STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-CV-08-041

The Friends of Great Diamond Island, LLC, et al.,

Plaintiffs

v.

DECISION AND ORDER
(Motions for Summary Judgment/
Motion to Dismiss)

The Inn at Diamond Cove, LLC, et al.,

Defendants

This matter was heard on July 8, 2009, on the Motion to Dismiss of Defendants The Inn at Diamond Cove, LLC (the Inn), Diamond Cove Homeowners Association (the Association), and the City of Portland (the City) (collectively, the Defendants), which motion Defendants assert pursuant to M.R. Civ. P. 12(b)(6). Defendants moved in the alternative for summary judgment in accordance with M.R. Civ. P. 56. The Court also considered the Motion for Summary Judgment of Plaintiffs, The Friends of Great Diamond Island, LLC (the Friends), James W. Fast (Fast) and James E. Brooks (Brooks) (collectively Plaintiffs).

Factual Background

The Friends is comprised of residents of Great Diamond Island, some of whom are residents of the Diamond Cove area of Great Diamond Island. According to Plaintiffs, the Friends was established by residents of Great Diamond Island concerned about preserving the aesthetic, ecological, and environmental qualities of the Island. Plaintiff Fast, who owns a home within the Diamond Cove area, is a member of the Association and the Friends. Plaintiff Brooks is a resident of Great Diamond Island and a member of the Friends.

The Diamond Cove development is approximately 190 acres and occupies the northerly half of the Island. In 1985, the northerly portion of Great Diamond Island was rezoned to the IR-3 Residential Zone pursuant to a Conditional Rezoning Amendment (the Conditional Rezoning).

Under the Conditional Rezoning, the City imposed certain Conditions and Restrictions on the property within that zone.

The Diamond Cove development was formally created under a General Declaration of Covenants and Restrictions (the Declaration), originally dated September 27, 1989, and recorded in the Cumberland County Registry of Deeds. From 1989 to the present, the Declaration has been amended and supplemented several times, which changes have also been recorded in the Cumberland County Registry of Deeds.

The Diamond Cove development includes property commonly known as the "Fort McKinley Property." The Double Barracks and Hospital Buildings are located within this development, which is comprised of 144 lots.

On or about May 10, 1991, title to the Double Barracks and Hospital buildings was conveyed to The Double Barracks at Diamond Cove, LLC and the Hospital at Diamond Cove, LLC, respectively. In April 2002, the City assessed taxes to the owners of the Double Barracks and Hospital buildings. When the owners of the property did not pay the taxes, the City sent notices of lien and tax lien certificates via certified mail to "Hospital at Diamond Cove LLC" and "Double Barracks at Diamond Cov." The tax lien certificates identified the owners of the property as "Hospital at Diamond Cove LLC" and "Double Barracks at Diamond Cov," and identified the property by reference to the tax map lot number, an address and the Plan of Diamond Cove. On June 16, 2003, the tax lien certificates were recorded in the Cumberland Country Registry of Deeds.

Defendants maintain that on November 12, 2004, the City sent the owners of the Double Barracks and Hospital notice of impending automatic foreclosure and informed the owners of their obligation to pay the outstanding tax liability by noon on December 16, 2004. Plaintiffs contend that that the notices are ineffective because the City incorrectly identified the owners in the notices. The owners did not pay by the established deadline. The City thus asserts that it acquired title to the property as the result of the tax lien procedure.

In ensuing years, the City followed the same procedure, and recorded (and subsequently foreclosed upon) tax lien certificates for each of those years. After obtaining ownership through the foreclosure of the tax liens, the City secured the Double Barracks and Hospital buildings by boarding up accessible windows and doors. The City also solicited requests for proposals for the development

of the buildings. On or about April 30, 2007, the City Council authorized the City Manager to enter into a purchase and sale agreement for the sale to the Inn of the Hospital and Double Barracks buildings.

On June 6, 2007, the Association's Board of Directors convened a meeting to consider a proposed Second Amendment to the Association's Declaration. Several days in advance of the Board's meeting, notice was sent to the members of the Association, the Maine Audubon Society, the Casco Bay Island Development Association and the Island Institute. At the meeting, the Association's Board members voted unanimously to approve a resolution calling for a vote on the proposed Second Amendment by the Association.

The purpose of the Second Amendment was "to provide for the development of the residential lots in Building 46 (the Double Barracks Lots)" by a developer to be approved by the Association's Board of Directors. The proposed Second Amendment's provisions included: (1) a release and waiver of assessments on any Double Barracks lot until developed; (2) an increase in the number of lots from fourteen to a maximum of twenty-two; (3) the developer's ability to declare Building 46 as a hotel condominium; and (4) the construction of an in-ground swimming pool and service bar area. If approved by the Association, the Second Amendment would not take effect unless the City conveyed all of the Double Barracks Lots to the approved developer.

