STATE OF MAINE
WALDO, SS.

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

JEFFREY R. MABEE, JUDITH GRACE, THE FRIENDS OF THE HARRIET L. HARTLEY CONSERVATION AREA, and UPSTREAM WATCH,

Plaintiffs,

v.

CITY OF BELFAST, MAINE; and NORDIC AQUAFARMS, INC.,

Defendants.

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AGAINST DEFENDANT NORDIC AQUAFARMS, INC. WITH INCORPORATED MEMORANDUM OF LAW

(Title to Real Estate Involved)

Pursuant to Rules 65(b) and 80B(b) of the Maine Rules of Civil Procedure, Plaintiffs Jeffrey R. Mabee and Judith B. Grace ("Mabee/Grace"), Friends of the Harriet L. Hartley Conservation Area ("Friends") and Upstream Watch ("Upstream") (collectively, "Plaintiffs") move this Court for a preliminary injunction enjoining Defendant Nordic Aquafarms, Inc. ("NAF" or "Nordic") from:

> (a) Entering, or authorizing any others to enter, for any purposes, the Mabee/Grace Intertidal Property as shown on the survey by Donald R. Richards, P.L.S., recorded in the Waldo County Registry of Deeds ("WCRD") at Book 24, Page 34 and attached hereto as Exhibit A, other than for those purposes permitted by the terms of the Conversation Easement recorded in the WCRD Book 4367, Page 273 and/or permitted under the public's common law rights to enter the property for fishing, fowling and navigation under the Colonial Ordinance of 1641-47;
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> (b) Receiving or transferring to anyone any right, easement, title or interest in the Mabee/Grace Intertidal Property, and/or
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> (c) Using, occupying or possessing the lot shown as Belfast Tax Map 29, Lot 36 for any non-residential purpose and/or to conduct any for-profit business thereon including and commercial or industrial development associated with the installation of seawater intake or wastewater discharge pipes;
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> (d) Taking any action to nullify, violate, amend, evade, ignore or terminate the Conservation Easement presently held by Friends of Harriet Hartley or to authorize any third party to do so by authorizing uses of or commercial or industrial development in the intertidal land on which Belfast Tax Map 29, Lot 36 fronts that are prohibited by the Conservation Easement, dated 4-29-2019 and recorded in the WCRD at Book 4367, Page 273; and/or

(e) Conducting any construction activity or installing any pipes within the Mabee/Grace Intertidal Property

BACKGROUND

1. Nordic Aquafarms, Inc. began working with the City of Belfast's City Council and officials to construct and operate a land-based salmon growing and processing facility in Belfast since 2017.

2. Plaintiffs Upstream and Mabee and Grace have opposed this project in various local, State and federal administrative forums and in litigation filed in the Waldo County Superior Court since 2018.

3. Plaintiffs' challenges in all of those forums have included Nordic's lack of title, right or interest in the intertidal land on which Lot 36 fronts – thus, lacking administrative standing to obtain the permits, licenses and leases that Nordic sought from the City of Belfast and the State of Maine to bury its two 30" seawater intake pipes and one 36" wastewater discharge pipe in upland Lot 36 and the intertidal land on which Lot 36 fronts.

4. Upstream's challenges were initially based on Nordic's failure to obtain an easement from the Eckrotes who owned Lot 36 to grant Nordic an easement option to use the intertidal land on which Lot 36 fronts – the easement option granting by the Eckrotes on August 6, 2018 terminated at the Eckrotes' high water mark and did not include any right to use the intertidal land on which this lot fronts.

5. Initially, the Bureau of Parks and Lands ("BPL") and Department of Environmental Protection ("DEP") agreed with Upstream's challenge.

6. However, these determinations were reversed on dubious grounds that are the subject of other litigation (*Mabee and Grace, et al. v. Board of Environmental Protection, et al.*, formerly Consolidated Docket No. AP-2020-05, Waldo County Superior Court (consolidated with Docket

No. AP-2020-49, Kennebec County Superior Court) – recently transferred to the Business and Consumer Docket ("BCD") without a new case number yet assigned; and *Mabee and Grace, et al. v. DACF Bureau of Parks and Lands*, AP-2020-04).

7. In April of 2019, Plaintiff Upstream retained experts to determine ownership of the intertidal land on which Lot 36 fronts, due to the curious nature of documents submitted by Nordic to State regulators, in Nordic's quest to overturn the January 2019 DEP and BPL determinations that Nordic had failed to demonstrate sufficient right, title or interest ("TRI") based on the August 6, 2018 easement option agreement from the Eckrotes.

8. At that time, Upstream discovered that Plaintiffs Mabee and Grace actually own the intertidal land on which Lot 36 fronts, based on an examination of the deeds in their chain of title, the deeds in the Eckrotes' chain of title, and the 1970 quiet title judgment in *Ferris v. Hargrave,* recorded in the WCRD at Book 683, Page 283.

