

STATE OF MAINE  
YORK, SS.

SUPERIOR COURT  
DOCKET NO. AP-12-023

JON -YOR- 10/4, 2012

JAMES and PATRICIA HARTWELL, )  
)  
Plaintiffs, )  
v. )

ORDER

TOWN OF OGUNQUIT and )  
WAYNE C. PERKINS, )  
)  
Defendants. )

### BACKGROUND

Plaintiff appeals Defendant, Town of Ogunquit's, grant of site plan and design review for the redevelopment of Mr. Wayne C. Perkin's, Plaintiff's neighbor's, garage into "Perkins Cove Lobster Pound," a lobster pound. Plaintiff alleges that because the lobster pound was misclassified as a retail establishment rather than as a restaurant, the initial application was never completed and the site plan and design review should not have been granted. Plaintiff Moves for a Trial on the Facts in order to introduce evidence of the Perkins Cove Lobster Pound website and Facebook page, which list a menu and classify the lobster pound as a restaurant.

### DISCUSSION

Plaintiff moves for a Trial on the Facts pursuant to the Maine Rules of Civil Procedure 80B(d), which states in part:

"If the court finds on the motion that a party to a review of a government action is entitled to a trial of the facts, the court shall order a trial to permit the introduction of evidence that does not appear in the record of governmental action and that is not stipulated. Such a motion shall be filed within 30 days after the complaint is filed. The failure of a party to file said motion shall constitute a waiver of any right to a trial of the facts." Me. R. Civ. P. 80B(d)(2012).

## 1. Timing

Rule 80B(d) allows 30 days from the date of the filing of the complaint for the filing of a motion for trial of the facts. Plaintiff filed the Complaint on May 9, 2012. Plaintiff filed the Motion for Trial on the Facts on June 22, 2012. Thirty days from the filing of the Complaint was June 8, 2012. Plaintiff's filing of the Motion for Trial on the Facts was not timely. Plaintiff's motion is denied on this basis and on the basis that follow.

## 2. Introduction of Evidence not on the Record

In the review of governmental action pursuant to Maine Rule of Civil Procedure 80B, parties are generally constrained to the record as it was developed before the governmental agency. 5 M.R.S.A. § 11006(1)(2011). The exceptions to the general rule are § 11006(1)(A), allowing the Superior Court itself to take additional evidence in certain circumstances, and § 11006(1)(B), allowing remand to the agency to take additional evidence.

Section 11006(1)(A) states that the reviewing court itself may take additional evidence “[i]n the case of the failure or refusal of an agency to act or of alleged irregularities in procedure before the agency which are not adequately revealed in the record.” To establish “irregularities in procedure,” the moving party must present at least prima facie evidence of some impropriety on the agency's part, such as bad faith or improper behavior.” *Carl L. Cutler Co., Inc. v. State Purchasing Agent*, 472 A.2d 913, 918 (Me. 1984). See also *Strong Green Energy, LLC v. Geneva Wood Fuels, LLC*, 2009 Me. Super. LEXIS 156, \*5 (July 17, 2009) (“Procedural irregularity of the type contemplated by section 11006(1)(A) clearly encompasses some form of bad faith, bias, improper behavior, or other misconduct.”) (citations omitted).

Plaintiff essentially argues that the new evidence found on the website and on the lobster pound's Facebook page is evidence that the Mr. Perkins misclassified the use of the space, therefore the initial application was never completed and the site plan and design

review should not have been granted. Plaintiff does not claim that the Planning Board made its decision in bad faith nor does Plaintiff allege any type of misconduct. Thus, Plaintiff's allegations do not meet the test for the taking of additional evidence by the Superior Court under § 11006(1)(A). Because Plaintiff's allegations do not meet the test for the taking of additional evidence by the Superior Court under § 11006(1)(A), Plaintiff is not entitled to a Trial of the Facts under 80B(d).

Further it was apparent at oral argument that regardless of how this use was described on Facebook, the use itself was the same as considered by the Planning Board.

For these reasons, the Court finds that the Plaintiff is not entitled to a Trial on the Facts under Rule 80B(d). Plaintiff's motion is denied.

The clerk may incorporate on the docket by reference.

10/4/12  
DATE

  
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SUPERIOR COURT JUSTICE

*/s/ John H. O'Neil*

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