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STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-17-26

CAPE SHORE HOUSE OWNERS ASSOCIATION and CONSTANCE JORDAN,

Plaintiffs

v.

TOWN OF CAPE ELIZABETH and ALAN and MARA DeGEORGE,

Defendants.

ORDER ON DEFENDANTS ALAN AND MARA DeGEORGE'S MOTION TO DISMISS AND/OR TO STRIKE AMENDED COMPLAINT AND TO RESUME BRIEFING SCHEDULE ON 80B APPEAL

I. Background

Plaintiffs filed their Rule 80B complaint in this matter on June 27, 2017, generally alleging that Defendant Town of Cape Elizabeth ("Town") erred in granting the application of Defendants Alan and Mara DeGeorge ("the DeGeorges") to build a house that would unreasonably block Plaintiffs' water views. Plaintiffs thereafter filed their Rule 80B brief on August 4, 2017. On August 29, 2017, the Town filed an unopposed motion to stay and remand this case to the Town of Cape Elizabeth Zoning Board of Appeals ("ZBA") for further findings of fact. The motion states that "[t]he parties understand that Plaintiff reserves the right to file an amended complaint after remand, if necessary." (Mot. Remand 1.) The Court granted this motion on September 7, 2017. The ZBA issued its supplemental Findings of Fact and Decision on December 26, 2017. (Pl.'s Amended Compl., Ex. C.) Plaintiff filed an amended complaint on January 26, 2018. The complaint was amended to add independent claims for a declaratory judgment and for trespass. The Town answered the amended complaint on February 5, 2018. The DeGeorges filed the present motion on February 9, 2018.

II. Discussion

Plaintiffs–William Dale, Esq.
Defendant Town of Cape–John J Wall, Esq.
Defendants DeGeorges–David Kallin, Esq.

A. Count II: Declaratory judgment

Count II of Plaintiffs' amended complaint is an independent action for a declaratory judgment that the height restriction of 35 feet in the Town of Cape Elizabeth Zoning Ordinance § 19-6-11(E)(2) is inconsistent with and therefore preempted by the Shoreland Zoning Act, 38 M.R.S.A. § 439-A(4)(C)(1), thereby invalidating the approval of the DeGeorges' application.

Plaintiff Constance Jordan and Plaintiffs' attorney William Dale attended the May 23, 2017 public hearing on the DeGeorges' application. Jim Fisher, President of Northeast Civil Solutions, who spoke on behalf of the DeGeorges, commented that the proposed structure, at 30 feet high, could legally be another five feet higher. Although Attorney Dale vigorously objected to the height of the structure, he made no objection to the applicability or validity of the municipal ordinance. Instead, Attorney Dale's objections were to the height of the structure to the extent it would block his clients' water views. While discussing the matter, the ZBA further acknowledged the 35-feet height restriction with no objection from Plaintiffs. No mention whatsoever was made of a statutory height restriction.

Plaintiffs' original complaint likewise obviously makes no mention of an alleged violation of a statutory height restriction. Further, Plaintiffs' 80B brief suffers from the same defect, stating:

> Finally, the ZBA's findings failed to determine whether the enlarged structure would meet the various dimensional standards for the Residence C Zoning District and the Shoreland Performance Overlay District, *which are both applicable to the Property*. For example, the Ordinance provides a maximum building height of 35 feet and maximum lot coverage of 20%. … The ZBA's oral findings in the case do not state whether the proposed structure meets either of those standards, and makes no reference to any competent evidence in the record to support a conclusion that both of those standards have been met.

(Pl.'s Br. 9 (emphasis added).) Not only did Plaintiffs fail to invoke the Shoreland Zoning Act, but they affirmed the applicability of the municipal ordinance. The ZBA's findings on remand clarify that "the height of the proposed structure is in excess of thirty feet (30') but does not exceed thirty-

five feet (35'). The board considered the applicable sections in the zoning ordinance relating to height...." (Pl.'s Am. Compl., Ex. C ¶ 6.) Now that the ZBA has expressly confirmed that the structure meets the ordinance's 35-feet height restriction – a finding 80B Plaintiffs' brief contends the ZBA was required to make – Plaintiffs wish to bring a new claim alleging the 35-feet height restriction is not applicable to the property, and instead the property is restricted to the greater of a height of 20 feet or the height of the original structure, pursuant to the Shoreland Zoning Act.

