

August 19, 2015. Viewpoint of **John Sullivan**, property owner in the Suissevale Development.

### **Governing Documents**

The Articles of Agreement and the By-Laws are POASI's governing documents. There are no other documents which are '*governing documents*' with respect to POASI.

The association's governing documents are a contract that governs the legal rights between the association and property owners. The governing documents are a policy framework which enables the BOD to address day-to-day necessities in the association's operation. The governing documents should be interpreted broadly so the association may address day-to-day operations and thereby meet the expectations of property owners who purchased property subject to, and with notice of, the association's governing documents. The BOD does not have a license to do anything it pleases.

Because New Hampshire law regards these documents to be a contract, the Board of Directors ("BOD") does not have the authority to unilaterally change either of these documents. Any change to the Articles of Agreement or the By-Laws requires the assent of the property owners.

The governing documents are separate from the covenants.

### **The Covenants**

The existing covenants have three very important paragraphs:

23. These covenants are imposed as part of a common scheme for the protection and benefit of Suissevale, Incorporated and each subsequent owner of a lot in the subdivision, and their respective successors and assigns, shall run with the land and shall be binding on all parties claiming under them for a period of thirty (30) years from July 1, 1966, and may be extended for successive periods of twenty (20) years by vote of the owners of a majority of lots in said Development. If any provision hereof shall be held invalid by any court, such invalidity shall in no way affect the validity of any other provision hereof.

24. Anything herein to the contrary notwithstanding, Suissevale, Incorporated reserves the right to change or modify these covenants and restrictions by duly recorded amendment(s) hereto, but no such change or modification shall have retroactive effect or shall otherwise in any substantial way change the character of the subdivision or otherwise affect any lots previously sold.

25. Notwithstanding any other provisions hereof, the words "Suissevale, Incorporated" shall be deemed to include any successor or assign of Suissevale, Incorporated to which rights hereunder may be specifically assigned by written and recorded instrument.

In paragraph 23, the covenants are “**imposed as part of a common scheme**” of development. New Hampshire law recognizes a common scheme of development where there are “reciprocal servitudes.” Reciprocal servitudes arise when an original developer has inserted uniform restrictions in deeds which are imposed on each lot for the benefit of all other lots in the development. In other words, the conditions and restrictions which run with the land are the same for all lots in the development. Only lots which have identical covenants are part of the common scheme. (Keep this underlined sentence in mind for later.)

For clarity, I’ll jump to paragraph 25. Paragraph 25 tells us that, when the covenants mention *Suissevale, Incorporated*, it includes any “**successor or assign**” of Suissevale, Inc., “to which rights hereunder may be specifically assigned by written and recorded instrument.” A ‘successor’ is a person or entity which acquires an entire corporation. Succession can be through multiple entities. For example, B acquires A and C acquires B; C is the successor to A & B. An assign is a person or entity which acquires some right or duty by assignment. ‘Assignment’ means the original holder of the right or duty transfers the right or duty to another person or entity.

When a right related to real property is transferred, New Hampshire law requires that the right be in writing and recorded at the county Registry of Deeds in order to be recognized and enforceable. Thus, paragraph 25 requires any rights in the covenants be “**specifically assigned by written and recorded instrument**” and, implicitly, the assignee must be identified in the writing.

Now, let’s look at paragraph 24. Paragraph 24 tells us that, “**Suissevale, Inc. reserves the right to change or modify**” the covenants. Suissevale, Inc. was dissolved in June, 1971. So, there are three possibilities (1) Suissevale, Inc. assigned its rights prior to dissolution; (2) an entity became the successor to Suissevale, Inc. prior to its dissolution; or, (3) the right expired because neither (1) or (2) occurred.

Here’s what I know: (1) I cannot find an assignment recorded at the Registry of Deeds; (2) I have not seen documents which prove that another entity (or POASI) acquired Suissevale, Inc.; and, (3) the absence of (1) or (2) means the right to change or modify the covenants has expired.

Paragraph 24 also tells us that, if there are to be changes or modifications:

- no such change or modification shall have retroactive effect
- or shall otherwise in any substantial way change the character of the subdivision
- or otherwise affect any lots previously sold

The covenants “run with the land.” “Run with the land” is a phrase used to describe a covenant that automatically transfers with the property when the property is transferred. It is part of the land even though you cannot see it or touch it. And, it cannot be voluntarily changed or modified unless done so in strict compliance with the covenants themselves (or by a court Order). The covenants related to Suissevale Development unequivocally state that no “change or modification shall have retroactive effect.” That means exactly what it says, **no retroactive effect**; no change or modification can effect existing deeds.

