

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0385

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

v.

Spinnaker Cove Yacht Club Association, Inc.

**RULE 7 MANDATORY APPEAL FROM
THE BELKNAP COUNTY SUPERIOR COURT
CASE #: 211-2020-CV-00065**

BRIEF FOR THE PLAINTIFFS

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Questions Presented

Question 1

Whether the original Petition or the Amended Petition state claims for which declaratory and injunctive relief may be granted regarding: (1) condominium expansion; and, (2) use of condominium assessment monies.

Issues preserved: Apx. I at 5 (original Petition) & 31 (Pltfs. Objection to Dismissal), Apx. at II at 3 (Pltfs. Motion for Reconsideration), 21 (Pltfs. Motion to Amend Petition), 23 (Pltfs. 1st Amended Petition) & 43 (Pltfs. Response to Defs. Objection to Reconsideration). Apx. III at 9-11, & 12 (Superior Court Hearing Transcript).¹

Question 2

Whether the Superior Court misconstrued the law and facts, and committed an unsustainable exercise of discretion in denying a preliminary injunction: (1) to prevent expansion of the condominium; and, (2) to prevent use of condominium assessment monies to purchase land outside the condominium.

Issues preserved: Apx. II at 3 (Pltfs. Motion for Reconsideration) & 43 (Pltfs. Response to Defs. Objection to Reconsideration).

Standard of Review – De Novo

The questions call for contract and statutory interpretation which are matters of law reviewed *de novo*. *Behrens v. S.P. Constr. Co.*, 153 N.H. 498, 500 (2006); *Cady v. Town of Deerfield*, 169 N.H. 575, 577 (2017).

¹ Abbreviations used herein are: Pltfs. (Plaintiffs); Defs. (Defendant); Apx. (Appendix); and, Add. (Addendum).

STATUTES and AUTHORITIES INVOLVED in the CASE

These provisions are lengthy, their citation is provided in the Table of Statutes & Authorities. The text is set forth in Plaintiffs' Addendum which is filed concurrently with this brief.

STATEMENT OF THE CASE AND FACTS

Plaintiffs are condominium unit owners at Spinnaker Cove Yacht Club, a condominium, located in Laconia. Apx. I at 12. Apx. IV at 3.

The condominium consists of ninety (90) vehicle parking spaces (which are the Condominium Units) and a common area. There are ninety boat docks appurtenant to the 90 parking spaces. A 91st Condominium Unit is a commercial building owned by an independent boat sales, service and storage business. Each unit owner holds a 1/91th, undivided interest in the common area. Apx. I at 6. Apx. II at 24. There are no residential units.

In March 2021, a majority of the condominium unit owners voted to buy land outside the condominium and expand the condominium to provide approximately 10 additional guest parking spaces. Apx. I at 7, 12 & 17. Apx. II at 25, 44 & 47. Apx. III at 14. Apx. IV at 37.

The Defendant, Spinnaker Cove Yacht Club Ass'n., Inc., is a voluntary corporation and an executive which carries out instructions from the unit owners, acting as a group. When instructed, the Defendant's Board of Directors acts on behalf the unit owners. Apx. IV at 13. Apx. V at 16.

In response to the March vote by unit owners, the Defendant's Board of Directors has undertaken steps to purchase land outside the Condominium. The land is currently held by the State of New Hampshire, Dept. of Transportation. Those steps include hiring an attorney, employing a surveyor to survey and prepare subdivision plans, and executing an

undisclosed agreement with the abutters about use and acquisition of the land. The Association has asserted that, once purchased, the additional land shall become part of the Condominium common area. Apx. I at 7 and Apx. II at 25 & 48.

It is Plaintiffs' position that the Spinnaker Cove condominium is non-expandable and that assessment monies cannot be spent on anything unrelated to maintenance or replacement of condominium property (real and personal). In April 2021, Plaintiffs sought injunctive and declaratory relief in Belknap Superior Court on two issues: (1) to prohibit adding land to the condominium; and, (2) to prohibit using condominium assessment monies to purchase land outside the condominium. Apx. I at 5. Apx. II at 23.

Defendants moved to dismiss on the basis that "Plaintiffs' Petition is premised entirely on a fundamental misunderstanding of the law" (Apx. I at 16) and "Plaintiffs suit is frivolous" (Apx. I at 24). (No Answer was filed.)

Notably, the Defendants did not ask the Superior Court to dismiss for failure to state a claim.

Plaintiffs objected to dismissal. Apx. I at 31.

On May 12, 2021, the Superior Court held a combined hearing on Pltfs. request for preliminary injunction and Defs. Motion to Dismiss. Apx. III (hearing transcript).

On June 16, 2021, the Superior Court issued an Order which denied a preliminary injunction and dismissed the Petition. Add. 35.

In that Order, the Court stated, "Because the declaration does not contain an explicit reservation of the option to add certain land to the condominium, it is not an expandable condominium." *Citing* 356-B:16, III

and *Ryan James Realty, LLC v. Villages at Chester Condominium Ass'n*. 153 N.H. 194, 196 (2006). Add. 38. No explanation was given for denying declaratory judgment that the condominium is non-expandable.

Inexplicably, the Court also found (contrary to RSA 356-B:25) there is no provision in the Condominium Act which prohibits adding land to non-expandable condominiums. The Court also found (contrary to RSA 356-B:42, I(d)) that condominium assessment monies may be used to purchase land outside the condominium. Add. 35 (generally).

The Court also stated, “Because the Condominium Act allows the Association to purchase land, and the Declaration does not prohibit same, the Court concludes the plaintiffs’ Petition fails to state a claim as a matter of law.” Add. 45.

Plaintiffs filed a Motion for Reconsideration, a Motion to Amend their Petition and an Amended Petition. Apx. II at 3, 21 & 23.

In an Order dated August 11, 2021, the Court denied the Motion for Reconsideration and the Motion to Amend. Add. 46.

This appeal followed. Plaintiffs seek reversal in their favor.

SUMMARY OF THE ARGUMENT

Chapter 356-B of New Hampshire statutes is the “Condominium Act” (“the Act”) and it applies to all condominiums and condominium projects. RSA 356-B:1 & 2.

Per the Act, “‘Expandable condominium’ means a condominium to which additional land may be added in accordance with the provisions of the declaration and of this chapter.” RSA 356-B:3, XV. To be an expandable condominium, the declaration must contain an explicit reservation of the option to add land to the condominium, a legal

description of the additional land, which is the land that may be added to the condominium, and numerous other provisions stated in RSA 356-B:16, III. *Ryan James Realty v. Villages at Chester*, 153 N.H. 194, 196 (2006). The declaration for Spinnaker Cove condominium does not contain any of the requirements specified by RSA 356-B:16, III. Thus, Spinnaker Cove is not an expandable condominium.

No condominium shall be expanded except in accordance with the provisions of the declaration and the Act, and any such expansion requires recordation of site plans and floor plans pursuant to RSA 356-B:20, III, together with an amendment to the declaration, executed by the Declarant of the condominium. RSA 356-B:25. Per the Act, the Defendant is expressly excluded as eligible to be the Declarant. The Defendant also admits they are not the Declarant. There is no provision in the Act for the Defendant, or anyone other than the Declarant, to expand the condominium. The Legislature stated, unambiguously, no condominium shall be expanded except in accordance with the Declaration and the Act. RSA 356-B:25.

The Superior Court correctly found that the condominium is not expandable. Contrary to RSA 356-B:25, the Court incorrectly found, there is no provision in the Condominium Act which prohibits adding land to non-expandable condominiums.

The Act authorizes a unit owners association to acquire and hold title to real property (RSA 356-B:42, I(d)) provided such acquisition complies with any restrictions and limitations in the condominium instruments. Notably, RSA 356-B:42, I(d) does not, in any way, authorize expanding a condominium.

The Declaration is a condominium instrument, and an agreement by and between the Unit owners. Per the Declaration, the unit owners have agreed that “assessment” means “that portion of the cost [f]or maintenance, repairing, and managing the property which is to be paid by such unit owner.” Apx. IV at 19. Use of assessment monies to purchase land outside the condominium does not fall within the agreed costs of “maintenance, repairing, and managing the property.” Therefore, the unit owners (and the Defendant acting on behalf of the owners) may not use monies collected through assessments to purchase (or acquire title to) land outside the condominium. Such restriction or limitation in the Declaration prevents the acquisition of title per RSA 356-B:42, I(d). And, both the Defendant and the unit owners are required to comply with the Act and the condominium instruments. Any lack of such compliance is grounds for an action by any unit owner seeking injunctive and/or declaratory relief to enforce compliance. RSA 356-B:15, I.

The Superior Court’s finding that assessment monies may be used to purchase land outside the condominium *and* dismissal of the petition in its entirety is error. This case is strictly about questions of law. The Plaintiffs have established sufficient bases for declaratory and injunctive relief, and Plaintiffs assert they have actually proven their case.

Based upon the judicial record of this case, the Superior Court’s dismissal is a de facto declaratory judgment in favor of the Defendant which the Supreme Court may now reverse and remand with an Order to enter declaratory judgment and injunctive relief in favor of the Plaintiffs on all claims.

ARGUMENT

I. The Relief Sought

The Plaintiffs sought declaratory and injunctive relief on two issues: (1) the condominium is not an expandable condominium pursuant to the Condominium Act; and, (2) that the monies accumulated from the unit owners, by way of assessments, may only be used for maintenance and replacement of condominium property (real & personal).

II. The Superior Court Erred by Conflating the Claims

In its June 16th Order, the Superior Court stated:

The Plaintiffs argue that the Association may not purchase land because it is ‘non-expandable’ and the Declaration lacks the specifications required by RSA 356-B:16, III, which are prerequisites to the expansion of the Condominium. (Pls.’ Pet. ¶ 9.)

Add. 37.

The Petition does not read as cited by the Court. Plaintiffs have never asserted that the Association cannot purchase land because it is non-expandable. Paragraph 9 of the original Petition and the Amended Petition both read:

The AZNH Revocable Trust, through its Trustees, has repeatedly informed the Association and its attorney that the

Condominium is non-expandable because the Declaration does not contain the specifications required by RSA 356-B:16, III, which are prerequisites to expansion of the Condominium;

Apx. I at 7 and Apx. II at 25.

Plaintiffs also stated in both petitions:

The Trust asserts that the “restrictions and limitations” clause of RSA 356-B:42 prevents a purchase by the Association, and the requirements of RSA 356-B:3, XV, 356-B:15, 356-B:16, III, & 356-B:25, prevent the addition of land to the condominium by the Association;

Apx. I at 7 and Apx. II at 25-26 (underscore in both originals).

Plaintiffs also clearly identified their separate claims in the Motion for Reconsideration:

The Plaintiffs sought declaratory and injunctive relief on two distinctly separate bases: (1) Spinnaker Cove Yacht Club, a condominium,² is non-expandable pursuant to the New Hampshire Condominium Act (Petition ¶¶ 9, 10, 26 & p.7 sec. D); and, (2) the Defendant cannot use condominium assessment monies to purchase land outside the condominium.

