State of New Hampshire
Supreme Court

Docket No. 2015-573

Thomas M. Benoit & Kathleen A. Nawn-Benoit,
Petitioners/Appellants

v.

Residents of Profile Estates,
(Joseph A. Cerasaro, Trustee of the Joseph A. Cerasaro Revocable Trust, et al.)
Respondents/Appellees

RULE 7 APPEAL FROM DECISION ON THE MERITS
HILLSBOROUGH COUNTY SUPERIOR COURT, SOUTHERN DISTRICT

BRIEF OF APPELLEES
RITA A. DELUDE & RONALD N. DELUDE

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Matthew J. Delude will represent the Appellees at oral argument

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TEXT OF RELEVANT STATUTES

N.H. REV. STAT. ANN. § 491:8-a

Motions for Summary Judgment

I. A party seeking to recover upon a claim, counterclaim, or crossclaim, or to obtain a declaratory judgment, may, at any time after the defendant has appeared, move for summary judgment in his favor upon all or any part thereof. A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought, may, at any time, move for a summary judgment in his favor as to all or any part thereof.

II. Any party seeking summary judgment shall accompany his motion with an affidavit based upon personal knowledge of admissible facts as to which it appears affirmatively that the affiants will be competent to testify. The facts stated in the accompanying affidavits shall be taken to be admitted for the purpose of the motion, unless within 30 days contradictory affidavits based on personal knowledge are filed or the opposing party files an affidavit showing specifically and clearly reasonable grounds for believing that contradictory evidence can be presented at a trial but cannot be furnished by affidavits. Copies of all motions and affidavits shall, upon filing, be furnished to opposing counsel or to the opposing party, if the opposing party is not represented by counsel.

III. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

IV. If affidavits are not filed by the party opposing the summary judgment within 30 days, judgment shall be entered on the next judgment day in accordance with the facts. When a motion for summary judgment is made and supported as provided in this section, the adverse party may not rest upon mere allegations or denials of his pleadings, but his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue for trial.

V. If it appears to the court at any time that any of the affidavits presented pursuant to this section are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees. Any offending party or attorney may be found guilty of contempt.

STATEMENT OF THE CASE

Thomas M. Benoit and Kathleen A. Nawn-Benoit (the "Appellants" or "Petitioners") brought a declaratory judgment action against Residents of the Profile Estates ("Respondents") after they attempted to acquire the consent of two-thirds of the Respondents to terminate the Declaration of Covenants for the Profile Estates ("Declaration") encumbering the parcel at issue in this case. Appellees' Appendix ("Appellee App.") at 6, ¶¶ 20-21. The summary judgment record reveals that Petitioners never obtained the affirmative consent of any more than 15 of the 70 lots in the Profile Estates subdivision, and that one of those 15 was their own consent and at least three were only provided in response to Petitioners' lawsuit. Appellants' Appendix ("Appellant App.") at 107-21.

Having failed to achieve voluntary termination of the Declaration in accordance with its terms, the Petitioners brought suit against 65 of the lots covered by the Declaration, seeking: (1) a declaratory judgment that the Declaration is unenforceable; (2) an order ruling that Petitioners acquired title to the parcel at issue free and clear of the Declaration through adverse possession; and failing both of those requests, (3) "other equitable relief," expressly predicated upon the assumption that the Declaration is enforceable, in the form of an order that the Respondents form an association and purchase the land at issue from the Petitioners, as well as pay Petitioners for all out-of-pocket expenses paid by the Petitioners relative to the land, including real estate taxes. Appellee App. at 7-8, ¶¶ 29, 34, 36. Of the 65 lots sued by Petitioners, 21 lots have specifically appeared to defend the action and oppose the relief requested, including an incredible 19 *pro se* litigants. *Id.* at 27. This number falls just shy of a third of the lots with authority to either terminate or block the termination of the Declaration. *See* Appellant App. at 33, Art. III, § 10.

Two of the Respondents, the Deludes ("Appellees"), sought summary judgment on all of the claims asserted against all of the Respondents. Appellant App. at 1-59. The Appellees' motion further noted that the matter had been properly joined for a declaratory judgment pursuant to RSA 491:22, and therefore the Appellees requested a declaratory judgment of their own that the Declaration was enforceable. *Id.* at 2, 17. The Appellants objected and cross-moved for summary judgment on only their first count of relief, namely their request for a declaratory judgment that the Declaration was unenforceable, but they did not dispute or otherwise contest Appellees' request for a declaratory judgment of their own and in favor of all of the Respondents. *See* Appellant App. at 60-103; N.H. REV. STAT. ANN. § 491:8-a. Appellees objected to the cross-motion and Appellants responded. *See* Appellee App. at 11-41.

By a twenty-four page well-reasoned decision dated June 2, 2015, the trial court granted summary judgment in Appellees' favor on all counts, and further directed the Respondents to form a homeowners' association and for Appellants to transfer the common land in question to that association consistent with the terms of the Declaration. Appellants' Appendix to Brief ("Br. App.") at 35-58. Appellants moved for reconsideration, Appellees objected, the trial court denied the motion, and this appeal followed. *See* Br. App. at 60-63.

STATEMENT OF FACTS

In 1974, 101 Realty, Inc. (the "Developer") prepared plans for the creation of the "Profile Estates" subdivision and recorded those plans at the Hillsborough County Registry of Deeds ("HCRD") as Plans 7178, 8040, and 8088. Appellee App. at 5, ¶ 6; Appellant App. at 46, 48, 50. In addition to the creation of 70 parcel lots (the "Lots"), those plans called for the creation of Lot 71, a 7-acre parcel of common land to be designated as the "Profile Estates Common Land" (the "Common Land"). Appellee App. at 5, ¶¶ 6-7; Appellant App. at 48. Pursuant to those plans, on

November 14, 1974, the Developer recorded the Declaration at the HCRD at Book 2388, Page 056. Appellee App. at 5, ¶ 12; Appellant App. at 31-33. The Developer further included reference to the Declaration in each of the individual deeds conveying each lot to the original lot owners. *See, e.g.*, Appellant App. at 29; *id.* at 55; *id.* at 59. It is undisputed that the Appellants were on notice of the Declaration, as well as the easements and covenants contained in the Declaration, when they purchased the Common Land. Br. App. at 44, 56-57.

A. <u>The Covenants, Easements, and Restrictions Set Forth In the Declaration</u>.

The Declaration provides that the Common Land and the Lots "shall be held, transferred, sold, conveyed and occupied subject to the covenants, restrictions, easements, charges and assessments hereinafter set forth." Appellant App. at 31. Article I sets forth definitions and Article II sets forth the properties subject to the Declaration, including the vast majority of the Lots in Plans 7178, 8040, and 8088. *Id.* at 31-32, Arts. I-II. Finally, Article III sets forth numerous "RESTRICTIONS ON THE PROPERTIES." *Id.* at 32-33, Art. III.

Some of the "restrictions on the properties" set forth in Article III relate to the anticipated creation and administration of the planned Profile Estates Homeowners Association (the "Association"). Section 1 of Article III contemplates the creation of the Association "for the purpose of maintaining and administering the Common Properties and facilities thereon, administering and enforcing the restrictions, and collecting and disbursing the assessments and charges," as well as the assessment of an annual charge for the maintenance and upkeep of the Common Land. *Id.* at 32, Art. III, § 1. To ensure payment of charges assessed, Section 4 of Article III provides that the Association has the power "as provided in its Articles and By-Laws, to suspend the enjoyment rights of any Owner" for nonpayment of levied assessments and for infractions of the Association's "published rules and regulations." *Id.* at 32, Art. III, § 4. In

acknowledgement of that power, the broad grant to each Owner of "a right and easement of enjoyment in and to the Common Properties, [which] easement shall be appurtenant to and shall pass with the title to every lot," in Section 2 of Article III specifically subjects itself to that power. *Id.* at 32, Art. III, § 2.

To ensure the Common Land included "permanent open spaces," the Declaration provides further restrictions unrelated to the creation or administration of any Association. *Id.* at 31. In Section 5 of Article III, the Declaration requires that "[t]he Common Properties shall be restricted to recreational, conservation and park uses for all of the Owners." *Id.* at 33, Art. III, § 5. In Section 6, the Declaration further provides that "[n]o structures shall be erected on the Common Properties except as incident to said uses." *Id.* at 33, Art. III, § 6. In Section 7, the Declaration prohibits "snowmobiles, motorcycles, motorbikes or other motor vehicles" in the Common Properties. *Id.* at 33, Art. III, § 7. Section 8 provides that "[n]o nuisance shall be maintained on the Common Properties." *Id.* at 33, Art. III, § 8. Section 9 prohibits any "business or commercial activities" on the Common Properties. *Id.* at 33, Art. III, § 9.

