

**THE STATE OF NEW HAMPSHIRE
Rockingham Superior Court**

PO Box 1258
Kingston, NH 03848 1258
603 642-5256

MAR 15 1997

NOTICE OF DECISION

BERNARD H CAMPBELL
BEAUMONT & CAMPBELL
1 STILES ROAD - SUITE 107
SALEM NH 03079

95-E-0470 Town of Windham vs. Brian Bauchman, Jr., et al

Please be advised that on 3/10/97 Judge Gray made the following order relative to:

Order on Merits ;

Copy enclosed

03/14/97

Raymond Taylor, Clerk

cc: Sumner Kalman

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

Town of Windham

v.

Brian P. Bauchman, Jr., Susan B. Bauchman
and Bauchman's Towing, Inc.

No. 95-E-470

ORDER

This action involves a zoning dispute between the Town of Windham and Brian Bauchman of Bauchman's Towing, Inc. A trial was held in the Superior Court on March 5,

1997. After considering the facts and evidence presented at trial, the Court finds for the defendants for the following reasons.

The defendants own a 4.6 acre tract of land in Windham, New Hampshire, on which is housed their principal residence, a three-car garage and an attached storage unit that is located in the "rural zone." Prior to purchasing the property in 1993, Mr. Bauchman inquired as to the town's view on constructing a garage on the premises for overnight storage of his tow trucks.

After reviewing the site plans with Mr. Bauchman, the Town Building Department Code Enforcement Administrator, Frank Keefe, indicated that the construction of a garage would not be a problem with respect to the existing zoning. The Bauchman's specifically sought a lot that would enable them to construct a 50' x 50' garage in which to house any trucks incidental to their towing activities. Relying on the representations made by Town Officials, the Bauchmans closed on the real estate transaction in November 1993.

The Bauchmans own three trucks, one of which is used as a regular vehicle by mr.

Bauchman as his primary means of transportation, in addition to being used on calls.

Additionally, the Bauchmans own one flatbed and two tow trucks. All of the activities that

involve towing, however, have been and continue to be conducted off the premises of the 120

Haverhill Road site. The tow trucks need to be accessible to Mr. Bauchman 24 hours per day.

The property is located .6 miles from a neighborhood business district and .9 miles from an

industrial zone. The residential character of the neighborhood is unaffected by the Bauchman's

act of parking the trucks on the property. There is no unusual signage and there are no

extraordinary sounds, sights, lights, noises, smells or traffic that result from the parking of these

trucks, because Mr. Bauchman is not operating a business on the premises.

By letter dated April 20, 1995, the Town of Windham stated that the Bauchmans' property

is situated in the rural zone, that the primary structure on the site is a single family residence

occupied by the Bauchmans, that no exterior signs except markings on the vehicles exist and that

there are no employees operating from the site. The Town further stated that the vehicles were

currently stored outside, but that if it would be permitted and/or make a difference, a garage

could be considered. On April 21, 1995, Mr. Bauchman went to the Town Hall to discuss

potential options presented by the letter from the building inspector. A meeting was scheduled

between the Bauchmans and various town officials, and the town made a request for proof

regarding storage facilities off site. The Town expressed concern over the construction of a 50'

x 50' garage to store the trucks, with the issue being the size of the garage.

In June 1995, the town and Mr. Bauchman agreed that a 40' x 30' garage could be built.

the Town had full knowledge that the Bauchmans intended to build this garage for storage of

their trucks and supported the enclosure of the trucks within the Windham Zoning Ordinance

definition of "accessory use." The Town then issued a building permit on June 26, 1995. In reliance on this permit, the Bauchmans believed there had been resolution and agreement that there was compliance with the Windham Zoning Ordinance. The Bauchmans then took out a second mortgage and have undertaken contractual obligations with a general contractor to clear the log and pour the concrete foundation. The evidence submitted indicates that the Bauchmans have undertaken a substantial personal financial risk in reliance on this permit. On November 9, 1995, the town suddenly served the Bauchmans with an Order of Notice to Attach and a Petition to Temporarily and Permanently Enjoin the building of the garage.

