STATE OF MAINE CUMBERLAND, ss.	BUSINESS AND CONSUMER COURT Location: Portland DKT. NO. BCDWB-RE-2019-14
RANDY SLAGER, Plaintiff/Counterclaim-Defendant, v. LORI L. BELL and JOHN W. SCANNELL, Defendants/Counterclaim-Plaintiffs.	**ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

This case involves a dispute between neighbors in Kennebunkport (the "Town") over the construction of a retaining wall on Defendants Lori Bell and John Scannell's property close to the boundary line between the properties. Defendants move for summary judgment on Plaintiff Randy Slager's nuisance claim contained in his amended complaint on the basis that the claim is barred by claim preclusion, issue preclusion, and a failure to exhaust administrative remedies.[1] Plaintiff filed a Rule 56(f) motion to conduct additional discovery to respond to Defendants' motion. The Court denied the Rule 56(f) because Plaintiff failed to explain "how the emergent facts, if adduced, will influence" whether his nuisance claim is barred by preclusion or a failure to exhaust administrative remedies. *Bay View Bank, N.A. v. Highland Golf Mortgagees Realty Tr.*, 2002 ME 178, ¶ 22, 814 A.2d 449. Following this, the Court held oral argument on August 10, 2021. After reviewing the parties' legal memoranda, the statements of material fact and supporting record material, and considering the parties' oral arguments, the Court issues the following decision.

[1] Plaintiff's amended complaint also contains a claim for trespass that survived Defendants' motion to dismiss. (*See* Order on Mot. Dismiss (Mar. 9, 2020).) Defendants' motion for summary judgment does not address the trespass claim.

LEGAL STANDARD

Summary judgment is granted to a moving party where "there is no genuine issue as to any material fact" and the moving party "is entitled to judgment as a matter of law." M.R. Civ. P. 56(c). "A material fact is one that can affect the outcome of the case, and there is a genuine issue when there is sufficient evidence for a fact-finder to choose between competing versions of the fact." *Lougee Conservancy v. CitiMortgage, Inc.*, 2012 ME 103, ¶ 11, 48 A.3d 774 (quotation marks omitted). When reviewing the record on a motion for summary judgment, a court views the facts in the light most favorable to the non-moving party. *See Cormier v. Genesis Healthcare LLC*, 2015 ME 161, ¶ 7, 129 A.3d 944. "Any doubt on this score will be resolved against the movant, and the opposing party will be given the benefit of any inferences which might reasonably be drawn from the evidence." 3 Harvey, *Maine Civil Practice* § 56:5 at 240 (3d, 2011 ed.).

SUMMARY JUDGMENT RECORD

Though the parties' Rule 56(h) filings contain many qualifications and objections, the key historical facts underlying this case are not truly in dispute.[2] The following is a recitation of those facts.

On December 4, 2018, the Town issued a permit to Defendants to construct the retaining

[2] The Court overrules many of the objections to the relevance of the history of the case. Such facts are relevant to the res judicata and exhaustion of remedies issues raised by Defendants in their motion. The Court also overrules objections asserting a violation of the one-fact-per-statement rule because it does not intend to decide this motion on such purely technical grounds. However, it is not overlooking more substantive noncompliance with Rule 56(h). In many instances, without record citations denied portions of statements "to the extent they are inconsistent with" whatever document was at issue in the statement. It is the parties' obligation to provide specific record citations to enable the Court to identify the ostensible inconsistencies: "The opposing statement shall admit, deny or qualify the facts asserted by reference to each numbered paragraph of the moving party's statement of material facts and *unless a fact is admitted, shall support each denial or qualification by a record citation as required by this rule*." M.R. Civ. P. 56(h)(2) (emphasis added); *see also id.* 56(h)(4) ("Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted."). To the extent the parties' statements of material fact veer toward argument or editorialization, the Court has attempted to exclude such characterizations because Rule 56(h) statements are not intended for such purposes.

walls at issue in this case. On August 1, 2019, 240 days after the permit was issued, Plaintiff appealed to the Town's Zoning Board of Appeals (the "ZBA"). Plaintiff contended that the permit was improperly issued because the retaining wall Defendants had built along the parties' shared boundary line, and the patio atop the wall that Defendants planned to build, constituted an impermissible "structure" within the fifteen-foot setback. Plaintiff argued that "[t]he walls of Ms. Bell's patio are not reinforced with rebar nor engineered to be anything other than a fence with air on both sides," and that he had "safety concerns about the structural sufficiency of Ms. Bell's patio and the height of her patio walls." Thus, Plaintiff argued, the Town had violated its own Ordinance by issuing the permit and Defendants had violated the permit. Plaintiff further contended "that the work on the subject property has created a safety problem for Mr. Slager's residence . . . ." Acknowledging that his appeal was untimely and that he needed "good cause" to avoid his appeal being dismissed as such, Plaintiff contended that the safety concerns "should give the Board good cause to hear Mr. Slager's appeal on the merits."

