

STATE OF NEW HAMPSHIRE

BELKNAP, SS.

SUPERIOR COURT

DOCKET NO. _____

Rita Sutton, by and through her attorney-in-fact, Glenn Sutton
38 Northfield Woods Road
Weston, Connecticut

v.

Town of Gilford
47 Cherry Valley Rd
Gilford, New Hampshire

Barbara Aichinger
36 Olde English Road
Bedford, New Hampshire

and

Governor's Island Club, Inc.
c/o Richard P. Brouillard, Esquire
16 Academy Street
Laconia, New Hampshire 03246.

**VERIFIED PETITION FOR DECLARATORY JUDGMENT,
PERMANENT INJUNCTIVE RELIEF AND DAMAGES**

The Petitioner, Rita Sutton, by and through her attorney-in-fact Glenn Sutton ("Sutton"), by and through her attorneys, McLane, Graf, Raulerson & Middleton, Professional Association, complains against Respondents Barbara Aichinger ("Aichinger"), the Governor's Island Club, Inc. (the "Club") and the Town of Gilford ("Town"), and state as follows:

INTRODUCTION

1. This action involves a parcel of land on Governor's Island in Lake Winnepesaukee, in the town of Gilford now owned by Aichinger (herein referenced as the "non-conforming parcel."). The non-conforming parcel is, the Petitioner believes, too small to

lawfully build on. For the past approximately twenty years, the non-conforming parcel has been joined in the Town's land records to an adjacent second parcel, also owned by Aichinger, that has sufficient land to conform it to local zoning ordinances for a single residence. The problem arises in that Aichinger now seeks to de-merge her nonconforming lot from her residential lot and, presumably, to build a second house on the nonconforming parcel. This, the Petitioner contends, cannot be lawfully done.

2. The Aichinger parcel here at issue is the same one that was considered by the Supreme Court in *Governor's Island Club, Inc. v. Town of Gilford, et al*, 124 N.H. 126 (1983). In that prior case, the Court ruled that the subject parcel could not be subdivided from the existing building lot because it could not, standing alone, conform to the local zoning ordinances. *Id* at 130. Hence, before and after the Supreme Court's 1983 decision, the nonconforming lot here at issue was combined with the larger home lot. The Petitioner contends that, as in the 1980s, the nonconforming parcel is still too small to build on.

3. The reason for this action is that Aichinger was somehow able to garner the "agreement" of a Town official that the Town would be able to "de-merge" the subject nonconforming lot from the other buildable lot. Although the local official had no authority for his "de-merger" statement, later retracted his erroneous opinion, and although she had every ability to understand that the official's representation was in error, Aichinger now contends that the official's opinion constitutes a binding ruling by the Town that she can both lawfully subdivide her nonconforming parcel, and also build upon it notwithstanding the local ordinances.

4. Aichinger has threatened a lawsuit against the Town. She has intimated that her possible lawsuit would cost the town a substantial sum in attorneys' fees and alleged damages. This threat has resulted in the town backing off entirely from enforcing its zoning and

subdivision laws against Aichinger. The town's failure to act thereby shifts the burden of doing so to Sutton. This latter fact is one that, upon information and belief, the town has done deliberately as an illegal cost savings measure.

5. Further, the Aichinger property is subject to the Declaration of Covenants and Restrictions of the Governor's Island Club. Before she builds upon her property, Aichinger would be required to secure permission from the Club. The Declaration, however, should preclude any such construction.

PARTIES

6. Glenn Sutton is the Attorney-in-fact for Rita B. Sutton. He resides at 38 Northfield Woods Road, Weston, Connecticut, 06883. Rita B. Sutton owns property at 548 Edgewater Drive, Gilford, New Hampshire 03249.

7. Town of Gilford, is a New Hampshire municipality with a principal place of business located at 47 Cherry Valley Rd, Gilford, New Hampshire 03249

8. Barbara Aichinger is an individual residing 36 Olde English Road, Bedford, New Hampshire who owns the property at 554 Edgewater Drive, Gilford, New Hampshire.

9. Respondent Governor's Island Club, Inc. is a non-profit association with a principal office address of Governor's Island, P.O. Box 7165, Gilford, New Hampshire and its registered agent is Richard P. Brouillard, Esquire, 16 Academy Street, Laconia, New Hampshire 03246.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this action. See, e.g. RSA 491:7.

