STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. BCD-21-257

RUSSELL BLACK, et al

Appellees/Cross-Appellants

v.

BUREAU OF PARKS AND LANDS, et al

Appellants/Cross-Appellees

On Appeal from Business and Consumer Court
Docket No. BCDWB-CV2020-29

BRIEF OF AMICUS CURIAE

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On behalf of APPELLANTS/CROSS-APPELLEES
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STATEMENT OF AMICUS'S INTEREST

Pursuant to the Maine Rules of Appellate Procedure, Rule 7A(e)(1) Amicus states as follows: I have a BS and MS degree in Economics and a JD degree from the University of Wisconsin. I was a full time member of the faculty of the University of Maine School of Law for 40 years (1966-2006). My areas of specialization include (and remain) property law, land use law, environmental law, administrative law, and state/local government. Over the years I have taught courses in these areas of law at least 20 times. I served on the State Environment Improvement Commission (now the BEP) for 5 years (1969-1974).

Since 2006 I have been an active Emeritus Professor of Law. I have taught occasional classes at the Law School, guest lectured, authored a book on intertidal land, written numerous op-eds for local media outlets, and consulted within my areas of expertise. As space within the Law School grew tight, I have (for the last four years) maintained office space at 222 St. John Street, Rm. 318, Portland, ME 04102.

Believing that global warming is the overarching environmental problem of our era, I have worked with a small group of former Maine State government agency leaders and environmental experts in support of CMP's NECEC project. I authored an Amicus brief in the *Avangrid* case. I believe my economics and law background, my long association with environmental and government regulatory issues in Maine gives me a unique perspective on issues now before the Law Court, and respectfully tender the attached brief for the Court's consideration.

STATEMENT OF BACKGROUND FACTS

In re Russell Black, et al. v. Andy Cutko, et al. Sup. Ct. Doc. DKT.NO.BCDWB-CV-2020-29, (now on appeal to the Law Court) Amicus accepts the Legal, Factual, and Procedural Background facts laid out in CMP's and NECEC, LLC's brief appealing the Superior Court's *Black* holding; see Appellants/Cross-Appellees brief, pgs. 1-17.

Amicus would note that the central issue as seen by both the Superior court in its Decision/Order and the appellant parties in the appeal of that Order, is whether a lease,[1] originally entered into in 2014, amended in 2020, between Maine's Bureau of Parks and Lands[2] [hereinafter BPL] and CMP [hereinafter NECEC, LLC] is valid. Validity turns on how one interprets a 1993 amendment to Maine's Constitution, i.e., Article IX, § 23. The full text reads:

> "**State park land.** 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 the 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."

The Superior Court's holding asserts that the above language not only applies to BPL leases "…issued pursuant to 12 MRS, § 1852(4)…" but gives rise to a series of

[1] The 25-year lease would allow CMP/NECEC, LLC to utilize 32.39 acres within a 1,241 acre parcel of state owned land to erect 4,700 feet of transmission line (approximately .9 of one mile) of the total 145 mile corridor project. Subsequently, DEP conditions reduced the acreage that would be affected to approximately 16 acres. The length of the transmission line remained the same.

[2] Both the Superior Court and the appellant parties agree that the Bureau of Public Lands is the designated state agency that holds title to state owned lands and is clothed with the power to relinquish title to, or lease, discreet portions of these lands subject only to enacted statutory or Constitutional limitations; see 12 MRSA §§ 1801-1900.

administrative duties on the part of BPL.[3] The Court states:

> "… before it [BPL] executes a lease under 12 MRS §1852 (4), the Court has found that BPL must make a reduction/substantial alteration determination. The Court has also concluded that the Maine Constitution requires that any such determination must be made pursuant to a public administrative process."[4]

Though these duties are not fully defined, the Superior Court recognized that it could not fashion the administrative process that is says is constitutionally required:

> "… the Court is not permitted as a matter of separation of powers to create such a process for the agency; it can only find, as it has, that a public process was required given this unique Constitutional Amendment and the enabling statute enacted by the Legislature."[5]

Amicus certainly agrees with this separation of powers observation by the Superior Court—more will be said on this point later in this brief. The Superior Court then holds that the constitutionally required "Public Administrative Process" has not been met by the agency, BPL. Indeed it could not be met because (as the Court recognized) the details of such a process do not yet exist. The Superior Court then states that there is "…no competent evidence to support BPL's claim that it made the constitutionally-required finding of…no 'substantial alteration'…" [6] Amicus disputes this conclusion at a later point in this brief. Finally, the Court holds that BPL Director Cutko "exceeded" his authority and accordingly the lease was held to be invalid.[7]