On September 24, 2019, the ZBA held a hearing on Plaintiff's appeal. Plaintiff brought an architect to the hearing to argue on his behalf about the ostensible safety issues with the walls. On October 1, 2019, the ZBA dismissed Plaintiff's appeal as untimely and lacking in "good cause" for the untimeliness and concluded that the ostensible safety issues Plaintiff raised were outside the ZBA's jurisdiction. Plaintiff did not appeal to the Maine Superior Court from the ZBA's denial of his appeal.

On July 17, 2019, the Town's Assistant Code Enforcement Officer ("CEO") wrote to Defendants regarding suspension of their permit. The Assistant CEO asserted differences between work as done and as permitted, including that "Wall section A11 was not constructed as per submitted plan," and that "Wall section A2 and A1 do not match submitted engineered drawing

dimensions." The Assistant CEO identified these issues as implicating Article 11.5(A)(3) of the Ordinance, which states: "A permit may be suspended or revoked, if: . . . (3) "[t]he continuation of the work authorized is endangering or may endanger the safety or general welfare of the community during the construction or work for which the permit was issued." The Assistant CEO stated that "[c]orrective actions will be . . .[v]erification by licensed professional engineer confirming wall sections A1 and A2 match submitted drawings [and] Wall section A11 needs to be reviewed structurally for potential failure due to the amount of uneven back fill."

On August 19, 2019, Plaintiff, through counsel, wrote to the Town's CEO expressing "grave concerns" and "substantial safety concerns" about the walls and demanding that the Town commission "3rd party destructive forensic structural evaluation" to address the "danger" posed by the walls. On August 22, the CEO notified Defendants that they had satisfactorily addressed the issues in the July 17 letter, except that the Town requested "an extensive review of the structural integrity and ability to continually support the current and proposed backfill on wall section A11 . . . by a licensed structural engineer." The suspension of work related to that wall remained in effect. On the same day, Plaintiff's counsel wrote to the CEO again, reiterating his "safety concerns" among other things.

On September 11, Plaintiff's counsel wrote to the CEO again. He reiterated that "Ms. Bell's elevated patio and wall section A11 pose an imminent threat to Mr. Slager's home and his family." He contended that the wall was not properly built and lacked structural support to keep it from collapsing and contended that it was a nuisance. He also directed the CEO's attention to 17 M.R.S.A. § 2851, *et seq.*, Maine's "dangerous building" statute. On September 24, 2019, in response to the CEO's August 22 letter, two licensed engineers reported that Wall A11 was in excellent condition with no signs of instability or distress and had been in place for approximately

seven months; its footing was pinned to ledge; its foundation bore on ledge; and that it appeared to be adequately constructed. The letters from the engineers were forwarded to the CEO and Plaintiff's counsel.

On or about October 31, 2019, Plaintiff filed his original Complaint in this case. Plaintiff alleged that he was concerned that Wall A11 (the "raised patio's retaining walls") was not built properly and that he was afraid it would collapse. Plaintiff alleged that he "reported his safety concerns to the Town," and that in late June 2019, he "again contacted the Town's code enforcement office to voice his concerns that Defendants' construction of a raised patio put his home in jeopardy given the proximity of the raised patio and lack of any plans and other documents supporting the raised patio's structural sufficiency." Plaintiff referenced and described the Town's July 17, 2019 correspondence described above, alleging that "[t]he corrective actions which were ordered by the Town to be taken by Defendants are to assure that the raised patio and retaining walls are safely constructed." Plaintiff also referenced and described the August 22, 2019 correspondence referenced above, as well as Plaintiff's ZBA appeal. Plaintiff alleged that his use and enjoyment of his property, and the value of that property, have been diminished by what "appears" to Plaintiff to be a safety threat based on "potentially" defective construction. His fears are based on his post-construction visual observations of Defendants' retaining walls, "to the extent possible," as well as the fact that he has not seen engineering documentation satisfying him that Wall Section A11 is safe.