11. Belknap is the proper venue for this action because the property in dispute is located within this district.

ALLEGATIONS COMMON TO ALL COUNTS

12. Aichinger, as Trustee of the Barbara P. Aichinger Revocable Trust (the "Trust"), owns property on Lake Winnepesaukee formerly known as 554 Edgewater Drive, Tax Lot 221-007 ("Lot 7" or the "Property").

13. Aichinger is also a member of the Governor's Island Club, Inc., which is a nonprofit association consisting of some of the owners of land on Governor's Island.

14. Mrs. Sutton owns property at 548 Edgewater Drive, which abuts Aichinger's Property.

15. The property at issue is the same as that referenced in *Governor's Island Club, Inc. v. Town of Gilford, et al*, 124 N.H. 126 (1983) (referred to here as the *Gagne* case). The prior owner of Aichinger's land, Robert Gagne, as Trustee of the Robert Gagne Realty Trust No. 4, had proposed to create two buildable lots by including a small portion of the land that he (and now Aichinger) owned on the other side of the road that fronts the two lakefront parcels. This type of annexation, the Court ruled, was prohibited. Moreover, the Court ruled that the Town could not lawfully grant Gagne a variance in the circumstances where he had two lots that, together, could serve as a home site, but where he really wanted to subdivide the lots in order to have two such sites. The Court held that such subdivision did not fall within the requirements for a hardship variance. Accordingly, Gagne was barred from subdividing his land to create the two lots that Aichinger seeks now to "de-merge."

16. The records of the Club and the Town tax records noted the two parcels as one.

17. Sometime in 2006, Aichinger sought to raze the existing house on Lot 7, and build a new house. She sought, at the same time, to garner permission to subdivide the two lots

so that she could also build a second house on the lot the Supreme Court effectively prevented Mr. Gagne from building on.

18. Aichinger contacted the Town Appraiser, Wil Corcoran, inquiring about Lot 7. Apparently, Aichinger was seeking to have the Property declared two lots. The Property has only one tax identification number and has been taxed as one lot. Mr. Corcoran responded to Aichinger by letter dated October 19, 2006 stating that he had no authority to proceed without direction from Planning and the Selectmen.

19. On January 15, 2007, John Ayer, the Director of Planning and Land Use for the Town of Gilford, proceeding without any authority from the Selectmen, sent Aichinger a letter erroneously stating that he and the Town Assessor agreed that Lot 7 is legally two lots and assigned addresses of 554 and 558 Edgewater Drive. Ayer stated his belief that Aichinger's lots had been merged because of "an old zoning ordinance that was thrown out in a court challenge and is no longer on the books."

20. Mrs. Sutton raised questions about the ability of Lot 7 to be subdivided given the Gilford Zoning Ordinance provision requiring contiguous, nonconforming lots in common ownership to be merged.

21. The Gilford Zoning Ordinance, Section 9.1.1 states as follows:

Contiguous Nonconforming Lots—When two (2) or more lots of record have the same owner and are contiguous, and one (1) or more lots is nonconforming to this ordinance as to size, dimension or frontage, the owner shall be required to merge all contiguous, nonconforming lots with contiguous lots under similar ownership until such contiguous, nonconforming lots are made conforming unless an exception is provided for below.

(a) Exception—If at the time the lots described above become owned by the same owner, there is a lawful and preexisting principal use listed in Article 4 on each lot, the owner shall not be required to merge the nonconforming lot or lots.

(b) Exception—Whenever lots are protected from merger by the provisions of RSA 674:39, the owner shall not be required to merge the lots.

Neither exception applies to Aichinger's Property.

22. On May 3, 2007, Aichinger, as Trustee, conveyed one of the parcels owned by the Trust to herself individually thereby creating two separate lots in violation of the Gilford Zoning Ordinance.

23. On May 23, 2007, Mr. Ayer sent Aichinger a letter advising that upon consultation with the Town's legal counsel, he learned that he had made a mistake and that her property in fact consisted of only one lot, not the two he had suggested in his earlier letter on the subject.

24. Despite the fact that the Property consists of only one lot, Aichinger has begun clearing the Property, started driveway work, and has poured a foundation for a modular home on one half of the Property, intending to sell or develop the other half.

25. Additionally, the Club has approved Aichinger's building plans for a home to replace the one she tore down, but has not approved construction of a second home on the disputed de-merged lot.

