THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2018-0172

Donald & Bonnie Toy

v.

City of Rochester, et al

Appeal Pursuant to Rule 7 from Judgment
of the Strafford County Superior Court

BRIEF FOR THE APPELLANT

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Oral Argument: Andrea K. Mitrushi,
15 minutes

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STATEMENT OF THE CASE AND FACTS

In August 2015, the City or Rochester (the "City") issued a Notice of Sale and Conditions of Sale regarding 422 Old Dover Road (the "Property") that it had acquired by tax deed. App. 1-4. The Notice of Sale and Conditions of Sale provided various instructions regarding the form of bids and procedure for sale. App. 1-2. The Notice of Sale specifically stated that each bidder must indicate on their bid form their intended use of the Property. App. 1. The Notice of Sale also specifically stated that the City "reserves the right to reject any and all bids and waive any minor or nonmaterial informalities, if deemed to be in the best interest of the City." App. 1. The Conditions of Sale gave preference to abutters by providing them with the right of first refusal at the highest bid price. App. 2. Nowhere in the Notice of Sale or Conditions of Sale did it indicate that the Property would be sold to the highest bidder, but rather to the successful bidder.

On August 12, 2015, Plaintiffs Donald and Bonnie Toy (the "Plaintiffs"), owners of Addison Estates, a manufactured home park located at 414 Old Dover Road, submitted the highest bid on the Property in the amount of Forty Five Thousand Five Hundred Dollars ($45,000.00). App. 5-7. In their bid package, they indicated that they intended to annex the Property to the abutting 418 Old Dover Road, a seventy-five foot strip of land separating Addison Estates from the Property, which they subsequently acquired on August 14, 2015. App. 5.

The City received four other bids which included the bidders intended use of the Property:

- Thirty-Six Thousand Two Hundred Dollars ($36,200.00) from Darlene Severance, a non-abutter, who intended to rehabilitate the structures on the Property. App. 8.

- Thirty-Five Thousand Eight Hundred Dollars ($35,800.00) from John Weeden, an abutter, who intended to absorb the Property into an adjacent lot.[1] App. 3-4, 8.
- Thirty-One Thousand Five Hundred Dollars ($31,500.00) from Donald Lesperance, a non-abutter, who intended to build a single family residence on the Property. App. 8.
- Thirty-One Thousand Dollars ($31,000.00) from Michael and Stacey Philbrook (the "Philbrooks"), abutters who reside at 424 Old Dover Road, who intended to add the Property to their land. App. 3-4, 8.

On September 8, 2015, the City's Finance Committee, which included Mayor T.J. Jean and Deputy City Manager Blaine Cox, discussed the bids. Tr. Trans. 114, 118, 220-21. The Mayor directed the Deputy City Manager to solicit more details from the bidders about their intended use. Tr. Trans. 119, 223.

The Deputy City Manager spoke with the Plaintiffs' Attorney Donald Whittum, who indicated the Plaintiffs had not decided exactly what they wanted to do with the Property, but that he "might combine it with [recently acquired 418 Old Dover Road] in order to expand Addison Estates." Tr. Trans. 121; App. 12. The Deputy City Manager also spoke with the Philbrooks who indicated they wanted to build a single family home on the Property sometime in the future. Tr. Trans. 122-23; App. 13. They also informed him that they could not match the Plaintiffs' bid, but they could match the next highest bid being considered by the City, Darlene Severance's bid. Tr. Trans. 123; App. 13.

At the Rochester City Council Meeting on September 15, 2015, the City Council discussed the Property and the bids received, as well as the additional information obtained by the Deputy City Manager. Tr. Trans. 132, 224; App. 15. The City Council discussed selling the Property to the Plaintiffs but were concerned about

[1] In light of a lawsuit the City was in with Weeden, the City ultimately decided it would not be in its best interest to pursue a transaction him.

the possibility of the Plaintiffs expanding their manufactured home park onto the Property despite recent changes to the City's Zoning Ordinances prohibiting such an expansion. Tr. Trans. 224. The Mayor expressed that it would be unfair to the Plaintiffs to sell the Property to them without first confirming they knew they would not be allowed to build or expand their manufactured home park onto the Property. Tr. Trans. 225-36. The Mayor wanted to be forthcoming with the Plaintiffs.

After further discussion, the City Council directed City Attorney Terence O'Rourke to inform Plaintiffs' Attorney Donald Whittum that, due to recent changes to the City's Zoning Ordinances, the City would sell the Plaintiffs the Property only if they would accept a deed with a covenant that no manufactured homes would ever exist on the Property. Tr. Trans. 226, 288. Attorney Whittum declined the sale on behalf of the Plaintiffs. Tr. Trans. 66, 294.

Subsequently, on October 6, 2015, the City Attorney notified the City Council of the Plaintiffs' declination. Tr. Trans. 294. He was then instructed to sell the Property the Philbrooks who ultimately purchased the Property for Thirty-Six Thousand Five Hundred Dollars ($36,500.00) on October 13, 2015. Tr. Trans. 294.

After learning of the sale of the Property to the Philbrooks, the Plaintiffs filed a Complaint (the "Complaint") in the Strafford County Superior Court against the City and the Philbrooks (collectively, hereinafter, the "Defendants") on November 2, 2015. App. 16.

At the bench trial held on July 13 and 14, 2017, the only cause of action that remained before the trial Court (Howard, J.) was the Plaintiffs' request for a declaration that the transfer by the City to the non-highest bidder violated the Conditions of Sale.[2] Yet, at trial, the Plaintiffs argued throughout that (1) as the

[2] The Complaint initially alleged two causes of action: Declaratory Judgment and Breach of Contract. However, on January 14, 2016, the trial Court (Houran, J.) granted the City's Motion to Dismiss Plaintiffs' Breach of Contract action. App. 28. Further, on June 24, 2016, the trial Court (Howard, J.) granted the City's Motion for Summary Judgment on the Plaintiffs request for a declaration that they were entitled to a right of first refusal on the Property. App. 51.

highest bidder, they were entitled to a deed with no restrictive covenants and (2) it was unreasonable for the City to offer the Property to them with a restrictive covenant and subsequently sell the Property to the Philbrooks with no restrictive covenant.

Upon the completion of the Plaintiffs' case, the Defendants moved to dismiss arguing that, in the light most favorable to the Plaintiffs, there was no proof by a preponderance of the evidence that the sale of the Property to the non-highest bidder violated the Notice of Sale and Conditions of Sale; that this was the only cause of action in the Plaintiff's Complaint before the trial Court and that allowing the Plaintiffs to proceed on a cause of action not contained in the Complaint was a direct violation to the Defendants' right to due process; and further, that with regard to the only remaining cause of action, the Plaintiffs had not provided proof to establish by a preponderance of the evidence that the City was required to sell the Property to the Plaintiffs as the highest bidders. Tr. Trans. 207-217.

The trial Court agreed that the argument presented by Plaintiffs during the presentation of their case was not claimed in the Complaint; however, stated that it did not need to be alleged and that it was simply evidence in support of Plaintiffs cause of action intended to defeat the Defendants defense. Tr. Trans. 216. The motion to dismiss was denied. Tr. Trans. 216.

After trial, but before the trial Court's decision, the Defendants received Plaintiffs' Motion for Attorney Fees on July 14, 2017. App. 86. The Defendants objected on July 19, 2017. App. 88.

On December 14, 2017, the parties received the Final Order on the Merits (the "Final Order") issued by the trial Court (Howard, J.) on November 30, 2017, finding that the City violated the Conditions of Sale when it failed to award the Property to the Plaintiffs as the highest bidding abutter, and improperly amended the Conditions of Sale when it imposed a restrictive covenant regarding mobile home park development or expansion as a condition of the sale to the Plaintiffs. App. 101. The trial Court ordered the City to convey title of the Property to the Plaintiffs upon

payment to the City of their bid amount. App. 105 The trial Court also included an award of Attorney's Fees and Costs, giving the Plaintiffs thirty (30) days to file claims for Attorney's Fees and Costs along with affidavits, which were filed on January 12, 2018. App. 105-07. The Final Order provided no time period for the Defendants to respond to any such filings by the Plaintiffs. App. 105-07.

The Defendants filed a Motion to Reconsider on December 21, 2017, arguing that the trial Court should not have entertained the Plaintiffs' argument that as the highest bidder they were entitled to a deed with no restrictive covenants, and that it was unreasonable for the City to offer the Property to them with a restrictive covenant and subsequently sell the Property to another without one, when neither argument was alleged anywhere in the Complaint and thus violated the Defendants' right to Due Process. App. 108. Further, the Defendants argued that the trial Court should not have grounded its decision in part on these unalleged theories. App. 108.

On January 16, 2018, the trial Court (Howard, J.) denied the Defendants' Motion to Reconsider. App. 114.

On January 18, 2018, the Defendants filed its first Notice of Appeal ("NOA") of the Final Order pursuant to Rule 7. App. 149.

