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MESSAGE: Goffstown Residents Assoc order as requested

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THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.
NORTHERN DISTRICT

05-E-0472

GOFFSTOWN RESIDENTS ASSOCIATION

v.

TOWN OF GOFFSTOWN,
SCHOOL DISTRICT

ORDER

The parties are presently before the Court on a request for a temporary restraining order brought by plaintiff against defendant. Plaintiff Goffstown Residents Association ("GRA") is an association of persons who have concerns regarding the location of a new elementary school which defendant Town of Goffstown, School District is in the process of constructing. Plaintiff Association does not object to the construction of a new school. Rather, plaintiff objects to the siting of the school on property that plaintiff submits had been earlier conveyed to the Town of Goffstown for recreation and conservation purposes.

The Goffstown School District has commenced certain site work for the construction of the new school. The School District is presently installing an access road for the construction site and the proposed school. That work involves the clearing of areas that are said by plaintiff to include older growths of trees. Additionally, the portions of the access road are said by plaintiff to impinge upon a wetland. The School District anticipates that the road, various culverts, utilities and a foundation hole will be completed upon the property between now and March, 2006. Thereafter, construction of the school building itself is anticipated to take place.

The site at issue constitutes a portion of certain premises conveyed to the Town of Goffstown by the State of New Hampshire.¹ The property conveyed to the Town by the State consisted of some 50 acres adjacent to Glenn Lake in the Town of Goffstown. A portion of that property was conveyed by the Town to the School District. The conveyance to the School District was of some 26 acres, more or less.

GRA asserts that the project is being developed in contravention of the intent of the conveyance of the property by the State of New Hampshire to the Town of Goffstown. The Association asserts that the intention of the State and of the Town, when the property had been earlier conveyed by the State to the Town, was that the property be conveyed for recreation and conservation purposes. GRA notes that the Town of Goffstown had obtained a Community Development Block Grant (CDBG) to purchase the property from the State. The

¹ The property had been earlier conveyed to the State of New Hampshire by Public Service Company of New Hampshire.

grant application had referenced opportunities to provide a public recreation facility for the community.

The deed from the State of New Hampshire to the Town of Goffstown, as recorded, does not contain a restriction limiting use of the property to recreation and/or conservation purposes. The deed does provide that the property conveyed was subject to a covenant that the conveyed premises "will be used for public purposes only." Quitclaim Deed dated September 20, 1977. The deed from the Town of Goffstown to the Goffstown School District provides for a similar condition. Additionally the Town's deed to the School District sets forth:

This conveyance is made on the condition that the Grantee construct a public school on the within granted premises and should construction of a public school on the said premises not be commenced by the Grantee within four (4) years of the date of this deed, the said premises will revert to the Town of Goffstown.

Quitclaim Deed dated August 22, 2005.

GRA represents that it shall be seeking reformation of the deed from the State of New Hampshire to the Town of Goffstown so as to reflect what GRA submits to be the correct intent of that conveyance. GRA also submits that the school construction project, which would not appear to involve direct recreational or conservation purposes, has been embarked upon without sufficient public input concerning the project, and in derogation of various land use statutes and regulations.

Counsel for GRA represents that the participants in GRA include Collis Adams and Kurt Lauer. GRA represents that Mr. Adams is an abutter to the

property and that Mr. Adams has engaged in recreation and other open air activities on the premises. In its pleading, GRA submits that it has some 100 members including some who are direct abutters to the site.

The Goffstown School District asserts that the Association has no standing to bring the claims at issue. The School District submits that GRA has no privity of deed upon which GRA may raise any deed reformation issues. Defendant further asserts that the public has had a full opportunity to be heard on the matter and that the Town of Goffstown's conveyance to the Goffstown School District had been authorized by ballot of the townspeople held in March, 2005, in conjunction with the Town's annual Town Meeting.

The Goffstown School District represents that if the injunction were to be granted, it would stand to incur a substantial financial loss. The School District also represents that it is one of the few school districts nationwide which do not have a publicly provided kindergarten. The District has recently authorized the establishment of the a public kindergarten program and has obtained substantial financial assistance from the State of New Hampshire for that endeavor. The project at issue involves the construction of a new elementary school with a kindergarten program located within it. The School District is concerned that it may lose access to those funds if the project does not go forward on a timely basis.

GRA submits that there is at least one other alternative reasonable site in the town for the location of the proposed school. The association asserts that if

the School District elects to go forward with its present plan, the District would be incurring its own harm.

