

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**

REPLY BRIEF FOR THE PLAINTIFFS

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The Defendant's Memorandum of Law avoided the Questions Presented in the Plaintiffs' Notice of Appeal & Brief, and Defendant presented a question for review without following applicable rules of this Court. The Defendant chose to argue only the substance of their claims and defenses, and has mis-stated the facts and applicable law.

I. Three Independent and Distinct Bases for Relief

One. Pursuant to RSA 356-B:15, the Defendant is required to comply with the Condominium Act and the Declaration. The statute authorizes the Plaintiffs to bring any remedy in law or equity to enforce any lack of compliance. RSA 356-B:15.

Two. The Declaration also requires strict compliance with the Declaration and authorizes the Plaintiffs to seek injunctive relief to enforce the Declaration. APX. IV, 33 (Article 13-100).¹

Therefore, RSA 356-B:15 and Declaration Art. 13-100, grant Plaintiffs authority to enforce the Declaration and the Condominium Act by declaratory and injunctive relief.

Three. In addition to the above, RSA 491:22 authorizes Plaintiffs to seek declaratory relief against the Defendant who is claiming legal or equitable, rights or title, adverse to the Plaintiffs. That adversity has been shown in the original and Amended Petition (APX. I, 5, & II, 23 respectively) and is shown herein.

II. Adding Land to the Condominium - Adverse Claims

The Defendant has undertaken to purchase land outside the Condominium and add it to condominium common area. That land is a

¹ APX. is Appendix. ADD. is Addendum.

former railway corridor currently held by the New Hampshire Dept. of Transportation. The Defendant asserts that, once purchased, the additional land shall become part of the condominium common area. *See* APX. I, 7 (¶¶ 8-9); APX. II, 25 (¶¶ 8-9). *See also*, APX. II, 48-49 (Defendant's letter stating a plan to buy land and add it to the Condominium). This letter was admitted into evidence at the preliminary injunction hearing without objection from the Defendant. APX. III, 14 (Plaintiffs' Exhibit 3 offered and admitted).

In addition, the Defendant's Superior Court, Motion to Dismiss, specifically stated, "Under New Hampshire law, a condominium association is permitted to purchase land to add to the common areas, unless the condominium instruments expressly prohibit it." APX. I, 16 (2nd sentence). That is *NOT* the law in New Hampshire (discussed *infra*).

The Plaintiffs purchased (and hold title to) a 1/91th interest in a non-expandable condominium (Spinnaker Cove) as tenants in common pursuant to Plaintiffs' deed, the Declaration of Condominium and the New Hampshire Condominium Act (RSA 356-B).

The Plaintiffs have repeatedly informed the Defendant and their attorneys that the Condominium is non-expandable because the Declaration for the Condominium does not contain the specifications required by RSA 356-B:16, III, which are prerequisites for expanding a New Hampshire condominium by adding land.

APX. I, 7 (¶¶ 8-9); APX. II, 25 (¶¶ 8-9).

III. Spinnaker Cove Is Not Expandable - The Condominium Act & Declaration

At no time, has the Defendant objected or contested the Superior Court's finding that the Condominium is not expandable.

Plaintiffs' opening Brief explains the applicable law; illuminates why the Superior Court is correct; and explains why the Declaration cannot be amended to add land to the Condominium. Pltfs. Brief, pp. 15-18, which we do not repeat here, but incorporate by reference in this Reply.

The Superior Court's finding is based upon statutes referenced in Plaintiffs original and Amended Petition (APX. I, 7 (¶ 10); APX. II, 27 (¶¶ 14-15, 17):

“‘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. The Legislature has succinctly stated, “No condominium shall be expanded except in accordance with the provisions of the declaration and of this chapter.” RSA 356-B:25. One of several such provisions is found in RSA 356-B16, III, which the Superior Court relied-upon to find that Spinnaker Cove is not an expandable condominium. ADD. 37-38, 44 (Superior Court ORDER, June 16, 2021).

