

STATE OF MAINE  
CUMBERLAND, ss.

BUSINESS AND CONSUMER COURT  
Location: Portland  
Docket No. BCD-APP-2025-\_\_\_\_\_  
(Superior Ct. Dkt. ELLSC-AP-2025-2)

**GOLDEN ANCHOR L.C.,**

Plaintiff

v.

**TOWN OF BAR HARBOR,**

Defendant

**TOWN OF BAR HARBOR'S  
OPPOSITION TO MOTION TO  
SPECIFY**

**and**

**MOTION TO DISMISS COUNTS II-XIII**

Defendant Town of Bar Harbor (the "Town"), by and through undersigned counsel, Rudman Winchell, opposes Plaintiff Golden Anchor L.C.'s Motion to Specify Future Course of Proceedings, and moves to Dismiss Counts II-XIII of Golden Anchor's Complaint, as follows.

### **BACKGROUND**

On August 5, 2024, the Town's Code Enforcement Officer (CEO) issued a Notice of Violation (NOV) to Golden Anchor for disembarking cruise ship passengers over its property without permits required by section 125-77(H) of the Town's Land Use Ordinance and Chapter 52 of the Town Code. (Compl. ¶¶ 6, 56 & Exs. A.1 through A.7.) Golden Anchor appealed that NOV to the Bar Harbor Board of Appeals (BOA). (Compl. ¶ 68.) Following a de novo evidentiary hearing, the BOA denied Golden Anchor's appeal. (Compl. ¶¶ 89-90, 93(D) & Ex. G.)

Count I of Golden Anchor's Complaint seeks judicial review of the BOA's decision pursuant to M.R. Civ. P. 80B. (Compl. ¶¶ 91-93.) Specifically, Golden Anchor alleges that the BOA erred in some 13 ways, which may be summarized as follows:

- Excluding certain written submissions of Golden Anchor (Compl. ¶ 93(A)-(C));
- Imposing the burden of proof on Golden Anchor (Compl. ¶ 93(D));
- "Exercising jurisdiction over the NOV" (Compl. ¶ 93(E));
- "Failing to rule" that Chapter 52 "effectively superseded and controlled the Land Use Ordinance" (Compl. ¶ 93(F));
- "Failing to rule" that the CEO's issuance of the NOV was "contrary to" section 125-77(H) of the Land Use Ordinance (Compl. ¶ 93(G));
- Finding that Golden Anchor failed to show it had vested rights to disembark cruise ship passengers over its property as a lawful nonconforming use, based on historical use and previously issued permits, protected by due process and "the common law of Maine, including but not limited to the Colonial Ordinance and the Wharfs and Weirs Act" (Compl. ¶ 93(H)-(J), (L), (M));
- Finding that Golden Anchor had "allowed" the cruise ship disembarkations at issue, when the Town's ordinances did not provide Golden Anchor with authority to prevent the disembarkations or any "standards or processes" to distinguish passengers from crew (Compl. ¶ 93(K));
- "[F]ail[ing] to consider" that Chapter 52 was "invalid and illegal" because it was adopted by the Town Council without a Town Meeting vote (Compl. ¶ 93(M)); and

- Making “improper” findings and findings not supported by substantial evidence (Compl. ¶ 93(M)).

Based on these claims, Golden Anchor requests that the Court

issue an Order reversing the BOA’s decision and vacate the CEO’s Notice of Violation as improper and illegal as based on an invalid Chapter 52 which was impermissibly adopted by a Town Council that was not authorized to adopt an amendment to the Town’s Land Use Ordinance under the Town Charter and 125-9(E) of the Town’s Land Use Ordinance, and to provide all other such relief as may be meet and just.

(Compl. at 28; *see also* Compl. ¶ 10 (indicating grounds on which Golden Anchor “challenges the Board of Appeals decision as clearly based on Chapter 52”).

The remainder of Golden Anchor’s Complaint sets forth a dozen repetitive, confusingly named, purportedly independent counts, as follows:

- Count II seeks a declaration that Chapter 52 was improperly adopted by the Town Council without a Town Meeting vote, and is therefore invalid and void (Compl. at 33);
- Count III seeks a declaration that Chapter 52 was improperly adopted by the Town Council without a Town Meeting vote and thereby violated Golden Anchor’s due process rights, and further seeks an injunction against Chapter 52’s enforcement against Golden Anchor (Compl. at 34-35);
- Count IV seeks a declaration that Chapter 52 was improperly adopted by the Town Council without a Town Meeting vote, and thereby violated Golden

Anchor's due process rights, and further seeks an injunction against Chapter 52's enforcement against Golden Anchor (Compl. at 36)<sup>1</sup>;

