STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 23, 2024)

BELVEDERE AT BRISTOL MASTER CONDOMINIUM ASSOCIATION, *Plaintiff,*	:	
v.	:	**C.A. No. PC-2023-01337**
423 HOPE STREET REDEVELOPMENT, LLC and TAS DEVELOPMENT, LLC, *Defendants.*	:	

DECISION

STERN, J. Both Plaintiff, Belvedere at Bristol Master Condominium Association (Plaintiff), and Defendants, 423 Hope Street Redevelopment, LLC (423 Hope Street or Declarant) and TAS Development, LLC (TAS Development)—collectively, Defendants—have filed cross-motions for summary judgment in this condominium dispute over ownership of the lower level of a two-floor parking deck. Jurisdiction is pursuant to Rule 56 of the Superior Court Rules of Civil Procedure.

I

Facts and Travel

Located along Hope, John, and Thames Streets in Bristol, Rhode Island, the Belvedere at Bristol Master Condominium (the Master Condominium) is a condominium complex created by declaration (the Declaration) on March 3, 2014. (Pl.'s Mem. in Supp. of Mot. for Summ. J. (Pl.'s Mem.) Ex. A, at 2.) The Declaration is governed by Rhode Island law. *Id.* at 59. Declarant[1]

[1] This Decision will frequently refer to 423 Hope Street as Declarant to distinguish it from the other Defendant, TAS Development. 423 Hope Street is a Rhode Island limited liability company principally located at 146 Brenton Road, Newport, Rhode Island 02840. (Pl.'s Mem. Ex. A, at 2.)

established the Master Condominium through the Declaration pursuant to its ownership of the property. *Id.* At its creation, the Master Condominium contained four Master Units (Master Units), Master Units 1, 2, 3 and 4. (Pl.'s Mem. Ex. A., at 15; Pl.'s Mem. Ex. B (Plats and Plans), at 2.) The Master Units are "air rights" units, "meaning that the Master Unit consists of all air space . . . that extends upward (i.e., into the air) from the land which is depicted as being the 'pad' for such Master Unit on the Master Condominium Plat." (Pl.'s Mem. Ex. A., at 9.) Each "pad" is defined as "[t]he land that the Master Unit is situated over" and is not part of the Master Unit. *Id.* The pads are referred to as the "Master Common Limited Element Pad[s]" in the Declaration. *Id.*

On March 14, 2014, Belvedere at Hope Condominium (Hope Condominium) was created on Master Unit 1 and contained fourteen residential units and two commercial units. (Roiter Aff. ¶ 12; Pl.'s Mem. ¶ 6.[2]) On the same day, Belvedere Carriage House Condominium (Carriage House Condominium) was established on Master Unit 2. (Pl.'s Mem. ¶ 7.) It contained two residential units. *Id.* Master Unit 3, Belvedere at John Street Condominium (John Street Condominium), featuring two residential units, was established on March 3, 2014. *Id.* ¶ 8. To date, Master Unit 4 has not been subject to the development of any buildings or structures. *Id.* ¶ 9.

Identified in the Declaration as a Master Limited Common Element, a two-story, uncovered parking deck is located on the property. (Pl.'s Mem. Ex. A., at 10.) The upper level of the parking deck contains twenty-eight assigned parking spaces for unit owners of Hope Condominium and Carriage House Condominium. *Id.* The ground level contains no assigned spaces. *Id.* The ground level of the parking facility is identified in the Declaration as "Master Common Element[.]" *Id.* James Roiter (Mr. Roiter), a real estate developer who serves as

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[2] The Court departs from its usual summary judgment practice of citing to exhibits rather than the parties' papers as it provides some of the facts because neither side disputes the other's rendition.

managing member of 423 Hope Street, avers that parking never was permitted for the Master Condominium residents on the lower level of the deck, absent his express approval. (Defs.' Mem. in Supp. of Obj. to Mot. Summ. J. (Defs.' Mem.) Ex. A (Roiter Aff.), ¶¶ 42-50.)

Years later, on October 8, 2021, Declarant amended the Declaration a fourth time, withdrawing Master Unit 4 and its Master Limited Common Elements from the Master Condominium. (Pl.'s Mem. Ex. C (Fourth Amendment), at 2; Roiter Aff. ¶ 55.) Mr. Roiter indicates that this was undertaken to attract another developer to create a mixed-use residential and commercial space. (Roiter Aff. ¶¶ 23-26, 32-35.) On the same day, Declarant conveyed Master Unit 4 to TAS Development. (Pl.'s Mem. Ex. D (TAS Warranty Deed), at 2.) The Master Condominium's resident association (the Association), through counsel, sent a series of e-mails and letters to Declarant objecting to any purported withdrawal of the lower level of the parking deck from the plot. *See generally* Pl.'s Mem. Ex. F (Correspondence).

On March 4, 2023, while discussions between Plaintiff and Declarant were ongoing, Declarant executed a Fifth Amendment to the Declaration, conveying Master Unit 4 back to Declarant and creating a new Master Unit 4 (Master Unit 4.2) to the Master Condominium. (Pl.'s Mem. Ex. G (Unit 4 Deed), at 1; Pl.'s Mem. Ex. H (The Amendments), at 1-2). The Fifth Amendment designated Master Unit 4.2 as withdrawable. (The Amendments 1-2.)

The same day, Declarant recorded the Sixth Amendment to the Declaration. *Id.* at 8-9. This designated the ground level of the parking structure as a Master Limited Common Element appurtenant to Master Unit 4.2. *Id.* The Declaration notes that the individual parking spaces on the parking deck are Master Limited Common Elements. (Pl.'s Mem. Ex. A, at 66.)

