

STATE OF MAINE
WALDO, SS.

SUPERIOR COURT
CIVIL ACTION
Docket No. WALSC-RE-2021-

JEFFREY R. MABEE, et al.,)	
)	
Plaintiffs/Petitioners,)	PLAINTIFFS' MOTION FOR
)	PRELIMINARY INJUNCTION WITH
v.)	INCORPORATED MEMORANDUM
)	OF LAW
CITY OF BELFAST, MAINE,)	
)	
Defendant/Respondent.)	<u>Title to Real Estate Involved</u>

I. INTRODUCTION

Pursuant to Rules 65(a)-(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,¹ staying the challenged final agency action and enjoining Defendant City of Belfast (“City”) and all those in active concert or participation with it, 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 WCRD at Book 24, Page 34 and attached hereto as Ex. 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;
- (b) Transferring to anyone any right, title or interest in the Mabee/Grace Intertidal Property, including granting any easement to a third party; and/or
- (c) Granting to anyone any right, title or interest, to use, occupy or possess the lot shown as Belfast Tax Map 29, Lot 36 for any non-residential purpose and/or to conduct any for-profit business thereon; and/or
- (d) Taking any action to nullify, 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 the intertidal land on which Belfast Tax Map 29, Lot

¹ Rule 81(c) of the Maine Rules of Civil Procedure makes Rule 65 applicable to a motion to stay under Rule 80B(b).

36 fronts that are prohibited by the Conservation Easement, dated 4-29-2019 and recorded in the Waldo County Registry of Deeds at Book 4367, Page 273.

II. SUMMARY OF THE RELEVANT LEGAL RIGHTS AND GROUNDS FOR ENTERING A PRELIMINARY INJUNCTION

Injunctive relief is necessary here because the City has unlawfully used its extraordinary power of eminent domain to take privately-owned intertidal land for the primary purpose of benefiting Nordic Aquafarms, Inc. (“Nordic” or “NAF”), a private, for-profit business entity. The public “benefits” of this taking, belatedly suggested by the City, are merely pretextual and incidental to the City’s primary purpose, which was expressly detailed in the Fourth Amendment to Evaluations Agreement and Options and Purchase Agreement (“Fourth Amendment”), entered by the City, Nordic and the Belfast Water District (“BWD”) on April 21, 2021. That Agreement states in relevant part that:

“. . . the parties would like to clear the Alleged Title defects in order to facilitate acquisition of Necessary Project Rights (hereinafter defined) on or before the Closing Date. . .the City action to clear title is to the [Necessary Project Rights] (including by 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.”

The proposed taking, by using eminent domain to take intertidal land used by the public for fishing, fowling and navigation for the primary purpose of transferring use of that property to a for-profit business entity, for commercial and industrial development and to enhance City tax revenues, violates clear federal and state constitutional protections and is prohibited by Maine statutory law. Because the City intends to alter the *status quo* by granting Nordic easement rights to occupy and use the taken land, and significantly alter the land by dredging, excavation, trenching and even blasting this fragile intertidal land in order to bury large industrial seawater intake and wastewater discharge pipes, the irreparable damage committed by the illegal taking will be compounded by the further illegal acts of the for-profit business entity to which City intends to grant rights. In addition,

the City has indicated its intent to use eminent domain to illegally attempted to evade, ignore, nullify or terminate a Conservation Easement on the intertidal land subject to taking, in contravention to the process for termination of conservation easement in Maine statutory law. Because the existing conservation easement on this intertidal land prohibits the City, its agents and assigns (including Nordic), from using the land subject to the Conservation Easement to bury pipes for a commercial and/or industrial operation. Public policy strongly favors the issuance of an injunction while the propriety of the City's taking and efforts to unilaterally terminate Conservation Easement, without first obtaining a court order pursuant to the process mandated by statute are tested at trial.

The United States Constitution prohibits the taking of private property except for public use. "It is the responsibility of the courts to assure that government does not abuse its extraordinary power to take the private property of its citizens against their wishes." *Blanchard v. Dept. of Transp.*, 2002 ME 96, ¶ 40, 798 A.2d 1119 (Saufley, C.J. dissenting). A court "should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits." *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J. concurring).

The Constitution of Maine limits the exercise of eminent domain even further, requiring both a public use and "public exigency." Article 1, section 21 provides that "[p]rivate property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." This language protects the owner of property to the extent of "churlish obstinacy," said Justice Kent in *Bangor & Piscataquis R.R. Co. v. McComb*, 60 Me. 290, 295 (1872), explaining further:

As between individuals, no necessity, however great, no exigency, however imminent, no improvement, however valuable, no refusal, however unneighborly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require any man to part with an inch of his estate.

Id. (emphasis supplied).

In 2006, Maine’s Legislature added even more protections for private property owners, enacting 1 M.R.S. § 816 to prohibit municipalities like the City from taking private property used for fishing (among other things) for the benefit of private commercial or industrial development, enhancement of tax revenue, or for the benefit of a for-profit business entity. Here, the City is attempting to take property that is not only used for fishing, but which is protected for that use as a matter of right pursuant to the Colonial Ordinance of 1641-47 and the public trust doctrine, and is protected for that and other uses under the conservation easement held by Plaintiff Friends. Moreover, here, the taking by the City is *specifically* for the purposes of facilitating commercial and industrial development *by Nordic*, to enhance the City’s tax revenues *from Nordic*, and to transfer the right to use this property *to Nordic*, a for-profit business entity. If this taking does not run afoul of 1 M.R.S. § 816 (!)(A), (B) and (C), it is difficult to imagine a taking that would.

The City voted to use eminent domain on August 12, 2020, to take by condemnation: (a) the portion of Plaintiffs Mabee/Grace’s Intertidal Property on which Belfast Tax Map 29, Lot 36 fronts; (b) Plaintiff Friend’s property rights as holder of the conservation easement on Lot 36; and (c) the right of the owners of Belfast Tax Map 29, Lots 38 (Mabee/Grace), 35, 34, 33, 32 and 31 to enforce deed restrictions that limit the use of upland Lot 36 “for residential purposes only” and prohibit for-profit business being conducted on this lot, was done to grant Nordic, a private party and a for-profit business entity within the meaning of 1 M.R.S. § 816(1)(C), an easement for Nordic to lay saltwater intake and discharge pipes—stretching from the upland lot (Belfast Tax Map 29, Lot 36), on the east (waterside) of the highway and out almost a mile into Penobscot Bay—for Nordic’s private commercial and industrial development.

