# State of New Hampshire
# Supreme Court

NO. 2008-0758

2009 TERM

JUNE SESSION

Town of Wakefield

v.

Donald McMullin

RULE 7 APPEAL OF FINAL DECISION OF
SOUTHERN CARROLL COUNTY DISTRICT COURT

BRIEF OF DEFENDANT/APPELLANT, DONALD McMULLIN

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## QUESTIONS PRESENTED

1. Did the court err in finding Mr. McMullin in violation of Town Ordinance and State statute, in fining him for the violations, and in ordering corrective action based on the violations, when the evidence was insufficient to show any violations?

   Issue preserved: Transcript, *passim*; ANSWER TO "CEASE AND DESIST ORDER" (undated), *appx.* at 11; MEMORANDUM (undated), *appx.* at 13; MOTION TO RECONSIDER (Aug. 20, 2008), *appx.* at 37.

2. Did the court err in allowing the Town of Wakefield to prosecute Mr. McMullin actions – keeping vehicles and box trailers on his property, rebuilding his burned garage, and cutting a tree to maintain access to the pond – when the Town was aware of them for decades and neglected to take timely action?

   Issue preserved: Transcript, *passim*; ANSWER TO "CEASE AND DESIST ORDER" (undated), *appx.* at 11; MEMORANDUM (undated), *appx.* at 13; MOTION TO RECONSIDER (Aug. 20, 2008), *appx.* at 37.

## STATEMENT OF THE CASE AND STATEMENT OF FACTS

Donald McMullin's hobby is restoring and selling collectable and antique cars from his home in Wakefield, New Hampshire. *Trn*. at 79. Mr. McMullin bought his property, which has 430 feet of shorefront on Pine River Pond, in 1986. *Trn*. at 73, 77, 83. On his property he keeps many vehicles, three box storage trailers (of the kind generally associated with tractor-trailer trucks), a canvas instant-carport, and a small steel-metal building used as a one-car garage. He also has a dock at the pond (as do his neighbors) and an access trail leading there.

The Town of Wakefield and Mr. McMullin have a history of friction regarding the aesthetic of his hobby. *See Trn.* at 74-75; ORDER (Aug. 14, 2008), *appx.* at 33; *Town of Wakefield v. Donald McMullin*, N.H. Sup.Ct. No. 2006-0423 (decided by order Mar. 26, 2007). The most recent discord began in early 2008 when a neighbor heard Mr. McMullin using a chainsaw near the pond, *Trn*. at 65-66, resulting in several inspections by the Town. Following them, the Town issued Mr. McMullin a letter detailing a number of alleged violations of state statutes and town ordinances. LETTER FROM TOWN TO MCMULLIN (Feb. 28, 2008), *appx.* at 2. A few days later the Town posted a "stop work" order on his land, citing violations of the Shoreland Protection Act and the Wakefield Zoning Ordinance. LEGAL NOTICE, Df's Exh. A (Mar. 5, 2008), *appx.* at 3; *Trn*. at 38.

Commencing this case, the Town filed a cease and desist order in the district court. CEASE AND DESIST ORDER PURSUANT TO RSA 676:17-a, AND REQUEST FOR FINES, PENALTIES, AND OTHER EXPENSES AND COSTS PURSUANT TO RSA 676:17 (Mar. 26, 2008), *appx.* at 5. Mr. McMullin filed an answer, which the court considered a general denial. ANSWER TO "CEASE AND DESIST ORDER" (undated), *appx.* at 11; *Trn*. at 3.

The Southern Carroll County District Court (*Robert C. Varney*, J.) heard the case in July 2008. The two-hour trial consisted of testimony by the Wakefield code enforcement officer, an abutter, and Mr. McMullin (*pro se*). After trial Mr. McMullin filed a memorandum, and the Town filed a proposed order, which the court adopted nearly verbatim. MEMORANDUM (undated), *appx.* at 123; PROPOSED ORDER (July 31, 2008), *appx.* at 23; ORDER (Aug. 14, 2008), *appx.* at 30.

In its order, the court found Mr. McMullin in violation of both Wakefield's zoning ordinance and building code, both the State's Shoreland Protection Act and junkyard statute, and unspecified "other related regulations." ORDER (Aug. 14, 2008), *appx.* at 34.[1] The court fined Mr. McMullin $275 for each of four types of violations, and ordered him to pay the Town's fees and costs. Mr. McMullin filed a reconsideration, which was denied. MOTION TO RECONSIDER (Aug. 20, 2008), *appx.* at 37; ORDER ON DEFENDANT'S MOTION TO RECONSIDER (Sept. 18, 2008), *appx.* at 40. This appeal followed.

**1. Cars**

John Ciardi had been the Deputy Code Enforcement Officer and Zoning and Shoreland Compliance Officer for the Town of Wakefield for about a year before this case. *Trn.* at 7. His background is in commercial construction, *Trn.* at 8, and during trial neither party qualified him as an expert in any field.

