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April 2, 2018

Danielle Young, Clerk
Business and Consumer Docket
205 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 *Plaintiff's Reply Memorandum in Support of Motion to Dismiss and Special Motion to Dismiss.*

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

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND SPECIAL MOTION TO DISMISS

I. Count I of MDOT's Counterclaim is Time Barred and even if it were not, MDOT has Failed to Show that it has Standing

State of Maine Department of Transportation ("MDOT") makes two arguments in defending Counterclaim Count I. First, MDOT argues that the time limits in Rule 80B do not apply to Count I because it is an independent declaratory judgment action. MDOT cites to *Sold, Inc. v. Town of Gorham*, 2005 ME 24, 868 A.2d 172 for the proposition that "[s]ubject to equitable defenses including laches, a governmental action may be challenged at any time, as *ultra vires*, when the action itself is beyond the jurisdiction or authority of the administrative body to act." *Id.* at ¶ 12, 868 A.2d at 176. The Court should reject that argument.

For an action to be "beyond the jurisdiction" of an administrative body, that action must be of a type that is "beyond the lawful authority of the challenged agency." *Id.* That is not the case here. No matter how procedurally-flawed the vote of the Town's Select Board may or may not have been, the bringing of a lawsuit on behalf of the Town is an action well within the Select Board's authority. *Cf. Black's Law Dictionary* 1158 (8th ed. 2004) (defining *ultra vires* as "beyond the scope of power allowed or

granted by a corporate charter or by law"). For that reason, the only avenue for challenging the Select Board's decision is through an administrative appeal pursuant to Rule 80B.

Next, MDOT advances a novel argument about how the timelines in Rule 80B work. Unless provided by statute, the 30-day time limit in which to appeal a municipal government's action under Rule 80B "shall commence upon the date of the public vote or announcement of final decision of the governmental decision-maker of which review is sought." Me. R. Civ. P. 80B(b). When Rule 80B is applicable, the 30-day time limit is strictly enforced. *See, e.g., Sold, Inc.*, 2005 ME 24, ¶ 15 (plaintiff cannot use declaratory judgment to bring after-the-fact appeal when Rule 80B time limit has expired); *Old Orchard Beach Partners v. Inhabitants of Old Orchard Beach*, 1999 Me. Super. LEXIS 17, *3 (Me. Super. Jan. 13, 1999) (where "Rule 80B would have provided an adequate remedy" its 30-day deadline applies to declaratory judgement claims). The action being challenged here is the vote on November 7, 2017. MDOT was required to file its appeal within 30 days, or by December 7, 2017. Rather than addressing this time line, MDOT instead refers to the filing date of this suit and the settlement negotiations – all of which are not relevant to the calculation of Rule 80B time lines.[1] As a result, Count I is time barred.

Even if it were not time barred, MDOT lacks standing. MDOT cites no statute or case law that even purports to provide it standing to challenge the validity of the Select Board's vote to authorize this suit. Rather, MDOT asks "[h]ow can Maine DOT, as the party being sued, not have standing to assert that the complaint filed against it has not been duly authorized?" *MDOT Opposition* at 7. The answer is simple: because Rule 80B and Maine case law do not provide MDOT with standing. *See Norris Family*

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[1] The Town is unaware of any case that found that settlement negotiations of any sort toll the time for filing an appeal pursuant to Rule 80B.

As a result, MDOT should have filed an 80B complaint by December 7, 2017, moved for consolidation with this case and/or then requested a stay while it undertook settlement negotiations. That is the law.

In fact, that is precisely the course that MDOT took in challenging a letter issued by the Town's Code Enforcement Officer regarding the application of the Historic Preservation Ordinance to MDOT. MDOT filed an appeal pursuant to Rule 80B, then consolidated it with this action. Thus, MDOT was well aware of the procedures that apply to administrative appeals, but chose not to follow them.

