THE STATE OF NEW HAMPSHIRE

SUPREME COURT

AZNH Revocable Trust, John & Susan Sullivan, Trustees, & a.

v.

Spinnaker Cove Yacht Club Association, Inc.

2021-0385

DEFENDANT SPINNAKER COVE YACHT CLUB ASSOCIATION, INC.'S MEMORANDUM OF LAW IN LIEU OF A BRIEF PURSUANT TO SUPREME COURT RULE 16(4)(b)

QUESTION PRESENTED

I. Whether the trial court correctly concluded that neither New Hampshire law nor the Condominium Instruments prohibit the Association from purchasing land, even if it is paid for by assessing the unit owners.

STANDARD OF REVIEW

This was an appeal from the Trial Court's dismissal of plaintiffs' petition for declaratory and injunctive relief. When reviewing a trial court's grant of a motion to dismiss, this Court "consider[s] whether the allegations in the plaintiffs' pleadings are reasonably susceptible of a construction that would permit recovery." *New Eng. Backflow, Inc. v. Gagne*, 172 N.H. 655, 661 (2019). This Court will uphold a trial court's

decision to grant or deny equitable relief unless it constitutes an unsustainable exercise of discretion. *Chase v. Ameriquest Mortgage Co.*, 155 N.H. 19, 24 (2007). In order "[t]o show that the trial court's decision is not sustainable, 'the [appealing party] must demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of his case." *State v. Lambert*, 147 N.H. 295 (2001).

SUMMARY OF PROCEDURAL AND FACTUAL BACKGROUND

One of the plaintiffs, the AZNH Revocable Trust, owns a condominium unit (the "Unit") in the Spinnaker Cove Yacht Club condominium (the "Condominium"). PETITION ¶¶ 1, 6, APPX. 6. The Condominium primarily consists of recreational boat slips on Lake Winnipesauke; there are no residential units. PETITION ¶ 5, APPX. 6. The defendant, the Spinnaker Cove Yacht Club Association, Inc., whose members are the unit owners, is the organization charged with managing and controlling the Condominium. *Id.*

At some point, the Association undertook steps to purchase land adjacent to the Condominium for use as parking spaces. PETITION ¶ 8, APPX. 7.

On April 5, 2021, the plaintiffs filed a petition for a preliminary and permanent injunction and declaratory judgment, in which they

asserted, in pertinent part, that "purchase of the land outside the Condominium violates the Condominium Instruments and New Hampshire Law." PETITION ¶ 20, APPX. 9. In their petition, plaintiffs cited various provisions of the Condominium Act as support for their position, including those governing so-called "expandable" condominiums. The Association filed a Motion to Dismiss primarily arguing that none of the statutes relied upon by plaintiffs supported their assertions, and that the law plainly empowers condominium associations to "acquire title to…real property." RSA 356-B:42.

On May 12, 2021, the Trial Court held a hearing on both the plaintiffs' preliminary injunction request and the Association's Motion to Dismiss. The Trial Court construed plaintiffs' petition as seeking an injunction against efforts by the Association to purchase land, as well as a declaration "that the instruments and New Hampshire law prohibit the Association from expanding the Condominium and from spending assessment monies/incurring any debt to purchase land outside the condominium." DISMISSAL ORDER 1, ADD. 35.

The Trial Court ultimately denied plaintiffs' request for injunctive relief and dismissed the petition, reasoning that the monies used to purchase land are considered a "common expense" under the

governing documents, and thus payable via assessments, and that the Condominium Act expressly authorizes associations to purchase land when, as here, the Condominium Instruments do not prohibit such a purchase. ORDER pp. 6-8, 11, ADD. 35-37, 40.

Plaintiffs then unsuccessfully moved for reconsideration and this appeal followed.

