

STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY
SOUTHERN DISTRICT

SUPERIOR COURT

226-2022-cv-00309

(Consolidated with Docket #226-2023-cv-00110)

Laurie Ortolano

v.

City of Nashua

and

201 Main Street Real Estate Corporation
201 Main Street Financing Corporation

THE MAIN STREET CORPORATIONS' PRE-TRIAL MEMORANDUM

Defendants 201 Main Street Real Estate Corporation and 201 Main Street Financing Corporation (collectively the “Main Street Corporations”), by and through counsel, McLane Middleton, Professional Association, submit this Pre-Trial Memorandum (the “Memorandum”) for the trial in this matter scheduled for the week of December 18, 2023.¹ The purpose of this Memorandum is to aid the Court by piercing through Plaintiff’s one hundred and fifty-nine paragraph Amended Complaint (the “Petition”) and the eighty-six attached exhibits to get to the heart of what has actually been alleged (and not alleged) against the Main Street Corporations.

INTRODUCTION

As it relates to the Main Street Corporations, this case is not about documents withheld or documents produced with redactions. To the Main Street Corporations’ knowledge, there are no documents within their possession, custody, or control that have been requested and not

¹ The Main Street Corporations are Defendants in the Docket #226-2022-cv-00309 along with the City of Nashua. The City of Nashua is the sole Defendant in Docket # 226-2023-cv-00110. That matter largely involves redactions to emails and other documents made by the City of Nashua to documents that it produced that were responsive to 91-A requests made by Plaintiff.

provided.² Instead, Plaintiff's Petition against the Main Street Corporations essentially boils down to the following questions: (1) did the Main Street Corporations commit the 91-A violations alleged in the Petition; and, if so, (2) were one or more of those violations committed in bad faith, justifying the imposition of civil penalties against any officer, employee, or other official of the Main Street Corporations? See RSA 91-A:8, IV.³ As explained in detail below, many of the RSA 91-A violations alleged in the Petition did not occur, or involve entities not before the court, and/or are not subject to RSA 91-A. To the extent the Main Street Corporations violated RSA 91-A, no violation was committed in bad faith.

The Main Street Corporations' boards are made up of volunteer community leaders. They became involved in the Nashua Center for the Arts (a/k/a the Performing Arts Center) (hereinafter referred to as the "Arts Center") because of their love for the arts and their community. At the time of the relevant allegations, no member of either board was a practicing attorney.⁴ The evidence will show that when the Main Street Corporations were formed at the direction of the City, board members were not informed that the Main Street Corporations were subject to RSA 91-A, and at no time thereafter did the City definitively inform the Main Street Corporations' boards that they should operate in compliance with RSA 91-A.⁵ As a result, there were times when the Main Street Corporations did not fully live up to the letter of the law.

² In previous pleadings and in open court, counsel for the Main Street Corporations have made this assertion and it has not been contested by the Plaintiff.

³ Attorneys' fees are not sought by the Plaintiff nor could they be, as Plaintiff has made clear throughout the proceeding, is pro se and has not sought the assistance of counsel. See e.g., Emerson v. Town of Stratford, 139 N.H. 629, 632 (1995) (pro se litigants may not recover attorneys' fees).

⁴ Jay Minkarah, who sits on one of the boards, holds a law degree but is not engaged in the private practice of law. In addition, William Barry, Esq., who is a practicing attorney, joined the Board of 201 Main Street Real Estate on December 12, 2023. Attorney Barry attended his first meeting of 201 Main Street Real Estate on December 13, 2023.

⁵ It was not until November of 2022, after the events relevant to this case took place, that Mr. Lannan was told by a City official that if it were him, he would conduct the business of the Main Street Corporations in compliance with RSA 91-A.

Nevertheless, because the board members appreciated that the Arts Center project was of great public interest, the Main Street Corporations, through their officers, responded promptly and courteously to Plaintiff's many requests for information and documents and held their meetings in public. Minutes were prepared, and when requested by the Plaintiff they were provided.

