

STATE OF MAINE  
CUMBERLAND, ss.

SUPERIOR COURT  
CIVIL/CRIMINAL ACTION  
Docket No. AP-23-2

MICHAEL MAKEE and MARY MAKEE,

Plaintiffs,

v.

TOWN OF CHEBEAGUE ISLAND,

Defendant,

and

JAMES GALLAGHER, ANNE  
GALLAGHER, NORMA DREW, AND  
JEFFERY DREW,

Parties in Interest.

**ORDER ON THRESHOLD  
JURISDICTIONAL QUESTION**

REC'D CUMB CLERKS OFC  
APR 30 '25 PM3:54

Before the court is the threshold jurisdictional question for Michael and Mary Makee's ("Plaintiffs") appeal of the Chebeague Island Board of Adjustment and Appeals' (the "Board") decision, pursuant to M.R. Civ. P. 80B. For the following reasons, this issue is REMANDED to the Board for further factual findings.

**Procedural History**

This action is one of multiple arising over the construction of a guest house on Plaintiffs' property. *See generally Gallagher v. Town of Chebeague Island*, No. AP-22-41, 2023 WL 7277282 (Me. Super. Ct. July 5, 2023). The location of the guest house subjects it to two different zoning ordinances: the Zoning Ordinance and the Shoreland Zoning Ordinance (the "SZO"). The Town of Chebeague Island's Code Enforcement Officer ("CEO") issued two permits to Plaintiffs, one under each ordinance.

Each ordinance establishes a 30-day appeal period. The SZO allows appeals past this deadline if the appealing party demonstrates good cause. The Zoning Ordinance contains no such exception. James Gallagher, Anne Gallagher, Norma Drew, and Jeffery Drew (the “Abutters”), who sought to appeal each permit outside the 30-day window, appealed the Zoning Ordinance permit directly to the Superior Court pursuant to M.R. Civ. P. 80B on September 30, 2022. *See Gallagher*, 2023 WL 7277282 \*2. The court dismissed the Abutters’ appeal, finding the Abutters did not meet the judicial standard for good cause for an untimely appeal, and Plaintiffs retained the Zoning Ordinance permit. *Id.* \*5.

The Abutters appealed the SZO permit, the subject of this action, to the Board. On December 1, the Board issued a decision concluding there was good cause to hear the Abutters’ untimely appeal based on the CEO’s lack of communication, and invalidated the SZO permit on the merits. On January 13, 2023, Plaintiffs appealed the Board’s decision to the Superior Court pursuant to R. 80B, naming the Town of Chebeague Island as Defendant and the Abutters as Parties in Interest.

Plaintiffs’ complaint asserted three counts: (1) the Board denied Plaintiffs due process in the administrative proceeding, and erred in hearing the Abutters’ appeal because there was no good cause for the late appeal; (2) the Board was equitably estopped from reversing the permit; and (3) the Board’s retroactive enlargement of time to appeal deprived Plaintiffs of their vested rights to their construction project. The parties subsequently jointly requested this bifurcated appeal to first address if the Board had the jurisdiction to hear the Abutters’ appeal under the SZO’s good cause exception. The parties agree that any future proceedings hinge on the outcome of this issue, as an untimely appeal that does not satisfy the good cause exception cannot be heard by the Board. *See Boisvert v. King*, 618 A.2d 211, 214 (Me. 1992).

## Discussion

### **I. *Gallagher* does not bar this action.**

As a preliminary question, Plaintiffs argue that the issue of good cause under the SZO is precluded from relitigation by this court's prior *Gallagher* judgment.

*Gallagher*, however, presented a different issue as in this action. Issue preclusion bars relitigation only when the barred party had the opportunity and incentive to litigate the *identical* issue in a prior proceeding, and that issue was resolved in a prior final judgment. *Portland Water Dist. v. Town of Standish*, 2008 ME 23, ¶ 9, 940 A.2d 1097. That the court is once again considering good cause does not mean the issue is identical as in *Gallagher*.

In *Gallagher*, the court decided the issue of good cause upon motion. The court was not tasked with reviewing a decision by the Board because no decision existed. The Board made no factual findings, and did not interpret an ordinance. The court conducted their own fact-finding *de novo*, rather than deferring to the Board.

This proceeding, however, does concern a Board decision, and thus the court is more limited in its review. Judicial review of zoning board decisions necessarily calls for a degree of deference from the court. *See, e.g., Grant v. Town of Belgrade*, 2019 ME 160, ¶ 8, 221 A.3d 112. Courts afford substantial deference to a board's findings of fact and consider only those facts on appeal. *See Stiff v. Town of Belgrade*, 2024 ME 68, ¶¶ 11-12, 322 A.3d 1167. Barring the parties from litigating good cause — and, by extension, the Board's jurisdiction — in a proceeding that resulted in a Board order would run counter to the limited role a court has in administrative appeals. *See Goldman v. Town of Lovell*, 592 A.2d 165, 168 (Me. 1991).<sup>1</sup>

---

<sup>1</sup> Moreover, the final judgment in *Gallagher* was issued *after* the Board proceedings where the Abutters litigated the issue of good cause, and so the *Gallagher* decision is likely not preclusive.

