Collin's Consent Agreement
May 9, 2007

STATE OF MAINE
AROOSTOOK, ss

SUPERIOR COURT
DOCKET NO. AP-06-005

RICHARD CAYER

Plaintiff

vs.

TOWN OF MADAWASKA

Defendant

and

ROGER COLLINS, et al

Parties in Interest

DECISION AND ORDER

Pending before the court is the Plaintiff's (Cayer) 80B appeal challenging the Town of Madawaska's (Town) authority to enter into a consent settlement agreement with the Parties in Interest (Collins).[1] The settlement pertains to the Collins' property on Long Lake and in particular to an extension/expansion done to their camp in the summer of 2005.[2]

BACKGROUND

Cayer has long complained that in November of 2004, the Town's Zoning Board of Appeals (ZBA) erroneously granted Collins a variance and issued him a permit to

[1] Although Collins is the owner of the property that is the subject of these proceedings and although he was also a party to the consent agreement, he has not participated in the prosecution of this appeal.
[2] This construction has previously been the subject of litigation before the court in Docket No. AP-04-011 decided on October 25, 2005. Both parties have requested the court take judicial notice of the record in those proceedings and the court has done so.

Received Time May. 14. 12:31PM

construct the camp extension. This court agreed with Cayer and in its October 25, 2005 decision in Docket No. AP-04-011 vacated the granting of the variance and related permit and remanded the matter back to the ZBA for a de novo hearing in accord with the controlling ordinance provisions relating to the granting of variances.

While the matter was still pending in this court with no decision regarding the validity of the variance and permit, Collins proceeded to construct his camp extension and in fact had completed it by the time this court declared that the variance and permit were invalid.

The ZBA never conducted a de novo hearing. However, purporting to exercise authority granted it under Section 16 (H)(3) of the Town's Shoreland Zoning Ordinance, (the Ordinance) on July 11, 2006 the Town voted to enter into a Consent Agreement with Collins (Record Tab 2) that called for Collins to pay a $1,500 fine to the Town; to remove a shed constructed upon the property; and to re-vegetate an area where the shed had been. In exchange, the Town agreed to forgo its right to prosecute Collins for violating the Ordinance.

Through this 80B appeal, Cayer now asks the court to reverse the Town's decision to enter into the Consent Agreement; to declare that agreement void and to require Collins to remove the camp extension that was built without a valid permit.

DISCUSSION

1. Jurisdiction

At the outset, the Town argues that this court does not have jurisdiction to address this appeal and should therefore dismiss it out right. Obviously, the Plaintiff disagrees.

Received Time May. 14. 12:31PM

Maine has long recognized that "a right of appeal is not inherent in our legal system. It is conferred only by statute or provisions allowing review by extraordinary writ." Carter v. Wilkins and State Personnel Board. (internal citations omitted) 203 A.2d 682 (Me. 1964)

The Plaintiff appeals pursuant to M.R.Civ.P. 80B that provides:

> 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.

The Law Court has also indicated:

> For this matter to be reviewable under Rule 80B, review must be either provided by statute or be "otherwise available by law". Rule 80B does not create an independent right to appeal any governmental action to the Superior Court, but only provides the procedure to be followed for those disputes in which the court has jurisdiction. Dowey v. Sanford Housing Authority, 516 A.2d 957, (Me. 1986)

The parties agree that there is no specific statutory grant of appellate jurisdiction to the court within the Maine Revised Statutes or even within the Ordinance itself that would permit the court to undertake 80B judicial review of the Town selectmen's exercise of its discretion to enter into a consent agreement.

Thus, there being no statutory right of appeal, the question of the court's jurisdiction turns on whether judicial review is *otherwise available by law*. Review is deemed otherwise available by law if it is in the nature of the review formerly available under the common law extraordinary writs, such as the writs of certiorari, mandamus or prohibition, adapted to current conditions. Lyons v. Board of Directors of SAD 43, 503 A.2d 233,236. (Me. 1986). Neither mandamus (an order compelling the performance of some specific duty, See Young v. Johnson, State Tax Assessor, 207 A.2d 392 (Me. 1965)

Received Time May. 14. 12:31PM

nor prohibition (an order to any inferior tribunal to cease abusing its power or usurping judicial functions that did not rightly belong to it, See Lyons v. School Administrative District 43, 503 A.2d 233, (Me. 1985) citing R. Field & V. McKusick, *Maine Civil Practices* § 81.6 at 617 I1st ed. 1959) appear to have any application to the circumstances of the present case. However, the writ of certiorari may apply.

