THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
No. 2012-CV-00342

J. Albert Lynch, Trustee of FIN-LYN Trust
Under Declaration of Trust Dated February 1, 1985

v.

Town of Pelham

ORDER

The plaintiff, J. Albert Lynch as trustee of FIN-LYN Trust under declaration of Trust dated February 1, 1985, brought this action for declaratory and injunctive relief against the defendant, the Town of Pelham (the "Town"). The heart of the dispute is whether the Town's development of a fire station/town office building ("fire station complex") violates restrictive covenants governing the property. In addition, the plaintiff asserts violation of other covenants regarding the planting of a tree buffer and the reconstruction and maintenance of a stone wall. The plaintiff also asks for attorney's fees, arguing that violation of the restrictive covenants warrants departure from the standard rule that each side is responsible for its own attorney's fees. The Court conducted a bench trial on June 3 and 4, 2015, and conducted a view of the property on July 6, 2015. Upon consideration of the evidence, the Court finds and rules as follows.

Procedural Background

The Town originally moved to dismiss this action, arguing that the plaintiff lacked standing to bring this action. This Court (Nicolosi, J.) agreed with the Town and dismissed the case, a determination which the supreme court reversed. See Lynch v. Town of Pelham, 167 N.H. 14 (2014). After the case was remanded, the Court scheduled it for a bench trial. Prior to trial, on April 14, 2015, the plaintiff moved to

bifurcate the trial, recommending a first phase to address whether the restrictive covenants had been violated and, if so, a second phase to determine the appropriate remedy or remedies. The defendant objected. The Court denied the motion to bifurcate on May 18, 2015 ("Order"), finding bifurcation inefficient, as testimony regarding those two issues were likely to overlap.

The plaintiff also moved for a determination that it should not bear the burden of proving the appropriate remedy if the court found that a covenant had been violated. The defendant objected, arguing that the plaintiff bears the burden of proof as to a violation of a covenant as well as the appropriate remedy, if violated. The Court held that the burden of proof regarding violation of a covenant as well as a proposed remedy rested with the plaintiff. If found to have been violated, however, the burden would then shift to the defendant to prove that the proposed remedy is "impossible, inequitable or would otherwise create a substantial hardship." (Order at 5.)

On the eve of trial, the plaintiff moved to amend the petition to adjust the remedy based upon changed facts. The proposed amendment would require the defendant to consult with the plaintiff to develop a plan, within six months, to modify the fire station "to bring it into a colonial character that meshes with the residential and municipal buildings on and around the Village Green and in Pelham, including that the flat roof be replaced with a gable or visibly pitched roof" and that construction be completed within two years. In addition, the tree buffer would be re-established "with the most mature trees feasible" and the stone wall repaired within 90 days of an order of the court. (Pl.'s Mot. Amend at 13)

The Court deferred ruling on the motion to amend in order to proceed with the trial as scheduled and to allow the defendant to file an objection. The defendant did so on June 12, 2015, arguing that the amendment would introduce a new cause of action regarding consistency of design with buildings on other properties in Pelham. Further, the defendant argued that the time for consultation was over and to allow a six month consultation period would effectively circumvent the Court's order regarding bifurcation.

Also at the start of trial, the plaintiff argued that, because the covenant regarding colonial architecture is clear on its face, the plaintiff's and defendant's expert witnesses addressing colonial architecture should not testify. The Court denied the request, finding the testimony would put the fire station design into context. Further, a key reason the Court denied the plaintiff's request for bifurcation was that the experts would still be needed to assess the appropriateness of any remedy proposed. (See Order at 3.) Thus, either way the experts would need to appear.

Background and Facts

On February 1, 1985, J. Albert Lynch and Louis Fineman formed the FIN-LYN Trust to purchase a 24 acre farm on Marsh Road in Pelham, for the purpose of transferring most of the land to the municipality for use as a town center with both open space and municipal buildings. The trust subdivided six lots for residential development and, on May 31, 1985, deeded the remaining 18 acres to the Town, under restrictive covenants regarding the land's use and improvements. The restrictive covenants included, among other things, the following:

> #6 All buildings to be constructed on the land hereby conveyed shall be of Colonial architecture and shall be architecturally consistent with each other. No building shall have a flat or single pitch roof and no building shall exceed two stories in height, excluding the basement.

> #7 Within two years of the date of this deed and prior to the construction of any building or parking lot on the southern one third of the land hereby conveyed, the Town of Pelham shall plant a dense row, at least thirty (30) feet deep, of white pine, scotch pine, fir, spruce or willow trees along the southern property line of the land hereby conveyed.
>
> #13 The Town of Pelham agrees to reconstruct and maintain the stone wall along Marsh Road and said wall may be breached only for ingress and egress.

(Pl.'s Ex. 1; Def.'s Ex. A.)[1]

In 2002, the Town built a new library and developed open space for sports, town concerts and the like on the protected land. The library is a white clapboard-sided building with steeply pitched roofs[2] and strong horizontal lines. (See Pl.'s Ex. 35.) Knowing that the old fire station needed replacement, the Town collected impact fees specifically for construction of a fire station complex on the southern section of the Village Green. According to both parties, after six years, impact fees not spent must be returned to the current property owner. See K.L.N. Constr. Co. v. Town of Pelham, 167 N.H. 180 (2014) (finding that unspent impact fees in Pelham should be returned to current landowner, not developer). Therefore, if it took longer to finance and build the fire station complex, the Town would need to refund more and more fees as the six-year deadline passed. The plaintiff contends that the need to refund impact fees was a motivation to rush the design through; the defendant disagrees.