The appellant parties (CMP/NECEC LLC) offered a wide range of arguments that take issue with procedural aspects of this case, e.g., plaintiff's lack of standing;

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[3] Sup. Ct. Opinion at pg. 10.
[4] Sup. Ct. Opinion at pgs. 18-19.
[5] Sup. Ct. Opinion at pg. 29.
[6] Id.
[7] Sup. Ct. opinion at pg. 30.

mootness with respect to the 2014 lease; whether seeking the original lease prior to receiving the PUC's CPCN is harmless error; whether the Superior Court erred in conducting its proceedings as both a Declaratory Judgment action and an 80C appeal of agency action. None of these CMP/NECEC LLC arguments moved the Court; some were not fully addressed. This appeal to the Law Court by the appellant parties reiterates these arguments more carefully, more fully, and may well persuade the court to reverse the Superior Court's holding that the lease is invalid.

Rather than repeat these and related procedural arguments, Amicus (as stated at the outset) accepts the Legal, Factual, and Procedural Background facts laid out in CMP's/NECEC, LLC's brief and the conclusions they draw from these facts.[8] Instead, this Amicus brief will focus on more fundamental errors by the Superior Court—errors that go to the heart of the 1993 Constitutional Amendment, (Maine Constitution, Article IX, § 23), the role of the Legislature in implementing the Amendment, and Separation of Powers principles.

HISTORICAL INFORMATION

In 1973, 20 years before passage of Article IX, § 23, the Maine legislature recognized the fact that "a public purpose" would be served by leasing portions of publically owned land to meet public infrastructure needs serving a much wider area. The 1973 legislation allowed the Forest Commissioner to: "Lease the right, for a term

[8] See Appellants/Cross-Appellees brief at pg. 50.

of years not exceeding 25, to set poles and maintain utility lines."[9] Seeing the benefit and need for its 1973 enactment, the Legislature in 1975 significantly broadened the leasing powers of the Commissioner to meet a wider range of public infrastructure needs. He now could:

> "Lease the right, for a term of years not exceeding 25, to set and maintain or use poles, electric power transmission and telecommunications transmission facilities, roads, bridges and landing strips; and to lay and maintain or use pipelines and railroad tracks, and to establish and maintain or use other rights-of-way."[10]

The passage of Article IX, § 23 and the Designated Lands Act (DLA)[11] in 1993, did not alter the Legislature's view. In 1997 many of the same legislators that enacted the Amendment and the DLA enacted legislation (12 MRS §1852) that once again saw the benefit of (need for) leasing publically owned land including historic public lots. One provision directly addressed public infrastructure needs; it clothed the BPL (now the holder of title to state owned lands) as follows:

> "**Lease of public reserved land for utilities and rights-of-way.** The Bureau may lease the right, for a term not exceeding 25 years, to: A. Set and maintain or use poles, electric power transmission and telecommunication transmission facilities, roads, bridges and landing strips; B. Lay and maintain or use pipelines and railroad tracks: and C. Establish and maintain or use other rights-of-way."[12]

The 1975 and 1997 broadening of state agency powers to encompass a wider range of essential infrastructure needs was facilitated by a 1973 *Opinion of the Justices*.[13] The *Opinion* grappled with questions raised by Massachusetts Separation Act and

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[9] See 1973 Laws of Maine, Chapter 628, Sec. 14 (amending the whole of 30 MRS § 4162).
[10] See 1975 Laws of Maine, Chapter 339, Sec. 8 (4)(C) (amending 30 MRS§ 4162).
[11] See 12 MRS § 598 et seq. This legislation fulfilled Article IX, § 23's mandate to fully "designate" state owned land.
[12] 12 MRS §1852 (4).
[13] *Opinion of the Justices*, 308 A2d 253 (Me. 1973).

