

STATE OF MAINE
Cumberland, ss.

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No. BCD-CV-17-59

TOWN OF WISCASSET,)
)
Plaintiff)
)
vs.)
)
STATE OF MAINE)
DEPARTMENT OF TRANSPORTATION,)
)
Defendant)

ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS OF
DEFENDANT STATE OF MAINE DEPARTMENT OF TRANSPORTATION

Defendant State of Maine Department of Transportation (“Maine DOT”) responds to Plaintiff Town of Wiscasset’s (the “Town’s”) Verified Complaint for Declaratory Judgment and for Preliminary and Permanent Injunctive Relief dated November 28, 2017 (the “Complaint”), as follows:

ANSWER

Parties

1. Maine DOT admits the allegations contained in Paragraph 1 of the Complaint.
2. Maine DOT admits the allegations contained in Paragraph 2 of the Complaint.

Jurisdiction and Venue

3. Maine DOT admits the allegations contained in Paragraph 3 of the Complaint, except that Maine DOT denies that the Town has no plain, complete, and adequate remedy at law.

4. Maine DOT admits the allegations contained in Paragraph 4 of the Complaint.

Allegations in Common

5. In response to Paragraph 5 of the Complaint, Maine DOT admits that Main Street in Wiscasset within the area of the project that is the subject of this litigation is a designated state highway and is part of U.S. Route 1 and State Highway 26. Maine DOT denies the remaining allegations contained in Paragraph 5 of the Complaint.

6. In response to Paragraph 6 of the Complaint, Maine DOT admits that the project that is the subject of this litigation is located within the so-called “village” area of Wiscasset. Maine DOT lacks sufficient knowledge and information to form a belief as to the truth of the remaining allegations contained in Paragraph 6 of the Complaint and therefore denies these allegations.

7. In response to Paragraph 7 of the Complaint, Maine DOT admits that the building at 36 Water Street, commonly referred to as “Haggett’s Garage,” is located within the so-called “village” area of Wiscasset. Maine DOT lacks sufficient knowledge and information to form a belief as to the truth of the remaining allegations contained in Paragraph 7 of the Complaint and therefore denies these allegations.

8. Maine DOT lacks sufficient knowledge and information to form a belief as to the truth of the allegations contained in Paragraph 8 of the Complaint and therefore denies these allegations.

9. In response to Paragraph 9 of the Complaint, Maine DOT admits that there was a public informational meeting in March 2016 at which two options for improving traffic flow and safety in Wiscasset were discussed. Maine DOT denies the remaining allegations contained in Paragraph 9 of the Complaint.

10. Maine DOT denies the allegations contained in Paragraph 10 of the Complaint.

11. Maine DOT admits the allegations contained in Paragraph 11 of the Complaint.

12. Maine DOT denies the allegations contained in Paragraph 12 of the Complaint.

13. In response to Paragraph 13 of the Complaint, Maine DOT admits that one of the articles at the June 2017 Town meeting pertained to the project that is the subject of this litigation. Maine DOT denies the remaining allegations contained in Paragraph 13 of the Complaint.

14. In response to Paragraph 14 of the Complaint, Maine DOT admits that there is no Municipal/State Project Agreement for the project that is the subject of this litigation. The remainder of Paragraph 14 of the Complaint consists of argument to which no response is required; to the extent that a response is required, Maine DOT denies the remaining allegations contained in Paragraph 14 of the Complaint.

15. In response to Paragraph 15 of the complaint, Maine DOT admits that (a) on or about September 8, 2017, the Town was made aware that Maine DOT will not apply for a Certificate of Appropriateness from the Historic Preservation Commission before commencing construction of the project that is the subject of this litigation; (b) prior to the commencement of this litigation, Maine DOT solicited and received bids for the demolition of the building at 36 Water Street, commonly referred to as "Haggett's Garage"; and (c) prior to the commencement of this litigation, counsel for Maine DOT advised counsel for the Town that the occupant of the building was planning to vacate the building by November 30, 2017, and that the building would be demolished shortly thereafter. Maine DOT denies the remaining allegations contained in Paragraph 15 of the Complaint.

16. In response to Paragraph 16 of the Complaint, Maine DOT admits that on November 7, 2017, the members of the Select Board voted, 3-2, in favor of a motion that

included (albeit with minor typographical differences) the language quoted in Paragraph 16 of the Complaint. Maine DOT specifically denies that this was a valid vote of the Select Board.

17. Paragraph 17 of the Complaint consists of argument to which no response is required. To the extent that a response is required, Maine DOT denies the allegations contained in Paragraph 17 of the Complaint.

18. Paragraph 18 of the Complaint consists of argument to which no response is required. To the extent that a response is required, Maine DOT denies the allegations contained in Paragraph 18 of the Complaint.

