MURRAY PLUMB & MURRAY
ATTORNEYS AT LAW

John B. Shumadine
jshumadine@mpmlaw.com
Direct: (207) 523-8225

March 5, 2018

Danielle Young, Clerk
Business and Consumer Docket
204 Newbury Street, Ground Floor
Portland, ME 04101

RE: Town of Wiscasset v. State of Maine Department of Transportation
Docket No. BCD-CV-17-59

Dear Danielle:

Enclosed for filing in the above-referenced matter please find a *Motion to Dismiss and Special Motion to Dismiss,* together with a proposed Order.

Thank you for your assistance. If you have any questions, please feel free to contact me.

Sincerely,

John B. Shumadine, Bar No. 8989

JBS/mfm
Enclosures
cc: Nathaniel M. Rosenblatt, Esq.
Town of Wiscasset

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER DOCKET
LOCATION: PORTLAND
DOCKET NO. BCD-CV-17-59

THE TOWN OF WISCASSET,

Plaintiff,

v.

STATE OF MAINE DEPARTMENT OF TRANSPORTATION,

Defendant

MOTION TO DISMISS AND SPECIAL MOTION TO DISMISS WITH INCORPORATED MEMORANDUM OF LAW

Pursuant to Rule 12(b)(6) of the Maine Rules of Civil Procedure, Plaintiff-Counterclaim Defendant the Town of Wiscasset (the "Town") respectfully moves to dismiss the Counterclaims filed by Defendant-Counterclaim Plaintiff the State of Maine Department of Transportation ("MDOT") in this matter. As discussed in more detail below, MDOT's counterclaims are either too late, not ripe, fail to exhaust administrative remedies, and otherwise fail to state a claim upon which relief may be granted. In addition, to the extent that Counts II and III seek to reach activities outside of this litigation, the Town also makes a special motion pursuant to Maine's anti-SLAPP statute, 14 M.R.S. § 556, to dismiss Counterclaim Counts II and III because they are – at least in part – "based on the [Town's] right of petition under the Constitution of the United States or the Constitution of Maine."

FACTUAL BACKGROUND

This dispute arises out of MDOT's plans to make alterations to the section of U.S. Route 1 that passes through the Town's village center (the "Project"). The parties are currently before the Court on the Town's Complaint, which, among other things, seeks to require that MDOT seek a certificate of appropriateness from the Wiscasset Historic Preservation Commission for certain parts of the Project. MDOT has filed an Answer to the Town's Complaint, objecting to the applicability of the Town's zoning ordinance – and specifically the historic preservation provisions in that zoning ordinance – to any part of the Project.

In addition, MDOT has included six counterclaims against the Town with its Answer. Those counterclaims are:

- Count I: a claim that the Wiscasset Select Board violated its internal rules in voting to authorize the current litigation;
- Count II: a claim under the declaratory judgment act to the effect that if this litigation results in a judgment that MDOT must comply with the historic preservation provisions in the Town's zoning ordinance, then the Town should be liable for any increased costs that result from MDOT having to follow the law;
- Count III: a claim under the declaratory judgment act to the effect that if this litigation delays the Project because MDOT must follow the historic preservation provisions in the Town's Zoning Ordinance, then the Town should be responsible for any increase in costs under the Project due to the delay associated with complying with the law;

- Count II and Count III also include language that seeks to recover costs from the Town due to "other actions by the Select Board or its members";
- Counts IV and V: two claims that portions of the historic preservation provisions in the Town's Zoning Ordinance are void due to vagueness;
- Count VI: a claim that members of the historic preservation commission are biased against MDOT.

As might be surmised by the underlying action in the Town's Complaint, MDOT has not filed any application with the Wiscasset Historic Preservation Commission and indeed has undertaken no aspect of the administrative procedures associated with the certificate of appropriateness.