On January 29, 2018, the trial Court (Howard, J.) issued an Order granting Attorney's Fees and Costs to the Plaintiffs despite the fact the Defendants had already perfected their appeal to the Supreme Court.[3] App. 132. The Defendants filed an Objection to Plaintiff's Affidavit for Attorney's Fees and Costs and a Motion for Reconsideration of and to Vacate Order on Attorney's Fees and Costs on February 1, 2018, arguing they had perfected their appeal by filing the NOA which inherently included the issue of attorney's fees, that they should have been allowed, at minimum, thirty (30) days to respond and that the trial Court had not completed the required analysis in awarding attorney's fees. App. 135. The trial Court (Howard, J.) denied the

[3] On January 18, 2018, following the court's denial of the City's Motion to Reconsider, the City filed its Notice of Appeal of the Final Order pursuant to Supreme Court Rule 7.

motion, finding that the trial Court had jurisdiction of the attorney's fees issue, the Defendants had not filed a timely response to the request for fees, and the trial Court engaged in the appropriate analysis in awarding reasonable attorney's fees. App. 154.

On February 9, 2018, the Defendants received an Order from the Honorable Court that the trial Court order being appealed did not appear to be a final decision on the merits due to the outstanding issue of attorney's fees referenced in the trial Court's Final Order. App. 153. The Defendants subsequently filed a second Notice of Appeal on March 30, 2018. App. 155.

SUMMARY OF ARGUMENT

The trial Court should not have provided relief on a cause of action not alleged by the Plaintiffs in their Complaint. Allowing the Plaintiffs to proceed on a claim and allege facts in trial that were not asserted in the Complaint and subsequently grounding the trial Court's awarded relief upon both was grossly unfair to the Defendants and in violation of the their right to due process. The only cause of action that should have been entertained by the trial Court was whether the transfer of the Property by the City to the non-highest bidder violated the Conditions of Sale. The trial Court should not have allowed the Plaintiffs to argue any other cause of action or allege any other facts to support that cause of action if they were not contained in the Complaint. The Plaintiffs had ample opportunity, almost two years in fact, to amend their Complaint but never did. The Defendants were not properly or legally on notice of the theory of relief upon which the Plaintiffs were proceeding and otherwise would have adjusted their defense at trial. Since the cause of action did not exist in the Complaint before the trial Court, the trial Court should not have provided relief upon it.

Without legal authority, the trial Court ultimately ordered the City to void the deed to the Philbrooks, take back the Property and transfer it to the Plaintiffs. If the Plaintiffs exposed an unfair bidding process by the City, which is what the Plaintiffs allege, the only remedy available is to set aside or invalidate the sale. This would not only vindicate the Plaintiffs' and other aggrieved bidder's rights but also protect the rights of the public by seeking a requirement of fairness. By ordering the City to void the deed to the Philbrooks, take back the Property and transfer it to the Plaintiffs, there is no benefit provided to the other aggrieved bidders or the public. The trial Court's order is improper, unfair and without legal authority.

In awarding Plaintiffs' attorney's fees and costs, the trial Court abused its discretion for four (4) reasons. First, the Defendants had perfected their Appeal by filing the NOA on January 18, 2018, prior to the trial Court's January 29, 2018 final order on attorney's fees and costs. The Defendants did not object to the Affidavits submitted by the Plaintiffs' attorneys believing that the trial Court no longer had jurisdiction over the matter.

Second, the issue of attorney's fees was an integral issue to the appeal, not a collateral one. In the NOA, the Defendants challenge every aspect of the trial Court's Final Order, including its granting declaratory judgment. The Plaintiffs are not entitled to attorney's fees and costs without a positive outcome of the issue of declaratory judgment. Ruling on attorney's fees and costs prior to the resolution of the Defendants' Appeal does not make sense logically or procedurally since the issue is integral to the underlying matter.

Third, is was unjust and inequitable for the trial Court to award attorney's fees and cost without allowing the Defendants to respond since it was clear the Defendants believed any further proceedings were stayed by the filing of the NOA. The Defendants should have bene notified of at least a thirty (30) day deadline to respond and should have been notified that the trial Court did not believe the NOA removed the issue of attorney's fees from the trial Court's jurisdiction when the trial Court was aware of and referenced the Defendant's NOA in its Order on Fees.

Fourth, the trial Court did not conduct the required analysis prior to awarding the requested attorney's fees and costs. Had it done so, the fees would have been substantially reduced given: the familiarity of the issue, with facts closely matching those of a thirty-three (33) years old precedent case; the limited contested facts and events; the limited exchange of discovery; the minimal trial preparation of witnesses; the less than two day trial; and the years of litigation experience of Plaintiffs' attorneys.

The trial Court erred in granting Declaratory Judgment and Injunctive Relief in favor of the Plaintiffs. There was not sufficient evidence presented at trial to support the only cause of action that was before the trial Court; that the transfer by the City to the non-highest bidder violated the Conditions of Sale. Nothing in the Notice of Sale or Conditions of Sale required the City to sell to the highest bidder and the City reserved the right to reject any and all bids not deemed to be in the best interest of the City. One of the Plaintiffs' potential uses was in violation of the City's Zoning Ordinance. The City believed it would not be in the best interest of the City to sell the Property to the Plaintiff without requiring compliance with the ordinance. The Plaintiffs were offered the Property with a restrictive covenant and they declined. In turn, the City sold to the next highest bidder whose use was not in contrast to the best interests of the City. The fact that the City offered the Property to the Plaintiffs with a restrictive covenant was not an issue before the trial Court as it was not plead in the Complaint.

STANDARD OF REVIEW

On review of a trial court's rulings on Declaratory Judgment after a bench trial, this Court has outlined its approach as follows:

> We review the trial court's legal conclusions and application of law to fact *de novo*. The trial court's findings of fact . . . are binding on us unless they are not supported by the evidence or are erroneous as a matter of law.

Sirrell v. State, 146 N.H. 364, 370 (2001) (internal quotations and citations omitted).

ARGUMENT

I. TRIAL COURT SHOULD NOT HAVE PROVIDED RELIEF ON CAUSE OF ACTION NOT ALLEGED IN THE COMPLAINT

The Plaintiffs in this matter filed the Complaint on November 2, 2015. App. 16. They initially alleged two causes of action against the Defendants: Declaratory Judgment and Breach of Contract. However, on January 14, 2016, the trial Court (Houran, J.) dismissed the Breach of Contract claim and the only remaining cause of action was for Declaratory Judgment. App. 28.

In their request for Declaratory Judgment, the Plaintiffs alleged that they were not awarded the right of first refusal as promised by the Conditions of Sale and that the transfer of the Property to the non-highest bidder violated the Conditions of Sale. App. 16. Following Defendants Motion for Summary Judgment, the trial Court (Howard, J.) agreed with the Defendants and denied the Plaintiffs request for a declaration that they were entitled to a right of first refusal, leaving only the allegation that the transfer by the City to the non-highest bidder violated the Conditions of Sale. App. 51.

The Plaintiffs never moved to amend the Complaint to include any other cause of action, yet in a subsequent pretrial pleading, their Response to Respondent's Objection to Motion for Summary Judgment, the Plaintiffs suddenly presented new arguments and facts. First, as the highest bidding abutter, they argued, they were entitled to a deed with no restrictive covenants. Second, they argued it was unreasonable for the City to offer the Property to them with a restrictive covenant and later sell the Property to the Philbrooks with no restrictive covenant. App. 159. Subsequently, at trial, the Plaintiffs were allowed to proceed with these arguments and facts to the detriment of the Defendants.

Upon the conclusion of the Plaintiffs' case, the Defendants moved to dismiss arguing that the Complaint did not set forth a claim for relief upon which the Plaintiffs

were now seeking relief. There are no facts in the Complaint that allege that the City violated the Conditions of Sale by imposing a deed restriction on the Plaintiffs and that there was nothing in the Complaint to put the Defendants on notice of this argument, thus violating the Defendants' Right to Due Process. All that remained in the Complaint was that the Plaintiffs were the highest bidders, and according to them, they were entitled to the Property. Tr. Trans Vol. 207-17.

The trial Court agreed that the argument presented by Plaintiffs during the presentation of their case was not claimed in the Complaint; however, mistakenly stated that said argument did not need to be alleged and that it was simply evidence in support of Plaintiffs cause of action intended to defeat the Defendants defense. Tr. Trans. 216. Trial continued and ultimately the trial Court ruled in favor of the Plaintiffs finding that, in failing to award the Property to the Plaintiffs as the highest bidding abutter, and imposing a restrictive covenant as a condition of the sale to the Plaintiffs, the City violated the Conditions of Sale and improperly and materially amended the Conditions of Sale. App. 101.

"It is well settled that a 'defendant is entitled to be informed of the theory on which the plaintiffs are proceeding and the redress that they claim as a result of the defendant's actions.'" *Morancy v. Morancy*, 134 N.H. 493, 497 (2016) (citation omitted). Rule 8 of the New Hampshire Rules of Civil Procedure clearly sets forth what is required of a pleading party in initiating a lawsuit. A Complaint *shall*:

> [c]ontain a statement of the material facts known to the pleading party on which the claim is based, showing that the pleader is entitled to relief, and a demand for judgment for relief to which the pleader claims entitlement;

Super. Ct. Civ. R. 8(a).