Article X of Maine's Constitution (the Article of Separation Maine adopted when we became a state separate from Massachusetts) as to whether the public lot reservation of land for "public uses" in both Massachusetts (and subsequently Maine) was exclusive, i.e., limited to "…the two beneficial uses particularly designated , i.e., 'Schools' and 'Ministry' … or merely illustrative of a more comprehensive assemblage of beneficial purposes…"[14] The Justices answered their rhetorical question: "We believe the latter is the correct interpretation of the constitutional language."[15] The *Opinion* further noted:

> "In light of the practice of Massachusetts prior to Maine statehood, the legislative response of Maine soon after statehood, and the joint action of the two states, it is evident that the uses mentioned, i.e., schools and the ministry, concerning reservations to be made after separation are illustrative, and not an exclusively exhaustive listing of the 'public uses' for which 'reservations' are to be made."[16]

In sum, the 1973 *Opinion* makes clear that upon statehood, title to all public lots in Maine devolved to the new State;[17] that the Maine Legislature's 1973 enactment permitting the lease of publically owned land for power lines was an appropriate "public use"; that the 1975 legislative enactment expanding the leasing power of the Forest Commissioner to meet a wider range of infrastructure needs was not barred by Massachusetts or Maine law, the Separation Act, or Article 10 of Maine's

[14] Id. at pg. 270.
[15] Id.
[16] Id. at pg. 271.
[17] Id. at pgs. 254-257; *also* L. Schepps, *Maine's Public Lots: Emergence of a Public Trust,* 26 Me. L. Rev. 217 (1974).

Constitution.[18]

The 1993 enactment of Article IX, § 23 clearly does not prohibit the leasing of publically owned land; it follows that the Legislature's 1997 enactment (cited above)[19] delineating the powers of the BPL to lease publically owned land for a wide range of infrastructure needs/purposes is similarly permissible—a "public use", subject only to the caveat that it (the lease) does not "substantially alter" publically owned land. Even this caveat may be waived by "the vote of 2/3 of all members elected to each House."[20]

DETAILED ARGUMENT *in re* ISSUE 1

WHETHER THE SUPERIOR COURT'S *BLACK* HOLDING ERRED IN IMPORTING INTO THE CONSTITUTIONAL LANGUAGE OF ARTICLE IX, §23 A REQUIREMENT THAT THERE BE "A PUBLIC ADMINISTRATIVE PROCESS."

In Amicus's view the Superior Court erred. Article IX, § 23 is 72 words long. Read it. It makes no mention of a "Public Administrative Process." It begins by noting several types of publically owned land, but then leaves the "…implementing [of] this section…" i.e., the delineation of public lands subject to the Amendment, to the Legislature to "…designate by legislation" the full compass of publically owned land. This constitutionally imposed task was accomplished (after passage of the

[18] Parenthetically, it should be noted that the area leased by the BPL to CMP/NECEC, LLC was part of an original public lot fashioned (to serve future public purposes) by Massachusetts before Maine became a State, *see* Appellants/Cross-Appellees brief at pg. 12.
[19] *Supra,* fn. 12 and accompanying text.
[20] See text of Constitutional Amendment, *supra* pg. 1.

Constitutional Amendment) by the separate (but simultaneous in time) passage by the Maine Legislature of the DLA.[21]

The last sentence of the 72-word Amendment imposes an administrative duty on some (unnamed agency of state government) to channel the proceeds of any sale of public lands to "…purchase additional real estate in the same county for the same purposes."[22] This mandate will also require a legislative directive to accomplish the ends sought. So be it. The point being made, however, is that this sentence clearly does not impose any process/procedural burdens on whatever agency is ultimately charged with carrying out this directive of the Amendment.

Turning then to the 23-word heart of the Amendment, the lead in says that "… real estate held by the state" … **may not be reduced or its uses substantially altered except on the vote of 2/3 of all the members elected to each House.**"[23] This language imposes no procedural requirements, much less a "Public Administrative Process" of the type and scope delineated by the Superior Court[24] and imposed on the agency (BPL) as a prerequisite to carrying out its statutory duties.[25] The Superior Court, attempts to finesse the absence of any language in the Amendment calling for the "Public Administrative Process" it asserts is "…constitutionally required…"[26] by

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[21] See *supra*, fn. 11.
[22] See Amendment text, *supra,* pg. 1.
[23] Id.
[24] See, Sup. Ct. Opinion at pgs. 18-19, 21-23.
[25] *Supra*, fn. 12 and accompanying text.
[26] Sup. Ct. Opinion at pg. 21.

further asserting that "the process-related requirements set forth above **arise by implication** from Article IX, § 23."[27]

But this simply is not possible. Interpreting/clarifying the language of provisions that are actually within a Constitution or an amendment to a Constitution is certainly within the purview of the Judicial Branch.[28] As shown above, that is not what we are dealing with here. The 72-word Amendment does not even allude to, much less create, a "Public Administrative Process" with the breadth and detail the *Black* holding fashions. Instead of interpreting Article IX, § 23 *Black* expands Article IX, § 23; the Court has fashioned a whole new provision and appends it to Maine's Constitution—a provision that is not within the four corners of the existing Constitutional Amendment. This enlargement of a constitutional provision is *ultra vires,* i.e., beyond the power of the Judicial branch of government. To achieve the Superior Court's objective constitutional amendment processes must be invoked; and for the new provisions to be in force, the amendment must be adopted. The latter course has not been followed here.