19. In response to Paragraph 19 of the Complaint, (a) Maine DOT denies that it has not complied with all of its State law obligations; (b) Maine DOT denies that there are any local law obligations with which Maine DOT, under State law, must comply; and (c) Maine DOT denies that there is no harm to Maine DOT or the public in delaying commencement of the construction of the project that is the subject of this litigation. To the extent that there are any remaining allegations contained in Paragraph 19 of the Complaint, Maine DOT denies them.

20. Paragraph 20 of the Complaint consists of argument to which no response is required. To the extent that a response is required, Maine DOT denies the allegations contained in Paragraph 20 of the Complaint.

Count I

21. In response to Paragraph 21 of the Complaint, Maine DOT repeats and re-alleges its responses to Paragraphs 1 through 20 of the Complaint.

22. In response to Paragraph 22 of the Complaint, Maine DOT admits that 23 M.R.S. § 651 includes a sentence that says:

The department shall take into consideration the interests of a municipality as to the location of any state or state aid highway construction or alteration within the boundaries of that municipality.

To the extent that there are any remaining allegations contained in Paragraph 22 of the Complaint, Maine DOT denies them.

23. In response to the first sentence of Paragraph 23 of the Complaint, Maine DOT admits that the project that is the subject of this litigation (a) is located within the boundaries of the Town; (b) includes the widening of sidewalks within a 750-foot long segment of state highway right of way; (c) includes the removal of on-street parking between Middle Street and Water Street and the reconfiguration of other parking; and (d) includes the installation of two traffic signals within a 750-foot long segment of state highway right of way. To the extent that there are any remaining allegations contained in the first sentence of Paragraph 23 of the Complaint, Maine DOT denies them. The second sentence of Paragraph 23 of the Complaint consists of argument to which no response is required. To the extent that a response is required, Maine DOT denies the allegations contained in the second sentence of Paragraph 23 of the Complaint.

24. Maine DOT denies the allegations contained in Paragraph 24 of the Complaint.

Count II

25. In response to Paragraph 25 of the Complaint, Maine DOT repeats and re-alleges its responses to Paragraphs 1 through 24 of the Complaint.

26. In response to Paragraph 26 of the Complaint, Maine DOT admits that its letter to the Town's Select Board dated October 31, 2016, includes a paragraph that says:

If through the development of the design the Municipality elects to add additional work to the Project at its own expense, the Department will incorporate the work into the design plans. Prior to finalizing the contract bid documents, the Department and the

Municipality will execute a Municipal/State Project Agreement to address the cost of any additional work and future maintenance of Project-related improvements. Other than payment for the additional work that the Municipality chooses to include in the Project, all design and construction costs will be paid by the Department.

To the extent that there are any remaining allegations contained in Paragraph 26 of the Complaint, Maine DOT denies them.

27. In response to Paragraph 27 of the Complaint, Maine DOT admits that on November 1, 2017, Maine DOT solicited bids for the demolition of the building at 36 Water Street, commonly referred to as "Haggett's Garage," as part of the project that is the subject of this litigation. Maine DOT denies the remaining allegations contained in Paragraph 27 of the Complaint.

28. In response to Paragraph 28 of the Complaint, Maine DOT admits that there is no Municipal/State Project Agreement for the project that is the subject of this litigation. Maine DOT denies the remaining allegations contained in Paragraph 28 of the Complaint.

29. Maine DOT denies the allegations contained in Paragraph 29 of the Complaint.

30. In response to Paragraph 30 of the Complaint, Maine DOT admits that the Town has not approved payment of any costs associated with the project that is the subject of this litigation. Maine DOT denies the remaining allegations contained in Paragraph 30 of the Complaint.

Count III

31. In response to Paragraph 31 of the Complaint, Maine DOT repeats and re-alleges its responses to Paragraphs 1 through 30 of the Complaint.

32. In response to Paragraph 32 of the Complaint, Maine DOT admits that the second sentence of 30-A M.R.S. § 4352(6) says:

Except as provided in this section, a state agency shall comply with a zoning ordinance consistent with a comprehensive plan that is consistent with the provisions of section 4326 in seeking to develop any building, parking facility or other publicly owned structure.

To the extent that there are any remaining allegations contained in Paragraph 32 of the Complaint, Maine DOT denies them.

33. Maine DOT denies the allegations contained in Paragraph 33 of the Complaint.

34. Maine DOT denies the allegations contained in Paragraph 34 of the Complaint.

35. Because the Wiscasset Historic Preservation Ordinance speaks for itself, Paragraph 35 of the Complaint consists of argument to which no response is required. To the extent that a response is required, Maine DOT denies the allegations contained in Paragraph 35 of the Complaint.

