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September 27, 2021

Kristin M. Collins, Esq.
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Augusta, ME 04330

Re: Conservation Easement Recorded in the Waldo County Registry of Deeds, Book 4367,
Page 273

Dear Ms. Collins,

Per William Kelly's letter dated July 13, 2021, the City of Belfast has requested the Office of the Attorney General (the OAG) confirm that it will not initiate any action pursuant to 33 M.R.S. § 478(1)(D)(4) or take the position that court approval of real estate transactions as to certain disputed intertidal land is necessary pursuant to 33 M.R.S. § 477-A(2)(B). Since my preliminary email response to Mr. Kelly, dated August 9, 2021, I have reviewed the information provided by the City in support of its request. Based on that review, the OAG declines to provide the requested confirmation. Instead, this letter confirms the OAG's position that, assuming the validity of the subject conservation easement and the City's condemnation of same, the City's condemnation of the conservation easement does not terminate that real property interest because, pursuant to 33 M.R.S. § 477-A(2)(B), only a court may terminate a conservation easement.

Background

Based on the information provided by the City, the OAG understands as follows.

1. Disputed Ownership of Intertidal Land

Nordic Aquafarms Inc. (Nordic) has obtained various federal, state, and local approvals to construct, operate, and maintain a land-based recirculating aquaculture system. The aquaculture system would consist of a primary upland facility site in Belfast and a seawater access system. The seawater access system would include one water discharge pipe and two water intake pipes that would run from the upland facility, cross intertidal land, and extend onto state-owned submerged lands in Penobscot Bay. Both Jeffrey Mabee and Judith Grace and Richard Eckrote and Janet Eckrote have claimed ownership of the disputed intertidal land where Nordic proposes

to bury its pipes. The Superior Court is adjudicating that title dispute in *Mabee v. Nordic Aquafarms, Inc.*, RE-2019-18 (Super. Ct., Waldo County).

2. *The Conservation Easement*

In April 2019, Jeffrey Mabee and Judith Grace conveyed to Upstream Watch a perpetual conservation easement over the disputed intertidal land, as further described in the Waldo County Registry of Deeds, Book 4367, Page 273. See 33 M.R.S. § 476(1) (defining "conservation easement").¹ As a threshold matter, the disputed intertidal land is not subject to the conservation easement unless Mabee and Grace owned that land at the time they granted the conservation easement to Upstream Watch. See *Almeder v. Town of Kennebunkport*, 2019 ME 151, ¶ 28, 217 A.3d 1111 ("[A] grantor may not convey more than what he or she owns."). As stated above, the Superior Court is adjudicating whether Mabee and Grace owned the disputed intertidal land at the time they conveyed the conservation easement to Upstream Watch. See *Mabee v. Nordic Aquafarms, Inc.*, RE-2019-18 (Super. Ct., Waldo County).

If valid, the conservation easement prohibits Nordic's seawater access system on the property subject to the conservation easement. The purposes of the conservation easement are to:

1. Preserve the Protected Property in perpetuity as open space and free from structures of any sort, especially any principal or accessory structures erected, constructed or otherwise located in furtherance of any commercial or industrial purpose.
2. Preserve the property in its natural condition. The term 'natural condition' as referenced in this . . . Conservation Easement shall mean the condition of the Protected Property as it exists at the time of this Conservation Easement, or other changes that may occur to the Protected Property related to restoration of the adjacent Little River as a natural Fishway.
3. Provide a significant public benefit by protecting and preserving, in perpetuity, the Protected Property in its present and historic, primarily undeveloped, natural condition.

To achieve its purposes, the conservation easement expressly prohibits, among other things: filling, excavating, and removing natural materials; any alterations of topography; vegetation removal, except by the grantor in limited instances; industrial activities; commercial activities; and structures.

Based on available information, Nordic's aquaculture system could be characterized as either a commercial or industrial use, or perhaps both. See, e.g., *Merrill v. Saco Valley Land Trust*,

¹ "'Conservation easement' means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic or open space values of real property; assuring its availability for agricultural, forest, recreational or open space use; protecting natural resources; or maintaining or enhancing air or water quality of real property." 33 M.R.S. § 476(1).

RE-2016-44, 2017 WL 2674057, *5-*6 (Super. Ct., York Cty., Apr. 29, 2017) (discussing the meaning of "commercial" as used in a conservation easement that did not define the term). Nordic's pipes are structures. *See* Black's Law Dictionary (defining "structure" as "[a]ny construction, production, or piece of work artificially built up or composed of parts purposefully joined together"); *see also* 12 M.R.S. § 682(4) (defining "structure" for purposes of the Land Use Planning Commission to mean "anything constructed or erected with a fixed location on or in the ground, including, but not limited to, buildings, mobile homes, retaining walls, billboards, signs, piers and floats"). Further, Nordic would need to excavate or remove natural materials, including vegetation present, to bury the pipes in the intertidal zone, which activities the conservation easement also prohibits. If Mabee and Grace owned the disputed intertidal land at the time they conveyed the conservation easement, multiple provisions of the conservation easement prohibit Nordic's seawater access system on that land.