Mr. Ciardi testified he saw "more than twenty" vehicles on Mr. McMullin's property. *Trn.* at 54. He took pictures, and offered them into evidence. *See e.g.*, PHOTOS, Pl's Exhs. 7, 8,

[1]Although the trial court did not take a view, it accepted for identification a useful sketch of Mr. McMullin's lot. LOT SKETCH, Df's Exh. D (undated), *appx.* at 166; *Trn*. at 79 (Court: "[I]t will just help me to understand the lay of the land.").

9, 10, *appx.* at 155-158. Mr. Ciardi counted at least twenty cars, as well as several boats and an airplane. *Trn.* 17-18, 26-27. He conceded that there is no allegation that any of the vehicles were disassembled. *Trn.* at 47, 57.

On direct examination, Mr. Ciardi testified that the cars "did not appear to me to be roadworthy." *Trn*. at 28.

On cross-examination, however, Mr. Ciardi admitted that his assessment of roadworthiness was not an informed opinion. He conceded "they were buried in the snow," *Trn*. at 28, that there were no footprints in the snow in the photos he offered which might betray a close examination of the cars, PHOTOS, Pl's Exhs. 11, 12, 13, 14, 15, *appx.* at 159-163, and that he did not walk up to the vehicles for a thorough inspection. *Trn*. at 49. He conceded that his basis for believing that "virtually all" the cars were not roadworthy, *Trn.* at 47, was his "understanding that those vehicles were sitting there for a number of years in that location." *Trn.* at 54. When asked, "You just feel they wouldn't pass an inspection sticker?" Mr. Ciardi answered, "That's correct." Regarding the condition of the vehicles, his testimony was:

Q: So today you can't say that any of them are non-roadworthy?

A: Today I cannot say that.

*Trn*. at 56-57. Upon being asked which vehicles were not roadworthy, Mr. Ciardi admitted: "I don't know." *Trn.* at 55; *see also*, *Trn.* at 56 (Court: "He doesn't know.").

The Town's own attorney and Mr. McMullin's neighbor undermined Mr. Ciardi's assumption that the cars were not roadworthy. The Town's attorney announced during trial: "[W]e'll stipulate that some of the cars are in a different location than they were in February of 2008." *Trn*. at 52. Likewise, the complaining neighbor, who has a commanding hilltop view of Mr. McMullin's property, *Trn*. at 67, testified that he had observed some of the cars running,

"starting and stopping." *Id.* The neighbor had "no idea how you moved some of these things around, but I have witnessed you starting and stopping vehicles." *Trn*. at 71.

Mr. McMullin's testimony largely confirmed this. He acknowledged there were twenty vehicles, *Trn*. at 75, and that they were his. *Trn*. at 76. He confirmed there were no disassembled vehicles, *Trn*. at 75, except for one that is "sitting on a trailer and the trailer is registered." *Trn*. at 76.

Mr. McMullin testified that "[e]very vehicle runs and operates." *Trn*. at 75. "All of them operate. All of them drive." *Trn*. at 76. He conceded that "probably … five" are registered and "some have temporary plates," which he uses to "road test them" before a sale. *Trn*. at 90. He testified that all the others "with a little bit of attention would pass an inspection sticker." *Trn*. at 75. He said that they are on his property to "restore them and sell them." "Most of them are collectible and antique vehicles." *Trn*. at 79.[2]

Mr. McMullin testified that before the cease-and-desist was served, the cars had been parked "completely out of sight," but after being served he "made it a point to move every vehicle so they would see they operate and moved." *Trn*. at 75, 90.

After trial the court found that "[a]lthough some of the motor vehicles are arguably roadworthy, clearly others are not." ORDER (Aug. 14, 2008), *appx.* at 32. The court thus found Mr. McMullin has a junkyard. For these violations, the court ordered removal of all vehicles which Mr. McMullin cannot demonstrate to the Town "can presently pass inspection." ORDER, *appx.* at 35.

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[2]Although the vehicles are not identified in the record, a review of the evidentiary photos discloses a wooden boat and an airplane, a mid-1980s Mercedes station wagon, several Maseratis, a 1959 Corvette, and a number of General Motors cars, one dating from the mid-1960s, several from the mid- and late-1970s, and the rest from the early- to mid-1980s.

**2. Trailers**

John Ciardi testified and showed pictures indicating Mr. McMullin's property contains three 30 to 40 foot commercial box trailers on wheels lined up next to each other. *Trn*. at 30; PHOTO, Pl's Exh. 7 (bottom photo), *appx.* at 155; PHOTO, Pl's Exh. 11, *appx.* at 159. Although Mr. Ciardi did not know when they were put there, *Trn*. at 57-58, the Town did not dispute Mr. McMullin's testimony that the trailers were there since the late 1980s for personal storage, that the Town moved them to their present location as a result of a previous dispute between the parties, that the Town has been aware of their presence for a long time, and that there was no ordinance prohibiting them at the time they were placed there. *Trn*. at 86

At trial Mr. Ciardi could not cite any law prohibiting the trailers, but only that "[t]here is a clear direction to me by the planning board that th[ier] interpretation of their regulations is that you cannot have commercial box trailers stored on residential land." *Trn*. at 58.

