THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS. **SUPERIOR COURT**

MARK KANE, *et alia*

V.

JENNIFER DICKERT, *et alia*

219-2014-CV-280

MOTION TO APPOINT RECEIVER

NOW COMES the Cushing Street Condominium Association (hereinafter "Cushing Street") and in support hereof states as follows:

Introduction

1. Cushing Street is a condominium association pursuant to New Hampshire RSA 356-B (hereinafter the "Condominium Act") and is organized and operated to provide management, maintenance and care of property known as Cushing Street Condominium situate at 27 Cushing Street in the City of Dover, New Hampshire.
2. The Declaration and Bylaws of the Association were recorded in the Strafford County Registry of Deeds on May 19, 1986, beginning at Book 1227, Page 0536 a copy of which has previously been provided to the Court, *see* Kane *et alia* v. William Helfinstine *et alia*, 219-2012-CV-532.
3. Additionally, the Association is further described on a site plan recorded in the Strafford County Registry of Deeds as Plans 29-50 and 29-51, a floor plan recorded in said Registry as Plans 29A-82 and 29A-83, as well as on a plan entitled "Cushing

Street Condominiums, Fourth Floor Attic Plan" dated June 17, 1986 by Bruce L. Pohopek and recorded in said Registry.

4. Cushing is comprised of one building with four (4) Units in it. Declaration at 3, D, (1).

5. The owners are as follows:

    - Unit 1 – William Helfinstine and Jennifer Dickert
        - Mr. Helfinstine purchased the Unit in 2005, per a deed recorded in the Strafford County Registry of Deeds beginning at Book 3226, Page 0494, and transferred it to he and Ms Dickert in January 2013 per a deed recorded in the Strafford County Registry of Deeds beginning at Book 4093, Page 0491.
    - Unit 2 – Mark and Monique Kane
        - Mr. and Mrs. Kane purchased the Unit in 1993, per a deed recorded in the Strafford County Registry of Deeds beginning at Book 1717, Page 414 and transferred it into a Trust in 2004, per a deed recorded in the Strafford County Registry of Deeds beginning at Book 2979, Page 0038.
    - Unit 3 – Nancy Greenwood and Matthew Greenwood
        - Ms Greenwood purchased the Unit in August 2006, per a deed recorded in the Strafford County Registry of Deeds beginning at Book 3424, Page 0320; earlier this year, she transferred the Unit to she and her son, Matthew by deed dated May 9, 2014 beginning at Book 4212, Page 0100.
    - Unit 4 – Kevin and Roddi Smith

- Mr. and Mrs. Smith purchased the Unit in November 2010, per a deed recorded in the Strafford County Registry of Deeds beginning at Book 3881, Page 0486.

6. The voting power of each Unit at Cushing Street is determined by the size of the Unit as compared to the size of the total square footage of all the Units. "Each Unit which has been conveyed or rented by the Declaration shall be entitled to the number of votes equal to the Percentage Interest assigned to such Unit in the Declaration." Bylaws Art. II, 1.
7. The Percentage Interests are as follows, Declaration, Exhibit B, Book 1227, Page 0571, *et seq.*:
    a. Unit 1 – 27.11
    b. Unit 2 – 25.24
    c. Unit 3 – 18.67
    d. Unit 4 – 28.98

8. Of course, as a condominium association the owners are bound by the terms of the Declaration, Bylaws, site Plan and Floor plans. "The declarant, every unit owner, and all those entitled to occupy a unit shall comply with all lawful provisions of this chapter and all provisions of the condominium instruments." RSA 356-B: 15, I.
9. The condominium instruments are the legal documents that form a contract that governs the rights between the association and owners. Schaefer v. Eastman Community Assoc., 150 N.H. 187, 191 (2003), Ryan James, LLC v. The Villages at Chester Condominium Association, 153 N.H. 194 (2006).

10. "'Condominium instruments'" is a collective term referring to the declaration, bylaws, and site plans and floor plans, recorded pursuant to the provisions of this chapter." RSA 356-B: 3, VI.

11. There are only two ways for a New Hampshire condominium association to govern, either to have the Association vote on all matters or to create a Board of Directors to operate the Association.

