THE STATE OF NEW HAMPSHIRE
SUPREME COURT

APRIL 2021 TERM

CASE NO. 2020-0370

CARTER COUNTRY CLUB, INC.

v.

CARTER COMMUNITY BUILDING ASSOCIATION, INC.

BRIEF ON BEHALF OF CARTER COUNTRY CLUB, INC.

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Oral Argument by Attorney Samantha D. Elliott

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II. Did the Superior Court correctly determine that the attempted conveyance of the right of reentry did not satisfy any exception to the rule of inalienability of rights of reentry?

III. Did the Superior Court abuse its discretion when it denied Carter Community Building Association's motion to amend its cross-petition to include a claim seeking to enforce a restrictive covenant requiring Carter County Club, Inc. to maintain and operate a golf course on the Property?

IV. Did the Superior Court correctly determine that res judicata applied to any interests already decided pursuant to the Order and Stipulation and Docket Markings from a 1990 action to quiet title?

V. Did any right that might otherwise have been held by any non-charitable party become void on January 2, 2011 pursuant to RSA 477:3-b?

STATUTE INVOLVED

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.

STATEMENT OF THE FACTS AND OF THE CASE

The former Carter Country Club, Inc. (an entity totally separate and unrelated to Petitioner and which will be referred to as "CCCI" to avoid confusion) was a New Hampshire business corporation incorporated in 1923 that owned a large tract of land in Lebanon, New Hampshire ("Property") on which it operated a golf course. Appendix to Brief of Appellant, Carter Community Building Association ("App."), at 144.

On July 30, 1986, CCCI conveyed the Property to Thomas D. Welch, Jr., Trustee of the Farnum Hill Trust ("Farnum Hill"), by warranty deed, which was recorded in the Grafton County Registry of Deeds at Book 1611, Page 641. App. at 31-34. Neither of the parties to the transaction were charitable organizations. App. at 146-147. The deed contained the following language which created a right of reentry in a portion of the Property in favor of CCCI:

> 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 this 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) Easement 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 and 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.

App. at 33-34 (emphasis added).

On December 19, 1986, CCCI's corporate board passed a resolution titled "Authority to Convey Reversionary Interest." App. at 37. CCCI resolved that its officers were authorized "to execute such deeds or documents as are required in order to convey the right of reversion" held by CCCI. App. at 37.

On December 30, 1986, CCCI attempted to convey its right of reentry in the Property to the Carter Community Building Association

("CCBA"), a non-profit corporation, for consideration paid, by a warranty deed recorded at Book 1652, Page 795 in the Grafton County Registry of Deeds. App. at 35-36. The deed from CCCI to CCBA attempts to grant "All and the same right, interest and title, in and to the reversionary interest retained by the Grantor in the deed from" CCCI to Farnum Hill. App. at 35.

On November 2, 1989, the Property was deeded from Farnum Hill to Lebanon-Farnum Corporation by foreclosure deed recorded at Book 1832, Page 750 in the Grafton County Registry of Deeds. App. at 156.

In September 1990, Lebanon-Farnum filed a Petition to Quiet Title and for Declaratory and Equitable Relief ("1990 Petition"). App. at 150-162. The original reason for the 1990 Petition was a concern that a 1974 dissolution of CCCI might have interfered with the authority to transfer title to the Property in 1986. App. at 153. However, the 1990 Petition asked the court to declare that Lebanon-Farnum held the Property in fee simple, free and clear of all rights or interests of the CCCI shareholders and all other unknown persons who may have an interest in the Property. App. at 150-155. The case proceeded, with Orders of Notice published in the Valley News, the Union Leader and the Sunday Union Leader, identifying by name the shareholders of CCCI according to corporate records and returns of service that appear in the docket. *See* Grafton County Superior Court, Docket No. 90-E-248. A guardian ad litem was appointed to protect the interests of the defendants, Robert A. Baker, Esq. *Id.* Nothing in the docket indicates that any shareholder ever appeared in the case. CCBA, represented by counsel, moved intervene in the 1990 Petition to assert its purported "reversionary interest." *Id.*; App. at 167-168.

On September 18, 1991, Judge Harold Perkins of the Grafton County Superior Court issued an Order declaring that all persons had adequate notice of the 1990 Petition, that Lebanon-Farnum had established record fee simple title to the Property subject to the rights reserved by

CCCI in the Farnum Hill deed, "which rights, if any, are presently claimed by" CCBA. App. at 167-168. The Order specifically acknowledged that there would be further proceedings regarding CCBA's claims, but, "The title of the Petitioner and of Carter Community Building Association, if any, is hereby decreed to be free and clear of all rights or interests of Defendants, and Petitioner is therefore granted permission to record this Order at the Grafton County Registry of Deeds." *Id.* Importantly, CCBA requested and consented to the relief granted in the Order. *Id.*

CCBA and Lebanon-Farnum continued to litigate the issue of the right of reentry for another two and one-half years. App. at 169. On December 22, 1992, Judge Golf, Inc., a predecessor of the current owner, Carter Country Club, Inc. ("Carter") obtained title to the Property, along with other nearby parcels, by quitclaim deed recorded at Book 2005, Page 0095 in the Grafton County Registry of Deeds. App. at 38-54. Rather than continue the litigation over the right of reentry after the sale, CCBA and Lebanon-Farnum entered a Stipulation and Docket Markings, which read:

> 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. As to all other matters, judgment shall be entered for neither party, without prejudice.

App. at 169.

On August 24, 2018, Carter filed its own Petition to Quiet Title and for Declaratory and Equitable Relief ("Petition"). App. at 4-9. The Petition alleged that CCBA's asserted right was incapable of transfer from CCCI, void because it violates the right against perpetuities, and an unreasonable restraint on alienation. *Id.* It asked the court to declare that the purported future interest held by CCBA is void, quiet title to the Property and order that Carter has fee simple title to the Property free and clear of any and all purported right, title, and interest held by CCBA. *Id.* CCBA answered and

counterclaimed, asking the court to declare the purported future interest valid and enforceable. App. at 10-18.

Carter filed a motion for summary judgment on February 21, 2019. App. at 19. CCBA filed a cross-motion for summary judgment on May 17, 2019. App. at 55-118. Also on May 17, 2019, CCBA moved for leave to amend its counterclaim to allege a second claim that the December 30, 1986 deed from CCCI to CCBA transferred, in addition to the alleged reversionary interest, a separate right to enforce against Carter a deeded covenant to maintain a golf course on the Property.

On November 22, 2019, the Superior Court held oral argument on the pending motions. At the beginning of the hearing, counsel for CCBA agreed that "nobody's created a dispute of fact" even though Carter disputed the facts alleged in the September 9, 1991 Affidavit of Barry C. Schuster ("September 1991 Schuster Aff."). Transcript of November 22, 2019 Summary Judgment Hearing ("Transcript"), attached hereto as an Addendum, at 3:21-4:9. Counsel later agreed "that this matter should be decidable, even without Mr. Schuster's affidavit, based on the law." Transcript, 12:18-20. Counsel later said about the facts in the affidavit, "But, I don't know that they're material for the purposes of the summary judgment motion." Transcript, 19:23-20:1.

On January 22, 2020, the Superior Court issued a decree declaring the interest reserved by CCCI a right of reentry that was not freely alienable. January 22, 2020 Decree ("Decree"), p. 6. Moreover, the court held that none of the exceptions to the alienability contemplated by the Restatement had been adopted in New Hampshire, or would apply had they been adopted. Decree, p. 8. The court did not decide the arguments regarding the rule against perpetuities. However, the court did not agree that the effort to transfer the reservation terminated it. Decree, p. 9. Therefore, it held that the right remained with CCCI. *Id.* The court also

denied CCBA's motion to amend because it held that the CCBA deed is void. Decree, p. 10.

On January 31, 2020, Carter filed a motion for clarification, asking the court to clarify that its order was limited to the interests held or not held by CCBA and did not extend to affirmatively establishing interests held or not held by CCCI because that issue, the necessary parties, the relevant facts, and the applicable law were not before the Superior Court in this action. App. at 125-128. The Superior Court denied the motion, but ordered Carter to inform it whether there "may be persons who have or may have some estate or interest in" the Property. March 5, 2020 Order on Motion for Clarification.

Carter filed a response to the court's order that explained that no one other than itself and CCBA could have any estate or interest in the Property pursuant to the orders issued in relation to the 1990 Petition. App. at 135-172. Thus, Carter argued, any right that might have originally remained in CCCI had been extinguished and Carter holds title to the Property in fee simple absolute. *Id.* It asked the court to reconsider its prior order that it holds title to the Property subject to any condition subsequent. *Id.* The Superior Court agreed and issued an order to that effect, declaring Carter's interest in the Property fee simple absolute. May 15, 2020 Order on Motion for Reconsideration. CCBA moved for reconsideration. App. at 173-176. CCBA's motion was denied. July 14, 2020 Order on Motion for Reconsideration. This appeal followed.

SUMMARY OF THE ARGUMENT

CCBA's appeal asks this Court to supplant a corporate resolution, two deeds, an order quieting title, and a stipulation and docket marking, all in exchange for the alleged intention of the original commercial parties to an arm's-length property transaction so that an inalienable reserved right can nonetheless be enforced by a third-party charitable entity for alleged charitable purposes which are not manifest in the deed. While this Court rightfully tries to give effect to the intentions of the parties to a real estate transaction, general predictability with respect to property rights demands that the Court give effect to unambiguous language in deeds, clear precedent, and res judicata. When the deeds are unambiguous, the Court should decide that the parties meant what they said and not let petitions to quiet title turn into an opportunity to undo prior decisions that have brought disappointing results.

Here, the deed uses clear language to create a right of reentry, and nothing more. CCBA does not have the ability to introduce extrinsic evidence to create an ambiguity that does not exist in the language of the deed, especially because CCBA waived that right at oral argument on the cross-motions for summary judgment. Because rights of reentry cannot be conveyed except under certain limited circumstances, not present here, CCBA does not possess a right to take title to the Property.

