

NEW HAMPSHIRE SUPREME COURT

WBTS CC Limited Partnership and
(as counterclaim defendants only) William Binnie and Harbour Links Estates, LLC

v.

Mark and Jenny Galvin, individually, and
as p/n/f of Holly Galvin, Paige Galvin, Kelly Galvin, Gregory Galvin and Michelle Galvin

Case No. 2009-0450

APPELLANTS' ANSWERING BRIEF

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QUESTIONS PRESENTED

In addition to the question presented by the appellant’s Appeal, the Cross-Appeal raises the following question with respect to the validity and enforceability of the Additional Golf Course Easement burdening the Galvins’ property.

1. Whether the trial court correctly held that the Additional Golf Course Easement burdening the Galvins’ land is valid and enforceable. Appendix to Appellant’ Brief (Appellant Appendix) at p. 34-37.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES OR REGULATIONS INVOLVED IN THE CASE

RSA 674:35

RSA 676:16

The text of these statutory provisions is contained in the Addendum, as permitted by Supreme Court Rule 16(3).

STATEMENT OF THE CASE

In its October 26, 2007, Order, this Court, affirming an April 17, 2006, Order from the trial court, rejected the first of the Galvins' three (3) challenges to the validity and enforceability of the Additional Golf Course Easement, rejecting the Galvins' claim that the exclusive nature of the easement somehow invalidated it. Appellant Appendix at pp. 27-28.

The Galvins' remaining challenges to the validity of the Additional Golf Course Easement concern whether the creation of the Additional Golf Course Easement in 1997 violated subdivision regulations.

First, the Galvins argue that the Additional Golf Course easement constituted a subdivision of Lot 5, requiring subdivision approval, and that the omission to obtain subdivision approval somehow nullifies the easement.

Second, the Galvins argue that the Additional Golf Course Easement is somehow invalid because Town counsel did not approve the associated deed language, contrary to a condition of subdivision approval. In making this argument, the Galvins ignore that deed language approved by Town counsel was actually less favorable to them than the deed language governing the Additional Golf Course Easement.

Because the trial court did not originally consider these two (2) challenges to the easement's validity, this Court remanded the two (2) questions to the trial court. Appellant's Appendix at p. 28. By Order dated September 8, 2008, the trial court rejected both challenges. Specifically, the trial court rejected the Galvins' claim that the Additional Golf Course Easement

somehow amounted to a subdivision, requiring subdivision approval. “This Court has no difficulty in dismissing that claim,” said the trial court, properly holding that “[u]nder no circumstances can the creation of an easement be deemed to need subdivision approval.” Id. at p. 35.

The trial court likewise rejected the Galvins’ contention that the omission to obtain Town counsel approval for the deed language associated with the Additional Golf Course Easement somehow invalidates the easement. The trial court properly concluded that “the remedy for failure to meet a condition of subdivision approval is a fine under RSA 676:16 not a divestment of title to property.” Id. at p. 37. The Galvins have appealed these holdings and have further appealed the trial court’s utterly arbitrary decision to award them “only” \$50,000.00 in attorney’s fees. Meanwhile, the Wentworth has appealed the trial court’s decision to award the Galvins any fees at all, as discussed in Appellant’s Brief.

STATEMENT OF FACTS

The Wentworth By The Sea golf course, one of the nation’s oldest golf courses located in Rye, New Hampshire, opened in 1897. WBTSCC Limited Partnership (hereinafter “the Wentworth”) acquired the golf course, including the surrounding 175 acres, on September 8, 1994. When the Wentworth acquired the property, it consisted of 13 separate taxable lots. The Wentworth sought from the Rye Planning Board permission to reconfigure, consolidate and subdivide these lots into the golf course and 24 residential lots. The Subdivision Plan depicting this reconfiguration received Rye Planning Board approval on May 1, 1996. Appendix to Appellee/Cross-Appellant Brief (Cross-Appellant Appendix) at p. 3.