The fire station complex efforts began in 2004 and continued until 2012 when voters approved the project; construction was substantially complete by July 2013. The

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[1] Many of the trial exhibits were duplicated by the parties. For ease, the Court will reference only one of the parties' exhibits; which party's document is referenced does not indicate a position of the Court regarding the contents of the document.

[2] The pitch of a roof is stated as a ratio, such as 6:12, or 6 for shorthand. That is, for every 12 inches of horizontal "run" there are 6 inches of vertical height. A roof pitch of 1 has for every 12 inches of horizontal run a vertical rise of 1 inch.

process to get to a completed building, however, was not simple. In 2005, the Board of Selectmen engaged the architectural firm Donham and Sweeney, which designed a fire station complex with multiple steep pitched roofs to comply with the covenants. The design, estimated to cost $7.3 million, would have required a three-fifth's majority vote necessary for a project that involved bonding. The voters rejected the proposal at the March 2007 Town meeting.

The Board of Selectmen then retained the architectural firm Sumner Davis to redesign the fire station complex. (Pl.'s Ex. 4.) The new design, estimated to cost $4,273,000, failed to get the three-fifth's majority vote required in March of 2008. In 2009, a slightly redesigned proposal was put forward, now estimated to cost $4.7 million; it too failed to garner a three-fifth's majority. In March of 2010 another version of the Sumner Davis proposal, estimated to cost $3,950,000, again failed to get the necessary three-fifth's support.

The Board of Selectmen decided not to present the proposal again for the 2011 Town meeting. Instead it engaged a new architectural firm, Berard Martel, to develop a less costly design. (Pl.'s Ex. 9 at 3–4.) Berard Martel had recently completed the Hackett Hill fire station in Manchester. At the December 14, 2010, meeting of the Board of Selectmen, Town Administrator Tom Gaydos reported that Berard Martel knew "it must work to ensure that [the building] meets all the restrictive covenants." The project was now budgeted at $3.7 million. (Pl.'s Ex. 11 at 1.) No one spoke in opposition.

Berard Martel proposed at that meeting to pitch the apparatus bay roof "sideways" so that water and snow would not fall in front of the building. This design would satisfy deed restrictions, according to the architects. The proposal was again

presented at the January 4, 2011, Board of Selectmen's meeting. According to Berard Martel, the proposal had been further revised to add colonial elements to the design and Berard Martel believed that the proposal met all restrictive covenants. (Compare Pl.'s Ex. 17 at 4, with Pl.'s Ex. 16 (Hackett Hill fire station).) The Town also stated that a single center column was an important element of the design, as it allowed fire equipment to be moved in and out without concern for structural support barriers. In addition, according to the minutes, Mr. Gaydos noted that the restrictions required "the Town to put in certain types of trees. He believed the idea was to select trees that would be attractive and act as a sound barrier." (Pl.'s Ex. 17 at 4.) The Board voted to recommend a warrant article to bond the funds needed to build the project. No one spoke in opposition. (Id. at 5.)

The Fire Chief made presentations to community groups in 2011 and 2012, and at the February 8, 2011, Town deliberative session showing the design of the fire station complex. No one spoke in opposition. The Board of Selectmen took up the project again on June 28, 2011. The project manager, David Mermelstein, offered two designs – steel construction which would have a single pitch roof or concrete construction which would have a slightly pitched roof "and would technically meet the covenants that were placed on the property." The Board voted to proceed with the concrete building design. (Pl.'s Ex. 18 at 4.) No one spoke in opposition.

The Budget Committee next took up the project on November 14, 2011, and voted to place the fire station funding proposal on the ballot, namely, to appropriate $3.9 million to construct the fire station complex, with expenditure of $423,393 from the impact fees account, $2,100,000 from Town funds, and $1,376,607 raised through

taxation. (Pl.'s Ex. 19 at 5.) The Budget Committee also discussed the tree buffer behind the fire station complex, agreeing to leave the existing buffer intact or "possibly enhance it." The "smaller growth toward Sawmill would not be touched." (Id. at 2.)

The Town restructured the financing to no longer require bonding and instead could be approved on a simple majority vote. At the 2012 Town Deliberative Session on February 7, 2012, the project was placed on the Town ballot. When asked about the tax impact of raising $1.3 million, Selectman Hal Lynde explained it would be "about $1 per $1000 of valuation in one year. That would be a $250 payment for the owner of a $250,000 home." (Pl.'s Ex. 20 at 5.) On March 13, 2012, voters approved the proposal by the required simple majority.