Further, there is a perverse irony in the previously noted Superior Court declaration that "separation of powers" principles barred it from laying out the details of the "Public Administrative Process" it has fashioned.[29] The Court seems guilty of seeing the "tree" but missing "the Forest." Its holding triggers the need for agency

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[27] Id. at pg. 20.
[28] See *Wagner v. Sec'y of State*, 663 A2d 564, 567 (Me. 1995).
[29] *Supra* fn. 5 and accompanying text.

rule making or legislation to lay out the myriad details incident to the whole new "Public Administrative Process" the *Black* holding has fashioned—a process the Court says is "constitutionally required". But Maine case law holds that Judicial branch involvement (even indirect) in legislative processes violates Maine's Separation of Powers principles. *Wagner v. Sec'y of State*, 663 A2d 564 (Me. 1995) made this point clear; citing an earlier *Opinion of the Justices*, 437 A2d 597, 610/44611 (Me. 1981), the *Wagner* court held:

> "We could not, and will not, try to elaborate on the ramifications the initiated legislation might have on existing laws, because '[t]o express a view as to the future effect and application of proposed legislation would involve [us] at least indirectly in the legislative process, in violation of the separation of powers mandated by Article III, Section 2, of the Maine Constitution.' "[30]

In *Wagner* the legislation is the product of 'initiative;' the legislation was only proposed at the time *Wagner* was decided; the 'initiative' might or might not pass—but the Law Court characterized any Judicial branch comment (even one said to be "indirect") is a violation of Maine Separation of Powers principles.[31] In *Black* the Superior Court does far more than comment. *Black* creates a whole new "Public Administrative Process;" *Black* characterized the Process as "constitutionally required;" *Black* created the need for rule making or legislation to fashion the myriad details it says are essential to the Process; and finally, *Black* invalidated BPL's lease

[30] 663 A2d 564, 567 (Me. 1995). More recently, *Avangrid Networks Inc. et al v. Sec'y of State*, 2020 ME 109 ¶ 16, 237 A3d 882, 889-890 makes the same point.

[31] The fact that *Black* involves a challenge to the constitutionality of BPL leasing procedures, whereas the cases noted involved initiatives and a proposed legislative enactment, is irrelevant to the point being made.

to CMP/NECEC, LLC because it was issued without complying with the Process, notwithstanding the fact that compliance was not possible at that point in time. Each of these actions by the Superior Court involved the Judicial branch in the Legislative and/or Executive processes of Maine Government; the involvement is far more than "indirect". Taken together these actions are an egregious violation of Maine case law and Maine Separation of Powers principles embodied in Article III, Section 2, of the Maine Constitution.

Amicus has argued that the Superior Court in *Black* has impermissibly expanded Article IX, § 23; the court has gone far beyond interpreting the existing 72-word amendment. It created a new, a greatly expanded "Public Administrative Process." This action is *ultra* vires, i.e., beyond the power of the Judicial Branch. Further, though seemingly aware of Maine separation of powers principles (the *Black* Court declined to delineate the specifics of the new Process)[32] the Court ignored multiple separation of powers issues its new Process gave rise to going forward. In declaring the Process to be "constitutionally required" it gave rise to the need for rule making or legislation to more specifically define the Process outlined by the Court. In applying the (undefined) Process to the pending BPL— CMP/NECEC LLC lease, and then invalidating the lease for non-compliance with the Process, knowing that compliance was not possible, the Court impermissibly dictates Executive branch

[32] *Supra* fn. 5 and accompanying text.

actions and responsibilities. These actions violate Maine separation of powers principles as enunciated to date.

In sum, (whether viewed separately or taken together) the impermissible expansion of Article IX, § 23 and the impermissible violation of Maine separation of powers principles/law are reversible errors. Amicus would ask the Law Court to so hold.

