VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 22-CV-00627

Tracy Nicholson and John Nicholson Plaintiffs v. Moon Ridge Homeowners Association, Inc., Defendant	DECISION ON MOTIONS

RULING ON PARTIES' MOTIONS FOR SUMMARY JUDGMENT

This case involves disputes over the validity and meaning of a contract. Plaintiffs Tracy and John Nicholson (the "Nicholsons"), owners of a unit of the Moon Ridge condominium development in Killington, seek a declaratory judgment regarding an amendment to the Moon Ridge declaration of condominium addressing the use of Moon Ridge lands for a planned wastewater system. The association of unit owners, Defendant Moon Ridge Homeowners Association, Inc. (the "Association"), asserts that the amendment is void for lack of consideration, and alternatively brings counterclaims for declaratory relief of its own regarding the amendment. The Association also asserts a claim for damages against the Nicholsons under 13 V.S.A. § 3606 for timber trespass. Plaintiffs are represented by Frank P. Urso, Esq. Defendant is represented by Rodney E. McPhee, Esq. Pursuant to Rule 56 of the Vermont Rules of Civil Procedure, the parties have moved for summary judgment as to the other side's claims. For the reasons discussed below, Plaintiffs' motion is GRANTED IN PART and DENIED IN PART and Defendant's motion is DENIED.

Factual and Procedural Background

The following facts are not in dispute for purposes of the parties' pending motions:

A common interest community, known as "Moon Ridge," was established in 1979 pursuant to a Declaration of Condominium Ownership made by the developer, Moon Ridge Corporation. *See* Pls.' SUMF, ¶ 2; Def.'s Resp. to SUMF, ¶ 2. The development was designed and plotted to consist of several residential buildings, positioned adjacent to a circular roadway or loop. *See* Kesselring Aff. (Jun. 6, 2022), ¶¶ 6-8 & attachment. The design also included ten discrete, rectangular-shaped plots of land, arrayed in a roughly circular pattern to the outside of the roadway, and designated them as locations for septic leach fields. *See id.* (fields enumerated

in Roman, I-X); Pls.' Ex. AA.[1] As built, the Moon Ridge residences utilized a number of these leach field plots but left at least three of them unused. *See* Def.'s SUMF In Support of Cross-Motion, ¶ 17; Pls.' Ex. AA (indicating that there were ten fields, each with ten-bedroom capacity, designed and plotted; six were made operational and are in use; one held unused for emergency; three meant for an additional phase of Moon Ridge units).

However, at some point a new, freestanding residence was built in the Moon Ridge development on vacant land adjacent to the same circular roadway serving the Moon Ridge condos. *See* Pls.' Ex. AA; Def.'s Ex. C; Pls.' Ex. 1 to Reply Mem.; Def.'s SUMF, ¶ 5. This house was apparently constructed on lands then designated as common lands, but before the development rights to such land had been conveyed out to the Association. *See* Pls.' Ex. AA; Def.'s SUMF, ¶ 5. In any event, there is no question that the Association became (and still is today) the sole owner of the real property underlying this particular residence. *See* Def.'s SUMF, ¶ 13; Pls.' Resp. to SUMF, ¶ 13. The septic line from this residence was connected to a septic line running from a Moon Ridge residential building (Building 6) to an operational leach field that had capacity to serve three more bedrooms. *See* Def.'s SUMF, ¶ 5; Pls.' SUMF, ¶¶ 8-9. The residence came to be owned by the Kelly family, although it was not made part of the condo complex. Def.'s SUMF, ¶ 6; Pl.'s Ex. AA.

At least as early as the early 2010s, when the Kellys began to try to sell their home, they learned that financial institutions would not finance a potential purchase, given the nature of ownership – i.e., where a mortgage would be secured by a residence that was not a part of a condominium and located on land owned in common by a condominium association. *See* Def.'s SUMF, ¶ 7; Pls.' Resp. to SUMF, ¶ 7. Thus, to make the residence marketable, the Kellys retained legal counsel to craft a solution. *See* Def.'s SUMF, ¶ 8; Pls.' Resp. to SUMF, ¶ 8. The Kellys' attorney drafted an amendment to the Declaration concerning the residence, which was unanimously approved by the member-owners of the Association on September 23, 2014. *See* Def.'s SUMF, ¶ 8; Pls.' Resp. to SUMF, ¶ 8; Pls.' SUMF, ¶ 5; Def.'s Resp., ¶ 5.