- Count V seeks a declaration that Chapter 52 and the BOA's decision violate Golden Anchor's rights "under the common law of Maine, the Colonial Ordinance in accordance with the Wharves and Weirs Act, and the Constitution of Maine and pursuant to the permits and licenses issued to" Golden Anchor (Compl. at 39);
- Count VI seeks an order that the Town is estopped from enforcing the NOV "as confirmed by the BOA decision" against Golden Anchor based on the Town's acceptance of cruise ship anchorage reservations and disembarkation fees, as well as its alleged failure to issue "standards or procedures" to differentiate passengers from crew (Compl. at 41);
- Count VII seeks a declaration that Chapter 52 is unlawful and invalid because it provides no "standards or procedures" to differentiate passengers from crew, and improperly delegates to Golden Anchor the "inherently governmental power" of counting the passengers disembarking over its property, and further seeks an injunction against Chapter 52's enforcement against Golden Anchor (Compl. at 43-44);
- Count VIII seeks a declaration that Chapter 52's requirement that Golden Anchor count the passengers disembarking over its property violates Golden

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<sup>1</sup> Golden Anchor's prayer for relief in Count IV is substantively identical to its prayer for relief in Count III, even though the body of Count IV does not deal with the manner in which Chapter 52 was adopted, but rather alleges that Chapter 52 violates Golden Anchor's vested rights in previously issued permits. (Compl. ¶¶ 112-18.)

Anchor's due process rights, and an injunction against its enforcement against Golden Anchor (Compl. at 44-45);

- Count IX seeks a declaration that Chapter “violates the Town’s Home Rule authority” and Golden Anchor’s due process rights because Golden Anchor is without power to prevent cruise ship passengers from disembarking over its property, and further seeks an injunction against Chapter 52’s enforcement against Golden Anchor (Compl. at 45);
- Count X seeks a declaration that the Town’s permit application forms relating to Chapter 52 violate Golden Anchor’s due process rights, and an injunction against enforcement of Chapter 52 against Golden Anchor (Compl. at 49-50);
- Count XI seeks a declaration that Chapter 52 is arbitrary and irrational, and thereby violates the due process, equal protection, and other provisions of the Maine and U.S. Constitutions, and further seeks an injunction against Chapter 52’s enforcement against Golden Anchor (Compl. at 51-52);
- Count XII seeks a declaration that Chapter 52 “violates the Town’s Home Rule authority” and Golden Anchor’s due process rights by deeming violations to constitute a “nuisance,” and further seeks an injunction against Chapter 52’s enforcement against Golden Anchor (Compl. at 53); and finally
- Count XIII alleges bias on the part of two members of the BOA, and asks the Court to vacate the decision of the BOA (Compl. at 55).

On February 7, 2025, Golden Anchor filed a Motion to Specify Future Course of Proceedings, in accordance with M.R. Civ. P. 80B(i).

## ARGUMENT

### I. Golden Anchor's Various Claims in Counts II to XIII are Duplicative of its Rule 80B Claim and Must Be Dismissed.

Rule 80B of the Maine Rules of Civil Procedure allows a party seeking judicial review of government agency action to join any number of independent claims for relief as separate counts. M.R. Civ. P. 80B(i). A petitioner raising such independent claims is required to move, within 10 days after filing the complaint, “requesting the court to specify the future course of proceedings, including the timing of briefs and argument and the scope and timing of discovery and other pretrial proceedings including pretrial conferences.” Although Rule 80B review is generally limited to the administrative record, the Rule provides for discovery on independent claims “as in other civil actions.” M.R. Civ. P. 80B(j).

Independent claims, however, must be truly independent. “[W]hen direct review is available pursuant to Rule 80B, it provides the exclusive process for judicial review unless it is inadequate.” *Gorham v. Androscoggin Cty.*, 2011 ME 63, ¶ 22, 21 A.3d 115. Duplicative claims—i.e., claims based on the same facts and seeking the same relief—are subject to dismissal. *See, e.g., Cape Shore House Owners Ass’n v. Town of Cape Elizabeth*, 2019 ME 86, ¶¶ 8-9, 209 A.3d 102 (affirming dismissal of declaratory judgment count as duplicative of Rule 80B count). This includes claims seeking declarative relief, and claims of deprivation of due process. *See, e.g., Cape Shore*, 2019 ME 86, ¶¶ 8-9, 209 A.3d 102 (declaratory relief); *Colby v. York Cty. Comm’rs*, 442 A.2d 544, 547-48 (Me. 1982) (due process claims); *see also Kane v. Comm’r of the HHS*, 2008 ME 185, ¶¶ 30-32, 960 A.2d 1196 (holding claim under 42

U.S.C. § 1983 was duplicative of Rule 80C claim and properly dismissed). As the Court explained in *Cape Shore*,

