

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS.

SEPTEMBER TERM, 2011

SUPERIOR COURT

THE STATE OF NEW HAMPSHIRE

v.

BRADY SULLIVAN PAUGUS WOODS, LLC

**STATE'S PETITION FOR PRELIMINARY INJUNCTION,
PERMANENT INJUNCTION AND CIVIL PENALTIES
PURSUANT TO RSA 356-A, THE LAND SALES FULL DISCLOSURE ACT, AND
RSA 358-A, THE CONSUMER PROTECTION ACT**

NOW COMES New Hampshire Attorney General Michael A. Delaney, and complains against the Brady Sullivan Paugus Woods, LLC and alleges as follows:

JURISDICTION AND VENUE

1. The Belknap County Superior Court has jurisdiction over the subject matter of this petition and the parties to it, pursuant to RSA 356-A:10, III and RSA 358-A:4, III(a), in that, at all times material to this petition, defendant has been in the business of developing The Villas At Paugus Bay, a high-density subdivision located on White Oaks Road in Laconia, Belknap County, New Hampshire. Venue properly lies in this Court in accordance with RSA 358-A:4, III(a).

PARTIES

2. Michael A. Delaney, Attorney General of the State of New Hampshire, is authorized by RSA 356-A:10, III to seek injunctive relief against any person that he has reason to believe has engaged in, or is about to engage in, an act or practice constituting a

violation of RSA 356-A, the Land Sales Full Disclosure Act (the “Land Sales Act”) or any rule adopted pursuant to the said Act. Furthermore, the Attorney General is authorized by RSA 358-A:4, III(a) to seek injunctive relief and civil penalties against any person that he has reason to believe has engaged in, or is about to engage in, unfair or deceptive acts or practices in the conduct of trade or commerce in this State in violation of RSA 358-A (the “Consumer Protection Act”). The Attorney General’s office is located at 33 Capitol Street, Concord, New Hampshire 03301.

3. Defendant Brady Sullivan Paugus Woods LLC is a New Hampshire LLC that is engaged in the business of real estate development and investment, and is the developer of the Villas at Paugus Bay Subdivision, located in Laconia, Belknap County, New Hampshire. The defendants maintain their principal place of business at 670 North Commercial Street, Manchester, Hillsborough County, New Hampshire.

NOTICE

4. Pursuant to RSA 358-A:5, the State sent notice to the defendants on May 6, 2011, that this Petition would be filed in court on or after May 16, 2011. Defendants responded asking for an opportunity to meet with the Bureau prior to litigation. On May 19, 2011, the State met with the defendants in an effort to achieve a resolution to this dispute, but despite months of discussion, such resolution has been elusive.

SUMMARY OF THE CASE

5. This is an action for civil penalties and equitable relief against Brady Sullivan Paugus Woods, LLC (the “Subdivider”), for violations of the Land Sales Full Disclosure Act, RSA 356-A, and the Consumer Protection Act, RSA 358-A.

6. The Subdivider is the developer of The Villas at Paugus Bay, a planned

93-lot high-density subdivision consisting of single-family modular homes and located on White Oaks Road in Laconia, New Hampshire. To date, 42 homes have been completed with all of those having been transferred to members of the public. On information and belief, four additional homes are near or at completion, and sales efforts remain under way.

7. The Land Sales Full Disclosure Act establishes substantive protections for consumers by requiring that subdivided lands be registered or exempted from registration by the Consumer Protection and Antitrust Bureau of the Attorney General's Office (the "Bureau") before the subdivider may offer the lands for sale to the public. RSA 356-A:4, I. As part of the registration or exemption process, the subdivider is required to submit numerous documents related to the subdivision for review by the Bureau, including the public offering statement. RSA 356-A:5, I (q). Intentional misrepresentations or misstatements of material facts in an application for registration or exemption is forbidden, and is grounds for revocation of the certificate of registration or exemption. RSA 356-A:13. If a certificate of registration or exemption is revoked or suspended, the subdivider must cease all sales and promotional activities. RSA 356-A:4, I.

8. The Land Sales Full Disclosure Act establishes further substantive protections for consumers by including, among others, a prohibition against the misstatement of material facts by the subdivider or his agent in the course of offering or disposing of a lot, parcel, unit or interest in subdivided lands. RSA 356-A:16, I.