To ensure the immediate application and perpetual continuation of the restrictions laid out in the Declaration, Section 10 of Article III provides specifically that:

> These restrictions shall run with, and bind the land, and shall inure to the benefit of and be enforceable by the Association, or the Owner of any land subject to this Declaration, their respective legal representatives, heirs, successors, and assigns, for a term of ten (10) years from the date this Declaration is recorded, after which time said restrictions shall be extended for successive periods of ten (10) years unless an instrument signed by the then Owners of two-thirds (2/3) of the Lots has been recorded, agreeing to change said restrictions in whole or in part, and provided that written notice of the proposed change is sent to every Owner at least ninety (90) days in advance of any action taken.

Id. at 33, Art. III, § 10. Additionally, in Section 11 of Article III, the Declaration provides for enforcement of the restrictions by a proceeding at law or in equity, but specifically mandates that

"failure by the Association or any Owner to enforce any covenant or restrictions herein contained shall in no event be deemed a waiver of the right to do so thereafter." *Id.* at 33, Art. III, § 11. As a further savings clause, Section 12 also mandates that "[i]nvalidation of any one of these covenants by judgment, court order, or otherwise, shall in no way affect the other provisions in this Declaration, all of which shall remain in full force and effect." *Id.* at 33, Art. III, § 12.

B. <u>The Developer Loses Title to the Common Land</u>.

After recording the Declaration on November 14, 1974, the Developer proceeded with the subdivision development of Profile Estates as envisioned in the plans it filed at the HCRD. Pursuant to the terms of the Declaration, the Developer was permitted to "retain the legal title to the Common Properties, until such time as, in the opinion of the Developer, the Association [wa]s able to maintain the same," and the Developer did so. Appellant App. at 32, Art. III, § 3; *id.* at 35. But the Declaration also provided that "the Developer must convey legal title to the Association when fifty-one percent (51%) of the Lots have been sold," and that "[t]he cost of maintenance of said Common Properties shall be borne by the Developer or its successors in title until the transfer of said Common Properties to the Association and thereafter the cost of maintenance shall be borne by said Association." *Id.* at 32, Art. III, § 3.

Despite the ultimate sale of all of the Lots, however, the Developer never complied with that provision and never conveyed legal title to the Association. *Id.* at 35. Instead, the Developer neglected its duty under the Declaration to bear the cost of maintenance of the Common Land, and the Town of Merrimack ultimately sold the property at a tax sale to R. Robert Gaumont, Jr. ("Gaumont"), who at that time owned and lived at 15 Woodbine Lane, Merrimack, New Hampshire, labeled Lot 51 on Plan 8040. *Id.* at 35, 48. Gaumont's Lot was directly North of, and abutting, the Common Land. *Id.* at 48. "The tax title to the Common

Land received by Mr. Gaumont conveyed '[t]he whole of the [property] . . . with appurtenances.'" Br. App. at 38; Appellant App. at 35.

C. Gaumont and Petitioners Leave the Common Land Undisturbed and Accessible.

After purchasing title to the Common Land situated behind his home, Gaumont held the land in its original undeveloped state for approximately 20 years while he lived at his residence. Appellant App. at 52-53; *id.* at 56-57; *id.* at 105. During those 20 years, Gaumont never built any structures on the property, never posted the property directing anyone entering it to leave, never instructed anyone to leave the Common Land, and essentially left the property as it was, recreational conservation land. *Id.* Gaumont's affidavit explained that he has been a licensed New Hampshire attorney since 1972, and when he purchased the Common Land he bought it "subject to the easements, covenants, and restrictions in the Declaration." Appellant App. at 104, ¶¶ 1, 5. He explained that he was familiar with this Court's decision in *Gowen v. Swain*, 90 N.H. 383 (1939), and that "[c]onsistent with that decision [he] understood that [he] only acquired title to the Common Land when [he] purchased it, and that the land remained burdened with the easements, covenants, and restrictions set forth in the Declaration." Appellant App. at 104-05, ¶¶ 6-7. During the twenty-year period he owned the Common Land (1981-2001), Gaumont "personally observed various lot owners and their children enjoying the Common Land with nature walks and other recreational activities," and he never took any action to prevent those activities. *Id.* at 105, ¶¶ 9-13.

In 2001, Gaumont sold his personal residence at 15 Woodbine Lane to the Petitioners. *Id.* at 39. At the same time, Gaumont also sold the Petitioners the Common Land by Quitclaim Deed for less than $100. *Id.* at 37. When Petitioners purchased the land, as now, the Declaration at issue in this case had already been recorded on the land records at the HCRD, laying out the

restrictions on the Common Land. *Id.* at 31. It is undisputed that the Appellants were on notice of the Declaration, as well as the easements and covenants contained therein, when they purchased the Common Land. Br. App. at 44, 56-57.

From 2001 to January, 2015, the Petitioners owned both the Common Land and the Lot in front of the Common Land. Appellant App. at 37, 39. During all that time, and to the present, Petitioners have never erected any structures on the property of any kind, including any structures intended to prevent access by others in any way. Br. App. at 50; Appellant App. at 53, ¶ 19; *id.* at 57, ¶ 9. Petitioners further never posted the property directing anyone entering it to leave. Appellant App. at 52, ¶ 18; *id.* at 56, ¶ 7. The Petitioners never even instructed anyone to leave the Common Land. Appellant App. at 52, ¶ 15; *id.* at 57, ¶ 8; Br. App. at 50.[1] In all that time, the Common Land stayed in its undeveloped recreational conservation state. Appellant App. at 53, ¶ 23; *id.* at 57, ¶¶ 10-12. Since its original creation in 1974, and through the periods of ownership by Gaumont and the Petitioners, the Common Land has remained undeveloped, and "nothing was ever built or developed on the Common Land in violation of the Declaration." Br. App. at 50; Appellant App. at 53, ¶ 23; *id.* at 57, ¶¶ 10-12.

The first indication Petitioners have ever made of any possible future intent to build or otherwise violate the Declaration at all was not until on or about July 30, 2014, when Petitioners obtained a variance with the Town of Merrimack. Appellee App. at 6, ¶ 18; Br. App. at 50. Several residents appeared in opposition to the request and specifically referenced the Declaration and explained that the "Covenants stay with the property, and are strictly for conservation and recreational use." Appellants' App. at 98-101. The Zoning Board granted the variance but expressly based its decision "solely on the zoning ordinance requirements" and did

[1] *See also infra*, note 11 and accompanying text.

not consider the private covenants "in its decision." *Id.* at 101. Shortly after that meeting, Petitioners attempted to acquire the consent of two-thirds of the Respondents to terminate the Declaration. Appellee App. at 6, ¶¶ 20-21. Petitioners brought suit against the Respondents after obtaining less than a quarter of the assents they needed. Appellant App. at 107-21.

SUMMARY OF THE ARGUMENT

The well-reasoned and extensive decision below should be affirmed because the summary judgment record made clear that the Declaration remains enforceable notwithstanding the transfer of the Common Land by tax sale. This Court's precedents, as well as the decisions provided by Appellants from other jurisdictions, make clear that whether or not the assessment of a property sold by tax sale accurately reflects the easements, covenants or restrictions that encumber the property is irrelevant to the determination of whether those restrictions survive the tax sale. The presumption of proper assessment is conclusive, and even if it could be shown that the property was not properly assessed, the restrictions would still survive the tax sale.

The decision below therefore properly ordered summary judgment in Appellees' favor on Count I, and denied Appellants' cross-motion for summary judgment on that Count. The denial of the cross-motion was further properly ordered because even if Appellants' "tax assessment theory" had applied in this case, summary judgment would not have been called for as there was at a minimum a disputed issue of material fact below as to whether the Common Land was properly assessed in 1978. In fact, the summary judgment record revealed that the Common Land was likely properly assessed in 1978.

The decision below likewise properly held that the Declaration, together with the covenants, restrictions, and easements contained therein, vested when the Developer recorded the Declaration on November 17, 1974, well before the property was taken and sold for taxes.

Appellants' argument to the contrary relies on a strained reading of the Declaration that fails to adhere to this Court's interpretive precedents and completely ignores numerous critical and specific provisions of the Declaration that directly refute their strained interpretation.

The decision below also properly held that the doctrine of redemption is irrelevant to the status of the easements, covenants, and restrictions contained in the Declaration as the tax sale had no effect on the Declaration, and there was nothing for Respondents to have redeemed. Appellants' new argument on appeal cannot provide a basis for reversal of the decision below as this Court's decisions in *Gowen*, *Buchholz*, and their progeny reject Appellants' argument, the terms of the Declaration itself reject that argument, and the language of the tax sale at issue does not even attempt to extinguish the Declaration, again providing nothing for Respondents to redeem *vis a vis* the Declaration.