On June 13, 2007, the Association notified its members that a special meeting would be held on June 30, 2007. The notice of the special meeting stated that "[t]he affirmative vote of at least sixty-seven percent (67%) in voting interest of the owners is required in order to adopt the proposed Second Amendment." Along with the notice of special meeting, the Association provided its members with: (1) the proposed Second Amendment; (2) a proxy envelope; (3) a ballot; (4) an explanation of the amendment; (5) homeowners questions and answers regarding the Double Barracks Development; and (6) a return mailing envelope.

The special meeting was held on June 30, 2007. Following a discussion of the proposed Second Amendment, the Association members were asked to vote for or against its adoption. Defendants assert that the ballots and proxies were counted three times by two Dirigo employees and the Association's president.

According to Defendants, the final count of the vote was: 100 in favor, 34 against, and 11 non-votes – a 69-percent affirmative vote.on the Second Amendment. Plaintiffs contend that in actuality the proposed Second Amendment received less than 67% percent approval.[1] The Association informed all of its members of the result of the vote, and recorded the Second Amendment in the Cumberland Country Registry of Deeds on August 28, 2007.

In connection with the proposed development of the buildings, the Inn submitted to the City an application requesting an amendment to the Conditional Rezoning (originally approved in 1985) in order to allow for the renovation of the Double Barracks and Hospital buildings. After two workshops and a public hearing, the Planning Board concluded that the proposed amendments to the Conditional Rezoning conformed with the City of Portland Comprehensive Plan, and with several conditions and additions, recommended to the City Council the approval of the proposed amendments. The amendments allowed the redevelopment of the Hospital and Double Barracks buildings into individually owned and fully equipped condominium units with a supporting pool/service area.

Before the amendment to the Conditional Rezoning, the area in which the swimming pool/service area was to be built under the proposed development was designated as "dedicated open space." Under the pre-amendment Conditional Rezoning, all portions of "dedicated open space" were to be "reserved as such in perpetuity."

Procedural History

The Friends, Fast and William Robitzek filed the original Complaint against the Inn and the Association on August 26, 2008. Count I of the original Complaint alleged failures by the City in acquiring title to property known as the Double Barracks and the Hospital through the tax lien foreclosure. Count II alleged that votes cast on behalf of the City were not in accordance with the "Declaration" or Bylaws of the Association because the City was not the title-holder to the property.[2]

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[1] Plaintiffs contend that multiple duplicate, incomplete and defective ballots and proxies were counted as "yes" votes, thus rendering the vote tally inaccurate.

[2] The reference to the "Declaration" in the pleadings is to the General Declaration of Covenants and Restrictions (Diamond Cove, Great Diamond Island, Portland, Maine) which is dated September 27, 1989 and recorded in the Cumberland County Registry of Deeds and which was amended and supplemented 8 times between 1989 and July 26, 2002, which amendments and supplements were also recorded in the Registry of Deeds.

In Count III, Plaintiffs alleged that the proposed project would be inconsistent with certain orders of the Maine Department of Environmental Protection (the DEP). The original complaint was never served on the Inn or the Association.

On August 27, 2008, Plaintiffs filed the First Amended Complaint, which replaced William Robitzek as a party-plaintiff with Plaintiff Brooks. The Amended Complaint contained the same three counts as the original complaint. The Court subsequently granted Plaintiffs' request to amend further their Complaint. The Plaintiffs thus filed a Second Amended Complaint on or about September 26, 2008. In the Second Amended Complaint, Plaintiffs joined the City as a Defendant, and alleged three new counts, which included challenges to the Association's adoption of the amendment to its Declaration, and the City's amendments to its zoning provisions.

Discussion

A. Standard of Review

As explained above, Defendants have moved to dismiss Plaintiffs' Complaint, or in the alternative, for summary judgment. Plaintiffs have also moved for summary judgment

A motion to dismiss pursuant to M.R. Civ. P. 12(b)(6) "tests the legal sufficiency of the complaint and, on such a challenge, 'the material allegations of the complaint must be taken as admitted.'" *Shaw v. Southern Aroostook Comm. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quoting *McAfee v. Cole*, 637 A.2d 463, 465 (Me.1994)). When reviewing a motion to dismiss, the court examines "the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* In the context of a motion to dismiss under M.R. Civ. P. 12(b)(6), the court's review is limited to the allegations contained in the plaintiff's complaint. However, when, as here, a motion for a judgment on the pleadings is accompanied by matters outside the pleadings and not excluded by the court, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." M.R. Civ. P. 12(c). In this case, the Court will consider the additional materials submitted by Defendants in support of their motion and, therefore, will treat the parties' pending motions as cross-motions for summary judgment.