Likewise, on the same day as the Fifth and Sixth Amendments, Declarant executed a Seventh Amendment to the Declaration. (The Amendments 14-16.) This amendment withdrew

Master Unit 4.2 and the Master Limited Common Elements appurtenant to Master Unit 4.2 from the Master Condominium. *Id.* Declarant simultaneously granted the Association an easement to access the lower level of the parking deck, allowing it to make repairs to the structure and the deck's sprinkler and draining systems. (Pl.'s Mem. Ex. E (Grant of Easement), at 1-4.)

On March 20, 2023, Plaintiff filed the instant action seeking a declaratory judgment (1) that it holds title to the land located underneath the parking deck and (2) that an easement by necessity or implication exists concerning the land under the deck. *See generally* Compl. Plaintiff also asks for an award of attorneys' fees and punitive damages for Declarant's actions. *Id.* ¶¶ 41-45. Plaintiffs moved for summary judgment on all counts of its Complaint on September 29, 2023. (Docket.) Defendants responded with an Objection to Plaintiff's Motion and a Cross-Motion for Summary Judgment of its own. *Id.*

II

Standard of Review

A motion for summary judgment should only be granted when '"the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as [a] matter of law."' *Plunkett v. State,* 869 A.2d 1185, 1187 (R.I. 2005) (quoting *Wright v. Zielinski*, 824 A.2d 494, 497 (R.I. 2003)).

'"[A] party who opposes a motion for summary judgment carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions."' *National Refrigeration, Inc. v. Standen Contracting Co.*, 942 A.2d 968, 971 (R.I. 2008) (quoting *Accent Store Design, Inc. v. Marathon House, Inc.*, 674 A.2d 1223, 1225 (R.I. 1996)). Summary judgment is only appropriate

when the Court '"conclude[s], after viewing the evidence in the light most favorable to the nonmoving party, that there is no genuine issue of material fact to be decided and that the moving party is entitled to judgment as a matter of law[.]"' *DeMaio v. Ciccone*, 59 A.3d 125, 129 (R.I. 2013) (quoting *Pereira v. Fitzgerald*, 21 A.3d 369, 372 (R.I. 2011)) (internal quotation marks omitted).

III

Analysis

A

The Rhode Island Condominium Act

Resolution of this dispute centers on the Court's interpretation of the Rhode Island Condominium Act, G.L. 1956 chapter 36.1 of title 34 (the Act). Under Plaintiff's reading of the statute, Declarant improperly revoked the lower level of the parking deck from the residents' ownership through a series of amendments. *See generally* Pl.'s Mem. Declarant counters that they always retained ownership of the ground floor, and the amendments were simply a means of effectuating Declarant's development intent. *See generally* Defs.' Mem.

As the Court analyzes the Act, it bears noting that, "[w]hen construing a statute '[the Court's] ultimate goal is to give effect to the purpose of the act as intended by the Legislature.'" *Interstate Navigation Co. v. Division of Public Utilities*, 824 A.2d 1282, 1287 (R.I. 2003) (quoting *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002)). During its inquiry, the Court must "adhere to the basic proposition of establishing and effectuating the intent of the Legislature[, . . . which] is accomplished from an examination of the language, nature, and object of the statute." *In re Estate of Gervais*, 770 A.2d 877, 880 (R.I. 2001) (per curiam) (quoting *State v. Pelz*, 765 A.2d 824, 829-30 (R.I. 2001)). '"If the language of a statute is clear on its face, then its plain meaning

must generally be given effect.'" *In re Estate of Gervais*, 770 A.2d at 880 (quoting *Skaling v. Aetna Insurance Co.*, 742 A.2d 282, 290 (R.I. 1999)). "It is a well-known maxim of statutory interpretation that [the] Court 'will not construe a statute to reach an absurd [or unintended] result.'" *Hargreaves v. Jack*, 750 A.2d 430, 435 (R.I. 2000) (quoting *Kaya v. Partington*, 681 A.2d 256, 261 (R.I. 1996)).

Enacted in 1982 and incorporating most of the language of the Uniform Condominium Act, the Act became the governing legislation for all condominiums established in Rhode Island after July 1, 1982. Section 34-36.1-1.02. *America Condominium Association, Inc. v. IDC, Inc.*, 844 A.2d 117, 127 (R.I. 2004) (citing § 34-36.1-1.02(a)(1)), *decision clarified on reargument*, *America Condominium Association, Inc. v. IDC, Inc.*, 870 A.2d 434 (R.I. 2005) "'The Act as a whole contains a strong consumer protection flavor[.]'" *America Condominium Association, Inc.*, 844 A.2d at 128 (quoting *One Pacific Towers Homeowner's Association v. HAL Real Estate Investments, Inc.*, 61 P.3d 1094, 1100 (Wash. 2002)).

Under the Act, a "declarant" is "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 34-36.1-1.03(9). A "declaration" is "any instruments, however denominated, that create a condominium, and any amendments to those instruments." Section 34-36.1-1.03(10). "Common elements" are "all portions of a condominium other than the units." Section 34-36.1-1.03(4). By contrast, limited common elements are "a portion of the common elements allocated by the declaration or by operation of § 34-36.1-2.02(2) or (4) for the exclusive use of one or more but fewer than all of the units." Section 34-36.1-1.03(19).

Since Plaintiff challenges the validity of the Fifth and Seventh Amendments of the Declaration, each will be addressed independently below. *See* Pl.'s Mem. 11-20.

1

Fifth Amendment

Plaintiff vehemently opposes the proposition that Declarant could add back Master Unit 4. (Pl.'s Mem. 16.) Plaintiff argues that the right to add land to the Master Condominium only applies to new Master Units and not those already withdrawn. *Id.* Plaintiff also contends that Declarant failed to describe Master Unit 4 as land subject to development rights on the plats. *Id.* (citing Pl.'s Mem. Ex. B). Specifically, Master Unit 4 only is labeled as withdrawable—according to Plaintiff—and the Declaration does not discuss whether it could be added back to the Master Condominium. (Pl.'s Mem. 16.) Plaintiff advances that Declarant should have received unanimous approval from the unit owners for this action. *Id.* at 17 (citing § 34-36.1-2.17(d)).