> I. There shall be recorded simultaneously with the declaration a set of bylaws providing for the self-government of the condominium by an association of all the unit owners. The unit owners' association may be incorporated.
>
> II. The bylaws shall provide whether or not the unit owners' association shall elect a board of directors. If there is to be such a board, the bylaws shall specify the powers and responsibilities of the same and the number and terms of its members.

RSA 356-B: 35.

12. At Cushing Street the Association is to be run by a Board of Directors. "The affairs and business of the Condominium shall be managed by a Board of Directors …" Bylaws, Art. III, 1.

13. "The Board of Directors shall be composed of three persons." Bylaws, Art. III, 3.

14. In turn, the Board members are elected by the association members.

> At the first annual meeting of the Unit Owners' Association, three (3) Directors shall be elected. The term of office of one Director shall expire at the second annual meeting; the term of office of One Director shall expire at the third annual meeting' and the term of office of one Director shall expire at the fourth annual meeting, subject to the provisions of Section 3 above. At the expiration of the initial term of office of each Director, his successor shall be

> elected to serve a term of three years, and each Director shall hold office until his successor has been elected.

Bylaws at Art. III, 4.

History

15. For many, many years, perhaps since the creation of Cushing Street, there had been no active Board, i.e. per the documents there has always been a Board, but seats on the Board remained unfilled.

16. The members, until sometime in 2012, just agreed on what to do … or not do. "We don't have a Board. The meetings have always been for Unit Owners for the 18 years we've resided in our Condo." Kane email to Dickert of December 12, 2012.

17. Mr. Helfinstine and Ms Dickert, though in disagreement with how the Association was run, had read the condominium instruments and noted they were only one vote in the association, and that vote carried with it an insufficient percentage of ownership to insist that the Association be run as required by the condominium instruments.

18. In 2010 Mr. and Mrs. Smith purchased their Unit.

19. They too, became concerned with how the Association was operating.

20. For instance, despite Mrs. Kane having been the Treasurer for seventeen (17) years, there was virtually no money in reserves, the owners having repeatedly voted not to fund a capital reserve fund.

21. By 2012 the concern had become great enough that together, Units 1 and 4 insisted on duly called meetings and the election of a Board.

22. As noted above, Mr. Kane disagreed.

23. As a result of the conflict between the Plaintiffs and the Respondents, a meeting was held in October 2012.

24. Over Mr. Kane's objections, an interim Board was elected in October 2012.[1]

25. Members vote according to the percentage of interest they have in their Unit. "Each Unit which has been conveyed or rented by the Declarant shall be entitled to the number of votes equal to the Percentage Interest assigned to such Unit in the Declaration." Bylaws at Art. II, 2.

26. As noted in Paragraph 7 herein, Units 1 and 4, those owned by the Respondents, have the largest Percentage Interest, essentially controlling who gets elected to the Board.

27. Units 1, 3 and 4 were elected to the Board.

28. Unit 2, represented by Mr. Kane, was not.

29. His voice of control was silenced.

30. And thus began the problems that lead us here.

Board Meetings

31. As the Court no doubt knows, Boards control the operation of condominium associations.

32. The Kanes have taken issue with nearly every decision taken by Ms Smith and Ms Dickert.

33. In light of the acrimony that began in 2012 when Units 1 and 4, as the largest percentage owners began questioning the prior actions and governance of the

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[1] In part, the *interim* Board was created because only the Board can appoint officers, set meeting dates, i.e. operate the association. One of the goals was to set a meeting date to have an actual election for Board members.

Association there has been acrimony over the simplest of issues. A few such examples follow.

Garden

34. In the summer of 2013 the Board set out gardening areas for each unit to use as they saw fit, in light of the inability to share garden space.
35. The Kanes were asked to leave a 4' space to walk between the designated quadrants to give room for people to traverse to their area while allowing space for overgrowth.
36. This was done without action by the Board, but as neighbors.
37. The Kanes left a two foot area instead without speaking or explain why.
38. This year, they were again asked to leave a four foot path and Ms Smith put down landscaping screen to mark the area so all could traverse, prevent plant growth on the paths, and so plants in the quadrants could overgrow a bit into the paths without the possibility of being trampled.
39. Mr. Kane then removed the landscaping screen and changed the dimensions of the garden taking space as he saw fit.
40. The Board then had to expend time and money, including legal fees, to create, pass, distribute and enforce a gardening policy with designated areas, with dimensions, on the common area for unit owners to plant their gardens.

