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December 23, 2021

Via Hand Delivery

Matthew Pollack, Esq.
Clerk of the Law Court
Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, ME 04101

RE: Russell Black, et al. v. Bureau of Parks and Lands, et al.
Docket No. BCD-21-257

Dear Mr. Pollack:

Enclosed for filing please find an original and one copy of Appellees/Cross-Appellants' Motion to Dismiss all Appeals along with a filing fee in the amount of $225.00. Please do not hesitate to contact me with any questions.

Thank you for your attention to this matter.

Sincerely,

David M. Kallin

DMK/tjl

Enclosures

cc: All counsel of record (via email)

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

APPELLEES-CROSS/APPELLANTS' MOTION TO DISMISS ALL APPEALS AS MOOT

MOTION

Pursuant to Rules 4(d) and 10 of the Appellate Rules of Civil Procedure, Appellees/Cross-Appellants Russell Black, et. al. ("Plaintiffs") hereby move this Court to dismiss all of the pending appeals as moot as a result of the enactment of L.D. 1295, I.B. 1 (Dec. 19, 2021). The grounds for this motion are as follows.

INCORPORATED MEMORANDUM OF LAW

On November 2, 2021, an overwhelming majority of Maine people voted in favor of Question 1 (the "Referendum") to enact L.D. 1295, I.B. 1 (Dec. 19, 2021) (codified as amended at 12 M.R.S. § 1852(4)), "An Act to Require Legislative Approval of Certain Transmission Lines and Facilities and Other Projects on Public Reserved Lands and Prohibit the Construction of Certain Transmission Lines in the Upper Kennebec Region" ("I.B. 1"). Section 1 of I.B. 1 declares that "poles" and

"electric power transmission and telecommunication transmission lines" constructed or operated on public lands "are deemed to substantially alter the uses of the land within the meaning of the Constitution of Maine, Article IX, Section 23," and thus a lease for such construction "may not be granted without first obtaining the vote of 2/3 of all the members elected to each House of the Legislature." L.D. 1295, I.B. 1 (Dec. 19, 2021). Section 1 further states that, "[n]otwithstanding Title 1, section 302 or any other provision of law to the contrary, this subsection applies retroactively to September 16, 2014." *Id.* I.B. 1 became effective on December 19, 2021.[1]

Although Plaintiffs were initially persuaded by the Bureau of Parks and Lands' (the "Bureau's") assessment that, even if the effectiveness of I.B. 1 mooted the portion of the appeal challenging the trial court's decision vacating the lease, the decision that a public process was required nonetheless had continued vitality on appeal. (Bureau Blue Br. at 17 n.8.) Upon further reflection over the course of drafting Plaintiffs' brief, however, Plaintiffs have concluded that the entire appeal is moot and accordingly should be dismissed.

[1] See Me. Const. art. IV, pt. 3, § 19; State of Maine Proclamation: An Act to Require Legislative Approval of Certain Transmission Lines, Require Legislative Approval of Certain Transmission Lines and Facilities and Other Projects on Public Reserved Lands and Prohibit the Construction of Certain Transmission Lines in the Upper Kennebec Region (Nov. 19, 2021), available at https://www.maine.gov/governor/mills/sites-/maine.gov.governor.mills/files/inline-files/An%20Act%20to%20Require%20Legislative%20Approval-%20of%20Certain%20Transmission%20Lines.pdf.

I. Section 1 Applies to the Lease at Issue.

This Court must apply Section 1 to the appeals here because the law in effect at the time of this Court's decision controls, even where the law was enacted after the judgment below. A newly-enacted statute may, "within broad constitutional bounds, make . . . a change retroactive and thereby undo . . . the undesirable past consequences of a misinterpretation of [the Legislature's] work product." *State v. L.V.I. Grp.*, 1997 ME 25, ¶ 13, 690 A.2d 960 (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 (1994)); *accord MacImage of Me., LLC v. Androscoggin Cty.*, 2012 ME 44, ¶ 23, 40 A.3d 975; *see also Patchak v. Zinke,* 138 S. Ct. 897, 910 (2018) (plurality opinion) ("Congress has the power to 'apply newly enacted, outcome-altering legislation in pending civil cases,' even when the legislation 'govern[s] one or a very small number of specific subjects.'" (citation omitted) (quoting *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1325, 1328 (2016))); *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801).