* * *

² The official name of the condominium is: “Spinnaker Cove Yacht Club, a condominium.”

The Plaintiffs do not contend that the Defendant is prevented from acquiring or purchasing title to real property because the condominium is non-expandable.

Rather, the Plaintiffs assert that the Defendant cannot use money collected through condominium assessments to purchase land outside the condominium because it violates the agreement between the unit owners on the use of assessment monies and, thus, the plan to purchase land outside the condominium does not comply with the restrictions and limitations clause of RSA 356-B:42, I(d). Whether a condominium is expandable is entirely unrelated to whether any condominium association may acquire (or purchase) title to real property pursuant to the statute.

Apx. II at 3, 5. *See also*, Apx. II at 26 (Amended Complaint identifies two distinctly separate claims).

By conflating the two separate issues presented by Plaintiffs, the Superior Court incorrectly dismissed the Plaintiffs' Petition in its entirety on the basis that, "Because the Condominium Act allows the Association to purchase land, and the Declaration does not prohibit same, the Court concludes the plaintiffs' Petition fails to state a claim as a matter of law."

III. The Superior Court Erred by Not Rendering a Declaratory Judgment and Injunction Preventing Condominium Expansion

In the original and Amended Petitions, Plaintiffs requested the Court:
Declare the Condominium Instruments of the Spinnaker Cove
Yacht Club and New Hampshire Law, prohibit the Spinnaker
Cove Yacht Club Association, Inc., its heirs successors and
assigns from expanding the Condominium;

Apx. I at 11. Apx. II at 34.

Please recall that, in the June 16th Order, the Superior Court stated,
“Because the declaration does not contain an explicit reservation of the
option to add certain land to the condominium, it is not an expandable
condominium.” *Citing* 356-B:16, III and *Ryan James Realty, LLC v.*
Villages at Chester Condominium Ass’n. 153 N.H. 194, 196 (2006).

The Plaintiffs assert that the Court’s finding that the Spinnaker Cove
condominium is “not an expandable condominium” conclusively supports
the allegations that the condominium is non-expandable. Thus, both the
original and Amended Petitions state a claim for declaratory relief and
warrant an injunction with respect to the Defendant’s intent to expand the
condominium.

**a. The Superior Court is Correct –
The Condominium is Not Expandable**

“Expandable condominium” means a condominium to which additional
land may be added in accordance with the provisions of the declaration and
of this chapter.” RSA 356-B:3, XV. Add. 51.

“If the condominium is an expandable condominium, the declaration must contain an explicit reservation of the option to add land to the condominium, a legal description of the additional land, which is the land that may be added to the condominium, and numerous other provisions. RSA 356-B:16, III.” *Ryan James Realty v. Villages at Chester*, 153 N.H. 194, 196 (2006). The declaration for Spinnaker Cove condominium does not contain any of the requirements specified by RSA 356-B:16, III as articulated in *Ryan James Realty*. See Declaration, Apx. IV at 6.

Pursuant to RSA 356-B:25, no condominium shall be expanded except in accordance with the provisions of the declaration of condominium and the Condominium Act.

This Court is the final arbiter of legislative intent as expressed in the words of the statute considered as a whole. *Ryan James Realty* at 198. This Court examines the language of the statute and, where possible, ascribe the plain and ordinary meanings to the words used. *Id.* at 198-99. When a statute’s language is plain and unambiguous, the Court need not look beyond it for further indication of legislative intent, and this Court does not consider what the legislature might have said or add language that the legislature did not see fit to include. *Id.* at 199.

There is nothing ambiguous in the language of RSA 356-B:16, III, or 356-B:25. Because the Spinnaker Cove Declaration does not contain an explicit reservation of the option to add land to the condominium, nor a legal description of the additional land, which is the land that may be added to the condominium, nor any of the other requirements of RSA 356-B:16, III, Spinnaker Cove cannot be expanded by adding land to the condominium.

Plaintiffs note also, pursuant to RSA 356-B:15, I, “The declarant, the board of directors, every unit owner, and all those entitled to occupy a unit shall comply with all lawful provisions of this chapter and all provisions of the condominium instruments.” And, the Condominium Act grants every unit owner the power to bring an action for declaratory or injunctive relief, or for any other remedy available at law or in equity to enforce the provisions of the Act or of the condominium instruments. *Id.*

b. Spinnaker Cove Condominium is Permanently Non-Expandable

Only a condominium Declarant as defined by RSA 356-B:3, XIII, may expand a condominium. RSA 356-B:25. The Defendant admits they are not the Declarant as defined by the Condominium Act. Apx. I at 20 citing RSA 356-B:3, XIII (excluding owners’ association as “Declarant”). Adding land to a condominium requires an amendment to the declaration which may only be “executed by the declarant.” RSA 356-B:25. When adding additional land to an expandable condominium, “the declarant shall record new site plans” conforming to RSA 356-B:20, I. *See* RSA 356-B:20, III.

The Declarant’s ability to exercise “powers and responsibilities” in relation to the condominium is time limited. Pursuant to RSA 356-B:36 & 40, the maximum amount of time a Declarant may act in relation to the condominium is 2 years from creation of a non-expandable condominium and 5 years from creation of an expandable condominium. RSA 356-B:36, I. Spinnaker Cove condominium was created in 1979 (Apx. I at 6. Apx. II at 24) and, pursuant to the declaration, the Declarant’s control of the

condominium actually ended on October 15, 1979 (Apx. IV at 14 & 17). Therefore, as of October, 15, 1979, Spinnaker Cove condominium may never be expanded.

c. An Injunction Preventing Expansion is Warranted

The Defendant, acting for the unit owners, has repeatedly stated it has a right to expand the condominium; has stated an intent to do so; and, has undertaken steps in furtherance of doing so.

The issuance of an injunction is an extraordinary remedy. *N.H. v. Mottolo*, 155 N.H. 57, 63 (2007). In the usual case, the party seeking an injunction must show (1) likelihood of success on the merits; (2) no adequate remedy at law; and, (3) immediate danger of irreparable harm. *Id.*

i. Success on the Merits

Plaintiffs respectfully assert that the record shows, *and we have shown herein*, that Spinnaker Cove condominium is not expandable, and the Defendant intends to violate the Condominium Act's prohibition on expanding the condominium. The Superior Court found the condominium is non-expandable. Add. 38. Therefore, Plaintiffs have actually been successful on the merits.

ii. No Adequate Remedy at Law

There is no adequate remedy at law; the Condominium Act requires the Defendant to obey the Act; and, the Plaintiffs are empowered by statute to

enforce the Condominium Act by declaratory and injunctive relief. RSA. 356-B:15.

iii. Irreparable Harm

It is Plaintiffs position that, the Defendant's threat to violate the Condominium Act "is sufficient to demonstrate the harm necessary to support an injunction when an injunction is authorized by statute." *Mottolo* at 64.

Furthermore, the addition of land to the condominium for an additional 10 guest parking spaces would result in additional expenses to the Plaintiffs for maintenance, taxes and insurance, while providing no benefit to the Plaintiffs. In essence, the majority of unit owners want to force the Plaintiffs to pay expenses they are not obligated to pay, and for land that the Plaintiffs do not have any right to possession, use or enjoyment.

The requirements of RSA 356-B:16, III, and RSA 356-B:20, which give notice to potential unit buyers of the precise additional land which might be added to a condominium, were intended to apprise the buyer of the details of the planned development. *See Condominiums at Lilac Lane Unit Owners' Ass'n v. Monument Garden, LLC*, 170 N.H. 124, 133 (2017) (the site plans required by RSA 356-B:20 protect the interests of potential condominium unit owners by ensuring they are apprised of the details of the planned development). With such notice, a buyer may weigh his/her capability (and willingness) to pay increased costs of ownership if the condominium is expanded.

The notification requirements of RSA 356-B:16, III, and 356-B:20, are precisely why the legislature was emphatically clear that, "No condominium shall be expanded except in accordance with the provisions

of the declaration and of this chapter.” RSA 356-B:25. Inexplicably, the Superior Court’s dismissal Order stated, the Condominium Act does not prohibit adding land to a non-expandable condominium. Add. 38.

iv. Injunction Is Warranted

Because the Superior Court found that the condominium is not expandable (Add. 38), but dismissed the Petition anyway, Plaintiffs’ Motion for Reconsideration articulated this dichotomy and asked the Court to grant declaratory and injunctive relief as follows:

- A declaratory judgment that the Spinnaker Cove Yacht Club, a condominium, is not an expandable condominium because the Declaration of Condominium does not comply with the requirements of the Condominium Act, RSA 356-B:3, XV; 356-B:15, 356-B:16, III; and, RSA 356-B:25;
- A declaratory judgment that, because the Declaration of Condominium does not comply with the requirements of the Condominium Act, Spinnaker Cove Yacht Club Association, Inc. is prohibited from expanding the condominium; and,
- Issue an injunction which prohibits the expansion of the Spinnaker Cove Yacht Club, a condominium.

Apx. II at 4-5.

In its August 11, 2021, Order, the Superior Court erroneously stated, inter alia, “Upon review of the parties’ arguments and applicable law, the

Court concludes it neither overlooked or misapprehended a point of law or fact in its June 16, 2021 Order.”

The Superior Court correctly found that the condominium is non-expandable. Plaintiffs have not only stated a claim, but have successfully proven their claim. Dismissing the Petition and denying the requested relief was error and an unsustainable exercise of discretion.

IV. Unit Owners’ Funds (Assessment Monies) Cannot Be Used to Purchase Land Outside the Condominium

The provisions of RSA 356-B:3, XV, 356-B:15, 356-B:16, III, & 356-B:25, prevent the addition of land to the Condominium by the Defendant but, with the exception of RSA 356-B:15, the aforesaid statutes have no affect on whether any unit owners’ association may acquire (or purchase) title to real property pursuant to RSA 356-B:42, I(d).

Similarly, RSA 356-B:42, I(d), does not permit adding land to a condominium and has no affect on whether land may be added to a Condominium.

RSA 356-B:15 requires compliance with the Condominium Act and condominium instruments, and provides for enforcement by court action. Non-compliance with RSA 356-B:42, I(d) or the condominium instruments triggers an enforcement action under RSA 356-B:15.

RSA 356-B:42, I(d) provides:

“Except 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: . . . (d) Acquire, hold, convey and encumber title to

real property, including but not limited to condominium units, whether or not the association is incorporated.”

As applicable here and stated succinctly: A condominium association, whether or not incorporated, and subject to any restrictions or limitations in the declaration (the contract), may acquire title to real property, including condominium units. RSA 356-B:42, I(d).

It is the Plaintiffs position that the Defendant may “acquire” title to real property, but monies collected as assessments pursuant to the condominium instruments may not be used to “purchase” (or pay the on-going costs for) real property outside the existing condominium.

a. The Unit Owners’ Agreement: The Declaration

The Spinnaker Cove Declaration was created to mutually benefit each condominium unit and to establish reciprocal rights and privity of contract between all unit owners. Apx. IV at 18 (last paragraph). The agreement does not contain a list of prohibited uses. Instead, it specifies the obligation to pay assessments and the agreed uses for the money.