The decision below further properly held that the doctrine of laches does not bar enforcement of the Declaration because there have been no acts of Appellants and no awareness of any acts of Appellants that would have called for Respondents to act to enforce the Declaration. As a further alternative ground for affirmance on laches, Appellees moved for summary judgment below on the basis that the Declaration itself prohibits any claim of laches here, and Appellants did not contest that basis for summary judgment. Accordingly, for all those reasons and more set forth below, the decision below property granted summary judgment in Appellees' favor on Count I of Appellants' Petition.

As to Count II of Appellants' Petition, Appellants' have elected not to appeal the trial court's order on that Count and accordingly that Count is no longer available to Appellants in this case, leaving only Count III.

Count III is Appellants' claim for "equitable relief," an unspecified vague reference to the general equitable powers of the Superior Court. In the summary judgment proceedings, Appellants made little effort to substantiate or explicate their claim in Count III into anything that would be capable of withstanding summary judgment as required by RSA 491:8-a. But most critically and most fatal to their claim in Count III is the fact that by the terms of their very Petition Count III is predicated upon the enforceability of the Declaration at issue in this case. Count III, by its express terms, presupposes the Declaration is enforceable. The trouble for Appellants is that if the Declaration is enforceable, as the trial court properly found, the terms of the Declaration specifically require that the maintenance obligation for the Common Land be borne by the Developer and its successors in title until such time as it is transferred to the Association. It is undisputed in this case that the Appellants are Developer's successors in title, and accordingly the maintenance obligation must continue to be borne by Appellants until the property is transferred.

Also consistent with the terms of the Declaration, the trial court ordered the transfer of the Common Land because the 51% trigger for its transfer had been satisfied, requiring Respondents to form the Association to receive the transfer in the process. This result was not only consistent with the terms of the Declaration, which Appellants' Count III presumed to be enforceable, but also ensured that Appellants would be freed from the future burden of tax obligations on the Common Land for property they regarded to be valueless with an enforceable Declaration. This separate aspect of the decision below should be affirmed because it is consistent with the terms of the Declaration, it is consistent with this Court's precedents, and it is consistent with the terms of the tax sale that transferred the Common Land.

ARGUMENT

I. The Decision Below Should Be Affirmed Because the Trial Court Properly Held that the Tax Sale Did Not Extinguish the Declaration, Which Remained Enforceable.

A. As a Matter of Law, the Tax Sale Did Not Extinguish the Declaration.

"Under the holding of *Gowen*, it has been the law of this state *for more than seventy years* that property owners holding a ripened prescriptive easement appurtenant do not lose this property right when the servient estate is sold for taxes." *Marshall v. Burke*, 162 N.H. 560, 568 (2011) (emphasis added). This Court has specifically held that this long-standing rule of law applies to easements and covenants, which survive a tax sale and continue to bind the land notwithstanding the sale. *Buchholz v. Waterville Estates Ass'n*, 156 N.H. 172, 175 (2007) (citing *Gowen v. Swain*, 90 N.H. 383, 10 A.2d 249 (1939)).

In *Buchholz*, this Court considered whether the purchasers of an unimproved lot within a condominium development took the land subject to the condominium covenants or stripped of all encumbrances upon it. 156 N.H. at 172, 174. The Court explained that "[c]ondominium declarations are covenants running with the land" and "[t]he condominium declaration covenants and the estate in land upon which they are imposed are literally inseparable." *Id.* at 174 (citations omitted). Such covenants "sink their tentacles into the soil" and stay with the land notwithstanding a tax sale. *Id.* at 175. Following the *Buchholz* decision, it has effectively become black letter law in New Hampshire that as with easements, a tax sale of real property does not extinguish covenants that run with the land. *See* N.H. Practice § 28.05 (Vol. 16 2008) (citing *Buchholz*, 156 N.H. at 175) ("condominium covenants run with the land and survive a tax sale and persons acquiring a tax deed are subject to the covenants and restrictions of the condominium.").

As noted above, the Declaration at issue here provides clearly and unequivocally that its "restrictions shall run with, and bind the land, and shall inure to the benefit of and be enforceable by the Association, or the Owner of any land subject to this Declaration, their respective legal representatives, heirs, successors, and assigns" unless two-thirds of the then Owners record a change to the restrictions after ninety days prior notice to every Owner. Appellant App. at 33, Art. III, § 10. Those "restrictions" include easements and covenants and pursuant to *Gowen, Buchholz*, and their progeny, the undisputed material facts therefore demonstrated as a matter of law that the tax sale of the Common Land did *not* extinguish the Declaration's easements and covenants, and the decision below should be affirmed.

Appellants attempt to confuse the issue by claiming that New Hampshire has adopted a "tax assessment theory" that Appellants claim provides that an easement only survives a tax sale if evidence is presented to demonstrate that the easement's value was actually assessed against the dominant estates. Appellants' Br. at 12-15. But both this Court's precedents and the foreign precedents relied on by Appellants have specifically rejected the theory Appellants advance.

In *Gowen* the New Hampshire Supreme Court explained that an easement is "a servitude imposed upon the land, sometimes said to be 'carved out' of the servient estate." *Gowen*, 10 A.2d at 252. Because easements are servitudes that are carved out of the servient estate, the easement is not assessed as part of the servient estate and instead the existence of the easement "lessens the value of that estate and increases the value of the dominant tenement." *Id.* Addressing the concern Appellants now raise, the Court explained that if tax assessors "acting in ignorance of the existence of an easement, [] overvalue the servient estate, the mistake is correctible by abatement proceedings." *Id.* Accordingly, even though the easement at issue in *Gowen* was a prescriptive easement not filed on the land records, the Court still held that the tax

sale did not extinguish the easement because "[p]resumably assessors take into account th[e] effect of easements on value in making their appraisals." *Id.*

This conclusive presumption was reiterated recently in this Court's *Marshall v. Burke* decision. The Court explained that "under *Gowen*, properties sold for taxes are sold subject to ripened prescriptive easements, and while assessors are *presumed* to take account of the impact of easements on the value of properties, the practical reality is that the actual burden of insuring that this occurs is placed on the property owner through the tax abatement process." *Marshall*, 162 N.H. at 566 (citing *Gowen*, 10 A.2d at 252) (emphasis in original). Whether the assessor *actually* accounts for the easement is irrelevant under *Gowen*, however, because "the value of that interest is ***deemed to be*** reflected in the property that is benefited by the easement (the dominant estate), and, conversely, the easement is ***regarded as*** diminishing the value to the servient estate." *Id.* at 567 (emphasis added). Justifiably acting in reliance on *Gowen*, therefore, property owners holding a ripened easement "have felt no particular need to pay attention to the tax status of adjoining or neighborhood properties burdened by the easements from which their properties benefit." *Id.* at 568.

But the *Marshall* decision did not simply reiterate and emphasize the conclusive presumption of *Gowen*, it specifically considered *and rejected* the "tax assessment theory" now advanced by Petitioners. In their briefing before this Court, the defendants in *Marshall* pointed out that "the uncontested evidence show[ed] that the assessor d[id] not value the Appellants' property with any right of access to the lake." Resp. Br. at 24-25, *Marshall v. Burke*, 2011 WL 7861642 (N.H. 2011); Appellee App. at 38. In light of the fact that the easement in question in *Marshall* had not actually been assessed against the dominant estate, the defendants argued, just as Petitioners now argue, that the easement survived the tax sale. *Id.* at 25. This Court flatly

rejected the defendants' argument, and explained that whether the assessor had actual notice of the easement was not dispositive in *Gowen* because *Gowen* "simply *presumed* that tax assessors take account of easements, and then observed that if this assumption was incorrect, the remedy lay in an abatement proceeding." *Marshall*, 162 N.H. at 569 (emphasis in original).

Marshall thereby constitutes a clear rejection of Petitioners' "tax assessment theory" under New Hampshire law, and the other decisions cited by Petitioners from other states do nothing to salvage their argument.[2] In fact, the *Hayes* decision cited by Petitioners in support of their "tax assessment theory" *also* specifically considered *and rejected* the argument pressed by Petitioners. *See Hayes v. Gibbs*, 169 P.2d 781, 786 (Utah 1946). In that case, the defendant claimed that she obtained title to her property free and clear of all building restrictions at issue because she obtained title through a tax sale. *Id.* at 783. Just like the New Hampshire Supreme Court, the Utah Supreme Court explained that "[p]resumably assessors take into account the effect of easements and covenants on value in making their appraisals." *Id.* at 786 (citing *Gowen*, 10 A.2d at 249). Directly refuting Petitioners' theory, the Court then explained that the fact that an assessor in the case "testified he acted in ignorance of the existing restrictive covenant thereby failing to correctly assess the servient estate ***is of no defense to defendant*** [because] [t]he law is not founded on mistakes." *Id.* (emphasis added). Instead, the court held that "*[i]t must be* ***conclusively presumed*** *in the assessment of lots that their value was fixed subject to the covenant*." *Id.* (emphasis added).[3]

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[2] Petitioners also cite to broad language from *Burke v. Pierro*, 159 N.H. 504, 513 (2009), discussing a tax sale as creating a "new and paramount title to the land in fee simple absolute." But that quotation of an ALR Annotation in *Burke* was subsequently limited by the Court in *Marshall*. 162 N.H. at 565-66. It offers no support to Petitioners' argument in light of *Marshall*. It is also highly distinguishable from the deed at issue here, which specifically limited the conveyance to "[t]he whole of the [property] . . . with appurtenances." Br. App. at 38; Appellant App. at 35.