The Comment following Rule 8 further explains that such requirements are necessary in order to set the parameters for the civil suit for not only the opposing party, but also the court. The Comment states:

> Pleadings which notify the opposing party and the court of the factual and legal bases of the pleader's claims or defenses better define the issues of fact and law

> to be adjudicated. This definition should give the opposing party and the court sufficient information to determine whether the claim or defense is sufficient in law to merit continued litigation. Pleadings should assist in setting practical limits on the scope of discovery and trial and should give the court sufficient information to control and supervise the progress of the case.

Further, a defendant is entitled to have a case *decided upon* grounds for relief alleged in a complaint. *Lesser v. Wells Fargo Bank, N.A.*, 2016 N.H. 271 (1985) (emphasis added).

The Complaint before the trial Court in this case made no mention of a restrictive covenant nor included any argument that the Plaintiffs were entitled to the Property without such restriction. App.16. Yet, the trial Court allowed the Plaintiffs to argue this throughout trial. The issue of fact and law before the trial Court was whether the Plaintiffs were entitled to the Property as the highest bidder. The Complaint limited the scope of the trial to that issue and that issue alone. The trial Court should have controlled and limited the Plaintiffs case to that issue and that issue alone.

Allowing the Plaintiffs to proceed on a cause of action not asserted on the face of the Complaint nor supported by facts within, and then subsequently grounding the trial Court's decision on the non-asserted claim and facts, was grossly unfair to the Defendants in this case. The Plaintiffs had nearly two years since the initiation of this lawsuit to amend the Complaint to include any other cause of action or facts to put the Defendants on notice of anything other than what remained in the Complaint after prior pretrial Orders. Had the Complaint been amended to include the argument the Plaintiffs were allowed to present at trial, the Defendants would have subpoenaed additional witnesses and prepared additional evidence. The trial Court should not have entertained any other argument and certainly should not have provided relief on a cause of action not alleged in the Complaint.

Parties in a lawsuit, like contestants in a game, must be bound by a set of rules. The most basic of which is that those rules cannot change mid-game. *Morancy*, 134

N.H. at 497. The playing field in this case was not level. The trial Court changed the rules.

II. TRIAL COURT EXCEEDED ITS AUTHORITY IN THE RELIEF GRANTED

Relying primarily on *Irwin Marine, Inc. v. Blizzard, Inc.*, 126 N.H. 271 (1985), the trial Court ruled that the Plaintiffs were entitled to the Property and the City was to transfer title to them because the City violated the Conditions of Sale by not selling the Property to the Plaintiffs as the highest bidder and unfairly treated the Plaintiffs by imposing a restrictive covenant on the sale of the Property. App. 101. However, pursuant to *Irwin Marine, Inc.*, a sale of a municipal property that is based on an unfair public bidding procedure may be set aside or invalidated only. There is no legal authority in this jurisdiction that would require a municipality to void the deed to the original buyer and require the municipality to transfer the property to the aggrieved party.

The Court in *Irwin Marine, Inc.* held that "a public bidding procedure that places a bidder at a disadvantage violated the public interest in according prospective bidders an equal opportunity to bid and weakens public confidence in government." *Id.* at 276. By setting aside the sale, the aggrieved party vindicates its own interest but also confers a substantial benefit on bidders and the municipality's citizen and taxpayers by successfully seeking a requirement of fairness in the city's public bidding procedures. *Id.* at 276-77.

It seems as though even the Plaintiffs understood this fact given they cite the same in paragraph three (3) of their Motion for Attorney's Fees: "[a] judgment in Toy's favor setting aside the sale of the Richardson lot, which was based on an unfair public bidding procedure, "...confers a substantial benefit on bidders as well as [the City's] citizens and taxpayers by successfully seeking a requirement of fairness in the city's public bidding procedures.'" App. 86. If the bidding procedure was unfair to

the Plaintiffs, it was unfair to other bidders or future bidders, the citizens and the taxpayers.

The trial Court ordered the City to buy back the Property from the Philbrooks, without indicating a price, and turn it over to the Plaintiffs for their bid price **AND** to pay the Plaintiff's Attorney's fees and costs; a "win win" for the Plaintiffs. App. 91. But what about the City's citizens and taxpayers who were aggrieved or whose confidence in the City was weakened? What benefit do they get? If the bidding process was unfair, and the Plaintiffs exposed that unfairness, like in *Irwin Marine*, the only legitimate and fair result would be to nullify the sale, refund the Philbrooks and grant the Plaintiff's reasonable Attorney's fees and costs, like in *Irwin Marine*, not give the Plaintiffs the Property and attorney's fees and costs. If the Plaintiffs are awarded the Property, only their rights are vindicated and they should not also be awarded attorney's fees and costs. Requiring the City to transfer title to the Plaintiffs is improper, unfair and without legal authority.

Judicial, quasi-judicial, legislative or quasi-legislative acts of a city ordinarily do not subject it to claims for damages. Unless the action by the city is unconstitutional or amounts to a taking, a party's only remedy for municipal error related to such acts is judicial reversal of the action. *Torromeo v. Fremont*, 148 N.H. 640, 644 (2002). A court does not pick winners and losers.

III. TRIAL COURT ABUSED ITS DISCRETION AWARDING ATTORNEY'S FEES AND COSTS TO PLAINTIFFS

A. Trial Court Impermissibly Awarded Attorney's Fees and Costs Despite Defendants Having Perfected Their Appeal to the Supreme Court

As part of its Final Order, issued December 14, 2017, the trial Court (Howard, J.) awarded the Plaintiffs Attorney's Fees and Costs. App. 105-07. The Final Order gave the Plaintiffs thirty (30) days to file claims for Attorney's Fees and Costs along with affidavits. App. 107. The Final Order did not provide a time period for the Defendants to respond to any such filings by Plaintiffs. The Defendants, however,

had previously objected to Plaintiffs Motion for Attorney's Fees and Costs filed during the pendency of the trial. App. 88.

On January 18, 2018, the Defendants filed a Notice of Appeal of the Final Order pursuant to Rule 7. App. 149. Despite this, the trial Court (Howard, J.) issued an Order granting Attorney's Fees and Costs to the Plaintiffs on January 29, 2018. App. 132. The Defendants filed an Objection to Plaintiff's Affidavit for Attorney's Fees and Costs, Motion for Reconsideration of and to Vacate Order on Attorney's Fees and Costs on February 1, 2018, both of which were denied. App. 135.

Generally, the perfection of an appeal transfers jurisdiction of the cause from the trial court to the appellate court. *Rautenberg v. Munnis*, 107 N.H. 446, 447 (1966) (citations omitted). The appeal "effect[s] the operation or execution of the order, judgment or decree from which the appeal is taken, and any matters embraced therein." *Id.* Once the appeal has been perfected, the Supreme Court is "vested with the exclusive power and jurisdiction over the subject matter of the proceedings, and the authority and control of the lower court with reference thereto are suspended." *Id.*

Rule 46(d) of the Superior Court Civil Rules states that a verdict or decree does not become final if one of the parties has filed an Appeal with the Supreme Court pursuant to Rule 7. Here, the Defendants believed that the Final Order granting Attorney's Fees and Costs was not a "final order" because the NOA had been timely submitted. Therefore, the Defendants did not object to the Affidavits submitted by Attorney Whittum and Attorney Potvin believing that the trial Court no longer had jurisdiction over the matter.

B. Challenge of Award of Attorney's Fees and Costs Is Not Collateral Issue

In awarding Attorney's Fees and Costs despite the perfection of the Defendant's Appeal, the trial Court mistakenly claimed that since the Defendants did not appeal the granting of attorney's fees, the issue became "collateral" and can therefore be ruled upon. However, the heart of the Defendant's appeal is that the trial

Court's Final Order granting Declaratory Judgment in favor of the Plaintiffs was in error. App. 149, 155. Moreover, the Defendant's claim that the Court misapplied the principles of *Irwin Marine*. App. 149, 155. The trial Court's only justification for departing from the American rule on attorney's fees and costs is the trial Court's claim in the Final Order that the present case is identical to *Irwin Marine*. App. 101-04.

Without making a determination that the issues in the present case were akin to those in *Irwin Marine*, the trial Court could not have ordered Attorney's Fees and Costs. Thus, the awarding of said Fees and Costs is integral to the underlying matter, not collateral.

> A test, however, is easily devised by focusing the inquiry on the function of a fee award, rather than on the source of the award. A difference exists between awards of attorney's fees intended to compensate for the underlying injury and awards designed to facilitate redress of injury by reducing litigation costs. An integral, or compensatory attorney's fees award is made as part of the "initial determination of liability" and requires the court to consider the very factors that bear upon the decision as to which party prevails. A collateral award, on the other hand, such as one under [statute], is made as a matter of course to the victorious party, without regard to underlying issues of the case.

