THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

File Copy

Case Name: **Town of Belmont v Michael Sylvia**
Case Number: **211-2018-CV-00200**

Enclosed please find a copy of the court's order of December 19, 2019 relative to:

Order on the Merits

December 19, 2019

Abigail Albee
Clerk of Court

(477)

C: Laura Spector-Morgan, ESQ; Michael Sylvia

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS. **SUPERIOR COURT**

Town of Belmont

v.

Michael Sylvia

Docket No.: 211-2018-CV-00200

ORDER

Bench trial held (10/24/19) on the plaintiff's Complaint and Request for Preliminary and Permanent Injunctive Relief, Civil Penalties and Attorneys' Fees (filed 8/13/18). Subsequent to review, the Court renders the following determination(s).

By way of brief background, this matter commenced when the Town of Belmont ("Town") filed a Complaint on August 9, 2018, against the defendant seeking preliminary and permanent injunctive relief enjoining the defendant from using his property in violation the Belmont Zoning Ordinance (the "BZO"), the State of New Hampshire Building Code, and the Department of Environmental Services ("DES") rules. During the course of the bench trial, the plaintiff provided the testimony of Steve Paquin. The Court also received various exhibits as evidence. Based on the above, the Court finds the following relevant facts.

Facts

The defendant owns property located at 216 Farrarville Road in Belmont, New Hampshire ("the subject property" or "the property"). The defendant purchased the property in or around 2011. In 2009, there was a fire at the property that destroyed the main structure and the septic system. (Pl.'s 5.) A garage survived the fire. When the

defendant purchased the property, he was aware that the septic system had to be replaced. (Pl.'s 1.) However, since allegedly living at the subject property, the defendant has not replaced the septic system. Despite this, the defendant allegedly lived on the property in the garage and/or a recreational vehicle during the relevant period.[1]

Steve Paquin, the Belmont Zoning Code Enforcement Officer since 2012, has driven past the building on at least twelve occasions and observed signs of an individual living at the subject property. Specifically, he has observed a car parked in the paved driveway, a plowed driveway in the winter, lights on in the recreational vehicle and garage, smoke coming from the garage, and general maintenance of the yard such as gardening. Mr. Paquin has also observed the defendant leaving the garage.

With respect to the recreational vehicle, Mr. Paquin testified that he drove by the property at least thirty times during the summer and believed the defendant was residing in the recreational vehicle. Specifically, Mr. Paquin observed that the stairs on the recreational vehicle were down and the windows and doors of the recreational vehicle were open while the defendant was sitting in the driveway.

Moreover, the defendant has represented 216 Farrarville Road as his domicile address on sworn documents. (Pl.'s Ex. 3.) On a domicile affidavit the defendant represented that his "Current Domicile Address" is 216 Farrarville Road in Belmont, New Hampshire. (Id.) The affidavit contains the following oath:

> I hereby swear and affirm, under the penalties for voting fraud set forth below, that I am not currently in possession of necessary documents to prove my domicile and that my established domicile is at the current domicile address I have entered above. I understand that a person can

[1] The Court notes that since the issuance of the preliminary injunction in this matter the defendant has not resided at the property.

> claim only one state and one city/town of his or her domicile at a time. A domicile is that place, to which upon temporary absence, a person has the intention of returning. By registering or voting today, I am acknowledging that I am not domiciled or voting in any other city/town, and that to the best of my knowledge and belief the information above is true and correct.

(Id.) The New Hampshire General Court website also has the defendant's "Home Address" as 216 Farrarville Road in Belmont, New Hampshire.[2] (Pl.'s Ex. 2.) Mr. Paquin's observations in combination with the defendant's representations that the subject property is his "domicile" led Mr. Paquin to believe that the defendant was residing at the property either in the garage or the recreational vehicle, depending on the season.