ARGUMENT

A motion to dismiss for failure to state a claim tests the legal sufficiency of an asserted claim or counterclaim. *U.S. Bank Tr., N.A. v. Mackenzie*, 2016 ME 149, ¶ 9. In evaluating a motion to dismiss under Maine Rule of Civil Procedure 12(b)(6) a trial court does not adjudicate the facts presented in the case, but rather relies on the articulated allegations to "determine if there is 'any cause of action that may reasonably be inferred from the complaint [or counterclaim].'" *Marshall v. Town of Dexter*, 2015 ME 135, ¶ 2 (quoting *Saunders v. Tisjer*, 2006 ME 94, ¶ 8). Dismissal is properly granted where "it appears beyond doubt that [the claimant] is entitled to no relief under any set of facts that [it] might prove in support of [its] claim." *Bean v. Cummings*, 2008 ME 18, ¶ 7.

None of MDOT's counterclaims can satisfy these tests.

I. Count I Fails because MDOT Lacks Standing to Challenge the Actions of the Town Select Board, and even if MDOT had Standing, Review under Me. R. Civ P. 80B is now Time Barred

While framed as a plea for declaratory judgment under the Uniform Declaratory Judgments Act, 14 M.R.S. §§ 5951 – 5963, Count I of the counterclaim seeks review of the Select Board's November 7, 2017, vote to retain counsel and bring this case. *Counterclaims* at ¶ 17. This claim fails to state a claim for two reasons.

First, MDOT is simply too late to challenge this action. MDOT's counterclaim alleges improprieties of the Town Select Board in voting to initiate this case. Those claims are precisely the type of claims that fall under Rule 80B. "[R]eview by the Superior Court, whether by appeal or otherwise, of any action or failure or refusal to act by a governmental agency, including any . . . board," unless pursuant to the Maine Administrative Procedures Act, 5 M.R.S. § 11001 et seq., is governed by Rule 80B of the Maine Rules of Civil Procedure. ME. R. CIV. P. 80B(a).

Moreover, review of governmental actions under Rule 80B must be filed within thirty (30) days after notice has been provided of the action or inaction for which review is sought. Me. R. Civ. P. 80B(b). Here, the challenged vote occurred on November 7, 2017, and the applicable period for Rule 80B review ran in full prior to December 8, 2017. *See, e.g., Cayer v. Town of Madawaska*, 2016 ME 143, ¶¶ 16-17, 148 A.3d 707 (holding that due process claims were barred because they should have been included as part of a timely Rule 80B appeal).

Second, even if MDOT were somehow to escape the untimely nature of the claims in Count I, MDOT lacks standing to challenge the Select Board's actions. Standing to bring an 80B action in Maine courts challenging a municipal board's decision requires the claimant to

prove (1) that it was a party involved in the disputed proceeding, and (2) that the claimant has suffered a particularized injury as a result of the board's decision. *Norris Family Assocs., LLC v. Town of Phippsburg*, 2005 ME 102, ¶ 11. MDOT is not a Town voter, nor a member of the Town Select Board, and was not in any way involved in the vote to authorize this suit. As much as MDOT might wish that the Town had not chosen to institute this suit, it lacks standing to complain about the procedures the Town followed in doing so.

The Court should dismiss Count I of MDOT's counterclaims.

II. Counts II and III fail to state any cognizable claim against the Town and must be dismissed, but are also arguably Based on the Town's Exercise of its Right to Petition the Government and must therefore be Dismissed under 14 M.R.S. § 556.

Counts II and III of MDOT's Counterclaims purport to seek declaratory judgment under the Uniform Declaratory Judgments Act, 14 M.R.S. §§ 5951 – 5963, that "to the extent that this litigation or other actions by the Select Board or its members" results in design changes or delays commencement of the Project that any such increase is the responsibility of the Town. *Counterclaims* at ¶¶ 18-21 (emphasis added).