On December 3, 2019, following additional correspondence, the CEO determined that Defendants had satisfied his concerns regarding Wall A11 (and all other matters) and informed Defendants that they could proceed with their work. Plaintiff was not provided a copy of the Town CEO's December 3, 2019 email but instead learned of it when his counsel visited the CEO's office

to examine the Town's file regarding Defendants' permits. A few weeks later, Plaintiff's counsel mailed the CEO a cover letter enclosing a report prepared by licensed structural engineer David Price of Price Structural Engineers, Inc. (the "Price Report"). Then, on or about December 23, 2019, Plaintiff filed his amended complaint in this Court. The amended complaint repeated the allegations in the original complaint and attached a copy of the Price Report, describing it as "a report of his findings and conclusions with respect to the safety and construction [sic] Defendants' raised patio and retaining walls." The Price Report alleged building code violations and structural safety concerns regarding the retaining walls and was referenced as a basis for alleging that "the raised patio and retaining walls . . . [are] unsafe."

On December 27, 2019, Plaintiff appealed the CEO's December 3 lifting of the stop-work order to the ZBA, contending that the CEO had failed to provide required certifications for his December 3 action under section 11.5.C of the Ordinance. On January 15, 2020, the CEO acknowledged the appeal and noted that he intended to review both sides' engineering reports and produce a formal position in writing on whether the suspension of Defendants' permits should be lifted. On January 23, 2020, Defendants' engineer, Thad Gabryszewski, P.E., S.E., responded to the Price Report, noting that it did not change his previously-expressed opinion. Mr. Gabryszewski stated that Wall A11 continued to show no signs of distress following further freeze-thaw cycles and cited a number of sources in opposition the Price Report's assertion that the wall was not built on ledge.

On January 31, 2020, the CEO requested additional information, advised the parties that he had retained an independent engineer, and stated that he would issue a decision on whether the suspension of work under the permits would remain in effect no later than February 28, 2020. On February 5, 2020, Mr. Gabryszewski responded, noting that "[t]hree engineering firms have

offered sound Opinions that counter the speculations of the Price Report and conclude that the walls are sound." Mr. Gabryszewski noted further that "[t]he Opinions are based on calculations, observations of in-progress construction, and evidence of performance." Mr. Gabryszewski then went on to compile and summarize in detail the bases for the engineers' opinions, addressing the CEO's concerns and concluding that: (1) walls A1 and A2 were designed to resist soil pressure by their weight and size and that their weight and size as built were consistent with their design; (2) wall A11 has been retaining soil for over a year through one and a half winters, showing no signs of distress despite numerous frosts, that it is pinned to ledge, that it bears on ledge and is protected from frost heaves, and is sufficiently reinforced to resist Code-required loads. Mr. Gabryszewski explained further that three test holes had been dug that very day at the base of the wall, and that "[a]ll three found ledge, and found the wall's foundation bears on ledge."

Mr. Price responded further on February 19, 2020, effectively contending that because all conceivable doubt as to the safety of the walls had not been removed, the walls should be taken apart and inspected. Mr. Gabryszewski replied on February 27, 2020, asserting that there were no reasonable grounds to believe that the retaining walls presented any safety threats in the short or long term and summarizing the evidence that wall A11 bears on ledge.

On February 28, 2020, Plaintiff's counsel sent an email to the CEO providing a copy of a draft letter from Mr. Price responding to Mr. Gabryszewski's February 27 letter. Also on February 28, 2020, the CEO wrote to Defendants, copying Plaintiff's counsel, and noting his receipt of, among other items, the August 19, 2019 letter from Plaintiff's counsel (which attached a letter from an architect); the September 24, 2019 McCullough and Gabryszewski letters; the December 17, 2019 Price Report; the February 5, 2020 Gabryszewski letter; and the February 19, 2020 Price letter. The CEO addressed each of the suspended items of work under the permit and, as to each,

