

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**NEWPORT, SC**

**SUPERIOR COURT**

**(FILED – AUGUST 27, 2009)**

**BENNIE SISTO, AS THE TRUSTEE OF THE :  
GOAT ISLAND REALTY TRUST :**

**v. :**

**No. NC-2008-0400**

**CAPELLA SOUTH CONDOMINIUM :  
ASSOCIATION, INC., HARBOR HOUSES :  
CONDOMINIUM ASSOCIATION, INC., AND :  
GOAT ISLAND SOUTH CONDOMINIUM :  
ASSOCIATION, INC. :**

**DECISION**

**CLIFTON, J.** Before this Court is Plaintiff Bennie Sisto, as Trustee of the Goat Island Realty Trust’s (“Plaintiff”) Motion for Summary Judgment pursuant to Rule 56 of the Superior Court Rules of Civil Procedure on Plaintiff’s Complaint for Declaratory Judgment pursuant to G.L. 1956 §§ 9-30-2 and 9-30-3.<sup>1</sup> This action involves the proposed expansion of Plaintiff’s condominium unit located on Goat Island in Newport, Rhode Island. Plaintiff now contends that no genuine issue of material fact exists, and Plaintiff is entitled to judgment in his favor as a matter of law on the remaining claims in his Complaint.<sup>2</sup> Specifically, Plaintiff asks this Court

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<sup>1</sup> The declaratory judgment relief requested in Sisto v. America Condo. Assoc., Inc., NC-2008-0119 (“Sisto I”) and the declaratory judgment requested in the present matter are substantially similar. One of the differences between Plaintiff’s request for declaratory judgment in Sisto I and the present matter relates to Plaintiff’s claim regarding air space adjacent to its unit. In the present matter, Plaintiff seeks a declaration that its claim to air space, adjacent to its unit, is synonymous with its development rights to expand his condominium unit.

<sup>2</sup> The parties have agreed to the following declarations set forth in Plaintiff’s Complaint:

- 1) Pursuant to the provisions of the Master Declaration and Condominium Act, each of the 154 unit owners has an undivided common ownership interest in the Land. Accordingly, the Land is not owned by any of the following: GIS, America, America Association, Capella, Capella Association, Harbor Houses, or Harbor Houses Association;
- 2) A Unit of Owner of Harbor Houses Residences has an undivided common ownership interest in the Land, including the Land under the Unit Owner’s Harbor Houses Residence Unit;
- 3) The Trust, as a Unit Owner of a Harbor Houses unit has a common undivided ownership interest in the Land under the Trust’s Residence Unit;

to declare that it has sufficient right to make improvements, alterations and changes to his Harbor Houses Residence Unit (“Unit”) in compliance with Section 2.3 of the Second Amended and Restated Declaration of Condominium (the “Master Declaration”) and Section 2.4 of the “Second Amended and Restated Declaration of Condominium, Harbor Houses Condominium” (the “Harbor Houses Declaration”). Plaintiff also asks this Court to declare that that it has sufficient ownership rights and title in the land beneath and around his Unit “to file” his application with the Coastal Resources Management Council (“CRMC”).

## I

### Facts and Travel

Defendant Goat Island South Condominium (“GIS”) is a condominium originally created in 1988 by Declaration of Condominium (the “First Declaration”). The First Declaration was amended from time to time with the current document, the Master Declaration, adopted August 25, 2007. The Rhode Island Condominium Act<sup>3</sup> (“the Act”) applies to any condominium created in Rhode Island after July 1, 1982, including GIS and its Declarations. GIS consists of 154

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- 4) Pursuant to the provisions of the Master Declaration, the Harbor Houses Declaration, and the Condominium Act, each of the 19 Harbor Houses Unit Owners has an undivided common ownership interest in the air space above the surface of the Land and surrounding each Harbor Houses Residences Unit.
  - 5) The Trust, as a Unit Owner of a Harbor Houses Residence Unit, has an undivided common ownership interest in the air space above the surface of the Land and around the Trust’s Residence Unit;
  - 6) The air space above the surface of the Land and surrounding the Trust’s Residence Unit, the lower boundary of which is the surface of the Land, is a Limited Common Element and the Trust has an exclusive right to use and enjoy that Limited Common Element;