Pending trial on the merits, a preliminary injunction barring the City from entering, or allowing anyone else to enter, and/or granting to anyone (including Nordic) any right, title or interest to: (i) enter and/or use upland Lot 36 in any manner not permitted by the 1946 “residential

purposes understanding,” and/or (ii) Plaintiffs’ intertidal land for any purpose or use, other than those permitted under the terms of the Conservation Easement or within the public rights of fishing, fowling and navigation. A Preliminary Injunction, pending trial on the merits, is warranted because:

- **The taking is for a private benefit, and any purported public benefit is demonstrably pretextual and incidental:** The dominant purpose of the taking is for the City to transfer to Nordic an easement over the intertidal zone to place its industrial pipes into Penobscot Bay. *The City and Nordic expressly stated this as the intent of this taking in the Fourth Amendment, executed by the City, Nordic and the Belfast Water District on April 21, 2021.* At no time prior to (or after) the City entered into the Fourth Amendment with Nordic did the City have a comprehensive, integrated, carefully-considered development plan, for obtaining the property condemned in order to enhance or obtain public access to Penobscot Bay, nor was this private property even considered for acquisition and use as a park to provide the public with “enhanced access to Penobscot Bay. Long before the taking, the City identified Nordic as the intended beneficiary of the taking and even contracted with Nordic to use its eminent domain power for Nordic’s benefit. The “public benefits” now espoused by the City for the taking -- “enhanced public access to Penobscot Bay” -- is a mere pretext.
- **Belfast cannot nullify, amend or terminate Plaintiffs’ conservation easement through eminent domain:** The City’s taking Plaintiffs’ Friends ‘title, right and interest in the flats on which Lot 36 fronts, as holder of the Conservation Easement on this intertidal land, for the non-public purpose of terminating the protections provided by the existing conservation easement so that Nordic can bury its pipes in this intertidal land, in contravention of the express protections and prohibitions in the Conservation Easement, is a clear violation of the mandatory process for amending or terminating a conservation easement prescribed by 33 M.R.S. §§ 477-A(2)(B) and 478.
- **Belfast cannot take land used or protected for fishing for purposes of industrial or commercial development or for transfer to a for-profit entity:** 1 M.R.S. § 813 bars the City from taking any property used for fishing for purposes of private industrial or commercial development, enhancement of tax revenue, or to transfer rights in the property to a for-profit business.

III. FACTS

The facts supporting this motion are set forth in the Affidavits of Jeffrey Mabee (“Mabee Aff.”), Andrew Stevenson (“Stevenson Aff.”), Kim Ervin Tucker (“Tucker Aff.”), and Sally Brophy (“Brophy Aff.”), which are submitted with this Motion.²

1. **The Mabee/Grace Property**

Plaintiffs Mabee/Grace are record title owners of residential property bounded along the Little River and Penobscot Bay in Belfast, Maine. (Mabee Aff. ¶ 3.) Mabee/Grace acquired this property in 1991 by virtue of a deed recorded at Book 1221, Page 347 in the Waldo County Registry of Deeds (“WCRD”). *Id.* As shown during the Title Litigation, the Mabee/Grace property includes the upland lot designated as Belfast Tax Map 29, Lot 38 and the intertidal land on which Lots 38, 37 (owned by the Schweikerts), 36 (formerly owned by the Eckrotes and now owned by the City) and most of 35 (owned by Morgan) front (the “Mabee/Grace Intertidal Property”). *Id.* ¶ 4. The Mabee/Grace Intertidal Property is shown on the survey by Donald R. Richards, P.L.S., a true and accurate copy of which is attached to the Tucker Aff., ¶ 5, Ex. 26, recorded in the WCRD at Book 24, Page 34. During the Title Litigation, Nordic and the Eckrotes claimed that Plaintiffs Mabee/Grace do not own the subject intertidal land on which Lot 36 fronts. That issue remains to be decided by this Court in RE-2019-18.

2. **The Conservation Easement**

In April of 2019, Plaintiffs Mabee/Grace granted a Conservation Easement over all of their intertidal property and named Upstream Watch as the holder of that conservation easement,

² The Court can take judicial notice of these facts because Plaintiffs, Nordic, the Eckrotes and others are presently litigating before this Court *inter alia* the issue of who owns the intertidal land on which Belfast Tax Map 29, Lots 37, 36 and 35 front, in an action captioned *Jeffrey R. Mabee, et al. v. Nordic Aquafarms, Inc., et al.*, No. WALSC-RE-2019-18 (the “Title Litigation”). *Wells Fargo Bank, N.A. v. Bump*, 2021 ME 2, ¶ 21, 244 A.3d 232 (“[c]ourts may take judicial notice of pleadings, dockets, and other court records where the existence or content of such records is germane to an issue in the same or separate proceedings”).

pursuant to 33 M.R.S. §§ 476, et seq. (Mabee Aff. ¶¶ 5-6). That Conservation Easement is recorded at WCRD Book 4367, Page 273. *Id.* ¶ 9; Tucker Aff. ¶ 5, Ex. 24. In November 2019, Upstream Watch assigned the Conservation Easement to the Friends, which is recorded at WCRD Book 4435, Page 344.³ *Id.* ¶ 6; Tucker Aff. ¶ 5, Ex. 25.