By deed dated December 3, 1996, recorded in the Rockingham County Registry of Deeds (RCRD) at Book 3189, Page 622, the Wentworth conveyed to Harbour Links Estates, LLC

(Harbour Links) all the lots in the subdivision that were intended to serve as residential home lots, including the lot designated as “Lot 5.” These residential home lots thus collectively became known as the “Harbour Links Estates subdivision.”

Harbour Links first conveyed the entirety of Lot 5 to Norman and Nassrine Traverse (the Traverses) by Warranty Deed dated July 2, 1997, recorded at the RCRD at Book 3224, Page 302. Addendum at pp. 72-76. The Warranty Deed expressly stated that “[t]he above Lot is conveyed subject to any and all easements, rights, restrictions, conditions, covenants, encumbrances, and reservations of record or otherwise, insofar as the same are in force and applicable to the premises,” including among other things the Additional Golf Course Easement created by the June 30, 1997, Easement Deed recorded in the RCRD at Book 3224, Page 208. Id. at p. 73.

The Additional Golf Course Easement subject to which the Traverses took Lot 5, and subject to which the Galvins took Lot 5 when the Traverses deeded Lot 5 to them, grants the Wentworth significant usage rights over the portion of Lot 5 burdened by the easement and significantly limits the rights of the Lot 5 owner to use that portion of the lot. The June 26, 1997, Revised Easement Plan, recorded in the RCRD at Book 3224, Pages 298-301, denotes the area of Lot 5 burdened by the “Additional Golf Course Easement.” Cross-Appellant Appendix at p. 114.

The “Corrective Reservation of Golf Course Easement”—specifically referenced in both the Warranty Deed from Harbour Links Estates, LLC, to the Traverses, and more importantly, in the Warranty Deed from the Traverses to the Galvins—describes the terms of the Additional Golf Course Easement. Pursuant to the “Corrective Reservation of Golf Course Easement,” the Wentworth has “the right to exclusively use, in its sole discretion, the land burdened by [the] Golf Course Easement for a Golf Course and Country Club and the playing of the game of golf,

and any other Country Club activities,” including, among other things, “[m]owing, removing, and/or planting trees, sod, grass, shrubs, other plants, and/or other landscaping and fertilizing....” *Id.* at p. 56 at ¶3. The Lot 5 owner may, however, use the areas of the lot burdened by the easement “to install, construct, maintain, repair, and replace septic systems.” *Id.* (emphasis supplied). *Id.* at p. 56 at ¶2C. The “Corrective Reservation of Golf Course Easement” provides, however, that the easement will be extinguished, and full usage rights over the land burdened by the easement will revert to the lot owner, if the land dedicated to the Golf Course and Country Club ceases to be used or operated as a Golf Course or Country Club “for a continuous and uninterrupted period of seven (7) years.” *Id.* at p. 60 at ¶8.

The Galvins make much of the fact that Town counsel did not approve the language of the Corrective Reservation of Golf Course Easement deed, but they ignore that Town counsel did approve a predecessor version of the easement deed that was far less favorable to landowners in the Harbour Links Estates subdivision such as themselves. On or about April 29, 1996, Town Counsel approved a Reservation of Golf Course Easement deed under which property owners had no rights to use the land burdened by the easement. Cross-Appellant Appendix at pp. 41-45. By contrast, the December 3, 1996, Corrective Reservation of Golf Course Easement gives landowners such as the Galvins some rights to use the land burdened by the easement, including the right to use such land to install, construct, maintain, repair, and replace septic systems. Thus, the Galvins’ argument that the easement deed with language approved by Town counsel should control amounts to an utterly nonsensical argument that the Galvins would prefer to have no rights rather than some rights in their land burdened by the easement. *Id.* at pp. 55-61.

The Traverses owned Lot 5 for nearly three (3) years but never developed it, opting instead to convey the lot to the Galvins by Warranty Deed dated May 10, 2000, subject to all the

same easements and encumbrances that the Traverses had borne in taking the lot from Harbour Links Estates, including the Additional Golf Course Easement. Addendum at pp.79-84.

