STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO: AP-10-044

RAC - CUM - 4/28/2011

KATHLEEN KURLANSKI and
ZBIGNIEW KURLANSKI,

Plaintiffs,

v.

TOWN OF FALMOUTH et al.

Defendants

ORDER ON
MOTION TO DISMISS

Kathleen and Zbigniew Kurlanski appeal from a decision of the Town of Falmouth's Zoning Board of Appeals finding the Portland Yacht Club may park cars on a grass lot adjacent to the Kurlanskis' property. The Kurlanskis have also filed independent claims for breach of contract and promissory estoppel. The Portland Yacht Club and the Town of Falmouth now move to dismiss these independent claims.

BACKGROUND

The Kurlanskis allege the following. The Portland Yacht Club is a private club in Falmouth, Maine. (Compl. ¶¶ 5, 7.) On June 10, 1983 the Club purchased an unimproved parcel of property abutting its premises. (Compl. ¶¶ 16–17, 19, 22.) This parcel is identified as Lot 2. (Compl. ¶ 16.) On December 16, 1983, the Kurlanskis purchased an adjacent property identified as Lot 1, on which they currently reside. (Compl. ¶¶ 2, 20–21.)

On September 12, 1999, the Kurlanskis submitted a letter to the Falmouth Code Enforcement Officer (CEO) complaining that the Club had regularly used Lot 2 for parking motor vehicles during the summer of 1999, in alleged violation of the Falmouth zoning ordinance.[1] (Compl. ¶ 29.) On October 19, 1999, the CEO ordered the Club to stop parking cars on Lot 2 in violation of the ordinance prohibiting the establishment of a parking area without approval from the Falmouth Planning Board. (Compl. ¶ 36.)

The Club did not appeal the CEO's decision. (Compl. ¶ 38.) However, on November 24, 1999 the Club wrote the CEO to request that he reconsider the matter. (Compl. ¶ 39.) In the letter, the Club reasserted its claim that the Falmouth Planning Board had already approved the use of Lot 2 for parking in a parallel proceeding.[2] (Compl. ¶¶ 39–40.) Finally, the Club indicated that it would be willing to accommodate the Kurlanskis and requested a meeting to discuss acceptable parking restrictions that would not run afoul of the ordinance. (Compl. ¶ 42; Amended Compl. ¶ 117.)

In letters dated May 22, 2000, and June 19, 2000, the Club wrote the CEO to request written confirmation that special event parking on Lot 2 would be acceptable pursuant to an agreement reached at a meeting between the Club, the CEO, and another town official. (Amended Compl. ¶¶ 120–22.) The Kurlanskis also played some role in these discussions. (Compl. 44.) The Club agreed to limit its use of Lot 2 for overflow parking to three events per year, which would

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[1] The parties have not placed the zoning ordinance in the record, and courts "do not take judicial notice of ordinances." *Mills v. Town of Eliot*, 2008 ME 134, ¶ 23, 955 A.2d 258, 266.

[2] The Club was also pursuing permits to build a boathouse and make other changes at this time. Those proceedings are not relevant to the pending motions.

constitute allowable incidental use.[3] (Stearns Aff. Ex. 1.) However, the Club also stated that it was actively investigating the past use of Lot 2, and would attempt to establish that parking was allowed as a grandfathered use. (Stearns Aff. Ex. 1.) The letter closed with the following: "This request is not intended as a waiver of any rights that the Club may have to continue the use of [Lot 2] as a grandfathered nonconforming use." (Stearns Aff. Ex. 1.)

The CEO responded by affirming that the use of Lot 2 for parking on no more than three specific events during the summer would constitute occasional use that would not be a zoning violation. (Compl. ¶ 46.) In a letter dated August 18, 2000, the CEO informed the Kurlanskis that the Club would park cars on Lot 2 during three events per year. (Compl. ¶ 47.)

Parking on Lot 2 was limited to three events per year from 2000 through 2006. (Compl. ¶ 52.) In 2007, the Kurlanskis' daughter reported that motor vehicles were parking on Lot 2 more frequently. (Compl. ¶ 54.) The Kurlanskis contacted the Club, which told them that it intended to use Lot 2 for parking more frequently in the future. (Compl. ¶ 55.) On April 2, 2009, the Kurlanskis sent the Town's new CEO a formal complaint alleging that the Club had violated the Town's ordinance by allowing vehicles to regularly park on Lot 2 and by depositing crushed rock onto the grass at the boundary of Lot 2. (Compl. ¶ 59.)