In retort, Declarant labels Plaintiff's distinction between adding new land versus adding withdrawn land "meaningless[.]" (Defs.' Mem. 23.) Declarant posits that the Master Declaration does not contain conclusory language that limits this amendment. *Id.* at 25. Declarant also rejects Plaintiff's assertion that the land had to be labeled as both withdrawable and subject to the right to add. *Id.* Declarant states this "illogical" step would require a declarant "to identify in its Master Plats and Plans every piece of real estate it may at some point add to the Master Condominium, potentially including real estate the [Declarant] did not own." *Id.*

Per § 34-36.1-1.03, development rights are "any right or combination of rights reserved by a declarant in the declaration to: (a) [a]dd real estate to a condominium, (b) [c]reate units, common elements, or limited common elements within a condominium, . . . or (d) [w]ithdraw real estate from a condominium." Section 34-36.1-1.03(11). A declarant also possesses "special declarant

rights" which include the right to: "(i) [c]omplete improvements indicated on plats and plans filed with the declaration, (§ 34-36.1-2.09) [and] (ii) [t]o exercise any development right, (§ 34-36.1-2.10), ..." Section 34-36.1-1.03.

The Act also requires Declarant to describe its development rights in the Declaration. Section 34-36.1-2.05(8). Specifically, the Declaration must contain a "description of any development rights and other special declarant rights (§ 34-36.1-1.03(26)) reserved by the declarant, together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised[.]" *Id.*

In § 1.02 of the Declaration, Declarant's "Master Development Rights" permits Declarant to: "(i) add real estate to the Master Condominium; (ii) create Master Units and Master Common Elements (whether Master General Common Elements, or Master Limited Common Elements) within the Master Condominium; . . . (iv) withdraw real estate from [the Master Condominium.]" (Pl.'s Mem. Ex. A.)

Here, the Court finds nothing precluded Declarant from adding Master Unit 4 back into the Master Condominium. *See* Pl.'s Mem. Ex. H. In fact, the Master Declaration specifically reserves with Declarant the right to add real estate to the Master Condominium, earlier described in the Master Declaration as "Belvedere at Bristol Master Condominium." (Pl.'s Mem. Ex. A.) Generally, a description of land is adequate if it "can be applied to the property so as to identify and distinguish the intended area from all other lands[.]" *Miracle Construction Co. v. Miller*, 87 N.W.2d 665, 669 (Minn. 1958); *see also Swan Kang, Inc. v. Kang*, 534 S.E.2d 145, 148 (Ga. Ct. App. 2000) (test for adequate description of land "is whether or not it discloses with sufficient certainty what the intention of the grantor was with respect to the quantity and location of the land

therein referred to, so that its identification is practicable") (citing *Crawford v. Verner*, 50 S.E. 958 (Ga. 1905).

To wit, our Supreme Court has considered descriptions of land for the purpose of the statute of frauds and has broadly stated that a valid description of land must be definite enough to distinguish it from others. *See Preble v. Higgins*, 43 R.I. 10, 109 A. 707 (1920); *Sherman v. Arnold's Neck Boat Club*, 64 R.I. 485, 13 A.2d 272, 273 (1940). It has found certain descriptions to fall short of the required language. *See Calci v. Caianillo*, 46 R.I. 305, 127 A. 361 (1925) (declaring "the buildings I have sold" was deficient); *Cunha v. Gallery*, 29 R.I. 230, 69 A. 1001 (1908) (finding the language "this place" was lacking); *Ray v. Card*, 21 R.I. 362, 43 A. 846, 847 (1899) (stating the language "that lot" was insufficient to describe land). Given that our Supreme Court has yet to fully opine on the description requirements in the context of the Act, the Court finds that it makes good sense to draw from these statute-of-frauds cases for a satisfactory description of land.[3]

Here, Declarant clearly identified that the land subject to development was the land in which the Master Condominium is located. (Pl.'s Mem. Ex. A., 2, 5.) Specifically, Declarant reserved to itself the right to add real estate to the Master Condominium. *See id.* at 6. The Declaration broadly defined "Master Condominium" as "the condominium created hereby, known as 'Belvedere at Bristol Master Condominium.'" *Id.* at 5. "Belvedere at Bristol Master Condominium" is the condominium developed on the land located along Hope, John, and Thames Streets in Bristol, Rhode Island. *Id.* at 2. This comports with the "legally sufficient" description of the land required under § 34-36.1-2.05(a)(8).

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[3] *See* § 34-36.1-1.08 (stating "the law of real property . . . supplement[s] the provisions of this chapter, except to the extent inconsistent with this chapter").

That definition is undoubtably more descriptive than “that lot[,]” “this place[,]” or “the buildings I have sold[.]” *See Ray*, 21 R.I. 362, 43 A. at 847; *Cunha*, 29 R.I. 230, 69 A. 1001; *Calci*, 46 R.I. 305, 127 A. 361. Therefore, Declarant satisfied § 34-36.1-2.05(a)(8). Moreover, there is nothing in the Declaration or the Act preventing Declarant from adding previously withdrawn land back to the Master Condominium. (Pl.’s Mem. Ex. A., at 6); *see* § 34-36.1-2.10.

Because the Declaration contained a legally sufficient description of the land subject to development rights, the Court finds that Declarant complied with the mandates of § 34-36.1-2.05(8). Further, the Fifth Amendment provided that Master Unit 4 would retain its status as withdrawable—a distinction that later will become important. (Pl.’s Mem. Ex. H.)