SUMMARY OF THE ARGUMENT

Here, plaintiffs' petition alleged that the Association lacked authority to purchase land outside the condominium, which plaintiffs characterized as an "expansion." Although omitted from their petition, plaintiffs concede the Association members voted to make the purchase. *See, e.g.,* BRIEF p. 7. Plaintiffs argued they were "not asking the Court to set aside a vote by the unit owners," in contravention of the *Bricker* doctrine. ORDER 10, ADD. 44; BRIEF p. 7. Instead, plaintiffs broadly, and generally, challenged the Association's authority to **ever** purchase land outside the condominium, regardless of the vote and will of the Association members.

RSA 356-B:42, in pertinent part, provides that "[e]xcept to the extent prohibited by the condominium instruments, and subject to any restrictions and limitations specified therein, the unit owners'

association shall have the power to…[a]cquire, hold, convey and encumber title to real property, including but not limited to condominium units, whether or not the association is incorporated."

Here, the Trial Court correctly determined that nothing in the Declaration prohibited the Association from acquiring land. ORDER 6, ADD. 40. The Trial Court also correctly determined that because the Association had the authority to purchase land, if the Association members approve the purchase, the money used is "properly a common expense." ORDER 8, ADD. 42. Both law and common sense commanded this result.

The Trial Court's decision should be AFFIRMED.

ARGUMENT

While it is unclear what legal theory truly underpins plaintiffs' claim that the Association cannot purchase land in this fashion, as a practical matter the dispute can be broken down into two subsidiary or related questions:

1. Can the Association purchase land?

2. Is the purchase money a "common expense"?

Because the answer to each of these questions is yes, the Trial Court's decision should be affirmed.

I. RSA 356-B:42 specifically grants condominium associations the power to purchase land.

Plaintiffs primarily argued that RSA 346-B:42 does not grant condominium associations the power to purchase land. ORDER p. 10, ADD. 44 (*citing* PL.'S OBJ. ¶ 4). Plaintiffs argued that although this statute allows an association to "acquire title" to real property, an association cannot expend funds (i.e., purchase the property) to do so. BRIEF p. 27. Under plaintiffs' theory, an association can acquire title to property only by gift. The Trial Court correctly rejected plaintiffs' attempts to read in restrictions not present in the statute.

RSA 356-B:42, in pertinent part, provides that "[e]xcept to the extent prohibited by the condominium instruments, and subject to any

restrictions and limitations specified therein, the unit owners' association shall have the power to…[a]cquire, hold, convey and encumber title to real property, including but not limited to condominium units, whether or not the association is incorporated." In other words, the default rule is that associations have this power. The exception is when this power is limited by the instruments.

In evaluating the plaintiffs' argument that an authorization "to acquire" does not include purchases, the Trial Court first looked to the definition of "acquire," which it determined means to "gain possession or control of; to get or obtain." ORDER 5, ADD. 39 (quoting *Black's Law Dictionary*). The Trial Court then reasoned that the definition "does not limit the manner in which possession or control is gained to non-purchases," and that the "plaintiffs are reading these limitations into the statute." *Id.* The Trial Court then "decline[d] to read words into the statute the legislature did not see fit to add." ORDER 5, ADD. 39.

Having established that RSA 356-B:42 grants associations the power to purchase real property, the Trial Court further observed that plaintiffs failed to identify in their petition any provision in the applicable condominium instruments that prohibits, limits, or restricts this power granted. ORDER p. 5, ADD. 39. Ultimately, plaintiffs'

assertion that the instruments prohibited this conduct is a legal conclusion. Because a "court need not accept statements in the complaint which are merely conclusions of law," plaintiffs' conclusory statements were insufficient to survive a motion to dismiss. *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 45 (1987).