Thus, when a statute expresses an unequivocal intent that it apply retroactively and "the period of retroactivity includes the pending litigation," *MacImage of Me.*, 2012 ME 44, ¶¶ 23-25, 40 A.3d 975, the Law Court must apply the standard set forth in the new statute as long as doing so would not violate a specific constitutional provision. *Norton v. C.P. Blouin, Inc.*, 511 A.2d 1056, 1060 n.5 (Me. 1986), *abrogated on other grounds by DeMello v. Dep't of Env't Prot.,* 611 A.2d 985 (Me.

1992); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995) ("Where a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.").

Application of Section 1 of I.B. 1—the legislative determination that a utility transmission line like the New England Clean Energy Connect ("NECEC") substantially alters the use of the public lands and accordingly requires the approval of 2/3 of the Legislature—invalidates the purported lease between the Bureau and Central Maine Power Company ("CMP")[2] (the "2020 Lease"). Its requirement of legislative approval similarly creates the public process argued for by Plaintiffs and held to be necessary by the trial court. And, because of the determination by the statute that the NECEC substantially alters the public lands, Plaintiffs' cross-appeal preserving their argument below that the Superior Court should have created a factual record and determined that NECEC effects a reduction or substantial alteration to the uses of the leased public lands is likewise no longer live.[3] The instant appeals consequently must be dismissed unless retroactive application of I.B. 1 to

[2] Throughout this motion Plaintiffs refer to Appellants/Cross-Appellees Central Maine Power Company and NECEC Transmission LLC collectively as CMP.

[3] Although the Superior Court vacated the lease, which was the ultimate judgment sought by Plaintiffs below, Plaintiffs filed a protective cross-appeal to preserve their position that the Superior Court, not the Bureau, should have created a factual record and declared that the lease reduced or substantially altered the uses of the public lands within the meaning of Me. Const. art. IX, § 23.

the lease somehow would violate a specific constitutional provision and hence be foreclosed from applying here. As Plaintiffs now show, it does no such thing.

II. Retroactive Application of I.B. 1 Does Not Violate the Contract Clauses of the Maine and United States Constitutions, and the Equitable Doctrine of Vested Rights Does Not Confer a Constitutional Claim as against a State Statute.

The only arguments likely to be raised against the retroactive application of I.B. 1 to the lease are that it somehow impermissibly impairs the contractual arrangement between the Bureau and CMP in violation of the Contracts Clauses of the United States and Maine Constitutions or that NECEC somehow has vested rights that preclude application of I.B. 1 to the 2020 Lease. Neither argument withstands scrutiny.[4]

A. Retroactive application of I.B. 1 does not result in substantial impairment of a contractual relationship and thus does not violate the Contract Clauses of the Maine and United States Constitutions.

The Contract Clauses of the Maine and United States Constitutions prohibit laws that impair contracts. Me. Const. art. I, § 11; U.S. Const. art. I, § 10, cl. 1. Courts employ a three-part test "to determine if the application of a statute results in an unconstitutional impairment of a contract." *Am. Republic Ins. Co. v.*

[4] These issues are also being litigated in Superior Court, in *NECEC Transmission LLC, et al. v. Bureau of Parks and Lands, et al.*, No. BCD-CIV-2021-00058, the lawsuit filed by NECEC and Avangrid Networks, Inc., the parent company of NECEC and CMP, challenging the constitutionality of I.B. 1. On December 16, 2021, the Superior Court issued an Order denying NECEC's and Avangrid's motion for a preliminary injunction, rejecting the arguments that I.B. 1 impaired the 2020 Lease and that NECEC had acquired vested rights. Order Denying Plaintiffs' Motion for Preliminary Injunction at 21-35, *NECEC Transmission LLC, et al. v. Bureau of Parks and Lands, et al.*, No. BCD-CIV-2021-00058 (Me. Super. Dec. 16, 2021).