As an initial matter, it is impossible to discern any actual cause of action in Counts II and III. The Town recognizes that MDOT is upset that this litigation might lead to delays or costs increases in the Project. However, the most likely manner in which that occurs is through a finding that MDOT has failed to comply with the applicable law. MDOT – and most assuredly not the Town – is the party liable for its own failure to comply with the law.

The lack of basis of these two counterclaims points to another issue. MDOT has undoubtedly filed these counterclaims purely due to the chilling effect of a possible money judgment owed by the Town to MDOT. Moreover, the broad nature of the activities

covered by these counterclaims – "this litigation or other action by the Select Board or its members" – indicates that MDOT's intent with these counterclaims is to chill the Town's ability to exercise its right of petition. As a result, these counterclaims fall under the anti-SLAPP statute.

Maine's anti-SLAPP statute "is designed to allow a [party] to file a special motion to dismiss" claims or counterclaims that have been brought "with the intention of chilling or deterring the free exercise of [its] First Amendment right to petition the government by threatening [it] with litigation costs." *Nader v. Me. Democratic Party*, 2012 ME 57, ¶ 14 (internal quotations and citations omitted); 14 M.R.S. § 556. Courts undertake a two-step analysis when applying Maine's anti-SLAPP statute. Under the first step, the moving party must show that the anti-SLAPP statute applies because "the suit was based on some activity that would qualify as an exercise of the defendant's First Amendment right to petition the government." *Schelling v. Lindell*, 2008 ME 59, ¶ 7. If the moving party does so, "the burden shifts to the non-moving party to establish, through pleadings and affidavits, that the moving party's exercise of its right of petition (1) was 'devoid of any reasonable factual support or any arguable basis in law,' and (2) 'caused actual injury' to the non-moving party." *Nader*, 2012 ME 57, ¶ 16 (quoting 14 M.R.S. § 556). If the non-moving party cannot meet this burden, the special motion to dismiss must be granted. *Maietta Constr., Inc. v. Wainwright*, 2004 ME 53, ¶ 6.

These counterclaims are subject to Maine's anti-SLAPP statute because they are based on the Town's current and potential activity in petitioning the government, in this case MDOT. 14 M.R.S. § 556. The right to petition is defined broadly in the statute and includes

both the right to file a complaint and pursue litigation, as well as the right to lobby through written and oral statements made to "encourage consideration or review of an issue" by a governmental body. *Id.*; *Nader*, 2012 ME 57, ¶ 21.

This litigation is a petitioning activity within the scope of 14 M.R.S. § 556. *Id.* "Other actions by the select board" that may result in design changes or commencement delays, while vague, certainly includes other protected petitioning activity, such as lobbying administrative and executive decision makers to encourage or require MDOT to obey the Town's Ordinance. 14 M.R.S. § 556. Thus, Counts II and III appear to have been brought "with the intention of chilling or deterring the free exercise of the [Town's] First Amendment right to petition the government." *Schelling*, 2008 ME 59, ¶ 6. As the Town's complaint is reasonably supported by fact and law, and MDOT has suffered no actual injury, these counterclaims must be dismissed under Section 556.

For these reasons, Counts II and III are subject to a special motion to dismiss and should be dismissed as a violation of 14 M.R.S.A. § 556.

III. Counts IV and V Fail because the Claims are Unripe and MDOT has Failed to Exhaust the Available Administrative Remedies as Maine Law Requires

Counts IV and V of the Counterclaim seek declarations from the court that the historic preservation provisions in the Town's Zoning Ordinance are vague and therefore void. Accordingly, MDOT asks that the Court order that the Town Historic Preservation Commission grant a certificate of appropriateness if MDOT is required to apply.

Both of these counterclaims are premature and should be dismissed. MDOT has not applied for a certificate of appropriateness for any aspect of the Project, has not been denied a certificate of appropriateness, and has therefore suffered no injury from which it could be

aggrieved. These counts constitute an attempt by MDOT to circumvent the certificate of appropriateness application process, which runs contrary to the established doctrines of primary jurisdiction and exhaustion of administrative remedies.