Once the President of the Main Street Corporations, Richard Lannan, determined—for himself—that the Main Street Corporations were likely covered by RSA 91-A, he took steps to be sure he complied with the statute.

When considering whether any officer or board member committed a 91-A violation in bad faith, consideration should be given to whether a lay person would or should, on his or her own, conclude that the Main Street Corporations are subject to the statute.⁶ Each was a not-for-profit corporation formed under New Hampshire Law. In addition, unlike most public bodies, no governmental official sat on the Boards of the Main Street Corporations and no board member was paid by the City. Only after careful analysis of RSA 91-A, the case law interpreting it, and RSA 162-G, would a New Hampshire attorney or a non-lawyer familiar with RSA 91-A jurisprudence conclude that the Main Street Corporations are likely covered by the statute.⁷

Before finding that a RSA 91-A violation was committed in bad faith, a threshold determination must first be made that the Board actually knew that the Main Street Corporations were subject to the statute. See e.g., Professional Firefighter of New Hampshire v. HeathTrust, Inc., 151 N.H.

⁶ The Main Street Corporations are not arguing that they are not subject to RSA 91-A. As stated in prior pleadings, while it is not obvious that the Main Street Corporations are covered by the statute, if the matter were litigated to judgment it is likely (though not certain) that a court would rule that they are subject to RSA 91-A.

⁷ Notably, outside counsel hired by the City to form the Main Street Corporations, represent them in connection with the New Market Tax Credit financing (see MS Ex. E) and prepare their by-laws, evidently did not come to the conclusion or did not consider that they might be subject to RSA 91-A. The Bylaws he prepared for the Boards to adopt permit the Boards to take corporate actions that would violate RSA 91-A if pursued. For example, board meetings could be held without notice and in private and the Board could adopt resolutions by written consent. Board members who reviewed the bylaws would have no reason to conclude the Main Street Corporations were subject to RSA 91-A. See MS. Ex. I, L.

501(2004) (denying award of attorneys' fees and noting: "[W]e disagree that HealthTrust should have known that it was a public body and, thus, its refusal to disclose the requested information was a violation of RSA chapter 91-A. As we acknowledged above, HealthTrust is a quasi-public entity that does not clearly fall within the ambit of entities covered by the Right-to Know Law and, thus, HealthTrust neither knew nor should have known that its conduct violated the statute.").

The evidence will show that at the time of the alleged violations, the Boards had not been told and had not concluded that the Main Street Corporations were covered by the statute. Thus, there is simply no evidence to support a finding that Mr. Lannan, or any other volunteer officer or board member of the Main Street Corporations, engaged in any type of conscious wrongdoing or bad faith justifying statutory civil penalties. See Porter v. Town of Sanbornton, 150 N.H. 363, 369 (2003) ("Bad faith involves more than mere bad judgment or negligence. Bad faith implies conscious wrongdoing. To carry the heavy burden of proving bad faith . . . one must demonstrate intent to injure or intent to disregard duties." (citations omitted)); H. Boone Porter, III, et al v. Town of Sandwich, et al, 212-2014-CV-00180 at 46 (N.H. Super. Ct. 2014) (Temple, J.).

FACTUAL BACKGROUND

I. The Creation of the Main Street Corporations

The Main Street Corporations were created to facilitate a New Market Tax Credit ("NMTC") transaction. The NMTC program is a federal program, administered by the Community Development Financial Institutions Fund of the United States Treasury Department, designed to attract private investment into low-income communities by permitting individual and corporate investors to receive a tax credit against their federal income taxes in exchange for

equity investments. See New Market Tax Credit Fact Sheet.⁸ The program operates by giving financial intermediaries called “Community Development Entities” (“CDEs”) tax credit authority. Id. “CDEs use their authority to offer tax credits to investors in exchange for equity in the CDE. Using the capital from these equity investments, CDEs can make loans and investments to businesses operating in low-income communities on better rates and terms and more flexible features than the market.” Id. The NMTC program was used, in part, to finance the construction of the Arts Center. The Arts Center is located in one of the most impoverished areas in the State of New Hampshire, making it an ideal candidate for the NMTC program.

