State of New Hampshire
Supreme Court

NO. 2015-0514

2016 TERM

FEBRUARY SESSION

New Hampshire Housing Finance Authority

v.

Pinewood Estates Condominium Association

RULE 7 APPEAL OF FINAL DECISION OF THE
HILLSBOROUGH COUNTY NORTH SUPERIOR COURT

ANSWERING BRIEF OF PLAINTIFF/APPELLANT
NEW HAMPSHIRE HOUSING FINANCE AUTHORITY

By: Joshua L. Gordon, Esq.
NH Bar ID No. 9046
Law Office of Joshua L. Gordon
75 South Main Street #7
Concord, NH 03301
(603) 226-4225 www.AppealsLawyer.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Hampshire Cases

Other States' Cases

New Hampshire Statutes

Secondary Authority

SUMMARY OF ARGUMENT

A condominium association has and can perfect a lien for unpaid assessments, but a foreclosure extinguishes the lien. The debt for unpaid assessments remains, but is personal to the owner who incurred it. A condominium association can terminate services and privileges to a non-paying owner, but cannot carry the liability forward to a post-foreclosure purchaser.

Although condominium covenants run with the land, a particular assessment does not. In asserting they do, Pinewood misreads controlling precedent, statutes, and its own declarations. If each assessment were a covenant, Pinewood would seize in the judicial branch what it could not have in the legislative, and enfeeble lawmakers' role in balancing the rights of condominium associations and lenders when new conditions arise. Also, Pinewood's claims are barred by prior litigation.

Pinewood's allegation of perfidious motivation is not justified given HFA's publically-chartered mission to promote affordable home ownership.

ARGUMENT

I. Pinewood's Position, Summarized

"Condominium declarations are covenants running with the land." *Buchholz v. Waterville Estates Ass'n*, 156 N.H. 172, 174 (2007) (quotations omitted). Based on *Buchholz*, Pinewood's position argued in its brief is:

- The obligation to pay assessments is among the covenants which run with the land;
- HFA bought the unit subject to an unpaid assessments left by the previous owner;
- HFA therefore has an obligation to pay the previous owner's debt.
- And Pinewood can deny all services and privileges until HFA pays.

PINEWOOD BRF. at 9, 11-16, 16-20, 30-32.

There are at least five flaws with this argument.

First, Pinewood offers a conflated reading of *Buchholz*.

Second, adoption of Pinewood's position would disempower the legislature from adjusting the relationship among condominium associations, owners, and lenders, which it has done continually.

Third, Pinewood's position would cause conveyancing chaos, because it would beget covenants unrecorded in the registry.

Fourth, Pinewood posits a reading of two portions of the Condominium Act regarding collection of assessments and termination of services, which cannot be reconciled with the statutory language.

Fifth, Pinewood's declaration does not provide authority to collect pre-foreclosure unpaid assessments from HFA as post-foreclosure owner, nor to refuse HFA common services.

To discern Pinewood's errors, it is necessary to first summarize the statutory context in which this case arises. *See* AMICI CURIAE BRF. at 3-7; PINEWOOD BRF. at 32-34.

II. Summary of Condominium Legislation in New Hampshire

A. Establishment of Condominiums

Condominiums are a legal oddity that largely could not be structured under the common law of property. This is due to pre-statutory legal doubt about owning a cube of air in the sky, and the inseverability of two otherwise severable ownerships – the individual space and the common area. Condominiums therefore are "shelter on a statutory foundation." They became financially viable in 1961 when the FHA began treating condominiums just like residential mortgages. Stuart Ball, *Division into Horizontal Strata of the Landspace Above the Surface*, 39 YALE L.J. 616 (1930); Donna S. Bennett, *Condominium Homeownership in the United States: A Selected Annotated Bibliography of Legal Sources*, 103 LAW LIBR. J. 249 (2011); Curtis Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987 (1963).

New Hampshire enacted an early condominium statute in 1965 (still on the books because existing condos were organized under it), although it has been superseded. RSA 479-A (Unit Ownership of Real Property); RSA 356-B:2. Price fluctuations in the mid-1970s revealed shortcomings in condominium laws generally, Richard J. Kane, *The Financing of Cooperatives and Condominiums: A Retrospective*, 73 ST. JOHN'S L. REV. 101, 110-114 (1999), and in 1977 New Hampshire adopted a version of the Uniform Condominium Act which persists. RSA 356-B.

The statute first defines its terms. It then makes inseparable the unit owner's otherwise discrete ownerships of the condominium unit in fee, together with the undivided interest in common areas. RSA 356-B:9. It provides for the inception, expansion, contraction, and dissolution of condominiums. It compels condominium instruments, creates condominium associations, enumerates their powers, and specifies voting allocation among owners. It requires compliance with condominium instruments, and establishes regulatory oversight.

B. Balancing the Rights of Condominium Associations, Owners, and Lenders

Three sets of parties have an interest in the collection of condominium assessments – associations, owners, and lenders. Section 46 of the Condominium Act, with which this appeal is concerned, balances their rights – an issue when an owner doesn't pay.

In its original form,[1] section 46 provided that the association has a lien "on every condominium unit for unpaid assessments." There is a procedure for perfecting the lien.

> [O]nce perfected, [the lien] shall be prior to all other liens and encumbrances except … sums unpaid on any first mortgages or first deeds of trust encumbering that condominium unit and securing institutional lenders.

RSA 356-B:46, I(c) (1984). Beyond citation lettering and numbering, this provision has never changed. RSA 356-B:46, I(a)(3) (2015).

The real estate market collapsed at the end of the 1980s, leaving lenders unable to collect mortgage payments, and associations unable to collect condominium assessments. *Banking Problems in the Northeast*, AN EXAMINATION OF THE BANKING CRISES OF THE 1980S AND EARLY 1990S, ch.10 (FDIC, 1997), *available at* https://www.fdic.gov/bank/historical/history/vol1.html; Kane, *supra* at 124-128.

---

[1]The appendix to this reply brief contains four codifications of RSA 356-B:46:

- RSA 356-B:46 (published 1984) (as amended in 1977), *Addn*. at 32;
- RSA 356-B:46 (published 1995) (as amended in 1994), *Addn*. at 35;
- RSA 356-B:46 (published 2009) (as amended in 1997), *Addn*. at 39;
- RSA 356-B:46 (published 2015) (as amended in 2010), *Addn*. at 45.

To ease confusion, citations to the developing statute include the appropriate published-year, and subparts are lettered and numbered as they appear in the cited version.

In addition, for this Court's convenience, a current version of RSA 356-B:46 is included in the addendum to this brief using color highlighting to indicate the 1995 and 2010 amendments. It can be found in the addendum, *infra*, at 30.

Among its reforms, in 1994 the New Hampshire legislature added several protections to the Condominium Act, including subsection IX, which provides:

> IX. *Notwithstanding any law, rule, or provision of the condominium declaration, bylaws, or rules to the contrary*, the unit owners' association may authorize … its board of directors to, after 30 days' prior written notice to the unit owner and unit owner's first mortgagee of nonpayment of common assessments, terminate the delinquent unit's common privileges and cease supplying a delinquent unit with any and all services normally supplied or paid for by the unit owners' association. *Any terminated services and privileges shall be restored upon payment of all assessments*.

RSA 356-B:46, IX (1995) (emphasis added). Although not relevant here, the 1994 legislature also added subsection X, allowing associations to escrow six months of assessments (as a practical matter rarely used), and the 1997 legislature added a provision allowing associations to collect rent from units in which there is a tenant. RSA 356-B:46-a (2009); *see generally* James L. Winokur, *Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 353 (1992).

After yet another banking crisis in 2008, Trevor G. Pinkerton, *Escaping the Death Spiral of Dues and Debt: Bankruptcy and Condominium Association Debtors*, 26 EMORY BANKR. DEV. J. 125 (2009), the 2010 legislature added another series of protections. Provided the association follows procedural steps notifying lenders:

> [T]he lien for regular monthly common assessments unpaid with respect to a residential condominium unit during the 6-month period immediately preceding the filing of the [perfecting papers] … shall be prior to the first mortgage.

RSA 356-B:46, I(c) (2015). Although it probably rarely happens in practice, the statute allows that if an association is hyper-diligent, it can perfect a lien each month an owner is delinquent, and have a rolling six-month lien priority. The policy encourages diligence, while capping lenders' liability for arrearages at six-months' worth of assessments. Moreover, it confirms the legislature understood, except for this six-month period, that any other debts for unpaid

assessments *are not* "prior to the first mortgage."

This historical summary demonstrates that the legislature has reacted to several crises in the banking and real estate industries by adjusting the relationship between banks and condominiums, and by continually balancing the interests of condominium associations, unit owners, and lenders. In addition, it shows the context in which the legislature added subsection IX.

III. *Buchholz*: Condominium Declarations Are Covenants Running With The Land

The foremost problem with Pinewood's argument is its befuddled rendition of *Buchholz*.

