

STATE OF MAINE
HANCOCK, ss

SUPERIOR COURT
DOCKET NO. AP-2009-15
RMC - HAN 59007

TERRENCE O'CONNELL
Plaintiff

RECEIVED & FILED

v.

MAY 06 2010

BAR HARBOR BOARD OF APPEALS

HANCOCK COUNTY
COURTS

DECISION AND ORDER

This matter is before the Court on an appeal from the Plaintiff of a decision by the Bar Harbor Board of Appeals affirming the decision of the Code Enforcement Officer to withdraw a Notice of Violation. The Decision suggests that the Code Enforcement Officer (CEO) had made a preliminary decision that a Bar Harbor resident was operating a commercial kennel as defined by the Bar Harbor Land Use Ordinance (hereinafter LUO), and the CEO issued a Notice of Violation with respect to the apparent operation of a commercial kennel. The Decision further suggests that a subsequent investigation led the CEO to conclude that her initial decision was wrong and the CEO withdrew the Notice of Violation and elected not to prosecute the resident for operating a commercial kennel.

The Plaintiff appealed the decision of the CEO to withdraw the Notice of Violation to the Bar Harbor Board of Appeals. The Board of Appeals dismissed the appeal concluding that the "CEO's decision not to prosecute the neighbor for operating a commercial kennel is not an appealable decision...".

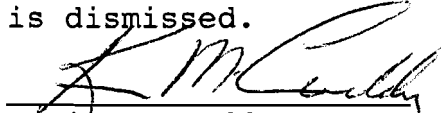
The Law Court decided this issue in 2002 and more recently in 2009. In *Salisbury v. Town of Bar Harbor* 2002 ME 13, ¶11, 788 A.2D 598, 601, the Law Court made it clear that the court is precluded from intruding "into municipal decision-making when a municipality decides whether or not to undertake and enforcement action." In *Moore v. Town of Bar Harbor*, 2009 Me. Unpub. LEXIS 3, the Law Court directed that "(b)ecause the CEO's determination to undertake an

investigation is discretionary, it is not an appealable decision."

As the Board noted in the O'Connell decision dismissing the appeal, Mr. Moore in his case filed a complaint with the CEO alleging a LUO violation by a third party but the CEO declined to prosecute the matter (Record at pg. 4). In the O'Connell matter, Mr. O'Connell is seeking a chance to contest the CEO's decision not to prosecute a citizen who Mr. O'Connell feels is operating a commercial kennel. THAT decision is precisely the type of decision that the Law Court identified as being 'discretionary' on the part of the CEO and "not appealable" to the Board of Appeals or this Court.

This Court is satisfied that the actions of the CEO in deciding not to undertake an enforcement action in the form of prosecuting a Notice of Violation, falls within the sound discretion of the Code Enforcement Officer and nothing provided in the Record on Appeal compels a different conclusion. For the reasons stated the 80 B appeal in this matter filed by and on behalf of Mr. O'Connell is denied and the matter is dismissed.

May 6, 2010


Kevin M. Cuddy
Justice, Superior Court

Date Filed 12/23/2009 HANCOCK
County

Docket No. AP-2009-15-A

Action RULE 80B APPEAL

ASSIGNED TO JUSTICE KEVIN M. CUDDY

TERENCE O'CONNELL

BAR HARBOR BOARD OF APPEALS
vs.

Plaintiff's Attorney

LYNNE WILLIAMS
13 ALBERT MEADOW
BAR HARBOR ME 04609

Defendant's Attorney

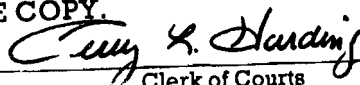
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Date of
Entry

12/23/09	Review of Governmental Action ME R Civ. P. 80B Filed.
1/20/10	Notice and Briefing Schedule filed. Plaintiff's Brief is due 40 days (from 1/20/2010). Defendant's brief due 30 days after service of brief by plaintiff. Plaintiff has 14 days after service of brief by Defendant for reply brief. Copy forwarded to all attorneys/parties of record.
3/1/2010	Appearance of Lee K. Bragg, eSq and Amanda A. Meader, Esq for Bar Harbor Board of Appeals. The Town Does not anticipate filing a brief or participating in the hearing in this action.
3/1/2010	Memorandum of Law filed by Plaintiff.
3/1/2010	Memorandum of Law filed by plaintiff
4/16/2010	Oral Argument on 80B Appeal scheduled for 5/4/2010 at 10:30 a.m. Copy forwarded to all attorneys/parties of record.
5/4/2010	Oral Argument on 80B Appeal Held. Justice Kevin M. Cuddy Presiding, Electronic Recording Tape No. 1244, Index 2609-3380. Margaret Costain Courtroom Clerk. Lynne Williams Esq for Plaintiff. No appearance for Defendant. After Hearing. Decision reserved, order to issue.
5/6/2010	Decision and Order: (Cuddy, J). For the reasons stated: The 80B Appeal in this matter filed by and on behalf of Mr. O'connell is Denied and the matter is dismissed. Copy forwarded to all attorneys of record and to the reporter of decisions.
5/6/2010	Appeal Denied/Dismissed

A TRUE COPY.

Attest


Clerk of Courts