

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

LEWIS BUNKER ROHRBACH,
Plaintiff

v.

Civil No. 99-282-P-C

PAUL G. CHARBONNEAU,
Defendant

GENE CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER

On September 16, 1999, Plaintiff filed a Complaint (Docket No. 1) seeking damages for defamation. (Docket No. 1). Five days later, Plaintiff filed an Amended Complaint (Docket No. 2). Currently before the Court is Defendant's Motion to Dismiss the Amended Complaint ("Defendant's Motion") (Docket No. 5) pursuant to Federal Rule of Civil Procedure 12(b)(6).

When considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court views the plaintiff's factual averments from the complaint as true and indulges every reasonable inference in the plaintiff's favor. *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). The Court may grant a motion to dismiss "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990). When considering a motion to dismiss a claim for defamation, the standard is somewhat refined. Specifically, when considering a motion to dismiss a cause of action that is traditionally disfavored, such as defamation, courts tend to be more inclined to grant a motion to dismiss. Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 at 359 (1990). To that end, courts are more apt to consider

motions to dismiss that raise an affirmative defense contained within the complaint that alleges a disfavored cause of action. *Id.* § 1357 at 360.¹

Keeping the standard of review in mind, the Court recites the relevant facts as alleged in Plaintiff's Amended Complaint. Plaintiff is a resident of California who owns property in Rockport, Maine. Amended Complaint ¶ 1. The Defendant resides in Rockport, Maine. *Id.* ¶ 2. On June 16, 1999, the Zoning Board of Appeals for the Town of Rockport ("the Board") held a regularly scheduled public hearing. *Id.* ¶ 5. During the hearing, the Board considered Plaintiff's appeal of the Rockport Code Enforcement Officer's denial of Plaintiff's application for a building permit. *Id.* ¶ 6. Defendant testified in opposition to Plaintiff's application. *Id.* ¶ 7. During Defendant's testimony, Defendant stated: "Rohrbach is a man who cannot be trusted." *Id.* As a result of this alleged defamation, Plaintiff claims damages to his business and special damages in the form of the Board's denial of Plaintiff's appeal. *Id.* ¶ 12, 13.

Defendant's motion seeks to dismiss the Amended Complaint on the grounds that Defendant has absolute immunity from a defamation action in this context.² In particular,

¹ Although federal procedure controls this case, it is useful to note that this practice is in accord with Maine procedure. *See, e.g., Cohen v. Bowdoin*, 288 A.2d 106, 112 (Me. 1972). In particular, the *Cohen* court stated that

even though qualified privilege is, ordinarily, an affirmative defense to a complaint for defamation, it may nevertheless be invoked as the ground for dismissal of a complaint which contains within its own confines allegations of sufficient facts to show the existence and applicability of a qualified privilege.

Cohen v. Bowdoin, 288 A.2d at 112 (citation omitted).

² In the context of defamation, absolute immunity relieves the defendant from liability even if the plaintiff alleges malice. Qualified immunity, on the other hand, would protect a defendant for all claims except where defendant has been found to have acted with malice. *See McNally v. Mocarzel*, 386 A.2d 744, 746 (Me. 1978); *Cohen v. Bowdoin*, 288 A.2d 106, 112 (Me. 1972). It is important to recall that "malice" in the defamation context is not ill will, but the publication of statements knowing they are false or with reckless disregard for their truth. *See Michaud v. Town of Livermore Falls*, 381 A.2d 1110, 1113 (Me. 1978). As a practical matter, any allegation of malice in a complaint will defeat a motion to dismiss by a defendant who enjoys only qualified immunity, but a defendant accorded absolute immunity would prevail on a motion to dismiss, even if malice is alleged.

Defendant contends that he enjoys absolute immunity under Maine law for his statement because he was a witness in a quasi-judicial proceeding.

Because this cause of action arises under the Maine common law of defamation, it is helpful to review the development in Maine law of immunity relative to participants in judicial and quasi-judicial proceedings. “It is universally admitted that a judge of a court of record is not liable at common law for any act he does as judge, while acting within his jurisdiction.” *Williamson v. Lacy*, 86 Me. 80, 85, 29 A. 943 (Me. 1893). The policies buttressing this longstanding principle are well settled. A judge’s actions must be unfettered by fear of litigation. If a judge errs, appellate review provides a remedy. If a judge acts maliciously or corruptly, sanctions – including removal by appropriate means – and criminal prosecution afford appropriate remedies. Civil suits against a judge for actions taken within his or her official capacity are simply not a permissible remedy to address alleged error or impropriety.