This amendment, which is at the heart of the case, provides that the Kelly residence "is hereby made subject to the [Moon Ridge] Declaration and shall create in the owner or owners of such unit a fee simple absolute ownership of the individual unit and [a] percentage interest in common with owners of all other units in the common areas, common elements and limited common areas." Pls.' Ex. C in Supp. of Mot. for Partial Summ. J. The residence will be designated "Unit 7A" of Moon Ridge, and its owners will have an undivided 9% ownership interest in the common areas and elements of the condominium. (The amendment thus became known as the "7A Amendment.") In exchange, the owners of Unit 7A agreed to pay a share of that portion of the Association's annual assessment and fees attributable to budget items or matters that pertain to the condominium common areas, elements, or functions. *Id*.

[1] According to the ANR's Wastewater System Rules, leach fields are areas of soil where wastewater or effluent from a septic system can be absorbed and dispersed without overland flow. *See* Vt. Agency of Nat. Res., Dep't of Envtl. Conservation, "Wastewater Sys. & Potable Water Supply Rules," §§ 1-201(55), 1-201(93) (eff. Apr. 1, 2019) ("WSPWS Rules").

Under a separate paragraph, the 7A Amendment included an option pertaining specifically to septic system matters, as follows:

> 7. If allowed by the state and local government permitting process, Unit 7A has the right to detach its septic system from the Moon Ridge septic system and construct a standalone leach field for the exclusive use of Unit 7A.
>
> (i) The cost to construct, detach and maintain (indefinitely from the detachment date forward without regard to subsequent sale(s) of Unit 7A) and obtain any necessary state and local government approvals and permits will be paid for by Unit 7A exclusively.
>
> (ii) The leach field can be completed as already plotted or subsequently amended on land adjacent to Unit 7A or on land adjoining Moon Ridge land which is owned by Unit 7A owners. The leach field, if constructed as described herein, must be naturally buffered from reasonable general view in a manner consistent with the buffering of the existing Association leach field(s).
>
> (iii) In the event Unit 7A chooses to disconnect its septic system from Moon Ridge, any cost currently considered in Schedule 1 for septic maintenance, operation, repair, liability will be removed from future calculations and assessments. Any mid-year separation will be retroactively prorated based upon days prior to separation (with any unused portion subject to section 5 above).
>
> (iv) On the date separated, and after approval by all state and local governing agencies, Unit 7A will be released by the Association and Lien holders of any liability for any future maintenance, repair or capital requirements of any nature of the existing Moon Ridge fields, system, equipment, and the like, (Schedule 1 will be adjusted to reduce the fees related to septic accordingly) and the Declaration amended, if necessary, at Unit 7A's expense without further notice requirement to the Unit or Lien holders of Moon Ridge but with notice to the Association Board of Directors. Unit 7A will assume full responsibility for maintenance and repair of the field, system, equipment, and the like associated with the separate system serving Unit 7.

Pls.' Ex. C. The next paragraph indicates that "[a]ny fines and/or expenses incurred by Unit 7A for failure to follow mandated septic system pumping and maintenance will be paid in full by Unit 7A. . . . [and] Unit 7A will indemnify the Association for same including attorney's fees and costs incurred in collecting same." *Id.* These and all other financial obligations on Unit 7A were made enforceable by way of Association liens, as well as rights of foreclosure and collection of costs held by the Association. *Id.*

In November 2014, the Nicholsons purchased Unit 7A from the Kellys, along with a nearby land parcel owned by the Kellys, but not the land on which the residence sits. On June 2, 2020, Plaintiff Tracy Nicholson sent an email message to Ron Riquier, a member of the Association's Board of Directors, as follows:

> Thanks for coordinating on the septic inspection. I have been worrying about the on going issues with the leach field we share with building 6. We would love to explore whether it might be feasible for us to build our own leach field either on our property or on the bottom of the hill in front of our house on [M]oon [R]idge property. If we were to do this, it would be cleaner if it was on property we own. I know the Kellys had previously looked into buying the land from the condo that the house is on. I am wondering if revisiting a land sale (swap?) would be of interest to you and the condo. Let me know if you would like to discuss live or if this is not of interest. Even if we were to purchase the land and separate from the condo we would still love to be able to use recycling and trash as well as contribute to the electric for the entrance to the loop.

