium have conducted their affairs. Spontaneous telephone voting, spontaneous closed meetings, failure to keep adequate minutes, substitution of non-board members for board members at meetings, and failure to keep the members of the condominium informed are problems that became apparent during the course of this hearing. With respect to the homeowners association, the panel feels that it was too quick in depriving individual condominium unit owners of their right and easement of enjoyment to the community facilities and that it was lax in properly implementing Section 5.9. There should have been more notice and a larger opportunity to cure before rights were suspended.

5. The deprivation of the right and easement of enjoyment suffered by the individual unit owners of the condominium was not due to improper action by the homeowners association. The homeowners association was exercising the rights it has under Section 5.9 to pursue relief against individual unit owners. Rather, that deprivation of the right and easement of enjoyment was the result of the condominium's failure to understand and abide by the relationship in which it acquiesced for the collection of homeowners association assessments by

the homeowners association directly from the governing body of the condominium. Consequently it is the condominium that owes restitution, if there is to be any, to its individual members.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law it is as of the effective date of this decision

ORDERED:

1. Since the parties are no longer availing themselves of the procedures of Section 5.9, there is no relief to be granted with respect thereto. As to the past due assessments in dispute, the homeowners association has availed itself of the right to collect assessments from each individual condominium unit owner. As to future assessments, the homeowners association is no longer looking to the condominium to collect assessments on behalf of the homeowners association. The panel is inclined to order the parties to abide by the governing documents. However that is something they must do in any event.
2. The complaint is therefore dismissed and its request for relief denied.
3. The condominium is directed to provide a copy of this Decision and

Order to

each of its members within thirty (30) days from the effective date thereof.

4. The homeowners association is directed to provide a copy of this Decision and Order to each of its members (excluding the condominium members) within thirty (30) days from the effective date thereof.

The decision of the panel was unanimous.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Memorandum Decision and Order as provided under the Maryland Rules governing administrative appeals.

After this Decision and Order was issued, the Respondent called to the Panel's attention that it had incorrectly stated the amount due from each homeowner in the Complainant association. On motion by Respondent, and with no objection from Complainant, the Panel has revised the Decision so that the correct sum ($236.71) due from each homeowner is stated. This revised Decision is distributed to both parties; however, since the error is a clerical one not affecting the merits of the Decision, the effective date of the Decision remains the same.

_____John F. McCabe, Jr., Panel Chair