THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2020-0370

Carter Country Club, Inc.

v.

Carter Community Building Association, Inc.

Rule 7 Mandatory Appeal from
Grafton County Superior Court

BRIEF OF APPELLANT, CARTER COMMUNITY BUILDING ASSOCIATION

Jeremy D. Eggleton, Esq.
NH Bar #18170
Orr & Reno, P.A.
45 S. Main Street, P.O. Box 3550
Concord, NH 03302-3550
Phone: (603) 224-2381
Fax: (603) 224-2318
jeggleton@orr-reno.com

To be argued by:
Jeremy D. Eggleton, Esq.

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PERTINENT NEW HAMPSHIRE CONSTITUTIONAL PROVISIONS AND NEW HAMPSHIRE STATUTES

477:3-b Limitations on Possibilities of Reverter, Rights of Re-entry, and Executory Interests. –

I. This section applies only to legal future interests in real property created by deed, will, or power of appointment and not to any beneficial interests created by or through trusts. This section shall not apply to rights of forfeiture or re-entry held by lessors or mortgagees, nor to conveyances of standing trees governed by RSA 477:35-a or RSA 477:35-b, nor to options to purchase real estate, whatever their form.

II. (a) After December 31, 2008, no legal possibility of reverter, right of re-entry, or executory interest in real property may be retained or created unless either the grantor or the grantee is a public or charitable organization. Any language purporting to retain or create such a future interest shall be void. Language which also creates a covenant may be enforced as such by an action at law or equity but without forfeiture.

(b) For purposes of this section, an organization is public or charitable if it is:

(1) The state of New Hampshire.

(2) A political subdivision or municipal corporation of the state of New Hampshire.

(3) A corporation organized under RSA 292, a religious organization, or a not-for-profit corporation chartered by act of the New Hampshire general court or United States Congress.

(4) A nonprofit organization qualified under section 501(c) of the Internal Revenue Code of the United States, as amended.

(5) A trustee as defined in RSA 7:21, VIII.

III. Renewal declarations shall be required in certain cases.

(a) Unless the original grantor or grantee of the interest was, or the present owner of the interest is, a public or charitable organization, any existing possibility of reverter, right of re-entry, or executory interest in real property shall become void unless renewal declarations are filed in the appropriate registry of deeds as hereinafter provided. Covenants as such are not subject to renewal and remain enforceable by an action at law or equity but without forfeiture.

(b) Times of filing future interests under this section shall be as follows:

(1) A declaration of renewal of an existing possibility of reverter, right of

re-entry, or executory interest in real property that was retained by or granted to a natural person need not be recorded while owned by that person. Any subsequent heir, devisee, grantee, creditor, or other successor to such interest shall record a declaration within 3 years after acquiring it or the interest shall become void.

(2) A declaration of renewal of an existing possibility of reverter, right of re-entry, or executory interest in real property other than those retained by or granted to a natural person shall be filed on or before January 2, 2011, and if such declaration is not filed within such time, the interest shall become void.

(3) A declaration shall be recorded once in every 25 years after the initial declaration is filed, and any interest for which such a declaration is not filed shall become void 25 years after the filing of the last renewal declaration.

(c) A declaration shall be signed and acknowledged by the declarant in the same manner as a deed and contain:

(1) A statement that the declarant owns all or part of a future interest reserved or created by a specified instrument and the declarant's current mailing address.

(2) The date of that instrument and the book and page, probate file, or other specific place where the instrument is recorded.

(3) The names of the owner or owners of the property rights subject to the future interest as of the time the declaration is filed.

(d) Each declaration shall be indexed in the grantor index under the name or names of the persons stated therein to be the owners of the property right subject to the future interest at the time of filing.

(e) The original declaration shall be returned to the declarant after recording in the same manner as a deed.

(f) A declaration which is actually recorded and correctly indexed shall be effective despite failure to name all present owners of the property subject to the future interest so long as at least one owner was correctly identified.

(g) The fee for filing a declaration shall be the same as for a deed.

IV. Unclaimed future interests of defunct public or charitable organizations shall be treated in the following manner: Whenever it shall appear that a public or charitable organization holding a possibility of reverter, right of re-entry, or executory interest has been defunct for more than 3 years with no successor to the future interest provided for or action commenced to determine a successor, the director of charitable trusts shall either commence such an action or, if it appears to be in the public interest,

release the future interest to the owners of the underlying estate, with or without conditions.

Source. 2008, 228:2, eff. Jan. 1, 2009.

514:9 Amendments. – Amendments in matters of substance may be permitted in any action, in any stage of the proceedings, upon such terms as the court shall deem just and reasonable, when it shall appear to the court that it is necessary for the prevention of injustice; but the rights of third persons shall not be affected thereby.

Source. RS 186:11. CS 198:11. GS 207:9. GL 226:9. 1879, 7:1. PS 222:8. PL 334:9. RL 390:9.

QUESTIONS ON APPEAL

1. When two parties irrefutably created a property interest to preserve a piece of property as a golf course in perpetuity, did the trial court err in determining that the interest was a power of termination rather than a reversionary interest? Preserved in CCBA's Cross Motion for Summary Judgment at ¶12.

2. Did the trial court err in not looking beyond the four corners of the deed instruments, including specifically to the Affidavit of Barry Schuster, Esq., when the language of the deeds, as construed by the Plaintiff, created ambiguity? Preserved in CCBA's Cross Motion for Summary Judgment at ¶13.

3. Did the trial court err in setting aside the uncontested Affidavit of Barry Schuster, Esq. when that affidavit either (a) created a triable issue of fact concerning the intent of the parties or (b) established the undisputed intent of the parties to the original instruments and agreements? Preserved in CCBA's Cross Motion for Summary Judgment at ¶13.

4. Did the trial court err in ruling that the power of termination was not transferable to a third party when the power of termination was coupled in the same instrument with an enforceable covenant, for the benefit of the Carter Community Building Association, requiring the land be preserved as a golf course in perpetuity? Preserved in CCBA's Cross Motion for Summary Judgment at ¶15.

5. Did the trial court err in ruling that the CCBA could not seek to enforce the covenant requiring the land in question to remain a golf course in perpetuity? Preserved in CCBA's Cross Motion for Summary Judgment at ¶16.

6. Did the trial court err in ruling that the 1991 Order and 1994 Docket Marking did not quiet title to the power of termination/reversionary interest in the CCBA at that time, rendering this case moot ab initio? CCBA's Motion for Reconsideration (May 15, 2020) at ¶3.

7. Did the trial court err in ruling that the so-called power of termination was quieted in the Plaintiff's successor in interest in 1991 or 1994, when, if the trial court's ruling was correct, it was distributed to the shareholders of the original grantor in 1987 upon dissolution of that corporation? CCBA's Motion for Reconsideration (May 15, 2020) at ¶4.

8. Did the trial court err in ruling that the interest created by the parties was a power of termination that should apply retroactively to the 1991/1994 quiet title determination against the shareholders of the original grantor, when those shareholders had no reason to believe at the time that the power of termination/possibility of reverter was part of the bundle of rights in dispute in that action, giving them no notice, nor opportunity to

litigate that question? CCBA's Motion for Reconsideration (May 15, 2020) at ¶¶5, 6.

STATEMENT OF THE FACTS AND THE CASE

Historical Facts and Relevant Title Record

The Carter Country Club is a small public golf course located on Mechanic Street in Lebanon, New Hampshire. In 1986, the eponymous corporation that owned the golf course decided to sell the property to a buyer, Fred Fish of the Farnum Hill Trust (Lebanon attorney Thomas Welch, Jr. Esq., Trustee). *See* Appendix to Brief of Carter Community Building Association, Inc. at 82, 82-84 (Affidavit of Barry Schuster, Esq., September 9, 1991) ("App at ___"). Edmond Goodwin was a local character whose family held a majority interest in the original Carter Country Club, Inc., and who wished to ensure, as part of the purchase, that the property would forever remain a golf course available to the people of Lebanon and the Upper Valley Community. *Id*. at 82. This desire to preserve the golf course forever for the public was not an ancillary consideration; it was the intent of Mr. Goodwin from the very start of negotiations concerning the sale of the club. *Id*. at 82. The price and terms of conveyance of the club from the Goodwin Family to Farnum Hill Trust were predicated upon the inclusion of a restrictive covenant binding the grantee to preserve the club as a golf course, and a reversionary interest in the grantor that protected the covenant. *Id*. at 82. The original Carter Country Club Inc's board approved the sale of the golf course under a resolution that expressly included the restriction on use of the property for something other than a golf course. *Id*. at 83.

Because the golf course was the sole functional purpose of the original Carter Country Club, Inc., the board resolved to wind up within a year of the conveyance to Farnum Hill Trust, and to convey its reversionary rights to a public entity or eleemosynary organization. *Id*. at 83. Mr. Fish, for Farnum Hill, approved this transaction at the same board meeting. *Id*. at 83. The parties and counsel discussed and agreed upon the language of the instruments, including the intent, operation and assignability of the restrictive covenant and the reversionary interest in March 1986. *Id*. at 83.

All parties to the transaction were aware of, and approved, the transfer of the reversionary interest from the original Carter Country Club Inc. to a charity or a public entity. *Id*. at 83. The sale from the Goodwin Family and the original corporation would never have occurred but for the existence of the reversionary interest. *Id*. at 84. Ultimately, the board of the Carter Country Club Inc. selected the highly regarded local non-profit Carter Community Building Association, Inc. (the Appellant or "CCBA") as the guardian of the reversionary interest and, by extension, the community golf course known as the Carter Country Club. *Id*. at 84.

