STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-21-257

RUSSELL BLACK, et al.

v.

BUREAU OF PARKS AND LANDS, et al.

ON APPEAL FROM THE BUSINESS AND CONSUMER COURT

REPLY BRIEF OF APPELLANTS BUREAU OF PARKS AND LANDS and DIRECTOR CUTKO

AARON M. FREY
Attorney General

Of Counsel

THOMAS A. KNOWLTON
Deputy Attorney General

LAUREN E. PARKER
LAURA E. JENSEN
SCOTT W. BOAK
Assistant Attorneys General
Office of The Attorney General
6 State House Station
Augusta, ME 04333-0006
(207)-626-8878

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INTRODUCTION

On June 23, 2020, the Bureau of Parks and Lands (the Bureau) issued to Central Maine Power Company the lease at issue in this appeal: a twenty-five-year lease covering 32.39 acres of the original public lots in Johnson Mountain Township and West Forks Plantation (the Lots) for purposes of electric power transmission (the Restated Lease). The Bureau issued the Restated Lease pursuant to 12 M.R.S. § 1852(4)(A) (2021), which, before I.B. 1 took effect on December 19, 2021, expressly authorized such leases. Because article IX, section 23 of the Maine Constitution (Article IX, Section 23) does not expressly exempt 12 M.R.S. § 1852(4)(A) from its application, Senator Black contends that this Court cannot give effect to the plain language of 12 M.R.S. § 1852(4)(A) without amending by negative implication Article IX, Section 23. Put another way, Senator Black contends that Article IX, Section 23 bars the Legislature from retaining and then renewing the Bureau's pre-Article IX, Section 23 leasing authority for public reserved lands. Although he mostly avoids saying so (*but see* Red Br. 30, 34), Senator Black is challenging the constitutionality of 12 M.R.S. § 1852(4)(A). His argument fails because he misunderstands Article IX, Section 23.

Article IX, Section 23 does not, as Senator Black contends, make a "'fundamental change' in the *management* of designated lands." (Red Br. 23

(emphasis added).) To be sure, Article IX, Section 23 works a fundamental change: it inhibits the Legislature's (and so too administrative agencies') ability to reduce the acreage and change the purposes of designated lands from what existed in 1993 by requiring a supermajority vote to make such changes. Article IX, Section 23 is a backstop.

Article IX, Section 23 does not compel the Legislature to conclude that leases issued by the Bureau pursuant to 12 M.R.S. § 1852 do or may reduce or substantially alter the uses of public reserved lands. Rather, it allows the Legislature to determine which less-than-fee conveyances will or may reduce designated lands and which uses of designated lands will or may substantially alter the uses of those lands.

Senator Black further argues that, even if it had the authority to do so, the Legislature did not retain and renew the Bureau's delegated authority to issue twenty-five-year leases of public reserved lands for electric power transmission. But the Legislature did just that. Through several provisions—its definitions of "reduced" and "substantially altered," 12 M.R.S. § 589(4), (5) (2021); its post-Article IX, Section 23 enactment of 12 M.R.S. § 1852 (2021) by P.L. 1997, ch. 678 § 13; and its cross-references to 12 M.R.S. § 598-A (2021), which P.L. 1997, ch. 678 added to Bureau statutes but not to 12 M.R.S. § 1852—the Legislature made clear that, before I.B. 1 took effect, the Bureau could issue

twenty-five-year leases of public reserved lands for electric power transmission without first obtaining the approval of the Commissioner, Governor, or the Legislature, and without first providing notice and administrative process to every person who lives or owns property in Maine.

I. Article IX, Section 23 did not rescind the Bureau's pre-existing, delegated authority to lease for twenty-five-year terms public reserved lands for purposes of electric power transmission.

Title 12 M.R.S. § 1852(4) expressly authorizes the Bureau to issue twenty-five-year leases of public reserved lands for purposes of electric power transmission. Senator Black contends that any such statutory authorization exceeds the Legislature's power, *i.e.*, is unconstitutional, because the Legislature lacks the authority to exempt from Article IX, Section 23 leases issued pursuant to 12 M.R.S. § 1852. (Red Br. 21-22.) As the party challenging the constitutionality of 12 M.R.S. § 1852(4), Senator Black bears the heavy burden of demonstrating that section 1852 conflicts with Article IX, Section 23. *Goggin v. State Tax Assessor*, 2018 ME 111, ¶ 20, 191 A.3d 341. Senator Black fails to carry that heavy burden.[1]

