

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,)
Petitioners/Plaintiffs,)
v.)
CITY OF BELFAST, MAINE and)
NORDIC AQUAFARMS, INC.,)
Respondents/Defendants.)

PETITIONERS' RENEWED
SUPPLEMENTAL MOTION FOR
DISCOVERY AND TRIAL OF FACTS
AND OBJECTIONS TO RECORD
SUBMITTED BY THE CITY OF
BELFAST

(Title to Real Estate Involved)

INTRODUCTION

Jeffrey Mabee, Judith Grace, Upstream Watch, and the Friends of the Harriet L. Hartley Conservation Area (collectively, the “Petitioners”) filed their Supplemental Motion Regarding Rule 80B Proceedings, Trial of Facts, and Scheduling Order on April 14, 2023. Below, based on the Administrative Record submitted by the City, the Petitioners renew and expand on the need for discovery and a trial of the facts in this proceeding.¹

¹ A motion under Rule 80B(d) requires a detailed statement, in the form of an offer of proof, of evidence the party intends to offer at trial. In its filing on August 16, 2021, Petitioners offered as their detailed statement the motion for preliminary injunctive relief with supporting affidavits. Petitioners stated they also intended to offer evidence based on to-be-conducted discovery, pursuant to Rule 80B(i) and (j), that the City's articulated public benefits statement was a pretext to conceal its primary purpose was to benefit a private for-profit business, for commercial and industrial development of Petitioners' intertidal property that is used by the public for fishing, and to enhance the City's tax revenues, and, as a result, the City acted in bad faith and abused its power under Article I, § 21, 1 M.R.S. § 816 and 23 M.R.S. §§ 3023 and 3024. This motion augments both the motion for trial of facts and further elaborates on the August 16, 2021, offer of proof.

A central issue in this litigation is whether the City of Belfast (“Belfast” or “City”) acted in bad faith or abused its power when taking property by eminent domain to benefit Nordic Aquafarms Inc. (“Nordic”). At every stage of its transactions with Nordic, Belfast has shielded its dealings with Nordic from the public with the use of executive sessions and the strategic concealment of various agreements and deeds that may, or may not, have been discussed, and or negotiated in such executive sessions. Most of the executive sessions were unlawful, as the substantive discussions and decisions regarding eminent domain by the Belfast City Council (“Council”) were all conducted in secret, under the false guise of deliberations that are permitted in executive session pursuant to 1 M.R.S. § 405(6). The City’s actions violate 1 M.R.S. § 403(1) which requires that: “all public proceedings must be open to the public and any person must be permitted to attend a public proceeding.”

The City has now submitted a Rule 80B record that lacks the Council’s deliberations relevant to the City’s eminent domain takings. In the record submitted by the City, the Council met nineteen (19) times in executive session, apparently to discuss the Nordic industrial project and the use of eminent domain to take land and property rights owned by Petitioners Jeffrey Mabee and Judith Grace (“Mabee/Grace”) and to attempt to extinguish the conservation easement held by Petitioner Friends of the Harriet L. Hartley Conservation Area (“Friends”).

The record provided by the City indicates that the Council approved, without a public hearing, the Fourth Amendment to the Options Agreement with Nordic, executed on April 21, 2021, which required the City to use eminent domain, as “necessary” to allow Nordic to use the intertidal land and the Eckrote parcel for its industrial intake and discharge pipes. On August 3, 2021, after coming out of executive session, the Council approved the City Manager signing notices of eminent domain, without a prior public notice of hearing or public hearing.

The record submitted by the City does not allow the Petitioners or the Court to determine the actual reasons for the City exercising its eminent domain powers to attempt to clear the way for Nordic's discharge pipes and the record omits documents that are integral to the transaction detailed in the Fourth Amendment Agreement and the July 9, 2021 City-Nordic Purchase and Sale Agreement.

Given the City's claim that the eminent domain taking was done for the public purpose of creating a park on the Eckrote property and the intertidal land, the Petitioners need discovery to demonstrate that the park justification was a pretext to cover the fact that the taking was done primarily to benefit Nordic. Discovery is also needed to obtain the relevant documents that the City has failed to share or place in the record.