9. Upon learning that they owned this intertidal land, Plaintiffs Mabee and Grace placed all of their intertidal land under the protection of a Conservation Easement, and named Upstream as the holder of that Conservation Easement. (WCRD Book 4367, Page 273).

10. On July 15, 2019, Plaintiffs Mabee and Grace filed a declaratory judgment action against the Eckrotes and Nordic to quiet title in the intertidal land on which Lots 37, 36 and most of 35 front, as well as enforce a negative easement in the 1946 deed from Harriet L. Hartley to the Eckrotes' predecessor in interest Fred R. Poor, which prohibits any "for-profit business" being conducted on Lot 36 without agreement of Harriet L. Hartley, her heirs and assigns. (*Mabee and Grace, et al. v. NAF, et al.*, Docket No. RE-2019-18).

11. Plaintiffs Mabee and Grace, as well as the owners of Lots 37, 35, 34, 33, 32 and 31 are all "Hartley assigns" as successors in interest to land that was part of her retained dominant estate.

12. Upstream Watch is an interested party and crossclaim Defendant in Docket No. RE-2019-18.

13. Plaintiff Friends, who was assigned Upstream's interest as holder of the April 29, 2019 Conservation Easement in November 2019, is a Plaintiff and a crossclaim Defendant in Docket No. RE-2019-18.

14. On June 22-24, 2021, the Superior Court conducted a trial on the title issues in RE-2019-18, including ownership of the intertidal land on which Lots 37, 36 and 35 front, as well as whether the negative easement in the 1946 Hartley-to-Poor deed runs with the land and is enforceable by the Hartley assigns.

15. However, while the Phase I trial was underway in Docket No. RE-2019-18, without the knowledge of the Court or opposing parties, the Eckrotes, Nordic and the City began to put in motion a scheme hatched in April of 2021, detailed in the Fourth Amendment of the City-NAF-Belfast Water District Evaluations Agreement and Options and Purchase Agreements, to take the intertidal land on which Lot 36 fronts and to extinguish the right of Hartley assigns to enforce the 1946 negative easement on Lot 36, by use of the City's eminent domain.

16. On August 12, 2021, the City of Belfast voted to take certain property and property rights from Plaintiffs Mabee and Grace and Friends of the Harriet L. Hartley Conservation Area ("Friends") and the Hartley assigns who own Belfast Tax Map 29, Lots 35, 34, 33, 32 and 31.

17. On August 16, 2021, Plaintiffs initiated this action challenging the City of Belfast's use of eminent domain to: (a) take Plaintiffs Mabee/Grace's property and property rights in Belfast Tax Map 29, Lot 36 and the intertidal land on which that lot fronts; and (b) attempt to amend or terminate Plaintiff Friends' rights as holder of the Conservation Easement recorded on April 29, 2019, recorded in the WCRD at Book 4367, Page 273.

18. Plaintiffs' challenge in this case is based upon the City's violation of the First, Fifth

and Fourteenth Amendments to the U.S. Constitution, Article I, Section 21 of the Maine Constitution, and 1 M.R.S. §§ 816 (1)(A), (B) and (C), by taking Plaintiffs' property and property rights, through the use of eminent domain, for the dominant and primary purpose of benefiting Nordic, a for-profit business entity, by allowing Nordic to use upland Lot 36 and the intertidal land on which it fronts -- which include land used for fishing and land improved by residential homes and other structures -- for commercial and industrial development and to enhance the City's tax revenues.

19. With that Complaint against the City, Plaintiffs filed an emergency motion for expedited review (with a request for a shortened period for response by the City) and a Preliminary Injunction Motion, pursuant to M.R. Civ. P. 65(a) and (b), both dated August 16, 2021.

20. Minutes after Plaintiffs filed their Clerk's Certificate for this litigation the City filed its Clerk's Certificate taking Plaintiffs Mabee/Grace's and Friends' property and property rights, as well and the property rights of the Hartley assigns who own Lots 35, 34, 33, 32 and 31.

21. Subsequently, Nordic moved to intervene in this litigation asserting its interests in upholding the City's taking and its rights, pursuant to agreements with the City (including under the Fourth Amendment and Nordic's July 9, 2021 Purchase and Sale Agreement with the City), to obtain easements from the City to use upland Lot 36 and the intertidal land on which it fronts to bury three industrial pipes into Penobscot Bay.

22. Plaintiffs assert that the uses that the City intends to authorize NAF to engage in, through an easement from the City, on upland Lot 36 would violate the prohibition in the "residential purposes only" negative easement in the 1946 Hartley-to-Poor deed (if the Court determines that that negative easement runs with the land to the benefit of Hartley's retained dominant estate in Docket No. RE-2019-18).