The Declaration states, among other things:

In addition to the purchase price, the unit owner will be required to pay for certain maintenance, use, and utility services.

Operating the condominium will be by the Declarant at the Declarant’s expense until October 15, 1979, at which time the Declarant will turn operations over to the unit owners

association and aid the association in contracting for such services. The unit owners association will thereafter be responsible for maintaining and operating the condominium, and each unit owner will be responsible for paying his prorate share of the maintenance and operating budget in the form of a common expense assessment.

* * *

The Declarant will deposit \$4000.00 into a capital reserve fund account to the benefit of the unit owners association, and therefore, the estimated common expense assessment of \$162.00 for the first year does not include a capital reserve contribution by a unit owner. It is anticipated that the unit purchasers, as they become members of the unit owners association, may wish to at some time begin a capital reserve fund in anticipation of major replacement or improvements to existing condominium property.

Apx. IV at 14, 15.

The Declaration itemizes the projected common expenses for the first year as water, sewer, electricity, taxes, maintenance, fuel, insurance and, capital expenditures and maintenance reserve. Apx. IV at 17. The Declaration also defines “assessment” as “that portion of the cost [f]or maintenance, repairing, and managing the property which is to be paid by such unit owner.” Apx. IV at 19.

Furthermore, the Declaration provides: “Each unit owner shall pay all Common Expenses assessed against him by the Board in accordance with

the terms of the Declaration. . . .” Apx. IV at 31. “‘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.” Apx. IV at 19.

When the definition of “Assessment” and “Common Expense” are read together in harmony with the overall intent of the Declaration, 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.

The interpretation of a contract is a question of law determined by this Court according to the meaning that would be attached to it by a reasonable person. *Robbins v. Salem Radiology*, 145 N.H. 415, 417 (2000). Contract language is given an interpretation which best reflects the parties’ intentions in light of: (1) the situation of the parties at the time of the agreement; (2) the intended objectives of the contract; and, (3) all the provisions of the agreement as a whole. *Id.* at 418. Absent ambiguity, the parties’ intent is determined by the plain meaning of the contract’s language. *Id.*

Plaintiffs respectfully assert that our interpretation of the agreement between and among the unit owners is consistent with both the expectations of a reasonable person and the analytical framework articulated in *Robbins, supra*. To the extent the Superior Court’s interpretation and conclusion is contrary, it is error.

b. Purchasing Land Outside the Condominium, With Assessment Money, Breaches the Agreement

Diverting assessment monies to purchase land outside the 91 unit condominium for the sole purpose of providing free parking to 10 non-owners:

- Does not mutually benefit each condominium unit owner;
- Exceeds the limitations and restrictions for which assessment monies may be used, i.e., maintenance, repair and management of the existing condominium property (or funding reserves); and,
- Therefore, such a purchase is not compliant with RSA 356-B:42, I(d) which prevents acquisition of real property contrary to the condominium instruments.

Assessment monies may only be used for maintenance, repair and management of the condominium common area, and for creation and/or maintenance of reserves. All of which, mutually benefit each condominium unit in accordance with the Declaration.

The continued spending of assessment monies to pursue and/or purchase land which cannot be added to the condominium is an ongoing injury to the Petitioners because their money is being diverted away from its agreed and intended uses, and thus creating an unwarranted, additional need to replace that money for maintenance, repair and management of the condominium common area, and for creation and/or maintenance of reserves.

The land in question is land-locked and unbuildable. It has no potential to produce income to mutually benefit each of the condominium units and it would be a perpetual financial liability to a non-profit corporation (the unit owners' association) for holding costs, e.g., taxes, insurance and

maintenance. Moreover, there would be no commercially reasonable way to sell this unbuildable, land-locked tract of land to recover all the acquisition and holding costs.

c. No Adequate Remedy at Law

There is no apparent method of quantifying money damages. And, because the unit owners association is a non-profit entity, and because it has no source of income other than that derived from assessments, there is no fund from which to recover damages without further economic injury to the Petitioners and other blameless unit owners. An award of money damages would only divert assessment monies away from their intended uses. Thus, the Petitioners shall suffer immediate, on-going and irreparable harm if injunctive relief is not granted.

V. A Claim for Which Relief May Be Granted Has Been Stated

The Plaintiffs' have consistently asserted that, although the Defendant may 'acquire' title to land outside the condominium, the Declaration prevents the use of assessment monies to do so. The Defendants claim adversely.

"Any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties." RSA 491:22, I. In addition, RSA 356-B:15 grants authority to a condominium unit owner to bring an action in law or equity, including declaratory and injunctive relief, to enforce the Condominium Act and/or the condominium instruments.

a. The Original Petition

The original Petition reads, in relevant part:

The Trust asserts that the ‘restrictions and limitations’ clause of RSA 356-B:42 prevents a purchase by the Association. . . .

* * *

Assessment monies may only be used for maintenance, repair and management of the condominium common area, and for creation and/or maintenance of reserves. All of which, mutually benefit each condominium unit in accordance with the Declaration.

Apx. I at 7 & 8.

b. The Court Hearing

At the only court hearing held, Plaintiffs asserted that the Association could ‘acquire’ title pursuant to RSA 356-B:42, but such acquisition was subject to limitations and restrictions in the Declaration. Apx. III at 9. Plaintiffs also referred the Court to the affidavit supporting the Petition which described the limitations and restrictions. *Id.*

At the hearing, Plaintiffs’ counsel argued, “the restrictions and limitations in the Declaration prevent the Association from using Association monies to purchase land outside the condominium.” Apx. III at 26.

c. Motion for Reconsideration

In a Motion for Reconsideration, Plaintiffs argued and articulated extensively that “the Defendant cannot use condominium assessment

monies to purchase land outside the condominium.” Apx. II at 3, et seq. Most specifically, one part of the Motion reads: “the Plaintiffs assert that the Defendant cannot use money collected through condominium assessments to purchase land outside the condominium because it violates the agreement between the unit owners on the use of assessment monies and, thus, the plan to purchase land outside the condominium does not comply with the restrictions and limitations clause of RSA 356-B:42, I(d).” Apx. II at 5. The motion contains specific reference to applicable portions of the condominium instruments.

d. Amended Petition

The Amended Petition (like the original) reads, in relevant part:

The Trust asserts that the ‘restrictions and limitations’ clause of RSA 356-B:42 prevents a purchase by the Association. . . .

* * *

Assessment monies may only be used for maintenance, repair and management of the condominium common area, and for creation and/or maintenance of reserves. All of which, mutually benefit each condominium unit in accordance with the Declaration.

Apx. II at 25 & 30. The Amended Petition also contains specific references to applicable portions of the condominium instruments which show the limitations and restrictions applicable to spending assessment monies.

e. Notice Pleading

The Plaintiffs have adequately pled adverse claims between themselves and the Defendant. In addition, the Plaintiffs' pleadings and filings in the Court, along with arguments at hearing, "do more than state the general character of the action and put both court and counsel on notice of the nature of the controversy." *Toy v. City of Rochester*, 172 N.H. 443, 448 (2019). The Plaintiffs' pleadings and filings indicate the theory on which they are proceeding with such sufficiency to put anyone on notice of the theory on which the Plaintiffs are proceeding and the redress claimed. *Morency v. Plourde*, 96 N.H. 344, 345-46 (1950). Moreover, no action may be dismissed (abated) "for any error or mistake, where the person or case may be rightly understood by the court." RSA 514:8.

VI. The Superior Court's Dismissal is a De Facto Declaratory Judgment

This is an action for declaratory judgment arising from adverse claims under condominium instruments and applicable law. The case has always been strictly about questions of law.

Plaintiffs filed a Petition seeking declaratory and injunctive relief, and the Defendant filed a Motion to Dismiss. Plaintiffs filed an Objection to Dismissal.

The Superior Court conducted a combined hearing on the Motion to Dismiss and Plaintiffs' request for preliminary injunction. At that hearing, both sides argued the interpretation of the condominium instruments and applicable law. The Court admitted into evidence, without objection from Defendants: (1) plaintiffs Deed; (2) the Declaration of Condominium;

and, (3) a letter by the Defendant wherein they state an intent to use assessment monies to purchase and add land to the condominium. The Plaintiffs provided the Court with written copies of numerous applicable statutes (Apx. V at 3, et seq.) and specific sections of the Declaration (Apx. V at 23).

In its June 16, 2021, dismissal Order, the Superior Court stated it made findings “from the evidence presented at the hearing and offers of proof.” Add. 36. The Court found, “under the plain language of the statute, the Association may purchase land in order to acquire same.” Add. 39. The Court reasoned the word, “acquire” is synonymous with “purchase” and, because of that, “Neither the language of the statute nor the definition of ‘acquire’ suggests the Association is limited in how it may acquire the property.” Add. 39. And, the Court stated, it reviewed the Declaration provisions and sections presented by the Plaintiffs, and it found no support for the Plaintiffs’ claims. Add. 41. The Court concluded:

[T]he plaintiffs have failed to identify, in their Petition or in their Objection to the Motion to Dismiss, what specific provisions of the Declaration they contend prohibit the Association from acquiring land. Even if the Court considers the sections identified during the preliminary injunction hearing, the plaintiffs’ petition fails as a matter of law because none of the identified provisions prohibit the Association from purchasing land. See supra at 5-7. Because the Condominium Act allows the Association to purchase land, and the Declaration does not prohibit same, the Court concludes the plaintiffs’ Petition fails to state a claim as a matter of law.

Add. 44-45 (underscore in original).

Plaintiffs moved for reconsideration with a memorandum which comprehensively and specifically asserted the applicable provisions of the condominium instruments and the applicable law which supported their Petition. Apx. II at 3. Plaintiffs also filed a Motion to Amend and an Amended Petition. Apx. II at 21, 23. The Amended Petition was enhanced with comprehensive and specific provisions of the condominium instruments and the applicable law.

The Defendant filed an Objection to Amend and Objection to Reconsideration. Apx. II at 35, 37. Notably, the Defendant asserted in their Objection to Reconsideration, that Plaintiffs are seeking “a determination that RSA 356-B:42, I(d) prevents use of condominium assessment monies to purchase land outside the condominium.” Apx. II at 38. Thus, the Defendant clearly understood that claim.

On August 11, 2021, the Superior Court issued an Order on the Plaintiffs’ Motions for Reconsideration and to Amend the Petition. Add. 46. The Court stated:

Upon review, the Court concludes that an amendment is not appropriate. The Court has dismissed the Petition and, thus, there is no Petition to amend. Further, even if the Court were to consider whether the Amended Petition cures the deficiencies of the original Petition, the Court concludes it does not. See ERG, Inc. v. Barnes, 137 N.H. 186, 189 (1993).

Add. 48.