In 2017, the Town of Belmont Board of Selectmen ("the Board") asked Mr. Paquin to address the alleged violations on subject property. On August 16, 2017, Mr. Paquin sent a letter to the defendant indicating that "it seems that there may [be] some potential violations on the [subject property] concerning the compliant conversion of an accessory building to a dwelling unit as the preexisting dwelling had been lost by fire." (Pl.'s Ex. 8.) Mr. Paquin also indicated in this letter that he hoped to meet with the defendant on the subject property to ensure the property is in compliance with Town and state regulations. (Id.) Mr. Paquin sent another letter to the defendant on December 5, 2017, stating that "[i]t clearly [seems] that [the defendant] may be using the garage on the [subject property] as a dwelling unit and that [the defendant] may have connect[ed] to the existing septic system illegally." (Pl.'s Ex. 9.) Mr. Paquin requested the defendant to cease using the unit as a dwelling and indicated that failure to do so would result in the case being turned over to the Town's counsel. (Id.) Mr.

[2] The defendant is a state representative and this information is provided as part of his representative information page.

Paquin sent a final letter to the defendant on March 27, 2018, which provides, in relevant part:

> On August 16, 2017 and December 5, 2017, [the defendant] received letters from [Mr. Paquin's] office regarding potential violations on [the subject property] located at 216 Farrarville Road . . . . The Town believes that [the defendant] remain[s] in violation of local ordinances and State building codes as well as [DES] rules.
>
> In 2009 the single-family dwelling unit on this property was lost to fire and the on-site septic system was destroyed. Remaining on the lot is the garage that was accessory to thee former dwelling, as well as an RV that [the defendant] ha[s] placed on the [subject property]. I have researched the building files pertaining to your property and I am unable to locate an approved permit for a primary dwelling unit, use of a recreational vehicle as a primary dwelling unit, or residency within the garage. There have been no permits filed, no inspections completed, and no certificate of occupancies issued for conversion of the garage to a primary dwelling unit. Moreover, your property has a failed septic system and there are no DES records for a new or repaired system.

(Pl.'s Ex. 10.) The letter explained that the defendant was in violation of the following ordinances, codes, and rules:

- Belmont Zoning Ordinance ("BZO"), Article 15, Definitions, "Dwelling" and "Lot"
- BZO, Article 4, Section A "Sanitary Protection"
- BZO, Article 4, Section E "Certificate of Compliance"
- BZO, Article 8, Section G "Recreational Vehicle Uses"
- State of New Hampshire Building Code, RSA 155-A and Section R105 of the International Residential Building Code
- DES Rules, Rule Env-Wq 1004.22 "Expansion, Relocation or Replacement of Existing Structures"

(Id.)

Article 4, Section A of the BZO provides that "[a]ll structures and sanitary systems shall be constructed and maintained in accordance with standards set by the State of New Hampshire, the Town Subdivision Regulations, and applicable health and sanitary codes." (Pl.'s Ex. 6.) Art. 4, Section E, titled "Certificate of Compliance," states, in relevant part:

> Prior to the issuance of a building permit or change of occupancy permit, the applicant shall obtain a certificate of compliance from the Planning Board Chairman or designated Member stating that the proposed structure, alteration, or use complies with all provisions of this Ordinance, or that the Zoning Board of Adjustment has issued a variance or special exception.

(Id.) Article 8, Section C, "Temporary Mobile Home/Manufactured Housing Permits," provides that the

> Planning Board may issue a permit for temporary use of a mobile/home manufactured housing . . . for living quarters by a person . . . for whom a residence is being build or repaired after damage sustained from fire . . . provided that such use is shown to be a temporary expedient and also that the use will comply with all sanitary and sewage disposal requirements.
>
> . . . .
>
> 3. Before a temporary use permit may be issued, as septic system and water supply must be in existence and be capable of being hooked up to the mobile home/manufactured housing. If a septic system and water supply is not in existence, a temporary use permit may be issued only after a septic design and well location have been approved by the New Hampshire Department of Environment Services. Under no circumstances may physical occupancy occur until both systems are constructed and hooked up to the mobile home/manufactured housing. The mobile home/manufactured housing unit must also comply with all applicable Building and Safety Codes.
>
> . . . .
>
> 8. A temporary use permit may not be extended beyond 360 days from the date of initial issuance of the permit."

