

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**NEWPORT, SC.**

**SUPERIOR COURT**

**(FILED: AUGUST 22, 2012)**

**AMERICAN CONDOMINIUM :  
ASSOCIATION, INC. and CAPELLA :  
SOUTH CONDOMINIUM :  
ASSOCIATION, INC., :  
Plaintiffs :**

**v. :**

**C.A. No. NC 2011-0234**

**STEFANIA M. MARDO, as TRUSTEE :  
of the CONSTELLATION TRUST-2011, :  
Defendant :**

**DECISION**

**THUNBERG, J.** The within action was initiated by Plaintiffs, American Condominium Association, Inc. (“ACA”) and Capella South Condominium Association, Inc. (“CSCA”) by way of a Verified Complaint for Injunctive Relief against the Defendant, Stefania M. Mardo, as Trustee of the Constellation Trust – 2011 (the “Defendant”). The Defendant is the owner of Unit Number 18 of the Harbor Houses Condominium, which consists of nineteen stand-alone units situated on a “peninsula” of Goat Island.

The above-described trio of residences comprises the Goat Island South Condominium (“Goat Island South” or “GIS”) complex, a waterfront

development originally created in 1988 by a Declaration of Condominium recorded in the Land Evidence Records of the City of Newport.

## **I**

### **Facts and Travel**

The Plaintiffs allege that the Defendant has unlawfully commenced construction upon her unit which results in an expansion of the unit's boundaries and constitutes an impermissible intrusion onto Goat Island South's limited common elements. Plaintiffs assert four theories entitling them to equitable relief: (1) violation of G.L. 1956 § 34-36.1-2.17(d)<sup>1</sup> (as well as condominium documents); (2) breach of contract, specifically of the Goat Island South and Harbor Houses Declarations; (3) violation of the restrictive covenants that run with the land; and (4) common law trespass by Defendant's permanent occupation of real property owned by all other unit Owners in an undivided percentage interest.

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<sup>1</sup> Section 34-36.1-2.17(d) of the Rhode Island General Laws provides as follows:

Except to the extent expressly permitted or required by other provisions of this chapter, no amendment may create or increase special declarant rights, increase the number of units, change the boundaries of any unit, the allocated interests of a unit, or the uses to which any unit is restricted, in the absence of unanimous consent of the unit owners. Sec. 34-36.1-2.17(d).

The Court proceeded to conduct and conclude a series of lengthy hearings and the Plaintiffs' motion for a preliminary injunction was advanced to a trial on the merits. (Hr'g Tr. vol. 4, 50-51, Sept. 22, 2011.) The merits of Plaintiffs' claims are now before the Court for decision.

Subsequent to the lawsuit being filed, Mr. Bennie Sisto, the father of the Defendant, "entered into [this] case" as "an additional trustee." (Hr'g Tr. vol. 2, 94, May 27, 2011.) Mr. Sisto, a very genial, respectful and forbearing gentleman, provided the Court with considerable information concerning both the construction history of unit 18 and his intentions for future modifications.<sup>2</sup>

The Constellation Trust-2011 was formed specifically for the acquisition of Harbor Houses Unit Number 18, which it accomplished in January, 2011. Id. at 95. Mr. Sisto explained that the original expansion of

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<sup>2</sup> Mr. Sisto is the owner of Harbor House Unit Number 1 which has been, and remains (on appeal to the Supreme Court), the subject matter of extensive litigation denominated in Newport Superior Court as Sisto v. America Condo. Ass'n, Inc., C.A. No. NC-2008-0119 ("Sisto I"), and Sisto, as Trustee of Goat Island Realty Trust v. Capella South Condo. Ass'n, Inc., C.A. No. NC-2008-0400 ("Sisto II). In Sisto II, a justice of this Court concluded that Mr. Sisto's proposed expansion of Unit 1 exceeded the unit's "footprint" and "boundaries" and intruded upon the "condo" development's "limited common elements." See Sisto II, 2009 WL 3328549 (R.I. Super. 2009). The justice, applying pertinent provisions of the Condominium Act (§§ 34-36-1, et seq.) and relevant condominium declarations, opined Mr. Sisto was required to obtain the unanimous consent of all 154 unit owners to amend the Master Declaration (before proceeding with his construction plans). See id.

the unit's footprint was effectuated by the previous owners. When asked by Plaintiffs' counsel if his (Mr. Sisto's) construction expanded the unit beyond its existing footprint, Mr. Sisto replied:

A: Well, the answer to that question is no. But the real answer to the question might be that it expands it past its 1998 footprint, because the existing foundation when we purchased it was with the foundation that Mr. and Mrs. Rabine [the previous owners] installed in the ground. So when we purchased it, the building right now is being expanded on the existing foundation when I purchased it. Id. at 96.

