

STATE OF MAINE
WALDO, ss

SUPERIOR COURT
Civil Action
Docket No. RE-2021-0007

JEFFREY R. MABEE, et al.,

Petitioners/Plaintiffs

ORDER

v.

CITY OF BELFAST,

Respondent/Defendant

and NORDIC AQUAFARMS, INC.,

Intervenor/Defendant.

This case concerns a petition brought under M.R. Civ. P. 80B for judicial review of the City of Belfast's Order of Condemnation issued on August 12, 2021, condemning and taking title to certain intertidal land and upland running along the Penobscot Bay near the mouth of the Little River and taking certain other property rights covering that land. The matters pending before the Court are Plaintiffs' motion to remand, Defendants' cross motion for remand and to stay or dismiss independent claims, and Plaintiffs' motion for trial of the facts. Defendants join the motion to remand in part and oppose in part and oppose the motion for trial of the facts.

Cross Motions for Remand and Motion to Stay or Dismiss Independent Claims

The disputes in this case center around an Order of Condemnation issued by the City of Belfast's City Council on August 12, 2021 that condemns and, through eminent domain, takes certain intertidal land and property rights owned by Plaintiffs along the Penobscot Bay near the mouth of the Little River. The motion to remand follows a ruling by the Law Court on February 16, 2023, determining that Plaintiffs own certain property rights to the land taken by the City, including title to

1
Entered on the Docket: 9/29/2023

the intertidal land and the right to enforce a residential purpose only restriction (equitable servitude) that encumbers the subject land and benefits Mabee and Grace's abutting land. *Mabee v. Nordic Aquafarms Inc.*, 2023 ME 15, 290 A.3d 79 (*Mabee I*). Plaintiffs' motion asserts that the Law Court's determination that Plaintiffs own those property rights and the Law Court's other holdings in that ruling have fundamentally changed the circumstances on which the condemnation order was based and revealed errors of law in the order.

The August 12, 2021, Order of Condemnation describes how the City of Belfast entered into an "Options and Purchase Agreement and Evaluation Agreement" with Nordic on January 30, 2018, through which the City asserts it will provide significant public benefits to the citizens of Belfast and to Belfast Water District utility customers by facilitating Nordic's planned land based aquaculture facility that Nordic hopes to operate in the City and through the City's development of a public park in the same area. The order describes how the City held public proceedings resulting in the adoption of changes to the City's land use law to facilitate the aquaculture project, how the Maine Public Utilities Commission authorized the sale of Belfast Water District land, and how the Public Utilities Commission found that the sale of the land was consistent with the public's interest. Part of both Nordic's project and the City's project calls for each to obtain rights to use a certain waterfront parcel along Penobscot Bay formerly owned by Janet and Richard Ekrote and an adjoining intertidal area.

The order then states that, after the above actions were taken, a lawsuit was commenced alleging "title defects" to the intertidal zone adjoining the waterfront parcel formerly owned by the Ekrotes which Nordic planned to use to contain pipeworks for its aquaculture facility and which the City had purchased and planned to use for its park. The order asserts that that lawsuit has caused delays to Nordic's aquaculture project, the City's park project, and delays to related plans by the BWD to upgrade its water supply facilities for the City. The City then reports that it has attempted to buy the conflicting real property claims but that the owners of those alleged claims have refused to accept fair value. The condemnation order then repeats some of the public benefits hoped to be gained from

the aquaculture facility and park project and declares the City Council's finding that the need to clear the "ongoing alleged title defects" from the former Eckrote land to allow the projects to progress is a public exigency that supports the taking of those "alleged" property claims by eminent domain. The particular property interests taken under the City's order are described in attachments to the order and include rights and interests claimed by plaintiffs Jeffrey Mabee, Judith Grace, and The Friends of the Harriet L. Hartley Conservation Area ("Friends") over the intertidal zone adjoining the Eckrote land and the right to enforce a residential purposes restriction (equitable servitude) that burdens the upland.

