STATE OF MAINE
WALDO, SS.

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

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

Plaintiffs/Petitioners,

v.

CITY OF BELFAST, MAINE,

Defendant/Respondent,

and

NORDIC AQUAFARMS, INC.,

Intervenor Defendant/Respondent.

Supplemental Motion Regarding Rule 80B Proceedings, Trial of the Facts, and Scheduling Order

(Title to Real Estate Involved)

Introduction

A critical issue in this lawsuit is whether the City of Belfast ("City") acted in bad faith and with an improper pretext in taking by eminent domain Mabee and Grace's intertidal land and to extinguish Mabee-Grace's right to enforce the "residential purposes only" servitude on Lot 36 benefitting Harriet L. Hartley's retained dominant estate land.[1] The Plaintiffs/Petitioners claim that the taking is unconstitutional under the Maine constitution, Article 1, Section 21, as the City and Nordic created a false narrative that the taking was for the primary purpose of creating a public park, when the taking was conducted to serve the needs of Nordic's industrial project. The Plaintiffs/Petitioners also claim that the City's eminent domain taking violates 1

[1] The City also used eminent domain to extinguished the right of the owners of Lots 35, 34, 33, and 32 to enforce the "residential purposes only" servitude. However, the City did not include Friends in Schedule B of the Condemnation Order and, thus, did not extinguish Friends right to enforce the "residential purposes only" servitude on Lot 36 as holder of land benefited by the servitude owned by Mabee and Grace.

M.R.S. § 816 as the land taken was used for fishing and involved land improved with a residential home. In addition, the taking exceeded the City's statutory authority because the land allegedly taken includes land outside the municipal boundaries of the City of Belfast and was done in the absence of any public exigency.

As shown in the Plaintiffs' Motion for Trial of the Facts dated August 16, 2021, a trial of the facts is necessary in cases that involve the issue of the pretextual motives of the condemning authorities. *See Portland Co. v. City of Portland,* 2009 ME 98, ¶ 15, 979 A.2d 1279 (appeal followed from a three day jury waived trial to determine whether exigent circumstances existed to justify the taking of private property); *Blanchard v. Dep't of Transp.,* 2002 ME 96, 798 A.2d 119 (appeal followed a three day jury waived trial to determine whether the Public Uses Clause of the Maine Constitution was satisfied); *Fuller v. Town of Searsport*, 543 A.2d. 361, 362 (Me. 1988) (trial court held evidentiary hearing on whether taking was in bad faith or abuse of power).

Given that the issues of pretext, bad faith, and lack of public purpose and public exigency cannot be adequately assessed by the Court solely on a record created by the City for the August 12, 2021 hearing, the Plaintiffs are entitled to discovery relating to the facts on their pretext and constitutional claims (including the issue of public purpose and public exigency) and a trial of the facts on such issues.

A. Procedural History

On April 16, 2021, the Plaintiffs/Petitioners filed their Motion for Trial of the Facts and to Specify Future Course of Proceedings (the "Motion").

On May 11, 2022, the Court issued its Order (the "Dismissal Order") on the Motion to Dismiss by the City of Belfast ("Belfast") and Nordic Aquafarms, Inc. ("Nordic").

On March 14, 2023, the Court issued its Order Regarding Conference Relating to Future Proceedings ("Proceedings Order"). In the Proceedings Order, the Court directed the parties to confer and attempt to prepare and submit a proposed Stipulated Order Specifying the Future Course of Proceedings.

The parties did confer and agreed on several procedural issues. But the parties were unable to agree on a draft Stipulated Order Specifying the Future Course of Proceedings.

Instead, the parties agreed that the Plaintiffs/Petitioners would file a Supplemental Motion detailing its position on the Stipulated Order Specifying the Future Course of Proceedings and the Defendants/Respondents would file their response in advance of the April 28, 2023 conference with the Court.

B. The Administrative Record is Inadequate

This case does not involve an administrative record that forms an adequate basis for the typical Rule 80B submission of record and briefing. The City will likely claim that its "public hearing" on August 12, 2021 is the operative decision regarding eminent domain. But the August 12, 2021 hearing occurred well after the City had entered into a contract with Nordic which required the City to conduct the eminent domain taking.

