

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

**2010 TERM
FEBRUARY SESSION**

No. 2009-0607

**PETER BUCKINGHAM,
KATHLEEN HOELZEL and
FRANK BISHOP,
Petitioners-Appellants,**

v.

**THE TOWN OF RAYMOND,
Respondent-Appellee.**

**RULE 7 MANDATORY APPEAL FROM
LOWER COURT DECISION ON THE MERITS**

**BRIEF OF RESPONDENT-APPELLEE,
THE TOWN OF RAYMOND**

**Peter J. Loughlin
NHBA ID No. 1511
144 Washington Street
P.O. Box 1111
Portsmouth, NH 03801-1111
(603) 431-6466**

**Robert G. Eaton
NHBA ID No. 9981
88 Cable Road
Rye, NH 03870
(603) 964-4709**

**Attorneys for Respondent-Appellee,
The Town of Raymond**

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court's decision should be affirmed because all of the issues raised on appeal, relating to whether the Town of Raymond maintained management and control over a reversionary interest in real estate it purchased in a piece of conservation property, were raised for the first time after trial on a motion for reconsideration, such that they are not properly before this Court.

2. Whether a Letter of Agreement between the Town of Raymond and the Southeast Land Trust of New Hampshire, whereby the Town purchased a reversionary interest in a piece of land as part of a transaction to conserve that property, violated RSA 36-A:4's requirement that municipalities "manage and control" property interests they purchase, where the Letter of Agreement did not bar the Town from managing and controlling its reversionary interest, and the Town is managing and controlling its property through annual inspections and monitoring.

3. Whether this appeal is moot because the purchase of a reversionary interest in conservation land pursuant to a Letter of Agreement, which the petitioners sought to enjoin, was consummated after the trial court denied the petitioners' request for injunctive relief, and the obligated funds have been released.

STATUTE INVOLVED IN THE CASE

RSA 36-A:4

[A conservation] commission may receive gifts of money and property, both real and personal, in the name of the city or town, subject to the approval of the local governing body, such gifts to be managed and controlled by the commission for the purposes of this section. Such commission may acquire in the name of the town or city, subject to the approval of the local governing body, by gift, purchase, grant, bequest, devise, lease, or otherwise, the fee in such land or water rights, or any lesser interest, development right, easement, covenant, or other contractual right including conveyances with conditions, limitations or reversions, as may be necessary to acquire, maintain, improve, protect, or limit the future use of or otherwise conserve and properly utilize open spaces and other land and water areas within the city or town, and shall manage and

control the same, but the city or town or commission shall not have the right to condemn property for these purposes.

STATEMENT OF THE CASE

This case arises out of a 2008 collaboration to conserve the environmentally significant Bond property, which is located primarily in Raymond, New Hampshire. In December 2008, the Town of Raymond entered into a Letter of Agreement (A 5-6)¹ with the Southeast Land Trust of New Hampshire (“the Land Trust”) to provide \$75,000 toward the \$300,000 purchase price of that land, in exchange for the Town receiving a reversionary interest in the property, whereby the Town would acquire the fee to the land if certain conditions were violated.

After failing to dissuade the Town’s elected Board of Selectmen from contributing to the purchase, the petitioners – Peter Buckingham, Frank Bishop and Kathleen Hoelzel – filed a Request for Injunctive Relief, seeking to block the payment. (A 1-3). In the text of their request, the petitioners alleged that the proposed payment should be enjoined because (1) it violated RSA 36-A:4, as in effect in 2008, because the Town could not donate to a third party’s acquisition of conservation land without itself obtaining a property interest, (2) it conflicted with two votes taken at the 2009 Raymond Town Meeting, (3) the money for the project had already been raised elsewhere, and (4) it conflicted with the amended version of RSA 36-A:4 – RSA 36-A:4-a – that went into effect on January 1, 2009.