Under the doctrine of primary jurisdiction "courts should avoid ruling . . . on matters committed by law to the decision-making authority of an administrative agency before the administrative agency has first had an opportunity to review and decide the facts on the merits of the matter at issue." *Christian Fellowship & Renewal Ctr. v. Town of Limington*, 2006 ME 44, ¶ 40. "Pursuant to the doctrine of exhaustion of administrative remedies, a party must 'proceed in the administrative/municipal arena until all possible administrative remedies are exhausted before initiating action in the courts.'" *Bryant v. Town of Camden*, 2016 ME 27, ¶ 10 (quoting *Cushing v. Smith*, 457 A.2d 816, 821 (Me. 1983)). Review by the court is only authorized after the applicable administrative proceeding itself has resulted in a decision on the merits, and the decision has been subjected to any available administrative review "to allow the administrative agenc[y] to correct [its] own errors, clarify [its] policies, and reconcile conflicts before resorting to judicial relief." *Ne. Occupational Exch., Inc. v. Bureau of Rehab.*, 473 A.2d 406, 409 (Me. 1984) (internal quotations omitted). Appeal to the Superior Court is only available under the Maine Rules of Civil Procedure and 30-A M.R.S. § 2691 once the administrative agency has completed "'an action that fully decides and disposes of the whole cause leaving no further questions for . . . future consideration and judgement' by the administrative agency. *Bryant*, 2016 ME 27 at ¶ 12 (quoting *Gorham v. Town of Rockport*, 2003 ME 135, ¶ 16).

The certificate of appropriateness process, by law, falls within the ambit of the Historic Preservation Commission's administrative decision-making authority. Wiscasset Zoning Ordinance § 10.5. MDOT has refused to submit an application for a certificate of appropriateness for any aspect of the Project, and thus there are no decisions on the merits to challenge, and moreover, there is no administrative record, a prerequisite for both administrative and judicial review. Furthermore, by both ordinance and statute, there are further and ample administrative remedies available should MDOT be unhappy with whatever decision the Historic Preservation Commission might reach. Among other things, the Town's Zoning Ordinance provides for appeal of HPC decisions within 30 days to the Town's Zoning Board of Appeals. Wiscasset Zoning Ordinance § 10.6.1.5. Until MDOT goes through that process, it has not exhausted its administrative remedies and may not bring the claims in Counts IV and V of its Counterclaim. For this reason, those counterclaims must be dismissed.

IV. Count VI Fails because it is Unripe, any Harm or Bias Alleged is Purely Speculative, and MDOT has Failed to Exhaust Available Administrative Remedies

Count VI of the Counterclaim seeks a judicial declaration that the Wiscasset Historic Preservation Commission is biased and cannot serve as a decision-maker on any application for a certificate of appropriateness that MDOT might file. Based on this claim of bias, MDOT asks that the Court order the Historic Preservation Commission to grant a certificate of appropriateness. *Counterclaims* at ¶¶ 31-33.

Just as with Counts IV and V, MDOT has failed to exhaust its administrative remedies. Maine law sets forth an exclusive procedure for situations in which a party

believes that an administrative body is biased. In that case, the party must file its application, then request that the biased members of the administrative body recuse themselves from consideration of the matter before them. Through that process, the administrative body can create a record, which in turn can be evaluated on appeal. Wiscasset Zoning Ordinance § 10.6.1.5 (The Board of Appeals may reverse a decision of the HPC "if it determines that the decision contained a procedural error or was clearly contrary to the provisions of this Ordinance, or was not supported by the facts."). MDOT's allegations of bias do not excuse it from undertaking the mandated administrative appeal process before seeking judicial review.[1] *See Ne. Occupational Exch.*, 473 A.2d at 411 (allegations of bias do not excuse failure to exhaust administrative remedies).