For many – if not all – of the policy reasons that judges are afforded this absolute immunity for judicial acts, most states have furnished similar immunity to officials acting in quasi-judicial roles. In Maine, entitlement to immunity for quasi-judicial officials was first established by *Richards v. Ellis*, 233 A.2d 37 (Me. 1967). In *Richards*, the plaintiff sued the members of the licensing board of the Town of York, alleging bad faith and malice in the denial of his application for a victualer’s license. *Id.* at 37. The Maine Law Court held the board members to be absolutely immune from suit. *Id.* at 38. This holding was by no means limited to such licensing boards; rather, the *Richards* court expressly contemplated the application of this principle to other similar bodies, such as school committees and zoning boards acting in their quasi-judicial roles. *Id.* at 40. It is apparent that the Law Court’s expansion of absolute immunity in *Richards* was a logical evolution of the same immunity afforded judges, based on the same public policies. *Id.* at 38-39. Society benefits when these officials, like judges, are able to make decisions absent fear of civil litigation. *Id.* at 39. As with judges, remedies other than

civil litigation are available to redress errors or misdeeds by these officials acting in quasi-judicial roles. *Id.* at 41.

Maine has also recognized a related immunity for witnesses in judicial proceedings. As with judicial immunity, witness immunity is a long-established legal principle. *See Barnes v. McCrate*, 32 Me. 442 (1851). The public policy goals served by this privilege again are similar to those underpinning judicial immunity. “To hold otherwise would tend to intimidate a witness and to deter from a disclosure of the whole truth.” *Id.* The doctrine has been reaffirmed by the Law Court more recently. *See Dineen v. Daughan*, 381 A.2d 663, 664 (Me. 1978); *Dunbar v. Greenlaw*, 128 A.2d 218 (Me. 1956).

It is important to remember, however, that, despite its moniker, absolute immunity of this kind does have limitations. The first of these limits is the requirement that to be covered by this absolute immunity, a statement must be related to the matter at issue before the judicial body. The Law Court has recognized this “exception” to the absolute immunity afforded witnesses in judicial proceedings. *See Dineen*, 381 A.2d at 665. “For the privilege to function as intended, the statements it protects must be relevant to the judicial proceeding.”³ *Id.* at 665.

Another important limitation is the requirement that the proceeding be quasi-judicial – absolute immunity does not apply to officials in all governmental proceedings where testimony is taken. Where public authorities are engaged in legislative functions they are not conducting quasi-judicial proceedings, and absolute immunity, as established in *Richards*, does not apply.⁴ *Cohen v. Bowdoin*, 288 A.2d 106, 113 n.8 (Me. 1972). In other words, a zoning board considering a permit application may very well be conducting a quasi-judicial function, whereas

³ In *Dineen*, the Law Court was technically addressing the privilege available to attorneys in judicial proceedings. *Id.* But because the *Dineen* court recognized that the immunity afforded attorneys was essentially the same as that afforded witnesses, the distinction is probably not relevant here. *Id.* at 664-65.

⁴ The Court need not examine the immunity, if any, available to participants in such legislative proceedings.

a zoning board considering a change in the zoning ordinance as a whole would presumably be conducting a legislative function. In the former instance, the zoning board members would enjoy absolute immunity per *Richards*, whereas in the latter instance, neither the board member nor the witnesses would enjoy absolute immunity under this doctrine.⁵

One final limitation on the privilege of absolute immunity surrounds abuse of the privilege. In *Vahlsing Christina Corp. v. Stanley*, 487 A.2d 264 (Me. 1985), the Maine Law Court held that an absolute privilege for pleadings in a court proceeding could be lost where the defendant unnecessarily or unreasonably published the allegedly defamatory material “beyond the scope of the privileged circumstances.” *Id.* at 267. The plaintiff corporation in *Vahlsing* alleged that the defendant had defamed the corporation by disseminating in Texas, New Jersey, and Maine false statements originally published in a complaint in a New Jersey probate court. *Id.* at 265. In rejecting the lower court’s dismissal of the complaint, based in part on the defendant’s claim of absolute immunity, the Maine Law Court concluded that the “privilege may well have been lost by unnecessary or unreasonable publication beyond the scope of the privileged circumstances.” *Id.* at 267. Although the Maine Law Court has not expressly adopted the rule of *Vahlsing* in the quasi-judicial arena, as opposed to the judicial proceeding with which that case dealt, there is no reason to suspect the Law Court would not do so.

