COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 19-01230

TOWN OF HULL

vs.

MICHAEL McDEVITT[1] & another[2]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

In this action, plaintiff Town of Hull (the Town) claims that the defendants have violated the Town's zoning bylaw, the State Building Code, and the Wetlands Protection Act by placing a building (the Building) on their coastal property located at 125 Main Street in Hull (the Property) without any permit authorizing them to do so. The matter is before the court on the Town's motion for a preliminary injunction requiring the defendants to remove the Building from the Property. For the reasons set forth below, the motion is **ALLOWED**.

BACKGROUND

Defendants Michael McDevitt (McDevitt) and Stephanie Aprea, as trustees of the 125 Main Street Trust, own the Property. McDevitt resides at the Property and operates a business there.

In July 2019, without notice to the Town, McDevitt had the Building moved by barge from Quincy across the bay to a wetlands area on the Property.[3] The Building was previously part of the Chatham Coast Guard Station. It measures approximately thirty feet by sixty feet and

[1] Individually and as trustee of the 125 Main Street Trust
[2] Stephanie Aprea, as trustee of the 125 Main Street Trust
[3] Initially, part of the Building was placed on Town-owned beach property without the Town's permission. At some point, the defendants moved the Building further inland. They claim that the Building no longer sits on a coastal beach area. The Town maintains that at least part of the Building remains on the coastal beach.

1/21/20
CC
JBL
AGF
ATP
AJB

is approximately thirty feet high. To date, no building or other permit allowing the Building to be on the Property has been issued. The defendants maintain that they are temporarily storing the Building on the Property while they obtain the necessary permits.

The Town claims that the Building is dilapidated and endangers public safety. Parts of the Building are falling apart and other parts are caving in. In addition, debris and wood have blown off the Building and landed in different locations in the surrounding area. However, the defendants' structural engineer believes that the Building is safe and in good condition.

The Town also claims that the placement of the Building has had adverse environmental impacts and altered areas protected under the Wetlands Protection Act (the Act), G. L. c. 131, § 40. The defendants maintain that the Building has not altered the characteristics of the land.

In July and August 2019, the Town's conservation administrator notified McDevitt that the Building was placed on, and could adversely affect, an area protected under the Act, and that a review before Town's conservation commission was required. The conservation administrator also stated that the Building needed to be removed by August 15, 2019.

On August 27, 2019, the conservation commission issued an enforcement order to McDevitt. The enforcement order stated that the unapproved placement of the Building on the Property violated the Act and its regulations. It also ordered the defendants to immediately remove the Building from the beach and return the beach to its pre-existing grade. Although the defendants have since moved the Building to a different location on the Property, the Town maintains they have not complied with the enforcement order.

On July 18, 2019 and August 13, 2019, the Town's building commissioner sent McDevitt violation notices stating that the placement of the Building on the Property violated both the State Building Code (the Code) and the Town's zoning bylaw (the Bylaw), and that this violated

the Code because the Building was not secure. The violation notices ordered McDevitt to immediately abate the violations. The defendants appealed the violation notices to the Town's zoning board of appeals. The appeal is pending.

The building commissioner also issued non-criminal disposition tickets and issued over $49,000 in fines against McDevitt. The defendants appealed the fines to the Hingham District Court, where the matter is pending. The Town has since withdrawn some of the fines.

The defendants are in the process of pursuing permits to permanently locate the Building on the Property. In November 2019, they filed applications with the planning board and a notice of intent with the conservation commission. They intend to file an application for a building permit.

DISCUSSION

To obtain a preliminary injunction, a plaintiff generally must establish "(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the plaintiff's likelihood of success on the merits, the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction." *Tri–Nel Management, Inc.* v. *Board of Health of Barnstable*, 433 Mass. 217, 219 (2001), citing *haling Indus. Group, Inc.* v. *Cheney*, 380 Mass. 609, 617 (1980). However, irreparable harm is not required where the government has sued to enforce a statute or declared policy of the Legislature. See *LeClair* v. *Norwell*, 430 Mass. 328, 331–332 (1999). In these circumstances, the court "must first determine whether there is a likelihood of success on the merits of a plaintiff's claims and then determine whether 'the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public.'" *Id.* at 331-332, quoting *Commonwealth* v. *Mass. CRINC*, 392 Mass. 79, 89 (1984).

I. Likelihood of Success on the Merits

Turning first to the merits, the court agrees with the Town that, under the Bylaw, a permit was required to place the Building on the Property. Whether such a permit was required is a matter of interpretation of a zoning bylaw, governed by the traditional principles of statutory construction. See *Shirley Wayside Ltd. P'ship* v. *Board of Appeals of Shirley*, 461 Mass. 469, 477 (2012). The court construes a statute according to the Legislature's intent, "ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Lynch* v. *Crawford*, 483 Mass. 631, 639 (2019), quoting *Halebian* v. *Berv*, 457 Mass. 620, 628-629 (2010). Where the meaning of a statute's language is plain and unambiguous, the court must enforce its plain wording "unless a literal construction would yield an absurd or unworkable result." *Shirley Wayside Ltd. Partnership*, 461 Mass. at 477 (quoting *Adoption of Daisy,* 460 Mass. 72, 76 (2011)).

