

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT**

Sullivan Superior Court  
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Newport NH 03773

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**NOTICE OF DECISION**

**FILE COPY**

Case Name: **Town of Goshen v Edina Realty Investment Corp, et al**  
Case Number: **220-2015-CV-00052**

Please be advised that on December 06, 2016 Judge Tucker made the following order relative to:

Cross Claim- Dismissed for reasons stated in court order

Court Order

December 12, 2016

James I. Peale  
Clerk of Court

(550)

C: William Thibeault; H. Bernard Waugh, JR; Michael C. Shklar, ESQ

# The State of New Hampshire

SULLIVAN, SS.

SUPERIOR COURT

No. 220-2015-cv-52

TOWN OF GOSHEN

v.

EDINA REALTY INVESTMENT CORP., *et al.*

## ORDER

On June 2, 2015, the Town of Goshen filed a complaint accusing Edina Realty Investment Corp., Alan Greenhalgh, and William J. Thibeault of maintaining a junkyard at 2185 Brook Road, and thereby violating state law governing junk yards and the town's zoning ordinance. None of the defendants disputed the facts supporting the Town's claims. Edina Realty and Alan Greenhalgh admitted the facts in their answer, while William Thibeault filed no answer at all. As a result, the Town established the following:

Edina Realty owns property in Goshen at 2185 Brook Road. At the times relevant to the allegations in the complaint, Alan Greenhalgh was Edina's registered agent and William Thibeault was Edina's tenant. Thibeault operated a salvage/recycling business on the property, and as a result of this venture the property transformed into a "junk yard" as defined in RSA 236:112, I. The defendants did not obtain a junk yard license or certificate of approval for the property's use as a junk yard (*see* RSA 236:114), so the town could seek injunctive relief and other penalties set out in RSA 236:128.

In addition to violating the state law restricting junk yards, the operation of Thibeault's business also breached the town zoning ordinance in that it was a commercial use of property in the Residential-Agricultural District without a special exception from the Zoning Board of Adjustment.

The town selectboard sent Greenhalgh and Thibeault a notice of violation by certified mail on March 24, 2015. *See* Complaint (Exhibit 1). Greenhalgh and Thibeault appeared at a selectboard meeting on April 14, 2015 and signed an agreement stating the violation would be rectified within 30 days. *See* Complaint, Exhibits 2, 3. The property's status as a junk yard persisted when the complaint was filed on June 2, 2015.

In October 2015, Edina began efforts to evict Thibeault, but not due directly to the condition of the property. As discussed in an earlier order in the case (doc. no. 17), the lease required Thibeault to "comply with all statutes, ordinances and requirements of all municipal, state and federal authorities now in force, or which may hereafter be in force, pertaining to the use of the premises." Edina could have terminated Thibeault's lease for "[f]ailure . . . to comply with a material term of the lease." RSA 540:2, II (c) (2016 supp.). Instead, it chose to seek Thibeault's eviction based on his failure to pay rent, but in a December 2015 stipulation it agreed to stay the eviction action in order to give Thibeault time to bring his rental payments up to date. The stipulation is included in court documents submitted by Edina after the hearing, with the agreement of the Town and Thibeault. The records show not only the stipulation, but also that the district division did not issue a writ

of possession until April 26, 2016. Testimony at the evidentiary hearing established that Edina rectified the violations in June 2016.

Liability is conceded, so the remaining questions involve the relief to be afforded the Town. Remedies for violations of state law pertaining to unlawful junk yards include an "injunction to end the violation" (RSA 236:128, I), and "a civil penalty of up to \$50.00" a day from the time at which the person's "land is deemed a nuisance pursuant to RSA 236:119 until such time as the nuisance is removed or abated to the satisfaction of the governing body, ...." RSA 236:128, III. (Under RSA 236:119, a junk yard constitutes a "nuisance" if it is kept in violation of the statute).

The Town's first request is for a permanent injunction against the property being used in the manner described in the complaint. But an injunction is "an extraordinary remedy," *Murphy v. McQuade Realty, Inc.*, 122 N.H. 314, 316 (1982), which "should not issue" in the absence of certain criteria being met, including a showing of "an immediate danger of irreparable harm to the party seeking injunctive relief." It is uncontested that Thibeault is no longer involved with the property and Edina Realty has cleaned it to the Town's satisfaction. Edina owns a number of properties in town and representatives of the Town and from Edina testified that there have been no other issues between them. There has been no showing that an injunction is necessary to save the Town from irreparable harm. Tied as it was to a specific tenant, there is no indication that another violation is likely. The request for an injunction is denied.