9. The Land Sales Full Disclosure Act describes a public offering statement as a document that is provided by the Subdivider for promotional purposes and that provides "full and fair disclosure" to prospective buyers. RSA 356-A:6 (f).

10. The Land Sales Full Disclosure Act further describes a public offering statement as a document that is provided by the Subdivider to prospective buyers and that enumerates all restrictions on the subdivided land, including regulatory restrictions, and whether the subdivision is compliant with the said regulations. RSA 356-A:6 (c).

11. The Land Sales Full Disclosure Act establishes a statutory right of rescission for purchasers of subdivided lands subject to its jurisdiction. RSA 356-A:4, II. Such right of rescission terminates five days after the purchaser signs a purchase and sales agreement or receives a copy of the current public offering statement, whichever is later. *Id.*

12. N.H. RSA 358-A, the Consumer Protection Act, outlaws “any unfair or deceptive act or practice in the course of any trade or commerce within this state.” RSA 358-A:2. An act is “unfair” if it is “within at least the penumbra of some common law, statutory, or other established concept of unfairness.” *Chroniak v. Golden Inv. Corp.*, 983 F.2d 1140, 1146 (1st Cir. 1993). The Land Sales Act is intended to protect consumers, and establishes a statutory concept of fairness in the field of land sales. Accordingly, any failure to abide by the terms of the Land Sales Act constitutes an unfair act, and is therefore also a violation of the Consumer Protection Act.

13. The Consumer Protection Act explicitly forbids a seller of goods or services from representing that its goods or services have “approval, characteristics, ingredients, uses, benefits or quantities” that they do not have. RSA 358-A:2, V.

14. The State brings this Petition because, as shown in detail below, it has reason to believe that the Subdivider has violated the Land Sales Full Disclosure Act by selling homes in the Subdivision without disclosing that these homes do not meet basic

building and housing codes, and are, in fact, hazardous to their occupants, and that the remediation of these deficiencies and code violations would cause substantial hardship to the purchasers and owners of these homes.

15. Furthermore, the State brings this petition because it has reason to believe that the purchasers of homes in the Subdivision were delivered a document purporting to be a public offering statement, but which failed to meet the minimum statutory requirements for such a document. Specifically, the document delivered misstated significant material facts regarding compliance with building and housing regulations. RSA 356-A:6, I (c). Accordingly, the purchasers have not yet received a public offering statement that fully and fairly discloses all material facts about the subdivision, and the five-day limit on the statutory right of rescission has yet to run.

16. The State also has reason to believe that the Subdivider violated the Consumer Protection Act in that it represented to its customers that these homes are compliant with all relevant building and housing codes, yet in fact the houses in the Subdivision do not meet basic building and housing codes and are, in fact, hazardous to their occupants.

FACTUAL ALLEGATIONS

17. The Villas at Paugus Bay Subdivision was first registered with the Bureau on March 28, 2007. At that time, the developer was Paugus Woods, LLC, and the developer of record was Norris Viviers. On July 23, 2009, the Bureau received a request for a bulk sales exemption pursuant to N.H. Admin. R. Jus 1305.02, indicating that the Subdivision was being transferred in bulk to the Subdivider. The Subdivider made the appropriate application for registration pursuant to RSA 356-A:4. After its statutory

review of the application for registration, the Bureau issued a Certificate of Registration for the Subdivision to the Subdivider on October 28, 2009. Following registration by the Bureau, the Subdivider may legally offer the homes to the public. RSA 356-A:4, I.

18. On January 20, 2010, Donald Carpia, Modular Building Inspector for the Division of Fire Safety of the New Hampshire Office of the State Fire Marshal, inspected at random seven homes in the Subdivision. Inspector Carpia identified thirteen code violations. All but two of these violations were common to all seven inspected homes in the Subdivision. Inspector Carpia informed the Director of Code Enforcement for the City of Laconia by letter of these code violations. The defects consisted of structural defects, electrical defects, and other violations of building codes that could cause the dwellings to be unsafe. In the letter, Inspector Carpia stated that he was accompanied on the inspection by Mr. Larry St. Pierre, an employee of the Subdivider and the project manager for the Villas at Paugus Bay, and that Mr. Carpia alerted Mr. St. Pierre to these violations.