[3] The *Hayes* decision also noted a contrary holding would burden landowners "by putting them in the precarious position of seeing that every one of their 1,058 neighbors are *properly assessed* and their taxes

Petitioners also cite *Alvin v. Johnson*, but in *Alvin* the court specifically recognized that "[t]he record fail[ed] to show whether the assessor did or did not take into consideration the easement in making the assessment of the properties involved." 241 Minn. 257, 263 (1954). Despite this fact, the court did not remand but instead explained that the prescriptive easement in question was "an apparent easement and would readily have been discovered upon reasonable inspection [and] [p]ublic officers are presumed to have performed their official duties." *Id.* Just as with New Hampshire law, the *Alvin* decision conclusively presumed that tax assessors will properly value properties and it was irrelevant whether the easement was *actually* properly assessed.[4] Here the covenants, easements, and restrictions were recorded on the land records, making the presumption as justified as it could possibly be. Appellant App. at 31. As New Hampshire law clearly provides that the tax sale did not extinguish the Declaration, the decision below properly granted summary judgment and held that the Declaration remained enforceable.

B. The Decision Below Properly Denied Petitioners' Cross-Motion Because There Is a Disputed Issue of Fact As to Whether the Easements and Restrictions Were Actually Assessed Against the Dominant Estates.

An issue of fact is only "material if it affects the outcome of the litigation." *Weeks v. Co-Operative Ins. Companies*, 149 N.H. 174, 176 (2003). Appellees' motion did not call for

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paid, in order to protect their property from the loss of the restrictive covenant." *Id.* at 788 (emphasis added). The New Hampshire Supreme Court cited *Hayes* for this point in *Marshall*, also noting the unreasonable burden that would be placed on landowners "by putting them in the precarious position of seeing that . . . their . . . neighbors are *properly assessed* and *their taxes paid*, in order to protect their property from the loss of [appurtenant easements]." *Marshall*, 162 N.H. at 569 (quoting *Hayes*, 169 P.2d at 788) (emphasis added, alteration in original).

[4] Petitioners also quote *Breezy Knoll Ass'n., Inc. v. Town of Morris*, 286 Conn. 766 (2008). But *Breezy Knoll* addressed a tax abatement proceeding, not a tax sale. The quoted passage is clear *dicta* that would not even constitute authority in Connecticut, much less New Hampshire. *See id.* at 788. In fact, the one apparent Connecticut decision actually addressing the effect of a tax sale adopted the approach taken by the New Hampshire Supreme Court. *See Faught v. Edgewood Corners, Inc.*, 63 Conn. App. 164, 175-76 (2001) (explaining without qualification that "[o]btaining unencumbered title following a tax lien foreclosure, therefore, does not extinguish burdens running with the land."). A trial court decision subsequent to *Breezy Knoll* referenced *Faught* and ignored the *dicta* cited by Petitioners. *See 15 Tower Ave., LLC v. Ecumenical Hous., Inc.*, No. CV085022316, 2009 WL 241709, at *2 n.1 (Conn. Super. Ct. Jan. 5, 2009).

consideration of whether the value of the easements and restrictions were actually assessed against the dominant estates, because such an inquiry is irrelevant under New Hampshire law given the conclusive presumption discussed above. *See* Part I-A. But for Petitioners to prevail based on their "tax assessment theory," they needed to demonstrate in their summary judgment pleadings that there was no dispute of material fact as to whether the value of the easements and restrictions were actually assessed against the dominant estates as part of the 1978 tax assessment. *See* N.H. REV. STAT. ANN. § 491:8-a. Petitioners claim that "[t]he evidence in this case is overwhelming that the value of the easements and restrictions has never been assessed against the dominant estates; Lot 71 has always been assessed at fair market value as a buildable lot." Appellants' Br. at 13. But the evidence actually presented below demonstrated precisely the opposite, as Petitioners offered no evidence below as to the Common Land's value in 1978 apart from a flawed comparison that did not account for the significant size difference between the referenced parcels. *See* Appellant App. at 60-103.

Petitioners relied on the current designation of the Common Land as a "buildable lot," but Petitioners offered no evidence below to substantiate their claim that the Common Land was designated as a buildable lot when assessed in 1978. *See id.* Under Petitioners' theory the assessment for that tax year is the only assessment of any relevance, as that assessment served as the basis for the subsequent tax sale. Petitioners' discussion of the Common Land's current designation and designation during their period of ownership (2001-2015) is completely irrelevant to the application of Petitioners' "tax assessment theory."

Furthermore, a designation of the Common Land as a buildable lot would not have been improper in 1978 and likely is not even improper today, as the terms of the Declaration permit building on the Common Land. As discussed in the Appellees' motion below, the Declaration

permits the erection of structures incident to "recreational, conservation and park uses for all of the Owners." Appellant App. at 33, Art. III, §§ 5-6. The Declaration thereby provides for the building of any number of valuable structures that would further enhance the value of the property, including a club house, a pool, or a tennis court, for example. In 1978 it was still contemplated that the Developer would transfer the Common Land to the Association and a designation of the Common Land as a buildable lot would certainly have been reasonable, as the Association would be in a position to take full advantage of those building options.

The only other support Petitioners provided below for their claim that the Common Land was improperly assessed was a comparison of the value of the Common Land based on its taxes and the sale price of three undeveloped parcels in Profile Estates. *See* Appellant App. at 64-66. But Petitioners set up a false comparison below by comparing the total assessed value of the Common Land with the total sale price of each parcel noted without accounting for the most obvious difference between the parcels – *they are not even close to the same size as the Common Land*. *See id.* Lot 71, the Common Land, is a 7-acre parcel of undeveloped land. *See id.* at 48. The three undeveloped parcels that Petitioners referenced are all 2 acres or less in size. Lot 61 is 1.065 acres. *Id.* at 48, 86. Lot 19 is 2.050 acres. *Id.* at 50, 87. Lot 55 is 1.308 acres. *Id.* at 48, 88. The only appropriate apples-to-apples comparison would be to obtain the per acre valuation of each parcel by dividing the total value provided by Petitioners by the number of acres of each parcel. Once that value is determined, it would then need to be multiplied by 7 (the number of acres on Lot 71) to control for the different sizes between the parcels. A proper comparison using this method reveals a comparative value of $36,150 for Lot 61, $17,073 for Lot 19, and $34,786 for Lot 55.[5] Controlling for size difference, therefore, it became immediately apparent

[5] Lot 61: $5,500/1.065 = $5,164.32 x 7 = $36,150.24. Lot 19: $5,000/2.050 = $2,439.02 x 7 = $17,073.14. Lot 55: $6,500/1.308 = $4,969.42 x 7 = $34,785.94.

in the summary judgment record below that the Common Land was assessed at a value more than 55% less than Lots 61 and 55.[6] This 55% reduction would account for the fact that a clubhouse, pool, or tennis court could be built on the Common Land, but not a single family residence.[7]

Accordingly, based on Petitioners' own evidence below, if anything the undisputed material facts actually revealed that the Common Land *was* assessed lower than the comparable parcels based on the Declaration that encumbered it. As Petitioners failed to demonstrate that the easements and restrictions were not assessed properly, and the evidence below revealed at a minimum a genuine dispute of material fact relevant to Petitioners' theory but wholly irrelevant under New Hampshire law and the Appellees' motion below, the trial court properly denied the Petitioners' cross-motion for summary judgment.[8]

C. Pursuant to the Terms of the Declaration, the Covenants, Restrictions, and Easements in the Declaration Vested When the Developer Recorded It.

The very first operative clause of the Declaration states unequivocally that "the Developer declares that the real property described in Article II, ***is*** and shall be held, transferred, sold, conveyed and occupied *subject to the covenants, restrictions, easements, charges and assessments hereinafter set forth*." Appellant App. at 31 (emphasis added). In a new argument

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[6] *See* Appellee App. at 19-20. While Lot 71's value is closer to parity with Lot 19, Lot 71 was still assessed at only 88% of the value of Lot 19. The deed provided by Petitioners for Lot 19 reveals that Lot 19 was not sold to an individual but instead sold to a realty trust that likely had superior bargaining power. *See* Appellant App. at 87.