Superintendent of Ins., 647 A.2d 1195, 1197 (Me. 1994). "The threshold question is whether the law 'operate[s] as a substantial impairment of a contractual relationship.'" *Id.* (quoting *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983)). "If there has been a substantial impairment, then the inquiry becomes whether the impairment is justified as 'reasonable and necessary to serve an important public purpose.'" *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 38, 856 A.2d 1183 (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977)). "In addition, the adjustment of the contracting parties' rights and responsibilities that results from the new law must be based on reasonable conditions and 'of a character appropriate' to the purpose that justified its adoption." *Am. Republic Ins. Co.*, 647 A.2d at 1197 (quoting *Energy Reserves Grp.*, 459 U.S. at 412).

Here, not even the threshold inquiry is satisfied. CMP cannot establish that application of I.B. 1 substantially impairs a contractual relationship because the Superior Court's decision in this case reversed the Bureau's issuance of the Lease on August 10, 2021. (A. 55-56.) Accordingly, CMP had no valid lease in place on November 2, 2021, and thus no contract that could be impaired by I.B. 1. *See, e.g.*, Order Denying Plaintiffs' Motion for Preliminary Injunction at 12 n.9, *NECEC Transmission LLC, et al. v. Bureau of Parks and Lands, et al.*, No. BCD-CIV-2021-

00058 (Me. Super. Dec. 16, 2021) ("As of now, however, the BPL lease stands as void in the eyes of the law.").

Even setting aside the Superior Court's holding below and assuming, for the sake of argument, that CMP did have a valid lease in place when the Referendum passed, the language of the 2020 Lease anticipates the possibility of new legislation and provides that "Lessee shall be in compliance with all Federal, State and local statutes, ordinances, rules and regulations, now or hereinafter enacted which may be applicable to Lessee in connection to its use of the Premises." (A. 413, 418). It is difficult to imagine how a change brought about by a new law could substantially impair a contractual relationship when the written instrument underlying that relationship expressly contemplates such legislation.[5]

Additionally, and importantly, the possibility that new legislation would be enacted that would affect CMP's rights under the lease was entirely foreseeable on June 23, 2020, when the 2020 Lease was executed. *See All. of Auto. Mfrs. v. Gwadosky*, 304 F. Supp. 2d 104, 115 (D. Me. 2004) ("[A] contractual obligation is not impaired within the meaning that the modern cases impress upon the Constitution if at the time the contract was made the parties should have foreseen the new regulation challenged under the clause." (quoting *Chrysler Corp. v. Kolosso*

[5] *See also* A. at 420-21: § 14 (changes regarding public reserved lands); § 13(a) (default for non-compliance with state law).

Auto Sales, Inc., 148 F.3d 892, 897 (7th Cir. 1998))). Land use is "an area that has traditionally been regulated by the state and municipalities," *Kittery Retail Ventures*, 2004 ME 65, ¶ 39, 856 A.2d 1183, and that is particularly true for the regulation of *public* lands, *see Biodiversity Assocsiates v. Cables,* 357 F.3d 1152, 1162 (10th Cir. 2004) ("the power over the public land thus entrusted to Congress is without limitations") (quoting *Kleppe v. New Mexico,* 426 U.S. 529, 539 (1976)), as well as with the regulation of public utilities, *In re Searsport Water Co.*, 118 Me. 382, 108 A. 452, 455 (1919) ("When one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use and must submit to be controlled by the public for the common good to the extent of the interest he has created.").

Thus, such regulation is generally foreseeable to contracting parties.[6] Even more directly, in December 2019, Senator Black and several co-sponsors introduced L.D. 1893. Committee Amendment A to that L.D. required that any lease of public reserved lands under 12 M.R.S. § 1852 be approved by a two-thirds vote of the legislature pursuant to Article IX, Section 23 and specifically canceled the lease for the NECEC. (A. 32-33; A. 528-33 (text of L.D. 1893 (129th Legis. 2019) and

[6] As the U.S. Supreme Court has explained, "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson County Water Co. v. McCarter,* 209 U.S. 349, 357 (1908); *see also Energy Res. Grp., Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 411 (1983) ("In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past.")