The Superior Court correctly found:

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. ‘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, LLC v. Villages at Chester Condominium Ass’n*. 153 N.H. 194, 196 (2006). 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.

* * *

As discussed above, Spinnaker Cove is not an expandable condominium.

ADD. 37-38, 44 (Superior Court ORDER, June 16, 2021).

By failing to object to the above findings in the Superior Court, or filing a cross-appeal to this Court, the Defendant has conceded that “Spinnaker Cove is not an expandable condominium.”

IV. Adding Land to the Condominium – Relief Sought

In the Superior Court, Plaintiffs sought declaratory and injunctive relief as follows:

- 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; and,
- Issue an injunction to prohibit the Spinnaker Cove Yacht Club Association, Inc., its heirs, successors and assigns from adding land to Spinnaker Cove Yacht

Club, a condominium (a non-expandable condominium).

APX. I, 11; APX. II, 33-34.

Relief is available pursuant to RSA 356-B:15 to enforce compliance with the Condominium Act and the Declaration of Condominium.

Relief is also available pursuant to Art. 13-100 of the Declaration (APX. IV, 33) whereby Plaintiffs may seek injunctive relief to enforce the Declaration.

Relief is also available pursuant to RSA 491:22 (Declaratory Judgments) whereby Plaintiffs may seek declaratory relief to determine whether Plaintiffs hold title to a non-expandable condominium (as claimed by the Plaintiffs), or an expandable condominium (a condominium to which land may be added) as claimed by the Defendant.

V. Superior Court Error

The Superior Court correctly found “Spinnaker Cove is not an expandable condominium.” Having made that finding, it was error not to grant the requested relief.

The Defendant has unequivocally stated an intent to add land to the condominium common area. The addition of land to the Condominium simultaneously violates the Condominium Act and the Declaration of Condominium, and is adverse to the Plaintiffs title to a non-expandable condominium (no land may be added).

The Plaintiffs’ original and Amended Petition state identical claims for relief. The Superior Court erred by dismissing the Plaintiffs original Petition (and rejecting the Amended Petition) on the basis that “plaintiffs’ Petition fails to state a claim as a matter of law.” ADD. 45 & 48.

VI. Purchasing Land with Assessment Monies – Adverse Claims, Violation of the Declaration and Condominium Act.

The Defendant has undertaken to purchase land outside the Condominium with monies collected from condominium unit owners as obligatory assessments. *See* APX. II, 47-49 (Defendant's letter stating a plan to buy land with assessment monies). This letter was admitted into evidence at the preliminary injunction hearing without objection from the Defendant. APX. III, 14 (Plaintiffs' Exhibit 3 offered and admitted). The plan is to buy the land to create about 10 additional parking spaces for use by guests, not unit owners.

Plaintiffs have repeatedly told the Defendant, and alleged in their original and Amended Petition, that:

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 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. Purchase of the land outside the Condominium

violates the Condominium Instruments and New Hampshire law, and shall cause the Petitioners to incur additional costs and expenses not anticipated by them when, after reading the Condominium Instruments, they purchased the Condominium Unit. The Trust asserts that the ‘restrictions and limitations’ clause of RSA 356-B:42, I(d) prevents a purchase by the Association.

APX. I, 7, 8-10 (¶¶ 9-10, 12-13, 20-22); APX. II, 25, 30, 32 (¶¶ 9-10, 31-32, 39-41). *See also*, APX. II, 5-8 (Sec. II., *The Defendant Cannot Use Condominium Assessment Monies to Purchase Land Outside the Condominium*). *See also*, APX. I, 12-14 (Affidavit of Susan B. Sullivan).

Additionally, RSA 356-B:15 requires Defendant’s compliance with the Condominium Act and the condominium instruments, which include the Declaration. Thus, any breach of the Declaration is also a violation of the Condominium Act.