In *Buchholz v. Waterville Estates Ass'n*, 156 N.H. 172 (2007), the town acquired a condominium unit by tax deed, and sold it at auction. When the association came to collect assessments, the purchaser sought "to remove the 'cloud' of the declarations from their title to the condominium unit." *Buchholz*, 156 N.H. at 173. Relying on the lien statute, under which a municipality gets a "100 percent common and undivided interest in the property," the purchaser claimed the auction had the effect of "stripping away all encumbrances …, including condominium assessments and fees." *Id.* at 174.

The *Buchholz* purchaser was claiming that the condominium *form of ownership* had dissolved on that unit; it was a direct attack on the condominium form.

But the condominium form of ownership involves a covenanted *quid pro quo*:

> Each condominium owner finds his or her estate both burdened by the assessment obligation and benefitted by the function that the assessments serve (namely, the maintenance and preservation of the common areas, in which the [owners] have an undivided interest inseparable from their interest in the condominium unit itself).

Buchholz, 156 N.H. at 174 (brackets omitted and added).

If the *Buchholz* purchaser were correct, a tax-sale purchase would unilaterally disentangle the benefits and burdens intrinsic to the condominium form, and undo the condominium form of ownership for that unit, thereby removing the unit entirely from the condominium scheme.[2]

Rejecting the *Buchholz* purchaser's argument, this Court made the condominium form of ownership a fixture of property law. It declared that "[c]ondominium declarations are

[2]Although not mentioned in *Buchholz*, the purchaser's position could unravel the condominium, outside of the contraction and dissolution procedures specified by the statute. RSA 356-B:34 (termination requires vote of at least four-fifths of unit owners); RSA 356-B:16, IV & -B:26 (limiting conditions of withdrawal).

covenants running with the land." "[C]ondominium declaration covenants and the estate in land upon which they are imposed are literally inseparable." "Condominium covenants sink their tentacles into the soil." *Buchholz*, 156 N.H. at 174-75 (quotations and citations omitted).

Thus, this Court held that the purchaser "took title subject to the condominium covenants that ran with the land," *Buchholz*, 156 N.H. at 175, and held that the association could collect from the purchaser assessments arising after the tax sale.

Pinewood makes two errors regarding *Buchholz*. As noted in HFA's opening brief, Pinewood ignores the distinction between assessments before and after the interruption in ownership, occasioned there by the tax sale and here by the foreclosure. HFA BRF. at 10

More important, Pinewood conflates the covenanted *general obligation* to pay assessments with a *particular assessment*. The former clearly runs with the land; the latter is individual to the owner. The two are distinguished because if the covenanted general obligation did not run, the condominium form of ownership would collapse. But nonpayment of any particular assessment as it comes due, while maybe impoverishing the association, has no impact on the essential form of ownership.

Here, HFA has at all times acted within the statute and declaration by (in accordance with *Buchholz*) paying assessments arising after the foreclosure.

IV. Pinewood's Position Would Disempower the Legislature From Balancing the Rights of Condominium Associations, Owners, and Lenders

Throughout New Hampshire's 50-year experience with condominium enabling statutes, the legislature has repeatedly recalibrated the balance among condominium associations, owners, and lenders, as new conditions have emerged. Pinewood's position would disempower the legislature from continuing that oversight, and enfeeble the legislative role.

A. Substantive Rights in Exchange for Procedural Prerequisites

In the original 1977 Condominium Act, the legislature established a method of functioning: associations get substantive rights in exchange for complying with a particular procedure.

For example, RSA 356-B:46, III, says an association may perfect a lien for up to six months of assessments, provided it records in the county registry a memorandum stating the unit number, its owners, the date, and the amount of unpaid assessments.

The association's lien is substantive: "once perfected, [it] shall be prior to all other liens and encumbrances" except taxes, obligations pre-dating the condominium form, and "sums unpaid on any first mortgages or first deeds of trust encumbering that condominium unit and securing institutional lenders." RSA 356-B:46, I(c).

Thus the association can acquire substantive rights in exchange for performing procedural prerequisites. The lender, or anyone paying attention to the registry, gets notice of the arrearage, and can take steps to protect itself. This method of functioning is sensible. It tasks the condominium association, presumably periodically on-site, with the capacity and interest to intuit problems not immediately apparent, such as the death of an owner. By notifying those who have interests but not necessarily the ability to timely discern their jeopardy, a mortgagee can act to ensure its asset.

The legislature has mimicked this method of functioning twice more.

As noted, in 1995 the legislature added subsection IX, which provides that an association may "after 30 days' prior written notice to the unit owner and unit owner's first mortgagee of nonpayment of common assessments, terminate the delinquent unit's common privileges and … services." RSA 356-B:46, IX. As before, the association gets substantive rights (to terminate services), in exchange for providing notice to the lender (that its mortgagor may be struggling).

Similarly, the 2010 amendment gave associations a lien priority over mortgages for six months' worth of assessments,

> provided that the unit owners' association sends, within 70 days of the occurrence of any delinquency, the unit owner and the institutional lender holding the first mortgage written notice of the delinquency by certified mail and first class mail that the account is at least 60 days delinquent; and additionally, sends such lender notice by certified mail and first class mail, at least 30 days prior, of its intent to file said memorandum of lien.

RSA 356-B:46, I(c). This again shows the legislature's method: exchange of substantive rights for procedural notice, thereby simultaneously encouraging associations' diligence and capping lenders' liability.

B. Balancing Months of Assessment Arrearages and Days of Notice

From the face of the statute, it appears the legislature has several times determined that six months is an appropriate amount of time for which assessment arrearages can accrue before their burden becomes infeasible. RSA 356-B:46, I(e) allows lenders to escrow "not more than 6 months of current regular assessments … to cover the cost of any delinquency" (as a practical matter rarely used). RSA 356-B:46, III allows associations to perfect a lien for up to six months of assessments, provided they follow specified procedure. RSA 356-B:46, X allows associations to escrow six months of assessments. The choice of six months is a legislative balancing – apparently sufficient to protect associations, but not so much potential liability to deter financial

institutions from lending on condominiums. *See* Winokur, *supra* at 353. The statute also specifies a variety of deadlines for these notice procedures: 10 days, 30 days, 60 days, 70 days. *See* RSA 356-B:46, I(c), -B:46, VIII, & -B:46, IX.

The point here is not to question the legislature's wisdom in balancing interests, but to recall that the legislature has the wisdom to balance them.

C. Pinewood's Position Circumscribes Legislative Choices

Pinewood's position, however, is that HFA as post-foreclosure owner owes pre-foreclosure assessments, because the debt itself is a covenant running with the land. Indeed Pinewood's position is that it doesn't need the legislative protection it has gained, *see* PINEWOOD BRF. at 32-34, because it already has a remedy.

This is Pinewood's position, despite the language of the legislation, and the *quid pro quo* of substantive rights for procedural prerequisites. This is Pinewood's position despite the legislature's periodic adjustment of lien priorities, its determination that six months is a feasible period of assessment arrearages, and its chosen days-of-notice. This is Pinewood's position despite legislative balances, and the incentives they are intended to create.

Pinewood's position is that none of these things matter because associations have a soil-based property right to collect regardless of legislative choices. Pinewood's position is that, once established, a condominium is unstuck from the statute that created it, disempowering the legislature from recalibrating the balances.

Pinewood's position would thus use *Buchholz* to rid condominium associations of legislative oversight, an absurd result this Court cannot countenance. *See Holt v. Keer*, 167 N.H. 232 (2015). It would, for example, make surplusage of the legislature's 2010 amendment creating a priority lien for six-months of unpaid assessments. RSA 356-B:46, I(c).

V. Pinewood's Position Would Create Unrecorded Covenants

Pinewood's position would also create unrecorded covenants purportedly running with the land, thereby undermining transparency.

> The purpose of deed recording requirements is to provide notice to the public of a conveyance of, or encumbrance on, real estate. Recording requirements serve to protect both those who already have interests in land and those who would like to acquire such interests. Indeed, once recorded, the present and future interest that is conveyed in the deed cannot be defeated by any act of any cotenant, including the grantor. The purpose of recording statutes is also to determine priorities as between subsequent claimants to title interests, and to protect future purchasers for value and creditors. Statutory requirements for the recording or registration of deeds are additionally intended for the benefit of the grantee, and provide a method by which a transferee can protect himself or herself from intervening claimants.

26A C.J.S. *Deeds* § 159; *see also, Mansur v. Muskopf*, 159 N.H. 216, 223 (2009) (well-conducted registry search should reveal all encumbrances); RSA 477:3-a ("Every deed or other conveyance of real estate and every court order or other instrument which affects title to any interest in real estate, except probate records and tax liens which are by law exempt from recording, shall be recorded at length in the registry of deeds for the county or counties in which the real estate lies and such deed, conveyance, court order or instrument shall not be effective as against bona fide purchasers for value until so recorded.").

For these reasons, and in accord with *Buchholz*, a condominium does not exist until its formation documents are recorded. RSA 356-B:7. For these same reasons, the Condominium Act provides that a lien for unpaid assessments is not perfected until recorded. RSA 356-B:46, III. Thus, when an interested party investigates title, the lien will be found, and the amount of unpaid assessments will be known. *Mansur v. Muskopf*, 159 N.H. at 223 (2009) ("[P]urchasers are obligated to fully investigate apparent discrepancies to determine whether title to the desired parcel is encumbered in any way."); *Amoskeag Bank v. Chagnon*, 133 N.H. 11, 15-16 (1990)

(improperly recorded mortgage obligates purchaser to investigate whether mortgage exists).

