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Agency Seminar

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Katie Button
VP, State Underwriting Counsel
FNF Family of Companies

Jennifer Shea,
AVP, Senior Underwriting Counsel
FNF Family of Companies

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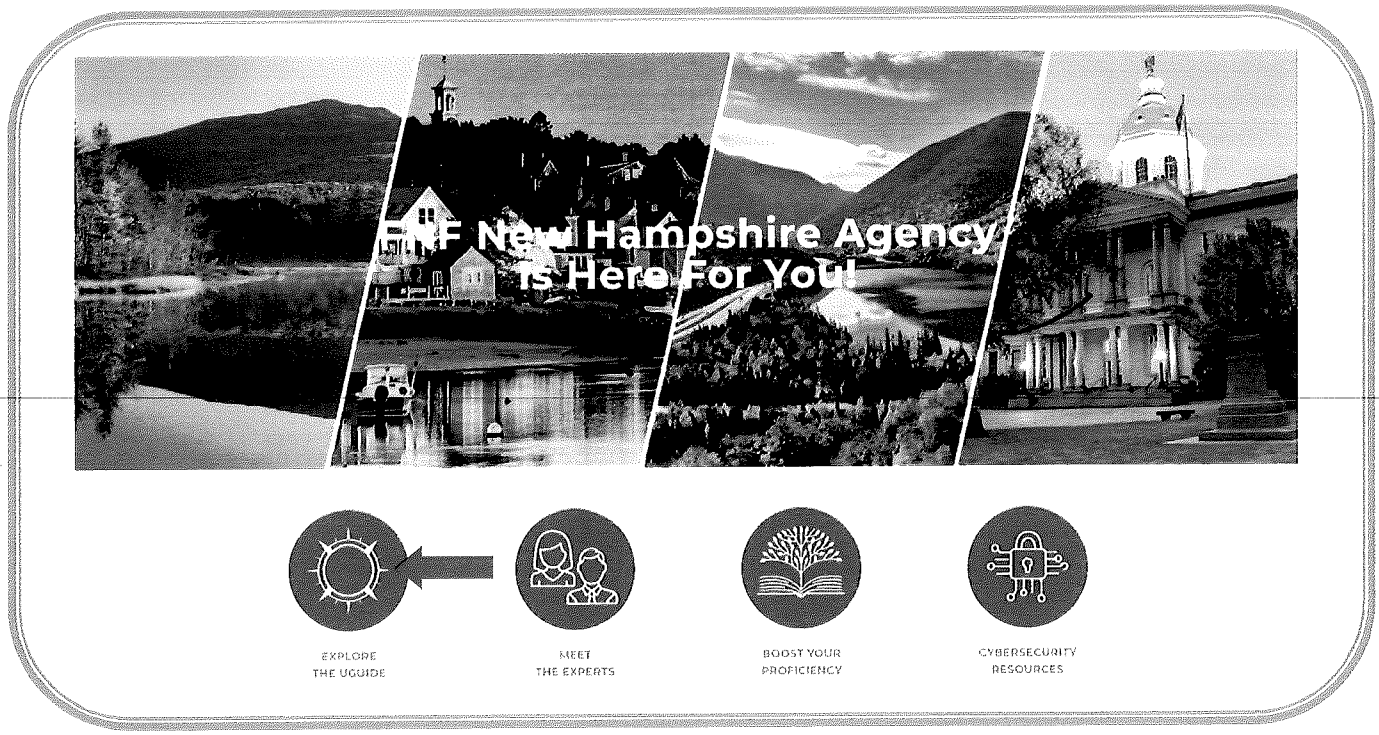

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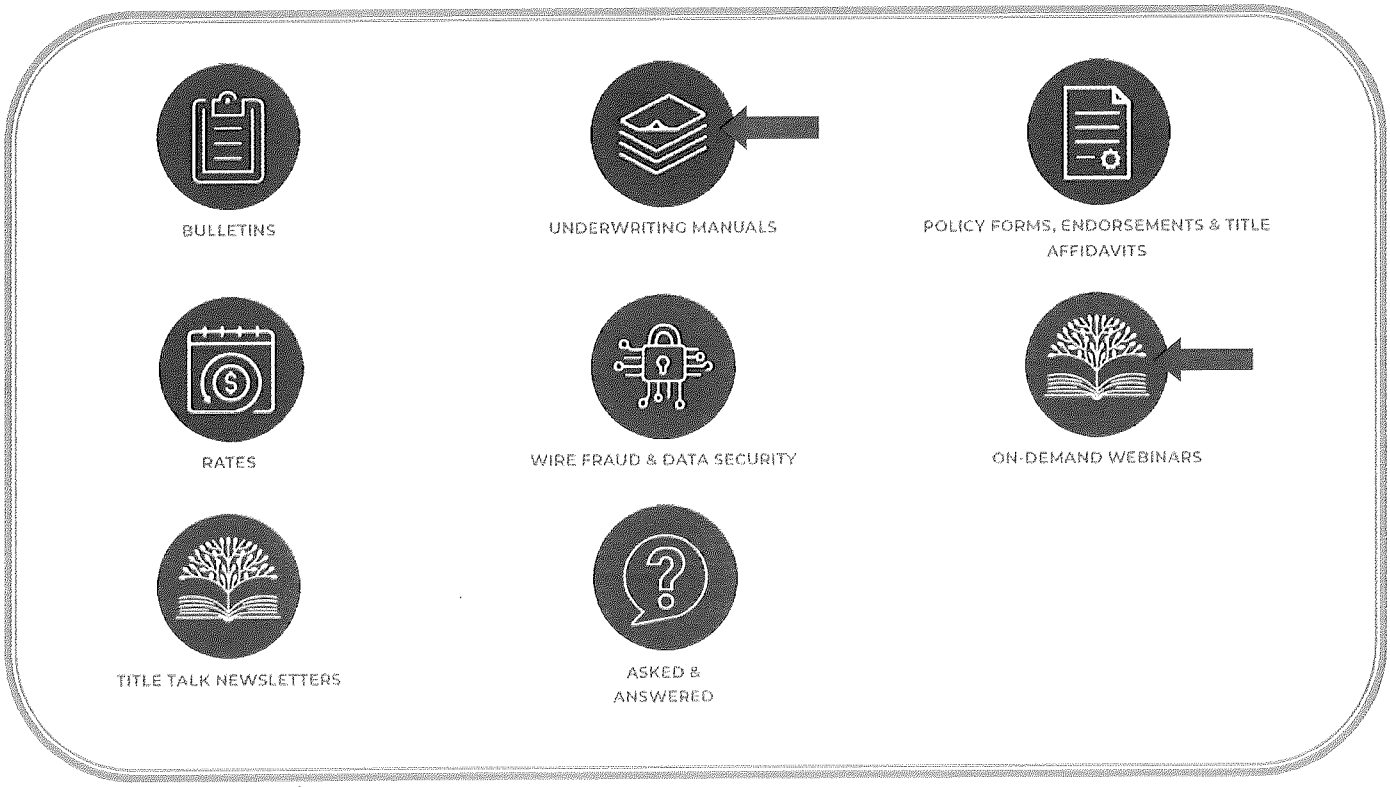


CHICAGO TITLE INSURANCE COMPANY Commonwealth Fidelity National Title

NEW HAMPSHIRE CONDOMINIUMS
REVIEWING FORMATION DOCUMENTS FOR INSURABILITY

Condominiums in New Hampshire can very drastically in their structure and take a variety of forms including a typical residential unit, a land unit, and even airplane hangars and boat slips (the "Unit"). This guidance document is designed to cover the required elements to confirm the condominium is properly formed under the New Hampshire Condominium Statute, NH RSA 356-B (the "Condominium Act"), a pre-requisite to insure a Unit with Fidelity National Financial. Not every variation or situation you may encounter will necessarily be covered here. As always, please contact the New Hampshire office with any questions.

The Basic Elements.

The key components required to form a condominium, pursuant to the Condominium Act, are:

1. **Declaration of Condominium** detailing the land being converted to a condominium, the number of Units, the boundaries of the Units, and identify the Limited Common Area (the "LCA") assigned to a Unit;
2. **Site Plan** depicting the land submitted to the condominium, any existing improvements, and the proposed location of any unbuilt Units;
3. **Floor Plans** depicting the vertical and horizontal boundaries of the Unit;
4. **Certification of Substantial Completion** signed by a registered land surveyor as to accuracy and compliance with NH RSA 356-B:20, (applicable to Units declared after January 1, 1991); and
5. **Attorney General Registration** as evidence by a recorded Certificate of Registration for the Unit(s) being sold (for a complex of ten or more residential units).

The Declaration is usually recorded prior to any Units being built and the first Site Plan depicts the proposed locations of Units. As the Units are built, new Site Plans are recorded to document the actual location of the Units. You may find Floor Plans specific to each Unit or, if the Units share a common layout, you may find a Floor Plan that applies to all Units or groups of Units. New Floor Plans may also be necessary if Unit layouts change or if the Floor Plan is used to confirm the Unit is substantially complete.

The Declaration of Condominium.

A Declaration of Condominium (the "Declaration") can be a very long and detailed document, often thirty to fifty pages in length. However, to insure we are looking for very specific information that can be easily located. This includes:

1. **Legal description of the submitted land.** Generally, this is found on an Exhibit A at the end of the document. The metes and bounds legal description must correspond to the land depicted on the related Site Plan.
2. **Description of Unit.** Commonly incorporated into the first few sections of the Declaration. The description must include the boundaries of the Units, both horizontal and vertical. Some examples are:
    a. Interior surfaces of floor, ceilings, and walls (typical in residential Units).
    b. Exterior surfaces of all structures (typical in detached structure style complexes).
    c. An area of land described by metes and bounds or the description could reference as shown on the Site Plan which then depicts the metes and bounds (Land Unit).
3. **Description of the Common Area (the "CA").** Generally, CA is all land that isn't part of a Unit. CA is a required element for a condominium.
4. **Description of the Limited Common Area (the "LCA").** The LCA will also be depicted on the Site Plans and/or Floor Plans. LCA is area that is designated for the exclusive use of one or more of the Units. The LCA will also be depicted on the Site Plans and/or Floor Plans. Typical condominium amenities or facilities often designated as LCA may include:

a. Decks, patios, walkways, driveways, and parking areas.
b. Loading docks, boat slips, and larger parking areas are common variations.

5. Common optional features which may be incorporated into the development and addressed in the Declaration. These elements only need attention if the Unit you are insuring is located within land that was Expandable Land or Convertible Land.
   a. **Withdrawable Land.** Land that can be removed from the condominium by an amendment to the Declaration. Title is then vested in the Declarant.
   b. **Expandable Land.** Land that is not submitted to the condominium, but the Declarant has the option to add it to the condominium later. The Declarant retains fee title to the expandable land until it is added to the condominium by amendment to the Declaration.
   c. **Convertible Land.** Land that is submitted to the condominium, but no Units are declared or created within this land until it is specifically converted by the Declarant. If the conversion is not exercised under the terms of RSA 356-B and the Declaration, the land becomes part of the Common Area of the condominium.

   NOTE: If your Unit is located within the area defined as Expandable Land or Convertible Land, the Declaration must be properly amended to submit/convert these lands and declare the Units located within them, along with additional Site and Floor Plans.
6. **Bylaws.** Establishes how the condominium association is structured and how it governs the condominium property and Unit owners, including the assessment and collection of condominium dues. The bylaws can be incorporated as an exhibit to the Declaration or recorded as a separate document. For title insurance purposes, the contents of the Bylaws are not important, but they must be recorded.

The Site Plan.

