STATE OF MAINE
WALDO, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. BELSC-RE-2021-007

JEFFREY R. MABEE, et al.,

Plaintiffs/Petitioners,

v.

CITY OF BELFAST, MAINE, et al.,

Defendants/Respondents

PLAINTIFFS' REPLY TO DEFENDANT CITY OF BELFAST'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

(Title to Real Estate Involved)

INTRODUCTION

The City has acknowledged in its Response that Nordic approached the City in March 2021 to solicit the City's contractual agreement to use its eminent domain powers to obtain the land Nordic needs to place its industrial pipes into Penobscot Bay. (Herbig Aff. ¶18). Nordic and the City then created a pretext for the taking - which is that the City exercised its eminent domain authority to create a new public park and to secure walking public trails in the intertidal land.

Effectuating contracts between the City and Nordic to use eminent domain to acquire the land Nordic needs to place its industrial pipes across Lot 36 and the adjacent intertidal land is not even remotely equivalent to the preexisting well-developed land use plan reviewed by the United States Supreme Court in *Kelo* and by the Law Court in *The Portland Company*. Rather, the contracts between the City and Nordic create a presumption of illegality that the taking was unconstitutional and statutorily prohibited for the purposes the City documented for using its eminent domain powers.

A. The City's Desire to Expedite Nordic's Industrial Project is the Dominant Purpose for the Eminent Domain Taking of the Plaintiff's Property.

The City has documented in its contracts with Nordic and its Order of Condemnation that

the dominant purpose for taking Plaintiffs' property was for Nordic's benefit, to make possible Nordic's commercial and industrial development of Lot 36 and the intertidal land.[1]

On August 12, 2021, the City issued its Order of Condemnation ("Order") and recorded it in the Waldo County Registry of Deeds on August 16, 2021 (Book 4493, Page 304)[2]. The public exigency proffered for the taking is "to clear title defects," a euphemism that the City and Nordic use to describe the title claims asserted by Plaintiffs in the pending Declaratory Judgment action to quiet title.[3]

The pretextual nature of the public purposes espoused by the City is also shown by the July 9, 2021 City-Nordic Purchase and Sale Agreement[4], and the September 3, 2021 City-to-Nordic Easement Agreement;[5] both primarily drafted by Nordic's counsel and both of which render the City's ability to ever use Lot 36 as a real public park virtually impossible. Indeed, the City's September 3, 2021 Easement limits the City from removing soil or adding fill, disturbing

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[1] That the dominant and primary purpose for the taking of the above-referenced property and property rights was to extinguish property rights that were impediments to Nordic placing its industrial pipes into Penobscot Bay is expressly stated in: (i) the Fourth Amendment to the Evaluations Agreement and Options and Purchase Agreements ("Fourth Amendment"), solicited by Nordic, drafted by Nordic, and executed by the City, Nordic and the Belfast Water District ("BWD") on April 21, 2021; (2) the July 9, 2021 City-Nordic Purchase and Sale Agreement ("City-NORDIC P&S"); (iii) the July 12, 2021 Offer letter from the City of property owners whose property and property rights the City and Nordic sought to take; (iv) the unrecorded City-to-Nordic deed, executed by the City and delivered to Nordic on or before July 16, 2021 (the text of which is attached to the City-NORDIC P&S as Exhibit A); and the recorded Easement from the City to Nordic dated September 3, 2021, the text of which is attached to the City-NORDIC P&S as Exhibit D. Nordic was the primary drafter of all of the foregoing documents.

[2] A true copy is attached to the Third Affidavit of Kimberly J. Ervin Tucker, Esq. ("Third Tucker Aff.") as Exhibit A.

[3] April 21, 2021 Fourth Amendment to Evaluations Agreement and Options and Purchase Agreement and July 9, 2021 City-NORDIC P&S Agreement, Exhibit B. Third Tucker Aff., Exhibits B and C.

[4] Third Tucker Aff., Exhibit B, p. 3, § 1 and p. 4, § 3.A-C.

[5] On September 7, 2021, the Easement from the City to Nordic was recorded in the Waldo County Registry of Deeds. Third Tucker Aff., Exhibit D. The City-to-Nordic Easement executed on September 3, 2021: (i) encumbers the entire Lot 36 parcel; and (ii) allows the so-called public park. The Nordic Easement, however, prohibits the City from constructing any permanent structure on Lot 36, and further limits the City's use of this land stating: "(i) [n]o earth shall be removed, no fill may be added, and no other change shall be made to the final designed surface grade of the Property [by the City] without the written permission of Grantee (i.e., Nordic).

the soil, and installing any structures, improvements, or impermeable surfaces and grants Nordic an easement over all of Lot 36. *See*, Third Tucker Aff., Exhibit D.