Mr. Sisto acknowledged that the unanimous consent of the 154 unit owners on Goat Island to expand unit 18 was not obtained. (Hr'g Tr. vol. 2, 108, May 31, 2011.) He also concurred with Plaintiffs' counsel that § 2.3 of the Harbor Houses declaration provides that the "boundaries of each of the units are, as set forth in the plat and plans, are the floors, ceilings, walls, doors, and windows thereof[.]" Id. at 114-15. Mr. Sisto candidly admitted, with regard to the exterior walls, that "there is a completion of the construction on the existing foundation as it existed when [he] purchased it." Id. at 120. Furthermore, the construction resulted in the placement of exterior walls "where there were no walls before." Id. These walls were identified as a new "west exterior wall" and a new "south" exterior wall "being extended to . . . reach that new west exterior wall." Id. at 122.

Although Mr. Sisto agreed that “moving the walls [would] alter the boundaries of [his] unit,” id. at 123, he disagreed that the unanimous consent of 154 unit owners was required per the declaration. Id. at 127.

## II

### Analysis

The Plaintiffs have dedicated nearly one-third of their post-trial memorandum to a discussion of res judicata and claim/issue preclusion. Plaintiffs raised these identical arguments in the context of their motion to stay these proceedings pending the appellate outcome of Sisto I and Sisto II. This Court declined to halt the proceedings and is not disposed to revisit these issues which have already been comprehensively argued by counsel. Our Supreme Court has declared that “[it] will leave it to the sound discretion of the individual trial justice as to whether . . . final judgment on the second suit should be delayed until the pending appeal has been decided.” Perez v. Pawtucket Redevelopment Agency, 111 R.I. 327, 338, 302 A.2d 785, 792 (1973). The Perez court observed that “there are divergent views as to the effect of an appeal on the finality requirement” of the res judicata doctrine. Id., 111 R.I. at 337, 302 A.2d at 791 (citing 9 A.L.R.2d 984 (1950)). This Court retains the opinion that the instant

controversy is a distinct action which should be decided on its own merits (or lack thereof) in the context of its discrete circumstances.

The arguments advanced by Harbor Houses Condominium Association, Inc. by and through its Executive Board cleave to those asserted by the Defendant. Harbor Houses vehemently repudiates Plaintiffs' "unanimity argument," claiming that this Court's acceptance of same would "be tantamount to changing the entire condominium structure on Goat Island and declaring that there is only a single solitary condominium consisting of 154 residence units and ignoring the fact that there are [three] sub[-]condominiums and three sub[-]associations." (Harbor Houses Post-Trial Br. at 5-6.)

If the Court were to declare that there had been an alteration to the boundaries of Harbor House Unit Number 18, Harbor House posits that the requisite consent would be that of the nineteen Harbor House unit owners, and not that of all 154 Goat Island unit owners.

Furthermore, Harbor Houses denies that any Harbor Houses unit expansion constitutes an improper intrusion onto Goat Island South's limited common elements. Harbor Houses faults the Plaintiffs for failing to observe a distinction (in Harbor Houses' perception) between limited common elements and "ordinary" common elements such as "the pool, the tennis

courts, some grass areas, the roads, the guard house and . . . Belle Mer.” Id. at 21. Although the aforementioned are unrestrainedly shared by all of the Goat Island South unit owners, the “Constellation Trust is the only person entitled to occupy her limited common . . . area.” Id. at 22.

Harbor Houses articulates the additional arguments that: (1) §2.3 of the GIS Declaration expressly allows and permits HH expansions; (2) HH expansions are not unit building changes, they are limited common elements; (3) § 11.1(b) of the GIS Declaration does not require 154 unit owners consent for HH expansions; and (4) the fact that 154 unit owners consent is not required for HH expansion is consistent with the Rhode Island Supreme Court’s decisions in America Condo. Ass’n, Inc. v. IDC, Inc., 844 A.2d 117, 128 (R.I. 2004), clarified on reargument by 870 A.2d 434 (R.I. 2005).