You will likely find numerous Site Plans recorded between the original Declaration and the final Unit being constructed and depicted as a completed Unit on a Site Plan. When reviewing Site Plans to determine insurability for a particular Unit, look for the following:

1. **Metes and Bounds survey of submitted land.** This description must match the Metes and Bounds description in the Declaration. If the development has any Convertible, Withdrawable, and/or Expandable Land that land also needs to be depicted and labeled.
2. All condominiums require a **Site Plan recorded at the time of Declaration** depicting any existing improvements and the proposed location of the declared Units. *See NH RSA 356-B:20.*
   a) Condominium declared after January 1, 1991, also require a post construction **as-built Site Plan** plotting the completed Unit on the ground and tying it to a fixed point which is usually a lot line. The surveyor will plot a line that measures the distance between some point on the Unit and the fixed point, this locates the Unit on the ground.
   b) Units declared prior to January 1, 1991, do not require an as-built Site Plan post construction.
3. The **LCA**, usually decks, stairs, walkways to unit, and parking, must be depicted on either Site or Floor Plans.
4. **Certification by registered land surveyor** as to accuracy and compliance with NH RSA 356-B:20.

The Floor Plan.

Floor Plans are required for each Unit and are a visual depiction of the boundaries of the Unit. If all Units are the same layout/dimensions, one set of Floor plans with all the elements below is acceptable. If there are multiple styles of Units, Floor Plans for each style can be recorded but the condominium documents must contain a designation assigning a style to a particular Unit. This designation can be in the Declaration, on the Site Plan or on the Floor Plans.

1. **The Unit number(s)** the plan depicts must be included. However, if all floor plans are the same, unit numbers aren't required but the floor plan needs to indicate it applies to all units.

2. **Vertical and horizontal boundaries with measurements** matching the description in the Declaration must be included. For example, if the vertical boundaries are the inside surface of walls, the dimensions need to be the interior dimensions. If the vertical boundaries are the outside surface of the walls, the dimensions need to be the exterior dimensions.
    a) Horizontal Boundaries are the "floor and ceiling."
    b) Vertical Boundaries are the "walls" of the Unit.
3. **LCA**, if not shown on Site Plans, must be depicted on the Floor Plans.
4. **Certification by a licensed land surveyor**, architect, or engineer as to accuracy and compliance with NH RSA 356-B:20.

Substantially Complete Certification.

A certification from a registered architect, registered engineer or licensed land surveyor confirming the Unit is substantially complete is required for all condominiums declared after January 1, 1991. This certification can be found on/in:

1. **Site Plan**. The most common format is labelling a Unit as substantially complete and then reciting in the plan certification that all Units shown as substantially complete are substantially complete.
2. **Floor Plan.** You may find a recitation on Floor plans. But this does not remove the requirement for a Site plan showing the as built location of the Unit for all declared after January 1, 1991.
3. **Separately recorded certification**. A separate document is also acceptable, but again does not remove the requirement for a Site plan showing the as built location of the Unit (for all Units declared after January 1, 1991), or Floor plans for the Unit. A registered architect, registered engineer, or licensed land surveyor can provide the certification.

NOTE: Condominiums declared prior to 1991 do not require this certification, but Site and Floor Plans are still required.

Attorney General Registration.

All residential condominiums with ten or more Units must be registered with the New Hampshire Attorney General's office prior to being sold to a consumer. The Certificate of Registration must be recorded in the registry of deeds and list your Unit number. Commercial condominiums and residential condominiums of less than ten Units are exempt from registration.

Frequently Asked Questions.

Q. Does a condominium Site Plan require **subdivision approval from the planning board**?
A. Usually but not in every Municipality. Any Municipality that includes "condominium" or adopts the statutory definition of subdivision from RSA 672:14 requires subdivision approval. However, there are some local nuances where a Municipality may not consider a condominium a subdivision despite their own ordinances defining "condominium" as a subdivision. If you encounter this situation on a newly formed condominium, document your file with written evidence from the Municipality that subdivision approval was not required.

Q. Can **storage spaces** and **parking areas** be Limited Common Area?
A. Yes, so long as the Declaration creates and identifies them as LCA, they are depicted on the Site or Floor Plans as LCA, and they are assigned to a specific Unit in the manner required under the Declaration. Generally, once LCA is assigned to a Unit it cannot be separated from the Unit or assigned to a different Unit unless a very specific process is completed. If you encounter any attempt to convey LCA separate from a Unit, contact the NH office for assistance.

Q. We've been asked to insure a transaction involving a **boat slip condominium.** Is this insurable?
A. That depends. See Title Talk Edition 10 (https://nationalagency.fnf.com/nh/Agent-Success-Tolls/Education) which specifically addresses boat slip condominiums.

Q. A Unit in a residential condominium is created as Unit 110 and appropriately labelled Unit 110 on both the Site and Floor Plans, however the **mailing address** is 120 Condo Lane. What do I use for the description in the title policy?
A. A mailing address is simply the location mail is delivered and has no bearing or effect on the legal description of a condominium Unit. The Unit is Unit #110 and it receives it's mail at the mailbox assigned the designation 120 Condo Lane by the Post Office. That mailing address could also change at any time in the future, but the Unit number will never change unless there is a properly adopted and recorded amendment to the Declaration of Condominium.

Q. A condominium complex was recently approved by the Municipality and both the Declaration, and an initial Site Plan has been recorded, but **nothing has actually been constructed yet.** Can a Unit be insured?
A. Maybe. The NH Supreme Court found in Condominiums at Lilac Lane Unit Owners' Association v. Monument Garden LLC, that a Unit located on submitted land legally exists once it is declared by a recorded Declaration and depicted on a recorded Site Plan complying with RSA 356-B:20. The Unit may be insurable with an exception for a lack of recorded Site and Floor Plans in compliance with RSA 356-B:20 and a certification of substantial completion. Gather information and contact the NH office.

Q. This is a **new development.** The Unit being insured has been completed but there are other Units in this phase that have not. The developer wants to record one plan at the completion of the entire phase. Is this insurable without an exception?
A. Yes, but we have specific requirements for escrow of funds sufficient to obtain and record the required plans post-closing. Under the NH RSA to properly create a condominium as built site and floor plans need to be recorded. Without a recorded floor plan, at a minimum, title is not marketable, hence we require sufficient funds to make the title marketable should the developer fail to. Gather information and contact the New Hampshire office for specific guidance.

Q. The Declaration identifies the Units in a numerical fashion, but the recorded Site and Floor Plans label the Units alphabetically. Is this a problem?
A. Yes. The Declaration, and Site/Floor Plans must all match and harmoniously exist to adequately define and describe the Units. Any discrepancies need to be resolved and can usually be fixed with a well-crafted affidavit. Gather information and contact the New Hampshire office for assistance.

Q. The Declaration defines the Units by number and describes the boundaries as a tract of land as shown on the Site Plan. The Site Plan depicts squares of land with a metes and bounds description labeled with the Unit numbers from the Declaration. Are Floor plans required?
A. Usually no. This form of condominium is what we call a land Unit. Floor Plans would not be required under the terms of **Statute, RSA 356-B**, because the unit is the plot of land and not actual structures, however the Declaration needs to be read to determine if as-builts are required under the terms of the **Declaration**. The Declaration will define the vertical boundaries (walls) as the bounds shown on the Site Plan and the horizontal boundaries (ceiling and floor) are usually described as extending from the center of the Earth under the Unit to the upper limits of the atmosphere above the Unit. So essentially the Unit is a column of air above the lot shown on the Site Plan. The Declaration will usually have language that the Unit owner can build within the land Unit and Floor Plans under RSA 356-B would not be required. However, **if the Declarant**, as the developer of the condominium, decided to **require floor plans** despite not being required by Statute and included a requirement for as-built Floor plans in the Declaration, we require that task be completed or an exception for lack of compliance included in the title policy.

Q. When searching the title to a condominium Unit **should the name of the condominium also be searched?**
A. Yes, the name of the condominium is a required element of the Declaration. The name should be run to locate amendments to the formation documents along with possible changes to the submitted land including easements granted by the condominium association.

Q. How are the status of the **condominium dues** confirmed?
A. The condominium association must be contacted for a purchase transaction and provide a statement confirming the below items at a minimum. Condominium dues have the potential to take priority over a mortgage for six months of unpaid dues, it is very important to confirm they are paid current.

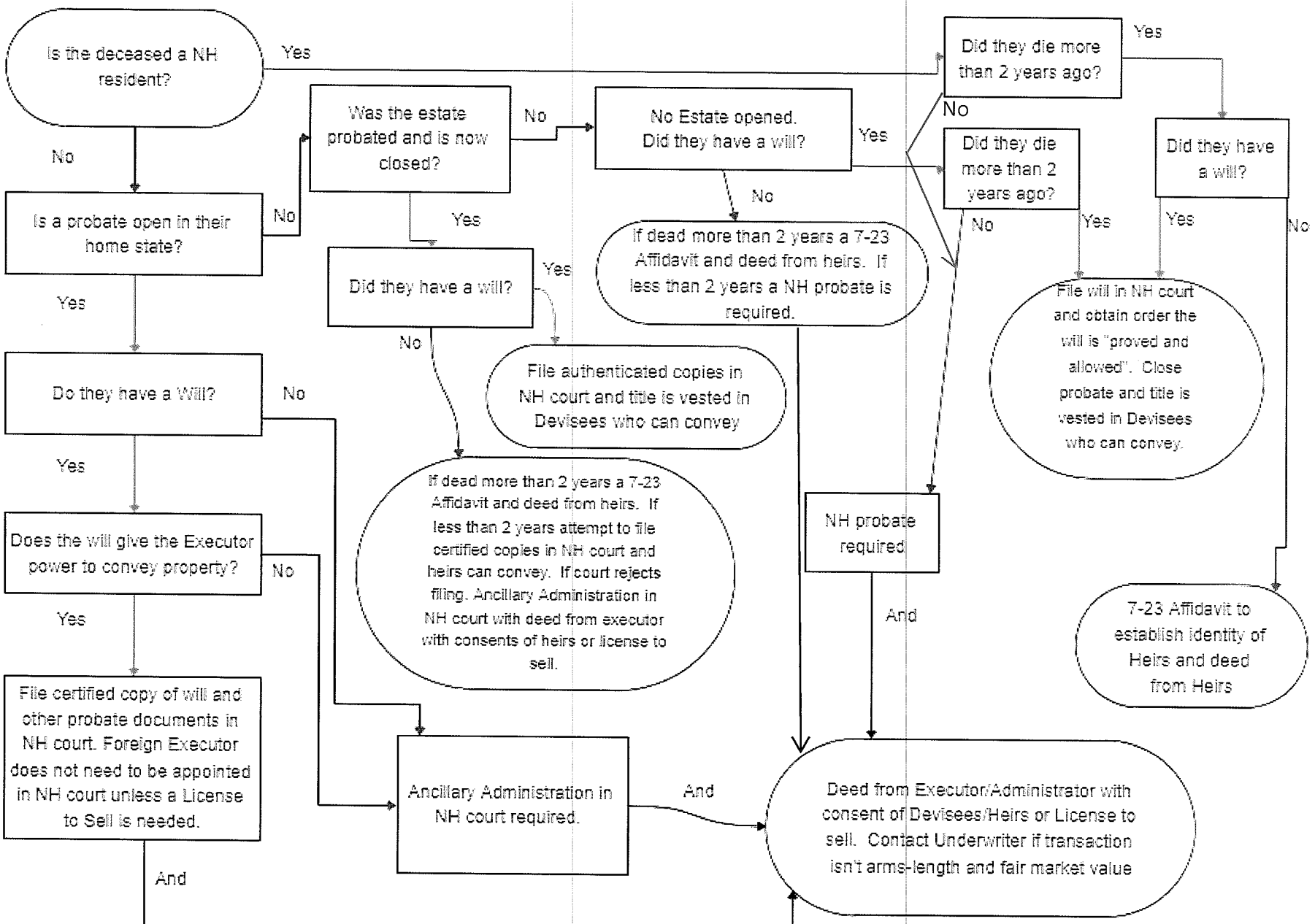
1. Amount of regularly assessed dues and billing interval.
2. Confirmation dues are paid current or any amount outstanding.
3. Any special assessments outstanding or any pending/proposed (usually for large expenditures like roof replacement, siding, etc).
4. Any fees due on the sale of a Unit.