[7] It is also not true that the Declaration deprives the Common Land of all value. *See* Appellants' Br. at 14. The owner of the Common Land has the ability to use that property in the same manner available to all of the other Lot owners in the Profile Estates subdivision. Furthermore, the Petitioners and the Iandolos placed at least a $20,000 value on the Common Land. Appellant App. at 43. But more importantly, in 1978, the only time relevant under Petitioners' "tax assessment theory," the Declaration was even less of a burden and certainly did not deprive the Common Land of all value then.

[8] On appeal Appellants add a reference to the Common Land's frontage, Appellants' Brief at 13, but Appellants did not argue this below or provide evidence to substantiate or quantify in any way what effect any lack of frontage would have had on the Common Land's value in 1978, and the record shows the Common Land did have some frontage. *See* Appellant App. at 48, 103; N.H. REV. STAT. ANN. § 491:8-a.

on appeal the Petitioners claim that language should somehow be disregarded because they incorrectly conclude that it is a "preliminary clause" in the "recitals." Appellants' Br. at 19-20. In truth, however, it is not, as that language follows the "NOW THEREFORE" clause, which instead makes it the very first operative clause of the Declaration, and accordingly the most important operative clause of the Declaration from which all other aspects of the Declaration subsequently follow. *See, e.g., Bair v. Voelker Realty Co.*, 589 S.W.2d 867, 868 (Tex. Civ. App. 1979) ("The operative provision of the contract is as follows: NOW, THEREFORE . . ."); *Fugate v. Town of Payson*, 164 Ariz. 209, 210, 791 P.2d 1092, 1093 (Ct. App. 1990) ("The operative or granting clauses provide: NOW, THEREFORE . . ."); *Parkhurst v. Gibson*, 133 N.H. 57, 63 (1990) (referencing "WHEREAS" clause as general and preliminary, and focusing on substance of "NOW THEREFORE" clause).

But that is not all, as there is not even a conflict between that clause and other specific clauses of the Declaration. *See Parkhurst*, 133 N.H. at 63. In fact, the Declaration also provides unequivocally in "the specific restrictions set forth under Article III," Appellants' Br. at 20, that the "restrictions shall run with, and bind the land, and shall inure to the benefit of and be enforceable by . . . the Owner of any land subject to this Declaration . . . for a term of ten (10) years *from the date this Declaration is recorded*, after which time said restrictions shall be extended for successive periods of ten (10) years." Appellant App. at 33, Art. III, § 10 (emphasis added). By its terms, therefore, the Declaration's covenants, easements, and restrictions vested upon the satisfaction of a single condition precedent – the recordation of the Declaration. *See id.* at 32-33, Art. III, §§ 2, 10; Appellee App. at 7, ¶ 28. The Declaration was recorded on November 14, 1974, and therefore the covenants, easements and restrictions contained in the Declaration vested on that date. *See* Appellee App. at 5, ¶ 12.

In light of that language, it cannot be the case that formation of the Association or conveyance of title to that Association were conditions precedent to the Declaration's vesting because the Declaration specifically further contemplated the formation of an Association and the ultimate transfer of title to that Association as prospective events that would occur *after* the Declaration was recorded. *See, e.g.*, Appellant App. at 32, Art. III, § 1 ("Each Owner must join the Association *which is to be formed…*") (emphasis added); *id.* at § 3 ("The Developer may retain the title to the Common Properties, until such time as, in the opinion of the Developer, the Association is able to maintain the same; but the Developer must convey legal title to the Association when fifty-one percent (51%) of the Lots have been sold."). Despite its recognition that neither of those events had yet come to pass, the Declaration still stated at the outset that the real property in question "***is*** and shall be . . . subject to the covenants, restrictions, easements, charges and assessments hereinafter set forth" and set the date for vesting in the specific provisions of Article III as "the date this Declaration is recorded." *Id.* at 31 (emphasis added); *id.* at 33, Art. III, § 10.

The Declaration further contemplated the possibility that the homeowners association might never be formed by ensuring that the restrictions were "enforceable [either] by the Association, *or the Owner of any land subject to this Declaration…*" *Id.* at 33, Art. III, § 10 (emphasis added). The Declaration further provided that the "failure by the Association *or any Owner* to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter." *Id.* at § 11 (emphasis added).[9]

[9] Appellants' assertion that "[t]he trial court's finding that 'in the absence of an Association, lot owners are permitted to enforce the Declaration' is simply not correct," Appellants' Br. at 20, is itself incorrect, as the quoted language demonstrates the clear right afforded in the Declaration to each individual lot owner to enforce the covenants and restrictions. *See* Appellant App. at 33, Art. III, §§ 10-11.

Petitioners make no effort to reconcile these numerous provisions which all favor the Appellees' interpretation of the Declaration, despite their acknowledgement that courts must consider the Declaration as a whole. *See* Appellants' Br. at 19 (quoting *Chase v. Joselin Mgmt. Corp.*, 128 N.H. 336, 338 (1986)). Instead Petitioners claim that sections 2 and 3 of Article III establish formation of the Association and transfer of title as "conditions precedent" to the vesting of the Declaration. *Id.* at 5-7. But the language they cite clearly does not support their interpretation.

"Although the term 'subject to' may commonly indicate a condition precedent, 'conditions precedent are not favored,' and [the court] will not infer that they were intended unless required by the plain language of the [document]." *Bonneville v. Bonneville*, 142 N.H. 435, 438 (1997) (citations omitted). The "subject to" language cited by Petitioners in Section 2 relates only to the right of each Owner to an "easement of enjoyment in and to the Common Properties." Appellant App. at 32, Art. III, § 2. It specifically precedes only that easement, and is not found as a qualifier to the other restrictions in the Declaration or the Declaration as a whole. *See* Appellant App. at 32-33, Art. III, §§ 5-9. While the easement in Section 2 is qualified by the language "[s]ubject to the provisions stated below," it is clearly referencing Section 4 of the Declaration, because Section 4 picks up where Section 2 left off, referencing the same easement and stating "[t]he Owners' rights and easements of enjoyment in and to the Common Properties shall be subject to the following," and then lists certain provisions common in such declarations and intended to ensure payment of charges assessed and compliance with any rules issued by an Association. *Id.* at 32, Art. III, § 2, 4.

Section 3, on the other hand, which references the requirement of the Developer to convey legal title to the Association, states that requirement in clear connection with its

preceding language that permits the Developer to retain legal title to the Common Properties until the Developer feels comfortable conveying it to the Association. *Id.* at 32, Art. III, § 3. The conveyance requirement is a Lot conveyance threshold requirement intended to ensure that the Developer eventually conveys the property and cannot hold it with unlimited discretion. *Id.* That is why the same provision requires the Developer and its successors in title to bear the maintenance burden of the property until conveyance is made – to ensure that the Developer will be incentivized to convey the property. *Id.*

Nothing in the Declaration links the "subject to" language of Section 2 with the Developer's conveyance requirement in Section 3, nor suggests in any way that the formation of the Association or conveyance of the Common Land is a "condition precedent" to the vesting of the Declaration. This is because it would be unreasonable for the Declaration to contain such a "condition precedent," leaving the Lot Owners at the mercy of the Developer. *See Thiem v. Thomas*, 119 N.H. 598, 604 (1979) ("This court will, where possible, avoid construing a contract in a manner that leads to harsh and unreasonable results or places one party at the mercy of the other."). Read as a whole, the Declaration makes clear that its easements and restrictions vested upon recordation and therefore survived the tax sale.

D. The Doctrine of Redemption Is Irrelevant Here As Respondents Had Nothing to Redeem With Respect to the Declaration As a Result of the Tax Sale.

Petitioners' redemption argument below was predicated solely on the "tax assessment theory" they advanced, claiming that the tax sale extinguished the Declaration. As that argument failed for the reasons discussed above, *see supra* Part I-A, so too did their redemption argument below. Ultimately, whether the Respondents can challenge the tax sale's transfer of fee title to the Common Land is completely irrelevant to the status of the easements and restrictions that passed along with the fee simple title to the Common Land and were not extinguished by the tax

sale. *See supra* Part I-A. Petitioners provided no support below for their leap of logic that the doctrine of redemption somehow extinguished the Declaration. *See* Appellant App. at 67-68; N.H. REV. STAT. ANN. § 491:8-a. Logically it could not have or the doctrine of redemption would limit the effect of *Gowen*, *Buchholtz*, and *Marshall* to only a period of two years until the right of redemption lapsed. *See* N.H. REV. STAT. ANN. § 80:32. That of course was not the case in those decisions, as it is not the case here. As the tax sale did not extinguish the Declaration, the Respondents had no interests to redeem as a result of the tax sale and the doctrine of redemption is irrelevant.