Pinewood's position, based on its misreading of *Buchholz*, however, is that unpaid assessments run with the land, regardless of recordation or other procedural requirements. Investigation of title would show the existence of the condominium form of ownership and the general duty to pay assessments pursuant to the condominium instruments, but would not reveal an unpaid-assessment tentacle lurking in the soil.[3] Pinewood's position would thereby undermine the purpose of recordation.

[3]As a practical matter risks created by such unrecorded covenants are probably manageable because purchasers have a right, upon request, to a binding statement of unpaid assessments left behind by prior owners. RSA 356-B:46, VIII; *see also* RSA 356-B:58.

VI. Pinewood's Position Would Grab What the Legislature Refused

Pinewood correctly notes that in 1994, there was a legislative proposal that would have given condominium associations a lien for unpaid assessments with priority over mortgages, but that the legislature instead enacted RSA 356-B:46, IX and X, which, while significant, only allows associations to terminate services and escrow assessments. PINEWOOD BRF. at 32-33; AMICI CURIAE BRF. at 5-6.

In 2010 there was again a legislative proposal that would have given condominium associations a lien for unpaid assessments with priority over mortgages, but the legislature instead enacted RSA 356-B:46, I(c), (d), and (e), which, while again significant, only allows associations a single six-month priority lien. *See* AMICI CURIAE BRF. at 4-5 (with citations to legislative history).

Thus, the legislature twice rejected associations' ambitions to acquire a lien with priority over mortgages. But here Pinewood is trying to take through *Buchholz* what the legislature twice refused.

VII. Pinewood Omits Second Half of Statutory Phrase, "Notwithstanding ... to the Contrary"

Pinewood argues that although it has a general obligation to provide services to condominium units, because RSA 356-B:46, IX, begins with the phrase "notwithstanding any law …," it operates as an exception, and that Pinewood can refuse to provide services until the previous owner's debt is paid. PINEWOOD BRF. at 19.

Pinewood is correct in noting the termination-of-services subsection of the Condominium Act begins with the conditional phrase "notwithstanding any law." Pinewood disregards, however, the second half of the conditional phrase, "to the contrary." The entire conditional phrase of the subsection on which Pinewood relies actually says:

> Notwithstanding any law, rule, or provision of the condominium declaration, bylaws, or rules *to the contrary*,[4] the … association may … terminate … services.

RSA 356-B:46, IX (emphasis added).

"Contrary" means "not possible of harmonization," *Weinstock v. Holden*, 995 S.W.2d 411, 420 (Mo. 1999), or "against." *Laferriere v. Saliba*, 117 A.2d 380, 383 (Vt. 1955).

The clear-title provision of the foreclosure statute is neither "not possible of harmonization" nor "against" the service-termination provision of the condominium statute. Rather, the two exist side-by-side, and therefore must be construed harmoniously, as HFA has argued. HFA's OPENING BRF. at 7-9.

---

[4]The "to the contrary" portion of the phrase cannot be considered surplusage, as the legislature has demonstrated it can distinguish conditions beginning with "notwithstanding" alone from those beginning with "notwithstanding … to the contrary." Indeed both types of conditions appear in section 46 of the Condominium Act itself. *Compare* RSA 356-B:46, II ("Notwithstanding any other provision of this section, or any other provision of law, all memoranda of liens arising under this section shall be recorded in the registry of deeds …") *with* RSA 356-B:46, IX ("Notwithstanding any law, rule, or provision of the condominium declaration, bylaws, or rules to the contrary, the … association may … terminate … services."); *see also Border Brook Terrace Condo. Ass'n v. Gladstone*, 137 N.H. 11, 13 (1993) (construing on other grounds RSA 356-B:41, which begins, "Notwithstanding anything in this section to the contrary …").

Construed together, the statutes say that a condominium association can terminate services and privileges to a non-paying owner, the association has and can perfect a lien for unpaid assessments, if there is a foreclosure it extinguishes the lien, and the debt for unpaid assessments remains but it is personal to the former owner. Andrea J. Boyack & William E. Foster, *Muddying the Waterfall: How Ambiguous Liability Statutes Distort Creditor Priority in Condominium Foreclosures*, 67 ARK. L. REV. 225, 240-42 (2014).

Pinewood's omission of the second half of the condition allows it to promote a construction not intended. Because the foreclosure statute is not "to the contrary," the statute means what it says. Pinewood can terminate Ms. Rugg's services (and would have had to reinstate them if she paid before she died), but it cannot refuse to provide them to HFA when it became the owner after foreclosure.

VIII. Pinewood Misstates the Statutory Command That Services Shall be Restored Upon Payment

The portion of the Condominium Act addressing termination of services allows the association, after certain procedures, to turn off privileges and services.[5] The last sentence of the subsection addresses turning them back on. It provides:

> Any terminated services and privileges *shall be restored* upon payment of all assessments.

RSA 356-B:46, IX (emphasis added). Pinewood, however, claims this sentence means:

> Any privileges and services so terminated *may only be restored* upon the payment of all assessments.

PINEWOOD BRF. at 17 (emphasis added).

Pinewood misstates the meaning of the statutory sentence. The "shall be restored" commands the association to restore; it does not command the owner to pay. It is a consumer protection; if the owner pays all assessments, the association cannot refuse to restore. The sentence is sensibly silent on whether the association can restore to an owner who has not paid.

Pinewood's construction is different. In Pinewood's version – "may only be restored upon payment" – the association is prohibited from restoring until the owner pays.

The importance of this distinction is that Pinewood is using the sentence as though it protects the association. Pinewood points to the provision as pretext for not providing privileges and services, even though HFA has paid all assessments since it became owner.

Further, the provision is not now germain to this case, although it may become so. If this Court determines that HFA does not owe Pinewood back assessments, then HFA is currently

---

[5]The record is sparse regarding the "services and privileges" Pinewood has terminated, but it appears they are generally utilities, and HFA is harmed by their inexistence. The statute contemplates a broad array of condominium services and privileges, including sharing in common profits, RSA 356-B:3, IV & -B:44, access to limited common areas, RSA 356-B:3, XX, subdivision and relocation of boundaries, RSA 356-B:31 & -B:32, and participation in condominium governance. RSA 356-B:35, -B:37, -B:39, -B:40.

paid-up; the statute is relevant, and commands Pinewood to restore services.

Regardless of the eventual outcome of this case and the ultimate relevance of the statutory sentence, correctly construed there is nothing in it to support Pinewood's position here.

IX. Declaration Does Not Provide Authority for Pinewood to Collect Unpaid Assessments from HFA Nor Refuse HFA Common Services

In its brief Pinewood suggests the declaration gives it authority to charge HFA for the unpaid assessments left by Ms. Rugg, and to continue termination of services even though HFA has paid in full from the time it became owner. PINEWOOD BRF. at 24-28.

Condominium instruments must be construed consistent with the Condominium Act, pursuant to both the statute and Pinewood's declaration. RSA 356-B:13 ("[A] construction [of condominium instruments] conformable with the statute shall in all cases control over any construction inconsistent therewith."); DECLARATION § 14.3, *Appx*. at 38 ("Where required by the condominium act, the act shall control over any contrary provision in the declaration, bylaws and the rules.") (capitalization altered).

As to charging HFA for Ms. Rugg's unpaid assessments, the declaration provides partial authority. DECLARATION § 2.3, *Appx*. at 8. ("Any owner acquiring a unit shall be liable personally for any prior and outstanding assessments levied against the unit, *unless exempted by state law*.") (emphasis added, capitalization altered). But the provision takes what it gives, because it is indeed preempted "by state law," because the lien is extinguished by foreclosure, and because both the Condominium Act and the declaration allow at most six months' worth of prior-owner liability. DECLARATION § 11.4.3, *Appx*. at 30 ("[I]n the event that a first mortgagee succeeds to the interests of an owner through foreclosure … the mortgagee's liability for unpaid assessments accrued as of the date of acquisition of title by the mortgagee shall not exceed six (6) months of unpaid assessments.") (capitalization altered).

As to not restoring services, the declaration does not provide authority. Rather it allows that "*the defaulting owner* … shall lose their common privileges and services … for failure to pay assessments," DECLARATION § 2.6, *Appx*. at 8 (emphasis added), and that "[a]ny terminated

services and privileges shall be restored upon payment of all assessments." DECLARATION § 6.1(C), *Appx*. at 17. Under the declaration, only the defaulting owner, not a subsequent owner, may lose services. And identical to the statute, the services "shall be restored" when assessments are paid. Thus, as with the statute, discussed *supra*, the declaration does not give Pinewood authority to continue termination of services against HFA after the foreclosure sale.