NOTE: This is often called a 6D certificate which is a Massachusetts term but often used in New Hampshire.
NOTE: Refinance transactions only require a title affidavit confirming the dues are paid current by the current owner, unless your title exam locates outstanding condominium liens which requires you obtain a payoff statement and bring all dues current.

Q. The seller says the **condominium does not have an organized board** and doesn't regularly collect dues. Can I just take their word for it?
A. No, this may happen with smaller condominium associations of 2 Units, but you should never accept the seller's word. Utilize assessing and/or registry records to locate other Unit owners and contact them to determine the truth of the seller statement or who the treasurer is for the association.

Resources

Guidance documents are housed in our virtual NH Underwriting Manual on our website.
A tutorial on requesting access to the website is found here and accessing the NH Underwriting Manual and On-Demand Webinars is found here.



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NEW HAMPSHIRE AGENCY

Probate in New Hampshire Flowchart

nationalagency.fnf.com/nh

8.17.2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

UMB Bank, N.A.,
Appellant

v.

Civil No. 23-cv-036-LM
Opinion No. 2023 DNH 130 P

The MacMillin Company, LLC, et al., Appellees

ORDER

UMB Bank, N.A., appeals the bankruptcy court's order (doc. no. 588 in the bankruptcy proceeding, Case No. 21-10523) that (1) granted appellee The MacMillin Company's motion seeking a determination that its mechanics' lien has priority over UMB Bank's mortgage and (2) granted the motion filed by appellees Denron Plumbing & HVAC, LLC; Wallace Building Products Corporation; and JNR Gutters, Inc. (collectively the "subcontractors") requesting the same. For the following reasons, the bankruptcy court's order is affirmed in part, and vacated in a limited respect and remanded in part.

STANDARD OF REVIEW

Under 28 U.S.C. § 158(a), this court has jurisdiction to hear appeals from final judgments, orders, and decrees of the bankruptcy court. District courts reviewing an appeal from a bankruptcy court decision generally examine the bankruptcy court's findings of fact for clear error, and its conclusions of law de novo. Stilkey v. Marsters, No. 17-cv-337-LM, 2018 WL 345946, at *2 (D.N.H. Jan. 9,

2018). Discretionary rulings made under the bankruptcy code are reviewed for abuse of discretion. Id. This court may affirm, modify, reverse, or remand the bankruptcy court's judgment with instructions for further proceedings. See GT Advanced Techs. Inc. v. Harrington, No. 15-cv-69-LM, 2015 WL 4459502, at *1 (D.N.H. July 21, 2015).

BACKGROUND

The parties stipulated to the factual record before the bankruptcy court, and the relevant background facts are not disputed.

Debtor Prospect-Woodward was a not-for-profit corporation which owned and operated a retirement facility in Keene, New Hampshire. On April 14, 2017, Prospect-Woodward hired MacMillin to manage the facility's construction. Appellees Denron Plumbing, Wallace Building Products, and J.N.R. Gutters were some of MacMillin's subcontractors.

About a month later, on May 15, MacMillin began preliminary work on the facility. This work included tree clearing pursuant to a wetlands permit that required such work to be performed before June 1, 2017. The subcontractors involved in this appeal did not begin work until later.

Under a loan agreement dated June 1, 2017, a state agency loaned proceeds of a bond sale to Prospect-Woodward to finance the facility's construction. On June

19 appellant UMB Bank's predecessor in interest[1] recorded the mortgage against the facility.

MacMillin worked under the construction contract through 2019. During this time, UMB Bank paid MacMillin at least $55 million for labor and materials from the money loaned to Prospect-Woodward. MacMillin executed partial lien waivers over the course of the project. The partial lien waivers expressly reserved MacMillin's mechanics' lien for unpaid retainage, interest, pending unresolved change order requests, unresolved claims, and amounts not yet billed by MacMillin's subcontractors and suppliers.

By 2019, the facility was almost complete. Prospect-Woodward, however, stopped paying MacMillin because of alleged construction defects. Between July and October 2019, MacMillin and its subcontractors sued Prospect-Woodward for breach of contract and to perfect their then-inchoate mechanics' liens.

On October 25, 2019, a state court found that MacMillin and its subcontractors were likely to prevail on their claims and were entitled to attachments. MacMillin recorded the writ of attachment and the state court's order based on the mechanics' liens on October 31. The total amount of these liens is approximately $5.7 million.

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[1] UMB Bank is the assigned trustee of the mortgage. For ease of reference and because it makes no difference as to the legal issues involved in this appeal, the court generally refers to UMB Bank when discussing actions taken by its predecessors in interest, though it may have been, in fact, UMB Bank's predecessors in interest or such predecessors' agents taking the action.

Prospect-Woodward filed a chapter 11 bankruptcy petition in August 2021. In the bankruptcy, UMB Bank's mortgage is an allowed claim[2] against Prospect-Woodward that is secured by the facility to the extent of the mortgage amount, which is about $65 million. MacMillin and the subcontractors also have allowed claims via their mechanics' liens on the facility totaling approximately $5.7 million. In late 2021, the bankruptcy court approved a sale of the facility for $33 million. As these figures demonstrate, the facility's sale will fail to cover all of UMB Bank's, MacMillin's, and the subcontractors' claims.

Understanding that reality, MacMillin and the subcontractors filed a motion in the bankruptcy court arguing that, by virtue of their mechanics' liens and a victory under New Hampshire's "race-notice" rules, they have priority over – or are "senior" to – UMB Bank's mortgage. UMB Bank objected, contending that its mortgage has priority under a New Hampshire statute, RSA 447-12:a ("Section 12-a"), or, alternatively, that it has priority under the race-notice rules, not MacMillin.

The bankruptcy court agreed with MacMillin, finding that MacMillin's mechanics' lien had priority under the race-notice rules because UMB Bank had actual or inquiry notice of MacMillin's mechanics' lien before it recorded the mortgage. The bankruptcy court rejected UMB Bank's argument that it was entitled to priority under Section 12-a. The bankruptcy court also found that under

[2] An "allowed claim" is a claim against the debtor that no party in interest has objected to or that the bankruptcy court has found to be permitted. See 11 U.S.C. § 502(a); Bank of Am., N.A. v. Caulkett, 575 U.S. 790, 793 (2015). The parties have reserved litigation about the precise amounts of their claims, so the numbers used in this order are approximations consistent with the parties' positions.

RSA 447:5 and 447:8, the subcontractors' liens followed MacMillin's priority. UMB Bank filed this appeal and argues that the bankruptcy court erred as to all three points.

DISCUSSION

Generally, in bankruptcy "state law governs the substance of claims." Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443, 450 (2007). The parties do not dispute that New Hampshire law governs the relative priority of their claims.

New Hampshire is a "race-notice" jurisdiction, meaning that "a purchaser or creditor has the senior claim if he or she records without notice of a prior unrecorded interest." Amoskeag Bank v. Chagnon, 133 N.H. 11, 14 (1990); In re McLaughlin, Nos. BK 09-11671-JMD, BK 09-11672-JMD, & BK 09-11673-JMD, 2011 WL 1706791, at *3 (Bankr. D.N.H. May 4, 2011). In other words, when there are two interests competing for priority, the first creditor to have recorded its interest has priority over the second-in-time creditor's interest, unless the first creditor already knew or should have known about the second interest. In re Moultonborough Hotel Grp., LLC, 726 F.3d 1, 5 (1st Cir. 2013) ("The New Hampshire recording statute, [RSA] 477:3–a, acknowledges by negative implication the rule that the first party to record without notice of a prior party's claim has priority."). The creditor who has priority under the race-notice rules is often called the race-notice "winner" or "victor" in relation to the other creditor, who may be called the race-notice "loser."

A court can find that a creditor had prior notice of another's interest in several ways. Of course, a creditor had notice if it in fact knew about the prior interest at the time it recorded its own interest. Amoskeag Bank, 133 N.H. at 14. Likewise, a creditor has constructive notice of any interest already recorded. Id. And, finally, an unrecorded interest may have priority over a recorded interest if the recording party possessed facts which would cause a reasonably prudent person to have inquired further into the existence of the unrecorded interest. See C.F. Invs. v. Option One Mortg. Corp., 163 N.H. 313, 316 (2012); In re McLaughlin, Nos. BK 09-11671-JMD, BK 09-11672-JMD, BK 09-11673-JMD, 2011 WL 1706791, at *3 (Bankr. D.N.H. May 4, 2011) ("A party is deemed to have actual notice if an investigation would show the existence of an interest in property.").

Beyond the race-notice rules, New Hampshire law provides certain interests automatic priority in specified circumstances. Specifically, MacMillin and the subcontractors hold mechanics' liens arising under RSA 447:2(I).[3] Under New Hampshire law, mechanics' liens begin as inchoate – meaning incomplete or unperfected – liens at the time work under a contract first begins. See In re McLaughlin, 2011 WL 1706791, at *3 ("The mechanic's lien arises by operation of law when the labor or materials are furnished."); Boulia-Gorrell Lumber Co. v. E.

[3] RSA 447:2(I) states: "If any person shall perform labor, provide professional design services, or furnish materials to the amount of $15 or more for erecting or repairing a house or other building or appurtenances, . . . , or for consumption or use in the prosecution of such work, . . . , by virtue of a contract with the owner thereof, he or she shall have a lien on any material so furnished and on said structure, and on any right of the owner to the lot of land on which it stands."

Coast Realty, 148 A. 28, 30 (N.H. 1929) (stating that a mechanics' lien is "one indivisible lien for the whole" if it was performed "under one entire contract," so that "as the work was done under an entire contract, the lien had priority over the mortgages for the labor and materials furnished after as well as before the mortgages were recorded"); Pike v. Scott, 60 N.H. 469, 471 (1881) ("If the materials were furnished under one entire contract, one indivisible lien for the whole was created thereby."). After the contractor finishes its work under the contract, it must take steps to perfect (or complete) the lien. See RSA 447:9; RSA 447:10. Otherwise, the lien expires. See RSA 447:9; In re McLaughlin, 2011 WL 1706791, at *3. There is no dispute in this appeal that MacMillin held a mechanics' lien for the total amount due under its contract with Prospect-Woodward at the time UMB Bank recorded the mortgage. There is also no dispute that MacMillin timely perfected its mechanics' lien after completing work under the contract.

UMB Bank's interest, on the other hand, is a construction mortgage, which is "any mortgage loan made for the purpose of financing the construction, repair or alteration of any structure on the mortgaged premises where the lien secured by such attachment arises from the same construction, repair or alteration work." RSA 447:12-a.

By statute, New Hampshire provides mechanics' liens "precedent and priority over any construction mortgage." Id. The priority given to mechanics' liens, however, is qualified as follows:

> Such attachment shall not be entitled to precedence as provided in this section to the extent that the mortgagee shows that the proceeds of the mortgage loan were disbursed either toward payment of invoices from or claims due subcontractors and suppliers of materials or labor for the work on the mortgaged premises . . . .

Id.[4] The parties agree that UMB Bank paid MacMillin for some of the work MacMillin performed under the contract, so the applicability of Section 12-a is qualified to the extent of those payments, which is about $55 million.

UMB Bank argues that the bankruptcy court erred: (1) by rejecting its argument that Section 12-a mandates that its construction mortgage has priority over MacMillin's lien, regardless of whether MacMillin's lien would have priority under New Hampshire's race-notice rules; (2) in the alternative, by finding that MacMillin has priority under New Hampshire's race-notice rules on the ground that UMB Bank had notice of the mechanics' liens prior to UMB Bank's recording of the mortgage; and (3) by finding that the subcontractors share in MacMillin's race-notice victory under RSA 447:5 and 447:8.[5]

The court addresses each argument below.

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[4] RSA 447:12-a also contains a second qualification that is not relevant to this appeal.

[5] RSA 447:5 and 447:8 are discussed in greater detail in Section III.

I. Whether the bankruptcy court erred in finding that Section 12-a (when a qualification applies) does not override the race-notice rules.