Plaintiffs contend that the Superior Court's proceedings, as described above, constitute a declaratory judgment, based upon a misperception about the merits, in favor of the Defendant. There was no motion for judgment on the pleadings, no motion for summary judgment, and no formal trial. The Court did not dismiss on the basis that there was a procedural defect in Plaintiffs' pleadings, but dismissed on the basis that the Plaintiffs lose as a matter of law. The Superior Court plainly stated, "Because the Condominium Act allows the Association to purchase land, and the Declaration does not prohibit same, the Court concludes the plaintiffs' Petition fails to state a claim as a matter of law." Add. 45.

VII. CONCLUSION

Plaintiffs assert that, because the Superior Court issued an erroneous (albeit de facto) Declaratory Judgment in favor of the Defendant, the Supreme Court may now reverse and remand with an Order to enter declaratory judgment and injunctive relief in favor of the Plaintiffs on all claims. And, Plaintiffs respectfully request same.

Alternatively, reverse and remand with an Order: that the original Petition states a claim for relief; and, further proceedings shall be conducted thereon;

Alternatively, reverse and remand with an Order: that the Amended Petition states a claim for relief; and, further proceedings shall be conducted thereon;

Grant such other or further relief as justice may require; and,

Award the Plaintiffs/Appellants reasonable attorneys' fees and costs in an amount to be determined.

REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully request 15 minutes of oral argument before the full Court.

RULE 16(3)(i) CERTIFICATION

Counsel hereby certifies that the appealed decisions are in writing and are attached as the first item in an addendum to this brief.

Respectfully submitted,

AZNH Revocable Trust,
John F. Sullivan & Susan B. Sullivan, Trustees

John F. Sullivan and Susan B. Sullivan

By and through counsel,

/s/ *John F. Sullivan*

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STATEMENT OF COMPLIANCE

Pursuant to Sup. Ct. R. 26(7), counsel certifies this brief complies with the applicable word limitation, and contains 6,210 words according to the word count feature of counsel's software, exclusive of pages containing the table of contents, tables of cases, statutes and authorities, and the addendum.

/s/ *John F. Sullivan*

CERTIFICATE OF SERVICE

Plaintiffs' counsel hereby certifies that a copy of this brief was served contemporaneously upon counsel for the Defendant, Atty. Demetrio Aspiras, at the time of filing, through the electronic filing and service system of the Court.

/s/ John F. Sullivan

ADDENDUM

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THE STATE OF NEW HAMPSHIRE

BELKNAP, SS.

SUPERIOR COURT

John and Susan Sullivan, as Trustees of AZNH Revocable Trust and Individually

v.

Spinnaker Cove Yacht Club Association, Inc.

Docket No.: 211-2021-CV-00065

ORDER

Hearing held (5/12/21) on the plaintiffs' Request for Preliminary Injunctive Relief (filed 4/5/21) the defendant's Motion to Dismiss (filed 4/29/21), and the plaintiffs' Objection to same (filed 5/11/21). Subsequent to review, the Court renders the following determination(s).

By way of brief background, this matter commenced on April 5, 2021, when the plaintiffs¹ filed their Complaint against the Spinnaker Cove Yacht Club Association, Inc. ("the Association") seeking to enjoin the Association from expending assessment monies or incurring debt to purchase land outside the condominium (the "Condominium"). (See generally Pet.) The plaintiffs also seek a declaration that the condominium instruments of the Spinnaker Cove Yacht Club ("Spinnaker Cove") and New Hampshire law both prohibit the Association from expanding the Condominium and from spending assessment monies/incurring any debt to purchase land outside the condominium. The plaintiffs presently seek preliminary injunctive relief, to which the Association objects. The Association moves to dismiss the plaintiffs' Petition, and the plaintiffs object.

¹ The plaintiffs are John and Susan Sullivan, individually and as trustees of the AZNH Revocable Trust.

Preliminary Injunction

The Court finds the following facts from the evidence presented at the hearing and offers of proof.

The Association is an organization created for the management and control of the condominium. (Pls.' Ex. 2 at 7.) Each condominium unit consists of a boat slip and parking spot. (Pls.' Ex. 2 at 13, 17.) Each unit is also encumbered by the covenants and restrictions contained in the Declaration and By-laws ("the Declaration"). (Pls.' Ex. 2.) The Association is considering purchasing a portion of the railroad property abutting Spinnaker Cover to designate as common area. (Pls.' Ex. 3.) If the Association purchases the land, it intends to convert this land into additional parking spaces for guests of unit owners. The Association made this decision after having all unit owners vote on the proposal. AZNH Revocable Trust owns a unit at the condominium.

The plaintiffs seek a preliminary injunction enjoining the defendant from "expending assessment monies or incurring any debt to purchase land outside the Condominium[.]" (Pls.' Pet. at A.) The plaintiffs aver that the Condominium Act, RSA chapter 356-B, and the Declaration prohibit the Association from purchasing land.

Under applicable New Hampshire law, the injunctive relief sought by the plaintiff is an extraordinary remedy. N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007) (citing Murphy v. McQuade Realty, Inc., 122 N.H. 314, 316 (1982)). Courts will only grant temporary injunctive relief if the plaintiff can prove the following five factors: (1) that the plaintiff has no adequate remedy at law; (2) that the plaintiff will suffer immediate irreparable harm if the injunctive relief is not granted; (3) that there will be no

hardship to the defendant if the injunctive relief is granted, or that the hardship to the plaintiff, if the injunctive relief is not granted, is greater; (4) that the plaintiff is likely to succeed on the merits; and (5) that the public interest will not be adversely affected if the injunction is granted. Mottolo, 154 N.H. at 63; UniFirst Corp. v. City of Nashua, 130 N.H. 11, 14 (1987); Murphy, 122 N.H. at 316.

Entitled the "Condominium Act," RSA chapter 356-B governs all condominiums and condominium projects. RSA 356-B:2; Ryan James Realty, LLC v. Villages at Chester Condominium Ass'n, 153 N.H. 194, 196 (2006). Same provides that a condominium is created by recording condominium instruments in the local registry of deeds. RSA 356-B:7, :11; Ryan James Realty, 153 at 196. "The condominium instruments include a declaration of condominium, which defines the rights as among the condominium owners, the condominium association, and the developer." Id.

The plaintiffs argue that the Association may not purchase land because it is "non-expandable" and the Declaration lacks the specifications required by RSA 356-B:16, III, which are prerequisites to the expansion of the Condominium. (Pls.' Pet. ¶ 9.) Second, the plaintiffs aver that the Association's position that RSA 356-B:42, I(d) implies an exception to RSA 356-B:16 is incorrect and that RSA 356-B:42 does not grant the Association authority to purchase land. (Id. ¶ 11.) Finally, the plaintiffs assert that any purchase of land outside the Condominium is a violation of the condominium instruments, thereby falling within the "restrictions and limitations" clause of RSA 356-B:42, preventing any purchase of land. (Id. ¶¶ 10-11.)

"If the condominium is an 'expandable condominium,' the declaration must contain an explicit reservation of the option to add land to the condominium, a legal

description of the 'additional land,' which is the land that may be added to the condominium, and numerous other provisions." Id.; RSA 356-B:16, III. "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." Ryan James Realty, 153 at 196. Because the Declaration does not contain an explicit reservation of the option to add certain land to the condominium, it is not an expandable condominium.

First, the plaintiffs do not point to any provision in the Condominium Act that prohibits non-expandable condominiums from adding land to the condominium, nor could they because such a provision does not exist. However, there is a provision that governs a condominium association acquiring real property. RSA 356-B:42 provides that:

Except 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:

.....

(d) Acquire, hold, convey and encumber title to real property, including but not limited to condominium units, whether or not the association is incorporated.

This provision specifically deals with the Association's ability to acquire land. However, the plaintiffs argue that purchasing land is excluded from the "powers" granted to the Association in RSA 356-B:42.

"When examining the language of the statute, [the Court] ascribes the plain and ordinary meaning to the words used." Petition of State of N.H. (State v. Johanson), 156 N.H. 148, 151 (2007). "[The Court] interprets legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id.

Upon review, the Court concludes that under the plain language of the statute, the Association may purchase land in order to acquire same. First, RSA 356-B:42, by its plain language, does not limit its application to a certain type of condominium—non-expandable or expandable. Thus, RSA 356-B:42 applies to both expandable and non-expandable condominiums, like Spinnaker Cove. Second, the plain language of RSA 356-B:42 does not limit the manner in which the Association may acquire property. The plaintiffs argue that acquire means inheriting, receiving property as a gift, or through adverse possession, but that it does not include purchasing money. The Court disagrees. Black's Law Dictionary defines "acquire" as "[t]o gain possession or control of; to get or obtain." Black's Law Dictionary 29 (11th ed. 2019). The definition of acquire does not limit the manner in which possession or control is gained to non-purchases. The plaintiffs are reading these limitations into the statute and the Court declines to read words into the statute the legislature did not see fit to add. Petition of State of N.H., 156 N.H. at 151. Neither the language of the statute nor the definition of "acquire" suggests the Association is limited in how it may acquire the property. See id.

Thus, based on a plain reading of RSA 356-B:42, the Association may purchase land "[e]xcept to the extent prohibited by the condominium instruments, and subject to any restrictions and limitations specified therein." RSA 356-B:42. Accordingly, the Court must determine whether the Declaration restricts, limits, or prohibits the Association's ability to purchase land. See id.

The plaintiffs failed to identify in their Petition which specific provisions of the Declaration they contend prohibit the Association from purchasing land. At the hearing on the present Motions, the plaintiffs identified Sections 1-101, 1-106, 2-600, 2-602, and

3-103² of the Declaration as prohibiting the Association from expending monies and/or incurring debt to purchase land. The plaintiffs also submitted pages 8, 12, and 13 of the Declaration for the Court's consideration.

Page 8 contains a section titled "Fees and Charges." (Pls.' Ex. 5.) This section provides, in relevant part:

Operating of the condominium will be by the Declarant at the Declarant's expense until October 15, 29979, at which the Declarant will turn operations over to the unit owners association . . . The unit owners association will thereafter be responsible for maintaining and operating the condominium, and each unit owner will be responsible for paying his prorate share of the maintenance and operating budget in the form of a common expense assessment. The common expense assessments payable by each unit owner will vary from year depending on actual expenditures approved by the unit owners association.

(Id.)

Section 1-101 provides a definition for "assessment." Per the Declaration, "[a]ssessment means that portion of the cost or maintenance, repairing, and managing the property which is to be paid by such unit owner." (Pls.' Ex. 2 at 13 (quotation omitted).) Section 1-106 defines "common expenses" as "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[.]" (Id.) Same defines "future common expenses" as "Common Expenses for which assessments are not yet due and payable." (Id.)

Section 2-600 provides the statement of purpose of the condominium: "Excepting the warehouse, Spinnaker Cove Yacht Club, a Condominium, is limited to recreational use and the following provisions, together with the provisions of the Condominium

² Section 3-103 deals with worker's compensation insurance and the Court thus fails to see the relevance of that section to the Association's ability to purchase land.

Rules, are in furtherance of this limitation and purpose as singularly excepted.” (Pls.’