⁵ The Court acknowledges that the distinction between those functions that are legislative in nature and those that are quasi-judicial may not be sharp in all circumstances. While the Maine Law Court has expressly recognized the distinction in *Cohen*, the Law Court has apparently not had the opportunity to address the intricacies of the variation between the two functions. Because absolute immunity in the realm of quasi-judicial proceedings is a direct descendant of the immunity afforded in judicial proceedings, it follows that in those instances where officials are acting more like judges in a trial and less like a legislature, the immunity should attach. The *Richards* case provides some insight, by listing licensing boards, school committees, zoning boards, and various commissions including the Public Utilities Commission as agencies that could exercise quasi-judicial powers. *See Richards*, 233 A.2d at 40. Obviously there are numerous indicia that could be used to determine if a proceeding is quasi-judicial. A non-exhaustive list of such indicia includes whether the proceeding is adversarial, whether the officials must make findings of fact and apply the law to those facts, whether the results may be appealed to a court, whether the witness is sworn, whether there is an opportunity for cross examination or rebuttal, and whether a record of the proceedings is created. *Cf. Allan and Allan Arts LTD. v. Rosenblum*, 615 N.Y.S.2d 410 (N.Y. App. Div. 1994).

The Court is aware of one other attempt to expand absolute immunity with respect to a witness. *Lester v. Powers*, 596 A.2d 65 (Me. 1991), was a defamation action arising out of a tenure review process at Colby College. Lewis Lester, a professor who had been denied tenure, sued a former student, Jane Powers, alleging libel, slander, and tortious interference with contract. The suit arose out of comments Powers made in a letter to the committee reviewing Professor Lester's tenure status. *Id.* at 66-67. At the trial court level, Powers argued unsuccessfully that she was entitled to absolute immunity on the ground that she was a witness in a quasi-judicial proceeding, namely the tenure review process. *Id.* at 69. Although the issue of absolute immunity was apparently not generated on appeal, the Maine Law Court indicated support for the lower court's conclusion that absolute immunity was not available in this situation. *Id.* at 69 n.6.

Although some courts in other jurisdictions have adopted an absolute privilege for comments in the tenure review process, we have never accepted that doctrine. Our past decisions restrict absolute privilege to settings where unconstrained speech is of the highest importance.

Id. at 69 n.6.

This represents the end of the trail, however, in the development of Maine law with respect to absolute immunity in judicial and quasi-judicial proceedings. The Maine Law Court has not taken what Defendant argues is the next logical step – granting witnesses in quasi-judicial proceedings the same immunity afforded witnesses in judicial proceedings. Defendant predicates his Motion to Dismiss on this Court's recognition of such an absolute immunity, and its application to the facts alleged in the Amended Complaint.

Unable to point to a Maine case holding that absolute immunity bars defamation suits against witnesses at quasi-judicial proceedings, Defendant relies heavily on a New York case that he argues should be adopted in Maine. The facts of *Allan and Allan Arts LTD. v. Rosenblum*, 615 N.Y.S. 2d 410 (N.Y. App. Div. 1994), are remarkably similar to the case at bar. At a zoning board of appeals meeting, the defendant was testifying with regard to the plaintiff's application

for a variance.⁶ *Id.* at 411. The plaintiff sued, alleging that the defendant, during his statement to the zoning board of appeals, made various defamatory statements concerning the plaintiff. *Id.* The defendant moved to dismiss the complaint based on absolute immunity. *Id.* The trial court granted the motion to dismiss, and the New York Supreme Court, Appellate Division, affirmed the dismissal. *Id.* In its opinion, the *Rosenblum* court outlined, much as this Court has already done, the development of absolute immunity from judicial proceedings to quasi-judicial proceedings, as well as the public policy objectives served by such immunities. *Id.* at 412-13. With respect to testimony before a zoning board, the *Rosenblum* court concluded that it was part of an adversarial proceeding, and that the board, in making its decision, would necessarily have to make findings of fact and apply the law to the facts. *Id.* at 413-14. Accordingly, the *Rosenblum* court determined, the board requires a complete record including truthful testimony, unhindered by fear of civil liability just like a traditional judicial proceeding. *Id.* Finally, the *Rosenblum* court provided one additional public policy ground for affording absolute immunity to individuals who testify in quasi-judicial proceedings. Specifically, the court noted that “we are also advancing the important public policy of encouraging the active participation of the citizenry in the issues affecting the welfare of the community.” *Id.* at 415.⁷