A Temporary Hearing was held by the superior court (Lewis, J.) on June 29, 2009. (A 25). At the hearing, the petitioners again argued that the payment by the Town violated RSA 36-A:4 because, they claimed, the Town was not getting any interest in the land at issue. (A 34). That argument was based, at least in part, on their

¹ The Town’s Appendix is referenced by the letter “A”, followed by the page number.

misunderstanding that the reversionary interest in the property was to be held by Martha Bond, the original owner of the property, rather than by the Town. (A 30, 35). They also again claimed that the proposed payment was invalid because it (1) violated the votes of the Raymond Town Meeting (A 31-32) and (2) RSA 36-A:4-a, as amended. They also argued that the Letter of Agreement was invalid because, of the 60 acres to be conserved, 3.55 acres were in Epping and .14 of an acre was in Nottingham. (A 16, 28). The Town argued that neither RSA 36-A:4-a, effective January 1, 2009, nor the vote of the 2009 Raymond Town Meeting, barred the proposed payment because the Letter of Agreement, pursuant to which that obligation was assumed, was dated December 8, 2008. (A 12D-12E). Moreover, it asserted, RSA 36-A:4, which was in effect when the Letter of Agreement was executed, permitted town conservation commissions to acquire "any lesser interest" in land, including "reversions", such as the one the Town was purchasing for \$75,000. (A 12D).

After hearing the parties' argument, the court concluded, as the Town argued, that the \$75,000 payment did not violate RSA 36-A:4 because the payment was not a donation. (A 44). Rather, in exchange for its payment, the Town, not Martha Bond, was getting a reversionary interest in the property (A 42-45), said reversion to be triggered if certain conditions were not met. (A 36-37). Consequently, the court denied the petitioners' request for an injunction, but on the condition that a corrective deed be issued excluding from the Town's reversionary interest the land in Epping and Nottingham. (A.59). Shortly after the court's denial of injunctive relief, the Town released to the Land Trust the \$75,000 that it had committed under the Letter of Agreement. (A 65). The Corrective Deed that was a condition of the court's Order was recorded on July 6, 2009. (A 67).

On July 9, 2009, the petitioners filed a Motion for Reconsideration. (A 61-64). In that motion, the petitioners raised none of the issues argued in their Request for Injunctive Relief or at the Temporary Hearing. Rather, they argued, for the first time, that the proposed payment violated RSA 36-A:4's requirement that municipal conservation commissions "manage and control" property interests they acquire. Notwithstanding their assertion to the contrary (Appellants' Brief, p. 3), the transcript unequivocally demonstrates that the petitioners never raised that issue before, either in writing or at the Temporary Hearing. In its opposition to the Motion for Reconsideration, the Town noted that it had filed the Corrective Deed, as ordered by the court, and argued that this new issue regarding management and control had not been raised in a timely manner. It further noted that the Raymond Conservation Commission did have the right to manage and control its reversionary interest in the Bond property through annual inspection and monitoring. On July 23, 2009, the trial court denied the petitioners' Motion for Reconsideration. (A 73). This appeal followed.

STATEMENT OF THE FACTS

On October 1, 2008, the Land Trust asked the Raymond Conservation Commission, pursuant to RSA 36-A:4, to recommend to the Board of Selectmen the expenditure of \$75,000 of Conservation Commission funds toward its purchase of the ecologically valuable 60.55-acre Bond property. (A 15, 16). The total price to conserve the land, including transaction costs, was \$314,000, the balance coming from \$201,000 in private gifts and \$38,000 in grants from the State of New Hampshire. (A 14). The Land Trust proposed to purchase the fee to the property and convey a conservation easement to Bear Paw Regional Greenways. (A 13). The land has considerable conservation values, including proximity to the Pawtuckaway River and 380 acres of additional conservation

land along its banks, numerous recreational opportunities – including a network of hiking trails, and high quality wildlife habitat and water quality protection values. (A 13). Of the land to be protected, 56.86 acres are in Raymond. (A 16). The remaining 3.69 acres are in Nottingham and Epping. (A 16). The Conservation Commission voted to recommend spending the requested \$75,000 on the condition that the Town receive “a reversion clause in the event that [the] Land Trust . . . ceases to exist”. (A 16). In that event, it said, “the Town reserves the right to pursue legal acquisition of the land.” (A 16).

The first of three public hearings to consider the Conservation Commission’s recommendation was held by the Raymond Board of Selectmen on October 20, 2008. The Board voted “to approve the conservation easement, provided it included a reverter clause and a guaranteed right of passage for area residents and such other appropriate reservations”. (A 19). At its next meeting on December 8, 2008, the Land Trust assured the Board that public access would be guaranteed. (A 20, 21). However, the Board did not vote on the Commission’s recommendation because one of its members was absent. (A 21). Finally, on December 22, 2008, after hearing from the public, the Board voted to use \$75,000 of existing Conservation Commission funds “to support the acquisition of the Bond property, in exchange for an interest in the property and the reverter clause.” (A 22-24).