[1] Senator Black contends that the Bureau incorrectly begins its plain language review with 12 M.R.S. § 1852(4) (2021), instead of with Article IX, Section 23. (Red Br. 20; *cf.* Blue Br. 21-23.) The Bureau starts with 12 M.R.S. § 1852(4)—the statute pursuant to which it issued the Restated Lease—because the Bureau is not challenging the constitutionality of 12 M.R.S. § 1852(4). *Goodrich v. Me. Pub. Emps. Ret. Sys.*, 2012 ME 95, ¶ 6, 48 A.3d 212 ("In interpreting a statute, [this Court] begin[s] with its plain language to determine whether it is ambiguous."); *Stone v. Bd. of Registration in Med.*, 503 A.2d 222, 225 (Me. 1986) ("As on all

A. Article IX, Section 23 Preserves the Status Quo—the Acreage and Existing Uses—of Specified Categories of State-owned Land.

Senator Black contends that Article IX, Section 23 "made a fundamental change in the management of designated lands" and that the "very purpose of the constitutional amendment—and the express addition of 'public lots'—was to limit the existing authority over those lots, not to maintain the status quo." (Red Br. 23, 24 (quotation marks omitted).) But his contention misperceives the legal framework. In large part, the purpose of Article IX, Section 23 is to maintain the status quo: that is, the acreage and purposes of designated lands that existed in 1993. It does so by requiring a supermajority vote to make such changes.

In 1993, the Legislature considered whether existing legal protections for Maine's state parks were sufficient. L.D. 228, Committee File (116th Legis. 1993) ("Public reserve lots have been ruled to be protected under the

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questions of statutory construction, the starting point must be the language of the statute itself." (alterations omitted) (quotation marks omitted)); *see also Goggin v. State Tax Assessor*, 2018 ME 111, ¶ 20, 191 A.3d 341 ("'[A]ll acts of the Legislature are presumed constitutional.'"). In the Bureau's view, it may issue leases pursuant to 12 M.R.S. § 1852(4) without seeking 2/3 legislative approval because the Legislature determined that section 1852(4) leases do not reduce or substantially alter the uses of public reserved lands. (Blue Br. 21-39.) That argument assumes, as this Court must, the constitutionality of 12 M.R.S. § 1852(4) and the statutory definitions of "reduced" and "substantially altered." *See Goggin*, 2018 ME 111, ¶ 20, 191 A.3d 341; *see also* 12 M.R.S. § 598(4), (5) (2021) (defining "reduced" and "substantially altered").

Constitution by the Law Court; State Parks should be too."). As initially proposed, Article IX, Section 23 would have prohibited any sale, transfer, or change in use of state parks and memorials (*i.e.,* historic sites). L.D. 228 (116th Legis. 1993). This prohibition was too restrictive for some. The committee considered an amendment that would authorize the sale of state parks and historic sites but "only if the proceeds of the sale are used to acquire other state park or historic site land." Comm. Amend. A. to L.D. 228, No. H-92 (116th Legis. 1993). A subsequent amendment expanded the classes of lands to which Article IX, Section 23 would apply, and required a 2/3 vote of all members of each house to reduce the lands subject to Article IX, Section 23 and to substantially alter the uses of those lands.[2] Comm. of Conf. Amend. A to Comm. Amend. A to L.D. 228, H-679 (116th Legis. 1993).

Ultimately, the electors were presented with the following question:

> Do you favor amending the Constitution of Maine to protect state park or other designated conservation or recreation land by requiring a 2/3 vote of the Legislature to reduce it *or change its purpose*?

[2] The Legislature considered other amendments to L.D. 228 with differing vote requirements. *E.g.*, House Amend. A to Comm. Amend. A to L.D. 228, H-360 (116th Legis. 1993) ("four fifths of the members of each House present and voting"); Senate Amend. A to Comm. Amend. A to L.D. 228, S-185 (116th Legis. 1993) ("two thirds of the members of each House present and voting"); House Amend. B to Comm. Amend. A to L.D. 228, H-428 (116th Legis. 1993) ("3/4 of all the members elected to each House"); House Amend. C to Comm. Amend. A to L.D. 228, H-454 (116th Legis. 1993) ("3/4 of all the members elected to each House").

Const. Res. 1993, ch. 1, *approved in* 1993 (emphasis added); *see Opinion of the Justices*, 283 A.2d 234, 236 (Me. 1971) (acknowledging that, when faced with an ambiguous constitutional amendment, this Court may consider the question submitted to the electorate). They answered in the affirmative.

Article IX, Section 23 provides:

> State park land, public lots or other real estate held by the State for conservation or recreation purposes and designated by legislation implementing this section may not be reduced or its uses substantially altered except on the vote of 2/3 of all members elected to each House. The proceeds from the sale of such land must be used to purchase additional real estate in the same county for the same purposes.