Comm. Amend. to L.D. 1893 (129th Legis. 2020)). The Committee on Agriculture, Conservation, and Forestry ("ACF") unanimously voted to recommend that L.D. 1893 as amended "ought to pass" in February 2020, but the full Legislature could not consider the bill because it adjourned on March 17, 2020, due to the COVID-19 pandemic. (A. 34.) CMP clearly could have foreseen a statutory change.

Even assuming a substantial impairment, however, I.B. 1 nevertheless survives constitutional scrutiny because it "has 'a significant and legitimate public purpose.'" *Am. Republic Ins. Co.*, 647 A.2d at 1197 (quoting *Energy Reserves Grp.*, 459 U.S. at 411). In assessing whether legislation is necessary to serve a significant public purpose, courts generally defer to the judgment of the Legislature, unless the State is a contracting party. *See Kittery Retail Ventures*, 2004 ME 65, ¶ 38, 856 A.2d 1183; *see also U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 26 (1977) (observing that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate [when] the State's self-interest is at stake").

This rule is not implicated by I.B. 1, however, because the change it brings about does not result in a financial benefit to the State. *See U.S. Tr. Co. of N.Y.*, 431 U.S. at 26. Here, I.B. 1 reflects the judgment of the people of Maine that the additional environmental protections and legislative oversight imposed by I.B. 1 are in the public interest. Additionally, the method that I.B. 1 adopts for enforcing those protections mirrors the method required under Article IX, Section 23. Thus, "the

people, as sovereign," *Opinion of the Justices*, 2017 ME 100, ¶ 59, 162 A.3d 188, 209, have now spoken twice on this issue. Their judgment should be accorded deference.

B. The vested rights doctrine does not apply or is unavailing.

The doctrine of "vested rights" is a common law doctrine applied in the municipal zoning context. *See, e.g., Thomas v. Zoning Bd. of Appeals of City of Bangor,* 381 A.2d 643, 647 (Me. 1978); *Peterson v. Town of Rangeley*, 1998 ME 192, ¶ 12 n.2, 715 A.2d 930; *Sahl v. Town of York*, 2000 ME 180, ¶¶ 12-14, 760 A.2d 266. It simply has no application to leases or contracts, impacts to which instead are evaluated under an impairment of contract analysis, nor to state statutes as opposed to municipal ordinances.

"The circumstances when rights vest . . . occur when a municipality applies a new ordinance to an existing permit." *Peterson*, 1998 ME 192, ¶ 12 n.3, 715 A.2d 930 (emphasis omitted). Vested rights cases universally involve attempts to apply ordinances enacted after issuance of a building permit. The concept of vested rights simply does not translate to contractual relationships, including leases. As this Court has recognized, "all property is held in subordination to the police power." *Thomas,* 381 A.2d at 647 (quoting *R. A. Vachon & Son, Inc. v. Concord*, 289 A.2d 646, 648 (N.H. 1972)). Any challenge to the exercise of that power by a lessee of public lands must therefore be brought as an impairment of contract claim.

Similarly, decisions of this Court have clarified that the vested rights doctrine does not apply to retroactive State statutes as opposed to municipal ordinances. In *Baxter v. Waterville Sewerage District*, 146 Me. 211, 79 A.2d 585 (1951), residents of Waterville brought a constitutional challenge to a state law establishing a sewerage district that would charge fees for sewage disposal. The residents argued that they had a contract with the city of Waterville because they had connected to the public sewer line and, therefore, the statute impaired their rights under the Contracts Clause of the Maine Constitution. *Id.* at 217. The court rejected this argument, concluding that the residents had "a permit or license only," not a contract, and holding that the exercise of the state's police power "violates no constitutional guaranty against the impairment of vested rights." *Id.* at 218.