M.R. Civ. P. 56(c) provides that summary judgment is warranted if "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." M.R. Civ. P. 56(c)). For purposes of summary judgment, a "material fact is one having the potential to affect the outcome of the suit." *Burdzel v. Sobus*, 2000 ME 84, ¶ 6, 750 A.2d 573, 575. "A genuine issue of material fact exists when there is sufficient evidence to require a fact-finder to choose between competing versions of the truth at trial." *Lever v. Acadia Hosp. Corp.*, 2004 ME 35, ¶ 2, 845 A.2d 1178, 1179. If ambiguities in the facts exist, they must be resolved in favor of the non-moving party. *Beaulieu v. The Aube Corp.*, 2002 ME 79, ¶ 2, 796 A.2d 683, 685.

B. Count I: Validity of the Second Amendment.

In Count I of the Second Amended Complaint, Plaintiffs seek a declaration that the Second Amendment to the Declaration was not valid because it did not pass by the 80% threshold Plaintiffs contend is required by Article 13.1 of the Declaration. According to Plaintiffs, because at most the favorable votes represent 67% of the eligible votes, the Second Amendment is invalid as a matter of law. Plaintiffs also contend that, even if the Amendment could be approved by 67% of the eligible votes, because of irregularities with some of the votes, the number of votes in favor of the Second Amendment is actually less than 67% of the eligible votes.

Defendants maintain that Article 12, rather than Article 13.1, governs the Second Amendment and that under Article 12, only 67% of eligible votes were required in order for the Amendment to pass. Based on their assertion that the Second Amendment received 69% (or, at the very least, 67%) of the eligible votes, Defendants contend that the Second Amendment is valid. Defendants further contend that Count I is time-barred and that the Friends and Plaintiff Brooks lack standing to challenge the validity of the Second Amendment because they are neither parties to nor third-party beneficiaries of the Declaration.

Article 12, which Defendants maintain governs the Second Amendment, reads in pertinent part:

> 12. <u>AMENDMENT</u>
>
> Except in cases of amendments to this Declaration that may be unilaterally executed and recorded by the Declarant under Sections 3.2 and 13.4, and subject to the other provisions of this Declaration and the Bylaws, this Declaration, and the Phase I and Phase II Plans may be amended as follows:
>
> . . .
>
> A. After the first conveyance of a lot by a Declarant, the terms of the following subparagraphs shall apply to the amendment of this Declaration:

. . .

(2) Resolution: An amendment may be proposed by either the Board of Directors or by owners holding in the aggregate no less than twenty (20%) percent of the votes in the Association. No resolution of the Board of Directors adopting a proposed amendment shall be effective unless it has been adopted at a meeting of the Association duly called and held in accordance with the Bylaws by the affirmative vote of at least sixty-seven percent (67%) in voting interest of the owners and then executed and recorded as provided in paragraph B(5) of this Article 12.

(3) Agreement: In the alternative, an amendment may be made by an agreement signed by the record owners of the lots to which at least sixty-seven percent (67%) of the votes in the Association are allocated in the manner required for the execution of a deed and acknowledged by at least one of them, and such amendment shall be effective when recorded.

(4) Certain Amendments: Notwithstanding the foregoing provisions of this Article 12, except as otherwise provided in this Declaration, no amendment may increase the number of lots or change the boundaries of any lot, or the uses to which any lot is restricted without the consent of the owners and the consent of the Eligible Mortgage Holders representing or holding mortgages on lots having at least sixty-seven percent (67%) of the votes in the Association and, in the case of changes in the boundaries or permitted uses of a lot, the consent of the owners of the lots affected. No amendment of this Declaration shall make any change which would in any way affect any of the rights, privileges, powers and options of the Declarant, its successors or assigns, unless the Declarant or its successors or assigns shall join in the execution of such amendment.[3]

Plaintiffs argue that Article 12 is expressly subject and subordinate to other conflicting provisions within the Declaration. More specifically, Plaintiffs assert that because Article 12 is expressly "subject to the other provisions of this Declaration and the Bylaws," any amendments to the Declaration relating to the land use covenants and restrictions that run with and bind the land, are governed by Article 13, not Article 12. Article 13 provides in relevant part:

13. GENERAL PROVISIONS

[3] Subsection 6 of Article 12 further provides:

(6) Notice and Challenge: No action to challenge the validity of an amendment to this Declaration adopted by the Association pursuant to this Article 12 may be brought more than one year after such amendment is recorded.