The stated purpose of the Conservation Easement is to protect the intertidal land in its natural condition, and prohibit commercial and industrial infrastructure in, on or under this fragile estuary. All of the activities Nordic has proposed in order to bury its three industrial pipes in the intertidal land adjacent to Lot 36 are expressly prohibited by the conservation easement. (, Tucker Aff. ¶ 5, Ex. 24 pp. 3-4 (PROHIBITED USES)). Specifically, the Conservation Easement contains a covenant that states in relevant part that: “. . . the land on which the above Conservation Easement is hereby conveyed *shall be and is restricted against any commercial or industrial use or uses accessory to such commercial or industrial uses.*” *Id.* at p. 2 (emphasis supplied). The Conservation Easement states that this covenant is intended to “run with the land.” *Id.* (COVENANT TO RUN WITH THE LAND). *Id.*

Friends, in its role as holder of the Conservation Easement, has also permissively granted the public additional rights of access and recreation in the intertidal area – and posted signs to welcome the public for these purposes. (Mabee Aff., ¶¶ 16-19; Stevenson Aff., ¶¶ 15-16). Mabee/Grace have also provided a permissive easement along their northern boundary of Lot 38 to allow the public to access the conservation area and have allowed the permissive use of two parking spaces for this purpose on the upland of Lot 38. *Id.* The Conservation Easement by its terms and 33 M.R.S. §§ 476, et seq. impose a duty on the easement holder (Friends) to enforce the easement against all persons and entities – including a successor in interest to Mabee/Grace.

³ True copies of the Conservation Easement and Assignment are attached to the Tucker Affidavit as Exs. 24 and 25.

On August 9, 2021, the Maine Office of the Attorney General advised the City that:

Dear William – I have received your letter dated July 13, 2021. . . .in which the City of Belfast asks that the Maine Office of the Attorney General (the OAG) confirm that the OAG will not “take the position that Court approval of the contemplated real estate transactions was necessary pursuant to 33 M.R.S. § 477-A(2)(B).” My initial reaction is as follows.

Title 33 M.R.S. § 477-A(2)(B) requires court approval to terminate a conservation easement. The Attorney General must be made a party in any such termination proceeding. 33 M.R.S. § 477-A(2)(B). As the City knows, the disputed property may be subject to a conservation easement. The validity of that conservation easement depends on resolution of the title dispute pending in Superior Court (Waldo County). If the Court determines that Jeffery Mabee and Judith Grace own the disputed intertidal land, the conservation easement held by the Friends of Harriet L. Hartley Conservation Area would be valid and may not be terminated absent court approval. 33 M.R.S. § 477-A(2)(B). If you are aware of any contrary authority, please provide me with a copy of same for my consideration. Additionally, I cannot at this time confirm that the OAG would not bring an enforcement action pursuant to 33 M.R.S. § 478(1)(D)(4).⁴

3. The City’s taking of the Mabee/Grace Intertidal Property and Friend’s Conservation Easement.

Nordic’s proposal, as it has been presented to local, state and federal administrative boards and agencies, uniformly shows three large industrial water intake and discharge pipes entering Penobscot Bay from Lot 36 and crossing the Mabee/Grace Intertidal Property on which Lot 36 fronts. (Tucker Aff., ¶ 6). If ever operational, Nordic would discharge up to 7.7 million gallons per day of warm, brackish, nitrogen-rich effluent into Penobscot Bay, and extract 6 million gallons per day of seawater from these pipes. *Id.*

On or about April 21, 2021, the City and Nordic amended certain contracts between them relating to the acquisition of land from the Belfast Water District (“BWD”) for the proposed Nordic fish farm. *Id.* ¶ 11. Pursuant to the express terms of the “Fourth Amendment to Evaluation Agreement and Options and Purchase Agreement” (“Fourth Amendment”) the City contractually committed to Nordic to use the City’s eminent domain authority to take the privately-owned

⁴ Tucker Aff., ¶ 5, Ex. 1.

intertidal land and property rights that Nordic needs to have extinguished in order to allow Nordic to place its industrial pipes into Penobscot Bay.⁵ (This undisputed fact alone defeats any City contention that the taking meets the United States Supreme Court test in *Kelo* discussed below.)

⁵ A true and accurate copy of the Fourth Amendment is attached as Ex. 14 to the Tucker Affidavit. The Fourth Amendment states in relevant part as follows:

WHEREAS, subsequent to the Eckrote P&S and NAF's application to the Bureau of Parks and Lands as part of its Governmental Approvals, alleges title defects have been raised stemming from language in a certain warranty deed dated from Harriet L. Hartley to Fred R. Poor dated January 25, 1946 and recorded at Waldo County Registry of Deeds Book 452, Page 205, including (i) language in that deed that the "lot or parcel of land herein described is conveyed to Fred R. Poor with the understanding it is to be used for residential purposes only, that not business for profit is to be conducted there unless agreed to by Harriet L. Hartley, her heirs or assigns" that it is alleged could interfere with the rights described in the Eckrote P&S; and (ii) a waterfront call in that deed that reads "thence Easterly and Northeasterly along high water mark of Penobscot Bay 410 ft. more or less to a stake at the outlet of a gully," that has been alleged create title defect in the Eckrote's [sic] rights in the intertidal zone described in the Eckrote P&S (together, the "Alleged Title Defects");

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;*

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 headquarter 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;

WHEREAS, this Amendment, including the Necessary Project Rights described below and *City action to clear title to the same (including by exercise of eminent domain), is for the benefit of all parties and is necessary for the Project and associate public benefits to the City and the BWD including those identified in the Project Agreements.*

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:

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*

On July 8, 2021, following the conclusion of a three-day bench trial in the Title Litigation (June 22-24, 2021), but before the Court had rendered any judgment, the City Council held a special meeting at which the Council went into an executive session. (Tucker Aff. ¶12.) When the Council emerged from executive session, it unanimously voted to approve the following motions:

(a) Authorizing the Mayor to sign the Eckrote Purchase and Sale Agreement by and between the City and Nordic Aquafarms, regarding the real estate identified on the City of Belfast Tax Map 29 as Lot 36;

(b) Authorizing an Attorney for the City to make offers to purchase potential alleged or claimed interests in and to the intertidal area of the Eckrote property, as depicted in Exhibit C-1 to the Eckrote Purchase and Sale Agreement, to clear alleged title defects related to the Eckrote property's intertidal area, from those persons and entities listed, and based on the opinions of value provided, on page 61 in the Charest Appraisal Services Appraisal Report, prepared as of June 25, 2021,

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.*

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. . . .