On August 6, 2009, the new CEO found that there was no violation because intermittent seasonal use for parking had been established on the property prior to the adoption of zoning in 1965. (Compl. ¶ 61.) The Kurlanskis appealed the CEO's decision to the Falmouth Zoning Board of Appeals (ZBA).

[3] The letters form the written evidence of the alleged contract, so may be considered on a motion to dismiss without converting the motion into one for summary judgment. *Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 12, 843 A.2d 43, 48.

(Compl. ¶ 65.) At a hearing on April 20, 2010, the ZBA ruled that it had jurisdiction to hear the appeal over the Kurlanskis' objection. (Compl. ¶ 66.)

A special hearing was then held on July 20, 2010, at which the ZBA conducted a de novo inquiry into whether the use of Lot 2 was a grandfathered nonconforming use. (Compl. 74.) The new CEO was on a leave of absence and was not available to defend his decision, but a deputy CEO was present to assist the ZBA. (Compl. ¶¶ 70, 74.) The ZBA heard statements from various individuals, and received from the Kurlanskis an affidavit from Lot 2's prior owner. (Compl. ¶ 75.) The ZBA discussed this evidence at its regular meeting on July 27, 2010, took a preliminary vote on the matter, and instructed its attorney to draft findings of fact and conclusions of law. (Compl. ¶¶ 76–77.) Finally, on October 26, 2010, the ZBA adopted findings of fact showing that Lot 2 was a grandfathered, nonconforming use that could be used for parking during four to eight events per season. (Compl. ¶ 79.)

The Kurlanskis filed their Rule 80B appeal and complaint on December 7, 2010, claiming among other things that the communications between Town, the Club, and the Kurlanskis in the year 2000 formed a contract. This alleged contract bound the Club to use Lot 2 for parking no more than three times per year, and bound the Town to prevent all parking on the Lot if the Club exceeded the three-event limit. The Kurlanskis later amended their complaint to add a claim for promissory estoppel. The Town and Club move to dismiss these independent claims.

DISCUSSION

"A motion to dismiss tests the legal sufficiency of the complaint." *Heber v. Lucerne-in-Maine Village Corp.*, 2000 ME 137, ¶ 7, 755 A.2d 1064, 1066 (quoting

McAfee v. Cole, 637 A.2d 463, 465 (Me. 1994)). "For purposes of a 12(b)(6) motion, the material allegations of the complaint must be taken as admitted." *McAfee*, 637 A.2d at 465. The Court examines "the complaint 'in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory.'" *Johanson v. Dunnington*, 2001 ME 169, ¶ 5, 785 A.2d 1244, 1245–46 (quoting *In re Wage Payment Litig. v. Wal-Mart Stores*, Inc., 2000 ME 162, ¶ 3, 759 A.2d 217, 220).

"Generally, 'the existence of a contract is a question of fact to be determined by the jury.'" *Sullivan v. Porter*, 2004 ME 134, ¶ 13, 861 A.2d 625, 631 (quoting *June Roberts Agency, Inc. v. Venture Props., Inc.*, 676 A.2d 46, 48 (Me. 1996)) (quotations omitted). However, in order for a contract to exist, a jury must be able to find that "the parties mutually assent[ed] to be bound by all its material terms, the assent is either expressly or impliedly manifested in the contract, and the contract is sufficiently definite to enable the court to ascertain its exact meaning and fix exactly the legal liabilities of each party." *Id.* (citing *Forrest Assocs. v. Passamaquoddy Tribe*, 2000 ME 195, ¶ 9, 760 A.2d 1041, 1044). Furthermore, the contract must be legal, *Lehigh v. Pittston Co.*, 456 A.2d 355, 361 (Me. 1983), and there must be consideration. *Laflamme v. Hoffman*, 148 Me. 444, 450, 95 A.2d 802, 805 (1953).

While it is clear that the parties did reach some form of agreement, the question is whether their mutual understanding could have created a legally binding contract. The answer is no. Giving the Kurlanskis the benefit of all reasonable inferences, the court could assume for the purpose of these motions that the attorney representing the Club had authority to bind the Club to a

contract. The CEO, however, could not have had legal authority to enter into a contract on behalf of the Town.