On February 16, 2023, in *Mabee I*, the Law Court issued its ruling on precondemnation ownership of the subject intertidal area and the enforceability of the residential purpose restriction. Most relevant here, the Law Court held that the intertidal land is owned by Mabee and Grace, that Mabee and Grace have the right to enforce the residential purposes restriction over the adjoining upland, and that Friends has an enforceable conservation easement over the intertidal land (which also includes the right to enforce Mabee and Grace's equitable servitude). *Id.* ¶ 61. The Law Court also held that, in boundary dispute cases, the phrase "mouth of a brook" is the point of discharge of the brook and that when the brook discharges into a tidally influenced water body the "mouth" is a "fixed point defined by the upland boundary" and "does not shift with the tide." *Id.* ¶ 35.

The Law Court's ruling in *Mabee I* clarifies the matter of precondemnation ownership of the intertidal and the enforceability of the residential property restriction that the City took through its Order of Condemnation, as well as other matters. These developments have generated or revealed, a number of inconsistencies and errors in the City's condemnation order, some of which the Court has briefly listed below:

- The Law Court's ruling in *Mabee I* reveals that the "alleged title defects" referenced by the City in its Order of Condemnation, which prompted the Order itself, are not "alleged" but actual "title defects"—the intertidal zone condemned by the City was always owned by Mabee and

Grace, rather than the Eckrotes, and the alleged residential purpose restriction over the condemned upland is enforceable by Mabee, Grace, and Friends.

- The Order of Condemnation relies on a survey plan created by Gartley & Dorsky that Nordic used to represent its position in *Mabee I*. The survey plan indicates that the intertidal zone adjoining the Eckrote upland is owned by the Eckrotes rather than Mabee and Grace and does not identify Friends as owning a conservation easement.
- The Gartley & Dorsky survey plan attached to and relied on by the Order of Condemnation appears as though it was created with the misunderstanding that the location of the “mouth” of a river or stream that flows into a tidally influenced water body shifts with the tide of the water body, instead of being a fixed point on the upland boundary of that water body, as the Law Court held in *Mabee I*. This misunderstanding may have resulted in inaccuracies in the City’s identification of the boundaries of the land that it takes through the condemnation order. One potential inaccuracy resulting from Gartley & Dorsky’s apparent misunderstanding of the term “mouth” concerns whether the City’s municipal boundary was *mismarked* on the Gartley & Dorsky survey attached as “Schedule A” to the Order of Condemnation because the ancient Massachusetts statute which established the City’s municipal boundaries calls for one of the boundary lines to be drawn “due east” from the “mouth of Little River” and the location of the mouth of the Little River is substantially different if determined with the understanding that the mouth is a fixed point on the upland boundary or a shifting point that ranges between the high water and low-water marks of the Penobscot Bay. (*See Pls.’ Mot. Remand, Ex. D ¶¶ 5-35.*) (*Affidavit of Donald R. Richards, P.L.S.*); *An Act to Establish the Boundaries of the Town of Belfast in the County of Hancock, 1813 Mass. Acts 281-282, June 6, 1813.*¹ The

¹ The “Act to Establish the Boundaries of the Town of Belfast in the County of Hancock” can be viewed by accessing the State Library of Massachusetts website at the following web address: <https://archives.lib.state.ma.us/bitstream/handle/2452/109152/1813acts0053.pdf?sequence=3&isAllowed=y>