X. Underlying Probate and Foreclosure Cases Bar Pinewood From Claiming Unpaid Assessments

In its brief Pinewood makes a procedural argument, based on events that occurred in two prior related cases – the probate of Ms. Rugg's estate, and the foreclosure of her mortgage. PINEWOOD BRF. at 3, 6-8, 12-14. It is not clear what relief Pinewood seeks nor what purpose Pinewood has in raising those matters now. Because Pinewood has nonetheless commented on the prior proceedings, a summary of them is presented here. Moreover, because Pinewood raised in the foreclosure case the same issue presented in this case, *res judicata* bars Pinewood from now seeking back assessments.

A. Probated Estate

Patricia Rugg died testate in May 2011, CERTIFICATE OF DEATH (May 4, 2011), *Appx*. at 82, leaving unpaid assessments for her unit in the Pinewood Condominium. Her estate was administered in the probate court, whence its executor abandoned interest in the unit. REPORT OF GAL (June 12, 2013), *Appx*. at 107. At some point Pinewood contacted the estate, and in June 2012 received answering correspondence from a daughter informing that Ms. Rugg had died. LETTER FROM DANIELLE RUGG TO CONNELLY (June 21, 2012), *Appx*. at 86. The estate was closed in December 2012. REPORT OF GAL, *Appx*. at 110. Although Pinewood knew of Ms. Rugg's death before the estate was closed, Pinewood did not attempt to assert in the probate proceeding its interest in collecting the unpaid assessments, *id.,* nor to mitigate its alleged loss.

B. Foreclosure Action

New Hampshire law contains two types of foreclosure proceedings under power of sale. One allows mortgagees to foreclose without judicial oversight provided there is compliance with the statute. RSA 479:25. The other involves petitioning the court for a judgment of foreclosure. RSA 479:22, :23 & :24; *In re Estate of Mills*, 167 N.H. 125, 128-29 (2014); *see generally*, 17 C. Szypszak, *New Hampshire Practice, Real Estate* § 4.06 (2003). In the second method:

> The party selling shall, within 10 days after the sale, make to the court under oath a report of the sale and of his doings and file the same in the clerk's office, and the same may be confirmed and allowed or set aside and a new sale ordered as to the court seems just.

RSA 479:23. When the court confirms the sale, it "shall be conclusive evidence as against all persons that the power was duly executed." RSA 479:24.

Because both methods are "pursuant to the power" of sale, RSA 479:26, I, "upon … recording, title to the premises shall pass to the purchaser free and clear of all interests and encumbrances which do not have priority over such mortgage." RSA 479:26, III.[6]

Although the first method is most common, HFA proceeded under the second. In January 2013, as holder of Ms. Rugg's mortgage, HFA petitioned for foreclosure, naming several parties as defendants including Pinewood, and asking the court to confirm the foreclosure sale and quiet title in the name of the foreclosure-auction purchaser. PETITION FOR FORECLOSURE DECREE OF SALE AND TO QUIET TITLE (Jan. 28, 2013), *Appx*. at 90. The estate filed an answer averring it had no interest. ANSWER AND ASSENT TO PETITION (Mar. 5, 2013), *Appx*. at 95. Pinewood also filed an answer, in which stated:

> [C]ommon rights, services, and privileges relative to the [condominium] unit may only be restored upon the payment to [Pinewood] of any outstanding assessment, regardless of any sale, including foreclosure sale, of the unit. Accordingly, title to the unit is subject to the resolution unless and until outstanding assessments are paid.

ANSWER OF PINEWOOD ESTATES CONDOMINIUM ASSOCIATION ¶ 8 (Mar. 14, 2013), *Appx*. at 97. Pinewood requested that the court:

---

[6]It is apparent that RSA 479:26 applies to both methods because otherwise there would be no statutory affirmation that the purchaser gets title to the foreclosed premises, and because there is nothing in RSA 479:26 that suggests it is limited to one method or the other. Any conjecture to the contrary, PINEWOOD BRF. at 12-13, appears to be based on codification numbering alone, which is not relevant to statutory construction, *see Doe v. State*, 167 N.H. 382, 398 (2015) ("the location of codification within a state's statutes is not dispositive of … intent"), and is also incongruous with the statute's language that it applies to foreclosures under the power of sale.

> Condition any decree that the premises be sold at public foreclosure auction upon payment of any excess proceeds to the Association as a lienholder of record [and] [i]n quieting title to the unit, declare that any title to the unit is subject to the recorded resolution terminating common rights, privileges and services unless and until any outstanding assessments are paid.

Id. at 4 ¶¶ A & B, *Appx*. at 100.

At HFA's request, a guardian *ad litem* was appointed to protect the interests of unknowns. The GAL's June 2013 report noted that Pinewood "requests that the [c]ourt, in quieting title to the [p]roperty, declare that any title to the property is subject to the outstanding assessments." REPORT OF GAL, *Appx*. at 110. The GAL concluded there were no other parties with legal interests and that HFA had the right to proceed with a foreclosure auction, but took "no position" on Pinewood's interest in unpaid assessments. *Id.*, *Appx*. at 111.

In June, noting that the GAL had issued his report but that several of the named defendants had not filed answers, HFA requested default and a decree *pro confesso*. The court signed HFA's proposed "final decree," which provided that HFA schedule a foreclosure sale within 90 days and publish notice of sale in accord with the foreclosure statute. The order directed HFA's attorney to file an appraisal of value, a report showing the high bid and sales price, and identify the purchaser. The order specified:

> If the sales price as shown by such report is not less than 70% of the estimated fair market value of the mortgaged premises as shown by said appraisal or opinion of value, said sale shall be deemed to be confirmed by the court without further order. If the sales price is less than 70%, said sale shall not be confirmed, except upon a motion by Plaintiff setting forth the circumstances of the sale and showing good cause for confirmation of the sale.

FINAL DECREE (July 8, 2013), *Appx*. at 112-113. In the following weeks, HFA advertised the sale and conducted the auction in accord with the statue and the order. *See* LEGAL NOTICE, NOTICE OF SALE, & BROKER PRICE OPINION, *Appx*. at 114-124.

C. Tardy Confirmation

The condominium unit was appraised at $84,500; HFA bought it at auction for $45,000. This is less than the "70%" specified in the order, meaning HFA was required to take further action in court. Nonetheless, a foreclosure deed was issued in error without court intervention, FORECLOSURE DEED (Aug. 23, 2013), *Appx*. at 132, and HFA informed Pinewood it was the new owner. LETTER FROM HFA TO PINEWOOD (Aug. 22, 2013), *Appx*. at 128.

A few months later, in February 2014, HFA filed the petition that began this declaratory judgment action, the third case. Litigation commenced, including the cross-motions for summary judgment now on appeal. Referencing the foreclosure error, Pinewood alleged the "purported foreclosure was invalid," and requested summary judgment on that basis. PINEWOOD'S MEMO SUPPORTING SUMMARY JUDGMENT (Feb. 11, 2015) at 9, *Appx*. at 228.

Now alerted to the error, HFA responded by asking the court to reopen the foreclosure case, and accept late filing of the report of sale, the affidavit of sale, the appraisal, and the proposed order for confirmation of sale. MOTION TO REOPEN AND MOTION FOR LATE FILING (Mar. 20, 2015), *Appx*. at 243. Pinewood objected to reopening and confirming the foreclosure on the grounds that it had asserted in the foreclosure action its alleged right to collect unpaid assessments under the Condominium Act, RSA 356-B:46, IX, that the GAL had acknowledged the issue, but that the issue had been ignored. OBJECTION TO MOTION TO REOPEN AND FOR LATE FILING (Mar. 30, 2015), *Appx*. at 256.

In April 2015 the court confirmed the foreclosure sale, and Pinewood did not appeal. CONFIRMATION OF SALE (Apr. 1, 2015), *Appx*. at 266. Later the court ruled on the merits of the present case.

It is conceded that, probably due to the relative rarity of court-involved foreclosure, or

perhaps because it failed to notice the sales price was less than 70 percent of the apprisal, HFA neglected to timely file the confirmation of sale and related documents in the foreclosure case. While the court eventually approved the foreclosure sale and quieted title to Ms. Rugg's unit as the property of HFA, despite Pinewood's efforts the court did not rule in the foreclosure case on Pinewood's request for unpaid assessments.

D. *Res Judicata*

If Pinewood is correct that the tardy confirmation means the foreclosure was not valid, then HFA does not now own the condominium. If that is so, Pinewood has been unjustly enriched by HFA's payment of assessments since the sale, and Pinewood's remedy for Ms. Rugg's unpaid assessments could only be against her estate.

But regardless of when the sale was confirmed, it is clear that although Pinewood did not attempt to collect unpaid assessments from Ms. Rugg in the probate case, it worked hard to collect them in the foreclosure case. Because Pinewood raised and litigated the back-assessments issue in the foreclosure case, it is now barred by *res judicata* from claiming them in this case.[7]

> The doctrine of res judicata prevents parties from relitigating matters actually litigated and matters that could have been litigated in the first action. The doctrine applies if three elements are met: (1) the parties are the same or in privity with one another; (2) the same cause of action was before the court in both instances; and (3) the first action ended with a final judgment on the merits.

Gray v. Kelly, 161 N.H. 160, 164 (2010) (emphasis, quotation, and citation omitted).