Ex. 2 at 17.) Section 2-602 also provides that

[t]he Common Area is fundamentally for recreational purposes and no activity shall be inconsistent with that objective. No one shall obstruct, commit any waste in or otherwise cause any damage beyond reasonable wear and tear to the Common Area; and no personal property of the unit owners shall be stored in the Common Area without prior written approval of the Board. No alteration, addition to or removal from the Common Area shall be done without prior written approval of the Board.

(Id.)

A condominium association's governing legal documents, such as its bylaws, form a contract between the association and owners of condominium units within the association. See Barclay Square Condo. Owners' Assoc. v. Grenier, 153 N.H. 514, 517 (2006). The interpretation of condominium declaration is a question of law. See Ryan James Realty, 153 N.H. at 196.

When interpreting a written agreement, [the Court] give[s] the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole. Absent ambiguity, however, the parties' intent will be determined from the plain meaning of the language used in the contract.

Id. at 197.

Upon review, the Court concludes that the plaintiffs have not shown a likelihood of success on the merits. The Court has reviewed the Declaration provisions and sections highlighted by the plaintiffs and has found no support for the plaintiffs' position in same. The section of the Declaration discussing fees and charges provides no prohibition on purchasing land. Indeed, said section references “common expenses,” which as defined, includes “all expenditures lawfully made or incurred by or on behalf of the Association.” (Pls.’ Ex. 2 at 13.) Thus, if the monies paid to purchase the land is an

expenditure lawfully incurred, then it is properly a common expense. The plaintiffs have pointed to no provision in the Declaration which provides that money paid to purchase land cannot be a lawfully incurred expenditure, nor has the Court found any in its review. Further, Section 6-202's statement of purpose, while indicating that the purpose of Spinnaker Cove is recreational use, does not prohibit the Association from purchasing additional land. In sum, the Court finds no support in the Declaration for the plaintiffs' position that the Declaration prohibits the purchase of land.

Because the Court concludes that neither the statutes nor the provisions of the Declaration cited by the plaintiffs prohibit the Association from purchasing land, the plaintiffs have not shown a likelihood of success on the merits. Accordingly, the plaintiffs' request for injunctive relief is DENIED, consistent with the above.

Association's Motion to Dismiss

The following facts are drawn from the Petition and are assumed true for the purposes of this Order.³ See Lamb v. Shaker Reg'l Sch. Dist., 168 N.H. 47, 49 (2015).

Spinnaker Cove is a condominium, established in 1979, consisting of parking spaces, boat docks, and a common area. (Pet. ¶ 5.) The condominium does not have any residential units. (Id.) AZNH Revocable Trust owns a unit in the condominium. (Id. ¶ 6.) The Association has undertaken steps to purchase land outside the condominium to add approximately 10 guest parking spaces. (Id. ¶ 8.) The plaintiffs argue that the Condominium Act and the condominium's Declaration prohibits the Association from purchasing this land. (See generally Pet.) They seek preliminary and permanent injunctive relief enjoining the Association from purchasing this land, and declaratory

³ The Court only recites facts alleged by the plaintiffs, and not the legal conclusions asserted in their Petition. In re Guardianship of Madelyn B., 166 N.H. at 457.

judgment that the condominium instruments and the Condominium Act prohibit the defendant from expanding the condominium and spending assessment monies/incurred any debt to purchase land outside the condominium.

In ruling on a motion to dismiss, the Court determines “whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery.” Pesaturo v. Kinne, 161 N.H. 550, 552 (2011). The Court rigorously scrutinizes the facts contained on the face of the Petition to determine whether a cause of action has been asserted. In re Guardianship of Madelyn B., 166 N.H. 453, 457 (2014). The Court “assume[s] the truth of the facts alleged by the plaintiff and construe[s] all reasonable inferences in the light most favorable to the plaintiff.” Lamb, 168 N.H. at 49. The Court “need not, however, assume the truth of statements in the pleadings that are merely conclusions of law.” Id. “If the facts do not constitute a basis for legal relief, [the Court will grant] the motion to dismiss.” Graves v. Estabrook, 149 N.H. 202, 203 (2003).

The defendant moves to dismiss, arguing that the statutes governing expandable condominiums have no bearing on the Association's ability to purchase land and that RSA 356-B:42 specifically grants condominium associations the power to purchase land. (Def.'s Mot. Dismiss at 3–6.) The defendant also avers that the Bricker doctrine, see Bricker v. N.H. Med. Soc'y, 110 N.H. 469 (1970), bars judicial intervention into the Association's decision-making. (Id. at 6–7.) Finally, the defendant asserts that John Sullivan and Susan Sullivan lack standing to assert claims against the Association. (Id. at 9.)

With respect to the Association's argument that the Bricker doctrine bars judicial intervention into the Association's decision making, the plaintiffs concede that they are not asking the Court to set aside a vote by unit owners. (Pls.' Obj. ¶ 21.) Instead, the plaintiffs aver that they are asserting that the Condominium Act prevents the Association from adding land to the condominium and prevents the purchase of land outside the condominium, and thus, the Bricker doctrine is inapplicable. (Id. ¶¶ 22, 24.) The Court agrees that the plaintiffs do not seek to set aside a vote, but instead argue that the Spinnaker Cove instruments and New Hampshire law prohibit the Association from purchasing land. (See Pet.) Thus, the Court's inquiry is limited to whether the plaintiffs' Petition sufficiently alleges that the Declaration and New Hampshire law prohibits the Association from purchasing land.

The plaintiffs maintain that RSA 365-B:42 does not grant condominium associations the power to purchase land. (Pls.' Obj. ¶ 4.) The plaintiffs also assert that Spinnaker Cove's instruments contain restrictions and limitations which prevent a purchase of land outside the condominium. (Id. ¶ 13.)

Upon review, the Court concludes that the plaintiffs have not sufficiently alleged, as a matter of law, that the Declaration or the Condominium Act prohibits the Association from purchasing land. As discussed above, Spinnaker Cove is not an expandable condominium. Regardless, RSA 356-B:42, which appears applicable to both expandable condominiums and non-expandable condominiums, allows the Association to acquire land "except to the extent prohibited by the condominium instruments." RSA 356-B:42. The Court has already concluded that "acquire" may include purchasing land. See supra at 4-5. Further, the plaintiffs have failed to identify,


in their Petition or in their Objection to the Motion to Dismiss, what specific provisions of the Declaration they contend prohibit the Association from acquiring land. Even if the Court considers the sections identified during the preliminary injunction hearing, the plaintiffs' Petition fails as a matter of law because none of the identified provisions prohibit the Association from purchasing land. See supra at 5–7. Because the Condominium Act allows the Association to purchase land, and the Declaration does not prohibit same, the Court concludes the plaintiffs' Petition fails to state a claim as a matter of law.

Accordingly, the defendant's Motion to Dismiss is GRANTED, consistent with the above. The plaintiffs' Petition is DISMISSED.

SO ORDERED.

Date

6/16/21


James D. O'Neill, III
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 06/16/2021

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS.

SUPERIOR COURT

AZNH Revocable Trust, John and Susan Sullivan, as Trustees and Individually

v.

Spinnaker Cove Yacht Club Association, Inc.

Docket No.: 211-2021-CV-00065

ORDER

Order in reference to the plaintiffs' Motion for Reconsideration of Order Issued June 16, 2021 (filed 6/25/21), the defendant's Objection (filed 7/6/21), the plaintiffs' Reply (filed 7/9/21), the plaintiffs' Motion to Amend Petition (filed 6/28/21), and the defendant's Objection (filed 7/6/21).¹ Subsequent to review, the Court renders the following determination(s).

By way of brief background, this matter commenced on April 5, 2021, when the plaintiffs² filed their Complaint against the Spinnaker Cove Yacht Club Association, Inc. ("the Association") seeking to enjoin the Association from expending assessment monies or incurring debt to purchase land outside the condominium (the "Condominium"). (See generally Index # 1.) The plaintiffs also seek a declaration that the condominium instruments of the Spinnaker Cove Yacht Club ("Spinnaker Cove") and New Hampshire law both prohibit the Association from expanding the Condominium and from spending assessment monies/incurred any debt to purchase land outside the

¹ The Court notes that a hearing was scheduled in this matter on the pending Motions; however, because the Court finds that a hearing will not assist it in deciding the pending issues, the Court acts on the basis of the parties' pleadings and the record before it. See Super. Ct. Civ. R. 13(b). Thus, the September 7, 2021 hearing is cancelled.

² The plaintiffs are John and Susan Sullivan, individually and as trustees of the AZNH Revocable Trust.

condominium. In an Order dated June 16, 2021, the Court dismissed the Petition for failure to state a claim as a matter of law. The plaintiffs presently seek reconsideration of same, and the defendant objects. In the alternative, the plaintiffs seek to amend their Petition, and the defendant objects.

Plaintiffs' Motion for Reconsideration of Order Issued June 16, 2021

The Court provided factual background in its June 16, 2021 Order based on the plaintiffs' Complaint and incorporates same by reference herein. (Index # 10.)

The plaintiffs assert that the Court overlooked or misconstrued various points of law and fact in finding that the plaintiffs' Petition failed to state a claim. (See generally Index # 11.) The defendant objects, arguing that the Court neither overlooked nor misapprehended any points of law or fact in its June 16, 2021 Order. (Index # 15.)

A Motion for Reconsideration "shall state, with particular clarity, points of law or fact that the [C]ourt has overlooked or misapprehended[.]" Super. Ct. Civ. R. 12(e). Upon review of the parties' arguments and applicable law, the Court concludes it neither overlooked nor misapprehended a point of law or fact in its June 16, 2021 Order. Accordingly, the plaintiffs' Motion for Reconsideration is DENIED, consistent with the above.

Motion to Amend

The plaintiffs have moved to amend their Complaint, in the event that the Court does not vacate its June 16, 2021 Order, as requested in the plaintiffs' Motion for Reconsideration. (Index # 12 at 1.) The defendant objects, arguing that the plaintiffs may not amend their Complaint to assert new causes of action and, even if the Court

allowed same, the amendment does not cure the defects in the original Petition. (See generally Index # 14.)

Upon review, the Court concludes that an amendment is not appropriate. The Court has dismissed the Petition and, thus, there is no Petition to amend. Further, even if the Court were to consider whether the Amended Petition cures the deficiencies of the original Petition, the Court concludes that it does not. See ERG, Inc. v. Barnes, 137 N.H. 186, 189 (1993).

Accordingly, the plaintiffs' Motion to Amend is DENIED, consistent with the above.

SO ORDERED.

Date 8/11/21

J. DON. III
James D. O'Neill, III
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 08/11/2021

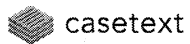
N.H. Rev. Stat. § 356-B:1

Section 356-B:1 - Short Title

This chapter shall be known and may be cited as the "Condominium Act".

RSA 356-B:1

1977, 468:1, eff. Sept. 10, 1977.



