STATE OF MAINE
AROOSTOOK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-14-2

RICHARD & ANN CAYER,
Plaintiffs,

v.

TOWN OF MADAWASKA,
Defendant.

DECISION AND ORDER ON PLAINTIFFS' RULE 80B APPEAL

Before this Court is the Plaintiffs Richard and Ann Cayer's Rule 80B appeal of the Town of Madawaska's ("the Town") failure to proceed with Plaintiffs' petition to secede from the Town pursuant to 30-A M.R.S. § 2171 (2012) (now amended by P.L. 2013, c. 384, § 2).[1] Plaintiffs brought four separate causes of action against the Town: Review of Governmental Action under Maine Rule of Civil Procedure 80B (Count I); Declaratory Judgment under 14 M.R.S. § 5951 and M.R. Civ. P. 57 (Count II); Violation of Federal and State Civil rights under 42 U.S.C.A. §§ 1983 and 1988 (Count III); and Mandamus pursuant to 14 M.R.S. § 5301 (Count IV). The Town moved for summary judgment on all counts.

BACKGROUND

Secession is a statutory right undergirded by the Maine Constitution. *See* 30-A M.R.S. § 2171 ("the citizens have an inalienable and indefeasible right [under the

[1] The court notes that the Defendant has requested a hearing on this motion. The court is satisfied that the written submissions of the attorneys are thorough and more than sufficient to enable the court to understand the respective positions of the parties. Accordingly, the court exercises its discretion pursuant to M.R.Civ.P. 7(b)(7) to address the pending motion for summary judgment without further hearing.

Constitution] to institute government and to alter, reform or totally change the same, when their safety and happiness require it.").

Plaintiffs are a couple who own six parcels of land in the Town of Madawaska. On May 28, 2013, Plaintiffs petitioned to secede from the Town pursuant to 30-A M.R.S. §§ 2171–2172 (2012) (hereinafter the "Former Statute"). Under the Former Statute, the secession process begins when applicants-secessionists submit a petition to the Town requesting a public hearing on the issue of secession. *Id.* § 2171-B. Upon receipt of a conforming petition, the municipality must hold a public hearing to allow citizens and town officers to discuss secession. *Id.* § 2171-C. After the hearing, the municipality must conduct an advisory referendum within the secession territory within a certain time frame. *Id.* § 2171-D. Next, the municipality must vote on whether to support the secession request, *id.* § 2171-E, and if the municipality and the secessionists cannot agree on secession, then the parties must mediate. *Id.* If mediation does not resolve the issues after six months, the matter may be submitted to the Legislature, *Id.* § 2171-G, which would then make the ultimate determination on the matter. *Id.* § 2172.

On May 30, 2013, the Town Manager decided that Plaintiffs' petition met the requirements of § 2128-B. (PASMF ¶ 4) Around the same time, the Town reached out to a local Representative in the Maine Legislature, Ken Theriault, and the Maine Municipal Association to discuss what it viewed as a loophole in the Former Statute. (DSMF ¶ 4) By early June, Representative Theriault submitted an emergency bill to amend the Former Statute. (Pls.'s Exh. 8, L.D. 1561, Testimony of the Maine Municipal Association (126th Legis. 2013)). On July 1, 2013, the Legislature passed emergency legislation to amend the secession statute, (1) inserting a requirement that the secessionists first obtain

approval of the Legislature before proceeding with the secession process and (2) changing the § 2171-D timeframe for conducting the advisory referendum (the "Current Statute").[2]

The Town then deemed that it was bound to follow the *Current* Statute instead of the Former Statute, and it set the § 2171-C public hearing for July 30, 2013. (DSMF ¶ 8) At the July 30 hearing, Mr. Cayer presented the reasons why he and his wife sought secession. (DSMF ¶ 11; PASMF ¶ 44) The Town took no action on the petition at that time. (PASMF ¶ 44) After receiving no response from the Town, Mr. Cayer attended the regularly schedule meeting of the Town on August 6, 2013 and again spoke about his petition to secede. (DSMF ¶ 12; PASMF ¶¶ 46, 47) At that meeting, the Town voted not to support the secession as provided in § 2171-E. (DSMF ¶ 15; PASMF ¶ 48).