Richard S. Crummins, *Judgment on the Merits Leaving Attorney's Fees Issues Undecided: A Final Judgment?*, 56 Fordham L. Rev. 487, 499 (1987).

In New Hampshire, parties are not awarded attorney's fees as a "matter of course" when prevailing in a claim for Declaratory Judgment. The award of fees is fact intensive, discretionary, and based upon the underlying issues of the case. Thus, the award of Attorney's Fees was integral to the Final Order of this case, which Final Order was appealed leaving the trial Court without jurisdiction to take any further action on the issue.

The Plaintiffs would not be entitled to Attorney's Fees and Costs without a positive outcome on the issue of Declaratory Judgment. That the trial court erred in granting Attorney's Fees and Costs is inherent in the question of error as to

Declaratory Judgment. Ruling on the reasonableness of the Plaintiffs request for Attorney's Fees and Costs was premature by the trial Court.

The trial Court cited two foreign state court cases to support its award of Attorney's Fees and Costs prior to the ruling of this Appeal. App. 133-34. Neither support this proposition. In *Ellis v. Arkansas State Highway Commission*, 363 S.W. 3d. 321 (2010), there were two separate Orders. The first order rendered judgment which did not contain a provision for attorney's fees. Thereafter, the Plaintiffs filed a Motion for Attorney's Fees which was denied. The Arkansas Supreme Court simply stated that the trial court had the jurisdiction to act on the Motion for Attorney's Fees and that such motion did not toll the appeal period for the first order of judgment. Essentially, the Motion for Attorney's Fees did not go to the substance of the first order, so two separate appeal periods applied to each order. In the present case, the award of Attorney's Fees was included in the Final Order finding Declaratory Judgment in favor of the Plaintiffs. App. 91. Therefore, the award is part and parcel of the original Final Order. Hence, any action to amend or otherwise disturb that Final Order is a "matter arising out of, and directly related to the issues presented on appeal" and, thus, is outside the jurisdiction of the trial Court. *Rautenberg*, 107 N.H. at 447.

The Utah Court of Appeals case cited by the trial Court is also inapposite to the present matter. App. 133-34. In *Saunders v. Sharp*, 818 P.2d 574 (1991), the trial court awarded attorney's fees pursuant to a contract provision as part of its order of judgment. Awards of attorney's fees by way of contract, like those awarded pursuant to a statute, are considered "collateral" to the underlying judgment. Thereafter, the trial court awarded additional attorney's fees by way of post-judgment Motion filed by the prevailing party. As with *Ellis* above, the issue had to do with the propriety of the Court acting on a post-judgment motion for attorney's fees. Further, the Court in *Saunders*, did, in fact, order the trial court to refrain from taking any further action on attorney's fees until the underlying appeal resolved.

In both *Ellis* and *Saunders*, the prevailing party needed to file post-judgment motions in order to preserve their right to claim fees at all. That is not what happened in the present case. The request for fees was part of the original Complaint and the subject of a Motion filed during the trial. App. 16, 68. The Plaintiffs claim to fees is well preserved.

Ruling on Attorney's Fees and Costs prior to the resolution of the Defendant's Appeal does not make sense logically or procedurally since the issue is integral and not collateral to the underlying matter.

C. The Trial Court Abused Its Discretion by Not Allowing Defendants to Respond to Plaintiffs Request for Attorney's Fees and Costs

If the trial Court is correct, that the issue of Attorney's Fees and Costs is actually a collateral issue, it still should have provided the Defendant an opportunity to respond to the Plaintiff's Affidavits for Attorney's Fees Costs rather than deny Defendant's Motion for Reconsideration of and to Vacate Order on Attorney's Fees and Costs.

Since the issue of whether or not holding a hearing on the amount of Attorney's Fees and Costs prior to the resolution of this appeal is within the trial Court's jurisdiction would be one of first impression in New Hampshire, the trial Court should have vacated the Order of Attorney's Fees and Costs and allowed the Defendants an opportunity to respond.

Clearly, from the record, the Defendants believed that the filing of the Notice of Appeal would have prevented the trial Court from acting upon the Plaintiffs Affidavits of Attorney's Fees and Costs. App. 135. It is also clear from the record that the Defendants disagree with all aspects of the Final Order, including the award of Attorney's Fees and Costs. App. 149, 155. To the extent the Defendants may have been in error as to its need to respond to the filing of the Affidavits, due to the uniqueness of the procedural issue, justice required a vacation of the Order to allow the Defendants time to fully respond.

New Hampshire courts have long recognized that they had the authority to afford new proceedings where "justice has not been done through any accident, mistake or misfortune" when "further hearing would be just and equitable." *Chase v. Brown*, 32 N.H. 130, 131 (1855). It is unjust and inequitable for the trial Court to simply award the Plaintiffs fees based upon the submissions by Attorney Whittum and Attorney Potvin because the Defendants believed that further proceedings on the issue had been stayed by its filing of the NOA.

Further, the Final Order provided the Plaintiffs with thirty (30) days to compile and submit their Affidavits but did not state a deadline for the City to respond. App. 107. Generally, the Defendants should have been allowed at least thirty (30) days to respond to the submissions made by the Plaintiffs. The submissions by the Plaintiffs were not a Motion, so the ten (10) day response deadline outlined in Rule 13 (a) would not apply. The submission by the Plaintiffs is more akin to a Complaint itself which Rule 9 (a) provides a respondent thirty (30) days from the date of service to Answer. The Plaintiffs filed their Affidavits on January 12, 2018. App. 115. The trial Court issued its Order on Attorney's Fees on January 29, 2018. App. 132.

Regardless, justice and due process require that the Defendants should have been notified of a deadline to respond and should have been notified that the trial Court did not believe that the NOA removed the issue from its jurisdiction. The Defendants provided the trial Court with a copy of the NOA as required by Supreme Court Rule and the trial Court references it in its Order on Fees. App. 133. The trial Court was also aware the Defendants had previously objected to the granting of Attorney's Fees and Costs. App. 88.

Vacating the Order and allowing the Defendants time to adequately respond would, in no way, prejudice the Plaintiffs. Simply put, the Plaintiffs cannot collect on any such award until disposition of this Appeal. On the other hand, the Defendants would be greatly prejudiced were the Order to remain as the Defendants are confident

that, after fully vetting the Affidavits submitted, any such award would be considerably less than those claimed.

D. The Trial Court Erred in Granting Attorney's Fees and Costs Without Conducting the Required Analysis

In granting Attorney's Fees and Costs, the trial Court is required to conduct a specific analysis of the submitted fee claim. Attorney's Fees and Costs are determined using the following guiding factors:

> [T]he amount involved, the nature, novelty, and difficulty of the litigation, the attorney's standing and skill employed, the time devoted, the customary fees in the area, the extent to which the attorney prevailed, and the benefit thereby bestowed on his clients.

Funtown USA v. Conway, 129 N.H. 352, 356 (1987).

Even absent an objection by the Defendants, the trial Court should have conducted the required analysis; it did not. Had the trial Court conducted a *Funtown USA* review of the submitted fees, the fees would have been substantially reduced as follows:

This case was in no ways "novel." It was a straightforward claim that the facts matched those in *Irwin Marine*, a thirty-three year old case, and, therefore, the result of *Irwin Marine* should apply here.

The "facts" in this case in terms of real time, occurred in no more than one and a half to two hours total, and were about four actual "events." There was not a substantial amount of discovery. In fact, the Plaintiffs submitted no interrogatories and conducted no depositions. On top of that, the Plaintiffs only filed their Automatic Disclosures after being prompted by the Defendants by way of letter on August 1, 2016, in which the Defendants demanded the same. App. 69. As stated below, the facts were largely undisputed at trial and were again largely provided by the Defendants' witnesses.

In terms of the extent to which the attorney prevailed, the Plaintiffs lost the Motion to Dismiss filed by the Defendants, the Plaintiffs lost their Motion for Summary Judgment, the Defendants were partially successful on its Motion for Summary Judgment, the Defendants were successful in their Motion to Disqualify Attorney Whittum, and the Defendants were successful in their Motion Regarding Damages. App. 28, 51, 68, 79. When you lose, you do not receive attorney's fees. It is particularly acute when you are the Plaintiffs and have drug another party into Court and that party successfully defends itself. "When a party prevails upon some claims and not others, and the successful and unsuccessful claims are analytically severable, any fee award should be reduced to exclude time spent on unsuccessful claims." *LaMontagne Builders, Inc. v. Brooks*, 154 N.H. 252, 261 (2006).

As to both the Motion to Disqualify Attorney Whittum and the Motion to Disqualify Attorney Potvin, the Defendants were obligated to file those motions under Rule 8.3 of the rules of Professional Conduct. App. 64, 70. The Defendants successfully moved to disqualify Attorney Whittum and still maintains the belief that Attorney Potvin has a conflict with concurrent client John Weeden. App. 68. Mr. Weeden was on the Plaintiffs' witness list and Plaintiffs indicated he would testify at trial that he too was mistreated by the City. Mr. Weeden, therefore, may have also had a meritorious claim against the Defendants equal to or superior to that of the Plaintiffs. These fees were self-created by the Plaintiffs. The Defendants are not obligated to pay Attorney's Fees or any charges related to these Professional Conduct issues because the Defendants' efforts were related to the preservation of the profession itself, an issue totally unrelated to the underlying matter.

