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2013 DEC 13 P 3:09

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

MONTANANS AGAINST ASSISTED
SUICIDE (MAAS), a Montana nonprofit
public benefit corporation,

Plaintiff,

v.

BOARD OF MEDICAL EXAMINERS,
MONTANA DEPARTMENT OF
LABOR & INDUSTRY,

Defendant.

Cause No.: ADV-2012-1057

**ORDER ON DEFENDANT'S
MOTION TO DISMISS**

INTRODUCTION

On December 17, 2012, Petitioner Montanans Against Assisted Suicide (MAAS) filed a petition for judicial review and declaratory judgment against Respondent Board of Medical Examiners, Montana Department of Labor and Industry (Board), seeking an order declaring position statement no. 20 invalid because the Board lacked statutory authority to adopt it. Petitioners also seek an order declaring position statement no. 20 invalid arguing it is a "rule" under the Administrative Procedure Act which the Board adopted without complying with the notice and hearing provisions of section 2-4-305(7), MCA. The Board filed a motion to dismiss

1 on October 4, 2013 based upon the following grounds: (1) the case is moot;
2 (2) MAAS has no standing because it was never injured; and (3) MAAS has
3 not been “aggrieved” so as to permit judicial review.

4 On December 10, 2013, the Court heard oral argument on the petition
5 and motion to dismiss. The matter is fully briefed. Craig D. Charlton and Margaret
6 Dore represent MAAS. Michael L. Fanning represents the Board. Upon
7 consideration of the parties’ arguments, the Court grants the motion to dismiss.

8 **BACKGROUND**

9 MAAS is a Montana nonprofit public benefit corporation located in
10 Hamilton, Montana, whose core purpose is to oppose assisted suicide and euthanasia.
11 The Board is the occupation and licensing board for health care professionals within
12 the Montana Department of Labor and Industry. Pursuant to section 2-15-1731,
13 MCA, the Board is authorized to have thirteen members: eleven health care
14 professionals and two public members. The Board’s declared statutory purpose is to
15 protect the public from unprofessional practice of medicine and “thereby provide for
16 the health needs of the people of Montana.” Section 37-3-101, MCA.

17 On December 31, 2009, the Montana Supreme Court issued its opinion
18 in *Baxter v. State*, 2009 MT 449, 354 Mont. 234, 224 P.3d 1211, in which it held that
19 under section 45-2-211, MCA, a terminally ill patient’s consent to physician aid in
20 dying constitutes a statutory defense to a physician charged with the criminal offense
21 of homicide.

22 In September 2011, two doctors, Stephen Speckhart, M.D., and Eric
23 Kress, M.D., wrote a letter asking the Board to adopt a policy “recognizing aid in
24 dying as a legitimate form of medical treatment” in which a doctor providing such
25 treatment to a competent, terminally ill patient would not risk disciplinary action.

1 (Pl.'s Memo. Estab. Admin. Rec. "Position State. No. 20," Ex. A-2 (June 12, 2013).)

2 On October 7, 2011, the Board referred the matter to its physician/hospital committee
3 to draft a response. On January 12, 2012, the physician/hospital committee gave
4 notice to interested persons of its final draft of its position statement regarding
5 physician aid in dying. On January 20, 2012, the Board adopted an amended version
6 of the position statement, subsequently posted on the Board's website identified as
7 "Position Statement No. 20."

8 On March 12, 2012, MAAS, through its attorney Craig D. Charlton,
9 wrote a letter requesting the Board to vacate the position statement no. 20 and remove
10 it from the Board's website. (Id., Ex. A-16.) On March 16, 2012, the Board revised
11 its position statement no. 20 on physician aid in dying. It read:

12 The Montana Board of Medical Examiners has been asked if
13 it will discipline physicians for participating in aid-in-dying. This
statement reflects the Board's position on this controversial question.

