STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

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LAW COURT DOCKET NO. BCD-21-416

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NECEC TRANSMISSION, LLC, et al.

Plaintiff-Appellants

v.

BUREAU OF PARKS AND LANDS, et al.

Defendant-Appellees

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On Report from Business and Consumer Court
Docket No.: BCDCIV-2021-00058

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# BRIEF OF APPELLANT

# THE MAINE STATE CHAMBER OF COMMERCE

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## STATEMENT OF FACTS AND PROCEDURAL HISTORY

The long history of this Project from the request for proposals to this Report will undoubtedly be detailed fully by others. In briefest summary, after years of hearings in multiple administrative proceedings and careful consideration of days of testimony, including expert testimony, all agencies with jurisdiction issued all necessary state or federal permits for construction and operation of the NECEC Project. The permits were not stayed, and tens of millions of dollars were spent in construction pursuant to legally valid contracts with pressing deadlines. That construction has now been halted solely as a direct result of the certification of the vote at the November 2021 referendum on the second citizens' initiative ("Initiative") mounted by Project opponents. After expedited briefing and oral argument, the Business Court denied preliminary injunctive relief but reported the case to the Law Court for the reasons stated in the Report. (A. 12-15)

## STATEMENT OF ISSUES AND STANDARD OF REVIEW

The Maine State Chamber of Commerce ("Chamber") as Plaintiff below has the role of Appellant in the briefing sequence on this Report. The Chamber challenges the Business Court's denial of preliminary injunctive relief as resting on fundamental errors of law that, once corrected, inevitably warrant the requested injunctive relief. The correct legal analysis establishes not merely a likelihood of success on the merits but a strong probability, approaching inevitability, of success on

the merits, thus completely changing the calculus of the other factors governing the availability of injunctive relief.

The denial of injunctive relief may technically be classified as on review for abuse of discretion. *See Walsh v. Johnston*, 608 A.2d 776, 778 (Me. 1992). In this instance, however, the denial of injunctive relief is actually an error of law because it rests upon fundamental errors of law, the correction of which would make denial of injunctive relief a clear abuse of discretion. *See Windham Land Tr. v. Jeffords,* 2009 ME 29, ¶ 42, 967 A.2d 690; *Fitzpatrick v. Town of Falmouth*, 2005 ME 97, ¶ 19, 879 A.2d 21 (reviewing conclusions of law de novo regarding a denial of preliminary injunction).

The first issue is whether permits, or the governmental actions underlying them, are subject to retroactive operation or application of subsequently enacted legislation, without regard to the established legal limitation on retroactivity based on vested legal rights of the permit holder because the vested rights limitation on retroactivity applies only to municipal permits or actions.

The second issue for review for legal error is whether the Order on Report correctly decided either that many millions of dollars of lawful construction activity did not confer any vested rights or that whatever rights might have been vested could have been divested retroactively by the Initiative because it might have been anticipated that opponents would mount a successful referendum campaign to revoke or nullify the permits retroactively.

The third issue that will arise upon correct resolution of the first two issues, is whether it is a reversable error or a reversable abuse of discretion to deny injunctive relief based on errors of law when denial of injunctive relief as a practical matter will serve as the death knell for the Project.

## SUMMARY OF ARGUMENT

It is an exception to the general rule for any statute to be operational or applicable retroactively with respect to completed events. Retroactivity is not legally possible if the retroactive operation or application will materially affect or divest vested legal rights. A holder of multiple lawfully issued permits is lawfully entitled to commence construction and, once substantial construction has been commenced and continued in good faith, the permit holder has vested legal rights that insulate the permits from retroactive application or operation of any subsequently enacted legislation, regardless of the manner of its enactment.

The law of vested rights in Maine is settled and consistently reinforced in multiple precedents over the course of more than a century. The vested rights doctrine is consistent with multiple principles, norms, and standards of English and American law since time immemorial and is rooted in constitutional principles guaranteeing due process and prohibiting impairment of contract.

Apart from its constitutional, legal, and equitable roots, the law of vested rights is the only rule that can sensibly operate in a capitalist economy in which investors make forecasts of risk and reward before committing hundreds of millions of dollars

to essential energy infrastructure to meet growing demand, and to respond to changing environmental needs. If every permit is subject to revocation by referendum indefinitely, notwithstanding the nature and extent of the lawful construction conducted in good faith pursuant to the permit, then investment in Maine for any projects requiring permits will be chilled, if not frozen. Disregard of the vested rights doctrine will not only be contrary to constitutional principle and an affront to decades of Maine jurisprudence, but it will also be dangerously unwise policy at odds with modern standards and practices for the prudent exercise of good business judgment.