23. Plaintiffs assert that the uses that the City intends to authorize NAF to engage in,

through an easement from the City, on upland Lot 36 would also violate the prohibitions and protections in the April 29, 2019 Conservation Easement established by Plaintiffs Mabee/Grace and Upstream and held by Plaintiff Friends.

24. Neither the City nor NAF have filed an action to amend or terminate that Conservation Easement pursuant to the mandatory process in 33 M.R.S. §§ 477-A(2)(B) and 478.

25. On September 2, 2021, this Court held a status conference at the request of the City's counsel, who sought two additional weeks to file their response to Plaintiffs' Preliminary Injunction Motion.

26. During the status conference, Nordic's Motion to Intervene and the Defendants' requests for additional time to file their respective responses to the Preliminary Injunction motion were considered.

27. Plaintiffs advised the Court at that time that they did not oppose Nordic's intervention, since Nordic as the primary beneficiary of the City's improper use of eminent domain pose a direct threat to intertidal property that Plaintiffs Mabee and Grace have sought a judgment declaring that they own through the proposed and intended use of this property by Nordic.

28. Further, Plaintiffs stated that they did not oppose counsel for the City and Nordic having two additional weeks from the twenty-one days permitted under the Maine Rules of Civil Procedure for response.

29. However, Plaintiffs stated their opposition to any change in the *status quo* prior to disposition by the Court of the Phase I claims in Docket No. RE-2019-18 and the issues raised in this case challenging the City's use of eminent domain.

30. While counsel for Nordic advised that no alteration of the intertidal land would begin prior to the Court's consideration of the Preliminary Injunction motion in October, Nordic would not say that no other actions would be taken to alter the Belfast Water District ("BWD") property or

upland Lot 36.

31. Nordic also made clear that it was demanding that the City fulfill its contractual obligations to Nordic to grant to Nordic easements to use the property taken by the City before the Preliminary Injunction Motion is considered by this Court and within the additional 2-week response time provided to Defendants.

32. Because the contract between the City and Nordic is based upon violation of Plaintiffs' constitutional and statutory rights and adversely impacts Plaintiffs' property and property rights Plaintiffs will be irreparably harmed if the Defendants are not enjoined from further actions clouding title to this land, including granting Nordic an easement to use this land.

33. The NAF-City contracts, including the Fourth Amendment and the July 9, 2021 NAF-City Purchase and Sale Agreement, are *ultra vires* and should not be enforced as a matter of law.

34. Because Plaintiff Friends holds a Conservation Easement on the intertidal land on which Lot 36 fronts, which prohibits the very uses that the City proposes to grant an easement to Nordic to engage in on this land, Plaintiff Friends will be irreparably harmed if Defendant Nordic is not enjoined from using this intertidal land pending the Court's Phase I determination in Docket No. RE-2019-18 and the substantive claims in this case.

MEMORANDUM AND ARGUMENT

The Plaintiffs incorporate herein by this reference the Plaintiffs' Motion for Preliminary Injunction and Incorporated Memorandum of Law dated August 17, 2021 ("the August 17 Preliminary Injunction Motion"), and the attached affidavits and exhibits, as well as the facts recited in the Plaintiffs' Rule 80B Petition with Independent Claims for Relief, which were previously filed against the City of Belfast, and the Plaintiffs' First Amended Rule 80B Petition for Review with Independent Claims for Relief submitted herewith. The Plaintiffs seek a preliminary injunction

against Nordic based upon the prior submissions contained in the August 16 Preliminary Injunction Motion with Incorporated Memorandum of Law, the First Amended Rule 80B Complaint and all exhibits and affidavits filed with the Court and this motion.

A. Plaintiffs Are Entitled to a Preliminary Injunction against Nordic and Belfast

A party seeking a temporary restraining order, like a party seeking a preliminary injunction has the burden of demonstrating 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." *Bangor Historic Track, Inc. v. Dep't of Agric., Food & Rural Res.*, 2003 ME 140, ¶ 9, 837 A.2d 129. Injunctive relief must be denied when the party fails to demonstrate any one of these criteria. *Id.* ¶ 10. *DSCI, LLC v. Wolf*, No. CV-15-440, 2015 WL 9898961, at *1 (Me. Super. Dec. 06, 2015). "An irreparable injury is one for which there is no adequate remedy at law. *Bar Harbor Banking & Trust Co. v. Alexander*, 411 A.2d 74, 79 (Me. 1980)." *Id.*

Here, the Plaintiffs seek a preliminary injunction to maintain the *status quo* of the parties and property, while the pending litigation referenced above is being considered and resolved, including, but not limited to, this case and the pending declaratory judgment action to quiet title. It is apparent that the City exercised eminent domain now to evade or nullify the imminent judgment of the Superior Court in the pending declaratory judgment action to quiet title which will determine ownership of intertidal land including the intertidal land on which Lot 36 fronts that the City now has presumed to take for Nordic's benefit and use, using the City's eminent domain power. *Hodgdon v. Campbell*, 411 A.2d 667, 669 (Me. 1980) ("An action for declaratory judgment is an appropriate vehicle for establishing rights in real property.").