After Plaintiffs wrote several letters attempting to persuade the Town that the Former Statute required action on their petition, the Town's attorney sent a letter to Plaintiffs' attorney informing Plaintiffs that the Town would take no further action on the petition to secede until Plaintiffs obtained approval from the Legislature as required by the newly enacted Current Statute, section 2171-C-1. (PASMF ¶ 56) On November 5, 2013, Plaintiffs again appeared before a Town meeting to request that the Town act on their petition to secede in accordance with the Former Statute. (DSMF ¶ 18; PASMF ¶ 57) Again, the Town then voted not to support Plaintiffs' secession, and the Town considered the matter closed as of November 5, 2013. (DSMF ¶ 20; PASMF ¶ 58) The Town took no further formal action on Plaintiffs' petition. (DSMF ¶ 21; PASMF ¶ 60)

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[2] P.L. 2013, ch. 384 ("An Act to Amend the Laws Governing Secession from a Municipality"). The Current Statute is available at http://www.mainelegislature.org/legis/statutes/30-A/title30-Ach113sec0.html.

On February 4, 2014, Plaintiffs filed suit under Rule 80B seeking judicial review of the Town's failure to conform with the Former Statute. Plaintiffs contend that the Town's actions deprived them of their constitutional rights in violation of 42 U.S.C. § 1983. Significantly, Plaintiffs' § 1983 challenge rests on two related, but nevertheless analytically distinct Town actions—the Town's evaluation of Plaintiffs' petition and the Town's lobbying efforts to change the secession statute. The Town moved for Summary Judgment on all counts on February 26, 2015.

DISCUSSION

Summary judgment is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. M.R. Civ. P. 56. "A material fact is one having the potential to affect the outcome of the suit." *Burdzel v. Sobus*, 2000 ME 84, ¶ 6, 750 A.2d 573. Where there is sufficient evidence to support competing versions of material facts, the outcome must be decided by the factfinder at trial. *See id.* (citations omitted).

1. The Former Statute Governed Plaintiffs' Petition Because the Legislature Did Not Intend for the Current Statute to Have Retroactive Application.

A threshold issue in this case is whether the Town properly applied the Current Statute to the Cayer's petition. By virtue of 1 M.R.S. § 302, the Legislature has a "rule of construction," that actions and proceedings pending at the time of the amendment of a statute are not affected by that amendment. *MacIMAGE of Maine, LLC v. Androscoggin Cnty.*, 2012 ME 44, ¶¶ 22–23, 40 A.3d 975. This rule of construction can be overcome by legislation expressly citing section 302 or explicitly stating an intent to apply the

amendment to pending proceedings. *Id.*[3] Here, neither the Current Statute nor its legislative history evinces an intent that the Current Statute be applied retroactively to Plaintiffs' petition. Moreover, the legislative history purports to show that the Legislature considered (but did not enact) a provision that would make the Current Statute applicable to any secession effort commenced after January 1, 2013 (which would have included the Cayer's petition). *See* Pls.'s Exh. 11. In this court's view, the Current Statute does not apply retroactively to the Cayer's petition. The court concludes that the Town erred when it determined that the Current Statute governed the Plaintiffs' petition, and failed to process Plaintiffs' petition to secede in accordance with the Former Statute.

2. Merits of Plaintiffs' Rule 80B Action

    a. Rule 80B

> When review by the Superior Court, whether by appeal or otherwise, of any action or failure or refusal to act by a governmental agency, including any department, board, commission, or officer, is provided by statute or is otherwise available by law, proceedings for such review shall...be governed by these Rules of Civil Procedure as modified by this rule.