Back Lighting

41. Unit 2, owned by the Kanes, is on the second floor of the main building.
42. In the rear, it has a deck.

43. The deck is level, or nearly so, with the second floor of Unit D, a converted carriage house.
44. The deck has a light on it.
45. The light shines on Unit D and into the bedroom, preventing Ms Smith from sleeping.
46. For many months, after this was mentioned, the Kanes diligently and courteously shut the light off at night.
47. Since the initiation of this suit, the light has been left on three times.
48. It has been mentioned to the Kanes, without fines, with no change in the behavior causing lack of sleep and further consternation.
49. The Board on Tuesday of this week, had to expend time and money on an issue that, yet again, should not be an issue.
50. Undersigned counsel noted the light is part of the Association's property under the condominium instruments, and the answer would be simply for the Association to replace the light with a sensor that would shut off after a few seconds of non-motion.
51. The Kanes were informed that day and objected stating they would take the light bulb out (an interesting position in light of their concerns about light in the front of the building and proper lighting being necessary for safety issues in the evening).
52. It was explained by counsel the light is not their property, but that of the Association as it is part of the Common Area, and in light of their actions, the Board

chose to take care of the problem without having the Kanes have to worry about sanctions should they forget (again) to shut the light off at night.

53. Wednesday morning, two days ago, Mrs. Kane sent an email noting she would ignore the directive of the Board and noted the light bulb has been put back in, and she will "try to remember" to turn it off at night.
54. The Kanes were not fined or otherwise sanctioned for their actions.
55. The cost of the sensor light installation, although it could be assigned to the Kanes as it services their limited common area, will be an Association expense.

Smoking

56. Mr. Kane smokes the occasional cigar.
57. He took to smoking in such a way as the smoke would drift into Units 1 and 4.
58. Mr. Kane would not abide by requests not to smoke so as not to interfere with the quiet enjoyment of others at the Association, such as in his Unit.
59. Rather, the Board had to deliberate and expend monies to create a smoking policy.
60. The Board could have voted to outlaw smoking on the Common Area.
61. It could have fined Mr. Kane.
62. Instead, it passed a policy restricting smoking within 15 feet of another unit.

Noise

63. Noise is a common problem in condominium associations.
64. As such, without near-irrefutable proof that someone is causing noise purposely to annoy another, noise issues are most often not addressed by Boards.
65. Mr. Helfinstine and Ms Dickert have repeatedly complained about loud walking and stomping by the Kanes, Mr. Kane in particular, who live directly above Mr.

Helfinstine and Ms Dickert, talking loudly at night, waking their baby, stomping down the stairs in the early morning hours, and more.

66. As such, the Board has been put in the difficult position of having to discern how much noise is too much, while the Kanes have complained that they are being harassed as they are not causing any undue noise and are particularly careful about not creating too much noise.

67. However, the facts seem to belie this stance.

68. For instance, on one occasion, both cars of Unit 1 were gone.

69. Mr. Kane was alone in Unit 2.

70. Ms Smith was babysitting the newborn child of Mr. Helfinstine and Ms Dickert in Unit 1.

71. It was apparent Mr. Kane was home and was, indeed, very quiet.

72. Ms Dickert then came home and parked her car in her designated spot such that it could be seen by Unit 2.

73. Within minutes of arrival the loud walking and stomping began in Unit 2, heard by Ms Smith who noted that when it appeared no one was in Unit 1, i.e. Mr. Kane would not have known Ms Smith was in Unit 1 babysitting, Mr. Kane had been quiet, and when Ms Dickert returned home, the loud walking and stomping began.