The Law Court has observed that the writ of certiorari "was the appropriate procedure to invoke judicial review of actions taken by a governmental agency performing a...quasi-judicial function." Lyons, ¶ 7. Thus, if the Town's selectmen performed a "quasi-judicial function", it follows that the court would have jurisdiction to review that action and if they did not perform such a function, there would be no right of review.

The Town concedes that this court has jurisdiction to entertain this 80B action if review is "otherwise available by law". (Town brief p. 5) However, relying upon *Lyons* the Town contends that its entering into the consent agreement was not a quasi-judicial act. In *Lyons*, the Law Court stated that:

> An agency's actions are quasi-judicial in nature when it adjudicates the rights of a party before it.
>
> and
>
> Whether an act is judicial or quasi-judicial so as to be reviewable by certiorari depends on the nature of the act performed, rather than on the character of the officer or body performing it. Judicial action is an adjudication on the rights of the parties who, in general, appear or are brought before the tribunal by notice or process, and on whose claims some decision or judgment is rendered. Lyons at ¶ 8. (internal citations omitted)

Town argues that this court does not have jurisdiction in this case because Mr. Cayer, like Mr. Lyons, had no rights at stake and therefore, the Town's decision to enter

Received Time May. 14. 12:31PM

into the consent agreement with Collins cannot be seen to be an adjudication of Cayer's rights, thus defeating any conclusion that the Town engaged in a quasi-judicial action.

The court would disagree and concludes that the Town's decision to enter into the consent agreement did involve a reviewable quasi-judicial action. To be sure, an adjudication of individual rights would clearly be a quasi-judicial action, however, noting the "in general" qualifier included within the forgoing *Lyons* language, one can't conclude that the Law Court was indicating that an adjudication of disputed rights, such as occurred in *Lyons,* was the only kind of quasi-judicial determination possible. At the center of the *Lyons* dispute was the question of whether Mr. Lyons had a property right in continued employment or not. Thus, the Court addressed the issue of jurisdiction specifically with regard to disputed property rights and not within the context of a discussion regarding appellate jurisdiction generally.

Many years ago, the Law Court upheld the power of judicial review of the actions of a town's governing municipal board by writ of certiorari. In connection with a case relating to a municipal board's conduct of a disciplinary proceeding seeking the removal of the city marshall, the Law Court noted that,

> This jurisdiction is broad enough to include a superintendence of the mayor and aldermen where they are sitting in any judicial capacity. Such power has been repeatedly exercised in England and in this country, and in cases of removal of officers of private corporations as well as of public officers. It does not extend to a retrial of the facts, nor to a view of the evidence, nor to a revision of any matter of discretion. *It does extend to an examination of the grounds of the proceedings, and of the course of the procedure, to determine whether the inferior court kept within its jurisdiction, and proceeded according to law.* (emphasis supplied) Whether the inferior court is legally constituted; whether the allegations made to it are sufficient in form and substance to authorize it to proceed; whether its procedure is correct and whether its sentence is lawful are questions for this court to determine. If abuse or error be found in any of these matters, this court can by proper process annul the whole proceeding, where no other mode of correction is provided. The forgoing proposition as to the extent of the supervisory power of

Received Time May. 14. 12:31PM

> this court, and that it comprehends cases of attempted removal of officers for cause, is well established by authority. Andrews v. King, 77 Me. 224 (Me. 1885)

The Law Court also stated:

> The act of hearing and deciding is always a judicial act. Id.

Lyons tells us that it's the "nature of the act" that is important and this court concludes that while an adjudication of disputed rights might well be one kind of reviewable "quasis-judicial" action, it is not exclusive. This conclusion is supported by *Andrews*, supra and additionally,, by two law dictionary definitions.

BLACK'S LAW DICTIONARY, REVISED 4TH EDITION defines "quasi-judicial" as follows:

> "Quasi Judicial" A term applied to the action, discretion, etc. of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action and to exercise discretion of a judicial nature.