Now for the first time on appeal, having passed on three chances to present this argument to the trial court below, the Petitioners appear to assert that the Respondents' rights under the Declaration are somehow different than other easements and covenants and somehow "derivative of their ownership of the entire fee interest in the Property." Appellants' Br. at 17. They claim now that "the tax sale extinguished the Residents' ownership rights in the Property, and their corresponding rights under the Declaration were equally extinguished," Appellants' Br. at 17-18, but they cite no authority that some easements or covenants are to be treated differently than other easements or covenants in this state, for there is none. In fact, *Gowen*, *Buchholz,* and their progeny clearly direct otherwise. *See supra* Part I-A.

They further completely ignore Section 12 of Article III of the Declaration, which mandates that "[i]nvalidation of any one of these covenants by judgment, court order, or otherwise, shall in no way affect the other provisions in this Declaration, all of which shall remain in full force and effect." Appellant App. at 33, Art. III at § 12. Even if a right of ownership under the Declaration were extinguished by a tax sale, Section 12 preserves the remaining covenants and restrictions to be enforced by any owner of the lots of Profile Estates.

Finally, the doctrine of redemption cannot extinguish the Declaration based on Petitioners' reasoning because the tax sale itself carved out the easements and covenants of the Declaration from the tax sale transfer. The tax sale here specifically conveyed "[t]he whole of the [property] . . . *with appurtenances*." *See id.* at 35 (emphasis added); Br. App. at 38 (emphasis added); Appellee App. at 47. So even if the tax sale extinguished a right of ownership, the terms of the tax sale specifically provided for and carved out the easements and covenants, further obviating the need for redemption and providing yet an additional reason why the Respondents had no need to take action to preserve the Declaration. *See Doyle v. Comm'r, New Hampshire Dep't of Res. & Econ. Dev.*, 163 N.H. 215, 222 (2012); *Handley v. Town of Hooksett*, 147 N.H. 184, 189-90 (2001).

E. <u>The Doctrine of Laches Does Not Bar Enforcement of the Declaration</u>.

"Laches is an equitable doctrine that bars litigation when a potential plaintiff has slept on his rights." *In re Estate of Laura*, 141 N.H. 628, 635 (1997). But the doctrine of laches presupposes an act requiring the potential plaintiff to exercise his or her rights, and "laches is not a defense where there was no prior need to litigate the easement rights because the servient owner had only recently denied access to the easement." 25 Am. Jur. 2d EASEMENTS AND LICENSES § 99. That is why this Court has consistently recognized that there must be some misconduct sufficient to trigger a right in need of enforcement. *See, e.g., Healey v. Town of New Durham Zoning Bd. of Adjustment*, 140 N.H. 232, 242 (1995). In fact, "the burden is on [the party asserting laches] to show that the complainant's delay in bringing a complaint was not merely a result of the lack of awareness of the nature of the conduct, but that the complainant, after becoming aware of the misconduct, slept on his rights." *Id.*

The undisputed material facts in this case demonstrated that "at no time before July of 2014, when the petitioners received a variance for the Common Land, did the respondents become aware of any misconduct by the petitioners that would require them to exercise and enforce their rights under the Declaration." Br. App. at 50. The trial court properly found that "nothing was ever built or developed on the Common Land in violation of the Declaration," and that "[t]he evidence shows that the Common Land has remained unchanged since the petitioners purchased it." Br. App. at 50. The only act Petitioners pointed to below as the basis for their laches claim was the tax sale that transferred fee title to the Common Land to Gaumont. As the tax sale did not extinguish the Declaration, however, it has no bearing on the issue of whether the doctrine of laches applies to bar enforcement of the Declaration. *See supra* Part I-A.

Consistent with Section 5 of Article III of the Declaration, both the Petitioners and the Gaumonts left the land undeveloped. Appellant App. at 53, ¶ 23; *id.* at 57, ¶¶ 10-12; *id.* at 33, Art. III, § 5. As the affidavits of the Petitioners' two former abutting neighbors and Mr. Gaumont himself revealed, neither the Gaumonts nor the Petitioners actually prevented the use of the Common Land for recreational and conservation purposes nor acted otherwise in a manner contrary to the terms of the Declaration. *Id.* at 53, ¶¶ 21-23; *id.* at 57, ¶¶ 10-12; *id.* at 105, ¶¶ 8-13. Indeed, the Appellees set forth the various covenants, easements, and restrictions of the Declaration below and moved for summary judgment on the laches issue because the undisputed material facts demonstrated "that there have been no acts on the part of Petitioners that would require the Respondents to exercise their rights," and Petitioners provided no evidence below in response that they had acted in a manner contrary to any of those easements, covenants or restrictions. *See* Appellant App. at 15-17, 70-72; N.H. REV. STAT. ANN. § 491:8-a, IV. Petitioner Thomas Benoit's affidavit submitted below claimed that no one ever used the

Common Land other than Larry Demers, but even if that were true,[10] the mere nonuser by the residents of the Common Land would not implicate the doctrine of laches, which requires an action by Petitioners contrary to the terms of the Declaration and an awareness of that misconduct by the Respondents. *See Bogardus v. Zinkevicz*, 134 N.H. 527, 530-31 (1991). Ultimately, Petitioners never claimed that they acted affirmatively to prevent any of the Respondents from using the Common Land, nor otherwise acted contrary to the Declaration.[11]

Indeed, the absence of an act contrary to the terms of the Declaration makes this case precisely the opposite of *Nashua Hospital Association v. Gage*, which Petitioners' claim is analogous. 85 N.H. 335, 159 A. 137 (1932). In *Nashua Hospital* the Court found that, beginning at least thirty years prior, "use contrary to the restrictions" were made on twenty of twenty-four restricted lots "without objection from anyone." *Id.* at 137. Indeed, one of the owners insisting on enforcement of the restrictions had herself erected and maintained a building contrary to them. *Id.* at 141. Here there are no such actions, and while the court considered the fact that "all but three" of the twenty-four lots involved allowed the bill to be taken *pro confesso*, the court specifically noted that "[s]tanding by itself evidence as to what such other owners will consent to would be of no value." *Id.*

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[10] It is unquestionably not true based on the record below, as several affidavits with actual knowledge of the relevant facts directly dispute the "mere allegations or denials" in Mr. Benoit's affidavit. *See* N.H. REV. STAT. ANN. § 491:8-a, IV; Br. App. at 53.

[11] Mr. Benoit's affidavit claimed that "[o]n one (1) occasion [he] heard people in the woods of Lot 71 [and] called the police." Appellant App. at 76, ¶ 13. The trial court properly held that such an isolated incident where Mr. Benoit "believed" someone might be using the property, *id.* at 71, 75 ¶ 4, was insufficient as a matter of law to support Appellants' claim for laches. Br. App. at 50-51. Indeed, Petitioners conceded that they did not even know for sure if someone was actually on the property, and certainly they could not have known the identity of any such individual. With no connection to anyone with authority to enforce the Declaration, and no indication as to the circumstances of the incident, this isolated reference cannot serve as the basis for a claim of laches. *See Healey*, 140 N.H. at 242 ("the burden is on [the party asserting laches] to show that the complainant's delay in bringing a complaint was not merely a result of the lack of awareness of the nature of the conduct, but that the complainant, after becoming aware of the misconduct, slept on his rights."); Br. App. at 50-51; N.H. REV. STAT. ANN. § 491:8-a, IV.