summarized the information that had been provided to him. The CEO found that licensed professional engineers had demonstrated that Walls A1 and A2 were built according to an approved alternate design, and that Mr. Price had cited the wrong building code standards. As to Wall A11, the CEO noted that he had earlier found that "Wall section A11 needs to be reviewed structurally for potential failure due to the amount of uneven back fill," and that this "corrective action" would satisfy the safety-related basis for the suspension. The CEO noted that as of February 28, "[p]hotographic evidence provided indicates footings on ledge, as well as the presence of rebar within CMU cores," and concluded that "Mr. Gabryszewski's follow up documentation on February 5th, 2020 reasonably addresses the concerns raised regarding fill placement. Further site review and photographic evidence supplied by Mr. Gabryszewski supplements the already existing evidence confirming the presence of ledge beneath the wall footings. This reasonably confirms that additional frost protection is not needed." Thus, the CEO found that the requested "corrective action" had been taken and he lifted the suspension of the permits. On or about March 24, 2020, Plaintiff appealed the CEO's February 28 decision to the York County Superior Court under Rule of Civil Procedure 80B.[3]

On March 9, 2020, this Court entered an order denying Defendants' motion to dismiss Plaintiff's nuisance claim. In its March 9 order, the Court cited portions of the amended complaint that cited the Price Report for the propositions "that the construction was done in violation of building codes, that the retaining walls are not 'bearing on ledge'—meaning they are subject to 'frost heaves and overturning' and hence unsafe," and that "the retaining walls are unstable and were constructed without full-width capstones or through-stones which present safety concerns."

On March 25, 2020, Plaintiff appealed the CEO's February 28 decision to the ZBA. On

[3] Throughout the process culminating in the CEO's Decision, Plaintiff was not afforded a hearing with or before the CEO.

June 8, 2020, the ZBA held a hearing to decide whether it had jurisdiction over Plaintiff's appeal. At the conclusion of the June 8 hearing, the ZBA determined that it did not have jurisdiction over Plaintiff's appeal. On or about June 22, 2020, Plaintiff filed a motion in the York County Superior Court for leave to supplement his appeal, seeking to add an appeal of the ZBA's June 8, 2020 decision.

On July 9, 2020, this Court granted Defendants' motion to stay. The Court found that "[t]he overlap between at least the nuisance claim and the safety and code violations alleged before the Town is so significant as to be almost complete." The Court also noted the "likelihood that the Plaintiff could obtain much if not all of the relief he seeks should he prevail in the administrative proceedings before the Town and the York County Superior Court." On July 29, 2020, Plaintiff withdrew his motion for leave to supplement. On or about September 30, 2020, Plaintiff filed with the York County Superior Court a Notice of Dismissal of his appeal. On January 20, 2021, the York County Superior Court entered an order specifying that the dismissal of Plaintiff's appeal was with prejudice. Plaintiff sought reconsideration of the dismissal with prejudice but was denied.

ANALYSIS

1. Claim preclusion and issue preclusion.

Defendants argue that both claim preclusion and issue preclusion bar Plaintiff from maintaining his nuisance claim against Defendants. "The doctrine of *res judicata* is a court-made collection of rules designed to ensure that the same matter will not be litigated more than once" and it has "two separate components, issue preclusion and claim preclusion." *Machias Sav. Bank v. Ramsdell*, 1997 ME 20, ¶ 11, 689 A.2d 595 (citation and quotation marks omitted). It "applies to decisions made by municipal bodies as well as to judgments issued by the court." *Town of*

Mount Vernon v. Landherr, 2018 ME 105, ¶ 15, 190 A.3d 249.

Claim preclusion "bars relitigation if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action." *Cutting v. Down E. Orthopedic Assocs., P.A.*, 2021 ME 1, ¶ 10, 244 A.3d 226 (quotation marks omitted). The Law Court uses the "transactional test" for determining whether the "matters" are the same, which requires courts to

> examin[e] the aggregate of connected operative facts that can be handled together conveniently for purposes of trial to determine if they were founded upon the same transaction, arose out of the same nucleus of operative facts, and sought redress for essentially the same basic wrong. In such circumstances, the newly pleaded claim is precluded even if the latest suit relies on a legal theory not advanced in the first case, seeks different relief than that sought in the first case, or involves evidence different from the evidence relevant to the first case. Claim preclusion does not, however, apply when a court reserves a party's right to maintain a second action, as happens when a court dismisses a claim without prejudice.

