

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-11-472
NM - cum - 1/29/2013

R. BRUCE MONTGOMERY
and WANDA HADDOCK,

Plaintiffs

v.

ORDER ON MOTION
TO DISMISS

EATON PEABODY, LLP,
JUDY METCALF, and
WILLIAM V. FERDINAND, JR.,

STATE OF MAINE
Cumberland, ss, Clerk's Office

JAN 29 2013

Defendants

RECEIVED

Before the court is the defendants' motion to dismiss¹ counts I through V of the amended complaint. For the following reasons, the motion is granted.

At its 8/17/05 meeting, the Georgetown Planning Board voted to rescind the Montgomery permit no. 0424. (R. Tab 2.) The plaintiffs challenged the Planning Board's action. (R. Tab 3.) On 10/17/05, defendant Ferdinand argued that Mr. Montgomery had not received notice that revocation of permit no. 0424 would be considered at the 8/17/05 hearing. (R. Tab 3 at 1.) Defendant Ferdinand also argued that the lot size was grandfathered under the Shoreland Zoning Ordinance. (R. Tab 3 at 2.)

On 10/31/05, the Georgetown Board of Appeals made findings and conclusions² but remanded the matter to the Planning Board for reconsideration because the plaintiffs had not been properly notified of the 8/17/05 meeting. (R. Tab 4 at 2.)

¹ The parties have submitted an amended joint stipulation of documents. See Moody v. State Liquor & Lottery Comm'n, 2004 ME 20, ¶ 10, 843 A.2d 43.

² In the decision, the Board included finding #8, "The lot at issue was created in 1999, is less than two acres in area, and is non-conforming under the Shoreland Zoning Ordinance, and is not a "non-conforming Lot of Record." The Board included conclusion #1, "The Planning Board had the authority to revoke the permit." (R. Tab 4.)

On 11/16/05, the Planning Board held a hearing on the remand from the Board of Appeals with regard to the 8/17/05 rescinding of the Montgomery permit. (R. Tab 5.) Defendant Ferdinand stated that the plaintiffs had no objection to the Board's revocation of the part of the permit that dealt with expansion of the existing principal structure. He argued that a valid permit for the separate garage still existed. (Id.) The Planning Board voted to revoke the part of the permit that dealt with the expansion of the principal structure. (Id.)

Defendant Metcalf represented the plaintiffs in an enforcement action by the Town of Georgetown and a boundary line dispute. These proceedings are the subject of count VI.

In 2008, the plaintiffs, appearing pro se, sought a new building permit³ for the accessory structure. The Planning Board denied the application. (R. Tabs 6 & 7.) The plaintiffs, represented by successor counsel, appealed the Planning Board's decision. After hearings, the Board of Appeals determined that no building permit could be issued. (R. Tabs 8-12.)

In 2010, the plaintiffs submitted another application to modify the accessory structure. That application was denied. (R. Tabs 13-14.) A Rule 80B appeal followed. After remand and additional findings, the Superior Court affirmed the decision of the Planning Board. (R. Tabs 15-18.) An appeal of the Superior Court's decision to the Law Court was voluntarily dismissed by the plaintiffs.

In counts I through V, the plaintiffs allege that defendants Eaton and Ferdinand were negligent because they failed to appeal the "findings of fact" #8, failed to argue before the Board of Appeals on 10/17/05 that their lot was not a nonconforming lot of

³ Permit no. 0424 was scheduled to expire according to its terms on 09/15/05. (R. Tab 1; see Peterson v. Town of Rangley, 1998 ME 192, ¶ 12, 715 A.2d 930 (expired variance has no res judicata effect.))

record, failed to advise the plaintiffs of their right to appeal finding #8, failed to ask the Planning Board at the 11/16/05 hearing to find that the lot was a non-conforming lot of record, and failed to be familiar with, and advise the plaintiffs about, the Shoreland Zoning Ordinance and failed to evaluate fully the implications of finding #8.

Because the 10/31/05 remand by the Board of Appeals was not a final judgment, no appeal was possible. See Bruesewitz v. Grant, 2007 ME 13, ¶ 5, 912 A.2d 1255, 1257; see also Aubry v. Town of Mount Desert, 2010 ME 111, ¶ 2, 10 A.3d 662. On 11/16/05, the Planning Board voted to revoke the “part of permit 0424 dealing with expansion of the principal structure.” (R. Tab 5.) The minutes reflect that the plaintiffs “had no objection to the Board’s revocation of the part of the permit dealing with expanding the existing structure.” (R. Tab 5.) Accordingly, the plaintiffs did not suffer a particularized injury as a result of the decision of the Board. See Witham Family Ltd. P’ship v. Town of Bar Harbor, 2011 ME 104, ¶ 7, 30 A.3d 811; Brooks v. Town of North Berwick, 1998 ME 146, ¶ 11, 712 A.2d 1050.

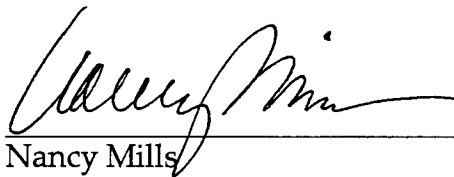
Further, finding #8 of the Board of Appeals was not relevant or essential to the 10/31/05 remand, which was based on inadequate notice, or to the 11/16/05 revocation of part of the permit, which was based on a violation of the setback requirements. (R. Tabs 4-5; but see R. Tab 18 at 6, n.7; see Sargent v. Buckley, 1997 ME 159, ¶ 6, 697 A.2d 1272, 1274.)

Finally, the record shows that at the 9/29/09 and 10/16/09 Board of Appeals hearings on the 10/15/08 Planning Board denial of the plaintiffs’ application for a permit for a new accessory structure, the plaintiffs conceded that the lot was not a grandfathered nonconforming lot of record. (R. Tabs 8-9.) The Board of Appeals found that the lot was a nonconforming lot of record. (R. Tab 12.) The Board did not reference the 2005 finding. (Id.)

The entry is

The Defendants' Motion to Dismiss Counts I-V of the Plaintiffs' Amended Complaint is GRANTED. Counts I-V of the Amended Complaint are DISMISSED.

Dated: January 28, 2013



Nancy Mills
Justice, Superior Court

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