The legal standards for consideration of injunctive relief are well established. "The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." Murphy v. McQuade Realty, 122 N.H. 314, 316 (1982) (citing Timberlane Regional Sch. Dist. v. Timberlane Regional Educ. Ass'n, 114 N.H. 245, 250 (1974)). The standard for granting injunctive relief requires the plaintiff to demonstrate that: 1) plaintiff is likely to succeed on the merits; 2) there is a present threat, based upon the lack of an adequate, alternative remedy at law, of irreparable harm to the plaintiff if the Court does not grant preliminary injunctive relief; 3) the potential harm to the plaintiff outweighs any harm to the parties who would be enjoined; and 4) the public interest would be served by granting the injunction. See UniFirst Corp. v. City of Nashua, 130 N.H. 11, 13-14 (1987) (citations omitted); see also Thompson v. N.H. Bd. of Med., 143 N.H. 107, 108 (1998); 4 R. Wiebusch, New Hampshire Practice, Civil Practice and Procedure §§ 19.05 - 19.16.

As an initial matter, the Court will address issues of irreparable harm. Irreparable harm is generally considered that type of a harm for which a party would not have an adequate, alternative remedy at law, such as, for example, monetary damages. Real estate is generally considered unique, and, therefore, particularly amenable to equitable relief. Thus, as noted in the context of equitable actions seeking specific performance of contracts for the sale of real estate: "[O]rdinarily a binding agreement for the sale of real estate will be specifically enforced in equity

because the unique character of real estate makes the damages for breach of contract irreparable as a matter of law." Moore v. Sterling Warner Industrial Development Corp., 114 N.H. 520, 522 (1974), citing to Jesseman v. Aurelio, 106 N.H. 529, 532 (1965).

Within the context of the present matters, plaintiff submits that there would be loss of public green space, including conservation and recreation opportunities, should the project be completed. The Court concludes, on a temporary hearing basis, that plaintiff would be able to establish a sufficient prospect of irreparable harm. The Court will turn to issues relating to the probability of success on the merits and other requirements concerning injunctive relief.

The caption of the within action makes reference to "Town of Goffstown, School District" as the party defendant. The defendant school district, however, constitutes a separate corporate and governmental entity from the Town of Goffstown. The Goffstown School District and the Town of Goffstown may well share geographic boundaries. However, generally, school districts are entities that are independent from the municipalities that may be physically encompassed within the district. The two governmental entities have separate management authority and separate corporate identities. Keene v. Union School District, 89 N.H. 477, 481 (1938); Clough v. Osgood, 87 N.H. 444, 447 (1935).

To the extent that plaintiff would seek reformation of a deed on behalf of the State of New Hampshire or on behalf the Town of Goffstown, potential issues of standing to bring such an action may arise. Neither GRA nor its members are asserted to be in privity of deed. See 66 Am. Jur. 2d, Reformation of Instruments,

§§ 57-59. "As a general rule, the reformation of written instruments may be had by the immediate parties thereto and by those standing in privity with them. . . . [C]ourts will not interpose in behalf of other persons who are neither parties to the instrument nor claiming any privity. " *Id.* at § 57. "Following the general rule, to be entitled to reform a deed one must be a party to or in privity with a party to the deed. Applying the rule, a suit to reform a deed may be brought by the grantor, the grantee or the mortgagee." *Id.* at § 58. It may also include "a real party in interest claiming privity with a party to the instrument, such as a grantee, an assignee, a purchaser at execution or a judicial or foreclosure sale, a personal representative, or devisees or heirs." *Id.* at § 59.

Additionally, potential issues appear to exist as to the right of plaintiff to stand in for the State or for the Town concerning these deed issues. To the extent that GRA may be seeking to enforce rights and obligations on behalf of the State, the Court has not been provided with evidence that the State of New Hampshire joins in GRA's request for relief or has authorized an action on the State's behalf.

Neither the constitution nor the laws of this State authorize a taxpayer to bring a suit on behalf of the State, see Gallagher v. Continental Insurance Co., 502 F.2d 827, 832 (10th Cir. 1974); however, such authority can arise by implication when the attorney general tacitly encourages the claim or assists in its assessment of damages. In this case, the attorney general essentially ratified the plaintiff's suit; therefore, his suit was properly brought on behalf of the State. To avoid problems in this area in the future, any citizen bringing suit in the name of the State should do so only with the express consent of the attorney general in writing which is made a part of the case file in the appropriate court.

Sununu v. Clamshell Alliance, 122 N.H. 668, 673-74 (1982).

The School District represents that it has received a letter from the Assistant Commissioner of Environmental Services of NH DES indicating that the proposed transfer by the Town to the School District falls within the intent of the deed from the State to the Town and had satisfied requirements of a public purpose. The School District also represents that the Town of Goffstown received confirmation from the United States Department of Housing and Urban Development that the Town property, acquired with CDBG funds, could be used for any public purpose.

