STATE OF MAINE
Knox, SS.

SUPERIOR COURT
Docket No. CV-2021-0002
AP-2021-0002

Friends of Rockport,
John Priestley,
Mark Schwarzmann,
and Clare Tully,
Plaintiffs,

v.

Town of Rockport,
Defendant,

and

20 Central Street LLC,
Party-in-Interest.

Order on Pending Motions

John Priestley, David Barry
David Kantor,
Mark Schwarzmann,
and Winston Whitney,
Plaintiffs

v.

Town of Rockport,
Defendant,

and

20 Central Street, LLC,
Party-in-Interest.

Introduction

This civil action returns to court for consideration of Plaintiffs' second application for a temporary restraining order, by which they seek to arrest construction

on 20 Central's project to build a hotel in downtown Rockport. Plaintiffs' specific request for relief is an order suspending the operation of a building permit issued by Defendant Town of Rockport. To the civil action is joined an appeal pursuant to M.R. Civ. P. 80B, by which a substantially overlapping set of plaintiffs seeks, for the same reasons, to delay construction pending final judicial action. In the latter case, the requested relief is a motion for stay.

Once again, the parties on very short notice briefed the issues in detail and in depth. They then appeared on Tuesday, March 30, for a hearing on both requests for relief. The pending requests for temporary relief are in order for decision.

Because the procedural sequence in both cases is complicated, the court begins by recounting events and filings event-by-event. The court then examines the legal standards by which Plaintiffs' similar but not identical claims for relief must be evaluated. The court concludes with its analysis and rulings.

Those rulings are of necessity provisional. They are subject to potential modification based on the parties' ongoing filings, in particular Plaintiffs' motion for leave to amend, filed immediately before the last oral argument and based on issuance of the building permit for the hotel. The pendency of that permit application was integral to the court's second order in this rolling series of claims for relief; that it had been issued was addressed at oral argument on March 30 but the legal implications had not been developed.

Events and Filings

October 24, 2019: 20 Central submitted a site plan application for a 35-room hotel to the Rockport Planning Board.

October–December, 2019: The planning board held three meetings in which it reviewed the application, and the public submitted comments regarding the project.

January–February, 2020: 20 Central revised its site plan application in light of the public comments. The revised application contemplated a proposed hotel with the same footprint, but reduced the number of rooms from 35 to 26. 20 Central submitted the revised application to the planning board at the end of February.

February 27, 2020: A public hearing was held in which the planning board reviewed and deliberated over 20 Central's revised site plan application. The board unanimously voted to approve the application to construct the 26-room proposed hotel and issued various findings of fact. The planning board reserved its final site plan approval, however, for a later date.

February –early March, 2020: Plaintiff Tully and several others circulated two citizens' petitions—Petition A and Petition B—pursuant to 30-A M.R.S. § 2528(5).

Petition A requested an ordinance amendment mandating that an independent traffic study be submitted prior to the approval of any off-site parking, shared parking, or waiver of parking requirements. It was expressly made retroactive to any "land uses and all off-site parking facilities that ha[d] not received final approval as of 45 days prior to" the amendment's enactment.[1]

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[1] Specifically, Petition A sought the following amendment to Section 803.1(3):

> Location of Off-Street Parking: Required off-street parking in all districts shall be located on the same lot as the principal building or use, except that where off- street parking cannot be provided on the same lot, the Planning Board ~~Board of Appeals~~ may permit such off-street parking to be located a reasonable distance from the principal building or use, measured along the line of public access. If serving a business or industrial use, such parking area shall be in a business or industrial district. Such parking areas shall be held under the same ownership or lease. The Planning Board ~~Board of Appeals~~ may approve the joint use of a parking facility by 2 or more principal buildings or uses where it is clearly demonstrated that the parking facility will substantially meet the intent of the requirements by reasons of variation in the time of use by patrons or employees among such establishments. No off-site or shared parking, or waiver of parking requirements, shall be approved unless it is supported by an independent traffic study prepared by a qualified professional, hired by the reviewing authority and paid for by the applicant, which establishes that the parking facility is adequate for the proposed use and any shared use(s), will not cause undue burdens on traffic or parking in the vicinity, and will not cause safety concerns.
>
> Notwithstanding 1 M.R.S. § 302, this amendment shall apply to all land uses and all off-site parking facilities that have not received final approval as of 45 days prior to enactment of this amendment.