The right would potentially have remained in CCCI and its shareholders, but it did not. Because the Superior Court previously quieted title with respect to any rights that may have been held by CCCI or its shareholders, no one remains who could possess the right of reentry. If res judicata somehow failed to quiet title as to those parties, the right itself would have become void because no one registered it as required by RSA 477:3-b. Either way, the right of reentry has extinguished.

The Farnum Hill deed only reserved to CCCI a right of reentry. As a result, CCCI could not attempt to convey anything else to CCBA. Even if the deed created a separate right, such as the right to enforce a restrictive covenant, CCCI did not vote to transfer and did not transfer that right to CCBA. Like the right of reentry, it was extinguished by the prior action to quiet title. If not, and CCBA somehow acquired a right to enforce a restrictive covenant over the Property, it cannot do so because it does not have a legitimate interest in requiring the maintenance and operation of a private golf course, which is all that the language required.

Given the unambiguous language in the deeds and prior court orders, Carter holds title to the Property in fee simple absolute.

ARGUMENT

I. Standard of Review

In reviewing a trial court's grant of summary judgment, the Supreme Court considers "the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party." *Tarbell Administrator, Inc. v. City of Concord*, 157 N.H. 678, 682 (2008). "If [the Court's] review of the evidence does not reveal any genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, [the Court] will affirm the trial court's decision." *Id.* The Court reviews the trial court's application of the law to the facts *de novo*. *Id.* Likewise, the interpretation of a statute is a question of law, which this Court reviews *de novo*. *Farm Family Cas. Ins. Co. v. Town of Rollinsford*, 155 N.H. 669, 671 (2007) (citation omitted). "Where the trial court reaches the correct result on mistaken grounds, [this Court] will affirm if valid alternative grounds support the decision." *State v. Dion*, 164 N.H. 544, 552 (2013) (quotation and brackets omitted).

II. The Superior Court Correctly Determined that the 1986 Deed to Farnum Hill Trust Reserved a Right of Reentry and Not a Possibility of Reverter.

The Superior Court correctly found that the interest reserved by CCCI in the July 30, 1986 deed to Farnum Hill was a right of reentry and, consequently, not alienable. The plain language of the deed is conclusive on the issue. CCBA asks this Court to overlook that plain language and allow it to create an ambiguity where there is none on the basis of an argument that has been waived, all to secure an outcome neither required nor permitted.

A. The plain language of the deed conclusively creates a right of reentry.

Generally, when interpreting a deed, the Court will "determine the parties' intent at the time of the conveyance in light of the surrounding circumstances." *Red Hill Outing Club v. Hammond*, 143 N.H. 284, 286 (1998). However, this Court has acknowledged that it will not apply the general rule of construction involving deeds to conditions subsequent. *Id.* "The [grantor of a fee simple subject to a condition subsequent] shall have his exact legal right, but no more." *Id.* (quoting *Emerson v. Simpson*, 43 N.H. 475, 478–79 (1862)). "To defeat an estate of his own creation, [he] must bring the grantee clearly within its letter." *Id.*

The deed states, "[i]f at any time the above requirement 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 and assigns, revert to Grantor, or its successors and assigns." App. at 33 (emphasis added). Because the language in the deed allows the Grantor to choose whether to take title to the Property after the Grantee violates the condition or to refuse to take title, the language describes a right of reentry or power of termination in land[1] and not a possibility of reverter.

The distinction between a possibility of reverter and a right of reentry is that a person holding a right of reentry for condition broken may or may not decide to take possession of the property, whereas a person holding a possibility of reverter automatically takes possession if the

[1] The Restatement (First) of Property tends to describe the right created by the deed in this case as a "power of termination," while this Court and the New Hampshire legislature have described it as a "right of reentry." Restatement (First) of Property § 24 Special Note (noting that the interest described within the Restatement as a "power of termination" is frequently referred to as a "right of entry.")

condition is broken. *Compare Anna H. Cardone Revocable Trust v. Cardone*, 160 N.H. 521, 531 (2010) (quoting Black's Law Dictionary 1284 (9th ed. 2009) for the premise that under a possibility of reverter, the grantee's estate automatically terminates and the property reverts to the grantor if the terminating event occurs) *with Whitten v. Whitten*, 36 N.H. 326, 332 (N.H. Superior Court of Judicature 1858) (noting the "slender right" held by a party holding a right of entry compared to that of a reversioner because he "has but a right to enter, of which he may or may not take advantage."). Another distinction is that a right of reentry is generally inalienable, while a possibility of reverter can be transferred. Restatement (First) of Property §§ 160 and 161.

The language of the deed that the Property "shall, at the option of the Grantor or its successors and assigns, revert to Grantor, or its successors or assigns," App. at 33 (emphasis added), contains nothing automatic. The very essence of the distinction between a right of reentry and a possibility of reverter is the choice that is contained in the language at issue. *Colette v. Charlotte*, 114 Vt. 357, 360 (1946) ("The only practical distinction between 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."). Here, there can be no dispute that the reversionary interest is a right of reentry. *See Unknown Heirs v. Covington*, 815 S.W.2d 406, 413 (Ky. 1991) (construing language providing that property "shall revert back, at their option, to [grantors], their heirs, or assigns" as a "right of re-entry upon condition broken rather than a possibility of reverter as argued on behalf of the heirs.").

CCBA cites to *Colette* for the proposition that this Court should find the right reserved by CCCI a transferable possibility of reverter. CCBA

Brief, pp. 22-24. However, the case does not stand for the proposition for which it is offered. In *Colette*, the Vermont Supreme Court discussed the same distinction between a "determinable fee" (which is what it calls a "possibility of reverter") and a "possibility of forfeiture" (which it what it calls a "right of reentry," while documenting that the Restatement calls it a "power of termination") that New Hampshire Courts have recognized—whether the estate terminates automatically on the occurrence of an event or only after entry by the person holding the right. *Colette*, 114 Vt. at 359-362. The court acknowledged that "a slight change in the language of the deed would usually be sufficient to change a determinable fee into a fee upon a condition subsequent, or vice versa." *Id.* The right at issue in the case vested automatically if the property ceased to be used for school purposes and was, therefore, a determinable fee or possibility of reverter. *Id.* at 360. The court pointed out, in dicta, that powers of termination (rights of reentry) are not alienable. *Id.* at 362. The court did not, as CCBA argues, find the interest at issue alienable due to the parties' intent that it be alienable, but rather found that the parties intent was to have title automatically revert after a breach and, thus, found the right alienable consistent with the Restatement's treatment of reversionary interests. *Id.*

Contrary to CCBA's allegations, the "inescapable intention" of the parties to the Farnum Hill deed was not to create a defeasible interest. CCBA Brief, pp. 24-25. Quite the opposite. The only reason that the deed's language appears to track the defeasible interest cases cited in CCBA's brief is that CCBA replaces the key provision of the deed's language, "at the option of the Grantor or its successors and assigns," with ellipses. While CCBA is correct that this Court has not yet had occasion to decide a case that turned on the distinction between a right of reentry and a possibility of reverter, it has defined that distinction consistently. *See Lyford v. Laconia*, 75 N.H. 220 (1909); *Ashuelot Nat'l Bank v. Keene*, 74 N.H. 148, 152

(1907). There is no reason to ignore that distinction in this case, or fail to see that the language of the deed evinces an "inescapable intention" to create a right of reentry.

It is true that this Court has been willing to relax some of the formalities of property law in favor of charitable grantees. *See Horse Pond Fish & Game Club, Inc. v. Cormier*, 133 N.H. 648 (1990) (restraint imposed on a charity is rebuttably reasonable); *Smart v. Durham*, 77 N.H. 56 (1913) (rule against perpetuities relaxed for donation to charity). The reason for this is that restraints on alienation imposed upon charities are different than those imposed upon private owners and do not raise the same concerns about freedom of alienation. *Horse Pond*, 133 N.H. at 653-54. Here, the original restraint was imposed by CCCI, a New Hampshire Business Corporation. App. at 144. It was imposed upon Farnum Hill, a private buyer acquiring the Property in trust. App. at 146. It cannot be the law that a Grantor or Grantee can resuscitate otherwise invalid restraints, or worse, revise clear terms in a deed, by later conveying the property to a charitable organization. That is what CCBA seeks to do here. The effect is even less equitable here than it might be in other cases because the restraint has always been and continues to be imposed upon a private owner and not upon a charitable trust, so there is nothing to diminish legitimate concerns about the restraint against alienation created by the right of reentry.

In addition, "the rule of non-transferability [of rights of reentry] emphasizes the personal character of the transferor's option to exercise, or not exercise, this power, in the event of a breach of the condition subsequent." Restatement (First) of Property § 160, comment a. Whether the attempted transferee of the right happens to be a charitable organization should not affect the personal character of the option. CCBA's charitable status is irrelevant to the Court's analysis.

B. The Superior Court correctly declined to resort to extrinsic evidence.

The Superior Court was not permitted to rely on extrinsic evidence because the deed's language is clear and not ambiguous. *See White v. Auger*, 171 N.H. 660, 663 (2019). "Ambiguity exists only when the parties could reasonably disagree as to a clause's meaning." *Anna H. Cardone Revocable Trust*, 160 N.H. at 531 (quoting *Lassonde v. Stanton*, 157 N.H. 582, 594 (2008)). There is no question that the language of the deed permits the Grantor the choice between taking title to the Property or leaving it with the Grantee. No one could reasonably disagree as to what is permissible if the Grantee were to breach the restriction. Thus, there is no ambiguity, and the Superior Court was correct in declining to resort to extrinsic evidence.