BALLENTINE'S LAW DICTIONARY defines "quasi-judicial" as follows:

> 1. The characterization of an adjudicatory function of an administrative agency. The characterization of an act partially judicial, such as the issuance of a warrant of arrest by a clerk of court. The characterization of a power reposed in an officer or board involving the exercise of discretion, judicial in its nature, in connection with and as incidental to the administration of matters assigned or intrusted to such officer or board.
>
> 2. *Where the administrative tribunal is under a duty to consider evidence and apply the law to the facts as found, thereby exercising a discretion of judgment judicial in nature on evidentiary facts, the function is ordinarily quasi-judicial and not ministerial.* (emphasis supplied)
>
> 3. The acts of an officer which are executive or administrative in their character and which call for the exercise of that officer's judgment and discretion are not ministerial acts and his authority to perform such acts is quasi-judicial. (internal citations omitted)

Received Time May. 14. .12:31PM

Both of these definitions describe "quasi-judicial" as the process of reviewing evidence, making factual determinations from that evidence, and then applying the law to the facts found to exist.

The grant of the municipal authority at the center of this dispute issue is found within section 16 (H)(3) that provides in relevant part:

> The Town Officers, or their authorized agent, are hereby authorized to enter into administrative consent agreements for the purpose of eliminating violations of this Ordinance and recovering fines without Court action. *Such agreements shall not allow an illegal structure or use to continue unless there is clear and convincing evidence that the illegal structure or use was constructed or conducted as a direct result of erroneous advice given by an authorized Town Official and there is no evidence that the owner acted in bad faith, or unless the removal of the structure or use will result in a threat or hazard to public health and safety or will result in substantial environmental damage.*

The forgoing grant of authority to the Town to enter into consent agreements is not unlimited. It is specifically constrained by several essential preconditions. Before the Town may enter into a consent agreement, there must be *clear and convincing evidence:*

1. That the offending structure was erected as a direct result of *erroneous advice*
2. Given by an authorized *Town Official* and
3. *No evidence* that the owner acted in *bad faith.*

Therefore, an essential prerequisite for the Town's exercise of its discretionary authority to enter into a consent agreement is for the Town first to engage in an evaluation of evidence and then to engage in fact finding according to an enhanced standard of proof. Since at least 1885, when a Maine municipal board engages in the acts of hearing evidence and making factual determinations based upon that evidence, they have engaged in a "judicial act".

Received Time May. 14. 12:31PM

The court recognizes that the grant of "consent agreement authority" falls within the enforcement provisions of the Ordinance and that Maine law is clear that enforcement decisions are discretionary decisions not subject to review. (See Herrle v. Town of Waterboro, 2001 ME 1, ¶10, 763 A.2d 1159, 1162). The court would agree that how, when, or whether the Town uses its discretionary authority to enter into consent agreements as part of its Ordinance enforcement authority is not subject to judicial review. However, that consent settlement authority does not exist, except perhaps in some kind of inchoate form, until and unless the Town takes the preliminary steps necessary to cause that power to ripen into a power that may be exercised under law. Thus, in this court's opinion, the Town necessarily must engage in a "quasi-judicial act" prior to any exercise of that authority and that quasi-judicial act is subject to review under Rule 80B because it would be subject to review by writ of certiorari. For this reason, the court determines that it has jurisdiction to entertain this appeal.

2. Standard of Review

As set forth in the Town's brief (page 9), the applicable standard of review can be articulated as follows:

> When a local board acts as a tribunal of original jurisdiction, the Superior Court reviews the decision of the board for errors of law, abuse of discretion, or findings not supported by substantial evidence in the record. See Brackett v. Town of Rangeley, 2003 ME 109, ¶15, 831 A.2d 422, 427 (citing Yates v. Town of Southwest Harbor, 2001 ME 2, ¶10, 763 A.2d 1168, 1171). Substantial evidence is evidence that a reasonable mind would accept as sufficient to support a conclusion. Gensheimer v. Town of Phippsburg, 2005 ME 22, ¶ 7, 868 A.2d 161, 163-164. This Court must review a local board's factual findings with deference; it may not substitute its own judgment for that of the board and may not hold that the board's decision is wrong because the record is inconsistent or a different conclusion could be drawn from it. A board's decision is not wrong because the record is inconsistent or a different conclusion could be drawn from it, and a

Received Time May. 14. 12:31PM

demonstration that no competent evidence supports the board's findings is required in order to vacate its decision. Phaiah v. Town of Fayette, 2005 ME 20, ¶ 8, 866 A.2d 863, 866.