Petition B requested an ordinance amendment placing a 20-room cap on the number of allowable rooms within a single hotel. It was expressly made retroactive to all hotels that had not received final approval and all building permits as of March 1, 2020.[2]

Both petitions were submitted and accepted by the Town of Rockport for inclusion on the warrant for the June 9, 2020 annual town meeting. [3]

March 18, 2020: The Governor signed into law "An Act To Implement Provisions Necessary to the Health, Welfare and Safety of the Citizens of Maine in Response to the COVID-19 Public Health Emergency" (COVID response act). The legislation included provisions allowing municipal officers to postpone the date of a scheduled municipal secret ballot election or referendum. *See* P.L. 2020, ch. 617, *available at* https://legislature.maine.gov/legis/bills/getPDF.asp?paper=SP0789&item=2&snum=129.

March 23, 2020: The Rockport Select Board held a meeting in which it discussed the COVID response act and the secret ballot vote on Petitions A and B. The select board opted to postpone the town meeting and secret ballot vote (then scheduled for June 9, 2020) to a date uncertain.

April 10, 2020: Governor Mills signed an Executive Order moving Maine's primary election from June 9, 2020 to July 14, 2020 and adjusting other dates associated with the primary. Exec. Order No. 39 (April 10, 2020), *available at* https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline

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[2] Specifically, Petition B sought the following amendment to Section 917(G):

> No more than 40 (forty) rooms, in the aggregate, shall be permitted at Inns/Hotels in the 913 zoning district. No single inn or hotel, nor any combination of such uses located on the same lot, shall have more than 20 guest rooms.
>
> Notwithstanding 1 M.R.S. § 302, this amendment shall apply to all hotels and inns that have not received final approval and all building permits as of March 1, 2020.

[3] The Rockport Town Charter contemplates that the annual town meeting be held on the second Tuesday of June each year, which fell on June 9, 2020.

-files/An Order Modifying the Primary Election to Reduce Exposure to COVID-19.pdf.

May 21, 2020: The Rockport Planning Board formally approved 20 Central's application to construct the proposed hotel of 26 rooms, issuing findings of fact and conclusions of law. (The parties appear to agree that if 30-A M.R.S. 3007(6) applies, it was the planning board's decision of May 21, 2020 that started the 45-day clock for "nullify[ing] or amend[ing] a municipal land use permit by [] subsequent ... amendment ... of a local ordinance." 30-A M.R.S. § 3007(6).)

May 26, 2020: Due to the pandemic, the Rockport Select Board voted to reschedule the town meeting and referendum vote on the petitions to August 18, 2020. It further scheduled a public hearing for July 27, which included consideration of Petitions A and B.

June 9, 2020: This is the date on which the town meeting and vote on the petitions would have taken place, had it not been rescheduled due to the pandemic.

June 16, 2020: The planning board issued a notice of decision regarding the hotel application.

June 18, 2020: Plaintiffs/Petitioners Priestly and Schwartzmann, et al. timely appealed the May 21, 2020 planning board decision to the Zoning Board of Appeals.

July 5, 2020: The 45-day period following the planning board's May 21, 2020 decision came to an end. Assuming 30-A M.R.S. § 3007(6) applied, this was the last day the town could "nullify or amend" the May 21, 2020 decision by voting in favor of the ordinance amendments described in Petitions A and B. 30-A M.R.S. § 3007(6).

July 27, 2020: The Rockport Select Board held a meeting and public hearing on the items to be presented to the annual town meeting, including Petitions A and B.

