STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

David Schofield-Savo, et al

v.

Town of Barrington, et al

Docket No. 219-2022-CV-350

ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The plaintiffs-homeowners seek a preliminary injunction requiring the defendants to conduct snow removal from Overlook Circle in the Town of Barrington ("Barrington"). The defendants do not appear to seriously dispute, at this stage, the merits of the plaintiffs' claims, but only whether they demonstrate a risk of irreparable harm sufficient to support a preliminary injunction, and, if so, which of them bears the snow removal obligation.[1] The Court held a hearing on the plaintiffs' preliminary injunction request on January 13, 2023, at which all parties appeared.

Background

The plaintiffs own homes on a road known as Overlook Circle in the Barrington. The developer, Ian James, LLC ("James"),[2] represented to at least some of them that Barrington would accept Overlook Circle as a town road. James made that representation based on the Barrington's approval of the subdivision plans which envisioned that occurrence, provided, as Barrington observes, that James constructed the road consistent with town regulations. The plaintiffs contend – and no defendant disputed – that Overlook Circle comprises approximately

[1] Given their respective positions in the litigation, the preliminary injunction request lodges against Barrington and the developer defendants.
[2] For purposes of this order, James also includes the Better Built defendant entities.

one mile of road.

Paving of Overlook Circle occurred on November 7, 2019. Barrington's representative, defendant Dubois & King, observed the paving as it occurred that day, and memorialized those observations in a field report of the same date (Exhibit B, James' objection.) Dubois & King confirmed that "[t]he wearing course pavement width met the 24-foot travel way and 1-inch compaction depth." Davis & King memorialized an issue that arose concerning whether the temperature of the paving material necessitated a thicker wearing course, which, in turn, appears to bear on whether, once compacted, the wearing course will achieve a thickness of one inch. To that end, later in the field report Dubois & King confirmed that "pavement depths were recorded 1 1/4-1 1/2" loose and 1 ¼ to 1" compacted; *meeting the 1inch compacted requirement.*" (Emphasis added). Dubois & King forwarded the field report to James on November 8, 2022. (Exhibit B, Barrington's objection.)

The field report also confirmed that James had only to complete the remaining punch list items to complete the project. And, in an email dated November 21, Dubois & King confirmed to James that the gravel pit remained "the only item to be completed" on the punch list. (Exhibit C, James' objection.) The developer interpreted that email to mean that it had satisfactorily completed all other outstanding items and Barrington's presentation at the hearing did not suggest an alternative interpretation.

Dubois & King followed up its field report with a letter to Barrington's town planner, dated November 24, 2019, in which it confirmed the findings of its field report, namely, that "the wearing course pavement met the 24-foot travel way and 1-inch compaction requirements. (Exhibit C, James' objection.) Dubois & King did flag the temperature issue, stating that the paving met the applicable specifications except as to temperature. The record does not reflect

any communication from Barrington to James after November 24 retracting the November 21 punch list email.

Barrington, however, later took the position that the road did not meet town regulations. Barrington retained a second engineer to inspect the road and identified a series of issues of concern. (Report of Hoyle, Tanner & Assoc. dated 9/27/21, Exhibit D, Barrington objection.) The Hoyle Tanner report describes potential consequences from these deficiencies, but does not assert any actual consequences to the quality and condition of Overlook Circle.

As part of the subdivision requirements, James posted a performance bond. It appears that Barrington eventually made a demand upon the bonding company for the amount Barrington claimed remediation would cost. (Exhibit F, James' objection.) Although no party has provided the Court with any significant information about the process to call the bond or what that process entails, Barrington's counsel represented at the hearing that the developer objected to Barrington's effort to call the bond, and the bonding company denied Barrington's claim. It appears that Barrington then voluntarily declined to pursue further remedies against the bonding company. (Exhibit F, James' objection.) Rather than pursue further remedies pursuant to the performance bond, Barrington voted not to accept Overlook Circle. Shortly after, Barrington released the performance bond.

Analysis

Preliminary injunctive relief may issue only if the plaintiffs establish, among other things, a likelihood of success on the merits of their claim and an immediate risk of irreparable harm. *N.H. Dep't Envtl. Servs. v. Mottolo*, 155 N.H. 57, 63 (2007).

The Court is satisfied that, at this early stage of the proceedings, the plaintiffs have established a likelihood of success on the merits of their claims. In their lot/home purchases, the

plaintiffs relied at least in part on representations from the developer – backed by the approved subdivsion plan – that Overlook Circle would become a town road. Town road designation carries significance to any homeowner, as it means, among other things, that the town will maintain and repair the road. The representations, therefore, which James acknowledged making, must be viewed as material. Wherever blame lies for the current status of the road – with James or Barrington – does not affect the plaintiffs' likelihood of success. It bears note that no defendant seriously contests the likelihood of success element of preliminary injunctive relief.

The risk of irreparable harm presents perhaps a closer call. James, who owns the road and has provided snow removal in prior years, threatens to amend the declaration of covenants to require the plaintiffs to fund the snow removal unless or until Barrington accepts the road. Barrington agrees that the financial obligation the developer proposes – just over $200 per household based on last winter's snow removal costs – falls well short of creating a risk of irreparable harm.