For these reasons, Petitioners are entitled to: discovery on all issues relevant to the City's eminent domain takings, the right to supplement the Rule 80B record, and a trial of the facts on whether the taking was undertaken in bad faith.²

A. Discovery is Needed to Determine What the City Council Discussed Prior to Approving the Eminent Domain Taking

The City Council made the decision to take the intertidal land and to extinguish the residential use restrictions in the 1946 servitude on the "Eckrote" parcel by eminent domain in an unlawful, non-public manner. Relevant to whether the taking was undertaken in bad faith, discovery is needed on what was discussed in the Council's private discussions and the court must allow for a trial of the facts so the court can determine whether the taking was made in bad

² Rule 80B(j) provides in part that discovery "shall be allowed as in other civil actions when such discovery is relevant ... to the subject matter involved in a trial of the facts to which the discovering party may be entitled."

faith.³

The Belfast Council improperly used executive sessions for: (i) working with Nordic to develop a pretextual narrative for justifying the eminent domain taking; (ii) discussing the justifications that the Council would cite for an eminent domain taking; and (iii) deciding to proceed with eminent domain. The executive session meetings were unlawfully used for purposes of strategy and defeating opposition to the Nordic project.

The limited record that Belfast produced to date relating to the eminent domain taking shows:

- February 20, 2018: The Council went into executive session citing 1 M.R.S. § 405(6) (C-008)⁴.
- April 4, 2019: The Council went into executive session citing 1 M.R.S. § 405(6)(c) (C-036).
- April 18, 2019: The Council went into executive session citing 1 M.R.S. § 405(6)(E) (C-055). After coming out of executive session, the Council approved the Second Amendment to the Evaluation Agreement apparently without any public discussion.

³ In *Kelo v. City of New London*, 545 U.S. 469 (2005), whether the taking was made in bad faith was the subject of a 7-day bench trial. *Id.* at 475. At that trial per Justice Kennedy, “the trial court conducted a careful and extensive inquiry into “whether, in fact, the development plan is of primary benefit to ... the developer [*i.e.*, Corcoran Jennison], and private businesses which may eventually locate in the plan area [*e.g.*, Pfizer], and in that regard, only of incidental benefit to the city. The trial court considered testimony from government officials and corporate officers; ... documentary evidence of communications between these parties...; respondents’ awareness of New London’s depressed economic condition and evidence corroborating the validity of this concern, ...; the substantial commitment of public funds by the State to the development project before most of the private beneficiaries were known, ...; evidence that respondents reviewed a variety of development plans and chose a private developer from a group of applicants rather than picking out a particular transferee beforehand, ...; and the fact that the other private beneficiaries of the project are still unknown because the office space proposed to be built has not yet been rented....” *Id.* at 491-92 (Kennedy, J., concurring).

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

⁴ The numbering C-058, etc., refers to the bates-stamp numbering on the City’s Rule 80B record.