First, UMB Bank contends that Section 12-a overrides New Hampshire's race-notice rules and provides construction mortgages priority over mechanics' liens to the extent the lienholder was paid for its work. In support, UMB Bank primarily points to Moultonborough, a First Circuit decision with similar facts to this case. UMB Bank contends that the bankruptcy court erred by failing to follow this binding precedent. Because this presents a pure question of law, the court reviews the bankruptcy court's decision on this issue de novo. See In re Hill, 562 F.3d 29, 32 (1st Cir. 2009).

In Moultonborough, the debtor hired a contractor, ROK, to build a hotel. 726 F.3d at 2. ROK performed some work under that contract but terminated it when the debtor failed to pay. Id. at 2-3. The debtor found a lender a short time later, and ROK agreed to resume work on the hotel, but under a new, second contract. Id. at 3. The lender paid ROK what was owed under the first contract. Id. By doing so, the lender extinguished ROK's mechanics' lien for the work performed under the first contract. Id.

After the lender recorded its mortgage on the property, ROK resumed construction, now under the second contract. Id. During construction, the lender paid ROK about $6.5 million for its ongoing construction work under the second contract. Id. As the lender paid it, ROK executed complete lien waivers that covered all work that had occurred prior to the payment date. See id. When ROK finished work under the second contract, however, the lender refused to pay the

balance owed to ROK under the second contract, alleging that the debtor had breached the loan agreement by failing to secure yet more funding to ensure the project's completion. Id. ROK claimed approximately $2.5 million in unpaid amounts under the second construction contract. Id.

The debtor ultimately defaulted on the mortgage and went into bankruptcy. Id. at 4. In the bankruptcy case, the lender brought an adversary proceeding against ROK, asserting – like UMB Bank here – that its construction mortgage was senior to ROK's mechanics' lien under Section 12-a, to the extent of its $6.5 million total payments to ROK. Id. In other words, the lender asserted that it should be paid the first $6.5 million of the hotel's foreclosure sale proceeds and that if and only if that amount were satisfied, ROK could collect the $2.5 million it claimed to be owed. See id. at 5.

In response, ROK argued that "its lien for later work on the project for which it was not paid takes precedence over the mortgage." Id. In support, ROK argued that "because it began work on the project before the mortgage was recorded, any lien arising out of work on the project performed at any time, whether prior to or after recording of the mortgage, remains senior to the mortgage, even to the extent the mortgagee paid for work." Id. ROK also argued that aside from Section 12-a, New Hampshire common law provided another alternative avenue for priority and that if such rules were applied, ROK would have priority under the circumstances. See id.

Examining "the New Hampshire statutory scheme that recognizes mechanics' liens" and "provides the procedure for their perfection," the First Circuit rejected ROK's arguments and agreed with the lender. First, the Circuit looked at the race-notice issue, finding that "the race-notice rules favor[ed]" the lender "because the mortgage was recorded well before the work for which a lien is claimed was performed." Id. Second, the Circuit analyzed whether ROK had priority under Section 12-a, notwithstanding the race-notice rules. Id. at 6. But, as here, Section 12-a did not apply because it has "an important qualification" – namely, a mechanics' lien does not have priority under Section 12-a to the extent the contractor was paid for its work. Id.

Finally, the court looked to ROK's claim that – setting aside the race-notice rules and Section 12-a – it had priority under alternative common law rules. The court also rejected this argument, concluding that neither case identified by ROK "establishe[d] any principle at variance with the present statutory scheme." Id. In other words, ROK had not identified any New Hampshire common law rule which entitled it to priority notwithstanding its race-notice loss and the non-applicability of Section 12-a. See id.[6] Having rejected all three of ROK's arguments for priority

[6] Though somewhat unclear from the Circuit's decision, it appears the two cases identified by ROK in Moultonborough (Cheshire Provident Institute v. Stone, 52 N.H. 365 (1872), and Graton & Knight Manufacturing Company v. Woodworth-Mason Company, 69 N.H. 177 (1897)), applied, in effect, what was or developed into race-notice rules. See Graton & Knight Mfg. Co., 69 N.H. at 177 ("The building being in the course of erection when the claimant took the mortgages, [the mortgagee] would have constructive, if not actual, notice of the contract under which the [material] was furnished; and his security would be subject to the [mechanics' lien],

in its favor, the court held that the lender's construction mortgage was senior to the amount owed to ROK under the second contract to the extent that ROK had already been paid by the lender. Id.

UMB Bank argues that, under Moultonborough, a mechanics' lien can only have priority over a construction mortgage if Section 12-a applies. Said differently, UMB Bank contends that Section 12-a provides automatic priority for construction mortgages when one of its qualifications applies. But the plain language of Section 12-a shows otherwise, and Moultonborough, which is distinguishable from the facts of this case, does not establish any rule contrary to that plain language.

To start, when it applies, Section 12-a creates an exception to the race-notice rules in favor of mechanics' liens over construction mortgages. Section 12-a, however, is silent regarding which interest has priority when it does not apply due to a qualification. And going further, Section 12-a expressly limits the effect of its qualifications to a mechanics' lien's priority "as provided in this section." Therefore, a mechanics' lien may be entitled to priority under some other rule, including race-notice, when Section 12-a does not apply.

Notwithstanding Section 12-a's plain language, UMB Bank points to Moultonborough to support its position that Section 12-a is the exclusive source of priority for mechanics' liens. But, read closely, Moultonborough refutes rather than

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if one existed."); Cheshire Provident Inst., 52 N.H. at 367 (holding that mechanics' lien "took precedence of the mortgages for all that [the contractor] did 'by virtue of the contract'" where "[u]pon reasonable inquiry, [the mortgagees] would undoubtedly have learned of the existence of the contract between the mortgagor and the [contractor].").

supports UMB Bank's position. Tellingly, the Circuit began its analysis by setting out New Hampshire's race-notice rules and confirming that ROK was the race-notice loser. 726 F.3d at 5.[7] Only after resolving that threshold issue did the Circuit analyze whether ROK's mechanics' lien might find priority under Section 12-a. See id. If the Circuit intended to hold that Section 12-a provided the exclusive source of priority for a mechanics' lien, there would have been no reason to consider whether ROK's mechanic lien might have priority pursuant to New Hampshire's race-notice rules.

To be sure, taken without context, some of the Circuit's language in Moultonborough appears to support UMB Bank's argument. But the Circuit's holding must be understood in the context of the opinion as a whole. Most notably, when addressing whether ROK could still find priority over the lender's construction mortgage despite its race-notice loss and its inability to use Section 12-a, the Circuit observed that ROK had presented an argument that "the scheme envisioned by [Section 12-a] is nonexclusive, and that an alternative source of priority for mechanics' liens can be found in older New Hampshire case law." 726 F.3d at 6. UMB Bank contends that because the Circuit rejected ROK's argument – described in the opinion as a contention that Section 12-a is "nonexclusive" – the

[7] Importantly, the lien at issue in Moultonborough related to the work ROK performed under its second contract with Moultonborough, as opposed to the lien which arose from the work ROK performed under the first contract. The First Circuit thus chose its words carefully when it explained that the mortgage was recorded "before the work for which a lien is claimed was performed." See id. By contrast, in this case, the work for the lien that MacMillin claims began before the mortgage was recorded.

Circuit must have intended to hold that Section 12-a is indeed exclusive. Far from making such a sweeping holding, the Circuit merely reasoned that the two 19th-century cases cited by ROK in support of this claimed alternate source of priority were unpersuasive on that count because neither "establishe[d] any principle at variance with the present statutory scheme" – the "present statutory scheme" referring to both New Hampshire's race-notice rules and Section 12-a. See 726 F.3d at 5-6.[8] UMB Bank thus incorrectly equates the First Circuit's rejection of ROK's argument that it was entitled to priority under two 19th-century cases with a rejection of the applicability of the race-notice rules. See id. at 5.[9] As just discussed, it would have been odd for the Circuit to have examined and applied the race-notice rules, just to reverse course a few paragraphs later and implicitly hold that they were irrelevant.

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[8] UMB Bank also points to similar reasoning in Judge Barbadoro's decision in the same case. Finding, as the First Circuit ultimately did, in favor of the lender, Judge Barbadoro wrote: "I conclude that [Section 12-a] unambiguously sets forth the exact terms of priority between a mechanic's lien attachment and a construction mortgage, notwithstanding any prior inconsistent common law." ROK Builders, LLC v. 2010-1 SFG Venture, LLC, No. 12-cv-57-PB, 2012 WL 3779669, at *3-4 (D.N.H. Aug. 30, 2012). UMB Bank contends that, by this, Judge Barbadoro meant the race-notice rules were inapplicable. But in that paragraph Judge Barbadoro was not rejecting the race-notice rules, as UMB Bank seems to suggest, but was rather rejecting ROK's convoluted argument that the common law establishes some alternative scheme for automatic priority for mechanics' liens which Section 12-a did not abrogate. In any event, the district court opinion underlying Moultonborough is not binding precedent, while Moultonborough is. To the extent the two decisions are inconsistent, Moultonborough necessarily controls.

[9] Moreover, the First Circuit again observed that ROK's first-in-time lien under the first contract had "expired, leaving ROK with only a lien for later work," meaning work performed under the second contact, for which the Circuit found ROK was the race-notice loser.

Finally, UMB Bank cites language from a treatise, which states that "[a] statute dealing with construction loan mortgages may be enacted with the intent of giving the construction mortgage priority over mechanics' liens . . . ." Doc. no. 27 at 28 (emphasis added) (quoting 56 C.J.S. Mechanics' Liens § 263 (2023)). But that treatise continues, observing that a state "may" decide to treat mechanics' liens and construction mortgages in many different ways. See 56 C.J.S. Mechanics' Liens § 263 (2023) (listing several possible approaches that states may take to accomplish their policy objectives related to mechanics' liens and construction mortgages). For that same reason, UMB Banks's reference to how mechanics' liens are treated under Ohio law is unpersuasive. See id. § 4 ("By reason of the dissimilarity of the mechanic's lien statutes of the different states, the decisions of the courts of one state construing the statute of that state are generally not considered as of great value as precedents . . . ."); see also Grant S. Nelson, et al., Real Estate Finance Law § 12.4 at 1063 (6th ed. 2014) ("Generalizations about mechanic's liens are extremely problematic and always must be checked against local law, because the laws creating the liens and judicial interpretations of the laws are extremely varied . . . .").[10] At bottom, New Hampshire chose to determine priority by race-notice

[10] UMB Bank claims that Ohio law "mimic[s]" Section 12-a, but this is not the case. Compare O.R.C. § 1311.14 ("Except as provided in this section, the lien of a mortgage . . . shall be prior to all mechanic's . . . and similar liens . . . to the extent that the proceeds thereof are used and applied for the purposes of and pursuant to this section . . . ."), with RSA 477:12-a (stating that mechanics' liens have "precedent and priority over any construction mortgage" but that "[s]uch attachment shall not be entitled to precedence as provided in this section to the extent that the mortgagee shows that the proceeds of the mortgage loan were disbursed . . . ."). Ohio's statute

rules and to provide mechanics' liens a qualified automatic priority under Section 12-a. But there is nothing in the plain language of Section 12-a or the caselaw interpreting it that holds New Hampshire likewise intended a construction mortgagee to have automatic priority when Section 12-a's applicability is qualified.

For these reasons, the court affirms the bankruptcy court's finding that MacMillin's mechanics' lien has priority over UMB Bank's lien to the extent MacMillin was the race-notice winner.

II. Whether the bankruptcy court erred in finding that UMB Bank had inquiry notice about MacMillin's lien prior to recording its mortgage.

In the alternative to its argument that it is entitled to automatic priority under Section 12-a, UMB Bank contends that it was the race-notice winner because it was the first to record its interest in the property and did so without notice of MacMillin's prior existing interest. UMB Bank argues that the bankruptcy court erred by finding otherwise.