Def.'s Ex. A. On June 3, 2020, Riquier responded by giving Nicholson his understanding of the history leading to the adoption of the 7A Amendment. He stated, among other things, that three designated but unused leach fields (enumerated 8, 9, and 10) were designed for a next phase of Moon Ridge units that were never actually built, and that another field (No. 1) was intentionally kept unused as an emergency back-up. *See* Pls.' Ex. AA. Nicholson responded the same day with a message that included the following:

> The most obvious space for a field would seem to be the bottom of the lawn in front of the house (current Moon Ridge property) although you probably have better information on where else had acceptable soil and grade for future fields if the rest of the development had ever happened? We also would be open to separating from the condo leach field and not purchasing the land if that was preferable, but of course, if that was on condo land, not sure what that process looks like for us to get approvals vs. as an individual homeowner.

Def.'s Ex. F. She concluded her message as follows:

> I think I might be a little lost with so much info below so to be clear, here are my questions:
>
> 1. Would [Moon Ridge] want to sell the property (4 acres?) to us that the house is on and below
> 2. If not, would you [be] amenable to us looking into a separate leach field that would still be under the condo plan?
> 3. Alternatively, does [Moon Ridge] have land that was originally spec'ed to be a leach field under the bigger devt plan they would be interested in selling?

Id.[2] Later during the month of June 2020, the Nicholsons sent a request to Riquier asking for permission to have engineers retained by the Nicholsons conduct soil sample "pit tests" at two locations: at Leach Field 10, and on the lawn located directly below the Nicholsons' house. Pls.' Ex. E.

On July 12, 2020, the President of the Board of Directors wrote to the Nicholsons indicating, among other things, that the Board would grant the Nicholsons' request to have a contractor perform a soil sample "pit test" within Leach Field 10 and another location, provided that the Nicholsons sign and return the letter, agreeing that no trees will be cut down and that no property will be damaged. *See* Def.'s SUMF, ¶ 14; Pls.' Ex. D. The Nicholsons never signed the Association's letter, and their engineer conducted the soil tests and also cut down trees on Association land. Def.'s SUMF, ¶ 15; Pls.' Resp. to SUMF, ¶ 15.

Discussion

Summary judgment shall be granted when the moving party shows that there is no genuine issue as to any material fact "and the movant is entitled to a judgment as a matter of law." V.R.C.P. 56(a). Thus, if "after adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to her case upon which she has the burden of proof," then summary judgment is warranted. *Gallipo v. City of Rutland*, 2005 VT 83, ¶ 13, 178 Vt. 244, 249-50. "The court need consider only the materials cited in the required statements of fact, but it may consider other materials in the record." V.R.C.P. 56(c)(3). "The nonmoving party may survive the motion if it responds with specific facts raising a triable issue, and it is able to demonstrate sufficient evidence to support a prima facie case." *Kelly v. Univ. of Vt. Med. Ctr.*, 2022 VT 26, ¶ 15, 280 A.3d 366 (quotation omitted). In determining whether there is a disputed issue of material fact, courts "resolve all reasonable doubts and inferences . . . in favor of the nonmoving party." *Id.* (citation omitted). A party opposing summary judgment may not simply rely on allegations in the pleadings to establish a genuine issue of material fact. Instead, it must come forward with "specific facts that would justify submitting [its] claims to a factfinder." *Robertson v. Mylan Labs., Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356 (citation omitted). "[C]onclusory allegations without facts to support them are insufficient to survive summary judgment." *Id.* ¶ 48. However, "[w]here a genuine issue of material fact exists, summary judgment may not serve as a substitute for a determination on the merits." *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶ 10, 179 Vt. 545 (citation omitted).

The Court first addresses the parties' claims concerning the validity and proper construction of the 7A Amendment. The Nicholsons argue that, under the unambiguous terms of the 7A Amendment: (a) they may construct and use an operational leach field located within any of the "unused" leach fields owned by Moon Ridge, including Leach Field 10; (b) they will owe the Association no compensation for the exercise of such rights; and (c) while the Association is obligated, as owner of Leach Field 10 and the land on which Unit 7A sits, to sign applications for State approval of the Nicholsons' planned soil-based wastewater system, such approval cannot

[2] An additional numbered question asked whether a land swap might be considered by the Association as payment or partial payment for the sale of some common land to the Nicholsons.

be withheld in bad faith. The Association counters, as a threshold defense, that the 7A Amendment is void *ab initio* for lack of consideration.[3] Alternatively, the Association seeks a ruling that the 7A Amendment does not authorize the Nicholsons to unilaterally choose where to locate their new leach field, and that the Association is due fair compensation for the Nicholsons' planned use of the Association's land. Further, the Association argues that under the 7A Amendment, the Association may withhold its signature on State permitting applications for this planned leach field because it disapproves of the location chosen for the leach field.