Broken down, it does four things. First, it identifies those state-owned lands that are subject to Article IX, Section 23—state parks and public lots—and those state-owned lands that will be subject to Article IX, Section 23—other real estate held by the state for conservation or recreation purposes and designated as such by implementing legislation. Second, it expressly contemplates implementing legislation. Third, it requires a 2/3 vote of all members of each house to reduce or substantially alter the uses of designated lands and, in so doing, prohibits the Legislature from delegating to administrative agencies the ability to reduce (*i.e.*, convey fee title) or substantially alter the uses of the lands

subject to it. Fourth, it requires that proceeds from the sale of designated lands be used to purchase real estate in the same county for the same purposes.

Equally important is what Article IX, Section 23 does not do. *See Allen v. Quinn*, 459 A.2d 1098, 1100 (Me. 1983) ("'[I]n construing the Constitution we seek the meaning which the words would convey to an intelligent, careful voter.'"). It does not require a 2/3 vote for all less-than-fee-conveyances of some or all types of designated lands. Rather, it allows the Legislature to define "reduced" to include *some* less-than-fee conveyances. *Cf.* NY Const. art. XIV, § 1 (prohibiting leasing of those state lands constituting the forest preserve).[3] It also does not require a 2/3 vote to site an electric power transmission line on some or all types of designated lands. Rather, it allows the Legislature to define "substantially altered" by reference to existing statutes that govern those administrative agencies with jurisdiction over designated lands. Aside from fee conveyances of designated lands then, Article IX, Section 23 allows the Legislature to retain existing delegations of authority to those administrative

[3] Senator Black contends that Article IX, Section 23 should be construed like article XLIX of the Massachusetts Constitution (Article 97). (Red Br. 22 n.12.) Given their differing language, Article IX, Section 23 does not appear to be modeled after Article 97. Even if it were, Article IX, Section 23 requires a 2/3 vote to reduce designated lands, whereas Article 97 requires a 2/3 vote to dispose of Article 97 lands. Reduced and disposed of do not mean the same thing. *See* 12 M.R.S. § 598(4); *compare* Reduced, Merriam-Webster, www.merriam-webster.com (last visited Jan. 13, 2021) (defining "reduced" as "to diminish in size, amount, extent, or number"), *with* Disposed Of, *id.* (defining "disposed of" as "to get rid of" and "to transfer to the control of another").

agencies with jurisdiction over designated lands without the need for an express constitutional or statutory exemption or exception as argued by Senator Black (*see* Red. Br. 20-25).[4]

B. In 1993, the Status Quo of Public Reserved Lands included the Bureau's Delegated Leasing Authority.

When the voters chose to require a 2/3 vote of all members of each house to reduce or change the purposes of designated lands in 1993, the Bureau was authorized to lease public reserved lands for certain purposes for specified terms, including for electric power transmission. 12 M.R.S. § 585(4)(C)(1) (1993), *repealed by* P.L. 1997, ch. 678, § 5 (effective June 30, 1998); *see Stockly v. Doil*, 2005 ME 47, ¶ 14, 870 A.2d 1208 ("'The Legislature is presumed to be aware of the state of the law . . . when it passes an act.'"). Senator Black contends that this Court must treat Article IX, Section 23 as revoking the Bureau's delegated leasing authority for public reserved lands; doing otherwise, he argues, would be absurd and would render Article IX, Section 23 a nullity. (Red

[4] "[U]nder the Bureau's theory," Article IX, Section 23 has applied to state parks and public lots from the moment it took effect and, since that moment, has required 2/3 legislative approval of fee conveyances of state parks and public lots because those categories of lands are expressly mentioned in Article IX, Section 23 and because fee conveyances of state parks and public lots reduce those lands. (*Cf.* Red Br. 27-28 n.14.) *But see* 12 M.R.S. § 1851(3) (2021) (addressing less than one-quarter-acre fee conveyances of public reserved lands).

Br. 20-25 & n.11, 30-31.) Senator Black again misperceives the legal framework.

The Bureau's authority to lease public reserved lands was not absurd before 1993, and it is not absurd today. Public reserved lands originate from the public lots, which date back to the settlement of Maine. *Opinion of the Justices*, 308 A.2d 253, 268-71 (Me. 1973). Such lands must be used for beneficial purposes "generally reflected by the usage of Massachusetts." *Id.* at 269-71, 272-73; *see Cushing v. State*, 434 A.2d 486, 489 (Me. 1981).