August 18, 2020: The town meeting with secret ballot vote on the petitions was held. Petition A passed by a vote of 328 to 271 and Petition B passed by a vote of 332 to 250.

August 19, 2020: Counsel for 20 Central submitted a letter to the town arguing that the two petitions could not be applied to the proposed hotel because, pursuant to 30-A M.R.S. § 3007(6), they had been passed more than 45 days after the planning board's May 21, 2020 approval decision.

August–December, 2020: 20 Central obtained several permits for excavation, fill, and other preparatory work for the hotel.

January 7, 2021: Plaintiffs Friends of Rockport et al. filed a verified complaint in Case No. CV-21-02 (the independent action), seeking a declaratory judgment that the August 2020 ordinance amendments apply to 20 Central's project. Plaintiffs also sought injunctive relief to prohibit Rockport from issuing a building permit for the hotel that does not conform to the terms of the amended ordinances. In an accompanying motion for temporary restraining order (TRO) and preliminary injunction, Plaintiffs asked the court to (1) enjoin the town from granting any building permit to 20 Central for the proposed hotel, and (2) enjoin 20 Central from engaging in any construction activities.

January 12, 2021: Plaintiffs filed an amended verified complaint in the independent action.

January 19, 2021: The court, having previously granted Plaintiffs' request for a TRO on an *ex parte* basis, vacated the TRO after a hearing. The court explained: "[i]f the court vacates the TRO and the code enforcement officer issues the building permit, Plaintiffs will be able to return to court for further relief before 20 Central takes irrevocable steps in the project."

January 21, 2021: The Zoning Board of Appeals issued a decision upholding the planning board's May 21, 2020 approval of the proposed hotel.

March 5, 2021: Plaintiffs/Petitioners Priestly and Schwartzmann, et al. filed a rule 80B appeal challenging the planning board's decision, as affirmed by the Zoning Board of Appeals.

March 10, 2021: The Town of Rockport issued a building permit for a "new 26 room hotel with restaurant and associated use as Planning Board Approved with off-site satellite parking." The permit indicates that it is "subject to the Land Use Ordinance Dated June 12, 2018 since this is the date that the Planning Board was going through their review." There was no condition requiring 20 Central to reduce the number of rooms to 20 or submit to the planning process for guest parking, as required by the amended ordinances passed by referendum in August, 2020.

The same day, 80B Plaintiffs/Petitioners filed a motion asking the court to issue a

stay (1) preventing construction of the hotel pending decision on its rule 80B appeal; and 2) precluding the town "from issuing any further permits or approvals, including but not limited to any building permit for the hotel, for activity on the property that is predicated on [p]lanning [b]oard's May 21, 2020 approval."

March 17, 2021: Plaintiffs in the independent action moved for a TRO and preliminary injunction seeking to prevent any construction on the proposed hotel authorized by the building permit.

March 29, 2021: Rockport and 20 Central filed motions opposing the stay and opposing the TRO and preliminary injunction.

March 30, 2021: Plaintiffs filed a motion for leave to file a second amended verified complaint, based on issuance of the building permit.

On the same day, the court conducted oral argument on the second motion for TRO.

April 19 and 20, 2021: Rockport and 20 Central filed oppositions to Plaintiffs' motion for leave.

Standard for Decision

"A temporary restraining order may be granted only if it 'clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant.'" *Bangor Historic Track, Inc. v. Dep't of Agric., Food & Rural Res.*, 2003 ME 140, ¶ 10, 837 A.2d 129 (quoting M.R. Civ. P. 65(a)). "A party seeking injunctive relief by a temporary restraining order or a preliminary injunction has the burden of demonstrating to the court that four criteria are met." *Id.* ¶ 9. "The moving party must demonstrate that (1) it will suffer irreparable injury if the injunction is not granted; (2) such injury outweighs any harm which granting the injunctive relief would inflict on the other party; (3) it has a likelihood of success on the merits (at most, a probability; at least, a substantial possibility); and (4) the public interest will not be adversely affected by granting the injunction." *Id.*; *Ingraham v. University of Maine at Orono*, 441 A.2d 691, 693 (Me. 1982). "Failure to demonstrate that any one of these criteria are met requires that injunctive relief be denied." *Bangor Historic Track*, 2003 ME 140, ¶ 10, 837 A.2d 129.