The Kentucky cases cited in CCBA's brief do not stand for the propositions described. CCBA mistakenly argues that the term "right of reversion" in *Covington*, 815 S.W.2d at 413, is synonymous with "possibility of reverter." CCBA Brief, pp. 28-29. The use of "right of reversion" in the Farnum Hill deed notwithstanding the option left to the Grantor, CCBA argues, creates an ambiguity that requires the Court to resort to intrinsic evidence. However, the phrase appears only in a block quote from another case and, when the quote is read in the context of the original case, it is clear that "right of reversion" encompasses both possibility of reverters and rights of reentry. *Scott County Board of Ed. v. Pepper, Ky.*, 311 S.W.2d 189, 190 (Ky. 1958). Thus, the use of the term in the Farnum Hill deed does not create an ambiguity.

The fact-finding described in *Scott County* likewise does not serve to create an ambiguity or justify the use of extrinsic evidence in this case. In *Scott County*, the fact-finding assists the court in determining whether any type of interest had been created, not which type of interest. *Scott County*, 311 S.W.2d at 190. There is no dispute that the deed at issue created a

"right of reversion" as that phrase is used in Kentucky. However, the "right of reversion" created by the Farnum Hill deed was, indisputably, a right of reentry and not a possibility of reverter. The cases relied upon by CCBA are irrelevant to the issues before the Court in this case.

CCBA would like to use the September 9, 1991 Affidavit of Barry Schuster to create an ambiguity that does not exist in the Farnum Hill deed. The language of the deed is clear. CCCI had the option to take title if Farnum Hill ceased to operate a golf course. App. at 33-34. Using extrinsic evidence to create an ambiguity is a perversion of New Hampshire property law. *See Arell v. Palmer*, No. 2019-0553, 2020 WL 6372951, at *2-3 (N.H. Oct. 30, 2020). The Superior Court was correct to reject the idea.

Importantly, this Court need not reach the issue of whether the Superior Court should have found an ambiguity that required it to use extrinsic evidence, including the September 9, 1991 Affidavit of Barry Schuster because CCBA waived this issue at the November 22, 2019 oral argument on the cross-motions for summary judgment. CCBA agreed that "nobody's created a dispute of fact" even though Carter clarified that it disputed the facts alleged in the Schuster Affidavit that CCBA had offered. Transcript 3:21-4:9. CCBA agreed "that this matter should be decidable, even without Mr. Schuster's affidavit, based on the law." Transcript, 12:18-20. CCBA also said that the facts in the affidavit were not clearly "material for the purposes of the summary judgment motion." Transcript, 19:23-20:1. These statements waived any issue concerning an alleged ambiguity in the deeds or the need to consider the Schuster Affidavit. Further, CCBA did not raise the issue in any motion to reconsider the Superior Court's ruling. This Court need not consider it.

III. The Alleged Conveyance of the Right of Reentry Does Not Satisfy Any Exception to the Rule of Inalienability of Rights of Reentry.

CCBA has evidently conceded that, if this Court finds that the language in the Farnum Hill deed created a right of reentry rather than a possibility of reverter, CCCI could not transfer its reserved right unless the transfer satisfies one of the exceptions enumerated in the Restatement (First) of Property. CCBA Brief, pp. 32-33. As a preliminary matter, this Court has not yet adopted any of the exceptions to the inalienability of rights of reentry and it is not required to do so here. The concerns about rights of reentry that limit its alienability are on full display in this case. If the provision is valid, Carter, a private entity, cannot use a large tract of land for anything other than a nine-hole golf course and cannot sell the land for any other use. App. at 33. If it ceases to operate a golf course, it will simply forfeit the property, for no consideration at all. *Id.* This is a momentous restraint on alienation. *See Great Bay Sch. & Training Ctr. v. Simplex Wire & Cable Co.*, 131 N.H. 682, 686 (1989) (possibility that owner would receive only 25% of the unrestricted value compelled application of the rule against perpetuities because it posed a substantial restraint on alienation). There is no corresponding public benefit. Contrary to CCBA's statements in its brief, the deed does not require the operation of a public golf course, but only the maintenance of a golf course. App. at 33. Conceivably, Carter could close the course to the public if it wished to do so. This Court need not adopt the Restatement's exceptions to inalienability in this case.

If this Court chooses to adopt the Restatement's exceptions, CCCI's right of reentry remains incapable of transfer. The Restatement (First) of Property, Section 161(c) permits transfer of a right of reentry if it supplements a "reversionary interest also had in the same land" and the

owner makes an effective conveyance of both simultaneously. CCBA argues that the restrictive covenant contained in the deed is a "reversionary interest" with which the right of reentry was transferred. CCBA Brief, pp. 33-36. It is not. A "reversionary interest" is a "future interest left in the transferor or his successor in interest." Restatement (First) of Property, § 154. It is not a future interest subject to a condition subsequent. *Id.* Transfer for a specific term of years or of a life estate leaves a reversionary interest in the grantor. *Id.* CCCI possessed no such interest.

A restrictive covenant is not a "reversionary interest." *See* Restatement (First) of Property, § 154. A restrictive covenant is a servitude, it is true. Restatement (Third) of Property (Servitudes) § 1.3 (2000). A servitude, however, is not a reversionary interest. *Compare id.* and Restatement (First) of Property, § 154. By its very nature, it provides no future interest. If restrictions on the use of property were reversionary interests providing an exception to the inalienability of rights of reentry, the exception would swallow the rule. Because of the way rights of reentry work and their purpose, they are nearly always accompanied by a restriction on the use of the Property. A right of reentry cannot be transferred when coupled with a servitude, but only with a reversionary interest. *See* Restatement (First) of Property, § 161(c).

The portion of the Restatement to which CCBA cites that refers to covenants is not relevant here. CCBA Brief, 34-35. The reference to covenants in that comment describes determining how closely a reversionary interest is related to the right of reentry in the same deed which, itself, determines whether the right of reentry can supplement the reversionary interest (be transferred with it) and how explicit the language of the deed needs to be to do so. Restatement (First) of Property, Section 161(c), comment e. There are similarities between this determination and the law of covenants. *Id.* The language does not establish, or even suggest,

that a restrictive covenant is a reversionary interest. Because CCCI did not have and did not transfer a reversionary interest with the right of reentry, it was incapable of transferring the right of reentry.

Even if the restrictive covenant qualified as a reversionary interest for the purposes of Section 161(c) of the Restatement, which it does not, it could not validate the purported transfer of the right of reentry because the restrictive covenant was not transferred to CCBA, as explained *infra*.

IV. It Was Not an Abuse of Discretion to Deny CCBA's Motion to Amend.

Whether to allow CCBA to amend its complaint was within the Superior Court's sound discretion. *Coan v. N.H. Dep't of Env't Servs.*, 161 N.H. 1, 11 (2010). This Court will not disturb that determination absent an unsustainable exercise of discretion. *Id.* The Superior Court did not abuse its discretion when it denied CCBA's Motion to Amend to add a count seeking to enforce a restrictive covenant requiring Carter to maintain a golf course on the Property. The Superior Court correctly determined that the invalidity of the transfer of the right of reentry voided the entire CCBA deed. The amendment would be futile and was properly denied. *Tessier v. Rockefeller*, 162 N.H. 324, 340 (2011). First, the Farnum Hill deed reserves no such separate right that could have been transferred. Second, CCCI was authorized to and did only attempt to convey a "right of reversion." Additionally, CCBA would not be able to enforce any such right because there is nothing in the deed indicating that it has any legitimate interest in its enforcement, as is required.

A. The so-called restrictive covenant is not a separate right.

The Farnum Hill deed did not create a right of reentry and a separate enforceable restrictive covenant. Rather, the conditions and restrictions listed in the deed language codify the circumstances that will trigger the right of reentry. *See* App. 33-34. If the conditions and restrictions are

violated—CCCI can reenter. *Id.* The deed does not provide for any enforcement mechanism other than the right of reentry. *Id.* Counsel was unable to find any cases in which a court transformed an invalid right of reentry into a restrictive covenant, as CCBA seeks to do here. Because CCCI possessed only the right of reentry, it could attempt to pass no other right to CCBA. The deed purporting to convey the right of reentry was invalid. CCBA had no other right to enforce and its proposed amendment was futile.

B. CCCI did not convey the right to enforce the restrictive covenant to CCBA.

Even if there were a separate restrictive covenant held for the benefit of CCCI, CCBA would not be entitled to enforce it because the only property right that CCCI attempted to transfer to CCBA was the right of reentry. "Only current beneficiaries are entitled to seek judicial enforcement of deed covenants, even if enforcement would be beneficial to persons or entities other than beneficiaries." *Town of Newington v. State*, 162 N.H. 745, 749 (2011) (citing Restatement (Third) of Property (Servitudes) § 8.1 comment b, at 475 (2000)). Because CCBA is not a current beneficiary, it would not be able to enforce any restrictive covenant.

The July 30, 1986 deed from CCCI to Thomas D. Welch, Jr., Trustee of the Farnum Hill Trust, states that the "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." App. at 34. Even if there were a right to enforce a restrictive covenant separate from the right of reentry, it specifically inured to the benefit of CCCI and its successors and assigns. The December 19, 1986 Corporate Resolution authorizing CCCI to transfer a property right to CCBA is titled "Authority to Convey Reversionary Interest" and authorizes CCCI's corporate officers

to "execute such deeds or documents as are required in order to convey the right of reversion" held by CCCI. App. at 37. Nowhere does it authorize the officers to convey the interest in the "restriction" or any right to enforce the restriction other than through the "right of reversion." *Id.*

The December 30, 1986 deed from CCCI to CCBA attempts to grant "All and the same right, interest and title, in and to the reversionary interest retained by the Grantor in the deed from" CCCI to Farnum Hill. App. at 35. It describes the interest it is attempting to transfer as "[s]aid reversionary interest and its reservation, conditions and restriction." App. at 35. This language is clear. It does not even attempt to transfer any right to enforce an alleged restrictive covenant, even if one existed.