4. City Costs. *NAF shall allow the City to offset for any condemnation award and the costs associate 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.*

5. Additional Payment to BWD. *At closing NAF shall pay BWD an additional \$222,000 in consideration of the mutual agreements expressed in the Acquisition Agreement, the conveyance to NAF by the City of the Necessary Project Rights, and the agreement by BWD that it shall vacate that portion of the Realty currently used as garages and storage sheds within the 90 day period following the Closing Date, with such portion of the Realty to be occupied by BWD under the lease described below to be limited to the current BWD office building and associated parking, and in order for the City and BWD to obtain public benefits flowing from the Project Agreements. . . . [emphasis supplied].*

said sums to be offered in exchange for release deeds to the City from each person or entity so listed; and

(c) Authorizing an Attorney for the City to make offers to purchase potential alleged or claimed interests in and to the “Residential Purposes” understanding language, as referenced in a deed from Harriet L. Hartley to Fred R. Poor in a deed recorded in Book 452 Page 205 of the Waldo County Registry of Deeds, to each real property owner of record who could claim or allege an interest in said “Residential Purposes” understanding, to include each Lot Owner(s) of real estate depicted on Tax Map 29, Lots 31, 32, 33, 34, 35 and 38, as further described on page 58 of the Charest Appraisal Report; the sum to be offered for each Lot shall be \$500, said sums to be offered in exchange for release deeds to the City of Belfast of said “Residential Purposes” restrictions.

Id.

Nordic and the City then entered into a Purchase and Sale Agreement with an effective date of July 9, 2021, which describes Plaintiffs’ property interests as “Alleged Title Defects”. Tucker Aff. ¶ 5, Ex. 3, at Exhibit B. The Purchase and Sale Agreement provides that the City shall obtain the right to grant to and to deliver to Nordic, among other instruments, *an easement over the Mabee/Grace Intertidal Property*. *Id.* at p. 3 § 3(C).⁶

On July 12, 2021, in furtherance of its efforts to acquire property on behalf of Nordic, the City sent the following offers, received on July 14, 2021 (Mabee Aff. ¶ 12; Stevenson Aff. ¶ 7):

⁶ In announcing the 7-9-2021 Purchase and Sale Agreement, the City’s Mayor stated:

The City of Belfast is pleased to announce that it will acquire the Richard and Janette [sic] Eckrote waterfront property for the public benefit of all the people of Belfast, made possible in part through the generous cooperative act of Nordic Aquafarms and the Eckrote family. These 2.75 acres with 500 feet along Route One and 325 feet of Penobscot Bay shore frontage will be a remarkable addition to City of Belfast’s parks, anchoring public waterfront access far into the future. The next closest public access for Belfast people is 1.25 miles away at Belfast City Park. For this kind and remarkable gift we will always be grateful.

The Council action also includes steps in furtherance of the Fourth Amendment of the Options and Evaluations Agreements, signed in April of this year, between the City, Nordic Aquafarms and the Belfast Water District, in which the parties acknowledged the need to make efforts to clear the alleged title defects.

In its efforts to clear alleged title defects, the City will make offers, based on professional appraisal advice, to purchase alleged claims of interest in and to the Eckrote property, which includes the intertidal area. As soon as that is accomplished, the City will be thrilled to permanently secure the 40 acres of walking trails along the Little River Reservoir and the Eckrote property for perpetual public use and enjoyment.

Tucker Aff. ¶ 5, Ex. 30 (emphasis supplied).

(i) To Friends a check for \$36,000, for a Release Deed for all of Friends' right, title and interest in the intertidal land on which the Eckrotes' lot fronts;

(ii) To Plaintiffs Jeffrey R. Mabee and Judith B. Grace, a check for \$4,000, for a Release Deed for all of Mabee/Grace's right, title and interest 5.1 acres of in the intertidal land on which the Eckrotes' lot fronts; and

(iii) To Plaintiffs Jeffrey R. Mabee and Judith B. Grace, a check for \$500, for a Release Deed releasing Mabee/Grace's right, as assigns through conveyance of Harriet L. Hartley, to enforce the "residential purposes only" "understanding" in the 1946 Hartley-to-Poor deed.

The basis for the offers was explained in the City's July 12, 2021, offer letters as follows:

"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." (Stevenson Aff. Ex. 4, p. 1, ¶ 1.); (Mabee Aff. Ex. 8, p. 1, ¶¶ 1 and 10, p. 1, ¶ 1) (emphasis supplied).

The stated "public purposes" or "public benefits" for the City to acquire/take the Mabee/Grace Intertidal Property, as well as the property interest of Friends and the owners of Lots 35, 34, 33, 32 and 31, in the July 12, 2021 offer letters were:

(i) "As you know, litigation regarding this Eckrote property is pending in Docket No. RE-2019-18 of the Waldo County, Maine Superior Court. This litigation involves alleged claims of title, which have served to delay the acquisition of nearby property ("Waterfront Parcel") referenced in the attached Fourth Amendment which the City of Belfast is seeking to purchase, pursuant to the original Options and Evaluations agreements which were signed on January 30, 2018. There are significant public uses and purposes that the City wishes to pursue, which include the acquisition of approximately 40 acres of property on the Little River Reservoir (Waterfront Parcel) that are to be set aside for permanent public trail usage; these acquisitions will be enabled by clearing alleged title claims.

(ii) The City's public uses and purposes, and other public uses and purposes benefitting the Belfast Water District and its customers are being delayed and hampered by these litigation claims. These delays have impacted the public uses and purposes of the City of Belfast and other the Belfast Water District, which is seeking to sell the Waterfront Parcel to the City of Belfast, and sell the remainder of its property to Nordic Aquafarms, Inc., as referenced in the attached Fourth Amendment and the underlying Agreement.

(iii) Additionally, the City of Belfast has executed a Purchase and Sale Agreement [dated July 9, 2021] to acquire both the upland and the intertidal zone depicted in Exhibit 1, this purchase will significantly expand public access and public uses of the upland and intertidal zone of the property to be purchased as depicted and the related public [sic] access and use of Penobscot Bay in general.