After trial, the court found "as presently used," the trailers are "structures" within both the zoning ordinance and the building code, and constitute violations because they exist without building permits. ORDER (Aug. 14, 2008), *appx.* at 33. Although the court heard no evidence of value, it found the trailers are worth more than $800, ORDER, *appx.* at 32, thus making the building code applicable, and requiring that they be on foundations, which themselves would make the trailers worth more than the building code's $600 minimum. ORDER, *appx.* at 33. The court also found that although the trailers were moved by the Town to their current location, they were originally placed on the land no earlier than 1988. According to the court, however, Wakefield had a zoning ordinance since 1986 and a building code since 1987, such that any grandfathering would not apply, and also that Mr. McMullin had not met the elements of laches.

ORDER, *appx.* at 34. Finally, For these violations, the court ordered Mr. McMullin apply for an after-the-fact town permit, and either comply with the permit or remove the trailers if a permit is denied. ORDER, *appx.* at 35.

**3. Garage**

The Town does not take issue with the canvass carport on Mr. McMullin's land. PHOTO, Pl's Exh. 7 (top photo), *appx.* at 155; PHOTO, Pl's Exh. 9 (top photo), *appx.* at 157; *Trn*. at 58. Although the Town also conceded there is no ordinance prohibiting the metal garage to its left, the metal garage is the subject of the Town's complaint. *Trn*. at 59, 84-85.

The Town claims it does not know when the metal garage was erected, *Trn*. at 59, but did not dispute Mr. McMullin history.

Mr. McMullin testified that in 1988 he applied for a building permit for a house and garage. *Trn*. at 73. The permit application, which was granted, specifies a single family house and a garage. APPLICATION FOR BUILDING PERMIT, Df's Exh. B (Mar. 10, 1988), *appx.* at 165; BUILDING PERMIT, Df's Exh. C (Aug. 22, 1990), *appx.* at 165. Mr. McMullin testified that after the original garage burned down, the steel garage at issue was erected in the same location in 1996 or 1997 to replace it. *Trn*. at 85. At that time, Mr. McMullin said he learned from the Town that no re-permitting was necessary in the circumstances. *Trn*. at 85, 90-91. He also testified the Town has been on his property many times since the steel garage was installed. *Id.*

After trial, without citation to any law, the court held that the garage was built without a permit, and even if it replaced the previous one that burned, it still needed a permit. ORDER, *appx.* at 34. For this violation, the court ordered Mr. McMullin apply for an after-the-fact permit, and either comply with the permit or remove the garage if a permit is denied. ORDER, *appx.*at 35.

**4. Dock**

The Town at first alleged Mr. McMullin committed violations with regard to installing a dock. *Trn.* at 26. In its Cease and Desist Order the Town wrote:

> You have created a second access through the buffer zone to serve a boat dock without the required permit from the Wakefield Code Enforcement Office
>
> You have installed a dock in the waters of the state without the required permit from the Department of Environmental Services.

CEASE AND DESIST ORDER PURSUANT TO RSA 676:17-a, AND REQUEST FOR FINES, PENALTIES, AND OTHER EXPENSES AND COSTS PURSUANT TO RSA 676:17 (Mar. 26, 2008), *appx.* at 5.

During trial, however, it became clear that the Town mistakenly believed Mr. McMullin had installed a second dock on his property, and also mistakenly believed Mr. McMullin's tree cutting was for the purpose of providing access to it. The evidence disclosed, however, that the dock belonged to Mr. McMullin's neighbor, and the Town apparently withdrew that portion of its complaint. *Trn*. at 27-28, 41-42, 87; PROPOSED ORDER (July 31, 2008), *appx.* at 23.

**5. Trees**

John Ciardi, the Wakefield official, testified on direct examination that he saw Mr. McMullin cutting at least one tree, *Trn*. at 23-24, that he saw other trees that had been felled, *Trn*. at 8, 14-15; PHOTOS, Pl's Exhs. 1, 2, 3, 6, *appx.* at 149-151, 154; and that he saw a pile of trees and brush in the area where the cuttings had taken place. *Trn*. at 14; PHOTOS, Pl's Exhs. 4, 5, *appx.* at 152-53. He said the trees had been cut in a 10-foot-wide path leading to the pond. *Trn*. at 22, 25-26.