This Decision addresses the remaining declarations, which include:

- 1) The Trust, as a unit owner of a Harbor Houses’ Residence Unit, is permitted and authorized to make improvements, alterations and changes to its Harbor Houses Residence Unit provided that the Trust complies with the provisions of § 2.3 of the Master Declaration and § 2.4 of the Harbor Houses Declaration; and
- 2) The Trust has sufficient right, title and interest in the Land and air space above and surrounding its Harbor Houses Residence Unit to confer standing upon the Trust to file the Application with the CRMC, and any other appropriate government agency.

<sup>3</sup> See Section 34-36.1-1.01, et al.

residential units located in the following three “Residences”: 1) 46 units in America Condominium (“America”), 2) 89 residential units located in the Defendant Capella South Condominium (“Capella”); and 3) 19 separate townhouse, stand-alone residential units located in Defendant Harbor Houses Condominium Association, Inc. (“Harbor Houses”). In accordance with § 34-36.1-2.01 of the Act, each of the three Residence Condominiums has its own Declaration of Condominium recorded in the City of Newport Land Evidence Records. The Act and the Master Declaration, together with each respective Residence Condominium Declaration, govern the rights, responsibilities and obligations between the condominium associations and the GIS unit owners. The operative Harbor Houses Declaration (the “Harbor Houses Declaration”) is dated May 27, 1988, as amended by the First Amendment,<sup>4</sup> Second Amendment,<sup>5</sup> Third Amendment,<sup>6</sup> Fourth Amendment,<sup>7</sup> and Fifth Amendment.<sup>8</sup> Pursuant to the Harbor Houses Declaration, all of the land underlying each condominium and unit is a GIS Common Element. Plaintiff owns Harbor Houses Unit #1, a townhouse that is surrounded by land that §2.3 and §2.5 of the Harbor Houses Declaration designate as a Limited Common Element.

On or about October 19, 2006, Plaintiff filed an application with the CRMC to demolish his existing Unit and construct a new and larger single-family dwelling that would extend beyond the Unit’s current “footprint.”<sup>9</sup> The CRMC requires applicants to provide “a letter from the local tax assessor stating ownership of the property.” The local tax appraisal specified the assessed value for “Improvements,” which includes the Unit, but provided no assessed value for the “Land” beneath and surrounding the Unit. On January 16, 2007, America submitted a

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<sup>4</sup> The First Amendment to the Harbor Houses Declaration was adopted on July 20, 1995.

<sup>5</sup> The Second Amendment to the Harbor Houses Declaration was adopted on October 13, 1999.

<sup>6</sup> The Third Amendment to the Harbor Houses Declaration was adopted on November 20, 2000.

<sup>7</sup> The Fourth Amendment to the Harbor Houses Declaration was adopted on September 16, 2004.

<sup>8</sup> The Fifth Amendment to the Harbor Houses Declaration was adopted on October 5, 2005.

<sup>9</sup> Black’s Law Dictionary defines the term “footprint” as “[t]he shape of a building’s base.” Black’s Law Dictionary 672 (8<sup>th</sup> Ed. 2004). Additionally, Section 2.4 of the Harbor Houses Declaration defines the term “footprint” as “the foundation of the Building as it existed on January 20, 1988.”

substantive objection to the Plaintiff's application to the CRMC. The objection stated that (1) Plaintiff did not own the land it proposed to expand upon; (2) that Plaintiff's proposed expansion failed to comply with CRMC setback regulations; and (3) that a Rhode Island Supreme Court decision had held that the condominium common areas are commonly owned by all 154 unit owners (citing America Condominium v. IDC, Inc., 870 A.2d 434 (R.I. 2005)).