Two hundred years ago, those purposes—schools and the ministry—encouraged the settlement and development of Maine. *Opinion of the Justices*, 308 A.2d at 270-71 (identifying historical purposes of the reserved public lots). In the last fifty years, those purposes have manifested as a multiple-use mandate (*e.g.*, multiple-use forest). 12 M.R.S. § 1847(1) (2021); 12 M.R.S. § 585(1)(B), *repealed by* P.L. 1997, ch. 678, § 5 (effective June 30, 1998). Of all the categories of designated lands, public reserved lands (and nonreserved public lands) have the broadest management mandate, which allows for broader leasing authority. *Compare* 12 M.R.S. §§ 1833(1) (2021) (nonreserved public lands) & 1847(1) & (2) (2021) (public reserved lands), *with* 12 M.R.S. § 1801(7) (2021) (defining "park"); *see also* 12 M.R.S. § 598(5) (2021) (identifying the essential purposes of the different types of designated lands).

The Bureau's statutory leasing authority for public reserved lands encompasses development purposes (*e.g.*, public utilities, public infrastructure, water-related industrial and commercial uses) and conservation and recreation purposes. The Bureau's leasing authority thus syncs with the historical origins of the public lots (*e.g.*, public development) and the newer aspects of the Bureau's management mandate (*e.g.*, conservation and recreation). The Bureau's authority to lease public reserved lands is consistent with the purpose of Article IX, Section 23.

Nor does retaining and renewing the Bureau's delegated leasing authority for public reserved lands somehow nullify Article IX, Section 23. Article IX, Section 23 still requires 2/3 legislative approval of reductions and substantial alterations of the uses of designated lands; it just does not require that section 1852(4) leases be treated as reducing or substantially altering the uses of public reserved lands. *See Portland Reg'l Chamber of Commerce v. City of Portland*, 2021 ME 34, ¶ 7, 253 A.2d 586 ("'Constitutional provisions are accorded a liberal interpretation in order to carry out their broad purpose, because they are expected to last over time and are cumbersome to amend.'"). If an entity (other than the federal government) sought a lease of public reserved lands that was not authorized by 12 M.R.S. § 1852, it would need legislative approval, and the Legislature would need to determine whether such

a lease could be approved by a simple majority vote or by 2/3 of all members of each house. Article IX, Section 23 remains in full force and effect.

II. The Legislature retained and renewed the Bureau's leasing authority for public reserved lands.

The question at issue becomes then, did the Legislature through implementing Article IX, Section 23 require 2/3 legislative approval of section 1852 leases either categorically or on a lease-by-lease basis? As explained in the Bureau's blue brief, it did not require either. (Blue Br. 21-39.) In contrast, Senator Black contends through a series of disparate arguments that the Legislature did not determine that section 1852 leases, including subsection 1852(4)(A) leases, do not reduce or substantially alter the uses of public reserved lands. (Red Br. 21, 24-34.) His arguments fail to overcome the plain language of the statutes at issue and are contrary to relevant legislative history. (*See* Blue Br. 34-36.)

Senator Black begins by relying on 12 M.R.S. § 598-A for the proposition that "*uses* of public reserved lands remain subject to" Article IX, Section 23 "unless the Legislature repeals the designation by a 2/3 vote." (Red Br. 25 (emphasis added).) But Senator Black misreads 12 M.R.S. § 598-A. That part of section 598-A states: "*designated lands* remain subject to" Article IX, Section 23 until such time as the Legislature repeals the designation by a 2/3 vote.

12 M.R.S. § 598-A (emphasis added). Because section 598-A is focused on designating categories of lands and does not parse individual uses of each category of designated lands, it does not support Senator Black's contention.

Unlike section 598-A, the Designated Lands Act's definition of "substantially altered" focuses on uses. 12 M.R.S. § 598(5). And it was worded with flexibility in mind. 12 M.R.S. § 598(5); *see In Support of L.D. 1953, An Act to Designate Certain Lands Under the Constitution of Maine, Article IX, Section 23 Before the J. Standing Comm. on Energy & Natural Res.*, 116th Legis. 1-2 (1994) (testimony of C. Edwin Meadows, Jr., Commissioner, Department of Conservation) ("The definition of . . . 'substantially altered' is of particular importance, because it will establish what activities can take place on these lands through agency initiative, without the approval of 2/3 of the Legislature. . . . We believe it should also allow the Department's agencies the management flexibility they now have for natural resource management.").