C. CCBA does not have a legitimate interest in enforcing the restrictive covenant.

Even if CCBA could prove that CCCI had transferred to it a separate right to enforce a covenant requiring the maintenance of the golf course, which it cannot, it would not be able to enforce that right because it does not have any legitimate interest in doing so. In *Lynch v. Town of Pelham*, this Court acknowledged the potential opportunism abetted by enforcement of covenants in gross. 167 N.H. 14, 25 (2014). Consequently, this Court adopted Section 8.1 of the Restatement (Third) of Property, which requires the person seeking to enforce a covenant in gross to establish a legitimate interest in enforcing the covenant. *Id.*

CCBA attempts to manufacture such an interest by claiming that the alleged restriction requires Carter "to maintain a public golf course on the premises in perpetuity." CCBA Brief, p. 39. There is no such requirement. At best, the deed requires Carter to maintain and operate a golf course. App. at 33. Nothing requires Carter to open that golf course to the public. *Id.* In fact, the deed never mentions the word "public" and specifically states that the restriction inures to the benefit of private parties. App. at 33.

The grantor was a private corporation. App. at 144. The grantee was a private trust. App. at 146-147. There is no language in the deed that the restriction was intended to benefit the public rather than the shareholders of the private corporation. The Superior Court did not err by denying CCBA's motion to amend.

V. The Superior Court Correctly Held that Res Judicata Applied to Quiet Fee Simple Title in Carter.

The Superior Court correctly applied res judicata to its previous decisions in determining that Carter now holds title to the Property in fee simple absolute. When Carter filed its Petition on January 24, 2020, the only entities remaining who could possibly possess any interest in the Property were Carter and CCBA because the Superior Court had previously quieted title as to all others in 1991. App. at 167-168. Now that CCBA's purported interest has been declared void, Carter holds unfettered title to the Property.

In 1990, Carter's predecessor in title, Lebanon-Farnum Corporation, filed a Petition to Quiet Title and for Declaratory and Equitable Relief. App. at 150-162. The 1990 Petition asked the court to declare that Lebanon-Farnum held the Property in fee simple, free and clear of all rights or interests of the CCCI shareholders and all other unknown persons who may have an interest in the Property. App. at 150-155. In 1991, the Superior Court issued an Order declaring that all persons had adequate notice of the 1990 Petition, that Lebanon-Farnum had established record fee simple title to the Property subject to the rights reserved by CCCI in the Farnum Hill deed, "which rights, if any, are presently claimed by" CCBA. App. at 167-168. The Order specifically acknowledged that there would be further proceedings regarding CCBA's claims, but, "title of the Petitioner and of Carter Community Building Association, if any, is hereby decreed to be free and clear of all rights or interests of Defendants, and Petitioner is

therefore granted permission to record this Order at the Grafton County Registry of Deeds." *Id.*

After another few years of litigation over the right of reentry, the Property was conveyed to a predecessor of the current owner, Carter. App. at 38-54. Rather than continue the litigation, CCBA and Lebanon-Farnum entered a Stipulation and Docket Markings, which read:

> 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. As to all other matters, judgment shall be entered for neither party, without prejudice.

App. at 169. Consequently, the only remaining cloud on Carter's title was CCBA's alleged right.

CCBA now complains that the others against whom title was quieted, specifically the CCCI shareholders, did not have a full and fair opportunity to litigate their interest in the Property. CCBA's Brief, pp. 41-42. CCBA does not argue that the CCCI shareholders had insufficient notice or representation. Orders of Notice published in the Valley News, the Union Leader and the Sunday Union Leader, identifying by name the shareholders of CCCI according to corporate records and returns of service that appear in the docket. *See* Grafton County Superior Court, Docket No. 90-E-248. A guardian ad litem was appointed to protect the interests of the defendants, Robert A. Baker, Esq. *Id.* There is no allegation that the Superior Court lacked jurisdiction over CCCI and its shareholders when it quieted title with respect to their potential interests.

Rather, CCBA argues that the CCCI shareholders had insufficient notice that they might still possess rights in the Property because they believed that they had transferred the right of reentry to CCBA. CCBA's Brief, p. 41. As a result, CCBA wants to avoid the application of res judicata. CCBA ignores the fact that it requested and consented to the relief

granted in the 1991 order quieting title as to CCCI and its shareholders and the 1994 Stipulation and Docket Markings reconfirming that relief. App. 167-168. It cannot now avoid the function of that consent simply because it does not like some of the ramifications of the relief it then requested.

The Superior Court and the parties to the earlier action did not, as CCBA alleges, stipulate the right of reversion had been divested. CCBA Brief, p. 41. On the contrary, they acknowledged at every step the possibility that CCBA may not hold any rights in the Property, precisely because they were litigating that issue. *See* App. at 167-168 ("which rights, if any, are presently claimed by" CCBA); App. at 169 ("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").

Moreover, res judicata is not limited by the expectations of the parties to the underlying actions. For res judicata to apply, the parties must be the same or in privity with one another, the same cause of action must be before the court, and a final judgment on the merits must have been rendered. *Meier v. Town of Littleton*, 154 N.H. 340, 342 (2006). The CCCI shareholders were parties to the prior action, the 1990 Petition sought to quiet title to the Property, and the 1991 Order and 1994 Stipulation and Docket Markings, taken together, constitute a final judgment on the merits. There is no exception in the law of res judicata for unexpected consequences flowing from the judgment. *See Sleeper v. Hoban Family Partnership*, 157 N.H. 530, 534 (2008) ("[A] judgment in an action that determines interests in real or personal property conclusively determines the claims of the parties to the action regarding their interests in the property involved in the action.") (quotation omitted).

VI. Any Right Held by CCCI or its Shareholders Would Have Become Void Pursuant to RSA 477:3-b on January 2, 2011.

Even if res judicata did not apply, the Superior Court did not err in holding that Carter possesses a fee simple absolute interest in the Property. Any interest held by CCCI or its shareholders would have previously become void pursuant to RSA 477:3-b.

In 2008, the New Hampshire legislature enacted RSA 477:3-b, which in relevant parts states:

> 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.
>
> RSA 477:3-b(III)(a).
>
> 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.
>
> RSA 477:3-b(III)(b)(2).

CCCI was a business corporation that reserved the right of reentry in a deed provided in a business transaction for consideration. App. 31-34, 144. Neither the grantor nor the grantee was a public or charitable organization. App. at 146-147. Because the right of reentry was incapable of transfer, it was never transferred to a charitable organization. As a result, the right is void under RSA 477:3-b unless a declaration of renewal was filed on or before January 2, 2011. The registry of deeds does not contain any declaration. Consequently, even if it had not already been divested by

virtue of the 1990 quiet title action, the interest would have become void on January 2, 2011.

CONCLUSION

For the reasons set forth above, in the pleadings, and in the Superior Court's well-reasoned decisions, this Court should affirm.

REQUEST FOR ORAL ARGUMENT

If the Court determines that oral argument would assist it in deciding this appeal, Counsel for Carter Country Club, Inc. hereby request 15 minutes for oral argument and designate Samantha D. Elliott to present it.

Respectfully submitted,

CARTER COUNTRY CLUB, INC.

By Its Attorneys,

GALLAGHER, CALLAHAN & GARTRELL, P.C.
214 N. Main Street
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(603) 228-1181

Dated: April 12, 2021

By: /s/ Samantha D. Elliott

Samantha D. Elliott, Esq. (#17685)
Matthew V. Burrows, Esq. (#20914)
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(603) 228-1181

CERTIFICATE OF SERVICE

I, Samantha D. Elliott, hereby certify that a copy of the foregoing has been forwarded this day to Jeremy D. Eggleton, Esq., counsel for Appellant and Thomas J. Donovan, Esq., Director of Charitable Trusts, via the Supreme Court's electronic filing File and Serve System.

Dated: April 12, 2021 By: /s/ Samantha D. Elliott
Samantha D. Elliott, Esq. (#17685)

ADDENDUM

BRIEF OF APPELLEE, CARTER COUNTRY CLUB, INC.

PAGE

STATE OF NEW HAMPSHIRE

GRAFTON COUNTY SUPERIOR COURT

CARTER COUNTRY CLUB, INC., Plaintiff, vs. CARTER COMMUNITY BUILDING ASSOCIATION, Defendant.	) Supreme Court Case No. 2020-0370) Superior Court Case No. 215-2018-CV-00272) North Haverhill, New Hampshire) November 22, 2019) 10:53 a.m.

HEARING ON MOTIONS FOR SUMMARY JUDGMENT
BEFORE THE HONORABLE LAWRENCE A. MACLEOD, JR.
JUDGE OF THE SUPERIOR COURT

APPEARANCES (All present by video or telephone):

For the Plaintiff:	Matthew V. Burrows, Esq. Samantha D. Elliott, Esq. GALLAGHER, CALLAHAN & GARTRELL, P.C. 214 North Main Street Concord, NH 03301
For the Defendant:	Jeremy D. Eggleton, Esq. ORR & RENO P.A. 45 South Main Street, Suite 400 P.O. Box 3550 Concord, NH 03302-3550
For the State:	Thomas J. Donovan, Esq. ATTORNEY GENERAL'S OFFICE 33 Capitol Street Concord, NH 03301-6397
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Proceedings recorded by electronic sound recording; transcript produced by court-approved transcription service.

(Proceedings commence at 10:53 a.m.)

THE COURT: So this is Docket No. 18-CV-272, Carter Country Club, Inc. v. Carter Community Association -- or Carter -- let me see my notes here, Carter Community Building Association, 18-CV-272.

So we're here on competing motions for summary judgment. Could everyone just -- some of you I know, some of you, I don't. Could you all identify yourselves for the record, please, and whom you represent?

MS. ELLIOTT: Good morning, Your Honor. Samantha Elliott from Gallagher, Callahan & Gartrell. I'm here with my colleague, Matthew Burrows. We're here on behalf of the Carter Country Club.