DETAILED ARGUMENT *in re* ISSUE 2

WHETHER THE SUPERIOR COURT'S *BLACK* HOLDING ERRED IN STATING THAT THE "ENABLING STATUTE" ENACTED BY THE LEGISLATURE [THE DESIGNATED LANDS ACT] SUPPORTS THE VIEW THAT "A PUBLIC ADMINISTRATIVE PROCESS" IS REQUIRED.

In Amicus's view the Superior Court erred. In its zeal to shore up its requirement that a broad Public Administrative Process is required, the *Black* holding at several points asserts (directly or implicitly) that the enabling statute (the DLA) supports/ requires the Process requirements imposed. The *Black* holding states: "The Court first concluded that the language in both the Constitution and enabling statute is clear."[33] At another point the holding states "… that a public process was required given this unique Constitutional Amendment and the enabling statute enacted by the Legislature."[34] But nothing in the statute (the DLA) alludes to, or supports the establishment of a Public Administrative Process of the type and scope fashioned by the *Black* holding. Though the statute is longer than the 72-word Amendment,

[33] Sup. Ct. Opinion at pg. 10. Parenthetically, one might note that these proceedings evidence the inaccuracy of this statement.
[34] Sup. Ct. Opinion at pg. 29.

Amicus would urge, respectfully, that the DLA be read in full. It's not long. The statute begins by defining some terms in the Amendment;[35] it ends by briefly addressing "Proceeds" from the sale of public lands. The body of the statute does precisely what Article IX, § 23 required be done, i.e., that the full compass of publically owned land be "…designated by legislation implementing this section…."[36]

Finally, the point made earlier bears repeating. Nothing in the enabling statute (the DLA) speaks of leases, the leasing of state owned land, or procedural requirements incident to the sale or lease of state owned land. The DLA clearly cannot be said to support (much less require) the broad Public Administrative Process fashioned by the *Black* holding. In sum, the drafters of the DLA could not, did not anticipate the Superior Court's holding in *Black*—the enabling statute does not support the *Black* holding. Amicus would ask the Law Court to so hold.

DETAILED ARGUMENT *in re* ISSUE 3

WHETHER THE SUPERIOR COURT's *BLACK* HOLDING ERRED IN FAILING TO ACKNOWLEDGE OR GIVE WEIGHT TO ENACTED LEGISLATIVE PROCESSES, 12 MRS §§1851, 1852, IN PARTICULAR §1852 (4).

In Amicus' view the Superior Court erred. Shortly after the 1993 passage of Article IX, § 23 and the DLA delineating the full compass of state owned land subject to the Constitutional Amendment, the Maine Legislature in 1997 (no doubt comprised

[35] 12 MRS §598.
[36] See *supra* fn. 11 and accompanying text.

of many of the same Legislators who enacted the Amendment and DLA) enacted 12 MRS §§1851 and 1852 dealing with the sale and lease of public reserved lands. This 1997 enactment almost certainly was adopted to augment and clarify the intent and scope of the recently adopted Constitutional Amendment.

Though these proceedings clearly do not involve the sale of publically owned land it is worth noting that §1851 has four component parts; each part authorizes the sale of public land in slightly different contexts; sales in each part are initiated by the Director of the BPL; each of the component parts require Legislative and/or Legislative Committee approval. Two of the component parts also require the Governor's approval. These provisions no doubt reflected the recently adopted (1993) Constitutional Amendment. The1997 legislation remains unchanged today.

Interestingly, the last sentence in §1851 states: "… the director shall give notice of the proposed sale, exchange or relocation **and may hold a public hearing.** A public hearing must be held by the director if requested by any party." Importantly, §1851 imposes no other procedural requirements on the sale of public land.

Given that these proceedings involve the leasing of publically owned land, §1852 is certainly (for our purposes) the more pertinent of these two provisions. It consists of nine component parts. The first component part permits the transfer of public land from one agency to another; BPL is not directly involved; such transfers are initiated by the Commissioner of the Department of Agriculture, Conservation and Forestry and must be approved by the Governor. The second component part allows BPL to

directly grant public lands for the construction of public roads. The remaining seven component parts allow the BPL (in varying contexts) to lease public lands—five of these require the consent of the Governor and the Commissioner, but only one of these five, §1852 (7) permitting the lease of public land to the Federal government, also requires Legislative approval. **This is the only legislative involvement in §1852.** The two remaining component parts, §1852 (4) and (5)[37] leave the leasing process of public land in the hands of BPL exclusively.