13.1 Duration: The covenants and restrictions set forth in this Declaration shall run with and bind the land, for the benefit of all property owned by Declarant and shall inure to the benefit of and be enforceable by Declarant, the Association or the owner of any land subject to this Declaration, their respective legal representatives, heirs, successors and assigns, for a term of twenty (20) years from the date this Declaration is recorded, after which time said covenants shall be automatically extended for successive periods of ten (10) years unless an instrument signed by the then owners of eighty percent (80%) of the lots has been recorded agreeing to change said covenants and restrictions in whole or in part; provided, however, that no such agreement of change shall be effective unless made and recorded three years in advance of the effective date of such change, and unless written notice of the proposed agreement is sent to every owner at least ninety (90) days in advance of any action taken.

Plaintiffs argue that because the Second Amendment unquestionably did not receive approval of 80% of the eligible votes, Plaintiffs are entitled to judgment as a matter of law as to their request for a declaration that the vote was invalid.

While the parties disagree as to which Article governs the Second Amendment, each party argues that the Declaration is unambiguous and that the unambiguous language supports each of their respective, and conflicting, interpretations. Given the parties' dispute over the proper interpretation of the Declaration, however, and based upon well-established principles of contract construction, the Court concludes that summary judgment on Count I is not available to either party.

The interpretation of unambiguous contract language is a question of law. *See Benton Falls Assoc. v. Central Maine Power, Co.*, 2003 ME 99, ¶ 13, 828 A.2d 759, 763. Similarly, the threshold question of whether a contract is ambiguous is a question of law. *Id.* (citing *Acadia Ins. Co. v. Buck Constr. Co.*, 2000 ME 154, ¶ 8, 756 A.2d 515, 517). Under Maine law, "[c]ontract language is ambiguous if it is reasonably susceptible to different interpretations." Further, "canons of construction require that a contract be construed to give force and effect to all of its provisions . . . and [courts] will avoid an interpretation that renders meaningless any particular provision in the contract[.]" *Acadia Ins. Co.*, 756 A.2d at 517 (internal citations and quotation marks omitted). "While interpretation of unambiguous contract language is . . . a question of law, interpretation of ambiguous contract language is a question of fact." *Id.*

In this case, both the Plaintiffs and the Defendants argue that the Declaration unambiguously supports their respective position. Plaintiffs argue that Article 13 unambiguously requires that 80% of lot owners approve any amendment to the Declaration's covenants and restrictions while Defendants maintain that Article 12 unambiguously requires the support 67% of voting interest in

order to amend the Declaration. Based on the language of Articles 12 and 13, both parties' urged interpretations could be considered reasonable. The language of the Declaration is, therefore, ambiguous. Given the ambiguity, the Court can consider factual evidence as to the intent of the drafters of the Declaration. *Pine Ridge Realty, Inc. v. Massachusetts Bay Ins. Co.*, 2000 ME 100, n.11, 752 A.2d 595, 601 ("if a contract is ambiguous, the court may consider extrinsic evidence regarding the intent of the parties.") (*citing Handy Boat Serv., Inc. v. Professional Servs., Inc.*, 1998 ME 134, ¶ 13, 711 A.2d 1306, 1309). Accordingly, summary judgment is not warranted. *See Farrington's Owners' Ass'n v. Conway Lake Resorts, Inc.*, 2005 ME 93, ¶¶ 10-14, 878 A.2d 504, 507-08 (explaining that when contract language is reasonably susceptible to different interpretations, summary judgment is not appropriate).[4]

Furthermore, if Article 12 governs as Defendants contend, a factual dispute plainly exists regarding the number of votes actually cast in support of the amendment. As explained above, while Defendants assert that 69% approval was obtained, Plaintiffs contend that "multiple duplicate, incomplete and defective ballots and proxies were counted as 'yes' votes" and, as result, the "vote tally was not accurate and the proposed Second Amendment received less than 67% approval. The validity of some of the ballots is, therefore, very much in dispute.

B. Whether Count I is Time-Barred.

Defendants also move for summary judgment on Count I on the grounds that it is time barred. As noted *supra* at footnote 3, Article 12(6) provides that any challenge to an amendment to the Declaration made under Article 12 must be brought within one year after any such amendment is recorded. Given that the limitation period applies to amendments adopted pursuant to Article 12, and given the Court's determination that a factual dispute exists as to whether Article 12 applies, neither summary judgment nor dismissal is appropriate at this stage of the proceedings.