M.R. Civ. P. 80B(a). As the text of the rule makes clear, Rule 80B does not create judicial authority to review government action generally, *F.S. Plummer Co. v. Town of Cape Elizabeth*, 612 A.2d 856 (Me. 1992), but is only a vehicle for review of government action when review is "provided by statute or otherwise available by law." M.R. Civ. P. 80B(a); *see also Lyons v. Bd. of Directors of S.A.D.*, 503 A.2d 233, 236 (Me. 1986) ("otherwise available by law" refers to review of an action that could have been had by

[3] Whereas the Law Court in the past looked to whether the statute was "procedural" or "substantive" to determine whether it could be applied retroactively, the *Sinclair* decision made clear that *legislative intent* determines the applicability of new legislation to a pending claim. *MacIMAGE*, 2012 ME 44, ¶ 22 (citing *Sinclair v. Sinclair*, 654 A.2d 438 (Me. 1995)). As explored in this Order, the Current Statute does not enjoy retroactive application to Plaintiffs' petition.

means of a common law writ, such as writ of certiorari, writ of mandamus, or writ of prohibition, adapted to current conditions).[4] It is also said that Rule 80B is the exclusive vehicle for plaintiffs who challenge government *adjudications*, such as when the government denies a petition. *See Lyons*, 503 A.2d at 236 (Me. 1986) ("[T]he principle governing the right to [Rule 80B review] is...based on whether the governmental agency acted in a quasi-judicial manner.").

There is an important distinction between the Town's actions upon the Plaintiffs' petition to secede and the Town's ulterior efforts to amend the secession statute. In sum, Rule 80B provides review for quasi-judicial governmental decisions but does not create a license to challenge government action generally.

b. Plaintiffs' Rule 80B Appeal Was Not Timely

As the parties indicate, the crux of the timeliness issue is whether the Town has "refus[ed] to act" on Plaintiffs' petition to secede (for which there is 30 days to appeal) or has "fail[ed] to act" (for which there is six months to appeal). *See* M.R. Civ. P. 80B(b). The words of commentator Charles Harvey carry particular significance to the case at bar: "In the case of a failure to act, *as distinguished from an expressly communicated refusal*, Rule 80B(b) allows an appeal within six months after a reasonable time for action has expired." Charles Harvey, *Maine Civil Practice*, § 80B:3 at 439 (3d ed. 2011). If the plaintiff does not bring an appeal in a timely fashion under Rule 80B, the decision

[4] Before Rule 80B was enacted, a writ of *certiorari* was the procedure for judicial review of actions taken by government agency performing a judicial function, the writ of *mandamus* was the procedure to compel a ministerial act, and the writ of *prohibition* was the procedure to direct an inferior tribunal to cease abusing its power or usurping judicial power. *Lyons*, 503 A.2d at 236 n.3. As explained below, Plaintiffs' allegations against the Town's lobbying efforts do not fall within the umbrella of Rule 80B because review of such action is not "provided by statute or otherwise available by law."

of the governmental body becomes final. *Fitandes v. Perry*, 537 A.2d 1139, 1140 (Me. 1988).

Here, the Town twice *refused* to act on Plaintiffs' petition. (DSMF ¶ 20; PRSMF ¶ 20; PASMF ¶¶ 48, 58) At the latest, the Town considered the secession matter closed on November 5, 2013 when the Town decided that Plaintiffs' petition could not proceed. In this instance, the Town has refused, rather than failed, to act.

Plaintiffs' position that the Town "failed" to act upon its petition does not hold sway. A failure contemplates omission. Additionally, the language of 80B(b) reflects that a "failure" is an omission that may not be immediately obvious to an aggrieved party. *See* M.R. Civ. P. 80B(b) ("the complaint shall be filed...in the event of a failure to act, within six months after expiration of the time in which action *should reasonably have occurred*.") (emphasis added). An inspection of the Town's actions persuades the Court that the Town refused, rather than failed, to act on the petition. The Town voted on the matter. The Town apprised the Plaintiffs that it would proceed no further on their petition. These actions constitute clear refusals.

The argument that the Town's erroneous decision on the petition could be considered a "failure" to follow the Former Statute is not the same as saying that the Town "failed" to act on Plaintiffs' petition for which there would be a six month window to bring suit. Moreover, Plaintiffs' suggestion that resolution of the issue turns on the applicable secession statute is not logical. Regardless of whether the Town believed that the Former Statute or the Current Statute applied, the critical fact is that the Town dismissed the Plaintiffs' petition. If Plaintiffs believed that action to be in error, their

redress would be an 80B appeal of that decision. Accordingly, the Plaintiffs' appeal is untimely because they filed it outside of the 30-day window permitted by Rule 80B(b).

