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CLERK OF SUPERIOR COURT

STATE OF MAINE  
KNOX, SS.

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO. CV-2021-2  
AP-2021-2

FRIENDS OF ROCKPORT,  
JOHN PRIESTLEY, MARK  
SCHWARZMANN AND CLARE TULLY )

Plaintiffs, )

v. )

TOWN OF ROCKPORT, )

Defendant, )

and )

20 CENTRAL STREET LLC, )

Party-in-Interest )

ORDER RE: MOTION TO AMEND AND  
MOTION TO DISMISS; ORDER  
SETTING COURSE OF FUTURE  
PROCEEDINGS

JOHN PRIESTLEY, DAVID BARRY,  
DAVID KANTOR, MARK  
SCHWARZMANN, and  
WINSTON WHITNEY, )

Plaintiffs, )

v. )

TOWN OF ROCKPORT, )

Defendant, )

and )

20 CENTRAL STREET LLC, )

Party-in-Interest )

The factual and procedural history of this matter is fully set forth in the Court's Order dated June 14, 2021, which is incorporated by reference. Plaintiffs' Rule 80B appeal docketed in the above AP-docketed action challenges the Rockport Planning Board's approval of a site plan for a hotel proposed by Party-in-Interest 20 Central Street LLC. Plaintiffs in the above CV-docketed action challenge the Town of Rockport Code Enforcement Officer's issuance of a building permit for the proposed hotel.

**Plaintiffs' Motion to Amend in CV-2021-02**

The Town of Rockport Zoning Board of Appeals (ZBA) heard and issued a decision affirming the Planning Board's site plan approval on January 21, 2021. The Zoning Board of Appeals has now also acted fully and finally on an appeal filed by certain of the Plaintiffs challenging the building permit, having approved findings of fact by vote taken on July 8, 2021 (although the ZBA has not, to the court's knowledge, yet issued written findings). In the unusual circumstances of this case, and notwithstanding the absence of written findings, the court finds Plaintiffs have now exhausted their administrative remedies such that both matters are ripe for judicial review. The court further finds the Rule 80B appeal has been timely filed because, in the case of an appeal from a municipal Board of Appeals, the appeal period runs from the date of the board's vote on the original decision. 30-A M.R.S. § 2691(3)(G). Because Plaintiffs' administrative remedies have been exhausted and the Court has jurisdiction over the appeal, Plaintiffs' Motion to Amend is hereby GRANTED to add the Rule 80B claim, and Plaintiffs' submitted Second Amended Verified Complaint is accepted.

In extensive preliminary briefing and argument to date, no party has suggested further factual development will be required in order to address all issues in both cases. The court therefore finds, subject to the provision in scheduling order paragraph (5) below, that review

pursuant to the procedures set forth in M.R. Civ. P. 80B is adequate to address all factual and legal issues raised in Plaintiffs' Second Amended Verified Complaint and that the administrative record of these two proceedings will provide all evidence necessary to resolve all claims raised. Accordingly, review of the CV-docketed matter will proceed in accordance with M.R. Civ. P. 80B. Given the time sensitivity of these matters and the detail with which pending pleadings have been presented, the Court finds it unnecessary to require submission of a further amended complaint to outline the Board of Appeals' recent action on the municipal appeal. The parties shall simply outline the updated procedural and factual history in their briefs. The Court acknowledges that because the Zoning Board of Appeals exercised *de novo* review of the Code Enforcement Officer's decision, the Court will review the decision of the Zoning Board of Appeals directly. *Dunlop v. Town of Westport Island*, 2012 ME 22, 37 A.3d 300 (Me. 2012).