26. Upon information and belief, Aichinger threatened the Town with protracted litigation claiming estoppel and damages because of the Town's employees earlier erroneous assertions concerning Aichinger's claim to be able to sever her merged lots.

COUNT I

INJUNCTIVE RELIEF (Against Aichinger, the Town and the Club)

27. All of the preceding allegations are incorporated herein as if fully set forth.

28. As described herein, Aichinger cannot demerge the nonconforming lot from the lot that she has already lawfully built upon. Any effort to do so violates the Town's pertinent

ordinances and creates an illegal subdivision. Moreover, the nonconforming lot, standing alone, does not, upon information and belief, meet the requirements of the Town's other land use ordinances.

29. As an abutter, and landowner in the Town, Sutton will be harmed by the unwarranted disruption of the natural environment and the increase in density caused by Aichinger's illegal construction.

30. Likewise, both the Town and the Club are, respectively, obliged to enforce the local land use ordinances and the Declaration. Both are designed to preclude construction such as Aichinger presumably intends on her nonconforming parcel.

31. As a result of the Respondents' conduct, Sutton has suffered irreparable harm, and unless the Court grants the requested injunctive relief, she will continue to suffer irreparable harm.

32. Sutton has no complete and adequate remedy at law.

COUNT II

DECLARATORY JUDGMENT (Against Aichinger and the Town)

33. All of the preceding allegations are incorporated herein as if fully set forth.

34. Sutton contends that Aichinger is collaterally estopped by the the *Gagne* case. She denies this.

35. Sutton further contends that any representations made by a Town official about a property owner's ability to de-merge or otherwise develop their property cannot bind the Town in circumstances such as those evident here. In particular, the ability to estop the government is very narrow and the facts upon which governmental estoppel applies are narrow.

36. The Court should therefore declare that collateral estoppel applies to bar Aichinger's development of the nonconforming parcel and that governmental estoppel does not apply on the facts of this case.

COUNT III

**MANDAMUS
(The Town)**

37. All of the preceding allegations are incorporated herein as if fully set forth.

38. The Town is responsible for the full and fair enforcement of its laws. It cannot determine, based on its convenience or financial considerations, not to enforce a particular law, especially where the non-enforcement wrongly imposes the burden of law enforcement upon a private party.

39. The obligation to enforce the zoning ordinances at issue is plain and the policy requiring the enforcement of those laws critical.

40. The Town should be mandated to enforce its zoning laws.

COUNT IV

**ATTORNEYS' FEES
(The Town)**

41. All of the preceding allegations are incorporated herein as if fully set forth.

42. The Superior Court has the authority to award attorneys' fees to a litigant who has been forced to "seek judicial assistance to secure a clearly defined and established right, which should have been fully enjoyed without such intervention..." Keenan v. Fearon, 130 N.H. 494, 502 (1988)(quotations omitted).

43. Here, Sutton has been required to bring this action to secure a clearly defined right, i.e., the enforcement of the local land use laws.

44. Based on the foregoing, Sutton is entitled to her attorneys' fees and costs to be paid by the Town. Keenan, 130 N.H. at 502.

WHEREFORE, the Petitioner respectfully requests that this Honorable Court:

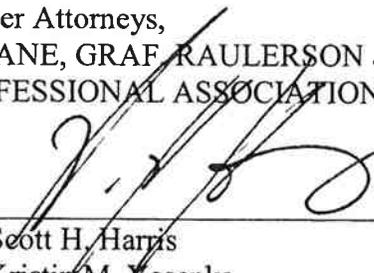
- A. Issue an Order enjoining the Respondent from further developing the Property in violation of the Gilford Zoning Ordinance and ordering the Town and Club not to grant Aichinger permission to build on her nonconforming parcel;
- B. Declare that Aichinger is collaterally estopped by the *Gagne* decision;
- C. Declare that the Town is not estopped to the opinion of its employee concerning the propriety of Aichinger's de-merger of her nonconforming lot from the adjacent building lot that she also owns;
- D. Order the Town to enforce its land use ordinances and not shift that burden to private parties who have the right to expect that the Town will undertake necessary law enforcement; and
- E. Award Sutton her attorneys' fees to be paid by the Town;
- F. Grant such other relief as is just and equitable.

Respectfully submitted,

Rita B. Sutton, by and through her attorney-in-fact,
Glenn Sutton

By Her Attorneys,
McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: July 11, 2007

By: 

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