Id. Issue preclusion, also known as "collateral estoppel," "is focused on factual issues, not claims, and asks whether a party had a fair opportunity and incentive in an earlier proceeding to present the same issue or issues it wishes to litigate again in a subsequent proceeding." *Macomber v. Macquinn-Tweedie*, 2003 ME 121, ¶ 22, 834 A.2d 131. "An issue of law or fact litigated and decided in a valid, final judgment is conclusive in a subsequent legal proceeding between the same parties." *Landherr*, 2018 ME 105, ¶ 15, 190 A.3d 249.

As it pertains to claim preclusion, Defendants argue that the first element is met because Plaintiff and Defendants were parties to the 80B appeal that stemmed from the CEO's decision to lift the suspension of the permits. The second element is satisfied, Defendants argue, because the

York County Superior Court dismissed the pertinent 80B appeal with prejudice.[4] On the third element, Defendants contend that the same transaction and nucleus of operative facts are at issue because both the nuisance claim here and the 80B appeal from the CEO's lifting of the suspension of the permits directly regard the construction of the retaining walls, their safety, and their status under permits and the Town's ordinance and building code. The redress being sought is the same (an end to the construction of the wall).

Regarding issue preclusion, Defendants assert that the identical factual issues were decided by the CEO (and then abandoned on the 80B) appeal, those factual issues being Defendants' compliance with permits, the ordinance, and the building codes. There was a final judgment because the 80B appeal was dismissed with prejudice. Finally, Defendants contend, Plaintiff had every opportunity and incentive to litigate the issue at the Town level and, in fact, did so extensively (by providing Mr. Price's opinions and Report) and successfully (for a period when he secured a suspension of the permits).

For Plaintiff's part, his only argument in opposition to Defendants' claim preclusion argument is that he could not have brought his nuisance claim against Defendants as part of the 80B proceeding. The Court agrees with Plaintiff that a nuisance claim against Defendants would not have been proper under Rule 80B(i) as a private civil claim against third parties would not have been a claim seeking "relief from governmental action . . . ." *See* M.R. Civ. P. 80B(i) (emphasis added) ("If a claim for review of governmental action is joined with a claim *alleging an independent basis for relief from governmental action*, the complaint shall contain a separate count

[4] From reading the York County Superior Court's handwritten decision dismissing the 80B appeal with prejudice, it appears implicit to this Court that the Justice in that case dismissed the appeal with prejudice as a sanction: "[T]he number of motions and pleadings and the associated costs warrant a dismissal with prejudice." (Rosenthal Aff. Ex. 28.) The Law Court has permitted dismissals with prejudice as a sanction to constitute an adjudication on the merits for purposes of *res judicata*. *E.g.*, *Fannie Mae v. Deschaine*, 2017 ME 190, ¶ 17, 170 A.3d 230.

for each claim for relief asserted . . . ."). However, the question that requires answering under the transactional test is broader than whether the specific "claim" could have been brought. *See Cutting*, 2021 ME 1, ¶ 10, 244 A.3d 226; *see also* 46 Am. Jur. 2d *Judgments* § 458 ("The present trend is to see a claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff, regardless of the number of primary rights that may have been invaded, and regardless of the variations in the evidence needed to support the theories or rights."). As it regards issue preclusion, Plaintiff contends that the process before the CEO (which culminated in the 80B appeal) did not contain the essential elements of adjudication.

Though Plaintiff only directed the "essential elements of adjudication" argument toward issue preclusion, the Court concludes that it is dispositive on both prongs of *res judicata* here. It is noteworthy to highlight that the Restatement section – adopted by the Law Court[5] and from which the "essential elements of adjudication" consideration derives – clearly states that the scope of the consideration is applicable to both claim preclusion and issue preclusion. *See Restatement (Second) of Judgments* § 83 cmt. a. ("The rule of this Section applies when a final adjudicative determination by an administrative tribunal is invoked as the basis of claim or issue preclusion in a subsequent action, whether that subsequent action is another proceeding in the same administrative tribunal or is a proceeding in some other administrative or judicial tribunal."). Under section 83(2),

> An adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including:
> (a) Adequate notice to persons who are to be bound by the adjudication . . . ;

[5] *See N. Berwick v. Jones*, 534 A.2d 667, 670 (Me. 1987) (issue preclusion); *Maines v. Sec'y of State*, 493 A.2d 326, 329 (Me. 1985) (claim preclusion).