The paired covenant and reversionary interest in the deed from Carter Country Club Inc. to the Farnum Hill Trust read:

> The above described premises, shall be SUBJECT, HOWEVER, to the following RESERVATION, CONDITIONS AND RESTRICTION which shall run with the land and be binding on the Grantee, and all his successors and assigns:
>
> At all times in perpetuity, a nine hole golf course shall be maintained and operated on the premises. The term "nine hole golf course"

shall mean a golf course with nine playing holes with a total playing distance of at least 3,000 yards. The terms “maintain and operate” shall mean maintaining the existence and use of said course for golfing and recreational purposes during normal and customary golfing seasons, except for reasonable interruptions for course improvements, alterations, and maintenance. The location of the property set aside for and containing the golf course shall be referred to as the “golf course area”.

The above restriction shall not prohibit the use of portions of the property not included within the golf course area for other uses, (including but not limited to residential use or use for recreational purposes other than golf), provided that:

(a) Said other use or uses shall not unreasonably interfere with or impair the use of the golf course area as a nine hole golf course;

(b) If any portion of the property is conveyed to third parties in connection with said other uses, there shall at all times remain under contiguous ownership the golf course area, dedicated to use as a nine hole golf course as provided above; and

(c) Easements for access and utilities may be created over the golf course area to supplement or enhance said other uses provided that such easements shall not unreasonably interfere with the use of the golf course

> area as a nine hole golf course as provided above.
>
> The golf course area may be changed by the owner thereof from time to time in size and configuration, provided that the minimum requirements for a nine hole golf course as stated hereinabove continue to be met.
>
> If at any time the above requirements for maintenance and operation of a nine hole golf course are not met for a period of one year, the title to the golf course area (in its configuration and boundaries at the time of its last use as a golf course and as required to be dedicated as set forth above) shall, at the option of the Grantor or its successors or assigns, revert to Grantor, or its successors or assigns.
>
> This restriction and the right of reversion shall be binding upon and shall inure to the benefit of, Grantor and Grantee and their respective heirs, executors, administrators, successors and assigns as a covenant that shall run with the land, in perpetuity.

See App. at 33 (Affidavit of Douglas Homan at Exhibit A) (Deed of Trust from CCC, Inc. to Welch/Farnum Hill Trust, July 30, 1986, recorded July 31, 1986 at Book 1611, Page 644 of the Grafton County Registry of Deeds).

Six months later, the dissolving original Carter Country Club, Inc. conveyed its rights in the said reservation, conditions, and restriction to the CCBA. App. at 35-37 (Homan Aff. at Exhibit B, Deed into CCBA dated December 30, 1986, recorded February 13, 1987 at Book 1652, Page 797 of the Grafton County Registry of Deeds). The conveyance from the original

Carter Country Club, Inc. into the CCBA included, expressly, the benefit of the restrictive covenant expressed in the Deed from the original Carter Country Club, Inc. to the Farnum Hill Trust, as well as the reversionary interest in the property for failure to abide by the restriction. *Id*.

In 1990, Plaintiff/Appellee the new Carter Country Club Inc. (exclusively identified as "Plaintiff" herein to distinguish it from the original Carter Country Club, Inc.), led by Mr. Homan, acquired the Carter Country Club and set about attempting to dissolve the reversionary interest in order to develop the property into housing. *See* App. at 144 (showing docket information in Grafton County Superior Court No. 90-E-0248, *Lebanon-Farnum Corp. v. Shareholders of Carter Country Club et al*.). That litigation was resolved in 1994 without resolving the status of the reversionary interest.[1] *See* App. at 167-69.

Procedural History of this Case

Some twenty-five years later, the Plaintiff revived its effort to annul the CCBA's reversionary interest in the Carter Country Club by filing this action to quiet title. *See* App. at 4-9 (Plaintiff's Complaint). The Plaintiff argued that the interest conveyed was not a reversionary interest; that if it was a reversionary interest, it was barred by the Rule Against Perpetuities; and that the reversionary interest, if valid, was not alienable and therefore never vested with the CCBA. *See* Decree of January 22, 2020, by Notice of January 24, 2020 at 4-5 ("Decree at ___").

The CCBA answered and counterclaimed, arguing that the interest was not barred by the Rule Against Perpetuities; that the interest in question

[1] It was in the context of this litigation cycle that Attorney Schuster prepared the Affidavit attached to CCBA's Cross-Motion for Summary Judgment. *See* App. at 82-84.

was a reversionary interest, not a right of reentry or power of termination; and that even if it were a right of reentry, such an interest is alienable if coupled, as here, with a tangible property interest. See App. at 10-18 (CCBA's Answer and Counterclaims).

The parties filed cross-motions for summary judgment on these arguments. As part of its Cross-Motion for Summary Judgment, the CCBA also moved simultaneously to amend its Answer and Cross/Counterclaims to include a claim for simple enforcement of the restrictive covenant burdening the Plaintiff for the benefit of CCBA (and the public). *See* Plaintiff's Motion for Summary Judgment, Affidavits and Memorandum of Law (App. at 19-54); CCBA's Cross-Motion for Summary Judgment, Affidavit and Memorandum of Law (App. at 55-118), Motion to Amend Answer and Counterclaims (App. at 119-124).

The trial court held oral argument on November 24, 2019 and issued the Decree on January 22, 2020, determining that the interest held by CCBA was a right of reentry or power of termination, and that such an interest was not alienable from the original grantor.[2] Decree at 6. The trial court further found that, because the interest was not alienable, it remained in the original Carter Country Club, Inc. or its successors-in-interest following dissolution. *Id*. In other words, the power of termination was not annulled; it continued to burden the property, albeit in the hands of a party, or a set of parties, not named in the action. *Id*.

The Plaintiff then moved for clarification, arguing that this quiet title action established a fee simple interest in the Plaintiff free and clear of that

[2] The trial court never addressed the question whether the conveyance violated the rule against perpetuities. Decree at 8.

of any other party. App. at 125-28. On March 5, 2020, the trial court denied the motion to clarify, but ordered the Plaintiff to brief the question of whether there were any other parties who have or may have some estate or interest in the property and who should have been named in the action. Order of March 5, 2020 ("Order on Clarification").

The Plaintiff filed a response to the Court's Order on Clarification on May 4, 2020, citing—for the first time in this case—the trial court's September 18, 1991 order (the "1991 Order") and its 1994 Docket Marking (the "1994 Docket Marking") in the 1990 dispute over these same issues. App. at 135-73. Those orders purportedly quieted title to all the assets of the original Carter Country Club, Inc. in the Plaintiff, except the reversionary interest, which was expressly reserved by the trial court, and later the parties for later adjudication. App. at 167-68, 169. In its Response, the Plaintiff asked the trial court to decide that those rights, too, were retroactively vested in the Plaintiff by operation of the 1991 Order and the 1994 Docket Markings because the conveyance of the right of reentry/power of termination to CCBA had *now* been decreed to be void. App. at 135-42.

On May 14, 2020, the trial court issued an order consistent with the Plaintiff's Response, decreeing that the effect of the 1991 Order and 1994 Docket Markings, in light of the Court's January 22, 2020 Order, was to vest the possibility of reverter/power of termination in the Plaintiff and thereby terminate it. May 14, 2020 Order ("Order on Plaintiff's Response and Motion for Reconsideration").

CCBA moved to reconsider, arguing that the trial court's own rationale concerning the inalienability of powers of termination barred the

original Carter Country Club, Inc. from transferring—intentionally or otherwise—the power of termination to the Plaintiff. App. at 173-76. This was particularly the case when all potential shareholders of the original Carter Country Club, Inc. would have understood and believed at the time of its corporate dissolution that the power of termination had been lawfully transferred to CCBA. App. at 174. The trial court denied CCBA's Motion for Reconsideration. Order on Motion for Reconsideration, July 14, 2020, via notice of July 15, 2020. This appeal followed.

SUMMARY OF THE ARGUMENT

The plain language of the deed in question makes no mention of a power of termination or a right of re-entry. It expressly talks about a "right of reversion." Either that language is unambiguous and clearly creates a transferable "right of reversion" or possibility of reverter; or, it is ambiguous, and the substantial, compelling extrinsic evidence of the parties' intentions show that the parties intended to create a transferrable reversionary interest. In either case, the right of reversion was validly transferred to CCBA in 1986 and may be exercised by CCBA today.

Alternatively, even if the "right of reversion" is considered to be a "power of termination," it was conveyed together with a future interest reserved in the grantor, in the form of a restrictive covenant, burdening the property in perpetuity for the express benefit of the grantor. When conveyed together, the power of termination was properly conveyed.

Alternatively, the "right of reversion" was just part of the interest conveyed. The other part was a restrictive covenant requiring the grantee to maintain a portion of the property as a golf course in perpetuity. The grantee, now the Plaintiff, had great flexibility within that basic constraint,

but still had to abide by the restriction. That restriction inured to the benefit of the original grantor and was conveyed lawfully to the CCBA in 1986. The CCBA may enforce that covenant, separately and independently from the so-called "right of reversion." It was error for the trial court to deny the CCBA its motion to amend its counterclaims to seek enforcement of that covenant.

Finally, the trial court erred in ruling that two orders of the trial court from 1991 and 1994, respectively, had the retroactive effect of quieting title to the "right of reversion" in the Plaintiff following its 2020 Decree. The parties in the 1990 lawsuit never understood that the shareholders potentially held the "right of reversion" because that issue was never fully and fairly litigated in that action. So, the orders in that case cannot bind the trial court and the parties—named or unnamed—in this case.

