

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-18-053

ELVIN COPP, et al.,

Petitioners

v.

DECISION AND ORDER

WILLIAM LONGLEY, et al.,

Respondents

Before the court is petitioners Elvin Copp and Randall Copp's Rule 80B appeal of the respondent Town of Cumberland's October 11, 2018 decision. Respondent Town Board of Adjustment and Appeals upheld the Code Enforcement Officer's determination that petitioners were in violation of local ordinances. For the following reasons, respondent Town's decision is affirmed.

Background

On November 8, 2018, petitioners filed a Rule 80B complaint against respondent William Longley, the Town of Cumberland's Code Enforcement Officer. Petitioners alleged that the decision of the Town's Board of Adjustment and Appeals to uphold respondent Town's Code Enforcement Officer's Notice of Violation was arbitrary and capricious, constituted an abuse of discretion, error of law, and/or findings not supported by substantial evidence. On November 26, 2018, petitioners amended their complaint to add respondent Town of Cumberland. On December 21, 2018, respondent Town filed a counterclaim against petitioners seeking a land use enforcement pursuant to 30-A M.R.S. § 4452.

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On November 26, 2018, petitioners filed a motion for a trial of the facts by jury. On December 21, 2018, respondent Town filed an opposition to petitioners' motion for trial of facts. On January 4, 2019, petitioners filed a motion to dismiss respondent Town's counterclaim. On January 15, 2019, respondent Town filed an opposition to petitioners' motion to dismiss its counterclaim. On January 22, 2019, petitioners filed a reply to respondent Town's opposition to dismiss its counterclaim.

On January 22, 2019, petitioners filed their Rule 80B brief and a transcript of the October 11, 2018 Board hearing. On February 8, 2019, Petitioners moved to supplement the record. On February 20, 2019, respondent Town filed a combined Rule 80B brief and opposition to petitioners' motion to supplement the record. On March 6, 2019, petitioners filed a reply Rule 80B brief and a reply to respondent Town's opposition to supplement the record. On March 12, 2019, petitioners filed an opposition to a nonexistent respondent Town's motion to dismiss for want of prosecution. By order dated April 5, 2019, the court denied petitioners' motion for a trial of facts and petitioners' motion to dismiss respondent Town's counterclaim.

On April 5, 2019, petitioners filed a motion for leave to file a second amended complaint, a motion for leave to file an amended motion for trial of facts or supplement the record, and filed an amended motion for trial of facts. On April 12, 2019, the court denied petitioners' motion to supplement the record. On April 16, 2019, petitioners filed a reply to respondent Town's counterclaim. On April 26, 2019, respondent Town filed oppositions to petitioners' motion for leave to file an amended motion for trial of the facts and motion to file a second amended complaint. On May 6, 2019, petitioners filed a motion for recusal of the presiding justice and a motion for clarification and to consolidate hearings on the complaint with the counterclaim. On May 8, 2019, petitioner filed a reply to respondent Town's opposition to the motion to amend the

motion for a trial of facts and respondent Town's opposition to the motion for leave to file a second amended complaint. By order dated July 26, 2019, the court denied petitioners' motion to file a second amended complaint, petitioners' motion to amend their motion for a trial of facts or to supplement the record, petitioners' motion for recusal, and petitioners' motion to consolidate hearing on the Rule 80B complaint and respondent Town's counterclaim.

Rule 80B Motion

In a Rule 80B proceeding, the court reviews the "local agency's decision for abuse of discretion, errors of law, and findings not supported by the evidence." Beal v. Town of Stockton Springs, 2017 ME 6, ¶ 13, 153 A.3d 768 (quotation marks omitted). "The party seeking to overturn the decision bears the burden of persuasion." Aydelott v. City of Portland, 2010 ME 25, ¶ 10, 990 A.2d 1024.

Rule 80B(e) states:

(e) Record.

(1) **Preparation and Filing Responsibility.** Except where otherwise provided by statute or this Rule, (i) it shall be the plaintiff's responsibility to ensure the preparation and filing with the Superior Court of the record of the proceedings of the governmental agency being reviewed, and (ii) the record for review shall be filed at the same time as or prior to the plaintiff's brief. Where a motion is made for a trial of the facts pursuant to subdivision (d) of this Rule, the moving party shall be responsible to ensure the preparation and filing of the record and such record shall be filed with the motion.

(2) **Record Contents.** The parties shall meet in advance of the time for filing the plaintiff's brief or motion for trial of the facts to agree on the record to be filed. Where agreement cannot be reached, any dispute as to the record shall be submitted to the court. The record shall include the application or other documents that initiated the agency proceedings and the decision and findings of fact that are appealed from, and the record may include any other documents or evidence before the governmental agency and a transcript or other record of any hearings. If the agency decision was based on a

municipal ordinance, a state or local regulation, or a private and special law, a copy of the relevant section or sections from that ordinance, regulation, or private and special law, shall be included in the record. For appeals from decisions of a municipal agency, a copy of the section or sections of the municipal ordinance that establish the authority of the agency to act on the matter subject to the appeal shall also be included in the record. Copies of sections of the Maine Revised Statutes shall not be included in the record.