MR. EGGLETON: Jeremy Eggleton, with Orr & Reno, on behalf of the CCBA. I'm joined by one of our staff, Rick Dixon (phonetic).

THE COURT: Good morning.

Mr. Donovan, good morning.

MR. DONOVAN: Tom Donovan, director of charitable trusts at the attorney general's office.

THE COURT: So I -- I still don't have a file for this one. I take it are no factual issues in dispute, right? We're here on summary judgment. Wrong?

MR. EGGLETON: No, I think you're right, Your Honor. I think there's some background facts, which I don't think is

disputed, that there is some of the issues in the case. But I don't think -- nobody's created a dispute of fact.

THE COURT: All right.

MS. ELLIOTT: I think there are some facts included in the affidavit that was provided by the CCBA that would be disputed.

THE COURT: Material facts?

MS. ELLIOTT: But I don't think that those facts were material to the Court's decision in summary judgment.

THE COURT: All right, well we've got the rest of the morning, so you may commence when you want.

MR. EGGLETON: A point of procedure, Your Honor, there the other motion, as well. So as you may recall -- or you might not. I don't know how attuned you are to the record, but basically we filed our counter summary judgment motion on May 17th by mail. And it arrived Monday morning, the 20th. And one of the allegations, or one of the arguments of the CC, of the Carter Country Club, the Plaintiff, is that that was untimely and therefore, they're entitled to summary judgment. And so I'm wondering if you want to handle that first or how do you want address the motions, I guess?

THE COURT: Do you want to be heard on that?

MS. ELLIOTT: It's never pleasant to have to raise these types of issues that I'm going to raise today. And because of what I'm going to argue, I think it is important.

It's important for me to give the Court the opportunity to enforce its own rules.

The issues that we have are not only that, the motion, the objection to motion for summary judgment is filed late. It's that it's also not an objection to a motion for summary judgment. And it's an omnibus motion, instead.

And I know that in the CCBA's -- and for ease of reference, I'm going to refer to our client as the country club and Jeremy's client is the CCBA. I hope that that will work for the Court.

So in the CCBA -- the CCBA actually filed a motion to deem the CCBA's summary judgment filings timely, because in our reply to their other motion, we mentioned that it was untimely and also that it was an omnibus motion that violated the Superior Court rules. In that motion to deem the CCBA's motion for summary judgment filing as timely, there's no argument that the justice requires this. There's no good cause shown that the court's rules should be waived.

We, as a State, take a lot of effort to create these rules. The Court makes a lot of effort to enforce them. And the attorneys and their clients make a lot of efforts to comply with them. And in this case, I understand that the Court has the authority, of course, to waive any rule as good cause appears and justice may require, pursuant to Rule 1. The CCBA's motion to deem the filings timely also addresses

this omnibus issue within it, though it's not in the title. It doesn't give any good cause why this should happen.

So we filed the motion for summary judgment. And in response, got to cross motion for summary judgment. Did not get an objection to our motion. The only time that our motion for summary judgment is mentioned in that motion at all is in a prayer for relief.

And in the motion that the CCBA filed to say that that's not a violation of the court rules, that motion quotes only a portion of the rule and leaves out the portion of the rule that explicitly says that objections to pending motions and affirmative motions for relief shall not be combined in one filing. And that's exactly what was done. And there's no explanation of why that was done. The only explanation that's in there is that, well, these are overlapping arguments. Well, that might be true, but the rule says what it says. And I'm not going to stand on formality. These rules are created so that we have a procedure that's less confusing than the one we find ourselves in today. We're having difficulty figuring out how to argue this because there isn't a motion and an objection and then a cross-motion and an objection to that. So I do think that those rules are important and I just would like to give the Court the opportunity to enforce that rule.

In addition to the timeliness issue, we filed our motion for summary judgment on February 25th. Opposing

counsel had a number of other commitments. And as is New Hampshire custom, we assented to every motion to extend. There was originally a motion to extend this to May 1st. There was an additional motion to extend -- or no, I'm sorry. Then there was an additional motion to extend to May 15th. On May 15th, nothing was filed. On May 17th, a motion for further extension was filed to extend the deadline to May 17th. But on May 17th, no motion, no objection was filed. That motion and objection was filed on May 20th.

Now, I understand that the motion or objection, whatever you want to call it, was sent via FedEx on May 17th, but that's not the court rule. And absolutely, if there is good cause to waive the court rules, that's within the Court's discretion. But in the seven pages or so, in the motion to deem the CCBA's motion for summary judgments filings timely, there's no cause given. The only argument is that the rule doesn't really matter. And that's not the standard, because if that's the standard, then rules never matter. And so I do think it's important. I know it seems like a technicality. I feel uncomfortable arguing it, because we've all found ourselves in these positions. But that's why a further request for extension would've been granted. I absolutely would have assented to that.

It doesn't make sense that you had to combine the two, pleadings. There's no explanation given for that. And

so I just would like the Court to consider whether or not it's appropriate. I understand we're probably going to reach the merits of the argument today, and I hope that we do. But I do think these other issues are important to consider.

THE COURT: Mr. Eggleton?

MR. EGGLETON: So with respect to the first piece of this, Your Honor, we filed a cross-motion for summary judgment and the essence of our argument is you can't grant both motions. So therefore, if you grant one, you deny the other, by the nature of the motions that were filed. We included the request to deny their motion in our cross-motion for summary judgment. And it does function, practically speaking, as an objection.

I noted in our motion to deem the pleadings timely filed that we'd be happy to submit a pro forma, one-page objection, incorporating the essence of our cross-motion for summary judgment. But that seemed like a triumph of form over substance on the circumstances of the case.

With respect to the timeliness argument, I do want to make one point of clarification. We made sure to include in our motion to deem the matter timely filed that there is a factual misstatement, I guess. On May 15th, I obtained the assent of counsel to submit our materials on the 17th. And that is documented in our motion here. We didn't, I think, filed a motion to extend the deadline until the 17th. But I

obtained the assent of the counsel on that point. So this notion that no motions were filed on the 15th is neither here nor there. I did obtain the assent of counsel in order to extend to the 17th.

And I concede that in a perfect world, I would have had the filings here on the 17th by 4 p.m., but they were delayed in the final editing process. And I got them into FedEx and they were here by Monday morning, together with Attorney Donovan's filing, by the way. So Attorney Donovan -- and I'm not making any argument on his behalf -- but as a matter of fact, he put his filing into the mail on Wednesday, I think, on the 15th. That didn't arrive here until the 20th, either.

Under the case of Chemical Insecticide Corp. -- and I just have to note that it's a refreshing thing to see a company that would name itself that in 1967 -- we have a different world today. But in any event, in Chemical Insecticide Corp, a similar situation occurred where the motion for summary judgment was filed, the objection was due on December 7th, I think it was. And the objection was not submitted on the 7th. The Plaintiff company attempted to have judgment entered against the State that day. The State turned around and filed a contrary opposition affidavit on 10th. And the trial court deemed that sufficient to meet the objectives of the summary judgment statute.

And what the Supreme Court said when it considered this issue is the purpose of the summary judgment statute is not jurisdictional. It's to establish whether there's a dispute of fact on the facts of the case. And if there is a dispute of fact, then there should be a trial. It's a case management statute. So to that extent, given that there was virtually no prejudice to the party that had submitted the original motion for summary judgment, the trial court properly exercised its discretion to accept a contradictory affidavit.

Now in this case -- so for those reasons, you have the authority to exercise that discretion and accept our filing on Monday morning at 10:00, instead of Friday afternoon at 4:00. But the other point that I would make, with respect to that case, is in that case, there was actually an affidavit filed that contradicted the original affidavit filed with the summary judgment motion. The result, if there is no objection filed or if there is no affidavit filed, would be that the court deems the affidavit submitted with the first motion for summary judgment to have been admitted.

And we concede that the affidavit supplied by the Plaintiff in this matter with its motion for summary judgment was, in fact, correct. We don't contest any of the facts in that affidavit. It was an affidavit from Mr. Homan that authenticated the deeds that were subject to the court's consideration. So even if you take the position that the

failure to file by 4 p.m. on Friday means that it has some effect on the facts of the case, it's to admit the facts that were contained in the Plaintiff's affidavit.

The Plaintiff still has to prevail on the matter of summary judgment. So they still have to show and demonstrate that they're entitled to summary judgment as a matter of law in this case, and that for the reasons set forth, I think, in our motion -- our cross-motion for summary judgment, they can't. So for those reasons, the request to enter judgment in favor of the Plaintiff because of the firing on Monday morning is a triumph of form over substance. And you should really consider the merits of the matter. And that was a point that the Supreme Court made in the Chemical Insecticide case, which is that, look, this is a docket management statute. And the real goal of the court should be to focus on the merits of the case.

THE COURT: Anything more you want to say about this, Attorney Elliott?

MS. ELLIOTT: Just very briefly, Your Honor. In Chemical Insecticide, the whole thing there is that you have the authority, you have the power to waive the rules. I agree and I think, stated such in my opening. In that case, there wasn't justification for missing the deadline. It was unknown to them. And so there's no allegation here that the deadline was unknown. There was just a lack of effort to get it to the

court on time. And there is a distinction between the court rules and the statute. And I agree that the statute does not say that if you're -- if his motion -- his objection is late, we win. That isn't how it works. But it does say that our facts are admitted. And it also would prevent the affidavit, which for other reasons, I think is irrelevant to this dispute, but it would prevent the Court from considering the affidavit that was presented in the papers. Those are the only two distinctions I would like to make.

THE COURT: Anything more on this?

MR. EGGLETON: Only with respect to Mr. Schuster's (phonetic) affidavit. That actually doesn't contradict any of the material in Mr. Homan's affidavit, so it's not offered as a rebuttal affidavit, so to speak, in order to create a question of fact. It's offered as a separate and independent set of factual assertions. And so I guess to the extent that the argument applies, it applies to the fact that there's no competing affidavit to Mr. Schuster's affidavit. But I agree that this matter should be decidable, even without Mr. Schuster's affidavit, based on the law.