The executive and administrative authority of a town is generally vested in the board of selectmen, acting as a body. *Sirois v. Frenchville*, 441 A.2d 291, 294 (Me. 1982) (quoting 30 M.R.S.A. § 2316 (1978) (current version at 30-A M.R.S. § 2635 (2010))). A municipality's code enforcement officer, in contrast, has limited authority defined by statute. *See id.* (discussing the limited authority of selectman acting alone). This authority does not allow the officer to enter contracts on the town's behalf. *See* 30-A M.R.S. §§ 4451–52 (2000). "All persons contracting with town or city officers must take notice at their peril of the extent of the authority of such officers. It is not the town's burden to establish the absence of authority, but the plaintiff's burden to prove the authority." *Sirois*, 441 A.2d at 294.

The Kurlanskis have not alleged any basis from which they might prove that the Town's CEO had the authority to bind the Town to the alleged contract. A jury would have to speculate that the CEO's action had been authorized or ratified at some unidentified meeting of the Board of Selectmen. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (pleading must allege more than speculative grounds for relief in order to avoid dismissal). The Kurlanskis have thus failed to allege a prima facie case for breach of contract against the Town.

Even assuming that all parties were represented by agents with adequate authority, the alleged contract must fail for lack of mutual assent to be bound and a related want of consideration. Confusion on this point appears to stem from the terms of the alleged agreement reached in 2000. The Kurlanskis allege that the CEO found that the Club's use of Lot 2 up to that point had violated the ordinance. However, the CEO also determined that parking cars on Lot 2 for no

more than three events per year would be occasional use not violating the ordinance. The Club declared that it would conform its use of the Lot to meet the CEO's interpretation of the ordinance, but expressly reserved its right to challenge the CEO's interpretation in the future if and when it gained more information regarding Lot 2's history.

It is clear from the above that the Club did not assent to be bound or offer any other form of consideration. The Club only agreed to conform its behavior to what the CEO interpreted the law to demand. Performance of an existing legal obligation, in this case by refraining to use the Lot for general parking, cannot serve as consideration for a reciprocal promise in a contract. *Panasonic Commc'ns & Sys. Co. v. Dept. of Admin*, 1997 ME 43, ¶ 14, 691 A.2d 190, 195 (citing Restatement (Second) of Contracts § 73 (1981)). Even this promise was illusory, because the Club also expressly reserved its right to challenge the CEO's interpretation of the ordinance or develop new evidence that would change how the ordinance applied. Ultimately, the Club only agreed to comply with the CEO's interpretation of the law until it felt like it didn't have to. This is not a promise.

Similarly, the CEO did not promise to refrain from enforcing the ordinance.[4] Assuming that he could have made such a promise, all the CEO did was interpret the ordinance as allowing occasional use of the Lot for parking. In the CEO's opinion, using Lot 2 for overflow parking on no more than three events per summer would fall short of establishing a parking area without prior approval, and thus not violate the ordinance. So long as the Club did not attempt

[4] The court cannot ascertain the limits of the CEO's prosecutorial discretion without reference to the Town of Falmouth's ordinance. *See Adams v. Town of Brunswick*, 2010 ME 7, ¶¶ 8–9, 987 A.2d 502, 506.

to use the Lot more frequently and thereby establish a parking area, there would be no violation and the CEO could not initiate an enforcement action.

As alleged in the complaint, the supposed promise to not enforce the order of October 19, 1999 was really nothing more than a promise not to bring an enforcement action so long as there was no violation. Like the Club's promise to obey the law, the CEO's promise to enforce the law only when there was a violation cannot constitute consideration for a contract.

Finally, the Kurlanskis allege that they agreed to refrain from filing a complaint with the CEO or seeking relief in the nature of a writ of mandamus so long as the Club limited its use of Lot 2 to three events per year. Only the Town could actually initiate an enforcement action, so the Kurlanskis really promised to refrain from two actions. *Herrle v. Town of Waterboro*, 2001 ME 1, ¶ 11, 763 A.2d 1159, 1162 (citing 30-A M.R.S. § 4452(4)).