2

Sixth Amendment

Next, Plaintiff argues that the Sixth Amendment is invalid because Declarant is prohibited from declaring that the ground level of the parking deck is a limited common element to Master Unit 4. (Pl.’s Mem. 17.) In support, Plaintiff points to the Declaration, asserting that the parking area was not identified as subject to development or allocation as a limited common element. *Id.* at 18-19. This, according to Plaintiff, is at odds with the statutory mandates contained in § 34-36.1-2.05(a)(7)—a section that Plaintiff contends requires a description of land that subsequently could be allocated as a limited common element. (Pl.’s Mem. 19 (citing § 34-36.1-2.05(a)(7))). Plaintiff submits that this failure to describe the future allocation should void the Sixth Amendment. (Pl.’s Mem. 19.)

In retort, Declarant advances that “the allocation of the lower level of the Parking Garage from a Master General Common Element to a Master Limited Common Element fits squarely within [§ 34-36.1-2.05(a)(7)], thereby invoking the exception stated under [§ 34-36.1-2.08(c)].”

(Defs.' Mem. 27.) Declarant states that, because the Declaration broadly provides that the Master Condominium—and the land contained therein—is subject to development rights, Declarant was within its authority to designate the lower level of the parking deck a limited common element appurtenant to Master Unit 4. *Id.* Declarant further submits that the broad description is specific enough to comport with "a legally sufficient description of [land]" required for land to be subject to development rights. (Defs.' Reply Mem. 5.)

The Court pauses here to note that it views this issue—whether Declarant was within its authority to change the land underneath the parking deck from a common element to a limited common element—to be the most pressing question in this inquiry. *See* § 34-36.1-2.08(c). In the absence of controlling and on-point guidance from our Supreme Court, the Court first will address the applicable statutory scheme and then survey persuasive case law to support its conclusion.

Pursuant to § 34-36.1-2.08(c) and effectuated through amendments to the declaration, "[a] common element not previously allocated as a limited common element may not be so allocated except pursuant to provisions in the declaration made in accordance with § 34-36.1-2.05(a)(7)." Section 34-36.1-2.08(c). Section 34-36.1-2.05 then states that "[t]he declaration for a condominium must contain: (7) [a] description of any real estate (except real estate subject to development rights) which may be allocated subsequently as limited common elements, other than limited common elements specified in § 34-36.1-2.02(2) and (4), together with a statement that they may be so allocated[.]" Section 34-36.1-2.05(a)(7).

This statutory maze continues next at § 34-36.1-2.05(a)(8), the exception to § 34-36.1-2.05(a)(7). Section 34-36.1-2.05(a)(8) provides: "[a] description of any development rights and other special declarant rights (§ 34-36.1-1.03(26)) reserved by the declarant, together with a legally

sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised[.]"

The Court finds that Declarant complied with §§ 34-36.1-2.08(c), 34-36.1-2.05(a)(7), and 34-36.1-2.05(a)(8) when it expressly reserved in the Declaration that the Master Condominium in its entirety was subject to Declarant's development rights. (Pl.'s Mem. Ex. A, at 6.) Look no further than the reference made to conversion from common element to limited common element discussed in the definition of "Master Development Rights[.]" *Id.* In pertinent part, the definition provides: the right or combination of rights that are reserved to the [Declarant] in this Master Declaration to (A) with respect to the [whole] Master Condominium: . . . (ii) create Master Units and Master Common Elements (whether Master General Common Elements, or Master Limited Common Elements) *within the Master Condominium* . . . ." *Id.* (emphasis added).

Stating—as Declarant did here—that the right to convert all the common elements in the Master Condominium into limited common elements sufficiently complies with § 34-36.1-2.05(a)(8). *Id.* This is because the "Master Condominium" is defined in the Declaration as "the condominium created hereby, known as 'Belvedere at Bristol Master Condominium.'" *Id.* at 5. Taking it one step further, the Declaration refers to "Belvedere at Bristol Master Condominium" as a condominium complex located along Hope, John, and Thames Streets in Bristol, Rhode Island. *Id.* at 2. Neither the Act, nor the case law the Court reviewed, prohibits a declaration from allowing the conversion of common elements into limited common elements.

Both parties point to *America Condominium Association, Inc.* in support of their respective positions surrounding consent. (Pl.'s Mem. 11-12; Defs.' Mem. 22.) There, our Supreme Court

disallowed a voting scheme[4] that permitted the declarant to *increase* its special declarant rights by lengthening the time to exercise the same by five years. *America Condominium Association, Inc.*, 844 A.2d at 122-23. The declarant also sought to grant an easement for an access road to another property and to convert unused land into a master limited common element. *Id.* The Court concluded that, because the declarant sought to expand its development rights reserved in the declaration, unanimous approval was required by the unit owners. *Id.* The Court rejected the defendants' argument that Declarant was carrying out improvements and not exercising development rights. *Id.* at 132.

Plaintiff advocates that *America Condominium Association, Inc.* supports its contention that Declarant increased its development rights by converting the lower level of the deck from a common element to a limited common element. (Pl.'s Mem. 13-14.) Specifically, Plaintiff states that the Declaration must include descriptions of limited common elements, a reservation of special declarant rights, and a description of real estate. *Id.* at 11. Declarant also believes that *America Condominium Association, Inc.* fits with their position, distinguishing the case as a developer's attempt to exercise rights it did not reserve in the declaration. (Defs.' Mem. 22.)

The Court finds *America Condominium Association, Inc.* distinguishable from the present case. Here, Declarant reserved the right in the Declaration to continue development of the Master Condominium—a project Declarant labeled as "Phase II" of construction. (Pl.'s Mem. Ex. A, at 41.) Declarant even memorialized these plans in its Public Offering Statement issued on July 19, 2013. (Defs.' Reply Mem. Ex. A, Ex. 2.) There is no evidence to suggest that Declarant tried to push its development deadline back or make any changes to the Master Condominium that was

[4] Said scheme restricted the votes of sub-condominium unit owners and required just 67 percent of owner support rather than unanimity. *America Condominium Association Inc. v. IDC, Inc.*, 844 A.2d 117, 127 (R.I. 2004).

not permitted. *See id.* Thus, while *America Condominium Association, Inc.* provides the Court with instructive law, its fundamental holding is inapplicable to the facts presented by the current dispute before the Court. *See America Condominium Association, Inc*, 844 A.2d at 132. Additionally, the plaintiffs in that action conceded that the declarant could lawfully convert a master common element into a master limited common element—the precise move Plaintiff in this matter challenges. *Id.* at 131.