Mr. Ciardi testified that "I believe that there were trees and saplings and brush cut within the twenty-foot buffer zone" from the pond specified by the Wakefield Zoning Ordinance, *Trn.* at

24-25, and that the cuttings were also within the 150-foot shoreland protection area specified by state statute. *Trn*. at 14, 24-25, 62. He testified that Mr. McMullin needed a town permit for cutting of trees within 20 feet of the pond and a state permit for cutting within 150 feet, and that Mr. McMullin had no permits. *Trn*. at 23. He estimated that a total of 20 trees had been cut. *Trn.* at 33-34, 63.

On cross examination, Mr. Ciardi narrowed his allegation to a single cut tree within the Town's 20 foot buffer zone. *Trn.* at 35, 38, 40, 42. He also admitted that he did not measure its distance from the pond. Instead, he insisted, "I have a fairly good idea of what twenty foot looks like." *Trn.* at 44. He said he was not present when a police officer or a DES official measured the tree at 28 feet from the pond. *Trn*. at 45.

Mr. McMullin testified that before cutting he had measured the distance from the tree to the pin demarcating his property line, and that distance was greater than 20 feet. He testified that the pin is about five feet above the high water mark to which the ordinance measures, thus making the tree between 28 and 32 feet from the pond. *Trn.* at 80, 82. Mr. McMullin also testified that he spent a half-day with a state inspector from the Department of Environmental Services before the tree was cut, learning "what I could and what I couldn't do." *Trn.* at 84. Mr. McMullin testified that he saw the inspector conducting measurements, that he watched the inspector's tape measure, that he noted the inspector's tape indicated the tree was 28 feet from the pin which is short of the high-water mark, and that he concluded from his session with the state inspector that he could legally cut the tree. *Trn*. at 84, 88. Mr. McMullin thus pointed out that the Town's evidence was nothing more than a guess. *Trn*. at 87.

The Town's Mr. Ciardi acknowledged that there are exceptions to the state statute which

allow some cutting for purposes such as maintaining existing access, that whether or not the exceptions apply a certain number of trees can be cut, and that Mr. McMullin had an existing access. *Trn.* at 39-40, 42, 45-46.

On these matters, Mr. McMullin testified that he established his access to the lake twenty years ago, *Trn.* at 76-77, and that he cut the tree because he could not maneuver a corner with his snowmobile. *Trn*. at 82. He noted he had disclosed his intention to maintain the access on his original 1988 building permit. *Trn*. at 86; APPLICATION FOR BUILDING PERMIT, Df's Exh. B (Mar. 10, 1988), *appx.* at 164. Mr. McMullin testified that he cut only one tree within 50 feet of the water over the past 20 years thus complying with the old shoreland protection law, *Trn*. at 84, that he did the cutting before April 1, 2008 as that was the date the new shoreland protection law was supposed to be effective, *Trn.* at 82, and that the shoreland protection law was designed to "protect against massive development … not … to stop someone from cutting a tree down on their property." *Trn.* at 89.

After trial, the court found there was one tree cut within the town's 20-foot buffer zone. ORDER, *appx.* at 31-32. The court held that without a permit this violated the zoning ordinance for both the cutting and for the construction of a pathway to the pond. ORDER, *appx.* at 31. The court also held that the tree cutting violated the Shoreland Protection Act. *Id.*

For the town tree violations, the court ordered that Mr. McMullin cease cutting within 20 feet of the shore, ORDER, *appx.* at 34, apply for an after-the-fact permit "to create the access to the waterfront through the buffer," *id.*, comply with town requirements if a permit is issued, and remediate insofar as practicable if a permit is denied. *Id.* For the state tree violations, the court ordered that Mr. McMullin apply for an after-the-fact DES permit, and either comply with the permit or remediate as DES requires. *Id.* at 35.

## SUMMARY OF ARGUMENT

After recitation of the facts, Mr. McMullin demonstrates that none of the actions he took – keeping vehicles, keeping box trailers, replacing his garage, and maintaining his access to the pond – were in violation of any statute or ordinance. He also shows that because the Town of Wakefield knew of these matters for many years, but took no action against them, it is barred by laches from prosecuting them now.

## ARGUMENT

### I. Mr. McMullin's Property is Not a Junkyard

New Hampshire law provides that one needs a license to operate a junkyard business. RSA 236:114. A junkyard, as it pertains to cars, is generally defined as "a place used for storing and keeping … *junked, dismantled, or wrecked* motor vehicles, or parts thereof." RSA 236:112, I (emphasis added). An "[a]utomotive recycling yard" is a place "the primary purpose of which is to salvage multiple motor vehicle parts and materials for recycling or reuse." RSA 236:112, I(a). A [m]otor vehicle junk yard" is a place "where the following are stored or deposited in a quantity equal in bulk to 2 or more motor vehicles: (1) [m]otor vehicles which are *no longer intended or in condition for legal use according to their original purpose* including motor vehicles purchased for the purpose of dismantling the vehicles for parts or for use of the metal for scrap; and/or (2) [u]sed parts of motor vehicles. RSA 236:112, I(c) (emphasis added).[3]