The Plaintiffs have utilized their Motion for Preliminary Injunction dated August 16, 2021, and the affidavits attached thereto, as their offer of proof pursuant to Rule 80B(d) showing the evidence that they intend to offer at trial. That Motion and the attached affidavits demonstrate that the City of Belfast made the decision to take the intertidal land and the right to enforce the "residential purposes only" servitude well before the August 12, 2021 "public hearing." The City contractually obligated itself to take the Mabee-Grace intertidal land and to eliminate the "residential purposes only" servitude through eminent domain when the City signed the Fourth

Amendment dated April 21, 2021. Affidavit of Kimberly Tucker ("Tucker Affidavit"), Par. 11 The City Council held a closed-door executive session on July 8, 2021, after which the City's Mayor announced that Nordic was conveying the Eckrotes' upland parcel to the City (in return for the City taking the intertidal land by eminent domain and removing the "residential purposes only" servitude on upland Lot 36). Tucker Affidavit, Par. 12. On or about July 12, 2021, the City sent offers to the Plaintiffs to initiate the eminent domain process. Tucker Affidavit, Par. 13. On July 9, 2021, the City entered into a Purchase and Sale Agreement with Nordic and obtained a deed from Janet and Richard Eckrote for their property. *See* Order of Condemnation, Paragraph 8, attached as Exhibit S to Plaintiffs' Complaint. On or about August 5, 2021, Plaintiffs received a "Notice of Intent to Condemn Real Property" regarding the intertidal land. Tucker Affidavit, Par. 19. On August 3, 2021, the City Council voted to proceed to take the intertidal land of Mabee-Grace and the right to enforce the "residential purposes only" servitude of Mabee-Grace and the owners of Lots 35, 34, 33 and 32 by eminent domain. Tucker Affidavit, Par. 20.

After the City had contractually obligated itself to use eminent domain and after the City commenced the eminent domain proceedings, the City then held a "public hearing" on August 12, 2021. Tucker Affidavit, Par. 23. The City's Order of Condemnation made findings that were not supported by any competent evidence in the record. *See* Schedule D of the Order of Condemnation, Paragraph 8, attached as Exhibit S to Plaintiffs' Complaint. For instance, the Order states in Schedule D, #9, that the property was not used for fishing or improved with a residential house, when the truth is that the land owned by Mabee-Grace is used for fishing and their land is improved by a residential house. The Order, in Schedule D #8, states that the Eckrotes' land "… will be a remarkable addition to the City Parks, anchoring the City's most southerly public waterfront use and access for generations." In truth, the Eckote parcel will be the location for Nordic's discharge

pipes and pump/utility houses and there will be no material recreational or park values given the lack of parking and access and the size and contour of the land. The record that the City utilized for its Order of Condemnation consisted of comments read into the record by the City's attorney, William Kelly, Esq.

C. Plaintiffs Should be Allowed Discovery and a Trial of the Facts

Under these circumstances, the Plaintiffs/Petitioners are entitled to conduct discovery and to supplement the Rule 80B record. While the written record alone demonstrates an improper pretext and a lack of a public exigency for the taking, it would be unfair to the Plaintiffs to deny them a reasonable opportunity to take discovery on the subjective intent of the City officials at the time of the taking, including the narrative that the taking was conducted to create a City park. In addition, since the eminent domain case was initiated and stayed, Plaintiffs/Petitioners learned that the City and Nordic had concealed restrictions on the use of a 12.5-acre parcel on the inland (western) side of Route 1, the existence of which nullify the City's claim that an exigency existed justifying taking Plaintiffs' property and property rights by eminent domain in August 2021 (*see*, e.g. BELSC-CV-2023-6). The Plaintiffs should be entitled to then have a trial of the facts on matters relating to the pretextual basis provided for the taking and the lack of public exigency.

Discovery and a trial of the facts is also needed, as most of the discussions of the City officials regarding eminent domain occurred behind closed doors and/or were deliberately concealed from the public by the City and Nordic.