In anticipation of the Town votes in 2011 and 2012, an architect's drawing of the fire station complex was posted in the Town office. The drawing is 2 feet by 3 feet and was mounted on an easel in the front lobby of the town offices, (Def.'s Ex. B), so that "it was the first thing you saw" according to Mr. Gaydos. The drawing was displayed approximately from December 2010 to the Town meeting in March of 2012. In addition, the Town sent a mailer to all residents that included a small print of the architect's drawing that showed the building design and estimated that the average homeowner would pay $286 in a one-time tax assessment for the costs of the fire station complex. (Def.'s Ex. C.) A newspaper notice included the same information and architect's drawing. (Def.'s Ex. D.) The architect's drawing and newspaper insert did not restate or address the restrictive covenants.

William T. Hayes, a longtime Pelham resident whose property shares 2,000 linear feet of the stone wall, testified to the creation and purposes of the Trust. At the

time the Trust was formed, Mr. Hayes was Chairman of the Planning Board as well as a lawyer for the U.S. Treasury Department. He worked with the plaintiff to develop the restrictive covenants. He testified that he understood "Colonial architecture" to require a roof with a minimum pitch of 8 and design elements from the New England colonies, and "not the New York colonies." When asked why he had not drafted more specific covenant language, he stated that he may have been "naïve" but "we all know" what colonial means.

Prior to Town action on the fire station complex proposal, Mr. Hayes voiced his concern regarding its design. He testified that he always disliked the flat roof of the old fire station and was upset to see the design of the new station, as it appeared to have essentially a flat roof. (Pl.'s Ex. 2.) In his view, the fire station looks like "the back of a factory or warehouse." Mr. Hayes stated that the fire station project went to Town meeting without discussion of the deed restrictions and that no one presented the plan to him or the plaintiff for their review. He conceded, however, that the covenants had not been drafted to require such review or approval. He recalls speaking with Town Administrator Gaydos expressing his concerns. Mr. Gaydos testified that he does not recall the conversation with Mr. Hayes, but if he did discuss the fire station, he would have told Mr. Hayes that the architect had assured the selectmen that the plans complied with all of the restrictive covenants.

Mr. Hayes cited the new library as an example of a building that complies with the colonial architecture covenant, as it has gabled roofs, small window panes, and symmetry. (Pl.'s Ex. 35.) He stated that the construction of the library was complicated because the initial Town design located the parking lot in front of the building, defeating

the open space concept of the Town center and violating the restrictive covenants. After repeated communications and threats to contact bond counsel, the parking area was relocated and the open space was preserved for sports and other activities. Mr. Hayes' 2002 letters and e-mail to the Board of Selectmen on behalf of himself and the plaintiff, detailing their concerns regarding the library parking plan, need for a tree buffer, and need for repair and maintenance of the stone wall, were introduced as defendant's exhibits E, F and G. Mr. Hayes testified that he did not pursue the tree buffer and stone wall issues when the library was being built because "you have to pick your battles." The defendant brought forth these documents to demonstrate the difference between the dogged opposition that Mr. Hayes and the plaintiff mounted in 2002 regarding the covenants before finalization of the library plan to the minimal opposition voiced for the most part after Town approval of the fire station complex.

The plaintiff, J. Albert Lynch as trustee, is a lawyer, retired municipal judge, real estate developer and long-time resident of Pelham. He testified to the purchase of the land for a Town center and the creation of the Trust with Mr. Fineman. In his view, the fire station is not consistent with the rest of the Town center and "looks like a Jiffy Lube." The roof is essentially flat, which is a characteristic from the old fire station he sought to avoid. He also commented, regarding consistency, that "you wouldn't want to see a mosque there." He testified that he did not want construction halted once begun but believed there were things they could do to "pretty it up," such as a new roof with cupolas.

He conceded that the covenants did not require the trustee to review and approve the design, but felt that wasn't necessary because he and Mr. Hayes lived in

colonial houses and everyone knew what that meant. He found the new library acceptable under the covenants, although it could have been more attractive. He felt that the flat roof portion of the library was de minimus—what was really important to him was the appearance of the "top roof."

Judge Lynch testified that he had been in and out of the Town office at least once a month for real estate and other business matters during the 14 to 16 months the architect's drawing was displayed in the lobby, but did not recall seeing it. He did remember trying to speak to Selectmen Bill McDevitt and Planning Board member Jason Croteau but they both refused, referring him instead to Town counsel. Mr. Gaydos recalls that the plaintiff expressed concerns at some point, but could not recall when or over which medium. Mr. Gaydos knew that the plaintiff had issues with the building before construction, but he was not certain whether it was before or after the Town approved the proposal. He stated he was not authorized to enter into negotiations with him, and that Town counsel was to handle the communications.

Asked why he did not attend public meetings when the project was being discussed, Judge Lynch said he did not want to be "the skunk at the garden party." When asked why he didn't express his opposition in writing early on, he stated that he didn't have a secretary, and, in any event, Mr. Hayes "was the better chronicler." He also expressed dismay that he was not formally invited to attend the opening of the building and there were no seats reserved for him or Mrs. Fineman, after his work to purchase the land and create the Town center. Judge Lynch also testified that portions of the stone wall were well repaired and maintained but other sections were in need of reconstruction.