difference between a line drawn due east from the mouth of the Littler River when the mouth is located at the upland boundary of the river or at the point of discharge when the Penobscot Bay is at low tide is shown on Exhibit 4 of the affidavit of Donald Richards P.L.S. attached to Plaintiffs' motion to remand. The City attached the Gartley & Dorsky survey as "Schedule A" to its Order of Condemnation and relies on the survey in the Order to identify the land and interests taken under it. The Gartley & Dorsky survey's apparent misunderstanding as to how the mouth of the Littler River should be located therefore may have caused the City to inaccurately identify the extent of the land taken under its Order of Condemnation as a result of the City contemplating its boundary line as being drawn from the point where the Little River discharges into the Penobscot Bay at the low-water mark of the Bay instead of at the fixed point where the Little River discharges from the upland. *Compare* Richards Aff., Ex. 4 with Belfast, Me., Order of Condemnation at "Schedule A" (August 12, 2021). Accordingly, the City's reliance on Gartley & Dorsky's now defunct survey in its condemnation order generates a serious question as to whether the City misidentified its municipal boundary in the order and, as a result, mistakenly condemned and took a segment of land that lies outside of its municipal boundaries.

- The Order of Condemnation does not identify Friends of the Harriet L. Hartley Conservation Area as having, through its conservation easement, the right to enforce the residential purposes restriction (equitable servitude) owned by Mabee & Grace.

In short, the conclusion of *Mabee I* has generated new facts and issues concerning the ownership of property rights over the condemned land which are material to the City's condemnation decision and which alter the factual context of the City's decision.

M.R. Civ. P. 80B(c) provides that the Court "may remand" an 80B matter to the governmental agency for further proceedings on the issues. When the Superior Court remands an 80B petition for further action or proceedings by the governmental agency, the court transfers jurisdiction from the

court back to the governmental agency and the court's decision is not regarded as a final judgment.

M.R. Civ. P. 80B(m); *York Hosp. v. Dep't of Human Health & Human Servs.*, 2008 ME 165, ¶¶ 34-36, 959

A.2d 67. As it is acting as an intermediate appellate court in this matter, the Superior Court looks to Maine's primary jurisdiction doctrine, which provides that appellate courts should avoid ruling "on matters committed by law to the decision-making authority of an administrative agency before the administrative agency has first had an opportunity to review and decide the facts on the merits of the matter at issue." *Christian Fellowship & Renewal Ctr. v. Town of Limington*, 2006 ME 44, ¶ 40, 896 A.2d 287.

In the *Christian Fellowship & Renewal Ctr.* case, the Law Court encountered the circumstance where a governmental agency issued a decision, a petition for judicial review was initiated, and additional material facts developed after issuance of the agency decision but before the matter was concluded in the courts. The Christian Fellowship and Renewal Center had applied for a charitable exemption from taxes for its ninety acres of land in Limington, Maine but was denied by the Town of Limington and by the York County Commissioners. When the matter was on its third appeal to the Superior Court, the parties entered a stipulation identifying mutually agreed upon facts that had developed since the time the York County Commissioners had entered their last administrative decision, had not been before considered by the Commissioners, and which were material to the issue of whether Christian Fellowship qualified for the charitable exemption. The Superior Court affirmed the Commissioners' denial of the charitable exemption and Christian Fellowship appealed. The Law Court applied the primary jurisdiction doctrine to the circumstances and reasoned:

When new evidence or stipulations of fact are developed that would expand a record presented to a fact-finding agency, that evidence or those stipulations should first be presented to the fact-finder for consideration. They should not be presented to an appellate court on review with an invitation to the court to adopt facts or conclusions that an agency, by law, has the primary jurisdiction to decide.

Id. ¶ 41. The Law Court then held that the new evidence set forth in the parties' mutual stipulations required that the Superior Court's judgment be vacated and the matter be remanded to the County

Commissioners to reconsider the application for charitable exemption in light of the new facts and the Law Court's clarifications of Maine's charitable exemption law which the court had also provided in its ruling.