Next, the Town asks for imposition of the daily civil penalty prescribed in RSA 236:128, III. The statute provides that after giving notice, a town body or enforcement official (not a court) "may impose" a \$50.00 penalty for each day that the nuisance (junk yard) is not abated. The town may bring a court action "to collect the civil penalty," but that presupposes the town imposed one in the first place. Nothing in the court file or in the evidence presented at the hearing shows the Town levied a civil penalty and notified either defendant that it was doing so. As a result, there is no civil penalty that the Town may collect through the court.

This brings us to the admitted zoning violation. RSA 676:17, I provides,

Any person who violates . . . any local ordinance, code, or regulation adopted under this title, 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 date on which the violator receives written notice from the municipality that the violator is in violation. . . . Each day that a violation continues shall be a separate offense.

On March 24, 2015, the Town sent notice of the violation to Alan Greenhalgh (Edina's agent), and William Thibeault. On April 14, 2015, Greenhalgh and Thibeault signed an agreement committing them to resolve the issue within 30 days. Some efforts were made to bring the property into compliance, but the clean-up was not complete. The evidence reflects that final clean-up work was finished until June 17, 2016. *See* Exhibit D.

As the owner and tenant of the property, Edina and Thibeault constitute "persons" who violated the zoning ordinance. Therefore, they (but not Greenhalgh personally) are

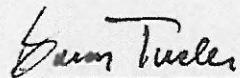
subject to the civil penalty. And because it is as liable for the violation as Thibeault, Edina's cross claim to shift the entire penalty to Thibeault is dismissed.

There is no firm date on when Greenhalgh and Thibeault received written notice of the violation, so the period for which the civil penalty may be assessed is the 430 days between when they agreed to clean the property (April 14, 2015) and when Edina finished cleaning it (June 17, 2016). A civil penalty of \$10.00 per day (a total of \$4,300.00) is assessed against Edina. A separate penalty of \$10.00 per day is also assessed against William Thibeault. Each party shall pay its civil fine to the Town within 30 days of the date of this order, unless there is an agreement on a longer period.

The Town is the prevailing party and is entitled to its attorney's fees in bringing this case. RSA 676:17, II. The parties shall attempt to agree on what fee is reasonable under the circumstances, the liability for which shall be joint and several unless the parties agree otherwise. In the absence of an agreement, the Town may submit a properly supported request for fees. The defendants may file a response within 20 days of the Town's filing.

**SO ORDERED.**

**DATE: DECEMBER 6, 2016**



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**BRIAN T. TUCKER**  
**PRESIDING JUSTICE**

# THE STATE OF NEW HAMPSHIRE

Sullivan, ss  
Sullivan Superior Court

Town of Goshen v. Edina Realty Investment Corp., et al.

Case No.: 220-2015-CV-00052

## CROSS-CLAIM


NOW COMES, Edina Realty Investment Corp., by and through their attorney's Elliot, Jasper, Auten & Shklar, LLP does hereby state as follows:

- 1) That the personal property at issue is the property of Defendant Thibeault, who is a tenant.
- 2) That as a tenant, Defendant Thibeault is liable for his conduct and the damages to leased property pursuant to RSA 540-A:3 (VI), and the common law rules pertaining to waste.
- 3) That this action is caused wholly by Defendant Thibeault who is, therefore, responsible for any costs or other remedies assessed against Defendant Edina.
- 4) That in a PLEA OF INDEMNIFICATION, Defendant Edina hereby asserts that it be entitled, as a matter of law, to recover any costs incurred by it in this action.

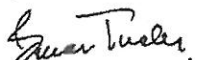
Respectfully submitted,

Michael C. Shklar, Esquire  
Attorney for Edina Realty Investment Corp.  
Elliot, Jasper, Auten & Shklar, LLP

Dated: June 16, 2015

  
Michael C. Shklar, Esquire #2334  
35 Main Street  
Newport, New Hampshire 03773  
603-863-4105

Dismissed for reasons stated  
in order of December 6, 2016.

  
12/9/16