In the years after *Baxter*, the Law Court made statements in some cases that were inconsistent with this rule, stating on occasion "that retroactive application of a statute is unconstitutional if it 'impairs vested rights or imposes liabilities,' without identifying the source of the asserted constitutional prohibition." *Norton*, 511 A.2d at 1060 n.5 (quoting *Merrill v. Eastland Woolen Mills, Inc.*, 430 A.2d 557, 560 n. 7 (Me. 1981)). This led the Court to clarify, in *Norton*, that, if a statute unequivocally states that it is to be applied retroactively, "the statute will be so applied unless a specific provision of the state or federal constitution is demonstrated to prohibit such action." *Id.* As the Norton court explained, a limitation upon the Legislature's power

to regulate conduct "in the intended manner . . . can only arise from the United States Constitution or the Maine Constitution." *Id.*; *see also Laughlin v. City of Portland*, 111 Me. 486, 90 A. 318, 319 (1914) ("[T]he powers of the Legislature are, broadly speaking, absolute, except as limited or restricted by the Constitution.").

The vested rights doctrine does not appear to be grounded in any specific constitutional provision and accordingly is not a constitutional impediment in any case. *See* Order Denying Plaintiffs' Motion for Preliminary Injunction at 22, *NECEC Transmission LLC, et al. v. Bureau of Parks and Lands, et al.*, No. BCD-CIV-2021-00058 (Me. Super. Dec. 16, 2021) ("Rather, the doctrine of vested rights appears to be an equitable concept, derived by implication from the state and federal constitutions (but without attribution to any specific provisions), and developed (especially in the municipal context) through a process of judge-made constitutional common law.") (collecting cases); *see also, e.g., Friends of Yamhill Cty., Inc. v. Bd. of Comm'rs of Yamhill Cty.*, 264 P.3d 1265, 1277 (Or. 2011) (describing vested rights as a "body of substantive common law that identifies which expenditures count in determining whether a landowner has a vested right to complete construction and which do not"); *Andalucia Dev. Corp. v. City of Albuquerque*, 2010-NMCA-052, ¶¶ 21-23, 148 N.M. 277, 285, 234 P.3d 929, 937 (discussing standard for establishing common law vested rights). *See also L.V.I. Grp.*, 1997 ME 25, ¶¶ 9-16, 690 A.2d 960.

Finally, even if the vested rights doctrine did apply in this context, CMP would not be able to establish that it has equitably acquired vested rights to complete construction of the portion of the Project that crosses the public reserved lands in West Forks Plantation and Johnson Mountain Township. "Vested rights" arise only by: (1) actual physical commencement of significant and visible construction; (2) undertaken in good faith with the intention to continue with the construction through to completion; and (3) construction commenced pursuant to validly issued permits. *Sahl*, 2000 ME 180, ¶ 12, 760 A.2d 266. Under Maine law, mere issuance of a permit does not establish vested rights, and a developer's "knowledge of the situation must be taken into account" in determining whether this "equitable remedy" is appropriate. *Kittery Retail Ventures,* 2004 ME 65, ¶¶ 24, 27, 856 A.2d 1183.

CMP cannot meet even the first of the three vested rights criteria because it has not commenced construction on the public reserved lands in West Forks Plantation and Johnson Mountain Township. *See* Affidavit of Thorn C. Dickinson at ¶ 17, filed with this Court on September 7, 2021 in support of CMP's Opposition to Appellees/Cross-Appellants' Motion to Lift Automatic Stay Pending Appeal. Nor may CMP now commence construction, as this Court has ordered CMP "to refrain from all construction activities, including vegetation removal, on the leased premises . . . during the pendency of this appeal." Order on Appellees/Cross-Appellants'

Motion to Lift Automatic Stay Pending Appeal, *Russell Black et al. v. Bureau of Parks and Lands et al.*, Docket No. BCD-21-257 (Sept. 15, 2021).

