STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC **SUPERIOR COURT**

(FILED: SEPTEMBER 11, 2012)

ROSE NULMAN PARK FOUNDATION
By Its TRUSTEES,
CAROL B. NULMAN and
JOEL S. NULMAN
Plaintiff **C.A. No. WC11-0154**

v.

FOUR TWENTY CORP. and
ROBERT C. LAMOUREUX
Defendant

DECISION

STERN, J. On June 21, 2012 this Court held a preliminary injunction hearing regarding the unfortunate situation where a property owner built a home valued at almost One Million eight hundred thousand dollars (1,800,000) entirely on his neighbor's property, which is a park on the ocean for public use. The neighbor now seeks to have the house moved from the property. After considering the evidence, the arguments of counsel, and the legal memoranda submitted, this Court makes the following findings of fact and conclusions of law.

I

FACTS AND TRAVEL

In 1984, Robert Lamoureux ("Lamoureux") purchased a parcel of land on Ocean Road in Narragansett, Rhode Island. Thereafter, in 1987, Lamoureux hired ERA Engineering to prepare a subdivision plan to obtain approval to subdivide the parcel into two parcels. Lamoureux retained ownership in one of the parcels, located at 1444 Ocean Road, Narragansett, Rhode

Island. In 1993, Saul Nulman acquired another parcel, (the "Nulman Property"), located at 1460 Ocean Road, Narragansett, Rhode Island. The Nulman Property immediately abuts 1444 Ocean Road.

In 2004, Saul Nulman conveyed the Nulman Property to Ocean Road Realty, LLC. Subsequently, in 2007, the Nulman property was transferred to the Rose Nulman Park Foundation (the "Foundation"). The Foundation was established under a Declaration of Trust (the "Declaration"), dated June 16, 2006, by Saul Nulman and Glenda F. Kirby. The Declaration sets out the primary purpose of the trust as to:

> "preserve and maintain the real property located at 1460 Ocean Road, Narragansett, Rhode Island (the "Property") for use as a park which is open to the public free of charge for recreation and contemplation, under the name "Rose Nulman Park" in honor of the donor's beloved late mother (the "Designated Use")."

As prescribed by a Settlement Agreement and General Release ("Settlement Agreement"), Carol Nulman and Joel Nulman have succeeded their father and Glenda Kirby as Trustees of the Rose Nulman Park Foundation. The Declaration prohibits the trustees from disposing of the Nulman Property in any manner unless "the trustees have ensured that the Nulman Property will continue to be maintained and preserved for the Designated Use in perpetuity." Furthermore, the Settlement Agreement imposes a $1.5 million penalty to the trustees, payable to New York Presbyterian Hospital, should they, "permit the park to be used in any manner other than the Designated Use." There is one exception to this penalty. In the event of changed circumstances pursuant to the doctrine of cy pres, the Trustees will not be required to make payment if a court determines that the Nulman Property can be put to uses other than the Designated Use, consistent with the intent of the Trust, and so long as notice and opportunity to be heard is afforded to the New York Presbyterian Hospital.

In 2009, Lamoureux conveyed 1444 Ocean Road to Four Twenty Corporation ("Four Twenty"), a Rhode Island corporation. At all relevant times hereto, Lamoureux has been the owner, principal, officer and employee of Four Twenty, a corporation in the business of purchasing, holding, developing and selling real estate. The Defendants applied, and were granted, the municipal and state permits necessary in order to build on the Four Twenty Property. In 2010, relying on plans and a survey prepared by Carrigan Engineering, Four Twenty built a 2,400 square foot, three bedroom residence, a septic system, and substantial portions of a driveway (the "Structure") on what the faulty plans and survey revealed to be part of the Four Twenty Property. In 2011, Four Twenty entered into a purchase and sale agreement to sell the Four Twenty Property and the Structure to a third party for approximately $1,800,000. However, before the transaction was completed, the third-party purchaser commissioned a Class I survey to ensure the marketability of the property. The results revealed that the Structure was not located on the Four Twenty Property, but rather it rested entirely on the Nulman Property. Consequently, the third party terminated its agreement to purchase the Four Twenty Property and the Structure.

In early 2011, Carol Nulman, via a phone conversation and subsequent meeting with Lamoureux, became aware that the Structure had, in fact, been built on the Nulman Property. Ms. Nulman told Lamoureux that the Nulman Property was not for sale and that the Structure would have to be removed. As a result, this suit for mandatory injunction was filed by Plaintiffs on March 11, 2011, and a preliminary injunction hearing was held on June 21, 2012.