For clarity again, I'll skip to 'lots previously sold.' Once again, this clause means exactly what it says. **No change or modification may affect lots previously sold.** If you own a lot in Suissevale Development, that lot is a 'lot previously sold' and, consequently, no change or modification applies to your lot at anytime.

Now, recall the sentence from above: Only lots which have identical covenants are part of the common scheme. Paragraph 24 tells us that no changes or modifications shall "otherwise in any substantial way **change the character of the subdivision.**"

So, if there are lots remaining in Suissevale Development which somehow may have their covenants changed or modified, and there are lots which cannot have their covenants changed, there would be two groups of lots which would not have the same covenants. The result in lots without identical covenants and, thus, the common scheme of development, with uniform reciprocal servitudes, would cease to exist. Paragraph 24 prohibits that result because such condition would substantially "change the character of the subdivision."

### **The Summary:**

I have not seen any document which demonstrates that POASI is the successor or assign of Suissevale, Inc. In the absence of such document, or if such document was not recorded at the Registry of Deeds, POASI has no authority to change or modify the covenants.

The document which Mr. DeMeo posted on the POASI Website which he purports to demonstrate that POASI has the right to change or modify the covenants does not establish such right. That document is NOT a court Judgment, Order or Decree. (See further below for an expanded explanation.)

If, however, POASI is a successor or assign of Suissevale, Inc., it really doesn't matter. As explained herein-above, paragraph 24 effectively prevents any changes or modifications.

### **Mr. DeMeo's Posted Documents and Memo**

The paragraphs which follow are largely an academic discussion because even if POASI is the successor or assign to Suissevale, Inc., the covenants cannot be changed. It has been reported to me that Mr. DeMeo posted numerous documents on the POASI Website. I write below because that presentation is, in my opinion, erroneously misleading.

- **Findings of Fact, Rulings of Law and Decree, Equity # 3972 (posted by Mr. DeMeo and later removed)**

POASI was created as a corporation on June 24, 1969. The above-referenced document (Equity # 3972) was signed by the Court on August 18, 1966, almost 3 years before POASI existed. Neither POASI nor Suissevale, Inc., were involved with this equity case, and this Decree has nothing to do with changing or modifying the existing covenants.

- **Stipulation and Settlement Agreement, Equity # 4574 & 4591**

This document, by itself, does not appear to relate, in any way, to changing or modifying the covenants. In fact, this document suggests that R & W Realty Company, Inc. is the successor in interest to Suissevale, Inc., not POASI.

- **Mr. DeMeo's Memo**

Mr. DeMeo lists five (5) documents which he states, “form the Governing Documents for Suissevale, or POASI,inc , Property Owners Association at Suissevale, Inc.”

There are only two (2) documents which are the governing documents and I have identified them herein-above: the Articles of Agreement and the By-Laws.

Mr. DeMeo relies on the below document to conclude that POASI has the right to change the covenants.

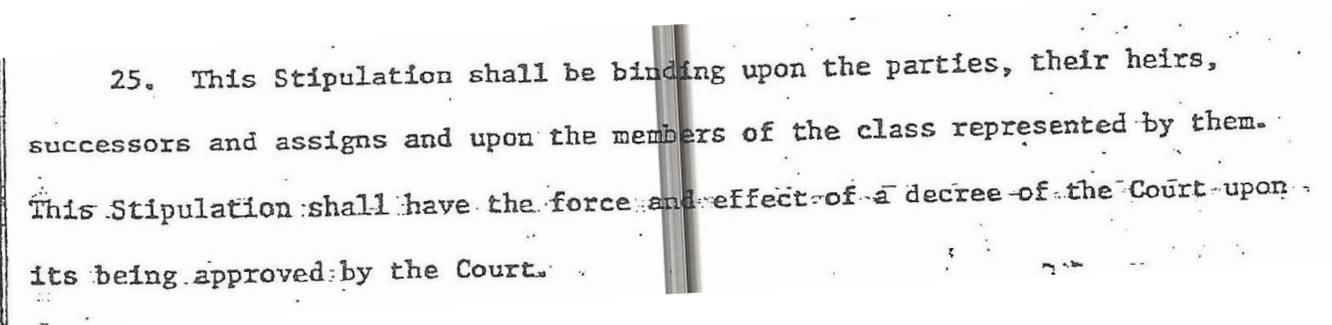
3. Decree of the Superior Court, Carroll County, New Hampshire, October 7, 1976, duly recorded on May 14, 1980 in the Registry of Deeds, Carroll County, New Hampshire, Book 783, Page 247

I have examined the above document. It is a *Stipulation for Settlement by Consent Decree*, filed with the court in **Equity # 4574 & 4591**. (A different document than the above-referenced, *Stipulation and Settlement Agreement*, Equity # 4574 & 4591.)