Selectman McDevitt testified that the restrictive covenants were discussed throughout the project. Berard Martel assured the Town that the design was "colonial" and that the pitch of the apparatus bay roof had enough slope to be considered not "flat." He could not recall any concerns raised by the plaintiff, as that would have "scared [him] to death." He further stated that voters did not express concerns regarding the fire station design, and that they were more concerned with emergency service, time of response, and cost.

The plaintiff's first written statement of concern about the fire station design was a letter from counsel dated March 27, 2012, two weeks after voters approved the project. The letter stated in pertinent part, "[t]he proposed concrete building with a flat roof is plainly contrary to the language of the restrictive covenant." (Pl.'s Ex. 21.) There was no mention of the tree buffer or stone wall. Judge Lynch conceded that, at the time of the letter, he probably didn't realize that clapboards were going to be added to the building. Mr. McDevitt testified that the letter disturbed him and he forwarded it to Town counsel for response.

Town counsel responded on April 20, 2012, asserting that the fire station "does not have a flat or single pitch roof" and that the "architectural details of the building are consistent with Colonial architecture." The letter concludes that the building complies with the covenant. (Pl.'s Ex. 22.) After further exchanges as to whether the building complies with or violates the covenant, Town counsel stated that the project would go forward and the plaintiff was free to seek a temporary restraining order or preliminary injunction if it felt such was necessary. (Pl.'s Ex. 24.) This action for declaratory or injunctive relief was filed on April 20, 2012.

There was much testimony regarding the elements of colonial architecture. Architect Kelly Davis, who designed one of the proposals rejected by voters, testified that colonial buildings tend to have 6 or 7 pitch roofs. The fire station roof appears from the exterior to be flat, which in his view is not colonial. He acknowledged that he does not have personal knowledge of the roof's measurements.

The plaintiff called Fred Matuszewski of Bedford, a registered architect. Mr. Matuszewski testified that colonial architecture is characterized by classical design elements, including symmetry, proportion, balance of size and mass, and use of trim. According to Mr. Matuszewski, what we generally refer to as "colonial" architecture was prevalent through the first quarter of the 19th century, replaced by Greek Revival and Gothic Revival styles. There was a resurgence of interest in colonial architecture in the late 19th to early 20th centuries, then known as Georgian Revival or Colonial Revival. The new style blended colonial design with changes such as greater massing of buildings and asymmetrical floor plans, but keeping classical trim elements. According to Mr. Matuszewski, "[w]hile the revival styles kept the classical trim elements, the fundamental classicism of symmetry, proportion and balance was frequently cast aside as the structure became larger and grander." (Pl.'s Ex. 34 at 3.) Parapet walls on the front of a building, some even and some stepped, were common, particularly in New York, reflecting Dutch influences, though they were also seen in New England. The old State House in Boston, he noted, was a colonial revival building that had a stepped parapet. With advances in design and materials, roofs could be less steep and lower slope roofs became more common. Although some commercial buildings, including fire

stations, used nearly flat roofs in the 19th century, in his opinion these should not be considered "colonial" or "colonial revival." Id.

Examining the Pelham fire station, Mr. Matusewski found the mass of the building to be too great, losing the relationship to human scale known as the classical "Golden Mean" or "Golden Section." In his view, the fire station is not colonial in character. (Pl.'s Ex. 34 at 6.) He found no easy way to remedy the problem. "Perhaps the office end wall can receive a large porch that better relates to the gable wall. Perhaps the apparatus bay can receive a gabled roof, or pediment that begins to visually diminish its over-all size." He concluded, "[t]hese additions to the existing building should be able to be achieved without imposing substantial costs to the owner." Id.

The plaintiff also called Lisa Mausolf, a preservation consultant located in Reading, Massachusetts. She too testified that colonial architecture is characterized by symmetry, balance, with hip roofs or gable roofs with a medium pitch, use of wood clapboards or brick, double hung windows with six or more panes in each sash, sometimes use of wooden shutters, an entrance at the center with paneled doors, casings, pediments, porches and transoms. She found the office section of the building to violate colonial principles but showed an attempt to "blend with and not detract from its pre-existing neighbors," noting use of clapboards, a gable roof, and double hung windows with six panes up and down. The only colonial element in the fire station portion, in her view, was use of clapboards, and they did not change her position that the structure was a "flagrant violation" of the colonial architecture covenant. She asserted that buildings of this size did not exist in colonial times and the architect made

no effort to imitate a building that might have been of the period, such as a barn or stable. The use of a stepped parapet reminded her of the early 20th century and "the Wild West" and was not an element of colonial architecture. (Pl.'s Ex. 33.) She considered the new library to violate colonial architecture principles as well.

To make the office portion of the building more colonial in character, she testified, one could move the entrance, which is now off center, to make it more symmetrical, and modify windows and signs to restore a sense of balance and symmetry. Square piers could be replaced with round columns, as used in the library, columns could be added to the side elevation, window lintels or shutters could be placed on the front, and the "monotony" of the front gable could be broken with some type of ornament. The fire station portion she found more difficult to remedy. She suggested a new gabled roof that included dormers and/or a cupola that would help to break up the mass of such a roof. Although she identified significant reconstruction measures to make the building more symmetrical and balanced, she testified that most of the changes were "prohibitively expensive."