The Court finds that the defendants' activities of parking commercial vehicles by occupants of the home located in a rural zone is a common occurrence in Windham and has not, in the past, been considered the operation of a business or commercial activity which would violate the Windham Zoning Ordinance. Moreover, the purpose of issuing building permits is to facilitate compliance with zoning ordinances. 3 American Law of Zoning, Anderson, §19.02 (1957). Pursuant to RSA 676:11, building permits are required by any person who intends to erect a building. Plans are submitted to the town building inspector for his approval and the zoning officer is charged with knowledge of the zoning ordinance. The Town of Windham approved a building plan on June 13, 1995 and issued a building permit on June 26, 1995 when the Town's Building Inspector signed the permit.

This approval, combined with the representations made to the Bauchmans throughout the process, entitled the Bauchmans to rely on the approval. City of Concord v. Tompkins, 124 N.H. 463 (1984). It is well-settled in New Hampshire law that a party can rely on the authority of an official to establish a claim in estoppel, so long as the official acted within his actual authority.

The doctrine of estoppel has been applied to municipalities "to prevent unjust enrichment and to accord fairness to those who bargain with the agents of municipalities for the promises of the municipalities." Aranosian Oil co. v. City of Portsmouth, 136 N.H. 57, 59 (1992). If there is proof of the four elements of estoppel, it may be invoked against a town as a result of conduct or assertions made by a town official. See City of Concord v. Tompkins, 124 N.H. 463 (1984).

Those four elements are:

[f]irst, a representation or concealment of material facts made with knowledge of those facts; second, the party to whom the representation was made must have been ignorant of the truth of the matter; third, the representation must have been made with the intention of inducing the other party to rely upon it; and fourth, the other party must have been induced to rely on the representation to his injury."

Id. at 465:

The Town made material representations of fact by issuing the building permit and making explicit assurances to Mr. Bauchman. Further, it is expected that the holder of a building permit will rely thereon, and the town had no reason to believe that the Bauchmans would not rely on it. Mr. Bauchman did not know nor should he have known that the conduct or representations made by the town were either improper, incorrect or misleading. His reliance was therefore reasonable. See City of Concord v. Tompkins, 124 N.H. 463, 467-68 (1984). Finally, he did actually rely on the representations to his detriment. There was no evidence to support a finding that the building inspector acted in anything other than his official capacity, and the town is therefore estopped from enjoining the building of the garage. The Building Inspector had full knowledge of the extent of the plans before he approved them, as he signed the building plans themselves. The Court finds, therefore, that the Town is estopped from asserting a claim against the Bauchmans.

Accordingly, the Court finds that the defendants are not conducting a commercial activity or other business use on the premises in question. Additionally, the Court finds that the issuance of the building permit and other assurances given to the Bauchmans entitle the Bauchmans to have reasonably relied upon such representations, which they did. The Town cannot now require them to cease and desist. The Court does not, however, find any bad faith in this action and therefore attorney's fees are not appropriate. With respect to the requests for findings and rulings, the Court finds as follows:

PLAINTIFF'S REQUESTS FOR FINDINGS AND RULINGS

FINDINGS OF FACT:

Granted: 1-4, 6, 10-11

Denied: none.

Neither Granted Nor Denied: 7-9

RULINGS OF LAW:

Granted: F-H

Denied: C, I, J

Neither Granted Nor Denied: A-B, D, E,

DEFENDANTS' REQUESTS FOR FINDINGS AND RULINGS

FINDINGS OF FACT:

Granted: all.

Denied: none.

Neither Granted Nor Denied: none.

RULINGS OF LAW:

Granted: all.

Denied: none.

Neither Granted Nor Denied: none.

SO ORDERED.

Date: March 10, 1997


Douglas R. Gray
PRESIDING JUSTICE