THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

File Copy

Case Name: **Westward Shores Plaintiffs v Northgate Ossipee, LLC, et al**
Case Number: **212-2018-CV-00150**

Enclosed please find a copy of the court's order of December 09, 2019 relative to:

Interim Order

December 11, 2019

Abigail Albee
Clerk of Court

(406)

C: Patricia M. Panciocco, ESQ; Richard Dean Sager, ESQ; Lawrence B. Gormley, ESQ; Hilary Anne Holmes Rheaume, ESQ; Roy W. Tilsley, ESQ

THE STATE OF NEW HAMPSHIRE

CARROLL, SS. **SUPERIOR COURT**

Westward Shores Plaintiffs

v.

Northgate Ossipee, LLC;
Northgate Ossipee Lessee, LLC;
Town of Ossipee

Docket No. 212-2018-CV-00150

INTERIM ORDER

This action arises out of a dispute about whether the Town of Ossipee can enforce its Floodplain Development Ordinance ("FDO") against certain structures at Westward Shores Cottages and RV Resort ("Resort") in Ossipee. Upwards of ninety individuals identifying themselves collectively as the "Westward Shores Plaintiffs" claim to own and occupy these structures and seek declaratory and preliminary injunctive relief against enforcement action by the Town of Ossipee ("Town"). Twenty-one of these plaintiffs are also seeking damages against Northgate Ossipee, LLC and Northgate Ossipee Lessee, LLC (collectively, "Northgate") under RSA 358-A, New Hampshire's Consumer Protection Act ("CPA").

The twenty-one plaintiffs asserting CPA claims have moved to maintain these claims as a class action pursuant to Superior Court Civil Rule 16 and RSA 358-A:10-a. (Court index #33.) At the court's request, the parties addressed the class action issue during a hearing on September 19, 2019. Based on the information presented at that hearing, the court declines to rule on the class action issue at this time as it is concerned that the plaintiffs' claims are not fit for judicial resolution at this time. As such, the court issues this Interim Order to explain why it is inclined to dismiss this action and to offer the parties an opportunity to respond.

BACKGROUND

The Resort is a camping facility in Ossipee with frontage along Ossipee Lake. (Court index #35 ("Am. Compl.") at 2 ¶ 1.) After the Resort opened in the early 1980s, (id. at 3 ¶ 8), campers built various structures at their campsites, (id. at 6 ¶ 29), including "stick-built rooms, durabuilt/silvertop rooms, sheds, carports, decks, porches and/or stick-build roofs" with electricity, plumbing, and (in some instances) heating, (id. at 5 ¶ 23). Each of the plaintiffs claims to own and occupy at least one of these structures. (Id. at 2 ¶¶ 1, 5; id. at 4 ¶ 20.)

After Northgate purchased the Resort in 2015, (id. at 2 ¶ 5), the Town notified Northgate that the structures do not comply with the FDO, (id. at 8 ¶¶ 48–49). The Town approached Northgate about this issue only after the Federal Emergency Management Agency ("FEMA") informed the Town that if the Town does not enforce the FDO then its residents will not remain eligible to receive discounted flood insurance rates. (Id. at 6 ¶ 30; id. at 8 ¶ 47; see also id. at 3 ¶ 12.) In response to receiving this information from FEMA, the Town and Northgate informed the plaintiffs that the structures would have to be removed if not brought into compliance with the FDO by October 2018. (Id. at 6 ¶¶ 33–35; id. at 8 ¶¶ 48–49.) The plaintiffs responded by filing this lawsuit. (See court index #1.)

In an Amended Complaint filed on June 14, 2019, the plaintiffs requested the following relief against the Town: (1) an order declaring that the structures do not need to comply with the FDO because they were built before the Town adopted the FDO, (Am. Compl. ¶¶ 70–77), and (2) a preliminary injunction maintaining the status quo pending resolution of this case, (id. ¶¶ 61–69). Meanwhile, the twenty-one plaintiffs seeking damages against Northgate under the CPA assert that Northgate engaged in an unfair or deceptive business practice by representing that

certain structures were "grandfathered" and by not disclosing the need to bring the structures into compliance with the FDO. (Id. ¶¶ 78–85.)