Pinewood "actually litigated" in the foreclosure case its alleged right to collect from HFA unpaid assessments under RSA 356-B:46, IX. The parties are the same, Pinewood put the cause of action before the foreclosure court, and the action ended with a final judgment that did not

[7]HFA preserved *res judicata* below. PINEWOOD'S MEMO SUPPORTING SUMMARY JUDGMENT (Feb. 11, 2015) at 6-7, *Appx*. at 225-26.

award Pinewood what it claimed.

The foreclosure court ruled on the merits, even though it declined to rule on Pinewood's unpaid assessment allegation. *Matter of Hampers*, 166 N.H. 422, 429 (2014) ("even a default judgment can constitute res judicata"). Accordingly Pinewood is barred by *res judicata* from now claiming that HFA is responsible for Ms. Rugg's unpaid assessments.

XI. HFA's Mission is to Promote Affordable Home Ownership

In its brief Pinewood abrades HFA for "its desire for greater profit," PINEWOOD BRF. at 20, 21, and goes so far as to suggest that HFA has pursued this litigation in bad faith.[8] *Id.* at 36-37.

As noted in its opening brief, HFA is a publically-chartered corporation whose statutory mission is to promote affordable home ownership by guaranteeing loans to those who might not otherwise qualify. To the extent HFA creates a profit, they are public dollars, mandated for public purposes, and subject to public disclosure. If HFA were a private institution it probably would have settled this case for the nominal sum at issue. But because it remains unresolved who pays assessments when defaulted owners do not, HFA is compelled to bring the matter to closure.

[8]Pinewood's request for attorneys fees for this appeal is premature. SUP.CT.R. 23 ("In the interest of justice in extraordinary cases, but not as a matter of right, the supreme court in its sole discretion may award attorney's fees related to an appeal to a prevailing party if the appeal is deemed by the court to have been frivolous or in bad faith."). In addition, Pinewood filed a cross-appeal on the issues herein addressed, belying a claim of frivolity.

CONCLUSION

This Court should recognize that Pinewood's position is unsustainable, and not countenanced by the Condominium Act. It should reverse the lower court's rulings, and order Pinewood to turn on services to HFA's condominium unit.

Respectfully submitted,

New Hampshire Housing Finance Authority
By its Attorney,

Law Office of Joshua L. Gordon

Dated: February 3, 2016

Joshua L. Gordon, Esq.
NH Bar ID No. 9046
75 South Main Street #7
Concord, NH 03301
(603) 226-4225
www.AppealsLawyer.net

CERTIFICATIONS

I hereby certify that on February 3, 2016, copies of the foregoing will be forwarded to Mark E. Connelly, Esq.; John Deachman, Esq.; and to John Funk, Esq. (for *amici curiae*).

Dated: February 3, 2016

Joshua L. Gordon, Esq.

ADDENDUM

TITLE XXXI
TRADE AND COMMERCE

CHAPTER 356-B
CONDOMINIUM ACT

III. Unit Owners' Associations

Section 356-B:46

356-B:46 Lien for Assessments. –

I. (a) The unit owners' association shall have a lien on every condominium unit for unpaid assessments levied against that condominium unit in accordance with the provisions of this chapter and all lawful provisions of the condominium instruments, if perfected as hereinafter provided. The said lien, once perfected, shall be prior to all other liens and encumbrances except (1) real estate tax liens on that condominium unit, (2) liens and encumbrances recorded prior to the recordation of the declaration, and (3) sums unpaid on any first mortgages or first deeds of trust encumbering that condominium unit and securing institutional lenders.

(b) The provisions of this paragraph shall not affect the priority of mechanics' and materialmen's liens.

(c) Notwithstanding subparagraph (a), the lien for regular monthly common assessments unpaid with respect to a residential condominium unit during the 6-month period immediately preceding the filing of the memorandum specified in paragraph III, together with all costs of collection, including reasonable attorney's fees, shall be prior to the first mortgage; provided that the unit owners' association sends, within 70 days of the occurrence of any delinquency, the unit owner and the institutional lender holding the first mortgage written notice of the delinquency by certified mail and first class mail that the account is at least 60 days delinquent; and additionally, sends such lender notice by certified mail and first class mail, at least 30 days prior, of its intent to file said memorandum of lien. The lien shall not include any amounts attributable to special assessments, late charges, fines, penalties, or interest assessed by the unit owners' association, nor shall the lien apply to regular assessments or costs of collection coming due prior to the effective date of this section. In giving the foregoing notices, the unit owners' association may rely on the records of the applicable registry of deeds as to the address of the first institutional lender unless such lender has notified the unit owners' association by certified mail of a different address.

(d) The priority lien rights established under subparagraph (c) shall not entitle or permit the unit owners' association to assert more than one priority lien unless and until the existing priority lien is first discharged by the unit owners' association. The priority lien rights established under subparagraph (c) also shall not apply to any mortgage executed prior to the effective date of this section.

(e) After notification to the first mortgage institutional lender of a delinquency, in addition to any previously agreed to or required escrow amounts, the institutional lender may also require a residential unit owner to place an amount equal to not more than 6 months of current regular assessments in escrow to cover the cost of any delinquency.

II. Notwithstanding any other provision of this section, or any other provision of law, all memoranda of liens arising under this section shall be recorded in the registry of deeds in each county in which any part of the condominium is located. Such memorandum shall be indexed in the general index to deeds, and such general index shall identify the lien as a lien for condominium assessments.

III. The unit owners' association, in order to perfect the lien given by this section, shall file, before the

expiration of 6 months from the time such assessment became due and payable in the registry of deeds in the county in which such condominium is situated, a memorandum, verified by the oath of the principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, which contains the following:

(a) A description of the condominium unit in accordance with RSA 356-B:9;

(b) The name or names of the persons constituting the unit owners of that condominium unit;

(c) The amount of unpaid assessments currently due or past due together with the date when each fell due; and

(d) The date of issuance of the memorandum.

It shall be the duty of the register in whose office such memorandum shall be filed as hereinabove provided to record and index the same as provided in paragraph II, in the names of the persons identified therein as well as in the name of the unit owners' association. The cost of recording such memorandum shall be taxed against the person found liable in any judgment or decree enforcing such lien.

IV. No suit to enforce any lien perfected under paragraph III shall be brought after 6 years from the time when the memorandum of lien was recorded; provided, however, that the filing of a petition to enforce any such lien in any suit wherein such petition may be properly filed shall be regarded as the institution of a suit under this section; and provided further that nothing herein shall extend the time within which any such lien may be perfected.

V. The judgment or decree in an action brought pursuant to this section shall include, without limitation, reimbursement for costs and attorneys' fees, together with interest at the maximum lawful rate for the sums secured by the lien from the time such sum became due and payable.

VI. When payment or satisfaction is made of a debt secured by the lien perfected by paragraph III, said lien shall be released in the same manner as required by RSA 479:7 for mortgages. For the purposes of this section, the principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, shall be deemed the duly authorized agent of the lien creditor and shall discharge said lien.

VII. Nothing in this section shall be construed to prohibit actions at law to recover sums for which paragraph I creates a lien, maintainable pursuant to RSA 356-B:15.

VIII. Any unit owner or purchaser of a condominium unit, having executed a contract for the disposition of the same, shall be entitled upon request to a recordable statement setting forth the amount of unpaid assessments currently levied against that unit. Such request shall be in writing, directed to the principal officer of the unit owners' association or to such other officer as the condominium instruments may specify. Failure to furnish or make available such a statement within 10 business days from the receipt of such request shall extinguish the lien created by paragraph I as to the condominium unit involved. Such statement shall be binding on the unit owners' association, the board of directors, and every unit owner. Payment of a fee not exceeding $10 may be required as a prerequisite to the issuance of such a statement if the condominium instruments so provide.

IX. Notwithstanding any law, rule, or provision of the condominium declaration, bylaws, or rules to the contrary, the unit owners' association may authorize, pursuant to RSA 356-B, its board of directors to, after 30 days' prior written notice to the unit owner and unit owner's first mortgagee of nonpayment of common assessments, terminate the delinquent unit's common privileges and cease supplying a delinquent unit with any and all services normally supplied or paid for by the unit owners' association. Any terminated services and privileges shall be restored upon payment of all assessments.

X. The unit owners' association may collect an amount of up to 6 months' common expense assessments in advance from unit owners and hold the amount so collected in escrow and, upon default by any unit owner in the payment of common expense assessments, apply the same to cure such default.

Source. 1977, 468:1. 1994, 163:1, eff. July 22, 1994. 2010, 142:1, eff. Jan. 1, 2011.

NEW HAMPSHIRE REVISED STATUTES ANNOTATED

1955

1984 REPLACEMENT EDITION

Titles 31–34

Chapters 333–382

PUBLISHED BY

EQUITY PUBLISHING CORPORATION

ORFORD, NEW HAMPSHIRE 03777

number of votes in the unit owners' association appertaining to any condominium unit shall enlarge, diminish, or otherwise affect any liabilities arising from assessments made prior to such change.

HISTORY

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

CROSS REFERENCES

Common areas generally, see RSA 356-B: 16–19.

356-B: 46 Lien for Assessments.