ARGUMENT

I. Standard of Review

This case involves the interpretation of a deed and the facts surrounding the conveyance. As this Court has observed:

> The proper interpretation of a deed is a question of law for this court. As a question of law, we review the trial court's interpretation of a deed de novo. In interpreting a deed, we give it the meaning intended by the parties at the time they wrote it, taking into account the surrounding circumstances at that time. We base our judgment on this question of law upon the trial court's findings of fact. If the language of the deed is clear and unambiguous, we will interpret the intended meaning from the deed itself without resort to extrinsic evidence. If, however, the language of the deed is ambiguous, extrinsic evidence of the parties' intentions and the circumstances surrounding the conveyance may be used to

> clarify its terms. When interpreting the parties' intent, we consider the deed as a whole. We generally disfavor interpreting deed conditions in such a way that would cause a forfeiture of the property upon breach of such conditions; however, we adhere to the guiding principle that the intent of the parties should be effectuated whenever possible. Furthermore, we remain mindful that formalistic requirements in real estate conveyancing have largely given way to effectuating the manifest intent of the parties, absent contrary public policy or statute.

White v. Auger, 171 N.H. 660, 663–64 (2019) (citations, quotations and brackets omitted for clarity).

II. The parties to the original transaction intended to create, and did create, a reversionary interest that would protect the preservation of the land as a public golf course in perpetuity.

a. The language of the deed unambiguously reserves in the grantor a reversionary interest.

The language of the deed creates a reversion interest. It says as much in black and white. The deed declares that the property shall "revert to Grantor, or its successors or assigns" if the property is not maintained and operated as a nine-hole golf course "for a period of one year." App. at 33, 35-36. "This *right of reversion*," it reads, "shall be binding upon and shall inure to the benefit of, Grantor and Grantee and their respective heirs, executors, administrators, successors and assigns as a covenant that shall run with the land, in perpetuity." *Id*. at 33. Neither "right of re-entry" nor "power of termination" can be found anywhere in the deed(s). *Id*. at 31-37.

The first law of interpreting written instruments is that when they are unambiguous, they mean what they say. *See In re Collins*, 170 F.3d 512, 513 (5th Cir. 1999); *J.F. Bell & Sons, Co. v. American Ry Exp. Co.*, 84

N.H. 273, 274 (1930). The deed in this case unambiguously names the interest reserved to the grantor as a "right of reversion," and makes no mention of a "power of termination" or "right of reentry." App. at 31-37. A right of reversion is an alienable interest. *Collette v. Town of Charlotte*, 45 A.2d 203, 205 (Vt. 1946). Therefore, the original Carter Country Club, Inc.'s grant of that right to the CCBA was valid.

The Plaintiff argued at the trial court that the language, "shall, *at the option of the Grantor* or its successors or assigns, revert to Grantor, or its successors or assigns…" created not a transferrable automatic reversion interest but rather an unalienable power of termination. App. at 26 (citing *Ashuelot Nat'l Bank v. City of Keene*, 74 N.H. 148, 151 (1907)). The trial court analyzed the common law right of re-entry described in *Ashuelot Nat. Bank*, and the power of termination approach utilized by the First Restatement of Property, and concluded that the interest in this case was a right of re-entry or power of termination.

The trial court's common law analysis was incorrect because, in this case, the entire estate did not vest in the grantee, and the reservation in this case was expressly intended to survive the grantor, and vest in any successor or assign. The trial court theorized:

> [T]he theory of the common law was that, when an estate in fee simple was granted upon condition subsequent, the entire estate vested in the grantee; that, until entry by the grantor for breach of condition, the grantee had both the possession and right of possession; that, until then, the grantor had no reversionary right or interest in the granted premises and could convey none; that he had a mere possibility, capable of being exercised in his lifetime if the condition was broken, or by his heir upon whom, after his decease, it devolved as his representative, and not by way of inheritance.

Decree at 6 (quoting *Ashuelot Nat'l Bank*, 74 N.H. at 151). In this case, the fee interest came with a binding covenant, benefitting the "Grantor and its heirs, successors and assigns," that barred the Farnum Hill Trust and its successors in interest *in perpetuity* from using the golf course land for purposes that excluded a golf course. App. at 33. This was not minor encumbrance. The grantor retained a very substantial stick from the proverbial bundle: the unfettered right to do with one's land what one pleases.

The conveyance also gave to the "Grantor *and its heirs, successors and assigns*" a right of reversion to enforce the covenant. App. at 33 (emphasis added). Thus, the plain language of the deed contemplated expressly that the interests reserved in the grantor would be heritable, assignable, and transferrable. If fidelity to the intent of the parties is paramount, *see Anna H. Cardone Revocable Trust v. Cardone*, 160 N.H. 521, 529 (2010), and giving effect to every word of a deed mandatory, *see Lyford v. City of Laconia*, 75 N.H. 220, 222 (1909), the interest in this case could not be a mere right of re-entry under the *Ashuelot* definition. *See* Decree at 5 (citing *Lyford*, 75 N.H. at 225).

The proper authority for this case is *Collette*, 45 A.2d 203. In *Collette*, the Vermont Supreme Court considered similar language and found a right of reversion that could be validly enforced by a third-generation successor-in-interest of the original grantor. The facts of *Collette* were very similar to the facts of the present case. Levi Scofield conveyed a piece of land to the Town of Charlotte "to be used by said Town for school purposes, but when said Town fails to use it for said school purposes it shall revert to said Scofield, his heirs and assigns, but the

Town shall have the right to remove all buildings located thereon. The Town shall not have the right to use the premises for other than school purposes." *Collette*, 45 A.2d at 204. Later, Scofield conveyed the balance of his holdings, including the reversionary interest described, to one West, who conveyed to Collette. *Id*. at 204. When the Town ceased using the land for a school, Collette sought to quiet title. *Id*. at 204-05. The Town argued that Collette had only a right of re-entry that—it argued—could not be conveyed to a third party. *Id*.

The Vermont Supreme Court observed that this area of property law was beset by confusing terms, settling on a distinction between a "determinable fee" which is "a fee simple limited to a person and his heirs with a qualification annexed to it by which it is provided that it must determine whenever the qualification is at an end," and a "fee upon condition" which "may return to the grantor because of the breach of the condition subject to which it was granted, but it does not return until there has been an entry by the person having that right." *Id*. at 205. "The only practical distinction between a right of entry for breach of condition subsequent and a possibility of reverter on a determinable fee is that in the former the estate in fee does not terminate until entry by the person having the right, while in the latter the estate reverts at once on the occurrence of the event by which it is limited." *Id*.

With this distinction in mind, the Vermont Supreme Court held that "a conveyance of land 'to be used for school purposes' without further qualification, created a condition subsequent. The same words were used in Scofield's deed to the Town of Charlotte, but they were followed by the provision that 'when said Town fails to use it for said school purposes it

shall revert to said Scofield, his heirs or assigns,' clearly indicating the intent of the parties to create a determinable fee, which was, we think, the effect of the deed." *Id*. (quoting *Fall Creek School Twp. v. Schuman*, 103 N.E. 677, 678 (Ind. App. 1913)).

The court then went on to hold that this interest was alienable, practically focusing on the intent of the parties to the original deed. "When, as here, the parties appear to have understandingly reached an agreement and to have embodied it in their deed providing that upon termination of the estate conveyed it shall revert to the grantor, his heirs or assigns, such provision should not be held void, in whole or in part, unless for sound reasons of public policy… We hold that when the land in question ceased to be used by the defendant Town it reverted to the plaintiff." *Id*. at 206.

Based just upon the language of the deed, this was also the inescapable intention of the original Carter Country Club, Inc. and its Grantee, the Farnum Hill Trust. The deed stated, "If at any time the above requirements for maintenance and operation of a nine hole golf course are not met for a period of one year, the title of the golf course area … shall… revert to Grantor, or its successors or assigns." The language "if at any time… shall revert" conveys a defeasible interest, not a right of reentry. *Pfeffer v. Lebanon Land Dev. Corp.*, 360 N.E.2d 1115, 1120 (Ill. App. 1977) ("An intention to convey a determinable fee, also called a 'base' or 'qualified' fee, is evidenced whereby following the language of grant of the fee, words of special limitation are employed. Examples of language of special limitation are 'until,' 'during,' 'for so long as,' 'as long as,' 'during that time,' and 'no longer.'"). *Id*. (citing 28 Am.Jur.2d Estates, §§ 28-30).

In this case, not only did the deed describe a special limitation to the fee ("if at any time"), it expressly mentioned a "right of reversion" and included a clearly stated covenant and restriction, or servitude, requiring the maintenance of a public golf course in perpetuity. *See Wheeler v. Monroe*, 523 P.2d 540, 542 (N.M. 1974) ("a possibility of reverter is that future interest which a transferor keeps when he transfers an estate and attaches a special limitation which operates *in his own favor*") (emphasis added). Taken as a whole, it is impossible to escape the intent of the parties to the original conveyance that the "special limitation" that the golf course would persist in perpetuity "operated in favor" of the grantor and its preferred stakeholders, the public. *Id*.

Lyford, which the trial court also favorably referenced, involved a taking by the state of a piece of land in Laconia that had been occupied by a church. *See* Decree at 5; *Lyford*, 75 N.H. at 220-21). The successor of the original grantor to the church sued for compensation, arguing based on reversionary language in the deed, that he held a right of re-entry and that the land became his because the church's ouster by the state under eminent domain proceedings triggered the condition subsequent. *Id*. Therefore, he argued, he was due any compensation received from the State. *Id*. In rejecting this argument, the Court briefly articulated the difference between a right of re-entry and a possibility of reversion in exactly the same way that the Vermont Supreme Court did in *Collette*. *Compare Lyford*, 75 N.H. at 220 ("The only practical distinction between a right of entry for breach of condition subsequent and a possibility of reverter on a determinable fee is that in the former the estate in fee does not terminate until entry by the person having the right, while in the latter the estate reverts at once on the

occurrence of the event by which it is limited."); *Collette*, 85 A.2d at 205 (verbatim).