II

ANALYSIS

Statutory Provisions Regarding the Transfer of Property Ownership

One acquires real property in hopes of being able to fully enjoy its benefits. To some, the benefits associated with ownership include shelter, privacy and protection; while to others property ownership may serve as a financial benefit. When drafting the Declaration of Independence, many of the Founders believed that the "guiding principle was that people come together to form governments in order to secure their rights to property—not to create an entity which will, itself, 'take from the mouths of labor the bread it has earned.'" W. David Stedman & La Vaughn G. Lewis, Our Ageless Constitution, Part III (1998). James Madison powerfully articulated the importance of property rights, stating, that "government is instituted to protect property of every sort… this being the end of government, that is not a just government,… nor is property secure under it, where the property which a man has is violated by arbitrary seizures of one class of citizens for the service of the rest." Id. Regardless of the owner's intent, property ownership is a fundamental right that has been recognized over the past several hundred years

Undoubtedly, since the initial ratification of the Constitution there has been many amendments made changing its actual content. In the past one-hundred years alone, the United States of America has amended its Constitution, thereby implementing changes ranging from the prohibition of slavery to the ability of women to vote. One of the most substantial constitutional changes regarding property rights is prescribed by the Fifth Amendment, passed in 1791 which states, "no person… shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." Similarly, the Constitution of the State of Rhode Island and Providence Plantations, adopted in 1843, echoes

this ideology in Article 1, Section 2, which states, "no person shall be deprived of life, liberty, or property without due process of law." R.I. Const. art. I § 2.

In accordance with the Constitutions, both the Rhode Island and Federal governments have set forth very few statutory provisions through which an owner of real property may be forced to relinquish their ownership rights. For instance, both the United States Constitution and the Rhode Island Constitution explicitly prescribe a municipality's ability to transfer land ownership rights through the process of eminent domain. Eminent domain is "the power of the State to take private property for public use…It is a right founded on the law of necessity which is inherent in sovereignty and essential to the existence of government." Twp. of W. Orange v. 769 Assocs., LLC, 172 N.J. 564, 571 (N.J. 2002). As prescribed by the Takings Clause of the Fifth Amendment of the United States Constitution, private property shall not be taken for public use without just compensation.

The Rhode Island Constitution echoes this sentiment in Article 1, Section 16, stating that "private property shall not be taken for public uses, without just compensation." R.I. Const. art I, §16. Although a state's eminent domain authority is not derived from a specific constitutional grant, its exercise is limited by the United States and Rhode Island Constitution. R.I. Econ. Dev. Corp. v. The Parking Co., LP, 892 A.2d. 87, 96 (R.I. 2006). Like the federal Constitution, the Rhode Island Constitution prescribes the limits the state has in its police power when exercising its right of eminent domain. The United States and Rhode Island Constitutions impose two limits on the state's eminent domain authority: 1) private property must be taken only for public uses, and; 2) the taking must be accompanied by just compensation. R.I. Econ. Dev. Corp., 892 A.2d at 96. The strict limitations granted to the states in using its eminent domain power clearly indicates the legislatures' recognition of the sanctity of property ownership rights.

Alternatively, the doctrine of adverse possession may also compel an individual to relinquish their ownership rights in property. Adverse possession is a doctrine that allows "the ripening of hostile possession, under proper circumstances, into title by lapse of time." 3 American Jurisprudence 2d §2. Furthermore, "our society has made a policy determination that 'all things should be used according to their nature and purpose and when an individual uses and preserves property 'for a certain length of time, [he] has done a work beneficial to the community.'" Cahill v. Morrow, 11 A.3d 82, 87 (R.I. 2011)(citations omitted). Currently all fifty states have some type of statute regarding adverse possession, the elements of which vary depending on the jurisdiction. In Rhode Island, as prescribed under General Laws 1956 §34-7-1, to establish adverse possession, the claimant's possession must be "actual, open, notorious, hostile, under claim of right, continuous, exclusive… and establish indicia of adverse possession for a period of ten years." Anthony v. Searle, 681 A.2d 892, 897 (R.I. 1996) (citations omitted).

In the instant case, neither eminent domain nor the doctrine of adverse possession would support the transfer of Plaintiff's property rights, nor has either party made such contentions. Therefore, the court is not able to rely on clearly enacted statutory provisions regarding the mandatory transfer of property rights. Rather, the court must make a factual determination regarding the appropriateness of a mandatory injunction.