After successfully disqualifying Attorney Whittum, both Attorney Whittum and Attorney Potvin make fee claims as part of the transfer of the case. App. 115. That hardship was completely self-created by the Plaintiffs and is not susceptible to recovery.

Both Attorney Whittum and Attorney Potvin claim numerous hours working on this case outside those already discussed above. The Defendants have serious objections to the Affidavits submitted. Had the Defendants been given an opportunity to respond, it would have hired an expert witness on the issue of the reasonableness of the fees and contested them in a hearing. Both Attorneys have been members of the bar for many years. As stated above, the legal precepts which governed this case were straightforward from Plaintiffs point of view: does *Irwin Marine* apply or does it not? As to the facts, they were largely uncontested. For two experienced litigators, the amount of time claimed does not seem reasonable and the Defendants should have an opportunity to challenge such an assertion.

Circumstances and justice require that the Order be vacated and a hearing be scheduled in order to fully vet the claims made by Attorney Whittum and Attorney Potvin, and for the trial Court to conduct the analysis as to the reasonableness of the claimed fees required by *Funtown USA* and to make findings of fact to substantiate any award ultimately granted by the trial Court.

IV. TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF PLAINTIFFS

In its Final Order granting judgment in favor of the Plaintiffs, the trial Court held that the City violated and improperly amended the Conditions of Sale by not awarding the Property to the Plaintiffs as the highest bidding abutter and by imposing a restrictive covenant regarding mobile home park development or expansion as a condition of sale to the Plaintiffs. App. 101. While the Defendants maintain their previous argument, that since the Plaintiff's Complaint did not contain the cause of action, supporting facts and theory of relief argued at trial, the trial Court should not have allowed Plaintiffs to proceed with such an argument nor subsequently ground its decision on the same, the Defendants also submit that there was not sufficient evidence presented at trial to support the only cause of action that was before the trial Court; that the transfer by the City to the non-highest bidder violated the Conditions

of Sale. The trial Court erred in granting Declaratory Judgment and Injunctive Relief in favor of the Plaintiffs.

To justify declaratory relief, present right of the plaintiff must be subjected to an adverse claim. *Gitsis v. Thornton*, 91 N.H. 192 (1940). The Court will not issue declaratory judgment unless the plaintiff demonstrates a present legal or equitable right and an adverse claim that is "definite and concrete touching the legal relations of parties having adverse interest." *Delude v. Town of Amherst*, 137 N.H. 361, 363-64 (1993).

There is no dispute that the Plaintiffs were the highest bidder. App. 8. However, the City was not required to sell to the highest bidder. Nowhere in the Notice of Sale or Conditions of Sale did the City indicate it would sell the Property to the highest bidder. App. 1. The Deputy City Manager testified at trial that such language is not included, intentionally, in the Notice of Sale or Conditions of Sale because there are a number of other conditions to the sale and the highest bidder may not be able to meet all of those conditions. Tr. Trans. 147. The City was required to sell the Property to the successful bidder only.

The Notices of Sale and Conditions of Sale required the bidders to indicate their intended use. App. 1. One of the potential intended uses indicated by the Plaintiffs was to expand their manufactured home park. App. 11. Mayor Jean testified that the City had exerted years of effort to adopt a new zoning and manufactured home park ordinance that did not allow manufactured home park development or expansion without a variance. Tr. Trans. 221-23. In its discussions, the City Council determined that, while the highest bidder, the Plaintiffs' potential intended use would violate the ordinance and therefore would not be in the best interest of the City. Tr. Trans. 224-26. However, rather than rejecting the Plaintiffs highest bid outright, the City Council considered it further.

The City could have sold the Property to the Plaintiffs without further discussion; however, Mayor Jean testified that he believed it would have been unfair

to sell the Property to them without first confirming they were aware of the ordinance and that they would not be allowed to build or expand their manufactured home park onto the Property. Tr. Trans. 225-26. The Mayor wanted to be forthcoming with the Plaintiffs. The City decided it would offer the Plaintiffs the Property with a covenant restricting manufactured home parks. Tr. Trans. 252-56. In doing so, the City was attempting to be up front with and fair to the Plaintiffs and was perfectly within its rights and within the Notice of Sale to require the Plaintiffs to conform to the Zoning Ordinance.

The Notice of Sale indicated that the City reserved the right to refuse any and all bids if not in the best interest of the City. App. 1. While selling to the Plaintiffs who were considering a use which the City determined would not be in its best interest, the City still offered the Plaintiffs the Property but with a restrictive covenant. The Plaintiffs rejected the offer. In turn, the City sold to the next highest bidder whose use was not against the best interests of the City.

The fact that the City offered the Property to the Plaintiffs with a restrictive covenant was not an issue before the trial Court as it was not plead in the Complaint. The Complaint before the trial Court had one remaining cause of action: was the transfer by the City to the non-highest bidder a violation of the Conditions of Sale? No, because the City DID offer the Property to the Plaintiffs. They declined. App. 66, 294.

The Plaintiffs have not shown what present legal or equitable right would entitle them to the trial Court issuing declaratory judgment when they were offered the opportunity to purchase the Property, through counsel, but rejected it. When the Plaintiffs rejected the opportunity to purchase the Property with the restrictive covenant, the City was within its rights to reject their bid as not being in the best interest of the City and offering the Property to the next bidder whose intended use complied with the Zoning Ordinance. The Plaintiffs have no meritorious claims

against the City or the Philbrooks and no "present legal or equitable right" to the relief they seek and which they were granted by the trial Court.

CONCLUSION

WHEREFORE, The Defendants respectfully request that this Honorable Court vacate the trial court's Order granting the Plaintiffs declaratory judgment, injunctive relief and attorney's fees and remand this case for proceedings consistent with the Honorable Court's Order. Pursuant to Supreme Court Rule 16, (3) (i), the City has included the trial Court's Final Orders as part of this Brief.

REQUEST FOR ORAL ARGUMENT

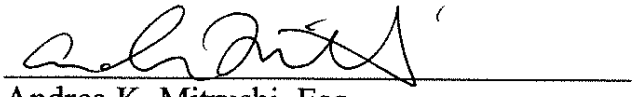
Undersigned counsel requests fifteen (15) minutes for oral argument before this Court.

Respectfully submitted,

THE CITY OF ROCHESTER, et al

By and through their attorney,

Dated: October 19, 2018



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of the Plaintiff has been delivered this 19th day of October, 2018 to Plaintiffs' Counsel:

Carol Potvin, Esq.
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Rochester, NH 03866

Andrea K. Mitrushi, Esquire

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Strafford Superior Court
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Dover NH 03820

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

Case Name: Donald Toy, et al v City of Rochester, et al
Case Number: 218-2016-CV-00458

Enclosed please find a copy of the court's order of November 30, 2017 relative to:

Order on the Merits

December 14, 2017

Kimberly T. Myers
Clerk of Court

(277)

C: Donald F. Whittum, ESQ; Terence M. O'Rourke, ESQ; Andrea K Mitrushi, ESQ; Carl William Potvin, ESQ

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

Donald and Bonnie Toy

v.

City of Rochester

and

Michael G. and Stacey A. Philbrook

Docket No.: 219-2015-CV-00458

ORDER ON THE MERITS

The plaintiffs Donald and Bonnie Toy ("the Toys") seek a declaratory judgment and injunctive relief against the defendants City of Rochester ("the City") and Michael and Stacey Philbrook ("the Philbrooks"),[1] requiring the defendants to transfer title to a parcel of land in Rochester to the Toys pursuant to the Conditions of Sale of an advertised sealed bid process. The court conducted a bench trial on July 13 and 14, 2017. Upon consideration of the evidence presented at the trial, the parties' arguments, and the applicable law, the plaintiffs' petition is GRANTED. Consistent with this Order and the Notice of Sale and Conditions of Sale, the defendants are ordered to convey title to the parcel by quitclaim deed to the plaintiffs upon payment to the City by the plaintiffs of their bid amount. The plaintiffs' motion for attorney's fees is GRANTED.