As a matter of undisputed fact, the Galvins had full notice of the fact that the Additional Golf Course Easement burdened Lot 5, and likewise had full notice of the terms of the easement, when they took title. In particular, the Galvins had notice that they took Lot 5 subject to the restrictions described in their Warranty Deed, the Easement Deed and the Corrective Reservation of Easement Deed, and the Galvins had a full opportunity to review these documents, before they purchased the property.

Not only did the Galvins have notice, but the Galvins took affirmative steps to recognize and affirm the Wentworth's rights with respect to the Additional Golf Course Easement when they purchased Lot 5. The Galvins executed a May 10, 2000, letter agreement with the Wentworth—drafted by their own counsel—in which the Galvins confirmed their “understanding of the absolute discretion vested in the golf course owner to deal exclusively with the golf course property, including the easement area.” Addendum at p. 77(emphasis supplied).

Notwithstanding that the Galvins took Lot 5 subject to the Additional Golf Course Easement, they challenged the easement's validity when they filed their counterclaims in this case in November of 2004, four-and-a-half years after they took title to Lot 5, and after they completed construction of their home on the lot.

The Galvins' remaining challenges to the Additional Golf Course Easement include: a.) whether the Additional Golf Course Easement is invalid because it somehow constitutes a subdivision and required subdivision approval—an argument that turns a blind eye to the fact that easements, by definition, are nonpossessory interests in land and hence cannot subdivide land; and b.) whether the Additional Golf Course Easement is invalid because a condition of

subdivision approval was not met in that Town Counsel did not approve the associated deed language, even though Town Counsel did approve deed language for a predecessor version of the deed that was less favorable to landowners such as the Galvin, and even though the law is well-settled that the remedy for an omission to meet a condition of subdivision approval is a civil fine, not an invalidation of the property interest.

SUMMARY OF ARGUMENT

The Court should affirm the trial court's holdings with respect to the Additional Golf Course Easement, finding it valid and enforceable and finding the Galvins' challenges to it uniformly lacking in merit. The Galvins' argument generally is that the Court should invalidate the Additional Golf Course Easement because it somehow violates subdivision regulations. The Galvins have no standing to make this claim because only municipalities have standing to enforce subdivision regulations. Private individuals such as the Galvins do not.

Moreover, even if the Galvins had standing to enforce subdivision regulations against the Wentworth, the Galvins' substantive arguments have no merit. The Galvins argue that the Additional Golf Course Easement is invalid because they claim it effected a subdivision, requiring subdivision approval. This argument is wrong because it ignores the well-settled legal principle that easements, by definition, are nonpossessory and do not subdivide land.

The Galvins further argue that the Court should deem the Additional Golf Course Easement invalid because Town counsel did not approve associated deed language as required by a condition of the subdivision plat. This argument is equally flawed. First, it ignores directly apposite case law holding that a conveyance in violation of a subdivision plat is not void, but that the remedy for such a violation is simply a civil fine, pursuant to RSA 676:16. Second, the Galvins lack standing to make the argument because they suffered no legal injury as a result of

this supposed violation of a condition of subdivision approval. This is so because Town counsel did approve language for a predecessor version of the relevant easement deed that was actually less favorable to the Galvins than the unapproved language about which the Galvins complain. The unapproved language gives the Galvins some rights to use the land burdened by the easement, while the approved language gave the Galvin no rights to use such land.

For these reasons, the Court should affirm the trial court's September 8, 2008, decision finding the Additional Golf Course Easement valid and enforceable.

ARGUMENT

A. The Court Should Affirm The Trial Court And Reject The Galvins' Challenges To The Validity And Enforceability of The Additional Golf Course Easement Because Only A Municipality, Not Private Persons Such As The Galvins, Have Standing To Enforce Subdivision Regulations.

This Court pointedly stated in its October 26, 2007, Order that: "On remand, the trial court may also consider whether the issues [pertaining to the validity of the Additional Golf Course Easement] are properly before it." Appellant's Appendix at p. 28. The Supreme Court here was referencing the "important land use issues" pertaining to whether the easement constituted a subdivision or whether its validity as an interest in land was in any way impaired by an omission to meet a condition of subdivision approval. Id.