Plaintiffs incorporate their memorandum of law and argument in their initial Motion for Preliminary Injunction and request for expedited review, in support of this request for temporary restraining order and state as additional grounds for injunctive relief, as follows:

Neither the City nor Nordic will be irreparably harmed by entry of a prohibitory injunction preserving the *status quo* while this case and the long-pending declaratory judgment action, for which judgment on the title issues is imminent post-trial,[1] are resolved. In contrast, the City's unjustified infringement of Plaintiffs' constitutional rights, in collusion with Nordic, necessarily constitutes irreparable harm and preserving the status quo while Plaintiffs vindicate the violation of their constitutional and statutory rights in this litigation would be in the public interest.

In *Occupymaine v. City of Portland*, No. CV-11-549, 2012 WL 368333 (Me.Super. Jan. 31, 2012), the Superior Court for Cumberland County considered a request for temporary restraining order and motion for preliminary injunction based on a claims of violations of the plaintiffs constitutional rights guaranteed under the United States and Maine constitutions, stating in relevant part:

> In this case, likelihood of success is the dispositive issue [in determining whether the plaintiffs can satisfy the four criteria for obtaining a preliminary injunction]. The evaluation of other factors largely turns on whether plaintiffs have demonstrated a sufficient likelihood of success. Thus, if plaintiffs are able to demonstrate that they have a sufficient likelihood of success on the merits on their claims under the First Amendment or Maine Constitution Article I, Sections 4 and 15, it would follow that an ***unjustified infringement of their constitutional rights would necessarily constitute irreparable harm*** and that vindication of plaintiffs' constitutional rights would be in

[1] A court may *sua sponte* take judicial notice of facts, *see* M.R. Evid. 201(c), but such notice is appropriate only if a fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." M.R. Evid. 201(b)(2). We have previously recognized that Rule 201(b) permits a court to take judicial notice of, among other things, the existence of certain court records, government-issued statistics, and the reliability of Horizontal Gaze Nystagmus (HGN) tests in operating under the influence cases. *Deutsche Bank Nat. Tr. Co. v. Wilk*, 2013 ME 79, ¶ 15, 76 A.3d 363, 368. See also, *Facilitators Improving Salmonid Habitat v. Towns of Winterport & Frankfort*, 2003 ME 33, ¶ 5, 819 A.2d 325, 326 ("As a preliminary matter, we take judicial notice of the actions filed by the parties in the Superior Court in Waldo County that have arisen from the same dispute that is the subject of this appeal. *See* M.R. Evid. 201(b).").

> the public interest. *See, e.g., Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

Similarly, in *City of Springfield v. Dreison Invs., Inc.*, No. 000014, 2000 WL 782971, at *2 (Mass. Super. Feb. 25, 2000), property owners challenging the September 1999 eminent domain takings by the City of Springfield of three privately owned parcels of land for "municipal purposes" were granted a temporary restraining order during the Court's consideration of the merits of their constitutional challenge to the City's use of eminent domain. In *City of Springfield*, it was undisputed that the City took the parcels by eminent domain for the purpose of leasing the property to the Springfield Baseball Corporation (hereinafter SBC) in order that SBC could build and operate a baseball stadium on the site for use by SBC's minor league baseball franchise.

All of the parties before the court sought a declaration of their rights with respect to the disputed land takings and each party sought differing forms of equitable relief. Following a hearing on the City's renewed its motion for a preliminary injunction, the court entered a temporary restraining order prohibiting:

> 1. the City from taking any further action to enforce the takings; 2. the City Clerk from laying the taking orders before the City Council for reconsideration and from printing ballots for an election on the referendum petition; 3. the City Council from voting reconsideration of the orders of taking; and 4. the City Treasurer from paying the City Council's award of damages for the parcel. The court further ordered the Dreison and Northgate cases consolidated with the City case and advanced the cases for trial.

City of Springfield v. Dreison Invs., Inc., No. 000014, 2000 WL 782971, at *2 (Mass. Super. Feb. 25, 2000) (footnotes omitted).

Ultimately, based on the evidence and the applicable law, the court in *City of Springfield* found that the takings by the City were not a valid exercise of the general eminent domain powers of the City and were not primarily made for a public purpose. The court held that the takings were made in bad faith and the September 23, 1999 takings of the subject parcels were set aside by the court.