I. The unit owners' association shall have a lien on every condominium unit for unpaid assessments levied against that condominium unit in accordance with the provisions of this chapter and all lawful provisions of the condominium instruments, if perfected as hereinafter provided. The said lien, once perfected, shall be prior to all other liens and encumbrances except (a) real estate tax liens on that condominium unit, (b) liens and encumbrances recorded prior to the recordation of the declaration, and (c) sums unpaid on any first mortgages or first deeds of trust encumbering that condominium unit and securing institutional lenders. The provisions of this paragraph shall not affect the priority of mechanics' and materialmen's liens.

II. Notwithstanding any other provision of this section, or any other provision of law, all memoranda of liens arising under this section shall be recorded in the registry of deeds in each county in which any part of the condominium is located. Such memorandum shall be indexed in the general index to deeds, and such general index shall identify the lien as a lien for condominium assessments.

III. The unit owners' association, in order to perfect the lien given by this section, shall file, before the expiration of 6 months from the time such assessment became due and payable in the registry of deeds in the county in which such condominium is situated, a memorandum, verified by the oath of the principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, which contains the following:

(a) A description of the condominium unit in accordance with RSA 356-B: 9;

(b) The name or names of the persons constituting the unit owners of that condominium unit;

(c) The amount of unpaid assessments currently due or past due together with the date when each fell due; and

(d) The date of issuance of the memorandum.

It shall be the duty of the register in whose office such memorandum shall be filed as hereinabove provided to record and index the same as provided in paragraph II, in the names of the persons identified therein as well as in the name of the unit owners' association. The cost of recording such

memorandum shall be taxed against the person found liable in any judgment or decree enforcing such lien.

IV. No suit to enforce any lien perfected under paragraph III shall be brought after 6 years from the time when the memorandum of lien was recorded; provided, however, that the filing of a petition to enforce any such lien in any suit wherein such petition may be properly filed shall be regarded as the institution of a suit under this section; and provided further that nothing herein shall extend the time within which any such lien may be perfected.

V. The judgment or decree in an action brought pursuant to this section shall include, without limitation, reimbursement for costs and attorneys' fees, together with interest at the maximum lawful rate for the sums secured by the lien from the time such sum became due and payable.

VI. When payment or satisfaction is made of a debt secured by the lien perfected by paragraph III, said lien shall be released in the same manner as required by RSA 479: 7 for mortgages. For the purposes of this section, the principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, shall be deemed the duly authorized agent of the lien creditor and shall discharge said lien.

VII. Nothing in this section shall be construed to prohibit actions at law to recover sums for which paragraph I creates a lien, maintainable pursuant to RSA 356-B: 15.

VIII. Any unit owner or purchaser of a condominium unit, having executed a contract for the disposition of the same, shall be entitled upon request to a recordable statement setting forth the amount of unpaid assessments currently levied against that unit. Such request shall be in writing, directed to the principal officer of the unit owners' association or to such other officer as the condominium instruments may specify. Failure to furnish or make available such a statement within 10 business days from the receipt of such request shall extinguish the lien created by paragraph I as to the condominium unit involved. Such statement shall be binding on the unit owners' association, the board of directors, and every unit owner. Payment of a fee not exceeding $10 may be required as a prerequisite to the issuance of such a statement if the condominium instruments so provide.

HISTORY

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

CROSS REFERENCES

Liens against condominiums generally, see RSA 356-B: 8.
Liens generally, see RSA 444 et seq.

356-B: 47 Restraints on Alienation. If the condominium instruments create any rights of first refusal or other restraints on free alienability of the condominium units, such rights and restraints shall be void unless the condominium instruments make provision for promptly furnishing to any

NEW HAMPSHIRE REVISED STATUTES ANNOTATED 1955

1995 REPLACEMENT EDITION

Title 31

Chapters 333 — 359-F

MICHIE BUTTERWORTH
Law Publishers
Charlottesville, Virginia

CROSS REFERENCES

Common areas generally, see RSA 356-B:16-19.

LIBRARY REFERENCES

ALR

Liability of owner of unit in condominium, recreational development, time-share property, or the like, for assessment in support of common facilities levied against and unpaid by prior owner. 39 ALR4th 114.

356-B:46 Lien for Assessments.

I. The unit owners' association shall have a lien on every condominium unit for unpaid assessments levied against that condominium unit in accordance with the provisions of this chapter and all lawful provisions of the condominium instruments, if perfected as hereinafter provided. The said lien, once perfected, shall be prior to all other liens and encumbrances except (a) real estate tax liens on that condominium unit, (b) liens and encumbrances recorded prior to the recordation of the declaration, and (c) sums unpaid on any first mortgages or first deeds of trust encumbering that condominium unit and securing institutional lenders. The provisions of this paragraph shall not affect the priority of mechanics' and materialmen's liens.

II. Notwithstanding any other provision of this section, or any other provision of law, all memoranda of liens arising under this section shall be recorded in the registry of deeds in each county in which any part of the condominium is located. Such memorandum shall be indexed in the general index to deeds, and such general index shall identify the lien as a lien for condominium assessments.

III. The unit owners' association, in order to perfect the lien given by this section, shall file, before the expiration of 6 months from the time such assessment became due and payable in the registry of deeds in the county in which such condominium is situated, a memorandum, verified by the oath of the principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, which contains the following:

(a) A description of the condominium unit in accordance with RSA 356-B:9;

(b) The name or names of the persons constituting the unit owners of that condominium unit;

(c) The amount of unpaid assessments currently due or past due together with the date when each fell due; and

(d) The date of issuance of the memorandum.

It shall be the duty of the register in whose office such memorandum shall be filed as hereinabove provided to record and index the same as provided in paragraph II, in the names of the persons identified therein as well as in the name of the unit owners' association. The cost of recording such memorandum shall be taxed against the person found liable in any judgment or decree enforcing such lien.

IV. No suit to enforce any lien perfected under paragraph III shall be brought after 6 years from the time when the memorandum of lien was recorded; provided, however, that the filing of a petition to enforce any such lien in any suit wherein such petition may be properly filed shall be regarded as the institution of a suit under this section; and provided further that nothing herein shall extend the time within which any such lien may be perfected.

V. The judgment or decree in an action brought pursuant to this section shall include, without limitation, reimbursement for costs and attorneys' fees, together with interest at the maximum lawful rate for the sums secured by the lien from the time such sum became due and payable.

VI. When payment or satisfaction is made of a debt secured by the lien perfected by paragraph III, said lien shall be released in the same manner as required by RSA 479:7 for mortgages. For the purposes of this section, the principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, shall be deemed the duly authorized agent of the lien creditor and shall discharge said lien.

VII. Nothing in this section shall be construed to prohibit actions at law to recover sums for which paragraph I creates a lien, maintainable pursuant to RSA 356-B:15.

VIII. Any unit owner or purchaser of a condominium unit, having executed a contract for the disposition of the same, shall be entitled upon request to a recordable statement setting forth the amount of unpaid assessments currently levied against that unit. Such request shall be in writing, directed to the principal officer of the unit owners' association or to such other officer as the condominium instruments may specify. Failure to furnish or make available such a statement within 10 business days from the receipt of such request shall extinguish the lien created by paragraph I as to the condominium unit involved. Such statement shall be binding on the unit owners' association, the board of directors, and every unit owner. Payment of a fee not exceeding $10 may be required as a prerequisite to the issuance of such a statement if the condominium instruments so provide.

IX. Notwithstanding any law, rule, or provision of the condominium declaration, bylaws, or rules to the contrary, the unit owners' association may authorize, pursuant to RSA 356-B, its board of directors to, after 30 days' prior written notice to the unit owner and unit owner's first mortgagee of nonpayment of common assessments, terminate the delinquent unit's common privileges and cease supplying a delinquent unit with any and all services normally supplied or paid for by the unit owners' association. Any terminated services and privileges shall be restored upon payment of all assessments.

X. The unit owners' association may collect an amount of up to 6 months' common expense assessments in advance from unit owners and hold the amount so collected in escrow and, upon default by any unit owner in the payment of common expense assessments, apply the same to cure such default.

HISTORY

Source. 1977, 468:1. 1994, 163:1, eff. July 22, 1994.

Amendments—1994. Added pars. IX and X.

CROSS REFERENCES

Liens against condominiums generally, see RSA 356-B:8.
Liens generally, see RSA 444 et seq.

ANNOTATIONS

Cited

Cited in Border Brook Terrace Condominium Ass'n v. Gladstone (1988) 137 NH 11, 622 A2d 1248.

356-B:47 Restraints on Alienation. If the condominium instruments create any rights of first refusal or other restraints on free alienability of the condominium units, such rights and restraints shall be void unless the condominium instruments make provision for promptly furnishing to any unit owner or purchaser requesting the same a recordable statement certifying to any waiver of, or failure or refusal to exercise, such rights and restraints, in all cases where such waiver, failure, or refusal does in fact occur. Failure or refusal to furnish promptly such a statement in such circumstances in accordance with the provisions of the condominium instruments shall make all such rights and restraints inapplicable to any disposition of a condominium unit in contemplation of which such statement was requested. Any such statement shall be binding on the association of unit owners, the board of directors, and every unit owner. Payment of a fee not exceeding $25 may be required as a prerequisite to the issuance of such a statement if the condominium instruments so provide.

