STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2020-0320

ROBERT ST. ONGE

V.

OBERTEN, LLC

Defendant's Memorandum of Law in Response to Plaintiff's Brief in this Appeal from the 9th Circuit Court, District Division, in Manchester

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ARGUMENT

1. Simply put, there is no valid basis for Plaintiff's appeal, and, thus, the trial court's decision should be affirmed. The trial court properly concluded that Defendant's Live Free Structured Sober Living program constitutes a "group home" per RSA 540:1-a, IV(c), and is, therefore, exempt from RSA chpts. 540 and 540-A. Nor did Plaintiff's brief do anything to alter this conclusion, as such was merely a re-hash of failing arguments previously set forth. Additionally, Defendant has already thoroughly addressed in prior pleadings – even before this Court – the unsupported and conclusory arguments that Plaintiff continues to press. Thus, although Defendant may not repeat all such arguments herein, Defendant continues to rely upon the same and incorporates all prior arguments herein by reference. See Defendant's Motion (and Incorporated Memorandum) to Decline Acceptance of the Discretionary Appeal or for Summary Affirmance ("Motion for Summary Affirmance") and Exhibits B-D thereto.

2. As a threshold matter, and as previously argued, Plaintiff's appeal should be denied because Plaintiff failed to comply with proper appellate procedure. Plaintiff failed to file a notice of intent to appeal with the trial court prior to filing this appeal, even though such notice of intent is a prerequisite to appealing here.

3. RSA 540:20 provides that "[a]ny party to an action brought pursuant to this chapter shall, within 7 days of the date of the notice of judgment, file in the district court a notice of intent to appeal to the supreme court." (Emphasis added); see In re Robyn W., 124 N.H. 377, 379 (1983) (the "general rule of statutory construction is that the word 'shall' is

a command which requires mandatory enforcement"). RSA 540:13, II(d)(1)-(2) likewise requires that if a party "wishes to appeal the district court's decision, he must . . . File a notice of intent to appeal with the district court within 7 days of the notice of the district's decision." District Division Rule 5.10(b) similarly provides that "[a]ppeals are initiated by filing a Notice of Intent to Appeal with the Clerk within seven days[.]"

4. Thus, the applicable statutes and rules make clear that the timely filing of a notice of intent to appeal below is necessary before filing an appeal with this Court. Although Plaintiff may have timely filed his Notice of Appeal with this Court, Plaintiff failed to file any notice of intent to appeal with the District Division. He, therefore, failed file such notice of intent within the seven-day time-period prescribed by the above-mentioned statutes and rules. A review of the docket sheet below confirms the same. See Exhibit A to Motion for Summary Affirmance.

5. Accordingly, Plaintiff's appeal was never perfected. See Thayer v. State Tax Comm'n, 113 N.H. 113, 115 (1973) (affirming grant of motion to dismiss, explaining that no "appeal is or was properly pending . . . since the plaintiff has never fulfilled the statutory requirements for perfecting an appeal"). Therefore, this Court has no jurisdiction to hear this appeal, thereby necessitating affirmance of the decision below. See RSA 540:20 (providing that "[u]ntil the appeal is perfected . . . the district court shall retain exclusive jurisdiction of the case"); see also In re Carreau (Bd. of Trustees of City of Manchester Employees' Contributory Ret. Sys.), 157 N.H. 122, 123 (2008) ("We have repeatedly held that New Hampshire follows the majority rule regarding compliance with statutory time requirements, and, thus, one day's delay may be fatal to a party's appeal,"

and "compliance with a statutory appeal period is a necessary prerequisite to establishing jurisdiction in the appellate body"; thus, "petitioner's failure to comply with the appeal period set forth in RSA 541:6 . . . deprives this court of jurisdiction to hear his appeal" (quotations, emphasis, brackets omitted)); Route 12 Books & Video v. Town of Troy, 149 N.H. 569, 575 (2003) ("New Hampshire law requires strict compliance with statutory time requirements for appeals . . . because statutory compliance is a necessary prerequisite to establishing jurisdiction.").