Specifically, the court held that:

> "[W]hen the evidence overwhelmingly demonstrates that the dominant reasons for a taking is to benefit private interests or to use the power of eminent domain for improper reasons, then the taking is invalid. See *Pheasant Ridge Associates Limited Partnership v. Burlington,* 399 Mass 771, 776 (1987)."
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> The court's decision that the City acted in bad faith in taking these parcels is based in large measure on the actions and representations of the mayor in the events giving rise to the takings. His intent is of consequence, since property cannot be taken without his approval (G.L.43, § 30). The actions, words and knowledge of the mayor, acting within his authority, are attributable to the City. *Pheasant Ridge Associates Limited Partnership v. Burlington,* 399 Mass. 771, 777 (1987).
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> The mayor developed a coherent plan for the central business district that was targeted at maintaining the traditional professional business and other uses in downtown while at the same time expanding tourist, entertainment, cultural and athletic uses, within the same area. Such expanded uses would serve many tangible public goals, including providing family-oriented activities, increasing business for the hotel, restaurant and cafe trades, and providing increased opportunities for employment. The mayor's plan also took into account that revitalization of the central business district would increase public pride and spirit. All of these goals, tangible and intangible, fit comfortably within the meaning of public purpose. See *Berman v. Parker,* 348 U.S. 26, 33 (1954).
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> However, as the City faced one roadblock after another in its efforts to acquire a franchise, the quest for a professional baseball team took on a life of its own, and by the time the takings occurred, the primary beneficiary of the City's contribution to the project was not the public. There is no single defining moment that marks the City's departure from its basic obligation to protect the public interest and guard against improper diversion of public funds and privileges for the benefit of private persons and entities. It was a gradual process marked by the mayor's lack of concern regarding separate interests in the stadium project.

Id. at *46-*47. See also, *City of Springfield v. Dreison Invs., Inc.*, No. 19991318, "DECLARATION OF THE RIGHTS OF THE PARTIES AND ORDER FOR ENTRY OF JUDGMENT," 2000 WL 1015857 (Mass. Super. Feb. 25, 2000) (Detailing the injunctive relief entered against the City of Springfield and other relief provided to the land owners to remove the cloud on their title caused by the City's improper taking).

Here, there is no dispute that the City's intent in exercising eminent domain is detailed in the Fourth Amendment to the Evaluations Agreement and Options and Purchase Agreements, entered by the City, Nordic and the BWD on April 21, 2021. Indeed, the first paragraph of the July 12,

2021 Offer letters from the City to Plaintiffs Mabee and Grace, Plaintiff Friends and the other Hartley assigns, all expressly state that: "***The City is taking this action pursuant to the terms of the Fourth Amendment of the options and Evaluations Agreement ("Fourth Amendment") as attached hereto in Exhibit 2.***" (attached as composite Exhibits Z to the Amended Complaint and Exhibit A to this Request for TRO).

The Fourth Amendment was signed by the Mayor on behalf of the City, on April 21, 2021 -- months before any public vote on acquiring the Eckrotes' lot or the adjacent intertidal land and/or taking. The Fourth Amendment expressly states that the dominant reasons for the City's taking are to benefit NAF's private interests and to use the power of eminent domain for improper reasons of facilitating Nordic's use of Lot 36 and the intertidal land on which Lot 36 fronts for placement of its three industrial pipes.[2] Further, as part of the *quid pro quo* consideration between Nordic and the

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[2] The Fourth Amendment states in relevant part as follows:

> WHEREAS, the parties would like to clear the Alleged Title Defects [that are the subject of the pending Declaratory Judgment Action filed by Plaintiffs (WALSC-RE-2019-18)] in order to facilitate acquisition of Necessary Project Rights (hereinafter defined) on or before the Closing Date as more specifically described below;
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> WHEREAS, the transactions contemplated in the Project Agreements will produce several direct and indirect benefits to the BWD and its ratepayers including direct benefits to the BWD allowing it to upgrade its infrastructure, keep its rates as low as possible, bring a third well on line, move its headquarters and garage facilities to a more favorable location, reduce chlorine costs; and potentially divest itself of the Lower Dam, which the District considers to be a liability, as well as indirect benefits to the BWD and its ratepayers including creating jobs in the area, NAF investing up to $500 million in the area; and the City maintaining the Little River Trail, thereby benefiting BWD and its customers over the life of said Project Agreements, which public benefits are discussed in Maine Public Utilities Order dated June 8, 2018, docket number 2018-00043;
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> WHEREAS, this Amendment, including the Necessary Project Rights described below and City action to clear title to the same (including be exercise of eminent domain), is for the benefit of all parties and is necessary for the Project and associated public benefits to the City and the BWD including those identified in the Project Agreements.