I. Consideration for the 7A Amendment.

Consideration is not lacking for the 7A Amendment. As an amendment to a declaration of condominium, the 7A Amendment "is in the nature of a contract." *Highridge Condo. Owners Ass'n v. Killington/Pico Ski Resort Partners, LLC*, 2014 VT 120, ¶ 14, 198 Vt. 44. Under well settled principles of contract,

> consideration exists only where a promise "giv[es] up something which the promise was theretofore privileged to retain, or doing or refraining from doing something which the promise was then privileged not to do, or not refrain from doing." A promise to refrain from doing something which the promise was never legally empowered to do – like a promise to do what one is already legally bound to do – "creates no new duty and cannot support an action; nor does it afford a consideration for a promise by the other party."

Theberge v. Theberge, 2020 VT 13, ¶ 10, 211 Vt. 535 (quoting 3 R. Lord, *Williston on Contracts* § 7:4 (4th ed. 2019) and *Manley v. Vt. Mut. Fire Ins., Co.*, 78 Vt. 331, 336, 62 A. 1020, 1021 (1906)). Notably, "[m]utual promises, in each of which the promisor undertakes some act or forebearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is void, are sufficient consideration for one another." *Id*. ¶ 11 (quotation omitted). Further, consideration "is a question of law," *Bergeron v. Boyle*, 2003 VT 89, ¶ 19, 176 Vt. 78, and it "must be evaluated at the time the contract was made." *Lloyd's Credit Corp. v. Marlin Mgmt. Servs., Inc.*, 158 Vt. 594, 598, 614 A.2d 812, 815 (1992).

Here, under the 7A Amendment, there were mutual promises through which the parties received things "desired for [their] own advantage" and which the promising party was not obligated to provide prior to the Amendment. *Theberge*, 2020 VT 13, ¶ 12 (quoting *Lloyd's Credit*, 158 Vt. at 599). For the Kellys, their residence was made part of the condominium; they were given an undivided 9% ownership interest in the condominium's common areas and facilities; and they were given the right to continue utilizing the condominium's septic system as

[3] The Association also suggests that the motion for summary judgment is premature because no discovery has been conducted in this action. However, it has not identified any specific facts that are material to the construction of the 7A Amendment that would be obtained through discovery, nor shown by affidavit why it cannot "present facts essential to justify its opposition." V.R.C.P. 56(d); *cf. Town of Victory v. State*, 174 Vt. 539, 543, 814 A.2d 369, 375 (2002) (mem.) (reversing grant of summary judgment where opposing party "detailed in its response why it would need discovery").

well as an option to construct and use a new septic leach field. Each of those rights or permissions made the property more marketable and afforded the Kellys the opportunity to enjoy such rights while they owned the property. The Association readily concedes that it was under no prior legal obligation to afford the Kellys any of those benefits. *See* Def.'s SUMF, ¶ 9 ("Out of pure hospitality and selflessness, Moon Ridge adopted the [7A] Amendment[.]"); Def.'s Reply Mem. at 6 ("[T]he Amendment was made from true altruism on the part of Moon Ridge[.]"). Thus, the benefits obtained by the Kellys under the 7A Amendment were not naked gratuities or gifts. *See Theberge*, 2020 VT 13, ¶ 10 ("[I]f one promises to do what he is already legally bound to do, the promise is nude." (quotation omitted)).

Likewise, the 7A Amendment also contains promises under which the Kellys agreed to afford benefits *to* the Association. Perhaps of most significance, the Kellys agreed to make their residence and use of it "subject to" the Declaration, which contains restrictions on each individual unit owner that are intended to benefit and further the interests of the condominium ownership community as a whole. *See* 27 V.S.A. § 1307 (requiring unit owners to strictly comply with declarations, bylaws, and other documents limiting owners' rights); *Madowitz v. The Woods at Killington Owners' Ass'n*, 2010 VT 37, ¶¶ 32-33, 188 Vt. 197 (Dooley, J., dissenting) (citing 27 V.S.A. § 1307 and other provisions of Vermont Condominium Ownership Act to conclude that declarations of condominium "control condominium ownership" in "support" of the common interest community). The Kellys also agreed to pay portions of the Association's annual common expenses, including for categories of expense other than those pertaining to the septic system. Finally, in exchange for the right to detach and utilize an unused septic leach field, the Kellys promised to indemnify the Association and pay for all costs of permitting, construction, maintenance, and regulatory compliance.