In November 2019, Upstream Watch assigned the conservation easement to the Friends of the Harriet L. Hartley Conservation Area (the Friends). That assignment is recorded in the Waldo County Registry of Deeds, Book 4435, Page 344.

3. *City Agreements with Nordic*

In April 2021, the Belfast Water District, the City, and Nordic executed the Fourth Amendment to Evaluation Agreement and Options and Purchase Agreement (the Fourth Amendment).² The Fourth Amendment obligates the City to clear any title defects to the disputed intertidal land to facilitate Nordic's acquisition of necessary project rights. The Fourth Amendment defines "necessary project rights" to mean:

fee or easement rights sufficient for a perpetual subsurface easement for the purpose of maintaining, owning, and operating water pipes and related equipment, including in connection therewith, installation of culverts, pipes, gaskets, pumps, valves, and other equipment, together with an easement for the purpose of constructing, grading, excavating, and performing earth work as may be necessary to construct, install and maintain such pipes, gaskets, pumps, valves and other equipment as required by any approvals issued by any municipal, state or federal authorities for the installation and maintenance thereof.

In July 2021, the City and Nordic executed a Purchase and Sale Agreement pursuant to which the City agreed to convey to Nordic an easement over the disputed intertidal land for the installation, operation, and maintenance of Nordic's seawater access system along with a temporary construction easement (the proposed Nordic easement). The proposed Nordic easement would also convey to Nordic the right to remove vegetation and change the grade of the property. The Purchase and Sale Agreement requires that the City convey the proposed Nordic easement to Nordic free from specified title defects, including any right, title, and interest of the Friends.

² The OAG has not been provided with nor reviewed the Evaluation Agreement and Options and Purchase Agreement or the first, second, and third amendments to that agreement. Because the scope of this letter is limited, the letter does not recount all aspects of those agreements.

4. *City's Condemnation of Disputed Intertidal Land*

In August 2021, the City condemned the Friends' property interest in the disputed intertidal land. The City's Condemnation Notice states that the City is acting pursuant to 30-A M.R.S. § 3101, 23 M.R.S. §§ 3021 *et. seq.*, and 1 M.R.S. § 816. Neither the City's Condemnation Notice nor its Condemnation Certificate refer to the Friends' real property interest as the conservation easement, but the OAG assumes that the City condemned the conservation easement. Among other findings set forth in its Condemnation Certificate, the City incorporated the Fourth Amendment, finds that the City has been unable to purchase rights to the alleged title defects from certain parties, and further finds that the exercise of eminent domain is "necessary to clear ongoing alleged title defects to its land described in Schedules A and B" and obtain specified, recited benefits. The City's Condemnation Certificate does not specify what effect the City believes the condemnation has on the conservation easement.

Mabee and Grace are contesting the City's exercise of its eminent domain authority over the disputed intertidal land on numerous bases, including, without limitation, as violating 33 M.R.S. §§ 477-A(2)(B) and 478 (Count VII).³ *Mabee v. City of Belfast*, BELSC-RE-2021-007 (Super. Ct., Waldo Cty.).

5. *City's Conveyance of the Nordic Easement*

In September 2021, the City conveyed to Nordic a permanent easement appurtenant over the disputed intertidal land, which easement is recorded in the Waldo County Registry of Deeds, Book 4704, Page 158 (the Nordic easement). The Nordic easement, if valid, grants to Nordic the right to install, operate, and maintain its aquaculture piping along with a temporary construction easement. The Nordic easement also affords Nordic the right to remove vegetation and change the grade of the property.

Discussion

As laid out above, the City (1) agreed to clear title on a disputed parcel of intertidal land that may be subject to a conservation easement and convey to Nordic the Nordic easement, which allows Nordic to use the property for its seawater access system; (2) condemned the conservation easement pursuant to 30-A M.R.S. § 3101, 23 M.R.S. §§ 3021 *et. seq.*, and 1 M.R.S. § 816; and (3) conveyed to Nordic the Nordic easement. Assuming the conservation easement is valid, it prohibits Nordic's use of the property pursuant to the Nordic easement (i.e., for the seawater access system). The City has asked the OAG to confirm that the City may condemn the conservation easement and convey the Nordic easement without obtaining court approval pursuant to 33 M.R.S. § 477-A(2)(B).