The bankruptcy court did not clearly err. The bankruptcy court found[11] that MacMillin "offered undisputed evidence that work had in fact commenced on the

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provides that covered mortgages have priority over a mechanics' lien when loan funds have been disbursed to the lienholder, while Section 12-a only eliminates the automatic priority given to mechanics' liens in the same circumstances. Further, Ohio's statute also expressly overrides other statutory rules, stating: "This section, as to mortgages contemplated by this section, controls over all other sections of the Revised Code relating to mechanic's . . . and all liens that can be had under this chapter . . . ." O.R.C. § 1311.14.

[11] The parties dispute whether MacMillin or UMB Bank bears the burden of proof as to notice. The bankruptcy court found that regardless of who had the burden,

property at the time the [original lender] recorded its mortgage," that a reasonable inquiry by UMB Bank would have revealed such work, and, by operation of law, the existence of MacMillin's mechanics' lien. Doc. no. 29-27 at 15. The court continued, explaining that, "[s]pecifically, the stipulated record shows that the wetland permit issued in connection with the project prohibited tree clearing work between June 1, 2017, and July 31, 2017, but the Contract required work to commence by June 30, 2017." Id. So, "unless tree clearing work commenced before the June 1, 2017, proscription period, the pricing under the Contract was in jeopardy." Id. Consequently, Prospect-Woodward "instructed MacMillin to commence work on May 15, 2017, and the [original lender] paid invoices at the [loan] closing that referred to both the wetland permit and the tree clearing that had already occurred at the project site." Id. The bankruptcy court found that UMB Bank "did not refute that such invoices were paid prior to the [original lender] recording its mortgage, or that they referred to pre-recordation work that would have been obvious to anyone inspecting the work site." Id.

The record shows, just as the bankruptcy court described, that prior to recording its interest, UMB Bank knew about the construction contract and the wetlands permit which together required certain work to be performed prior to June 1, 2017. A reasonable creditor possessing this information would have undertaken a simple observation of the property, which would have revealed the already-

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there was sufficient evidence to find that UMB Bank had notice of MacMillin's interest. The court agrees that there was sufficient evidence to find that UMB Bank had notice regardless of who had the burden of proof.

commenced tree-clearing work resulting in MacMillin's mechanics' lien. For those reasons, the bankruptcy court did not clearly err by finding that UMB Bank knew or should have known about MacMillin's mechanics' lien prior to recording its mortgage.[12]

III. Whether the bankruptcy court erred by finding that the subcontractors are entitled to priority via MacMillin's mechanics' lien.

Lastly, the bankruptcy court found that the subcontractors shared in MacMillins' race-notice victory by virtue of RSA 447:5 and 447:8, even though the subcontractors were race-notice losers as against UMB Bank. RSA 447:8 states, in relevant part, as follows:

> Any person giving notice as provided in RSA 447:5-7 shall . . . furnish to the owner . . . an account in writing of the labor performed . . . and the owner or person in charge shall retain a sufficient sum of money to pay such claim, and shall not be liable to the agent, contractor or subcontractor therefor, unless the agent, contractor or subcontractor shall first pay it.

And RSA 447:5 states:

> If a person shall perform labor . . . or furnish

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[12] In a footnote, doc. no. 27 at 48 n.12, UMB Bank summarily asserts that MacMillin was on notice of the "construction financing" before it began work. This argument does not appear to have been presented to the bankruptcy court, and it is insufficiently developed before this court, in any event. Accordingly, it is waived. See Coons v. Industrial Knife Co., 620 F.3d 38, 44 (1st Cir. 2010) (explaining that "judges are not obligated to do a party's work for him" and that district courts are "free to disregard" arguments that are not developed in briefs); Timmins Software Corp., v. EMC Corp., 502 F. Supp. 3d 595, 606 (D. Mass. 2020) (explaining that superficial arguments may be deemed waived) (citing United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990)). Similarly, UMB Bank did not argue that MacMillin is necessarily a race-notice loser as against the mortgage because MacMillin's mechanics' lien was inchoate at the time the mortgage was recorded.

> materials to the amount of $15 or more for any of the purposes specified in [assorted statutory sections], by virtue of a contract with an agent, contractor or subcontractor of the owner, the person shall have the same lien as provided in said sections, provided, that he or she gives notice in writing to the owner or to the person having charge of the property that he or she shall claim such lien before performing the labor or furnishing the material for which it is claimed.

In other words, so long as the subcontractors provided notice under RSA 447:5, :6, or :7, "the owner or person in charge [i.e., Prospect-Woodward] shall retain a sufficient sum of money to pay" the subcontractors' claims. RSA 447:8. The bankruptcy court found that the subcontractors provided the requisite notice under RSA 447:5, so Prospect-Woodward was required to pay the subcontractors' claims prior to paying MacMillin's claim (whose claim is prior to UMB Bank's claims). In effect then, the subcontractors' claims have first priority.

UMB Bank argues that, contrary to the bankruptcy court's finding, the subcontractors did not provide the required notice and the record does not evidence such notices. The subcontractors respond and appear to agree with UMB Bank that they did not provide notice prior to their work commencing as required by RSA 447:5. See doc. no. 31 at 4. The subcontractors argue, however, that they in fact provided notice after work commenced and that RSA 447:6 permits such post-work notice.[13]

[13] RSA 447:6 states that "[s]uch notice may be given after the labor is performed, the professional design services are provided, or the material is furnished, and said lien shall be valid to the extent of the amount then due or that may thereafter become due to the contractor, agent or subcontractor of the owner."

Considering the agreement between UMB Bank and the subcontractors that they did not provide notice under RSA 447:5, the court finds that the bankruptcy court erred in finding that the subcontractors were entitled to priority under RSA 447:8 by virtue of RSA 447:5 alone. The court vacates the bankruptcy court's decision only in this limited respect and remands the matter so that the bankruptcy court can determine whether RSA 447:8 nonetheless still applies on the present record because the subcontractors provided sufficient notice considering RSA 447:6.[14]

CONCLUSION

The bankruptcy court's order is affirmed in part and vacated and remanded in part.

SO ORDERED.

Landya McCafferty
United States District Judge

October 16, 2023

cc: Counsel of Record

[14] The subcontractors argue that the court should affirm on an alternative basis that the bankruptcy court did not reach, namely, that the subcontractors are entitled to automatic priority under Section 12-a. The court declines to do so and leaves that matter for the bankruptcy court to address in the first instance, if it chooses to do so.

2023 BNH 001 **Note: This is an unreported opinion. Refer to LBR 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

Bk. No. 21-10523-BAH
Chapter 11

The Prospect-Woodward Home
dba Hillside Village Keene,
Debtor

Jeremy R. Fischer, Esq.
Kellie W. Fisher, Esq.
Drummond Woodsum
Manchester, New Hampshire
Attorneys for The MacMillin Company, LLC

Frank P. Spinella, Esq.
Wadleigh, Starr & Peters, PLLC
Manchester, New Hampshire
Attorney for Denron Plumbing & HVAC, LLC

Bruce J. Marshall, Esq.
Bruce J. Marshall Law Offices, PLLC
Bow, New Hampshire
Attorney for Wallace Building Products Corporation

Alan L. Braunstein, Esq.
Riemer & Braunstein LLP
Boston, Massachusetts
Attorney for J.N.R. Gutters, Inc.

Daniel S. Bleck, Esq.
Eric R. Blythe, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
Boston, Massachusetts
Attorneys for UMB Bank, N.A. as Successor Bond Trustee to U.S. Bank National Association

Peter N. Tamposi, Esq.
The Tamposi Law Group, PC
Nashua, New Hampshire
Attorney for UMB Bank, N.A. as Successor Bond Trustee to U.S. Bank National Association

Jason A. Manekas, Esq.
Bernkopf Goodman LLP
Boston, Massachusetts
Attorney for UMB Bank, N.A. as Successor Bond Trustee to U.S. Bank National Association

MEMORANDUM OPINION

I. INTRODUCTION

The MacMillin Company, LLC (on behalf of itself and as assignee of Wayne J. Griffin Electric, Inc., Pro Stock Kitchens, LLC, Schindler Elevator Corporation, and Metro Walls, Inc.) (collectively, "MacMillin") filed a motion seeking a determination, pursuant to 11 U.S.C. § 506(a) and Federal Rule of Bankruptcy Procedure 3012,[1] that (1) its mechanic's lien has priority over the mortgage of UMB Bank, N.A. (the "Bond Trustee") as successor bond trustee to U.S. Bank National Association (the "Original Bond Trustee") for all amounts due under MacMillin's

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[1] MacMillin cites Rule 3012 in support of it having made its request by motion. That rule provides in relevant part:

> (a) Determination of Amount of Claim. On request by a party in interest and after notice—to the holder of the claim and any other entity the court designates—and a hearing, the court may determine:
>
> (1) the amount of a secured claim under § 506(a) of the Code; or
>
> (2) the amount of a claim entitled to priority under § 507 of the Code.
>
> (b) Request for Determination; How Made. Except as provided in subdivision (c), a request to determine the amount of a secured claim may be made by motion, in a claim objection, or in a plan filed in a chapter 12 or chapter 13 case. When the request is made in a chapter 12 or chapter 13 plan, the plan shall be served on the holder of the claim and any other entity the court designates in the manner provided for service of a summons and complaint by Rule 7004. A request to determine the amount of a claim entitled to priority may be made only by motion after a claim is filed or in a claim objection.

Fed. R. Bankr. P. 3012(a) and (b) (emphasis added). MacMillin, the Subcontractors, and the Bond Trustee have not asked the Court to determine the amount of their claims (and in fact have reserved all rights with respect to that issue), see n.5, but rather the priority of their liens. This relief is more appropriately sought by filing an adversary proceeding:

> An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:
>
> ...
>
> (2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, but not a proceeding under Rule 3012 or Rule 4003(d).

Fed. R. Bankr. P. 7001(2) (emphasis added). To date, no one, including the Court, has raised an issue about proceeding in the manner to which all parties have agreed. For that reason, the Court will proceed to address the merits of the relief requested by the parties.

construction contract with the Debtor; and (2) all amounts due MacMillin under the contract are fully secured (Doc. No. 400) (the "Motion"). Denron Plumbing & HVAC, LLC ("Denron"), Wallace Building Products Corporation ("Wallace"), and J.N.R. Gutters, Inc. (on behalf of itself and as assignee of American Builders and Contractors Supply Co.) (together, "JNR") (collectively, the "Subcontractors") have joined in the Motion and filed their own pleadings requesting that the secured status of their mechanics' liens also be established (Doc. Nos. 403, 406, and 417) (the "Joinders"). The Bond Trustee has objected to the relief requested by MacMillin and the Subcontractors and has requested that the Court find that its allowed secured claim has priority over MacMillin's and the Subcontractors' mechanics' liens for the amounts that the Bond Trustee paid for work performed on the Debtor's property (Doc. No. 463) (the "Objection"). The parties agreed that the Court could decide the issues based on a stipulated factual record, which MacMillin has filed with the Court (Doc. Nos. 401 and 438). The Court held a hearing on May 6, 2022, on the Motion, the Joinders, the Objection, and the various responses and replies thereto and took the matters under advisement (Doc. No. 500).

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and Local Rule 77.4(a) of the United States District Court for the District of New Hampshire. This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS[2]

At the time the Debtor filed a chapter 11 bankruptcy petition on August 20, 2021, the Debtor was a not-for-profit corporation that owned and operated a licensed continuing care retirement facility known as Hillside Village Keene, located in Keene, New Hampshire (the

[2] As noted above, the parties submitted a stipulated factual record which forms the basis for the Court's findings of fact.