**II. The Board's findings are insufficient for the court to conduct meaningful review.**

Good cause exceptions to appeal deadlines can be applied in two ways: first, a court can extend an ordinance deadline if it finds “special circumstances which would result in a flagrant miscarriage of justice[;]” second, a board can extend an ordinance deadline through their own proceedings. See *Tominsky v. Ogunquit*, 2023 ME 30, ¶ 22, 294 A.3d 142 (quoting *Viles v. Town of Embden*, 2006 ME 107, ¶ 8, 905 A.2d 298). *Gallagher* gave rise to the first circumstance; here, however, the Board determined good cause, and so the standard of review changes. The court defers to the board’s fact-finding regarding *why* the appeal was untimely, but interprets good cause *de novo* as a question of law. *Id.* The court ultimately “accord[s] substantial deference to the Planning Board's characterizations and fact-findings” as to what meets that standard. *Moreau v. Town of Parsonsfield*, 2024 ME 75, ¶ 27, 327 A.3d 48 (quoting *Bryant v. Town of Wiscasset*, 2017 ME 234, ¶ 12, 176 A.3d 176). Nevertheless, application of the good cause exception is “judicial[], rather than administrative[], to prevent local arbitrariness[.]” *Brackett v. Town of Rangeley*, 2003 ME 109, ¶ 17, 831 A.2d 422 (quoting *Gagne v. Lewiston Crushed Stone Co., Inc.*, 367 A.2d 613, 619 (Me. 1976)).

The court here does not have sufficient information as to why the appeal was untimely. The Board made the following findings of fact to support their application of the good cause exception:

The Town of Chebeague Island’s Zoning and Shoreland Zoning ordinances do not specifically enshrine . . . [a] right to be notified in a timely fashion about pending permits on a neighbor’s property.

The [CEO] admitted to not making the file available to the public in a fashion and time frame that could allow an interested party to appeal *any* permit pertaining to 107 Cottage Rd.

The CEO also admitted to not returning phone calls and emails from the [Abutters] in a fashion and a time frame that

could allow an interested party to appeal any permit pertaining to 107 Cottage Rd.

There are no records in the file of any of these phone calls or emails.

The CEO admitted to having a full-time job as CEO in Old Orchard Beach and thus having limited time to deal with the issues arising as a result of his part-time job as CEO of the Town of Chebeague Island.

The [Board] did not receive the “complete” file on 107 Cottage Rd until the evening of the November 3, 2022, hearing, when the CEO supplied the board with a paper copy.

The [Abutters]’ Exhibit 17 shows a photocopy of an electrical permit application dated 10/21/22 that was not included in the paper file the CEO supplied to the [Board].

The CEO admitted that some of the permits had been “misfiled” and it took him a while to realize it.

The point made by the permittees — that the CEO had office hours on island approximately 14 times between the time of the [Abutters]’ initial inquiries about the availability of the file and the time they actually received access to the file — is not relevant. The relevant point is that the public file was not available or complete during this period, thus stymying [Abutters]’ efforts and ability to file an appeal in the timeframe specified in the Zoning Ordinance and denying their right to due process.

(R. 0001-02.) The Board made no findings regarding the Abutters’ conduct, nor did they identify any relevant dates: when the permit was issued, when the Abutters had constructive notice, when the Abutters had actual notice, when the appeal was ultimately filed, or any other information. The Board’s findings do support extending the appeal deadline, but, without more, the court cannot discern how long the deadline was extended, to what extent the CEO’s culpable conduct delayed the appeal, or even if further explanation is needed. When there are insufficient facts, the court must remand to afford the Board the opportunity to provide a sufficient basis for judicial review. *Murray v. City of Portland*, 2023 ME 57, ¶ 13, 301 A.3d 777.

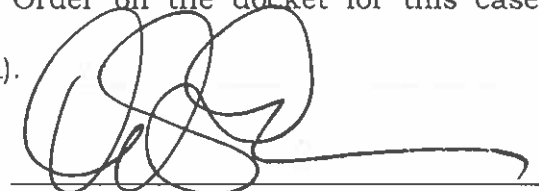
### Order

The entry shall be:

1. The portion of the appeal concerning good cause is REMANDED to the Board for further facts relevant to the determination of good cause, including notice and timing.
2. The remainder of the appeal is STAYED pending future proceedings consistent with this decision.

The Clerk is requested to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

DATED: April 30, 2025



Deborah P. Cashman  
Justice, Maine Superior Court

Entered on the Docket: 05/01/2025 ✓