VII. Requirements of the Condominium Instruments

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, 18 (Declaration, last paragraph). The Declaration (the contract) does not contain a list of prohibited uses. Instead, it specifies the obligation to pay assessments for agreed purposes. *See, e.g.*, APX. IV, 31 (Art. 9-100) requiring payment of “Common Expenses” by all unit owners.

Per the Declaration, “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.” APX. IV, 14 (middle of 4th ¶).

“Assessment” is defined as “that portion of the cost for maintenance, repairing, and managing the property which is to be paid by such unit owner.” APX. IV, 14 (Art. 1-101). “Common expenses” is defined by the declaration as “expenditures lawfully made or incurred by or on behalf of the Association, together with all funds lawfully assessed for the creation and maintenance of reserves pursuant to the provisions of the Condominium Instruments.” APX. IV, 14 (Art. 1-106). (All the sentences of this paragraph appear in the Amended Petition. APX. II, 29.)

In addition to the above, Plaintiffs alleged in their Amended Petition, “All funds and the titles to all property acquired by the Association and the proceeds thereof shall be held only for the benefit of the members in accordance with the provisions of the Condominium Instruments. Articles of Agreement, art. 3-103 a condominium instrument per Declaration art. 1-109.” The Articles of Agreement are not part of the Superior Court record. But, in reviewing the sufficiency of a complaint, the Plaintiffs’ allegations are taken as true and construed with all reasonable inferences in the light most favorable to the plaintiff. *Lamb v. Shaker Reg'l Sch. Dist.*, 168 N.H. 47, 49 (2015).

The Defendant incorrectly claims that, “if the Association members [the unit owners] approve the purchase, the money used is properly a common expense chargeable to unit owners.” Defendant’s Memorandum of Law, p.15. According to the Defendant, the unit owners may collect and expend assessment monies, in any amount, for whatever purpose they choose. That is not what the Declaration states and it is an absurd interpretation which removes all limits on assessments or spending.

VIII. Interpreting the Contract (the Declaration)

Courts determine the meaning of a contract based on the meaning that would be attached to it by reasonable persons. *Robbins v. Salem Radiology*, 145 N.H. 415, 417-18 (2000) citing *Galloway v. Chicago-Soft*, 142 N.H. 752, 756, (1998). See *Gamble v. University of New Hampshire*, 136 N.H. 9, 13 (1992) (holding same). In reviewing a contract, courts give its language the interpretation that best reflects the parties' intentions. *Robbins* at 418. In ascertaining the parties' intent, courts consider the situation of the parties at the time of their agreement and the object that was intended thereby, together with all the provisions of their agreement taken as a whole. *Id.*

Near the beginning of the Declaration, the parties' intentions regarding the use of assessment monies is succinctly stated: "In addition to the purchase price, the unit owner will be required to pay for certain maintenance, use, and utility services." APX. IV, 14 (Fees & Charges).

When interpreting the Declaration, it is particularly significant that the second paragraph of the Public Offering Statement (which is pp. 1-11 of the Declaration) reads, in part:

The Act requires that a public offering statement be furnished to a purchaser prior to or at the time he enters into a purchase agreement. The purpose of the statement is to disclose **material facts** pertaining to this condominium. APX. IV, 7 (Declaration, p.1) (bold added).

Plaintiffs assert that, when reading the "material facts," a reasonable unit owner (or potential unit owner) would understand the intent of the

agreement as requiring payment of assessments which mutually benefit all unit owners by supplying funds to maintain, repair and manage the Condominium. It would *not* be reasonable, in light of the situation of the unit owners and the expressed intent of the agreement, to conclude that assessment monies may be collected and spent for any other purpose (like purchasing land outside the Condominium and paying costs of ownership). It is particularly noteworthy that purchasing land for the sole purpose of providing 10 parking spaces to guests does not mutually benefit all the unit owners and, thus, is an additional breach the agreement regarding use of assessment monies.