CONCLUSION

For the foregoing reasons, the Town respectfully requests that this Court grant this motion to dismiss Counts I, IV, V and VI of the Counterclaim for failure to state a claim upon which relief can be granted, and to further grant this special motion to dismiss Counts II and III of the Counterclaim under 14 M.R.S. § 556 because they are based on the Town's

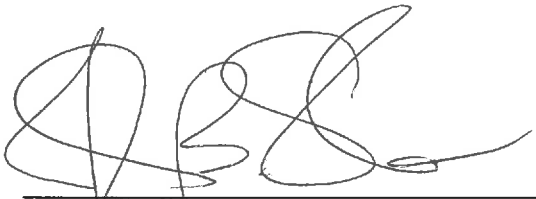
---

[1] As discussed in the text above, MDOT's failure to exhaust its administrative remedies is enough, standing alone, to require dismissal of this count of its Counterclaims. However, MDOT has also inadvertently demonstrated a significant and severe practical problem should this counterclaim be allowed to proceed. MDOT has already propounded a notice of deposition seeking to depose John Reinhardt. Mr. Reinhardt is the chair of the Historic Preservation Commission. If MDOT were allowed to take that deposition, it is difficult to imagine any line of questioning related to any part of the Project that would not explicitly result in Mr. Reinhardt being forced to engage in *ex parte* communications with MDOT about a matter that the Town believes is due to go before the Commission. In effect, the deposition itself would be disqualifying. Such *ex parte* communication influence the decision-maker and may affect the procedural integrity of the COA application and its outcome. *See, e.g., Duffy v. Town of Berwick*, 2013 ME 105, ¶ 18 (Ex-parte communications between applicant and a town board may affect "the integrity of the process and the fairness of the result.") (quotations and citations omitted).

right to petition the government, and have been brought "with the intention of chilling or deterring the free exercise" of those rights. *Nader*, 2012 ME 57, ¶ 14. Or, in the alternative, the Town requests that this Court dismiss all counts of the Counterclaim for failure to state a claim upon which relief can be granted.

The Town further requests, in accordance with 14 M.R.S. § 556, that all discovery proceedings be stayed until a ruling on this special motion to dismiss has been entered.

Dated: March 5, 2018



Peter L. Murray, Esq., Bar No. 1135
pmurray@mpmlaw.com
(207) 523-8220
John B. Shumadine, Esq., Bar No. 8989
jshumadine@mpmlaw.com
(207) 523-8225
Attorneys for Plaintiff Town of Wiscasset

MURRAY PLUMB & MURRAY
75 Pearl Street, P.O. Box 9785
Portland, ME 04104-5085

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER DOCKET
LOCATION: PORTLAND
DOCKET NO. BCD-CV-17-59

THE TOWN OF WISCASSET,

Plaintiff,

v.

STATE OF MAINE DEPARTMENT OF TRANSPORTATION,

Defendant

ORDER ON PLAINTIFF'S MOTION TO DISMISS AND SPECIAL MOTION TO DISMISS

After consideration of the Plaintiff's Motion to Dismiss and Special Motion to Dismiss, for good cause shown and after hearing, **IT IS HEREBY ORDERED:**

1. That Counts I, IV, V and VI of the counterclaim filed by the State of Maine Department of Transportation ("MDOT") are dismissed for failure to state a claim upon which relief may be granted.
2. That Counts II and III of the counterclaim filed by MDOT are dismissed under 14 M.R.S. § 556 because they "are based on [the Plaintiff's] exercise of [its] right of petition under the Constitution of the United States or the Constitution of Maine," that petitioning activity was reasonably supported by fact and law, and MDOT suffered no actual injury from the Plaintiff's lawful petitioning activity.

3. MDOT shall pay reasonable attorneys fees related to the dismissal of Counts II and III as allowed under 14 M.R.S. § 556. The Plaintiff shall file a fee petition with this Court within 30 days of the date of this order.

DATED:

_____
Justice, Superior Court