M.R. Civ. P. 80B provides that "[e]xcept as otherwise provided by statute, the filing of the complaint does not stay any action of which review is sought, *but the court may order a stay upon such terms as it deems proper*." M.R. Civ. P. 80B(b) (emphasis added). The rule "gives persons a mechanism to test a government decision but, by imposing time limits to appeal and not automatically staying the action being reviewed, it recognizes the countervailing policy that the administration of government should not be unnecessarily impeded." *Cobbossee Dev. Grp. v. Winthrop*, 585 A.2d 190, 194 (Me. 1991). "A broad reading of the non-stay provision in the rule best reconciles these two policies by not holding government hostage by private parties unless there is some showing made to a court that a stay is proper." *Id.*

Neither the text of the rule nor the cases interpreting it state that the 4-part test for preliminary injunctions and TROs controls the court's analysis of motions to stay under 80B(b). Although the court is therefore not bound by the 4-part test and the "failure to satisfy every one of those factors will not necessarily result in a denial" of the motion to stay, this court will not deviate from other decisions in which the Superior Court has determined the standard offers "guidance to the court's evaluative process with respect to the scope and bounds of [its] discretion under 80B(b)." *Pike Indus. P. City of Westbrook*, BCD-WB-Ap-09-31 (Bus. & Consumer Ct. Nov. 17, 2009); *Mills v. Town of Bar Harbor*, No. BANSC AP-19-18, 2019 Me. Super. LEXIS 107, *14-15 (November 27, 2019). Accordingly, the court's analysis of the motion to stay will largely track its analysis of Plaintiffs' request for a TRO. *See id.*

Discussion

Irreparable Injury

Plaintiffs have made a persuasive preliminary showing that construction of the hotel in accordance with 20 Central's building permit will close off sightlines for townspeople that have existed for decades. In a scenic harborside village in which both civic enjoyment and commercial success are predicated upon scenic values, this could constitute a substantial loss. The potential loss is amplified by potential congestion or other complications resulting from traffic and parking that exceeds municipal capacity. None of this is literally "irreparable"; buildings can be removed, reconfigured, and rebuilt. Parking lots and garages can be built. In the circumstances of this tiny village

and this proposed hotel, for 20 Central to build the building only in order to deconstruct it would constitute waste of such magnitude that the court considers Plaintiffs' asserted loss to be irreparable. The same is true if parking as approved turns out to be unworkable; once the hotel is built, its guests will have to park their cars even that means village space and systems are overburdened.

Further injury relates to the process of citizen petition and civic government. Plaintiffs did exactly what they were supposed to do when aggrieved: they employed a statutory process to secure the relief they sought. They did the hard work of gathering signatures, generating a vote, and persuading their neighbors to support their cause. They "failed" only because their efforts ran afoul of a disease that overwhelmed the entire country. For the statutory relief Plaintiffs sought to be frustrated by a pandemic that ejected their neighbors from their jobs, schools, entertainment, churches and synagogues; the homes of their aged parents and infant grandchildren; and the hospital rooms of their dying loved ones, at a time when specific and substantial legal relief was otherwise offered by every body of State government, appears to contravene foundational ideas of participatory government. The court deems this to be irreparable harm of considerable magnitude.

Comparative injury

Defendant Rockport and Party-in-Interest 20 Central, too, present serious risks of irreparable injury. 20 Central hoped to build a hotel of 36 rooms, presumably having calculated costs and projected revenue on that basis. It has substantially accommodated Plaintiffs' concerns by diminishing the number of rooms to 26 and lowering the building profile by an entire floor. How much further trimming the project could stand before economic considerations would require its abandonment is not apparent on the record as thus far developed.