**IX. Purchasing Land with Assessment Monies –
RSA 356-B:42, I(d)**

The Defendant asserts that RSA 356-B:42, I(d), grants the Association authority to purchase real property. It does not. The statute allows an association to “acquire title” subject to any “restrictions and limitations” in the Declaration or other condominium instruments.

The statute reads, in relevant part:

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:

* * *

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

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

The “restrictions and limitations” clause of the statute prevents use of Spinnaker Cove assessment monies to purchase land outside the Condominium. As explained herein-above (and in the Amended Petition), the use of assessment monies is restricted and limited to maintenance, repair and management of the Condominium for the mutual benefit of all unit owners.

**X. Purchasing Land with Assessment Monies –
A Liability, Not An Asset**

Without citing any authority in the Declaration or other condominium instruments, the Defendant has told this Court that, “the association [Defendant] can always hold the property as an asset of the association.” Defs. Mem. of Law, p.17.

As stated in the original and Amended Petition:

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 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.

APX. I, 8 (¶ 14); APX. II, 30 (¶ 33). See also, APX. I, 13 (¶¶ 14-15).

XI. Purchasing Land with Assessment Monies – Superior Court Error

The Superior Court found, *incorrectly*, that RSA 356-B:42, I(d), “allows the Association to acquire land ‘except to the extent prohibited by the condominium instruments’.” ADD. 44. The Superior Court ignored, and did not apply, the full statutory phrase which reads, “Except to the extent prohibited by the condominium instruments, and subject to any restrictions and limitations specified therein. . . .”

The Superior Court went on to say that, “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.” ADD. 45 (bold added).

The statute is not limited to whether the condominium instruments “prohibit” a purchase. The statute also requires consideration of “any restrictions and limitations” in the condominium instruments such as the Declaration.

It has always been the Plaintiffs position that the ‘restrictions and limitations’ clause of the statute, as applied to the condominium instruments of Spinnaker Cove, prevent use of assessment monies to purchase land outside the condominium. As explained in the original and Amended Petition (and *supra*), when that clause is considered, the Declaration prevents use of assessment monies to purchase land outside the Condominium. Thus, the Plaintiffs original and Amended Petition state a plausible claim for declaratory and injunctive relief.

XII. Statutory Nullification

The Defendant argues that, “An association’s purchase of real property, even for common use by its members, does not constitute expansion of the condominium.” Defs. Mem. of Law, p.8.

A finding that RSA 356-B:42, I(d) allows the condominium association of a non-expandable condominium to use assessment monies to purchase and maintain (taxes, insurance, etc.) land outside the condominium, is a *de facto* expansion of the condominium which nullifies the legislature’s specific prohibition that, “No condominium shall be expanded except in accordance with the provisions of the declaration and of this chapter.” RSA 356-B:25.

Statutes dealing with similar subjects are construed so that each effectuates legislative purposes and do not contradict each other. *State v. Rix*, 150 N.H. 131, 132-33 (2003). A specific law is deemed to control over a general law. *Id.* The Court presumes that the legislature would not pass an act that would lead to an absurd or illogical result. *In re Appeal of Dunbarton Sch. Dist.*, 169 N.H. 50, 59 (2016).

RSA 356-B:25 is a specific and unambiguous restriction on adding land. RSA 356-B:42, I(d) does not override the statutory restrictions imposed on non-expandable condominiums nor create an exception which ignores the spending ‘restrictions and limitations’ of condominium instruments.

Similarly, the Defendant can “acquire title,” but must find funding other than assessment money to be compliant with the ‘restrictions and limitations’ clause of RSA 356-B:42, I(d) as applied to the Spinnaker Cove condominium instruments.

Respectfully submitted,

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

John F. Sullivan and Susan B. Sullivan

By and through counsel,

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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 2,997 words according to the word count feature of counsel's software, exclusive of the table of contents, tables of cases, statutes and authorities, and compliance & certification.

/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*