The Legislature defined "substantially altered" in reference to existing management mandates. 12 M.R.S. § 598(5). Senator Black appears to contend that, because section 598(5) does not reference section 1852, the Legislature must have decided that section 1852 leases could or do substantially alter the uses of public reserved lands. (Red Br. 28-30.) This argument ignores the long co-existence of the Bureau's multiple-use mandate and its leasing authority for

public reserved lands and is undermined by the plain language of 12 M.R.S. § 1852(4), unallocated language, and legislative history expressly stating the Legislature's intent to retain the Bureau's existing powers. P.L. 1997, ch. 678, § 13 (renewing the Bureau's delegated authority to issue twenty-five-year leases of public reserved lands for electric power transmission); P.L. 1995, ch. 502, §§ E-29, E-31 (stating the Legislature's intent to maintain the Bureau of Public Lands' existing powers until enactment of a comprehensive unified statute); *see* L.D. 1852, Summary (118th Legis. 1997) ("This bill also repeals certain provisions of law and consolidates various bureau programs into one chapter while not altering the essential purposes and practices of these programs as established in current law. . . . Subchapter IV uses language from existing law to specifically define the powers of the new bureau with regard to public reserved lands. . . . There are no substantive changes from current law in this subchapter.").

Senator Black next contends that a particular use of designated lands matters more than the conveyance, itself: "It is nonsensical for the Bureau to say that it can authorize a private company to build a transmission line on public lands if it uses a lease but that it cannot authorize the same activity if it uses an easement." (Red Br. 33.) But this is exactly the distinction the Legislature drew, and Senator Black advances no cogent explanation as to why

Article IX, Section 23 prohibits the Legislature from drawing distinctions based on differing types of property conveyances. "Unlike a lease or a license, an easement may last forever." Easement, *Black's Law Dictionary* (11th ed. 2019).

The Bangor-Hydro and TransCanada resolves to which Senator Black cites illustrate the Bureau's point because they authorize easements. In 2007, the Bureau issued to Bangor Hydro-Electric Company (Bangor-Hydro) a section 1852(4)(A) lease. (A.R. VI0012-19.) Bangor-Hydro then pursued and obtained legislative approval for an easement.[5] Resolves 2007, ch. 91, §§ 1, 2 (authorizing the Bureau to convey easements); *see also* Resolves 2009, ch. 209, § 3 (same). (*Cf.* Red Br. 34.) Unlike Bangor-Hydro's section 1852(4)(A) lease, the easements authorized by the referenced Resolves were not for a specified term of years.[6] Resolves 2007, ch. 91, §§ 1, 2; Resolves 2009, ch. 209, § 3. If,

[5] It was in this context that the Bureau testified to the Joint Standing Committee on Agriculture, Conservation and Forestry (the committee) that section 1852(4) leases do not require legislative approval but easements do. (Blue Br. 37.) Contrary to Senator Black's characterization (Red Br. 37), a state agency's written testimony to its committee of jurisdiction (so, prepared in advance of the committee proceeding) is not "an offhand remark." Because the Bureau did so testify, and because its annual reports specify how many leases of public reserved lands are in effect each year, the Legislature was on notice that the Bureau was issuing leases pursuant to 12 M.R.S. § 1852(4) without obtaining legislative approval. Despite the committee's recommendation that the Legislature amend 12 M.R.S. § 1852(4) to declare the New England Clean Energy Connect project a substantial alteration, the Legislature never did so. *See Thompson v. Shaw's Supermarkets, Inc.*, 2004 ME 63, ¶ 7, 847 A.2d 406 (describing legislative acquiescence). (*Cf.* Red Br. 35-37.) The people did. I.B. 1 (L.D. 1295, 130th Legis. 2021).

[6] As Senator Black notes, the Bureau contends that the Legislature's different treatment of the proceeds from easements and leases support the Bureau's arguments that the Legislature treats easements differently from section 1852 leases. (Red Br. 33-34; Blue Br.

like Bangor-Hydro, Central Maine Power Company had wanted an easement (or a ninety-nine-year lease, or a fifty-year lease), it would have needed legislation. Had such legislation been proposed, the Legislature would have needed to decide whether it could approve such legislation by a majority vote, or by a super-majority vote. Me. Const. art. IX, § 23.