(iv) This acquisition of this upland and intertidal zone will also significantly enhance and complement the public purposes and uses of the Waterfront Parcel, thus creating a combined public recreation area of substantial permanent benefit to the Community. This comes at a critical time when public access to the waterfront property and Penobscot Bay is dwindling and becoming more difficult to obtain.⁷

However, these purposes are expressly contradicted by the Fourth Amendment and statements made to Friends' Secretary Andrew Stevenson, by City Councilor Mike Hurley, who states that an "easement for pipes" is the purpose of this taking. Stevenson Aff., Ex. 8 (Response to Question 3) & Ex. 10 ("Mike's Reply" to Question 2).⁸

On July 29, 2021, Plaintiffs responded to the City's offer letters. Mabee Aff. ¶ 22; Tucker Aff. ¶ 5, Ex. 31. Plaintiffs Mabee/Grace and Friends attempted to address any concerns about public access by making the City a counteroffer, which would have permitted the City to permanently acquire and maintain the existing permissive easement granted to Friends and the public by Mabee/Grace for the access path along the northern boundary of Lot 38 to the Harriet L. Hartley Conservation Area for \$40,000.⁹ Stevenson Aff. ¶ 17; Mabee Aff. ¶ 19. On July 30, 2021, the City rejected Plaintiffs' counteroffer. Tucker Aff. ¶ 5, Ex. 4.

On August 3, 2021, the City Council authorized the Mayor to sign and issue a "Notice of Intent to Condemn Real Property Interests" pursuant to 30-A M.R.S. § 3101 and 23 M.R.S. § 3022 ("Notice"). Tucker Aff. ¶ 5, Ex. 21; Mabee Aff. ¶ 23; Stevenson Aff. ¶ 20. On August 12, 2021, purportedly pursuant to 30-A M.R.S. § 3101 and 23 M.R.S. § 3022, the City Council voted to take the Mabee/Grace Intertidal land on which Lot 36 fronts, as well as the property rights of the Hartley assigns who own Lots 38, 35, 34, 33, 32 and 31, by eminent domain. Tucker Aff. ¶ 21.

⁷ Tucker Aff. ¶ 5, Exs. 7, 9 and 11.

⁸ Councilor Hurley's Reply reads:

Mikes reply.... "The city has portrayed the acquisition of the Eckrote property as the addition of badly-needed new park," ... " that is your characterization of our motivations. It is not accurate in any way."

⁹ A true copy of the Plaintiffs' response letter and counteroffer is attached the Tucker Aff., ¶ 5, Exhibits 30 and 31.

IV. MEMORANDUM OF LAW AND ARGUMENT

The standard for the issuance of preliminary injunction relief is well established. A motion for temporary restraining order or a preliminary injunction should issue if the moving party is able to demonstrate: (1) that it will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which granting the injunction relief would inflict on the other party; (3) that it has a likelihood of success on the merits (at most, a probability, at least, a substantial possibility); and (4) that the public interest will not be adversely affected by granting the injunction. *Bangor Historic Track, Inc. v Dept. of Agric.*, 2003 ME 140, ¶ 9, 837 A.2d 129; *Ingraham v. Univ. of Maine at Orono*, 441 A.2d 691, 693 (Me. 1982). The above criteria “are not to be applied woodenly or in isolation from each other; rather, the court of equity should weigh all of these factors together in determining whether injunctive relief is proper.” *Dept. of Envtl. Prot. v. Emerson*, 563 A.2d 762, 768 (Me. 1989).

A. Plaintiffs have shown a likelihood of success on the merits.

1. The City’s takings were for a private benefit.

a. Legal Standard: The City’s power to seize private property for public use is limited by the Fifth Amendment to the United States Constitution¹⁰ and by Article 1, Section 21, of the Constitution of the State of Maine. The Fifth Amendment provides, in relevant part: “nor shall private property be taken for public use, without just compensation,” U.S. Const. Amend. V(1791), and the Constitution of the State of Maine states: “Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it.” Me. Const. Art. I, § 21.

¹⁰ The 14th Amendment of the United States Constitution makes the Fifth Amendment applicable to state and local governments. *Chicago, B & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897).

With respect to the rights secured by the Fifth Amendment, in *Kelo v. City of New London* the United States Supreme Court reaffirmed that a taking of private property “for the purpose of conferring a private benefit on a particular private party” is unconstitutional. *Kelo*, 545 U.S. at 477-78. Nor may a public entity “take property under the mere pretext of a public purpose, when its actual purpose [is] to bestow a private benefit.” *Id.* at 478; *see also Calder v. Bull*, 3 Dall. 386, 388 (1798) (legislative action “cannot be considered a rightful exercise of legislative authority” where it “takes property from A. and gives it to B.”).

Justice Kennedy’s concurrence in *Kelo* stated that under the Public Use Clause, a court “should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits.” *Kelo v. City of New London*, 545 U.S. at 491 (Kennedy, J., concurring). His opinion further anticipated that some private transfers could raise such a substantial risk of “undetected impermissible favoritism” that they should be presumptively invalid. *Id.* at 493 (Kennedy, J. concurring). That is, “the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, *that courts should presume an impermissible private purpose.*” *Id.* (emphasis added).

With respect to the rights secured by Maine’s Constitution, the Law Court stated in *Brown v. Warchalowski*, 471 A.2d 1026, 1029 (Me. 1984):

Article 1, section 21, of the Constitution of Maine provides that "private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." *This constitutional guarantee surrounding the acknowledged right of ownership of private property necessarily implies from its mere declaration that private property cannot be taken through governmental action for private use, with or without compensation, except by the owner's consent. Paine v. Savage*, 126 Me. 121, 123, 136 A. 664, 665 (1927); *Haley v. Davenport*, 132 Me. 148, 149, 168 A. 102, 103 (1933) ...

(Emphasis supplied).

Maine has thus established a standard above the federal minimum in its constitutional protection of private property rights. Article I, Section 21 “necessarily implie[s] that private

property cannot be taken for private uses, without the consent of the owner, *with or without compensation.*” *Brown v. Gerald*, 100 Me. 351, 360, 61 A. 785, 789 (1905) (emphasis supplied). A municipal taking benefiting an individual property owner, as opposed to the public at large, is unconstitutional. *Id.* The City must establish both that its taking is for a public use *and* that there is a public exigency, i.e., a *public* need to take this particular property at this particular time for the stated public purpose. The needs of a private party, such as Nordic, to take particular property at a particular time, even if they are significant (which is not the case here) will not suffice.