The procedural posture of *Christian Fellowship* is different from the posture of the litigation here, but the legal concepts are equally applicable—under the primary jurisdiction doctrine, “when new evidence or stipulations of fact are developed that would expand a record presented to a fact-finding agency, that evidence or those stipulations should first be presented to the fact-finder for consideration.” *Id.* ¶ 41. Here, new material facts have developed since Belfast's City Council issued its August 12, 2021, Order of Condemnation. The Law Court issued its decision in *Mabee I* determining the validity of Mabee, Grace, and Friends' precondemnation claims to the property taken by the City for the Nordic aquaculture and City park projects. The decision held that Mabee and Grace always owned the condemned intertidal area (rather than the Ekrotas), Friends holds an enforceable conservation easement over the condemned intertidal land, and that Mabee, Grace, and Friends all hold a right to enforce a residential purpose only restriction on the condemned upland. The clarification from the Law Court that Mabee, Grace, and Friends' property interests in the subject land are not “alleged title defects” but actual valid enforceable property claims is material both to the City's decision to take the condemned land, which it believed may not have actually been burdened by those interests, and decision as to what amount to pay the owners for just compensation for those takings. The ruling in *Mabee I*, clarifying ownership of the land before the taking and clarifying the definition of “mouth of a brook,” also revealed that the Gartley & Dorsky survey plan used by the City Council to designate the condemned land may no longer be reliable and may have misidentified the condemned land. In addition, because of the proximity of the condemned land to the mouth of the Little River (a monument used to designate the City's municipal boundaries) and the questionable reliability of the Gartley & Dorsky survey, which may have mislocated the mouth of that river, and which the City used to identify the condemned land in “Schedule A” of its condemnation order,

creates a new question as to whether some of the land taken by the City's order actually lies outside of the City's municipal boundaries. See pages 4-5 of this Order. All of these new determinations and circumstances resulting from the Law Court's ruling in *Mabee I*, would expand the record presented to the Belfast City Council (the administrative body with the authority to make condemnation decisions for the City of Belfast) and could significantly impact the City's condemnation decision. Accordingly, under the doctrine of primary jurisdiction, the Court has concluded that Plaintiffs' 80B matter must be remanded to the Belfast City Council for it to review these new developments and enter a decision that considers the new circumstance and clarifies the property that is being condemned and taken. See *Christian Fellowship & Renewal Ctr.*, 2006 ME 44, ¶¶ 40-41, 896 A.2d 287.

Although Plaintiffs and Defendants agree that remand is appropriate, they disagree as to whether the Court should ~~order remand and vacate the Order of Condemnation or merely remand the matter without vacating the City's order.~~ Maine's Law Court has not spoken on this particular issue; however, both parties have referred the Court to the legal rule used by the District of Columbia Circuit and Fifth Circuit Courts of Appeals to decide such matters under the federal Administrative Procedure Act, which, although not directly on point to the subject at issue in this case, the Court finds to be a useful reference point. The D.C. Circuit recently articulated the rule used under the federal APA as:

While unsupported agency action normally warrants vacatur, [a] court is not without discretion" to leave agency action in place while the decision is remanded for further explanation. *Advocates for Highway and Auto Safety v. Federal Motor Carrier Safety Administration*, 429 F.3d 1136, 1151 (D.C. Cir. 2005) (citation omitted). In *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993), our court set forth the two factors governing that exercise of discretion: "The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Id.* at 150-51 (internal quotation marks omitted). The "seriousness" of a deficiency, we have explained, is determined at least in part by whether there is "a significant possibility that the [agency] may find an adequate explanation for its actions" on remand. *Williston Basin Interstate Pipeline Co. v. FERC*, 519 F.3d 497, 504 (D.C. Cir. 2008).