6. Affirmance is also warranted to the extent that Plaintiff's brief includes new issues not included in his Notice of Appeal. The only issued raised therein is "[w]hether an unlicensed sober home is a group home within the meaning of RSA of RSA [sic] 540:1-a, IV(c)." Notice of Appeal, p. 6. No other issues were raised. Id. Thus, to the extent that Plaintiff's brief includes additional issues beyond the single issue raised – including issues pertaining to Emergency Order #4, purported licensing requirements for Defendant's program, issues pertaining to child-care and mentally-disabled adults, and more – Plaintiff has necessarily waived such matters, and this Court should refuse to entertain them. See Gunderson v. Comm'r, New Hampshire Dep't of Safety, 167 N.H. 215, 217 (2014) ("Because the Commerce Clause and Equal Protection issues were not raised in the notice of appeal, we deem them waived and will not address them further."); Lassonde v. Stanton, 157 N.H. 582, 587 (2008) ("Appellate questions not presented in a notice of appeal are generally considered waived by this court."); Halifax-Am. Energy Co., LLC v. Provider Power, LLC, 170 N.H. 569, 574 (2018) ("An argument that is not raised in a party's notice of appeal is not preserved for appellate review.").

7. The same result follows as to any arguments in Plaintiff's brief that were not raised below, and, thus, were not preserved. As the appealing party, Plaintiff, of course, bears the burden of demonstrating that the issues in his brief were raised below. See Halifax-Am. Energy Co., LLC, 170 N.H. at 574 (declining to "review any argument that the defendants did not raise before the trial court"); Milliken v. Dartmouth-Hitchcock Clinic, 154 N.H. 662, 665 (2006) (the "burden is on the appealing party to demonstrate that the issues on appeal were raised before the trial court").

8. Here, however, Plaintiff's brief contains issues not raised below, including as to children's homes/services (and child-care related issues generally), the state legislature's purported recent "attempts to pass legislation for the licensing and regulation of New Hampshire's sober homes," and more. See generally Brief. This Court should refuse to entertain such matters.

9. Because Plaintiff's brief should be limited only to the one issue raised in his Notice of Appeal – which focuses solely upon whether an allegedly "unlicensed" sober home can be excepted from application of RSA chpts. 540 and 540-A – Plaintiff has effectively waived any arguments against the multitude of arguments raised by Defendant below as to why the sober living program here constitutes a "group home" pursuant to RSA 540:1-a, IV(c). As described in Defendant's prior pleadings, which are incorporated by reference herein, Defendant raised numerous arguments to support the conclusion that the program here constitutes a "group home" under RSA 540:1-a, IV(c).

10. These arguments included, among others, those based upon: the plain statutory language of RSA 540; a review of the statute's amendment history; legislative intent; a review of other pertinent statutes; the common meaning/usage of "group home," given the undefined nature of the same in RSA 540:1-a, IV(c); helpful decisions from other courts concerning similar group homes; agreements signed by Plaintiff with respect to Defendant's program and by which Plaintiff agreed to be bound; the fact that Defendant does not constitute a landlord and Plaintiff does not constitute a tenant given the set-up of the sober living arrangements and the program in general; the fact that Plaintiff violated the rules of the program by, among other things, abusing a controlled substance at the sober facility, thereby placing the sobriety and lives of other program participants at stake; the purpose and structure of Defendant's program; the inapplicability of Emergency Order #4, particularly due to Emergency Order #24; prior decisions by the District Division that determined that two other programs similar to Defendant's program were also "group homes"; and public policy. See Exhibits B-D to Motion for Summary Affirmance. These arguments conclusively demonstrate that Defendant's program is a "group home" per RSA 540:1-a, IV(c).

11. By failing to raise in his Notice of Appeal any of the above issues, however, Plaintiff has waived any arguments in opposition to the same. See, e.g., Gunderson, 167 N.H. at 217; Lassonde, 157 N.H. at 587. Thus, Plaintiff has effectively conceded these points raised by Defendant, and he should not be entitled to attempt to rebut them now in his brief. As such, all these legal and factual matters – particularly the factual issues due to Plaintiff having stipulated at the final hearing to the facts stated by

Defendant[1] – that undergird Defendant's position that the sober living program here is a "group home" per RSA 540:1-a, IV(c), are all effectively unopposed by Plaintiff, despite Plaintiff's now after-the-fact attempt to address some such issues for the first time in his brief.

12. Additionally, to prevail here, Plaintiff would need to show that all of Defendant's arguments concerning the program's "group home" status were legally and factually incorrect. Unfortunately for Plaintiff, however, given his concessions, such is impossible.[2] Nor does Plaintiff's

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[1] See Exhibit C to Motion for Summary Affirmance, n.1; Plaintiff's Brief, p. 13. Because Plaintiff stipulated to the facts in Defendant's Motion to Vacate, see Exhibit B to Motion for Summary Affirmance, Plaintiff's attempt to inject new and/or different facts into his brief (and Notice of Appeal) is a nonstarter and should be ignored. This includes but is not limited to: the purported amount of money that participants pay to enroll and participate in Defendant's program; the purported reason for Plaintiff's expulsion from the program; whether Plaintiff was "evicted" from the group home; and licensing issues. See Brief; Notice of Appeal. Many such issues, including the program's cost, were never discussed or addressed by Defendant below (nor are these matters relevant), and other assertions by Plaintiff – such as whether he was expelled only for "failing to turn over all his prescription medication" – are simply inaccurate. See Exhibits B-D to Motion for Summary Affirmance.