The defendant presented an expert witness as well, Richard M. Casella, an architectural and engineering historian located in Portsmouth, Rhode Island. He described the geographic variations in colonial design and the general acceptance of the term to refer to buildings up through the mid-19th century, including federal and Greek revival styles. He stated that "colonial revival" started with the restoration of Independence Hall in 1828 and continued to 1940, with eclectic combinations of elements rather than strict adherence to original colonial designs. (Def.'s Ex. W at 1.)

Mr. Casella testified that commercial buildings and fire stations tended to use flat or nearly flat roofs and stepped parapets. He identified three bank buildings from the early 1800's that are classified "colonial" and four fire stations from the late 1800's to early 1900's that are classified "colonial revival," all of which have flat roofs and stepped parapets. (Id. at 6–7.) He also noted that colonial revival fire stations of the early 1900's often had flat or nearly flat roofs with stepped parapets, similar to the Town's structure. (Id. p. 4.) According to Mr. Casella, both the fire station and the Town office sections incorporate elements of colonial and colonial revival architecture, including gable roofs, low to medium slope, triangular and flat pediments, double hung windows, wide trim around openings, cornice returns, a stepped parapet, and a blind window. (Id. at 2.)

The fire station portion of the building approved by the voters and ultimately built includes clapboard siding, shadow blocks and molded decorative elements to give a sense of depth, strong vertical lines between the bays that suggested columns, corner returns, and window partitions mimicking individual panes of glass. (Def.'s Ex. GG.) The roof on the far southern edge of the building and the roof connecting the fire station section to the town offices section have a significant pitch. (Id.) The fire station also has a large horizontal parapet that bears the name of the fire station and blocks the roof line from the public's view.

The roof over the fire station apparatus bay has a slight pitch of 1:12. From the street, it appears flat (Pl.'s Ex. 25) although, if one is on the roof, the slight pitch is apparent. (Def.'s Ex. L.) Inside the apparatus bay the slight pitch is visible. There is a single center column but otherwise the apparatus bay is open. The Town offices

section of the building has a steeply pitched roof, corner returns, individual panes of glass in the front windows, and two steeply pitched porticoes.

Regarding remedies, the plaintiff did not ask that the fire station be torn down. The plaintiff did ask, however, that a secondary roof be constructed that has significant pitch, similar perhaps to the library roof. The plaintiff did not propose a more detailed remedy.[3] The defendant presented the plaintiff's' request that a more steeply pitched roof be built over the existing roof to its building contractor, Meridian Construction. Meridian Construction developed a rough estimate to build a roof over the current roof. A pitch of 6 would result in a roof 60 feet high, which Meridian believed would overpower the other buildings on the Town center.[4]

A roof that is less steeply pitched than the library roof but more steeply pitched than the current fire station roof, could be built, according to Meridian. It could not, however, simply be placed over the existing roof, as the building is designed only to bear the weight of the existing roof. Even a "faux" roof would require that new weight bearing columns be punched through the current roof, which would reduce the useful space inside the building and make it more difficult to house and move the fire equipment. As a further complication, a second roof would have to accommodate the heating, air conditioning and other equipment housed on the current roof. Any new roof would have to allow for access and lighting. According to Mr. Martel, Meridian Construction estimated the cost to design and construct a second roof over the existing roof to be $1.1 million to $1.3 million. Administrator Gaydos testified to his experience

[3] While the defendant was presenting its case, Ms. Mausolf, who was sitting in the courtroom, developed a sketch showing a "faux" roof placed over the existing roof. The sketch was not introduced into evidence.
[4] Pelham zoning restricts buildings to 40 feet in height. Although the Town testified that it is not bound by zoning, it strives to abide by the zoning limits.

with voters when large expenditures are required. He testified that a $25,000 cruiser is difficult to get through a Town meeting and, based on that, $1.1 to $1.3 million to build a new roof would not be well-received. Plaintiff's counsel argued that this cost estimate is "extraordinarily high" and that the true cost would be lower, but he presented no testimony to support that assertion.

Regarding the tree buffer, Mr. Hayes testified that years ago the Boy Scouts and other volunteers planted 300 trees. He was not able to recall, however, the exact year this occurred or the species that were planted. Many of the trees were plowed up when the Town leased the land to a pumpkin grower, while others died. Only one tree remains from the initial planting. Mr. McDevitt also recalled the planting effort years ago, and the subsequent loss of those trees when the area was leased to a pumpkin farmer. Over the years, however, new trees have filled in and the area is now heavily wooded, though Mr. McDevitt concedes the species may not be those set forth in covenant #7. The defendant argues that the matter of the tree buffer should be dismissed due to the statute of limitations and/or laches. The defendant also contends, however, that trees were appropriately planted years ago and the tree buffer is now well established.

Finally, regarding the stone wall, the plaintiff claims that the covenant requiring reconstruction and maintenance of the wall along Marsh Road has been violated. According to the plaintiff, the portion of the wall towards Sawmill Road has not been repaired. At trial, Mr. Gaydos stated that much of the wall has been repaired but other segments were in "disarray." (See, e.g., Pl.'s Exs. 28–32.) Mr. McDevitt acknowledged that the segment "towards the woods" in the direction of Sawmill Road is in need of

repair, but the rest of the wall is in "very good shape." When asked if the Town was willing to work on sections that had not been reconstructed, he replied "[a]bsolutely," as it is something that should be done. The defendant argues, however, that the matter of the wall should be dismissed due to the statute of limitations and/or laches.