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[4] Defendants also argue that Plaintiffs "admitted" the applicability of Article 12's 67% percent requirement as well as of the applicability of Article 12(6)'s limitations period in various paragraphs of their Complaint and First Amended Complaint. Although an assertion of fact in a pleading is generally considered an admission to which a party will remain bound, the assertions cited by Defendants do not constitute an admission that Article 12 governs. *See* M.R. Civ. P. 8(d) and *Bahre v. Liberty Group, Inc.*, 2000 ME 75, ¶ 15, 750 A.2d 558, 562. Paragraph 29 merely summarizes the language of Article 12. It does not purport to concede that Article 12 or its limitations period applies. Moreover, given the claims made in the First Amended Complaint and in Plaintiffs' summary judgment filings that 80% approval was required under Article 13, Plaintiffs have not waived their ability to contest the applicability of Article 12.

C. Whether The Friends and Brooks Have Standing to Assert Count I.

Defendants also challenge the standing of the Friends and Plaintiff Brooks to assert Count I of the Amended Complaint.[5] In their motion, Defendants contend that the Friends and Plaintiff Brooks lack standing to bring Count I because they are neither parties to, nor identified beneficiaries of the Declaration. Plaintiffs argue that Plaintiff Brooks has standing by virtue of the fact that he is a resident of Great Diamond Island, a member of the Friends, and the Second Amendment "impacts environmental interests."[6] Plaintiffs further contend that the Friends has organizational standing to bring Count I by virtue of Plaintiff Fast's status as a beneficiary of the Declaration and his membership the Friends.[7]

Contrary to Defendants' argument, Plaintiffs have at a minimum demonstrated the existence of facts upon which one could conclude that the interests of Plaintiff Fast are sufficient to give him standing, and that his interests are relevant to the purpose of the Friends. *See Friends of the Earth, Inc.*, 528 U.S. at 181 ("An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.") (citations omitted). Defendants are thus not entitled to dismissal or summary judgment on the Friends' claims in Count I based on the standing issue.

The Court is not, however, persuaded that Plaintiff Brooks has sufficiently demonstrated a personal interest in the meaning and validity of the Second Amendment such that he has individual standing to seek relief under the Declaratory Judgment Act. As the Law Court has recently reiterated, "whether a party has standing depends on the wording of the specific statute involved." *Nergaard v. Town of Westport Island*, 2009 ME 56, ¶ 12, 973 A.2d 735, 739 (quoting *Nelson v.*

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[5]Article 13.8 of the Declaration provides that:

> The easements, licenses, rights, and privileges established, created and granted by this Declaration shall be for the benefit of, and restricted solely to, Declarant, the Association and the owners; and any owner may also grant the benefit of such easement, license, right or privilege to his tenants and guests and their immediate families for the duration of their tenancies or visits, subject in the case of the common properties to the Rules and Regulations of the Board, but the same is not intended to create nor shall it be construed as creating any rights in or for the benefit of the general public.

[6] In support of this argument, Plaintiffs cite, *inter alia, Sierra Club v. Morton*, 405 U.S. 727, 734, 738-39 (1972)).

[7] Plaintiffs cite *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000) in support of this argument.

Bayroot, LLC, 2008 ME 91, ¶ 9, 953 A.2d 378, 381). In this case, Count I is brought pursuant to the Maine Declaratory Judgment Act. 14 M.R.S. §§ 5951-5963. Under the Act,

> Any person interested under a deed, will, written contract or other writings constituting a contract, *or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract* or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

14 M.R.S. § 5954 (emphasis added).

Not insignificantly, Plaintiff Brooks does not allege that he is a party to the Declaration. He also does not contend that he is a third-party beneficiary who is entitled to enforce the Declaration.[8] Instead, Plaintiffs contend that Plaintiff Brooks has standing by virtue of the environmental impact of the proposed development of the Double Barracks and Hospital buildings. In support of their argument, Plaintiffs cite a series of opinions issued by the United States Supreme Court in which that Court recognized that harm to "aesthetic, conservational, and recreational as well as economic values" are cognizable injuries for the purposes of demonstrating standing.[9] After a review of *Sierra Club*, other related Supreme Court cases as well as applicable Maine law, the Court concludes that Plaintiffs have failed to make the necessary showing with respect to Mr. Brooks.

Under the United States Supreme Court's holding in *Sierra Club* and consistent with the Law Court's rulings on the issue,[10] in order to have suffered "particularized injury" or to have a "substantial interest" in a contract so as to confer standing, a person must suffer a harm or have an interest that is "in fact distinct from the harm [or interest] experienced by the public at large."