3. Whether Rule 80B Review Is Adequate to Address Plaintiffs Claims

The Court's conclusion that Plaintiffs' Rule 80B appeal is out of time does not end the analysis. Plaintiffs have made independent claims, specifically, Count II (Declaratory Judgment) and Count III (Violation of section 1983).[5]

The core rule is that where the relief sought under such independent claims duplicates relief that could be obtained by Rule 80B review, Rule 80B provides the exclusive means of review for these claims. *Colby v. York Cnty. Comm'rs*, 442 A.2d 544, 547 (Me. 1982). However, this "principle of exclusivity" dissolves when the Rule 80B review process would be "inadequate" to remedy the plaintiff's claims. *Id.*; *Gorham v. Androscoggin Cnty.*, 2011 ME 63, ¶ 22, 21 A.3d 115. Accordingly, the Court more closely examines those claims.

Plaintiffs contend that the Rule 80B appeal process is inadequate to redress its core grievance: that the Town ostensibly subverted Plaintiffs' path to secession (1) by lobbying to amend Former Statute and (2) applying the less-favorable Current Statute to their petition for secession.

In *Colby*, the Law Court concluded that due process claims—related to Commissioners' failure to hold a public hearing—could be adequately addressed through Rule 80B review. *Id.* at 545, 547. Similarly, in *Kane v. Comm'r of the Dep't of Health & Human Servs.*, 2008 ME 185, ¶¶ 30–32, 960 A.2d 1196, the Law Court concluded that

[5] Plaintiffs' Count IV for mandamus is not an independent claim. Count IV is subsumed in their Count I for 80B relief because mandamus is a natural incident of Rule 80B relief. *See Me. School Admin. Dist. No. 37 v. Pineo*, 2010 ME 11, ¶ 18, 988 A.2d 987.

the trial court's dismissal of a plaintiff's § 1983 claim was not an abuse of discretion because the plaintiff's claims against DHHS for failure to conduct meaningful review and application of improper standard were duplicative of a Rule 80C appeal. The *Colby* and *Kane* cases counsel that errors which occur *during* the quasi-judicial proceeding at issue are exclusively reviewable under Rule 80B.

The story is different, however, in *Gorham*. 2011 ME 63. There, the Law Court distinguished *Colby* and *Kane* and concluded that the plaintiff's § 1983 claims could not be adequately addressed through Rule 80B review because the alleged deprivation of rights occurred *before* the government issued its final decision. In *Gorham*, a corrections officer was suspended without pay by the county sheriff without a pre-suspension hearing. The sheriff recommended Gorham's termination to the town, which held a hearing and voted to terminate his employment. Gorham then filed suit alleging violations of due process and violations of § 1983. The Law Court ruled that Gorham's § 1983 claim regarding the sheriff's pre-hearing suspension was independent of the 80B review process of the town's decision to terminate employment and might not be remedied thereby. *Id.* ¶ 25. Hence, the Law Court decided that Gorham's § 1983 claim against the sheriff was independent and not subject to the 30-day filing window applicable to 80B actions.

a. Claims Adequately Addressed by a Rule 80B Appeal

Plaintiffs' challenges to the manner in which the Town handled their secession petition are duplicative of (and would adequately be addressed by) their Rule 80B appeal. Here, Plaintiffs argue that the Town erroneously applied the Current Statute and accordingly ignored the Former Statute. *See* Complaint ¶¶ 35, 37, 62. In addition,

Plaintiffs seek declaratory judgment that the Former Statute applied, that the Town was obligated to act on that petition, and that the Town's denial of their petition violated their right to due process and to petition the government. *See* Complaint ¶¶ 50, 53–55.