(Id.) Article 8, Section E, "Recreational Vehicle Uses," provides, in pertinent part:

> b. Property owners may house one unit on their property as an accessory to an existing primary residential use providing the intent is to store the unit or use the unit for temporary recreational use of the property owner or non-paying guest. Such use shall not exceed 45 days during any twelve-month period unless the unit is attached to NH State approved on-site water and septic or sewer facilities. If so attached, use of the unit shall not exceed six months during any twelve-month period. The allowed single unit shall not be considered a structure for Zoning and Planning purposes and shall not be used as a primary residence.

> c. Property owners may place one unit on their vacant lot for temporary recreational use by themselves or members of their immediate family for no more than 30 days during any twelve-month period. Such units shall remain registered, shall not be attached to any structure or the ground, and shall have and use a manufacturer-installed self-contained wastewater system. Further, if the unit is attached to NH State approved on-site water and septic or sewer facilities, the unit may remain on site for up to six months during any twelve-month period. Units place on lots not having an existing primary residential use are subject to the 320 square foot clause above.

(Id.) Lastly, Article 15 provides the definition of "dwelling" and "lot." "Dwelling" is defined as "[a] building designed or used as a place of residence. Only one dwelling is allowed per lot with the exception of apartment complexes." "Lot" is defined as:

> [A] parcel of land occupied or to be occupied by only one main building and the accessory buildings or uses customarily incident to it. A lot shall be of sufficient size to meet minimum zoning requirements for use, coverage, and area, and to provide such yards and other spaces as are herein required. Such lot shall have frontage as required by this Ordinance. However, multiple primary buildings and/or uses, as well as mixed uses, including commercial, industrial and multi-family complexes shall be allowed on a lot when approved under the Site Plan Regulations.

(Id.)

The New Hampshire Building Code, RSA chapter 155-A, provides that "[a]ll buildings, building components, and structures constructed in New Hampshire shall comply with the state building code and state fire code. The construction, design, structure, maintenance, and use of all buildings or structures to be erected and the alteration, renovation, rehabilitation, repair, removal, or demolition of all buildings and structures previously erected shall be governed by the provisions of the state building code."[3] RSA 155-A:2, I (2017). "New Hampshire building code" or "state building code" as used in RSA chapter 155-a "means the adoption by reference of the International

[3] The Court notes this statute was amended in 2018. The Court references the language of the statute that was in effect at the time this suit was filed, specifically the version that was effective January 1, 2015 to December 31, 2017.

Building Code 2009, the International Existing Building Code 2009, the International Plumbing Code 2009, the International Mechanical Code 2009, the International Energy Conservation Code 2009, and the International Residential Code 2009, as published by the International Code Council, and the National Electrical Code 2017."[4] RSA 155-A:1, IV.

Section R-105 of the 2009 International Residential Code provides that "[a]ny owner or authorized agent who intends to construct, enlarge, alter, repair, move, demolish or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any electrical, gas, mechanical or plumbing system, the installation of which is regulated by this code, or to cause any such work to be done, shall first make application to the *building official* and obtain the required *permit*." (Pl.'s Ex. 7) (emphasis in original). Section R-110 provides that "No building or structure shall be used or occupied, and no change in the existing occupancy classification of a building or structure or portion thereof shall be made until the building official has issued a certificate of occupancy therefor as provided herein." (Id.)

Discussion

As noted above, the Town commenced this action on August 9, 2018, by filing its Complaint against the defendant. In same, the Town specifically alleges that the defendant "has on his property a recreational vehicle which he is occupying in the summer; and a garage in which he is residing in the winter," (Compl. ¶ 3), in violation of the BZO, the State of New Hampshire Building Code, and state environmental laws and

[4] This statute was amended in 2017 and 2019. For this reason, the Court quotes the version of the statute that was in effect in 2017 when Mr. Paquin sent the first letter to the defendant. The statute in effect at that time became effective on June 18, 2012. There are no differences in the 2012 and 2017 versions of RSA 155-A:2, I.