74. The Board chose not to fine Mr. Kane for his actions in the hope of reducing stress and agita.

75. A Noise Log is now maintained noting instances of unusual noise and the circumstances surrounding the noise.

Parking

76. The Site Plan is not accurate.
77. It is apparently a draft of a plan that was not finalized before the Association was created with, in part, the filing of the incomplete Site Plan.
78. The Site Plan makes clear each Unit is assigned two parking spaces as Limited Common Area, with one space left over for guests.
79. The parking spaces (see above about draft being filed as final plan) assigned spaces such that the assigned spaces were not the spaces closest to each Unit.
80. Additionally, the site plan does not match the topography of the condominium property, making it difficult to determine exactly where all should be parking.
81. However, it is clear both from the site plan as well as the condominium property, that there are nine spaces.
82. Over time, the owners parked in spaces closest to their Units.
83. The Kanes complained that people, Ms Dickert and Mr. Helfinstine, were not parking in their assigned spaces.
84. Parking in the assigned spaces would require Ms Dickert and Mr. Helfinstine to park much further from their Unit, than they had been, causing inconvenience, at a minimum.
85. The spaces for the Kanes are next to the walkway that leads to their Unit.
86. It was not surprising, in light of their constant challenges to the authority of the Board, that the Kanes wished for Mr. Helfinstine and Ms Dickert to have to walk further, in the dark, with a child, when no one had raised the issue previously.

87. Regardless, the Board had counsel look at the site plan and the documents, thereby expending more sums unnecessarily.
88. It was discovered the Site Plan was inaccurate and parking could not be matched according to the Site Plan, as noted above.
89. As such, the Board, which controls Common Area, was entitled to assign spaces.

90. Nevertheless, there were, indeed, two spaces for each Unit and an extra space for a visitor.
91. The visitor's space was next to the two spaces for Unit 2, the one owned by the Kanes.
92. Mr. Kane then took to parking his car diagonally across one of Unit 2's spaces and the visitor space, taking two spaces, once again creating a situation where the Board had to become involved.
93. When asked to keep to but one space or face a fine, Mr. Kane has since moved his car, apparently in fit of pique, out onto the roadway, refusing to park in any of the spaces.

Finances

94. It would appear the near constant attacks on the actions of the Board and the threat of personal lawsuits against Ms Dickert and Ms Smith is good reason to have counsel at all Board and Association meetings in order to ensure the Board is following both the law and the condominium instruments while operating the Association.

95. But it incurs costs that need not be incurred and could be much better spent elsewhere.
96. For instance, many of the noise issues could likely go away or be dimmed with the installation of better insulation between Units 1 and 2, but there is no money to do so.
97. The Association now has a capital reserve plan, but it is underfunded, particularly in light of the funds continually expended on legal fees to fend off constant challenges to the actions of the Board.

98. The Site Plan needs to be updated as it is not accurate (and causes continued difficulties with parking).
99. The Floor Plan needs to be updated as it does not accurately reflect the living spaces of the Units.
100. The Declaration and Bylaws should be updated to provide clarity in the governance of the Association.
101. There is a front walk that needs to be repaired; front steps in such a state of disrepair owners and guests are banned from using them; paving needs to be done; painting needs to be done; Unit B's deck stairs need to be replaced/reconstructed; roofs need to be tended to; and there is asbestos on the exterior walls that needs to be remediated.
102. Yet the owners cannot agree on what needs to be done, when and in what order, without getting bogged down into near daily actions that annoy one another, make

life unpleasant, divert time, attention and money away from the substantive matters at the Association, in turn causing the continued deterioration of the property and decreasing the value of the Units.

Insurance

103. The gravest danger facing the Association is that it is in danger of becoming uninsured. And worse.

104. For years the Association had, apparently without a competitive bidding process, received its insurance through a professional (and perhaps personal) friend of Mr. Kane's, who is in the insurance industry and now owns an agency, where Mrs. Kane also works.

105. As part of the Board's review of costs, it was suggested by undersigned counsel that the then-current insurance policy may have overvalued the property, creating an unnecessarily high insurance premium.

106. The matter was referred for review to an insurance agent who deals almost exclusively with condominium insurance.

107. Indeed, the agent re-valued the property at approximately $1.5 million.

108. This was down from the coverage provided by Mr. Kane's friend who had valued the property at approximately $2.1 million, creating, of course, a higher commission for the friend.

109. Additionally, the agent found certain Directors and Officer's liability coverage, despite being required by the condominium instruments, was not provided under the then-current policy.

110. The Board, as is its prerogative and duty, changed insurance companies and agents.

111. The Kanes were not and are not pleased.

112. The Kanes have threatened to sue over the insurance matter arguing the Board of Directors breached its fiduciary duty.