The foregoing set of alleged errors occurred within and incident to the Town's review of Plaintiffs' petition. Therefore, these claims also fall within the "principle of exclusivity." *Colby*. Moreover, as Justice Alexander writes, "The declaratory judgment law does not provide a self-help device for parties who have failed to timely appeal a municipal administrative decision to gain an extension…of the time to appeal and reopen a decision that has otherwise become final." *Sold, Inc.*, 2005 ME 24, ¶ 10. Moreover, to the extent that Plaintiffs challenge the basis and validity of the Current Law, Complaint ¶¶ 51–52, a Rule 80B appeal would have provided Plaintiffs an adequate forum to air those issues. In sum, because Plaintiffs challenge the Town's adjudication of their petition, Rule 80B provides the exclusive means of review. *Colby*, 442 A.2d at 547; *cf. Gorham*, 2011 ME 63. Plaintiffs' untimely Rule 80B appeal bars the Court from considering those claims falling within this "principle of exclusivity."

b. Claims Not Adequately Addressed by a Rule 80B Appeal

Plaintiffs also bring § 1983 claims against the Town on the basis that the Town's lobbying efforts wrongfully undermined Plaintiffs' petition for secession. *See* Complaint ¶¶ 23, 31, 51, 62. A section 1983 action provides a mechanism for a party to obtain relief for the acts of government officials who, while acting under color of state law, deprive another of rights protected by the Constitution. *Antler's Inn & Rest., LLC v. Dep't of Public Safety*, 2012 ME 143, ¶ 14, 60 A.3d 1248 (citing *Pratt v. Ottum*, 2000 ME 203, ¶ 16, 761 A.2d 313). In the main, Plaintiffs take issue with the Town's contacting a

legislative representative, who on the urging of the Town drafted (and the Legislature enacted) the more "Town-friendly" Current Statute. Complaint ¶ 23. Plaintiffs claim that they were further aggrieved by the Town's failing to inform them that it sought to change the law while their petition was pending. On these grounds, Plaintiffs argue that the Town violated their constitutional rights to due process and to petition the government.

Unlike Plaintiffs' objections to the Town's review of their petition, for which Rule 80B review is appropriate, Rule 80B is not a competent vehicle to address government activity dissociated with the quasi-judicial process. *Lyons*, 503 A.2d at 236 ("[T]he principle governing the right to [Rule 80B review] is...based on whether the governmental agency acted in a quasi-judicial manner."). Like the sheriff's action in *Gorham*, the Town's lobbying efforts were separate and apart from its official decision to reject Plaintiffs' petition. Accordingly, Rule 80B review does not extend to a municipality's non-adjudicatory actions, such as lobbying activities.

4. Plaintiffs' Independent Claims Nevertheless Fail

Plaintiffs bring a § 1983 claim against the Town on the basis that once the Town received Plaintiffs petition for secession, it approached a local legislator to seek a change in the secession law. A municipality can be sued under § 1983,[6] but it cannot be held liable unless it has violated a constitutional right and unless a municipal "policy or custom" was the cause of the injury. *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 713–14 (1978) ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to

[6] A municipality does not enjoy absolute or qualified immunity from § 1983 suits. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 701 (1978); *Owen v. Independence*, 445 U.S. 622, 650 (1980).

represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."); *cf. Moen v. Town of Fairfield*, 1998 ME 135, ¶ 24 n.8 ("Because we conclude that Moen's constitutional rights have not been violated by the Town, we need not reach the Town's claim that it cannot be held liable pursuant to section 1983 where Moen has failed to identify any policy or custom of the Town that caused him to be deprived of his constitutional rights."). Because Plaintiffs bear the burden to prove their § 1983 claims at trial, Plaintiffs must produce enough evidence to withstand a motion for a directed verdict in order to avoid summary judgment. *Erskine v. Comm'r of Corrections*, 682 A.2d 681, 685 (Me. 1996).

Here, Plaintiffs have not raised a genuine issue of material fact on the issue of municipal liability under § 1983. Beyond Plaintiffs' conclusory allegation in paragraph 63 of their Complaint, Plaintiffs present no evidence that the Town's "custom or policy" was to approach a legislator when applicants filed petitions for government action. More so, Plaintiffs fail to establish a genuine issue of fact that might demonstrate that the Town's lobbying efforts deprived them of a constitutional right. Assuming, *arguendo*, that Plaintiffs had liberty interest in their petition to secede,[7] the Court finds that no reasonable jury could find that Town deprived Plaintiffs of any liberty interest safeguarded by the United States or Maine Constitutions. Plaintiffs always had, and indeed exercised, their right to petition the Town to secede. Moreover, the Town in no way interfered with Plaintiffs ability to bring their petition to secede. With regards to the

[7] The Due Process Clause protects cognizable property interests and liberty interests. Although an applicant generally has no *property* interest in his or her application for government benefits, *Jackson v. Searsport*, 456 A.2d 852 (Me. 1983), especially where the government has broad discretion to grant or withhold the benefit, *Gonzales v. Comm'r, Dep't of Pub. Safety*, 665 A.2d 681, 683 (Me. 1995), the Court is not prepared to say that Plaintiffs did not have a *liberty* interest in their petition to secede. The right to secede and institute government "when their safety and happiness require it," 30-A M.R.S. § 2171, sounds in liberty.