The Law Court has provided the following framework in reviewing of the legality of a taking. The Court reviews a finding of public exigency to determine whether there was “a rational basis to support a finding that an exigency existed.” *Dyer v. Dept. of Transp.* 2008 ME 106, ¶ 19, 951 A.2d 821; *Fuller v. Town of Searsport*, 543 A.2d 361, 363 (Me. 1988). “A finding of public exigency involves a determination that the taking was necessary; the property interest was taken only to the extent necessary; and the property is suitable for the particular public use for which it was taken.” *The Portland Co. v. City of Portland*, 2009 ME 98, ¶ 25, 979 A.2d 1279, citing *Dyer v. Dept. of Transp.*, 2008 ME 106, ¶ 19, 951 A.2d at 826–27.

The determination as to whether a use is public or private is a question of law. *Brown v. Warchalowski*, 471 A.2d at 1033; *Crommett v. City of Portland*, 150 Me. 217, 231, 107 A.2d 841, 849 (1954). That the government's use of a piece of property will benefit a private party does not render a taking necessarily unconstitutional, as long as the public use is the dominant purpose of the taking. *Crommett*, 150 Me. at 236, 107 A.2d at 852 (holding that the dominant purpose of the taking was a public purpose); *In re Opinions of the Justices*, 118 Me. 503, 516, 106 A. 865, 872 (1919) (finding the public benefit to be only incidental).

b. Application of the facts to legal standard: Here, there is no public use, beyond pretext. There is no public exigency, beyond the City’s desire to complete its deal with Nordic,

presumably before this Court issues its judgment on the Title claims in RE-2019-18. The City's plan, such as it is, was not designed to benefit the residents of Belfast, with a benefit to Nordic as a necessary and ancillary result. To the contrary, all of the City's efforts have been directed toward obtaining land that *Nordic* needs to fulfill *Nordic's* plans, with any proposed benefit to the people of Belfast an afterthought, *at best*.

i. No Preexisting Plan. In *Kelo*, an important part of the Court's consideration and ultimate approval of the taking by New London was the fact that the city had a "carefully formulated" economic plan, designed to "coordinate a variety of commercial, residential, and recreational uses of the land . . ." *Kelo*, 545 U.S. at 483. The Court noted the city's "thorough deliberation" in developing its plan, *Kelo*, 545 U.S. at 484; and Justice Kennedy, in his concurring opinion, was careful to note that the city could not be accused of favoritism or of developing its plan primarily to benefit private developers (which would have been fatal to an eminent domain taking), because the city had developed its plan *before* most of the private developers became involved. *Kelo*, 545 U.S. at 491-92. In other words, New London didn't take property because certain private developers wanted that property, or because it had contracted with a specific developer to take a specific property, it took the property because it had a preexisting plan for the private property taken to help the residents of that city, and it brought the private developers onboard only after the taking, to help the city meet its already-established and well-developed goals.

In contrast here, Belfast has no preexisting, comprehensive, integrated, carefully considered development plan that requires obtaining the subject real property and property rights in order to enhance or obtain public access to Penobscot Bay or for any other public purpose. A plan developed wholly in conjunction with Nordic, sealed by a binding contract with Nordic, to take private property for Nordic's development, regardless of the stated rationale (to enhance the City's

tax base, to provide funds to the local water district, or to enhance public access), is not under *Kelo* a preexisting development plan showing a justification for the taking of the condemned land.

At no time before Nordic made its needs known for an easement over Lot 36 and the adjacent intertidal land was the condemned land even considered for the stated purposes (“enhanced public access to Penobscot Bay”) given in the July 12, 2021 offer letters for this taking. There is nothing in the City’s Comprehensive Plan, as amended most recently in 2018, that in any way suggests the City had any preexisting plan to take intertidal land already subject to a conservation easement and public easement rights in order to enhance access to the intertidal zone at the location of Lot 36 and to Penobscot Bay. Brophy Aff. *Generally*. There was no plan. And there still is no plan.¹¹

ii. **Nordic identified before the taking.** Unlike the *Kelo* case, the City here did not decide on a course of action and then identify Nordic as a private party that could help fulfill the City’s public purpose. Until Nordic became unsure about the strength of its claim to a valid easement over the intertidal area fronting Lot 36, the City had no plan to take the property for any purpose. *See* Footnote 11 *supra*. The City expressed no concern about increasing public access, or even about developing the land for commercial and industrial use (to the extent such uses might

¹¹ *See*, Stevenson Affidavit, Exhibit 5 (Question 5 Answers from Councilor Mike Hurley):

[Question] 5. There is no parking lot on the former Eckrote property. There is no overhead or underground access to it across Route 1. There are no bathing facilities or restrooms on it. Has the Council considered what developing the parcel would cost Belfast taxpayers?

[Hurley 8-6-2021 Response]///// ***no determination about the use has yet to be made so ...no.***

Andy’s [8-8-2021] reply: If there has been “...no determination about the use...” of the Eckrotes’ upland lot, when will the City deal with that question? Will the public be invited to participate in the decision-making? Or will this be one of those “...many things regarding real estate and economic development that do not receive or demand public discussion...” as you said in your answer to Question 2?

Mike’s [8-9-2021] response... ***it is years in the future*** and will be done with the city committees [*sic*] etc. public input... (emphasis supplied).

meet a hypothetical public purpose).¹² Nordic was identified as the party to be benefited by the taking when the City first initiated the idea of taking in the Fourth Amendment that Nordic, the City and Belfast Water District executed on April 21, 2021 – eliminating any realistic possibility that Belfast was motivated by the concept of “public” benefit when it began this process. Indeed, the Fourth Amendment identifies the intended beneficiaries of the City’s use of eminent domain and agreement to grant Nordic the right to use the condemned property for its pipes, stating: “this Amendment, including the necessary Project Rights . . . and City action to clear title to the same (including by exercise of eminent domain), *is for the benefit of all parties* [to the Fourth Amendment] and is necessary for the [Nordic] Project and associated public benefits to the City and the BWD including those identified in the Project Agreements.” Tucker Aff. ¶ 5, Exhibit 14, p. 4.