[2] For example, from a factual standpoint, Plaintiff stipulated to, among other things, the following, which facts were in Defendant's Motion to Vacate and Dismiss, see Exhibit B to Motion for Summary Affirmance: the sober living program at issue contains 12 program participants all striving toward the common goal of sobriety; program participants live in a group setting similar to dormitories, as Plaintiff was only provided limited furnishings and a roommate – he was not provided with a kitchen, private bathroom or other amenities necessary to lease the space out as a stand-alone rental unit; all participants, including Plaintiff, signed agreements that prescribed various rules each participant agreed to be bound by and which explicitly provided that no landlord-tenant relationship existed; Plaintiff

brief do anything to suggest a contrary conclusion. Accordingly, this provides yet another reason to affirm.

13. The same conclusion follows when addressing Plaintiff's sole appellate issue, in which he asserts that Defendant was required to be licensed (perhaps as a licensed child-care facility) under RSA 151, 161, RSA 47:11-b, or another statutory provision to properly constitute a "group home" under RSA 540:1-a, IV(c). Thus, according to Plaintiff, because Defendant allegedly operates an unlicensed facility for adults where a license is supposedly required,[3] Defendant's program cannot be exempted from the provisions of RSA chpts. 540 and 540-A. See Brief.

14. Respectfully, the issue of whether any licensing may be required for Defendant's program here – an argument that undergirds Plaintiff's appeal – is not properly before this Court. This is because the District Division is a court of limited jurisdiction that has no ability to determine whether any licensing for Defendant's sober living program is

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violated said rules by, among other things, abusing medication at the sober facility, and, thus, he knew, per the signed agreement, that he was subject to immediate expulsion from the program; and Plaintiff never rented or leased any space from Defendant, as the sober living accommodations were merely ancillary to the program's primary purpose to help participants become and stay sober.

These, and other facts Plaintiff stipulated to, render it impossible for Plaintiff to overcome the conclusion that the program at issue here certainly constitutes a "group home" under any reasonable interpretation of that term. Such also comports with the trial court's conclusions in other cases involving similar programs to Defendant's program, which were discussed and cited to in the Motion to Vacate and Dismiss. See id.

[3] Note, though, that Plaintiff concedes that "New Hampshire does not require a license for a recovery house," such as the program here. Brief, p. 21.

required for it to operate or required to constitute a "group home." See Friedline v. Roe, 166 N.H. 264, 266 (2014) (the "district division of the circuit court is a court of limited jurisdiction with powers conferred upon it by statute"). Rather, only a court of general jurisdiction, such as the Superior Court, or perhaps an appropriate administrative body, would have jurisdiction to entertain such licensure questions. Thus, neither the District Division, nor this Court now, is the proper venue to adjudicate such matters.[4]

15. This is especially so because there is no developed record regarding any licensing matters. During the hearing below, Plaintiff stipulated to all facts in Defendant's Motion to Vacate and Dismiss, and there were no facts in said pleading concerning the purported need for Defendant's program to be licensed or not. See Exhibit B to Motion for Summary Affirmance. Nor did Plaintiff ever: (a) file a declaratory judgment action concerning the purported licensing issue; (b) seek a stay of the District Division matter to determine purported licensing requirements for Defendant's program; or (c) take any other action to try to create a record concerning whether Defendant's program must be licensed to operate.

16. Additionally, Plaintiff's petition per RSA 540-A – by which this action was initiated – is, by its terms, necessarily limited to the few prohibited practices in the landlord-tenant context set forth in that statute.

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[4] Nor does Plaintiff have standing to raise these purported licensing issues. Only a proper administrative agency or other governmental body that provides licenses would have standing to bring a claim (or impose a fine or other penalty) premised upon certain licensing that may be required.