The document was signed in June 1976 and filed in the Superior Court the same day. Filing the document at Court does not make it a court Judgment, Order or Decree.

Mr. DeMeo described this document as a “Decree”, but it is not. A Judgment, Order or Decree is a document signed by a judge which commands something to be done (or not to be done).

This document contains the following paragraph:



25. This Stipulation shall be binding upon the parties, their heirs, successors and assigns and upon the members of the class represented by them. This Stipulation shall have the force and effect of a decree of the Court upon its being approved by the Court.

I have been unable to find any record showing this document was “approved by the court” and, despite repeated requests, POASI has not provided such document to me.

On May 14, 1980, almost 4 years after being signed by the litigants, the document was recorded at the Registry of Deeds without any accompanying Court Order, Judgment or Decree.

There are several issues with this document:

1. The litigants can agree to anything they choose, but unless one of the parties was a legally established successor or assignee of Suissevale, Inc., no litigant had authority to exercise or assign the rights which Suissevale, Inc. reserved to itself. This document suggests, but does not establish, that Speculator Realty Corporation is the successor in interest to Suissevale, Inc. (But see, Equity # 4574 & 4591 above – R & W Realty.) Thus, this document/agreement does not grant any covenant rights to POASI.
2. Notwithstanding number 1, if the parties entered into this agreement and it became a Court Order (Decree), then it becomes the law of the case and would be enforceable to the extent it was not later over-ruled, modified, or in conflict with state or federal laws. But, I cannot find the Court's approval, Judgment, Order or Decree which adopts this agreement as the law of the case. I did not find the Court's approval in the Court's records or at the Registry.
3. This document is, on its face, nothing more than an expression of agreement (an executory agreement) between the signatories; it is not a Judgment, Decree or Order by a court. It is my opinion that, unless and until a Judgment, Decree or Order approving this agreement is recorded at the Registry of Deeds, it has no effect on any previously recorded titles to land. So, if recorded today, the Judgment, Decree or Order would have only prospective effect, if effective at all, because of the delay. Also, it may be subject to defeat based upon the legal doctrine of "laches." (See below.)
4. In my opinion, it is unquestioned, that recorded sales/conveyances prior to 2:45 p.m. on May 14, 1980, are unaffected by this agreement even if it is actually a Judgment, Decree or Order. That is because no grantee would have notice of the document which is precisely why the Registry of Deeds exists - to give notice to the world as to all interests affecting land and the chain of title to land.
5. Thus, it becomes questionable whether any presently held title, or any future conveyance or sale, can be affected by this document because people in real estate transactions before May 14, 1980, had no notice of this burden on the title. Restrictions on alienation of land, or restrictions on use and enjoyment of land, must appear in the chain of title by recording at the Registry of Deeds.
6. Laches is based on the maxim that equity aids the vigilant and not those who procrastinate regarding their rights. Laches is neglecting to do what should or could, have been done to assert a claim or right for an unreasonable and unjustified time causing disadvantage to another. "Laches is an equitable doctrine that bars litigation when a potential plaintiff has slept on his rights." In re Estate of Laura, 141 N.H. 628, 635, 690 A.2d 1011, 1016 (1997). In my opinion, if POASI did not get the Court to adopt this document as a judgment, or if POASI did not record the judgment, POASI has *slept on its rights* and has lost the ability to enforce its rights.

7. If this document is, in fact, a Decree, it appears that POASI has been operating the water system contrary to this Decree for decades. This document (so called 'Decree') requires POASI to operate the water system subject to regulation by the New Hampshire Public Utilities Commission including, but not limited to, water rates set by the PUC. See paragraph 11 of the document. I further opine that this document, if a Decree, would require POASI, at its expense, to install water meters at each home. I also opine that this document *may* prevent POASI from creating the water production facility currently contemplated. Paragraph 11(III)(C) reads:

No additional charges will be made against existing consumers on the present system except for a fair share of the current operating costs including repair and replacement. In any event, such costs to existing consumers shall exclude the capital costs of extending the water system beyond its present capacity or geographical location or into areas of the development not presently serviced by existing water lines.

Finally, I encourage all readers to investigate and educate themselves about POASI matters through all reliable resources.

I may be contacted at [POASI@GMX.com](mailto:POASI@GMX.com)

Respectfully submitted,

*John F. Sullivan*