Still, the *Lyford* Court avoided a decision concerning *which* of these interests the Plaintiff held. This was because the case at bar was a takings case; for the purposes of the takings analysis, the church alone possessed the property exclusively and completely at the time of the taking—irrespective of the nature of the plaintiff's interest. *Lyford,* 75 N.H. at 227-28. Thus the Church, not the plaintiff, was due any compensation for the taking. *Id*. at 228. A determination on the issue before the Court in this case was never required. In fact, despite discussing these matters with detail in *dicta* in *Lyford* and *Ashuelot Nat'l Bank*, this Court has never had occasion directly to resolve whether a particular deed has created a right of reversion or a right of re-entry, and what test properly distinguishes the two.

In this case of first impression, it would be a travesty if the Court were to adopt a view of the law that disfavored a private charitable institution. The CCBA is a highly regarded charity that provides a host of recreational services to the people of Lebanon and surrounding towns. App. at 84. The CCBA was expressly selected by the original Carter Country Club, Inc. as the guarantor of the public golf course because it was a perpetual eleemosynary institution with a recreational focus that would not be tempted, as the City might, to convert recreational property for tax, housing, or economic purposes. App. at 84. As the charitable holder of the protective interest, the CCBA is entitled to a presumption that the language of the deed was intended to advance the charitable interest of the grantor. *See Horse Pond Fish & Game Club, Inc. v. Cormier*, 133 N.H. 648, 653

(1990) (holding that restraints against alienation that might otherwise be unreasonable are nevertheless upheld when the grantee is a charity in whom the property was vested with the intention it be preserved in perpetuity); *Smart v. Durham*, 77 N.H. 56, 60 (1913) (otherwise impermissible perpetuities permitted for a donation to charity); *cf*. RSA 477:3-b (limiting possibilities of reverter, rights of re-entry, and executory interests in property, except to charities).

One lesson of *Horse Pond* and *Smart* is that an otherwise unalienable property interest, such as a power of termination, should be permitted to be transferred when the grantee is a charitable institution and the purpose is to safeguard the grantor's original intent:

> The reasoning on which this result is arrived at would seem to be that since a donor may make a gift for charitable purposes perpetual in duration [i.e., the rule against perpetuities does not apply to gifts for charitable purposes,], he may, as a corollary of this right, and in order to effectuate his primary purpose, impose a condition that the gift property shall not be alienated[.]

Horse Pond, 133 N.H. at 654 (*citing* Restatement (Second) of Trusts § 365, *comment a* at 245 (1959)); *see Smart*, 77 N.H. at 60 ("The direction that the real estate should not be sold does not create a perpetuity forbidden by law, but only a perpetuity allowable in the case of charitable trusts."). The same rationale should apply to a power of termination, if that was what was created by the parties to the deed in this case. But the Court need not even go that far to resolve this case in CCBA's favor. It is enough to conclude that the entirety of the deed from the original Carter Country Club, Inc. to

the Farnum Hill Trust creates a transferable right of reversion that remains valid and enforceable by CCBA to this day.

The trial court relied upon this Court's admonition that court should "generally disfavor[] interpreting deed conditions in such a way that would cause a forfeiture of the property upon breach of such conditions[.]" *See* Decree at 5-6 (quoting *White v. Augur*, 171 N.H. at 664). But the trial court overlooked the Court's qualifying reminder immediately following: "*[H]owever*, we adhere to the guiding principle that the intent of the parties should be effectuated whenever possible." *Id*. (emphasis added). There can be no serious doubt that the parties intended for the grantor and its successors in interest to be able to enforce the perpetual golf course covenant with a right of reversion. In the face of the inescapable intentions of the parties embedded in the deed itself, the trial court's careful parsing of terms of art placed undue weight on "formalistic requirements in real estate conveyancing that have largely given way to effectuating the manifest intent of the parties[.]" *White*, 171 N.H. at 664 (quoting *Anna H. Cardone Revocable Trust v. Cardone*, 160 N.H. 521, 529 (2010)). Therefore, the trial court's order should be reversed.

b. <u>In the alternative, the language of the deed contained ambiguity that required the court to look beyond the four corners of the deed to extrinsic evidence, including the contemporaneously created Affidavit of Barry Schuster, Esq., for clarification</u>.

Plaintiff argues that the language "shall, at the option of the Grantor or its successors or assigns, revert to Grantor, or its successors or assigns" creates a power of termination. App at 33. CCBA disagrees. But even if this language characterizes a power of termination under the common law,

it is coupled in the operative deed with the express statement that the interest created by the original Carter Country Club Inc. was a "right of reversion"—language that has been acknowledged to create a *transferrable* reversionary interest. *See Unknown Heirs v. Covington*, 815 S.W.2d 406, 413 (Ky. 1991) (transferrable "right of reversion" is not created *unless* "expressly stated or inescapably implied"). Yet the interest in question cannot be both a power of termination and a right of reversion. Thus, if the Court construes the "option" language to reference a power of termination, the language of the deed contains a patent ambiguity.

Courts will look to the manifest intent of the parties as set forth in the deed or conveyance instrument in order to interpret and enforce it. *Therrien v. Therrien*, 94 N.H. 66, 66-67 (1946). The deed could not be any clearer about the parties' intentions. App. at 33. However, if a court determines that there is ambiguity in a deed, for example, when a deed contains mutually exclusive terms, courts may turn to extrinsic evidence to discern the intent of the parties. *Flanagan v. Prudhomme*, 138 N.H. 561, 566 (1994).

In *Scott County Board of Ed. v. Pepper, Ky*., 311 S.W.2d 189, 190 (Ky. 1958), the Kentucky Supreme Court emphasized the importance of fact finding to evaluate whether a transferrable right of reversion/possibility or reverter, is created:

> When a limitation merely states the purpose for which the land is conveyed, such limitation usually does not indicate an intent to create an estate in fee simple which is to expire automatically upon the cessation of use for the purpose named. Additional facts, however, can cause such an intent to be found. Among the facts sufficient to have this result are clauses in other parts of the same instrument, the relation

> between the consideration paid for the conveyance and the market value of the land in question, and the situation under which the conveyance was obtained.

Scott Cty. Bd. of Ed. v. Pepper, 311 S.W.2d at 190 (quoting Restatement (First) Property §44 (1936), *note m*). If the trial court had undertaken this factual analysis of the intentions of the parties, as the CCBA urged it to when it proffered the Affidavit of Barry Schuster, it would have been compelled to determine that the interest created in the deed from the original Carter Country Club, Inc. to the Farnum Hill Trust was a transferrable possibility of reverter.

Mr. Schuster's affidavit was not created for this case, but rather was drafted some thirty years ago, when the events surrounding the sale of the Carter Country Club and the vesting of the reversionary interest in CCBA were fresh. App. at 82, 84. Lacking any personal knowledge of the transaction, the Plaintiff did not, and could not, contest Mr. Schuster's assertions of fact. *Id*. Mr. Schuster's uncontested affidavit either resolved the question of the parties' intent conclusively, or required a trial concerning the contested intent of the original parties.

Mr. Schuster represented the original Carter Country Club, Inc. during the sale of the Carter Country Club to the Farnum Hill Trust. App. at 82. He participated in every planning and negotiating discussion between the parties. *Id*. He drafted the deeds and documents. *Id*. He jointly planned, discussed, and drafted the precise language creating the reversionary interest, and the covenant it enforced, with the Trustee for the grantee/buyer, Thomas Welch, Esq. *Id*. at 83. Mr. Schuster's uncontradicted testimony, based on his first-hand knowledge as a

participant in the transaction, was that the parties intended for the property to remain a nine-hole golf course in perpetuity, for the grantor and/or its chosen successor to enforce that covenant, and for drafted the language of the deed to have those effects. *See id.*, generally, at 82-84.

From the very start of the negotiations, the buyer, Farnum Hill Trust, was fully aware that the original Carter Country Club, Inc. intended to dissolve following the sale, and that it intended to vest its reversionary interest in the property in an entity that could safeguard the golf course forever. *Id*. at 82. The principal beneficiary of the Farnum Hill Trust, Fred Fish, attended the original Carter Country Club, Inc. board meeting resolving to approve the sale to Farnum Hill Trust on those specific terms. *Id*. at 83-84. The original Carter Country Club entertained vesting the reversionary interest in the City of Lebanon, but ultimately selected the CCBA as an eleemosynary institution dedicated to public recreation opportunities and not subject to public political pressures. *Id*. at 84. Six months after conveying the Carter Country Club to the Farnum Hill Trust, the original Carter Country Club, Inc. deeded its reversionary interest to the CCBA before dissolution of the corporation. *Id*. at 84; App. at 35-37.

Those facts are more compelling than the facts of *Collette*, because the original Carter Country Club, Inc. did not merely pass its right of reversion on to a general successor-in-interest. It identified a charitable institution of perpetual duration in which to safeguard the golf course requirement it imposed on the Farnum Hill Trust, its heirs, successors and assigns. *Collette*, 85 A.2d at 206. Read together with the covenant and reversion language in the deed, the uncontradicted facts asserted by Mr. Schuster provide clear and convincing evidence that the parties to the

original deed intended for a reversion interest to be created and to be held by a charitable entity forever as a safeguard. That intent should be honored by the courts of New Hampshire. *Therrien*, 94 N.H. at 66-67.

III. The trial court erred in ruling that the original grantor's alleged power of termination could not be conveyed to a third party because the power of termination was coupled with a covenant burdening the grantee and benefiting the grantor, which was a separate and distinct property interest.

The trial court agreed with the Plaintiff that the deed created a power of termination subject to condition subsequent and ruled that powers of termination are not transferable under the common law. Decree at 6 (citing Restatement (First) of Property at §160). Therefore, the transfer from the original Carter Country Club, Inc. was never effected and the CCBA's interest was a nullity.[3] *Id*. This was wrong.

Generally, a power of termination is seen as not being transferrable to a third party because of the difficulty of separating an ephemeral interest from the thing itself. *See* Restatement (First) of Property at §160, *comment a*. Although this rationale has now become outmoded, *id*., the common law still adheres to the view that powers of termination are non-transferable because of the mischief they can cause with regard to titles. *Id*. Legislatures seem to agree, taking steps to erode the common law availability of reversionary interests in the name of promoting integrity in estates in property. *See* RSA 477:3-b (limiting possibilities of reverter, rights of re-entry and executory interests).

