

Levy&BlackmanLLP

May 18, 2023

Evan Lemoine, President
Executive Board
The 903 Condominium Owner's Association, Inc.
903 Providence Place Management Office
Providence, RI 02903

Dear Mr. Lemoine:

This office represents Boyang Song and Travis McCune, the owners of Unit 334. We have been contacted in connection with a developing issue involving a proposed change to how gas charges are billed to unit owners for their individual (non-common) gas usage. Messrs Song and McCune have been advised that the Executive Board intends to institute a new practice of billing gas expense without metering and instead based on a formula that conflicts with the governing condominium documents and the Rhode Island Condominium Act. The Board should proceed with utmost caution before it violates the Condominium Act. It should instead provide the unit owners with all necessary information and put to a vote of the Association whether to perform the necessary repairs to the gas metering systems.

The background of this issue dates back to the initial use of the complex as income-producing rental property. The original apartment building was constructed with a master gas meter and each apartment was equipped with a submeter. Each submeter is wired into the gas lines servicing each residential unit, and each submeter transmits the usage information directly or through infrastructure to a master unit that operates as a receiver. The building owner was billed by the gas company for all gas used by the entire complex, and the landlord either billed its tenants for their individual gas usage based on the submeter or included gas and utilities in the rent.

The apartment complex was converted to a condominium in 2006. Neither the Condominium Declaration nor any of its amendments or restatements clearly address utility usage or the metering and submetering apparatus. Nevertheless, the practice followed that the Association received a single gas bill (in place of the former owner/landlord) and the Association passed individual usage to each unit based the submetering. The remainder was treated as common expense and was assessed to each unit based on the formula provided by the declaration. It now appears that the master receiving unit and many of the submeters require repair or replacement. The Board, perhaps in an effort to avoid the necessary repair cost, appears to have decided not to perform repairs to the common elements and to instead commence charging each unit for gas based on a "ratio utility billing system" (RUBS) that, in turn, relies on "occupancy" as one of several factors as a substitute for actual usage based on submetering.

The governing documents and the Condominium Act are clear on two points pertinent to this gas metering issue. First, it is the duty of the condominium association to maintain the common elements and each unit owner is responsible to maintain and repair his or her unit. RIGL § 34-36.1-3.07(a). The gas metering infrastructure is subject to § 3.07. Second, although a condominium declaration may require utilities to be assessed based on usage, see RIGL § 34-36.1-3.15(c)(3), in the absence of such a requirement, common expenses may only be assessed based on the formula set forth in the declaration.

RIGL § 34-36.1-2.07. The 903 Condominium allocates common expenses based on square footage and those percentages are calculated and scheduled out in Exhibit 2 to the Declaration. (This letter refers to this § 2.07 formula simply as “square footage.”) The square footage formula cannot be changed, except by the unanimous consent of all the unit owners. RIGL § 34-36.1-2.17(d). The Board has no power to amend the declaration and change the formula on its own. RIGL § 34-36.1-3.03(b).

The metering and submetering apparatus was originally part of the condominium infrastructure and is subject to the § 3.07(a) requirement that they be maintained. Historically, the Association relied on this metering system to separate individual gas usage from common gas usage. Although the gas company may have billed the aggregate gas use to the association (as it previously did to the landlord/owner), individual gas usage was always passed through to individual units based on the submetering infrastructure. Individual gas usage was never a common expense even though the Association's financial statements over the years show aggregate utility expense (all gas) which offset by utility income (attributable to payments by unit owners for individual usage based on submetering). The only real common gas expense has been for gas that is used in connection with the common elements (i.e., the pool, club house, outdoor grills, etc.). This historical practice obviously relies on the maintenance and repair of the gas metering apparatus and infrastructure, which the Association *is required* to do pursuant to § 3.07(a) of the Act.

The Board's apparent decision not to repair the metering system and to instead use a multi-factored, occupancy-based RUBS formula conflicts with the Condominium Act. First, it conflicts with the Association's duty to maintain and repair the common elements under § 3.07. Second, if one regards the aggregate gas usage by the condominium as a common expense (which it is not), then it can only be charged to the unit owners as common expense based on the formula prescribed by the declaration as required under § 2.07 of the Act. That means square footage. The RUBS method does not rely on square footage alone but is instead based on occupancy and other factors. There are obvious differences between “square footage” and “occupancy.” The former method is fixed (as required by the Act); the latter method is variable (which is prohibited by the Act). Thus, no matter how reliable the Association's third party vendor, may believe its formula to be as an alternative to submetering, it is not a formula that the declaration or the Act permits. Nor does the Condominium Act permit the Board to identify a particular class of common expenses and to allocate them according to some methodology of the Board's selection and choosing. In short, there is no legal theory under which the Board can employ the meterless RUBS methodology to assess gas usage to each unit based on multiple factors, including “occupancy.”

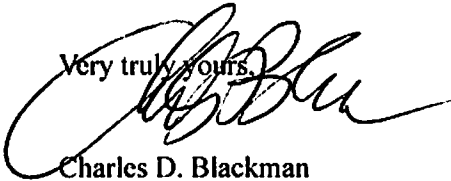
The obvious solution to the gas metering issue is to repair or replace the necessary submetering apparatus that has been in use from the inception of the condominium to pass through each unit's gas expense to each unit owner. While Messrs Song and McCune recognize that there may be some expense involved in repairing or replacing this equipment, the Association has a duty under § 3.07(a) to maintain and repair the common elements (and each unit has a duty to maintain and repair its unit) as noted above. In this respect, the repair and replacement of the submetering system is no different than a repair to the roof, the parking areas, or any other repair to the common elements that may arise from time to time. The common elements of every condominium require maintenance and repair (and sometimes replacement), and the Association is charged with maintaining that infrastructure and making repairs when necessary. It is beyond the scope of the business judgment rule for the executive board to “opt out” of making necessary repairs to the common elements.

There are a variety of ways a condominium association can pay for repairs as the need arises. First, it can spend money out of any available reserves if the association has built up reserves over time, which is a

prudent practice that well-run condominium boards generally follow in anticipation of a foreseeable need for exactly this type of capital expenditure. Second, an association can impose a special assessment. Third, in some circumstances, a condominium association may decide borrow money secured against a pledge its right to future income, including the right to receive common expense assessments. See RIGL § 34-36.1-3.02(a)(14). Some banks are willing to loan money to condominium associations on that basis. The one thing that the Board cannot do, however, is abdicate its statutory responsibility to repair the common elements when necessary and to pass the cost onto the units according to a multi-factored, RUBS / "occupancy" formula that is not provided for by either the documents or the Act.

To date, the Executive Board has given Messrs. Song and McCune and other similarly-situated unit owners the proverbial "brush off." I urge the Board to begin taking their concerns more seriously by providing the unit owners with the information necessary to decide as an Association whether to repair the gas metering infrastructure or to possibly amend the condominium documents so as to provide for dividing common gas expense in a manner other than square footage. The Board should not – and cannot – proceed without gas metering and divide all gas expense (individual and common) according to a formula not provided by the governing documents or the Act.

Very truly yours,



Charles D. Blackman

Cc Boyang Song & Travis McCune