The Association asserts that consideration was lacking because the Kellys (and their successors) were only made to pay their "fair share" of the common expenses, and the Association never actually received any gain or advantage from the transaction, especially not at the time that the 7A Amendment was approved. Such arguments misconstrue the principles of consideration. The Association's position that it did not obtain terms of compensation that resulted in a monetary gain or profit perhaps suggests that they made an unwise deal or exercised poor business judgment, but it is does not demonstrate lack of consideration. As explained by the Vermont Supreme Court:

> The definition of benefit is extremely broad. Even in commercial transactions, consideration can exist without economic benefit or advantage; a benefit need not be measurable in money. The extent of the benefit is not important; a very slight advantage is sufficient to constitute consideration.

Lloyd's Credit, 158 Vt. at 599 (citations omitted). Indeed, legal benefit is not the same as benefit in fact, like what would be expressed on a financial balance sheet. The test is whether a promisee received something desired for his or her own advantage that he or she was not already entitled by law to receive. *Cf. id*. at 598-99 (citing 1 *Willison on Contracts* § 102A, at 382 (3d ed. 1957) (stating that "legal detriment" is not the same as detriment in fact; rather, it means "giving up something which immediately prior thereto the promisee was privileged to retain"). And while consideration must be found to exist at the time of contracting, that does not mean

that bargained-for promises that compel future performance by the other party – i.e., an actual conferral of benefits at a time after contract formation – fail for lack of consideration. *See id*. at 599 (so long as bargained-for, "a 'mere expectation or hope of benefit is sufficient' to serve as consideration.") (quoting *Affiliated Enters. v. Waller*, 5 A.2d 257, 260 (Del. 1939)).

Thus, the Court concludes the 7A Amendment was adequately supported by consideration, and therefore denies the Association's motion for summary judgment on its claim that the Amendment is void.

II. Obligation to Pay For Exercising Option To Construct New Leach Field.

The parties dispute whether, to exercise the right to construct and use one of the designated, unused leach fields owned by the Association, the Nicholsons have an obligation to compensate the Association. The Court finds no such obligation.

"The interpretation of a contract is a question of law unless the meaning of the contract is ambiguous." *Lundeau v. Peerless Ins. Co.*, 170 Vt. 442, 445, 750 A.2d 1031, 1033-34 (2000). When interpreting a written instrument, the intent of the parties governs. *City of Newport v. Vill. of Derby Ctr.*, 2014 VT 108, ¶ 10, 197 Vt. 560. In determining the intent of the parties, the court "begin[s] with the plain language of the contract's provisions." *Id*. "Where the terms of a [contract] are plain and unambiguous, they will be given effect and enforced in accordance with their language." *Downtown Barre Dev. v. C&S Wholesale Grocers, Inc.*, 2004 VT 47, ¶ 8, 177 Vt. 70 (quotation omitted).

Here, the terms of the 7A Amendment are clear and unambiguous and require no compensation from the Nicholsons *to the Association* in connection with the construction and use of a new operational leach field within a designated location. On its face, the Amendment contains such no term or provision, despite addressing the issue of the costs and expenses to be borne by the Nicholsons in exercising their right to construct and use a new leach field. Paragraph 7(i) makes the Nicholsons responsible for all costs associated with creating a new leach field. *See* Pls.' Ex. C ("The cost to construct, detach and maintain (indefinitely from the detachment date forward without regard to subsequent sale(s) of Unit 7A) and obtain any necessary state and local government approvals and permits will be paid for by Unit 7A exclusively."). Thus, this is not a circumstance where there are grounds for finding ambiguity because the parties failed to include any terms of concerning costs or expenses in an agreement that otherwise reasonably indicates that the parties intended to address such matters. Rather, the fact that the contracting parties specifically addressed a range of costs and expenses related to the construction and operation of a new leach field on condominium lands (everything from state and local permitting costs at the outset, to regulatory fines if the leach field comes out of compliance) and included no term even suggesting compensation to the Association, is clearly indicative of the parties' intent.