Title 30-A M.R.S. § 3101 authorizes the City to "acquire real estate or easements for any public use by using the condemnation procedure for town ways, as provided in Title 23, chapter 304." Assuming that "easements" as used in 30-A M.R.S. § 3101 includes conservation easements, the City arguably may condemn for public use a conservation easement held by a private entity

³ The complaint in *Mabee v. City of Belfast* also contends the City's condemnation violates 1 M.R.S. § 816 (Count I), Maine Constitution Art. I, § 21 (Count II), and 30-A M.R.S. § 3101(2) (Count VI).

provided such condemnation does not violate 1 M.R.S. § 816.⁴ Before 2007, the process used by a municipality to condemn a conservation easement may have been fully prescribed by 23 M.R.S. §§ 3021-3035.⁵ The condemned conservation easement would "pass to the municipality upon service of the order of condemnation and check or upon recordation in accordance with section 3024, whichever occurs first." 23 M.R.S. § 3023. Before 2007, a municipality's purported condemnation of a privately held conservation easement potentially could have modified or terminated the conservation easement "to the extent that the taking permits a use inconsistent with the continuance of the servitude." Restatement (Third) of Property (Servitudes) § 7.8 (2000).

In 2007, however, the Legislature amended Maine's conservation easement statute, 33 M.R.S. §§ 476 to 479-C, to specifically address amendments and terminations of conservation easements. P.L. 2007, ch. 412. As amended, Maine's conservation easement statute now vests in the courts the power to terminate a conservation easement or amend it in a manner that materially detracts from the conservation values intended for protection. Importantly, it provides: "Amendments and terminations of a conservation easement may occur *only* pursuant to this subsection." 33 M.R.S. § 477-A(2) (emphasis added). Subsection 477-A(2)(B) further provides:

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.

Title 33 M.R.S. § 478(3) further states that "[t]he court may permit termination of a conservation easement or approve amendment to a conservation easement that materially detracts from the values its serves, as provided in section 477-A, subsection 2(B)." Maine's conservation easement statute does not identify any exceptions to its requirement of court approval. Nor did P.L. 2007, ch. 412 amend 30-A M.R.S. § 3101 or 23 M.R.S. §§ 3021-3035 to provide that a municipality is exempt from 33 M.R.S. § 477-A(2)(B) when condemning a conservation easement.

Alone, a municipality's condemnation of a conservation easement does not necessarily require court approval provided the conservation easement remains intact: Municipalities may hold conservation easements and conservation easements may be amended without court approval provided the amendment does not materially detract from the conservation values intended for protection. 33 M.R.S. § 476(2)(A) (defining "holder" to include "a governmental body empowered to hold an interest in real property under the laws of this State or the United States"); *see* 33 M.R.S. § 477-A(2), (2)(B) (requiring, as to conservation easement amendments, court approval of amendments that materially detract from the conservation values intended for protection). For example, if the Nordic easement did not authorize uses prohibited by the conservation easement, and assuming the City's exercise of its eminent domain authority was valid, the City presumably could condemn the conservation easement and become the holder, without any need to terminate, partially terminate, or amend the conservation easement in a manner so as to materially detract from the values intended for protection. But where, as here, the conservation easement prohibits

⁴ Title 1 M.R.S. § 816 limits the use of eminent domain in response to *Kelo v. City of New London*, 545 U.S. 469 (2005). L.D. 1870 (122d Legis. 2006).

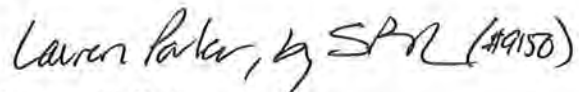
⁵ This letter does not consider the application of charitable trust principles to the condemnation of a privately held conservation easement.

the uses authorized by the Nordic easement, the conservation easement must be terminated or amended before Nordic can exercise the rights conveyed by the Nordic easement. And as discussed above, since 2007 the only entity with the authority to terminate, partially terminate, or amend the conservation easement to allow Nordic's use of the property pursuant to the Nordic easement is a court. 33 M.R.S. § 477-A(2), (2)(B); *see* 33 M.R.S. § 478.

Assuming its validity, the conservation easement remains in effect and prohibits Nordic's use of the disputed intertidal land pursuant to the Nordic easement until such time as a court terminates or amends the conservation easement to allow Nordic's use of the property in an action in which the Attorney General is made a party, or holds that 33 M.R.S. § 477-A(2) and (2)(B) do not apply when a municipality condemns a conservation easement pursuant to 30-A M.R.S. § 3101.

The Office of the Attorney General takes seriously its role in the proper administration of conservation easements. Thank you for your interest in this matter and please feel free to be in touch with additional questions.

Sincerely,



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