Nonetheless, Plaintiff proceeded with his CRMC application, and on October 7, 2007, he re-submitted plans for his proposed expansion. On November 26, 2007, counsel for America and Capella submitted a substantive objection stating that Plaintiff was not the owner of the land he intended to expand upon. Unsatisfied with Plaintiff's ownership interest in the land, the CRMC refused to process Plaintiff's application. Plaintiff therefore filed suit asking this Court for a declaratory judgment. On January 30, 2008, Plaintiff filed revised building plans, together with supporting materials, with the CRMC. On February 20, 2008, the CRMC, by letter, informed Plaintiff that it refused to process his application on the grounds that it lacked "jurisdiction to resolve the ownership issue."

## **II Standard of Review**

"Summary judgment is a proceeding in which the proponent must demonstrate by affidavits, depositions, pleadings and other documentary matter ... that he or she is entitled to judgment as a matter of law and that there are no genuine issues of material fact." Palmisciano v. Burriville Racing Association, 603 A.2d 317, 320 (R.I. 1992). It is well settled that in ruling on a motion for summary judgment, the motion justice should construe all evidence in the light most favorable to the non-moving party. Sakonnet Point Marina Ass'n v. Bluff Head Corp., 798 A.2d 439, 441 (R.I. 2002); McKinnon v. Rhode Island Hospital Trust National Bank, 713 A.2d 245, 247 (R.I. 1998). If after considering the evidence, the motion justice concludes that there

are no genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Id.

### III

#### Analysis

##### A

#### **Plaintiff's Right To Improve, Alter and Change His Unit in Accordance with § 2.3 of the Master Declaration and § 2.4 of the Harbor Houses Declaration**

Plaintiff first asks this Court to declare that he, as a Harbor Houses' unit owner, is permitted and authorized to make improvements, alterations, and changes to his unit provided that Plaintiff complies with the provisions of § 2.3 of the Master Declaration<sup>10</sup> and § 2.4 of the

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<sup>10</sup> Section 2.3 of the amended Master Declaration states, in pertinent part,

(i)Improvements, alterations or changes may be made to any building or Common Element of Harbor Houses Condominium to the extent permitted by its Declaration as of June 30, 2007. No alterations, change in exterior appearance or increase in the size of any building ("improvements") shall be made that is not first approved by the Harbor Houses Condominium executive board and does not comply with the following:

(A) the improvements shall not encroach into the yard designated as a Limited Common Element for the adjoining Residence Unit, nor shall the improvements encroach beyond the Limited Common Elements of the Residence Unit that is being improved, altered or changed;  
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(D) the work shall be done in accordance with the applicable Federal, State and local laws in a good and workman like manner free from defective materials;  
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(N) if any proposed improvements, alterations or increases in the size of any building would extend any portion of the building in which such unit is contained beyond the "footprint," so called, of the building as it existed on January 20, 1988 and would significantly diminish the water view of other Residence Units, as viewed from the glass doors/windows/balconies of such other Residence Units, the Owners of not less than two Residence Units which are in reasonable proximity to such proposed improvements, alterations or changes may request in writing review by his/her Residence Condominium Board. If that Board determines that the diminution of the water view is significant, it may, by majority vote of its members, refer the matter for final and binding review by the GIS Board . . . . Sections 2.3(a)(i), 2.3(a)(i)(A); 2.3(a)(i)(D); 2.3(a)(i)(N).

Harbor Houses Declaration.<sup>11</sup> Plaintiff proposes to expand his Unit into his yard, which is a Limited Common Element. The Harbor Houses Declaration defines the term, “Limited Common Element,” as “that portion of the Common Elements appurtenant to or associated with and intended for the exclusive *use* [but not ownership] by one or more but fewer than all Units, and

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<sup>11</sup> Section 2.4 of the Harbor Houses Declaration, entitled “Alterations” provides in paragraph (c):

A Unit Owner may, with the prior written consent of the Executive Board, change or make alterations to the exterior design and arrangement of the Building in which his Unit is contained . . . provided that any such change or alteration does not extend any portion of the Building in which said Unit is contained beyond the “footprint,” so called, of the Building as it existed on January 20, 1988 . . . [e]xcept as specifically provided in Section 4.2(d) . . . no Unit Owner may make any changes or alterations to the exterior of the Building in which such Unit Owner’s Unit is contained, which alterations or changes would extend any portion of the Building beyond the Building’s “footprint,” without first obtaining the unanimous written consent of all Unit Owners.”