regulations because the defendant has no permits for the recreational vehicle or the conversion of the garage space to a dwelling unit and there is no record of a properly installed and functioning septic system. (See id.) The Town accordingly requests several forms of relief, which are specified in greater detail in the Proposed Order filed by the Town during the trial on this matter. Specifically, the Town requests that the Court:

> a) Permanently enjoin the defendant from occupying the garage and/or recreational vehicle at 216 Farrarville Road unless and until he receives all required permits for the use of the subject property.
>
> b) Permanently enjoin the defendant from using any water appliance or fixture, including but not limited to, showers, sinks, and toilets, at 216 Farrarville Road unless and until he installs a compliant septic system.
> c) Award statutory civil penalties in the amount of $275.00 per day since August 16, 2017.
>
> d) Award the Town its statutory attorney's fees and costs incurred in the course of this matter.
>
> e) Order the defendant to pay all attorney's fees and civil penalties within thirty days of the date of this Court's Order.

(Pl.'s Proposed Order ¶ 17a–e.) The Town requests injunctive relief, statutory civil penalties, and attorney's fees.

Injunctive Relief

First, the defendant argues that the Town lacks evidence that he is living on the subject property. The Court disagrees. The Court concludes that the Town has shown by a preponderance of the evidence that the defendant resided on the subject property prior to the issuance of the preliminary injunction. First, the Town has presented evidence that the defendant has represented, under oath, that the subject property is his "domicile" residence. Webster's Third New International Dictionary defines

"domicile" as "the place of residence either of an individual or of a family." Webster's Third New International Dictionary 671 (unabridged ed. 2002); see also Black's Law Dictionary (11th ed. 2019) (defining "domicile" as "[t]he place at which a person has been physically present and that the person regards as a home[.]"). Thus, it is reasonable to infer that the defendant understood that he was representing that he resided at the subject property when he represented same as his "domicile" residence under oath.

Next, Mr. Paquin observed the defendant at the subject property on numerous occasions. Depending on the weather, Mr. Paquin observed the defendant exiting the garage or sitting on the steps of the RV. Mr. Paquin also observed smoke coming from the chimney of the garage and that the driveway was plowed during the winter. The Court is satisfied that the Town has met its burden of establishing that the defendant resided at the subject property, in both the recreational vehicle and the garage, based on Mr. Paquin's observations and the affidavit the defendant signed.

Next, the Court concludes that the BZO, RSA chapter 155-A, and the International Residential Code 2009 are governing state law and apply here. The defendant avers that the Town has misapplied the law because RSA 155-A only applies to "public buildings" and not the defendant's private property. The Court disagrees.

When examining the language of a statute, the Court applies the plain and ordinary meanings to the words used. Petition of Carrier, 165 N.H. 719, 721 (2013). "[The Court] interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. "[The Court] construe[s] all parts of a statute together to effectuate its

overall purpose and avoid an absurd or unjust result." Id. "Moreover, [the Court] do[es] not consider words and phrases in isolation, but rather within the context of the statute as a whole." Id.

RSA 155-A:1, I defines "building" as "defined and interpreted by the International Code Council's Building Code 2009[.]" RSA 155-A:1, I. The International Building Code 2009 defines building as "[a]ny structure used or intended for supporting or sheltering any use or occupancy." § S-202, ICC 2009 International Building Code. This definition does not indicate that "building" is limited to only public buildings. Moreover, RSA 155-A:2, I provides that "[a]ll buildings, building components, and structures constructed in New Hampshire shall comply with the state building code and state fire code." The plain language of the statute does not distinguish between public and private structures or buildings, and the Court declines to read same into the statute. Accordingly, the Court concludes that RSA chapter 155-A applies to buildings and structures on private property.

The defendant also argues that the Town has unclean hands in bringing this suit. He first asserts that the Town's suit is barred by laches, and second, that the Town has brought a punitive suit against the defendant.

"Laches is an equitable doctrine that bars litigation when a potential plaintiff has slept on his rights." Appeal of Prof'l Fire Fighters of Hudson, 167 N.H. 46, 57 (2014). "Laches . . . is not a mere matter of time, but is principally a question of the inequity of permitting the claim to be enforced—an inequity founded on some change in the conditions or relations of the parties involved." Id. "Because it is an equitable doctrine, laches will constitute a bar to suit only if the delay was unreasonable and prejudicial."