Yet even if CMP had commenced construction on the public reserved lands – which it has not done – it would nevertheless be unable to establish the criteria requiring that construction be undertaken in good faith and in reliance on validly issued final permits: when NECEC made the calculated decision to start clearing and construction, it knew for almost a year that the ACF Committee of the Legislature, with jurisdiction over the Bureau, had unanimously recommended to the Legislature that the Lease be canceled and that any such lease required 2/3 legislative approval; it knew for over six months before it began any physical work (on portions of the Project outside of the leased premises) that this case had been brought to invalidate the Lease, which ultimately the Superior Court did in August 2021; and it knew for more than six months before it started any work that its Maine Department of Environmental Protection permits had been appealed to the Board of Environmental Protection in part on the ground that the lease was invalid. That appeal remains pending.

While NECEC could build under these circumstances, it did so entirely at its own risk and did not and could not in any way acquire "vested rights" precluding application of I.B. 1 to the 2020 Lease. To hold otherwise would enable and encourage a race to develop during pending appeals as a means of depriving litigants

of their appeal rights, the agency and courts of their authority to make final decisions and the Legislature of its rights to regulate the uses of Maine's public lands.

This Court has made clear that a developer does not proceed in good faith if it had actual notice of a pending legislative change and was aware of public opposition like the proposed legislation about the lease of public lands and the proposed citizens' initiative. In *Kittery Retail Ventures*, 2004 ME 65, ¶ 2, 856 A.2d 1183, a developer received preliminary approvals from the Town's planning board to construct a shopping mall. Shortly thereafter, a group of citizens opposed to the shopping mall filed a petition for a referendum to enact zoning changes that would prohibit such retail development. *Id.* ¶¶ 3-4. The referendum passed but did not include a retroactivity provision and therefore did not prohibit the shopping mall. *Id.* ¶ 5. The group of citizens filed a petition for a second referendum that included a retroactivity provision, which passed and had the desired effect of prohibiting the shopping mall. *Id.* ¶ 6. The developer argued that it had equitable vested rights based on the bad faith enactment of the referendum but the Law Court rejected that argument and instead focused on the fact that the developer knew about the pending ordinance change via the referendum and the public opposition to the project. *Id.* ¶¶ 23-28. Like the developers there, CMP knew of the proposed legislation addressing the Lease and the Referendum's retroactivity provision that would prohibit the Project. CMP also knew of the public's significant opposition to the Project.

Likewise, in *City of Portland v. Fisherman's Wharf Associates II,* 541 A.2d 160, 161 (Me. 1988), a group of citizens proposed an initiative to limit development of the waterfront to marine related uses. Shortly after the initiative was proposed, a developer filed an application to develop a condominium on the waterfront. *Id.* The developer's application was approved on April 28, 1987, and on May 5, 1987, the initiative passed. *Id.* It included a retroactivity provision that prevented the development. *Id.* at 162. The Law Court held that no rights had vested "considering [the applicant's] knowledge of the contents of the proposed ordinance and its retroactive provisions prior to acquiring title to the property in question, and the lack of any evidence of bad faith or discriminatory treatment by the City or initiated ordinance proponents, [the applicant] has failed to establish any vested rights based on equitable grounds." *Id.* at 164. Just like the *Fisherman's Wharf* developer, CMP had knowledge of the legal hurdles to completing the NECEC at the time it decided to commence construction, especially the challenge to its lease of public lands.

Courts in other jurisdictions have similarly held that developers who began construction in an effort to evade contemplated zoning changes lacked the type of "good faith" necessary to vest rights. *See generally* 4 Am. Law. Zoning § 32:5 (5th ed., May 2021 update) (citing *Hanchera v. Bd. of Adjustment*, 269 Neb. 623, 694 N.W.2d 641 (2005) (developer of confined animal feeding operation lacked good faith where it was aware of pending ordinance change that would hinder or stop its

operation and nevertheless began construction); *Biggs v. Town of Sandwich*, 470 A.2d 928 (N.H. 1984) (plaintiffs did not acquire vested rights when they began construction with full knowledge of pending ordinance and, in so doing, took a "calculated risk" that was theirs to bear)).