The plaintiffs advance the New Hampshire Supreme Court decision in *Keene v. Proulx*, 102 N.H. 407 (1960) for the proposition that annoyance, depreciation in value and "uncomfortable and inconvenient" enjoyment of their property establishes irreparable harm. While *Proulx* involved a very different factual posture directly caused by the municipality, namely, the burning of materials at a dump adjacent to the plaintiff's property, the Court finds – at this preliminary stage – that a road owned and maintained by the town adds value to a home, or at least, that a private road diminishes value; and no document in the record so far provides a basis to compel the plaintiffs to band together to establish a snow removal, or road maintenance regimen, at all. To the contrary, the version of the declaration of covenants currently in effect

omits provisions for the establishment of a homeowner's association, something the prior draft contained. In other words, these plaintiffs deliberately rejected any obligation to form an association to undertake obligations such as arranging and paying for snow removal. As it concerns the value of their property, their enjoyment of their property and likely requires an association the plaintiffs rejected, the Court concludes that the plaintiffs have established a risk of irreparable harm: this dispute impacts the plaintiffs' property ownership and enjoyment beyond just their wallets.[3]

The plaintiffs, therefore, have demonstrated entitlement to a preliminary injunction, leaving only the question of which of James or Barrington must provide snow removal. On the one hand, James knew of the potential dispute concerning the wearcoat pavement temperature the day of the paving, or, at least, shortly after when it received Dubois & King's field report. On the other hand, Barrington's documents – in particular the field report and the punch list correspondence with the developer – appear to express no concern with the paving and, instead, suggest no concerns about the paving. To the extent the report flags the temperature issue, neither it nor the punch list email flag the significance Barrington later placed upon that issue. To the contrary, Barrington confirmed to James (through its engineer) that the gravel pit (an issue not relevant to this action) remained the sole remaining punch list item. The lack of any Dubois & King objection to the temperature issue, or expression of concern, suggests that Dubois & King lacked any concern. Dubois & King served as Barrington's agent.

Barrington, moreover, released the performance bond after the bonding company denied Barrington's effort to call the bond, but without any further proceedings, whether arbitration, adjudication or otherwise. Several of the parties advance the New Hampshire Supreme Court

[3] To the extent relevant, public interest favors the plaintiffs as well in that a road cleared of snow serves the public interest in effective access for emergency vehicles and passing of the public.

decision in *Wolfeboro Neck Property Owners Assoc. v. Wolfeboro*, 146 N.H. 449 (2001) as bearing on the significance of Barrington's release of the performance bond, and this Court has been unable so far to find other applicable decisional law.

Wolfeboro arose through somewhat similar circumstances; a town regularly inspected the road at issue during construction and, upon completion, released the performance bond. Later, when the homeowners petitioned the town to lay out the road, the town conducted further inspection that revealed deficiencies on the basis of which it refused to accept the road. Our Supreme Court clarified that "[a] performance bond is intended to guarantee completion of the improvements it covers," observed that "the town established not only the procedure, but also the means to insure that town standards would be met," and described the town's role as "like that of a trustee *who was required*, should the developer fail to make the secured improvements, to attempt to recover the funds from the bonding company and use them ultimately to complete improvements." 146 N.H. at 453 (quotation and citation omitted) (emphasis added). The court refused to allow the town to rely on the post-bond release inspections in attempting to avoid laying out the road.

The Supreme Court used the mandatory term "required" in describing the town's obligation with respect to a performance bond when the construction falls short of town regulations. Analogizing the town in that situation to a trustee elevates the nature of the town's role from protecting not just itself, but also its residents. This makes sense since the town, and not individual homeowners, has the resources necessary to ensure that road construction meets necessary standards, and town approval provides powerful incentive for developers to strive to meet town standards. *Wolfeboro* strongly implies that, by releasing the performance bond, a town effectively certifies project completion consistent with town regulations. Any town's

release of a performance bond, therefore, bears scrutiny, and a town may not release a performance bond unreasonably by way of leaving homeowners with all of the obligations of a private road or a dispute with their developer.

On this admittedly thin record at this admittedly early stage of the proceedings, Barrington's release of the performance bond does not appear reasonable. Barrington conducted its inspection of Overlook Circle's paving and omitted to include any remediation on the punch list, leaving the developer believing the paving passed town muster. Later, Barrington decided the road fell actionably short of town standards and made what appears to be a demand on the bonding company but simply withdrew after the latter refused to release any funds rather than continue to pursue other remedies. Barrington then washed its hands of the situation by declining to accept the road. As in *Wolfeboro*, this falls short of the trustee-like obligation a municipality holds with respect to a performance bond.[4]

At this preliminary stage of the proceedings, the Court concludes that Barrington's actions in refusing to accept the road after releasing the bond were unreasonable, and that, for purposes of this preliminary injunction, Overlook Circle should be considered a town road. Barrington, therefore, bears the snow removal obligations. In the event that, after trial, Barrington proves that it reasonably released the bond and that James bears liability to the plaintiffs, Barrington may seek to recoup any snow removal costs from James.

The Court GRANTS the plaintiffs a preliminary injunction and orders Barrington to conduct snow removal on Overlook Circle.

[4] The facts that (1) Barrington made a demand on the bonding company, (2) the bonding company rejected it, and (3) Barrington took no further action also suggest that Barrington itself did not have significant conviction in its assertions about Overlook Circle – in other words, either Barrington believed the road fell materially short of specifications, in which case it *Wolfeboro* instructs that it should not have released the bond, or it did not have concerns about any material shortfall in which case it had no basis not to accept the road.

So Ordered.

Date: January 25, 2023

Hon. Daniel. E. Will

Clerk's Notice of Decision
Document Sent to Parties
on 01/26/2023