N.H. Rev. Stat. § 356-B:2

Section 356-B:2 - Application

I. This chapter shall apply to all condominiums and to all condominium projects. This chapter shall be deemed to supersede RSA 479-A, the New Hampshire Unit Ownership of Real Property Act; and no condominium shall be established under the latter on or after September 10, 1977. This chapter shall not be construed to affect the validity of any provision of any condominium instrument recorded prior to September 10, 1977. Nor shall this chapter, except as set forth in paragraphs II and III, be deemed to apply to any real estate, or any interest therein, submitted to the provisions of RSA 479-A prior to September 10, 1977.

II. Notwithstanding the provisions of paragraph I, this subdivision, General Principles, and subdivision IV, Administration and Enforcement, shall apply to any offer or disposition on or after November 1, 1981, of time sharing interests in condominium units established under RSA 479-A, regardless of the date on which such condominium units were created.

III. Notwithstanding the provisions of paragraph I, if any condominium instrument recorded under RSA 479-A prior to September 10, 1977, shall be amended after September 10, 1977, for the purpose of creating 10 or more additional units in any such condominium project, this subdivision, General Principles, and subdivision IV, Administration and Enforcement, shall apply to said additional units. If said amendment creates 10 or more, but less than 26, additional units, the applicant shall be permitted to make an abbreviated registration pursuant to RSA 356-B:51, II, and shall not be required to prepare a public offering statement pursuant to RSA 356-B:52; provided, however, this sentence shall not apply if time sharing interests are offered with respect to such additional units.

RSA 356-B:2

1977, 468:1. 1981, 255:1, eff. Nov. 1, 1981.

N.H. Rev. Stat. § 356-B:3

Section 356-B:3 - Definitions

In this chapter:

I. "Board of directors" means an executive and administrative entity, by whatever name denominated, designated in the condominium instruments as the governing body of the unit owners' association.

II. "Common area" or "common areas" means all portions of the condominium other than the units.

III. "Common expenses" means all expenditures lawfully made or incurred by or on behalf of the unit owners' association, together with all funds lawfully assessed for the creation and/or maintenance of reserves pursuant to the provisions of the condominium instruments; "future common expenses" shall mean common expenses for which assessments are not yet due and payable.

IV. "Common profits" means all income collected or accrued by or on behalf of the unit owners' association, other than income derived from assessments pursuant to RSA 356-B:45.

V. "Condominium" means real property, and any interests therein, lawfully submitted to this chapter by the recordation of condominium instruments pursuant to the provisions of this chapter. No project shall be deemed a condominium within the meaning of this chapter unless the undivided interests in the common area are vested in the unit owners.

VI. "Condominium instruments" is a collective term referring to the declaration, bylaws, and site plans and floor plans, recorded pursuant to the provisions of this chapter. Any exhibit, schedule, or certification accompanying a condominium instrument and recorded simultaneously therewith shall be deemed an integral part of that condominium instrument. Any amendment or certification of any condominium instrument shall, from the time of the recordation of such amendment or certification, be deemed an integral part of the affected condominium instrument, so long as such amendment or certification was made in accordance with the provisions of this chapter.

VII. "Condominium unit" means a unit together with the undivided interest in the common area appertaining to that unit.

VIII. "Contractable condominium" means a condominium from which one or more portions of the submitted land may be withdrawn in accordance with the provisions of the declaration and of this chapter. If such withdrawal can occur only by the expiration or termination of one or more leases, then the condominium shall not be deemed a contractable condominium within the meaning of this chapter.

IX. "Conversion condominium" means a condominium containing structures which before the recording of the declaration were wholly or partially occupied by someone other than the declarant or those who have contracted for the purchase of condominium units and those who occupy with the consent of such purchasers.

X. "Convertible land" means a building site which is a portion of the common area, within which additional units and/or a limited common area may be created in accordance with this chapter.

XI. "Convertible space" means a portion of a structure within the condominium which portion may be converted into one or more units and/or common area, including but not limited to limited common area, in accordance with this chapter.

XII. "Days" mean calendar days, unless modified by the word "business", in which case said term shall include all days except Saturdays, Sundays and legal holidays in the state of New Hampshire.

XIII. "Declarant" means all persons who execute or propose to execute the declaration or on whose behalf the declaration is executed or proposed to be executed. From the time of the recordation of any amendment to the declaration expanding an expandable condominium, all persons who execute that amendment or on whose behalf that amendment is executed shall also come within this definition. Any successors of the persons referred to in this paragraph who come to stand in the same relation to the condominium as their predecessors did shall also come within this definition; provided, however, this definition shall not include any homeowners association which is not controlled by a declarant or any mortgage holder that forecloses on a declarant's interest in the condominium, provided that the foreclosing mortgagee refrains from exercising any of the rights reserved to the declarant by this chapter. A foreclosing mortgagee may transfer all such rights to a successor builder or developer without registration or exemption, provided that prior to such intended transfer, the mortgagee files an affidavit or with the attorney general identifying the intended transferee by name, address, and telephone number, and listing the number of units or interests remaining in the condominium, and the number of units or interests so transferred.

XIV. "Dispose" or "disposition" refers to any sale, contract, assignment, or any other voluntary transfer of a legal or equitable interest in a condominium unit, except as security for a debt.

XV. "Expandable condominium" means a condominium to which additional land may be added in accordance with the provisions of the declaration and of this chapter.

XVI. "Identifying number" means one or more letters and/or numbers that identify only one unit in the condominium.

XVI-a. "Improvement" means any addition to condominium land, facilities, or amenities other than condominium units.

XVII. "Institutional lender" means one or more commercial or savings banks, savings and loan associations, trust companies, credit unions, industrial loan associations, insurance companies, pension funds, or business trusts including but not limited to real estate investment trusts, any other lender regularly engaged in financing the purchase, construction, or improvement of real estate, or any assignee of loans made by such a lender, or any combination of any of the foregoing entities.

XVIII. "Interest in a unit" and "interest in a condominium unit", when not modified by the word "undivided," include without limitation any fee simple interest, leasehold interest for a term of more than 5 years, life estate and, for the purposes of this subdivision and subdivision IV, Administration and Enforcement, time sharing interest.

XIX. "Leasehold condominium" means a condominium in all or any portion of which each unit owner owns an estate for years in his unit, or in the land within which or on which that unit is situated, or both, with all such leasehold interests due to expire naturally at the same time. A condominium including leased land, or an interest therein, within which or on which no units are situated or to be situated shall not be deemed a leasehold condominium

- within the meaning of this chapter, nor shall a condominium be deemed to be a leasehold condominium solely because of the offering or disposition of time sharing interests therein.
- XX.** "Limited common area" means a portion of the common area reserved for the exclusive use of those entitled to the use of one or more, but less than all, of the units.
- XXI.** "Nonbinding reservation agreement" means an agreement between the declarant and a prospective purchaser which is in no way binding on the prospective purchaser and which may be cancelled without penalty at the sole discretion of the prospective purchaser by written notice, hand delivered or sent by United States mail, return receipt requested, to the declarant or to any agent of the declarant at any time prior to the formation of a contract for the sale or lease of any interest in a condominium unit. Such agreement shall not contain any provision for waiver or any other provision in derogation of the rights of the prospective purchaser as contemplated by this paragraph, nor shall any such provision be a part of any ancillary agreement.
- XXII.** "Offer" means any inducement, solicitation, or attempt to encourage any person or persons to acquire any legal or equitable interest in a condominium unit, except as security for a debt.
- XXIII.** "Officer" means any member of the board of directors or official of the unit owners' association.
- XXIV.** "Person" means a natural person, corporation, partnership, association, trust, or other entity capable of holding title to real property, or any combination thereof.
- XXV.** "Publicly held corporation," "subsidiary corporation," "closely held corporation," "hearing" and "broker" have the same meaning as set forth in the respective definitions of such terms in RSA 356-A:1; and "agent" and "blanket encumbrance" have the same meaning as set forth in the respective definitions of such terms in RSA 356-A:1, except that within such definitions references to "developer" or "subdivider" shall mean "declarant," references to "lot" or "lots" shall mean "unit" or "units" and references to "subdivision" shall mean "condominium project."
- XXVI.** "Purchaser" means any person or persons who acquires by means of a voluntary transfer a legal or equitable interest in a condominium unit, except as security for a debt.
- XXVII.** "Size" means the number of cubic feet, or the number of square feet of ground and/or floor space, within each unit as computed by reference to the floor plans and rounded off to a whole number. Certain spaces within the units including, without limitation, attic, basement, and/or garage space may but need not be omitted from such calculation or partially discounted by the use of a ratio, so long as the same basis of calculation is employed for all units in the condominium, and so long as that basis is described in the declaration.
- XXVII-a.** "Small condominium" means a condominium created without possibility of conversion or expansion and limited to 25 or fewer residential units.
- XXVIII.** "Time sharing interest" means the exclusive right to occupy one or more units for less than 60 days each year for a period of more than 5 years from the date of execution of an instrument for the disposition of such right, regardless of whether such right is accompanied by a fee simple interest or a leasehold interest, or neither of them, in a condominium unit. Time sharing interest shall include "interval ownership interest," "vacation license" or any other similar term.

XXIX. "Unit" shall mean a portion of the condominium designed and intended for individual ownership and use. For the purposes of this chapter, a convertible space shall be treated as a unit in accordance with RSA 356-B:24, IV.

XXX. "Unit owner" means one or more persons who owns a condominium unit, or, in the case of a leasehold condominium, whose leasehold interest or interests in the condominium extend for the entire balance of the unexpired term or terms.

XXXI. "Value" means a number of dollars or points assigned to each unit by the declaration. Substantially identical units shall be assigned the same value, but units located at substantially different heights above the ground, or having substantially different views, or having substantially different amenities or other characteristics that might result in differences in market value, may, but need not, be considered substantially identical within the meaning of this paragraph. If value is stated in terms of dollars, that statement shall not be deemed to reflect or control the sales price or fair market value of any unit, and no opinion, appraisal, or fair market transaction at a different figure shall affect the value of any unit, or any undivided interest in the common area, voting rights in the unit owners' association, liability for common expenses, or rights to common profits, assigned on the basis thereof.

RSA 356-B:3

Amended by 2020, 3:1, eff. 4/10/2020.

Amended by 2018, 192:1, eff. 8/7/2018.

Amended by 2011, 156:1, eff. 8/7/2011.

1977, 468:1. 1992, 278:5, eff. July 17, 1992.

N.H. Rev. Stat. § 356-B:15

Section 356-B:15 - Compliance With Condominium Instruments

I. The declarant, the board of directors, every unit owner, and all those entitled to occupy a unit shall comply with all lawful provisions of this chapter and all provisions of the condominium instruments. Any lack of such compliance shall be grounds for an action or suit to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity, maintainable by the unit owners' association, or by its board of directors or any managing agent on behalf of such association, or, in any proper case, by one or more aggrieved unit owners on their own behalf or as a class action.

II. The prevailing party shall be entitled to all costs and attorneys' fees incurred in any proceeding under RSA 356-B:15, I.

RSA 356-B:15

Amended by 2014, 224:1, eff. 1/1/2015.