"Facility"). Development of the Facility was financed through the issuance of bonds by the New Hampshire Health and Education Facilities Authority (the "Authority") in the principal amount of $93,015,000.00. On or about April 14, 2017, MacMillin and the Debtor executed a contract whereby MacMillin agreed to serve as the Debtor's construction manager for the construction of the Facility (the "Contract"). MacMillin agreed to a "guaranteed maximum price" for the project as long as construction commenced by June 30, 2017. MacMillin and some of its subcontractors commenced preliminary work at the Facility site on or about May 15, 2017. On or before June 19, 2017, MacMillin's subcontractors (including some of the Subcontractors) prepared numerous submittals and engineered drawings. None of the Subcontractors performed any work on site at the Facility before June 19, 2017.

The Original Bond Trustee signed a loan agreement, dated as of June 1, 2017, pursuant to which the Authority agreed to lend the proceeds of the bonds to the Debtor. On June 19, 2017, the Original Bond Trustee recorded its mortgage against the Facility. As part of the closing, the Debtor submitted five disbursements requests, which included documentation referencing a timber cut and tree cutting work, which of necessity had commenced prior to June 1, 2017, due to a wetlands permit issued in connection with the project that prohibited tree clearing between June 1 and July 31, 2017.[3]

From 2017 and continuing into 2019, MacMillin provided labor and materials under the Contract, both directly and through its subcontractors, and proceeds of the bonds were used to pay MacMillin, less retainage. During the course of construction, the Bond Trustee paid

[3] See Stipulated Ex. C. The fact that timber and tree clearing work needed to occur prior to the recording of the mortgage is further evidenced by the statements of the Debtor's representative, Edward Kelly of Kelly Real Estate Investment Properties, LLC, that "[w]e must take the trees down prior to June 1st. This will require that we have a clear path to do this or the financing of this great project could be substantially delayed or perhaps go away." Stipulated Ex. D. Invoices for this site work were presented to the Original Bond Trustee for payment at the bond closing. Stipulated Ex. P.

MacMillin not less than $55 million for labor and materials. In connection with the payments, MacMillin executed partial lien waivers which expressly reserved MacMillin's mechanic's lien for unpaid retainage, interest, pending unresolved change order requests, unresolved claims, and amounts not yet billed by MacMillin's subcontractors and suppliers. As construction neared completion in 2019, the Debtor stopped paying MacMillin, taking the position that it was entitled to withhold further payments because of alleged construction defects.

Between July 2019 and October 2019, MacMillin and various subcontractors filed suit for breach of contract and to preserve and perfect their mechanics' liens, by writ of attachment under New Hampshire statute, to secure their right to payment for labor and materials. On October 25, 2019, after contested hearings, the state court determined that MacMillin and the Subcontractors were likely to prevail on their claims and were therefor entitled to attachments. The state court approved lien requests for MacMillin and the Subcontractors in the following amounts:

MacMillin	$3,615,775.46[4]
Griffin:	$687,414.12
Pro Stock:	$130,000.00
Denron:	$693,535.44
JNR:	$139,308.00
American:	$121,779.69
Wallace:	$325,579.64

On October 31, 2019, MacMillin recorded the writ of attachment and the state court's order.

After commencement of this bankruptcy case, MacMillin and the Subcontractors filed proofs of claim asserting secured claims in the following amounts:

MacMillin:	$8,277,933.73

[4] The state court found that MacMillin had met its burden of establishing its basic right of recovery in the amount of $5,713,392.34. The state court then subtracted all the subcontract lien amounts from MacMillin's and approved a lien in this lower amount.

Denron:	$693,535.44
JNR:	$242,806.47 and $121,779.69
Wallace:	$342,000.00

Effective July 2, 2020, the Bond Trustee was named successor trustee to the Original Bond Trustee. As of the commencement of this case, by virtue of its mortgage, the Bond Trustee holds an allowed claim, secured to the extent of the value of its lien on the Facility, in the amount of $64,659,386.30. On November 22, 2021, the Court approved a sale of the Facility for $33,000,000.00. The sale order provided that the various secured claims asserted against the Facility attached to the sale proceeds.

III. DISCUSSION

The Bond Trustee holds an allowed claim totaling more than $64 million, secured by its construction mortgage on the Facility, which was recorded with the registry of deeds on June 19, 2017. MacMillin and the Subcontractors also have allowed claims for which the state court, on October 25, 2019, allowed attachments to secure their mechanics' liens on the Facility in an amount totaling more than $5.7 million (Stipulated Ex. R). The Bond Trustee's mortgage and MacMillin's and the Subcontractors' mechanics' lien attachments all attached to the proceeds of the sale of the Facility with "the same validity, priority and extent as existed prior to such sale" in accordance with the Court's November 21, 2021, order approving the sale (Doc. No. 317). The Court is faced with a priority dispute between the Bond Trustee as construction mortgagee and MacMillin and the Subcontractors as mechanics' lienholders. The crux of the dispute is which law governs the priorities of their claims: New Hampshire's general "race-notice" rule or New Hampshire Revised Statutes Annotated ("RSA") 447:12-a.

MacMillin and the Subcontractors argue that RSA 447:12-a is inapplicable and that the race-notice rule applies. The Bond Trustee argues that RSA 447:12-a governs the dispute and

deprives the contractors of race-notice priority. MacMillin and the Subcontractors contend that their claims have priority over the Bond Trustee's claim and that all amounts due them under the Contract are fully secured pursuant to § 506(a) of the Bankruptcy Code. The Bond Trustee disagrees and contends that its claim has priority over MacMillin's and the Subcontractors' claims.

The Bankruptcy Code provides in relevant part:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest ... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property ... and is an unsecured claim to the extent that the value of such creditor's interest ... is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use ... affecting such creditor's interest.

11 U.S.C. § 506(a). In the Motion and Joinders, MacMillin and the Subcontractors have asked the Court to determine the priority and extent of their secured claims. Section 506(a) of the Bankruptcy Code provides a secured creditor's claim is limited to the value of the collateral securing it. The value of the collateral in this case is $33 million, the proceeds from the sale of the Facility. The Bond Trustee holds a claim that exceeds $64 million. MacMillin and the Subcontractors have filed claims in this bankruptcy case that together total more than $9 million.[5] Clearly, the value of the collateral is insufficient to treat all asserted claims as secured. MacMillin's and the Subcontractors' mechanics' liens must have priority over the Bond

[5] MacMillin's proof of claim includes all amounts it alleges are due for labor and materials provided by MacMillin and all its subcontractors (including the Subcontractors) under the Contract. The state court attachment order subtracted all subcontractor lien amounts from MacMillin's.

To date, the allowed amount of MacMillin's and the Subcontractors' claims as well as the amount of MacMillin's and the Subcontractors' liens have not been determined. The parties have reserved all rights related thereto. In addition, the mechanic's lien claims arise under contracts that invariably contain arbitration clauses, which federal courts are generally bound to enforce. The determination of the relative priority of the mechanic's lien claims vis-à-vis the Bond Trustee's mortgage can occur without determining the amounts of those claims, including the extent to which the mechanic's lien claims may be subject to any defenses, setoffs or counterclaims.

Trustee's construction mortgage if MacMillin and the Subcontractors are to recover any of the net sale proceeds. For that reason, the Court must determine the priority of the competing claims.

"New Hampshire is a race-notice jurisdiction regarding priority of interests in real property." In re McLaughlin, Bk. Nos. 09-11671-JMD, 09-11672-JMD, and 09-11673-JMD, 2011 WL 1706791, at *3 (Bankr. D.N.H. May 4, 2011). New Hampshire's recording statute "acknowledges by negative implication the rule that the first party to record without notice of a priority party's claim has priority." ROK Builders, LLC v. 2010-1 SFG Venture, LLC v. (In re Moultonborough Hotel Group, LLC), 726 F.3d 1, 5 (1st Cir. 2013) ("Moultonborough III") (citing RSA 477:3-a).

In a race-notice jurisdiction,

> a purchaser or creditor has the senior claim if he or she records without notice of a prior unrecorded interest. The purpose then of the recording statutes ... is to provide notice to the public of a conveyance of or encumbrance on real estate. The statutes serve to protect both those who already have interests in land and those who would like to acquire such interests.

Id.

In re Chase, 388 B.R. 462, 467 (Bankr. D.N.H. 2008) (quoting Amoskeag Bank v. Chagnon, 133 N.H. 11, 14 (1990)). Notice of a prior unrecorded interest may be (1) actual; (2) record (also referred to as constructive), or (3) inquiry. Bilden Props., LLC v. Birin, 165 N.H. 253, 258 (2013). A party is deemed to have notice of an unrecorded interest "upon receipt of enough information ... that would cause a reasonably prudent person" to make further inquiry. CF Invs., Inc. v. Option One Mortg. Corp., 163 N.H. 313, 316 (2012). "If a party is obligated to investigate, then the party is chargeable with actual notice of what the investigation will show." Amoskeag Bank v. Chagnon, 133 N.H. at 14.

Normally construction projects get financed before a builder breaks ground on a project, and construction mortgages get recorded before contractors commence work. Without statutory intervention, first-recorded construction mortgages would always trump mechanics' liens that arise under state law.[6] Typically, construction mortgagees would be race-notice winners as compared to contractors with mechanics' liens, who would be race-notice losers. However, New

[6] New Hampshire's mechanic's lien schema was described in In re McLaughlin as follows:

> In New Hampshire, any person who performs labor or furnishes materials to the amount of $15 or more for erecting a house, by virtue of a contract with the owner, shall have a lien on any material furnished and on said structure. NH RSA 447:2. The mechanic's lien arises by operation of law when the labor or materials are furnished. Couillard v. O'Connor, 97 N.H. 89, 91 (1951); Pike v. Rackley, 60 N.H. 469 (1881) ("The lien is a creation of statute, and attaches to the building and the interest of the owner in it by force of statute); see also Whitefield Vill. Fire Dist. v. Bobst, 93 N.H. 229, 231 (1944). ...
>
> Once a lien is created, it will expire unless it is perfected in a timely manner after completion of the contract. To perfect a mechanic's lien, a party must acquire an attachment after the contract is completed on the specific property to which it supplied materials. Upon completion of the contract from which the mechanic's lien arose, a single indivisible lien for the whole is created. Boulia–Gorrell Lumber Co. v. East Coast Realty, 84 N.H. 174 (1929). The mechanic's lien continues for 120 days after completion of delivery of goods or performance of services under the contract. The lien must be perfected before it expires. NH RSA 447:9. The time starts to run not from the date the mechanic's lien accrues but from when the final bill is sent or the last work is completed under the contract. Tolles–Bickford Lumber Co. v. Tilton Sch., 98 N.H. 55, 58, (1953); Pike, 60 N.H. at 469. In order to continue or secure the mechanic's lien, the lien holder must attach the property by "writ and return thereon distinctly expressing that purpose," within the 120 day period. NH RSA 447:10. After the mechanic's lien is validly perfected, it has priority over any interests that were created after the mechanic's lien first arose.

McLaughlin, 2011 WL 1706791, at *3-4. RSA 447:5 sets forth the manner in which subcontractors' mechanics' liens are established:

> If a person shall by himself or others perform labor or furnish materials to the amount of $15 or more for any of the purposes specified in RSA 447:2 ... by virtue of a contract with an agent, contractor or subcontractor of the owner, he shall have the same lien as provided in said sections, provided, that he gives notice in writing to the owner or to the person having charge of the property that he shall claim such lien before performing the labor or furnishing the material for which it is claimed.

RSA 447:5.

Hampshire has adopted an exception to priority laws with respect to mechanic's lien attachments. RSA 447:12-a states, in relevant part:

> [A]ttachment [of a mechanic's lien] shall have precedence and priority over any construction mortgage. ... However, such attachment shall not be entitled to precedence as provided in this section to the extent the mortgagee shows that the proceeds of the mortgage loan were disbursed either toward payment of invoices from or claims due subcontractors and suppliers of materials or labor for the work on the mortgaged premises, or upon receipt by the mortgagee from the mortgagor or his agent of an affidavit that the work on the mortgaged premises from which such disbursement is to be made has been completed and that the subcontractors and supplier of materials or labor have been paid for their share of such work, or will be paid out of such disbursement.