ANALYSIS

In the course of considering the issues in this case—particularly those related to the plaintiffs' pending requests for preliminary injunctive relief and class certification—the court has come to doubt whether the action presents claims for relief that are fit for judicial determination at this time. Specifically, it appears that (1) there are adequate administrative remedies available to the plaintiffs with respect to their claims for relief against the Town, and (2) that until they exhaust such remedies their CPA claims against Northgate are premature. While the court is inclined to dismiss this action for these reasons, the court also believes that the parties should have an opportunity to address these issues first. As such, to the extent the parties wish to address any of the issues discussed herein, they may file a written response within 15 days. If no response objecting to dismissal is filed within that time period, then the court will dismiss this action without prejudice for the reasons explained below.

The underlying issue in this case is whether the Town can require any of the plaintiffs' structures to comply with the FDO. Pursuant to Section 23.3 of the Town's zoning regulations, "[i]f a lawful structure or use exists before this Ordinance is effective, which does not comply with the requirements contained herein, it may remain subject to the other provisions of this Ordinance." Ossipee Zoning Ordinance § 23.3 (Non-Conforming Structures and Uses) (as revised Mar. 10, 2015), https://www.ossipee.org/sites/ossipeenh/files/file/file/zoning_ordinance_revised_march_10_2015.pdf (emphasis added); see also New London Land Use Ass'n v. New London Zoning Bd. of Adjustment, 130 N.H. 510, 516 (1988) (explaining that "the right to continue a previously lawful use of one's property after enactment of a zoning ordinance that

prohibits such use is a vested right recognized by the New Hampshire Constitution and our New Hampshire statutes") (citations omitted).

According to the plaintiffs, the Town cannot require any of their structures to comply with the FDO because they all lawfully existed before the Town adopted the FDO. As such, after the Town and Northgate notified the plaintiffs that their structures would have to comply with the FDO by October 2018, the plaintiffs filed this action for declaratory relief and a preliminary injunction against the Town. However, as explained below, the plaintiffs appear to have administrative remedies available to them that make this action premature.

First, the Town's zoning regulations and state law provide the plaintiffs with an opportunity to appeal a definitive decision to enforce the FDO against one or more of the structures to the Town's Board of Adjustment ("Board"). Specifically, Article XXVIII of the Zoning Ordinance provides that "[a]ppeals to the Board of Adjustment may be taken by any person aggrieved . . . by any decision of the town officials, in the manner prescribed by RSA 676:5, as amended, within the time limit set by the Board of Adjustment according to said statute." Ossipee Zoning Ordinance, infra, Article XXVIII ("Appeals"); see id. § 4.10 (declaring that the FDO is "part of the Zoning Ordinance for purposes of administration and appeals"). Additionally, the FDO states that "[a]ny order, requirement, decision or determination of the Zoning Enforcement Officer made under this Ordinance may be appealed to the Zoning Board of Adjustment as set forth in RSA 676:5." Id. § 4.10.9(1) ("Variances and Appeals").

As these two provisions of the Town's zoning regulations make clear, municipal decisions under the FDO can be appealed to the Board pursuant to the appeals process set forth in RSA 676:5. Under RSA 676:5, "any person aggrieved . . . . by any decision of the administrative officer" may appeal the decision to the Board. RSA 676:5, I. The statute defines

an "administrative officer" as "any official . . . who . . . has responsibility . . . for enforcing the ordinance." RSA 676:5, II(a). It further defines a "decision of the administrative officer" as "any decision involving construction, interpretation or application of the terms of the ordinance." RSA 676:5, II(b). Additionally, to be a "person aggrieved" by such a decision, one must have "some direct definite interest in the outcome of the proceedings," the sufficiency of which is fact dependent. Goldstein v. Town of Bedford, 154 N.H. 393, 395–96 (2006); see also Golf Course Investors of N.H. v. Town of Jaffrey, 161 N.H. 675, 680–84 (2011) (discussing the "person aggrieved" standard).