The Dismissal Order ruled that the Principle of Exclusivity requires dismissal of Counts I-VI and Count IX. At page 21, the Dismissal Order states: "At the same time, the Law Court's jurisprudence has indicated that an 'independent basis for relief from governmental action' only lies when the 80B review process will not raise all material issues involved or is unable to provide

the adequate remedy for the alleged wrong. M.R. Civ. P 80B advisory note 1983 amend." At page 22 of the Dismissal Order, the Court cited *Fisher v. Dame*, 433 A. 2d 366, 372 (Me. 1981): "Resort to the courts by alternative routes will not be tolerated, subject only to an exception for those circumstances in which the course of 'direct appeal' review by a court is inadequate and court action restricting a party to it will cause that party irreparable injury." The Court continued: "Accordingly, '[w]hen direct review is available pursuant to Rule 80B it is exclusive unless inadequate.'" *Colby v. York Cnty. Comm'rs,* 442 A.2d 544, 547 (Me. 1982).

At page 22, the Court continued:

"As to when the Rule 80B review process should be deemed "inadequate," the Law Court stated the following in *Fisher*:

> This Court has enumerated expressly, and by example, circumstances we believe to justify departure from the doctrine that where an avenue to court is provided through a direct appeal in relation to pending administrative proceedings or determinations, that way into court is exclusive. Such deviation is permitted, for example, where the direct appeal is not broad enough in scope to allow judicial review of all the issues the aggrieved party seeks to have judicially considered, *see Lewiston, Greene, Monmouth Telephone Company v New England Telephone and Telegraph Company,* Me., 299 A. 2d 895, 904 (1973); … or where the case involves a complex course of executive and legislative conduct by municipal officials as to which a remedy is impossible through an appeal to the Zoning Board of Appeals and subsequent direct judicial review, *Walsh v City of Brewer*, *Me.,* 315 A. 2d 200 (1974).

The Dismissal Order, at page 23, further states: "In addition to the three exceptions described above, the Law Court indicated that an additional exception may be recognized if the court was presented 'with an injustice necessitating articulation of an additional category of circumstances justifying deviation from the rule of exclusivity." Citing *Fisher*, 433 A. 2d at 374. The Court notes at page 23: "Also, the Law Court has further clarified that for 80B review to be deemed inadequate it must be apparent that 'court action restricting a party to [Rule 80B review]

will cause [the petitioner/plaintiff] irreparable injury." *Colby v. York Cty. Comm'rs,* 442 A. 2d 544, 547 (Me. 1982).

The Dismissal Order will cause the Plaintiffs irreparable harm and a Rule 80B proceeding constrained to the record created by the City will be inadequate to remedy the wrongs Plaintiffs have suffered, if the Plaintiffs are denied a full and fair opportunity to take discovery and to conduct a trial of the facts on the issues relating to pretext and the lack of public exigency for the taking.

D. The Proposed Orders Regarding Future Course of Proceedings and Scheduling:

The Plaintiffs have attached hereto as Exhibit A their proposed Order Regarding Future Course of Proceedings and a Modified Scheduling Order. The Order establishes a 120-day discovery period, followed by a trial of the facts. The Plaintiffs request that this order be entered to govern these proceedings.

The Plaintiffs have also attached Exhibit B which is an alternative order that provides for discovery but no trial of the facts. This order is provided in case the Court denies the Plaintiffs' request for a trial of the facts.

Conclusion

For all of the above reasons, the Plaintiffs/Petitioners request that the Court issue the Order attached as Exhibit A providing for discovery and a trial of the facts in the Rule 80B count.

Dated: April 14, 2023

/s/David J. Perkins

David J. Perkins, Bar No. 3232
David P. Silk, Bar No. 3136
CURTIS THAXTER LLC
One Canal Plaza, Suite 1000
P.O. Box 7320
Portland, ME 04112-7320
(207) 774-9000
dperkins@curtisthaxter.com
dsilk@curtisthaxter.com

/s/Kimberly J. Ervin Tucker
Kimberly J. Ervin Tucker, Bar No. 6969
48 Harbour Pointe Drive
Lincolnville, ME 04849
(202) 841-5439
k.ervintucker@gmail.com

/s/David B. Losee
David B. Losee, Bar No. 6500
DAVID B. LOSEE, LLC
7 Highland Avenue
Camden, Maine 04843
(860) 707-3215
david@loseelaw.com

Pro Hac Vice:

/s/Wesley W. Horton
Wesley W. Horton
McElroy Deutsch
One State Street, 14th floor
Hartford, CT 06103
(860) 241-2645
whorton@mdmc-law.com

Attorneys for Plaintiffs Jeffrey R. Mabee, Judith Grace, The Friends of The Harriet L. Hartley Conservation Area and Upstream Watch

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.