- June 29, 2020: The Council went into executive session citing 1 M.R.S. § 405(6)(E) (C-058).
- January 5, 2021: The Council went into executive session citing 1 M.R.S. § 405(6)(E) (C-066).
- January 26, 2021: The Council went into executive session citing 1 M.R.S. § 405(6)(E) (C-070).
- March 30, 2021: The Council went into executive session citing 1 M.R.S. § 405(6)(C) (C-073)
- April 8, 2021: The Council went into executive session for 4 hours citing 1 M.R.S. § 405(6)(C) (C-079)
- April 13, 2021: The Council went into executive session citing 1 M.R.S. § 405(6)(C) for 1.5 hours (C-080)
- April 20, 2021: The Council went into an executive session for 2 hours citing 1 M.R.S. § 405(6)(C) (C-088).
- April 21, 2021: The City Council approved the Fourth Amendment with Nordic apparently without public discussion (C-097)
- May 4, 2021: The Council went into executive session citing 1 M.R.S. § 405(6)(A) for an hour (C-128).
- June 1, 2021: The Council went into executive session citing 1 M.R.S. § 405(6)(E) for 2 hours (C-136).
- June 29, 2021: The Council went into executive session citing 1 M.R.S. § 405(6)(C) (C-150).
- July 6, 2021: The Council went into executive session citing 1 M.R.S. § 405(6)(C and E) (C-153).
- July 8, 2021: The Council went into executive session citing 1 M.R.S. § 405(6)(C). Upon coming out of the executive session, the Council authorized the City manager to sign the purchase and sale agreement with Nordic. There was no public discussion of the basis for entering into the purchase and sale agreement. (C-195-196).
- July 27, 2021: The City Council went into executive session citing 1 M.R.S. § 405(6)(C). The record reflects that questions regarding eminent domain were submitted by a member of the public, but the City Council did not respond to the questions. (C-201).
- August 3, 2021: The Council went into executive session citing 1 M.R.S. § 405(6)(C). Upon coming out of the executive session, the Council authorized the City Manager to sign a notice of intent to condemn, without any public discussion (C-209). Additional questions were submitted by the public regarding eminent domain, without any response from the Council. (C-217).
- August 12, 2021: The Council held its one and only “public hearing” on its prior decision to proceed with eminent domain (C-221). The Council received 79 emails and numerous public comments, with the vast majority of the comments being opposed to the eminent domain taking (C-222). The only evidence submitted by the City in support of the eminent domain taking was comments by the Council’s attorney, William Kelly. The Councilors voted to approve taking the intertidal land and extinguishing the restrictive covenants at the meeting, each reading extensive pre-written statements that they brought with them to the meeting (C-225).

The Council approved the Fourth Amendment on April 21, 2021, which required Belfast to grant Nordic easements for laying Nordic's pipes in the intertidal land with Belfast taking the intertidal land by eminent domain. The Fourth Amendment also required Belfast to extinguish the residential use restrictions on the Eckrotes' land that prevented Nordic from using that land for installing its pipes and pump house. There is no record of any public discussions involving the City Council's approval of the Fourth Amendment with Nordic.

After coming out of an executive session on July 8, 2021, and without notice of, or, a public hearing, the Council approved the City entering into the Purchase Agreement with Nordic. With the July 8, 2021 Council Agenda, the Council received a prepared statement announcing the City entering into the transaction with Nordic for the purpose of moving Nordic's project forward and the "public benefit" of a park on the Eckrotes' land (C-190). The statement was included in the Council's record, even though the statement was never discussed or approved. The record does not reveal who authored the statement.

On August 3, 2021, the Council effectively authorized the eminent domain proceeding, when it authorized the City Manager to sign the notice of intent to condemn. Again, there was no public discussion prior to the authorization.

The only public hearing reflected in the City's record occurred on August 12, 2021, which was after the City had commenced the eminent domain proceedings. Throughout the proceeding, the Council refused to answer questions from the public regarding eminent domain. The Council's "legislative findings" in support of eminent domain consisted solely of arguments that the City's counsel, William Kelly, read into the record on August 12, 2021, without any supporting evidence presented to the Council to support the factual claims made in the

Condemnation Order, including statements asserting that no fishing occurred on the intertidal land to be taken.

B. Discovery Regarding FOAA Violations Must be Included in the Record

Maine's Freedom of Access Act ("FOAA") requires that: "... All public proceedings must be open to the public and any person must be permitted to attend a public proceeding." 1 M.R.S. § 403(1).