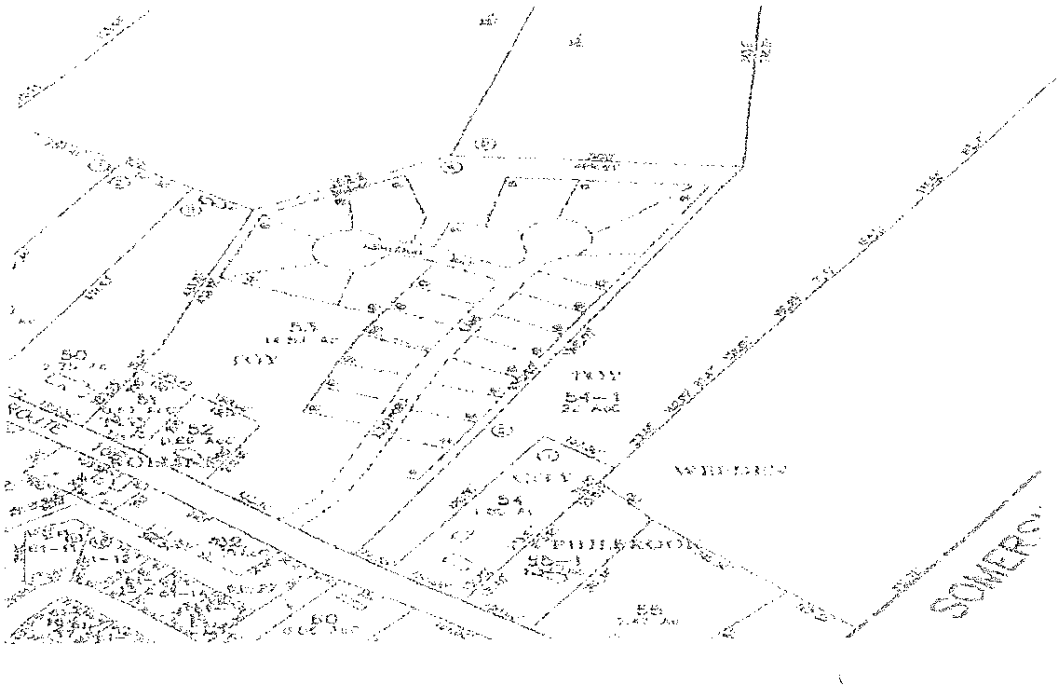
[1] The complaint alleges that Michael's and Stacey's last name is "Philbrick," (Compl. ¶ 3); however, it appears that their last name is actually spelled "Philbrook." There is no dispute that they are the properly named parties to this suit.

FACTS

Based on the evidence presented at trial, and upon the court's assessment of the credibility of the witnesses and the reliability of the evidence, the court finds the following facts.

The Subject Parcel – The Richardson Lot

The parcel of land at issue in this case is the so called Richardson lot located at 422 Old Dover Road (also known as Route 16B) in Rochester. The Richardson lot is identified as Lot 54 on Tax Map 256 and consists of 1.8 acres, more or less. (See Fig. 1. below). The Richardson lot has 150' of frontage on Route 16B on the southwesterly boundary line.



[Figure 1: Pltf. Ex.6, page 5 (excerpt)]

The Abutters

The Toys own three parcels on Old Dover Road to the northwest of the Richardson lot. They own Lot 53, which consists of 14.57 acres, more or less, and is comprised by a manufactured home development known as Addison Estates on Alexandria Drive. (See Fig. 1). They also own lot 51, which is approximately a half acre to the southwest of lot 53 and borders Route 16B. On or about August 14, 2015, the Toys took title to Lot 54-1, which is immediately to the southeast of Addison Estates and shares common boundaries with the Richardson lot. (Ex. 4; See Fig. 1). Lot 54-1, consisting of 22 acres, more or less, is commonly referred to as the Sullivan lot. Defendants Michael and Stacey Philbrook own Lot 55-1, which abuts the Richardson lot along its southeasterly border and is comprised by 1.34 acres, more or less. (See Fig. 1).

Notice of Sale of Lot 54

By tax deed dated May 5, 2015 and recorded in the Strafford County Registry of Deeds on May 14, 2015, at Book 4292, Page 0608-09, the City took record title to the Richardson lot. (Ex. 1). Thereafter, on August 4, 2015, the City Council voted to sell the property by way of an advertised sealed bid process. (Ex. 16 at 7; *see* Ex. 14, City Ord. Ch. 4, § 4.4(a) (Sale of Tax Deeded Property)); *see also* RSA 80:80. On or before August 10, 2015, the City posted a bid package, including Notice of Sale and Conditions for Sale for the Richardson lot on the City's public website. (Ex. 2). The Notice of Sale provided the street address and tax map designation of the Richardson lot, as well as its assessed value. (Id. at 2). The Notice of Sale announced that "[s]ealed bids will be accepted until 2:15 p.m. on Thursday, August 27, 2015" at the business office of City hall. The bids were to be opened and read aloud publicly at 2:30 p.m. the same day.

The Notice of Sale provided that all bids must be submitted with a deposit of $500 in the form of cash or bank check. In addition, the "successful bidder" would be responsible financially for the purchase price, deed preparation, recording, and legal services incurred by the City, as well as any costs customarily incurred by a real estate buyer. (Id.). The City reserved the right to hold the bids for up to 45 days to evaluate them and determine rights of first refusal as set forth in the Conditions of Sale. Upon notification, the "successful bidder" would have 60 days to close. (Id.). With regard to the content of a bid, the Notice of Sale required that "[e]ach bidder . . . note on the Bid Form their intended use of the property, i.e., owner occupied single family residence, absorption into adjacent lot, etc." The declaration of intended use required no further specificity or greater clarity of purpose. Finally, the Notice of Sale reserved to the City "the right to reject any and all bids and waive any minor or nonmaterial informalities, if deemed to be in the best interests of the City." (Id.).

Conditions of Sale

Together with the Notice of Sale to the public, the City identified and posted publicly certain Conditions of Sale. The Conditions of Sale repeated or expounded upon some of the information set forth in the Notice of Sale, and set a minimum bid of $30,000. In addition, Paragraph 6 the Conditions of Sale specifically informed the public:

> Abutters (i.e. those whose property lines touch upon the property line of the property being sold) who bid on the parcel will have the right of first refusal at the highest bid price. In the case of more than one abutter having bid on the property, the right of first refusal will . . . be assigned . . . in order of the highest to lowest bid of any other abutters who may have bid on the parcel.

(Ex. 2 at 3, ¶ 6). With regard to any warranties made by the City regarding the property, the Conditions of Sale provided that the City would convey title by "Quit Claim Deed" (Id., ¶ 10), and further:

> The property is being sold in "As Is" condition. The City makes NO WARRANTY of any information contained herein. The parcel is being sold without warranty as to suitability for building, the ability to gain any desired regulatory approval from the City (i.e. zoning compliance), or the absence of any environmental hazard. The property is being sold as a tax deeded property without any warranties or guarantees regarding chain of title or condition of the real estate. Bidders are responsible for performing their own due diligence appropriate to the purchase of any real estate.

(Id., ¶ 8). Neither the Notice of Sale nor the Conditions of Sale informed bidders that the City reserved the option to convey title to the successful bidder with restrictive covenants limiting or prohibiting future uses of the property

The Bids

On August 12, 2015, the Toys submitted a bid on the subject property of $45,500. (Ex. 3). Their Bid Form stated that their intended use of the property was "[t]o annex the property to abutting property owned by Donald and Bonnie Toy (Tax Map 54-1)." (Id.). The Toys' bid was significantly higher than any other bid. The next highest bid of $36,200 was submitted by a non-abutter who intended to "rehab single house and garage." (Exs. 6 and 7). The third highest bid of $35,800 was submitted by John Weeden, an abutter who indicated an intent to "absor[b] into an adjacent lot." (Id.). Another non-abutter bid $31,500 and proposed to utilize the property for "single family residence." (Id.). Finally, the overall lowest bid was submitted by the Philbrooks, who bid $31,000 and, like the Toys and Weeden, stated their intent to "[a]dd this abutting land to his land." (Id.). At some time after the bid closing on August 27, 2015, the City determined that the Toys submitted the highest bid on the subject property. (Ex. 9, ¶ 5).

City's Review of the Bids

The City's Finance Committee convened a meeting on September 8, 2015, and discussed the bids in non-public session. (Ex. 6 at 1); *See* RSA 91-A:3, II(d)(non-public session permitted under "Right to Know" law when governmental body considers "the acquisition, sale, or lease of

real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community"). Deputy City Manager Blaine Cox prepared a memorandum dated September 7, 2015, in which he summarized the bids for the purpose of providing the City Council with "guidance . . . as to preferred bidder based upon price, intended use, etc." (Ex. 6 at 3 (original text of memorandum in black). During the non-public session, Mayor Jean "directed Mr. Cox to contact the abutters and solicit more details on their intended uses of the property." (Id. at 1). According to Mayor Jean's testimony, his directive was motivated by a concern that the Toys were not aware that the City had removed mobile home parks as a permitted use from the zoning ordinance, and no longer allowed expansion of existing mobile home parks.

According to his updated memorandum, Cox contacted the Toys' attorney, Donald Whitturn, who explained that "Mr. Toy had not decided exactly what he wanted to do with the property. . . '[h]e might put a single family home on the property to simply make the entrance to Addison Estates more attractive. Or he might combine it with the Sullivan parcel he just purchased in order to expand Addison Estates." (Ex. 6 at 2 (updated text in red)).