At oral argument, the court inquired of counsel what further evidence might be developed on the issue of irreparable harm. Responses varied. The court's preceding summary suggests further economic and geographic evidence might generate a more knowledgeable decision. Based on the information in the record, however, the court concludes that Plaintiffs' demonstrated irreparable harm exceeds that shown by the town and the developer.

Public Interest

In the court's view, the public interest would be served by a halt to construction pending final evaluation of the issues presented in these two cases. The court expressed concern at the first oral argument and in its written order of January 19 that 20 Central, by continuing its construction even as litigation was pending, was manufacturing reality that would change, to its (unfair) advantage, any future calculation of remedies by any body charged with enforcing municipal building ordinances. That concern has been, if anything, amplified by 20 Central's unhindered construction in the last two and a half months.

Likelihood of Success on the Merits

As the parties noted at the more recent oral argument, this is the element on which both claims for relief depend. The critical statute, 30-A M.R.S. 3007(6), imposed a hard deadline of 45 days for a vote to take place in response to Plaintiffs' petitions. The statutory language neither refers to any exception nor leaves apparent room for one. This presents a constitutional hurdle the court must surmount in order to provide the relief Plaintiffs seek.

The separation of powers provision of the "Maine Constitution bars Maine courts' exercise of executive or legislative power." *Burr v. Dep't of Corr.*, 2020 ME 130, ¶ 20, 240 A.3d 371. In interpreting the provision, the Law Court has stated that "'[t]he separation of governmental powers mandated by the Maine Constitution is much more rigorous than the same principle as applied to the federal government.'" *Bates v. Dep't of Behavioral & Developmental Servs.*, 2004 ME 154, ¶ 84, 863 A.2d 890. Accordingly, the Law Court has been hesitant to grant remedies that would require it to act as a "legislator[]" or to "exercise the executive branch's power to implement legislation." *All. for Retired Ams. v. Sec'y of State*, 2020 ME 123, ¶ 25 & n.10, 240 A.3d 45. More specifically, the Law Court has suggested that it "'should be uncomfortable extending a legislatively imposed deadline and [it] should do so reluctantly.'" *Id.* at n.10. Extending a statutory deadline is an "extraordinary step." *Id.*

Indeed, statutory deadlines (at least those in the election context) "serve[] an important state interest in maintaining voter confidence in the integrity of the election

by establishing a date certain—established by the people's representatives in the Legislature—on which votes are cast, a date not subject to a court's determination that 'the statutory deadline is not really a deadline at all.'" *Id.* ¶ 20. To discard such a statutory deadline "would amount to a judicial re-writing of the election laws"—a prospect that would offend Maine's strong separation of powers provision. *Id.*; Me. Const. Art. III, § 2.

There are, broadly, three major categories of cases in which courts have modified statutory deadlines in emergency circumstances. Although these categories do not exhaust the universe of possible justifications for judicial action, this court is satisfied its justification in this case must be found in one of them if it exists at all.

Executive orders and legislative enactments may expressly authorize judicial modification of statutory deadlines in the face of an emergency situation. *See, e.g., State v. Williams*, 945 So. 2d 106, 109 (La. App. 2006) (statutory deadline excused where executive order, in the wake of Hurricane Katrina, expressly suspended "All deadlines in legal proceedings, including liberative prescription and peremptive periods in all courts, administrative agencies, and boards" as well as "non-constitutionally mandated deadlines in criminal proceedings"); Va. Code Ann. § 17.1-330 (allowing the judiciary to declare a state of judicial emergency, which "may suspend, toll, extend, or otherwise grant relief from deadlines, time schedules, or filing requirements imposed by otherwise applicable statutes, rules, or court orders in any court processes and proceedings, including all appellate court time limitations.").