The Court should affirm the trial court, finding the Galvins' challenges to the Additional Golf Course Easement meritless, because the Galvins have no private right of action to enforce subdivision regulations. Pursuant to RSA 674:35, municipalities hold the power to regulate subdivisions. RSA 676:16 fully sets forth the procedure for remedying a conveyance of land in violation of subdivision regulations. Pursuant to RSA 676:16, only a municipality may enforce subdivision regulations. RSA 676:16 authorizes the municipality to pursue injunctive relief to enjoin a transfer of land in violation of subdivision regulations, and for transfers of land violating

subdivision regulations that have already occurred, the municipality may levy “a civil penalty of \$1,000 for each lot or parcel so transferred or sold.”

By challenging the Additional Golf Course Easement as an alleged “illegal” subdivision of land or a conveyance of land in violation of subdivision regulations, the Galvins ask this Court to endow them with a private right of action where no such right exists. RSA 676:16 neither expresses nor implies a private right of action to redress alleged violations of subdivision regulations. The statute vests exclusive power to seek remedies for such violations with the municipality, which only makes sense given that the power to regulate subdivisions lies exclusively with the municipality pursuant to RSA 674:35. Because RSA 676:16 neither expresses nor implies a private right of action, the Galvins have no right to seek a judicial declaration that subdivision regulations have been somehow violated or to seek a remedy for the alleged violation. Blagbrough Family Realty Trust v. A & T Forest Prods., 155 N.H. 29, 45 (2007) (“Where there is no explicit or implicit private right of action to seek a declaration of the statute’s violation, we will conclude that the statute does not do so.”).

The Court should therefore affirm the result reached by the trial court, based on the fact that the Galvins as private individuals do not have the right to seek a declaration that subdivision regulations have been violated, nor do they have the right to seek any remedy for such an alleged violation.

B. The Court Should Affirm The Trial Court, Finding That The Additional Golf Course Easement Did Not Create A Subdivision And Did Not Require Subdivision Approval.

Contrary to the Galvins’ contentions, the Additional Golf Course Easement is valid, and did not require Rye Planning Board approval, because the easement did not “further subdivide” Lot 5. A subdivision by definition entails bifurcation of ownership of one lot into two (2) lots.

Restatement (Third) of Property (Servitudes) §5.7 (2000) (stating that a subdivision occurs when property “is divided into separately owned parcels”) (emphasis supplied); 15 Peter J. Loughlin, *New Hampshire Practice: Land Use Planning and Zoning* §30.03 (2000) (“[a] subdivision plat...contemplates a division of a tract of land into a number of smaller lots with eventual separate ownership of each lot.”) (emphasis supplied); RSA 672:14 (defining subdivision as “the division of the lot, tract, or parcel of land into 2 or more lots, plats, sites or other divisions of land”) (emphasis supplied).

The Additional Golf Course Easement, by definition, cannot possibly constitute a subdivision. The easement did not subdivide Lot 5 into two “separately owned” lots (to quote the Restatement). The Galvins hold title to the entire lot. Moreover, the easement did not create two (2) lots with separate ownership of each lot (as is required for a subdivision to exist) because the Additional Golf Course Easement is nonpossessory, as this Court has repeatedly held. *E.g.*, Arcidi v. Town of Rye, 150 N.H. 694, 698 (2004). This is consistent with the view of the Town of Rye, whose Code Enforcement Officer Susan Whitaker testified in her Affidavit submitted to the trial court that “[e]asement lines are not lot lines.” Addendum at p. 50 at ¶4.

Notably, Code Enforcement Officer Whitaker specifically rejected the Galvins’ claim that the Additional Golf Course Easement somehow reduced their frontage below 150 feet. Said the Code Enforcement Officer in her Affidavit, “In particular, Mr. Galvin’s lot has 150 feet of frontage. Easement lines are not lot lines and generally do not interfere with the required frontage.”). *Id.* The courts agree. *See Walkill Valley Acres, Inc. v. Planning Bd. of the Town of Shawangunk*, 527 N.Y.S.2d 124, 126 (N.Y.App.Div. 1988) (holding that there is no authority for the exclusion of an easement from the calculation of frontage).