The City contractually bound itself to Nordic, on April 21, 2021, to obtain the property Nordic needs for its pipes, by any means, *including the use of eminent domain*. It did so in order for Nordic to obtain the easement it needs to place its pipes in Lot 36 and the adjacent intertidal land. And Nordic agreed in exchange to: (i) allow the City up to \$120,000 in offsets from the water quality cost share, previously pledged to NAF from the City in Section 1A of the Evaluation Agreement to pay for the cost of any condemnation awards and condemnation proceedings (*Id.* (Fourth Amendment), p. 4, § 4); and (ii) pay an additional \$222,000 to the BWD, in part, “. . . in consideration of the mutual agreements expressed in the Acquisition Agreement, [and] the

¹² Indeed, Belfast currently has seventeen “access ways to water” available to the public to access Penobscot Bay. Additional access ways were obtained by the City in 2017, pursuant to a grant the City received to acquire more access ways to Penobscot Bay. The use of the grant for this purpose was pursuant to a plan, the “Rangeway Development and Management Plan.” <https://www.cityofbelfast.org/426/Rangeway-Public-Hearing-Notice-Documents> (last accessed Aug. 12, 2021).

The Eckrotes’ lot (Lot 36) was not part of that plan. A Map of the 17 access ways to water can be viewed here: <https://www.cityofbelfast.org/DocumentCenter/View/226/public-ways-map-list?bidId=> (last accessed Aug. 12, 2021).

conveyance to NAF by the City of the Necessary Project Rights. . .” A more blatant use of the government’s taking power to benefit a targeted and known private party is hard to imagine.¹³

iii. Public Benefits, if any, are incidental. Here, the purported public benefits are a moving target, with the City seemingly developing a rationale for taking the property while it simultaneously takes the property. *Compare* the City’s July 12, 2021, offer letters *with* Councilor Hurley’s admission that the City has no present public access plans for the parcel taken. The pretext rationale (expanding public access to Penobscot Bay), is, *at best*, an incidental or trivial benefit, given the fact that: (i) the public already enjoys access to Penobscot Bay from the permissive easement on Mabee/Grace’s Lot 38 (and seventeen other access ways in the City); (ii) the public has rights to use the intertidal area for fishing, fowling and navigation under the Colonial Ordinance of 1641-47, which will be reduces, not enhanced, if the City is permitted to grant Nordic an easement to use this intertidal land for its pipes; and (iii) the property is already subject to the Conservation Easement that expands public recreational uses of the intertidal land beyond those guaranteed by the Colonial Ordinance.

Further, the purported public rights are, *at worst*, non-existent, since Nordic’s intended and proposed use of this intertidal land involves burying three industrial pipes along a 100-foot wide area from the high-water mark of Lot 36 to the low water mark, by excavating, trenching, side-casting spoils, and using explosives to blast any ledge within this area. None of these activities are consistent with or conducive to expanding public access to Penobscot Bay or preserving the

¹³ That granting Nordic an easement to place its pipes into Penobscot Bay, and not enhancing public access to the Bay, is the real purpose of this taking is also shown by Attorney Kelly’s statements in the July 30, 2021 email rejecting Plaintiffs’ counteroffer (Tucker Aff. ¶ 5, Ex. 4) and Councilor Hurley’s August 6, 2021 response to Andrew Stevenson’s Question #3, in which Councilor Hurley states that counteroffer was rejected because it did not include an “easement for pipes.” Stevenson Aff., Exs. 3 and 5.

public's existing rights to use this intertidal land for fishing, fowling and navigation; and all of these proposed uses and activities are expressly prohibited by the Conservation Easement.

Under *Kelo*, when there is no well-developed preexisting plan for the development of the parcels taken, a private party is identified as the beneficiary of the takings before the takings occur, and the public benefit is minimal and incidental to the planned private benefit, a court must conclude that a taking for economic development under those circumstances is not a public use sufficient to warrant the taking. Under Maine law, the above facts show that the dominant purpose of the taking was in fact to benefit a private party, that there is no "public" exigency of any kind, and therefore the taking was unconstitutional.

While the City may believe that Nordic's private development is in the best interest of the City, it must find other ways to support the development other than to take private property needed by Nordic, a for-profit business entity, in order for Nordic's commercial and industrial development to go forward. Government cannot take private property whenever it deems that property is needed by a private for-profit developer in order for private development to occur. The rights secured to citizens under the both the federal and State constitutions not to be compelled to give up "one inch" of his or her property would be meaningless if government can do what the City knowingly and intentionally did here. In the City's view, as long as it finds a developer promising "great benefits" that will trickle down to the public at large, the City has the right to contract with the developer to use the City's condemnation power to take any private property the developer claims it "needs" in order to accomplish the development, and extinguish any private property interests, anywhere in the City (and here, even *outside the City's bounds*). This is just not legal; this is an unconstitutional abuse of the City's eminent domain power.

It is this Court's important role to put a stop to such utter disregard of basic constitutional rights. Based on the above, it is more likely than not that the Plaintiffs will prevail on their claim

that the City’s taking serves no public purposes, and that the stated purposes are a mere pretext to bestow a private benefit on Nordic, a private for-profit business entity, for the purpose of commercial and industrial development.

2. The City illegally took the Friends’ interest as Holder of the Conservation Easement.

Conservation Easements in Maine are permitted and regulated by Maine law. 33 M.R.S. §§ 476, *et seq.*¹⁴ Nowhere in that section has the Legislature empowered a City to take by eminent domain the holder’s interest in a conservation easement and unilaterally terminate that interest, without complying with the mandatory process for amending or terminating a conservation easement in 33 M.R.S. §§ 477-A(2)(B) and 478. Such an act by the City amounts to a forced amendment and/or termination of the Conservation Easement. By the taking, the City is seeking to eliminate the easement so it will not bar Nordic from installing its intake and discharge pipes in the intertidal area for its commercial and industrial development – s use that is expressly prohibited by the Conservation Easement. But the law is clear that no one, including the City, can amend or terminate a conservation easement except by court order, following the process in Sections 477-A(2)(B) and 478, and only then, if the court determines that the conditions and criteria in Section 477-A(2)B and 478(3) have been shown to exist.¹⁵ As noted above, the Office of Attorney General

¹⁴ Title 33 M.R.S. § 477-A(1) states: “A conservation easement may be terminated or amended by the parties only as provided in section 477-A, subsection 2.” Subsection 2 states in relevant part that:

2. Amendment and termination. Amendments and termination of a conservation easement may occur *only pursuant to this subsection.*

B. A conservation easement may not be terminated or amended in such a manner as to materially detract from the conservation values intended for protection without the prior approval of the court in an action in which the Attorney General is made a party. In making this determination, the court shall consider, among other relevant factors, the purposes expressed by the parties in the easement and the public interest. ... [emphasis supplied].