1977, 468:1. 1997, 228:2, eff. Jan. 1, 1998.

N.H. Rev. Stat. § 356-B:16

Section 356-B:16 - Contents of Declaration

I. The declaration for every condominium shall contain the following:

- (a) The name of the condominium, which name shall include the word "condominium" or be followed by the words "a condominium";
- (b) The name of the town or city and county in which the condominium is located;
- (c) A legal description by metes and bounds of the land submitted to this chapter;
- (d) A description or delineation of the boundaries of the units, including the horizontal boundaries, if any, as well as the vertical boundaries;
- (e) A description or delineation of the limited common areas, if any, showing or designating the unit or units to which each is assigned;
- (f) A description or delineation of all common areas not within the boundaries of any convertible lands which may subsequently be assigned as limited common areas, together with a statement that they may be so assigned and a description of the method whereby any such assignments shall be made in accordance with RSA 356-B:19;
- (g) The allocation to each unit of an undivided interest in the common areas in accordance with RSA 356-B:17;
- (h) A statement of the purposes for which the condominium and each of the units are intended and restricted as to use;
- (i) A description of the manner of determining appropriate action following damage to any portion of the condominium by fire or other casualty; and
- (j) Such other matters as the declarant deems appropriate.

I-a. All lands within the declaration of the condominium which are within the original bounds of the condominium shall be identified therein as individual units, common areas, limited common areas, convertible spaces, or convertible lands. All lands proposed for possible future expansion shall be identified as expandable lands.

II. If the condominium contains any convertible land, the declaration shall also contain the following:

- (a) A legal description by metes and bounds of each convertible land within the condominium;
- (b) A statement of the maximum number of units that may be created within each such convertible land;
- (c) A statement, with respect to each such convertible land, as to whether or not any portion of such convertible land will not be restricted to residential use, and, if not, the

nature of the permitted uses, and the maximum percentage of the aggregate land and aggregate floor area of all units that may be created which will not be restricted exclusively to residential use;

(d) A statement of the extent to which any structure erected on any convertible land will be compatible with structures on other portions of the submitted land in terms of quality of construction, the principal materials to be used, and architectural style;

(e) A description of all other improvements that may be made on each convertible land within the condominium;

(f) A statement that any units created within each convertible land will be substantially identical to the units on other portions of the submitted land, or a statement describing in detail any differences in design, layout, size, quality or other significant characteristics of the units that may be created therein; and

(g) A description of the declarant's reserved right, if any, to create limited common areas within any convertible land, and/or to designate common areas therein which may subsequently be assigned as limited common areas in terms of the types, sizes, and maximum number of such areas within each such convertible land.

Provided, that site plans and floor plans may be recorded with the declaration and identified therein to supplement information furnished pursuant to subparagraphs II(a), (d), (e), (f) and (g), and that subparagraph II(c) need not be complied with if none of the units on other portions of the submitted land are restricted exclusively to residential use.

III. If the condominium is an expandable condominium, the declaration shall also contain the following:

(a) The explicit reservation of an option to expand the condominium;

(b) A statement of any limitations on that option, including, without limitation, a statement as to whether the consent of any unit owners shall be required, and, if so, a statement as to the method whereby such consent shall be evidenced; or a statement that there are no such limitations;

(c) A time limit, not exceeding 7 years from the recording of the declaration, upon which the option to expand the condominium shall expire, provided, however, that the time limit contained in the declaration may be extended by not more than 7 years by an amendment to the declaration adopted pursuant to RSA 356-B:54, V, together with a statement of the circumstances, if any, which will terminate that option prior to the expiration of the time limit so specified;

(d) A legal description by metes and bounds of all land that may be added to the condominium, henceforth referred to as "additional land";

(e) A statement as to whether, if any of the additional land is added to the condominium, all of it or any particular portion of it must be added, and, if not, a statement of any limitations as to what portions may be added or a statement that there are no such limitations;

- (f)** A statement as to whether portions of the additional land may be added to the condominium at different times, together with any limitations fixing the boundaries of those portions by legal descriptions setting forth the metes and bounds thereof and/or regulating the order in which they may be added to the condominium;
- (g)** A statement of any limitations as to the locations of any improvements that may be made on any portions of the additional land added to the condominium, or a statement that no assurances are made in that regard;
- (h)** A statement of the maximum number of units that may be created on the additional land. If portions of the additional land may be added to the condominium and the boundaries of those portions are fixed in accordance with subparagraph III(f), the declaration shall also state the maximum number of units that may be created on each such portion added to the condominium. If portions of the additional land may be added to the condominium and the boundaries of those portions are not fixed in accordance with subparagraph III(f), then the declaration shall also state the maximum number of units per acre that may be created on any such portion added to the condominium;
- (i)** A statement, with respect to the additional land and to any portion or portions thereof that may be added to the condominium, as to whether or not any portion of such expandable land will not be restricted to residential use, and, if not, the nature of the permitted uses and the maximum percentage of the aggregate land and aggregate floor area of all units that may be created thereon which will not be restricted exclusively to residential use;
- (j)** A statement of the extent to which any structures created on any portion of the additional land added to the condominium will be compatible with structures on the submitted land in terms of quality of construction, the principal materials to be used, and architectural style, or a statement that no assurances are made in those regards;
- (k)** A description of all other improvements that will be made on any portion of the additional land added to the condominium or a statement of any limitations as to what other improvements may be made thereon, or a statement that no assurances are made in that regard;
- (l)** A statement that any units created on any portion of the additional land added to the condominium will be substantially identical to the units on the submitted land, or a statement of any limitations as to what differences in design, layout, size, quality or other significant characteristics of the units may be created thereon, or a statement that no assurances are made in that regard; and
- (m)** A description of the declarant's reserved right, if any, to create limited common areas within any portion of the additional land added to the condominium, and/or to designate common areas therein which may subsequently be assigned as limited common areas in terms of types, sizes, and maximum number of such areas within each such portion, or a statement that no assurances are made in those regards.

Provided, that site plans and floor plans may be recorded with the declaration and identified therein to supplement information furnished pursuant to subparagraphs III(d), (e), (f), (g), (j), (k), (l) and (m), and that subparagraph III(i) need not be complied with if none of the units on the submitted land is restricted exclusively to residential use.

IV. If the condominium is a contractable condominium, the declaration shall also contain the following:

- (a)** The explicit reservation of an option to contract the condominium;
- (b)** A statement of any limitations on that option, including, without limitation, a statement as to whether the consent of any unit owners shall be required, and, if so, a statement as to the method whereby such consent shall be evidenced; or a statement that there are no such limitations;
- (c)** A time limit, not exceeding 7 years from the recording of the declaration, upon which the option to contract the condominium shall expire, provided, however, that the time limit contained in the declaration may be extended by not more than 7 years by an amendment to the declaration adopted pursuant to RSA 356-B:54, V, together with a statement of the circumstances, if any, which will terminate that option prior to the expiration of the time limit so specified;
- (d)** A legal description by metes and bounds of all land that may be withdrawn from the condominium, henceforth referred to as "withdrawable land";
- (e)** A statement as to whether portions of the withdrawable land may be withdrawn from the condominium at different times, together with any limitations fixing the boundaries of those portions by legal descriptions setting forth the metes and bounds thereof and/or regulating the order in which they may be withdrawn from the condominium; and
- (f)** A legal description by metes and bounds of all of the submitted land to which the option to contract the condominium does not extend. Provided, that site plans may be recorded with the declaration and identified therein to supplement information furnished pursuant to subparagraphs IV(d), (e) and (f), and that subparagraph IV(f) shall not be construed in derogation of any right the declarant may have to terminate the condominium in accordance with RSA 356-B:33.

V. If the condominium is a leasehold condominium, then with respect to any ground lease or other leases the expiration or termination of which will or may terminate or contract the condominium, the declaration shall set forth the county wherein the same are recorded and the deed book and page number where the first page of each such lease is recorded; and the declaration shall also contain the following:

- (a)** The date upon which each such lease is due to expire;
- (b)** A statement as to whether any land and/or improvements will be owned by the unit owners in fee simple, and, if so, either (a) a description of the same, including without limitation a legal description by metes and bounds of any such land, or (b) a statement of any rights the unit owners shall have to remove such improvements within a reasonable

time after the expiration or termination of the lease or leases involved, or a statement that they shall have no such rights; and

(c) A statement of the rights the unit owners shall have to redeem the reversion or any of the reversions, or a statement that they shall have no such rights.

Provided, that after the recording of the declaration, no lessor who executed the same, and no successor in interest to such lessor, shall have any right or power to terminate any part of the leasehold interest of any unit owner who makes timely payment of his share of the rent to the person or persons designated in the declaration for the receipt of such rent and who otherwise complies with all covenants which, if violated, would entitle the lessor to terminate the lease. Acquisition or reacquisition of such a leasehold interest by the owner of the reversion or remainder shall not cause a merger of the leasehold and fee simple interests unless all leasehold interests in the condominium are thus acquired or reacquired.

VI. Wherever this section requires a legal description by metes and bounds of land that is submitted to this chapter or that may be added to or withdrawn from the condominium, such requirement shall be deemed satisfied by any legally sufficient description and shall be deemed to require a legally sufficient description of any easements that are submitted to this chapter or that may be added to or withdrawn from the condominium, as the case may be. In the case of each such easement, the declaration shall contain the following:

(a) A description of the permitted use or uses;

(b) If less than all of those entitled to the use of all of the units may utilize such easement, a statement of the relevant restrictions and limitations on utilization; and

(c) If any persons other than those entitled to the use of the units may utilize such easement, a statement of the rights of others to utilization of the same.

VII. Wherever this section requires a legal description by metes and bounds of land that is submitted to this chapter or that may be added to or withdrawn from the condominium, an added requirement shall be a separate legally sufficient description of all lands in which the unit owners shall or may be tenants in common or joint tenants with any other persons, and a separate legally sufficient description of all lands in which the unit owners shall or may be life tenants. No units shall be situated on any such lands, however, and the declaration shall describe the nature of the unit owner's estate therein. No such lands shall be shown on the same site plans showing other portions of the condominium, but shall be shown instead on separate site plans.

RSA 356-B:16

Amended by 2018, 192:3, eff. 8/7/2018.

1977, 468:1. 1991, 110:1, 2, eff. May 13, 1991.