Like its federal counterpart, the Freedom of Information Act (FOIA), 5 U.S.C.A. § 552 (West, Westlaw through P.L. 113–31 approved 8–9–13), FOAA's "basic purpose ... is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152, 110 S. Ct. 471, 107 L.Ed.2d 462 (1989) (quotation marks omitted). The Legislature has declared that "public proceedings exist to aid in the conduct of the people's business," and enacted FOAA with the express intent that public actions "be taken openly and that the records of [public] actions be open to public inspection and [public] deliberations be conducted openly." 1 M.R.S. § 401; *see Citizens Commc'ns Co. v. Att'y Gen.*, 2007 ME 114, ¶ 9, 931 A.2d 503. To that end, FOAA requires generally that, "[e]xcept as otherwise provided by statute, a person has the right to inspect and copy any public record in accordance with this section within a reasonable time of making the request to inspect or copy the public record." 1 M.R.S. § 408–A; *see S. Portland Police Patrol Ass'n v. City of S. Portland*, 2006 ME 55, ¶ 6, 896 A.2d 960. To best promote its "underlying purposes and policies as contained in the declaration of legislative intent," FOAA explicitly states that it must be "liberally construed and applied." 1 M.R.S. § 401.

FOAA allows a public board to go into executive session, but only for purposes specified

in the statute. Significantly, 1 M.R.S. § 405(1) states: “An executive session may not be used to defeat the purposes of this subchapter....”

Before going into an executive session, the Council must make a motion that indicates “the *precise nature of the business* of the executive session and include a citation to one or more sources of statutory or other authority that permits an executive session for that business.” See 1 M.R.S. § 405(4) (emphasis added). 1 M.R.S. § 405(5) provides: “Matters other than those identified in the motion to go into executive session *may not be considered in that particular executive session.*” (emphasis added.)

In every instance of the City Council going into executive session regarding the Nordic project, the Council violated FOAA by failing to indicate in the record the precise nature of the business of the executive session. Given that the Council took votes without discussion after coming out of executive sessions, the City Council evidently made decisions in the executive sessions on pursuing eminent domain, developing a narrative that the taking benefitted the public because of the creation of a public park, and granting Nordic rights to lay its pipes and construct an industrial pump house.

The Council cited either 1 M.R.S. § 405(6)(C) or (E) as the statutory authority for the executive sessions. Subsection C only allows the use of an executive session for discussions regarding real estate “only if premature disclosures of the information would prejudice the competitive or bargaining position of the body or agency.” The executive sessions did not involve the City’s bargaining position. The City’s taking of the intertidal land and its contracts with Nordic did not involve the conditions for an executive session allowed by Subsection C.

Subsection E allows the use of an executive session regarding consultations between the Council and its attorney concerning the legal rights and duties of the Council, pending or

contemplated litigation, settlement offers, and matters where the duties of the Council's attorney pursuant to the code of professional responsibility clearly conflict with the public right's to know under FOAA or where premature general public knowledge would clearly place the Council in a substantial disadvantage. This section cannot be used to shield all of the Council's discussions on eminent domain from the public. The meetings were clearly not limited to discussion of legal rights and duties, as the Council, upon leaving the executive sessions, voted on proceeding with eminent domain without any prior public discussion.

In summary, the City Council used the nineteen (19) executive sessions to keep the public unaware of the real reasons behind the Council's decision to benefit Nordic through the exercise of eminent domain. The Petitioners are entitled to have an opportunity through discovery to determine the actual basis for the City Council's actions, as well as to determine whether 1 M.R.S. § 405(6)(C) or (E) applies to any communications in executive sessions.⁵

C. Discovery is Needed Regarding Communications Between Nordic and the City

Through FOAA requests, the Petitioners have learned that the City Council's attorney arranged a meeting during April 2021 between Nordic's attorneys and the City Council in executive session. The emails are attached to the Petitioners' supplemental record. There was no notice to the public of those meetings and no record of what was discussed between the City Council and Nordic and/or Nordic's attorneys. The City has provided no information as to whether that meeting occurred and what was discussed. The Petitioners are entitled to discovery regarding all communications between the City and Nordic, including communications between their legal counsel.

⁵ In the May 11, 2022 Order, the Court ruled that the Petitioners' FOAA claims (Count XIV) would proceed as an independent claim. The Petitioners have initiated discovery on the FOAA claims. Accordingly, the discovery relating to the FOAA claims can be used in the Rule 80B proceeding.