Governors, legislatures, and courts have responded to the coronavirus pandemic by extending and suspending statutory deadlines. In interpreting measures taken by legislatures and governors, courts have been reluctant to extend deadlines beyond those expressly identified in the pertinent enactment. *See, e.g., C&R Elton Hills, LLC v. Cty. of Olmsted*, No.-CV-20-3142, 2020 Minn. Tax LEXIS 64, *7-8 (Dec. 10, 2020) (refusing to extend deadline in the property tax context, noting that "the Legislature statutorily extended the property tax petition filing deadline, but provided no such extension" of a related deadline by which the property tax petitioner needed to make certain disclosures).

This court finds no express authority by which it might modify the deadline imposed by 30-A M.R.S. 3007(6). The Governor of Maine enjoys general emergency management powers, including the authority to "[s]uspend the enforcement of any statute prescribing the procedures for conduct of state business, or the orders or rules of any state agency, if strict compliance with the provisions of the statute, order or rule would in any way prevent, hinder or delay necessary action in coping with the emergency," 37-B M.R.S. §§ 741-42, but no such authority is afforded to the courts. Similarly, none of the measures enacted in response to the pandemic—by the legislature, the governor, or the Supreme Judicial Court (*see, e.g.*, Pandemic Management Order 2(C), originally issued March 30, 2020)—vest courts with the broad power to modify statutory deadlines or, specifically, with authority to modify the timeframe established by 30-A M.R.S. § 3007(6). *See* P.L. 2020, ch. 617 (March 18, 2020); Exec. Order No. 39 (April 10, 2020); and PMO-SJC-2(C) (March 30, 2020 and as revised) ("This order does not extend any statutory requirements or deadlines, including but not limited to, statutes of limitations and statutory deadlines for appeals of governmental actions and decisions.").

Lacking legal authority to modify an unambiguous statute, the court next looks for an equitable basis on which it might afford relief. Courts have recognized that "the COVID-19 pandemic is an extraordinary circumstance that is preventing parties from meeting deadlines established both by rules and by statutes." *Dale v. Williams*, No. 3:20-cv-00031-MMD-CLB, 2020 U.S. Dist. LEXIS 151448, at *4 (D. Nev. Aug. 20, 2020). Thus, over the past year, courts have relied on an equitable doctrine, equitable tolling, to modify and extend deadlines imposed by statutes of limitations (both on a prospective and retrospective basis). *See, e.g., id.*; *Cowan v. Davis*, No. 1:19-cv-00745-DAD, 2020 U.S. Dist. LEXIS 146142, at *17 (E.D. Cal. Aug. 13, 2020).

The Law Court has explained that "[i]n cases involving the doctrine of equitable tolling," courts may conclude that "the statute of limitations is tolled when strict application of the statute of limitations would be inequitable. *Dasha by Dasha v. Me. Med. Ctr.*, 665 A.2d 993, 995 n.2 (Me. 1995).[4] The "simple fact that a deadline is phrased in an

[4] "The doctrine of equitable estoppel is distinct from the doctrine of equitable tolling." *Dasha*, 665 A.2d at 995 n.2. "In cases of equitable estoppel, the statute of limitations has expired and the defendant asserts the running of the statute of limitations as a defense."

unqualified manner does not necessarily establish that tolling is unavailable." *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714 (2019).

Not all statutes, however, are subject to equitable tolling and similar equitable doctrines. *See State v. Tucci*, 2019 ME 51, ¶17, 206 A.3d 891. The availability of equitable tolling as a remedy depends on whether a statutory deadline constitutes a statute of limitations or a statute of repose.