N.H. Rev. Stat. § 356-B:20

Section 356-B:20 - Contents of the Site Plans and Floor Plans

I. There shall be recorded simultaneously with the declaration one or more site plans of survey showing the location and dimensions of the submitted land, the location and dimensions of any convertible lands within the submitted land, the location and dimensions of any existing improvements, the intended location and dimensions of any contemplated improvements which are to be located on any portion of the submitted land other than within the boundaries of any convertible lands, and, to the extent feasible, the location and dimensions of all easements appurtenant to the submitted land or otherwise submitted to this chapter as a part of the common areas. If the submitted land is not contiguous, then the site plans shall indicate the distance between the parcels constituting the submitted land. The site plans shall label every convertible land as a convertible land, and if there be more than one such land the site plans shall label each such land with one or more letters or numbers or both different from those designating any other convertible land and different also from the identifying number of any unit. The site plans shall show the location and dimensions of any withdrawable lands, and shall label each such land as a withdrawable land. If, with respect to any portion or portions, but less than all, of the submitted land, the unit owners are to own only an estate for years, the site plans shall show the location and dimensions of any such portions, and shall label each such portion as a leased land. If there is more than one withdrawable land, or more than one leased land, the site plans shall label each such land with one or more letters or numbers or both different from those designating any convertible land or other withdrawable or leased land, and different also from the identifying number of any unit. The site plans shall show all easements to which the submitted land or any portion thereof is subject, and shall show the location and dimensions of all such easements to the extent feasible. The site plans shall also show all encroachments by or on any portion of the condominium. In the case of any improvements located or to be located on any portion of the submitted land other than within the boundaries of any convertible lands, the site plans shall indicate which, if any, have not been begun by the use of the phrase "(NOT YET BEGUN)" and which, if any, have been begun but have not been substantially completed by the use of the phrase "(NOT YET COMPLETED)." In the case of any units the vertical boundaries of which lie wholly or partially outside of structures for which floor plans pursuant to paragraph II are simultaneously recorded, the site plans shall show the location and dimensions of such vertical boundaries to the extent that they are not shown on such floor plans, and the units or portions thereof thus depicted shall bear their identifying numbers. Each site plan shall be certified as to its accuracy and compliance with the provisions of this paragraph by a registered land surveyor, and the said surveyor shall certify that all units or portions thereof depicted on any portion of the submitted land other than within the boundaries of any convertible lands have been substantially completed. The specification within this paragraph of items that shall be shown on the site plans shall not be construed to mean that the site plans shall not also show all other items customarily shown or hereafter required for land title surveys.

II. There shall also be recorded, simultaneously with the declaration, floor plans of every structure which contains or constitutes all or part of any unit or units, and which is located on any portion of the submitted land other than within the boundaries of any convertible lands. The floor plans shall show the location and dimensions of the vertical boundaries of each unit to the extent that such boundaries lie within or coincide with the boundaries of such structures, and the units or portions thereof thus depicted shall bear their identifying numbers. In addition, each convertible space thus depicted shall be labeled a convertible space. The horizontal boundaries of each unit having horizontal boundaries shall be identified on the floor plans with reference to established datum. Unless the condominium instruments expressly provide otherwise, it shall be presumed that in the case of any unit not wholly contained within or constituting one or more such structures, the horizontal boundaries thus identified extend, in the case of each such unit, at the same elevation with regard to any part of such unit lying outside of such structures, subject to the following exception: in the case of any such unit which does not lie over any other unit other than basement units, it shall be presumed that the lower horizontal boundary, if any, of that unit lies at the level of the ground with regard to any part of that unit lying outside of such structures. The floor plans shall be certified as to their accuracy and compliance with the provisions of this paragraph by a registered architect, registered engineer or licensed land surveyor, and such architect, engineer or land surveyor shall certify that all units or portions of units depicted on the floor plan have been substantially completed.

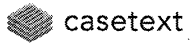
III. When converting all or any portion of any convertible land, or adding additional land to an expandable condominium, the declarant shall record new site plans of survey conforming to the requirements of paragraph I. (In any case where less than all of a convertible land is being converted, such site plans shall show the location and dimensions of the remaining portion or portions of such land in addition to otherwise conforming with the requirements of paragraph I.) At the same time, the declarant shall record, with regard to any structures on the land being converted, or added, either floor plans conforming to the requirements of paragraph II, or certifications, conforming to the certification requirements of said subsection, of floor plans previously recorded pursuant to RSA 356-B:21.

IV. When converting all or any portion of any convertible space into one or more units or limited common areas, or both, the declarant shall record, with regard to the structure or portion of such structure constituting that convertible space, floor plans showing the location and dimensions of the horizontal and vertical boundaries of each unit or limited common areas, or both, formed out of such space. Such plans shall be certified as to their accuracy and compliance with the provisions of this paragraph by a registered architect, registered engineer or licensed land surveyor.

V. For the purposes of paragraphs I, II and III, all provisions and requirements relating to units shall be deemed equally applicable to limited common areas. The limited common areas shall be labeled as such, and each limited common area depicted on the site plans and floor plans shall bear the identifying number or numbers of the unit or units to which it is assigned, if it has been assigned, unless the provisions of RSA 356-B:12, V, make such designations unnecessary.

RSA 356-B:20

1977, 468:1. 1990, 6:1, 2. 1991, 110:3, eff. May 13, 1991.



N.H. Rev. Stat. § 356-B:25

Section 356-B:25 - Expansion of the Condominium

No condominium shall be expanded except in accordance with the provisions of the declaration and of this chapter. Any such expansion shall be deemed to have occurred at the time of the recordation of site plans and floor plans pursuant to RSA 356-B:20, III, together with an amendment to the declaration, duly executed by the declarant, including, without limitation, all of the owners and lessees of the additional land added to the condominium. Such amendment shall contain a legal description by metes and bounds of the land added to the condominium, and shall reallocate undivided interests in the common areas in accordance with RSA 356-B:18, II. A merger of 2 condominiums the land of which abuts and which is merged by consent of all existing unit owners shall not be considered an "expansion".

RSA 356-B:25

1977, 468:1, eff. Sept. 10, 1977.

N.H. Rev. Stat. § 356-B:36

Section 356-B:36 - Control by the Declarant

I.The condominium instruments may authorize the declarant, or a managing agent or some other person or persons selected or to be selected by the declarant, to appoint and remove some or all of the officers of the unit owners' association or its board of directors, or both, or to exercise powers and responsibilities otherwise assigned by the condominium instruments and by this chapter to the unit owners' association, the officers, or the board of directors. But no amendment to the condominium instruments shall increase the scope of such authorization if there is any unit owner other than the declarant, and no such authorization shall be valid after the time limit set by the condominium instruments or after units to which 3/4 of the undivided interests in the common areas appertain have been conveyed, whichever occurs first. The time limit initially set by the condominium instruments shall not exceed 5 years in the case of an expandable condominium, 3 years in the case of a condominium containing any convertible land, or 2 years in the case of any other condominium.

II.If entered into during the period of control contemplated by paragraph I, no management contract, lease of recreational areas or facilities, or any other contract or lease executed by or on behalf of the unit owners' association, its board of directors, or the unit owners as a group, shall be binding after such period of control unless then renewed or ratified with the consent of unit owners of units to which a majority of the votes in the unit owners' association appertain.

III.If the unit owners' association is not in existence or does not have officers at the time of the creation of the condominium, the declarant shall, until there is such an association with such officers, have the power and the responsibility to act in all instances where this chapter requires action by the unit owners' association, its board of directors, or any officer or officers.

IV.This section shall be strictly construed to protect the rights of the unit owners.

RSA 356-B:36

1977, 468:1, eff. Sept. 10, 1977.

N.H. Rev. Stat. § 356-B:42

Section 356-B:42 - Control of the Common Areas

I. Except 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)** Employ, dismiss, and replace agents and employees to exercise and discharge the powers and responsibilities of the said association arising under RSA 356-B:41;
- (b)** Make or cause to be made additional improvements on and as a part of the common areas;
- (c)** Grant or withhold approval of any action by one or more unit owners or other persons entitled to the occupancy of any unit which would change the exterior appearance of any unit or of any other portion of the condominium, or elect or provide for the appointment of an architectural control committee, the members of which must have the same qualifications as officers, to grant or withhold such approval; and
- (d)** Acquire, hold, convey and encumber title to real property, including but not limited to condominium units, whether or not the association is incorporated.

II. Except to the extent prohibited by the condominium instruments, and subject to any restrictions and limitations specified therein, the board of directors of the unit owners' association, if any, and if not, then the unit owners' association itself, shall have the irrevocable power as attorney-in-fact on behalf of all the unit owners and their successors in title to grant easements through the common areas and accept easements benefiting the condominium or any portion thereof.

III. This section shall not be construed to prohibit the grant, by the condominium instruments, of other powers and responsibilities to the unit owners' association or its board of directors.

RSA 356-B:42

1977, 468:1, eff. Sept. 10, 1977.

N.H. Rev. Stat. § 491:22

Section 491:22 - Declaratory Judgments

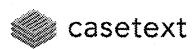
I. Any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the court's judgment or decree thereon shall be conclusive. The taxpayers of a taxing district in this state shall be deemed to have an equitable right and interest in the preservation of an orderly and lawful government within such district; therefore any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief under this section when it is alleged that the taxing district or any agency or authority thereof has engaged, or proposes to engage, in conduct that is unlawful or unauthorized, and in such a case the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced. The preceding sentence shall not be deemed to convey standing to any person (a) to challenge a decision of any state court if the person was not a party to the action in which the decision was rendered, or (b) to challenge the decision of any board, commission, agency, or other authority of the state or any municipality, school district, village district, or county if there exists a right to appeal the decision under RSA 541 or any other statute and the person seeking to challenge the decision is not entitled to appeal under the applicable statute. The existence of an adequate remedy at law or in equity shall not preclude any person from obtaining such declaratory relief. However, the provisions of this paragraph shall not affect the burden of proof under RSA 491:22-a or permit awards of costs and attorney's fees under RSA 491:22-b in declaratory judgment actions that are not for the purpose of determining insurance coverage.

II. The district court shall have concurrent jurisdiction over such claims arising under its subject matter jurisdiction authority in RSA 502-A except that the defendant shall have the right to remove said declaratory judgment action to the superior court, subject to conditions established by rule of court, if the claim exceeds \$1,500. The court of probate shall have exclusive jurisdiction over such claims arising under its subject matter jurisdiction authority in RSA 547 and RSA 552:7.

III. No petition shall be maintained under this section to determine coverage of an insurance policy unless it is filed within 6 months after the filing of the writ, complaint, or other pleading initiating the action which gives rise to the question; provided, however, that the foregoing prohibition shall not apply where the facts giving rise to such coverage dispute are not known to, or reasonably discoverable by, the insurer until after expiration of such 6-month period; and provided, further, that the superior court may permit the filing of such a petition after such period upon a finding that the failure to file such petition was the result of accident, mistake or misfortune and not due to neglect. A petition for declaratory judgment to determine coverage of an insurance policy may be instituted as long as the court has personal jurisdiction over the parties to the matter, even though the action giving rise to the coverage question is brought in a federal court or another state court.

RSA 491:22

Amended by 2012, 262:1, eff. 1/1/2013.



N.H. Rev. Stat. § 514:8

Section 514:8 - Abatement

No writ, declaration, return, process, judgment or other proceeding in the courts or course of justice shall be abated, quashed or reversed for any error or mistake, where the person or case may be rightly understood by the court, nor through defect or want of form or addition only; and courts and justices may, on motion, order amendment in any such case.

RSA 514:8

RS 186:10. CS 198:10. GS 207:8. GL 226:8. PS 222:7. PL 334 :8. RL 390:8.