B. The City's Taking Is Unconstitutional.

The City misstates the question raised by the Plaintiffs' preliminary injunction motion. The question is whether the *dominant purpose* of the City's taking is for a public use; *Portland Co. v. City of Portland*, 2009 ME 98, ¶ 30, 979 A.2d 1279; or whether the taking was a "mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 478 (2005). If the dominant purpose is to create a private benefit, the taking cannot be saved by ancillary (and disputed) claims of public benefit.

In *Kelo*, the Court emphasized that New London took the property pursuant to a carefully considered development plan that the city had prepared, that the developer had not even been chosen when the plan was prepared, and that the developer ultimately chosen would be contractually bound to carry out the plan. *Id.* at 478 n.6, 486, 486 n.15. Here, we have precisely the opposite. The plan to take Plaintiffs' property, detailed first in the Fourth Amendment, was initiated *by Nordic,* (Herbig Aff. ¶ 18), for the purpose of benefiting Nordic. The supposed public benefits of a park and walking trails in the intertidal zone were thrown into the Fourth Amendment for the sole purpose of covering up the unconstitutional nature of the use of eminent domain to benefit a private developer. As the City concedes, there is no Belfast economic development plan that led to the Nordic project.

Ultimately, the identified public benefits were winnowed down by subsequent City-Nordic contractual agreements leaving only the paper illusion of City ownership of Lot 36, imposing sweeping prohibitions on the City's use of this lot, and granting Nordic permanent and perpetual use of *all of Lot 36* "forever". The City's opposition statement, and the public record of

actions taken by the City of Belfast, and Nordic, demonstrate only the absence of all of these key points in *Kelo*. These points were critical to the result, given Justice Kennedy's fifth vote in his concurring opinion emphasizing such points. *Id.* at 490-93.

The City is also silent about the public use of the *condemned* intertidal land and/or the public purpose obtained in extinguishing the Hartley assigns' restrictive covenants on Lot 36.[6] The City never uttered a word about using Lot 36 or the condemned intertidal land as a park and walking trail, or for any other public purpose, until Nordic said it needed to remove the negative covenant on Lot 36 and the adjacent intertidal land and obtain an easement for laying its pipes within the intertidal land. But the point is that the intertidal land already is presently available for public use, including for expanded recreational uses, as the public has both access and the legal right to use the intertidal land for expanded recreational uses, beyond the fishing, fowling and navigation, that the City references.

The fact that Nordic is willing to provide money and land *elsewhere* for a purported public park has nothing to do with the public use of the condemned intertidal land, which is only being taken to benefit Nordic. Taking this intertidal land is not necessary to accomplish the City's identified public purposes of enhanced public access to Penobscot Bay or expanded public recreational use beyond fishing, fowling and navigation. *See, e.g. Finks v. Maine State Highway Commission,* 328 A.2d 791, 800 (Me. 1974) (taking of marshland and intertidal flats more than 1000 feet from roadway under highway beautification statute was excessive, unreasonable and an abuse of power, and thus determined by the Law Court to be null and void).

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[6] The City has identified no public purpose served in using eminent domain to extinguish the negative easement on Lot 36. That easement only prohibits "for-profit business" being conducted on Lot 36 without the agreement of the Hartley assigns. The only reason for the City to use eminent domain to extinguish this negative easement was to benefit Nordic and allow Nordic to conduct its for-profit business on this lot by placing its pipes and a "pump house" on Lot 36.

What the City is really saying is that private property can be condemned for a private use if it will facilitate ancillary public benefits on some other property. Neither the Maine Constitution nor the United States Constitution permits the City's misreading of the public use clauses.

C. The City Fails to Demonstrate a Public Exigency Supporting the Taking.

The City argues that there must be a public exigency here because the taking of the intertidal land and conservation easement is for a public use. Basically, the City's point is that the public exigency clause adds nothing of judicial significance to the public uses clause. The City relies on 1975 and 1988 cases, but a more recent case suggests otherwise. In *Bayberry Cove Children's Land Trust v. Town of Steuben,* 2018 ME 28, ¶¶ 9-13, 180 A.3d 119, the Law Court spends four paragraphs discussing why it was not an abuse of power for the Town to find that the taking was pursuant to a public exigency, a discussion that would be irrelevant if public use alone were enough.