On October 6, 2020, Tim Cummings, the then Director of Economic Development at the City, sent an email to individuals he understood would be willing to serve on as volunteer board members for each of the Main Street Corporations. See MS Ex. II. Most of the individuals had served on the Performing Arts Center Steering Committee, an official committee named by the Mayor and Nashua Board of Alderman in 2017 to make “recommendations to the mayor and the board of alderman for the physical design, planning and construction of a Performing Arts Center located at 201 Main Street.” See MS Ex. A. Others had been involved in raising private funds for the Art Center—independent of any NMTC transaction—though their work on Nashua Community Arts, a 501(c)(3) corporation formed in June of 2019 for that purpose. See MS Ex. AA.⁹

On October 27, 2020, the Main Street Corporations were formed, pursuant to RSA 162-G and RSA 292:1, to facilitate the NMTC transaction. See MS Exs. H, K. Although not a party named in this lawsuit, NPAC Corp. (“NPAC”), a domestic profit corporation, was formed on

⁸ Available at: https://www.cdfifund.gov/sites/cdfi/files/2022-11/New_Markets_Tax_Credit_Program_FactSheet.pdf

⁹ All had been named in an April 2019 Resolution of the Board of Alderman which had authorized the formation of the two RSA 162-G corporations to be used in connection with a New Market Tax Credit transaction should one be authorized. See MS Ex. F.

November 9, 2020 also to facilitate the execution of the NMTC transaction for the Arts Center. Though not relevant to the claims made, the specific roles each of the Main Street Corporations played in the NMTC transaction are described in NMTC resolutions passed by the each of the Main Street Corporations at their organizational meeting which were held on December 8, 2020 at the Hunt Building in Nashua. MS Exs. J, M.

The City engaged outside counsel to form the Main Street Corporations, Attorney John Kaminski of Drummond Woodsum. Apart from preparing the Resolutions and bylaws for the Main Street Corporations, he provided no legal advice to the Main Street Corporations. Meanwhile, the City apparently believed it was important for the Main Street Corporations to operate independently of the City and did not provide legal advice or counsel to these newly formed entities. As a result, the Main Street Corporations' boards were not informed that they likely were subject to RSA 91-A or provided training on how to comply with the statute. The bylaws prepared and provided by Attorney Kaminski for adoption by the Boards gave no hint that the Main Street Corporations were subject to RSA 91-A. Instead, provisions of the bylaws suggested just the opposite. The bylaws allowed for meetings without notice, written actions by the board without a meeting, and other powers that run counter to RSA 91-A.¹⁰

Beginning in December of 2021 the Main Street Corporations along with NPAC began holding joint public Board of Directors meetings at the City Hall Auditorium in Nashua. These meetings occurred on December 13, 2021, February 7, 2022, and May 9, 2022. At the time of these public meetings, the Board Members of the Main Street Corporations did not know, and

¹⁰ Plaintiff appears to believe that the act of having bylaws at odds with RSA 91-A is itself a violation of the statute. As the Main Street Corporations have previously noted, nothing in RSA 91-A so provides. Index # 144. Following a provision of the bylaws that violates the act could be a violation of RSA 91-A—but merely having non-compliant bylaws is not. Although not relevant to this case, the Main Street Corporations amended their bylaws which include a provision that: “The Officers and Directors of the Corporation will conduct the affairs of the Corporation in compliance with the Requirements of RSA ch. 91-A.”

