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

REPLY BRIEF OF APPELLANT, CARTER COMMUNITY BUILDING ASSOCIATION

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TABLE OF CONTENTS

Table of Authorities

I. The CCBA did not waive any arguments about ambiguity in the deed language or the appropriateness of the trial court considering the Affidavit of Barry Schuster.

The Appellee-Plaintiff Carter Country Club Inc. ("CCC") argues that the Carter Community Building Association ("CCBA") waived the argument that the deeds in this matter were ambiguous at the trial court hearing on the cross-motions for summary judgment filed in this case. CCC's argument is in response to the CCBA's argument, in its Brief, that to the extent the trial court finds the deed of conveyance in this case to be ambiguous, it may refer to the Affidavit of Barry Schuster, dated September 9, 1991, as evidence of the parties' intentions in the original conveyance. CCBA Appendix at 82-84 ("CCBA App. at ___"). As evidence for its argument of waiver, the CCC relies on several statements by the undersigned counsel during the trial court hearing on the parties' cross-motions for summary judgment, in which the undersigned agreed that the case was appropriate for summary judgment because there was no material dispute of fact.

CCBA did not waive the ambiguity argument, nor set aside the affidavit of Barry Schuster. As the CCBA noted in its briefing at the trial court (77-79), during the trial court summary judgment hearing (Tr. at 10-11), and in its briefing in this case (Brief of CCBA at 29-32), there was no question of disputed fact on the Affidavit of Douglas Homan, attached to CCC's Motion for Summary Judgment, because it was an authenticating affidavit only. It simply verified the origin of the deeds upon which CCC predicated its Motion for Summary Judgment. Similarly, together with its cross motion for summary judgment, CCBA provided the Affidavit of Barry Schuster, which CCC never opposed. *See* Tr. at 12; App. at 77-79 (noting Schuster Affidavit attached to cross motion was unopposed); Brief of CCBA at 29-32. Thus, CCBA did not produce facts that would create a dispute of fact regarding the Affidavit of Douglas Homan; and, CCC did not produce facts that would create a dispute of fact regarding the Affidavit of Barry Schuster. For this reason, the trial court could have and should have considered the facts

in Mr. Schuster's affidavit concerning the intentions of the parties if it had concerns about ambiguity in the source deed. *See* App. at 79.

At the trial court hearing, the undersigned may (or may not) have been inartful in his responses to the trial court about the precise role of Barry Schuster's affidavit or the nuance of his assertion concerning the suitability of the matter for summary judgment at that moment. But there is no legitimate doubt that CCBA made the alternative argument that while the deed was not ambiguous because it provided facially for transfer of the reversionary interest to successors and assigns, if there *were* any doubt, the extrinsic evidence of Mr. Schuster's uncontested affidavit erased it. *See* Tr. at 19-20 (discussing background facts); App. at 77-79 (trial court memoranda making alternative arguments and asking court to weigh uncontested affidavit of Schuster).

II. RSA 477:3-b is not dispositive because CCBA is a charitable entity that is exempt from the requirement under the statute that beneficiaries of a reversionary interest renew their interest at regular intervals, and the statute itself supports the existence of a separate enforceable restrictive covenant, as well as the transferability of a right of re-entry or possibility of reverter.

RSA 477:3-b, III(a) states: "(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." By its plain terms, this statute exempts the CCBA which is a charitable organization and was—at least until the trial court's order—the owner of the reversionary interest at issue in this case. Thus, RSA 477:3-b cannot have extinguished the reversionary interest in this case.

RSA 477:3-b is relevant, however, to two other arguments made by CCBA in its Brief. First, as CCBA argued, the language of the original deed created a "restriction *and* right of reversion," App. at 33-34 (emphasis added). The "restriction" so created was a servitude or covenant that bound the owner of the property to maintain a golf course on it in perpetuity, under certain terms and conditions. The benefit of this covenant inured to

the grantor and was conveyed by the grantor to CCBA in 1987. App. at 35-37. Unlike with the separate, but simultaneously conveyed possibility of reverter or right of reentry/power of termination, there is no argument to be made that the benefit of the covenant lapsed or could not be lawfully conveyed to a third-party charitable beneficiary to ensure its enforceability in perpetuity. As noted in the CCBA's brief, the benefits of a servitude are separately conveyable and enforceable, a position reflected in the last sentence of RSA 477:3-b ("Covenants as such are not subject to renewal and remain enforceable by an action at law or equity but without forfeiture.").