Thus, in order to be in violation of the junkyard statute, the Town must prove one has an unlicenced place where motor vehicles are "junked, dismantled, or wrecked," or are "no longer intended or in condition for legal use according to their original purpose." The statute does not

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[3]RSA 236:112 provides in full: "Junk yard" means a place used for storing and keeping, or storing and selling, trading, or otherwise transferring old or scrap copper, brass, rope, rags, batteries, paper, trash, rubber debris, waste, or junked, dismantled, or wrecked motor vehicles, or parts thereof, iron, steel, or other old or scrap ferrous or nonferrous material. As used in this subdivision, the term includes, but is not limited to, the following types of junk yards:

(a) Automotive recycling yards, meaning a motor vehicle junk yard, as identified in subparagraph (c), the primary purpose of which is to salvage multiple motor vehicle parts and materials for recycling or reuse;

(b) Machinery junk yards, as defined in paragraph III; and

(c) Motor vehicle junk yards, meaning any place, not including the principal place of business of any motor vehicle dealer registered with the director of motor vehicles under RSA 261:104 and controlled under RSA 236:126, where the following are stored or deposited in a quantity equal in bulk to 2 or more motor vehicles:

(1) Motor vehicles which are no longer intended or in condition for legal use according to their original purpose including motor vehicles purchased for the purpose of dismantling the vehicles for parts or for use of the metal for scrap; and/or

(2) Used parts of motor vehicles or old iron, metal, glass, paper, cordage, or other waste or discarded or secondhand material which has been a part, or intended to be a part, of any motor vehicle.

define a junkyard with regard to such matters as whether vehicles have passed inspection, are registered, are in sight of the public, or have been carelessly parked.

There is no evidence here that any cars on Mr. McMullin's property were dismantled. In his testimony, the Wakefield official believed the cars were not inspected, and assumed they were not "roadworthy." But there was no evidence that any of the cars (or boats or plane) were "no longer intended or in condition for legal use according to their original purpose." As they were covered with snow, it would have been impossible to determine. All the pictures entered into evidence show fully intact cars. And Mr. McMullin moved them, which the neighbor noticed. Mr. McMullin testified that all the cars work, and that he intended to sell them as "collectible and antique vehicles." *Trn*. at 79.

In its order, the court found "[a]lthough some of the motor vehicles are arguably roadworthy, clearly others are not." ORDER (Aug. 14, 2008), *appx.* at 32. There simply is no evidence to support the court's finding.

The court also ordered removal of all vehicles which Mr. McMullin cannot demonstrate to the Town "can presently pass inspection." *Id.* at 35. This presumably means an ordinary annual safety and emissions inspection pursuant to RSA 266:1. Not only is passing such an inspection unrelated to the determination of a junkyard, but the court reversed the burden – requiring Mr. McMullin to prove inspectiblity to a town official who may or may not have any expertise regarding the topics of state inspection.

For these reasons, both the court's determination that Mr. McMullin was operating a junkyard, and its prospective requirement of proof, are beyond the terms of the statute. The court erred in finding Mr. McMullin has a junkyard, and in requiring that he prove a made-up standard to merely keep his property.

## II. Trailers are Not Structures

The Wakefield Zoning Ordinance, in effect when Mr. McMullin put the three box trailers on his land, is a short document. It sets forth its purpose, establishes the various zoning districts, contains a grandfathering clause, and allows for special exceptions and variances. ZONING ORDINANCE, TOWN OF WAKEFIELD, NEW HAMPSHIRE (Mar. 11, 1986), *appx.* at 50. It does not contain any provision that addresses Mr. McMullin's trailers. The court's finding that the presence of Mr. McMullin's trailers violate the ordinance cannot be sustained.

The Wakefield Building Regulations, also in effect in 1988 when Mr. McMullin put the trailers on his land, is likewise a short document. BUILDING REGULATIONS, TOWN OF WAKEFIELD, NEW HAMPSHIRE (Mar. 10, 1987), *appx.* at 58. It requires a permit for "any person … intending to construct or erect a new building or to make structural alterations of an estimated cost of more than $600." *Id.* Art. IV. It also specifies that "[n]o building or structure shall be erected, altered, rebuilt, remodeled or substantially repaired," unless it complies with a variety of requirements, including that "[a]ll structures shall be set on solid wall type foundations." *Id.*, Art. VII, ¶ 7.

The Building Regulations do not define "structure." The Regulations appear to assume that a structure is something that is "erected, altered, rebuilt, remodeled or substantially repaired," *id.*, but not something that is pulled there on wheels. The $600 minimum pertains to structural alterations of an existing "building." Nothing in the document appears to bring wheeled box trailers under its auspices.