First, the Kurlanskis promised not to bring an action as abutters to compel the CEO to enforce the October 19, 1999 order, assuming that they could do so under the ordinance. The problem here is that the order of October 19, 1999 was issued in response to the Club's supposed attempt to establish a parking area. So long as the Club did not regularly park cars on the Lot, there would be no violation to enforce the order against, so the promise was empty. The Kurlanskis' second promise was to refrain from challenging the CEO's determination that parking on Lot 2 during three events per year would not violate the ordinance, again assuming they could do so. This may conceivably have constituted legal consideration, but it would have been non-mutual and therefore insufficient to bind the other parties to a contract.

The illusory nature of the alleged contract in this case becomes clear if the court tries "ascertain its exact meaning and fix exactly the legal liabilities of each party." *Sullivan*, 2004 ME 134, ¶ 13, 861 A.2d at 631. If the Club were to "breach" the agreement by parking motor vehicles on the Lot more than three times per year, the Kurlanskis would be free to file a complaint with the Town CEO against the alleged breach of the ordinance. The CEO would then determine whether the Club's increased use violated the ordinance, and be free to initiate an enforcement action if the law was being violated. Either the Kurlanskis or the Club could appeal the CEO's decision to the ZBA. This is exactly what would happen in the ordinary course without the alleged contract, and is exactly what happened in this case.

Giving the Kurlanskis the benefit of all reasonable inferences, they have failed to allege facts that could prove the existence of the alleged contract between the parties. Their Count VI for breach of contract is dismissed.

In addition to their contract claim, the Kurlanskis contend that the defendants are bound by their alleged promises through the doctrine of estoppel. Maine has adopted the Restatement definition of promissory estoppel, which states:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Harvey v. Dow, 2008 ME 192, ¶ 11, 962 A.2d 322, 325 (quoting Restatement (Second) of Contracts § 90(1) (1981)). The Kurlanskis argue that the Club promised them and the CEO that it would limit its use of Lot 2, and that the CEO promised to refrain from enforcing the October 19, 1999 order so long as the use

was so limited. The Kurlanskis, reasonably relying on these promises, refrained from seeking enforcement of their complaint and the October 19, 1999 order.

The promissory estoppel claim suffers from many of the same deficiencies as the contract claim. Assuming that the Kurlanskis reasonably believed the defendants' statements were directed at them, the only written evidence of the Club's alleged promise shows that it expressly reserved the right to increase its use of Lot 2 for parking in the future. This is not a promise, and it would be unreasonable to view it as such. Similarly, the CEO merely interpreted the ordinance and promised to enforce its terms. The Kurlanskis could not reasonably have read anything extraordinary into this statement from a town official.

The Kurlanskis have also not alleged that they materially changed their legal position in reliance on the defendants' alleged promises. Here it is important to note that private citizens cannot enforce an ordinance. *Herrle*, 2001 ME 1, ¶ 11, 763 A.2d at 1162. The Kurlanskis could have filed a new complaint if they felt the Club was at any time using Lot 2 in violation of the ordinance, or they could have sought mandamus to compel action on the CEO's prior order if they felt it was not being enforced. *See Ray v. Town of Camden*, 533 A.2d 912, 913–14 (Me. 1987). "[M]andamus can only overcome a failure to act and set the deliberative process in motion, assuming the applicant is entitled to have the process performed." *Id.* at 914. It cannot guaranty an outcome.

While the Kurlanskis did refrain from taking the above actions while the Club limited overflow parking on Lot 2 to three events per year, they initiated this current complaint as soon as the Club began to use the Lot more extensively. They have not alleged any undue prejudice arising from this delay, nor have

they shown any injustice resulting from the seven-year détente between the parties. The Kurlanskis have not alleged a viable claim for promissory estoppel, and their Count VII is dismissed.

The entry is:

The Portland Yacht Club's motion to dismiss Counts VI and VII is granted.

The Town of Falmouth's motion to dismiss Counts VI and VII is granted.

DATE: April 25, 2011

Roland A. Cole
Justice, Superior Court

Date Filed 12-07-10 Cumberland County Docket No. AP-10-44

Action 80B Appeal

KATHLEEN KURLANSKI
ZBIGNIEW J. KURLANSKI

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THE PORTLAND YACHT CLUB

vs.

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Date of Entry
2010