In lieu of an actual record, the parties may submit stipulations as to the record; however, the full decision and findings of fact appealed from, and the applicable ordinances, regulations, or private and special laws as detailed above shall be included.

M.R. Civ. P. 80B(e). The only record included with petitioners 80B brief was a transcript of the October 8, 2018 hearing where the Board upheld the CEO's NOV. See Ram's Head Partners, LLC v. Town of Cape Elizabeth, 2003 ME 131, ¶ 18, 834 A.2d 916 (“[I]t is generally the responsibility of the appellant to see that a proper record is preserved for appeal.”). Petitioners failed to submit as part of the record “the application or other documents that initiated the agency proceedings and the decision and findings of fact that are appealed from” as required by Rule 80B(e). M.R. Civ. P. 80B(e). Petitioners failed to include any exhibits relied upon by the Board or exhibits presented to the Board during the hearing or any local ordinances that were at issue in this appeal. Without the inclusion of these documents in the record, the court cannot conduct any meaningful review of the Board's decision to uphold the CEO's NOV. See Penkul v. Town of Lebanon, 2016 ME 16, ¶ 18, 136 A.3d 88. Additionally, petitioners' brief contains no citations to the limited record they did provide to support their claims.

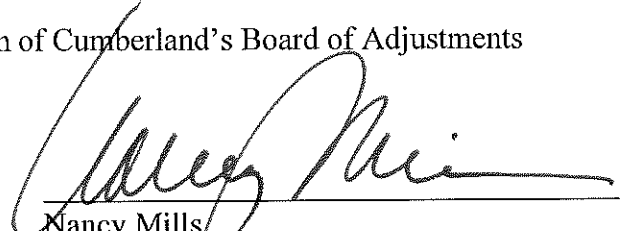
Because petitioners have failed to comply with the requirements of Rule 80B(e), this court cannot determine that the Board's decision to uphold respondent CEO's NOV was arbitrary and capricious, or constituted an abuse of discretion, error of law, and/or findings not supported by substantial evidence as petitioners allege in their Rule 80B complaint. M.R. Civ. P. 80B(e); see

Penkul, 2016 ME 16, ¶ 18, 136 A.3d 88. Petitioners failed to meet their burden. See Aydelott, 2010 ME 25, ¶ 17, 990 A.2d 1024.

The entry is

The Decision of Respondent Town of Cumberland's Board of Adjustments and Appeals is AFFIRMED.

Date: August 12, 2019



Nancy Mills
Justice, Superior Court

Entered on the Docket: 8/14/19

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-18-053 ✓

ELVIN COPP, et al.,

Petitioners

v.

ORDER

REC'D CUMB CLERKS OFC
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WILLIAM LONGLEY, et al.,

Respondents

Before the court are petitioners' motion for leave to file a second amended complaint; petitioners' motion for leave to file a first amended motion for trial of the facts or in the alternative, motion to supplement the record with newly located evidence; petitioners' motion for recusal; and petitioners' motion for clarification and to consolidate hearing on the complaint and counterclaims.

The court previously denied petitioners' motion for trial of the facts, motion to dismiss respondent's counterclaim, and motion to supplement the record. (Orders dated 4/5/19 & 4/12/19.)

Motion for Leave to File a Second Amended Complaint

In their proposed second amended complaint, petitioners seek to add count II, declaratory judgment; count III, equitable estoppel, and count IV, deprivation of property and denial of due process. Petitioners do not bring an anticipatory challenge. They ask for a declaration that they are in compliance with the zoning code. They seek the same relief in count I of their first amended complaint. See Sold, Inc. v. Town of Gorham, 2005 ME 24, ¶ 14, 868 A.2d 172. Equitable estoppel can be asserted against a municipality only as a defense and not as an affirmative cause of action. See Buker v. Town of Sweden, 644 A.2d 1042, 1044 (Me. 1994). All of the proposed amendments were known to petitioners at the time they filed the first amended complaint.

Petitioners specifically agree they could have brought their constitutional claims earlier. (Pet'rs' Reply Mot. for Leave to File Second Amend. Compl. 1.) Considering the circumstances of this case, justice does not require the granting of the second motion to amend. M.R. Civ. P. 59(e). The motion is denied.

Petitioners' Motion for Leave to File a First Amended Motion for Trial of the Facts or Motion to Supplement the Record

Petitioners seek to file an amended motion for trial of the facts or motion to supplement the record. The parties' Rule 80B memoranda and the record have been filed. Petitioners' original motion for trial of facts was denied on April 5, 2019 because it did not comply with Rule 80B(d) and (e). (Order April 5, 2019.)

“Where a motion is made for a trial of the facts pursuant to subdivision (d) of this Rule, the moving party shall be responsible to ensure the preparation and filing of the record and such record shall be filed with the motion.” M.R. Civ. P. 80B(e)(1). Petitioners' amended motion for trial of facts does not comply with Rule 80B(e) because petitioners failed to prepare or attach their proposed supplement to the record, the July 10, 2017 transcript and development plan. Petitioners refer to the evidence as newly discovered, but provide no valid reason as to why this evidence could not have been made part of the record below. (Pet'rs' Mot. for Leave to File Amend. Mot. for Trial of Facts 7.)