To the extent, plaintiffs identified during the hearing various sections of the instruments they believed supported their argument, the Trial Court reviewed those sections prior to dismissal. The Trial Court determined that they provided "no support" for the plaintiffs' position. Indeed, no such restriction exists anywhere in the instruments.

a. <u>An association's purchase of real property, even for common use by its members, does not constitute expansion of the condominium.</u>

Neither party has *ever* claimed the Condominium is expandable as defined by the Condominium Act. Yet, plaintiffs have repeatedly raised the fact that the Condominium is not an expandable condominium under RSA 356-B as the stated basis for their claims[1], without ever clearly explaining their reasoning. *See, e.g.,* MOT. TO

[1] To the extent plaintiffs purport to seek a declaratory judgment that the Condominium is "not expandable," they could never be entitled to the same because the parties agree the Condominium is not expandable. Declaratory judgment is for resolving *adverse* claims. RSA 491:22.

RECONSIDER p.2, APPX. II p. 4. Reading between the lines, it appears that plaintiffs may be conflating the purchase of land by an association – even for common use by its members – with expansion of a condominium, as regulated under the Condominium Act. *See, e.g.,* BRIEF p. 16-18.

Plaintiffs' logic appears to be that any attempted addition of land to a condominium (even by a proper vote of its association) constitutes an "expansion" of the condominium and is therefore prohibited unless A) it is an "expandable condominium" and B) the expansion is done by the declarant. MOT. RECONSIDER p.2, APPX. II p. 4; BRIEF pp. 17-19. Plaintiffs misconstrue the statutes.

An expandable condominium is one for which the *declarant* retains the *option* to add land to the condominium during a limited period of time after it is initially created. *See* RSA 356-B:16, III; RSA 356-B:36. "By declaring an expandable condominium, *a developer* may submit land to the condominium while reserving the right to expand the condominium by later adding more land…" *Town of Windham v. Lawrence Sav. Bank*, 146 N.H. 517, 520 (2001)(emphasis added). The developer then may amend the declaration to add the land: "[w]hen a developer amends a condominium declaration to submit portions of the

additional land to the condominium, the developer transfers ownership of those portions of land to the condominium." *Ryan James Realty v. Villages at Chester*, 153 N.H. 194 (2006)(internal citation omitted). While a developer is limited in its ability to amend the declaration in this fashion, the portions of the statutes concerning expandable condominiums, including the *limitations*, by their plain language apply only to the *declarant*. *See, e.g.,* RSA 356-B:3, XIII; RSA 356-B:25.

For example, RSA 356-B:20, III provides that "[w]hen converting all or any portion of any convertible land, or adding additional land to an expandable condominium, *the declarant* shall record new site plans of survey…" (emphasis added). This makes sense because a convertible or expandable condominium allows a declarant to *add* units or land to a condominium, and this could affect the make-up of the resultant association, and, ultimately, the bargained-for interests of unit owners in a unique and potentially unforeseen way *beyond their control*. *Compare Town of Windham,* 146 N.H. at 518 ("The condominium declaration provided for the initial phase of sixteen units on twenty-two acres of the parcel; the remaining 141 acres were designated as expandable land for further development of more than 150 additional units.") *with Condominiums at Lilac Lane Unit Owners' Association v.*

Monument Garden, LLC, 170 N.H. 124, 133-134 (2017)(creation of a condominium that includes planned future development but does not contain convertible land is lawful so long as the site and floor plans depict the requisite information, so that potential unit owners will be fully informed of planned development).

When the Condominium Act is construed as a whole, the statutes governing a "expandable condominium" is not applicable to all circumstances in which land is added to a condominium, but only the specific circumstances in which a declarant desires to do so. The statutes defining and governing expandable condominiums are effective limits on the *declarant's* ability to amend a declaration – and thus change the make-up of condominium – after its creation. They are designed to ensure notice to prospective buyers, and preserve unit owners' interests, not limit those very buyers from exercising their authority, as unit owners, after the condominium is created.

An alternative interpretation would lead to an absurd result.

As plaintiffs recognize, a condominium association is, by definition, not the declarant. *See* RSA 356-B:3, XIII; BRIEF p. 17. If, as plaintiffs appear to suggest, the mere purchase of land by an association constitutes "expansion" of a condominium, then an

association could **never** purchase land even if the condominium was expandable, since only the declarant can expand a condominium as contemplated by those statutes. This is inconsistent with RSA 356-B:42, which expressly empowers an association to acquire land and is inconsistent with the framework of the Condominium Act.