Town's lassitude towards the Plaintiffs' petition (because the Town favored application of the Current Statute), Plaintiffs' challenges could have been addressed through the Rule 80B process, and as indicated herein are time-barred.

Likewise, Plaintiffs do not succeed in arguing that the Town's surreptitious lobbying deprived them of the right to participate in the legislative process (couched as a violation of their right to free speech or right to petition). The Plaintiffs have not raised a genuine issue of material fact that would demonstrate that it was the "policy or custom" of the Town to approach a legislator when applicants filed petitions for government action. Moreover, the Plaintiffs fail to raise a genuine issue which might demonstrate that the Town's lobbying efforts impinged on Plaintiffs' right to free speech, to petition their representatives in government, or to petition the Town. The Town has no obligation to apprise the citizenry at large about its efforts to further State legislation. *See F.S. Plummer Co.*, 612 A.2d at 861 ("There is no constitutional requirement of individual notice when a legislative body conducts hearings or enacts laws.") (citing *Bi-Metallic Co v. Colorado*, 239 U.S. 441, 445 (1915)). Nor does the Town have an obligation to apprise applicants about pending legislation which may or may not affect their application to the Town. In any event, the State legislative process is open and public. Here, the Town proceeded through ordinary and lawful channels to amend a law to further its interests, and the Legislature agreed that the amendment furthered State interests. Even though the Town's actions were probably precipitated by the Plaintiffs' petition for secession, the Town's lobbying efforts affected neither the Plaintiffs' procedural nor substantive rights

to secede; it only seemed that way.[8] Here, Plaintiffs only injuries were caused by the Town's erroneous handling of the petition, which errors are redressible by a Rule 80B appeal.

CONCLUSION

The Court grants the Town's motion for summary judgment on all Counts of Plaintiffs complaint. Plaintiffs' Count I is time-barred because Plaintiffs filed suit more than 30 days after November 5, 2013, the date on which the Town decided to "close" Plaintiffs petition to secede. Plaintiffs' Count II for Declaratory Judgment is time-barred because a Rule 80B review would have adequately addressed Plaintiffs' claims. For the same reason, Plaintiffs' Count III is time-barred to the extent that Plaintiffs claim the Town's review process may have deprived Plaintiffs of their constitutional rights. For the same reason, Plaintiffs' Count IV for mandamus relief is time-barred. The Court grants the Town's summary judgment motion as to Count III to the extent that Plaintiffs claim that the Town's lobbying activities deprived Plaintiffs of their constitutional rights because the Plaintiffs have no cognizable claims as a matter of law. Accordingly, the Court finds that on the undisputed material facts on the record, the Town is entitled to summary judgment.

The entry is:

1. The Town's motion for summary judgment is **GRANTED.**

2. Plaintiffs' M.R. Civ. P. 80B Appeal is **DISMISSED**.

[8] The Court uses the word "seemed" because the Current Statute was not retroactive to Plaintiffs' petition, and did not affect Plaintiffs' rights. Moreover, the true harm to the Plaintiffs was caused by the Town's failure to follow the Former Statute, a failure which Plaintiffs' did not timely appeal. On a final note, to the extent that Plaintiffs' § 1983 claims would be governed by the Maine Civil Rights Act ("MCRA"), the Law Court has indicated that it does not treat claims any differently whether they are brought pursuant to § 1983 or the MCRA. *Clifford v. Maine General Med. Ctr.*, 2014 ME 60, ¶ 50.

3. This Order shall be incorporated into the docket by reference pursuant to M.R. Civ. P. 79.

Dated: July 21, 2015

JUSTICE, SUPERIOR COURT

ENTERED 7-23-15