3. Sufficiency of the Evidence

As indicated above, the court reviews the Town's decision for abuse of discretion, errors of law, or findings not supported by substantial evidence in the record.[3] Pursuant to Section 16 H(3), the Town is authorized to enter into "consent agreements" that would allow an illegal structure to continue if it finds that there is clear and convincing evidence that the owner constructed his building as a direct result of erroneous advice given to him by an authorized Town Official.[4] There must also be no evidence of bad faith.

The court can find no evidence in the record to support a conclusion that Collins constructed his camp extension as a direct result of erroneous advice given to him. There

[3] It is well-settled law in Maine that a decision of an administrative board or agency cannot stand when the administrative board or agency "fails to make sufficient and clear findings of fact and such findings are necessary to judicial review." Widewaters Stillwater Co., LLC. v. Bangor Area Citizens Organized for Responsible Development, 2002 ME 27, ¶ 12, 790 A.2d 597, 602 (citing Christian Fellowship & Renewal Ctr. v. Town of Limington, 2001 ME 16 ¶¶ 14-18, 769 A.2d 834, 838-40). Such decisions cannot stand because "[m]eaningful judicial review of an agency decision is not possible without findings of fact sufficient to apprise the court of the decision's basis." Chapel Road Associates v. Town of Wells, 2001 ME 137, ¶ 10, 787 A.2d 137, 140. Without sufficient findings of fact, "a reviewing court cannot effectively determine if an agency's decision is supported by the evidence, and there is a danger of 'judicial usurpation of administrative functions.'" Id. (citing Christian Fellowship & Renewal Ctr., 2001 ME 16 ¶ 15, 769 A.2d at 839). (Citation omitted). In this instance, the Ordinance requires the Zoning Board of Appeals to issue written decisions including its findings and conclusions (Section 16 (G)(3)(b) but does not impose the same requirement upon the Board of Selectmen. Notwithstanding that there is no specific Ordinance requirement that Town decision makers issue written findings, the Law Court has determined that 1 M.R.S.A. § 407(1) requires agencies to make findings of fact, in writing, sufficient to apprise the applicant and any interested member of the public of the basis for the decision. Chapel Road Associates LLC v. Town of Wells, 2001 ME 178, ¶11, 787 A.2d 137, 140. Although the selectmen's minutes reflect that they were cognizant of their obligation to consider evidence and to make factual findings and although they engaged in a limited discussion of the relevant issues, they did not make any specific findings or issue any written decision indicating the basis for their determination. (See Record Tab, 4, page 7). Nonetheless, the court concludes that the record is so devoid of probative evidence that it could not in any event support a finding that Mr. Collins relied on "erroneous advice by an authorized Town Official".

[4] Clear and convincing evidence is an intermediate standard of proof and a higher level of proof than a mere preponderance. This standard requires that before a fact or proposition can be determined to exist, the fact finder must have an abiding conviction that it is highly probable that the fact or proposition under consideration has been established. Taylor v. Commissioner of Mental Health and Mental Retardation, 481 A.2d 139, 152 (Me. 1984)

Received Time May. 14. 12:31PM

is no evidence in the record whatsoever that any individual Town Official gave erroneous advice to Collins. The Town seems to ignore the plain meaning of the language in the Ordinance and attempts to finesse this point by arguing that the Town is itself the equivalent of a "Town Official" and that it's issuance of a building permit later determined to be invalid was "erroneous advice". The court does not find this argument persuasive.

Section 16(H)(3) does not authorize "consent agreements" to allow the Town to side step the requirements of the Ordinance with unfettered discretion.[5] To the contrary the Ordinance expressly requires town officials to take all necessary actions to enforce the ordinance and to eliminate violations. Section 16H(3) provides:

> 3. Legal Actions.
>
> When the above action does not result in the correction or abatement of the violation or nuisance condition, the Town Officers, upon notice from the Code Enforcement Officer, are hereby directed to institute any and all actions and proceedings, either legal or equitable, including seeking injunctions of violations and the imposition of fines, that may be appropriate or necessary to enforce the provisions of the Ordinance in the name of the Town. The Town Officers, or their authorized agent are hereby authorized to enter into administrative consent agreements for the purpose of eliminating violations of the Ordinance and recovering fines without Court action. *Such agreements shall not allow an illegal structure or use to continue unless there is clear and convincing evidence that the illegal structure or use was constructed or conducted as a direct result of erroneous advice given by an authorized Town Official and there is no evidence that the owner acted in bad faith* (emphasis supplied), or unless the removal of the structure or use will result in a threat or hazard to public health and safety or will result in substantial environmental damage.