The distinction between these two forms of relief is explained in a decision by the Supreme Court of the United States. In *CTS Corp. v. Waldburger*, the Court stated: "In the ordinary course, a statute of limitations creates 'a time limit for suing in a civil case, based on the date when the claim accrued.'" 573 U.S. 1, 7 (2014). "A statute of repose, on the other hand, puts an outer limit on the right to bring" an action. *Id.* at 8. "That limit is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." *Id.* "The statute of repose limit is 'not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered.'" *Id.* "The repose provision is therefore equivalent to 'a cutoff.'" *Id.*

"Although there is substantial overlap between the policies of the two types of statute, each has a distinct purpose and each is targeted at a different actor." *Id.* "Statutes of limitations require plaintiffs to pursue 'diligent prosecution of known claims.'" *Id.* "Statutes of limitations 'promote justice by preventing surprises through [plaintiffs'] revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Id.* "Statutes of repose also encourage plaintiffs to bring actions in a timely manner, and for many of the same reasons." *Id.* at 9. "But the rationale has a different emphasis." *Id.* "Statutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" *Id.*

"One central distinction between statutes of limitations and statutes of repose underscores their differing purposes." *Id.* "Statutes of limitations, but not statutes of

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Id. "The defendant, however, is estopped from benefitting from the statute of limitations as a defense because the defendant has acted in such a way as to cause the claimant to forego filing a timely cause of action." *Id.*

repose, are subject to equitable tolling, a doctrine that pauses the running of, or tolls, a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Id.* (quotation marks omitted); 4 C. Wright & A. Miller, Federal Practice and Procedure §1056, p. 240 (3d ed. 2002) ("[A] critical distinction is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling"). "Statutes of repose, on the other hand, generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control." *Waldburger*, 573 U.S. at 9. "Equitable tolling is applicable to statutes of limitations because their main thrust is to encourage the plaintiff to 'pursu[e] his rights diligently,' and when an 'extraordinary circumstance prevents him from bringing a timely action,' the restriction imposed by the statute of limitations does not further the statute's purpose." *Id.* at 10. "But a statute of repose is a judgment that defendants should 'be free from liability after the legislatively determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason.'" *Id.*

The deadline of 45 days imposed in 30-A M.R.S. § 3007(6) imposes a cutoff beyond which municipal actors lose the capacity to alter by ordinance a municipal land use permitting decision. The deadline is not defined by when a plaintiff's claim accrues but by the defined action of final approval of the permit. Beyond that 45-day period, no one—not aggrieved townspeople, not the municipal applicant, and not even the municipal officers—can force changes to a municipal land use permitting decision by way of the ordinance process. The deadline therefore appears to be a statute of repose and not subject to equitable tolling.

This is an unsatisfactory conclusion. All parties were aware of the pending petitions, their aims, and their potential effect on 20 Central's project, as a result of which the effective difference between statutes of limitations and repose was inoperative—the lapse generated no unforeseen reliance interest; but the court cannot for that reason overlook a clear legal distinction.

Thus, as in *State v. Tucci*—a case where the Law Court deemed a deadline a statute of repose—section 3007(6) cuts off rights across the board, rather than cutting off a particular party's ability to claim a remedy. 2019 ME 51, ¶¶ 13-14, 206 A.3d 891; *see also Let the People Vote v. Bd. of Cty. Comm'rs*, 2005 MT 225, ¶ 20, 120 P.3d 385; *Heidbreder v. Carton*, 645 N.W.2d 355, 370 (Minn. 2002). Moreover, legislative history supports this

conclusion by confirming the purpose of section 3007(6) was to promote finality. Indeed, the bill enacting the provision was titled "An Act to Provide Certainty to Businesses and Development." L.D. 86 (112th Leg.) (2011-12).

One final category of Covid-related remedies remains. Courts have in some cases affirmed their authority to modify statutory deadlines in the face of emergencies, even in the absence of express authorization and even though remedies like equitable tolling are unavailable. Plaintiffs cite several cases in which such authority has been exercised. *See Goldstein v. Sec. of Commonwealth*, 142 N.E. 3d 560 (Mass. 2020); *Fair Maps Nevada v. Cegavske*, 463 F. Supp. 3d 1123 (D. Nev. 2020); *Dem. Nat'l Comm. v. Bostelmann*, 488 F. Supp. 3d 776 (W.D. Wis. 2020).