36. Paragraph 36 of the Complaint consists of argument to which no response is required. To the extent that a response is required, Maine DOT denies the allegations contained in Paragraph 36 of the Complaint.

37. Maine DOT denies the allegations contained in Paragraph 37 of the Complaint.

38. In response to Paragraph 38 of the Complaint, Maine DOT admits that, prior to the commencement of this litigation, Maine DOT stated that it would not apply for a Certificate of Appropriateness from the Historic Preservation Commission for the demolition of the building at 36 Water Street, commonly referred to as "Haggett's Garage," or for the construction of the project that is the subject of this litigation. To the extent that there are any remaining allegations contained in Paragraph 38 of the Complaint, Maine DOT denies them.

WHEREFORE, Maine DOT requests that the Complaint be dismissed and that the Court award Maine DOT its costs and grant Maine DOT such further relief as the Court deems just and proper.

AFFIRMATIVE DEFENSES

1. There has been no final agency action.
2. The Town has no right of action under 23 M.R.S. § 651.
3. The Town has no right of action under 30-A M.R.S. § 4352(6).
4. Maine DOT is not required to comply with the second sentence of 30-A M.R.S. § 4352(6) in the implementation of state transportation projects.
5. The Complaint fails to state a claim upon which relief can be granted.
6. The claims stated in the Complaint are not justiciable.
7. Maine DOT is immune from the claims stated in the Complaint.
8. Maine DOT is vested with the statutory authority to perform the project that is the subject of this litigation.
9. Maine DOT may remove on-street parking on Main Street in Wiscasset, at Maine DOT's discretion, in the exercise of Maine DOT's statutory authority over state highways.
10. Maine DOT may remove on-street parking on Main Street in Wiscasset, at Maine DOT's discretion, in the exercise of Maine DOT's police power.

COUNTERCLAIMS

Common Allegations

1. Maine DOT is an agency of the State of Maine.

2. Under Maine law, Maine DOT is vested with broad discretionary authority with respect to state highways, including the authority to designate, construct, maintain, alter, and improve state highways.

3. U.S. Route 1 in Wiscasset is a designated state highway.

4. On June 20, 2016, the Town's Select Board (the "Select Board") voted unanimously to approve the conceptual design known as "Option 2" for traffic and pedestrian improvements to a 750-foot long segment of U.S. Route 1 in Wiscasset.

5. One distinguishing feature of this conceptual design is the removal of most of the on-street, angled parking from this segment of U.S. Route 1.

6. Another distinguishing feature of this conceptual design is the construction of a parking lot on a parcel of land on Water Street in Wiscasset (the "Water Street Parcel").

7. Following the Select Board's approval of this conceptual design, Maine DOT, in reliance on that approval and on other communications and assurances from Town officials and representatives, and consistent with and in furtherance of this conceptual design, (a) expended substantial resources and incurred substantial expenses on the final design of the project that is the subject of this litigation, and (b) acquired the Water Street Parcel in a "friendly" condemnation in which Maine DOT paid fair market value for the Water Street Parcel.

8. The final design of the project is virtually complete.

9. Part of the project – the demolition of the now-vacant building on the Water Street Parcel and limited site preparation of the Water Street Parcel – has already been put out to bid. Maine DOT anticipates that the remainder of the project will be put out to bid in March or April of 2018.

10. Based on legal and equitable principles, and pursuant to Maine law that vests Maine DOT with broad discretionary authority with respect to state highways, the Town may not interfere with the performance of the project.

Counterclaim Count I

11. Maine DOT repeats and re-alleges Paragraphs 1 through 10 as if set forth in full.

12. On June 20, 2017, acting on an item that was not on the meeting agenda, the members of the Select Board voted, 3-2, “to have the Town Manager draft a letter to MDOT withdrawing its support for Option 2.”

13. That vote was in violation of the Select Board’s rules of order and procedure, as well as Maine law, and was not a valid vote of the Select Board.

14. On October 3, 2017, acting on an item that was not on the meeting agenda, the members of the Select Board voted, 3-2, that “the board does not support removing any downtown parking as it now exists.”

15. That vote was in violation of the Select Board’s rules of order and procedure, as well as Maine law, and was not a valid vote of the Select Board.

16. On November 7, 2017, acting on an item that was not on the meeting agenda, the members of the Select Board voted, 3-2, to retain counsel to sue Maine DOT.

17. That vote was in violation of the Select Board’s rules of order and procedure, as well as Maine law, and was not a valid vote of the Select Board.

WHEREFORE, Maine DOT requests that the Court, pursuant to its authority to do so under the Uniform Declaratory Judgments Act, 14 M.R.S. §§ 5951 - 5963, declare that the votes described above were not valid votes of the Select Board and that the Town has not duly

authorized the filing of the complaint in this case, and grant Maine DOT such other and further relief as is just and proper.