At the view, the Court observed segments of the wall along Marsh Road, particularly towards Sawmill Road, clearly in need of repair and maintenance. The plaintiff and Mr. Hayes also took issue with the change from a free-standing stone wall to a retaining wall in the center section where an electronic town sign is located. Although Mr. Hayes testified the retaining wall portion was out of character from the original stone wall, the plaintiff does not ask that the retaining wall be restored to a free-standing wall.

Analysis

The Court first addresses the plaintiff's motion to amend. Pursuant to RSA 514:9, "a trial court may permit a substantive amendment to pleadings in any stage of the proceedings, upon such terms as the court shall deem just and reasonable, when it shall appear to the court that it is necessary for the prevention of injustice." Sanguedolce v. Wolfe, 164 N.H. 644, 647 (2013) (internal quotes omitted). "Accordingly, liberal amendment of pleadings is permitted unless the changes would surprise the opposing party, introduce an entirely new cause of action, or call for substantially different evidence." Id. at 647–48 (citations omitted). "Although amendment of pleadings is liberally permitted, the decision to grant or deny a motion to amend rests in the sound discretion of the trial court." Dent v. Exeter Hosp., Inc., 155 N.H. 787, 796–97 (2007). The Court's decision on such a motion will not be overturned

on appeal "absent an unsustainable exercise of discretion." Sanguedolce, 164 N.H. at 648.

As noted above, the Court deferred ruling on the plaintiff's motion to amend, which sought to include in the complaint a requirement that the fire station be modified to be consistent not only with the architecture of the village green, but with residential and municipal properties throughout Pelham. The proposed requirement is not a requirement of the restrictive covenants and creates a new cause of action. The plaintiff also requested an additional six months for the parties to consult regarding remedies, and that the flat roof be replaced with a gabled or visibly pitched roof within two years. Further, the Court made clear in its Order that the plaintiff had the obligation to identify, prior to trial, the remedies it proposed if one or more of the restrictive covenants were found to be violated. This matter has been pending since 2012 and the parties deserve a decision. For these reasons, the plaintiff's motion to amend is DENIED.

Turning to the merits, the supreme court has ordered this Court to "determine whether the fire station violates the restrictive covenants, and, if so, the nature of the remedy." Lynch, 167 N.H. at 27. The legal standards regarding enforcement of restrictive covenants were set forth in the Court's Order. As stated therein, a plaintiff or covenantee may sue for equitable enforcement of a restrictive covenant, and the Court may order specific performance or injunctive relief. The party seeking enforcement bears the burden of proving the validity and meaning of the covenant, and must establish that the restrictive covenant has been violated by the defendant and request a remedy. (Order at 3–4 (citing Perel v. Brannan, 594 S.E.2d. 899 (Va. 2004); Bogardus v. Zinkevicz, 134 N.H. 527 (1991); Gauthier v. Robinson, 122 N.H. 365 (1982)).)

If the plaintiff proves a violation of a restrictive covenant, the ultimate test the Court will use is 'whether the injunctive relief [requested] would be equitable in view of all the circumstances" of the case. Johnson v. Shaw, 101 N.H. 182, 189 (1957). As the Court previously noted, the plaintiff is entitled to the relief requested, unless the defendant establishes one of several defenses or the Court finds enforcement unusually difficult. (Order at 4 (citing Perel, 594 S.E.2d at 905).) As the Court stated, a defendant may avoid imposition of the remedy if it can prove that the remedy creates a hardship or injustice that is out of proportion to the relief sought. (Order at 4 (citing Perel, 594 S.E.2d at 905.)

In this case, the plaintiff alleges violations of restrictive covenants #6, #7 and #13. The Court will address each of the covenants in turn.

I. Fire Station

A. Covenant Requiring Colonial Architecture

Restrictive covenant #6 requires all buildings placed on the property, now known as the Town center or village green, to be of "Colonial architecture and shall be architecturally consistent with each other." "Colonial" is not defined. This is an aesthetic covenant and although the term is not legally ambiguous, there are no doubt subjective differences in what people find most important in considering what qualifies as "Colonial" architecture.

The fire station complex includes numerous design elements that are colonial in character, such as clapboard siding, extensive use of trim, windows, corner returns, use of vertical lines between the bays to mimic columns, and use of trim to create shadowing and depth on the façade. Further, three of the roofs are steeply pitched, at

the southern end of the building, in the section that connects the fire apparatus bay to the office portion, and over the offices portion of the building itself.

The testimony of both the plaintiff's expert Mr. Matuszweski and the defendant's expert Mr. Cassella, established that colonial, and colonial revival are somewhat fluid concepts.[5] Further, elements found in a colonial style residence, which tends to have small dimensions, symmetry, balance, a steeply pitched roof, and wooden clapboards, for example, are not necessarily found in a colonial commercial building, which tends to have a more imposing scale, off center design, some flat roofs, and use of brick, for example. Finally, the colonial design appears to have varied from one geographic area to another. Indeed, Mr. Hayes acknowledged as much when he testified that he expected "New England colonial" design and not New York colonial design.