In *Eason v. Town of Erie*, 997 P.2d 1235 (Colo.App. 1999), the property owner claimed he did not need a permit to use tractor trailers as storage sheds. The town had adopted the

Uniform Building Code, widely used by municipalities everywhere. Similar to Wakefield, the Uniform Building Code provided that "no building shall be erected, moved, added to, or structurally altered without the necessary building permits." "Building" was defined as "any structure used or intended for supporting or sheltering any use or occupancy" and "structure" as "that which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner."

The court in *Eason* noted that the box trailers, the same kind as Mr. McMullin's, "were not affixed to the property in any manner, and no foundation was built for them. Further, the wheels had not been removed from the semi-trailers, and although they were not licensed, the semi-trailers remained mobile." Thus the court found they were not "structures" under the Uniform Building Code, cited other cases finding the same, and held that the property owner therefore did not need a permit. *Eason v. Town of Erie*, 997 P.2d at 1237.

*Eason v. Town of Erie* is typical. Outside of the criminal context, the cases defining "structure" generally turn on whether the trailer in question was made a permanent part of the property – by affixing it to the ground, by setting it on a foundation, or by making it immobile. *See e.g.*, *Mossman v. City of Columbus*, 449 N.W.2d 214 (Neb. 1989) (mobile home set on concrete foundation and attached to a septic system); *Anderson v. State, Dept. of Ecology*, 664 P.2d 1278 (Wash.App. 1983) (trailers "attached or affixed to the realty even though in a temporary fashion as compared to permanent building"); *see also Kelsea v. Town of Pembroke*, 146 N.H. 320 (2001) (involving definition of "structure"; for zoning, telecommunications tower was "nonconforming use," rather than "nonconforming structure").

Here, there is no evidence of permanence or immobility. The pictures appear to show

wheels and the mechanism necessary to attach Mr. McMullin's trailers to a tractor. PHOTOS, Pl's Exhs. 7, 11, *appx.* at 155, 159. There was no testimony that the trailers had been de-wheeled, otherwise rendered immobile, or somehow permanently affixed.

Here the court turned the logic completely around. Rather than recognizing that the trailers' lack of foundation and continued mobility left them something other than structures, the court assumed Mr. McMullin's trailers needed a foundation, named the value of a presumed foundation (for which there is no evidence whatsoever in the record), and used that value (which pertains to "buildings" but not "structures") to create a permanence that does not exist. On those mistaken bases, the court erroneously deemed the trailers "structures" within the Building Regulations.

## III. Metal Garage Did Not Need a Permit

The court accepted the fact that Mr. McMullin's built his original garage in 1988 pursuant to a valid building permit, that the original burned, and that it was replaced with the current metal building in the same location in 1996 or 1997.

The current zoning ordinance comprehensively requires a permit for "any activity regulated by this Ordinance," and for "the construction, erection, alteration, movement, or placement of any structure." TOWN OF WAKEFIELD, NH ZONING ORDINANCE, Art. 36 (Mar. 11, 2008), *appx*. at 63, 145.

The local law in effect at both the time Mr. McMullin built his original garage and replaced it, however, contains a gap.

The building regulations in force at both the time of Mr. McMullin's original garage construction and the time of its replacement provides that "any person … intending to construct or erect a *new* building … shall first make application for a permit." BUILDING REGULATIONS, TOWN OF WAKEFIELD, NEW HAMPSHIRE, Art. IV, ¶ 1 (Mar. 10, 1987), *appx.* at 58, 59 (emphasis added).

The zoning ordinance in effect at both those times also contains a grandfather clause, which provides that "[n]on conforming buildings destroyed by fire or other natural disaster may be repaired within one year of their destruction and if their degree of non-conformity is not expanded upon." ZONING ORDINANCE, TOWN OF WAKEFIELD, NEW HAMPSHIRE, Art. II, ¶ 1 (Mar. 11, 1986), *appx.* at 50.

Thus, the local law in effect when Mr. McMullin *built* his metal garage required that he obtain a permit, which he did. The local law in effect when Mr. McMullin *replaced* the burnt

garage required a permit only for "new" buildings, and also allowed replacement of burnt non-conforming buildings without a permit.

The permitting scheme does not address replacement of a conforming building. When Mr. McMullin replaced his burnt garage, there was no requirement of a permit, and he did nothing wrong. Although the gap has been filled by current town law, which comprehensively requires a permit for "any activity" and "construction … of any structure," current law was not in effect when Mr. McMullin built or replaced his garage. The court thus erred in holding that a permit was required.

## IV. Trees

### A. Ordinance and Statute

There are two relevant sources of law regarding Mr. McMullin cutting trees.