III. No Public Administrative Process Requirement Arises by Implication from Article IX, Section 23.

Senator Black contends that a public administrative process requirement arises by implication from Article IX, Section 23 because public reserved lands constitute a public trust. (Red Br. 46-49.) Notably, Senator Black does not argue that the public administrative process to which he contends to be entitled arises from the due process clauses of the federal and state constitutions, or that it is required by the Maine Administrative Procedure Act (the MAPA). (*Id.*)

28-29.) To refute this argument, Senator Black contends that an easement conveyance is not a "sale." (Red Br. 34.) But that line is for the Legislature to draw (and, in the event of ambiguity, for the Bureau to decide). Money earned from conveying easements on public reserved lands accrues to the Public Reserved Lands Acquisition Fund to be used consistent with Article IX, Section 23. 12 M.R.S. §§ 1850(2), (3), 1851(1) (2021). For example, in 2010, pursuant to Resolves 2009, ch. 209, § 3, the Bureau conveyed easements to Bangor-Hydro. Me. Dep't of Conservation, Bureau of Parks & Lands, 2010 Annual Report for Public Reserved, Non-Reserved, and Submerged Lands to the Joint Standing Committee on Agriculture, Conservation and Forestry ("BPL 2010 Annual Report") 24, 40 (Mar. 1, 2011), available at www.maine.gov/dacf/parks/get_involved/planning_and_acquisition/docs/2010landsannualreport.pdf (last visited Jan. 11, 2022). The proceeds from that conveyance accrued to the Bureau's Lands Acquisition Fund, to be used consistent with Article IX, Section 23. BPL 2010 Annual Report 28 ("Income this year was derived from . . . sale of interests in land to Bangor Hydro.").

Rather, he appears to concede that his claim to public process is not mandated by the due process clause or the MAPA. (*Id.* 46 ("Article IX, Section 23 . . . requires public process without resort to due process protections.").) Thus, on the issue of administrative process, the discrete question before this Court is whether a public administrative process requirement inheres in Article IX, Section 23 based on trust principles. It does not.

Public reserved lands do constitute a trust, but "not in the ordinary sense of the word." Schepps, *Maine's Public Lots: The Emergence of a Public Trust*, 26 Me. L. Rev. 217, 239 (1974). The public lots are a trust with "no beneficiary interposed between the trustee and the corpus." *Id.* Because each member of the public is not a beneficiary of the public reserved lands, each member of the public is not entitled to notice and process before the Bureau issues a lease pursuant to 12 M.R.S. § 1852, or issues a license, or decides to harvest timber.

Additionally, there was (legislative) public process before the Legislature enacted 12 M.R.S. §§ 598(4) & (5) and 12 M.R.S. § 1852. Similarly, the public is afforded (legislative) public process each time the Legislature considers legislation that would or may reduce or substantially alter the uses of designated lands. As Senator Black concedes in his motion to dismiss, that legislative process is "by definition—a public process." (Sen. Black Mot. to Dismiss All Appeals 20.) The public process that inheres in Article IX, Section

23 occurs before the Legislature, not the administrative agencies with jurisdiction over designated lands.

The Legislature may and does require agencies with jurisdiction over designated lands to provide certain administrative public process before taking certain actions on designated lands. For example, the Bureau must provide notice and an opportunity for comment on draft management plans for public reserved lands. 12 M.R.S. § 1847(2) (2021). (*See* A.R. II0016-18, 127-52 (describing the public process for the Upper Kennebec Region Management Plan); A.R. VIII0059 (same).) The Bureau must also make written findings before selling parcels of public reserved land that are less than 1/4 acre in size and make those findings available for public inspection. 12 M.R.S. § 1851(3) (2021). And, "[b]efore requesting approval from the Legislature [to sell, exchange, or relocate public reserved lands], the director shall give notice of the proposed sale, exchange or relocation and may hold a public hearing." 12 M.R.S. § 1851(4) (2021); *see* 12 M.R.S. § 1837(2) (2021) (same for nonreserved public lands). If any party requests a public hearing, the director must hold one. 12 M.R.S. § 1851(4); *see* 12 M.R.S. § 1837(2) (same for nonreserved public lands); *see also* L.D. 1852, Summary (118th Legis. 1997) ("Substantive changes from current law" include requiring "the director to give notice of proposed sales of nonreserved public lands similar to the notice required for public reserved

lands."). Although it has the authority to do so, the Legislature has yet to require the Bureau to provide public notice or process before issuing a lease pursuant to 12 M.R.S. § 1852.