## A

### **Violation of § 34-36.1-2.17(d) and Condominium Documents**

Section 34-36.1-2.17(d) of the Rhode Island General Laws provides, in pertinent part, that no amendment may change the boundaries of any unit or the allocated interests of a unit “in the absence of [the] unanimous consent

of the unit owners.”<sup>3</sup> Sec. 34-36.1-2.17(d). It is axiomatic that state law governing condominium ownership would prevail over any disparate provisions in a particular condominium declaration. “A condominium is strictly a creature of statute.” Winkleman v. Toll, 661 So.2d 102, 105 (Fla. Dist. Ct. App. 1995) (citing Suntide Condo. Ass’n v. Div. of Florida Land Sales and Condominiums, 463 So.2d 314 (Fla. Dist. Ct. App. 1984), review denied 469 So.2d 750 (Fl. 1985)). In Winkleman, as in the instant controversy, “the declaration itself provides that it is subject to the existing condominium law.” Id. “Therefore, the provisions of the declaration must conform to the statutory requirements, and to the extent that they conflict therewith, the statute must prevail.” Id.

A condominium is defined in Rhode Island law as “real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real estate is not a condominium unless the undivided units in the common elements are vested in the unit owners.” Sec. 34-36.1-1.03(7)(i). A “unit” is the “physical portion of the condominium designated for separate ownership or occupancy, the boundaries of which are described pursuant to

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<sup>3</sup> GIS is comprised of 154 residential units: 19 stand-alone cottages in HH Condo, 46 units in America Condo (one building) and 89 units in Capella South Condo (one building).

§ 34-36.1-2.05(a)(5).” Sec. 34-36.1-1.03(28). “Common elements” are “all portions of a condominium other than the units.” Sec. 34-36.1-1.03(4).

Each “unit owner” is vested with “an undivided interest in the fee simple estate of the common areas and facilities specified and established in the declaration.” Sec. 34-36-3(18). “Common areas and facilities” include, in pertinent part: the land on which the building is located; the foundations, columns, gardens and parking areas. See § 34-36-3(3)(i)-(iii). Furthermore, “the percentage of the undivided interest of each unit owner in [those] common areas and facilities . . . shall not be altered without the consent of all of the unit owners expressed in an amended declaration duly recorded.” Sec. 34-36-7(b). No amendment may operate to change the boundaries of a unit or the allocated interests of a unit absent the unanimous consent of the unit owners. Sec. 34-36.1-2.17(d).

The “Second Amended and Restated Declaration of Condominium Goat Island South”<sup>4</sup> (“SAR”) provides that the Harbor Houses Condominium:

“shall mean the air space above, and all buildings and improvements now or hereafter located on, the

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<sup>4</sup> The original Declaration of Condominium is dated January 12, 1988, and was recorded in the Land Evidence Records of the City of Newport on January 20, 1988. The SAR cited here was approved by the “vote of unit owners of the Residence Condominiums to which at least 67% of the votes of the Goat Island South Condominium are allocated” on August 25, 2007.

land described in Exhibit D-4<sup>5</sup> hereto, but excluding said land itself, such airspace is a physical portion of the GIS Condominium designated for separate ownership. The lower boundary of Harbor Houses Condominium is the upper surface of the land under Harbor Houses Condominium. The lateral or perimeter boundary of Harbor Houses Condominium extends vertically and coincides with the boundary described on said Exhibit D-3.<sup>6</sup> There is no upper boundary. The Harbor Houses Condominium is owned in the condominium form of ownership pursuant to the Harbor Houses Condominium Declaration.” SAR § 1.19.

With reference to alterations or changes to any building, the SAR forbids encroachment upon limited common elements. Additionally, no alteration can exceed the building’s “footprint” as it existed on January 20, 1988. Id. at § 2.3(a)(1)(A) and (M). In Article 11, the SAR incorporates R.I.G.L. § 34-36.1-2.17(d), which requires the unanimous consent of all unit owners should an owner propose to change the boundary of any unit. Id. at § 11.1(b).

The Second Amended and Restated Declaration of Condominium, Harbor Houses Condominium, (the “Harbor Houses SAR”), in essence, echoes the aforementioned requirements and provisions. Any Harbor Houses unit owner who is desirous of effecting an alteration to a building’s

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<sup>5</sup> Exhibit D-4 is entitled “Legal Description.”

<sup>6</sup> Exhibit D-3 is “Intentionally Omitted” on the List of Exhibits to the SAR.

exterior which would extend beyond the building's foundation, as extant on January 20, 1988, is obligated to procure the unanimous written consent of all unit owners. Harbor Houses SAR at § 2.4(d). The Harbor Houses SAR further specifies that decks and yards designed to serve a single unit, but located outside the unit's buildings are limited common elements. Id. at § 2.3.