Now that the Court has distinguished all potentially applicable Rhode Island precedent, the Court finds instructive condominium matters decided in other states. In neighboring Massachusetts, the Supreme Judicial Court invalidated a condominium by-law amendment that allocated a walkway to the exclusive use of one-unit owner. *Kaplan v. Boudreaux*, 573 N.E.2d 495, 496-97 (Mass. 1991). There, the Court determined that unanimous unit owner support was required because the amendment took away use rights from the other unit owners. *Id.* at 500. The Court relied on the pertinent Massachusetts' statute, the condominium trust instrument, and the master deed in overturning the amendment, because the declarant failed to obtain the unit owners' consent to decrease their interest in the walkway. *Id.*

Here, however, § 34-36.1-2.08(c) permits a common element to be changed to a limited common element without unit owner consent so long as Declarant reserves the right to do so in its development rights. Section 34-36.1-2.08(c). The *Kaplan* court did not address whether the declarant reserved the right in the declaration to allocate the walkway to the exclusive ownership of the unit owner. *Kaplan*, 573 N.E.2d at 500. In this case, Declarant reserved the right of conversion in the Declaration. *See* Pl.'s Mem. Ex. A (definition of "Master Development Rights"). Because §§ 34-36.1-2.08(c), 34-36.1-2.05(a)(7), and 34-36.1-2.05(a)(8) permit a declarant to

reserve the right to convert a common element to a limited common element in the declaration, the Court finds that *Kaplan*'s holding is inapplicable to the instant matter. *See id.*

In *Penney v. Association of Apartment Owners of Hale Kaanapali*, 776 P.2d 393, 394-95 (Haw. 1989), the Hawaii Supreme Court invalidated a development owner's amendment that attempted to reallocate a clubhouse area from a common element to a limited common element. *Id.* at 394. The court stated that the conversion diminished the unit owners' interest in the common element and required unanimous approval to do so by the applicable statute. *Id.* at 395. The statute in question—a provision that has since been repealed—provided that "[t]he common interest appurtenant to each apartment as expressed in the declaration shall have a permanent character and shall not be altered without the consent of all the apartment owners affected." *Id.* (citing Hawaii Revised Statutes (HRS) § 514A-13(b) (1985)).

Unlike *Penney*, the Court here is presented with a different statute. Specifically, § 34-36.1-2.08(c) bans the practice of converting common elements into limited common elements *unless* the declaration expressly reserves the right to do so within Declarant's development rights. By denoting that the entire Master Condominium (a limited and clearly identifiable plot of land) is subject to development rights, Declarant sufficiently provided the unit owners with notice of its ability to convert common elements into limited common elements. *See* § 34-36.1-2.05(a)(8).

Like *Kaplan* and *Penney*, and under a statutory scheme distinct from the one at issue here, the Louisiana Court of Appeal held in *Cusimano v. Port Esplanade Condominium Association, Inc.*, 55. So.3d 931, 938 (La. Ct. App. 2011) that a declarant could not redesignate a pool and passageway from a common element to a limited common element. There, the statute on point provided that all unit owners must consent to a conversion, which did not occur. *Id.* (citing La.

R.S. 9:1122.108). As previously noted, the Act permits a declarant to reserve the right to convert common elements in the Declaration. *See generally* § 34-36.1.

Neither party can locate an exact parallel case in which a declarant converted a common element into a limited common element without unanimous approval pursuant to a reservation in the Declaration. *See* Pl.'s Mem.; Defs.' Mem. A United States Bankruptcy Court in Pennsylvania interpreted Pennsylvania's Uniform Condominium Act, a statute modeled after the Uniform Condominium Act, which was likewise adopted in Rhode Island. *See In re Pius Street Associates LP*, 639 B.R. 153, 163-64 (Bankr. W.D.Pa. 2022); *America Condominium Association, Inc.*, 844 A.2d at 127.

There, in a ruling ancillary to the court's final conclusion, the *In re Pius Street Associates, LP* court concluded that the declarant sufficiently reserved the right to convert common-element parking spaces into limited common elements through licensing. *In re Pius Street Associates, LP*, 639 B.R. at 167. Specifically, the declaration noted that certain common-element areas were to remain such until they were licensed and later be reallocated as limited common elements. *Id.* at 158. Setting aside the unique licensing arrangement present in *In re Pius Street Associates LP*, the court's conclusion illustrated the statute's deferential treatment to a declaration and the absence of unanimity required. *Id.* Here, the Declaration provided that the entirety of the common elements in the Master Condominium were subject to development rights, including the right to convert common elements to limited common elements. (Pl.'s Mem. Ex. A); § 34-36.1-2.05(a)(7). Like the court in *In re Pius Street Associates, LP*, this Court must honor that reservation. *See* § 34-36.1-2.08(c).

Finally, Plaintiff's reliance on § 34-36.1-2.17 must be disregarded because it ignores other key language in the section. *See* Pl.'s Mem. 19. In particular, subsection (a) in § 34-36.1-2.17 declares:

> "*Except in cases of amendments that may be executed by a declarant under § 34-36.1-2.09(f) or 34-36.1-2.10* . . . and *except as limited by subsection (d) of this section*, the declaration . . . may be amended only by vote or agreement of unit owners of units to which at least sixty-seven percent (67%) of the votes in the association are allocated, or any larger majority the declaration specifies." Section 34-36.1-2.17(a) (emphasis added).