City in the Fourth Amendment, Nordic agrees to pay for up to $120,000 of the City's takings-related costs and litigation expenses by granting the City an offset of up to $120,000 from funds the City agreed to pay Nordic in prior agreements from the "water quality cost share."[3]

Any after-the-fact recitation of public benefits for this taking by the City are merely pretextual and incidental. Like the City of Springfield, the City of Belfast has departed from its basic obligation to protect the public interest and guard against improper diversion of public funds and privileges for the benefit of private persons and entities – here Nordic. As a consequence, the City has all but abandoned the public's interests – including the Belfast citizens whose rights under

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> NOW THEREFORE, in consideration of One Dollar and other good and valuable consideration, receipt and sufficiency of which is hereby acknowledged, and the mutual covenants contained herein, the parties agree as follows:
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> 1. Necessary Project Rights. The additional project rights to be acquired by the City and NAF as part of or in addition to the Waterfront Parcel and the Realty in accordance with the Acquisition Agreement shall mean fee or easement rights sufficient for a perpetual subsurface easement for the purpose of constructing, grading, excavating, and performing earth work as may be necessary to construct, install and maintain such culverts, pipes, gaskets, pumps, valves and other equipment as required for the installation and maintenance thereof (the "Necessary Project Rights") and any such additional rights as the City, in its sole discretion, deems necessary or desirable. The Necessary Project rights shall be acquired by NAF through the Eckrote P&S and any amendments thereto and through best reasonable efforts by the City to facilitate the transaction and thereby secure the associated public benefits to the City and the BWD as contemplated in the Project Agreements, *including, as necessary in the sole discretion of the City, through the exercise of its powers of eminent domain, and conveyed free of the Alleged Title Defects and any existing restrictions which might otherwise interfere with the rights described above.*
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> 2. Locus of Necessary Project Rights. The location of the Necessary Project Rights described in Section 1 above shall mean the area of land defined as the Easement Area described in the Eckrote P&S, which, for the avoidance of doubt, shall include the portion of the intertidal area between the high water mark and low water mark of Penobscot Bay included therein or adjacent thereto and adjacent to NAF's Submerged Lands Leases. . . .

[3] See, Fourth Amendment at §4, p. 4:

> 4. City Costs. NAF shall allow the City to offset for any condemnation award and the costs associated with the condemnation proceedings contemplated hereby from the water quality cost share, previously pledged to NAF from the City in Section 1A of the Evaluation Agreement, in an amount up to $120,000 in order to facilitate City receipt of the public benefits flowing from the Project Agreements.

the U.S. and Maine constitutions and the laws of the State of Maine have been sacrificed in the City's pursuit of its myopic obsession with facilitating the Nordic project.

While the City had the ability to change its own ordinances and plans to facilitate the Nordic Project (*Daniels v. City of Belfast*, No. CV-2018-45, 2019 WL 4457766 (Me. Super. July 10, 2019) – even where such amendments were arguably adopted to the detriment of existing land owners and abutters – the City cannot ignore and violate the Fifth and Fourteenth Amendment to the U.S. Constitution, Article I, Section 21 of the Maine Constitution, or 1 M.R.S. § 816(1)(A), (B) and (C) to benefit Nordic.

Nordic should not be permitted to compel the City to issue it Easements in the Next Two Weeks because the Fourth Amendment to the Options Agreement executed by the City, NAF and BWD on April 21, 2021 and all contracts obligating the City to grant Nordic an easement on this improperly taken property are *ultra vires* contracts that cannot be enforced because they obligate the City to violate Article I, § 21 and 1 M.R.S. § 819(1)(A) and (C)

In executing the Fourth Amendment to the Option Agreement, the City agreed to undertake actions that, as a matter of law, violate Article I, § 21 of the Maine Constitution and 1 M.R.S. § 819(1)(A) and (C). Specifically, in this agreement the City expressly pledges to use its eminent domain authority to take private property and property rights from Plaintiffs, as well as the owners of Lots 35, 34, 33, 32 and 31, for the purpose of granting Nordic a fee interest or easement over the property to be taken. (cite to 4th A). That this agreement, and the related agreements cited in the 4th Amendment, were entered for the ultra vires purpose of the City acting as the agent of Nordic (not the servant of the public) is highlighted by the fact that Nordic is paying the costs of the condemnation damages and litigation costs.

Because the Fourth Amendment creates a contractual obligation for the City to take private property through governmental action for private use, by a private business entity for the purpose of commercial and industrial development – a *per se* violation of Art. I, § 21 of the Maine Constitution

and 1 M.R.S. § 819(1)(A) and (C) – the Fourth Amendment, and any other contract obligating the City to grant Nordic an easement to use property improperly taken by the City, should be declared unenforceable as an *ultra vires* contracts.[4] *City of Belfast v. Belfast Water Co.*, 115 Me. 234, 98 A. 738, 741 (1916) ("The ultra vires contract of a municipality is a legal wrong."); Barron v. McKinnon, 196 F. 933 (1st Cir. 1912) (The doctrine of ultra vires rests on the principle that on grounds of public policy courts will not enforce an illegal or ultra vires contract.); Sch. Admin. Dist. No. 3 v. Maine Sch. Dist. Comm'n, 158 Me. 420, 426, 185 A.2d 744, 747 (1962) ("Strictly speaking an ultra vires contract is a contract which is beyond the power of a municipal corporation to make. Such a contract cannot be ratified." (citations omitted)); *Sold, Inc. v. Town of Gorham*, 2005 ME 24, Par 12, 868 A.2d 172, 176 ("governmental action may be challenged at any times, as *ultra vires*, when the action is beyond the jurisdiction or authority of the administrative body to act") (citations omitted); *Day v. Reece*, No. CV-13-22, 2013 WL 8114503 at *4 (Me. Super. Aug. 15, 2013) ("The Law Court has been very clear that *ultra vires* actions, those take outside the authority or jurisdiction of an agency, may be challenged at any timed.") (citations omitted).

