

STATE OF MAINE
MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. PIS-25-577

TOWN OF SANGERVILLE, Appellee

v.

PHILIP KINNEY, Appellant

ON APPEAL
FROM THE DOVER-FOXCROFT DISTRICT COURT
Docket No. CV-2025-00080

REPLY BRIEF OF APPELLANT PHILIP KINNEY

Charles E. Gilbert III, Bar #0395
Of Counsel
Russell Johnson Beaupain
175 Exchange St., Ste. 200
Bangor, ME 04401
207-942-7110
ceg@rjb.law

Attorney for Appellant Philip Kinney

TABLE OF CONTENTS

	Page No.
I. TABLE OF AUTHORITIES.....	3
II. ISSUES PRESENTED	
SETTING THE RECORD STRAIGHT.....	4
THE “PREMATURE” ARGUMENT: IF NOT NOW, WHEN IS THE TIME TO CHALLENGE THE MOTIVES FOR THE TAKING?.....	6
THE COMPELLING NEED ARGUMENT.....	9
THE TOWN DID NOT REQUEST AND THE COURT DID NOT GRANT PERMISSION TO ENTER ON OR SURVEY ANY PORTIONS OF APPELLANT’S PROPERTY OTHER THAN THE SOUTH SANGERVILLE ROAD EXTENSION AND THAT ROUTE DOES NOT GET TO THE TOWN’S PROPERTY.....	10
III. CONCLUSION.....	10
IV. CERTIFICATE OF SERVICE.....	13

TABLE OF AUTHORITIES

Page No.

Constitutional Provisions:

Maine Constitution Art. I, Section 5.....11

Cases:

Cedar Point Nursery v. Hassid, 594 US 139, 141 S. Ct. 2063 (2021).....7

Samuels v. Raytheon Corp., 934 F.2d 388 (1st Cir. 1991).....6

Sanseverino v. Gregor, Trustee, 2011 ME 8, 10 A.3d.....4

St. Mary’s Honor Center v. Hicks, 113 S. Ct. 2742 (1993).....6

Statutes:

23 M.R.S.A. § 3021.....8

23 M.R.S.A. § 3023.....8

Other Authorities:

M.R. Civ. P. Rule 80J.....8

I. SETTING THE RECORD STRAIGHT

In an effort to bolster its claim of civic responsibility and rectitude, the Town advances a narrative that puts the town in a favorable light. However, as is often the case, that version of events is disputed and even on the limited record the trial court allowed Mr. Kinney to make, a close examination of the evidence shows that there are holes in the story.

It is true that the town acquired land from the United States in 1955. The deed is subject to reversion to the federal government if the town fails to use the property for public purposes. From 1955 to about 2023, the town offered no evidence of the use of that land except that at some indeterminate point, it had been cut. [T.T. 19/20] That in itself causes a problem for the town because of this court's decision that harvesting wood to sell is a commercial purpose. Sanseverino v. Gregor, Trustee, 2011 ME 8, 10 A.3d 735 [cutting timber for sale and profit is a commercial use violating a restrictive covenant limiting use of property to residential purposes]. There was no evidence that the wood which was harvested was hauled out over the route which would come onto Mr. Kinney's property via the northerly extension of the South Sangerville Grange Road. Contrary to what has been suggested, there is no evidence that, over the years, there was an active town forestry committee watching over this property; rather, that committee was

likely hastily formed or reactivated to address what to do about the gate. All they could say was that a town forestry committee “has met.” [T.T. 19/24-35]

Other than the hunters who complained to the town after installation of the gate, the town was unable to cite any evidence of any person using the town’s land for recreational purposes. [T.T. 32/17]. And as noted in the Blue Brief, hunting is not a public recreational purpose. In short, this parcel of town owned land had been the subject of benign neglect for about 65 years except for possibly one timber harvest. A bridge which by reputation had once existed to provide access from the north side of the property had faded away due to lack of attention. [T.T. 35/11-18]. The Town’s version of events also conveniently neglects to mention the role of the hunters, and their complaints about being shut off by Mr. Kinney’s gate as being the impetus for sudden interest in this route. Instead, the Town misstates the evidence by claiming Appellant failed to show “that he has been to the property and the Town Manager has not.”) Red Brief at 14. In fact, the Town Manager admitted that he had not personally walked the land [T.T. 35/8] In his testimony, Mr. Kinney indicated that he had been over the town’s land a number of times. [T.T. 63/10-11].