Petitioners also argue in their amended motion for trial of facts that the Board did not base its findings on substantial evidence. In a Rule 80B proceeding, the court reviews the “local agency's decision for abuse of discretion, errors of law, and findings not supported by the evidence.” Beal v. Town of Stockton Springs, 2017 ME 6, ¶ 13, 153 A.3d 768. Petitioners may not argue their Rule 80B motion in their amended motion for trial of facts in order to retry the facts presented to the Board. See Baker's Table, Inc. v. City of Portland, 2007 ME 7, ¶ 9, 743 A.2d

237. Finally, petitioners' vague allegations of bias in the offer of proof do not meet the Rule 80B(d) requirement that petitioner provide "a detailed statement, in the nature of an offer of proof, of the evidence that the party intends to introduce at trial. That statement shall be sufficient to permit the court to make a proper determination as to whether any trial of the facts as presented in the motion and offer of proof is appropriate." M.R. Civ. P. 80B(d); see also Ryan v. Camden, 582 A.2d 973, 975 (Me. 1990). Petitioners' motion for leave to file a first amended motion for trial of facts is denied. Petitioners' motion to supplement the record is denied.

Petitioners' Motion for Recusal

The motion for recusal is denied. M. Code Jud. Conduct Canon 1, R. 2.11.

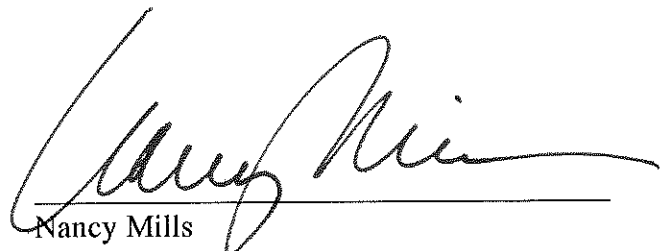
Petitioners' Motion for Clarification and to Consolidate Hearing on Complaint and Counterclaim

In the court's order dated and filed April 5, 2019, the court denied petitioners' motion for trial of the facts filed on November 26, 2018 and motion to strike or dismiss respondent's counterclaim filed January 22, 2019.

Petitioners' motion to consolidate hearing on their Rule 80B complaint and the counterclaim is denied. No hearing is required on the Rule 80B complaint. The court will decide the issues raised in the complaint based on the filings and then schedule the hearing on the counterclaim.

The clerk is directed to incorporate this order into the docket by reference. M.R. Civ. P. 79(a).

Date: July 25, 2019



Nancy Mills
Justice, Superior Court

Entered on the Docket: 7-26-19

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-18-053

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v.

ORDER

WILLIAM LONGLEY, et al.,

Respondents

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Before the court are petitioners' motion for trial of facts and motion to strike or dismiss respondent Town of Cumberland's counterclaim. For the following reasons, the motions are denied.

Trial of Facts

Petitioners' motion for trial of facts does not comply with Rule 80B(d) and (e). M.R. Civ. P. 80B(d)-(e). In addition, petitioners do not explain why evidence they now seek to add could not have been made part of the record below. See Baker's Table, Inc. v. City of Portland, 2000 ME 7, ¶ 9, 743 A.2d 237; New England Whitewater Ctr., Inc. v. Dep't of Inland Fisheries & Wildlife, 550 A.2d 56, 60 (Me. 1988). Petitioners allege bias by the Code Enforcement Officer and Town Manager. The court may only review the decision made by Town of Cumberland Board of Adjustment and Appeals. See Bryant v. Town of Wiscasset, 2017 ME 234, ¶ 11, 176 A.3d 176. Petitioners' motion for trial of facts is denied.

Counterclaim

Petitioners object to respondents' counterclaim because no answer was filed. M.R. Civ. P. 7(a). No answer is required in a Rule 80B action. M.R. Civ. P. 80B(a). Respondents filed their

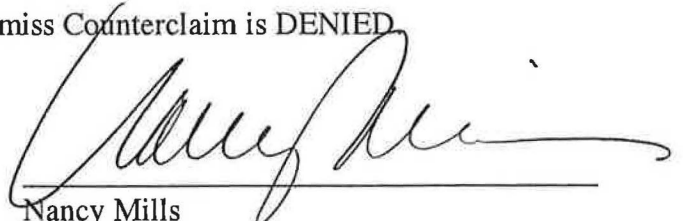
entry of appearance as required in a Rule 80B action. Id. A land use enforcement counterclaim such as respondents' counterclaim is permitted in a Rule 80B action. See Baker v. Town of Woolwich 517 A.2d 64, 66 (Me. 1987).

The entry is

Petitioners' Motion for Trial of Facts is DENIED.

Petitioners' Motion to Strike or Dismiss Counterclaim is DENIED.

Date: April 5, 2019



Nancy Mills
Justice, Superior Court