Assocs., LLC v. Town of Phippsburg, 2005 ME 102, ¶ 11 (Standing under Rule 80B require participation and particularized injury).

MDOT simply does not have a particularized injury.[2] MDOT confuses the potential consequences of this lawsuit – such as expenditures in defense or delays to its project – with the harm that arises under an allegedly procedurally-flawed vote by the Select Board. The harm or injury from a defective vote would be to taxpayers of the Town for having their funds wasted on unauthorized legal work.[3] It is not the litigation expenses incurred by the party being sued.

Indeed, the remedy for any procedural shortcoming in the vote shows how MDOT is not injured. The remedy would simply be for the Select Board to put the authorization on its next agenda and then vote on it, thus eliminating any alleged impropriety. The Court must dismiss Counterclaim Count I.

II. Counts II & III of MDOT's Counterclaim Fail to State Any Cognizable Claim and are in Violation of Maine's Anti-SLAPP Statute (14 M.R.S. § 556)

MDOT's arguments in support of Counts II and III fail to show that they are based on any claim cognizable in Maine law. Rather than cite to authority, MDOT offers naked assertions that it has untrammeled authority to direct the Project without interference. The Town does not agree and has filed suit to force MDOT to comply with the statutes that the Town has shown limit MDOT's authority. There is simply no legal basis for seeking recovery from a party because that party is asking that MDOT comply with the law.

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2 MDOT spends a fair bit of energy arguing that it should be excused from the participation prong of standing because of the alleged procedural improprieties of the Select Board vote. The participation requirement exists to allow administrative bodies a chance to hear about the claimed error and avoid making that error. It is firmly established in Maine law. *See, e.g., Dep't of Envtl. Prot. v. Town of Otis*, 1998 ME 214, ¶ 15 (holding that Rule 80B's standing requirements apply to the Maine Attorney General and Department of Environmental Protection). Contrary to that requirement, MDOT made no effort to bring the alleged error to the attention of the Select Board at any time.

3 An apt analogy is to a situation where a corporation's board fails to follow its internal procedure in authorizing a lawsuit against a rival. Would that rival have standing to bring a counterclaim that the board improperly authorized the suit simply because it was the party being sued? Most definitively it would not. The injury from the flawed vote would be to the shareholders of the corporation, not to the rival.

Rather than provide legal analysis, MDOT makes the absurd claim that Counts II and III are designed to allow MDOT to recover costs if the Court incorrectly issues an injunction. That argument is not an independent claim – MDOT misunderstands the purpose of a security bond under Me. R. Civ. P. 65(c). A bond, if required, exists to provide security to the enjoined party against damages and costs incurred if and only if the court later deems that they were wrongfully enjoined. Me. R. Civ. P. 65(c). The security bond is not a mechanism for general cost recovery, nor is recognized as an independent claim.

MDOT's arguments against the special motion to dismiss fare no better. MDOT mischaracterizes the burden shifting approach utilized in 14 M.R.S. § 556. "It is first the moving party's . . . burden to . . . establish, as a matter of law, that the claims against [it] are based on [its] exercise of the right to petition pursuant to the federal or state constitutions." *Gaudette v. Davis*, 2017 ME 86, ¶ 8 (internal quotations omitted). If the moving party does so, "the burden then shifts to the nonmoving party . . . to establish that although petitioning activity is at issue, that petitioning activity (1) 'was devoid of any reasonable factual support or any arguable basis in law' and (2) 'caused actual injury to the [nonmoving] party.'" *Id.* at ¶ 9 (quoting 14 M.R.S. § 556).