A

Trespass

As stipulated by both parties, the subject Structure is situated entirely on the Nulman Property, and is not located on any portion of the Four Twenty Property, and that the location of the Structure constitutes a continuing trespass. Understandably, the Defendants placed great emphasis on Lamoureux's hiring of an engineering firm to conduct a survey showcasing his

parcel of land. The Defendants had relied on the results of the survey, a right afforded to them after paying approximately $30,000 for such services. However, the Defendants are still responsible for the continuing trespass, as a landowner cannot excuse himself from trespass upon adjoining property by showing that he gave over the location of the building to his builder or independent contractor. Kershishian v. Johnson, 210 Mass. 135, 138 (1911). Responsibility cannot be shifted from the landowner to the contractor in this respect. Kershishian, 210 Mass. at 138. The Defendants are responsible for the continuing trespass upon the Nulman Property and the Court must now decide the appropriate remedy.

B

Injunctive Relief

In the case at bar, Plaintiffs are requesting injunctive relief, arguing that equitable relief would be inadequate. Generally, the owner of land is entitled to a mandatory injunction to require removal of a structure that has been unlawfully placed upon his land. See Santilli v. Morelli, 102 R.I. 333,338 (R.I. 1967). In Santilli, after conducting a survey, the plaintiff discovered that the defendant's retaining wall protruded eighteen inches onto the plaintiff's property. Santilli, 102 R.I. at 335. The Rhode Island Supreme Court granted the mandatory injunction. The Court stated, as a general rule, "a continuing trespass wrongfully interferes with the legal rights of the owner, and in the usual case those rights cannot be adequately protected except by injunction which will eliminate the trespass." Id. at 338.

However, the court in Santilli notably recognized that exceptions can be made to the general rule. Id. Courts may exercise equitable discretion, departing from this general rule, only in exceptional cases "where the substantial rights of the landowner may be properly safeguarded without recourse to an injunction which in such cases would operate oppressively and

inequitably." Id. Such exceptional cases implicate doctrines of estoppel by acquiescence, laches, or the de minimus rule. See, e.g., Adams v. Toro, 508 A.2d 399 (R.I. 1986); Peters v. Archambault, 361 Mass. 91, 92 (1972).

By definition, de minimis is "a fact or thing so insignificant that a court may overlook it in deciding an issue or case." Black's Law Dictionary 442 (7th ed. 1999). Generally, cases that invoke the de minimus rule involve encroachments measured in small increments, sometimes even inches. See Ferrone v. Rossi, 311 Mass. 591 (Mass. 1942). The court in Ferrone granted a mandatory injunction thereby removing multiple encroachments that were mere inches, despite the land being of "little value". 311 Mass at 597.

More recently, the Rhode Island Supreme court dealt with the issue of a de minimus encroachment. The Court in Renaissance Development Corporation v. Universal Properties Group held that a permanent injunction was appropriate where "the amount of land involved was approximately 250 square feet, and the result of the encroachment was the economic enrichment of the defendants at the expense of [the Plaintiffs]." 821 A.2d 233, 239 (R.I. 2003). In the case at bar, the Structure encroaches upon 133,000 square feet, approximately six percent of the Nulman Property. Certainly, a 133,000 square foot intrusion cannot be classified as a de minimus encroachment if the court in Renaissance made clear that much less, 250 square feet, was not de minimus. Due to the substantial encroachment on the Nulman Property, this court finds the de minimus rule inapplicable.

Another exception to the general rule of mandatory injunctions occurs in cases of estoppel by acquiescence. According to the Rhode Island Supreme Court:

> "A party alleging acquiescence must show that a boundary marker existed and that the parties recognized that boundary for a period equal to that prescribed in the statute of limitations to bar a reentry, or ten years. We have said that recognition of a boundary line can be inferred from the silence of a party, or his

> predecessor in title, who is aware that it exists... The party charged with acquiescence must have 'actual notice' of the boundary." Acampora v. Pearson, 899 A.2d 459, 464-65 (R.I. 2006).

In the case at bar, there was no clear boundary line between the Nulman Property and the Four-Twenty Property. As testified to during trial, at no point during the construction phase of the Structure did any of the parties know that the Structure was being built upon the Nulman Property. Upon the realization that the Structure was on the Nulman Property, Mr. Lamoureux informed Ms. Nulman, who immediately responded that the Structure would have to be removed. Ms. Nulman's instant response to Mr. Lamoureux proves she was anything but silent or inactive. Consequently, estoppel by acquiescence is inapplicable.