Healey v. Town of New Durham, 140 N.H. 232, 241 (1995) (quotation omitted). In general, when determining whether the doctrine should apply to bar a suit, the court should consider: (1) the knowledge of the plaintiffs; (2) the conduct of the defendants; (3) the interests to be vindicated; and (4) the resulting prejudice. Appeal of City of Laconia, 150 N.H. 91, 93 (2003). "The party asserting laches bears the burden of proving both that the delay was unreasonable and that prejudice resulted from the delay." Town of Seabrook v. Vachon Management, Inc., 144 N.H. 660, 668 (2000) (quotation omitted).

Upon review, the Court concludes that the defendant has not proven that the delay was unreasonable and that prejudice resulted from the delay. Mr. Paquin testified credibly that while he was aware of the defendant's property and possible violations in 2012, there were other properties that were deemed more hazardous and those were addressed prior to the defendant's property. The defendant does not present any evidence that the delay was unreasonable or that any prejudice resulted from this delay.

As part of his unclean hands argument, the defendant argues that the Town brought this action as a punitive suit. However, the defendant has not presented any evidence or law to support this claim. He asserts that the Town has "a particularly keen interest in the county budget" and that the Board decided to investigate his property in 2017 after receiving correspondence from the defendant regarding the county budget. (Def.'s Memo. ¶¶ 7-8.) He asserts that "it is quite clear that this matter has been brought for political purposes" and the suit "is measured to serve as retribution for the actions of a sitting member of the state House of Representatives." (Id. at ¶ 9.) Despite these assertions, the defendant has presented no competent evidence that this suit was

brought for political purposes. Moreover, Mr. Paquin testified that he discussed the defendant's property with the Board as early as 2012, indicating that the Town believed the subject property might be in violation of state and Town regulations prior to the 2017 county budget. In sum, the Court finds that the defendant has not shown through competent evidence that the Town has unclean hands in bringing this action.

Finally, the defendant argues that the Town cannot meet the necessary requirements for an issuance of an injunction.[5] RSA 676:15 generally governs when a Town may seek injunctive relief for a violation of a zoning ordinance. It reads, in relevant part, as follows:

> In case any . . . land is . . . used in violation of this title or of any local ordinance, code, or regulation adopted under this title . . . the building inspector or other official with authority to enforce the provisions of this title or any local ordinance, code, or regulation adopted under this title . . . may, in addition to other remedies provided by law, institute injunction . . . to prevent, enjoin, abate, or remove such unlawful [activity].

RSA 676:15 (2016). Under applicable New Hampshire law, the injunctive relief sought by the Town is an extraordinary remedy. N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007) (citing Murphy v. McQuade Realty, Inc., 122 N.H. 314, 316 (1982)). "The requirements for statutory injunctive relief are met when . . . the [City] establishes that the defendant[] [has] violated the statute and there exists some cognizable danger of recurrent violations." Id.; see also 15 P. Loughlin, New Hampshire Practice: Land Use Planning and Zoning § 7.08, at 134–37 (2010) (explaining how the requirements for injunctive relief differ when used by a municipality to enforce its ordinances, stating that "it can be assumed that a municipality may maintain an action to enjoin an ordinance

[5] The defendant also argues that he is using his property in a way that does not harm others and that the BZO is a direct restraint upon, and invasion of the right of property. (Def.'s Memo. ¶ 22.) The Court finds this argument meritless.

violation without the necessity of proving irreparable damages . . . [because] a municipality is under an obligation to maintain and enforce those valid regulations which have been enacted by the legislative body").