113. The Kanes base this position upon three arguments.

114. First, the Kanes argue the premium has gone up.

115. This is true, for three reasons.

116. As explained by the insurance agent, premiums across the country have recently gone up, on average, approximately 40% as a result of industry-wide losses.

117. Additionally, as noted, a required coverage for Directors and Officers had not been acquired by the prior agent, nor by Mr. Kane despite his stated expertise in insurance matters.

118. Finally, the Kanes sued, *see* Kane *et. alia* v. William Helfinstine *et alia*, 219, 2012-CV-532.

119. The Kanes have maintained they were correct in their complaint despite law to the contrary provided to the Court and despite the City of Dover noting there was no violation of City Ordinances, either, on the use of the Units.

120. Regardless, the Kanes institution of suit caused the premium to increase, which they then complained about.

121. This is, of course, in addition to the anticipated increase that will occur in light of the instant lawsuit filed by the Kanes.

122. The Board has been warned that if there are any additional suits filed, it is likely the Association will not be able to acquire coverage, despite the need for it and the mandate required by the Condominium Act. *See* RSA 356-B: 43.

123. Second, the Kanes note the previous policy was cancelled as a result of the (allegedly) illegal activities Units 1 and 4 conducted in their units through AirBnB, necessarily placing the Association at risk. *See*, Kane *et. alia* v. William Helfinstine *et alia*, 219-2012-CV-532.

124. Indeed, the prior policy was cancelled.

125. It is worth noting the policy was cancelled for alleged commercial activities being run out of two units in violation of a residential use restriction.

126. However, the determination was made by the agent; after being contacted by Mr. Kane, a friend of the agent, without Board approval or knowledge; the agent never contacted the Board or counsel to discuss the matter; the City of Dover had determined the activities were not commercial; undersigned counsel determined residential was not defined in the documents; and case law supported the actions of the Units 1 and 4, not Mr. Kane's position.

127. Nonetheless, Mr. Kane caused the policy to be cancelled, placed the Association at risk, and then blamed the Board for the cancellation and now threatens suit against the Board for the cancellation of the policy.

128. Third, Mr. Kane has argued the actions of the Board caused the deductible to increase.

129. This is true; the deductible did increase.

130. The decision to raise the deductible was made after discussions with undersigned counsel and the insurance broker who both indicated to the Board that an increased deductible would result in a lower premium cost.

131. Finally there is another matter, not driven by the Kanes, which will likely result in yet another suit, filed against the Association, further putting the Association at risk of becoming uninsurable

132. Units 1 and 4 found out a Tier II sex offender was on site when Ms Dickert answered the door to her Unit one day last year to find two armed Probation Officers at her door.

133. She asked why they were there.

134. They indicated they were looking for Matthew Greenwood, who was a convicted sex offender and who had listed the Association as his secondary address.

135. Ms Dickert informed the officer Mr. Greenwood was likely visiting his mother, Ms Greenwood, who owned Unit 3.

136. When asked about the matter, the Kanes responded for Ms Greenwood, insisting the owners of Unit 1 and 4 were making a big deal out of nothing as they had known about the convictions (Indecent Exposure in 2001; Possession of Child Pornography in 2008; and a probation violation in October 2013, approximately three months before the end of his probation, for having a cellphone that had downloaded pornography on it) for many years, had no problem with him being on

site, and saw no need to inform the owners of either Unit 1 or Unit 4, of his presence.

137. The Kanes have no children.

138. The Smiths do.

139. Ms Dickert and Mr. Helfinstine welcomed their first child into the world (and into being a neighbor of Mr. Greenwood) this past winter.

140. Despite the position of the Kanes, having a repeat sexual offender, a Tier II mandated-to-report offender, visiting the association at unknown times and for unknown durations was and is of concern to the owners of Unit 1 and 4.

141. Rather than simply prohibiting Mr. Greenwood from being on site, the Board asked Ms Greenwood to notify them by email when he would be on site, and for how long, and upon receipt of that information the owners of Units 1 and 4 would simply not have their children and nieces and nephews and other visiting children outside while Mr. Greenwood was on site.

142. Ms Greenwood indicated she did not have a home computer and never used her work computer for personal use, so she could not email.