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[8] Nor would Plaintiff Brooks succeed in such an argument. Maine courts utilize the definition of "intended beneficiary" in the RESTATEMENT "when determining whether a party is entitled to enforce a contract as a third-party beneficiary." According to the Restatement:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
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> (a) the performance of the promise will satisfy an obligation of the promise to pay money to the beneficiary; or
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Id. (quoting RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981)).

[9] Among the authority cited by Plaintiffs is *Sierra Club v. Morton*, 405 U.S. 727, 734, 738-39 (1972).
[10] *See e.g. Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189 (Me. 1978); and *Nergaard*, 2009 ME 56, 973 A.2d 735.

Nergaard, 2009 ME 56, ¶ 18 (internal quotations omitted). *See also Halfway House v. City of Portland*, 670 A.2d 1377, 1380 (Me. 1996). Although Plaintiffs argue that the environmental impact of the project is sufficient to confer standing, Plaintiff Brooks has not affirmatively asserted how, if at all, will be impacted to a greater degree than the public at large. Given the absence of any supported assertion of fact suggesting that Plaintiff Brooks' interests or rights are implicated to any degree greater than the general public, Plaintiff Brooks does not have standing to bring Count I.

D. Count II: The Tax Lien Foreclosures.

In Count II, Plaintiffs assert that the tax lien foreclosures are invalid because the City failed to identify properly the Barracks and Hospital building properties when it foreclosed. In support of their motion, Defendants first argue that Plaintiffs lack standing to assert Count II. The Court agrees.

As explained above, in order to have standing, a party must demonstrate "that he or she has suffered a particularized injury or harm," distinct from the harm suffered by the general public. *Nergaard*, 2009 ME 56, ¶ 16. Here, Plaintiffs do not allege that they held an interest in the property that was foreclosed upon or that their property interests were otherwise impacted. Instead, Plaintiffs contend that by virtue of their residency on Great Diamond Island they have a "personal stake" in the controversy. Contrary to Plaintiffs' contentions, however, a general interest in the controversy is insufficient. Plaintiffs must demonstrate a "particularized injury." *See Nergaard*, 2009 ME 56, ¶ 16.

In this case, Plaintiffs' fail to assert that they have actually suffered, or will likely suffer, a particularized harm. There is no factual assertion that the City's foreclosure impacts the Plaintiffs to a degree greater than it would impact the general public. Therefore, the Court concludes that Plaintiffs do not have standing to assert Count II, and summary judgment in favor of Defendants on that count is warranted.

E: Count III: The City's Vote.

In Count III, Plaintiffs maintain that the City of Portland was not entitled to cast votes on behalf of the Double Barracks and Hospital Buildings because it was not the record owner of those properties, and under the Declaration only "record owners" are entitled to vote on amendments to the Declaration. That is, Plaintiffs argue that because the City is not listed as the record owner of the Double Barracks and Hospital buildings in the Cumberland County Registry of Deeds or in the

City's Tax Assessor's office,[11] its votes in favor of the Second Amendment were invalidly cast and should not be counted.

The Declaration provides in pertinent part that:

> [a]ll *members* shall be entitled to one (1) vote for each residential lot, and for each 2,000 square feet of commercial lot area, in which they hold the interests required for membership pursuant to Article 6. When more than one person or entity holds such an interest or interests in any dwelling or lot, all such persons or entities shall be members, and the vote for such dwelling or lot shall be exercised as they among themselves determine by majority vote, but in no event shall more than one vote be cast with respect to any such dwelling or residential lot, or more than one vote for each 2000 square feet of commercial lot area.

Declaration at § 6.2 (emphasis added). The term "member," in turn, is defined as an "owner." Therefore, in order for the City to be entitled to vote, it must appropriately be deemed an "owner," as that term is defined in the Declaration. *See* Declaration at § 6.1. The Declaration defines "owner" as follows:

> "Owner" shall mean and refer to the record owner, whether one or more persons or entities, of the fee simple title, or that estate or interest which is most nearly equivalent to a fee simple title, to any lot situated upon the properties, but shall not mean or refer to any mortgage holder thereof unless and until such holder has acquired title pursuant to foreclosure or any proceeding in lieu of foreclosure.

Declaration at § 2.12.