[3] The trial court agreed with the CCBA that if the interest was a power of termination that cannot be alienated from the original grantor, it was not extinguished, but remained in the original Carter Country Club, Inc. *See* App. at 74, n. 2; Decree at 9.

The common law has settled on the principle that such powers are available personally to the grantor, and heritable (or, in the case of a corporation, distributable to shareholders) for his or her successors, but not transferrable to third parties. Rest. (First) Property §160; *see* Decree at 6-7. Examples given in the Restatement suggest a concern about the picayune conditions of grantors seeking to control and embarrass their grantees or ensure their own well-being. *See* Rest. (First) Property §160 at *Illustration 1* (grant in fee simple subject to the condition that the property be used to construct a home for the grantor to live out his days), *Illustration 2* (grant in fee simple subject to condition that grantee construct a railroad within three years). These examples are uniquely fixed in a certain phase of American property use and development and are inapt to the factual scenario in this case, where the two parties to the operative deed endeavored explicitly to ensure that the land would remain available for a specific public purpose in perpetuity. App. at 33, 35-37.

Nevertheless, there are exceptions to the general rule that powers of termination may not be transferred, and it is the exceptions that apply in this case, not the general rule. Restatement (First) of Property §161. "The owner of a power of termination in land has a power, by conveyance inter vivos, to transfer his interest … (c) when the power of termination supplements *a reversionary interest* also had in the same land by the owner of such power, and the owner of such reversionary interest and power makes an otherwise effective conveyance of both such interests, or of the corresponding parts of such interests." *Id*. at §161(c) (emphasis added). A "reversionary interest" is defined by the same Restatement as, "any future interest left in a transferor or his successor in interest." *Id*. at §154(a). The

Restatement uses the following example to illustrate this definition: "A future interest is regarded as 'left in the transferor,' … when such transferor transfers less than his entire interest[.]" *Id*.

The Restatement observes:

> A power of termination in land can vary in its closeness of relationship to the reversionary interest also retained by the conveyor. These degrees of relationship can be expressed in terms of variations in the transferability of the powers of termination. The relationship may be so close that a transfer of the reversionary interest automatically transfers the powers of termination, in the absence of language expressly negativing the intent to make such transfer; or the relationship may be of a lesser degree, so that the power of termination is transferable along with the reversionary interest, but only by express language accompanying the otherwise effective conveyance of the reversionary interest; or the relationship may be so unimportant that the power of termination cannot be transferred, even by express language included in the otherwise effective conveyance of the reversionary interest. When either of the first two of these three relationships exists, then the power of termination "supplements" the reversionary interest, within the meaning of the word as it is used in this Clause.

Restatement (First) of Property § 161, *comment e*. While this comment is not a model of clarity, it goes on to observe: "The statement of those rules which determine what limitations create each of these three relationships is not within the scope of Divisions I to V of this Restatement. *These rules are so closely related to the law of covenants that they cannot be restated except as a part of the law determining alike the devolution of the benefit of conditions and covenants*." *Id*. (emphasis added). Under the law of covenants, an *in gross* servitude created for conservation purposes, such as

the one in this case, is a transferrable interest. *See* Rest. (Third) of Property §4.6(1)(c), *comment b*, §5.8(1), *comment b*. Thus, covenants retained for the future (and even more so, the perpetual) benefit of the grantor fall within the scope of reversionary interests with which powers of termination may permissibly be transferred.

It is easy to see why the retention of the benefit of a restrictive covenant concerning the use of the land would justify the transfer of a power of termination under the common law framework. In this case, the grantor retained a substantive, material interest: a covenant, running with the land, that restricted how the land conveyed could be developed. App. at 33. Without the permission of the grantor, the grantee could not eliminate a nine-hole golf course—a feature that, by any measure, occupies a substantial amount of land. If the ability to develop a substantial amount of land is held by another, controlled by another, and governed by another, it is unequivocally subject to a burdensome encumbrance "left in a transferor or his successor in interest." Rest. (First) Property §154(a).

A covenant is not a promise made back to a grantor. It is a reservation of right in the grantor to ensure that the grantor's wishes for the property are adhered to. Restatement (Third) of Property at §1.3(3), comment *e*. It is a servitude. *Id*. at *comment d*. That is the kind of reservation of right that justifies protection by a power of termination and the ability to transfer the power in order to remain paired with the permanent nature of the covenant. That makes this case different from a situation where a deed only makes the fee simple interest subject to a condition subsequent, *e.g.*, using the land for a golf course in perpetuity. Here, the condition subsequent references, restates, and reinforces a

separate and distinct covenant anchored in the original grantor and "its successors or assigns." App. at 33 ("If at any time the above requirements for maintenance and operation of a none hole golf course are not met for a period of one year the title to the golf course area… shall, at the option of the Grantor or its successors or assigns, revert to Grantor, or its successors or assigns").[4]

The property rights reserved to the original Carter Country Club Inc., and transferred to CCBA, contained a future interest, a perpetual covenant inuring to the benefit of the grantor. The land was to sustain and support a nine-hole golf course for the public, for the benefit of the grantor, forever. In this way, the power of termination—if that is what was created by the parties in 1986—was coupled with a perpetual benefit to the grantor and its successors-in-interest. The power of termination served to safeguard that benefit. To serve its guardianship function, that power would need to be transferrable or assignable to an entity that endured as long as the covenant itself did. Thus, the exception set forth in Restatement (First) of Property §161(c) applies to the deed in this case, and the power of termination was properly transferred to the CCBA as an enduring charitable institution that could protect the public's right to the Carter Country Club golf course for ever.

[4] Perhaps most compellingly, the precise language of the clause in question only requires the reversion of the "golf course area" if the grantee does not maintain the operation of a nine-hole golf course for a period of one year. Thus, even with the triggered reversion clause, the Plaintiff will retain the remainder of the property for its own use and benefit.

IV. The trial court erred in denying CCBA's Motion to Amend to include a count seeking enforcement of the restrictive covenant, which was a distinct property interest, separate from the possibility of reverter or power of termination included to enforce it.

There is no dispute that the original Carter Country Club unambiguously conveyed the property to the Plaintiff's predecessor in interest subject to an express covenant and restriction that ran with the land, a servitude. App. at 33; Restatement (Third) of Property at §1.3(3). After conducting the research necessary to respond to Plaintiff's Motion for Summary Judgment, the CCBA filed a motion to amend its counterclaims to assert a claim for enforcement of the separate and distinct restrictive covenant that bound the Plaintiff. App. at 119. As part of its summary judgment argument, CCBA argued that even if the "right of reversion" was deemed to be an unenforceable power of termination, CCBA could still enforce the covenant it benefitted from through a traditional legal action. App. at 74-76. The trial court denied that motion on the ground that its decision concerning the non-transferability of the power of termination disposed of all the issues. Decree at 9-10. This was an error, and the trial court likely would have granted the motion to amend under New Hampshire's liberal amendment doctrine if it had not mistakenly assumed that its disposition of the "right of reversion" claim resolved all issues. [5] *See Kravitz v. Beech Hill Hosp., LLC*, 148 N.H. 383, 392 (2002) ("[T]he general rule in New Hampshire is to allow liberal amendment of pleadings

[5] Normally, a trial court has substantial discretion regarding a motion to amend pleadings. In this case, discovery had barely started, and the trial court's order was not based on discretionary factors such as prejudice to the opposing party, the discovery calendar, and so forth. Thus, the trial court made a legal error that compelled its motion to deny the request to amend.

and we have held that a party may seek to amend even after a jury's verdict has been entered."); RSA 514:9.

The covenant in the deed to the Plaintiff creates a negative or restrictive easement, also called a servitude. Rest. (Third) of Property §1.3(3). The power of termination was nothing more than a tool by which the keeper of the benefit of the golf course would be able to ensure that the Plaintiff would continue to be bound by the covenant *in perpetuity*. *See id*., *comment d*, *e*. While the power of termination was one tool—a explicit mechanism in the deed—it was not the only tool. The covenant was a servitude enforceable under the common law. Restatement (Third) of Property §8.3(1) ("A servitude may be enforced by any appropriate remedy or combination of remedies, which may include declaratory judgment, compensatory damages, punitive damages, nominal damages, injunctions, restitution, and imposition of liens."). Furthermore, there is no dispute at all that restrictive covenants are assignable. *Moore v. Merrill*, 17 N.H. 75, 81 (1845). Thus, even if there had never been a power of termination, the original Carter Country Club, Inc. could have lawfully assigned its beneficial interest in the restrictive covenant to CCBA and CCBA could have sought its enforcement.

The case of *Shaff v. Leyland*, 154 N.H. 495 (2006) is instructive. In *Shaff*, this Court confronted the question whether a restrictive covenant could be enforced by a beneficiary who no longer owns land in the vicinity of the burdened property. Based on the facts of that case, the Court held that the covenant was appurtenant, not *en gross*, and therefore was only enforceable by someone owning land near to or abutting the subject property. *Id*. at 499. However, the *Shaff* Court left open the possibility that

a covenant may be enforceable by an individual who could "establish a legitimate interest in enforcing it." *Id*. at 498. To be valid and enforceable, such a covenant would clearly need to be evidenced in the language of the conveyance, for instance, where the deed expresses intent 'regarding the benefit of the covenant or the type of covenant conveyed." *Id*. at 499.