As a counterpoint to *Rosenblum*, Plaintiff focuses the Court’s attention on a factually similar New Hampshire case in which the opposite result was reached. In *Supry v. Bolduc*, 293 A.2d 767 (N.H. 1972), Richard Supry sued Beatrice Bolduc, alleging slander. The allegedly

⁶ The Court is unable to discern from the opinion whether the defendant’s allegedly defamatory statements were made under oath.

⁷ While the facts of *Rosenblum* are indeed similar to the facts in the case at bar, one important distinction must be noted. In reaching its holding, the *Rosenblum* court relied, at least in part, on the fact that the defendant, as an abutting landowner, had a heightened role in the proceedings. The defendant had a greater interest in the proceedings because it was well established under New York law that the defendant, as an adjacent landowner, was “entitled to judicial review of the zoning board’s determination or to intervene in any proceedings . . . initiated by a disappointed applicant.” *Rosenblum*, 615 N.Y.S.2d at 414 (internal citations omitted). The Amended Complaint in this case does not establish that Defendant was an abutting landowner or that he otherwise enjoyed a greater interest in Plaintiff’s application.

slanderous remarks were made during the course of Bolduc's testimony at a public hearing in opposition to Supry's request for a zoning variance. *Id.* at 768. The defendant's testimony before the Concord Zoning Board of Adjustment followed testimony by the plaintiff, was made under oath, and was recorded. *Id.* As in *Rosenblum*, the defendant owned property adjoining the plaintiff's property subject to the proposed variance. *Id.* The New Hampshire Supreme Court rejected the defendant's contention that her comments were absolutely privileged because they were made at a quasi-judicial proceeding. *Id.* at 769. The New Hampshire Supreme Court concluded that this proceeding was simply not sufficiently important to afford the witnesses the same protection they would enjoy in a court of law. *Id.*

The occasion determines the existence and scope of the privilege, if any, and the availability of an absolute privilege must be reserved for those situations where the public interest is so vital and apparent that it mandates complete freedom of expression without inquiry into a defendant's motives. It is the judgment of this court that no such interest is presented by this case.

Id.

It is unclear from the decision in *Supry* whether, at the time, the New Hampshire Supreme Court would have afforded the zoning *officials* absolute immunity for their conduct during the consideration of the zoning variance. Subsequent decisions of the New Hampshire Supreme Court strongly suggest that zoning officials currently enjoy absolute immunity if acting in a quasi-judicial role. *See Winslow v. Town of Holderness Planning Bd.*, 480 A.2d 114, 116 (N.H. 1984) (planning board's consideration of application for subdivision is quasi-judicial); *Shargal v. New Hampshire Bd. of Examiners of Psychologists*, 604 A.2d 559, 561 (NH. 1992) (quasi-judicial officials entitled to immunity from tort actions arising out of official duties). These subsequent decisions appear to undermine, at least in part, the logic of *Supry*. The *Supry* court indicates that the consideration of a zoning variance does not rise to the level of a "vital" public interest – at least with respect to witness immunity. Yet subsequent decisions demonstrate that such proceedings are sufficiently important as to grant the presiding officials immunity, casting into doubt the *Supry* court's assertion that "[t]he occasion determines the existence and scope of

the privilege.” *Supry*, 293 A.2d at 769. In light of the New Hampshire Supreme Court’s subsequent recognition of immunity for officials at quasi-judicial proceedings, the Court is not convinced that *Supry* represents compelling authority for the proposition that witnesses in quasi-judicial proceedings are not entitled to absolute immunity.