Cox also spoke with defendant Michael Philbrook, who stated that he did not intend to merge the lot with his existing lot "unless it would guarantee the City would sell it to him. He wanted to keep it a separate lot to allow him to build a single family home on it sometime in the future." (Id. at 3). In addition, Cox reported in his updated memorandum that Mr. Philbrook also said that he "could not afford to match Mr. Toy's high bid of $45,500, but that he could probably match second bidder's price of $36,200." (Id.). Cox testified that he could not specifically recall asking Mr. Philbrook whether Philbrook could meet the highest bid price, but

he indicated that he may have asked him. Cox agreed that Philbrook's offer to buy at the second highest bid price was effectively another bid.

In connection with his further inquiry into the Toys' intended use of the property, Cox asked the city planner and the zoning administrator if the Toys could expand his existing mobile home park as a result of purchasing the Richardson lot. (Ex. 6 at 3). Both agreed that the Toys could not expand his existing mobile home park onto the Richardson lot without a variance. (Id.). Cox responded with a question whether it would make a difference if the Toys merged the Richardson lot with their existing lots. The zoning administrator responded that he was unaware of any provision that would specifically allow expansion based on a lot merger. (Ex. 6 at 4). The City Attorney agreed that the Toys could not "expand a non-conforming use just by attempting to enlarge his property." (Id.).

During a non-public session of the City Council on September 15, 2015, Cox presented the additional information from the abutters regarding their intended use. He also informed the Council of Philbrook's offer to purchase the property for the second highest bid. The City Council reached a "consensus" during the non-public session that the City would sell the Richardson lot to the Toys so long as the Toys agreed to a restrictive covenant in the deed prohibiting the Toys from ever using the Richardson lot for mobile home park development or the expansion of Addison Estates.[2] The City Council concluded that if the Toys would not accept the restrictive covenant, then the City would sell the property to the Philbrooks for the higher amount he had offered. According to the minutes of the September 15, 2015, meeting, Mayor Jean directed the City Attorney to contact Attorney Whittum and inform him that the city

[2] There was conflicting testimony regarding whether the City Council intended the restrictive covenant to apply only to the Richardson lot, or whether the City Council was seeking a stipulation from the Toys that they not expand Addison Estates on to the Sullivan lot as well. In light of the court's decision that the imposition of the restrictive covenant improperly altered the Conditions of Sale, this conflict need not be resolved.

ordinances would not allow expansion of Addison Estates, and "that the City may insert a deed restriction stipulating the same." (Ex. 8).

The City Imposes a Restrictive Covenant as a Condition of Sale to the Toys

City Attorney O'Rourke testified that he contacted Attorney Whittum the next day and told him that the City would sell the property to the Toys with a restrictive covenant that no manufactured home park would ever exist on the property. Attorney O'Rourke also testified that he informed Attorney Whittum that manufactured home parks are no longer allowed in the City. Attorney O'Rourke testified that he asked Attorney Whittum if the Toys would accept the property with the restrictive covenant. Attorney O'Rourke testified that Attorney Whittum said no.[3] The court finds that the Toys were not informed by the City that they were the highest bidders on the property.

On October 6, 2015, the City Council met in closed session with Attorney O'Rourke to discuss the subject property. Attorney O'Rourke informed the City Council of his conversations with Attorney Whittum. The City Council considered these conversations a rejection of its offer to the Toys to sell the Richardson lot subject to a restrictive covenant against mobile home parks. As a result, the City Council directed Attorney O'Rourke to sell the subject property to the Philbrooks for the increased amount the Philbrooks offered to Cox. The uncontradicted testimony established that the City Council never conducted a vote on the sale of the property.

[3] Attorney Whittum and Attorney O'Rourke offered conflicting testimony as to the content and number of conversations they engaged in regarding the property. Most of the conflicting testimony is not material to the court's decision because the court accepts Attorney O'Rourke's testimony that he, on behalf of the City, conditioned any sale of the Richardson lot to the Toys on the acceptance of a restrictive covenant regarding development or expansion of a mobile home park onto the lot.

A week later, on October 13, 2015, Attorney O'Rourke conducted a closing on the sale of the Richardson lot to the Philbrooks. The Philbrooks paid $36,200 for the property, a price substantially lower than the highest bid of $45,500. Attorney O'Rourke testified candidly that he was not familiar with the Conditions of Sale prior to the closing. He prepared a warranty deed from the City to the Philbrooks by "cutting and pasting" the property description into a warranty deed from a prior sale of property to the City. The warranty deed conveyed to the Philbrooks did not contain any restrictive covenants regarding manufacturing home parks or otherwise.

In mid-October 2015, Mr. Toy learned from an acquaintance that in fact he had been the highest bidder on the subject property, but that the property had been sold to another bidder. Mr. Toy contacted Attorney Whittum to confirm this information. Attorney Whittum then checked the Strafford County Registry of Deeds and discovered the October 13, 2015 conveyance to the Philbrooks. He subsequently informed the Toys of the conveyance.

By letter to the City Manager dated October 15, 2015, Attorney Whittum demanded that the City award the property to the Toys as the highest bidders. (Ex. 11). Attorney O'Rourke responded on October 20, 2015, that the Toys' "bid was rejected by the City" and the property was sold to another bidder. (Ex. 12). Although Attorney O'Rourke stated in his letter that the City had rejected the Toys' bid, in his testimony he stressed that the City considered the Toys' unwillingness to accept a restrictive covenant in the deed as a rejection by the Toys of the City's offer to sell the property to them. There was no evidence presented that the City actually rejected the Toys' bid, or what the City deemed to be in its best interests if it in fact had rejected the Toys' bid.

ANALYSIS

The court finds and rules that the City's failure to award the property to the Toys as the highest bidding abutter, and imposing a restrictive covenant regarding mobile home park development or expansion as a condition of sale to the Toys, violated the Conditions of Sale and improperly and materially amended the Conditions of Sale with regard to the Toys. Our Supreme Court has said that "[a]s a general rule, absent a competitive bidding statute, cities and towns are free to exercise discretion in determining what property to sell and how to sell it." Irwin Marine, Inc. v. Blizzard, Inc., 126 N.H. 271, 275 (1985). This discretion, however, is not boundless. See Id. The Supreme Court has held that "a municipality's discretion in matters concerning the sale of public property, even absent a statute, must be bounded by notions of fairness in order that the public interest and public confidence in governmental actions be upheld." Id. (citations omitted). Accordingly, the Supreme Court has held that a municipality generally must accept the highest bid "which conforms to the terms of the auction sale . . . ." Perry v. West, 110 N.H. 351, 355 (1970) (citations omitted). Furthermore, "[b]oth the City and the public [are] entitled to rely upon the terms of the auction sale." Id. Examples of municipal conduct indicating unfairness in the proceedings include "unfair advantage afforded to one bidder to the detriment of another and inadequate notice of subsequent developments to parties relying in good faith on a municipality's prior notice." Irwin Marine, Inc., 126 N.H. at 275–76 (upholding trial court's invalidation of municipal sale when city failed to provide plaintiff with notice that it rejected its bid and opened a second round of bidding); Perry, 110 N.H. at 352–55 (action to set aside municipal sale by highest bidder disputing whether form of deposit conformed to terms of auction sale).

Where, as here, the City has adopted competitive bidding provisions,[4] the Supreme Court requires "strict compliance with the municipal scheme . . . ." Marbucco Corp. v. City of Manchester, 137 N.H. 629, 633 (1993)(*quoting* Gerard Construction Co. v. City of Manchester, 120 N.H. 391, 415 (1980)). Citing Irwin Marine, the Marbucco Court directed that a municipality is "required to treat all bidders fairly and equally." Marbucco Corp., 137 N.H. at 633 (*citing* Irwin Marine, 126 N.H. at 275)). Indeed, in both the public contract and sale of publicly held real estate contexts, our Supreme Court has stated unequivocally that it is "essential that the bidders, so far as possible, be put on terms of perfect equality, so that they could bid on substantially the same proposition and on the same terms." Marbucco Corp., 137 N.H. at 633(*quoting* 10 E. McQuillin, Municipal Corporations § 29.52, at 436 (3d Ed. Rev.1990)); Rich v. Town of Enfield, et al., No. 2005-0468, 2006 WL 8418239 at *1 (N.H. June 8, 2006).

In this case, the City elected to utilize an advertised sealed bid process to sell the Richardson lot. The City posted a bid package that included among other things the Notice of Sale and Conditions of Sale. The Notice of Sale and Conditions of Sale, read together, afforded preferential treatment to abutters. The City promised that abutters would have the right of first refusal at the highest bid price. This condition clearly means that an abutter whose bid was not rejected in the best interests of the City, which the Toys' bid was not rejected, would be able to buy the property at the highest bid price. Since the Toys were both abutters and the highest bidders, and their bid was not rejected, they were entitled to the property.

[4] With regard to the sale of tax deeded property pursuant to RSA 80:80, the City has adopted an ordinance authorizing the City Manager to sell tax deeded property "provided, however, that a public auction and/or advertised sealed bid sale is held, and the results of said public auction and/or sealed bid sale are confirmed by a majority vote of the City Council." (Ex. 14, City Ord. Ch. 4, § 4.4(a) (Sale of Tax Deeded Property). The ordinance further authorizes the City Manager to "establish a minimum amount for which the property is to be sold and of the terms and conditions of sale." (Id.). Having elected to conduct an advertised sealed bid sale pursuant to terms and conditions of sale established by the City Manager, the City was bound to follow those conditions of sale.