Under Maine's tax lien foreclosure statute, the recording of a tax lien certificate in the Registry of Deeds "shall be sufficient notice of the existence of the tax lien mortgage." 36 M.R.S. 943. When the 18-month period of redemption expires, the tax lien mortgage "shall be deemed to have been foreclosed." *Id.* Further, under the statute,

> [t]he tax lien mortgage shall be prima facie evidence in all courts in all proceedings by and against the municipality, its successors and assigns, of the truth of the statements therein and after the period of redemption has expired, of the title of the municipality to the real estate therein described, and of the regularity and validity of all proceedings with reference to the acquisition of title by such tax lien mortgage and the foreclosure thereof.

Id.

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[11] Plaintiffs' Statement of Additional Fact 22 asserts: "The City of Portland has not recorded its putative ownership in the Cumberland County Registry of Deeds nor has it changed the record ownership as reflected in the City of Portland Tax Assessor's Office." *Id.* Although Defendants purport to object to the assertion made in paragraph 22 (on the grounds that it impermissibly states a legal conclusion), the Court overrules that objection. Plaintiffs' paragraph 22 does in fact constitute a factual assertion and Defendants have failed to deny it. Accordingly, paragraph 22 is deemed admitted. *See* M.R. Civ. P. 56(h)(4).

The issue at this stage of the proceedings is whether on this record, the Court can determine as a matter of law whether the City was or was not an "owner" as contemplated by the Declaration. On this issue, the factual record is not in dispute. Because the tax lien certificate was recorded and the City's tax lien mortgage foreclosed upon by operation of Section 943, the City was a mortgage holder that had obtained title through foreclosure.[12] As such, the City's interest in the property was sufficient to render it an "owner" under the Declaration and entitle it to cast votes in accordance with the Declaration. Plaintiffs' Count III thus fails as a matter of law, and Defendants are entitled to summary judgment on that claim.

F: Count IV: The Legitimacy of the Voting Process and Results.

In Count IV, Plaintiffs seek a declaration that the Second Amendment did not properly pass due to deficiencies in the voting process. According to Plaintiffs, even if the 67% voting standard is adopted, the June 30, 2007, vote was insufficient to pass the Second Amendment. Plaintiffs maintain that a number of the proxy votes cast in favor of the Second Amendment were defective and invalid.[13]

Simply stated, a review of the record plainly reveals factual disputes as to the validity of the proxy votes, including the extent to which the votes were authorized. Neither party is thus entitled to summary judgment on Count IV.

G. Count V: The DEP Site Location Orders.

On December 10, 1986, the Department of Environmental Protection (DEP) issued a Site Location Order. That Site Location Order contained so-called "Finding 19" in which the Maine Department of Inland Fisheries and Wildlife recommended that "[t]he area designated as open space on the Recording Plat be retained in its natural state with no new structures located there. This open space includes and is adjacent to, winter deer cover and will serve as a buffer between it and adjacent developed land." The 1986 Site Location Order also states that "[t]he applicant and the

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[12] Whether or not the City recorded another document outlining its ownership is immaterial given that the definition of an "owner" under the Declaration includes "the record owner," *and* a mortgage holder who has acquired title through foreclosure or some similar proceeding. The reference in Section 2.12 to "record owner" includes mortgagors, provided foreclosure has occurred. Here, the City was a mortgagor and foreclosure occurred by operation of law.

[13] In addition to their substantive arguments, Defendants also contend that the Friends and Plaintiff Brooks lack standing to assert Count IV. As it did in connection with Count I, the Court concludes that the Friends has organizational standing by virtue of Plaintiff Fast's membership in the association. However, Plaintiff Brooks, who is not a beneficiary of the Declaration and who has otherwise failed to assert a particularized injury as a consequence of the adoption of the Second Amendment, lacks standing to challenge the vote and the validity of the Second Amendment.

Diamond Cove Homeowners Association shall implement the recommendations . . . as set forth in Finding 19." In turn, the original Declaration, dated September 27, 1989, provided that the Association would comply with Finding 19 and maintain the open spaces identified therein.

The original Declaration was amended, however, in 1993. Section 7.3.2 of the 1993 Amendment to the Declaration provides in pertinent part:

> All areas designated as "Open Space Recreation Areas" within Phase II shall remain as open space and shall not be subdivided or built upon or otherwise altered from their natural character. . . . This restriction shall not be amended or released without the consent of all lot owners in Phase II, Maine Audubon Society, Casco Bay Island Development Association and Island Institute, and any attempted amendment or release thereof without such consent shall be void and of no effect.

The proposed development of the Double Barracks and Hospital Buildings includes the construction of a swimming pool and bar service area on land previously designated "Open Space." In Count V, Plaintiffs allege that construction of the proposed swimming pool and bar area violates Finding 19 of the DEP Site Location Order.