Section 2.4, paragraph (e) provides:

Any changes, alterations or construction undertaken by any Unit Owner pursuant to Sections 2.4(b), (c) and (d) . . . shall be performed only in accordance with all applicable laws, ordinances and regulations and the Unit Owner undertaking any such change, alteration, or construction shall be responsible for obtaining any and all consents, permits and approvals of any person or entity (including without limitation, any governmental or regulatory board, official or agency) necessary in connection with any such change, alteration or construction.

Section 2.4, paragraph (g) states,

Except as specifically permitted by the Act and this Declaration, no Unit Owner shall make or cause to be made any alterations or changes to any Common Element or Limited Common Element (including, without limitation, the exterior of the Building in which such Unit Owner’s Unit is located) without first obtaining the written consent of the Executive Board.

On July 20, 1995, the Harbor Houses Condominium Association adopted the First Declaration to the Harbor Houses Declaration. The First Amendment added § 2.8, entitled “Improvements to Unit,” which states in pertinent part,

A unit owner may construct improvements to increase the size of the Owner’s Unit and the Building containing the Unit subject to the following . . . the improvements shall constitute a Limited Common Element for the benefit of such Unit . . . the improvements shall not encroach on the yard designated as a Limited Common Element to the adjoining Unit . . . the improvements shall not increase the foot print of the Unit (inclusive of the exterior walls enclosing the Unit by more than thirty (30%) percent . . . the Association shall increase the Common Expenses charged to the Unit Owner . . . . See Sections 2.8, 2.8(a), 2.8(b), 2.8(c), 2.8(l).

intended for the exclusive *use* of such Units . . . .” Id. at § 1.16 (emphasis added.) Similarly, the Act defines a “Limited Common Element” as “a portion of the common elements allocated by the declaration . . . for the exclusive *use* of one or more but fewer than all of the units.” Section 34-36.1-1.03(19) (emphasis added.) Therefore, Harbor Houses’ Limited Common Elements are owned in an undivided percentage interest by all 154 unit owners.

To conclusively establish the scope of Plaintiff’s expansion rights, three issues must be examined: 1) whether Plaintiff is permitted and authorized to make improvements or alterations to his Unit in the form of an expansion provided that it complies with all governing statutes and condominium provisions; 2) whether Plaintiff’s is permitted to expand his Unit onto a Limited Common Element that is not part of Plaintiff’s present Unit; and, if so, 3) whether Plaintiff must comply with the Act, §§ 34-36.1-2.08 and 34-36.1-2.17(d), and file an amendment to the Master Declaration, thereby necessitating unanimous consent from all 154 unit owners.

## 1

### **Plaintiff’s Right To Make Improvements and Alterations to His Unit**

Section 2.8 of the Harbor Houses Declaration expressly grants unit owners the right to increase the size of the owner’s unit and the building containing the unit, subject to several restrictions. The Act, however, does not grant unit owners the same express right to expand one’s unit “boundaries.” Nonetheless, the provisions of a declaration under which a condominium is created must conform to all statutory requirements, and to the extent that they conflict therewith, the statute must prevail. 15A Am.Jur. 2d Condominium, Etc. § 7 (2009) (citing Winkelman v. Toll, 661 So.2d 102 (Fla. Dist. Ct. App. 4<sup>th</sup> Dist. 1995)). Additionally, § 2.3(a)(i)(D) of the Master Declaration and § 2.4(e) of the Harbor Houses Declaration specifically state that any changes, alterations or construction undertaken by a unit owner must

be performed in accordance with the applicable state laws. Thus, in any instance where the Master Declaration or Harbor Houses Declaration conflict with the Act, Plaintiff must comply with the applicable provisions of the Act rather than the inconsistent provision set forth in the applicable declaration.