19. In the public offering statement provided to prospective buyers, the Subdivider states at page 5 under the heading “M. Zoning, Housing and Building Codes” as follows: “The building site is zoned residential single family. The project is in compliance with all zoning ordinances, housing codes, building codes, and similar laws affecting the subdivision project.” Thus, the Subdivider explicitly informed prospective buyers that the units are in compliance with all applicable building and housing codes.

20. By offering the homes for sale, the Subdivider also implicitly guarantees that the homes are habitable. *Lempke v. Dagenais*, 130 N.H. 782 (1988).

21. In late 2010 through early 2011, in response to an inquiry by certain

homeowners in the Subdivision, Kenneth Walsh, the State Fire Marshal's modular building inspector, inspected six homes in the Subdivision that have been sold and are currently occupied. None of these homes was inspected earlier by Inspector Carpia. Each and every one of the inspected homes exhibited serious violations of building and housing codes. These violations included structural defects, electrical defects, heating and other building defects which could cause the dwellings to be unsafe or uninhabitable.

22. The above factual allegations are supported by the sworn affidavit of Kenneth Walsh, State Fire Marshal Building Inspector for modular structures, attached hereto.

23. By offering these homes for sale subject to a document purporting to be a public offering statement, but which failed to provide a "full and fair disclosure" to prospective purchasers, and which in fact contained material misstatements of the condition of the homes, the Subdivider has violated those provisions of RSA 356-A that require a public offering statement to provide truthful, accurate and full disclosure to the prospective buyers, and has, in fact, failed to provide prospective purchasers with a valid public offering statement as that document is described in the statute.

24. By submitting to the Office of the Attorney General as part of its application for registration pursuant to RSA 356-A, a document purporting to be a public offering statement but which contained false statements of material fact, the Subdivider has engaged in an act or practice constituting a violation of that chapter, and the Attorney General is thereby authorized to bring this action. RSA 356-A:10, III.

25. By stating that the homes being offered to consumers are in compliance with all applicable building and housing codes when in fact they are not, the Subdivider

has represented that the goods have “approval, characteristics ... uses, [or] benefits” that they do not have, in violation of RSA 358-A:3, V.

26. In addition to injunctive relief, the Attorney General also seeks penalties of up to \$10,000 for each of the Subdivider’s violations of RSA 358-A.

CONSUMER COMPLAINTS

27. Daniel and Dawn Crim closed on their new home at 86 Sarasota Lane in the Villas at Paugus Bay on November 24, 2010. Even before the closing, the Crims noticed problems with the new home, and were working with the Subdivider to resolve these issues. On December 1, 2010, Mrs. Crim noticed an anomaly in the ceiling in their 3-year-old child’s bedroom, where she saw what appeared to be severe cracks in the drywall. After being told by the Subdivider that the issue was cosmetic, the Crims contacted the State Fire Marshal for an inspection. Inspector Walsh responded to the request, and found and documented 18 building code violations attributable to the acts or omissions of the Subdivider. Inspector Walsh suspected that the home had not been properly assembled and ordered a more thorough inspection which included removal of sections of drywall covering the part of the structure where the bedroom module was to be attached to the adjoining module. When the drywall was removed, Inspector Walsh discovered that the large lag bolts that normally attach the bedroom module (the “C Module” or the “bump-out”) to the adjoining building module (the “B Module”) had not been installed. Thus the C Module was not bolted to the B Module, as it is intended to be by the manufacturer. Inspector Walsh also discovered that not only was the C Module not bolted to the B Module, the Subdivider had not constructed the foundation to provide the required foundation support for the C Module. Because of these failures, the C

Module was physically moving away from the remainder of the house, causing the cracks and deformation in the drywall that had attracted the attention of the homeowners and caused them to file their complaint. This more in-depth inspection also showed several other serious code violations, including but not limited to potentially dangerous wiring and electrical code violations, violations of building codes related to fire blocking, insulation, heating/ventilation and air conditioning (“HVAC”), and the installation of propane gas delivery systems.