The foregoing standards appear to be satisfied here. For one, a decision by Town officials to enforce the FDO against one or more of the structures would involve application of the terms of the Town's zoning ordinance, as the plaintiffs contend that Section 23.3 prohibits such a decision based on when the structures were built. Moreover, the plaintiffs appear to have a direct definite interest in such a decision because of their purported investments in the structures and the impact that such a decision may have on their ability to use the structures in the future. For these reasons, if and when Town officials definitively decide to enforce the FDO against one or more of the structures, it appears that the plaintiffs with a direct interest in any such structure may appeal that decision to the Board.[1]

During the September 19, 2019 hearing it became increasingly unclear whether the Town has issued a final determination regarding enforcement of the FDO and whether FEMA in fact has required an enforcement action. While at times the Town appears to have already "decided"

[1] Pursuant to the Board's Rules of Procedure, "[a]ppeals from an administrative decision taken under RSA 676:5 shall be filed within 30 days of the decision." Town of Ossipee Zoning Board of Adjustment[ ] Rules of Procedure at 3 (as revised Feb. 12, 2019), https://www.ossipee.org/sites/ossipeenh/files/file/file/zba_rules_of_procedure_-_2019.pdf.

to enforce the FDO, (see, e.g., Am. Compl., Ex. D at 1 (email from code enforcement officer stating that compliance with FDO would be required by October 2019); court index #37 ("Town's Obj. Am. Compl.") (stating that the Town "will be seeking compliance against the property owner . . . ."), the Town's representations during the September 19th hearing illustrate its equivocation on the issue, (see Hr'g CD at 3:38:00 to 3:42:00). Specifically, during the hearing the Town acknowledged that "[a]s far as the Town is concerned these structures that were built prior to the adoption of the [FDO] are essentially grandfathered pre-existing non-conforming . . . so long as they have not been modified since they were built prior to when [the FDO] was adopted." (Id. at 3:41:20 to 3:42:00.) And according to the Town, it has only ever indicated otherwise in response to "pressure from FEMA." (Id. at 3:41:20 to 3:41:30.) In light of these representations, it is noteworthy that the Town also represented that while FEMA originally gave "a drop dead date" for compliance, FEMA has recently changed positions and indicated that it does not have the authority to set any compliance deadline. (Id. at 3:38:45 to 3:39:40.) Based on FEMA's apparently relaxed position and the Town having previously acted only at FEMA's behest, Town counsel summarized the Town's current position as nothing more definitive than: "That's where we are right now." (Id. at 3:39:35 to 3:39:45.) The court further notes that the Town's description of FEMA's recent change of position is consistent with the plaintiffs' representation that "the State's FEMA representative has confirmed that grandfathering from FEMA regulations does exist and if met by the [p]laintiffs, doing so will not impact the Town's flood insurance rates." (Court index #39 ¶ 12.) Together, all of these circumstances indicate that Town officials have yet to definitively decide whether the Town will actually enforce the FDO against one or more of the structures at issue.

In addition to the administrative appeals process provided by the Town's zoning regulations and state law, the plaintiffs have also suggested that FEMA may provide an adequate administrative remedy itself. Specifically, as the court noted above, the plaintiffs recently indicated that "[t]he State's FEMA representative has confirmed that grandfathering from FEMA regulations does exist . . . ." (Court index #39 ¶ 12.) If this is true, then based on the Town's representation that it would only enforce the FDO in response to pressure from FEMA, (see Hr'g CD at 3:41:20 to 3:41:30), the plaintiffs may be able to seek an administrative decision from FEMA that would cause the Town to refrain from deciding to enforce the FDO against any one or more of the structures.

The availability of these administrative remedies is significant because it implicates the ripeness doctrine and its corollary exhaustion of administrative remedies rule. "The ripeness doctrine prevents courts 'from entangling themselves in abstract disagreements over administrative policies, and protects agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" Appeal of State Emples. Ass'n, 142 N.H. 874, 878 (1998) (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 148–49 (1967)) (ellipsis omitted). Whether a case is ripe for review is generally said to turn on (a) "the fitness of the issue for judicial determination," and (b) "the hardship to the parties if the court declines to consider the issue." Univ. Sys. of N.H. Bd. of Trs. & a. v. Dorfsman, 168 N.H. 450, 455 (2015). "A claim is fit for decision when: (1) the issues raised are primarily legal; (2) they do not require further factual development; and (3) the challenged action is final." Id. Meanwhile, hardship "requires that the contested action impose an impact on the parties sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." Id.