The Act permits individual unit owners to make “improvements” or “alterations” to their units so long as such “improvements” or “alterations” do not “impair the structural integrity of the mechanical systems or lessen the support of any portion of the condominium.” Section 34-36.1-2.11(1). Further, a unit owner may not change “the appearance of the common elements, or the exterior appearance of a unit or any other portion of the condominium, without permission of the association . . . .” Section 34-36.1-2.11(2). In other words, an individual unit owner may construct improvements or build any structure wholly within the “boundaries” of a single condominium unit.

Consequently, an individual unit owner’s right to construct upon and improve his or her unit does not constitute the exercise of a “development right” which the Act exclusively reserves to “declarants.”<sup>12</sup> This is so because improvements made to the interior of a particular unit do not alter any common areas or affect the other unit owners’ ownership interest in the condominium. Conversely, a declarant must amend the condominium declaration to exercise a “development right” because “the exercise of such a right changes the legal rights and ownership interests of the other condominium-unit owners.” Section 34-36.1-2.10(a). It therefore follows

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<sup>12</sup> Section 34-36.1-1.03(11) defines a “development right” as “any right or combination of rights reserved by a declarant . . . to . . . [a]dd real estate to a condominium . . . [c]reate units, common elements, or limited common elements within a condominium . . . [s]ubdivide units or convert units into common elements, or . . . [w]ithdraw real estate from a condominium.” When addressing unit improvement and expansion rights, the Act “draws a distinction between ‘development rights’ and the right to make improvements or alterations to a unit.” America Condominium Ass’n, Inc. v. IDC, Inc., 870 A.2d 434, 438 (R.I. 2005) (citing Sections 34-36.1-1.03(11) and 34-36.1-2.11). A “declarant” is defined as “any person or group of persons acting in concert who: (i) [a]s part of a common promotional plan, offers to dispose of his, her or its interest in a unit not previously disposed of; or (ii) [r]eserves or succeeds to any special declarant right.” Section 34-26.1-1.03(9).

that any improvements or alterations made to a unit by an individual unit owner which extend beyond the unit, as defined by the Act and applicable condominium declaration, would invariably alter common areas and affect the other unit owners' ownership interest in the condominium. Thus, while the Act expressly permits and authorizes Plaintiff to make improvements or alterations exclusively within the Unit's "boundaries," the Act does not automatically grant Plaintiff the absolute right to expand beyond his Unit's "boundaries." Therefore, the Court must next consider whether an individual unit owner has a right to expand his unit's "boundaries" or "footprint" onto a Limited Common Element.

## 2

### **Plaintiff's Right to Expand His Unit onto a Limited Common Element**

A unit's "boundaries" are defined by the Act in § 34-36.1-2.02 and § 2.3(a) of the Harbor Houses Declaration. Both the Act and Harbor Houses Declaration define a unit's "boundaries" as the floors, ceiling, walls, door, and windows of the unit. The Harbor Houses Declaration specifically provides that anything beyond a unit's "boundaries," including "the deck and other exterior portions and surfaces of the Building in which said Unit is located," are not part of the unit, but are Limited Common Elements. See Harbor Houses Declaration, § 2.3(a).

Neither the Master Declaration nor the Harbor Houses Declaration expressly permits a Harbor Houses unit owner to expand his or her unit's "footprint" or "boundaries" onto a Limited Common Element, which is owned in an undivided percentage interest by all 154 unit owners. Further, our Supreme Court has yet to address an individual unit owner's right to expand his or her unit's "boundaries" onto a Limited Common Element. The Act states, however, that a unit owner is permitted and authorized to make improvements or alterations to its unit subject to the provisions of the declaration, but such changes may not change the appearance of the common

elements without the association's permission. See Section 34-36.1-2.11(2). Thus, an individual unit owner may arguably change a Limited Common Element's appearance by expanding his unit's "boundaries" onto the Limited Common Element with the association's approval.