had not been told, that the Main Street Corporations were subject to RSA 91-A. Nevertheless, because the Board Members understood that the Art Center was of interest to Nashua residents, the meetings were held in public, many of them were noticed, and the agendas and minutes for these meetings were ultimately posted on the City's website at the following link:

<https://www.nashuanh.gov/1142/Performing-Arts-Center>

ARGUMENT

I. Fundraising and Donor Information for the Performing Arts Center is Not Information Held by the Main Street Corporations

Plaintiff alleges that the Main Street Corporations violated RSA 91-A because Richard Lannan did not respond to emails dated June 22, 2022 and July 6, 2022 from Plaintiff requesting information about funds raised for the Arts Center through the Capital Campaign Committee.

Pet. ¶¶ 107, 108.

On June 22, 2022, Plaintiff requested as follows:

Under NH RSA 91-A, please provide the latest construction financial report and/or construction update documents. Additionally, please provide records of the money fundraised for this project since the inception.

See Pet. ¶ 107.

On July 6, 2022, Plaintiff requested the following from Director Timothy Cummings, Mayor Jim Donchess, Corporation Counsel Steven Bolton, Chief Financial Officer John Griffin and Rich Lannan as follows:

Please provide me with the records of all donations received for the Nashua Performing Arts center since January 1, 2019. To reduce the burden and simplify the request, if a list or spreadsheet exists, please provide a copy in the usable software format.

See Pet. ¶ 108.

Individual contributions in support of the Arts Center from private citizens were handled privately. The Capital Campaign Committee was a voluntary association of citizens that supported the development of the Arts Center. It was not a legal entity. The members of the Capital Campaign Committee were comprised of private citizens, including Mr. Lannan, that organized together to raise money to support the Arts Center from businesses and members of the public. Funds raised by the Capital Campaign Committee were deposited in an account held by City Arts Nashua, Inc., a private 501(c)(3) that was created to support the arts in Nashua, which acted as its fiscal agent. Later, Nashua Community Arts was formed to head up the fundraising. It too was a private non-profit corporation that applied for and received a 501(c)(3) designation. Mr. Lannan serves as President of Nashua Community Arts. The Capital Campaign Committee was not a public body subject to RSA 91-A, nor is it a party to this lawsuit. City Art Nashua, Inc. and Nashua Community Arts were also private entities not subject to RSA 91-A. The conduct and/or knowledge of the Capital Campaign Committee, City Arts Nashua, Inc. or Nashua Community Arts cannot be imputed to the Main Street Corporations just because Mr. Lannan was involved in both organizations.

Any request made by Ms. Ortolano to Mr. Lannan in his capacities as a member of the Capital Campaign Committee or as President and Board Member of Nashua Community Arts did not require any response under RSA 91-A. Though not required to do so, on June 22, 2022, in response to another email inquiry about the entities, Mr. Lannan explained to Plaintiff that: “No alderman sit on either the NPAC or NCA Boards. Nashua Community Arts files their annual taxes and any information on fundraising would be available on line for prior years.” See MS Ex. HH.

As for the July 6, 2022 request, it is entirely unclear in what capacity that request is made to Mr. Lannan or if that particular request was made to him at all. If it was directed at Mr. Lannan as President of the Main Street Corporations (which it does not expressly provide) the request would be futile and the Plaintiff knew as much. The Main Street Corporations had nothing to do with fundraising. In fact, as Plaintiff well knew, all or substantially all of the fundraising through the Capital Campaign Committee and Nashua Community Arts was completed by September 28, 2020, before the Main Street Corporations were created.¹¹ Thus, there would be no reason for the Main Street Corporations to possess fundraising information, and there would be no reason for Mr. Lannan to understand that the request was made to him in his capacity as President of the Main Street Corporations.

Accordingly, judgment should be entered in favor of the Main Street Corporations and against Plaintiff on all allegations relating to the private funds raised through the Capital Campaign Committee and City Arts Nashua because those organizations are not parties to this litigation nor are they public bodies subject to RSA 91-A.