The Association asserts that, to allow usage of one of the Association's reserve leach fields without compensation is so detrimental to the condominium's interests that the 7A Amendment "should," as a matter of fairness, be read to include term that requires compensation. The Association reasons that, since Unit 7A has at most 5 bedrooms, and Leach

Field 10 was designed to accommodate up to ten bedrooms, to allow Unit 7A exclusive use of a newly built leach field will be wasteful and detrimental to the interests of the condominium as a whole. However, a bargain was already struck in 2014 on this issue, allowing the Unit 7A owners to construct the new leach field on any of the existing plotted lots; the deal was that the Association would be held harmless and the Unit 7A owners would bear all the responsibilities, costs, risks, and potential liabilities of the new leach field. Those terms may appear unwise and unjust upon further consideration, but "[n]o court may rewrite unambiguous contractual terms to grant one party a better bargain than the one it made." *Downtown Barre Dev*., 2004 VT 47, ¶ 14.

Nor does this conclusion change because of Tracy Nicholson's emails in June 2020 with Ron Riquier and the Association's Board. First, while the Association refers to these messages as though they are pertinent, the Association's briefs make no legal argument as to how they are material to the interpretation of a contract executed nearly six years earlier, or for any other legal remedy. Moreover, Nicholson's emails are fairly construed as exploring alternatives to remaining attached to the Moon Ridge septic system, not firm offers to purchase. Indeed, to the extent she asks about the possibility of purchasing one of the Association's unused, designated leach fields, she does so not with any stated concession that 7A Amendment requires such a purchase, but because of her belief that regulatory approvals would be less complicated (i.e., "cleaner") under unified ownership than if the leach field in question is not owned outright by the same owner of the home to which the field is attached. Thus, even affording the Association all reasonable inferences, Nicholson's emails do not affect the Court's conclusion that the Nicholsons are not obligated to compensate the Association in order to exercise their right to construct a new leach field.

III. Right to Decide Location of the New Leach Field.

The Association also argues that under the 7A Amendment, the Association has either the right to unilaterally decide where the Nicholsons may construct a new leach field, or alternatively, the Association at least has the right to "be involved" in making a mutual decision (with the Nicholsons) on the location. The Court disagrees. Rather, the Amendment unambiguously permits the owners of Unit 7A to construct and operate a new leach field in any one of the Association's unused, "as plotted" potential leach fields (e.g., Fields 8, 9, or 10).

As provided in Paragraph 7(ii) of the 7A Amendment: "The leach field can be completed as already plotted or subsequently amended on land adjacent to Unit 7A or on land adjoining Moon Ridge land which is owned by Unit 7A owners." The 7A Amendment contains no other provision regarding the new leach field's location, much less does it say that the Association (or any other party) retains the right to decide or be involved in deciding that matter. Nor do the parties dispute that Leach Field 10 is an "already as plotted" field. Thus, the issue of location, much like the issue of compensation owed to the Association, was bargained for and fully resolved in 2014, upon approval of the 7A Amendment.

This conclusion does not change even if we credit the Association's contentions that, as designed and proposed, the Nicholsons' new leach field will not actually fit within the rectangular plot of Leach Field 10. Assuming the planned field will occupy Association's land outside the dimensions of an unused leach field as already plotted, the Association presumably

has enforceable restrictions under the Declaration and bylaws to address unauthorized uses or encroachments by unit owners on common lands. But that does not undo the conclusion that the Nicholsons have an unambiguous right to construct and use a new leach field, so long as it fits within the confines of the plot lines of Leach Field 10.

Likewise, assuming as matter of engineering science that no leach field can ever be designed to fit within Field 10 as currently plotted – an issue that the Court does not address here – that too would not alter or render ambiguous the terms of the 7A Amendment as to the agreed-upon locations for the new Unit 7A leach field.[4] The Association cites no authority for such a holding. As noted, if the leach field is simply too wide and would result in the use or occupancy of common lands, the Association presumably has enforcement mechanisms to address that circumstance.[5] But that is a separate issue from the question whether, under the terms of the 7A Amendment, the Nicholsons may construct and operate a new leach field *within* the dimensions of Leach Field 10. The Court concludes that the Amendment gives them the right to do so.

IV. Landowner Signature Requirement Under State Law.

The Association also argues that because the Kellys and the Association both knew that State law requires a permit application for a new wastewater system to be filed with the signed consent of the landowner, the 7A Amendment should be construed as affording the Association discretion or control over the location of the new leach field. This argument is unavailing.