THE COURT: All right. Well, you're right. We're going to get to the merits. When I reviewed the file, I didn't focus on this -- the court rules and the deadlines and the rest of it. I noticed it, but I didn't focus on it. So I'll take that under advisement. I understand what you're

saying. So let's talk about the merits.

MS. ELLIOTT: Okay. Thank you, Your Honor. I'm going to go first just because we filed ours first. I'm sure we'll have some back and forth, if the Court will allow it.

THE COURT: It doesn't really matter to me.

MS. ELLIOTT: Yes, okay. You know, this case largely comes down to the nature of the interests held. We say that the interest held by the grantor -- I'm going to start with the grantor. Because, again, there are two arguments here. One is that the nature of the interest held is subject to the rule against perpetuities and, therefore, is related. The other argument is that because of the nature of the interest, it couldn't be conveyed to the CCBA, so the CCBA actually doesn't hold any interest in this property. And that's why we've come to the Court, to ask the Court to declare that so that the parties can move on.

The first question really is, is it a right of entry for a condition broken or a reverter? And the what, this is not an issue that we see every day. It's probably not something that comes into your courtroom as often as, you know --

THE COURT: No, I'm going to have to blow the dust off a few books.

MS. ELLIOTT: Yes, I have to confess, I think all of us do, too. But the difference between a right of entry for

condition broken and a reverter is whether the estate changes hands automatically. So in a reverter, if the condition is broken, the estate is automatically terminated and the property automatically is held by the other party. And for a right of entry, if the condition's broken, the person holding that right of entry has a decision to make. Would I like to take the property back or should I not take the property back? That's the decision.

And if you look at the language that we have here, it says if it's no longer used as a golf course, it shall, at the option of the grantor or its successors and assigns, revert to the grantor or its successors and assigns. A decision has to be made. The grantor decides, do I want to take this property back? That is a right of entry. And we have scoured the country. We found one case in Kentucky that used in which a deed used very similar language to this. It's the only case we found with incredibly similar language. And it says in there the deed language was, shall revert back at their option to grantors, their heirs or assigns. And the court in that case said that it's a right of reentry upon conditions broken, rather than a possibility of reverter, as argued on behalf of the heirs.

So in very similar circumstances, a court has already decided that this lang -- of course, it's nonbinding. But a court has already decided that this language is a

reverter. Now because that language is not ambiguous, the Court need not go to extremes (indiscernible). I think when Attorney Eggleton argues it's consistent with his motions, he's going to talk about how the parties knew that this was supposed to be used for charitable purposes. And that's what the affidavit is presented for, with the motion. That would be turning New Hampshire law on its head. You're only allowed to look at extrinsic evidence if there's any ambiguity in the deed. You're not allowed to look at extrinsic evidence to create an ambiguity in the deed. And that's what he would be doing. This language is unambiguous. You really don't need to look any further.

Now because it's a right of entry, the rule against perpetuities applies to it. And it is incapable of transfer. Now, I'll start with the fact that it's incapable of transfer. So the restatement provides that the owner of a power of termination in land has no power to transfer his interest or any part thereof by conveyance (indiscernible).

Now in their papers, the CCBA actually apparently agrees with this. It does appear, and please correct me if I'm wrong on that. I'm not trying to mischaracterize your papers. So under New Hampshire law, if the land was convened upon condition subsequent, we've already determined that it's at least doubtful whether a right of entry before breach is transferrable. Because until there's a breach, you have

nothing to transfer. You can't transfer this ambiguous idea. Nothing exists.

So to get around this, because apparently the CCBA agrees with us, they say, well, it wasn't transferred by itself. It was transferred with this other right. And this other right is the subject of the motion to amend that I think we'll probably have to discuss at some point today, as well. And the idea is that it was transferred with a right to enforce these restrictions on the property. And somehow, coupling those two things together would save it from this prohibition of transfer, absent some other right.

Now, there are two reasons why that argument just doesn't work. One is that there's no separate restrictive covenant. The deed very clearly provides what happens if the restrictions are violated. What happens is there's this right of entry. So that's -- there's no separate right. That can't be coupled with anything, because it doesn't exist.

But much more importantly, if you look at the resolution of corporate board that was filed with the warranty deed, the warranty deed that's recorded at 1652795 in the registry, that resolution only gave the board the authority to convey "the right of reversion." It did not provide any other right. And so they could not have transferred anything other than the right of reversion that was included in the deed. So because of that, it wasn't transferred. CCBA doesn't hold any

right in the property. And the country club should have sold the property, free and clear of any right of reentry.

The other issue is the rule against perpetuities. And this is a complex issue. I'm going to give you some simple points. It's all in our papers. I know that you will read them carefully. But the big issue here is that New Hampshire has held that the rule against perpetuities does apply to future interests if they pose a substantial restraint on alienation.

In this case, the country club owns a huge piece of property and they operate it right now is a golf course. They cannot cease operating as a golf course. They cannot transfer it to anyone else if the other person is not going operate it as a golf course. In the cases in which the New Hampshire Supreme Court has found that there is a significant restraint on alienation so significant that they should enforce the rule against perpetuities, those were about whether the purchase price of 25 percent of what they would get otherwise is significant. Well, clearly, if a lower purchase price is significant enough to require the imposition of the rule against perpetuities, then the inability to use it for any other purpose should be significant enough to enforce the rule against perpetuities.

There are some arguments that -- the rule against perpetuities operates differently if it's a right held by a

charitable trust. And that's been the case for quite some time. There's actually a statue on (indiscernible) now. What's important here is the rule against perpetuities determines whether something is void at its inception. Well, the (indiscernible) reserved this right was a corporation. It was not a charitable trust. Now, he has purportedly transferred it to the CCBA, which is the charitable trust. It was not created, it was not reserved by a charitable trust. It was reserved by a normal corporation, in the normal course of business.

There are some cases in New Hampshire that the charitable trust actually a partial objection to our motion cites to, in which the ruling is perpetuities doesn't appear to have come into play because they're talking about these kinds of rights, but they're not -- they're not saying they're void at their inception.

If you look at those cases, though, I think you'll find that -- it's Lyford v. Laconia and Gillis v. Bailey. One's from 1909 and one's from 1850. And they're consistent with New Hampshire's wait and see approach. That's what New Hampshire does. We don't say it's void immediately. If it's used within the period of time, that would have been valid, which in the case when it's two corporations, that would be 21 years since the date of the deed. If that option were exercised or that right of reentry had been exercised within

those 21 years, then potentially it could have been valid.

It was not used within those 21 years. And so it violates the rule in New Hampshire under the wait and see approach, because it's already been 21 years. The cases cited by the director, in Gillis v. Bailey, the right of reentry was asserted only nine years after it was created by the deed. So that would be consistent with our approach.

In Lyford v. Laconia, it's silent as to the death of the life and being, so we don't know. But it's not inconsistent with the arguments that I'm making today. It just really doesn't speak to those arguments and we're not really sure how it would apply. And as I said under the wait and see doctrine here, the deed from CCCI (phonetic) to Farnham (phonetic) was in 1986. And then they purportedly conveyed their future interest to the respondent in December of that year. That 21 years would've expired 2007. And here we are, 2019. Unless the Court has any questions?

THE COURT: I don't.

Counsel?

MR. EGGLETON: Thank you. So just by way of background, I know you're relatively familiar with the facts just because of where you live, Your Honor. But the Carter Country Club is a golf course in Lebanon. And these are just the facts of the case and they are included in our affidavit from Mr. Schuster. But I don't know that they're material for

the purposes of the summary judgment motion. But as -- by way of background, the Carter Country Club, in 1986, agreed to sell its interest in this piece of land to a buyer, to the Farnham Trust. Mr. Schuster represented the Carter Country Club at the time for that transaction. And as part of that transaction, the parties agreed and the grantor insisted -- and this is all reflected in the deed, so it's not even a matter of needing to turn to extrinsic evidence -- that this piece of property would be used as a golf course in perpetuity.

And so they incorporated that covenant into the deed itself and included, as an enforcement mechanism to protect that covenant, this questionable property interest. We argue that it is a right of reversion. It's not a power of termination or a right of reentry.

Addressing now the first question, which is whether the rule against perpetuities applies. We've cited abundant case law for the proposition that the rule against perpetuities does not apply to either a right of reversion or a right of reentry.

In the case of Great Bay School & Training Center v. Simplex Wire & Cable, 131 N.H. 682, which was relied upon heavily by the Plaintiff in their motion, the Supreme Court cited as the basis of its decision 40 A.L.R. 3rd Section 3, which deals with powers of termination, rights of repurchase,

and rights of reentry. And excuse me -- and reversions.

And so if you look carefully at that section of A.L.R., what it says is that powers of termination or rights of reentry are not subject to the rule against perpetuities. So there is a basic dispute on that question, as a matter of law between the parties. But we've cited ample case law for the proposition that the rule against perpetuities does not apply to rights of reentry because they are vested at the time of creation.

I think everyone agrees that the rule against perpetuities doesn't apply to rights of reversion and reverters. So the question is, do they apply -- does it apply to rights of reentry? And just a couple of quotes on the point, we cited Central Delaware County Authority, a Pennsylvania case, I believe, which stands for that proposition.

We cited a Warren v. Albrecht, out of Illinois. It says interests subject to the rule are contingent remainders, executory interests, options to repurchase land not incident to a lease of years and powers of appointment. Interests not subject to the rule are present interests in possession, reversions, vested remainders, possibilities of reverter, powers of termination, charitable trusts, and resulting trusts.

Dennis v. Bird, out of Kentucky, same jurisdiction

relied upon by the Plaintiffs in the park case that they referenced, which I'll discuss in a minute. Reversion and grantor, as well as the possibility of reverter, power of termination, right of reentry are all vested interests. So the rule against property perpetuities doesn't apply even to a right of reentry. That's solid, black letter law. It's well-supported. I think we can set that issue aside.