The precise text of §1852 (4), central to these proceedings, involving the "**Lease of public reserved land for utilities and rights of way"** was stated in full as part of the Historical Information portion of this brief.[38] Leases for power and telecommunication transmission lines, roads, bridges, landing strips, pipelines, railroad tracks and other (presumably infrastructure) rights-of-way are all permitted. No procedural requirements are imposed, beyond those fashioned by the agency (BPL) for the orderly handling of lease applications. No approvals by the Commissioner or Governor are statutorily required, and the Legislature (pursuant to Article IX, § 23) only becomes involved when/if a lease application is found by BPL to "substantially alter" existing permitted uses on surrounding publically owned land.

The *Black* holding ignored the statutory dichotomy, the sharp difference between §1851 (the sale of public land) and §1852 (leases of public land). The holding

[37] §1852 (5) leasing, beyond noting that it too is exclusively in the hands of BPL, is not germane to these proceeds and will not be further commented on.
[38] *Supra* fn. 12, pgs. 4-5.

ignored the latitude (with respect to leases of public land) accorded the BPL[39] by the Legislature. It ignored the Legislature's long-standing and continuing recognition of the fact that infrastructure is essential, a necessary public purpose that must be widely accommodated (even on publically owned lands) subject only to the "substantially alter" caveat noted above.[40] It ignored the fact that the BPL complied with the statute (§1852 (4)) in granting CMP NECEC, LLC the lease it sought (see Issue 4). These failures by the Superior Court in *Black* are an egregious violation of separation of powers principles[41] quite apart from those raised in Issue 1.

An early Maine case that examined separation of powers principles within the context of Maine's Constitution, *Ex parte Davis* [42] spelled out the duties of the legislative, executive and judicial departments; the Court noted:

> "The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them…. Each of the three departments being independent, as a consequence, are severally supreme within their legitimate and appropriate sphere of action. All are limited by the Constitution. **The judiciary cannot restrict or enlarge the obvious meaning of any legislative act,** although they are bound to give construction to [interpret] acts which are properly submitted to them…" [43]

As stated above the obvious meaning of 12 MRS §1852 (4) has been ignored by the Superior court. Indeed, Amicus has argued that the *Black* holding has violated both of the separation of powers prohibitions the *Davis* court noted— its fashioning of a broad

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[39] This agency, almost alone, has the personnel (boots on the ground) and the required expertise to impartially execute Article IX, § 23 mandates.
[40] *Supra* Historical Information fn's 9-12 and accompanying text.
[41] See Maine Constitution, Article III, § 2.
[42] 41 Me. 38 (1856).
[43] Id. at pg. 53.

and whole new Public Administrative Process[44] (one said to be constitutionally required) has "enlarged" the obvious meaning of Article IX, § 23, (see Issue 1) and it has "restricted" (ignored altogether) the obvious meaning of 12 MRS §1852, specifically §1852 (4).

A more recent Maine case *Myrick v. James* [45] in examining the scope of the general rule of *stare decisis,* issued a similar warning/prohibition:

> "That which we [the judicial department] may not do is change such a rule or policy once the Legislature has specifically taken the rule or policy out of the arena of the judicial prerogative…by a positive and definitive statutory pronouncement, legitimately within its own prerogative."[46]

This is precisely what the *Black* holding has done. Twenty-five years after the enactment of 12 MRS §§1851 and 1852, with dozens, if not hundreds, of leases having already been issued in reliance upon §1852(4) and BPL's procedures implementing that statutory provision, the Superior Court imposes its own, (a new, a comprehensive) Public Administrative Process; it characterizes the Process as constitutionally required; it requires the pending lease (CMP/NECEC, LLC) applicant to comply with the Process, knowing that is not possible; and asserting that non-compliance, it declares the BPL lease invalid. These actions are without precedent

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[44] Though not within the scope of this brief, it should be noted that the *Black* court's application of this (not yet defined) Process to the proceeding immediately before it (the CMP.NECEC, LLC lease application), then finding that applicant had not complied with the Process (knowing compliance was not now possible) and finally, invalidating the BPL lease, raises serious due process questions.

[45] 444 A2d 987 (Me. 1982)

[46] Id. at pg. 992. Massachusetts case law takes a similar position, see *Lewis v. Lewis*, 351 N.E.2d 526, 531-532 (MA, 1976)(courts may interpret, reinterpret the law, but legislative enactments cut-off or modify common law pronouncements).

and violate Maine separation of powers principles. These are reversible errors. Amicus respectfully asks this Court to so hold.