Here, the type of covenant was a restriction on the unfettered ability to use the land in the manner the grantee saw fit: the owner was required to maintain a public golf course on the premises in perpetuity. App. at 33. The owner could reconfigure the course, alter its dimensions, use the rest of the property for any purpose he liked; but he had to continue to operate a golf course. *Id*. This covenant was not intended to benefit a neighbor, but rather the public, long after the grantor had ceased to exist. App. at 82-84, 33. This motivation was agreed upon by the parties to the original deed and the agreement, and cogently incorporated into the express language of the deed, reserving the benefit of the covenant to the grantor—despite the grantor not continuing to own any physical property in the area—and its "successors and assigns" so that the maintenance of the golf course would be enforceable in perpetuity. App. at 33. Unlike the respondent in *Shaff,* the CCBA, as the charitable entity selected to safeguard and maintain this covenant, has "establish[ed] a legitimate interest in enforcing [the covenant.]" *Id*. at 498.

Therefore, the CCBA has the power to enforce the plain language of the restrictive covenant, independent of the power of termination or "right of reversion." App. at 35-37; Rest. (Third) Property §8.3(1). The trial court erred in denying the CCBA the right to amend its counterclaims to add a count seeking enforcement of the restrictive covenant.

V. The trial court erred in ruling that the 1991 Order and 1994 Docket Markings vested the power of termination/possibility of reverter in the Petitioner.

Following the Decree, the trial court affirmed, on reconsideration, its decision that the power of termination was never lawfully transferred to CCBA and instead devolved to the original Carter Country Club, Inc.'s shareholders upon dissolution of the corporation in the late 1980s. The trial court asked the Plaintiff for additional briefing on the question whether new parties should be joined to the action in order to quiet title in the property, given the broad spread of the power of termination amongst the many original shareholders. Plaintiff responded on May 4, 2020 with Response and Motion for Reconsideration that, for the first time in this litigation, referenced and included the trial court's orders in the action of the late 1980s or early 1990s, in which the Plaintiff sought to quiet title in all the remaining interest of the original Carter Country Club, Inc. in the land.

That litigation ended with a stipulation by the parties, which included the CCBA and the Plaintiff, to leave any dispute over the "right of reversion" unresolved. The parties then moved for summary judgment and the trial court quieted title to all remaining assets of the original Carter Country Club, Inc. in the Plaintiff, except the "right of reversion." App. at 167. The parties then filed docket markings in 1994. *Id*. at 169. The theory of the Plaintiff's Response and Motion for Reconsideration was that the trial court's 1991 summary judgment order, taken together with the trial court's Decree in this matter, retroactively quieted title to the "right of reversion" in the Plaintiff as well.

The trial court granted Plaintiff's request, styled as a Motion for Reconsideration, on May 15, 2020. Order on Response and Motion for Reconsideration. The same day, CCBA moved for reconsideration, arguing that the trial court's Decree could not apply retroactively in that manner. App. at 173. It was one thing to quiet title to assets, known or unknown, which were never definitely transferred to the Plaintiff by the sale of the Carter Country Club property, but also never affirmatively reserved. It was another altogether to suggest that the "right of reversion" and the property interest expressly reserved to the original Carter Country Club for transfer to a charitable entity were to be considered amongst these assets some thirty years later. In 1991, the shareholders and the original Carter Country Club Board would have known that they had conveyed the restrictive covenant and the "right of reversion" to CCBA in 1986. They would not have understood that they were litigating that matter because they must have known that those rights had been transferred to CCBA. The Plaintiff itself acknowledged this when it stipulated, in the 1994 Docket Markings, that Plaintiff and the CCBA stipulated: "The Superior Court's Order dated September 18, 1991, decreeing title of the Petitioner and of Carter Community Building Association, if any, to be free and clear of all rights or interest of Defendants shall remain in full force and effect." App. at 169.

At that time, therefore, the parties stipulated and the trial court marked the docket to the effect that the right of reversion had been divested from the shareholders. For the 1991 Order and the 1994 Docket Marking to have the effect that the Plaintiff wants them to have, it would need to be res judicata. It is not. The shareholders, defending the 1990 action, never had a full and fair opportunity to litigate a right that, at the time, was viewed by

all the parties and the court to have vested with CCBA. App. at 169. Absent a full and fair opportunity to litigate that matter, it was not resolved, and therefore, the dispositional orders from the 1990 case cannot resolve the question of who holds the "right of reversion" today.

The trial court erred in deciding that it resolved the issue in 1991 and 1994. The "right of reversion," if it was a power of termination, vested with the shareholders upon dissolution of the original Carter Country Club, Inc. and remains there still.

CONCLUSION AND REQUEST FOR RELIEF

The Court should reverse the trial court's ruling and hold that the "right of reversion" conveyed to CCBA by the original Carter Country Club, Inc. was a transferrable "right of reversion," possibility of reverter, or determinable fee.

In the alternative, the Court should rule that the power of termination was validly conveyed together with a future interest reserved in the grantor.

In the alternative, the Court should reverse the trial court's order on CCBA's motion to amend, permit the CCBA to enforce that covenant and remand for further proceedings.

In the alternative, the Court should reverse the trial court's decision that the "right of reversion" was quieted retroactively in the Plaintiff and/or its predecessors in 1991 or 1994, and remand for further proceedings.

REQUEST FOR ORAL ARGUMENT

Carter Community Building Association requests oral argument. Oral argument will be presented by Jeremy D. Eggleton.

RULE 16(3)(I) CERTIFICATION

I certify that the appealed decisions, Decree of January 22, 2020, Order of March 5, 2020, Order of May 15, 2020, and Order of July 14, 2020, are in writing and are appended to the brief as pages 46 through 59.

RULE 16(11) CERTIFICATION

I certify that the foregoing brief complies with the word limitation of 9,500 words and that it contains 9,495 words.

Respectfully submitted,

CARTER COMMUNITY BUILDING ASSOCIATION

By its Attorneys,

ORR & RENO, P.A.

Date: February 10, 2021 By: */s/ Jeremy D. Eggleton*

Jeremy D. Eggleton, Esq.
NH Bar #18170
jeggleton@orr-reno.com
Orr & Reno, P.A.
45 South Main Street, Suite 400
P.O. Box 3550
Concord, NH 03302-3550
Phone: (603) 224-2381
Fax: (603) 224-2318

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of the Appellant and Appendix to the Brief of the Appellant have been forwarded, this day, to counsel for the Appellee, Carter Country Club, Inc., via the Supreme Court's electronic filing File and Serve system.

/s/ Jeremy D. Eggleton

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ADDENDUM

BRIEF OF APPELLANT,
CARTER COMMUNITY BUILDING ASSOCIATION

Page

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

GRAFTON, SS. Docket No. 215-2018-CV-272

Carter Country Club, Inc.

v.

Carter Community Building Association

DECREE

The plaintiff, Carter Country Club, Inc., brought this quiet title action against the defendant, Carter Community Building Association, seeking a declaration that the defendant has no interest in certain real property and that the plaintiff owns said property in fee simple. (Index #1.) Presently before the court are the plaintiff's motion for summary judgment, (Index #15), the defendant's cross-motion for summary judgment, (Index #22), the defendant's motion to deem its cross-motion for summary judgment timely filed, (Index #28), and the defendant's motion to amend its counterclaims. (Index #23.) The New Hampshire Attorney General, Director of Charitable Trusts has intervened and objects in part to the plaintiff's motion for summary judgment. (Index #20.) The court held a hearing on the parties' motions and objections on November 22, 2019, at which it heard oral argument from the parties and the intervenor. Based on the parties' pleadings and arguments, the undisputed facts, and the applicable law, the court finds and rules as follows.

The following material facts are supported by the court's summary judgment record and are undisputed. By deed dated July 30, 1986 (the "July deed"), Carter Country Club, Inc. (an entity unrelated to the plaintiff and referred to hereafter as "CCCI")[1] conveyed a

[1] CCCI was dissolved shortly after making the conveyances at issue in this case. The plaintiff was originally

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parcel of real property located in Lebanon, New Hampshire (the "Property") to Thomas D. Welch, Jr., as Trustee of the Farnum Hill Trust. (Pl.'s Ex. A.)[2] The July deed was recorded on July 31, 1986, in the Grafton County Registry of Deeds at Book 1611, Page 644. The July deed contained a number of restrictions, including the following:

> The above described premises shall be SUBJECT, HOWEVER, to the following RESERVATION, CONDITIONS AND RESTRICTION which shall run with the land and be binding upon the Grantee, and his successors and assigns:
>
> At all times, in perpetuity, a nine hole golf course shall be maintained and operated on the premises. The term "nine hole golf course" shall mean a golf course with nine playing holes with a total playing distance of at least 3,000 yards. The terms "maintain and operate" shall mean maintaining the existence and use of said course for golfing and recreational purposes during normal and customary golfing seasons, except for reasonable interruptions for course improvements, alterations, and maintenance. The location of the property set aside for and containing the golf course shall be referred to as the "golf course area."
>
> . . .
>
> If at any time the above requirements for maintenance and operation of a nine hole golf course are not met for a period of one year, the title to the golf course area (in its configuration and boundaries at the time of its last use as a golf course and as required to be dedicated as set forth above) shall, at the option of the Grantor or its successors or assigns, revert to Grantor, or its successors or assigns.
>
> This restriction and the right of reversion shall be binding upon and shall inure to the benefit of, Grantor and Grantee and their respective heirs, executors, administrators, successors and assigns as a covenant that shall run with the land, in perpetuity.

(Pl.'s Ex. A.) The plaintiff is the successor-in-interest to the Farnum Hill Trust and presently holds title to the Property. (Pl.'s Ex. C.) The plaintiff's deed, recorded in the Grafton County Registry of Deeds at Book 2005, Page 94, contains the same restrictions that are quoted above. (*Id.*)

By deed dated December 30, 1986, and recorded in the Grafton County Registry of

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registered to do business as Judge Golf, Inc., but changed its name to Carter Country Club, Inc. after the dissolution of CCCI.

[2] The court refers to the exhibits submitted with the plaintiff's February 20, 2019 Affidavit of Doug Hoffman as there appears to be no dispute as to the authenticity and applicability of said exhibits.