In *Goldstein v. Sec. of Commonwealth*, the Supreme Judicial Court of Massachusetts held that the minimum signature requirements for candidacy, in the time of pandemic, were unconstitutional as applied to the plaintiffs. 142 N.E.3d at 571. As a remedy for this constitutional violation, the court ordered, among other things, that the deadline for submitting nomination papers to local election officials for certification be extended. *Id.* at 575.

Likewise, in *Fair Maps Nevada v. Cegavske*, the United States District Court for the District of Nevada determined that the enforcement of a statutory deadline to submit required signatures in support of a ballot initiative violated the First Amendment as applied in light of COVID-19 and stay-at-home orders. 463 F. Supp. 3d at 1146-47, 1150. Accordingly, the court granted Plaintiffs' motion for a preliminary injunction that asked the court to compel the Secretary of State to extend the deadline. *See id.*

Similarly, a federal court in Wisconsin extended the statutory deadline for electronic and mail-in voter registration, reasoning that the existing deadline would substantially restrict the right to vote in light of the ongoing pandemic. *Bostelmann*, 488 F. Supp. 3d 776. There are a number of other cases in which courts have similarly modified election-related deadlines in light of the pandemic, *e.g., SawariMedia LLC v. Whitmer*, 466 F. Supp. 3d 758, 778 (E.D. Mich. 2020); *Gallagher v. N.Y. State Bd. of Elections*, 477 F. Supp. 3d 19, 43-46, 52 (S.D.N.Y. 2020), and other natural disasters, *e.g., Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016).

The common thread in these cases is that courts have the authority to modify statutory deadlines in emergency situations if enforcement of the existing statutory deadline—though lawful in ordinary circumstances—would violate a constitutional right. If this court were to conclude that the 45-day deadline imposed by the statute were unconstitutional as applied during pandemic circumstances, it would be vested with the authority to grant the remedy Plaintiffs seek.

Plaintiffs advance just this contention. Their climb is uphill and steep: the Law Court has held that "[l]aws duly enacted by the legislature are presumed constitutional and, hence, their unconstitutionality must be *clearly demonstrated* by those who challenge them." *State v. Donovan*, 344 A.2d 401, 405 (Me. 1975) (emphasis added); *see also Matheson v. Bangor Pub. Co.*, 414 A.2d 1203, 1205 (Me. 1980) ("We have [] reiterated the undesirability of the Law Court's deciding constitutional issues prematurely or otherwise than in the context of a fully developed factual situation that demands a constitutional decision."). The court is not persuaded Plaintiffs' argument is well enough developed at this preliminary stage to permit their desired finding that they are likely to prevail on constitutional grounds.

Although the court concludes Plaintiffs have not met their burden of showing a likelihood of success on the merits at this time, its decision is without prejudice to Plaintiffs. The court invites further briefing and development regarding the "likelihood of success on the merits" prong. Of particular interest to the court are the following issues:

(1) Is the 45-day deadline imposed by section 3007(6) unconstitutional as applied to the circumstances of this case?

(2) Did the issuance of the building permit on March 10, 2021 constitute a separate event under 3007(6) that generated a new 45-day deadline, thus requiring application of the two new ordinances?

Conclusion and Orders

Plaintiffs have established three of the criteria for imposition of a temporary restraining order but not the final criterion of likely success on the merits. Neither can that final issue be definitively resolved against them on the record as thus far

developed. It is therefore ORDERED that Plaintiffs' Motion for Temporary Restraining Order and Motion for Stay be denied.

Although the court concludes Plaintiffs have not met their burden of showing a likelihood of success on the merits, this decision is entered WITHOUT PREJUDICE. The court directs the clerk to schedule an oral argument on the pending motion for leave to amend. At that argument, the court will consider any further briefing the parties may wish to submit concerning the two issues identified above.

The Clerk may incorporate this Order upon the docket by reference.

Dated: April 22, 2021

Bruce C. Mallonee

The Hon. Bruce C. Mallonee
Justice, Maine Superior Court