One final source of law on this subject is worthy of review. As a general principle, the Maine Law Court relies on the Restatement of Torts. In particular, the Maine Law Court has relied on the Restatement of Torts with respect to immunity in the judicial and quasi-judicial arenas. *See, e.g., Raymond v. Lyden*, 1999 ME 59, ¶ 6, 728 A.2d 124, 126 (citing Restatement (Second) of Torts § 587, and commentary, regarding the immunity afforded to parties to judicial proceedings); *Richards v. Ellis*, 233 A.2d 37, 39 (Me. 1967) (citing Restatement of Torts § 585 regarding the immunity afforded to judicial officers); *Hurley v. Towne*, 156 A.2d 377, 379 (Me. 1959) (citing Restatement of Torts § 588 regarding the immunity afforded witnesses in judicial proceedings).

Restatement (Second) of Torts section 588 provides that “[a] witness is absolutely privileged to publish defamatory matter concerning another . . . as a part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding.” Comment *d* to Restatement (Second) of Torts section 588 defines judicial proceedings as “all proceedings in which an officer or tribunal exercises judicial functions, as to which see § 585, Comments *c* and *f*.” Section 585 of Restatement (Second) of Torts sets forth the absolute immunity afforded to judicial officers acting in their official capacity. In relevant part, Comment *c* to section 585 provides that

[t]he exercise of the judicial function is not confined to tribunals created exclusively for the performance of these functions. An executive or legislative body may exercise a judicial function, in which case the members while so acting are judicial officers withing the rule stated in this Section.

Restatement (Second) of Torts § 585, Comment *c*. Although not specifically cited in the commentary accompanying section 588, Comment *b* of section 585 provides further explanation

of the judicial function. Again referring to the immunity afforded judicial officers in section 585, Comment *b* states that

[c]ertain governmental agencies whose functions are sometimes said to be quasi-judicial are empowered to exercise a wide discretion in the application of legal principles to varying fact situations, the conclusions reached having the effect of law. While performing these functions, members of these tribunals are protected under the rule stated in this Section.

Restatement (Second) of Torts § 585, Comment *b*.

Synthesizing section 588 with the commentary for section 585 of Restatement (Second) of Torts indicates strong support for the proposition that witnesses in quasi-judicial proceedings are entitled to absolute immunity. Section 588 provides immunity to witnesses in a judicial proceeding. The commentary for section 585 defines judicial proceeding to include quasi-judicial proceedings. These two sections, considered together, offer persuasive authority for the proposition that a witness in a quasi-judicial proceeding is entitled to absolute immunity.

The establishment of absolute immunity for witnesses at quasi-judicial proceedings – as with the other forms of absolute immunity previously discussed – necessarily requires a weighing of two conflicting interests. On one side of the scale is the valuable public policy objective of unfettered participation by witnesses in quasi-judicial proceedings. On the other side of the balance is the individual’s right to be protected from defamation. The Maine Law Court expressly recognized and applied this balance in *Richards* with respect to public officials acting in quasi-judicial roles. *See Richards*, 233 A.2d at 41. With respect to the public officers that preside at quasi-judicial proceedings, the *Richards* court concluded that the public policy benefit of absolute immunity “far outweighs” any harm to the allegedly defamed individual. *Id.* The unavoidable implication of *Richards*, contrary to the New Hampshire Supreme Court’s holding in *Supry*, is that quasi-judicial proceedings are sufficiently vital, as a matter of public policy, to afford absolute immunity to participants. As with witnesses in a traditional judicial setting, there is a strong public policy benefit of having witnesses in quasi-judicial proceedings be able to testify unfettered by the fear of civil liability. Furthermore, as the *Rosenblum* court recognized,

the expansion of absolute immunity to witnesses in quasi-judicial proceedings has the added benefit of “advancing the important public policy of encouraging the active participation of the citizenry in the issues affecting the welfare of the community.” *Rosenblum*, 615 N.Y.S.2d at 415. Stated another way, the absence of absolute immunity for witnesses in quasi-judicial proceedings could have a chilling effect on necessary public participation in these proceedings.

In addition to the public policy interests served by immunity for witnesses in quasi-judicial proceedings, meaningful limitations on absolute immunity in this context already exist under Maine law. As discussed above, to be protected by this immunity, the statement must be related to the matter at issue before the quasi-judicial body. *See Dineen*, 381 A.2d at 665. Furthermore, the proceeding must truly be quasi-judicial – not legislative – in nature. *See Cohen*, 288 A.2d at 113 n.8. Finally, if the immunity is abused, it can be lost. *See Vahlsing*, 487 A.2d at 267.