RSA 447:12-a (emphasis added). As a result of RSA 447:12-a, construction mortgagees forfeit their usual priority to mechanics' lienholders, except in the two circumstances described in the statute.

Under the facts of this case, the Bond Trustee did not record its construction mortgage before MacMillin and subcontractors began work on the Facility. Rather, it is undisputed that work on the Facility began on or about May 15, 2017—just over a month *before* the Original Bond Trustee recorded its mortgage. The Bond Trustee takes the position that RSA 447:12-a allows it to achieve priority over MacMillin, who would be the race-notice winner (assuming the Bond Trustee had notice—either actual, constructive, or inquiry—of MacMillin's mechanic's lien), to the extent of the $55 million it paid to MacMillin under the Contract.

In support of its position, the Bond Trustee cites a string of cases arising out of the bankruptcy of the Moultonborough Hotel Group, LLC: 2010-1 SFG Venture, LLC v. ROK Builders, LLC (In re Moultonborough Hotel Group, LLC), Bk. No. 10-14214-JMD, Adv. No. 11-1036-JBH (Bankr. D.N.H. Dec. 16, 2011) ("Moultonborough I"); ROK Builders, LLC v. 2010-1 SFG Venture, LLC, No. 12-cv-57-PB, 2012 WL 37779669 (D.N.H. Aug. 30, 2012) ("Moultonborough II"); and Moultonborough III. In all three decisions, the courts applied the rule of priority set forth in RSA 447:12-a and found that the secured claim held by the

construction lender's assignee was senior to the mechanic's lien attachment held by the contractor (to the extent of the amount that the mortgagee disbursed to the contractor for materials and labor for the hotel property). In ruling from the bench, Judge Haines indicated "[t]he statute is unambiguous on its face" and held that the contractor's mechanic's lien "shall not be entitled to precedence to the extent that the mortgagee shows that the proceeds of the mortgage loan were disbursed, either towards invoices from or claims due subcontractors … and for labor or work on the mortgaged premises." Moultonborough I, Tr., Dec. 15, 2011; Doc. No. 463-2. The District Court concluded that "the statute unambiguously sets forth the exact terms of priority between a mechanic's lien attachment and a construction mortgage, notwithstanding any prior inconsistent law. The statute plainly provides that the attachment is not entitled to priority to the extent that mortgage loan proceeds have been disbursed to suppliers or materials or labor." Moultonborough II, 2012 WL 37779669, at *4. The First Circuit explained that "the statutory scheme in New Hampshire creates an exception to the race-notice rule for mechanics' liens. Specifically, a mechanic's lien 'shall have precedence and priority over any construction mortgage.' … This exception is, however, itself subject to an important qualification: a mechanic's lien 'shall not be entitled to precedence as provided in this section to the extent that the mortgagee shows that the proceeds of the mortgage loan were disbursed … toward payment of invoices from or claims due subcontractors and suppliers of materials or labor for the work on the mortgage premises.'" Moultonborough III, 726 F.3d at 6.

In the Court's view these statements are fine as far as they go. However, the Moultonborough courts were not faced with the same (and relatively unusual) fact pattern as presented by this case. Here, the construction lender's mortgage was not recorded before the work first giving rise to a mechanic's lien claim was performed. As Judge Kayatta of the First Circuit noted in Moultonborough III, in that case "the mortgage was recorded well before the

work for which a lien is claimed was performed." Moultonborough III, 726 F.3d at 5 (emphasis added). Thus, the construction lender's assignee did not need to argue that a race-notice loser, other than a mechanic's lienholder, can claim the benefit of the statute. Further, if RSA 447:12-a were the exclusive manner for determining the priority of competing claims between a construction mortgagee and mechanics' lienholders, as the Bond Trustee argues, then Judge Kayatta would not have needed to discuss or apply the race-notice rule as he did when he stated: "the race-notice rules favor [the construction lender's assignee]." Why would the court address race-notice if it were inapplicable in all circumstances? Because the Moultonborough courts were not faced with the facts that the Court is faced with in this case, the Court finds the Moultonborough case distinguishable.

The New Hampshire Supreme Court has had the opportunity to address RSA 447:12-a, and it has recognized that RSA 447:12-a was enacted "to provide for special treatment for mechanic's liens in determine priority status so that laborers could get paid for their services." Lewis v. Shawmut Bank, N.A., 139 N.H. 50, 52 (1994) (emphasis added). The Court agrees with MacMillin and the Subcontractors that the statute was intended to expand a construction contractor's priority rights in situations where the contractor's lien would otherwise be junior to a construction mortgage. See Alex Builders & Sons, Inc. v. Danley, 161 N.H. 19, 24 (2010) ("'[T]he purpose of the mechanics' lien law is remedial, to guarantee effective security to those who furnish labor or materials which are used to enhance the value of the property of others."). The statute was not intended to narrow a contractor's rights in a situation where a contractor's lien is first in time. See id. ("The general rule is to construe remedial statutes liberally in favor of the person the statute is intended to benefit."). The Bond Trustee's argument that construction mortgagees who are also race-notice losers can achieve priority over mechanics' lienholders by

establishing one of the two limited circumstances in RSA 477:12-a is not supported by any language in the statute.

Because the facts of this case are materially different from the facts in Moultonborough, and because MacMillin is not seeking "precedence as provided in this section,"[7] i.e., RSA 447:12-a, the Court finds that RSA 477:12-a is inapplicable. Therefore, the priority of MacMillin's mechanic's lien is not impacted by that statute. Rather, the priority dispute between MacMillin and the Bond Trustee is governed by the race-notice rule. If the Bond Trustee had notice of MacMillin's mechanic's lien, which arose prior to the recording of the construction mortgage, MacMillin's secured claim for the outstanding amounts due under the Contract will have priority over the Bond Trustee's secured claim.

While the Subcontractors do not claim priority based on their own race-notice victories, as they all commenced work on site at the Facility after the recording of the construction mortgage, they contend that they nevertheless share in MacMillin's victory, as RSA 447:8 will require the Debtor to pay the Subcontractors what they are owed before the Debtor pays the Bond Trustee. RSA 447:8 provides in relevant part:

> Any person giving notice as provided in RSA 447:5-7 shall ... furnish to the owner ... an account in writing of the labor performed, professional design services provided, or materials furnished ... and the owner or person in charge shall retain a sufficient sum of money to pay such claim, and shall not be liable to the agent, contractor or subcontractor therefor, unless the agent, contractor or subcontractor shall first pay it.

The Subcontractors argue that because they have given notice of their lien claims to the Debtor as required by RSA 447:5 (which apparently no one disputes), the Debtor is in essence a trustee for the benefit of the unpaid subcontractors. The Court agrees that RSA 447:8 will dictate how

[7] As Denron noted in its papers, "[t]he phrase 'as provided in this section' was obviously inserted in recognition that there may be other sources of priority for a mechanic's lienor apart from this statute." Doc. No. 479 at 5-6.

money the Debtor owes to MacMillin must be handled if MacMillin succeeds on its race-notice claim. Pursuant to this statute, the Debtor will be required to pay the Subcontractors, from the net sale proceeds, the amounts owed on account of their own mechanics' liens, as finally determined by the Court.

Having determined the legal priority of the competing claims of the Bond Trustee, MacMillin, and the Subcontractors, the Court must next determine whether the facts support MacMillin's and the Subcontractors' contention that the Bond Trustee, as successor to the Original Bond Trustee, was on inquiry notice of MacMillin's mechanic's lien, it being undisputed that MacMillin had not recorded any interest in the Facility as of June 19, 2017. The Bond Trustee contends that this is a disputed fact, and its determination would require limited discovery and an evidentiary hearing. MacMillin contends that the parties agreed to proceed on a stipulated record, a process that presumes that any necessary discovery will be accomplished before submission of the stipulated record. On this point, the Court agrees with MacMillin, although the Court disagrees with MacMillin's characterization of the stipulated record process as akin to a motion for summary judgment. Rather, the stipulated record process is essentially a substitution for a trial, in which all material and relevant facts are submitted as the record on which the Court bases its adjudication of the dispute. Just as discovery would not be permitted after a trial, the opportunity for discovery in this proceeding passed upon submission of the stipulated record, particularly because no need for discovery was presented before or even at the time that the stipulated record was filed. The parties had ample opportunity to conduct discovery prior to their submission of the stipulated record, and the Bond Trustee makes no claim that material evidence was somehow withheld from it during the course of collaborating on a record that exceeds three thousand pages.

The parties did not specifically brief the issue about who carries the burden of proof that the Bond Trustee's mortgage was recorded with notice of the commencement of work at the Facility. In fact, the Bond Trustee argues that whether work commenced prior to the recording of its mortgage, or whether the Bond Trustee was on inquiry notice of such work, is irrelevant, an argument with which the Court already disagrees. To the extent that the Bond Trustee had the burden of proving that it (and the Original Bond Trustee) were not on notice (inquiry or otherwise), it did not offer or point to any evidence in the record to support that conclusion.

Conversely, MacMillin offered undisputed evidence that work had in fact commenced on the property at the time the Original Bond Trustee recorded its mortgage, the rights in which the Bond Trustee succeeded. The most salient evidence was the avowed need to commence tree removal on the property prior to the time that the mortgage was recorded, and the fact that such work had so commenced. Specifically, the stipulated record shows that the wetland permit issued in connection with the project prohibited tree clearing work between June 1, 2017, and July 31, 2017, but the Contract required work to commence by June 30, 2017. Thus, unless tree clearing work commenced before the June 1, 2017, proscription period, the pricing under the Contract was in jeopardy. Accordingly, the Debtor instructed MacMillin to commence work on May 15, 2017, and the Original Bond Trustee paid invoices at the closing that referred to both the wetland permit and the tree clearing that had already occurred at the project site. The Bond Trustee did not refute that such invoices were paid prior to the Original Bond Trustee recording its mortgage, or that they referred to pre-recordation work that would have been obvious to anyone inspecting the work site. Regardless of which party bore the burden of proof on the notice issue, those facts support a finding of at least inquiry notice to the Original Bond Trustee, to whom the Bond Trustee is a successor.

Thus, based on the stipulated record, the Court finds that the Bond Trustee, as the Original Bond Trustee's successor in interest, was aware or should have been aware that MacMillan might possess, and later perfect, an inchoate mechanic's lien prior to the recording of its construction mortgage. For that reason, the Court finds that MacMillin's mechanic's lien has priority over the Bond Trustee's construction mortgage.

The Court notes further that in addition to claiming priority based on MacMillin's race-notice victory, and the provisions of RSA 447:5 and 8, the Subcontractors also contend that their mechanics' lien attachments have priority over the Bond Trustee's secured claim pursuant to RSA 447:12-a. Because the Court has determined that MacMillin's mechanic's lien is entitled to priority under the race-notice doctrine, and the Subcontractors will share in MacMillin's race-notice victory, the Court need not determine whether the Subcontractors' mechanics' lien attachments also have priority based on the application of RSA 447:12-a.

IV. CONCLUSION

Having determined that, under the particular facts of this case, New Hampshire's general race-notice rule governs the priority dispute between the Bond Trustee and MacMillin, and that the Bond Trustee, as successor to the Original Bond Trustee, was on notice of MacMillin's mechanic's lien at the time the construction mortgage was recorded, the Court concludes that all amounts due MacMillin under the Contract are secured by a first priority lien on the Facility, and therefore on the sale proceeds. The Subcontractors are entitled to join in MacMillin's race-notice victory for the reasons set forth above. Because the proceeds from the sale of the Facility exceed the amounts due to MacMillin (and the Subcontractors), their claims, in whatever amounts are eventually determined, are deemed fully secured. This opinion constitutes the

Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

ENTERED at Concord, New Hampshire.

Date: January 6, 2023

/s/ Bruce A. Harwood
Bruce A. Harwood
Chief Bankruptcy Judge

current through April 26, 2024

Title and analysis are as they appear on the respective bill. See *www.gencourt.state.nh.us.*

HB 68-FN An Act adopting the uniform real property transfer on death act.
This bill adopts the uniform real property transfer on death act.
Senate: passed. House: passed with amendment.