CMP's unprecedented decision to pursue construction of the NECEC under these circumstances does not somehow transform it into a good faith pursuit just because its purported rationale was to follow a project schedule and meet contractual deadlines. Rather than serving as evidence of good faith, this is merely evidence of CMP's calculated decision to proceed with construction at its own risk during the pendency of both the legal challenges and the Referendum. Racing to build during pending legal challenges cannot out run those challenges, and is not commencing construction in good faith as a matter of law under "vested rights" jurisprudence.

Nor can CMP meet the final prong of the vested rights analysis, that it possessed all necessary land rights and permits, since the lease was being challenged in court. *Conservation L. Found., Inc. v. Maine*, No. AP-98-45, 2002 WL 34947097, at *3 (Me. Super. Jan. 28, 2002); *see also, e.g., Powell v. Calvert Cty.*, 795 A.2d 96, 1010 (Md. 2002) (holding that until all necessary approvals are final, "nothing can vest or even begin to vest"); *Donadio v. Cunningham*, 277 A.2d 375, 382-83 (N.J. 1971) (holding that developer may not acquire vested rights "prior to the end of the appeal period" or "after an appeal has been taken").

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Because Section 1 of I.B. 1 must be applied, and its application to the 2020 Lease suffers no constitutional infirmity, there is no longer a case or controversy for the Court to resolve. "Courts can only decide cases before them that involve justiciable controversies." *Lewiston Daily Sun v. Sch. Admin. Dist. No. 43*, 1999 ME 143, ¶ 12, 738 A.2d 1239. "In general, a case is moot and therefore not justiciable if 'there are insufficient practical effects flowing from the resolution of the litigation to justify the application of limited judicial resources.'" *Brunswick Citizens for Collaborative Gov't v. Town of Brunswick,* 2018 ME 95, ¶ 7, 189 A.3d 248 (quoting *Witham Family Ltd. P'ship v. Town of Bar Harbor*, 2015 ME 12, ¶ 7, 110 A.3d 642). "The principle is well-established that legislation passed during the course of litigation may render moot, or unnecessary, a determination of a former controversy by supplanting the gravamen of the complaint." *Thomas*, 381 A.2d at 646.

Section 1 of I.B. 1 provides the exact relief sought by Plaintiffs with respect to the 2020 Lease in this litigation, (A. 173-74), and conclusively answers the question whether the Project constitutes a reduction or substantial alteration of the public reserved lands in Johnson Mountain Township and West Forks Plantation. Section 1 reaffirms that the construction of transmission lines and facilities on public lands constitutes a substantial alteration of those lands under Article IX, Section 23, and that leases for such a purpose may not be granted without first obtaining two-

thirds legislative approval. Section 1 applies retroactively to 2014 and, therefore, provides the standard that governs the 2020 Lease. *See MacImage of Maine*, 2012 ME 44, ¶ 25, 40 A.3d 975. The 2020 Lease is plainly invalid under the standard set forth in Section 1 of I.B. 1 because it purported to lease public lands for a "transmission line corridor," (A. 413), without prior legislative approval.

Therefore, I.B. 1 obviates judicial determination of the two questions that were central to the parties' controversy before the Superior Court: whether the 2020 Lease is valid and whether the use for which the public reserved lands in Johnson Mountain Township and West Forks Plantation were leased constitutes a reduction of or substantial alteration to those lands.[7]

No practical effect would flow from this Court's holding with respect to those issues – even if the Court were to reverse the decision of the Superior Court that the 2020 Lease is invalid. The remedy that the Bureau seeks on appeal is a remand to the agency so that it can make a substantial alteration determination, (Bureau Blue Br. at 50), but section 1 of I.B. 1 already has made such a determination, making such a remand meaningless. The people of Maine have already determined that the construction of transmission lines and certain linear facilities on public reserved lands constitutes a substantial alteration of those lands; thus, there is no

[7] Because the basis of Plaintiffs' cross-appeal was the trial court's refusal to take evidence and determine whether the NECEC lease effected a reduction or substantial alteration to the uses of the leased lots, for this reason that cross-appeal is also moot.

determination left for the agency to make. As a result, the issues regarding the validity of the 2020 Lease are moot. *See Clark v. Hancock Cty. Comm'rs*, 2014 ME 33, ¶ 11, 87 A.3d 712.