### 3

#### **Obligations Associated with Plaintiff's Proposal To Expand His Unit onto a Limited Common Element**

Assuming that Plaintiff is permitted to expand his Unit onto the Limited Common Element surrounding his Unit, the Court must next consider whether Plaintiff is first required to amend the GIS Declaration. The Act provides that a condominium declaration must specify to which unit or units each Limited Common Element is allocated; such allocations may not be altered without the consent of the unit owners whose units are affected. Section 34-36.1-2.08(a). Additionally, a Limited Common Element "may be reallocated by an amendment to the declaration executed by the unit owners between or among whose units the reallocation is made." Section 34-36.1-2.08(b). The Act also mandates, however, that "no amendment may . . . change . . . 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." Section 34-36.1-2.17(d).

Section 2.3 of the Master Declaration and § 2.4 of the Harbor Houses Declaration differ from the Act, however, and do not require a declaration amendment or unanimous consent from all unit owners when a proposed expansion will alter a unit's allocated interests. Instead, § 2.3 of the Master Declaration only requires a unit owner to receive approval from the Harbor Houses Executive Board before making any alterations or changes to the exterior of the building or increasing the building's size. See Master Declaration, § 2.3(a)(i). Further, if a unit owner's proposed expansion will extend any portion of the building beyond the building's existing

“footprint,” § 2.3 only requires the unit owner to obtain approval from the Harbor Houses’ Executive Board.

Similarly, § 2.4 of the Harbor Houses Declaration permits a unit owner to change or make alterations to the exterior design and arrangement of the Building in which the unit is contained by simply obtaining the prior written consent of the Executive Board. See Harbor Houses Declaration § 2.4(c). Section 2.4 of the Harbor Houses Declaration also specifically addresses alterations made to Limited Common Elements, and states that a unit owner seeking to make alterations or changes to any Limited Common Element need only obtain the written consent of the Executive Board. See Harbor Houses Declaration § 2.4(g). As previously stated, however, the provisions of a declaration under which a condominium is created must conform to all statutory requirements, and to the extent that they conflict therewith, the statute must prevail. See 15A Am.Jur. 2d Condominium, Etc. § 7 (2009) (citing Winkelman v. Toll, 661 So.2d 102 (Fla. Dist. Ct. App. 4<sup>th</sup> Dist. 1995)); see also, Master Declaration at § 2.3(a)(i)(D) (stating that all alterations must be made in accordance with applicable federal, state and local laws); Harbor Houses Declaration at § 2.4(e) (stating that any changes, alterations or construction undertaken by a unit owner must be performed in accordance with the applicable laws). Thus, because the applicable provisions of both the Master Declaration and Harbor Houses Declaration directly conflict with the Act, Plaintiff must comply with the applicable provisions of the Act rather than the expansion provisions set forth in § 2.3 of the Master Declaration and § 2.4 of the Harbor Houses Declaration. Therefore, a unit owner who wishes to permanently take a portion of the Limited Common Elements, thereby necessitating a “reallocation,” is required to obtain unanimous consent from all other unit owners to amend the condominium declaration. See Sections 34-36.1-2.08(b), 34-36.1-2.17(d).