14 The Board recognizes that its mission is to protect the citizens
15 of Montana against the unprofessional, improper, unauthorized and
16 unqualified practice of medicine by ensuring that its licensees are
17 competent professionals. [Section] 37-3-101, MCA. In all matters of
18 medical practice, including end-of-life matters, physicians are held to
19 professional standards. If the Board receives a complaint related to
physician aid-in-dying, it will evaluate the complaint on its individual
merits and will consider, as it would any other medical procedure or
intervention, whether the physician engaged in unprofessional conduct
as defined by the laws and rules pertinent to the Board.

20 (Id., Ex. A-18.)

21 On May 2, 2012, MAAS, through its attorney Craig D. Charlton, wrote
22 another letter requesting the Board to vacate position statement no. 20 and remove
23 it from its website. In support of its request, MAAS submitted a document on
24 July 6, 2012, entitled "Summary of Legal Arguments Requiring Position Statement
25 No. 20 to be Vacated as a Matter of Law." (Id., Ex. A-21.) During the July 20, 2012

1 Board meeting, the minutes indicate the Board received information from the public
2 and interested persons regarding position statement no. 20. (Id., Ex. A-27.) On
3 September 27, 2012, MAAS filed a “Petition for a Ruling to Declare Position
4 Statement No. 20 Invalid and/or to Repeal Position Statement No. 20” seeking a
5 declaratory ruling, pursuant to section 2-4-501, MCA, that position statement 20 is
6 invalid. (Id., Ex. A-40.) On November 16, 2012, the Board held a hearing on the
7 petition. Shortly thereafter the Board issued its order denying the petition. MAAS
8 filed its petition for judicial review and declaratory judgment on December 17, 2012.

9 According to the Board, position statements are drafted to advise
10 physicians about issues related to the practice of medicine and professional issues.
11 Position paper no. 20 was not promulgated as an administrative rule and would not
12 be enforced against physicians as a rule. Instead, it was merely a restatement of the
13 Board’s obligation to process all complaints in a similar fashion, including those
14 complaints related to aid in dying. In response to the litigation in the matter pending
15 before this Court, the Board proposed to settle this case by withdrawing position paper
16 no. 20 and removing it from the Board’s website. In exchange, the Board asked
17 MAAS to dismiss its petition. MAAS refused. The Board contends it is apparent
18 MAAS is not interested in obtaining the relief it seeks in its petition—i.e., an order
19 declaring position paper no. 20 invalid. Rather, the Board argues Petitioner’s true
20 objective is to pursue a collateral attack on the Supreme Court’s decision in *Baxter*.
21 On September 20, 2013, the Board adopted a motion to withdraw all of its position
22 papers, including position paper no. 20. The Board asks the Court to dismiss the case
23 because it is now moot. Position paper no. 20 has been removed from the Board’s
24 website and database. The Board further argues MAAS has not been aggrieved and
25 has no standing to pursue judicial review.

1 MAAS contends position statement no. 20 is an invalid “rule” the Board
2 adopted in violation of the Administrative Procedure Act, sections 2-4-101 through
3 2-4-711, MCA. MAAS further argues position paper no. 20 wrongly implies assisted
4 suicide and euthanasia are permissible under Montana law; position paper no. 20 is
5 invalid because the Board has no authority to adopt a position paper interpreting a
6 Montana Supreme Court decision; and the *Baxter* decision is flawed and needs further
7 clarification to protect the public.

8 DISCUSSION

9 In support of its motion to dismiss, the Board claims there are no
10 justiciable issues before this Court. Specifically, it argues the case became moot
11 when the Board withdrew position paper no. 20 and removed it from its website
12 and database. The Board further insists MAAS has not been aggrieved and has no
13 standing to petition for judicial review.

14 The power of this Court, like all Montana courts, is limited to justiciable
15 controversies. *Greater Missoula Area Fed’n of Early Childhood Educators & Related*
16 *Personnel v. Child Start, Inc.*, 2009 MT 362, ¶ 22, 353 Mont. 201, 219 P.3d 881
17 (citations omitted). Article VII, Section 4(1) of the Montana Constitution confers
18 upon district courts original jurisdiction in “all civil matters and cases at law and in
19 equity.” The Montana Supreme Court has stated that the “cases at law and in equity”
20 provision of Article VII, Section 4(1) of the Montana Constitution “embodies the
21 same limitations as are imposed on federal courts by the ‘case or controversy’
22 language” in Article II, Section 2 of the United States Constitution. *Greater Missoula*,
23 ¶ 22. Whether an issue is justiciable is a threshold requirement to jurisdiction. In
24 *Plan Helena, Inc. v. Helena Regional Airport Auth.*, 2010 MT 26, ¶ 8, 355 Mont. 142,
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1 226 P.3d 567, the Montana Supreme Court stated the following with respect to
2 justiciability:

3 A justiciable controversy is one upon which a court's judgment
4 will effectively operate, as distinguished from a dispute invoking a
5 purely political, administrative, philosophical or academic conclusion.
6 The central concepts of justiciability have been elaborated into more
7 specific categories or doctrines—namely, advisory opinions, feigned
8 and collusive cases, standing, ripeness, mootness, political questions,
9 and administrative questions—each of which is governed by its own
10 set of substantive rules.

11 (Citations and internal quotation marks omitted.)

12 According to the Board, its members met at its regularly scheduled public
13 meeting on September 20, 2013 where it discussed, reviewed and rescinded position
14 paper no. 20 and all “Board Advisories” — the Board’s current label for position
15 papers. (Bd.’s Br. Supp. Mot. Dismiss, Ex. A attachment (Oct. 4, 2013).) The Board
16 maintains there is no actual case or controversy in the present matter and whatever
17 controversy may have existed when MAAS initiated its petition for judicial review has
18 now been resolved and is unquestionably moot. Under the mootness doctrine,

19 The requisite personal interest that must exist at the commencement
20 of the litigation (standing) must continue throughout its existence
21 (mootness). Thus, if the issue presented at the outset of the action
22 has ceased to exist or is no longer “live,” or if the court is unable
23 due to an intervening event or change in circumstances to grant
24 effective relief or to restore the parties to their original position,
25 then the issue before the court is moot.

26 *Greater Missoula*, ¶ 23 (citations omitted).

27 Because this Court has “an independent obligation to determine whether
28 jurisdiction exists and, thus, whether constitutional justiciability requirements (such as
29 standing, ripeness, and mootness) have been met,” as a preliminary matter, it is

1 necessary to determine whether there is an actual case or controversy. *Plan Helena*,
2 ¶ 11.

3 The facts presented in this case are remarkably analogous to those in
4 *Plan Helena*. There, plaintiffs challenged an airport authority board's proposed lease
5 of nine acres adjacent to the Helena airport to Blue Cross/Blue Shield. Plaintiffs
6 contended the proposed lease violated provisions of the Montana Code Annotated,
7 which they asked the court to interpret. When Blue Cross/Blue Shield determined not
8 to proceed with the lease, the Montana Supreme Court held the dispute over statutory
9 interpretation became moot. *Id.*, ¶ 12. There was no further justiciable case or
10 controversy before the district court. By proceeding to rule on the underlying merits
11 of the parties' dispute, "the court improperly rendered an advisory opinion." *Id.*

12 The heart of Petitioner's claim is their argument position paper no. 20 is
13 invalid and the Board had no authority to adopt it. When the Board rescinded position
14 paper no. 20, however, the dispute over its interpretation and questions of the Board's
15 authority or its compliance with rulemaking requirements became moot. There is no
16 longer a justiciable case or controversy before the Court, which therefore must grant
17 the Board's motion to dismiss. To rule on the underlying merits of the parties' dispute
18 would be an improper "advisory opinion—i.e., one advising what the law would be
19 upon a hypothetical state of facts or upon an abstract proposition, not one resolving an
20 actual 'case or controversy.'" *Id.*, ¶ 12 (citations omitted).

21 Because the Court concludes there is no longer an actual case or
22 controversy, there is no need to address the other issues relating to standing or the
23 merits of the petition for judicial review.

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1 Based on the foregoing, **IT IS HEREBY ORDERED** that the Board's
2 motion to dismiss the complaint is GRANTED.

3 DATED this 13th day of December 2013.

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5 
6 **MIKE MENAHAN**
7 District Court Judge

8 c: Craig D. Charlton
9 Michael L. Fanning/Anne O'Leary

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