A claim for a declaratory judgment is proper in circumstances where a challenge to a regulation or ordinance is necessary to resolve a dispute regarding a planned action, before the matter actually proceeds and the challenged ordinance is applied to the detriment of the plaintiffs—in other words, as an anticipatory challenge. **After a municipal agency has adjudicated a matter, however, a contention that the decision was erroneous because it infringes upon some superior legal authority becomes subsumed within the essence of matters that must be brought pursuant to Rule 80B to question whether the particular action of a municipal administrative agency is consistent with the requirements of law. This is true even when a party asserts that the challenged ordinance is inconsistent with statutory or constitutional provisions.** Therefore, if, pursuant to Maine Rule of Civil Procedure 80B(i), a complaint contains both a Rule 80B appeal and an ostensibly independent challenge to the law applied by the municipal body, the latter may properly be dismissed as duplicative if it relies on the same factual allegations, and seeks the same relief as the Rule 80B appeal.

2019 ME 86, ¶ 8, 209 A.3d 102 (quotation marks and citations omitted) (emphasis added); *see also Colby*, 442 A.2d at 547-48 (concluding that due process claims relating to agency's failure to hold a public hearing, exclusion of evidence, and lack of opportunity to examine witnesses could be adequately addressed through Rule 80B review).

Golden Anchor's Counts II through XIII are entirely duplicative of Count I seeking review under Rule 80B. Counts II through XII, although not labeled as such, seek a declaratory judgment that Chapter 52, the NOV, and/or the BOA's decision are invalid or violate various provisions of state or federal law. This is precisely the scenario discussed in *Cape Shore*, quoted above. 2019 ME 86, ¶ 8, 209 A.3d 102. Count XIII, alleging bias on the part of certain members of the BOA in the very

administrative action being appealed, is plainly subsumed within the Rule 80B appeal. *E.g.*, *Adelman v. Town of Baldwin*, 2000 ME 91, ¶ 7, 750 A.2d 577 (“The issue of bias is properly addressed in the Rule 80B appeal . . . not in an independent claim of bias, which would be duplicative of the Rule 80B appeal.”). All of these purportedly independent claims seek the same relief (i.e., a determination that the Board of Appeals erred and that Chapter 52 and the NOV are invalid) based on the same facts. Golden Anchor had the benefit of a de novo evidentiary hearing in the BOA, spanning two separate meetings, at which it had the opportunity to introduce and did introduce evidence and offer argument on the very issues raised in its purportedly independent counts, including past permits supposedly evidencing its vested rights. (Compl. ¶¶ 84-90, 93 & Ex. G.) These claims are part and parcel of its Rule 80B appeal.<sup>2</sup>

Where Rule 80B applies, it is exclusive. *See, e.g.*, *Cape Shore*, 2019 ME 86, ¶¶ 8-9, 209 A.3d 102; *Gorham*, 2011 ME 63, ¶ 22, 21 A.3d 115. As such, Counts II through XIII of Golden Anchor’s Complaint must be dismissed. In the absence of any genuine independent count, Golden Anchor’s Motion to Specify should be denied as moot.

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<sup>2</sup> To the extent that Golden Anchor wishes to argue that any of its various arguments require consideration of facts outside the administrative record, Rule 80B explicitly allows them to request such relief through a motion for a trial of the facts. M.R. Civ. P. 80B(d); *see also Silsby v. Belch*, 2008 ME 104, ¶ 6, 952 A.2d 218 (recognizing the purpose of a Rule 80B(d) trial of the facts “is not to retry the facts but rather to permit the court to obtain facts that are not present in the record”); *Adelman*, 2000 ME 91, ¶ 7, 750 A.2d 577 (“Rule 80B(d) allows an appellant to add facts to the administrative record for a trial of the facts when an appellant establishes, with sufficient particularity, the need for a trial of such facts.”); *Colby*, 442 A.2d at 547-48 (“[H]ad plaintiff availed himself of the relief provided by Rule 80B, he could have compelled the preparation of a record, including a new hearing if necessary.”). The Town does not concede that such trial would be appropriate here, where Golden Anchor already had an opportunity to put on whatever evidence it wished, but an alleged need for further process does not excuse appellants from the exclusivity rule.

## CONCLUSION

For all of the foregoing reasons, the Town respectfully requests that this Court dismiss Counts II through XIII of Golden Anchor's Complaint, and deny its Motion to Specify as moot.

Dated: February 24, 2025

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## NOTICE

Pursuant to rule 7(b)(1) of the Maine Rules of Civil Procedure, notice is hereby given that matter in opposition to this motion pursuant to Rule 7(c) of the Maine Rules of Civil Procedure must be filed not later than twenty-one (21) days after the filing of this motion unless another time is provided by the Rules or set by the Court. Failure to file timely opposition will be deemed a waiver of all objections to this motion, allowing the Court to grant this motion without further notice or hearing.