Moreover, basic principles of property law also apply to the case at hand. Bonczek v. Helena Place, Inc., 1990 WL 105766, \*3 (Del.Ch. 1990) (holding that where a unit owner sought to expand his free-standing unit to include, and build over, land that was part of the common elements, the unit owner was required to obtain unanimous consent from all other unit owners). “No individual or group may occupy, or authorize the occupation of, another person’s property to that property owner’s exclusion.” Id. (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982)). Further, no unit owner may “be deprived of his property right in the condominium development without his consent.” Id. Thus, while a unit owner’s unit expansion onto a Limited Common Element may not change the percentage interest of a particular unit owner in “the literal or formal sense,” it would, nonetheless, “achieve that result by reducing common elements in which all unit owners have an undivided interest.” Id. at 5. Consequently, granting one unit owner exclusive use of a common area is sufficient to change the relative interest of the other unit owners who own a percentage interest in that common area. Strauss v. Oyster River Condominium Trust, 1992 WL 12153337, \*22 (Mass.Land Ct. 1992) (holding that a defendant unit owner’s expansion of his unit onto a common area required unanimous consent of all owners for any change in the percentage interest in the common areas);<sup>13</sup> see also Kaplan v. Boudreaux, 410 Mass. 435, 443 (1991); Bonczek v. Helena Place, Inc., 1990 WL 105766, \*5 (Del.Ch. 1990) (holding that an undivided interest is an undivided interest in the whole, and when that whole changes, that interest, if not the percent, also changes).

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<sup>13</sup> This Court is aware that the Massachusetts Legislature subsequently amended its Condominium Statute to expressly state that the designation of a limited common area to an individual unit owner is not deemed to affect or alter the undivided interest of any owner. See Mass.Gen. Laws ch. 183A, § 5(b)(1). Nonetheless, Strauss remains relevant to the instant matter because Rhode Island has yet to adopt a similar statute. In fact, the lack of such a statute is the precise heart of this matter.

Therefore, unanimous consent from all unit owners is necessary to legally enable a unit owner to expand his unit onto a Limited Common Element.

In the instant matter, Plaintiff's Unit is a free-standing building that Plaintiff plans to enlarge to include—and build over—land that is presently part of the Limited Common Element allocated to Plaintiff's Unit for the Unit's exclusive use. If the expansion is approved, that Limited Common Element land, which is commonly owned by all 154 unit owners, would thereby become part of Plaintiff's Unit. Such an expansion would make the land part of a specific condominium unit belonging to a particular unit owner. Consequently, the proposed expansion would disturb the Declaration's current Limited Common Element allocation. See § 34-36.1-2.08(a). As a result, the proposed expansion would necessitate a "reallocation" of the remaining Limited Common Element allocated to Plaintiff's Unit and would ultimately decrease each unit owner's percentage interest in all Limited Common Elements.<sup>14</sup> Plaintiff must therefore obtain unanimous consent from all 154 unit owners to amend the GIS Declaration before the affected Limited Common Element can be reallocated. See Section 34-36.1-2.17(d).

Further, in accordance with basic property law principles, Plaintiff is prohibited from permanently occupying the Limited Common Element to the absolute exclusion of the other 154 property owners without their consent. Any expansion of Plaintiff's Unit beyond the current Unit's "footprint" or "boundaries" would infringe upon the current allocation of Limited Common Elements. Specifically, the construction of an addition on a portion of the Limited Common Element that comprises Plaintiff's yard would serve as a permanent occupation of that land, which is commonly owned by all unit owners. Thus, because no unit owner may be

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<sup>14</sup> Black's Law Dictionary defines the term "allocation" as "[a] designation or apportionment for a specific purpose . . ." Black's Law Dictionary 83 (8<sup>th</sup> Ed. 2004). "Allocation" is also defined as "assignment or allotment." Jacobson v. Bowles, 53 F.Supp. 532, 534 (D.C.Tex. 1944).

deprived of his property right without his consent, consent from all 154 unit owners is necessary. See Bonczek, 1990 WL 105766 at \*3.

In conclusion, the Master Declaration, the Harbor Houses Declaration, and the Act all afford Plaintiff an absolute right to make improvements or alterations to his unit in the form of an expansion provided that Plaintiff complies with all governing statutes and condominium provisions. The right to make improvements includes a right to construct an addition that may reduce the area of a condominium's Limited Common Element, provided that such an addition does not change the Common Element's appearance without association approval. See Section 34-36.1-2.11(2). Here, however, Plaintiff proposes to expand his Unit beyond the Unit's current "footprint" and "boundaries," and onto a Limited Common Element. To do so, Plaintiff is required to adhere to the procedures set forth in the Act, as well as to any other non-conflicting provisions set forth in § 2.3 of the Master Declaration and § 2.4 of the Harbor Houses Declaration.