IV. The Exclusivity of the MAPA Requires the Dismissal of Count I, Which Is Otherwise Barred by Sovereign Immunity.

Contrary to Senator Black's contentions, the trial court erred by not dismissing Count I of the complaint (Senator Black's Declaratory Judgments Act (DJA) claim) as duplicative of Count III (his MAPA claim). (*See* Red Br. 50-55.) Senator Black does not dispute that the 2020 Lease is final agency action. Because the lease is final agency action and the legal issues comprising Count I are reviewable pursuant to 5 M.R.S. § 11007(4)(C) (2021), the MAPA and Rule 80C provide the exclusive vehicle for review, and Count I should have been dismissed. *See* 5 M.R.S. § 11001(1) (2021); *Narowetz v. Bd. of Dental Prac.*, 2021 ME 46, ¶ 22 n.9, 259 A.3d 771 (citing *Cape Shore House Owners Ass'n v. Town of Cape Elizabeth*, 2019 ME 86, ¶ 7, 209 A.3d 102); *Fair Elections Portland, Inc. v. City of Portland*, 2021 ME 32, ¶ 21 n.7, 252 A.3d 504; *Antler's Inn & Rest., LLC v. Dep't of Pub. Safety*, 2012 ME 143, ¶ 14, 60 A.3d 1248; *Fisher v. Dame*, 433 A.2d 366, 372 (Me. 1981) (explaining that where the Legislature provides "for a direct means by which the decision of an administrative body can be reviewed

in a manner to afford adequate remedy, such direct avenue is intended to be exclusive" and "alternative routes [to judicial review] will not be tolerated").

Without addressing the MAPA's exclusivity, Senator Black asserts that the trial court should have made factual findings as to the constitutional question of whether the Restated Lease reduced or substantially altered the uses of public reserved lands. (Red Br. 50-51.) But the MAPA expressly authorizes judicial review of the constitutionality of final agency action, 5 M.R.S. § 11007(4)(C)(1), and does not authorize trial courts to make their own factual findings in Rule 80C actions, 5 M.R.S. § 11007(3) ("The court may not substitute its judgment for that of the agency on questions of fact."); *see* M.R. Civ. P. 80C(d) & (e).

Even if the DJA provided a cause of action separate from the MAPA, sovereign immunity would bar Count I.[7] The basis for Senator Black's contentions to the contrary (*see* Red Br. 53-55) is *Welch v. State*, which holds

[7] Senator Black notes that the Bureau did not assert sovereign immunity in its motions before the trial court. (Red Br. 53.) The Bureau consistently contended that the exclusive vehicle for judicial review of Senator Black's claims is the MAPA, which expressly authorizes suit against the government and thus waives sovereign immunity. Because the Restated Lease is subject to MAPA review, and because MAPA review of the Restated Lease is exclusive, the Bureau had no reason to raise the issue of sovereign immunity as to the DJA claim in its motions. *See* 5 M.R.S. § 11001. Notably, Senator Black does not argue that the Bureau has waived sovereign immunity. *Cf. Cushing v. Cohen*, 420 A.2d 919, 923 (Me. 1980) ("'[G]enerally, a specific authority conferred by an enactment of the legislature is requisite if the sovereign is to be taken as having shed the protective mantel of immunity.").

that sovereign immunity does not bar quiet title actions. 2004 ME 84, ¶ 1, 853 A.2d 214; *see also id.* ¶ 2 (explaining that the Welches claimed an access easement over land owned and maintained as a park by the state). But this case is not a quiet title action, and the Court's rationale for sparing quiet title actions from the bar of sovereign immunity is inapplicable here.[8] For example, unlike the quiet title claim in *Welch*, Count I has far greater implications for the state as sovereign than the resolution of a property dispute with a private party seeking to access a lakefront parcel. *See Welch*, 2004 ME 84, ¶¶ 6-7, 853 A.2d 214. (*See* A. 71-72 (interpreting the legal issues in Count I to be whether the Bureau was required to provide a public administrative process and obtain 2/3 legislative approval before issuing the leases to CMP).) And unlike the quiet title claim in *Welch*, Count I does not implicate constitutional protections to private property because Senator Black does not contend that any part of the Lots are private property. *See Welch*, 2004 ME 84, ¶¶ 8-9, 853 A.2d 214 (reasoning that applying sovereign immunity as a bar to quiet title actions would "fly in the face of . . . constitutional protections and property rights,"

[8] Senator Black does not claim that he holds fee title to or has some other real property interest in some or all of the Lots, nor does he assert an interest different from the public at large. (*See* A. 110-118, 156-62, 168-72.) Nor is Senator Black or any other member of the public at large a beneficiary of the Lots. *See* Schepps, *Maine's Public Lots: The Emergence of a Public Trust*, 26 Me. L. Rev. 217, 239 (1974) (explaining that the public lots comprise a trust with "no beneficiary interposed between the trustee and the corpus").

citing article I, sections 1, 6–A, and 21 of the Maine Constitution); *see Cushing v. Cohen*, 420 A.2d 919, 923 (Me. 1980) (explaining that the public lots are held by the State as trustee in its sovereign capacity).