Underlying the town’s entire presentation is the false premise that the town somehow had some rights in Mr. Kinney’s property and access over a path which

may or may not have once been an extension of the South Sangerville Grange Road north of the Bailey cemetery and through the middle of what Mr. Kinney owns. This was made clear in the town manager's testimony:

(T)he townspeople want access to this land,
they feel they are entitled to access to this land
and that they feel they have the right to use that
road that has been there for 200 years. [T.T. 29/12].

The entire purpose of eminent domain is to empower the government to gain title or rights in property it doesn't currently own in order to serve some public purpose and, in Maine, compelling need. It actually helps the Appellant's case when the town puts together a dubious version of events, since a showing that narrative is untrue permits the finder of fact to infer the opponent's version is true. Samuels v. Raytheon Corp., 934 F.2d 388 (1st Cir. 1991) as modified by St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993).

II. THE "PREMATURE" ARGUMENT: IF NOT NOW, WHEN IS THE TIME TO CHALLENGE THE MOTIVES FOR THE TAKING?

In its brief, the town uses the word "premature" at least five times. This was a key point the town presented to the trial court. T.T. 41/19. Indeed, the trial court found it persuasive. The essence of the argument is that the landowner's objections to the warrant are all "premature" because this is only a preliminary exploratory step to evaluate possible suitability of the property for a taking. The implied

premise of that position is that there will be time enough at some future point for Defendant to be heard. That position is wrong both as a matter of law and as a matter of fact. The trial court, in footnote 5 (App. 8) cited Part III of the Supreme Court's opinion in Cedar Point Nursery v. Hassid, 594 US 139, 169-172; 141 S. Ct. 2063 (2021) for the proposition that a governmental entry on private property to evaluate but not actually effect a taking is not of constitutional noteworthiness. However, just as in Hassid, the trial court's order constitutes a "physical taking" because it appropriates the owner's right to exclude third parties from their land and by granting access to a third party even for a short time. Hassid 141 S. Ct. at 2071-2073.

By the time the warrant application was presented to the trial court, the Town was laser focused on this one route of access, to the exclusion of all others. No other routes were evaluated or considered and indeed, the town meeting vote was specific to the route (App. 30 Article 35). The contract with the surveyor was to lay out this route, and not any others. [T.T. 35/10-17). It is clear that this route was the focus because of the brouhaha over the installation of the gate. To suggest the Town was just looking into the possibility of using this route is another example of stretching the narrative discussed to Section I, *supra*.

It is also important to note that there is no procedure expressly set forth in Maine law which would give a landowner subject to a taking the right to appear and make his arguments. The procedure for layout and taking is found in 23 M.R.S.A. §§ 3021, 3023, and by their express terms, those statutes do not give a landowner the right to participate or challenge the taking, even though the Maine Constitution and statutory law impose certain preconditions on any taking. It may be that a declaratory judgment is the way to proceed by default, but that does not mean a landowner is precluded in the first instance from raising his opposition at each and every opportunity along the way.

Appellant's position is also fully consistent with and supported by the Maine Constitution, whose very first article declares the protection of property an unalienable right. There is no provision in that Article, or anywhere else for that matter, which imposes a temporal limit on when this important-and unalienable-right can be raised.

To be fair, there is some confusion arising from the question of whether Rule 80J, which expressly discusses warrants and tests, applied here because its text mentions landfills. The trial court applied it at least by analogy. Was it the Legislature's and Court's intent that warrant application cases like this one should be brought as plenary actions with full right of discovery and motion practice?

Given what is or could be at stake, that might be a better solution, but in any event, this case should be remanded back to the trial court to allow the landowner to show the improper motives which were in play here.