> (b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;
> (c) A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status, or a specific series thereof;
> (d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and
> (e) Such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

Id. Though the process before the CEO undeniably contained much of the above, the Court concludes that it was of such an ad hoc nature that it cannot completely satisfy the essential elements of adjudication under consideration (e).[6] Most notably and persuasive to the Court, Plaintiff was not afforded an actual hearing in which the parties were all in one room (physical or in cyberspace) and at which Plaintiff and his counsel could more extensively probe the evidence offered in opposition to Plaintiff's position. The process before the CEO did not lack in documentation, but the Court cannot say it contained all the essential elements of adjudication such that Plaintiff's nuisance claim against Defendants is barred by *res judicata*.[7] The process before the CEO here lacked the type of formal hearing that occurred in *North Berwick v. Jones*:

> On August 25, 1982, Jones appeared, with counsel, before the Town's Planning Board to contest the notice and claimed that the Town was "without jurisdiction" to control his filling activities because no watercourse existed on the lot. Several witnesses made

[6] The Court is cognizant of the fact that it previously referenced the overlap between the nuisance claim here and the decision on appeal to the York County Superior Court in the 80B action. Per the considerations the Court must undertake to determine whether *res judicata* applies, the Court does not believe overlap does not automatically equates to the application of *res judicata*.

[7] If the process before the decisionmaker was insufficient for *res judicata* purposes, the 80B appeal cannot remedy this because the Superior Court would not have been deciding the issue anew. *See Fair Elections Portland, Inc. v. City of Portland*, 2021 ME 32, ¶ 20, 252 A.3d 504 (Superior Court and Law Court review is "for error of law, abuse of discretion or findings not supported by substantial evidence in the record.").

> presentations to the Board, including the Town's site evaluator, the Town's code enforcement officer, and a geologist hired by Jones. After argument by Jones's counsel, the Board tabled action on the question whether a watercourse existed on the lot until the next meeting to be held on September 8, 1982.

534 A.2d 667, 668 (Me. 1987).

The Court notes that it does not intend for this conclusion to be read to state that such a hearing at the municipal level is necessary in every case for *res judicata* to apply. In this case, though, the Court believes a more formal process before the Town was required for it to bear the essential elements of adjudication, particularly regarding such a hyper-technical issue requiring extensive expert input. Because of this, the Court denies Defendants' motion on the *res judicata* grounds.

2. Failure to exhaust administrative remedies.

Defendants also contend that Plaintiff's nuisance claim is barred by a failure to exhaust administrative remedies because Plaintiff abandoned his 80B appeal from the CEO's decision to lift the suspension of the permits. As the Law Court has described it,

> [t]he doctrine of exhaustion of administrative remedies requires a party who seeks an administrative remedy or who challenges an administrative action to pursue that remedy or challenge to a conclusion before the administrative agency prior to initiating action in the courts. [T]he rule is primarily designed to allow administrative agencies to correct their own errors, clarify their policies, and reconcile conflicts before resorting to judicial relief.

Marshall v. Town of Dexter, 2015 ME 135, ¶ 22, 125 A.3d 1141 (citations and quotation marks omitted). The Court does not find this doctrine to be applicable in these circumstances. This is not an instance like *Dexter* where the plaintiff received an adverse decision before the Town and then skipped an available municipal appeal to a governing board, resorting instead to filing a separate lawsuit against the Town in the Superior Court effectively seeking to overturn the

municipal decision. Here, though Plaintiff did not pursue to completion his 80B appeal of the CEO's decision to lift the suspension on the permits, his action against Defendants is not an action in which he is seeking to overturn the CEO's decision. Instead, he is seeking to obtain equitable and legal relief from his neighbors for what he alleges is tortious conduct. Had Plaintiff failed to appeal the CEO's decision to lift the suspension of the permits and instead filed a civil action in the Superior Court against the Town seeking a declaration that the permits were in violation of the Town's ordinance and relevant building codes, the Court would agree that Plaintiff failed to exhaust his administrative remedies. That is not the type of sequence that is at issue here, however. The Court denies Defendants' motion regarding failure to exhaust administrative remedies.

CONCLUSION

As the Court has detailed above, neither *res judicata* nor a failure to exhaust administrative remedies bar Plaintiff's nuisance claim as a matter of law. Defendants' motion for summary judgment is therefore denied.

The entry is:

1. Defendants Lori Bell and John Scannell's motion for summary judgment is **DENIED**.
2. The Clerk is directed to incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

Dated: 8/12/2021

Hon. M. Michaela Murphy
Justice, Maine Superior Court