On the same day it voted to approve the Conservation Commission’s recommendation, the Board and the Land Trust executed a Letter of Agreement that provided the Town would pay the Land Trust \$75,000 from the Raymond Conservation Fund “to support the purchase and permanent protection of the Bond property”, subject to two conditions: (1) the Land Trust would “convey a permanent conservation easement”

to Bear Paw Regional Greenways with an executory interest to the New Hampshire Fish & Game Department; and (2) the Land Trust would convey a reverter interest in the fee ownership of the property to the Town. (A 5-6). The Warranty Deed conveying the reverter interest to the Town was attached as an exhibit to the Letter of Agreement. (A 6). It conveyed to the Town the “Right to enter upon and possess the remaining fee interest in and to the [Bond] premises free and clear of any interest of the [Land Trust] should the Condition hereinafter specified be broken”. (A 53). The specified condition states as follows:

This conveyance is SUBJECT TO the Condition that at all times the [Land Trust] and its successors and assigns shall (1) maintain status as an income tax exempt, publicly supported corporation, as determined by the Internal Revenue Service, contributions to which are deductible for federal income tax purposes pursuant to the United States Internal Revenue Service Code; (2) have among its purposes the conservation and preservation of land and water areas; and (3) not post the subject real estate against pedestrian access for walking, fishing, hunting, and passive recreation, except as provided for in the above described Conservation Easement. ***In the event that such Condition is broken the Town of Raymond shall, at its option, be vested with fee title, subject to the terms of the above-described Conservation Easement and Notice of Grant Agreement, and thereafter the Town of Raymond as fee title holder shall have all rights to enter upon and take possession of the above-described real property, free and clear of all condition.*** Nothing herein shall prevent the Town of Raymond from refusing to accept fee title if it should so elect. The aforesaid right to be vested with fee title upon condition broken contained herein shall be specifically referenced in any future conveyance of the fee interest in the Property.

(Emphasis added). (A 57-58). Neither the Letter of Agreement nor the Warranty Deed conveying the reversionary interest to the Town contains any language suggesting that the Town’s right, pursuant to RSA 36-A:4, to manage and control its reversionary interest in the Bond property is in any way restricted. (A 5-6, 53-58). To the contrary, the Town has stated that it is indeed “managing and controlling the reverter interest that it acquired in conservation land through annual inspection and monitoring of the property.” (A 66).

As noted above, after the trial court issued its order denying the injunction, the Land Trust executed and recorded a Corrective Warranty Deed. (A 67). The corrective deed eliminated the Town's reversionary interest in the portion of the Bond property situated in Epping and Nottingham. (A 67, 72). It retained the Town's reversionary interest in the remaining 56.86 acres of the property in Raymond, together with the same conditions quoted above that would trigger the reverter. (A. 67, 71-72).

SUMMARY OF THE ARGUMENT

1. The Town and the Land Trust entered into a Letter of Agreement whereby the Town agreed to pay \$75,000 to help acquire land within its borders for conservation. In exchange for that payment, the Town received a reversionary interest in the property. The sole issue on appeal is whether that agreement violated RSA 36-A:4 because it allegedly gave the Town Conservation Commission no power to manage and control the property. However, the petitioners did not raise that issue in their request for injunctive relief. In fact, they did not raise the issue until after a Temporary Hearing was held and the injunction was denied, when they filed a Motion for Reconsideration. The Town submits that this appeal should be dismissed because the petitioners should have raised the management and control issue long before they did, and at the Temporary Hearing at the latest.

2. The petitioners claim that the Town's acquisition of a reversionary interest in conservation land, pursuant to a Letter of Agreement with the Land Trust, violated RSA 36-A:4, which provides that town conservation commissions shall "manage and control" such land. Nowhere, however, does the Letter of Agreement or the deed transferring the reversionary interest to the Town bar the Conservation Commission from exercising such management and control. To the contrary, the Town has stated that it is

managing and controlling its interest through annual inspection and monitoring of the property. Thus, the Letter of Agreement does not violate RSA 36-A:4.

3. The \$75,000 pledged by the Town under the Letter of Agreement was released to the Land Trust after the superior court denied the petitioners' request for an injunction. Thus, the contract between the Town and the Land Trust has been fully performed. Accordingly, there is nothing left for this Court to enjoin, such that the petitioners' appeal should be dismissed because it is moot.