As the Nicholsons note, a covenant of good faith and fair dealing is necessarily implied by law and considered part of every contract in Vermont. *See Carmichael v. Adirondack Bottled Gas Corp. of Vt.*, 161 Vt. 200, 208, 635 A.2d 1211, 1216 (1993). The definition of "good faith and fair dealing is broad": each party is bound "not to do anything to undermine or destroy the other's rights to receive benefits of the agreement." *Id*. The implied covenant "exists to ensure that parties to a contract act with 'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.'" *Id*. (quoting *Restatement (Second) of Contracts* § 205 cmt. a (1981)). The covenant applies here, for several reasons.

First, as discussed above, there is unambiguous textual evidence that the parties to the 7A Amendment decided and resolved the issue of location of any new leach field, which is on land "already plotted" for leach field construction and use. Further, the 7A Amendment states that Unit 7A has the right to detach and construct its own standalone leach field "[i]f allowed by the state and local government permitting process." Pls.' Ex. C, ¶ 7. Thus, that the state and local permitting process will commence (or be allowed to commence) is clearly implied by the parties'

[4] According to the Association, the issue is not strictly a matter of engineering science. It alleges that today's regulations necessarily require leach fields to perform in a manner that requires them to be built larger than the dimensions of the leach fields as they had been plotted back when Moon Ridge was designed.

[5] Or perhaps the parties will make another deal, under which the Association obtains some compensation for use of common lands outside the dimensions of Leach Field 10.

agreement, even if the outcome of that process is unknown and not assumed.[6] Accordingly, the reasonable and "justified expectations" of the Unit 7A owners are that the location of the new leach field is not subject to further review and approval by the Association, especially not on grounds that State law requires the landowner's signature on a permit application for a new wastewater system.

This conclusion is further supported by the State's regulations. There is no suggestion in the WSPWS Rules that the "landowner signature requirement" is in recognition of or intended to afford the landowner discretion or control as to the location of a wastewater system on his land. Rather, the signature requirement identifies a responsible party, and ensures that there is "permanent legal access," by the person or entity who owns the lot of the residence that will be served by a wastewater system, "to the . . . proposed . . . wastewater system . . . for the purposes of construction, operation, and maintenance of" that system. WSPWS Rules, § 1-305(b)(1). Here, there is no dispute that the Association will have such unfettered access, as it is the owner of Leach Field 10, the surrounding lands, and the lands beneath Unit 7A.[7] Thus, for the Association to withhold a signature on the Nicholsons' permit application for some other reason or on other grounds would undermine and deprive the rights afforded and benefits reasonably expected under the 7A Amendment.

In conclusion, the Court grants the Nicholson's summary judgment motion on their claim for declaratory relief of their rights to construct a new leach field under the 7A Amendment and denies the Association's cross-motion on its similar claims.

V. Claim of Timber Trespass.

Finally, the Nicholsons also move for summary judgment on the Association's counterclaim under 13 V.S.A. § 3606, arguing that any tree damage committed while their engineers were performing soil tests at Leach Field 10 was within the scope of the easement arising under the 7A Amendment, to construct an operational leach field on designated common lands. *See* Pls.' Mem. of Law In Supp. of Mot. for Partial Summ. J. at 3-4 (citing *Stanley v. Stanley*, 2007 VT 44, 181 Vt. 527). In addition, they point to draft minutes of a Moon Ridge Board of Directors meeting on June 24, 2020 (Pls.' Ex. E) as proof that, contrary to the letter they received from the Board's President on July 12, the Nicholsons merely had a duty to "minimize" tree and land damage when conducting soil sample tests. Lastly, they note that their arguments on this trespass claim were wholly unaddressed in the Association's opposition brief.

[6] The likely purpose of making the right to construct and operate a new leach field squarely contingent upon receiving State and local regulatory approval is to ensure that the Association, though remaining the responsible party for the system as landowner, will nevertheless avoid the risk of regulatory sanctions for an unauthorized wastewater system built and operating on its land.

[7] The Nicholsons are granted the right of exclusive use of their system once operational. That does not deprive the Association legal access to the system for any listed regulatory purpose, however. It merely means that the Association may not tie into the Nicholson's new system with septic lines from other Moon Ridge residences.