There is no conceivable public exigency in creating a public walking trail on the condemned intertidal land, which is currently used for expanded recreational uses by the public and protected by the Conservation Easement. Public exigency should mean that the City needs to take this particular property at this particular time, or the public purpose of the taking will be defeated.[7] The exigency here, if it exists at all, is a private one, namely, that Nordic may be

[7] In an email dated July 6, 2021, from the City's attorney, William Kelly, to Nordic's attorney, Attorney Kelly writes: "The City is not presently planning to [do] anything in particular [with lot 36] at the moment, but looking 100 years into the future, as long as the pipes are left undisturbed, I don't understand why no buildings or improvements are appropriate as a permanent restriction on the [City]." Despite Attorney Kelly's request that the City retain the right to place permanent structures on its own land, Nordic refused to allow such rights to the City in the Easement. Third Tucker Aff., Exhibit E (BF0235-BF0236). In July 2021, Belfast City Councilor Michael Hurley confirmed that plans for a park on the Eckrote property (Lot 36) were "undefined for now." And that "no determination about the use has yet to be made." Affidavit of Andrew Stevenson (Aug. 16, 2021), Exhibit 3 at ¶¶ 4, 5.

unable to proceed with its commercial enterprise if Belfast does not quickly condemn the Plaintiffs' land.

Finding a *public exigency* here is an abuse of power where the only exigency identified by the City in its Condemnation Order is "to clear ongoing alleged title defects" that are the subject of the pending Declaratory Judgment action to quiet title (BELSC-RE-2019-018). As the Law Court states in *Bayberry*, at ¶ 11, the use at the time of the taking must be public not only in a theoretical aspect but rather in actuality. The taking must be necessary, suitable for the public use, and taken only to the extent necessary. *See also, Fink v Maine State Highway Commission, supra.*

D. The City's Taking Violates 1 M.R.S. § 816.

In Maine, remedial statutes are broadly construed. *Director of Bureau of Labor Standards v. Cormier*, 527 A.2d 1297, 1300 (Me. 1987). There is no doubt from the extensive legislative history regarding enactment of 1 M.R.S. § 816 that Maine's legislators were outraged by *Kelo* and wanted to make sure what happened in Connecticut would not happen in Maine.

The first question is the meaning of "used ... for fishing" in Section 816. The City does not dispute that the intertidal land is available for use by the public for fishing. Given that the Law Court has discussed "public uses" as used in the Constitution in the sense of "available for use by all members of the public" (*Blanchard v. Dept. of Transp.*, 2002 ME 96, ¶¶ 33-34, 798 A.2d 1119), the Plaintiffs agree that "available for fishing" is the proper definition here.

The City's argument, rather, is that the public will still be able to use the land for fishing after condemnation. But that is not the point. The statute says land used for fishing *cannot be condemned* – period – if the condemnation is for any one of three purposes. Whether the

condemnation will interfere with the right to fish is irrelevant. Here, the condemnation of intertidal land violates 1 M.R.S. § 816(1)(A) and (C).

The second issue is whether the taking is for *any one* of the three prohibited purposes. Subsection (A) applies if the taking is for "the purposes of private . . . commercial [or] industrial . . . development" and subsection (C) applies for "transfer to . . . a for-profit business entity." There is no dispute that Nordic proposes a commercial or industrial development and that it is a for-profit business entity. The City says subsection (A) and (C) are inapplicable because the land is being taken for a public use and other public benefits. The problem for the City is that, under subsection (A), even if the public purpose is not a pretext, another purpose, surely not an ancillary purpose, is for private commercial or industrial development. The other problem is that, under subsection (C), whatever is being transferred to Nordic – fee or permanent easement – is a transfer of an interest in the condemned land to a for-profit business entity. Both subsections (A) and (C) of Section 816 apply here to prohibit use of eminent domain by the City of Plaintiffs' property interests.

The final issue is the significance of Section 816(3), the utilities exception, which applies only to takings "by or for the benefit of public utilities ...." But a public park and pipes to be installed in the condemned land will not benefit the Water District. The City's claim to this exception would gut Section 816. All a private developer working with an amenable municipality would have to do to get the land it wants is offer some cash or other benefit to any utility. If a private commercial development is a prohibited purpose, it is no answer to say that the proceeds from the developer will be used by a utility.

E. The City's Taking Violates 33 M.R.S. § 477-A(2).

The City claims that "there is no valid conservation easement on the relevant property." City Opp'n at 17. The fact remains, the City purports to have taken Plaintiff Friends' interest as holder of the Conservation Easement on the intertidal land on which Lot 36 fronts, and tendered to Friends, as the holder of that Conservation Easement what the City claimed to be "just compensation" for the taking (i.e. $36,000). *See* Third Tucker Aff., Exhibits G & H (at Order (Aug. 12, 2021), ¶ 7, Schedules A, C and D). The Order of Condemnation and tender of $36,000 to the Friends refutes the City's assertion that the Conservation Easement is not valid.

The City misreads 33 M.R.S. § 477 in asserting the statute does not address how a conservation easement may be terminated when the government uses eminent domain. Whether initiated by a party or anyone else, 33 M.R.S. § 477-A(2)(B) requires court approval before any conservation easement can be terminated. Subsection 2 states: "2. Amendment and termination. Amendments and termination of a conservation easement *may occur only pursuant to this subsection.*" (emphasis supplied).