Senator Black also points to the Court's consideration of *Avangrid Networks, Inc. v. Secretary of State*, 2020 ME 109, 237 A.3d 882 to support his assertion that sovereign immunity does not bar constitutional claims made pursuant to the DJA.[9] (Red Br. 55.) This Court has not recognized such a blanket exception to the doctrine of sovereign immunity for constitutional claims. *See Cushing*, 420 A.2d at 923 ("[T]he applicability of sovereign immunity as a bar is not avoided by plaintiffs' tactic of camouflaging the action to give it the appearance of seeking to prevent state officials, or agencies, from exceeding lawful authority."). In any event, *Avangrid* is plainly distinguishable from this case because, aside from the DJA, the *Avangrid* plaintiffs had no route to judicial review in challenging a citizen initiative to place a resolve on an election ballot. *See Avangrid Networks, Inc.*, 2020 ME 109, ¶¶ 10, 18-19, 237 A.3d 882 ("The issue before us is narrow—whether the proposed citizens'

[9] The Secretary of State did not raise sovereign immunity as a defense in that case, and thus this Court did not consider that issue. *See generally Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, 237 A.3d 882. (*See generally* Sec'y of State Reply Br., *Avangrid Networks, Inc. v. Sec'y of State*, CUM-20-181 (July 20, 2020); Sec'y of State Br., *Avangrid Networks, Inc. v. Sec'y of State*, CUM-20-181 (July 13, 2020); Def.'s Resp. to Pl.'s Mot. for Prelim. Inj. & J., *Avangrid Networks v. Matthew Dunlap*, No. CV-2020-206 (June 15, 2020).)

initiative falls within the scope of the citizens' constitutional power to legislate, created in section 18 of article IV, part 3 of the Maine Constitution."). In contrast, Senator Black has recourse to judicial review pursuant to the MAPA by challenging final agency action. Thus, any justification for applying an exception to sovereign immunity for constitutional claims does not exist here.

Ultimately, aside from the MAPA, Senator Black can identify no legislative enactment waiving sovereign immunity for the final agency action at issue in this case. *See Hinkley v. Penobscot Valley Hosp.*, 2002 ME 70, ¶ 10, 794 A.2d 643; *Liberty Mut. Ins. Co. v. Dir., Me. Bureau of Lab. Standards*, 614 A.2d 1311, 1312 (Me. 1992) (citing *Drake v. Smith*, 390 A.2d 541, 543 (Me. 1978) and *Cushing*, 420 A.2d at 923). And the DJA will not suffice. *See Cushing*, 420 A.2d at 922–23 (stating that the Court would not hold sovereign immunity inapplicable to a declaratory judgment action "involv[ing] the State's special [sovereign] status as trustee of the public lots"); *Bell v. Town of Wells*, 510 A.2d 509, 515 (Me. 1986) ("[r]ecognizing . . . that the [DJA] alone does not override sovereign immunity when that doctrine is properly applied").

Finally, Senator Black mentions in passing several arguments as part of his cross-appeal—which he has moved this Court to dismiss as moot—related to the terminated 2014 lease. Even if the trial court had jurisdiction over the 2014 lease (which it did not), the Restated Lease terminated the 2014 lease

effective June 23, 2020, thus mooting all issues related to the 2014 lease. (*See* Blue Br. 9-10, 46 n.16.) Regardless, issues raised in a perfunctory manner and not developed on appeal are waived. *Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290.

CONCLUSION

For the reasons stated above and in its opening brief, the Bureau respectfully requests that this Court vacate the trial court's judgment and remand for entry of judgment affirming the Bureau's decision to issue the Restated Lease.

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Respectfully submitted,

AARON M. FREY
Attorney General

Lauren E. Parker
Maine Bar No. 5073

Laura E. Jensen
Maine Bar No. 5821

Scott W. Boak
Maine Bar No. 9150

Assistant Attorneys General
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006

Attorneys for Appellants Andy Cutko,
as Director of the Bureau of Parks
and Lands, and the State of Maine,
Department of Agriculture,
Conservation and Forestry,
Bureau of Parks and Lands

CERTIFICATE OF SERVICE

I, Lauren E. Parker, hereby certify that on January 24, 2022, I caused to be served a copy of Director Cutko's and the Bureau of Parks and Lands' Brief on counsel of record by electronic mail and U.S. mail, first class postage prepaid, at the following addresses:

James T. Kilbreth III, Esq.
Drummond Woodsum
84 Marginal Way, Suite 600
Portland ME 04101-2480
jkilbreth@dwmlaw.com

Nolan L. Reichl, Esq.
Pierce Atwood
254 Commercial Street
Portland ME 04101
nreichl@pierceatwood.com

Dated at Augusta, Maine, this 24th day of January, 2022.

Lauren E. Parker
Assistant Attorney General
Maine Bar No. 5073