Rule 56(a) provides that the court shall grant "summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." V.R.C.P. 56(a). Here, however, the Nicholsons' Statement of Undisputed Material Facts includes no assertions related to tree cutting or soil testing. Thus, for example, the Court has been provided with no facts regarding who cut the trees;[8] whether those who cut the trees were agents of the Nicholsons acting within their scope of agency; or whether all or some of the trees were cut in furtherance of gathering soil samples intended to determine suitability or design of a new leach field. In short, the Nicholsons have not provided undisputed facts supporting their claim that their actions were within the scope of, or a necessary result of the use of, the easement arising from the 7A Amendment. Further, on the issue of written prohibitions or permission from the Board, there is no evidence whether or when the Nicholsons became aware of the Board's supposed decision, or even that the draft meeting minutes were duly approved and made a final record of the Board's actions. And even if the order to merely "minimize" tree damage was controlling (rather than a prohibition on tree cutting), there is no evidence in the record pertaining to that factual issue – i.e., showing whether the tree damage minimal, in light of the objective of conducting soil pit tests.

The Nicholsons' failure to identify the necessary facts with citations to materials in the record means that the Association did not have the opportunity to respond or indicate to the Court whether the facts asserted were disputed or not. *See* V.R.C.P. 56(c)(1). Moreover, even assuming that there are no genuine disputes as to any material facts, and while the Association offered no opposition to the Nicholsons' legal arguments, this does not compel the grant of summary judgment. On the contrary, the Court retains the independent duty to review the motion and determine if the moving party has satisfied its obligation. *See, e.g., In re Trs. of Marjorie T. Palmer Trust*, 2018 VT 134, ¶ 43, 209 Vt. 192 ("The failure to respond does not require an automatic summary judgment. The moving party is still required to show that no material facts are genuinely disputed and that it is entitled to judgment as a matter of law." (quotation omitted)). As a federal court has noted in analogous circumstances:

> Although the failure of a party to respond to a summary judgment motion may leave uncontroverted those facts established by the motion, the moving party must still show that the uncontroverted facts entitle the party to a "judgment as a matter of law." The failure to respond to the motion does not automatically accomplish this. Thus, the court, in considering a motion for summary judgment, must review the motion, even if unopposed, and determine from what it has before it whether the moving party is entitled to summary judgment as a matter of law.

Custer v. Pan Am. Life Ins. Co., 12 F.3d 410, 416 (4th Cir. 1993), *cited with approval by* M.K. Kane, 10A *Fed. Practice & Procedure Civil* § 2725.3 (4th ed. April 2022 update); *see* V.R.C.P. 56(a).

[8] In paragraph 15 of their response to the Association's Statement of Undisputed Facts in support of its cross-motion for summary judgment, the Nicholsons did not dispute that they cut down trees and conducted soil "pit tests" on common lands of the Association. It is reasonable to infer, from the fact that the Nicholsons sought permission for their design engineers to conduct the soil tests, that the engineers actually cut the trees and dug the holes in the soil.

Accordingly, the Nicholsons have failed to demonstrate that they are entitled to a judgment as a matter of law on the Association's claim for timber trespass, and their motion for summary judgment on this claim is denied.

Order

For the foregoing reasons, the parties' Motions and Cross-Motions for Summary Judgment are decided as follows:

1. Plaintiffs' motion for summary judgment on the defense that the 7A Amendment is void for lack of consideration is GRANTED, and Defendant's cross-motion on that defense is DENIED;

2. Plaintiffs' motion for summary judgment on the request for declaratory judgment that (a) Plaintiffs have no obligation to compensate Defendant in order to exercise their right to construct and use a new leach field for Unit 7A, (b) Plaintiffs may construct and use a new leach field at any one of the Association's unused, "as plotted" leach fields, including Leach Field 10, without need of further review or approval of Defendant, and (c) Defendant may not withhold signed consent to Plaintiffs' applications for a permit to construct and operate a new wastewater system on grounds that Defendant does not approve of Plaintiffs' plan to locate a new leach field at an unused, "as plotted" leach field, is GRANTED.

3. Plaintiffs' motion for summary judgment on Defendant's claims for declaratory relief is GRANTED and Defendants' motion on the parties' claims for declaratory relief is DENIED;

4. Plaintiffs' motion for summary judgment on Defendant's claim for timber trespass is DENIED.

It is further HEREBY ORDERED that the parties shall submit a proposed stipulated Discovery and Pretrial Scheduling Order pursuant to Rule 16.3 for the Court's consideration within 14 days of the date of this Order.

Electronically signed on March 31, 2023 at 12:51 PM pursuant to V.R.E.F. 9(d).

Megan J. Shafritz
Superior Court Judge