Second, RSA 477:3-b clearly contemplates that a right of re-entry or power of termination is a transferrable property interest. "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." *Id*. (emphasis added). The plain language of RSA 477:3-b very clearly implies that a right of re-entry may be held either by "the original grantor or grantee of the interest" or by "the present owner of the interest." *Id*. If the CCC were correct about the law, then the "present owner" could not own a "right of re-entry" and the language of this statute to that effect would be superfluous.

It is axiomatic that the Court must give meaning to every term of a statute, interpreting it in the context of the whole. *Merrill v. Great Bay Disposal*, 125 N.H. 540 (1984). There is no way to give meaning to the words "the present owner of the … right of reentry" than to accept that a right of reentry, or power of termination, is transferrable to third parties at least under certain circumstances. *See* RSA 477:3-b. Though the statute does not expressly state what circumstances might have to exist for a valid transfer of a right of re-entry, the entirety of the statute suggests that one circumstance is when a charitable organization is vested with the right in order protect an interest that benefits the public, or at least, its charitable beneficiaries. RSA 477:3-b (preferencing charitable and public organizations by protecting them from a law intended to do away with reversionary interests that are not mindfully maintained).

III. The CCBA incorrectly argues that the deed to CCBA from the original grantor did not attempt to convey any right to enforce the restrictive covenant the grantor reserved when it sold the Carter Country Club to the original grantee.

The original Carter Country Club, Inc. reserved for itself the benefit of a "RESERVATION, CONDITIONS AND RESTRICTION" that "at all times, in perpetuity, a nine hole golf course shall be maintained and operated on this premises." App. at 33. After describing the servitude, the grantor described the reservation of the reversionary interest intended to protect it: "If at any time the above requirements for maintenance and operation of a nine hole golf course are not met for 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." App. at 33. After expressly stating in the original deed that the reversionary interest was intended to be transferrable—thus a possibility of reverter, not a power of termination—the grantor stated that (a) "This restriction…" and (b) "the right of reversion shall be binding upon and shall inure to the benefit of the Grantor and Grantee and their respective heirs, executors, administrators, successors and assigns as a covenant that shall be on the land in perpetuity." App. at 34.

The deed therefore created a servitude on the land of the grantee, for the benefit of the grantor, with the burden of the servitude running to the grantees' heirs, successors and assigns, and the benefit running to the grantor's heirs, successors and assigns. The CCC's suggestion that no covenant was created by language reading "This restriction … [is] a covenant that shall be on the land in perpetuity" is simply nonsensical. App. at 33, 34.

The covenant is a distinct property interest, separately enforceable by CCBA, whether the power of termination is found to exist or not. The reversionary language only makes sense in light of the restriction on the land; and so, it must be read as a servitude that reserves some protective property interest in the grantor—making it enforceable under the Restatement (First) of Property §161(c). But even if that stick is

not available to CCBA, it may still enforce the benefit of the servitude that was clearly conveyed to it as a successor of the original grantor—just as the grantor and grantee unambiguously intended. Restatement (Third) of Property §8.3(1).

Conclusion and Request for Relief

The CCBA asks that the Court reverse the trial court's decision and find that the deed language created by the grantor, the original Carter Country Club, Inc., in 1986, created an assignable right of reversion or possibility of reverter, rather than a power of termination. This was the intent of the parties because the deed itself called for the transferability of the interest, whatever the nomenclature. In the alternative the CCBA asks that the Court find that the power of termination created by the parties to the original deed in 1986 was coupled with a servitude binding the grantee to maintain a portion of the property as a golf course in perpetuity, and thus was an enforceable, transferrable power of termination now held by CCBA. Finally, in the alternative, the CCBA asks the Court to reverse the trial court's determination that CCBA's Motion to Amend its Answer, Affirmative Defenses and Counterclaims was moot, permit the CCBA to enforce the restrictive covenant it has the benefit of, and remand for further proceedings.

RULE 16(11) CERTIFICATION

I certify that the foregoing brief complies with the word limitation of 3,000 words and that it contains 1,790 words.

Respectfully submitted,

CARTER COMMUNITY BUILDING ASSOCIATION

By its Attorneys,

ORR & RENO, P.A.

Date: May 4, 2021 By: */s/ Jeremy D. Eggleton*

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply 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