As this Court is aware, there is nothing within RSA 540-A that relates to licensing issues, and, thus, such matters are beyond the subject matter and scope of the petition Plaintiff filed. Thus, neither the District Division nor this Court is in a position – particularly now – to opine upon such licensing matters, especially when there is no jurisdiction in the first instance to decide the same. See RSA chpt. 540-A. Thus, this licensing question, upon which Plaintiff's entire appeal is premised, cannot and should not be answered by this Court now, thereby requiring affirmance of the decision below.[5]

17. Affirmance is also warranted because much of Plaintiff's brief is conclusory, with little or no developed argument or adequate authority cited in support. See generally Brief. For example, Plaintiff – without any citation – claims that "[w]hen RSA 540 was first enacted in 1985, and the term 'group homes' was used by the legislature, there was a peculiar and appropriate meaning for the term group home." Brief, p. 17.

[5] As explained in prior pleadings, which are incorporated herein by reference, the supposed need for Defendant's program to be licensed ignores the plain language and legislative history of the statute at issue, and is, in fact, simply irrelevant to the question as to whether the program constitutes a "group home" under RSA 540:1-a, IV(c). This is especially so due to the broad, undefined nature of the term "group home" in the statute. See Exhibits B-D of Motion for Summary Affirmance. Given the program's structure, the agreements entered into between the program and its participants, the statutory language in RSA 540, and the proper analysis of the same, the program here necessarily fits within the common meaning and usage of the term "group home," regardless of any licensing that may be required. Thus, the only conclusion that can be reached here is that Defendant's program is exempted from the provisions of RSA chpts. 540 and 540-A, as there is no landlord-tenant relationship.

Nor does Plaintiff explain such a bald assertion with developed legal argument. Id. Likewise, large swaths of Plaintiff's brief are devoid of citation to authority for the propositions therein. See, e.g., id. p. 23, 25. Other assertions by Plaintiff – such as his claims about how the term "group home" is supposedly "commonly used in the mental health and child services communities," and the alleged vulnerability of Plaintiff – are, at best, conclusory and without factual support. See id. p. 20, 26.

18. As this Court has stated, these sorts of arguments, which amount to nothing more than "a mere laundry list of complaints regarding adverse rulings by the trial court, without developed legal argument, [are] insufficient to warrant judicial review." State v. Blackmer, 149 N.H. 47, 49 (2003) (quotation omitted). Accordingly, affirmance is warranted.[6]

19. To the extent that Plaintiff relies upon public policy, see Brief at p. 22-23, this Court should decline to entertain it. At bottom, and to the extent that the merits are reached, the issue on appeal is one concerning statutory interpretation, not a public policy debate. As explained by this Court, "we will not undertake the extraordinary step of creating legislation where none exists. Rather, matters of public policy are reserved for the legislature." In re Blanchflower, 150 N.H. 226, 229 (2003) (quotation omitted)); see also Appeal of Northridge Envtl., LLC, 168 N.H. 657, 662

[6] Plaintiff's fleeting reference on page 21 of his brief to alleged recent "attempts to pass legislation for the licensing and regulation of New Hampshire's sober homes" is likewise devoid of support and should not have any bearing upon this Court's interpretation of the plain statutory language at issue. This is especially so given Plaintiff's concession that those legislative "efforts" have all "failed." Brief, p. 21.

(2016) (noting concerns raised by respondent "implicate matters of public policy that are better left to the legislature").

20. That said, if this Court does consider public policy, such should resolve in Defendant's favor. If the Court were to reverse the trial court and determine that Defendant's sober living program is not a "group home" under RSA 540:1-a, IV(c), such that the provisions of RSA chpts. 540 and 540-A would apply, not only would the Court be ignoring pertinent (and stipulated) facts – including the contracts entered into by Plaintiff that expressly state that no landlord-tenant relationship exists – but the Court would also cause devastating effects throughout New Hampshire.

21. In fact, if this Court concluded that Defendant's program was not a "group home," a broad range of common-law group homes that have existed for decades would no longer be excepted from the landlord-tenant statutory scheme. Such could have drastic consequences, including for drug and alcohol addiction group homes, where such would then be required to go through the lengthy eviction process before removing program participants. This is so even if a participant – like Plaintiff – puts the wellbeing, safety, and lives of other program participants at issue due to certain rule violations, such as the abuse of medication/alcohol in a sober living program. This result would be absurd and contrary to public policy. Thus, this provides yet another basis to affirm the decision below. See Hogan v. Pat's Peak Skiing, LLC, 168 N.H. 71, 73 (2015) (explaining that the court will "construe all parts of a statute together to . . . avoid an absurd or unjust result" (quotation omitted)).