The right to litigate falls within the ambit of the petitioning activities that are protected by the Maine and United States Constitutions. *Gaudette*, 2017 ME 86, ¶ 6 ("Within the right to petition is also found the right to access courts to seek redress."); *Nadar v. Me. Democratic Party*, 2012 ME 57, ¶ 21 ("The right to petition the government, including the right to file complaints in courts, is a fundamental right protected by the *First Amendment.*"). Counts II and III both concern costs that may be incurred due to "this litigation or other actions by the Select Board or its members" that may result in "changes to the design of the project" or "delays the performance of the project." *Counterclaims* at ¶¶ 19, 21. These are self-evidently claims based on the Town's petitioning activity, specifically this litigation.[4] Still, MDOT

[4] MDOT argues, based on Massachusetts law, that municipalities fall outside the scope of protection afforded by Maine's Anti-SLAPP statute. *MDOT Opposition* at 9-10. MDOT's argument is inapposite, and cites no authority that actually suggests a municipality's petitioning state government on behalf of its citizens would not fall

asserts that its counterclaims are not based on the petitioning activity itself, but on the consequences. If MDOT's argument is accepted then every party ever sued would have an automatic counterclaim for attorney fees against their opposing litigant. The American Rule clarifies that this is simply not the case in our system of justice. There is no basis in law for these counterclaims. They are merely an attempt by MDOT to chill the Town's "free exercise of its First Amendment rights to petition the government." *Schelling v. Lindell*, 2008 ME 59, ¶ 6.

Regardless of MDOT's confusion about the scope of Maine's Anti-SLAPP protections, the Town has met its initial burden under Section 556 and provided a *prima facie* showing that Counts II and III of MDOT's Counterclaim are based on its petitioning activity. MDOT has not established that this litigation or the other petitioning activities of the Town were "devoid of any reasonable factual support or any arguable basis in law" or "caused [it] actual injury." 14 M.R.S. § 556. For this reason, the Special Motion to Dismiss Counts II and II of MDOT's Counterclaim should be granted.

III. Counts IV & V of MDOT's Counterclaim are Unripe and MDOT has Failed to Exhaust the Available Administrative Remedies as Maine Law Requires; Counts IV & V must also be Dismissed because MDOT has not Complied with 14 M.R.S. § 5963

MDOT correctly states the Town's position, which is also the prevailing law of Maine, regarding the necessity to exhaust administrative remedies before seeking judicial review. *MDOT Opposition* at 13. MDOT must first apply for a certificate of appropriateness (COA); that application must be denied; MDOT must then appeal to the Town Board of Appeals, be denied; then and only then may MDOT to bring equivalent claims to Counts IV and V, because it is only then that MDOT will have a ripe claim

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within the protection of 14 M.R.S. § 556. Indeed, the cited cases do not concern comparable municipal petitioning activity. The first concerns a suit by a former city employee against the mayor and other city agents that terminated his employment. *Moriarty v. Mayor of Holyoke*, 883 N.E.2d 311 (Mass. App. Ct. 2008). In that case, the city agents (the defendants) were denied Anti-SLAPP protection because their activities (speaking to the press and to other city agencies against the fired employee) were not considered petitioning activities. *Id.* at 314-316. The second case concerned testimony by the defendant, who had been a paid expert witness for the State in a board of medicine disciplinary hearing. *Kobrin v. Gastfriend*, 821 N.E.2d 60, 62-63 (Mass. 2005). The defendant there was denied Anti-SLAPP protection because his participation in the disciplinary hearing was not exercising his right to petition. Rather, he was performing contracted services for the State. *Id.* at 66. It should also be noted that in Maine, municipalities are municipal corporations, and there is nothing in Maine's Anti-SLAPP statute or case law that suggests corporations of any type would be denied the law's protection for their corporate status.

which it could bring under a Rule 80B appeal. *See Bryant v, Town of Camden*, 2016 ME 27, ¶ 10; *see also Sold, Inc.*, 2015 ME 24, ¶ 10 ("A declaratory judgement action cannot be used to create a cause of action that does not otherwise exist."). MDOT asserts that Counts IV and V are excused from exhaustion because they concern only questions of law. *MDOT Opposition* at 14; *see also Bryant*, 2016 ME 27, at ¶ 10 n.1. This contention is mistaken. Counts IV and V seek adjudication of the HPO's validity as-applied to MDOT's Route 1 Project in downtown Wiscasset, which is a mixed question of fact and law.[5]