Here, by contrast, 21 of the 65 parcels sued by Petitioners have specifically appeared to defend the action, including an incredible 19 *pro se.* Appellee App. at 27. Of those who have not appeared to defend, 37 parcels have only been defaulted, and it is still unknown why and even whether they have been properly served. This is nothing like *Nashua Hospital*, particularly given that Petitioners only needed to acquire the consent of two-thirds of the Respondents to eliminate the Declaration entirely. *See* Appellant App. at 33, Art. III, § 10. It is undisputed that despite their best efforts, Petitioners have not been able to obtain the necessary assent of two-thirds of the Respondents. Appellee App. at 6, 27; Appellant App. at 107-21. Indeed, they have not been able to obtain the assent of even a third of the Respondents, and much less than have appeared in opposition to their Petition. *See id.* Coupled with the vigorous defense of this action by the Appellants and their neighbors, who do not have the unclean hands of the owners in *Nashua Hospital*, this case is precisely the opposite of the defense mounted in that case. *Id.*

Furthermore, the Declaration itself prohibits any claim of laches here. As noted above, the Declaration contains two savings clauses. One provides that the failure of any Owner to enforce any of the restrictions contained in the Declaration does not render it unenforceable. Appellant App. at 33, Art. III, § 11. That savings clause directly eliminates application of the doctrine of laches to bar enforcement of any of the restrictions in the Declaration. The other savings clause provides that "[i]nvalidation of any one of these covenants by judgment, court order, or otherwise, shall in no way affect the other provisions in this Declaration, all of which shall remain in full force and effect." *Id.* at 33, Art. III, § 12. Pursuant to that clause, even if Petitioners had shown below that they acted in a manner inconsistent with one of the Declaration's restrictions, the other restrictions would still remain in full force and effect. The Appellants raised this argument as an alternative and independent basis for summary judgment

below and the Petitioners offered no response, providing an additional and independent basis for affirmance on the laches issue. *See* Appellant App. at 16-17, 60-103; N.H. REV. STAT. ANN. § 491:8-a, IV; *Doyle*, 163 N.H. at 222; *Handley*, 147 N.H. at 189-90.[12]

Appellants claim that the trial court failed to take all reasonable inferences of fact in their favor because Gaumont's Affidavit stated that he bought the property to ensure it remained undeveloped. Appellants claim that "[t]he only reasonable inferences that can be drawn from this statement are" that (1) he believed the tax sale extinguished the Declaration and (2) he believed that the other residents had no right to use the Property after the tax sale. Appellants' Br. at 23; *but see* Appellant App. at 124, ¶¶ 16-17. As the trial court properly found, "[t]he petitioners' arguments are directly contradicted by Mr. Gaumont's Affidavit." Br. App. at 62. Indeed in paragraph 5 of the affidavit, Mr. Gaumont specifically states that he "bought the title to the common land at a tax sale *subject to the easements, covenants, and restrictions in the Declaration that is the subject of this dispute.*" Appellant App. at 104, ¶ 5 (emphasis added). In paragraphs 6 and 7 he specifically explained his familiarity with the *Gowen* decision at the time he purchased the property and that consistent with that decision he "understood that [he] only acquired title to the common land when [he] purchased it, and that the land remained burdened with the easements, covenants and restrictions set forth in the Declaration at issue in this case." *Id.* at 104-05, ¶¶ 6-7. Petitioners' claim of error is therefore absurd in light of Mr. Gaumont's clear statements in paragraphs 5, 6, and 7, and it is clear from the substance of Mr. Gaumont's affidavit that his references to others using the property without interference by him were

[12] The trial court's mistaken ruling of prejudice can also serve as an alternative basis for affirmance as there was no prejudice here because the Petitioners' decision to unquestioningly pay taxes on the Common Land for 13 years despite record notice of the Declaration can in no way be regarded as having been "*caused by* or *result from* the [Respondents' alleged] delay in pursuing a claim." *Pennichuck Corp. v. City of Nashua*, 152 N.H. 729, 741 (2005) (quoting 27 A Am Jur.2d *Equity* § 179 (1996) and adding emphasis).

specifically made to show that he did not attempt to assert a right of adverse possession over the rights of the other owners. *See id.* at 104-05, ¶¶ 5-7. Equally, the ZBA record provided by Appellants below clearly demonstrates that residents who appeared in opposition to the variance *did indeed* believe that the Declaration had not been extinguished. *See id.* at 98 ("the covenants stay with the property"); *see also id.* at 100 ("He has access to this recreational land.").

Finally, Petitioners claim the trial court failed to infer that the less than $100 price they paid for the Common Land reflected that the property was not buildable because it lacked frontage. The Petitioners offered no evidence to support this assertion, N.H. REV. STAT. ANN. § 491:8-a, IV, and the trial court properly held on reconsideration that "[t]he record is devoid of any evidence supporting this assertion." Br. App. at 63. Furthermore, it is not a reasonable inference to infer that a less than $100 purchase price for a 7 acre lot in Merrimack, New Hampshire is solely the result of the property lacking extensive frontage because Petitioner's own variance reveals that overcoming that minor hurdle to development could not possibly swallow the entire value of a 7 acre parcel. *See* Appellant App. at 103. The only reasonable inference is that the covenants, easements, and restrictions, which were recorded in the HCRD, referenced in Petitioners' deed, and which it is undisputed Appellants were on notice of, were the cause of at the very least a substantial portion of the incredibly low sale price. Br. App. at 44.

II. The Trial Court Did Not Err By Ordering the Formation of the Association and the Transfer of the Common Land.

This Court has held unequivocally that covenants and easements survive a tax sale and continue to bind the land notwithstanding the sale. *Buchholz*, 156 N.H. at 175 (citing *Gowen*, 90 N.H. 383, 386–87 (1939)). In *Buchholz*, the Court considered whether the tax sale purchasers took the land subject to the condominium covenants or stripped of "all encumbrances upon it, including condominium assessments and fees." *Id.* at 172, 174. The Court explained that

"[c]ondominium declarations are covenants running with the land" and "[t]he condominium declaration covenants and the estate in land upon which they are imposed are *literally inseparable*." *Id.* at 174 (citations omitted) (emphasis added). Such covenants "sink their tentacles into the soil" and stay with the land notwithstanding a tax sale. *Id.* at 175.

The Declaration at issue here provides clearly and unequivocally that its "restrictions shall *run with, and bind the land,* and shall inure to the benefit of and be enforceable by the Association, or the Owner of any land subject to this Declaration, their respective legal representatives, heirs, successors, and assigns" unless two-thirds of the then Owners record a change to the restrictions. Appellant App. at 33, Art. III, ¶ 10 (emphasis added). Among those restrictions, the Declaration clearly provided that "the Developer must convey legal title to the Association when fifty-one percent (51%) of the Lots have been sold. The cost of maintenance of said Common Properties shall be borne by the Developer or its successors in title until the transfer of said Common Properties to the Association and thereafter the cost of maintenance shall be borne by said Association." *Id.* at 32, Art. III, § 3. Pursuant to *Buchholz*, therefore, Petitioners "took title subject to the . . . covenants that ran with the land" notwithstanding that some of those covenants, easements and restrictions related to the maintenance of the Common Land. *Buchholz*, 156 N.H. at 175 (referencing association of surviving covenants with the "maintenance and preservation of the common areas").

Furthermore, Petitioners' argument is particularly unavailing when the tax sale at issue here is contrasted with the tax sale at issue in *Buchholz*. As noted above, in *Buchholz* the plaintiffs purchased by auction "an unimproved lot within the development [and] [t]itle passed by a deed entitled 'Quitclaim Deed *with No Covenants*.'" *Id*. at 173 (emphasis added). In other words, the tax deed specifically sought to eliminate the covenants on the property. Despite its

clear language, the deed in *Buchholz* was held not to have extinguished the covenants at issue, including maintenance obligations. *See id.* at 175. Here the tax sale specifically conveyed "[t]he whole of the [property] . . . *with appurtenances*." Appellant App. at 35 (emphasis added); Br. App. at 38 (emphasis added). Unlike in *Buchholz*, the language of the tax deed here did not even attempt to extinguish the covenants at issue, so it cannot be the basis for their elimination. Accordingly, given this Court's precedents, and partially in light of the language of the tax sale conveyance at issue, the trial court did not err in ordering the transfer of the Common Land.

Additionally, the transfer of the Common Land to Respondents was not an unconstitutional taking because the decision does not take the land from Petitioners for public use. *See* U.S. Const. amend. ("nor shall private property be taken *for public use*, without just compensation.") (emphasis added). Instead the order directs the transfer of the Common Land from Petitioners to the Association, which is to be comprised of private individuals who hold vested deeded rights to the transfer of that property. The trial court properly declined to consider Appellants' cursory reference to this argument below, but it is also worth noting as the trial court did, that for judicial action to constitute a taking it must eliminate an "established property right" and "[a] decision that clarifies property entitlements (or the lack thereof) that were previously unclear . . . does not eliminate established property rights." *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 728 (2010). Petitioners' Verified Petition expressly acknowledged at the outset that "[a]n actual controversy exist[ed] regarding the enforceability of the Declaration's covenants and restrictions on Lot 71," and indeed specifically requested this transfer. Appellee App. at 7, ¶ 25, 8 ¶ 36. The trial court's order resolved that acknowledged controversy and "clarifie[d]" Petitioners' "property entitlements (or the lack

thereof)," and accordingly cannot constitute the elimination of an established property right and by extension a taking. *Stop the Beach Renourishment, Inc.*, 560 U.S. at 728.

III. The Petitioners Could Have Received an Abatement, and In Any Event, Whether They Would Have Actually Received An Abatement Is Irrelevant.

