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When are Declarations Independent?

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The Law Court recently decided a Rule 80B case and so, of course we must discuss. *Cape Shore House Owners Association v. Town of Cape Elizabeth*.

The facts are simple, and I streamline them further to focus only on what matters for the purpose of my musings:

- X sought a permit;
- the ZBA granted it;
- the abutters filed a Rule 80B challenging the decision; and
- in addition to a straight 80B, the abutters appended a second count, seeking a declaratory judgment that the Ordinance that allowed the permit was preempted under state law.

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The Law Court affirmed dismissal of the declaratory judgment count as redundant and didn't address the merits of the preemption argument (which hadn't been raised before the ZBA).

Was the second count truly redundant?

At first blush, this decision seems inconsistent with the Court's ruling in *Bangs v. Town of Wells*, 2000 ME 186, involving yours truly.

Bangs involved some of the same core facts: an 80B appeal (this time by someone denied a permit). In that suit, we also included a second declaratory judgment claim based on a state law preemption argument. No judge said the second count was redundant. To the contrary, after Justice Brennan ruled against us on the 80B appeal, Justice Crowley held a trial on the second claim (along with a third count based on 42 U.S.C. § 1983), and ruled against us on the merits. On appeal, the Law Court reversed based on the state preemption claim, finding preemption as a matter of law. Again, not a peep suggesting that the second count was duplicative of the 80B appeal.

How do you reconcile these decisions? Here's how I do it.

The only relief the Law Court in Cape Shore mentions that the abutters asked for under their second preemption count was a request to flip the ZBA decision granting the permit – to change the ZBA's adjudication. If that is the *only* relief requested in the second count, then that count is entirely redundant, because you can raise violation of a statute as a basis for challenging a permitting decision before a ZBA and then within the 80B appeal itself. The likelihood of a town board actually ruling in your favor on an argument that the town's ordinance violates state law is pretty slim, but remember, for exhaustion purposes, you must raise all your arguments – even constitutional ones – before the administrative body in order to preserve review by the court. Since the abutters here hadn't done that, the result in *Cape Shore* – dumping the second count and not addressing the preemption argument unpreserved within the Rule 80B – makes sense.

IF, however, the abutters had asked in Count II not just that the adjudication be changed – not just that the permitting decision be reversed – **but also** requested that the ordinance itself be stricken as preempted, then the second count would not seem redundant to me, because that second count would be seeking relief beyond that which the ZBA could have granted. A ZBA can't strike down an ordinance. Nor is such relief available in a straight administrative appeal of an adjudication. *See, e.g.*, 5 M.R.S. § 11007(4). A Rule 80B action challenges an adjudication and *administrative* action. A true declaratory judgment action seeking that an ordinance be stricken challenges *legislative* action. Hence, the relief granted in *Bangs* was as follows:

”Judgment vacated and remanded to the Superior Court for remand to the Town of Wells Code Enforcement Officer for action consistent with this opinion. The Town of Wells Ordinance is declared invalid insofar as it prohibits the reasonable consideration of expansion of existing mobile home parks.”

To me, the key in most cases in deciding whether an argument constitutes an independent claim is whether the relief requested pursuant to that argument goes beyond a reversal of the adjudication of the administrative body, based on an argument that that body could not have addressed in its adjudication.

Language in the *Cape Shore* decision seems to embrace this reasoning – *see* ¶ 8. The decision also discusses the viability of “anticipated challenges,” i.e. filing suit before making pursuing an administrative adjudication. *See id*. To me, that viability isn’t based on timing, but the relief sought. The request in such an “anticipated challenge” has to be to strike the ordinance, not to adjust any (non-existent) adjudication. It is thus a true declaratory judgment action. Whether that request for relief comes before or after an administrative adjudication doesn’t seem to me to be the deciding factor – it’s the relief being sought.

It’s true that timing can affect the viability of a declaratory judgment action involving private parties. Sometimes a plaintiff will file an “anticipatory” declaratory judgment action before a purported breach of a contract, asking for a ruling interpreting the contract. If there’s an actual breach, however, then forget the declaratory judgment action, the action is one for breach, and the relief involves damages. Once there’s an actual breach, the declaratory judgment claim becomes superfluous, wholly subsumed within the actual breach claim. But that analogy doesn’t carry over to a Rule 80B claim and an accompanying declaratory judgment action based on state preemption of an ordinance, because in that context, we’re talking about governmental action that doesn’t just affect the parties in the case. A true declaratory judgment action seeking that an ordinance be struck down does not become superfluous after an agency adjudication, because the declaratory judgment request goes beyond the adjudicatory relief. Striking down an ordinance affects the world in general. An individual adjudication under that ordinance does not subsume the entirety of the dispute, as happens with a contract dispute among private parties.

As a practical matter, if the complainant raises a state preemption argument as a part of its 80B, as it’s allowed to do, there’s not much of a difference whether the complainant adds a second declaratory judgment claim. In the course of ruling on the merits of preemption argument, the court’s reasoning will presumably include a “declaration” as to the legality or illegality of the ordinance, and, if the complainant prevails, hopefully the town will take that individual adjudication to heart and adjust its ordinances accordingly (although it still seems like the better course of action is to ask for a declaratory judgment directly ordering the town to do so).

Things might get more complicated if, as in *Cape Shore*, the complainant doesn’t raise the state preemption argument, but apparently unlike in *Cape Shore*, the complainant seeks declaratory relief to strike down the ordinance. I can see the Court going in three possible ways in that situation. But this blog is getting too long, so let’s end things here.