Standing Rock Sioux Tribe v. United States Army Corps of Engineers, 985 F.3d 1032, 1051 (D.C. Cir. 2021), cert. denied sub nom. *Dakota Access, LLC v. Standing Rock Sioux Tribe*, 142 S. Ct. 1187 (2022); see also *Texas*

Ass'n of Manufacturers v. United States Consumer Prod. Safety Comm'n, 989 F.3d 368, 389 (5th Cir. 2021) (“Remand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so.”); *Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 518-519 (D.C. Cir. 2020); *Cent. & S. W. Services, Inc. v. U.S. E.P.A.*, 220 F.3d 683, 692 (5th Cir. 2000). A key distinction between the cases cited above and the matter before the court, is that in all of the above cases the federal circuit court was determining whether vacatur was appropriate after the merits of the case had already been more fully discussed in the district court proceeding (e.g., the federal agency’s failure to prepare an environmental impact statement in *Standing Rock Sioux Tribe*) and involved issues and circumstances that more easily demonstrated the seriousness of the deficiencies in the governmental agency’s order.

Looking at the circumstances of this case, the stage of the litigation, and the federal guidance, the Court has decided that remand without vacatur is appropriate. This litigation has not yet progressed to a decision on the merits and so, the matter of whether the City of Belfast’s condemnation and taking is an “unsupported agency action” has not yet been tried and determined. *See Standing Rock Sioux Tribe*, 985 F.3d at 1051 (“While unsupported agency action normally warrants vacatur, . . .”). While the parties dispute whether the taking was for a public purpose and whether a public exigency was established, the case has not progressed to the point that those matters have been argued by the parties and decided by the Court. Accordingly, it would be inappropriate for the Court to vacate the City’s order at this time, as vacating the order would be a de facto judgment that the City’s condemnation order is invalid. It is also possible that if the condemnation order is remanded to the Belfast City Council the City could amend its condemnation order to appropriately substantiate an eminent domain taking of the subject property rights in light of the new determinations provided by the Law Court’s resolution of the issues in *Mabee I*. Additionally, there has been no indication to the Court that Defendants have initiated actions “on the ground” to construct the aquaculture facility in reliance on the rights they claim under the pending Order of Condemnation. Given the early stage

that this litigation is in, and the circumstances described above, the Court has determined that remand without vacatur is appropriate.

For the above reasons, the Court grants the parties' cross motions to remand petitioner's 80B matter to the Belfast City Council for further proceedings on its Order of Condemnation dated August 12, 2021. On remand, the Court directs the City Council to consider the new clarifications and determinations provided by the Law Court's resolution of *Mabee I* and decide whether to alter, amend, or vacate its condemnation decision in light of the new circumstances. The Court does not retain jurisdiction of that 80B matter. The Court rejects Plaintiffs' invitation to vacate the Order of Condemnation as part of this remand. Plaintiffs' causes of action which are independent of their Rule 80B action are stayed until the City Council concludes its condemnation proceedings on remand because of the close relationship that those claims bear to the condemnation decision.

Motion for Trial of the Facts

Plaintiffs have also moved for a trial of the facts on their 80B action under M.R. Civ. P. 80B(d). Plaintiffs last filed a supplement to that motion on April 18, 2023. As the Court has remanded the 80B matter to the Belfast City Council for further proceedings and the Court does not retain jurisdiction of that matter after remand, Plaintiffs' motion for a trial of the facts on that 80B matter is moot.

Entry:

1. Plaintiffs' "Motion to Remand the 8-12-2021 Condemnation Order. . ." is GRANTED IN PART and DENIED IN PART.
2. Defendants' "Cross-Motion to Remand and Stay and/or Dismiss Independent Claims" is GRANTED.
3. Plaintiffs' motion for trial of the facts is MOOT.
4. The City of Belfast City Council's Order of Condemnation dated August 12, 2021, is REMANDED to the Belfast City Council for further proceedings.
5. All counts of Plaintiffs' complaint other than Plaintiffs' claim under M.R. Civ. P. 80B for review of the August 12, 2021, Order of Condemnation are STAYED until the Belfast City Council completes its proceedings on remand.

The Court directs the Clerk to incorporate this Order on the docket pursuant to M.R. Civ. P.

79(a).

Date

9/28/23


Justice, Maine Superior Court