Counterclaim Count II

18. Maine DOT repeats and re-alleges Paragraphs 1 through 17 as if set forth in full.

19. To the extent that this litigation or other actions by the Select Board or its members results in changes to the design of the project that make it different from the conceptual design that the Select Board approved on June 20, 2016, the Town is liable for the cost of making and implementing those changes.

WHEREFORE, Maine DOT requests that the Court, pursuant to its authority to do so under the Uniform Declaratory Judgments Act, 14 M.R.S. §§ 5951 - 5963, declare that the Town is liable for the cost of making and implementing those changes, and grant Maine DOT such other and further relief as is just and proper.

Counterclaim Count III

20. Maine DOT repeats and re-alleges Paragraphs 1 through 19 as if set forth in full.

21. To the extent that this litigation or other actions by the Select Board or its members delays the performance of the project, and that delay increases the cost of performing the project, the Town is liable for that increased cost.

WHEREFORE, Maine DOT requests that the Court, pursuant to its authority to do so under the Uniform Declaratory Judgments Act, 14 M.R.S. §§ 5951 - 5963, declare that the Town is liable for that increased cost, and grant Maine DOT such other and further relief as is just and proper.

Counterclaim Count IV

22. Maine DOT repeats and re-alleges Paragraphs 1 through 21 as if set forth in full.

23. In this action, the Town seeks, among other things, a declaration that Maine DOT must obtain, under the Town's Historic Preservation Ordinance (the "HPO"), a Certificate of Appropriateness (a "COA") from the Town's Historic Preservation Commission (the "HPC") for certain elements of the project that is the subject of this litigation, including the demolition of the building at 36 Water Street, commonly referred to as "Haggett's Garage."

24. The HPO states that a COA for the demolition of a building in an historic district: shall not be approved until either:

(i.) The building or structure has been identified by the Commission as incompatible or non-contributing with the historic district in which it located; or

(ii.) The building or structure, or important portions and features thereof, has been determined by the Code Enforcement Officer to represent an immediate hazard to the public health or safety, which hazard cannot be abated by reasonable measures.

HPO, § 10.7.1.5 (b).

25. Part (i.) of this standard of approval is unlawfully vague and therefor is void.

26. A void standard of approval cannot be applied to deny a COA application.

WHEREFORE, Maine DOT requests that the Court, pursuant to its authority to do so under the Uniform Declaratory Judgments Act, 14 M.R.S. §§ 5951 - 5963, declare that Maine DOT is not required to apply for a COA for the demolition of the building at 36 Water Street, or, in the alternative, that if Maine DOT is required to apply for a COA for the demolition of the building at 36 Water Street, the HPC must approve the application. Maine DOT further requests that the Court grant Maine DOT such other and further relief as is just and proper.

Counterclaim Count V

27. Maine DOT repeats and re-alleges Paragraphs 1 through 26 as if set forth in full.

28. In this action, the Town seeks, among other things, a declaration that Maine DOT must obtain, under the HPO, a COA from the HPC for certain elements of the project that is the subject of this litigation, including the construction of parking lots.

29. The HPO does not contain any standard of approval for the construction of parking lots. In the alternative, the HPO's standards of approval for the construction of parking lots are unlawfully vague and therefor are void.

30. A void standard of approval cannot be applied to deny a COA application.

WHEREFORE, Maine DOT requests that the Court, pursuant to its authority to do so under the Uniform Declaratory Judgments Act, 14 M.R.S. §§ 5951 - 5963, declare that Maine DOT is not required to apply for a COA for the construction of parking lots, or, in the alternative, that if Maine DOT is required to apply for a COA for the construction of parking lots, the HPC must approve the application. Maine DOT further requests that the Court grant Maine DOT such other and further relief as is just and proper.

Counterclaim Count VI

31. Maine DOT repeats and re-alleges Paragraphs 1 through 30 as if set forth in full.

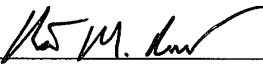
32. Statements made and actions taken by the HPC and by its members demonstrate bias against, and hostility towards, Maine DOT and the project that is the subject of this litigation.

33. Because of this bias and hostility, the HPC cannot serve as a neutral decisionmaker on any COA application submitted by Maine DOT.

WHEREFORE, Maine DOT requests that the Court, pursuant to its authority to do so under the Uniform Declaratory Judgments Act, 14 M.R.S. §§ 5951 - 5963, declare that Maine DOT is not required to apply for a COA for any element of the project that is the subject of this

litigation, or, in the alternative, that if Maine DOT is required to apply for a COA for any element of the project that is the subject of this litigation, the HPC must approve the application. Maine DOT further requests that the Court grant Maine DOT such other and further relief as is just and proper.

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