28. Suzanne Boles of 71 Siesta Lane in the Subdivision also noticed similar anomalies in the walls and ceiling of her child’s bedroom. Dr. and Mrs. Boles’s home was of a similar design to that of the Crims’ home, although it was manufactured by a different modular manufacturer. Mrs. Boles contacted the New Hampshire State Fire Marshal’s Office and filed a complaint. Inspector Walsh responded to this complaint as well and performed an initial inspection of the Boles’s home on the same day as his inspection of the Crims’ home. Inspector Walsh discovered that there were similar structural deficiencies in the construction of the Boles’s home. Again, Inspector Walsh’s inspection showed that the C Module in Dr. and Mrs. Boles’s home was not bolted to the adjoining module, and the required foundation support for the C Module was missing. As in the Crims’ home, the ceiling and wall drywall in the Boles’s home were cracked and deformed because the C Module was physically separating from the main structure. Along with these hazardous structural deficiencies, Inspector Walsh also found potentially hazardous violations of building codes related to fire blocking, electrical wiring, insulation, HVAC, and propane delivery similar to those discovered in the Crims’ home.

29. While her home was being inspected, Mrs. Boles informed Inspector Walsh that her parents, Mr. and Mrs. Holmberg, own a home in the Subdivision located near to hers at 63 Siesta Lane, and asked Inspector Walsh if he would also inspect their home. The Holmberg home is a different style, consisting only of two modules and had no C Module. Yet Inspector Walsh's inspection revealed potentially hazardous violations of building codes related to fire blocking, electrical wiring, insulation, HVAC, and propane delivery similar to those discovered in the previous two inspections.

30. In the next few weeks, pursuant to complaints received, Inspector Walsh inspected three more homes in the Subdivision. All three were of the two-module design with no C Module, but all three exhibited potentially hazardous violations of building codes related to fire blocking, electrical wiring, insulation, HVAC, and propane delivery similar to those discovered in every other home that the state Fire Marshal's inspector had reviewed.

ONGOING CONCERNS

31. On information and belief, the Subdivider made an attempt to remedy certain of the code violations identified by Inspector Walsh of the State Fire Marshal's Office. Yet, on information and belief, the Subdivider's original attempts to remedy the deficiencies were inadequate. It relied on its on-site project manager at the time to oversee the remediation. However, on information and belief, the homeowners found the Subdivider's project manager to be inflexible and unwilling to work cooperatively with them. Reportedly, repairs were scheduled and performed without due regard for the needs of the homeowners. On information and belief, some repair work was sub-standard and required reworking before it would meet applicable building and housing

codes. On information and belief, when homeowners have sought permission to hire contractors of their choice to perform the needed repairs and to file for reimbursement by the Subdivider, the Subdivider has denied these requests and stated that it would only pay for the remediation if it was performed by its own contractors.

32. After the State informed the Subdivider of its concerns regarding the condition of the homes in the Subdivision, the Subdivider agreed to halt sales activities temporarily while a resolution to this matter was sought. During that period, the Subdivider informed the State that it wished to close on two homes that it had sold prior to the agreement to suspend sales activities, as the buyers had moved from their previous homes and failure to allow them to take possession of their homes was a severe inconvenience. The State agreed provided that an independent inspector or building engineer inspect each of the two homes for code violations. The State engaged the services of an independent civil and structural engineering firm to inspect these buildings. During his review, the independent inspector found errors that needed to be corrected. These corrections were made, and the homes were deemed to be habitable.

33. At the State's request, the independent inspector has recently begun inspecting the buildings that currently exist in the Subdivision. To date, the independent inspector has examined over twenty of these existing, inhabited homes. The independent inspector has uncovered various building code violations in these homes, including but not limited to a failure to bolt modules together. The independent inspector has also identified other areas of concern in currently inhabited homes in the Subdivision. Of immediate concern is the independent inspector's recent discovery that the modules generally have not been properly fastened to their respective foundations. These

violations exist even after the Subdivider has been informed of code violations by two building inspectors from the State Fire Marshal's Office and after the Subdivider has made its own attempts to correct the violations.

34. Given the breadth and severity of the deficiencies exhibited, and the unacceptable failure rate of the homes that have been inspected by the State Fire Marshal's Office and the independent inspector, the Bureau concludes that these deficiencies may indicate a pattern or practice by the Subdivider to ignore applicable building and housing codes, in violation of the law. This pattern or practice puts buyers and homeowners at needless risk.

CAUSES OF ACTION

COUNT I **VIOLATION OF RSA 356-A**

35. The allegations of the preceding paragraphs are hereby incorporated into Count I as if fully set forth herein.

36. On July 28, 2009, the Subdivider submitted to the Bureau an application for registration under RSA 356-A:5, II for ninety-three lots, units or interests in the Subdivision.

