

STATE OF MAINE
WALDO, SS.

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

JEFFREY R. MABEE, et al.,)	
)	
Plaintiffs,)	PLAINTIFFS' MOTION FOR TRIAL
)	OF THE FACTS AND TO SPECIFY
v.)	FUTURE COURSE OF
)	PROCEEDINGS WITH
CITY OF BELFAST, MAINE, et al.,)	INCORPORATED
)	MEMORANDUM OF LAW
Defendants.)	(Title to Real Estate Involved)

Pursuant to Rules 80B(d) and 80B(i) of the Maine Rules of Civil Procedure, Plaintiffs Jeffrey Mabee and Judith Grace (“Mabee/Grace”), Friends of the Harriet L. Hartley Conservation Area (“Friends”) and Upstream Watch (“Upstream”) (collectively, “Plaintiffs”) move this Court for a trial of the facts and to specify the future course of proceedings, including the timing of filing of pleadings in response to the Plaintiffs’ Complaint¹, Plaintiffs’ Motion For Preliminary Injunction, and the scope and timing of discovery and other pretrial proceedings including pretrial conferences.

Plaintiffs are entitled to a trial of the facts. Given the finder of fact must decide whether the City’s taking was a mere pretext to benefit a private party and/or made in bad faith, it is clear that the Plaintiffs’ 80B appeal from the City’s August 12, 2021 condemnation vote is not as a matter of law limited to the self-serving record the government creates.

Decisions both before and after *Kelo v City of New London, Conn.*, 545 U.S. 469 (2005), have considered the motives of condemning authorities when considering whether a taking was

¹ Or First Amended Complaint. See Plaintiffs’ Motion For Leave To Amend Complaint filed currently with this motion.

pretextual. See *Fideicomiso De La Tierra Del Caño Martin Peña v. Fortuño*, 604 F.3d 7, 23 n.13 (1st Cir. 2010) (noting that the court was not foreclosing a challenge to a condemnation as a “mere pretext of a public purpose” (quoting *Kelo*, 545 U.S. at 478)); *Franco v. Nat’l Capitol Revitalization Corp.*, 930 A.2d 160, 171 (D.C. 2007) (acknowledging the potential for a claim that an alleged “public purpose is a pretext” to a condemnation (quoting *Kelo*, 545 U.S. at 478)); *Cty. of Hawaii v. C & J Coupe Family Ltd. P’ship*, 198 P.3d 615, 647-49 (Haw. 2008) (noting that courts must consider evidence of an illegitimate purpose and determine whether the rationale was “a mere pretext for its actual purpose to bestow a private benefit”); *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 337-38 (Pa. 2007) (“In considering whether a primary public purpose was properly invoked, this [c]ourt has looked for the ‘real or fundamental purpose’ behind a taking[,]” meaning that “the government is not free to give mere lip service to its authorized purpose or to act precipitously and offer retroactive justification.”) (citation omitted). *Kelo* itself arose in state court following a seven-day trial on whether the taking was lawful. *Kelo v. City of New London, Conn.*, 545 U.S. at 475.

Under Maine’s Constitution a fact finder decides whether a taking was in bad faith or was an abuse of power. This remains so even after Rule 80B was amended in 1967. See *The Portland Co. v. City of Portland*, 2009 ME 98, ¶ 15, 979 A.2d 1279 (appeal followed from a three-day jury-waived trial to determine whether exigent circumstances existed to justify the taking of private property); *Blanchard v. Dep’t of Transp.*, 2002 ME 96, ¶ 12, 798 A.2d 1119 (appeal followed from a three-day jury-waived trial to determine whether Public Use Clause of the Maine Constitution was satisfied); *Fuller v. Town of Searsport*, 543 A.2d 361, 362 (Me. 1988)(trial court held evidentiary hearing on whether taking was in bad faith or abuse of power).

As evidence of pretext and bad faith are not apparent in the record and given it is for the fact finder to determine whether the City's taking here of Plaintiffs' private property was a pretext and/or made in bad faith, the Rule 80B claims should be set for trial with the independent claims and subject to the same scheduling order.

A motion under Rule 80B(d) requires a detailed statement, in the form of an offer of proof, of evidence the party intends to offer at trial. Plaintiffs offer as their detailed statement the motion for preliminary injunctive relief with supporting affidavits. Plaintiffs also intend to offer evidence based on to be conducted discovery that the City's articulated public benefits statement was a pretext to benefit a private for-profit corporation and the City acted in bad faith.

In addition, as independent claims have been brought, under Rule 80B(i) the court is to specify the future course of proceeding. Once service is made, the court should hold a scheduling conference and then issue a scheduling order which shall include, among other items, the date for a jury demand. *See* M.R. Civ. P. 38(b).