Based on the plaintiff's acceptance of the new library as being consistent with colonial design, it is clear that the plaintiff does not read the covenant to require historically accurate recreation of 17th, 18th or 19th century buildings. Rather, the plaintiff's support of the library indicates an acceptance of a large modern building that incorporates certain colonial features, such as pitched roofs, symmetrical windows, clapboards and use of trim. It is noteworthy that the library also contains a distinctive horizontal flat panel that dominates the center of the building where the name appears. The parapet on the fire station is of a similar character and, in the Court's view, somewhat harmonizes the two buildings, helping to make them architecturally consistent, as required by the restrictive covenant.

Given the testimony of the broad range of architecture that constitutes colonial, colonial revival, and post-modern colonial revival, the design elements incorporated into

[5] Mr. Casella classifies many buildings as examples of "post-modern colonial revival architecture."

the fire station complex, and the consistency with the library building that has been well received by those finding fault with the fire station complex, the Court cannot conclude, that the fire station complex violates the restrictive covenant that the building be of "Colonial architecture." In light of this decision, the Court need not reach the laches argument with regard to this issue.

B. Covenant Prohibiting Flat Roof

Restrictive covenant #6 also prohibits any building on the property from having a "flat or single pitch roof." The defendant argues that because there is a slight pitch to the roof, which is visible from inside the building, it is not technically flat and thus does not violate the covenant. The slight pitch, however, is obstructed to the external viewer by the horizontal stepped parapet that contains the fire station name.

The Court finds the Town's response to be hyper-technical and contrary to common sense. Unlike the requirement of "Colonial architecture" that is non-specific and open to subjective difference of opinion, a prohibition against a roof that appears flat is clearly understood. The previous fire station had a nearly flat roof, and witnesses stated that they didn't want the new fire station to have a roof like the old fire station. The large roof over the apparatus bay has a pitch of 1:12, which architects testified was necessary to meet code requirements for run-off. While it is true that once inside, with some effort, the Court was able to discern a slight pitch to the roof, the photographs introduced at trial and the Court's direct observations confirm that to an outside observer, whether on the Town center or on Marsh Road, the roof appears flat. Thus, the Court concludes that the "no flat roof" provision of restrictive covenant #6 has been violated.

The defendant's argument that laches and/or the statute of limitations bars enforcement of this covenant term is DENIED. The plaintiff expressed his concerns with the fire station roof in a March 27, 2012, letter to Town counsel, two weeks after the voters approved the proposal. Although it would have been far preferable for the plaintiff or Mr. Hayes to speak to the issue during the 18 months that the final design was being publicized, debated, and presented to Town voters, or to have sought a preliminary injunction prior to construction, the Court does not find that an action to enforce the "no flat roof" covenant is barred.

C. Remedy

The question, then, is what the appropriate remedy should be. The only workable remedy presented by the plaintiff was the addition of a second pitched roof sitting over the current roof. It would have to be designed with enough of a pitch to not appear flat but gently sloped enough to keep from overwhelming the Town center with its height. It was estimated to cost between $1.1 and $1.3 million. While this estimate is preliminary and might prove to be too high, or too low, if fully designed and built, it is the only evidence in the record and does not strike the Court as lacking in credibility.

In addition to the cost, the necessary use of one or more new support columns and the resulting diminution of workable space inside the fire station is a significant concern of the Town. The fire apparatus bay was designed with a particular purpose and as the Court observed on the view, there is little excess space, given the size of the equipment. A second roof, requiring new support columns, would interfere to some degree with the building's current operations.

Based on the evidence, the Court finds that the defendant has met its burden

that construction of a new roof over the existing roof would "create a hardship or injustice that is out of proportion to the relief sought." Perel, 594 S.E.2d. at 905 (citations omitted). Further, the plaintiff did not seek a preliminary injunction or other relief and, in fact, Judge Lynch stated he had no intention to halt construction of the building but thought there would be ways to "pretty it up" once completed. Imposing a remedy after construction that costs from $1.1 to $1.3 million and diminishes the usefulness of the building, as compared to the aesthetic benefits that would be achieved, would not be just. Although the Court finds that the "no flat roof" covenant has been violated, the Court will not order that a second roof be constructed over the existing roof or the existing roof be replaced with a new gabled roof.

Because the Court does not find the colonial architecture restriction to have been violated, and because no proposals to modify the office portion of the building were presented to the defendant for cost estimates prior to trial, there is no need to address the reconstruction ideas Ms. Mausolf discussed on the stand.

II. Tree Planting

Based on the record and the Court's view, the area between the fire station complex and Sawmill Road is thickly vegetated. Volunteers planted hundreds of trees years ago, in accordance with covenant #7 but, for a variety of reasons, those trees did not survive. New vegetation filled in, though the species are not necessarily those called for in the covenant. The plaintiff did not ask for removal of the existing vegetation and did not propose any other remedy regarding this restrictive covenant.