HISTORY

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

CROSS REFERENCES

Limitations on disposition of units, see RSA 356-B:50.
Restraints on alienation, see RSA 356-B:14.

IV. Administration and Enforcement

HISTORY

Effective date of 1985 amendments. 1985, 300:33, IV, provided that the provisions of the act amending this subdivision would take effect when the department of justice became operational on the date set according to 1983, 372:5, II. Pursuant to 1983, 372:5, II, the joint committee on implementation of reorganization and the governor determined the effective date upon which the department became operational to be Jan. 1, 1986.

NEW HAMPSHIRE REVISED STATUTES ANNOTATED

1955

2009 REPLACEMENT EDITION

Title 31

Chapters 333—359-I

WEST®
A Thomson Reuters business

356–B:46 Lien for Assessments.

I. The unit owners' association shall have a lien on every condominium unit for unpaid assessments levied against that condominium unit in accordance with the provisions of this chapter and all lawful provisions of the condominium instruments, if perfected as hereinafter provided. The said lien, once perfected, shall be prior to all other liens and encumbrances except (a) real estate tax liens on that condominium unit, (b) liens and encumbrances recorded prior to the recordation of the declaration, and (c) sums unpaid on any first mortgages or first deeds of trust encumbering that condominium unit and securing institutional lenders. The provisions of this paragraph shall not affect the priority of mechanics' and materialmen's liens.

II. Notwithstanding any other provision of this section, or any other provision of law, all memoranda of liens arising under this section shall be recorded in the registry of deeds in each county in which any part of the condominium is located. Such memorandum shall be indexed in the general index to deeds, and such general index shall identify the lien as a lien for condominium assessments.

III. The unit owners' association, in order to perfect the lien given by this section, shall file, before the expiration of 6 months from the time such assessment became due and payable in the registry of deeds in the county in which such condominium is situated, a memorandum, verified by the oath of the principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, which contains the following:

(a) A description of the condominium unit in accordance with RSA 356–B:9;

(b) The name or names of the persons constituting the unit owners of that condominium unit;

(c) The amount of unpaid assessments currently due or past due together with the date when each fell due; and

(d) The date of issuance of the memorandum.

It shall be the duty of the register in whose office such memorandum shall be filed as hereinabove provided to record and index the same as provided in paragraph II, in the names of the persons identified therein as well as in the name of the unit owners' association. The cost of recording such memorandum shall be taxed against the person found liable in any judgment or decree enforcing such lien.

IV. No suit to enforce any lien perfected under paragraph III shall be brought after 6 years from the time when the memorandum of lien

was recorded; provided, however, that the filing of a petition to enforce any such lien in any suit wherein such petition may be properly filed shall be regarded as the institution of a suit under this section; and provided further that nothing herein shall extend the time within which any such lien may be perfected.

V. The judgment or decree in an action brought pursuant to this section shall include, without limitation, reimbursement for costs and attorneys' fees, together with interest at the maximum lawful rate for the sums secured by the lien from the time such sum became due and payable.

VI. When payment or satisfaction is made of a debt secured by the lien perfected by paragraph III, said lien shall be released in the same manner as required by RSA 479:7 for mortgages. For the purposes of this section, the principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, shall be deemed the duly authorized agent of the lien creditor and shall discharge said lien.

VII. Nothing in this section shall be construed to prohibit actions at law to recover sums for which paragraph I creates a lien, maintainable pursuant to RSA 356-B:15.

VIII. Any unit owner or purchaser of a condominium unit, having executed a contract for the disposition of the same, shall be entitled upon request to a recordable statement setting forth the amount of unpaid assessments currently levied against that unit. Such request shall be in writing, directed to the principal officer of the unit owners' association or to such other officer as the condominium instruments may specify. Failure to furnish or make available such a statement within 10 business days from the receipt of such request shall extinguish the lien created by paragraph I as to the condominium unit involved. Such statement shall be binding on the unit owners' association, the board of directors, and every unit owner. Payment of a fee not exceeding $10 may be required as a prerequisite to the issuance of such a statement if the condominium instruments so provide.

IX. Notwithstanding any law, rule, or provision of the condominium declaration, bylaws, or rules to the contrary, the unit owners' association may authorize, pursuant to RSA 356-B, its board of directors to, after 30 days' prior written notice to the unit owner and unit owner's first mortgagee of nonpayment of common assessments, terminate the delinquent unit's common privileges and cease supplying a delinquent unit with any and all services normally supplied or paid for by the unit owners' association. Any terminated services and privileges shall be restored upon payment of all assessments.

X. The unit owners' association may collect an amount of up to 6 months' common expense assessments in advance from unit owners and hold the amount so collected in escrow and, upon default by any unit owner in the payment of common expense assessments, apply the same to cure such default.

HISTORY

Source. 1977, 468:1. 1994, 163:1, eff. July 22, 1994. **Amendments—1994.** Added pars. IX and X.

CROSS REFERENCES

Release of liens, see RSA 356-B:8.
Resale by purchaser, see RSA 356-B:58.
Statutory liens on personal property, see RSA 444:1 et seq.

LIBRARY REFERENCES

West Key Number
Condominium ⇐12.
Westlaw Topic
Westlaw Topic No. 89A.
CJS
C.J.S. Estates §§ 198, 218, 221.

New Hampshire Practice
5 N.H.P. Civil Practice and Procedure § 53.02 (2nd Ed.).

ANNOTATIONS

Construction with other laws 1

1. Construction with other laws
Condominium association's efforts to collect association dues and fees from purchasers of condominium lot at tax sale were explicitly allowed by the Condominium Act and thus did not constitute unfair and/or deceptive acts within the meaning of the Consumer Protection Act. Buchholz v. Waterville Estates Ass'n (2007) 156 N.H. 172, 934 A.2d 511. Antitrust And Trade Regulation ⇐ 152

356-B:46-a Rent Collection Upon Delinquency in Payment of Common Expenses. On and after January 1, 1998:

I. If a unit owner fails to pay the common expenses assessed to the unit by the unit owners' association within 60 days of the date it was due, the unit owners association may, as a separate and additional remedy, subject to the existing rights of a holder of a first mortgage of record as provided in this section, collect from any tenant renting the unit any rent then or thereafter due to the owner of such unit. The unit owners' association shall apply such rent collected against the amount owed to it by the unit owner. Prior to taking any action under this paragraph, the unit owners' association shall give to the delinquent unit owner written notice of its intent to collect the rent owed. Such notice shall be sent by both first class and certified mail, shall set forth the exact amount the unit owners' association claims is due and owing by

the unit owner, and shall indicate the intent of the association to collect such amount from rent, along with any other amounts which become due within the current fiscal year and which remain unpaid. A copy of such notice shall be provided to any first mortgagee of record on such unit who has previously requested in writing that the unit owners' association notify it of any delinquency in the payment of amounts due to it by the owner of such unit.

II. The unit owner shall have 30 days from the date of mailing of such notice to pay the amounts due, including collection costs, or to provide proof of the prior payment of the assessments due. No unit owner shall be entitled to withhold payment of assessments due, off-set against the same, or make any deduction therefrom without first obtaining a determination by a court of competent jurisdiction that the assessment was unlawful.

III. If the unit owner fails to timely file a response in compliance with paragraphs I and II, the unit owners' association may notify and direct each tenant renting such unit from such owner to pay all or a portion of the rent otherwise due to such owner to the association, such rent or portion of such rent to be in the amount the association claimed is due on its notice to the unit owner or the full rent, whichever is less. The association shall have a continuing right to collect any rent otherwise payable by the tenant to such unit owner until such amount, plus any charges thereafter becoming due, are satisfied in full. Nothing in this section shall preclude the unit owner from seeking equitable relief from a court of competent jurisdiction or seeking a judicial determination of the amount owed. Nothing in this section shall prevent the unit owners' association from bringing an action under this chapter or to otherwise establish the amount owed to it by the unit owner or otherwise to seek and obtain an order requiring the tenant in such unit, or tenants in other units owned by the unit owner in the condominium, to pay to the association rent otherwise due to the unit owner or otherwise limit the unit owner's association's rights at common law.

IV. In no event shall a unit owner take any retaliatory action against any tenant who pays rent, or any portion of rent, to the unit owners' association as provided in this section. Any tenant so paying rent shall not be deemed in default on the rent to the extent of the payment to the association. Any waiver of the provisions of this section in any lease or rental agreement shall be void and unenforceable as against public policy.

V. Notwithstanding any other provision of this chapter, a vote of a majority of those attending an annual meeting of the unit owner's association, in person or by proxy, shall be necessary to adopt the

provisions of this section as a part of the association's declaration or bylaws or both.

HISTORY

Source. 1997, 228:1, eff. Jan. 1, 1998.

LIBRARY REFERENCES

West Key Number
Condominium ⇐12.
Westlaw Topic
Westlaw Topic No. 89A.
CJS
C.J.S. Estates §§ 198, 218, 221.