Committee Comment 1 provides: "[S]ubsection (a) lists those other instances where the declaration may be amended *by the declarant alone without association approval*, or by the association acting through its board of directors." Section 34-36.1-2.17 cmnt. 1 (emphasis added).[5] Moreover, subsection (d) of the same notes: "*[e]xcept to the extent expressly permitted or required by other provisions of this chapter*, no amendment may create or increase special declarant rights, . . . change the boundaries of any unit, the allocated interests of a unit, . . . in the absence of unanimous consent of the unit owners." (Emphasis added.)

Taken together, these statutory provisions permit Declarant to change common elements into limited common elements without unit owner approval because it expressly reserved the right to do so in the Declaration. *See* Pl.'s Mem., Ex. A. Essentially, the Court cannot locate any language in the Act that prohibits Declarant from making the conversion it made. Accordingly, Plaintiff's position that Declarant violated § 34-36.1-2.17(a) must be discarded. *See* Pl.'s Mem. 19.

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[5] As our Supreme Court stated in *America Condominium Association, Inc.*, "[u]nless the statutory language clearly and expressly states otherwise, [the official comments to the Uniform Condominium Act] are to be used as guidance concerning the legislative intent in adopting the chapter." *America Condominium Association, Inc.*, 844 A.2d at 127.

In sum, because nothing in the statute prohibits Declarant from converting the lower level of the parking deck into a limited common element of Master Unit 4, the Court finds that the Sixth Amendment was a lawful exercise of Declarant's development rights.

3

Seventh Amendment

Plaintiff maintains that, even if the Fifth and Sixth Amendments are upheld as valid exercises of Declarant's authority, the ground floor of the parking deck cannot be withdrawn because it was not labeled as withdrawable in the plats and plans. (Pl.'s Mem. 20.) Absent any label, Plaintiff advances it is insufficient for "Declarant to later re-allocate the real estate as appurtenant to some other withdrawable real estate and remove it from the Condominium, thereby depriving the unit owners of their undivided beneficial interest in that real estate." (Pl.'s Reply Mem. 6.) Plaintiff points to the deed conveying a parking space on the ground level as evidence that Declarant made a conveyance prior to withdrawal, a violation of the statute. *Id.* at 7 (citing Pl.'s Mem. Ex. I.)

In response, Declarant posits that providing a parking space on the ground floor to a unit owner was a temporary measure that was extinguished when the recipient gained a permanent parking space on the top level. (Defs.' Reply Mem. 7.) Declarant maintains that the plats and plans attached to the Fifth Amendment adequately identified the ground level as appurtenant to Master Unit 4. *Id.* Master Unit 4 and its appurtenant limited common element—the land underneath the parking deck—then was subsequently withdrawn, according to Declarant. *Id.* at 7-8.

Here, the Court finds that Declarant adequately labeled Master Unit 4 as withdrawable through the original Declaration and the Fifth Amendment. *See* Pl.'s Mem. Exs. B and H. The Declaration addresses the specific scenario that Plaintiff tries to refute—i.e., whether a declarant

also must label a limited common element as withdrawable if its attached master unit is already labeled as withdrawable. *Id.* at Ex. A; Pl.'s Reply Mem. 6-7. In addressing this, the Declaration defines "Withdrawable Real Estate" as "[a]ny portion of the Master Condominium that is labeled on the Master Plat as 'Withdrawable Real Estate,' all of which areas [Declarant] hereby reserves the right to withdraw from the Master Condominium pursuant to Section 10.01(e) hereof." (Pl.'s Mem. Ex. A, at 12-13.) Section 10.01(e), in pertinent part, provides Declarant's "right to withdraw such Master Unit *shall include the right to withdraw any limited common elements appurtenant to said Master Unit*, including, without limitation, the land underneath the Master Unit." *Id.* at 42 (emphasis added).

Likewise, Plaintiff's position that the temporary deed prevented withdrawal of the lower level of the deck is misguided. (Pl.'s Reply Mem. 7.) A finding in Plaintiff's favor on this point would ignore the unrefuted evidence that the deed *temporarily* provided a unit owner with a lower level parking space ceasing when an additional space became available on the upper level. (Pl.'s Mem. Ex. I; Roiter Aff. ¶ 45.) Declarant's practice of delineating parking on the upper deck for unit owners while only providing access to the lower level of the deck in extraordinary circumstances is supported by Mr. Roiter's Affidavit. (Roiter Aff. ¶¶ 43-44 (stating he, as operator of Declarant, never permitted parking on the lower level of the parking deck without approval and "regularly approved [temporary parking] during winter storms to allow for plowing of the Upper Level, contractor/vendor parking, and some parking during the Annual Fourth of July Parade")).

Plaintiff's argument as to the scrivener's error should similarly be discarded. (Pl.'s Reply Mem. 7 n.2.) Importantly, Plaintiff has offered nothing to support its assertion. *See id.* In other matters where a scrivener's error was alleged, an accompanying affidavit was filed to rectify the error. *See Deutsche Bank National Trust Co. for Registered Holders of Ameriquest Mortgage*

Securities, Inc. v. McDonough, Jr., 160 A.3d 306, 308 (R.I. 2017). Accordingly, Plaintiff's position as to a purported scrivener's error is unavailing.