The irreparable harm that will be suffered by the Plaintiffs is clear. If Nordic is not enjoined from disturbing the intertidal land and installing its industrial pipes, the intertidal land will be irrevocably damaged. Moreover, once Nordic's pipes are installed, it will make equitable relief involving the removal of the pipes more complex and challenging.

It is clear that the injury to the Plaintiffs will outweigh any injury that Nordic may experience from the Court granting the injunction. This injunction simply maintains the status quo

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[4] *Gardiner Tr. Co. v. Augusta Tr. Co.*, 134 Me. 191, 182 A. 685, 689 (1936), citing *In re Bankers' Trust Co.*, 27 F.2d 912 (N.D. Ga. 1928); *Davis v. Old Colony Railroad*, 131 Mass. 258, 41 Am.Rep. 221 (Mass. 1881) (An ultra vires contract cannot be held valid because of the supposed indirect benefits that may accrue from its performance); Guilford & Sangerville Water Dist. v. Sangerville Water Supply Co., 130 Me. 217, 154 A. 567 (1931) (Where legislation empowering water district to purchase plant of water company on terms of water company's ultra vires contract with municipality was repealed, water district could not specifically enforce contract).

while the title issues regarding the intertidal land and the constitutional and statutory issues regarding the eminent domain taking are resolved. This injunction prevents Nordic from acting in a preemptive manner to install its pipes and damage the intertidal land in advance of the relevant issues being adjudicated.

The public interest clearly supports granting the injunction. The conservation easement serves critical public interests of protecting the ecology and physical condition of the intertidal land. The public interest also supports preventing an unlawful taking of private land to support an industrial project by a private corporation.

The Plaintiffs' likelihood of success has been demonstrated clearly both in the motion and the earlier motion.

B. The City of Belfast has Improperly and Knowingly Taken Land Outside the Municipal Boundaries of Belfast By Use of Eminent Domain

The City states that its authority for taking Plaintiffs' property and property rights can be found in 23 M.R.S. §§ 3021 et seq. and 30-A M.R.S. § 3101. In Exhibit 1 to Schedule A of the August 12, 2021 Order of Condemnation, the City attaches an unsigned and unsealed drawing by Gartley & Dorsky, dated June 29, 2021, which the City states shows the land it has condemned. In Schedule D to the Order of Condemnation, the City makes the bald and erroneous statement that:

> All of this land including all of the shore frontage and intertidal ara, consistent with the depictions on the Tax Maps of both the City of Belfast and the Town of Northport, and consistent with the James Dorsky survey entitled "Intertidal Zone Survey" revised through July 24, 2020, is located within the City of Belfast.

WCRD Book 4693, Page 320 at ¶ 8.

However, Plaintiffs placed the City on notice on July 29, 2021 (Amended Complaint Exhibit P) that the unsealed and unsigned drawing of the land the City was attempting to acquire, by purchase or condemnation, included land that is outside the municipal boundaries of the City of Belfast.

First, it is a violation of Maine statutes for the City to use a unsealed and unsigned drawing to define land being taken by eminent domain. 32 M.R.S. § 18226 states in relevant part that:

> C. An official of this State, or of any city, county, town or village in the State, charged with the enforcement of laws, rules, ordinances or regulations may not accept or approve any plans or other documents prepared within the meaning and intent of this chapter that are not sealed and signed by the professional land surveyor under whose responsible charge they were completed.

Here, the City is using an unsealed or stamped plan, without the signature of a licensed surveyor to define the land it is taking by use of eminent domain. On the face of Exhibit I, it states:

> The exhibit is not a boundary survey and does not meet the standards of practice promulgated by the Maine Board of Licensure for Professional Land Surveyors.

Yet the City is using this expressly deficient drawing to take Plaintiffs land by eminent domain.

Second, the City attempts to use tax maps to support its claim that the land being taken is within the City's municipal boundaries, although the disclaimer on these tax maps makes clear that they are not permitted to be used to determine property boundaries – even by the entity that issues the tax maps.