Defendants contend that Plaintiffs lack standing to assert Count V. As part of their argument, Defendants maintain that only the DEP has standing to enforce its own Site Location Orders.[14] The Court does not, however, have to determine whether a private party can seek enforcement of a Site Location Order. Even if a private party can have standing to challenge an alleged violation of a Site Location Order based upon environmental impact, as explained above, Plaintiffs have failed to articulate any environmental impact from the proposed development that is unique to them. Accordingly, Plaintiffs lack standing to seek a declaration that the proposed development violates the DEP's 1989 Site Location Order or to otherwise seek to enforce that Order.

H. Count VI: Amendment of the 1985 Conditional Rezoning.

As noted above, in 1985 the City rezoned the northerly portion of Great Diamond Island and imposed certain conditions and restrictions on that portion of the Island. Under the 1985 Conditional Rezoning, the following conditions and restrictions, among others, were imposed:

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[14] Defendants rely upon 38 M.R.S. § 481 which provides in relevant part:

> The purpose of this subchapter is to provide a flexible and practical means by which the State, acting through the department, in consultation with appropriate state agencies, may exercise the police power of the State to control the location of those developments substantially affecting local environment in order to insure that such developments will be located in a manner which will have a minimal adverse impact on the natural environment within the development sites and of their surroundings and protect the health, safety and general welfare of the people.

Development limited. The development, use and occupancy of the Premises shall be limited to one hundred thirty-four (134) dwelling units and other permitted uses, and uses accessory thereto. Except for the reconstruction, renovation and repair of existing buildings and structures, and the construction of minor additions and improvements thereto, there shall be no construction or development of any new principal building or structure on the Premises. All portions of the Premises identified on the map attached hereto as open space shall be dedicated and reserved as such in perpetuity.

In Count VI, Plaintiffs contend that the 2008 Amendment to the Conditional Rezoning, which permitted the construction of a swimming pool and bar service area in an area previously designated as "open space," is invalid. Plaintiffs specifically argue that the 1985 Conditional Rezoning cannot be amended to allow development in the dedicated open spaces because the designated open space is to be maintained as such "in perpetuity."

In support of their motion for summary judgment and in opposition to Plaintiffs' motion, Defendants cite the following language within the 1985 Conditional Rezoning:

> Nothing in these conditions or restrictions shall constitute any representation or commitment by the City to retain the zoning classification of the Premises, or shall entitle the Owner to rely thereon for any purposes, or shall estop the City from any future rezoning or exercise of other authority with respect to the Premises. Nothing herein shall be deemed to preclude the Owner from petitioning the City for any future rezoning of the Premises or other property in the vicinity thereof; provided, however, that nothing herein shall constitute any representation or commitment by the City to grant such a petition or otherwise act thereon.

Defendants maintain that this language establishes that any designation of open space and any restriction of development contained in the 1985 Conditional Rezoning was properly subject to amendment. Plaintiffs nevertheless argue that the ability of the City to rezone the area is not pertinent insofar as Count VI does not challenge the City's authority to rezone the area, but, rather, challenges a developers' attempt to encroach on an area designated as open space in perpetuity

Once again, neither of the parties' interpretations is unreasonable on its face. Given the reasonable, though conflicting, interpretations urged upon the court by the parties, the Court determines that terms of the Conditional Rezoning, specifically those terms relevant to whether the "open space" provision may be amended, are ambiguous. Summary judgment is thus not appropriate.

Conclusion

Based on the foregoing analysis, the Court orders:

1. The Court grants Defendants' Motion for Summary Judgment on Count I as to Plaintiff Brooks, and otherwise denies the motion as to Count I. Judgment shall be entered against Plaintiff Brooks on Count I. The Court denies Plaintiffs' Motion for Summary Judgment on Count I.

2. The Court grants Defendants' Motion on Count II, and denies Plaintiffs' Motion as to Count II. Judgment shall be entered in favor of Defendants on Count II.

3. The Court grants Defendants' Motion on Count III. The Court denies Plaintiffs' Motion as to Count III. Judgment shall be entered in favor of Defendants on Count III.

4. The Court grants Defendants' Motion on Count IV as to Plaintiff Brooks, but otherwise denies the Motion as to Count IV. Judgment shall be entered against Plaintiff Brooks on Count IV.

5. The Court grants Defendants' Motion on Count V, and denies Plaintiffs' Motion as to Count V. Judgment shall be entered in favor of Defendants on Count V.

6. The Court denies Defendants' Motion on Count VI, and denies Plaintiffs' Motion as to Count VI.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 9/22/09

Justice, Maine Business & Consumer Docket