DETAILED ARGUMENT *in re* ISSUE 4

WHETHER THE SUPERIOR COURT'S *BLACK* HOLDING ERRED IN INVALIDATING THE 2020 LEASE BECAUSE THERE WAS NO COMPETENT EVIDENCE TO SUPPORT BPL'S CLAIM THAT IT MADE THE REQUIRED FINDING OF NO SUBSTANTIAL ALTERATION BEFORE IT ENTERED INTO THE 2020 LEASE.

In Amicus's view the Superior Court erred. At the outset it is important to note that the case before the *Black* court does not involve any "reduction" in the quantum of state owned land. There is no sale or gift or an easement interest being transferred. The Superior Court was dealing with a lease. Only the "substantially altered" question was before the Court.

A lease acknowledges on its face that the Lessor, here the State of Maine and/or its agent BPL, holds title to (and will continue to hold title to) the surrounding land area within which a lease is being proposed, and the land area subject to lease. That being the case, the **only** Article IX, § 23 burden placed on the Lessor when an applicant wishes to lease a portion of state owned land is to verify that the proposed use of the land subject to lease will not "substantially alter" the current uses being made on the surrounding state owned land.

A corollary burden is placed on the applicant/lessee. They must show that their activities *in re* the leased land will not "substantially alter" currently existing uses on

surrounding state owned land. If these burdens are met (as they arguably are here) Maine constitutional requirements are met; § 23's legislative override provisions that would allow a substantial alteration upon the vote of "…2/3 of all members elected to each House," are not triggered.[47]

The *Black* holding categorically asserts that it "… can find no competent evidence supporting BPL's assertion …that the 2020 lease would not 'reduce or substantially alter' the uses of lands."[48] The holding repeats this assertion several times in the concluding portions of the opinion.[49] These assertions simply ignore the facts. **Facts are "competent evidence".**

The facts in this case were on the table when the original lease was negotiated in 2014—they were more clearly understood when the renegotiated lease was approved in 2020—they are undisputed and were known by the parties to this proceeding and by the Superior Court. Some of the more obvious and well-known facts follow:

1. The public land in Johnson Mountain Township & West Fork Plantation subject to the CMP/NECEC, LLC lease is 1,241 acres in size; the leased area is .9 tenths of one mile in length (approx. 4,700 feet), 300 feet in width, and is 32.4 acres in size—approximately 2.6% of the adjoining public land.

2. An existing power line, the Jackson tie line, exists within this publically owned parcel; it is over 3 miles in length (16,035 feet long), 100 feet in width, occupies 37 acres, 2.9% percent of the 1,241 publically held parcel.

3. 1,156 acres of the 1,241 acre publically owned parcel is actively managed

[47] See s*upra* fn. 20 and accompanying text.
[48] Sup. Ct. Opinion at pg. 25.
[49] Id. at pgs. 27 and 29.

woodland; it has been harvested for decades, most recently in 1986-87, and again in 2006-07; these activities require miles of supporting and essential woods roads.

4. Abutting private property on all sides of the publically owned parcels is also managed commercial forest.

5. Both the 2014 and the amended 2020 lease are non-exclusive—the public may continue to use the leased property for hiking, hunting, fishing, trapping, bird-watching and other recreational uses.

6. Unlike many other publically owned parcels, the Johnson Mountain/West Forks parcel has not been designated by BPL as "unique" in any sense of the word; the parcel is not an important habitat for wildlife and biodiversity; it has no constructed recreational infrastructure or facilities (campsites, parking lots, toilet facilities, trail systems, etc.).

These facts (without more) persuaded the Lessor (BPL) that the applicant's proposed lease would not "substantially alter" existing uses on the surrounding public parcel.[50] The Constitutional requirements of Article IX, § 23 were met; the lease was approved.

A corollary view (advanced to support the trial Court's "no competent evidence" holding) is its repeated assertion that permitted uses on publically owned land have been, should be narrowed. It supports that view by referencing 12 MRS §§ 598(5) and 1847(1). A full reading of §598(5) however suggests a wide range of uses on/in publically own land, e.g., farming, forestry, enhancing plant and animal habitat,

[50] In the course of Superior Court hearings prior to its August 10, 2021 Decision and Order, the BPL on September 24, 2020 submitted a Memorandum that touched on all of the facts noted above (and more) in far greater detail than is possible in this brief. The Memo was characterized in the ***Black*** holding as "…an impermissible post-hoc justification of the actions it [the BLP] had taken…", and is not part of the record before the Law Court. Whether the Superior Court's determination is fair or accurate seems irrelevant at this point. The facts noted above predate the Memorandum and alone demonstrate that the lease (the power line) will not "substantially alter" existing uses on surrounding public land. Moreover, to the best of Amicus's knowledge, none of the above noted facts was ever challenged and found by the Superior Court to be inaccurate, or inapposite to these proceedings.