The restrictive covenant regarding the tree buffer calls for trees to be planted within two years of the date of the deed and prior to construction of any building or

parking lot on the southern one-third of the land. The deed was executed in 1986; thus the Town was obligated to plant by 1987. The Town in fact planted hundreds of trees years ago, though no one could remember the exact date. The plaintiff could have raised at that time concerns about the species of trees selected for planting, and may have been able to challenge the lease of the area between the fire station and Sawmill Road to a pumpkin farmer, rather than maintaining it as a tree covered buffer. And in his March 27, 2012 letter assertion violation of covenant #6, the plaintiff made no mention of covenant #7.

The Court finds that the defendant has met its burden to demonstrate that an action to enforce the "tree planting" restrictive covenant is barred by laches. Even if it were not barred, the Court finds that covenant #7 has not been violated. Of course, to the extent that new planting may be done on the Town center in coming years, the Town should consider whether species identified in the covenant would be appropriate for the location.

III. Stone Wall

The defendant's argument that laches and/or the statute of limitations bars enforcement of this covenant term is DENIED. Unlike the tree buffer covenant, the stone wall covenant is an on-going obligation to "reconstruct and maintain" the stone wall. It is reasonable that long periods of time would elapse without complaint or concern. The Court does not find that an action to enforce the stone wall covenant is barred.

Based on the record and the Court's view, the stone wall is in a mixed state of repair. The center portion has been reconstructed and, but for on-going maintenance

and vegetation control, it is in good condition. The section to the southeast, towards Sawmill Road, however, is in need of work, resetting fallen stones and cutting back vegetation that now obscures much of the wall. The Court finds that restrictive covenant #13 is only partially complied with, although it recognizes that maintenance of the wall is an on-going matter. The defendant shall make the necessary structural repairs to the wall and establish a regular schedule of maintenance that addresses winter damage and summer vegetation control.

Although certain witnesses complained that a long stretch of the wall had been transformed into a retaining wall, they did not assert that a retaining wall violated the restrictive covenant or that the retaining wall should be restored to a free-standing structure. The Court, therefore, makes no finding as to whether the retaining wall is consistent with or violates restrictive covenant #13.

IV. Attorney's Fees

Finally, the Court addresses the issue of attorney's fees. "The general rule in this State is that each party to a lawsuit is responsible for payment of his or her own attorney's fees." Clipper Affiliates, Inc., v. Checovich, 138 N.H. 271, 277 (1994). Therefore, "[a] prevailing party may [only] be awarded attorney's fees when recovery of fees is authorized by statute, an agreement between the parties, or an established judicial exception to the general rule that precludes recovery of such fees." In the Matter of Mason & Mason, 164 N.H. 391, 398 (2012). Those exceptions include:

> where an individual is forced to seek judicial assistance to secure a clearly defined and established right if bad faith can be established; where litigation is instituted or unnecessarily prolonged through a party's oppressive, vexatious, arbitrary, capricious or bad faith conduct; as compensation for those who are forced to litigate in order to enjoy what a court has already decreed; and for those who are forced to litigate against

an opponent whose position is patently unreasonable.

Id. at 399 (citation omitted). The trial court is given "tremendous deference" in deciding whether to award attorney's fees. Id. (citation omitted).

In this case, the plaintiff only seeks attorney's fees under the common law—he has not cited a statute or an agreement between the parties as the basis for such an award. The Court notes that the plaintiff has only partially "prevailed" on the stone wall issue. The Court finds that the imposition of attorney's fees on this limited issue is not appropriate. Unlike the issue with the fire station building, there is no evidence that Judge Lynch requested that the wall be fixed before instituting suit. Likewise, there was no evidence of bad-faith on this issue. Rather, Mr. Gaydos seem receptive to fixing the wall and acknowledged that it should be fixed. Accordingly, the plaintiff's request for attorney's fees is DENIED.

Conclusion

The Court finds that:

1) the plaintiff has failed to prove a violation of the "Colonial architecture" requirement of covenant #6;

2) the plaintiff has proven a violation of the "no flat roof" requirement of covenant #6;

3) the defendant has proven that the cost to remedy the flat roof violation is out of proportion to the benefits to be gained;

4) the defendant has met its burden that a claim for violation of the tree buffer requirement in covenant #7 is barred;

5) the defendant has failed to prove that a claim regarding the reconstruction and

repair of the stone wall requirement in covenant #13 is barred;

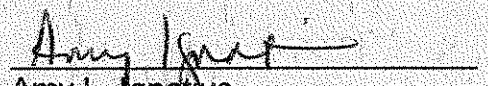
6) the plaintiff has proven that covenant #13 is only partially complied with; and

7) the plaintiff's request for attorney's fees is denied.

This order constitutes the Court's findings of fact and conclusions of law. Any of the parties' requests for findings and rulings not granted herein, either expressly or by necessary implication, are hereby denied or determined to be unnecessary for resolution of this matter in light of the Court's decision. See Harrington v. Town of Warner, 152 N.H. 74, 85–86 (2005); see also Geiss v. Bourassa, 140 N.H. 629, 632–33 (1996).

So ordered.

Date: September 10, 2015



Amy L. Ignatius,
Presiding Justice