I agree, and I concede, that the Plaintiff poses a much more difficult argument on the question whether a power of termination or a right of entry can be transferred without it being nullified in the transaction, essentially, because that is the rule. That is the general rule regarding powers of termination and rights of reentry.

What I would say to that is two things. First, the language of the deed in this case states if at any time the above required, that is that the golf course be maintained, requirement 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 have the option of the grantor, or its successors and assigns, revert to grantor or its successors and assigns.

So on the plain language of this deed, you don't see the words power of termination. You do not see the words right of reentry. You don't see some formulation of those words. Doesn't say the grantee has a right to reenter the

property. What it says is there is an option to revert.

And so at a minimum, that poses the question to the Court, which is it? Is it an option that has to be exercised or does it happen automatically? And our position on that is that it happens automatically, subject to the grantees common law right to waive accepting the reversion.

And so as such, it doesn't require any affirmative conduct on the part of the CCBA to trigger that reversion. Therefore, it is just a reversion. And you're posed, Your Honor, with the question of interpretation on this issue. And as you think about it, I suggest a careful read of the Cardone case, which we reference in our brief and I think we even attached it to our memorandum. For reference, it's 160 N.H. 521. And that's a very interesting and important case, I think, for the Court as it considers this issue. And what Cardone did is it affirmed in the first place that rights of reversion are transferable.

But beyond that, the Supreme Court articulated a way to approach these questions of interpretation that is very important. The facts of that case were that a beneficiary of a trust, who was subject to some -- maybe it was a cognitive disability or spendthrift kind of behaviors -- wanted to purchase a condominium in Manchester. And they identified a seller and the trust that she was the beneficiary of provided her with the cash to purchase the condominium. But in the

deed, there was a provision which said that if she should ever encumber the property or try to alienate the property before a certain date, then it would revert to the trust that provided her the money. So the trust was a third-party to that deed. But the reversion went to the trust if she triggered it.

And what the appellants argued in that case -- or excuse me, what the trial court said, responding to the argument of the people who were challenging that provision was look -- and understandably, I think, I can't disagree with the trial court's decision on this. The word revert means that it comes back to its original position. So you can't have a reversion to a third-party that never owned the property in the first place, which seems pretty rational to me.

But what the Supreme Court said when that went up on appeal was, no, we disagree with that interpretation. And the reason is we're not going to hold the creators of this deed to a technical interpretation that thwarts the purpose and intention manifested in the deed itself. The quote is, "We are not guided by such an overtly technical reading when considering the consequences delineated in the condominium warranty deed." And the purpose of that deed was to ensure that this person who took title to the property couldn't somehow alienate herself out of the benefit of that property. Therefore, the trust stood in the position of being there to protect her in case she did these things that jeopardized her

title. And so the purpose of the parties to that deed was to make sure that the property went to the trust for her benefit, if she should ever do any of these improper conditions.

And so the Supreme Court said, look, could they have chosen a better word, then revert? A better verb? Sure, they could've. But the point was that it would go to the trust for her benefit, not that it would go back to the original grantor should she implement any of these improper conditions.

And that's the kind of overarching, holistic view that the court needs to take when it looks at interpreting a deed like the deed in this case. So the Court asks itself here, is it a right of reentry, because it says the grantee has the option of reentering if this should stop being a golf course? Or is it a reversion, by which they don't have to act?

If you look at the deed itself, the whole point of conveying this interest, of preserving this interest on the part of the grant or at the very start, and then of conveying this interest from the original grantor to the CCBA was to ensure that we have a golf course here in perpetuity. The deed itself created the restriction requiring the perpetual use of this property as a golf course. And then it created the right of reentry, or the right of reverter, in order to protect that covenant.

And so if you look at that as the purpose of the

parties entering into this deed, then interpreting that language as a right of reentry and not a reversion, what's that purpose? Because as counsel has accurately, I think, stated, the general rule is that a right of reentry does become a nullity when it's transferred to a third party.

So you have an opportunity here, because it doesn't say that it's a right of reentry, to rule that it's, in fact, a reversion. And under the principles of Cardone, that's what you should do, because the overall purpose would be affected, and that purpose was to ensure that this maintains a golf course in perpetuity. If the Plaintiff is correct, then the Plaintiff can stop operating this as a golf course. And that was not the intention of the parties at the very start. And that's very clearly Mr. Homan's intention, at this point. He wants to develop this property.

So if you rule in his favor, he will be liberated from this provision and he can go ahead and do that. That would be contrary to the intentions of the parties in the original deed, and with respect to the transfer to CCBA. Now, even if you were to find that it was a power of termination, the result will be the same.

Under the first restatement of property Section 161, which sets forth the general rule that the Plaintiff relies upon in this case -- and again, we don't dispute the general rule -- there is an exception when the right of reentry or the

power of termination is conveyed together with a substantive property. And here there were two powers reserved to the grantor when it was originally conveyed to the first grantee, to the Farnham Trust. The first was the benefit of the restrictive covenant requiring that this piece of property be maintained as a golf course. And the second was the alleged power of termination or right of reversion, which was the stick that was to be used to ensure that the restriction was complied with.

So when coupled together, there is an exemption from the general rule that a power of termination becomes a nullity in the park transfer. That exemption applies in this case very clearly and so the result is going to be the same. It was properly transferred to my client. And my client has the benefit now of that property interest.

Even if the right of reentry, if you decide that's what it is, was nullified by the purported transfer to my client, that right of reentry didn't just vaporize. It's still there. It's held now by whoever the successors and interests are to the corporation, which was the original grantor. So that right of reentry still exists. The restrictive covenant still exists. And therefore the Carter Country Club remains bound by that covenant. And somebody has the right to enforce it.

And the notion that there's some person out there

who has this right to enforce a restrictive covenant that's not the CCBA makes no rational sense at all. That's exactly why this exemption exists, so that the right to enforce goes with the benefit of the restrictive covenant.

We've supplied law in our memorandum, which discusses the degree to -- I think it's the Schaft (phonetic) case -- discusses the degree to which a restrictive covenant can be enforced by a successor in interest, even when the successor in interest holds that benefit as an easement in gross, and not as an apartment easement. And that's exactly what the purpose is here.

There is law in the State of New Hampshire that says, as a broad rule, when interpreting these issues with respect to charitable trusts, the discretion should be exercised in favor of the trust. It's a charitable purpose. It was intended to make golf available to the people of Lebanon in perpetuity, and it was vested in the CCBA for that purpose. And so all of the inferences, the weights that you are given the discretion to apply in this case, favor enforcing this right on behalf of the CCBA.

Even if the CCBA -- excuse me, I won't actually go there. So with respect to the weight accorded by New Hampshire law to charitable trusts, even with respect to rights of reentry and rights of reverter, RSA 477:3-b, I think it is, carves out an exception. So some years ago, I think it

was about a decade ago, the legislature, in its wisdom, said that these property interests, these contingent, subsequent property interests are too complicated. So we're doing away with rights of reverter and rights of reentry and other kinds of reversionary property interests.

And if you are a private, noncharitable entity that holds one of these rights, that you have to renew that right on a regular basis through the statutory mechanism. So you have to reassert your entitlement to that property right on a regular basis or it goes away under this statute. The only exception to the statute is for rights of reverter and rights of reentry that are held by a charitable trust. So the law, the statutory law in our state, favors a charitable trust in the holding of these property interests.

So for all of those reasons, the overwhelming weight, to both authority and the discretionary favor you're supposed to give falls on behalf of the charitable trusts in this. Again, it's all in our papers and I'm happy to take questions.

THE COURT: Thank you.

Attorney Donovan, is there anything you want to say in this matter?

MR. DONOVAN: Yeah, I'll be brief, Your Honor, and I'll try not to repeat what others have said here. Our mandate in charitable trusts is to see that the donors' intent

is carried out. And sometimes that donor is long dead and it is still important that donor's intent be carried out, if appropriate, years later.

We have been dealing, over the past few years, with a number of church personages in which there is some type of future interest tied to the original gift of the residence to a local church. And so we've worked with churches when those interests, which could be in the nature of a reverter or a right of entry, and we've dealt with those in that context. But those circumstances are very much alive and in what we deal with every day.

So from a policy standpoint, we think that it is important that the future interests that were established as part of a conveyance be -- continue to be enforced. And we believe that the black letter law is that the rule against perpetuities does not apply to future interests by way of either reverters or rights of entry. Neither one is covered by the rule against perpetuities. And that, there's a lot of recent case law on that, but that is what the scholarly work seems to be saying. We cited to the signs in Smith (phonetic). There is a -- actually a treatise on the rule against perpetuities, it was updated as recently as 2018, and that's what it says.

THE COURT: That's encouraging to know.

MR. DONOVAN: So some professor is earning his or

her money. Still, being concerned about the rule against perpetuities and that the law goes back and the scholarship goes back. Professor Gray at Harvard Law School, more than a century ago also wrote that it's because they're considered to be vested interests, and therefore, the rule against perpetuities does not apply.

So from -- and we looked to see if we could find -- whether it was a New Hampshire Supreme Court case that specifically ruled on that, we could not find it. The cases I cited were ones where I thought the Supreme Court could weigh in on it, if it chose to, but particularly Lyford v. Laconia case, was one where I think if the rule against perpetuities, if it did apply, would have knocked out the claim of the grandson of the original grantor. So there was a 100-year, or 80-year gap there and then we -- I think Attorney Elliott is correct. We don't know precisely when the grantor died. But I think we can assume since the claims made by the grantor's grandson, 80 years later, that 21 years had passed since the life of that (indiscernible).