Upon review, the Court finds the Town has demonstrated by a preponderance of the evidence that the defendant neglected to apply for and obtain certain certificates of occupancy prior to converting the garage from an accessory use to a dwelling. The defendant does not dispute that the garage is an accessory building, not a "dwelling." The defendant does not dispute that the dwelling on the subject property burned down in 2009. As discussed above, the Court finds that the defendant was living at the subject property during the relevant times either in the recreational vehicle or the garage. Living in the recreational vehicle also violates the BZO because the Court finds that the Town has demonstrated by a preponderance of the evidence that a recreational vehicle has remained on the subject property longer than the permissible period. Finally, the Court finds that there is no compliant septic system located on the property, which violates the BZO and International Residential Code 2009.

The Court also concludes that absent an injunction, the defendant's property will remain noncompliant and that there is a significant likelihood the respondent will continue utilizing the property in a noncompliant manner. The evidence at trial demonstrated that the defendant has ignored the Town's concerns regarding the violations; he continued to reside at the subject property until a suit was filed and the Court issued a preliminary injunction ordering him to cease residing at the subject property. Further, the evidence and arguments presented at trial demonstrate that the defendant believes that his property is not subject to the various rules and regulations

cited by the Town. For these reasons, the Court finds the Town's requested injunctive relief to be warranted.

Accordingly, the Court incorporates ¶ 17(a)–(b) of the Town's Proposed Order (Index # 33) and directs the following:

1. That the defendant is prohibited from occupying the garage and/or recreational vehicle at 216 Farrarville Road unless and until he receives all required permits for the use of that property.

2. That the defendant is prohibited from using any water appliance or fixture, including but not limited to, showers, sinks, and toilets, at 216 Farrarville Road unless and until he installs a compliant septic system.

Statutory Civil Penalties

RSA 676:17, I states:

> Any person who violates any of the provisions of this title, or any local ordinance, code, or regulation adopted under this title, or any provision or specification of any application, plat, or plan approved by, or any requirement or condition of a permit or decision issued by, any local administrator or land use board acting under the authority of this title shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person; and shall be subject to a civil penalty of $275 for the first offense, and $550 for subsequent offenses, for each day that such violation is found to continue after the conviction date or after the date on which the violator receives written notice from the municipality that the violator is in violation, whichever is earlier. Each day that a violation continues shall be a separate offense.

The New Hampshire Supreme Court has held that RSA 676:17, I, grants the trial court discretion "to determine whether or not to impose a penalty and the amount of the penalty should it choose to impose one." City of Rochester v. Corpening, 153 N.H. 571, 575 (2006) (citing Town of Nottingham v. Newman, 147 N.H. 131, 134–35 (2001)). Upon review, the Court holds in abeyance the Town's request for civil penalties pending

further review and full compliance with the provisions of this Order and the applicable law by the defendant.

Attorney's Fees

RSA 676:17, II states in relevant part as follows:

> In any legal action brought by a municipality to enforce, by way of injunctive relief as provided by RSA 676:15 . . . any local ordinance, code or regulation adopted under this title . . . the municipality shall recover its costs and reasonable attorney's fees actually expended in pursuing the legal action if it is found to be a prevailing party in the action. For the purposes of this paragraph, recoverable costs shall include all out-of-pocket expenses actually incurred, including but not limited to, inspection fees, expert fees and investigatory expenses.

RSA 676:17, II. "The award of attorney's fees pursuant to RSA 676:17, II is mandatory." Town of Carroll v. Rines, 164 N.H. 523, 532, 62 A.3d 733, 741 (2013) (citing Bennett v. Town of Hampstead, 157 N.H. 477, 484 (2008)).

In the present case, the Town prevailed on its request for injunctive relief. The Town is therefore entitled to recover its costs and reasonable attorney's fees expended in pursuing this action. Accordingly, the Town's request for attorney's fees and costs is GRANTED, consistent with the above. The Town shall submit for approval an Affidavit of Attorney's Fees and Costs with an attached Invoice detailing the costs and fees requested within **thirty (30) days of the date of the Clerk's Notice of this Order.**

Accordingly, the Town's Complaint and Request for Preliminary and Permanent Injunctive Relief, Civil Penalties, and Attorneys' Fees is GRANTED in part and DENIED in part, consistent with the above.

SO ORDERED.

12/19/19
Date

J.D O'N. III
James D. O'Neill, III
Presiding Justice