hunting, trapping, fishing, recreation, and what it refers to as "multiple use objectives." §598(5) references 12 MRS §585 (now repealed and replaced by12 MRS §1847). The trial court cites §1847(1) to support its views, but §1847(2) enacted at the same time makes clear that beyond enhancing forestry, wildlife habitat and recreation on publically owned land, permitted uses include "…**economic and other values of the lands."** Accommodating essential infrastructure on small areas of public land certainly seems permissible given this statutory language.

Finally on this point, the Superior Court's view that permitted uses on public lands are (should be) narrowed is undercut by previously noted legislative enactments in 1973, 1975, and 1997[51] that have consistently broadened permitted uses, particularly those involving necessary/essential infrastructure improvements. The 1973 enactment was sustained by an *Opinion of the Justices* ,[52] and Amicus is unaware of any successful challenge to the 1975 or 1997 enactments. The point being made is that the Superior Court's argument that permitted uses are narrow (as a way of asserting that no competent evidence exists to support BPL's approval of the lease) is factually in error. The Superior Court has ignored the 1997 legislation, (impermissibly, in Amicus's view) but that is quite different from a Law Court determination that some or all of §§1851-1852 are invalid, because permitted uses are too broadly stated.

In sum, the BPL looked at the realities of the leased site, the realities of the

[51] *Supra* fns. 9-12 and accompanying text.
[52] 308 A2d 253 (Me. 1973); *supra* fns. 13-20 and accompanying text.

publically owned parcel of land within which the leased site is located, the legislatively approved character of the proposed use of the site, and its own legislatively authorized powers and duties in finding there was competent evidence to approve the lease—in finding that the constitutional mandate of no substantial alteration was met. In Amicus's view BPL's actions comply with both Maine legislative enactments and with Article IX, § 23 of the Maine Constitution. The *Black* holding to the contrary is error. Amicus respectfully asks this Court to so hold.

CONCLUSION

Amicus has offered four separate arguments outlining the errors in the Superior Court's *Black* holding. No detailed effort will be made to repeat or summarize these arguments here. Suffice it to say they are not of equal weight. Arguments 1 and 3 (standing alone, and certainly taken together) lay out fundamental separation of powers errors. The Superior Court contrary to Maine case law and Maine's Constitution has on one hand expanded the plain language of Article IX, § 23 of Maine's Constitution. On the other hand it has ignored legislative enactments that have been in place for 25 years. In Amicus's view neither of these errors can, should be, countenanced by this court. Amicus urges this Court to reverse the Superior Court holding on either (or both) of the two grounds noted, and to find BPL's lease of the defined area in Johnson Mountain Township & West Fork Plantation valid.

Arguments 2 and 4 speak for themselves. They lay out Superior Court errors of lesser magnitude, errors that nonetheless have misled the public and should be corrected. The Designated Lands Act did what it was designed to do—it delineated the full scope of Maine public lands subject to the Constitutional Amendment. It did not authorize the expansive Public Administrative Process fashioned by the trial court.

As for "competent evidence," Amicus would again note—**facts are competent evidence.** The facts outlined in the body of this brief are undisputed and were widely known by BPL and the parties to this proceeding when the lease was being negotiated; they were known by the Superior Court during the early stages of these proceedings. In Amicus's and BPL's view. these facts (without more) were sufficient to justify issuance of the lease CMP/NECEC, LLC sought. Amicus would again urge this Court to reverse the Superior Court holding on either (or both) of the two grounds noted, and to find BPL's lease of the defined area in Johnson Mountain Township & West Fork Plantation valid.

December 15, 2021

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Orlando E. Delogu, hereby certify that on or before December 15, 2021 copies of my letter to the Clerk of the Maine Supreme Judicial Court and my Amicus brief supporting Appellants/Cross Appellees CMP/NECEC, LLC *in re* Russel Black et al. v. Bureau of Parks and Lands, Law Court Docket No. BCD-21-257, have been hand delivered, sent electronically, or by First Class Mail (postage prepaid) to all of the Counsel named below, at the addresses shown. Additionally an electronic copy of the brief has been sent to the Clerk of the Maine Supreme Judicial Court.

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