New Hampshire Practice
5 N.H.P. Civil Practice and Procedure § 53.02 (2nd Ed.).

356-B:47 Restraints on Alienation. If the condominium instruments create any rights of first refusal or other restraints on free alienability of the condominium units, such rights and restraints shall be void unless the condominium instruments make provision for promptly furnishing to any unit owner or purchaser requesting the same a recordable statement certifying to any waiver of, or failure or refusal to exercise, such rights and restraints, in all cases where such waiver, failure, or refusal does in fact occur. Failure or refusal to furnish promptly such a statement in such circumstances in accordance with the provisions of the condominium instruments shall make all such rights and restraints inapplicable to any disposition of a condominium unit in contemplation of which such statement was requested. Any such statement shall be binding on the association of unit owners, the board of directors, and every unit owner. Payment of a fee not exceeding $25 may be required as a prerequisite to the issuance of such a statement if the condominium instruments so provide.

HISTORY

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

CROSS REFERENCES

Limitations on dispositions of units, see RSA 356-B:50.
Resale by purchaser, see RSA 356-B:58.
Validity of condominium instruments, see RSA 356-B:14.

LIBRARY REFERENCES

West Key Number
Condominium ⇐3, 13.
Westlaw Topic
Westlaw Topic No. 89A.

CJS
C.J.S. Estates §§ 197 to 203, 224 to 225, 244.

NEW HAMPSHIRE REVISED STATUTES ANNOTATED

TITLE 31
TRADE AND COMMERCE
Chapters 333 to 359-O

2015
CUMULATIVE SUPPLEMENT

Updated with legislation through Chapter 276 of the 2015 Regular Session of the General Court, which convened Jan. 7, 2015.

For Use Until Publication of 2016 Cumulative Supplement

Cite Supplement as RSA, with chapter and section followed by (Supp.), thus:
RSA 21:8 (Supp.)

Insert in pocket in back of the 2009 main volume

This supplement contains the legislative update for the 2015 session.

THOMSON REUTERS

356–B:43 Insurance.

ANNOTATIONS

In general 1

1. In general

Exclusion in general contractor's commercial general liability (CGL) insurance policies precluding coverage for property damage to any property that must be restored, repaired, or replaced because "your work" was incorrectly performed on it barred coverage for property damage to defectively constructed portions of condominium units, which unit owners alleged to be weather barriers, but did not bar coverage for damage to those portions of the units that were not defectively constructed by general contractor but were damaged as result of defective work. Cogswell Farm Condominium Association v. Tower Group, Inc. (2015) 167 N.H. 245, 110 A.3d 822. Insurance ⇨ 2090

Exclusion in commercial general liability (CGL) insurance policies precluding coverage for property damage to property owned by insured, which was developer of condominium, did not preclude unit owners' claims for property damage that occurred after insured sold units. Cogswell Farm Condominium Association v. Tower Group, Inc. (2015) 167 N.H. 245, 110 A.3d 822. Insurance ⇨ 2278(27)

356–B:46 Lien for Assessments.

I. (a) The unit owners' association shall have a lien on every condominium unit for unpaid assessments levied against that condominium unit in accordance with the provisions of this chapter and all lawful provisions of the condominium instruments, if perfected as hereinafter provided. The said lien, once perfected, shall be prior to all other liens and encumbrances except (1) real estate tax liens on that condominium unit, (2) liens and encumbrances recorded prior to the recordation of the declaration, and (3) sums unpaid on any first mortgages or first deeds of trust encumbering that condominium unit and securing institutional lenders.

(b) The provisions of this paragraph shall not affect the priority of mechanics' and materialmen's liens.

(c) Notwithstanding subparagraph (a), the lien for regular monthly common assessments unpaid with respect to a residential condominium unit during the 6-month period immediately preceding the filing of the memorandum specified in paragraph III, together with all costs of collection, including reasonable attorney's fees, shall be prior to the first mortgage; provided that the unit owners' association sends, within 70 days of the occurrence of any delinquency, the unit owner and the institutional lender holding the first mortgage written no-

tice of the delinquency by certified mail and first class mail that the account is at least 60 days delinquent; and additionally, sends such lender notice by certified mail and first class mail, at least 30 days prior, of its intent to file said memorandum of lien. The lien shall not include any amounts attributable to special assessments, late charges, fines, penalties, or interest assessed by the unit owners' association, nor shall the lien apply to regular assessments or costs of collection coming due prior to the effective date of this section. In giving the foregoing notices, the unit owners' association may rely on the records of the applicable registry of deeds as to the address of the first institutional lender unless such lender has notified the unit owners' association by certified mail of a different address.

(d) The priority lien rights established under subparagraph (c) shall not entitle or permit the unit owners' association to assert more than one priority lien unless and until the existing priority lien is first discharged by the unit owners' association. The priority lien rights established under subparagraph (c) also shall not apply to any mortgage executed prior to the effective date of this section.

(e) After notification to the first mortgage institutional lender of a delinquency, in addition to any previously agreed to or required escrow amounts, the institutional lender may also require a residential unit owner to place an amount equal to not more than 6 months of current regular assessments in escrow to cover the cost of any delinquency.

II. Notwithstanding any other provision of this section, or any other provision of law, all memoranda of liens arising under this section shall be recorded in the registry of deeds in each county in which any part of the condominium is located. Such memorandum shall be indexed in the general index to deeds, and such general index shall identify the lien as a lien for condominium assessments.

III. The unit owners' association, in order to perfect the lien given by this section, shall file, before the expiration of 6 months from the time such assessment became due and payable in the registry of deeds in the county in which such condominium is situated, a memorandum, verified by the oath of the principal officer of the unit owners' association, or such other officer or

officers as the condominium instruments may specify, which contains the following:

(a) A description of the condominium unit in accordance with RSA 356–B:9;

(b) The name or names of the persons constituting the unit owners of that condominium unit;

(c) The amount of unpaid assessments currently due or past due together with the date when each fell due; and

(d) The date of issuance of the memorandum.

It shall be the duty of the register in whose office such memorandum shall be filed as hereinabove provided to record and index the same as provided in paragraph II, in the names of the persons identified therein as well as in the name of the unit owners' association. The cost of recording such memorandum shall be taxed against the person found liable in any judgment or decree enforcing such lien.

IV. No suit to enforce any lien perfected under paragraph III shall be brought after 6 years from the time when the memorandum of lien was recorded; provided, however, that the filing of a petition to enforce any such lien in any suit wherein such petition may be properly filed shall be regarded as the institution of a suit under this section; and provided further that nothing herein shall extend the time within which any such lien may be perfected.

V. The judgment or decree in an action brought pursuant to this section shall include, without limitation, reimbursement for costs and attorneys' fees, together with interest at the maximum lawful rate for the sums secured by the lien from the time such sum became due and payable.

VI. When payment or satisfaction is made of a debt secured by the lien perfected by paragraph III, said lien shall be released in the same manner as required by RSA 479:7 for mortgages. For the purposes of this section, the principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, shall be deemed the duly authorized agent of the lien creditor and shall discharge said lien.

VII. Nothing in this section shall be construed to prohibit actions at law to recover sums for which paragraph I creates a lien, maintainable pursuant to RSA 356–B:15.

VIII. Any unit owner or purchaser of a condominium unit, having executed a contract for the disposition of the same, shall be entitled upon request to a recordable statement setting forth the amount of unpaid assessments currently levied against that unit. Such request shall be in writing, directed to the principal officer of the unit owners' association or to such other officer as the condominium instruments may specify. Failure to furnish or make available such a statement within 10 business days from the receipt of such request shall extinguish the lien created by paragraph I as to the condominium unit involved. Such statement shall be binding on the unit owners' association, the board of directors, and every unit owner. Payment of a fee not exceeding $10 may be required as a prerequisite to the issuance of such a statement if the condominium instruments so provide.

IX. Notwithstanding any law, rule, or provision of the condominium declaration, bylaws, or rules to the contrary, the unit owners' association may authorize, pursuant to RSA 356–B, its board of directors to, after 30 days' prior written notice to the unit owner and unit owner's first mortgagee of nonpayment of common assessments, terminate the delinquent unit's common privileges and cease supplying a delinquent unit with any and all services normally supplied or paid for by the unit owners' association. Any terminated services and privileges shall be restored upon payment of all assessments.

X. The unit owners' association may collect an amount of up to 6 months' common expense assessments in advance from unit owners and hold the amount so collected in escrow and, upon default by any unit owner in the payment of common expense assessments, apply the same to cure such default.

HISTORY

Source. 1977, 468:1. 1994, 163:1, eff. July 22, 1994. 2010, 142:1, eff. Jan. 1, 2011.

Amendments—2010. Paragraph I: Inserted subpar. designators (a) and (b); substituted "(1)" for "(a)", "(2)" for "(b)", and "(3)" for "(c)" in the second sentence of subpar. (a); and, added subpars. (c) to (e).

356–B:47–a Flag Display. Pursuant to the Freedom to Display the American Flag Act of 2005, Public Law 109–243, and notwithstanding any provision in the condominium instruments to the contrary, the unit owners' association shall not prohibit the outdoor display of the United States flag in a manner consistent