More importantly, Plaintiffs' counsel provided the City with a revised draft of the unsealed and unsigned Gartley & Dorsky drawing, with the actual City boundary as determined by statue in 1813, superimposed on the City's Exhibit 1 by licensed surveyor Donald R. Richards, P.L.S. Rather than attempting to make a proper determination regarding the location of the city's municipal boundaries, the City simply repurposed a survey plan prepared by James Dorsky, P.L.S. for Nordic Aquafarms, Inc. in July of 2020, to make a claim that it was taking land within its municipal boundaries.

As discussed in detail in Mr. Richards' Affidavit, and incorporated exhibits, attached hereto and incorporated herein, the Belfast City boundary line that Mr. Dorsky has drawn on his July 24, 2020 survey plan misplaces the mouth of the Little River and, thus, grossly misstates the location of the City's boundary within Penobscot Bay and the intertidal land on which Belfast Tax Map 29,

Lots 38, 37, 36, and 35 front. As a consequence, the City has taken land outside its municipal boundaries by eminent domain – in excess of its statutory authority to use this power pursuant to 23 M.R.S. §§ 3021 et seq. and 30-A M.R.S. § 3101.

This is an additional ground for nullification of this taking in addition to the City's violation of the U.S. and Maine Constitutions and 1 M.R.S. § 816(1)(A), (B) and (C).

CONCLUSION

For all of the above reasons, the court should grant preliminary injunctive relief against Nordic and the City of Belfast as detailed in the attached order.

Dated: September 8, 2021

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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. WALSC-CV-2021-**
JEFFREY R. MABEE, et al., **Plaintiffs,** **v.** **CITY OF BELFAST, MAINE,** **And NORDIC AQUAFARMS, INC.** **Defendants,**	)	**ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** **Title to Real Estate Involved**

Upon consideration of plaintiffs' motion for preliminary injunctive relief, and responses thereto, with/without hearing, and upon consideration of the standard for the issuance of a preliminary injunction, *see Bangor Historic Track, Inc. v. Dept. of Agric.*, 2003 ME 140, ¶ 9, 837 A.2d 129, the court finds that plaintiffs have shown a substantial possibility of success on the merits of their claims, that they will suffer irreparable injury if the injunction is not issued, that the ongoing injury to plaintiffs in being deprived of their property rights outweighs any harm to the defendants City of Belfast and Nordic Aquafarms, Inc., and that the public interest will not be adversely affected.

The court waives the giving of security given the presumption of unlawful pretextual taking raised by the plaintiffs' showing, under *Kelo v. City of New London*, 545 U.S. 469 (2005), that the taking of private property here occurred without a well-developed preexisting plan, and a known for-profit corporation was identified as a party to be benefited by the taking prior to the initiation of the taking proceedings. Indeed, the City of Belfast received substantial consideration from the private for-profit business that is the intended beneficiary of this taking, Nordic Aquafarms, Inc. ("Nordic"), in exchange for the City's contractual commitment to use all means, including eminent domain, to take the intertidal land Nordic needs to place its three industrial pipes. Given the strong likelihood that the court will find the taking to be in violation of the Fifth Amendment to the United States Constitution, Article I, Section 21 of the Maine Constitution and 1 M.R.S. § 816(A)-(C) the court waives security.

The court also waives security because the plaintiffs have shown a strong likelihood of success that the City's attempt to take the holder plaintiff Friends of the Harriet L. Hartley Conservation Area's interest in the Conservation Easement recorded in the Waldo County Registry of Deeds at Book 4367, Page 273 is unlawful given that under 33 M.R.S. §§ 477(1) and (2) and § 478(3), conservation easements can only be terminated by court order. Unless and until a court of competent jurisdiction terminates the Conservation Easement, it remains in full force and effect

Accordingly, until further Order of this Court, the Defendant CITY OF BELFAST and Defendant NORDIC, their agents, servants, employees, attorneys or anyone acting under their control, or any person in active concert or participation with either Defendant City or Nordic, are ENJOINED from:

a) entering. or authorizing any others to enter, for any purposes, the Mabee/Grace Intertidal Property as shown on the survey by Donald R. Richards, P.L.S., recorded in the Waldo County Registry of Deeds at Book 24, Page 34 and attached hereto as Exhibit A and incorporated herein, other than for those purposes permitted by the terms of the Conversation Easement recorded in the Waldo County Registry of Deeds at Book 4367, Page 273 and/or permitted under the public's common law rights to enter the property for fishing, fowling and navigation under the Colonial Ordinance of 1641-47;

(b) transferring any right, title or interest in the Mabee/Grace Intertidal Property, to anyone; and/or

(c) granting any right title or interest, to anyone, to use, occupy or possess the lot shown as Belfast Tax Map 29, Lot 36 for any non-residential purpose;

(d) take any action to terminate the conservation easement presently held by Friends of Harriet Hartley; and

(e) disturbing and/or conducting construction activities within the Intertidal Property including laying pipes.

IT IS SO ORDERED. The clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: _____

_____
Justice, Superior Court