Indeed, the legitimacy of easements throughout New Hampshire would suddenly be thrown into question, as the trial court properly observed, if the Galvins' arguments misconstruing the nonpossessory nature of easements ever to be receive acceptance., Appellant's Appendix at p. 35 ("Under no circumstances can the creation of an easement be deemed to need subdivision approval. If this were the law then 90% of the easements on New Hampshire land would be illegal."). Furthermore, deposition testimony from AMES MSC Survey Supervisor Colin Serpa submitted to the trial court showed that easements are routinely deeded from one party to another in the Town of Rye, without any contemplation of the supposed need for Planning Board approval:

Q. In addition to the plans that we've reviewed here today, have you over the course of your career here at MSC had occasion to draft plans featuring easements on property in the Town of Rye?

A. Yes.

Q. ...have you come to any understanding through your experience as to whether planning board approval is required for easements in the Town of Rye?

A. It's my belief it's not needed.

Q. What is the basis of your belief?

A. In the 16, 20 years that I've been doing this, I've never gone to a planning board at any time to get an easement, to create an easement.

Addendum at p. 54.

Because the Additional Golf Course Easement did not subdivide Lot 5, it did not require Rye Planning Board approval as a subdivision. Nor did the Town of Rye purport to require such approval, taking the correct position that "easement lines are not lot lines." The Court should therefore affirm the trial court, rejecting the Galvins' contention that the Additional Golf Course Easement somehow subdivided land.

C. **The Court Should Affirm The Trial Court, Holding That The Omission To Meet A Condition of Subdivision Approval Does Not Impair The Validity and Enforceability of the Additional Golf Course Easement.**

The Galvins contend that the Wentworth's omission to meet a condition of subdivision approval somehow entitles them to void the Additional Golf Course Easement, but they fail to provide any authority to support that the omission they allege somehow entitles them to the relief that they seek. This is because no such authority exists.

On the contrary, directly apposite case law from this Court dooms the Galvins' arguments. This Court has repeatedly held that "[a] conveyance in violation of a subdivision plat is not void." *E.g.*, White v. Francoeur, 138 N.H. 307, 311 (1994); Ryan James Realty v. Villages at Chester Condo Assoc., 153 N.H. 194, 199 (2006) ("Assuming without deciding that the Declarant (the grantor of land) needed subdivision approval to transfer its land (and did not obtain such approval), Ryan (the grantee) would still have title to the disputed land."). The Galvins refuse to acknowledge these holdings, failing even to address the cases in their brief. In spite of the settled case law, the Galvins argue that the June 30, 1997, conveyance of the Additional Golf Course Easement from Harbour Links Estates to the Wentworth is somehow void because Harbour Links Estates supposedly violated a condition subject to which the Town of Rye approved the Harbour Links Estates subdivision, omitting to obtain Town counsel's approval of the easement deed language.

The Ryan James Realty case makes clear that the Galvins cannot evade the easement subject to which they took their property in 2000 simply because the Wentworth may have transferred an easement in 1997 (on land in which the Galvins had no interest at the time) in violation of a subdivision plat. In Ryan James Realty, the defendant Villages at Chester Condominium Association made an argument analogous to the argument advanced by the

Galvins here. The Association sought to void a 1995 conveyance of 172.9 acres from a third party to Ryan James Realty because the third party had not received subdivision approval, just as the Galvins seek to void the 1997 conveyance of the Additional Golf Course Easement from Harbour Links Estates to the Wentworth because Harbour Links Estates did not seek subdivision approval. *See* Ryan James Realty, 153 N.H. at 194.

While the trial court agreed with the Association, this Court reversed. The Supreme Court held that the violation of subdivision regulations had no effect on the validity of Ryan James Realty's property interest. Id. at 199. The Supreme Court further held that RSA 676:16 provides the remedy for such a violation, not RSA 676:15, as the Galvins wrongly contend. As distinguished from RSA 676:15, RSA 676:16 deals specifically with transfers of land made without subdivision approval and vests enforcement authority over such transfers exclusively with the municipality. As the Supreme Court stated in Ryan James Realty:

RSA 676:16 “clearly states that a municipality's remedy against one who transfers land without first obtaining the necessary subdivision approval is a fine or an injunction....”