For similar reasons, the appeals of the trial court's determination of the need for a public process are also moot. Since leases pursuant to 12 M.R.S. § 1852(4) now will have to be approved by the Legislature, there will be—by definition—a public process. The thrust of the trial court's decision was that the public and the Legislature needed to be aware of proposed leases of transmission lines in order to make the constitutional protection of public lands effective but that is now effectively required by the statute. A ruling one way or the other on this issue will not affect either of the specific disputes between the parties here or the public process necessarily part of legislative review of proposed utility leases in the future. There are thus "no practical effects flowing from resolution" of this issue either.

III. No Exception to the Mootness Doctrine Applies.

There are "three narrow exceptions" pursuant to which a court may address the merits of issues that are otherwise moot. *Ten Voters of City of Biddeford v. City of Biddeford,* 2003 ME 59, ¶ 8, 822 A.2d 1196. The three exceptions apply where (1) "sufficient collateral consequences will result from determination of the questions presented so as to justify relief," (2) the questions presented are "of great public interest" and resolution of the questions would provide "future guidance [to]

the bar and the public," or (3) the questions are capable of repetition "yet escape review at the appellate level because of their fleeting or determinate nature." *Id.* (quoting *Lewis v. State*, 2000 ME 44, ¶ 4, 747 A.2d 1191).

None of the three exceptions to mootness applies here:

First, the collateral consequences exception clearly does not apply. This exception comes into play in criminal cases and allows a petitioner who has completed his sentence to challenge the conviction on post-conviction review because of the collateral consequences that are presumed to flow from a criminal conviction. *See Price v. State*, 2010 ME 66, ¶ 7, 1 A.3d 426.

Second, the exception for questions of great public interest also does not apply here because "court officials [do not] need an authoritative determination for future rulings, and ... the question is [unlikely] to recur in the future." *Mainers for Fair Bear Hunting v. Dep't of Inland Fisheries & Wildlife,* 2016 ME 57, ¶ 8, 136 A.3d 714 (quoting *Sparks v. Sparks*, 2013 ME 41, ¶ 11, 65 A.3d 1223). The specific issue of whether the 2020 Lease is valid will not recur and an "authoritative determination" as to whether the construction of transmission lines and linear facilities on public lands constitutes a reduction of or substantial alteration to such lands has been made by statute; thus, judicial determination of the question is unnecessary. Therefore, the public interest exception does not apply.

Finally, the exception for issues capable of repetition but evading review does not apply. This exception applies when there is a "reasonable likelihood that the same issues will imminently and repeatedly recur in future similar contexts." *Id.* ¶ 10 (quoting *Campaign for Sensible Transp. v. Maine Tpk.,* 658 A.2d 213, 215 (Me. 1995)). Again, I.B. 1 has now conclusively established that the Bureau may not grant leases for the construction of transmission lines on public lands unless the Bureau first obtains two-thirds legislative approval. L.D. 1295, I.B. 1 (Dec. 19, 2021). Therefore, it is highly unlikely that the same issues will "imminently and repeatedly recur in future similar contexts." *Mainers for Fair Bear Hunting*, 2016 ME 57, ¶ 10, 136 A.3d 714.

CONCLUSION

For the foregoing reasons, Appellees/Cross-Appellants Russell Black et al. respectfully request that all of the pending appeals in this matter be dismissed as moot.

Dated at Portland, Maine this 23rd day of December, 2021.

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CERTIFICATE OF SERVICE

I, David M. Kallin, attorney for Appellees/Cross-Appellants certify that I have this day caused the foregoing Appellees/Cross-Appellants' Motion to Dismiss All Appeals as Moot to be served on the below by electronic mail and U.S. mail, first class postage prepaid, addressed as follows:

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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

ORDER

Upon consideration of Appellees/Cross-Appellants' Motion to Dismiss, the Court finds that L.D. 1295, I.B. 1 (Dec. 19, 2021) renders these appeals moot; the motion is hereby GRANTED and the appeals are DISMISSED.

DATED:

_____
Associate Justice