**Town's Motion to Dismiss in CV-2021-02**

The Town's Motion to Dismiss dated June 17, 2021 is hereby DENIED. The Town's Motion challenges the Court's jurisdiction over the declaratory judgment counts contained within the First and Second Amended Complaint<sup>1</sup> on the basis that (1) Plaintiffs had not exhausted their administrative remedies; (2) Plaintiffs lack standing to assert generalized claims on behalf of the public; (3) the declaratory judgment count fails to state a claim upon which relief can be granted; and (4) the petitioned amendments to the Town's Land Use Ordinance at issue in this case are disabled as to the project at issue by 30-A M.R.S. § 3007(6). The Town's first, second and third arguments are mooted now that Plaintiffs Priestley and Schwarzmann have exhausted their administrative remedies by receiving a final decision from the Town's Zoning Board of Appeals. As to the Town's fourth basis for dismissal, Plaintiffs have set forth a prima

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<sup>1</sup> To the extent the Town's Motion to Dismiss concerns claims raised only in the Second Amended Complaint, those challenges were premature as the Court had not yet granted leave to accept the Second Amended Complaint.

facie case that 30-A M.R.S. § 3007(6) is either not applicable or cannot be constitutionally applied to block otherwise applicable provisions of the Town of Rockport Land Use Ordinance. This case represents a rare circumstance in which a declaratory judgment claim may lie notwithstanding the availability of relief pursuant to Rule 80B. “An ‘independent action’ is available “only when [Rule 80B] review will not raise all issues involved or will not provide an adequate remedy.” Advisory Committee’s Notes to Feb. 15, 1983 Order Amending Rule 80B. Plaintiffs Tully and members of Friends of Rockport, as circulators of the petitions that led to the August 2020 Land Use Ordinance amendments, have set forth a claim that their constitutional right to petition has been harmed by the Town’s failure to place the matters to timely vote and then to treat those petitioned amendments as legally effective once enacted. These claims could not have been raised in the appeal to the Zoning Board of Appeals because that board does not have authority to resolve constitutional issues. *Minster v. Town of Gray*, 584 A.2d 646; *Sawyer Env’tl Recovery Facilities, Inc. v. Town of Hampden*, PEN-AP-99-52. Further, although Plaintiffs Schwarzmann and Priestley signed the petitions, they were not the circulators and therefore cannot assert these specific constitutional claims. The claim for declaratory judgment shall therefore survive challenge and all issues raised within it will be adjudicated in the context of the Rule 80B briefing process.

### **Scheduling Order**

As set forth above, each of these pending matters will be considered pursuant to the procedures set forth in M.R. Civ. P. 80B and are to be consolidated for the purposes of briefing. The following Scheduling Order shall be entered:

1. On or before August 12, 2021, Plaintiffs shall submit separately compiled records related to the Planning Board approval challenged in the AP-docketed action and the building

permit approval challenged in the CV-docketed action. At the same time, Plaintiffs shall submit their written arguments for final decision.

2. Defendant and Party-in-Interest shall submit their briefs on or before August 26, 2021.

3. Plaintiffs shall submit any reply brief by September 7, 2021.

4. The Court will schedule a date for oral argument to occur as soon as possible after completion of briefing.

5. Should any party believe further factual exploration is required in order to present the merits of these matters fully, either by way of discovery or hearing, that party shall file an immediate motion specifying the information sought and proposing a schedule consistent with the other terms of this order.

#### **Plaintiffs' Motions for Preliminary Injunction and Stay**


Proceedings in these cases to date have focused on the parties' likelihood of eventual success. Notwithstanding the exhaustive documentation and arguments presented, the court's decisions have of necessity been speculative in accordance with the applicable standards; indeed, the court's caution in taking definitive and disruptive action has been constrained by the awareness that it has been called upon to exercise a preliminary, impressionistic analysis on virtually the same materials to which exhaustive and final analysis will later be brought to bear. The court declines on the record presented to issue either a preliminary injunction or a stay.

A further observation is in order. The court's earlier orders have addressed the parties' competing interests with respect to 20 Central's ongoing construction of its hotel. Although the court has declined to enter either a preliminary injunction or a stay, and declines to do so today, it has signaled to 20 Central with what it hopes is unmistakable clarity that in the event either set of plaintiffs prevails, and the court is required to assess remedies, it will not be constrained by

the risk 20 Central assumed by continuing construction as these cases were pending. Plaintiffs may not have presented claims justifying the preliminary relief they seek but their claims are not fanciful and the final merit of those claims may emerge as the parties brief and argue in accordance with the schedule set forth above.

This Order shall be incorporated into the dockets in each of the above-captioned actions.

Dated: July 14, 2021

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