Deeds at Book 1652, Page 795 (the "December deed"), CCCI conveyed to the defendant, Carter Community Building Association, the reversionary interest it reserved in the July deed. (Pl.'s Ex. B.) The December deed specifically conveyed the following:

> [a]ll and the same right, interest and title, in and to the reversionary interest retained by the Grantor in the deed from The Carter Country Club, Inc., to Thomas D. Welch, Jr., Trustee, as Trustee of the Farnum Hill Trust dated July 30, 1986, and recorded in Book 1611, Page 641, of the Grafton County Registry of Deeds.

(*Id.*) The December deed then recited the above-quoted language from the July deed, including the clause that is at issue in this case:

> If at any time the above requirements for maintenance and operation of a nine hole golf course are not met for a period of one year, the title to the golf course area (in its configuration and boundaries at the time of its last use as a golf course and as required to be dedicated as set forth above) shall, at the option of the Grantor or its successors or assigns, revert to Grantor, or its successors or assigns.

(*Id.*)

The plaintiff now seeks to quiet title to the Property, requesting that the court declare void the defendant's future interest in the Property, purportedly conveyed by the December deed, and "[q]uiet title to the subject property and order that [the plaintiff] has fee simple title to the subject property free and clear of any purported right, title, and interest of the [defendant]." (Compl. Prayers B and C.) The defendant has counterclaimed, seeking a declaratory judgment that its future interest in the Property is valid and enforceable, and that the Property shall remain a golf course in perpetuity, consistent with the parties' deeds. (Countercl. Prayers B and C.) The defendant also seeks to amend its complaint to assert a claim for declaratory judgment that the restrictions found in the plaintiff's deed are still enforceable and that the defendant has standing to enforce those restrictions. (*See* Amendment to Countercl. Prayers A–D.)

As an initial matter, the defendant seeks a determination that its cross-motion for summary judgment was timely filed. The plaintiff objects, arguing that the cross-motion was untimely. (*See* Pl.'s Obj. Def.'s Cross-Mot. Summ. J.) After receiving several assented-to motions to extend, the final filing date set by the court for the defendant's objection to the plaintiff's motion for summary judgment was May 17, 2019. The defendant did not submit its cross-motion for summary judgment until May 20, 2019. Despite the apparent tardiness of the defendant's filing, justice requires that the court waive the application of the filing deadline. Accordingly, the court GRANTS the defendant's motion to find its cross-motion for summary judgment timely filed. The court will therefore consider whether either party is entitled to summary judgment at this stage of the proceedings.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III; *see Super. Ct. Civ. R.* 12(g). "An issue of fact is 'material' for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law." *VanDeMark v. McDonald's Corp.*, 153 N.H. 753, 756 (2006) (citation omitted). The moving party bears the burden of proving its entitlement to summary judgment. *Concord Grp. Ins. Cos. v. Sleeper*, 135 N.H. 67, 69 (1991). In evaluating a motion for summary judgment, the Court considers "the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence." *Id.*

The parties' claims and arguments in this case require the court to determine: (I) what type of interest was purportedly conveyed by the December deed, (II) whether

such an interest was freely alienable, and (III) whether the conveyance violated the rule against perpetuities. First, based on the plain language of the December deed, the court rules that the December deed purported to convey a right of reentry. The December deed purportedly conveyed "[a]ll and the same right, interest and title, in and to the reversionary interest retained by [CCCI] in the" July deed. (Pl.'s Ex. B.) The parties do not dispute, and the court finds, that the reversionary interest retained by CCCI provided:

> If at any time the above requirements for maintenance and operation of a nine hole golf course are not met for a period of one year, the title to the golf course area . . . shall, at the option of the Grantor or its successors or assigns, revert to Grantor, or its successors or assigns.

(Pl.'s Ex. A.)[3] The defendant contends that this language created a possibility of reverter, (*see* Def.'s Mem. Law at 6), not a right of reentry as the plaintiff argues. (*See* Pl.'s Mot. Summ. J. ¶ 9.) The court is unpersuaded by the defendant's argument.

The primary difference between a right of reentry and a possibility of reverter "is that in the former the estate in fee does not terminate until entry by the person having the right, while in the latter the estate reverts at once upon the occurrence of the event by which it is limited." *Lyford v. City of Laconia*, 75 N.H. 220, 225 (1909). The defendant argues that the language here at issue created a possibility of reverter because it provides that the Property will revert to the grantor upon a specified condition. The plaintiff's interpretation of the deed fails to give effect to the phrase "at the option of the Grantor or its successors or assigns." When interpreting a deed, however, the court must "consider the deed as a whole" and "generally disfavor[s] interpreting deed conditions in

[3] The court notes that the plaintiff characterizes a right of reentry as a preemption right. (*See* Pl.'s Mot. Summ. J. ¶ 11.) A preemption right, however, is a "privilege to take priority over others in claiming land subject to preemption." Preemption Right, *Black's Law Dictionary* (11th ed. 2019). In contrast, a reversionary interest is a "future interest left in the transferor or successor in interest." Reversionary Interest, *Black's Law Dictionary* (11th ed. 2019). Because the deeds at issue here provide that the Property will "revert" upon the occurrence of a specified event, the interest at issue here is best characterized as a reversionary interest, not a preemption right.

such a way that would cause a forfeiture of the property upon breach of such conditions . . . ." *White v. Auger*, 171 N.H. 660, 664 (2019) (quotations omitted). Here, the plain language of the July and December deeds provides that the Property will revert only at the option of the grantor. Thus, should the grantor fail to exercise said option, the Property will not automatically revert to the grantor, as it would if the interest was a possibility of reverter. Therefore, the court concludes that the interest purportedly conveyed by the December deed was a right of reentry, not a possibility of reverter.

Next, the court rules that the right of reentry retained by CCCI was not freely alienable and that the December deed failed to convey such an interest. In states where the alienability of rights of reentry is not regulated by statute, such as in New Hampshire, there are two prevailing approaches. The first is the common law approach, which provides that rights of reentry, and indeed most reversionary interests, are not freely alienable. *See Ashuelot Nat'l Bank v. City of Keene*, 74 N.H. 148, 151 (1907). The New Hampshire Supreme Court has explained that

> [t]he theory of the common law was that, when an estate in fee simple was granted upon condition subsequent, the entire estate vested in the grantee; that, until entry by the grantor for breach of condition, the grantee had both the possession and right of possession; that, until then, the grantor had no reversionary right or interest in the granted premises and could convey none; that he had a mere possibility, capable of being exercised by him in his lifetime if the condition was broken, or by his heir upon whom, after his decease, it devolved as his representative, and not by way of inheritance.

Id.[4] Under this widely-accepted approach, the right of reentry retained by CCCI in the July deed was not freely alienable.

[4] It is worth noting that although numerous United States courts cite to this principle as the common law approach, there is no record of an English court having made such a determination. *See Lyford*, 75 N.H. at 224–25; *see also* W.W. Allen, Annotation, *Validity and effect of transfer of possibility of reverter or right of re-entry, following conveyance of determinable fee or fee subject to condition subsequent*, 53 A.L.R.2d 224 § 2 (1957).

The second approach is that of the Restatement (First) of Property. Because the Restatement describes "rights of reentry" as "powers of termination," *see* Restatement (First) of Property § 24, cmt. b, Special Note, the court uses the terms interchangeably when discussing the Restatement. Under the Restatement approach, "the owner of a power of termination in land [generally] has no power to transfer his interest, or any part thereof, by a conveyance inter vivos." *Id.* § 160. The Restatement provides that there are a number of exceptions to the general rule against conveying powers of termination. The defendant specifically relies upon § 161(c), which provides that

> The owner of a power of termination in land has a power, by conveyance inter vivos, to transfer his interest . . . when the power of termination supplements a reversionary interest also had in the same land by the owner of such power, and the owner of such reversionary interest and power makes an otherwise effective conveyance of both such interests, or of the corresponding parts of such interests.

Restatement (First) of Property § 161(c).[5] The defendant argues that the December deed transferred both a right of reentry and an otherwise alienable reversionary interest, and that the conveyance was therefore valid under § 161(c) of the Restatement. (*See* Def.'s Mem. Law at 11–12.)

The court, however, finds § 161(c) inapplicable to the purported transfer here at issue. The Restatement contemplates that a transfer of real property may result in the creation of both a power of termination and a reversionary interest. *See* Restatement (First) of Property § 155, cmt. c. An illustration makes this clear:

> A, owning Blackacre in fee simple absolute, transfers Blackacre "to B for life, but upon the express condition that if B ceases to live upon Blackacre, then A and his heirs may enter and terminate the estate hereby conveyed." A has both a reversionary interest and a power of termination.

[5] The Restatement does not characterize powers of termination as reversionary interests. *See* Restatement (First) of Property § 154, cmt. a.

Id. § 155, Illustration 3. In this illustration, the transfer creates a reversion in A by granting a life estate to B; it creates a power of termination in A and his heirs by providing that, upon the occurrence of a specified condition, A and his heirs may enter and terminate B's life estate. In contrast, the transfer at issue in this case did not create a reversionary interest in addition to a right of reentry. The July and December deeds provide that the property will revert to the grantor or its successors or assigns only at the option of the grantor or its successors or assigns. Neither deed creates a reversionary interest apart from that right of reentry. Accordingly, the court concludes that under §§ 160–161 of the Restatement, CCCI was unable to transfer the right of reentry it retained in the July deed.

Although it is unclear whether New Hampshire follows the common law approach or the Restatement approach, the court concludes that under either approach, the right of reentry originally created by the July deed and retained by CCCI was not freely alienable. As such, the court rules that CCCI did not have the power to convey its right of reentry to the defendant by way of the December deed. The court rules that the December deed, which purported to transfer only a right of reentry, was invalid and that it did not convey a right of reentry to the defendant. The court rules that there are no genuine issues of material fact and that the plaintiff is entitled to judgment as a matter of law as to Prayer B of its complaint, which seeks a determination that the December deed is void. Because the court finds the December deed void, it is unnecessary for the court to consider whether the conveyance violated the rule against perpetuities.