Similarly, issues may arise as to whether GRA may bring an action to enforce rights and obligations under a deed on behalf of the Town of Goffstown. The Court notes that "policy decisions as to whether or not litigation is to be brought or settled and the goals of the community in litigation are made by elected or appointed municipal officials or by the local legislative body." Loughlin, 14 NEW HAMPSHIRE PRACTICE, LOCAL GOVERNMENT LAW, § 980. A town may place control over litigation in the hands of a special committee, particularly where the litigation is not in the ordinary course of the town's business. Such, however, must be done by direction of the Town Meeting. Moulton v. Beals, 98 N.H. 461, 463-64 (1954). The Court has not been presented with information that GRA or its members have been constituted as a committee to conduct litigation on behalf of the Town of Goffstown. Nor has the Court been provided with evidence that the Town joins in GRA's request. Indeed, the vote at the Town ballot apparently allowed for the conveyance.

Under certain circumstances, however, an individual may challenge improper use of public property. Thus, as noted in Loughlin, 14 NEW HAMPSHIRE PRACTICE, LOCAL GOVERNMENT LAW, § 865 Management of Property, FN 38, citing to Sherburne v. Portsmouth, 72 N.H. 539 (1904), citizens may have the right to seek relief concerning unreasonable uses of dedicated public property. In Sherburne, the issue arose in the context of a public playground area, formerly a militia field, being fenced-off for a baseball park that would charge for admission. In the present matter, the Goffstown School District is not engaging in a use that is contrary to the provisions of its deed, as recorded. Further, neither the State nor the Town of Goffstown are parties to this matter.

Plaintiff asserts that the conveyance process between the Town of Goffstown and the Goffstown School Board did not comport with provisions under RSA 41:14-a. The Court is not persuaded that RSA 41:14-a provides an exclusive process for the conveyance or transfer of real estate by a town. In the present matter, the issue appears to have been addressed by ballot as part of the Town of Goffstown Town Meeting process. Additionally, the Court does not conclude that the proposed warrant article had been insufficiently warned.

Absent reformation, to the extent that the Town of Goffstown had received the property for a public use, it would appear that use of the property for a public school would not be prohibited.

In determining the uses of municipal property, the legislative body's only limitation is to devote the use of the property to the public in a manner that is to an unreasonable use. (In the case of property acquired or donated for a specific purpose, the use must be consistent with that purpose.) If a

municipality has acquired the property without any restrictions, or for any other necessary public use, at the discretion of the town, the municipality may change the use to which the property is devoted from one public use to another.

Loughlin, 14 NEW HAMPSHIRE PRACTICE, LOCAL GOVERNMENT LAW, § 865
Management of Property.

The School Board has apparently received authorization from NH DES for construction of the access road. Court would note that the Wetlands Board appears to have been presented with a number of concerns regarding the school project as raised by GRA and the Town of Goffstown Conservation Commission.

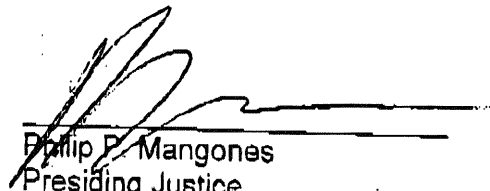
The Court would note that if it were to grant the requested injunctive relief, the present matter would likely require the posting of a bond. "A party subject to a wrongfully issued injunction is entitled to recover damages that were incurred or suffered as a result of the injunction." Mahoney v. Town of Canterbury, 150 N.H. 148, 154 (2003). The request for injunctive relief has been brought by plaintiff in the name of the plaintiff Association alone. Plaintiff is an unincorporated association. Without evidence of the members of the Association individually authorizing, assenting to or ratifying the Association's legal action, as opposed to one member simply verifying the truth of the allegations, defendants would be potentially subject to standing an economic loss in the face of an entity with an uncertain entity ability to meet that loss. Shortlidge v. Gutoski, 125 N.H. 510, 514 (1984). Thus, in the absence of appropriate undertakings on the part of individual members of the Association, a bond would appear called for.

While the Court has concluded that this matter involves issues regarding real estate which would support a finding of irreparable harm, the Court is not persuaded that plaintiffs have established a sufficient probability of success on the merits. Additionally, the Court is not persuaded that the remaining criteria for granting of injunctive relief, as outlined above, have been met. The following temporary orders are entered:

1. Plaintiff's request for temporary injunctive relief is denied.
2. These orders are entered without prejudice to any other or further orders that may be considered and entered after further proceedings.
3. Either party shall have leave to seek an expedited final hearing on these matters.

SO ORDERED.

11-29-05
Date


Philip P. Mangones
Presiding Justice