The first is the Wakefield Zoning Ordinance. It establishes a "buffer zone" "to include all land within 20 feet, measured horizontally, of the mean high-water mark of all lakes and ponds." TOWN OF WAKEFIELD, NH ZONING ORDINANCE, Art. 15, ¶ A. (Mar. 11, 2008), *appx*. at 106. The Ordinance flatly prohibits some activities within the buffer, requires a permit for some others, and does not require any permit for still others. Activities that are flatly prohibited include "[r]emoval of live vegetation, unless absolutely necessary to *construct* allowable structures, beaches or pathways." *Id.* at Art. 15, ¶ D.1, *appx*. at 106-07 (emphasis added). Activities requiring a permit are those that will "result in the removal of live vegetation." *Id.* at Art. 15, ¶ B, *appx*. at 106. This includes cutting trees, and "*construction* of a pathway to existing or permitted structures or beach area." *Id.* at ¶ B.3 (emphasis added). Finally, specifically allowed without a permit are the removal of dead vegetation and pruning of live vegetation. *Id.* at Art. 15, ¶ C.

It is important to note the Ordinance does not address maintenance of an existing pathway, and that the buffer zone is 20 feet from the pond's "mean high-water mark."

The second source of law is the Shoreland Protection Act, RSA 483-B.[4] The Act established a "natural woodland buffer," which "shall be maintained within 150 feet" of lakes

[4]New and replacement portions of the Act became effective on April 1, 2008, shortly after the Town of Wakefield issued its Cease and Desist order to Mr. McMullin. The lower court referenced the older version, and the parties have agreed it is applicable to this case. The older version is included in the appendix at page 43, and all citations herein refer to the older version.

and ponds. RSA 483-B:9, V, *appx.* at 44. Within that zone, the Act regulated how many trees can be cut:

> Not more than a maximum of 50 percent of the basal area of trees, and a maximum of 50 percent of the total number of saplings shall be removed for any purpose in a 20-year period. A healthy, well-distributed stand of trees, saplings, shrubs, ground cover, and their living, undamaged root systems shall be left in place.

RSA 483-B:9, V(a)(2)(A), *appx.* at 44.

**B. Mr. McMullin Cut No Trees Within 20 Feet From the Pond**

The parties agreed that Mr. McMullin cut one tree. The dispute was how far it was from the pond. John Ciardi, the Wakefield compliance officer, admitted he merely estimated 20 feet, and did not measure. Because mis-measuring by even one inch makes a difference here, his testimony that he has "a fairly good idea of what twenty foot looks like," *Trn.* at 44, is not a sufficient basis for liability. Moreover, even assuming laser accuracy, Mr. Ciardi neglected to mention the point on the land or water to which he estimated, thus making his eye-ball appraisal meaningless.

On the other hand, Mr. McMullin testified that he measured to ensure the tree was more than 20 feet to the high water mark, that he had a DES official visit his land before he cut for the purpose of finding out what was legal, that he witnessed the DES official conduct a measurement, and that he saw the measurement was greater than 20 feet.

There is no doubt that people in some occupations become proficient at estimating matters within their purview, and that their proficiency is sufficient where the burden of proof is low. In *State v. Sterndale*, 139 N.H. 445 (1995), for example, this Court held that an estimate of speed by an experienced police officer was a sufficient basis for probable cause to conduct an

automobile stop.

But here, Mr. Ciardi was not qualified as an expert. He did not provide any basis to gauge even whether he was experienced at measuring distance. His bare assertion that he has "a fairly good idea of what twenty foot looks like" is not a sufficient basis on which to ground his supposed proficiency, and is not a substitute for the evidentiary foundation necessary to give accurate reliance to his eye-ball estimate. And unlike *Sterndale*, the Town's burden of proof is higher than mere probable cause. In short, Mr. Ciardi's estimate is not sufficient proof of a violation of the Wakefield Ordinance.

**C. Mr. McMullin Cut Only a Few Trees Within 150 Feet From the Pond**

Mr. Ciardi testified he estimated Mr. McMullin cut 20 trees. But he did not count the total number of trees within the 150-foot Shoreland Protection buffer, nor estimate the number that would constitute "50 percent of the basal area of trees" on Mr. McMullin's shoreline, nor estimate the number that would constitute a "maximum of 50 percent of the total number of saplings" on Mr. McMullin's shoreline, nor estimate over what period the trees were cut. He offered no testimony showing that Mr. McMullin failed to leave in place a "healthy, well-distributed stand of trees, saplings, shrubs, ground cover, and their living, undamaged root systems."

As Mr. McMullin shoreline is forested along its 430 feet, it is inconceivable that 20 trees equals "50 percent of the basal area of trees" in the buffer. As there was no allegation that he conducted any other cuttings within the last 20 years, or that he damaged the forest system, Mr. McMullin cannot have run afoul of the terms of the statute. There is simply insufficient evidence that he violated the Shoreland Protection Act.