Prayer C of the plaintiff's complaint seeks a determination (1) that the plaintiff holds the Property in fee simple and (2) that the plaintiff holds title to the Property clear of any purported right or interest of the defendant. Having determined that the

December deed is void, it is plain that the plaintiff holds the Property free and clear from any claims or interests of the defendant. However, it does not follow from such a determination that the plaintiff necessarily holds title to the property in fee simple absolute. The original conveyance of the Property from CCCI to the Farnum Hill Trust reserved to CCCI a right of reentry. As such, the Farnum Hill Trust took title to the Property in fee simple subject to a condition subsequent. *See* Fee Simple, *Black's Law Dictionary* (11th ed. 2019) (defining "fee simple subject to a condition subsequent" as "[a]n estate subject to the grantor's power to end the estate if some specified event happens"). Although CCCI thereafter attempted to convey its right of reentry to the defendant, the New Hampshire Supreme Court has never held, and this court declines to rule, that an invalid attempt to transfer a right of reentry results in a forfeiture or termination of such right. The court instead finds that the right of reentry remained with CCCI despite its invalid attempt to alienate that right.

As successor-in-interest to the Farnum Hill Trust, the plaintiff took title to the same interest in the Property that was conveyed to the Farnum Hill Trust in the July deed. Accordingly, the court finds that there are no genuine issues of material fact and that the plaintiff is entitled to judgment as a matter of law as to Prayer C of its complaint; specifically, the court rules that the plaintiff holds title to the Property in fee simple subject to a condition subsequent. To the extent the plaintiff seeks a determination that it holds the Property in fee simple absolute, the court rules that the plaintiff is not entitled to judgment as a matter of law.

Finally, the defendant has filed a motion to amend its counterclaims to add a counterclaim for declaratory judgment. (Index #22.) Although "[a]mendments in matters of substance may be made on such terms as justice may require," *Super. Ct. Civ. R.*

12(a)(3), "[w]hether to allow a party to amend his or her pleadings rests in the sound discretion of the trial court." *Tessier v. Rockefeller*, 162 N.H. 324, 340 (2011). The defendant's proposed amendment appears to be premised on the validity of the December deed. (*See* Def.'s Amend. Counterel. ¶¶ 8–10.) Because the court has found that the December deed is void, the defendant's proposed amendment fails to state a claim upon which relief may be granted. Accordingly, the defendant's motion to amend is DENIED.

In summary, the court rules that the December 30, 1986 deed from CCCI to Carter Community Building Association, recorded in the Grafton County Registry of Deeds at Book 1652, Page 795, is VOID. The court rules that the plaintiff holds the Property in fee simple subject to a condition subsequent, free and clear from any claims, ownership interests, or future interests asserted by the defendant. The plaintiff's motion for summary judgment is therefore GRANTED in part, and DENIED in part, consistent with this order. The defendant's cross-motion for summary judgment and motion to amend are both DENIED.

SO ORDERED, this 22nd day of January 2020.

Lawrence A. MacLeod, Jr.
Presiding Justice

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

GRAFTON, SS. Docket No. 215-2018-CV-272

Carter Country Club, Inc.

v.

Carter Community Building Association

ORDER ON PLAINTIFF'S MOTION FOR CLARIFICATION

By Petition dated August 24, 2018, the plaintiff sought to quiet title to real property located in Lebanon, New Hampshire (the "Property"). (Index #1.) On January 22, 2020, the court issued a Decree quieting title to the Property. (Index #31.) In its Decree, the court ruled that the plaintiff did not prove it held the Property in fee simple absolute, but that the plaintiff proved it "holds title to the Property in fee simple subject to a condition subsequent." (Decree, 1-22-2020, at 8–9.)

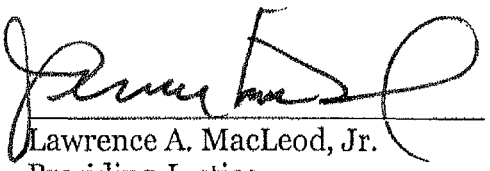
The plaintiff now seeks clarification that the court's decree "was limited to the rights of the Petitioner and Respondent vis-à-vis each other and does not decide whether CCCI, or any other person or entity apart from the Respondent, presently holds a valid right of reentry in the subject property." (Pet'r's Mot. Clarification, Prayer A.) The plaintiff's motion for clarification, however, appears to misapprehend the scope and purpose of a quiet title action. "A petition to quiet title quiets title as against the world with respect to the land at issue." *Mahmoud v. Town of Thornton*, 169 N.H. 387, 389 (2016) (quoting *Porter v. Coco*, 154 N.H. 353, 357 (2006)). The burden is on the plaintiff "to prove good title as against all other parties whose rights may be affected by the court's decree." *Id.* Accordingly, a petition to quiet title does not, as the plaintiff seems to argue, quiet title only as to those parties against whom the plaintiff desires judgment.

CLERK'S NOTICE DATE
3/9/2020
CC: S. Ellis T. Donovan, M. Burns, J. Eggleton

The plaintiff, therefore, is not entitled to the relief requested in its motion for clarification. The court's determination that the plaintiff holds title to the property in fee simple subject to a condition subsequent reflects the plaintiff's title to the Property "as against the world with respect to the land at issue." *Mahmoud*, 169 N.H. at 389. As the plaintiff was required to identify, as far as it was able, all persons who might be affected by the court's Decree, *see* RSA 498:5-a and 5-b, the court presumes, as it did when it issued its Decree, that all parties who might be affected were represented in these proceedings. The fact that the plaintiff now seeks clarification raises concerns that not all of the parties potentially affected by the court's Decree were identified in the plaintiff's petition. Such a possibility is mitigated somewhat by the court's determination that the plaintiff holds title in fee simple subject to a condition subsequent.

Nevertheless, in light of the concerns raised by the plaintiff's motion for clarification the court orders the plaintiff to review RSA 498:5-a and 5-b and, by pleading submitted within ten days of the date of the clerk's notice, inform both the court and the defendant whether there "may be persons who have or may have some estate or interest in" the Property. RSA 498:5-a. If the plaintiff responds in the affirmative, the plaintiff shall, by the same pleading, fully comply with the provisions of RSA 498:5-a and 5-b that require it to identify all affected parties to the best of its ability. Upon receiving the plaintiff's pleading, the court shall determine what, if any, further action must be taken for its January 22, 2020 Decree to become final. The plaintiff's motion for clarification is DENIED.

SO ORDERED, this 5th day of March 2020.



Lawrence A. MacLeod, Jr.
Presiding Justice

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

GRAFTON, SS. Docket No. 215-2020-CV-272

Carter Country Club, Inc.

v.

Carter Community Building Association

ORDER on MOTION for RECONSIDERATION

The plaintiff has filed a pleading captioned Response to the Court's March 5, 2020 Order and Motion for Reconsideration (Index #36), seeking a ruling vacating the court's determination of January 22, 2020, that the plaintiff holds title to the subject property in fee simple subject to a condition subsequent and instead hold that the plaintiff holds title to said property in fee simple absolute. No objection has been filed. A hearing on a motion to reconsider is not permitted except upon leave of the court. *See Super. Ct. R.* 12(e). Because the court finds that a hearing on the plaintiffs' motion will not assist it in determining the pending issues, the court acts on the basis of the pleadings and the record before it.

Having reviewed the plaintiff's pleading, including the attached exhibits which consist of copies of New Hampshire court, land, and executive branch records of public record, the court finds and holds that there are undisputed material facts and prior rulings of law which were not previously made known to the court in reaching its prior decree, which warrant a different result than that determined by the court in said order. As such, the plaintiffs' Motion for Reconsideration is GRANTED, and the court now finds that the plaintiff holds title to the subject property as described in the deed recorded at the Grafton County Registry of Deeds at Book 2005, Page 94 in fee simple absolute. In all other respects, the court's prior orders shall continue in full force and effect.

SO ORDERED, this 15th day of May 2020.

Lawrence A. MacLeod, Jr.
Presiding Justice

CLERK'S NOTICE DATE
5/15/2020
CC: S. Elliott; T. Donovan; M. Burrows; J. Eggleston

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

GRAFTON, SS. Docket No. 215-2020-CV-272

Carter Country Club, Inc.

v.

Carter Community Building Association

ORDER on MOTION for RECONSIDERATION

The defendant has filed a pleading captioned Motion for Reconsideration of May 15, 2020 Order and Reply to Response to Court's March 5, 2020 Order seeking not only a ruling from the court denying the plaintiff's prior motion to reconsider and vacating its May 15, 2020 order (Index #35) but also a determination from the court that the "power of termination" was not quieted by this court's order of September 18, 1991 in Docket No. 90-E-248 and subsequent docket markings filed therein in 1994. (Index #38). The plaintiff objects. (Index #39). A hearing on a motion for reconsideration is not permitted except by leave of the court. *See Super. Ct. R.* 12(e). Because the court finds that a hearing on the defendant's' motion will not assist it in determining the pending issues, the court acts on the basis of the pleadings and the record before it.

Having reviewed the parties' pleadings, and upon review of its file and prior orders, the court finds and holds that there are no points of fact or law which were misconstrued by the court or not previously considered which warrant a different result than that determined by the court in its prior orders. As such, the plaintiff's defendant's Motion for Reconsideration is DENIED.

SO ORDERED, this 14th day of July 2020.

Lawrence A. MacLeod, Jr.
Presiding Justice

CLERK'S NOTICE DATE
7/15/2020
CC: S. Elliott, T. Donovan, M. Burrows, J. Eggleston