22. As to Plaintiff's argument concerning Emergency Order #4, such is a nonstarter. As explained in prior pleadings, which are

incorporated herein by reference, Emergency Order #4 has no application since it only applies to eviction proceedings under RSA chpts. 540 and 540-A. See Exhibits B-D to Motion for Summary Affirmance. Here, however, there was no landlord-tenant relationship, as Defendant's program (in which Plaintiff was a participant) constituted a "group home." Thus, Defendant's program is explicitly exempted from the requirements of RSA chpts. 540 and 540-A. See RSA 540:1-a, IV(c).

23. Such conclusion is buttressed by the fact that no eviction proceeding ever commenced; rather, Plaintiff was merely discharged from the program and ancillary sober living facility after violating various rules – including when he abused medication, and, thus, put the sobriety and lives of other program participants in jeopardy.

24. Additionally, Plaintiff initiated this action via a petition under RSA 540-A, rather than Defendant having initiated anything. Thus, it was Plaintiff that claimed the protections of RSA chpts. 540 and 540-A. Stated differently, Defendant did not initiate any action, and so Emergency Order #4, by its plain terms, cannot apply, as it is premised upon only prohibiting landlords from "initiat[ing] eviction proceedings under RSA 540 during the State of Emergency." Brief, p. 9. Additionally, Defendant has always maintained that there is no landlord-tenant relationship here, and, therefore, there was no "eviction" in any sense. Rather, Plaintiff was merely discharged from a sober living program for violating the program's rules, including the prohibition against abusing medication. Nor is there anything within the plain language, or via any reasonable interpretation, of Emergency Order #4 that would suggest that it was intended to apply to

sober living programs or other group homes. Accordingly, the only rational conclusion is that Emergency Order #4 has no application here.

25. Even if Emergency Order #4 applied, as explained in prior pleadings that are incorporated herein by reference, Emergency Order #24 clarified that the temporary prohibition on initiating eviction proceedings did not apply when there was a "substantial adverse impact on the health or safety of the other persons residing on the premises." See Exhibit C, p. 13, Motion for Summary Affirmance. Clearly, Plaintiff's actions – particularly his medication abuse in a sober living program – not only violated the program's rules, but it also put the sobriety, and, thus, the health, safety, and lives of all other program participants in jeopardy. Accordingly, any reliance by Plaintiff upon Emergency Order #4 is erroneous, as any supposed "eviction" action against Plaintiff – to the extent one was initiated – would have been able to proceed via the plain language of Emergency Order #24.

26. However, this Court need not address such Emergency Orders, as the same only apply to evictions governed by RSA chpts. 540 and 540-A, which do not apply here given the "group home" status of Defendant's program. Thus, Plaintiff was validly and justifiably discharged from Defendant's sober living program following his rule violations – rules that he agreed to be bound by in a signed agreement.

27. To the extent that this Court addresses the merits, despite the various procedural and other threshold issues plaguing Plaintiff's appeal, Defendant has already conclusively demonstrated – including in a detailed Memorandum of Law – that the sober living program at issue constitutes a "group home" per RSA 540:1-a, IV(c), such that it is exempted from the

requirements of RSA chpts. 540 and 540-A. This is so from both a legal and factual perspective.

28. Because Defendant has already competently and exhaustively articulated these arguments in prior pleadings, there is no need to repeat them. Defendant, nonetheless, continues to rely upon such arguments and incorporates the same herein by reference. See Motion for Summary Affirmance and Exhibits thereto. Accordingly, there is only one rational conclusion here: affirmance of the trial court's decision.

CONCLUSION

29. As discussed above, and as explained in prior pleadings – which arguments are incorporated by reference – the only reasonable conclusion here is that the trial court properly determined that Defendant's sober living program constituted a "group home" per RSA 540:1-a, IV(c) such that it is exempted from RSA chpts. 540 and 540-A. Thus, the trial court's decision ought to be affirmed, and Plaintiff's appeal should be dismissed.

30. Finally, by virtue of this Memorandum, Defendant maintains that oral argument is unnecessary. Such conforms with Supreme Court Rule 16(4)(b).

Respectfully submitted,

OBERTEN, LLC

By its Attorneys,

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Date: January 13, 2021

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading has this 13th day of January 2021 been served via the Court's e-filing system upon all counsel of record. I further certify that this pleading complies with the applicable word limitations set forth in the Supreme Court Rule 16, as there are 3,952 words in this pleading, exclusive of the title page, signature block, and certificate of service.

/s/ Craig Donais
Craig Donais, Esq.