D. Discovery is Needed on the Issue of Whether the Taking Improperly Included Land in Northport

In the May 11, 2022 Order, the Superior Court ruled that the Petitioners' Count V, involving the claim that part of the land taken by eminent domain was located in Northport, was duplicative of the Rule 80B claim and therefore would be addressed within the Rule 80B proceeding. The issues relating to the location of the Belfast City line within the intertidal land can not be adjudicated on the Rule 80B record, as that record does not provide sufficient evidence for the Court to address these claims.

Presently, the record supplied by Belfast includes a survey by James Dorsky and a survey by Donald Richards. The Petitioners have proposed to include an affidavit of Donald Richards that concerns the location of the municipal boundary of the City of Belfast, pursuant to the 1813 statute, in the record, but the City has objected. The original version of Surveyor Richards' affidavit was attached to the August 16, 2021 Motion for Preliminary Injunction and explains the amended Dorsky image of the intertidal land to be taken submitted with Petitioners Mabee/Grace's and Friends' comments timely submitted to the City on August 12, 2021.

The boundary line issue will need to be resolved with both discovery and testimony by the surveyors, using the Law Court's recent clarification of the term "mouth of a river" in *Mabee v. Nordic Aquafarms Inc.*, 2023 ME 15, ¶¶ 34-36, 290 A.3d 79.

E. The Petitioners Should be Authorized to have their Supplemental Record Included in the Rule 80B Record

The Petitioners submitted the following documents to the City for inclusion in the record, but the City refused to include the records:

- 10/10/1973 Deed, State of Maine into City of Belfast (B710-P1153)
- 1987 City-to-BWD deed (WCRD Book 1092, Page 145)
- 02/14/2018 Belfast Water District letter to City of Belfast and exhibits

- 03/02/2018 City of Belfast Motion to Intervene, in Maine Public Utilities Commission, Docket No. 2018-00043, Belfast Water District Notice of Proposed Sale of Water Resource Land Pursuant to 35-A M.R.S. § 6109 and Chapter 691 of the Commission's Rules
- 03/05/2018 Order Granting Petition to Intervene in Maine Public Utilities Commission, Docket No. 2018-00043, Belfast Water District Notice of Proposed Sale of Water Resource Land Pursuant to 35-A M.R.S. § 6109 and Chapter 691 of the Commission's Rules
- 03/06/2018 Belfast Water District's Responses to MPUC's Data Requests of February 7, 2018, in Maine Public Utilities Commission, Docket No. 2018-00043, Belfast Water District Notice of Proposed Sale of Water Resource Land Pursuant to 35-A M.R.S. § 6109 and Chapter 691 of the Commission's Rules
- 04/09/2018 DOT Deed of Vacation to City (B4778-P34)
- 03/22/2021 Confidential Real Property Negotiations
- 04/07/2021 Confidential Real Property Negotiations
- 2021 07 05 email thread: William Kelly, Joanna B. Tourangeau, David Kallin RE Call at 3 today?
- 2021 07 07 W Kelly email P Klein
- 2021 07 08 323 pm W Kelly
- 2021 08 13 Jeffrey Mabee affidavit with photos
- 2021 07 08 City of Belfast Special City Council Meeting Packet (156 pp)
- 2021 07 12 William Kelly letter to Friends of the Harriet L. Hartley Conservation Area (with enclosures)
- 2021 07 12 William Kelly letter to Jeffrey R. Mabee and Judith B. Grace (with enclosures)
- 2021 07 12 William Kelly letter to Jeffrey R. Mabee and Judith B. Grace (with enclosures) (intertidal land)
- 2021 07 15 William Kelly letter to Peter D. Klein, Esq., and 07/15/2021 Municipal Deed, City of Belfast into Nordic (and 10/12/2021 email thread K. Collins, K. Ervin Tucker, William Kelly RE: FOAA Request)
- 2021 07 29 & 2021 08 12 K. Tucker emails to Belfast City Council and William Kelly RE Response Letter to Kelly (104 pp); 07/29/2021 K. Tucker letter to William Kelly RE 7-12-2021 "Offer(s) to Mabee/Grace and Friends with exhibits
- 2021 07 30 & 2021 08 05 email thread between K. Tucker and W. Kelly RE: Response Letter to Kelly, attachment: 2021 08 04 W. Kelly letter to Mabee/Grace and Notice of Intent to Condemn Real Property; 2021 08 04 W. Kelly letter to Friends (13 pp)
- 2021 08 16 William Kelly letter to Friends of Harriet L. Harley Conservation Area with attachments (Condemnation Order, \$36k check)
- 2021 08 16 William Kelly letter to Jeffrey R. Mabee and Judith B. Grace with attachments (Condemnation Order, checks)
- 2021 08 19 Affidavit of Donald R. Richards, P.L.S. and exhibits
- 2021 08 13 Andrew Stevenson Affidavit and exhibits
- 2021 08 12 Sally Brophy Affidavit and exhibits
- 2021 08 23 M. Hurley comment