Finally, a third exception to the general rule of mandatory injunctions occurs in cases involving estoppel by laches. To warrant a conclusion of laches barring plaintiffs from the remedy that they seek, we must find not only that there have been some inexcusable delay in the assertion of their rights but also that such delay has placed defendants in an unfavorable position. Bochterle v. Saunders, 36 R.I. 39,44 (R.I. 1913). Throughout trial, neither party alleged a delay in the assertion of Plaintiffs' rights, nor does the Court find there to be such. Here, the Plaintiffs informed Defendants that the Structure would have to be removed immediately after learning of the encroachment. With the Structure still remaining on the Nulman Property, Plaintiffs promptly brought suit, thereby defeating a claim of laches.

The case at bar does not meet the necessary standard regarding the exceptions to mandatory injunction. As noted by Justice Silverstein, "[t]he issuance of an injunction and the scope and quantum of injunctive relief rests in the sound discretion of the trier of fact." Providence and Worcester R. R. Co. v. J. Broomfield & Sons Co., 2009 R.I. Super. LEXIS 72, 12 (R.I. Super Ct. 2009) (citing DiNucci v. Pezza, 114 R.I. 123, 130 (R.I. 1974)). Aside from a

mandatory injunction, there is no plausible remedy that would ensure the Foundation retains its ownership rights in its entirety.

The Defendants urge the court to balance the equities in deciding the appropriateness of injunctive relief. Although courts are not obligated to balance the equities when considering injunctive relief, this Court is cognizant of the equitable arguments raised by the Defendants. See Cullen v. Tarini, 15 A.3d 968, 982 (R.I. 2011). Defendants argued that the harm to Plaintiffs was minimal, as the Plaintiffs did not suffer any financial loss. Although the Defendants argument is understood that the continuing trespass has not been a substantial financial burden on the Plaintiffs, this does not classify the harm as minimal. This Court places extreme value on the rights possessed by a property owner, and does not find the lack of financial harm to be dispositive. "The duty of the courts is to protect rights, and innocent complainants cannot be required to suffer the loss of their rights because of the expense to the wrongdoer." Cullen, 15 A.3d at 982. It is undisputed that the Defendants will endure a substantial financial burden with the grant of an injunction. However, the fact that the cost of removal would be greatly disproportionate to the benefit accruing to the plaintiff from its removal is not a bar to the granting of coercive relief. Santilli, 102 R.I. at 338.

According to the testimony of Robert Lamoureux, the area of land affected by the continuing trespass is only six percent ("6%") of the total Nulman Property. The Defendants argued that 6% is an insubstantial portion of the land, as it did not affect the ability of the Nulman Property to be used as a public park. The mere numerical representation of six percent (6%) may surely represent a very minimal figure in many situations. However, this Court finds the figure to be six percent more than what a landowner in fee simple should be forced to transfer. Although this Court is not obligated to balance the equities when considering injunctive

relief, the Court considered the aforementioned factors, the culmination of which indicates the potential sufferance of the Plaintiffs without the grant of injunctive relief.

When the restriction at issue is unambiguous, this court "will not seek ambiguity where none exists but rather we will effectuate the purposes for which the restriction is established." Ridgewood Homeowners Ass'n v. Mignacca, 813 A.2d 965, 972 (R.I. 2003). In the matter before this Court, there is no ambiguity in the restriction, and the purpose for such restriction is clearly stated in the Declaration; the Nulman Property is to be used as a public park, not for private use. Allowing the Structure to remain on the Nulman Property is inconsistent with the purpose effectuated by the Declaration. Furthermore, forcing the sale of the Nulman Property, or a part thereof, would be inconsistent with the fundamental right of property ownership. This Court is mindful of the opinion of Lord Camden in Boyd v. U S, 116 U.S. 616, 630 (1886):

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property..."

III

CONCLUSION

The mandatory injunction is granted. Mr. Lamoureux shall remove his property from the land of the Rose Nulman Trust. Counsel for the Plaintiffs shall prepare an Order providing for the demolition or removal of the Structure from the subject property. As the demolition or removal will be a complex process, possibly requiring permits and regulatory approvals, the Order shall provide for a reasonable time table, indemnification, and proof of insurance for the period until the house is removed.