Further, the Notice of Sale and Conditions of Sale made no mention that the City reserved any type of right or option to convey the property with a restrictive covenant limiting the acceptable intended use, or future use and marketability of the property. Instead, the City specifically notified potential bidders that the property was being sold in an "As Is" condition. The City expressly stated in the Conditions of Sale that it was making no warranty "as to suitability for building, the ability to gain any desired regulatory approval from the City (i.e. zoning compliance), or the absence of any environmental hazard."

Based on the Conditions of Sale, and the absence of any other conditions, the Toys, like the other bidders, had a right to expect that the City would treat them equally and fairly when reviewing their bid. The City clearly did not treat the Toys equally and fairly here. Even though they were the high bidders and abutters, the City imposed on them a restriction after the fact that they would only receive the property if they agreed to a restrictive covenant – a covenant that would run with the land and forever affect the land's future use and marketability -- not to use the property for the development or expansion of a manufactured home park. Indeed, the City's demand for a restrictive covenant regarding manufactured home parks was directly contrary to its representation in the Conditions of Sale that it would make no warranty as to the ability to gain any desired regulatory approvals. For the Toys, the City was insisting on a condition of sale that would prohibit the Toys from even applying for a desired regulatory approval, i.e. a variance from the expansion of a non-conforming use.

No other bidder was subject to the same condition of sale. Indeed, the City sold the property without the restrictive covenant to the Philbrooks. The Philbrooks do not have the same restriction on their use of the property, and do not have a cloud on the future marketability of the property affecting its value. In other words, the Toys were not bidding on the same property and

on the same terms as the other bidders. The Toys were not treated with near perfect equality. If the City wished to sell the property with a restrictive covenant, then it needed to advise the bidders in the Conditions of Sale of its intention to do so. To impose the condition after the fact against only one bidder was clearly contrary to law and the City's promise in its own bid procedures that it would follow the publicly posted Conditions of Sale.

The City relies heavily on the language in the Notice of Sale that it "reserve[d] the right to reject any and all bids . . . if deemed to be in the best interests of the City." First, the City presented no evidence in defense that it rejected the Toys' bid because it in fact deemed the Toys' bid not to be in the best interests of the City. Indeed, the City's attorney, when asked on cross examination if the City had rejected the Toys' bid, testified only that the Toys had rejected the City's offer to sell the property to them with the restrictive covenant. In other words, the City did not reject the Toys' bid; the City accepted the bid and then imposed a new condition of sale through the restrictive covenant.

Second, any potential argument by the City that its best interests were served by demanding a restrictive covenant is wholly belied by the fact that it sold the property without a restrictive covenant. In fact, there is no evidence that the City even suggested to the Philbrooks that they would have to accept a restrictive covenant. As the City Attorney acknowledged in his testimony, because the City did not impose a restrictive covenant on the Philbrooks, there is nothing preventing them from selling the property to the Toys or Weeden and either the Toys or Weeden seeking a variance to expand their mobile home parks on to the property.

Equitable Relief

Based on the foregoing, the Toys petition for a declaratory judgment and injunctive relief is granted and the court orders the following:

A. The City shall forthwith reacquire title to the subject parcel from the defendants Philbrooks;

B. The City shall immediately thereafter transfer the subject parcel by quitclaim deed to the Toys;

C. The Toys shall pay the bid amount, and all other costs and expenses identified as the responsibility of the successful bidder in the Notice of Sale and Conditions of Sale, to the City simultaneously with the transfer.

D. In the alternative to the foregoing relief, the parties may elect by agreement to convey title to the Toys in any other manner that accomplishes the same purpose.

Request for Attorney's Fees

Upon review, the Toys' motion for attorney's fees is GRANTED. The court finds that the Toys had a clear right to a conveyance of title to the subject parcel as the successful bidder because they were the highest bidding abutter with a bid conforming to the Notice of Sale and Conditions of Sale. The court finds and rules that the Toys' successful litigation against the City conferred a substantial benefit both to the Toys and to the citizens and taxpayers of Rochester. Irwin Marine, Inc. v. Blizzard, Inc., 126 N.H. 271, 276-77 (1985). In the court's view, the City's failure to adhere to its own Conditions of Sale by not awarding the property to highest bidding abutter, and its improper amending of the Conditions of the Sale after the fact against the Toys, are alone sufficient reason to award attorney's fees under Irwin Marine.

However, in this case, the City's departure from the Notice of Sale and Conditions of Sale in other areas not directly affecting the Toys, substantially impacts the public's confidence in the administration of public affairs by the municipality. *See* Irwin Marine, 126 N.H. at 277. For example, the City's Conditions of Sale required an abutter exercising the right of first refusal

to pay the highest bid price. The City sold the property to the Philbrooks for the second highest bid of $36,200. Not only was this directly contrary to the Conditions of Sale, it cost the taxpayers of Rochester $9,300 on the sale of its publicly held property. Moreover, the City permitted the Philbrooks in effect to submit a second bid by offering to buy the property at the second highest bid price.

In addition, the City Council never voted on the sale, as required by Chapter 4, § 4.4(a), of the City Ordinance. (Ex. 14). The ordinance requires confirmation of the results of the sealed bid sale by majority vote of the Council. Presumably, the purpose of this requirement is to insure the regularity of the process. Although several City officials testified that there was "consensus" among the Council in non-public session, the results were never confirmed by majority vote.

Finally, in direct contravention of the Conditions of the Sale, the City conveyed title to the Philbrooks by warranty deed. The Conditions of Sale informed the public that title would be conveyed only by quitclaim deed, with no warranties as to the quality or marketability of the title. The Philbrooks received full warranty title from the City.[5] Based on the testimony of both Attorney Whittum and Attorney O'Rourke, this was no trivial matter. Attorney Whittum had performed his own research into the title of the Richardson lot prior to the City taking the property for taxes, and was concerned about possible Richardson heirs claiming an interest. The City commissioned an outside law firm to investigate possible heirs. If any heirs were to come

[5] The court accepts the City Attorney's testimony that it was his error in preparing a warranty deed instead of a quitclaim deed. The court does not accept the plaintiffs' suggestion that the warranty deed was negotiated between the City and Philbrooks in exchange for the Philbrooks' increased offer from $31,000 to $36,200. Although circumstantially the plaintiffs' suggestion would otherwise makes sense, there is no direct evidence of such a bargain between the City and the Philbrooks and the court finds that no such bargain occurred. Although the conveyance of the warranty deed was more in the nature of negligence than a simple error (the City Attorney acknowledged that he did not review the Conditions of Sale prior to conveying title), there is no evidence that the conveyance of a warranty deed was intentional.

forward with a claim against the title, or if any other claim were made, the City would be obligated to defend the title it conveyed to the Philbrooks.

Based on the foregoing, an award of reasonable attorney's fees is appropriate in this case. In the absence of an agreement between the parties as to the amount of fees, plaintiffs' counsel is directed to file with the court an itemized request, verified by affidavit, within thirty (30) days of the date on the Clerk's Notice of Decision. Taxation of costs shall be determined in the ordinary course pursuant to Super. Ct. Cv. R. 45.

So Ordered,

Date: November 30, 2017

Mark E. Howard
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Strafford Superior Court
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NOTICE OF DECISION

FILE COPY

Case Name: **Donald Toy, et al v City of Rochester, et al**
Case Number: **219-2015-CV-00458**

Please be advised that on January 12, 2018 Judge Howard made the following order relative to:

Respondents City of Rochester and Michael G. Philbrook and Stacey A. Philbrook Motion for Reconsideration; "Upon review, the City has not demonstrated that the court overlooked or misapprehended points of law or fact necessitating reconsideration. Motion denied."

January 16, 2018

Kimberly T. Myers
Clerk of Court

(277)

C: Donald F. Whittum, ESQ; Terence M. O'Rourke, ESQ; Andrea K Mitrushi, ESQ; Carl William Potvin, ESQ

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NOTICE OF DECISION

FILE COPY

Case Name: **Donald Toy, et al v City of Rochester, et al**
Case Number: **219-2015-CV-00458**

Please be advised that on March 08, 2018 Judge Howard made the following order relative to:

Objection to Plaintiffs Affidavit for Attorney's Fees and Costs, Motion for Reconsideration of and to Vacate Order on Attorney's Fees and Costs; "Upon review, motion denied. This court had jurisdiction over the attorney's fees issue as a collateral matter, which the City clearly did not appeal. The City filed no timely response to the request for fees. The court engaged in the appropriate analysis in finding the awarded fees reasonable. So ordered."

March 22, 2018

Kimberly T. Myers
Clerk of Court

(277)

C: Donald F. Whittum, ESQ; Terence M. O'Rourke, ESQ; Andrea K Mitrushi, ESQ; Carl William Potvin, ESQ