The Plaintiffs also respectfully request that the Defendants City of Belfast and Nordic Aquafarms, Inc. be required to file an answer to the Complaint, as amended. While there is one count for Rule 80B relief, the Complaint, as amended, contains multiple counts that relate to independent claims pursuant to the common law, as well as constitutional and statutory claims for which there should be an answer filed.

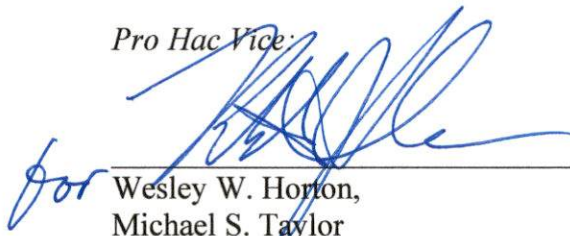
Dated: September 8, 2021

Kimberly J. Ervin Tucker, Bar No. 6969
Attorney for Plaintiffs Jeffrey Mabee,
Judith Grace, and Friends of the
Harriet L. Hartley Conservation Area
48 Harbour Pointe Drive
Lincolnton, ME 04849
(202) 841-5439
k.ervintucker@gmail.com

David B. Losee, Bar No. 6500
Attorney for Plaintiff Upstream Watch
DAVID B. LOSEE, LLC
7 Highland Avenue
Camden, Maine 04843
(860) 707-3215
david@loseelaw.com

David P. Silk, Bar No. 3136
David J. Perkins, Bar No. 3232
Attorneys for Plaintiffs Jeffrey Mabee,
Judith Grace, Friends of the
Harriet L. Hartley Conservation Area
and Upstream Watch
CURTIS THAXTER LLC
One Canal Plaza, Suite 1000
P.O. Box 7320
Portland, ME 04112-7320
(207) 774-9000
dperkins@curtisthaxter.com
dsilk@curtisthaxter.com

Pro Hac Vice:

for 

Wesley W. Horton,
Michael S. Taylor
HORTON DOWD BARTSCHI &
LEVESQUE
90 Gillett Street
Hartford, CT 06105
(860) 522-8338
Attorneys for Plaintiffs Jeffrey Mabee,
Judith Grace, Friends of the
Harriet L. Hartley Conservation Area
and Upstream Watch
wes@hdblfirm.com
mtaylor@hdblfirm.com

NOTICE

Pursuant to Rule 7 of the Maine Rules of Civil Procedure, opposition to this Motion must be filed not later than 21 days after the filing of the Motion, unless another time is provided by the Rules of Court. Failure to file a timely objection will be deemed a waiver of all objections to this Motion which may be granted without further notice or hearing.

**STATE OF MAINE
WALDO, SS.**

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

JEFFREY R. MABEE, et al.,)
)
 Plaintiffs,)
)
 v.)
)
 CITY OF BELFAST, MAINE, et al.,)
)
 Defendants,)

**ORDER ON MOTION FOR TRIAL OF
THE FACTS AND TO SPECIFY
FUTURE COURSE OF
PROCEEDINGS
(Title to Real Estate Involved)**

UPON CONSIDERATION of Plaintiffs’ Motion for Trial of the Facts and to Specify Future Course of Proceedings (“Motion”), the Court GRANTS the Motion. The Court finds that Plaintiffs’ Rule 80B appeal from the City’s August 12, 2021, condemnation vote on Plaintiffs’ property and property rights is not as a matter of law limited to the self-serving record the government creates.

IT IS SO ORDERED that Plaintiffs are entitled to a trial on Plaintiffs’ Rule 80B claims and Plaintiffs’ independent claims of the facts, including without limitation, the issues of: (i) whether the City’s taking was a mere pretext to conceal that its primary purpose was to benefit a private party; (ii) whether the City’s taking was in bad faith or was an abuse of power; and (iii) whether the City’s taking was lawful or violated Plaintiffs’ constitutionally and statutorily guaranteed property rights. All claims, including the Rule 80B claims and independent claims are subject to the same scheduling order.

IT IS FURTHER ORDERED that the clerk is directed to schedule a conference with the parties regarding the future course of proceedings of the case, including the timing of filing of

pleadings in response to the Plaintiffs' Complaint,¹ Plaintiffs' Motion For Preliminary Injunction, and the scope and timing of discovery and other pretrial proceedings including pretrial conferences.

IT IS FURTHER ORDERED that Defendants City of Belfast and Nordic Aquafarms, Inc. shall file an answer to the Complaint, as amended, pursuant to the Order Regarding Briefing Schedule and Maine Rules of Civil Procedure.

The clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a) of the Maine Rules of Civil Procedure.

Dated: _____, 2021

Justice, Superior Court

¹ Which shall be treated as Plaintiffs'/Petitioners' Rule 80B Petition.