Id. at 199 (emphasis supplied). The Supreme Court added that the Town had sought neither a fine nor an injunction in that case, just as the Town of Rye has sought neither here. Id.

Ryan James Realty dictates the result of this case, in favor of the Wentworth. Just as the Condominium Association's discovery that a third party had transferred land to Ryan James Realty without first obtaining subdivision approval did not entitle the Association to reap a windfall and void the transfer, so the Galvins should not reap a windfall and nullify an easement burdening their property just because Wentworth may not have met a condition of subdivision when—years before the Galvins acquired the property—the Wentworth amended language

contained in an easement deed. The remedy for the violation the Galvins allege is a civil fine that only the municipality—not the Galvins—has the power to levy.

This Court’s opinion in White v. Francoeur, and the statutory history of RSA 676:16 summarized therein, further demonstrate that the Wentworth’s Additional Golf Course Easement is valid and that its validity is in no way affected by whether Planning Board counsel approved the easement deed language as a condition for subdivision approval. As the White court specifically held, “**a conveyance in violation of a subdivision plat is not void.**” White, 138 N.H. at 311 (emphasis supplied). The White court supported its holding by reference to RSA 676:16’s statutory history. Said the Court:

In 1969, the legislature expressly provided that a conveyance in violation of a subdivision was void. Laws 1969, 185:1. In 1970, the legislature repealed this provision. Therefore, only illegal conveyances made between July 27, 1969, and July 3, 1970, are void.

Id. Because the conveyance creating the Additional Golf Course Easement occurred in June of 1997, twenty-seven (27) years after the legislature repealed the statute that invalidated conveyances made in violation of subdivision regulations, the Additional Golf Course Easement is valid and enforceable, and the conditions for obtaining subdivision approval have no relevance to its validity or enforceability.

Furthermore, the Galvins lack standing to grieve the Wentworth’s omission to obtain Town counsel approval of the deed language associated with the Additional Golf Course Easement because the omission caused the Galvins no injury and in fact benefited them. “In evaluating whether a party has standing to sue, we focus on whether the plaintiff suffered a legal injury against which the law was designed to protect.” Lake v. Sullivan, 145 N.H. 713, 716 (2000). Here, Town counsel approved language for a predecessor version of the easement deed

under which the servient estate had no rights to use the land burdened by the easement. The Corrective Reservation of Golf Course Easement about which the Galvins complain (because Town counsel did not approve the language) contains amendments that benefit landowners such as the Galvins, giving them the right to use the land burdened by the easement for septic system purposes. The Galvins therefore suffered no injury as a result of the omission of the Wentworth to obtain Town counsel approval of the Corrective Reservation of Golf Course Easement deed language. Rather, the Galvins benefited from the amended deed, regardless of whether Town counsel approved it. The Galvins therefore lack standing to raise this issue.

Because the remedy for a conveyance in violation of a subdivision plat is a civil fine rather than invalidation of the property interest at issue, and because the Galvins suffered no injury as a result of the omission they grieve, the Court should affirm the trial court, finding the Additional Golf Course Easement valid and enforceable.

CONCLUSION

The Wentworth relies on its opening brief for its legal arguments pertaining to the trial court's error in awarding the Galvins attorney's fees.

For the reasons discussed herein, the Court should affirm the trial court's September 8, 2008, Order finding the Additional Golf Course Easement valid and enforceable.

Respectfully submitted:
WBTS CC LIMITED PARTNERSHIP, WILLIAM
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DATED: February 22, 2010

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the within Brief was mailed this date, first class mail, to opposing counsel Ralph R. Woodman, Jr., Esquire.

Benjamin T. King

REQUEST FOR ORAL ARGUMENT

The appellants request fifteen (15) minutes oral argument and designate Benjamin T. King, Esquire, as the attorney to be heard.

Benjamin T. King

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