Our Supreme Court commands that '"statutes should not be construed to achieve meaningless or absurd results."' *Ryan v. City of Providence*, 11 A.3d 68, 71 (R.I. 2011) (quoting *Berthiaume v. School Committee of Woonsocket*, 121 R.I. 243, 247, 397 A.2d 889, 892 (1979)). As noted, Mr. Roiter has submitted sworn, uncontradicted statements that he did not permit resident parking on the lower deck absent unusual circumstances. (Roiter Aff. ¶¶ 43-45.) Disallowing the withdrawal of the lower level of the parking deck because one Master Condominium Association member enjoyed temporary access to a parking space on that level for no more than two years based on § 34-36.1-2.10(d)(2)[6] would lead to an absurd result. *See Ryan*, 11 A.3d at 71. Thus, the Court declines to strike the Seventh Amendment under § 34-36.1-2.10(d)(2) because an absurd result would occur if the statute were construed to incorporate the temporary, seemingly courteous conveyance of the parking space. *See* Pl.'s Mem. Ex. I.

Accordingly, the Seventh Amendment was a valid exercise of Declarant's development rights to withdraw real estate from the Master Condominium.

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[6] Section 34-36.1-2.10(d) notes that

> "[i]f the declarant provides, pursuant to § 34-36.1-2.05(a)(8), that all or a portion of the real estate is subject to the development right of withdrawal:
>
> > " . . .
> >
> > "(2) If a portion or portions are subject to withdrawal, no portion may be withdrawn after a unit in that portion has been conveyed to a purchaser."

B

Easement by Necessity or Implication

Plaintiff contends that withdrawal of Master Unit 4 from the Master Condominium created an easement by necessity over Master Unit 4's land so that unit owners could ingress and egress to the lower level of the parking deck. (Pl.'s Mem. 20.) Plaintiff classifies the ground level as "landlocked" because unit owners now will need to cross over Master Unit 4's land—land no longer part of the Master Condominium. *Id.* at 21.

In response, Declarant advances that Plaintiff cannot show a need for an easement by necessity because Plaintiff has no access rights to the lower level of the deck. (Defs.' Mem. 31.) Declarant points to the withdrawal of Master Unit 4.2 and the Limited Common Elements appurtenant to it in support, which were effectuated by the Fifth through Seventh Amendments. *Id.* at 30-31. Declarant also avers that Plaintiff had no access to the lower level before the Fourth Amendment because Declarant locked the gate to the ground level. *Id.* at 31. Further, Declarant maintains that, even if Plaintiff had access rights to the ground level, Plaintiff cannot show that a substitute could be established sans unreasonable trouble or expense. *Id.* at 31-32.

"When construing an instrument that purportedly creates an easement, it is the Court's 'duty . . . to effectuate the intent of the parties.'" *Hilley v. Lawrence*, 972 A.2d 643, 649 (R.I. 2009) (quoting *Carpenter v. Hanslin*, 900 A.2d 1136, 1147 (R.I. 2006)). To do so, '"[w]hen the written terms of an agreement are clear and unambiguous, they can be interpreted and applied to the undisputed facts as a matter of law."' *Hilley*, 972 A.2d at 649 (quoting *Mattos v. Seaton*, 839 A.2d 553, 557 (R.I. 2004)). "Additionally, where terms of an easement are clear and unambiguous, neither oral testimony nor extrinsic evidence will be received to explain the nature or extent of the

rights acquired." *Hilley*, 972 A.2d at 649 (citing *Waterman v. Waterman*, 93 R.I. 344, 349, 175 A.2d 291, 294 (1961)) (internal brackets omitted).

'"An implied easement is predicated upon the theory that when a person conveys property, he or she includes or intends to include in the conveyance whatever is necessary for the use and the enjoyment of the land retained."'[7] *Hilley*, 972 A.2d at 650 (quoting *Bovi v. Murray*, 601 A.2d 960, 962 (R.I. 1992)). Our Supreme Court "has held that, when land is divided, the law will imply a grant of 'all those continuous and apparent easements which have in fact been used by the owner during the unity, though they have no legal existence as easements.'" *Hilley*, 972 A.2d at 650 (quoting *Catalano v. Woodward*, 617 A.2d 1363, 1367 (R.I. 1992)). "However, it is incumbent upon the party claiming an easement over the land of another to present clear and convincing evidence of the claim." *Hilley*, 972 A.2d at 650 (citing *Ondis v. City of Woonsocket*, 934 A.2d 799, 803 (R.I. 2007)).

By contrast, "[a]n easement by necessity 'is limited to a factual scenario, in which a single owner partitions land and fails to reserve an express easement in favor of the parcel that has become landlocked as a result of the severance.'" *Hilley*, 972 A.2d at 653 (quoting *Ondis*, 934 A.2d at 806). "'[T]he test of necessity is whether the easement is reasonably necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made.'" *Hilley*, 972 A.2d at 653 (quoting *Nunes v. Meadowbrook Development Co.*, 824 A.2d 421, 425 (R.I. 2003)). "A party is not entitled to an easement by necessity if 'a substitute [can] be procured without unreasonable trouble or expense.'" *Hilley*, 972 A.2d at 653 (quoting *Nunes*, 824

[7] While Plaintiff asserts in its Complaint that the Court should find that an easement by implication exists in Plaintiff's favor, Plaintiff does not advance argument in support of this contention in its Motion or Memorandum. (Pl.'s Compl. ¶ 40); *see generally* Pl.'s Mem.

A.2d at 425). Whether an easement by necessity exists is a question of fact. *Hilley*, 972 A.2d at 653.

Here, the Court cannot find an easement by necessity exists as a matter of law. In arriving at this conclusion, the Court principally analyzes the "Grant of Easement" executed on March 4, 2023. (Pl.'s Mem. Ex. G, at 1.) For Plaintiff's benefit, the easement states:

> "Declarant, as the Owner of Master Unit 4 Land, hereby grants to the Master Association, as the owner of the Real Estate of the Master Condominium, a permanent and non-exclusive right and easement over the Master Unit 4 Land and the Ground Level Parking Master Limited Common Element for the sole purpose of making repairs to the structure of the Parking Garage, the Parking Garage sprinkler systems, and the Drainage System." (Pl.'s Mem. Ex. E, at 3.)