II. A condominium association may purchase land to add to the common area. The unit owners may then amend the declaration to include the land.

As discussed above, it appears plaintiffs are taking the position that merely purchasing land constitutes expansion and the **only** way to add land to a condominium is via expansion of an "expandable condominium." Under the Condominium Act, any change to the physical scope of a condominium necessarily requires an amendment to the declaration. *See* RSA 356-B:3, V; RSA 356-B:16, I(c). While the statutes governing expandable condominiums limit the *declarant's* ability to amend the declaration to add land, the unit owners, understandably, have much freer reign. Nothing in the Condominium Act prohibits the unit owners from adding land to the condominium, including land purchased by the association.

RSA 356-B:3, II defines "common area" to mean "all portions of the condominium other than the units." The declaration describes the

physical metes and bounds of the condominium. RSA 356-B:16, I(c). RSA 356-B:42 empowers associations to purchase land. RSA 356-B:34 permits unit owners to amend the instruments, including the declaration.

Therefore, in order to add land to a common area, the unit owners simply need to:

- Purchase the land via the association. RSA 356-B:42.
- Amend the declaration to include the additional land. RSA 356-B:34.

Since all portions of a condominium that are not a unit is deemed "common area," nothing more than this is required to add common area to a condominium.

Although this Court has never directly addressed the issue, when resolving the rights of unit owners with respect to expansion of limited common areas, this Court implicitly acknowledged an association's authority to purchase additional land for addition to the condominium in this fashion:

> For instance, if a condominium association enters into an agreement to purchase additional land, it may choose to create new limited common area for particular unit owners. Because pre-existing common area and limited common area rights would remain unaffected, a unit

> owner not receiving additional limited common area would not be "adversely affected." Therefore, in the posited scenario, unanimous consent of all owners would not be required.

Holt v. Keer, 167 N.H. 232 (2015). Here, the same reasoning applies: pre-existing rights are unaffected when an association purchases additional land for use by its members as a common area, which is why the limits on expandable condominiums is inapposite.

Certainly, the legislature could have prohibited unit owners from modifying certain provisions, such as the metes and bounds, of the declaration, but it did not.

Ultimately, if plaintiffs theory is correct then a condominium, once created, can never be substantively modified by its unit owners. They are forever stuck with a fixed amount of land and units in perpetuity. Land cannot be added to it. Land cannot be removed from it (plaintiffs' theory is presumably applicable to contractible condominiums, too). Indeed, under plaintiffs' theory only the declarant has this, albeit time and declaration limited, power. This would be an absurd result.

III. If the Unit Owners approve the purchase, the Association can treat the purchase price of a property as a "common expense" chargeable to Unit Owners.

The Trial Court also correctly determined that because the Association had the authority to purchase land, if the Association members approve the purchase, the money used is "properly a common expense" chargeable to Unit Owners. ORDER 8, ADD. 42. Both the law and common sense commanded this result. Notably, plaintiffs concede that the Unit Owners voted to engage in this process[2].

Plaintiffs argue that when the *definitions* of "Common Expense" and "Assessment" are read together, it means "a Common Expense is lawfully 'assessed' when it arises from the cost, to maintain, repair, or manage the condominium's existing property, or when money is needed to fund reserves in anticipation of major replacement or improvements to existing condominium property." BRIEF 24.

This argument is premised entirely on a misuse, and overly restrictive reading, of the definition of "assessment" and "common expense" in the declaration.

[2] As set forth in the February 24, 2021 letter, the only expenditures approved to-date have been for pre-purchase due diligence. APPX. II pp. 48-49. The Association would only ever purchase the property if authorized by a vote of the Unit Owners. Plaintiffs have never suggested the Board or Association would ever act otherwise.