37. On information and belief, to date the Subdivider has sold forty-two units to the public. Of these forty-two, all that have been inspected by the Office of the State Fire Marshal have exhibited multiple and serious building code violations, which if not remedied would render the structures unfit for habitation.

38. By representing that all units offered by the Subdivider met all applicable

building and housing codes, the Subdivider made incorrect statements of material fact in its application for registration, in violation of RSA 356-A:13.

COUNT II
VIOLATION OF RSA 356-A

39. The allegations set out in the preceding paragraphs are hereby incorporated in Count II as if fully set forth herein.

40. By selling homes in the Subdivision that do not meet all applicable building and housing codes despite assuring the public, via its statements in the purported public offering statement, that the subdivision is in compliance with all such codes, the Subdivider failed to provide consumers with a public offering statement that meets the minimum statutory requirements for said document, and therefore violated the requirements that a current public offering statement be provided to all purchasers.

COUNT III
VIOLATION OF RSA 358-A

41. The allegations in the preceding paragraphs are hereby incorporated into Count III as if fully set forth herein.

42. In offering and disposing of interests in the Subdivision, the Subdivider expressly represented to prospective purchasers that the homes met all applicable building and housing codes. The Subdivider thus represented that the subdivided lots had approvals, characteristics or benefits that they did not have, and the Subdivider had approval or status that it did not have, in violation of RSA 358-A:2, V.

43. Each offer or disposition of interests in the Subdivision constitutes a separate violation of RSA 358-A.

COUNT IV
VIOLATION OF RSA 358-A

44. The allegations in the preceding paragraphs are incorporated into Count IV as if fully set forth herein.

45. In offering or disposing of interests in the Subdivision, the Subdivider implicitly represented to consumers that it was doing so lawfully, *i.e.*, in compliance with the provisions of RSA 356-A, including, but not limited to: a) that the buildings in the Subdivision comply with all applicable building and housing codes; b) that all disclosures required by law had been made; and c) that all protections required by law were in place. In reality, the Subdivider had not complied with the statute or the Bureau's duly enacted regulations. The Subdivider thus represented that the subdivided lots had approvals, characteristics or benefits that they did not have, and the Subdivider had approval or status that it did not have, in violation of RSA 358-A:2, V.

46. Each offer or disposition of interests in the Subdivision constitutes a separate violation of RSA 358-A.

RELIEF SOUGHT

WHEREFORE, the plaintiff, State of New Hampshire, respectfully requests that this honorable Court grant the following relief:

A. Issue a preliminary injunction revoking the registration of the homes in the Villas at Paugus Bay subdivision, thereby halting the sales or transfer of any new homes in the Subdivision to any member of the public;

B. After notice and hearing, find that the Subdivider has violated RSA 356-A and RSA 358-A as alleged in Counts I through IV;

C. After notice and hearing, permanently enjoin the Subdivider from engaging in conduct in violation of RSA 356-A and RSA 358-A as alleged in Counts I

through IV;

D. Order the Subdivider to present a plan for the inspection of all buildings in the Subdivision by an independent building inspector or engineer, and the remediation and independent verification thereof of all building and/or housing code violations discovered by the independent building inspector or engineer. As part of this plan, all inspections of the homes must be performed by a qualified independent building inspector or engineer not in the employment of the Subdivider or any entity related to the Subdivider. Such inspections, remediation and re-inspection shall be undertaken at the convenience of the homeowners. Also, any homeowner whose home does not meet applicable building or housing codes must be allowed the choice of either 1) allowing the Subdivider's work crews to effectuate the necessary remediation; 2) hiring building contractors of their own choice to effectuate the necessary remediation, for which the Subdivider shall fully compensate the homeowner for his or her related expenses; or 3) exercising the statutory right of rescission and return the home to the Subdivider for a full refund of the entire purchase amount paid;

E. Assess and award the State civil penalties of up to ten thousand dollars (\$10,000) against the Subdivider for each violation. RSA 358-A:4, III(b).

F. Award to the State its legal and investigative costs of prosecuting this action. RSA 358-A:6, IV.

G. Grant such other relief as may be just and equitable.

Respectfully submitted,
THE STATE OF NEW HAMPSHIRE
Michael A. Delaney
Attorney General

DATE: _____

David Rienzo (NH Bar No 13860)
Assistant Attorney General
Consumer Protection and Antitrust Bureau
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3643