ARGUMENT

I. THE STANDARD OF REVIEW

“[T]he granting of an injunction is a matter within the sound discretion of the [trial] Court exercised upon a consideration of all the circumstances of each case and controlled by principles of equity.” Holl v. Claremont Assocs., 143 N.H. 563, 565 (1999) (quoting UniFirst Corp. v. City of Nashua, 130 N.H. 11, 14 (1987)). The New Hampshire Supreme Court “will uphold the issuance of an injunction absent an error of law, abuse of discretion, or clearly erroneous findings of fact.” Thompson v. New Hampshire Bd. of Med., 143 N.H. 107, 109 (1998). Moreover, this Court “will uphold a trial court’s decision on a motion for reconsideration absent an abuse of discretion.” Barrows v. Boles, 141 N.H. 382, 397 (1996).

II. THE TRIAL COURT’S DECISION SHOULD BE AFFIRMED BECAUSE THE ISSUES ARGUED IN THIS APPEAL WERE NOT RAISED IN A TIMELY MANNER

“It is well settled that a defendant is entitled to be informed of the theory on which the plaintiff is proceeding and the redress that he claims as a result of the defendant’s actions.” Porter v. City of Manchester, 151 N.H. 30, 43 (2004); Pike Indus., Inc. v. Hiltz Constr., 143 N.H. 1, 3 (1998). If “the plaintiff has suffered damages that are

not readily apparent from the facts alleged, those damages should be specifically stated.”

4 R. Wiebusch, *New Hampshire Practice, Civil Practice & Procedure*, § 7.21, at 178 (1997). In *Morancy v. Morancy*, 134 N.H. 493 (1991), the plaintiffs asserted a claim for intentional infliction of emotional distress. The trial court ruled for the plaintiff, but on a theory of invasion of privacy. Nowhere, however, in their writ, in opposition to a motion to dismiss, or in response to a request for a more definite statement, did the plaintiffs assert such a theory of recovery. *Id.* at 496-97. Only in opposition to a motion for summary judgment did the plaintiffs first raise a privacy claim, but they did not amend their declarations. *Id.* at 497. On appeal, the New Hampshire Supreme Court stated that the “defendant was entitled to have the case tried and decided on the grounds alleged by the plaintiffs The trial court erred in grounding its decision in part on a theory of invasion of privacy.” *Id.* “[C]ontestants in a law suit,” it continued, “must be bound by a set of rules. The most basic of these rules is that the rules cannot be changed in the middle of the contest. Since this contest began without invasion of privacy being a theory before the trial court, to resurrect that theory after the trial would be grossly unfair to the defendant.” *Id.* at 497-98.

On appeal, the petitioners argue that the Letter of Agreement violated RSA 36-A:4’s requirement that town conservation commissions “manage and control” property interests they acquire. However, in their Request for Injunctive Relief they argued that the 2008 Agreement (1) constituted a donation in violation of RSA 36-A:4 because the Town allegedly would not receive an actual property interest, (2) violated the votes of the 2009 Raymond Town Meeting, and (3) violated RSA 36-A:4-a, which did not become effective until 2009. They made the same claims at the Temporary Hearing before the trial court. At no time before the court issued its Order denying injunctive relief did the

petitioners claim that the Letter of Agreement violated RSA 36-A:4's management and control requirements.² Although it is fashioned in several different ways, that is the only issue raised on appeal. As noted above, "a defendant is entitled to be informed of the theory on which the plaintiff is proceeding". Porter, 151 N.H. at 43. In a law suit, "the most basic of rules is that the rules cannot be changed in the middle of the contest." Morancy, 134 N.H. at 497. That, however, is precisely what the petitioners are trying to do here. After arguing one set of theories throughout the litigation, they changed their theory of recovery only when the trial court rejected their earlier ones. To paraphrase Morancy, "since this contest began without [management and control] being a theory before the trial court, to resurrect that theory after the trial would be grossly unfair to the defendant." Id. at 497-98. Accordingly, the Town submits, the decision of the trial court should be affirmed.