Consistent with the ripeness doctrine, under the exhaustion of administrative remedies rule, courts "generally require[ ] parties to exhaust administrative remedies before seeking judicial review." New Hampshire Div. of Human Servs. v. Allard, 138 N.H. 604, 607 (1994); but see Konefal v. Hollis/Brookline Coop. School Dist., 143 N.H. 256, 258–59 (1998) (explaining that the exhaustion rule is "flexible" and that it will not be applied under circumstances where "further administrative action would be useless and result in delays that might make the claim moot").

Notably, ripeness and exhaustion principles are particularly applicable in the context of actions for declaratory judgment such as this one. See Morin v. Berkshire Mut. Ins. Co., 126 N.H. 485, 486 (1985) ("Under [the declaratory judgment statute], a declaratory judgment action may be maintained only if adequate relief through other proceedings is unavailable."); Lisbon Village Dist. v. Lisbon, 85 N.H. 173, 174 (1931) ("[W]here there is another plain, adequate and complete remedy available the statute cannot be invoked."); see also Delude v. Town of Amherst, 137 N.H. 361, 363 (1993) (explaining that "[w]hether to issue a declaratory judgment is a discretionary matter for the court").

In light of these principles and the circumstances described above, at this stage the plaintiffs' action against the Town does not appear to be fit for judicial determination. For one, absent a definitive decision to enforce the FDO against one or more of the particular structures and an appeal of that decision to the Board, the Town has yet to make a final decision with respect to whether any one of the structures at issue must comply with the FDO. See Dorfsman, 168 N.H. at 455. Thus, it is still reasonably possible that the Town ultimately will not require FDO compliance at all. Moreover, even if the Board were to affirm a decision to enforce the FDO against one or more of the structures, the administrative appeals process would facilitate

further development of the factual record with respect to whether those structures were built (or modified) after the Town adopted the FDO (i.e., whether they are lawfully nonconforming under Section 23.3). The court would then have the benefit of a developed factual record on a subsequent statutory appeal of the Board's decision. See RSA 677:4 (authorizing appeals of zoning board decisions to superior court). Under these circumstances, the court does not believe that it would be "useless" for the plaintiffs to pursue the administrative appeals process set forth in Article XXVIII of the Town's zoning regulations and RSA 676:5. See Konefal, 143 N.H. at 258–59.

It also does not appear that the plaintiffs would suffer any particular hardship as a result of the court declining to take up their action against the Town at this time. Notably, by simply filing an appeal with the Board the plaintiffs would obtain the type of short-term relief they seek by preliminary injunction here, as RSA 676:6 provides:

> The effect of an appeal to the board [of adjustment] shall be to maintain the status quo. . . . An appeal of any order or other enforcement action shall stay all proceedings under the action appealed from unless the officer from whom the appeal is taken certifies to the board of adjustment, after notice of appeal shall have been filed with such officer, that, by reason of facts stated in the certificate, a stay would, in the officer's opinion, cause imminent peril to life, health, safety, property, or the environment. . . .

RSA 676:6 (emphasis added). Furthermore, in a subsequent statutory appeal to this court, the plaintiffs could apply for a restraining order to prevent enforcement action by the Town pending the appeal. See RSA 677:9 (authorizing restraining orders against enforcement action for "good cause shown").

In summary, absent exhaustion of the administrative remedies discussed above, the court is inclined to find that the plaintiffs' action against the Town is not fit for judicial determination at this time. Moreover, the plaintiffs' CPA claims against Northgate also appear to be premature

based on the availability of these administrative remedies. This is because the plaintiffs' CPA claims are based on Northgate purportedly misrepresenting that the structures were "grandfathered" and not disclosing that the structures would need to be brought into compliance with the FDO. However, these claims will not ripen until the Town finally determines that one or more of the structures is not "grandfathered" and that enforcement action will be taken absent FDO compliance. And if the Town ultimately decides otherwise, then these claims will be moot. For these reasons, the court is inclined to dismiss this action in its entirety without prejudice.

CONCLUSION

For the reasons explained herein, the court does not believe that this action is presently ripe for judicial resolution. Although the court is inclined to dismiss this action, because none of the parties have moved to dismiss, the court will refrain from doing so at this time in order to give the parties an opportunity to respond to any of the issues raised in this Interim Order. The parties shall have 15 days to file written responses. If no response objecting to dismissal is submitted within that time, then the court will dismiss this action without prejudice for the reasons explained in this interim order.

So Ordered.

December 9, 2019

Amy L. Ignatius
Presiding Justice