The factual allegations and ultimate relief sought by Plaintiffs are the same in this purported independent action as in the 80B appeal. At the core of Plaintiff's declaratory judgment action is the argument that the DeGeorges' application was approved pursuant to an invalid municipal ordinance. Although Plaintiffs couch their preemption argument as an independent action for declaratory relief, this cause of action is exclusively the subject of an 80B appeal. *See, e.g., Sold, Inc. v. Town of Gorham*, 2005 ME 24, ¶ 13, 868 A.2d 172 ("Plaintiffs only challenge [the municipal ordinance] as inconsistent with statutory and constitutional requirements. Such challenges are the essence of matters that must be brought pursuant to Rule 80B to question whether the particular action of a municipal administrative agency is consistent with the requirements of law."); *see also Gorham v. Androscoggin Cty.*, 2011 ME 63, ¶ 22, 21 A.3d 115 ("[W]hen direct review is available pursuant to Rule 80B, it provides the exclusive process for judicial review unless it is inadequate."). Plaintiffs' Shoreland Zoning Act issue could have and should have been raised as part of their 80B appeal, and this count is therefore subject to dismissal as duplicative.

Having determined that this matter should have been made part of the 80B appeal, the Court further finds the issue may not now be raised because it has not been preserved for appellate review. As both parties recognize, "[i]ssues not raised at the administrative level are deemed

unpreserved for appellate review." *Carrier v. Sec'y of State*, 2012 ME 142, ¶ 18, 60 A.3d 1241 (citations omitted). In their opposition to this motion, Plaintiffs contend that this issue was preserved because "[f]rom the beginning, Plaintiffs' argument has been focused on preventing any expansion of height, volume, or anything that will *impact views*." (Pl.'s Opp'n to Def.'s Mot. Dismiss 11 (emphasis added).) The argument that Plaintiffs have preserved throughout the proceedings is that the DeGeorges' proposed structure will violate the Town water view ordinance, not that the ordinance is preempted by state law. Because the issue of preemption was not raised at the administrative level, it has been waived, and this count must be dismissed.[1]

B. Count III: Trespass

The Court likewise agrees with the DeGeorges that the trespass claim should be dismissed pursuant to Rule 80B(i), which requires an independent action joined with an 80B appeal to "alleg[e] an independent basis for relief from *governmental action*...." M.R. Civ. P. 80B(i) (emphasis added). Plaintiff's trespass claim does not seek relief from governmental action, but rather seeks relief from wholly unrelated actions by private parties. As such, this claim is not the proper subject of an independent action joined with an 80B appeal.

Moreover, given Plaintiffs' concession that the phrase "if necessary" in the unopposed motion to stay means "to the extent Plaintiffs were not satisfied with the ZBA's decision on remand," (Pl.'s Opp'n to Mot. Dimiss 5 n.3.) the joinder of this claim seems to fall outside the bounds of the parties' agreement to Plaintiffs' right to amend their complaint if necessary, as this amendment is unrelated to the ZBA's decision on remand. Because Plaintiffs have neither sought

[1] Plaintiffs argue that in their proposed findings of fact and conclusions of law that were submitted to the ZBA, they specifically requested a finding that the proposed structure would violate the height restriction contained in 38 M.R.S.A. § 439-A(4)(C)(1). This document containing proposed findings has not been made part of the record and therefore is not before the Court for consideration. Even if Plaintiffs did raise this issue in the manner they allege, because the issue was not raised at the hearing, in Plaintiffs' original complaint, or in Plaintiffs' 80B brief – all of which occurred before Plaintiffs allegedly submitted their proposed findings to the ZBA – the Court nonetheless finds the argument has been waived.

leave to amend from the Court nor secured Defendants' consent to amend, amendment to add this count was improper. *See* M.R. Civ. P. 15(a).

C. Lifting the stay

The DeGeorges further request that the Court lift the stay of this action entered on September 7, 2017. The stay was granted and the case was remanded so the ZBA could issue more explicit findings pertaining to the application that is the subject of the appeal. The ZBA has issued its supplemental findings. Having dismissed both counts amended to Plaintiffs' complaint, the Court finds no reason to further delay proceedings. The DeGeorges' 80B brief, filed with their motion to dismiss, is accepted, and the parties are to resume the briefing schedule.

III. Conclusion

For the foregoing reasons, Defendants Alan and Mara DeGeorge's motion to dismiss counts II and III of the amended complaint is GRANTED. Counts II and III of Plaintiffs' amended complaint are DISMISSED without prejudice. It is further ordered that the stay of this action is lifted, and the parties are to resume the briefing schedule. The Clerk is directed to incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

Dated: 4/23/18

Lance E. Walker, Justice
Maine Superior Court