Therefore, Plaintiff must obtain unanimous consent from all 154 unit owners to amend the Master Declaration. To date, Plaintiff has not filed such an amendment or received the required unanimous consent, and thus, Plaintiff does not have a sufficient right to make the proposed improvements, alterations and changes to his Unit. For the foregoing reasons, Plaintiff as a unit owner of a Harbor Houses' Unit, is not permitted to make improvements, alterations and changes to his unit by simply complying with the provisions set forth in § 2.3 of the Master Declaration and § 2.4 of the Harbor Houses Declaration. Instead, Plaintiff must also comply with the applicable provisions of the Act. Accordingly, as to this declaration, Plaintiff's Motion for Summary Judgment is denied.

## **B**

### **Plaintiff's CRMC Application**

Plaintiff next asks the Court to declare that Plaintiff has sufficient right, title and interest in the land and the air space above and surrounding his Unit to confer standing upon Plaintiff to file an application with the CRMC and any other appropriate government agency. Here, no material dispute exists as to whether Plaintiff is entitled to *file* an application with the CRMC; Plaintiff has previously filed an application with the CRMC, and indisputably has the right to file another application. Therefore, because Plaintiff has sufficient right, title and interest in the land and air space above and surrounding the Unit to confer standing upon Plaintiff to *file* an application with the CRMC and any other appropriate government agency, Plaintiff's Motion for Summary Judgment as to this declaration is granted.

For purposes of discussion, however, a dispute exists as to whether the CRMC may be ordered to *process* Plaintiff's application. The CRMC, in its "Notice to Applicants," states that "[t]he CRMC requires a letter from a local tax assessor stating ownership of the property." The local tax appraisal of Plaintiff's Unit indicates that the assessed value only applies to improvements on the Unit, but the appraisal provides no assessed value for the land underlying and surrounding the Unit. Consequently, Plaintiff cannot furnish the CRMC with a letter from the local tax assessor conclusively establishing Plaintiff's ownership of the Limited Common Element land upon which he intends to expand.

Additionally, G.L. 1956 § 9-30-11 requires that "when declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration and no declaration shall prejudice the right to the persons who is not parties to the proceeding . . . ." Section 9-30-11; see also Meyer v. City of Newport, 844 A.2d 148, 152 (R.I.

2004). “A court may not assume subject-matter jurisdiction over a declaratory-judgment action when a plaintiff fails to join all those necessary and indispensable parties who have an actual and essential interest that would be affected by the declaration.” Sullivan v. Chafee, 703 A.2d 748, 754 (R.I. 1997). Here, because a declaration entered in Plaintiff’s favor would unquestionably diminish the CRMC’s decision-making power, the CRMC has an essential interest in this matter that would be affected by the declaration. Thus, this Court cannot force the CRMC to *process* Plaintiff’s application because the CRMC is not a party to this action.

### III

#### Conclusion

For the foregoing reasons, this Court denies Plaintiff’s Motion for Summary Judgment as to the following declaration: “The Trust, as a unit owner of a Harbor Houses’ Unit, is permitted to make improvements, alterations, and changes to its unit provided that the Trust complies with the provisions of § 2.4 of the Harbor Houses Declaration and § 2.3 of the Master Declaration . . . .” This Court grants Plaintiff’s Motion for Summary Judgment as to the following declaration: “The Trust has sufficient right, title and interest in the Land and air space above and surrounding its unit to confer standing upon the Trust to *file* the Application with the CRMC and any other appropriate government agency.” (Emphasis added.) Nonetheless, Plaintiff is not entitled to a declaration requiring the CRMC to *process* his application. An appropriate form of order and judgment shall be presented.