The Declaratory Judgment Act provides that "[i]n any proceeding which involves the validity of a municipal ordinance . . . , such municipality shall be made a party and shall be entitled to be heard, and if the . . . ordinance . . . is alleged to be unconstitutional, the Attorney General shall be served with a copy of the proceeding and be entitled to be heard." 14 M.R.S. § 5963. Here MDOT asserts an as-applied challenge to the validity of the Town's historic preservation ordinance, yet has not provided any declaration, affidavit, or other proof that the Attorney General has been served with a copy of the Counterclaims. From this procedural failure alone, Counts IV and V should be dismissed. *Ferraiolo Constr. Co. v. Town of Woolwich*, 1998 ME 179, ¶ 8 ("Because [plaintiff] did not comply with this requirement, the trial court should have dismissed [their] claim for a declaratory judgment."); *La Fleur ex rel. Anderson v. Frost*, 80 A.2d 407, 411 (Me. 1951).

IV. Count VI of MDOT's Counterclaim is Unripe, any Harm or Bias Alleged is Purely Speculative, and MDOT has failed to Exhaust Available Administrative Remedies

MDOT's reliance on *Adelman v. Town of Baldwin* to demonstrate the viability of a preemptory bias claim is misplaced. That case concerned the dismissal of an independent claim under 30-A M.R.S. § 2605 when the plaintiff was also pursuing a parallel appeal under Rule 80B of a permit approval that had

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5 It is worth noting that MDOT has sought discovery related to Counts IV, V & VI – specifically, MDOT has noticed the deposition of the chair of the Historic Preservation Commission. It is also worth noting that similar language has been upheld against similar challenges across a variety of jurisdictions. *See, e.g., Boczar v. Kingen*, 6 F. App'x 471, 476 (7th Cir. 2001) (HPO upheld against vagueness challenge), cert. denied, 534 U.S. 952 (2001); *Conner v. City of Seattle*, 223 P.3d 1201, 1210 (Wash. Ct. App. 2009) (same); *Park Home v. City of Williamsport*, 680 A.2d 835, 838 (Pa. 1996) (same); *U-Haul Co. of E. Mo., Inc. v. St. Louis*, 855 S.W.2d 424, 427 (Mo. Ct. App. 1993) (same); *Salvatore v. Schenectady*, 139 A.D.2d 87, 89 (N.Y. App. Div. 1988) (same).

already occurred. *Adelman v. Town of Baldwin*, 2000 ME 91, ¶ 6. Similarly MDOT's analogy to the anticipatory challenge of an ordinance are unavailing and unsupported by Maine law.

MDOT's entire argument on this point demonstrates a fundamental lack of understanding of the administrative process it is challenging. If MDOT believes that the Historic Preservation Commission members are biased, Maine law requires that it first present those claims to the Commission. If the claims are well grounded, Commission members may decide to recuse themselves. Until Commission members are presented with the allegations and decide not to recuse themselves, MDOT's claims are purely speculative. Finally, if the Commission members do not recuse themselves and MDOT believes that it is harmed by that action, then under *Adelman* and Maine law, MDOT's remedy is to file a Rule 80B appeal challenging the Commission's decision. *Ne. Occupational Exch., Inc. v. Bureau of Rehab.*, 473 A.2d 406, 411 (Me. 1984) (the requirement to exhaust administrative remedies is not excused by allegations of bias). The Commission members' alleged bias will be taken up during the Rule 80B appeal.

In short, MDOT does not have an independent claim based on the alleged bias of the Historic Preservation Commission members. The Court should dismiss Counterclaim Count VI.

CONCLUSION

For the forgoing reasons, the Town respectfully requests that the Court grant its motion and dismiss all of MDOT's counterclaims.

Dated: April 2, 2018

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