Beyond these exceptions, there are other safeguards inherent in a quasi-judicial proceeding that limit the impact of any potentially defamatory statements. First, the presiding official or officials presumably have the ability to keep testimony focused on the issue at hand. Additionally, the officials can cut short any unnecessary speech that could be defamatory. While these safeguards are related to the exceptions to the immunity discussed above, in practice these safeguards are distinct because they can be implemented at the time of the testimony in a manner that can limit any damage from a defamatory statement. Another related deterrent is the fact that the subject of the potentially defamatory statement is often present at the quasi-judicial proceeding.⁸ The subject of the alleged defamatory statements then may have the opportunity to cross-examine the witness, or to rebut the potentially defamatory statement, or both. These inherent safeguards obviously cannot transform the potentially defamatory statements into

⁸ Obviously this will not always be true. However, the subject of the alleged defamatory statements was apparently present at the time the statements were uttered in the *Rosenblum* and *Supry* cases, as well as in the case at bar.

harmless speech, but this immediate opportunity to cross-examine or respond can mitigate potential damage to the subject's reputation.

Balancing the public policy interests against the rights of individuals, and considering the development of Maine common law, including the recognition of certain exceptions to absolute immunity in this arena, the Court concludes that the Maine Law Court, deciding a case presenting the same issue for resolution, would hold that witnesses at quasi-judicial proceedings enjoy the same absolute immunity as witnesses in judicial proceedings. As the *Rosenblum* court effectively demonstrated, the existence of absolute immunity for witnesses in quasi-judicial proceedings is a logical progression of the absolute immunity already afforded judges, witnesses in judicial proceedings, and officials presiding over quasi-judicial proceedings. Furthermore, the Court finds the analysis in *Rosenblum* more compelling and more consistent with existing Maine law than the New Hampshire Supreme Court's decision in *Supry*. The Court is also satisfied that this case is distinguishable from *Lester*, which addressed witness immunity in a private college's tenure review process. Finally, this conclusion is entirely consistent with the Restatement (Second) of Torts.

Having determined the existence of an absolute immunity for witnesses in quasi-judicial proceedings, the question becomes whether the immunity applies in this case. To that end, the Court must first determine if the proceeding at which this allegedly defamatory statement was made was quasi-judicial. The complaint reveals that the statement was made at a regularly scheduled public meeting of the Board. At the time Defendant was speaking, the Board was considering an appeal by Plaintiff of a building permit application that had been denied. Presumably, the Board was required to make findings of fact and then apply the zoning ordinance to those facts, in deciding whether or not to grant Plaintiff's appeal.⁹ In *Richards*, the Maine Law

⁹ Maine law requires any municipality which adopts a zoning ordinance to create a zoning board of appeals. 30-A M.R.S.A. § 4353. Section 4353 states that the zoning board of appeals must comply with the procedure set forth in 30-A M.R.S.A. section 2691. Section 2691

(continued...)

Court established that a town licensing board considering a victualer's license was acting within its quasi-judicial capacity. The consideration of an application for a victualer's license is similar to the consideration of an application for a building permit – in each instance the government agency must determine if it is appropriate to provide a license to a citizen to do something otherwise proscribed by law. Indeed, the Maine Law Court in *Richards* explicitly recognized that a zoning board was the type of body that could exercise quasi-judicial power. *Richards* 233 A.2d at 40; *see also Town of North Berwick v. Jones*, 534 A.2d 667, 670 (Me 1987) (holding that a decision of a town planning board, as a “quasi-judicial municipal body,” may collaterally estop a subsequent judicial proceeding). Accordingly, the Court is satisfied that the Board's consideration of Plaintiff's application for a building permit constituted a quasi-judicial proceeding.¹⁰

Having determined that the Board's consideration of Plaintiff's building permit application constituted a quasi-judicial proceeding, next it must be determined if Defendant was a “witness” at this quasi-judicial proceeding. The Amended Complaint reveals that Defendant was

⁹(...continued)
requires that

all decisions . . . must include a statement of findings and conclusions, as well as the reasons or basis for the findings and conclusions, upon all the material issues of fact, law or discretion presented and the appropriate order, relief or denial of relief.