HB 178 An Act relative to the enforcement of condominium liens for assessments.

This bill allows a condominium association to initiate a foreclosure proceeding in order to satisfy an outstanding lien for assessments.
House: inexpedient to legislate.

HB 202 An Act relative to property tax abatements.
This bill establishes a method to equalize market value for purposes of calculating property tax abatements.
House: passed/adopted. Senate: in committee.

HB 239 An Act relative to condominium disclosure of financial information.
This bill provides for regular disclosure of the financial records of a condominium association to unit owners.
House: inexpedient to legislate.

HB 347-FN An Act establishing a superior court land use review docket.
This bill establishes the land use review docket in the superior court.
House: inexpedient to legislate.

HB 398 An Act relative to notice of PFAS and other groundwater contamination prior to the sale of real property.
This bill requires certain notice of PFAS and other groundwater contamination prior to the sale of real property.
House: passed/adopted with amendment. Senate: consent calendar report filed.

HB 433-FN An Act providing that property tax exemptions granted prior to a home sale shall not be applied to the new homeowner.

This bill provides that property tax credits and exemptions expire on the date that a transfer of the property is filed with the registry of deeds. The new owner shall be responsible for the difference between the regular tax rate on the property and the amount billed to the person entitled to the exemption, for that portion of the tax year attributable to the new owner.
House: inexpedient to legislate.

HB 1001 An Act relative to exempting the land and buildings of Masonic lodges and associations from property taxation.
This bill adds Masonic lodges and associations to institutions whose property is exempt from taxation.
House: inexpedient to legislate.

HB 1034 An Act relative to enabling municipalities to adopt a homestead property tax exemption.
This bill enables municipalities to adopt a homestead property tax exemption.
House: interim study.

HB 1040 An Act relative to including interest in an abated property tax refund at the rate determined by the department of revenue administration.

This bill includes interest in an abated property tax refund at the rate determined by the department of revenue administration.
House: interim study.

HB 1055 An Act relative to the property tax exemption for charitable organizations.
This bill permits a charitable organization to file a late application for a property tax exemption as long as application and approval are made prior to approval of the tax rate for that year.
House: passed/adopted. Senate: passed/adopted with amendment.

HB 1144 An Act relative to requirements for sewage disposal system information to be disclosed during real estate transactions.
This bill requires certain information to be disclosed about sewage disposal systems during real estate transactions of dwellings and food service establishments.
House: passed/adopted. Senate: in committee.

HB 1154 An Act relative to property tax exemptions for certain disabled veterans.
This bill clarified eligibility for certain disabled veterans to be exempt from property taxation on a homestead that was adapted through a Veterans Administration Special Adapted Housing (SAH) or Special Home Adaptation (SHA) grant or that was acquired using proceeds from the sale of such a SAH or SHA home.

House: passed/adopted with amendment. Senate: passed/adopted.

HB 1180 An Act relative to the scope of the Homestead exemption.
This bill vests the Homestead right in a non-titled spouse who occupies the dwelling.
House: inexpedient to legislate.

HB 1183-FN An Act relative to prohibiting the sale of agricultural land and land essential to critical industries to China.

This bill provides that certain companies owned, in whole or in part, by the people's republic of China or Chinese communist party shall not own, lease, possess, or exercise any control over agricultural or farm lands and land essential to critical industries in this state.
House: interim study.

HB 1187 An Act relative to promoting lease agreements of equipment for building or facility improvements.
This bill specifies that building or facility improvements that become fixtures related to the installation, purpose, or operation of leased equipment shall not be financed through lease agreements.
House: passed with amendment. Senate: in committee.

HB 1215 An Act relative to subdivision regulations on the completion of improvements and the regulation of building permits.
This bill provides that approved subdivision plats, site plans, and building permits shall be exempt from subsequent changes in the state building code, fire code, and municipal zoning regulations.
House: passed/adopted with amendment. Senate: in committee.

HB 1224 An Act relative to amendment of condominium instruments.
This bill provides that not more than a simple majority shall be required to amend the condominium by laws or governing documents regarding the selection of a shared utility service.
House: inexpedient to legislate.

HB 1229 An Act relative to the purchase and sale of any interest in real property abutting public waters.
This bill requires buyers, lessees and transferees of shoreland property to acknowledge minimum requirements for compliance with the shoreland water quality protection act.
House: Interim study.

HB 1234-FN An Act relative to the repair of class VI roads not maintained by a municipality.

This bill is an amendment to existing RSA 231:81-a and requires residents on class VI road not maintained by a municipality to contribute to cost of maintenance.
House: inexpedient to legislate.

HB 1241 An Act relative to the regulation of money transmitters and relative to license applications and renewals for certain consumer credit entities.
This bill adopts the model money transmission modernization act. This bill also adjusts renewal procedures for certain consumer credit entities to align with those in the model money transmission.
House: passed/adopted with amendment. Senate: in committee.

HB 1291 An Act relative to accessory dwelling unit uses allowed by right.

This bill increases the number of accessory dwelling units allowed by right from one to 2, adds definitions, and increases the maximum square footage. It also gives municipalities the right to require accessory units meet the definition for workforce housing.
House: passed with amendment. Senate: in committee

HB 1317-FN-L An Act relative to municipal filings made by charitable organizations exempt from taxation.
This bill allows for late fees for charitable tax exemption filings with municipalities and specifies examples of good cause for tax abatements.
House: laid on table.

HB 1320 An Act relative to property and flood risk disclosure.
This bill requires that prior to the execution of a purchase and sale agreement for real property that flood risks be disclosed to the buyer.
House: passed with amendment. Senate: in committee

HB 1362 An Act relative to authorizing municipalities to stabilize rent increases in rental housing.
This bill authorizes municipalities to enact and enforce rent stabilizing ordinances.
House: inexpedient to legislate.

HB 1429-FN-A An Act establishing a procedure for the department of environmental services to transfer ownership of dams to municipalities or others, including making loans.

This bill establishes a procedure for the department of environmental services to transfer ownership of a dam and associated property to the municipality in which the dam is located, or to other associations or parties, and includes the authority of the department to make loans from a dam maintenance revolving loan fund.
Status: House in committee.

HB 1460-FN An Act relative to the sale of country property.
This bill requires counties to assess county-owned real estate before any sale, transfer, or lease, and establishes certain notice requirements.
House: indefinitely postponed.

HB 1498-FN An Act relative to establishing a state short term rental agency.
This bill includes short-term rentals in the licensing and registration requirements for taxes on meals and rooms.
House: inexpedient to legislate

HB 1563-FN An Act relative to the education property tax and the authority of political subdivision.
This bill replaces the statewide education property tax with a property tax contribution from political subdivisions based on the state education property tax warrant issued for the tax year beginning April 1, 2024. This bill also restores statutory authority for the determination of education grants for municipalities that tuition students to other institutions.
House: interim study.

HB 1633-FN-A An act relative to the legalization and regulation of cannabis and making appropriations therefor.
This establishes procedures for the legalization, regulation, and taxation of cannabis; the licensing and regulation of cannabis establishments; and makes appropriations, therefore.
House: passed/adopted with amendment. Senate: in committee.

HB 1651-FN An Act relative combining the board of tax and land appeals and the housing appeals board.
This bill moves the housing appeals board to combine with the board of tax and land appeals as a new land appeals board.
House: inexpedient to legislate.

HCR 10

A Resolution urging Congress to increase federal funding for special education services to reduce property taxes in New Hampshire.
This house concurrent resolution urges Congress to fully fund special education services for New Hampshire under the Individuals with Disabilities Education Act and provide property tax relief to New Hampshire tax payers.
House: passed/adopted.

SB 101 An Act relative to penalties for violations of manufactured housing park sales requirements.

This bill permits manufactured housing park residents to pursue additional legal remedies when a park owner violates the notice requirements required prior to sale of the park. This bill also increases the penalty the park owner is required to pay in such cases.
Senate: inexpedient to legislate.

SB332 An Act limited re-disclosure of consumer reports requested in connection with a credit transaction involving an extension of credit secured by real estate.
This bill provides that if a person requests a consumer report in connection with a transaction secured by real estate, the consumer reporting agency shall not release the report to a third party unless the consumer has a relationship with the third party or the consumer has consented to such release.
Senate: passed. House: in committee.

SB 366-FN An Act relative to restricting the purchase of real property on or around military installations.
This bill prohibits the purchase of real property by the People's Republic of China on or within 10 miles of any miliary installation or crucial infrastructure facility.
Senate: passed. House: in committee.

SB 364-FN

An Act relative to establishing a historic housing preservation tax credit and making an appropriation to the Invest NH fund.
The bill establishes a historic housing preservation tax credit administered by the housing finance authority. The bill also makes an appropriation to Invest NH fund in the department of business and economic affairs for the purpose of developing affordable housing in the state.
Senate: interim study.

SB 381-FN An Act prohibiting a municipality from designating a road as a private road under certain conditions.
This bill prohibits a municipality from designating a road as a private road under certain conditions.
Senate: inexpedient to legislate.

SB 383-FN An Act relative to local tax caps.
The bill creates an additional adjustment to local tax caps based on inflation and population changes. The bill also establishes procedures for adoption of a budget cap by school districts.
Senate: passed/adopted with amendment. House: in committee.

SB 454-FN An Act increasing the annual real estate transfer tax revenue contribution to the affordable housing fund.

This bill increases the amount of annual real estate transfer tax revenues which are transferred to the affordable housing fund.
Senate: passed/adopted with amendment. House: report filed.

SB 491

An Act relative to authorizing legislative bodies of municipalities to enter into voluntary agreements with owners of private roads.
This bill authorizes legislative bodies of municipalities to enter into voluntary agreements with owners of private roads.
House: in committee. Senate: passed with amendment.

SB 502-FN An Act relative to the scanning of non-drivers' identification cards by real estate brokers.
This bill clarifies that licensed real estate brokers may scan, record, retain, or store electronic information collected with a license holder's consent for a period lasting until the closing date or upon the license holder's request.
Senate: passed/adopted. House: in committee.

SB 538-L An Act relative to zoning procedures concerning residential housing.
This bill establishes a tax relief program for office conversion to residences; enables municipalities to allow its governing body to adopt certain zoning ordinance changes; and adds additional authority in zoning powers for parking requirements and lot size requirements related to sewer infrastructure.
Senate: passed/adopted with amendment. House: report filed.

SB 546 An Act removing the requirement that an executory interest be conveyed to the state of New Hampshire in all easements acquired through the use of LCHIP program funds.
This bill removes the requirement that an executory interest be conveyed to the state of New Hampshire in all easements acquired through the use of LCHIP program funds.
Senate: passed. House: in committee

SB 547 An Act relative to certain requirements relative to the LCHIP programs.
This bill clarifies certain requirements relative to the land and community heritage program.
Senate: passed. House: in committee.

SB 569-FN

An Act relative to the state education property tax and the low and moderate income homeowners property tax relief program.

This bill requires the department of revenue administration to receive the revenues from the state education property tax and deposit them in the education trust fund, and revises the procedures for calculating state education grants. The bill modifies the criteria for relief under the low and moderate income homeowners property tax relief program, and establishes a committee to study the low and moderate income homeowners property tax relief program.
House: interim study.

SB 586 An Act relative to tax exempt status of the International Order of Odd Fellows.
This bill provides tax exempt status for property owned by the International Order of Odd Fellows.
Senate: interim study.

SB 585-FN An Act relative to property lien resulting from unpaid meals and rooms taxes.
This bill provides that, for purposes of a property tax lien filed against an operator for unpaid meals and rooms taxes, the operator of a limited company includes any person in a managerial capacity of the limited liability company.
Senate: passed. House: in committee.

CACR 18 Relating to the tax exempt status of churches.
This constitutional amendment concurrent resolution adds an amendment specifying that churches, religious organizations, and houses of worship are subject to state and local taxes.
House: inexpedient to legislate.