143. The Board asked if she could text the same information.

144. Ms Greenwood indicated she did not have a cell phone so she could not text them.

145. The Board then asked her to notify them in writing when he would be on site.

146. The Board was then notified by counsel for Ms Greenwood that the actions of the Board in trying to learn when Mathew would be on site had caused Ms Greenwood “considerable stress and anxiety”, the “cruelty and callousness directed at her and

her son have resulted in substantial emotional distress", were advised the Board suffered from "unnecessary paranoia", that they could assume Mr. Greenwood would always be on site (even though Mr. Greenwood was listed under the Registry as living elsewhere), would not communicate his whereabouts other than that, and that if the harassment did not stop Ms Greenwood would sue.

147. In light of this lack of willingness to communicate with the Board and work out some balance regarding reporting, the Board voted to require reasonable notice of visitation on site by any known Tier II or Tier III sex offenders and prohibited them, not from owning at Cushing Street, but from residing on site.

148. It was later learned that Mr. Greenwood had been added to the Deed as an owner and had moved into the Unit.

149. As such, the Board wrote to Mr. Greenwood noting the policy and that if he had not moved out by September 1 (the letter having been sent in mid-July) he would be assessed a weekly $500.00 fine.

150. The matter is now in collection.

151. It is expected Ms Greenwood will countersue, further endangering the financial status of the Association.

152. The extraordinary danger of the actions to date at the Association are such that if one more lawsuit is filed, the members will likely find they cannot insure the property.

153. Of course, under the typical mortgage, the mortgagee requires the property to be insured.

154. If it cannot be insured, the owners could very well be in breach of their mortgages.

155. In turn, the mortgagees could call the mortgages due and payable.

156. It is likely the owners would not be able to sell their units for anything other than cash as no financial institution would lend large sums of money on uninsurable property.

157. As such, it is likely the owners would be sued by the mortgagees for the actions that led to the uninsurable state.

158. Finally, those actions could well lead to one or more bankruptcies.

Receivership

159. Even Mr. Kane has acknowledged the Association does not work well. "It's apparent we're a dysfunctional association." Email from Mr. Kane to all owners dated October 16, 2012.

160. Receivership is used in a variety of situations in New Hampshire. *See, e.g.* RSA 293-A (Corporate dissolution); RSA 151-H (Receivership of Nursing Homes and Other Residential Care Facilities); RSA 401-B: 12 (Receivership for Insurance Holding Companies).

161. There is nothing that limits the appointment of a receiver to these areas.

162. Additionally, there is no case in New Hampshire that has addressed the issue of the appointment of a Receiver in a condominium association.

163. However, it has been done elsewhere.

164. Attached hereto is Granada Lakes Villas Condominium Association, Inc. v. Metro-Dade Investments Co. 38 Fla. L. Weekly S777 (Fla. 2013). The Court will note the Florida Supreme Court pointed out that the appointment of a receiver has long been

recognized as inherent in a court's equity powers as equitable receiverships are a creation of common law.

165. Further, the Court noted the fact that a statutory scheme lists certain authorizations and not others, does not preclude the appointment of a Receiver in non-enumerated areas.

166. There are rarely certainties in life, but as much as one can be certain of anything, one can be certain that without the appointment of a Receiver in this matter, there is little chance the Association will survive and a great chance the members will suffer severe financial hardship.

167. If the Court is so inclined the Receiver should have a substantial amount of experience with condominium law in New Hampshire; should be given autonomy to make all decisions at the Association should be allowed to establish a fully-funded capital reserve plan, a budget that allows for deposits into the reserves, amend the Declaration and Bylaws as s/he sees fit; update the Site Plan and Floor Plans; and otherwise conduct all actions the Board and/or the Association would be allowed to do; report to the Court every three months for review for the first year; every six months for the next year; once the third year; and then have the Court determine if the Association is such it can be operated without a Receiver and court oversight.

WHEREFORE, Cushing Street respectfully requests that the Honorable Court:

A. Appoint a Receiver;

B. Grant the Receiver the powers enumerated herein; and

C. Grant such other relief as the Court may deem just and equitable.

Respectfully Submitted,
Cushing Street Condominium Association,

By and through,

Date:

_____

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CERTIFICATION

I hereby certify that I have hand-delivered this date a copy of the instant pleading to counsel of record.

EXHIBIT A