Nowhere is there an exception for amending or terminating a conservation easement by eminent domain, in either the conservation easement statute nor the two eminent domain provisions on which the City relies in this taking: 23 M.R.S. §§ 3021, et seq. and 30-A M.R.S. § 3101.

The City incorrectly suggests that the subsection (2) does not apply because the City is not a party to the easement. 33 M.R.S. § 477(1) states that when the parties wish to terminate a conservation easement they must follow the procedure in 33 M.R.S. § 477(2). It does not say that subsection (2) only governs when parties seek to terminate and thus anyone else can freely terminate an easement. By its plain terms, subsection (2) is not so limited.

At the request of the City, the Maine Attorney General's Office has issued its legal opinion on the issue of whether the Conservation Easement was terminated by the City's eminent domain taking. The Maine Attorney General's Office (Lauren E. Parker, AAG) legal opinion to Kristin M. Collins, Esq. (attorney for Nordic), dated September 27, 2021, agrees with the Plaintiffs' analysis that the City and Nordic must first obtain court approval for the termination of the Conservation Easement in eminent domain. The Opinion states:

> But where, as here, the conservation easement prohibits the uses authorized by the Nordic easement, the conservation easement must be terminated or amended before Nordic can exercise the rights conveyed by the Nordic easement. And as discussed above, since 2007 the only entity with the authority to terminate, partially terminate, or amend the conservation easement to allow Nordic's use of the property pursuant to the Nordic easement is a court. 33 M.R.S. § 477-A(2), (2)(B); *see* 33 M.R.S. § 478.

See Third Tucker Aff., Exhibit I, pp 5-6.

The City ignores a critical difference between the Uniform Conservation Easement Act, 12 U.L.A. 165 (2008)("Uniform Act") and as adopted in Maine. The Uniform Act allows conservation easements to be terminated "in the same manner as other easements." In contrast in Maine, conservation easements may *only* be terminated with court approval. Uniform Act Section 2(a) includes the word "termination."[8] Maine left out "termination" when enacting the corresponding provision. Thus, in Maine, the legislature has chosen to impose additional requirements for the termination of a conservation easement different from other easements.

Finally, the City contends that even if valid the City has not acted illegally because it "has not taken steps to amend or terminate" the easement. This ignores the fact that after taking the conservation easement, the City subsequently granted Nordic an easement over the intertidal land so as to permit Nordic to do acts clearly prohibited by the easement. The City and Nordic

[8] The Uniform Act, Section 2(a) states: "Except as otherwise provided in this Act, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements." (emphasis supplied).

should be enjoined from using the City-to-Nordic easement to circumvent the protections imposed by the conservation easement, in the absence of a court order terminating the conservation easement obtained pursuant to the mandatory process in 33 M.R.S. § 477-A(2)(B) and § 478.

F. The Plaintiffs have Standing to Contest the City's Unlawful Taking.

The City argues that the Plaintiffs do not have standing because the Waldo Superior Court has not yet recognized their title interests in the intertidal land. That is a peculiar argument, given that the City, after witnessing the testimony at the June 2021 trial, elected to take the Plaintiffs' interests in the intertidal land to avoid the Superior Court decision regarding Plaintiffs' title to the intertidal land. This Court, having heard the evidence at the June 2021 trial on title, is fully apprised of the Plaintiffs' property rights.

The Order of Condemnation[9] documents the fact that the City has taken Mabee/Grace's intertidal property and the Friends' property interests. Given that the City has exercised eminent domain to take the property interests of Mabee/Grace and Friends, those plaintiffs clearly have standing to pursue the claims asserted in this case. *See* 23 M.R.S § 3029.

G. Plaintiffs Show Good Cause for the Waiver of the Bond.

As shown by the affidavit of Jeffrey Mabee and the enclosed Order Granting Preliminary Injunction, good cause exists for the waiver of security pursuant to Rule 65(b)(2)(c) of the Maine Rules of Civil Procedure given that the Plaintiffs, who have suffered irreparable harm due the violation of their constitutional rights and the improper eminent taking of their property interests, do not have sufficient financial capacity to post a bond. Requiring a bond in these circumstances would cause a financial hardship and cause Plaintiffs irreparable harm.

[9] *See* Third Tucker Aff., Exhibit A.

CONCLUSION

For all of the above reasons, Plaintiffs request that their motion be granted.

Dated: September 28, 2021

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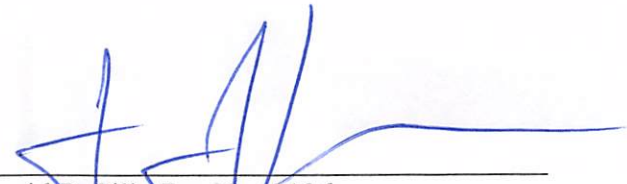

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