Under Art. I, § 3-1 of the Bylaw, "No building shall be built or altered and no use of land or building shall be begun or changed without a permit having been issued by the Building Commissioner." Ex. A to Plaintiff's Memorandum ("Zoning By-law of the Town of Hull") at Art. I, § 3-1. Article II, § 22-1 of the Bylaw defines a "building" as a "[c]ombination of any materials, whether portable or fixed, having a roof, to form a structure for the shelter of persons, animals, or property. For the purpose of this definition, 'roof' shall include an awning or any similar covering, whether or not permanent in nature." *Id.* at Art. II, § 22-1. The Building clearly satisfies this definition. Contrary to the defendants' argument, it is unnecessary for a structure be permanently affixed to land to constitute a "building" under the Bylaw. Indeed, the

definition of "building" explicitly encompasses portable structures. Therefore, the Building is a "building" within the meaning of the Bylaw.

Accordingly, under Art. I, § 3-1, a permit was required if the Building was "built or altered," or if the use of the Property or Building "beg[an] or changed." *Id.* at Art. I, § 3-1. By placing the Building on the Property, the defendants effectively built a building. They also began or changed the use of the Property because it now has a building that was not there before. The defendants were thus required under Art. I, § 3-1 to have a permit from the building commissioner when they placed the Building on the Property. Because they did not have such a permit when they did so, they violated the Bylaw.

In addition, the court agrees with the Town that storing the Building on the Property is not a permitted use under the Bylaw. The Bylaw provides that, "[e]xcept as provided in Massachusetts General Laws, Chapter 40A, or in this bylaw, no building, structure or land shall be used except for the purpose(s) permitted in the district as described in this section. Any use not listed shall be construed to be prohibited." *Id.* at Art. III, § 30-3.d. The Bylaw does not list the storage of buildings as a permitted use. It is thus unlawful to store the Building on the Property.

Therefore, the Town has shown a likelihood of success on the merits of its claim that the defendants violated the Bylaw.[4]

II. The Public Interest

Because the Town is a government entity seeking to enforce the law, the court must consider the public interest. See *LeClair*, 430 Mass. at 331-332. See also *Norton* v. *Gillis*, 2007 WL 981718 at *2 (Mass. Super. 2007) (MacDonald, J.) (applying *LeClair* standard when

[4] Because the Town has shown that it is likely to succeed on the merits of this claim, the court does not address the merits of its claims concerning the Act and Code.

evaluating town's motion for preliminary injunction in action to enforce town's zoning bylaw). The requested preliminary injunction would promote the public interest in several ways.

The enforcement of zoning laws such as the Bylaw is a matter of public interest. See *Wyman* v. *Zoning Bd. of Appeals of Grafton*, 47 Mass. App. Ct. 635, 637–638 (1999). See also Zoning By-law of the Town of Hull at Art. I, § 1-1 ("The purpose of this bylaw is to promote the health, safety, convenience, morals or welfare of the inhabitants of the Town of Hull . . . ."). In the absence of a permit for the Building, the public has not benefited from the safety and other protections afforded by the Bylaw's permit requirement. The preliminary injunction would promote the public interest by enforcing the zoning law and ensuring that the public receives the benefit of the Bylaw's protections.

Although the defendants' structural engineer believes that the Building is safe and in good condition, the Town's building commissioner and its conservation administrator have both averred that the Building is dilapidated. Parts of the Building are falling apart, and parts are caving in. Removing the Building would eliminate the risk that it presents to public safety and thus promote the public interest.

The preliminary injunction would also further the public interest by eliminating an environmental hazard. While the defendants maintain that the Building has not altered the characteristics of the land in the area, the Town has shown that moving the Building over the beach and placing it close to the water has had at least some negative environmental impacts. Removing the Building would promote the public's interest in stopping any adverse effects to the surrounding environmentally sensitive area.

The defendants argue that the preliminary injunction would not promote the public interest because the Town has not followed the procedural requirements for the demolition of

dangerous structures under G. L. c. 143, § 6 et seq. Even if the Town did not follow these procedures, this is of minimal significance to the public interest analysis because the removal of the Building is justified on a ground other than its unsafe condition, namely, the lack of a building permit. Furthermore, regardless of the procedures followed by the Town, the preliminary injunction would serve the public interests previously discussed.

Therefore, the requirements for the issuance of a preliminary injunction are satisfied.[5]

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the plaintiffs' motion for a preliminary injunction be **ALLOWED**. The defendants are **ORDERED** to remove the Building from the Property by April 1, 2020 and not return the Building to the Property unless and until all necessary permits have been obtained. Within ten days of the date of this order, the defendants must surround the Building with a fence with no trespassing signs. In addition, within ten days of the date of this order, an individual hired by the defendants must ensure, in the presence of the Town's building commissioner, that all siding and roof tiles are adequately secured to the Building.

Gregg J. Pasquale
Justice of the Superior Court

Dated: 1-13-20

[5] The parties do not argue that the court must consider irreparable harm. Nevertheless, it is clear that the Town would be irreparably harmed if the court did not issue the preliminary injunction because the Building is unlawfully on the Property and jeopardizes both the environment and public safety. Although removing the Building might be costly and inconvenient for the defendants, this does not outweigh the harm to the Town if the injunction does not issue.