III. THE COMPELLING NEED ARGUMENT

The town apparently agrees that the standard of review is *de novo*, because it involves a question of law. Red Brief at 11. It then goes on to argue that it met its burden because the town had a compelling need to access its land. With respect, the town and the trial court both focused on the wrong question. It cannot seriously be questioned that the town may have a compelling need to access its property. However, that is not the question that needed to be answered. Rather, the issue is, did the town show a compelling need to access its property *via this route*, especially when there were, even on this limited record, at least three other possible routes of access, none of which had been evaluated.¹

It is ironic and inconsistent for the trial court, on the one hand, to exclude much of Mr. Kinney's proffered evidence because this was just a preliminary and exploratory visit to see if the route might be suitable, yet to rule that there was a compelling need to evaluate only this one route because of the need for access. It

¹ It should also be noted that the route identified by the Town, the South Sangerville Grange Road, does not afford access to the Town's land. See Part IV, *infra*.

was an error of both fact and law to rule that the town had a compelling need to survey just this route when there were others that the town hadn't even looked at and dismissed out of hand. That dismissal of the other routes had nothing to do with compelling need but was geared towards political mollification of the hunters whose preferred but not legally enforceable access had been cut off by Mr. Kinney's gate protecting his own property.

Satisfaction of the complaints of the disgruntled hunters is neither a public purpose nor a compelling need and trying to pass off these private pursuits as high-minded protection of the public health, safety and welfare is totally without merit.

IV. THE TOWN DID NOT REQUEST AND THE COURT DID NOT GRANT PERMISSION TO ENTER ON OR SURVEY ANY PORTIONS OF APPELLANT'S PROPERTY OTHER THAN THE SOUTH SANGERVILLE ROAD EXTENSION AND THAT ROUTE DOES NOT GET TO THE TOWN'S PROPERTY

It is undisputed that the South Sangerville Grange Road extension goes in a north/south direction. The disputed portion begins where Mr. Kinney put up his gate. The Town's Application (APP 11-14) discusses the South Sangerville Grange Road and the need to access it. *See* ¶1 3,4 App 11. The Town's prayer for relief asks the Court "grant the Town the right to enter South Sangerville Grange Road to conduct the survey(s) needed to pursue condemnation." ¶19, App. 13.

The problem is that the South Sangerville Grange Road does not lead to the Town's land and access to the South Sangerville Grange Road would not get the surveyor where the Town claims it needs to be. Since both the Application and the Order address only the road, the warrant as issued would not allow the surveyor to somehow veer easterly to reach the Town lot. There is nothing in the Warrant which would allow that, especially given that the Maine Constitution requires a "special designation of the place to be searched." Maine Constitution, Art. 1, § 5. The only place designated is the South Sangerville Grange Road.

CONCLUSION

The Appellant, Philip Kinney, possessing of the natural, inherent and inalienable right to protect his property, seeks the opportunity to demonstrate that the path taken by the Town of Sangerville to put his property in its sights for condemnation is not because of public exigency or for a public purpose, but rather to give some local hunters rights of access which they wrongfully believed they possessed, only to have Mr. Kinney take them away. While it is true that there has been no taking yet, the record shows the Town has focused on this property and this route because of the legally unfounded complaints of local hunters and the false claims that the Town possessed rights which Mr. Kinney somehow wrongly took.

The Trial Court erred in accepting the Town's prematurity arguments and in finding on this record a compelling need to survey this particular route to the exclusion of the others identified. Mr. Kinney is entitled to show that the Town's motives were improper and illegal. The fact that this battle is being waged at an early stage of the proceedings is not important because the rights at stake are deserving of protection at any stage.

The appeal should therefore be sustained and the matter remanded back to the Dover Court with orders to dismiss the application, or to conduct a plenary hearing.

Date: June 10, 2026

Respectfully submitted,

/s/ Charles E. Gilbert, Esq.

Charles E. Gilbert III, Esq.

Maine Bar No. 0395

ceg@rjb.law

Russell Johnson Beaupain

175 Exchange St., Ste. 200

Bangor, ME 04401

(207) 942-7110

Counsel for Appellant Philip Kinney

CERTIFICATE OF SERVICE

I, Charles E. Gilbert III, Esq. hereby certify that on this 10th day of June, 2026, I served an electronic copy of the foregoing Reply Brief of Appellant Philip Kinney by email as follows:

Kristin M. Collins, Esq.
PretiFlaherty
45 Memorial Circle
Augusta, ME 04330
kcollins@preti.com

Paper copies will be served on Appellee at the above mailing addresses pursuant to M.R. App. P. 7(c)(4).

Dated: June 10, 2026

/s/ Charles E. Gilbert, Esq.
Charles E. Gilbert III, Esq.
Maine Bar No. 0395
ceg@rjb.law
Russell Johnson Beaupain
175 Exchange St., Ste. 200
Bangor, ME 04401
(207) 942-7110
Counsel for Appellant Philip Kinney