Moreover, the act specifies that "[w]here existing, a natural woodland buffer shall be maintained." It does not apply to places where there is no *existing* woodland buffer. The act does not require a property owner to allow the forest to become established in places where it is not already growing. Thus the maintenance of a pre-existing trail does not fall within the terms of the statute. It is not disputed that Mr. McMullin's cutting was for the purpose of maintaining his path to the pond, as he was no longer able to maneuver his snowmobile along it.

For both these reasons – Mr. McMullin cut only a few trees, and the path was pre-existing – there was no violation of the Shoreland Protection Act.

## V. Town of Wakefield Barred by Laches from Prosecuting Mr. McMullin

The Town of Wakefield and Mr. McMullin have a long history of legal friction on a variety of matters.

John Ciardi, the Town enforcement officer, testified that the Town was aware of the vehicles on Mr. McMullin's property "for a number of years." *Trn.* at 54. Mr. McMullin testified that the town had under a different law 15 years ago tried to make him liable for a junkyard, but had been unsuccessful. *Trn*. at 74-75. He noted the vehicles had actually been moved to their present location by the Town, *Trn.* at 75, and that the Town "moved them from one spot on the property to the other four or five times." *Trn* at 76.

The trial court acknowledged that the box trailers "were moved to their present location by the Town of Wakefield pursuant to a Carroll County Superior Court order." ORDER (Aug. 14, 2008), *appx.* at 33 (citing *Town of Wakefield v. Donald McMullin*, Carroll Cnty.Super.Ct. Nos. 97-E-191 and 98-C-0030).

The Town has visited Mr. McMullin's property dozens of times since he bought it in 1986. *Trn*. at 85. Some of the visits were a result of Mr. McMullin's invitation to the Town to correct flooding, well, and septic system damage he alleges it caused from some of the Town's prior actions on his property. *Trn*. at 74. Mr. McMullin suggested that the present case is merely retaliation for those allegations. *Id.*

Whatever the truth of these allegations, it is clear that Mr. McMullin's activities were not suddenly or recently discovered. With regard to the metal garage, not only was it originally permitted, but the Town was aware of the fire over a decade ago, and Mr. McMullin learned from the Town at that time that he did not need a permit for its replacement.

"Laches is an equitable doctrine that bars litigation when a potential plaintiff has slept on his rights. Ascertaining whether the doctrine of laches applies is not a mere matter of time, but is principally a question of the inequity of permitting the claim to be enforced." *Thayer v. Town of Tilton*, 151 N.H. 483, 485-86 (2004). Laches is a four-factor analysis: "(1) the knowledge of the plaintiffs; (2) the conduct of the defendants; (3) the interests to be vindicated; and (4) the resulting prejudice." *Id.* at 486.

Wakefield clearly had knowledge of Mr. McMullin's alleged violations for a very long time. The Town may disagree with the aesthetic of Mr. McMullin's hobby, but his activities are within the law. It is clear from the record that Mr. McMullin does not have great affinity for the governance of the Town of Wakefield, but the record does not demonstrate bad faith, maliciousness, or other conduct that would exempt him from equitable relief. Mr. McMullin has been prejudiced by the continuing attentions of the Town, the need to expend resources on the Town's overactive oversight, and by the lower court's finding of violations, imposition of fines, and orders to remediate violations that do not exist.

Based on this, the Town was barred by laches from prosecuting Mr. McMullin for alleged violations it knew about long ago, but neglected to pursue.

## CONCLUSION

Based on the foregoing, it is apparent that Mr. McMullin did not violate any law by keeping vehicles or box trailers on his property, by rebuilding his garage, or by cutting a tree to maintain his ability to drive his snowmobile to the pond. This court should thus reverse the ruling below.

Further, it appears that the Town's action here "was not based upon information and belief formed after reasonable inquiry" and "was not well-grounded in fact." RSA 676:17-a, VII. The Town admitted it did not adequately inspect the cars to determine whether they were in an adequate "condition for legal use according to their original purpose," made no attempt to show the trailers were "structures," could not show any permit was required for the garage, and did not even bother measuring the distance from the pond to the cut tree. Thus this court should "order the defendant's costs and reasonable attorneys fees to be paid by the municipality." *See Bio Energy, LLC v. Town of Hopkinton*, 153 N.H. 145, 157 (2005).

Respectfully submitted,

Donald McMullin
By his Attorney,

**Law Office of Joshua L. Gordon**

Dated: June 18, 2009

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## REQUEST FOR ORAL ARGUMENT

Counsel for Donald McMullin requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issues raised in this case are novel in this jurisdiction, because the facts in this case are susceptible of misunderstanding, because the outcome of the case will effectively determine the continuing viability of Mr. McMullin's antique and collectable car hobby, and because a decision here will hopefully settle a decades-long disagreement between the parties regarding an appropriate aesthetic.

## CERTIFICATION

I hereby certify that on June 18, 2009, copies of the foregoing will be forwarded to Richard D. Sager, Esq.

Dated: June 18, 2009

_____

Joshua L. Gordon, Esq.