II. The Main Street Corporations Alleged Failure to Identify Where NPAC Meetings are Held and to Produce Construction and Finance Reports Held by NPAC

Plaintiff made a number of requests to Mr. Lannan for information or records of NPAC. Though not expressly stated, presumably she was doing so in his capacity as President of NPAC Corp.—not as President of the Main Street Corporations. Nevertheless, it appears the Plaintiff may be attempting to allege that her requests were somehow directed to the Main Street

¹¹ As the Plaintiff knows, the Arts Center project was conditioned on private funds of approximately \$4 million being raised through private donations from members of the public. That goal was reached via \$1.5 million of private fundraising and \$2.5 million from the NMTC. See Plaintiff's Exhibit 98.

Corporations and by not producing the requested information or records, they have violated RSA 91-A.

For example, at Paragraph 125, the plaintiff quotes the following request:

I was unaware that the NPAC has quarterly posted meetings. Where are the minutes posted?... I have asked Tim Cummings about this but have not been given any information on the public nature of your organization.

I would like the paperwork that describes the NPAC for profit company - any records submitted to the state when the company was formed. What makes it a 91-A business. I would also like the latest construction report and any finance reports.

When are the quarterly meeting's scheduled and what are they called?

Requests of this type cannot make out a claim against the Main Street Corporations.

NPAC is not a party to this litigation. Plaintiff has sued NPAC in a separate action. See Docket No. 226-2023-CV-00251. Currently pending in that action is NPAC's motion to dismiss on the grounds that NPAC, a for profit business corporation, is not subject to RSA 91-A. Accordingly, judgment should be entered against Plaintiff on all claims relating to NPAC, which is not a party to this litigation or a public body as defined by RSA 91-A.¹²

III. The Main Street Corporations' Alleged Failure to Post or Provide Meeting Minutes

Plaintiff complains that she was not timely provided with meetings minutes. Not true. She requested minutes from Mary Lou Blaisdell, Mr. Lannan, and the City on June 23, 2022. Pet. ¶¶ 129–130. Mr. Lannan (a) responded to Plaintiff on June 27, 2022; (b) identified the dates of the last three Main Street Corporation meetings—December 13, 2021, February 7, 2022,¹³ and May 9, 2022; (c) told Plaintiff that minutes would be posted per the City's requirements, and

¹² Though not directly relevant to the alleged violation, all of the construction and finance reports requested from NPAC for the Arts Center project have been produced to Plaintiff by the City.

¹³ In her Petition, Plaintiff incorrectly alleges that Mr. Lannan advised her that this meeting took place on April 7, 2022. See Pet. ¶ 132.

(d) stated that he would provide Plaintiff with minutes as soon as he received them. Pet. ¶ 132. In a second email that same day, Mr. Lannan and the Mayor's office provided Plaintiff with a link to the meeting minutes she requested. Pet. ¶ 135. Finally, on June 29, 2022—less than five business days from her initial request—the City Clerk also provided Plaintiff with a link to the minutes she had requested. Pet. ¶ 136. No violation of RSA 91-A occurred or can be claimed because Plaintiff was provided with the information she requested within five business days as required by statute. See RSA 91-A:4, IV(b).

Plaintiff also complains that the minutes of the Main Street Corporations were not posted on the City website in the location where the minutes of City boards and commissions are typically posted. This complaint fails because there was no legal obligation for the Main Street Corporations to post their minutes on the City's website. The Main Street Corporations, though covered by RSA 91-A, are separate legal entities from the City. The website owned and maintained by the City is not the website of the Main Street Corporations. The Main Street Corporations do not have a website. Therefore, there is no statutory requirement that the Main Street Corporations post their minutes to the City's website, or any other. See RSA 91-A:2, II-b(a)-(b) (“**If** a public body maintains an Internet website or contracts with a third party to maintain an Internet website on its behalf, it shall either post its approved minutes in a consistent and reasonably accessible location on the website or post and maintain a notice on the website stating where the minutes may be reviewed and copies requested. (b) **If** a public body chooses to post meeting notices on the body's Internet website, it shall do so in a consistent and reasonably accessible location on the website. If it does not post notices on the website, it shall post and maintain a notice on the website stating where meeting notices are posted.” (emphasis added)).