And the court recognized that future interest. Again, it was unclear. The court didn't need to decide whether it was a right of entry or a right of reverter. But it upheld the one-dollar award that had been granted at the superior court to the grandson, who had a right of reverter. That was on land that had been donated for the establishment

of the Congregation Church. The city of Laconia took that land for a library, park. There was an award given to the church for its loss. And then the question was, what was the value of that future interest. And Mr. Lyford wasn't happy that it was determined to only be worth one dollar. But, the Supreme Court said, yes, it is a valid future interest and you get your dollar.

So we think that's a recognition of, at least implicitly, by the Supreme Court that rules against perpetuities does not apply to that kind of future interest. The country club had cited to the Great Bay v. Simplex case, which establishes that the right of -- excuse me that rules against perpetuities does apply to rights of first refusal. They are recorded. That's not this case. That kind of preemptive is not what we're talking about right here.

And we are not taking a position on whether a right of entry is transferable. That's not our issue here. Ours is that the rule against perpetuities does not apply to these kinds of future interests. Thank you.

THE COURT: Thank you.

Attorney Elliott?

MS. ELLIOTT: Briefly, Your Honor, and I apologize, I'll probably jump around a bit, because I don't want to take up too much more of your time.

The first thing is --

THE COURT: Don't worry about that. I find it fascinating.

MS. ELLIOTT: Oh, good.

THE COURT: It's well-argued. I'll say that right now.

MS. ELLIOTT: Attorneys seem to be split one way or the other on whether this is interesting.

THE COURT: Right.

MS. ELLIOTT: So I'm glad you fall into the interesting group. The first thing is just to the director's point about that these issues are important because they're trying to preserve donations that are made. I just want to point out this was not a donation. This was an incredibly expensive commercial transaction. And so this property was not donated to my client. He purchased it. That's a very different situation.

Going back to the CCBA's arguments, I mean, one of the -- it's really interesting to me, that the CCBA relies so heavily on the Cardone case, because this is one of those rare situations in which both sides think that's the case that helps them win. In the Cardone case, the point here is that you shouldn't look too closely at -- stand too closely on the words used, but rather look to the right that's been conveyed.

And in the Cardone case, the words -- the right that was conveyed says should this condition and covenant be in any

way violated, or any attempt to be made by the said grantee to violate the within condition, the title in the within premises shall, without further act or action, revert to the Anna H. Cardone Revocable Living Trust. So shall without further act or action, in that case is clearly a reverter. They don't have to do anything. The estate is extinguished and the title transfers.

In our case, it's the complete opposite. It's at the option of the grantee. And the idea that the purpose of this, to preserve golf course, means that the Court should construe it as a reverter, because otherwise it won't effectively preserve the property for use as a golf course, well, that's what all rights of entry do. Reverters try to enforce restrictions on property. Rights of entry try to enforce restrictions on property.

So the idea that there's a restriction that somebody is trying to enforce should have no bearing on whether this is a reverter or a right of reentry. That's always going to be the case. And in this case, the language that is used, something has to happen. There has to be an option. And it's not -- that language doesn't just preserve the right to waive it, because I don't think that anyone would look at that deed and think if the CCBA, or whoever holds it, the original grantor, decided not to come forward, that would mean one year later, the country club would no longer own that property and

the tax bill should be sent to the CCBA, or whoever owns that property, clearly, something would need to be done to exercise that right. And that's what that's what makes it a right of entry.

The other idea that the CCBA brought up was that even if it's incapable of transfer, it doesn't extinguish and it's still held by somebody. So somebody still has this right of entry. I'm not sure where that gets us. I don't know who supposedly would still own it. What's interesting about that is that, as I said, the original grantor in this case was a cooperation. And that means it's actually subject to the statute that Attorney Eggleton raised, which was 477:3-b. And because it's a corporation and not a charitable trust, it would have been required to come forward and register that right. And didn't do that. And so, even if some rights survive this failed transfer to the CCBA, it has since been extinguished by the legislature to that statute. Thank you, Your Honor.

THE COURT: Thank you.

Mr. Eggleton?

MR. EGGLETON: First, on that last point, the sequence was quite compressed back in 1986, this transaction occurred. The discussions were held. It was well-advertised to all the parties that the whole point was to keep this thing as --

MS. ELLIOTT: Your Honor, I'm going to renew my objection. Just -- I'll let you continue. I just feel like I need, for the record, to renew my objection to this extrinsic evidence. I don't think it's relevant and I don't think it's appropriate.

THE COURT: All right. So noted.

Go ahead.

MR. EGGLETON: And it was -- just by looking at the deed sequence, the conveyance into the CCBA happened within a year after that, within months, perhaps, after that. So it's not as if this right was created at a time when the legislature was requiring corporations to renew these rights of reentry. That didn't happen for another 15 or 20 years after this conveyance happened. It was in the hands of the CCBA by 1987, I believe. So that's what we're talking about. It's now held by the CBAA and therefore, is not subject to that statutory requirement.

With respect to the Kentucky case, which counsel has noted was the only case in the country that they were able to identify that had language similar to this one regarding an option, that option was intended to give the holder of that right flexibility, not to undermine the intent of the transfer. The Kentucky case was resolved on the totality of that deed. And that's an important point. When the court considered that deed, it was deed that conveyed some parkland

or some land to the city to establish a park. And then there were a host, I think, of 23 separate conditions that the grantors set on that conveyance, no drinking in the park, keep your clothes on in the park, you know, all the stuff that you would want to condition that on, in terms of governing people's behavior in the park.

And the city at some point in the 1980s, I think, came along and said these conditions make it impossible for us to continue operating the park in the way that we have and therefore we're seeking to acquire title and basically expunge those conditions. But we want to keep the park. And the successors and interests to the original grantor came along and said, no, we get the land back if you eliminate any of those conditions. And I think it's important to note that the trial court in that case and, ultimately, the appeals court in that case, affirmed the notion that you consider that deed in light of its purpose of creating a public amenity, which is exactly what happened in this case. So the point here was to create a recreational amenity available to the people of Lebanon and environs invested with -- or at least that vests the safeguards that would maintain that with an entity that is going to exist for a long time and which also has a recreational mission.

So in that case, in the Kentucky case, the court came down on the side of the grant, i.e., of maintaining the

purpose of the grant, which was to create a park. And it ultimately acquired the title by eliminating -- permitting the elimination of certain restrictions on remand. We don't need to go into the rest of it, but basically it came down on the side of preserving the fundamental grant, which was to ensure that a public amenity exists. And that's the situation that we find ourselves in here.

So again, it did so just as the Cardone case did, by looking at what the purpose was, as evidenced by the language of the deed itself. And here, it's self-evident if you just read the deed that the point was to have a golf course here in perpetuity.

THE COURT: Thank you.

MR. DONOVAN: Your Honor, I have another commitment. May I be excused?

THE COURT: Sure.

MR. DONOVAN: Thank you.

MS. ELLIOTT: Nothing further, Your Honor.

THE COURT: All right. Do you want to address the other issue? The amendment issue?

MS. ELLIOTT: Oh, the motion to amend?

MR. EGGLETON: Oh. Yes, I hadn't come prepared because the notice said only the motion.

THE COURT: I know.

MR. EGGLETON: But I'm happy to take it on.

THE COURT: Yeah, if you would.

MR. EGGLETON: Basically, Your Honor, when we originally filed our answer and counterclaim in this case, I believe we sought declaratory judgment on the same issue that we just discussed. As I was doing the research on the motion for summary judgment, I did come across the theory of the bifurcated property interest and the right of reentry being conveyed together. And when I was analyzing the deed, it was clear that there is a covenant and a restriction here that was intended to benefit the original grantor and that was subsequently conveyed to my client.

So my client now has the benefit of a covenant and the right of reentry to protect that or the right of reverter to protect that. And those are two separate property interests. But even if they didn't have the right of reverter or the right of reentry, they would still be entitled to protect the benefit of that covenant in the deed. So there's a certitude on this property from my client's benefit. They're entitled to enforce that, whether they have the specific stick of the right of reentry or right of reverter or not. And so having discovered that line of thinking in my motion for summary judgment research, I wanted to amend my complaint to add that enforcement count as a counterclaim in this case.

MS. ELLIOTT: Your Honor, we didn't file an

objection to the motion to amend because it's within the court's discretion to allow it. I'll note only for the record, that, as we said earlier, I think the amendment is futile. If there's a clear authorization to the board what they can transfer, and they didn't include anything other than (indiscernible).

THE COURT: All right. Anything else?

MR. EGGLETON: I just want to address that last point. Thank you. There is a corporate action and a deed. One can argue that there was some breach of fiduciary duty, I suppose, that the deed that was conveyed more than what the corporate corporation authorized itself to convey. But the deed speaks for itself. And I don't think we need to look at whether the corporation authorized the transfer of both the reversion and the benefit of the restriction to the grantee, the CCBA. The deed speaks for itself.

If there's a claim on that point, it would be from the people who would be the successors and interests of the original grantor, who felt more was conveyed than should have been. It shouldn't affect the rights of the parties in this case.

MS. ELLIOTT: I suspect if the motion to amend is granted, they'll be the subject of further motions for summary judgment. Nothing further today.

THE COURT: All right, anything else, then?

MR. EGGLETON: No, thank you, Your Honor.

THE COURT: I'll take the matter under advisement. I have to say in all candor, I can't promise you that I'll have an order in 60 days, given the nature of this controversy and the holidays. And I have a couple of other trials that are teed up that are very litigious and are both scheduled for more than a week and probably will take a lot more than a week, in December and January. So ballpark would be February.

MS. ELLIOTT: Okay.

THE COURT: All right?

MS. ELLIOTT: Thank you, Your Honor.

MR. EGGLETON: Thank you, Your Honor.

THE COURT: Have a nice Thanksgiving, everyone.

THE BAILIFF: All rise.

(Proceedings concluded at 11:51 a.m.)

CERTIFICATE

I, Frances Marcu, a court-approved proofreader, do hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my professional skills and abilities.

TRANSCRIPTIONIST(S): Emily Howard, CDLT-219

FRANCES MARCU, CDLT-136 December 15, 2020
Proofreader