The plain language of the Grant of Easement makes no mention of access for Plaintiff's residents aside from repairs to the structure. *See id.* Given this, Plaintiff's statement that "it is undisputed that the land beneath the parking deck is now landlocked and cannot be accessed by the unit owners in the sub condominiums" is correct but misleading. (Pl.'s Mem. 21.)

The statement presupposes that Plaintiff always enjoyed a relatively unfettered right to enter the lower level of the parking deck.[8] *See id.* No such right existed based on the plain language of the Grant of Easement as described above beyond "for the sole purpose of making repairs to the structure of the Parking Garage, the Parking Garage sprinkler systems, and the Drainage System." *See* Pl.'s Mot. Ex. E, at 3. The Court views this provision to be obviously restrictive to instances when the area in which Plaintiff does have access to—i.e., the top level of the parking structure—needs a repair implicating the lower level of the structure. *Id.* Plaintiff has presented no such

[8] It should be noted that the upper level of the parking deck is accessible to the Master Condominium residents without the need to traverse through or over the lower level of the parking deck. (Pl.'s Mem. Ex. B.)

evidence tending to show that Defendants blocked Plaintiff as it attempted to make a repair at play here. *See generally* Pl.'s Mem.

Plaintiff is correct that the determination of the existence of an easement by necessity is a question of fact. *Nunes*, 824 A.2d at 425. As outlined above, the problem with Plaintiff's position is that no facts support the notion that Plaintiff had access to the lower deck—meaning traversing over Master Unit 4.2 would be unnecessary and unlawful. Just as it did prior to the severance of Master Unit 4.2, Plaintiff's residents may continue using the parking spaces assigned to them on the upper level of the deck. *See generally* Pl.'s Mem. Ex. A. Accordingly, the Court declines to find that Plaintiff possesses an easement by necessity over Master Unit 4.2.

Moreover, since Plaintiff has not presented evidence to suggest an easement by implication, or by prior use, existed at the time of severance, the Court cannot find that Plaintiff has an easement by implication over Master Unit 4.2.

C

Consumer Protection

Both parties agree that the Rhode Island Condominium Act is a consumer protection statute aimed at shielding condominium unit owners from certain development actions by a declarant. Specifically, "[w]hen there exists a dominance of control by one owner, it becomes more important to allow minority owners greater participation in the administration of the commonly owned property, and increases the need for the majority owner to follow all the statutes and the declaration." *Artesani v. Glenwood Park Condominium Association*, 750 A.2d 961, 963 (R.I. 2000).

While the Court upholds Declarant's actions in this matter, it does so mindful of the Act's protections and views this Decision as consistent with the Act's mandates. *See generally* § 34-

36.1. To this point, Plaintiff has failed to present any evidence that its unit owners enjoyed access to the lower level of the deck absent extraordinary circumstances. *See* Pl.'s Mem. Ex. I. The Court reaches this conclusion by considering the limited easement granted by Declarant to Plaintiff to make repairs to the parking deck, the sworn statements by Mr. Roiter that the lower level of the parking deck has been locked since 2007 with only certain restricted access permitted for residents, and the absence of lower level rights proffered in the Declaration. (Pl.'s Reply Mem. Ex. 2; Roiter Aff. ¶¶ 42-44; Pl.'s Mem. Ex. A.)

Aside from Myra Page, one of Plaintiff's directors, suggestion that her organization "believe[s]" the lower level was unlawfully removed from the facility,[9] Plaintiff has failed to proffer competent evidence suggesting it had ownership rights to the bottom level of the deck. *See* Pl.'s Reply Mem. Ex. 1. By contrast, the uncontroverted evidence tends to suggest Plaintiff and its residents enjoyed limited instances in which they could access the lower level of the parking deck until they could resume using the parking spaces on the upper level. *See generally* Pl.'s Reply Mem. Ex. 2; Roiter Aff. ¶¶ 42-44; Pl.'s Mem. Ex. A. For these reasons, the Court finds that this Decision is consistent with the consumer protection "flavor" of the Act. *See America Condominium Association, Inc.*, 844 A.2d at 128.

D

Attorneys' Fees and Punitive Damages

Plaintiff seeks attorneys' fees and punitive damages for the amendments ratified by Declarant in purported violation of the Act. (Pl.'s Mem. 22.) Section 34-36.1-4.17 of the Act states:

> "If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration

[9] The Court does not consider Ms. Page's statements as sufficient to resist summary judgment because a party may not rely on "conclusory statements." *See Riel v. Harleysville Worcester Insurance Co.*, 45 A.3d 561, 570 (R.I. 2012).

> or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. Punitive damages may be awarded in the case of a willful failure to comply with this chapter. The court, in an appropriate case, may award reasonable attorney's fees."

As this Decision declares, Plaintiff has failed to show that Declarant failed to comply with the Act. *See generally* Pl.'s Mem. Hence, Plaintiff is not entitled to collect its fees and punitive damages. *See supra*, Part III, Sec. A.

IV

Conclusion

For the reasons outlined above, Plaintiff's Motion for Summary Judgment is **DENIED**, and Defendants' Cross-Motion for Summary Judgment is **GRANTED**. Correspondingly, Plaintiff is neither entitled to its attorneys' fees nor punitive damages. Defendants' counsel shall prepare the appropriate judgment order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Belvedere at Bristol Master Condominium Association v. 423 Hope Street Redevelopment, LLC, et al.**
CASE NO:	**PC-2023-01337**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**April 23, 2024**
JUSTICE/MAGISTRATE:	**Stern, J.**
ATTORNEYS:	
For Plaintiff:	**Edmund A. Allcock, Esq.**
For Defendant:	**Alexandra A. Briggs, Esq.; Seta Accaoui, Esq.; Mitchell Edwards, Esq.; Thomas W. Madonna, Jr.,; Mackenzie C. McBurney, Esq.; John P. Connelly, Esq.**