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October 5, 2018

VIA EMAIL
Matthew Pollack, Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street Room 139
Portland, ME 04112-0368
lawcourt.clerk@courts.maine.gov

Re: Comment on Proposed Amendments to Rule 80B

Dear Mr. Pollack:

On behalf of municipal law practitioners at the law firm of Jensen Baird Gardner & Henry, I am submitting these comments in response to your September 5, 2018 Notice of Opportunity for Comment regarding the proposed implementation of civil justice reform. We appreciate the opportunity to offer these comments, which are focused on two of the proposed changes to Rule 80B.

First, the proposed amendments would change the time period within which to file an appeal seeking review of a governmental action. The existing rule provides a default time period of "30 days after notice of any action or refusal to act of which review is sought," if no other time limit is specified by statute. *See* M.R. Civ. P. 80B(b). The proposed amendment would reduce the appeal period to 28 days. We believe this change would be problematic for a few reasons. The 30-day time frame is well-established and is engrained in the minds of most municipal practitioners and litigants. In addition, most municipal ordinances reference the current Rule 80B and provide for a period of 30 days to appeal a decision (other than board of appeals decisions, which have a 45-day appeal period by statute). All of those municipalities would need to amend their ordinances as a result of this rule change. We also note that the new time period would be inconsistent with 30-A M.R.S. § 4482-A(1) (providing that land use appeals must be filed "within 30 days of the date of the vote on the final decision") and Rule 80C, which references the Maine APA for a 30-day appeal period. *See* 5 M.R.S. § 11002. These discrepancies could lead to further unwarranted confusion.

Second, and perhaps more significantly, the proposed amendments would modify Rule 80B(e), which governs the preparation of the administrative record. The existing rule requires the plaintiff to prepare and file the record with the Superior Court, but if revised as proposed, that financial and administrative burden would be shifted to the municipality in all cases. We respectfully oppose this proposed change for the following reasons:

- The preparation of an administrative record at the local level is often time consuming and expensive, especially when a transcript of the relevant proceedings must be prepared or significant copying is needed. Unlike state agencies, most municipalities do not have extensive staff or in-house attorneys to assist in the review and preparation of the administrative record. Staff frequently will not have the training or expertise to determine what must be included in the administrative record, including which ordinance provisions are required. The proposed amendments would require municipalities to expend scarce personnel resources and engage their outside attorneys to prepare the administrative records. Moreover, there is no provision in the rule requiring the plaintiff to reimburse the municipality for expenses incurred in the preparation of the record, nor does it establish a procedure for recovering these costs if the plaintiff refuses to reimburse the municipality.

- The legislature recently enacted Title 30-A, Chapter 190, which governs judicial review of municipal land use decisions. For "significant municipal land use decisions" involving certain large-scale developments, the statute requires the municipality to file the administrative record with the Superior Court. *See* 30-A M.R.S. § 4482(2). In practice, we have found that the preparation of the record by the municipality in these types of cases has not resulted in more efficient litigation. Frequently, these matters are considered by local boards without participation by the municipal attorney, and municipalities are not put on notice that they are responsible for the submission of the record or the 35-day deadline for filing. In the ordinary course, municipalities do not notify their legal counsel of appeals until they have been served with the complaint, which may occur close to or even after the statutory deadline for filing the administrative record. Finally, while the statute provides for reimbursement of the cost of producing the record in this type of appeal, it does not address whether a municipality can recover its legal costs incurred in compiling the record and coordinating with the other parties in determining the final contents of the record. These issues should be clarified before adopting further amendments to Rule 80B that could create more confusion for parties.

- Municipalities are often caught in the middle of disputes between feuding neighbors, and therefore elect not to incur the expense of participating in those appeals. However, the proposed amendments would require municipalities to become embroiled in that category of disputes and expend resources by having to prepare the administrative record.

- In terms of timing, the plaintiff only has 40 days after the complaint is filed to submit its brief under the rule (42 days under the proposed amendment), but if there is any delay in preparing the record at the municipal level, the plaintiff would be at a disadvantage in

terms of preparing a brief. This is unlike Rule 80C, in which the briefing schedule is triggered by the date when the governmental agency files the administrative record with the court. The existing rule makes sense because it places the responsibility for compiling the record on the party that needs the record first, and avoids the administrative delays that often occur under Rule 80C.

- Finally, our experience is that one of the most common causes of delay related to the administrative record is the preparation of a transcript of the proceedings when one is requested by a party. This timing issue will not be resolved by shifting the burden of producing the record to a defendant municipality.

We appreciate the opportunity to provide these written comments in response to the Notice of Opportunity for Comment, and hope that they will assist in the decision-making process. We are pleased to respond to any questions that the Court might have regarding these comments.

Sincerely,

Mark A. Bower

MAB/gw