As a threshold matter, plaintiffs add in a restriction not present in either definition: "existing condominium property." No such limitation or restriction is present in either definition. APPX. III p. 19. Indeed, the definition of "assessment" is broad, and includes costs of "managing" the property which necessarily includes the expenses incurred by the Association, which, by definition, is the manager of the condominium. *See* APPX. III p. 13.

Further, plaintiffs' rely on *definitions* of terms, without regard to the particular provisions governing expenses and assessments. BRIEF p. 22-24. Section 9-100 of the Declaration provides, in pertinent part, that: "Each unit owner shall pay all Common Expenses assessed against him by the Board in accordance with the terms of the Declaration and the By-Laws…" APPX. III p. 31. As the Trial Court correctly observed: "Common Expenses" means "all expenditures lawfully made or incurred by or on behalf of the Association, together with all funds lawfully assessed for the creation and or maintenance of reserves pursuant to the provisions of the Condominium Instruments." ORDER p. 6, ADD. 40.

Read in conjunction, the "assessment" is just that: a portion charged to the unit owner. The definition of "assessment" does not

limit the obligation of unit owners under Section 9-100 (indeed the term "assessment" is not used in that section in any meaningful way). As the Trial Court correctly concluded, RSA 356-B:42 authorizes the Association to purchase land and therefore such a purchase would constitute an "expenditure lawfully made" subject to assessment as a common expense under Section 9-100. ORDER p. 8, ADD. 42.

IV. Even if the unit owners cannot add land to a condominium, they may still hold it in common as members of the association.

Even assuming, arguendo, that unit owners do lack authority to amend a declaration to add land to the condominium, plaintiffs' petition sought declaratory relief and an injunction against the mere purchase of land. As discussed above, an association plainly has the authority to purchase real property. Whether or not the unit owners add that property to the condominium, the association can always hold the property as an asset of the association. *See* RSA 356-B:42; *Nordic Inn Condominium Owners' Association v. Ventullo*, 151 N.H. 571, 576 (2004)(recognizing that the association/board may hold property subject to fiduciary duties to the unit owners, and that a contractual grant of a beneficial interest in the same does not grant the unit owner "title" or the right to appropriate the property). Here, too, the

Association is also a non-profit corporation, clearly entitled to purchase and hold property. *See* RSA 356-B:35, I; *cf. Brooks v. Tr. of Dartmouth College*, 161 N.H. 685, 691 (2011) ("at common law, an unincorporated association had no ability to hold property"); RSA 477:2; *see also LSP Ass'n v. Town of Gilford*, 142 N.H. 369 (1997)(association held land for the benefit of its members, unit owners, in a park containing mobile homes and cottages).

CONCLUSION

Ultimately, plaintiffs' lawsuit is simply an attempt to undermine the will of the Association's members, the Unit Owners. Here, plaintiffs concede a majority of the Unit Owners authorized the Association to take preliminary steps to purchase this land. While it is clear plaintiffs do not believe the subject parcel would be a valuable asset to the Association, that is a subject for internal debate, not judicial relief. As discussed herein, the contemplated action is plainly within the authority of the Association.

The Trial Court's decision should be AFFIRMED.

Respectfully Submitted,

Spinnaker Cove Yacht Club Association

By its Attorneys,

DRUMMOND WOODSUM

March 4, 2022

/s/ Demetrio Aspiras
Demetrio Aspiras, Esq. #19518
670 N. Commercial Street, Unit 207
Manchester, NH 03101
603-716-2895

CERTIFICATE OF SERVICE

I hereby certify that a copy of this memorandum of law was forwarded to opposing counsel via the court's e-filing system.

/s/ Demetrio Aspiras
Demetrio F. Aspiras, III., Esq.

CERTIFICATION OF WORD COUNT

I hereby certify that this memorandum of law does not exceed 4,000 words.

/s/ Demetrio Aspiras
Demetrio F. Aspiras, III., Esq.