The evidence and testimony presented to the Court, including Mr. Sisto's own frank acknowledgements, incontrovertibly establish that the construction<sup>7</sup> occurring on the site of Harbor Houses Unit 18 exceeds the controlling January 20, 1988 footprint. Mr. Sisto's testimony, as detailed above, is confirmatory of the fact that an alteration and a boundary change occurred to Harbor Houses Unit 18. Regardless of Mr. Sisto's sincerely held beliefs of good faith compliance with the Condominium Act and the condominium declarations, the written consent of all 154 unit owners is an absolute requisite. The Act is also transgressed due to the absence of the unit owners' consent to an amendment of declaration regarding the resultant shift in allocated interests.

Expansion of a unit onto a common area causes "a de facto alteration of the percentage of the undivided interest which each owner has in the

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<sup>7</sup> The Court actually viewed the property while construction was underway and was instructed by the parties as to what was proposed as an alteration.

common areas. . .<sup>8</sup> Strauss v. Oyster River Condo. Trust, 1992 WL 12153337, at \*23 (Mass. Land. Ct. 1992). If the Court was permitted to view this controversy through a purely equitable lens, a different outcome could be considered. The single-standing Harbor Houses condominiums are stunningly unique in their waterfront<sup>9</sup> location and attractive “cottage” architecture. Constrastingly, the residence units of America and Capella are all contained in their correspondent brick buildings. There is no view obstruction for America and Capella by the structures on Harbor Houses. Compellingly, Harbor Houses Condominium Association, Inc. endorses the actions of the Defendant, their immediate neighbor.

Nonetheless, the Court is duty-bound to apply the legal principles enunciated above, and in doing so, is precluded from accepting Harbor Houses’ contentions that: (1) the unanimous consent required is limited to the nineteen Harbor Houses unit owners; (2) the Harbor Houses expansion does not violate the GIS or Condominium Act’s definition of a “unit”; (3) the allocated percentages among the residence condominiums are not altered; (4) there is no intrusion into limited common elements; and (5) § 2.3

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<sup>8</sup> This finding is dispositive of Plaintiffs’ trespass argument.

<sup>9</sup> When one is standing on the deck of Harbor House Unit 18, the waters of Newport Harbor are literally flowing beneath one’s feet.

allowing unit expansions over limited common elements is consistent with the Act.

In the context of this particular litigation, the Court can apprehend the inclusion, in Harbor Houses' memorandum, of the issues of estoppel, laches, and statute of limitations regarding Harbor Houses' expansion, Harbor Houses, in its post-trial brief, correctly observes that the 2007 amendment to the GIS Declaration "was controversial because prior to its enactment certain American and Capella representatives contended that the America Supreme Court decisions (because of the 154 voting requirement) dictated that Goat Island was a single condominium (as opposed to 3 condominiums with a Master Condominium tiered structure[.])" (Harbor Houses Post-Trial Br. at 33.)

"Exhaustive debate" did ensue with the result that "the original condominium construct. . . was retained and § 2.3 was enacted which expressly recognized Harbor Houses' right to expand but imposed 16 different conditions, limitations and restrictions, including a view restriction, yet without the requirement of an Amendment to the GIS Declaration for each expansion." Id. at 33.

In fact, nine Harbor Houses unit owners "expanded their units without objection or challenge from America or Capella." Id. at 34. Clearly, this

scenario led Mr. Sisto to the regrettable, but understandable, perception that he was “singled out” by the opposition. Mr. Sisto had registered this objection to the SAR document/declaration and believes that it is inconsistently applied. He testified that he “spent a lot of money, a lot of time, [and] six years, trying to comply with this theoretical document that’s out there that sometimes they want to use it, to their convenience, sometimes they want to use it against [him] at that time.” (Hr’g Tr. vol. 3, 53, June 14, 2011.)

Any consideration of condominium controversies of this cast inevitably reverts to the paramount precept that a “condominium is strictly a creature of statute.” Winkleman, 661 So.2d at 105. Without rigorous adherence to the law which is its genesis, it has no lawful existence.

### **III**

#### **Conclusion**

Therefore, the Court is compelled to grant Plaintiffs’ request for injunctive relief precluding expansion of Harbor Houses Unit Number 18. The Court declines to grant Plaintiffs’ request that it order “Mr. Sisto to remove any and all construction that extends Unit No. 18 beyond its pre-expansion footprint” and further declines to award the Plaintiffs court costs

and attorneys' fees. Counsel shall prepare an order in conformance with this Decision.