As the trial court explained in its reconsideration order, "[t]he petitioners' actual success in abatement proceedings is irrelevant to the [trial] Court's decision." Br. App. at 61-62. And properly so, as whether or not Petitioners would have actually received an abatement is completely irrelevant under this Court's precedents. *See Marshall*, 162 N.H. at 567 ("the value of that interest is *deemed to be* reflected in the property that is benefited by the easement (the dominant estate), and, conversely, the easement is *regarded as* diminishing the value to the servient estate.") (emphasis added). The trial court properly did not concern itself with whether petitioners could have in fact received an abatement, just as this Court did likewise in *Marshall*. *See* Appellee App. at 38.

But more fundamentally, Petitioners' argument on this point is not supported by the summary judgment record. Appellees specifically asserted below that Petitioners could have brought a quiet title action back in 2001 when they were first on notice of the Declaration, and if the Common Land was rendered valueless by the encumbrances they could have sought and obtained an abatement. *See* Appellant App. at 21. Petitioners' objection never contested that assertion, nor provided any evidence to support their new assertion that "[i]n the absence of an Association, and ownership of the Property by the Association, an abatement would not be proper" or any of the other factual assertions they make on this point. *See* Appellants' Br. at 26; Appellant App. at 64-74; N.H. REV. STAT. ANN. § 491:8-a, IV. Instead, Petitioners specifically asserted below and now again on appeal that "[t]he covenants and restrictions in this case are such that they deprive Lot 71 of all value." Appellant App. at 66; Appellants' Br. at 14.

Petitioners made and make this assertion despite "the absence of an Association [or] ownership of the Property by the Association." Appellants' Br. at 26. Pursuant to this Court's precedents then, the Petitioners would have been entitled to obtain an abatement had they sought one. *See Gowen*, 10 A.2d at 252 ("When a piece of property is so encumbered with easements that no use can be made of it, the fee owner pays no tax."); *Locke Lake Colony Ass'n, Inc. v. Town of Barnstead*, 126 N.H. 136, 142 (1985) (property subject to covenants akin to the Declaration "was so encumbered with easements that it had no taxable value, and [the Court] h[e]ld, therefore, the plaintiff [wa]s entitled to an abatement").

IV. The Trial Court Correctly Granted Summary Judgment On Petitioners' Count III Claim for Equitable Relief.

As noted above, Count III of the Petitioners' Petition sought "Other Equitable Relief." The only substance provided to that count was a single averment by Petitioners that if the Declaration was deemed enforceable, they requested the trial court to order the Respondents to "form the Profile Estates Homeowners Association, purchase Lot 71 from the Petitioners at its fair market value, and reimburse the Petitioners for all out-of-pocket expenses paid by the Petitioners relative to Lot 71, including real estate taxes." Appellee App. at 8, ¶ 36. Respondents sought summary judgment on that count because there was no basis for the trial court to order Respondents to purchase Petitioners' property in the absence of any pre-existing purchase and sale contract between the parties that could call for specific performance, because the terms of the Declaration, which Count III presumed to be enforceable, prohibited the relief sought, and because Petitioners' conduct disentitled them to the relief sought.

The trial court correctly held that the Petitioners were "not entitled to the equitable relief they s[ought] because the Declaration prohibits it." Br. App. at 55. Indeed, the covenants specifically state that "[t]he cost of maintenance of said Common Properties *shall be borne by*

the Developer or its successors in title until the transfer of said Common Properties to the Association and thereafter the cost of maintenance shall be borne by said Association." Appellant App. at 32, Art. III, § 3 (emphasis added). "[I]t is undisputed that the petitioners are the Developer's successors in title" to the Common Land. Br. App. at 56. Accordingly, the Declaration's enforceability, which is expressly presumed by Petitioners' Count III, requires the cost of maintenance of the Common Land to continue to be "borne" by Petitioners as "successors in title" to the Developer "until the transfer of said Common Properties to the Association and [only] *thereafter* [will] the cost of maintenance . . . be borne by said Association." Appellant App. at 32, Art. III, § 3 (emphasis added).

In the face of this clear requirement of the Declaration, the Petitioners called on a vague reference to "equitable relief" below in an attempt to unravel the consequences of their own actions, but the trial court properly recognized that equity cannot provide the relief that they seek. As this Court has explained, "[w]hen equitable as distinguished from legal relief is sought, equitable as distinguished from legal defenses have to be considered. The conduct of the plaintiff may disentitle him to relief; his acquiescence in what he complains of or his delay in seeking relief may of itself be sufficient to preclude him from obtaining it." *Nashua Hosp. Ass'n*, 85 N.H. 335, 159 A. at 141; *see also Flanagan v. Prudhomme*, 138 N.H. 561, 575 (1994) ("As a general rule, plaintiffs may not recover damages for harm that could have been avoided through reasonable efforts or expenditures.").

Here Petitioners purchased the Common Land from Gaumont by a "Quitclaim Deed" for less than $100. Appellant App. at 37. It is undisputed in this case that Appellants "were on notice of the easements and covenants" in the Declaration. Br. App. at 44. As the trial court properly recognized, the fact that the property was conveyed by quitclaim for the paltry sum of

less than $100 "should at the very least have alerted the petitioners as to the nature of the Common Land." Br. App. at 44. But even if those warning signs were not enough, though they are legally presumed to be, Petitioners' *own* deed to 15 Woodbine Lane, which was conveyed to Petitioners on the same date as the Common Land, further provided explicit reference to the Declaration at issue in this case. *See* Appellant App. at 39.

Despite all these warning flags, Petitioners elected not to bring this quiet title action when they first acquired the Common Land back in 2001. Instead, "[d]espite knowledge of the Declaration, the [Petitioners] paid taxes on the Common Land for thirteen years without complaint." Br. App. at 56-57. If they had brought this action back in 2001 and obtained a determination that the property was so encumbered as to be rendered valueless they could have sought a tax abatement from the town. *See Gowen*, 10 A.2d at 252; *Locke Lake Colony Ass'n, Inc.*, 126 N.H. at 142; Appellant App. at 21. Their failure to bring such an action back in 2001, and their decision to pay taxes on the Common Land with knowledge of the Declaration means that if Petitioners incurred any out of pocket expenses as a result of paying inflated taxes on the property from then until now, those expenses are solely the fault of Petitioners. *See Marshall*, 162 N.H. at 566 ("the actual burden of insuring that this occurs is placed on the property owner through the tax abatement process."). Petitioners enjoyed the use of the 7 acre Common Land behind their former house for 13 years and turned their $100 investment into $20,000. *See* Appellant App. at 22-23, 43. While their inaction has caused them to pay $40,000 in taxes over those years, the transfer ordered below will relieve them of that maintenance obligation in the future and is consistent with the enforceable Declaration on the Common Land.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

Respectfully submitted,

RITA A. DELUDE and
RONALD N. DELUDE,

By their attorneys,

PRIMMER PIPER EGGLESTON & CRAMER PC

Date: January 13, 2016 By: _____

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REQUEST FOR ORAL ARGUMENT

The Appellees respectfully request 15 minutes to present oral argument. Matthew J. Delude will represent the Appellees at oral argument.

Date: January 13, 2016 _____

Matthew J. Delude (N.H. Bar No. 18305)

CERTIFICATION

Pursuant to Supreme Court Rule 16(10), I hereby certify that on this day two copies of this Brief and Appellees' Appendix have been mailed, postage prepaid, to:

> David E. LeFevre, Esq.; Joshua and Nikki Glennon, pro se; Walter Belushko, pro se; Grant and Mary Normandin, pro se; Jason Gosselin, pro se; Michelle Renaud, pro se; Pauline Renaud, pro se; Gary and Catherine Provencher, pro se; David and Linda Miller, pro se; Timothy Poole, pro se; Daniel and Cynthia Harrington, pro se; Richard and Janet Riley, pro se; Michael P. Robinson, Esq.; Kevin Burke, Esq.; Marshall Buttrick, Clerk, Hillsborough Superior Court-South;

and emailed to:

> David Pinsonneault, Esq.; Michael A. Klass, Esq.; Larry and Rachel Demers, pro se; Diane Perrault, pro se; Norman and Sheila Upson, pro se; Jamie Godin, pro se; Tony and Linda Desroches, pro se; Edward and Linda McCann, pro se; Glen and Laura Breton, pro se; Michael and Ruth Marie Swisher, pro se; David C. Baxter, Jr., pro se; Gordon and Susan Hollis, pro se; Jeffrey and Kim Gaumont, pro se; Michelle and Malcom Branen, pro se; Louis and Sherry Nassauer Yelgin, pro se; Rick Miller, pro se;

consistent with their agreement to accept electronic service of all pleadings in accordance with Superior Court Administrative Order 2012-01.

Date: January 13, 2016

Matthew J. Delude (N.H. Bar No. 18305)