30-A M.R.S.A. § 2691(3)(E). While it has not been established that the Board was compelled to comply with sections 4353 and 2691 in this case, (for example, these provisions do not apply if the Board was established prior to September 22, 1971), the Court finds that these sections lend further support to the conclusion that this proceeding was quasi-judicial in nature.

¹⁰ The Court acknowledges that *Richards* addressed the absolute immunity afforded officials – as opposed to witnesses – in quasi-judicial proceedings. The distinction, however, is of no import. As this Court has already established, the absolute immunity provided to witnesses at quasi-judicial proceedings is the result of a logical progression from the same immunity available to judges and witnesses in judicial proceedings, as well as to officials in quasi-judicial proceedings. The common genesis of these immunities dictates that there be no distinction with respect to what constitutes a quasi-judicial proceeding. Stated another way, if a proceeding is found to be quasi-judicial such that the officials are afforded absolute immunity, the same proceeding must also be quasi-judicial with respect to the witnesses that testify.

“testifying” when he made the allegedly defamatory statement. Amended Complaint ¶ 7. The Amended Complaint does not reveal whether Defendant’s testimony was sworn. In *Dunbar v. Greenlaw*, 128 A.2d 218, 224 (Me. 1956), the Maine Law Court, discussing the policy underlying witness immunity, noted that perjury statutes afford a potential remedy for false sworn statements. In other words, even though a witness is immune from civil liability for statements made during the course of testifying, the witness is not immune from criminal prosecution for perjury if false statements are made under oath. Indeed the existence of criminal perjury as an alternative remedy serves as a policy justification for the absolute immunity afforded witnesses.¹¹ Restatement (Second) of Torts section 588, which sets forth the immunity provided to witnesses in judicial proceedings, notes in the commentary that “[t]he witness is subject to the control of the trial judge in the exercise of the privilege. For abuse of it, he may be subject to criminal prosecution for perjury and to punishment for contempt.” Restatement (Second) of Torts § 588, comment *a*.¹² The holding of *Dunbar* indicates that to be a witness at a judicial proceeding – and presumably at a quasi-judicial proceeding as well – the party offering testimony must be sworn. Because the

¹¹ The possibility of perjury prosecution must remain as a remedy for the most egregious defamatory statements in this context. While a perjury prosecution is a severe and rarely employed remedy, it must be present as a deterrent to defamatory statements that would otherwise be absolutely immune from a civil suit. For example, assume a person is applying for a zoning variance to maintain a childcare facility in his home. A witness testifies before the zoning board, knowing that it is false, that the applicant is a pedophile who has abused dozens of children. Under the doctrine of absolute immunity, the applicant presumably could not maintain a civil suit for defamation against the witness, as the statement is plainly relevant to the matter being considered by the zoning board. If the witness is not sworn, there would be no criminal sanction for this abhorrent speech either. Accordingly, the Court is of the opinion that Maine law requires a witness to be giving sworn testimony before absolute immunity attaches. A public policy argument could be made that the benefit of absolute immunity for even unsworn testimony outweighs the cost of such egregious, yet presumably rare, speech. The Court concludes that, as a matter of policy and consistent with Maine law, the better approach is to reserve the powerful protection of absolute immunity for those who are providing sworn testimony under penalty of perjury.

¹² The Court notes that additional commentary to section 588 offers seemingly contrary interpretation of the rule. “The rule stated in this Section protects a witness while testifying. It is not necessary that he give his testimony under oath; it is enough that he is permitted to testify.” Restatement (Second) of Torts § 588, comment *b*.

Amended Complaint does not indicate whether or not Defendant was sworn, the Court must assume, at this stage of the case, that he was not. Accordingly, he is not a witness, and he, therefore, cannot enjoy absolute immunity.¹³

Defendant's Motion to Dismiss was predicated on the application of absolute immunity to his statement. While the Court has found that witnesses at quasi-judicial proceedings may be afforded absolute immunity, the Amended Complaint does not demonstrate that Defendant was a witness.

Accordingly, it is hereby **ORDERED** that Defendant's Motion to Dismiss the Amended Complaint be, and it is hereby, **DENIED**.

GENE CARTER
District Judge

Dated at Portland, Maine this 1st day of March, 2000.

¹³ Because, under the facts alleged in the Amended Complaint, Defendant is not a witness entitled to absolute immunity, the Court need not consider whether any exceptions to the absolute immunity afforded to witnesses at quasi-judicial proceedings might apply.