- 01/14/2022 J. Tourangeau/Nordic Letter to K. Collins, Legal Counsel to City of Belfast
- 03/14/2022 Quitclaim Deed: Belfast Water District into City of Belfast (B4776-P270)
- Belfast Water District into Nordic (B4776-P210)
- 03/15/2022 Deed of Vacation: City of Belfast to Nordic (B4778-P35)
- Release Deed Nordic to City (B4679-P160)
- Conservation easement deed B4367-P273
- Ex A Complete Clerk's Certificate
- Ex D 9-7-2021 Recorded Easement from City
- M Hurley Comment-Belfast City Council
- 2023 05 31 Affidavit of Donald R. Richard, P.L.S. and exhibits
- Complete FOAA Response with email threads 01/21/2021 through 07/02/2021 between Nordic (J. Tourangeau, B. Chandler) and City (B. Kelly) RE negotiations; various attachments, including without limitation: draft Third Amendment to Evaluation Agreement and Options and Purchase Agreement, draft Fourth Amendment to Evaluation Agreement and Options and Purchase Agreement, Purchase and Sale Agreement, Order denying Plaintiffs' Motion for Partial Summary Judgment (Dec. 18, 2020), Plaintiffs' Exhibit 27 (B4425-P165) (324 pp)

The City has also included the PUC's Order without including underlying documents from the City and the Belfast Water District ("BWD"), revealing that the City characterizes its relationship with Nordic as one of "partnering" to assist Nordic to obtain its local, State and federal permits, and both the City and BWD misrepresented the origins of the BWD property as limited to 1919 deeds, without advising the PUC of the 1973 state-imposed conditions and restrictions on 12.5-acres of the land owned by the BWD (WCRD Book 710, Page 1153), obtained by the BWD from the City in 1987 (WCRD Book 1092, Page 145). These PUC filings also should have been included as part of the basis for the eminent domain taking.

The Petitioners request that all the supplemental record described above be included in the Rule 80B record, as well as documents obtained through discovery. Each of the documents in the supplemental record are relevant evidence to these proceedings. The affidavit of Jeffrey Mabee contains the photographs of fishing that Amy Grant showed to the City Council on August 12, 2021. While the affidavits of Mabee, Stephenson, and Brophy were not filed with the City Council, the affidavits should be included in the record as the affidavits contain information

relevant to the decisions that the Council made in executive session.

CONCLUSION

For the above reasons, the Petitioners respectfully request that: (i) they be permitted to conduct discovery as provided in the scheduling order attached to their April 14, 2023, Supplemental Motion, (ii) the Petitioners' supplemental record be allowed to be part of the Rule 80B record, and (iii) as previously briefed and as set forth in the detailed offer of proof filed with request for a trial of the facts, Petitioners' request should be granted. The Court should also issue a scheduling order regarding the independent claims and the discovery allowed on the Rule 80B claims. The Court should also require that answers be filed at this time on the independent claims.

Dated: June 7, 2023

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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.