III. THE TRIAL COURT'S DECISION SHOULD BE AFFIRMED BECAUSE NOTHING IN THE LETTER OF AGREEMENT BARS THE RAYMOND CONSERVATION COMMISSION FROM MANAGING AND CONTROLLING THE REVERSIONARY INTEREST IN PROPERTY IT ACQUIRED

RSA 36-A:4 provides that, for the purpose of conserving open space, a municipal conservation commission may acquire fees in land, "or any lesser interest," including "reversions," "and shall manage and control the same". The petitioners argued for the first time in their motion for reconsideration, and now, that the Letter of Agreement whereby the Town acquired a reversionary interest in the Bond conservation property violated the management and control provisions of the statute. Nowhere, however, either in the Letter of Agreement or in the Corrective Warranty Deed transferring to the Town its reversionary interest, does there appear language extinguishing the Conservation

² The issue was raised for the first time, after the injunction was denied, on a motion to reconsider.

Commission's statutory right to manage and control the property interest it was receiving. To the contrary, the deed itself states that the Town has "the Right to enter upon and possess the remaining fee interest" in the land if the deed's conditions are broken. (A 53). That alone constitutes management and control over the Town's reversionary interest. Moreover, as the Town stated, it is "managing and controlling the reverter interest that it acquired in conservation land through annual inspection and monitoring of the property." (A 66). Thus, there being nothing in either the Letter of Agreement or in the Town's deed to the property that limits its right to manage and control said property, there is no violation of RSA 36-A:4 and the decision of the trial court should be affirmed.

IV. THE TRIAL COURT'S DECISION SHOULD BE AFFIRMED BECAUSE THE ISSUES RAISED BY THE PETITIONERS ARE MOOT

This Court "generally will refuse to review a question that 'no longer presents a justiciable controversy because issues involved have become academic or dead.'" Petition of Brooks, 140 N.H. 813, 816 (1996) (quoting Appeal of Hinsdale Fed'n of Teachers, 133 N.H. 272, 276 (1990)). "[T]o disregard apparent mootness there must be some pressing interest such as the avoidance of future litigation" or significant constitutional concerns. Timberlane Reg'l Educ. Ass'n v. State, 115 N.H. 77, 79 (1975); Brooks, 140 N.H. at 816. In Kenneth Curran, Inc. v. Auclair Transportation, Inc., the plaintiff sought to enjoin the State's award of a contract to provide transportation services for the liquor commission. 128 N.H. 743 (1986). The plaintiff was one of the losing bidders for the contract. By the time the case reached the Supreme Court, the contract had been performed. Thus, the Court concluded that the case was "entirely moot." Id. at 746. "If . . . there was a violation of the anti-trust statute or the legal standards for competitive bidding," it said, "it related only to a contract that has been fully performed.

With nothing left to enjoin or reform, the exercise of equity powers as requested by the plaintiff would be meaningless.” Id. at 746-47.

Here, the \$75,000 pledged by the Town under the Letter of Agreement was released to the Land Trust shortly after the superior court denied the injunction requested by the petitioners. The corrective reversionary deed promised by the Land Trust was executed and recorded. Consequently, the contract between the Town and the Land Trust has been “fully performed”. Although the petitioners dress their appeal in constitutional clothing, the Town submits that no significant constitutional issue is invoked where it participated in a statutorily sanctioned endeavor, adhering to the terms of the statute, to protect open space within its borders. RSA 36-A:4. Thus, because there is nothing left for this Court to enjoin, the petitioners’ appeal should be dismissed for the further reason that it is moot. Kenneth Curran, 128 N.H. at 746-47.

CONCLUSION

For the reasons stated above, the Respondent-Appellee, the Town of Raymond, respectfully requests that this Court affirm the judgment of the Superior Court.

REQUEST FOR ORAL ARGUMENT

The Respondent-Appellee, the Town of Raymond, hereby requests oral argument. It is estimated that the Appellee will need fifteen minutes for such argument. Peter J. Loughlin, Esq., will present oral argument on behalf of the Appellee.

Respectfully submitted,
THE TOWN OF RAYMOND,
By and through its attorneys,

Peter J. Loughlin
NHBA No. 1511
144 Washington Street
P.O. Box 1111
Portsmouth, NH 03802-1111
(603) 431-6466

Robert G. Eaton
NHBA No. 9981
88 Cable Road
Rye, NH 03870
(603) 964-4709

Dated: February 5, 2010

CERTIFICATE OF SERVICE

I, Robert G. Eaton, hereby certify that on the 5th day of February, 2010, I served two copies of the foregoing Brief of the Respondent-Appellee, Town of Raymond, on all counsel and parties pro se of record, via first class mail, postage pre-paid, to the following:

Mr. Peter Buckingham
Ms. Kathleen Hoelzel
Mr. Frank Bishop
75 Nottingham Road
Raymond, NH 03077