¹⁵ See *Town of Parker v. Colo. Div. of Parks & Outdoor Recreation*, 860 P.2d 584, 586 (Colo. App. 1993) (“The right to take property already dedicated to a public use for another public use exists in some cases, but such rights must be by specific grant of authority.”).

advised the City’s counsel, Attorney Kelly, on August 9, 2021, that the City could not terminate the conservation easement, if it is determined that Plaintiffs Mabee and Grace own this intertidal land at the time the Conservation Easement was imposed, without complying with the process and satisfying the criteria in Section 477-A(2)(B) and 478.

Title 33 M.R.S. § 478(3) specifically authorizes this Court to “enforce a conservation easement by injunction or proceeding at law and in equity.” Based on the above, it is more likely than not that the Plaintiffs will prevail on their claim that the City’s taking of the Friends’ interest as Holder of the Conservation Easement is unlawful, and contrary to public policy.

3. City’s taking is illegal pursuant to 1 M.R.S. § 816(1)(A) and (C).

Title 1 M.R.S. § 816 significantly restricts the City’s power to take property for the purpose of economic or commercial development. That statute states in relevant part:

1. Purposes. Except as provided in subsections 2 and 3 and notwithstanding any other provision of law, the State, a political subdivision of the State and any other entity with eminent domain authority may not condemn land used for agriculture, fishing or forestry or land improved with residential homes, commercial or industrial buildings or other structures:

- A. For the purposes of private retail, office, *commercial, industrial* or residential development;
- B. Primarily for the *enhancement of tax revenue*; or
- C. For transfer to an individual or *a for-profit business entity*.

(Emphasis supplied).

The facts recited in the Mabee Affidavit paragraphs 25-32; as well as the photos and page from the City’s Comprehensive Plan showing marine resources attached as Mabee Affidavit, Exhibits 1-4, show that the Mabee/Grace Intertidal Property has been and is used for both fishing and clamming, when the flats are open for such use. Mabee Aff. ¶ 5, Ex. 1-4. Further, for over 300 years the law in Maine has been that intertidal land such as the Mabee/Grace Intertidal Property is subject to a public easement for fishing, fowling and navigating. *McGarvey v. Whittredge*, 2011

ME 97, ¶¶ 31-35, 28 A.3d 620. The preservation of this land for public use, including for fishing, since colonial times is strong evidence that the statute should be read to prohibit the taking here.

Importantly, the *Kelo* decision suggested that, in some instances, a taking for economic development purposes could satisfy the requirement of a public benefit. With Section 816, the Maine Legislature reacted to that holding, and expressed the intent that Maine would not be willing to allow takings for economic development, except in very limited circumstances. The taking at issue here, of land used for fishing and which is a portion of a parcel of land that has been long-improved with a residential home, expressly for the purpose of benefitting a private for-profit business entity, for commercial and industrial development and purportedly for expanding the City's tax base, is precisely the type of taking this statute prohibits.

“When the Legislature delegates the power of eminent domain, the parameters of that power are strictly construed.” *Blanchard v. Dept. of Transp.*, 2002 ME 96, ¶ 17, 798 A.2d 1119. As Section 816 acts as a limitation on the City's taking power, any land used for fishing cannot be taken for transfer to a private for-profit business entity, like Nordic, for commercial and industrial development purposes and/or to expand the City's tax base. Based on the above, it is more likely than not that the Court will find that the City's taking of the Mabee/Grace Intertidal Property was unlawful pursuant to 1 M.R.S. §§ 816(1)(A)-(C).

B. Plaintiffs will suffer irreparable harm if the injunction is not granted.

Where real property is involved, a trespass that results in any alteration or encroachment on the land has been found to constitute irreparable injury. *See Walsh v. Johnson*, 608 A.2d 776, 778 (Me. 1992). Enjoining the City's granting of any right, title or interests to third parties, including Nordic, to use the Mabee/Grace Intertidal Property preserves the status quo and insures no damage, alteration or encroachment of the property occurs pending trial.

C. The injury to Plaintiffs will outweigh any harm to the Defendant.

The injury to Plaintiffs outweighs any harm to the Defendant City. Injury to the Plaintiffs is severe, irreparable and permanent. Plaintiffs Mabee and Grace have been ousted from their property and the Friends' r rights and responsibilities as holder of the Conservation Easement have been impaired and the conservation area placed in jeopardy – requiring enforcement of the terms of the Conservation Easement pursuant to 33 M.R.S. § 478(3). Additionally, injunctive relief is needed to protect the public's access to and use of this intertidal land for fishing, fowling and navigation – rights guaranteed to the public by the Colonial Ordinance that will be impaired in the absence of an injunction to preserve the status quo pending trial. The City has violated both Federal and State constitutional provisions and State law that bars the government from taking private property for a non-public benefit. At most, the City will have to wait to aid private developer Nordic until the legality of the City's action is reviewed, which is an insufficient claim of harm. Further, if time were really of the essence in pursuing to purposes detailed in the Fourth Amendment, the City would not have delayed in exercising its eminent domain powers for four months – taking no action until after the Phase I trial in RE-2019-18 of the title matters – which will properly “clear up the Alleged Title Defects.”

D. The public interest will not be adversely affected.

Here it is clearly in the public's interest to grant the requested injunction. Given Plaintiffs have shown a reasonable likelihood that the City's taking was unconstitutional and an abuse of power, a mere pretext to benefit Nordic, and that the public interest strongly favors enforcement through injunctive relief of conservation easements, it is in the public interest to enjoin the City from transferring to any third party, including Nordic, any interests in the Mabee/Grace Intertidal Property. Thus, the public interest will not be adversely affected by the issuance of the preliminary injunction.

IV. CONCLUSION

For all of the above reasons, the court should grant the preliminary injunctive relief requested herein.

Dated: August 16, 2021

/s/ Kimberly J. Ervin Tucker

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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.