In the absence of a website, the Main Street Corporations were required to provide Plaintiff with minutes upon her request. See RSA 91-A:4, IV. Pursuant to RSA 91-A:4, (b) the Main Street Corporations had five business days to respond to Plaintiff's record request. Pursuant to the Petition, Plaintiff requested minutes on June 23, 2022 and was provided with minutes on June 29, 2022. The Court may take judicial notice of the fact that Plaintiff was provided with the minutes she requested in four business days. See N.H. R. Evid. 201. Accordingly, judgment should be entered against Plaintiff on her claims alleging a failure to post and provide meeting minutes in timely manner.¹⁴

IV. Failure to Notice Meetings

Plaintiff alleges that the February 7, 2022 meeting of the Main Street Corporations was not placed on the meeting log for the week ending February 12, 2022. Pet. ¶ 141. However, there is no requirement that the Main Street Corporations meetings be noticed on the City's meeting log.

Plaintiff also alleges that the May 9, 2022 Main Street Corporations meeting was not noticed on the City's website. There was no requirement that meetings be noticed on the City's website because, again, the Main Street Corporations do not have a website and they are not the City.

V. Non-Compliant Minutes

Plaintiff alleges that the Main Street Corporation's minutes for the meetings occurring on December 13, 2021, February 7, 2022, and May 9, 2022 were not detailed enough to comply with the statute. See RSA 91-A:2, II ("Minutes of all such meetings, including nonpublic sessions, shall include the names of members, persons appearing before the public bodies, and a

¹⁴ Recently, the Main Street Corporations and the City entered into a Memorandum of Understanding and their meeting notices, agenda and minutes will be posted on the City's website where other similar information is posted.

brief description of the subject matter discussed and final decisions.”). While not ideal, the minutes do include attendance, topics raised and actions taken. At the time those minutes were prepared, the Main Street Corporations’ Boards did not know they were subject to RSA 91-A and arguably did not meet the statutory requirements to the letter of the law. Once their President determined they were covered, he undertook efforts to assure the minutes were in compliance with the statute. See MS Exs. N–O (minutes of Annual Meetings dated December 6, 2022). To the extent a violation is found to have occurred here, there is no evidence to suggest that the non-compliant minutes are the result of a conscious, bad faith decision to intentionally not comply with RSA 91-A. See Porter, 150 N.H. at 369; H. Boone Porter, III, et al, 212-2014-CV-00180 at 46.

CONCLUSION

For the reasons stated above, judgment should be entered against Plaintiff on the vast majority of the claims alleged in her Petition. In addition, there is no evidence that any board member, officer, or employee of the Main Street Corporations acted in bad faith.

Respectfully submitted,

201 MAIN STREET REAL ESTATE
CORPORATION AND
201 MAIN STREET FINANCING
CORPORATION

By their attorneys,

McLANE MIDDLETON, PROFESSIONAL
ASSOCIATION

Dated: December 14, 2023

By: /s/ Joseph A. Foster

Joseph A. Foster (NH Bar No. 838)
Graham W. Steadman (NH Bar No. 269003)
900 Elm Street, P.O. Box 326
Manchester, New Hampshire 03105-0326
Telephone (603) 625-6464
joseph.foster@mclane.com
graham.steadman@mclane.com

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2023, a copy of the foregoing document has been forwarded through the Court's electronic filing system to Laurie Ortolano, *pro se*, and all counsel of record.

/s/ Joseph A. Foster

Joseph A. Foster