

STATE OF MAINE
Knox, SS.

SUPERIOR COURT
Docket No. CV-2021-0002

Friends of Rockport, et. al.,)
Plaintiffs,)
)
v.)
)
Town of Rockport,)
Defendant,)
)
and)
)
20 Central Street LLC,)
Party-in-Interest)

Order on Motion to Vacate TRO

This case arises out of Party-in-Interest 20 Central Street LLC's plan to build a hotel in Rockport. 20 Central has obtained site plan approval for the hotel from the Town of Rockport Planning Board. Along with adjacent property owners, it has also received permits for certain preliminary work and has begun preparing the site for eventual construction. 20 Central has not received a building permit for the hotel itself.

Plaintiff Friends of Rockport (FOR) is an organization opposed to construction of the hotel. The three named persons are members of FOR who own property near the construction site and who believe their individual interests as owners will be adversely affected if the hotel is built as they believe is contemplated.

Certain members of FOR, including Plaintiffs Priestley and Schwarzmann, have filed an appeal with Rockport's Zoning Board of Appeals by which they challenge issuance of the site plan approval. The appeal is scheduled to be heard shortly but has not been decided. The ZBA's eventual decision will determine whether any infirmity in the site plan approval process will impede completion of the project. The ZBA will not, however, be able to rule on the application to the project of two amendments to municipal ordinances, both of them promoted by FOR and approved in a town election, that would limit the number of rooms in the hotel and direct the planning process for guest parking. Signature gathering for those amendments predated issuance of the site plan approval but the election was not held until after approval was issued. Rockport has determined it will not decide on the applicability of the amendments until a building permit is issued.

In their complaint, Plaintiffs seek a declaratory judgment that the ordinance amendments apply to 20 Central's project, such that the number of permitted rooms

will be 20 rather than 26 and a prescribed process for assessing and providing guest parking will have to be followed. Plaintiffs also seek injunctive relief to prohibit Rockport from issuing a building permit for the hotel that does not conform to the terms of the amended ordinances.

Plaintiffs' verified complaint was received in court shortly after 3 p.m. on Thursday, January 7, 2021. It was accompanied by a request for a temporary restraining order. The court granted the TRO; it then conferred with counsel for all parties on January 11 and conducted a hearing on January 13. At the hearing, Plaintiffs were represented by Attorneys Kristin M. Collins and Stephen E.F. Langsdorf; Rockport by Attorney Daniel J. Murphy; and 20 Central by Attorneys Sarah Irving Gilbert, Mark Coursey, Andre Duchette, and Gregg Frame.

The court wishes to recognize at the outset the admirable professionalism of counsel in marshaling factual material and legal arguments and submitting well-written memoranda, then arguing in a responsive and coherent way about complex issues, on short notice. Their efforts are appreciated.

The court also acknowledges its own error: although Plaintiffs did not ask that their request for a TRO be acted upon *ex parte*, the court interpreted it as such a request and granted it accordingly. Having conducted the hearing on January 13, this error appears to the court not to be of continuing consequence; the issue now is whether the TRO should be dissolved in accordance with Rockport's motion dated January 12 rather than, as it should have been, whether the TRO should be granted in the first place.

The urgency of Rockport's pending motion precludes a more elaborate review of the facts or a recounting of the many intertwined legal issues that will eventually be presented to the court for final decision. The facts outlined above afford a basis for determining whether, as Rockport and 20 Central urge, the TRO should be dissolved and the case dismissed in accordance with the Law Court's decision in Blanchard v. Town of Bar Harbor, 2019 ME 168, 221 A.3d 554.

In determining the immediate fate of the TRO, the court first refers to Plaintiffs' acknowledgement that they do not seek to interfere with any of the preliminary work now being done. Although that work and its enabling permits appears in prominent detail in the amended complaint, those references apparently were included only for context and to illustrate the potential impact on the town of the hotel if it is built as planned.

The court next considers the status of 20 Central's application for a building permit. In an affidavit dated January 12, 2021, submitted in support of Rockport's opposition to Plaintiffs' request for a TRO, Code Enforcement Officer Scott Bickford states,

[w]hen reviewing requests for building permits where the Planning Board already has performed a substantive review and issued a final approval, the grant of building permit based on the prior approval is ministerial in nature and does not retread the same subject matter or review that already has been performed by the Planning Board.

Bickford AF ¶ 7.

At the hearing, by contrast, counsel for Rockport and Plaintiffs agreed that issuance of the permit was not a foregone conclusion. Counsel for Rockport noted that the application, which was not in evidence, might render Plaintiffs' complaint moot by calling for a structure of 20 rather than 26 rooms; counsel for Plaintiffs, in turn, noted that if the issuance were a ministerial act it would long since have been accomplished.

This is of consequence to the court. The legal process by which municipal planning and permitting decisions are challenged in court would be completely frustrated if parties were free to construct reality on the ground that would either determine the outcome of the proceeding or require extraordinary relief to return to the *status quo ante*. It appears that is not the case here. If the court vacates the TRO and the code enforcement officer issues the building permit, Plaintiffs will be able to return to court for further relief before 20 Central takes irrevocable steps in the project.

Based on the foregoing, the court finds at this preliminary stage that Plaintiffs have not shown the required element of irreparable harm in the absence of equitable relief. See Ingraham v. University of Maine at Orono, 441 A.2d 691, 693 (Me. 1982). Without a permit having been issued and its terms known, and without factual development of the extent to which the proposed structure might impede Plaintiffs' view of the harbor or other relevant property interest, any assessment of harm is of necessity speculative. See Blanchard, 2019 ME 168, ¶ 21, 221 A.3d 554.

Blanchard does not, however, compel dismissal of the matter. In that case, no permit had been granted or even sought for construction or development in the town's Ferry Terminal Property, which had recently been altered to accommodate larger cruise ships. Id., ¶¶ 21, 22. Here, a site plan has been approved and a building permit applied for, and preparatory work has begun following issuance of ancillary permits. If the building permit is granted, Plaintiffs will be entitled to assess this element further and determine whether it still believes it requires injunctive relief.

It is therefore ORDERED that:

The court's Temporary Restraining Order dated January 7, 2021, is VACATED and Rockport's request for dismissal without prejudice is DENIED.

It is further ORDERED that the clerk schedule a televideo conference for the court with counsel to discuss further deadlines and, to the extent now possible, plan for an expedited trial.

The Clerk may incorporate this Order upon the docket by reference.

Dated: January 1~~7~~, 2021


The Hon. Bruce C. Mallonee
Justice, Maine Superior Court