

STATE OF MAINE
CUMBERLAND, ss.

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CLERK'S OFFICE

SUPERIOR COURT

CIVIL ACTION

DEC 17 8 22 AM '01

DOCKET NO. AP-01-065

REC-CUM-12/17/2001

THE PEAKS ISLAND CO., INC.,

Plaintiff

v.

ORDER ON DEFENDANT'S
MOTION TO DISMISS

CITY OF PORTLAND,

Defendant

The plaintiff filed an 80B Complaint and Request for Injunctive Relief based on the planning board's refusal to grant it a building permit. Defendant, the City of Portland, filed a Motion to Dismiss based on the plaintiff's failure to exhaust its administrative remedies. Upon reviewing the City's Motion, the plaintiff's Opposition and the relevant law, the City's motion to dismiss will be granted.

DISCUSSION

I. Count I: 80B Complaint

The City asserts that the 80B complaint should be dismissed because the plaintiff has failed to exhaust its administrative remedies. A motion to dismiss under M.R. Civ. P. 12(b)(6) may be granted based on an affirmative defense if the facts establishing the defense appear on the face of the complaint. See Sargent v. Sargent, 622 A.2d 721 (Me. 1993) (concluding that the complaint did not facially reveal that it was barred as a matter of law); Freeman v. Town of Southport, 568 A.2d 826 (Me. 1990) (affirming dismissal of complaint for failure to exhaust

administrative remedies). Here, the plaintiff's 80B complaint must be dismissed for lack of exhaustion of administrative remedies because the plaintiff has not appealed the planning board decision to the zoning board of appeals. See 30-A M.R.S.A. §§ 2691(4), 4103; Portland, Me., Code §§14-472, 6-118.

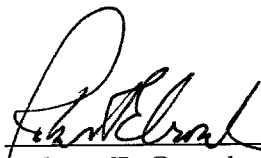
II. Count II: Injunctive Relief

The plaintiff also seeks injunctive relief, asking the court to order the City to issue the plaintiff the requested building permit. Although failure to exhaust administrative remedies may be excused upon a showing of the futility of such an appeal, the plaintiff has not alleged facts sufficient to raise the issue of futility. See Northeast Occupational Exchange, Inc. v. Bureau of Rehabilitation, 473 A.2d 406, 410 (Me. 1984). Accordingly, the plaintiff's request for injunctive relief must be dismissed because the plaintiff has failed to exhaust its administrative remedies.

The entry is

The City of Portland's Motion to Dismiss the 80B Complaint and Request for Injunctive Relief is GRANTED.

Dated at Portland, Maine this 14th day of December 2001.


Robert E. Crowley
Justice, Superior Court

Date Filed 10-29-01

Cumberland
County

Docket No. AP-01-065

Action RULE 80(B) APPEAL

THE PEAKS ISLAND COMPANY, LLC

vs.

CITY OF PORTLAND

Plaintiff's Attorney

MARSHALL J. TINKLE, ESQ.
P.O. Box 15060
Portland, ME 04112-5060
(207) 874-6700

Defendant's Attorney

874-8300

PENNY LITTELL, ESQ
389 CONGRESS ST
PORTLAND ME 04101-3509

Date of
Entry

2001
Oct. 29

Received 10-29-01:
Summary Sheet filed.
Complaint Pursuant to M.R. CIV.P. 80(B) and 65 filed.
Motion for Temporary Restraining Order filed.
Memorandum of Law in Support of Plaintiff's Motion for Temporary Restraining Order filed.
Affidavit of Frederic D. Weinschenk with Exhibits A - E filed.
Motion for Emergency Hearing filed.
Proposed Temporary Restraining Order filed.
On 10-29-01.
Briefing schedule mailed. Plaintiff's brief and record due 12-10-01.

Oct. 30

Received 10/30/01:
Defendant, City of Portland's Motion to Dismiss and/or Opposition to Plaintiff's Request for Injunction relief

" " Affidavit of Sarah Hopkins with Exhibits 1 - 5 filed.
" " Affidavit of Michael Nugent with Exhibits filed.
" " Affidavit of James Seymour filed.
" " Affidavit of Marge Schumckal filed.
" " Affidavit of Jonathan Spence with attachment filed.
" " Affidavit of Alex Jaegerman with Exhibits 1 - 4 filed.

Oct. 31

Received 10-31-01.
Supplemental Affidavit of Frederic D. Weinschenk on behalf of the Plaintiff, The Peaks Island Company, LLC. with Attachments A - J filed.

Nov. 1

Received 10/31/01:
Plaintiff's Motion to Specify Future course of proceedings filed.
" " Plaintiff's request for Hearing filed.
" " Plaintiff's proposed scheduling Order filed.

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On 10-31-01:
Hearing held on Temporary Restraining Order.
As to Temporary Restraining Order; Denied.
Presiding, Justice Robert Crowley: Tape No. 2041, Index 2985 - 5220.

Date of Entry	Docket No. <u>AP-01-65</u>
2001 Nov. 2	Received 11-2-01. Copy of correspondence from Penny Littell, Esq. to Justice Crowley regarding original performance guarantees executed by Ric Weinschenk filed. (original correspondence returned to Attorney Littell)
" "	On 11-2-01. Telephone conference held with counsel regarding issue of performance guarantees. Court takes no action at this time. Crowley, J. Presiding, no court reporter, Marshall Tinkle, Esq. for Appellant; Penny Littell, Esq. and Gary Wood, Esq. for Appellee.
Nov. 7	Received 11-6-01. Letter from Penny Littell, Esq. to Justice Crowley dated 11-2-01 regarding original performance guarantees executed by Ric Weinschenk filed. (returned to court at Appellant's request)
Nov. 8	Received 11/08/01: Defendant, City of Portland's Objection to Amended Scheduling Order filed.
" "	Acceptance of service filed showing service on November 6, 2001 upon defendant the City of Portland to Penny Littell, Esq.
" "	Defendant City of Portland's Objection to Plaintiff's notice of deposition of Joseph Gray and Sarah Hopkins filed.
Nov. 9	Received 11-9-01. Plaintiff's Notification of Discovery Service filed. Plaintiff's Notices of Depositions of Sarah Hopkins, Joseph E. Gray, Jr. and Michael Nugent served on Penny Littell, Esq. on 11-8-01.
Nov. 13	Received 11-13-01. Plaintiff's Reply Memorandum in Support of Plaintiff's Motion to Specify Future Course of Proceedings filed.
Nov. 20	Received 11-15-01: Letter from Penny Littell, Associate Corporation Counsel requesting a discovery dispute conference filed.
Nov. 21	Received 11-20-01. Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss filed.
Dec. 5	On 12-4-01. Conference held in chambers regarding discovery dispute and Plaintiff's Motion to Specify Future Court of Proceedings. Hearing on motion to dismiss to be set December 13, 2001 at 3:00 p.m. in City to file proposed order for future course of proceedings. If motion is not granted, court will pick between draft orders for future course of proceedings. Existing briefing schedule vacated. (Crowley, J.) Crowley, J. Presiding, no court reporter, Marshall Tinkle, Esq. for Plaintiff and Penny Littell, Esq. for Defendant. Copies mailed Marshall Tinkle, Esq. and Penny Littell, Esq. on 12-5-01.
Dec. 10	Received 12-7-01. Revised Scheduling Order filed.