In the court's judgment, the authority that permits "consent agreements" arises out of a purpose to do equity in circumstances where there is clear and convincing evidence that a strict application of the rule of law would produce injustice. This is the same principle

[5] "A court may vacate an agency's action if it results in procedural unfairness. Therefore, procedurally, an agency's decision can be 'arbitrary and capricious' if it was not the product of the requisite processes." (internal citations omitted) Hopkins v. DHS, 2002 ME 129, ¶12, 802 A.2d 999,1002.

Received Time May. 14. 12:31PM

that underlies the doctrine of equitable estoppel. Essentially, where a citizen, in good faith, relies to his detriment upon the representation of a government official, the doctrine estops the government from enforcing the law against him because of the evident injustice of doing so. The Law Court has indicated that:

> Proper application of the doctrine of equitable estoppel rests on the factual determination that the declaration or acts relied upon must have induced the party seeking to enforce the estoppel to do what resulted to his detriment, and what he would not otherwise have done. Such reliance, however, must be reasonable. Equitable estoppel may be applied to the activities of a government official or agency in the discharge of a government function. In assessing a claim of equitable estoppel against the government, we consider the totality of the circumstances, including the nature of the government official or agency whose actions provide the basis for the claim and the government function discharged by that official or agency. A party seeking to estop the enforcement of a zoning ordinance bears a greater burden of proof because of the forceful public reasons [that] militate against restricting the enforcement of municipal zoning ordinances. H.E. Sargent, Inc. v. Town of Wells, 676 A.2d 920,925 (Me. 1996)

The court concludes that the same principle underlies and is implicit in the authority provided for in Section 16H(3). There is no evidence in this record to support a finding of detrimental reliance within the meaning of the forgoing principles. There is simply no evidence in the record that the Town or any of its agents induced Collins to do anything. In fact, at hearing of this matter while discussing the issue of "bad faith" the Town's counsel characterized Collins' decision to go ahead with his construction as simply a "bold move". The Town characterized Collins decision to build during the pendency of Cayer's appeal as a "calculated risk" and acknowledged the possibility that one might even regard Collins' actions as "foolhardy" or "misguided".(Appellee's brief at page 12) The court notes that although Collins' attorney attended the July 11, 2006 Board of Selectmen meeting at which the Town addressed this matter, he presented no evidence or argument on the issue of estoppel or detrimental reliance. (See Record, Tab 4, Page 5.)

Received Time May. 14. 12:31PM

The record is clear that initially Collins received a permit for this construction but the record is also clear that Collins was aware that Cayer challenged the validity of this permit in court. In fact, Dwayne Collins, purporting to represent himself and his family member co-owners, appeared in court at the initial hearing on June 20, 2005 relating to Cayer's challenge in AP-04-011 and was therefore obviously aware that his permit faced a legal challenge. The record also reflects that Dwayne and Roger Collins attended the November 8, 2004 Madawaska Board of Appeals meeting where Cayer raised the possibility of Collins having to remove construction, later determined on appeal to have been invalidly permitted. (See Amended Record on Appeal, Tab 2, page 5).

In short, there is no evidence, clear and convincing or otherwise, in this record that would permit a rational fact finder to conclude that Collins constructed his expansion "as the direct result of erroneous advice". The issuance of a building permit or the granting of a variance is not the equivalent of giving advice. It appears to this court that Collins did indeed gamble when he constructed his camp extension with an appeal pending. He has lost his bet.

The entry shall be:

1. The court sustains the appeal. Because the Town entered into the Consent Agreement without clear and convincing evidence that Collins' illegal structure was erected as the direct result of erroneous advice given by a Town Official, the court declares that the Consent Agreement between the Town and Collins was unauthorized and is therefore void.[6]

2. The Town shall restore the July 11, 2006 status quo by returning the $1500 fine to Collins.

3. The case is remanded back to the Zoning Board of Appeals for a hearing de novo on Collins' permit application as provided for in the court's October 25, 2005 Decision and Order in AP-04-011 or in the alternative, should Collins not

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[6] Because the court sustains the appeal on the basis indicated, there is no need to discuss the Appellant's other issues.

Received Time May. 14. 12:31PM

wish to proceed with the permit application for any reason, for appropriate enforcement action pursuant to the provisions of 16H of the Ordinance pertaining to enforcement.

Date: May 9, 2007

JUSTICE, SUPERIOR COURT

Received Time May. 14. 12:31PM