Given the foregoing and given the fact that denial of preliminary injunctive relief means the end of this Project, denial of injunctive relief is more than a mere abuse of discretion but amounts to an error of law compounding the other errors of law. The harm to be avoided by injunction is enormous and irreparable; any balancing of any equities favors the Plaintiffs; and the public interest has been authoritatively determined in multiple agency proceedings already and could not overcome the legal merits or other factors in any event. The Order on Report should be vacated, and the matter remanded for entry of preliminary injunctive relief and such further proceedings as may be necessary or appropriate and not inconsistent with the Law Court's Opinion.

# ARGUMENT

## THE INITIATIVE CANNOT HAVE RETROACTIVE EFFECT ON THE NECEC PROJECT

### A. Introduction

The dispositive question is whether the statute enacted by the Initiative may be applied retroactively to prevent completion and operation of the NECEC Project. Generally, of course, it is well-settled and well-understood that legislation is applicable prospectively, on and after its effective date. It is the exception for legislation to be applied to events and situations that occurred before its effective date. *See Bernier v. Data Gen. Corp.*, 2002 ME 2, ¶ 16, 787 A.2d 144 (citing 1 M.R.S. § 302); *In re Guilford Water Co.*, 118 Me. 367, 375 (Me. 1919). Any such exceptions need to be justified. *Id.*

Usually, retroactive application is permissible for some, but not necessarily all, remedial statutes. *See Merrill v. Eastland Woolen Mills, Inc.*, 430 A.2d 557, 560-561 (Me. 1981) (citing *Dobson v. Quinn Freight Lines, Inc.*, 415 A.2d 814 (Me. 1980)). The Initiative is in no sense remedial. A crucial limiting principle for any retroactive application, remedial or otherwise, is the constitutionally grounded due process requirement, buttressed by the contract clause, and consistent with centuries of common law and equity jurisprudence, that vested rights must not be divested, especially when the statute in question retroactively targets the vested rights of a single party.

The short of it is that legislation may not have application concerning events occurring prior to its effective date if such retroactive application would impair or divest vested legal rights. It is important to be clear that there are also overlapping or supportive equitable considerations with respect to the analysis of retroactive applicability. Appellate decisions in Maine and other states show that the overall process sequence is roughly as follows.

First, the filing of an application for a permit does not create any vested right, but at most a mere expectancy.

Second, in some instances, conduct by project opponents deemed to be in bad faith with respect to enactment of new laws after the filing of a permit application may equitably preclude retroactive operation of the new laws to defeat the project in question. That is not this case, but those decisions nevertheless articulate important principles, norms, standards, and modes of analysis that reinforce the case against retroactive application of this Initiative. They are particularly instructive where the new laws are patently targeted at a fully permitted Project under construction, as was this Initiative.

Third, the issuance of permits in some states may confer vested rights, but that is not the law of Maine. Nevertheless, the issuance of all required permits in Maine does create a legal right to proceed with construction of the project, unless the permits are stayed.

Fourth, affirmance on final appeal vests the (initially contingent or inchoate) legal rights conferred by the permits. In this case, specifically, the rights conferred by the Public Utility Commission's ("PUC") Certificate of Public Convenience and Necessity ("CPCN") vested on issuance of the Law Court's decision in *NextEra v. PUC*, 2020 ME 34, ¶¶ 32-33, 227 A.3d 1117, which was reaffirmed by the Law Court in *Avangrid v. Sec'y of State*, 2020 ME 109, ¶¶ 36-38, 237 A.3d 882. Those decisions render the CPCN legally invulnerable to revocation by referendum. In addition to the CPCN, all the other required permits were issued, and none have been stayed, despite multiple efforts to stay them. In the aggregate, until the Department of Environmental Protection ("DEP") Commissioner suspended the DEP license after the election, those permits legally authorized the commencement and completion of construction and the operation of this Project.

Fifth, that legally authorized construction, at a cost of tens or even hundreds of millions of dollars, to complete the work in accordance with contractually binding deadlines, established a vested legal right that is not subject to divestment by retroactive application of any new law as a matter of settled retroactivity law.

In this case, the litigation logic is clear and simple. Plaintiffs have vested legal rights and the only point of the Initiative is to nullify them or divest them to use the vocabulary of property law. The permits or licenses or the CPCN by any name conferred legal rights authorizing construction. Those rights were legal, not equitable, and more importantly, by virtue of the millions of dollars spent pursuant to their

authority, the legal rights became vested, not inchoate or contingent in any sense that would be recognized by any property lawyer from the Middle Ages until now. By their nature, those vested legal rights were subject to divestment if, but only if, direct appellate review determined that a permit had been improperly granted originally as not compliant with the law in effect at the time the permit application was approved.

In this instance, there are also overwhelming equitable considerations that further reinforce that fundamental legal rule. They are unnecessary but, as a matter of fundamental justice, they make the case all the more clear.

**B. The Context**

Before specifically demonstrating that vested legal rights preclude retroactivity here, two general points reinforce and contextualize the point. The first is that multiple principles and rules of law recognized from time immemorial consistently reinforce and secure essential and fundamental characteristics of justice: protection of reliance interests, stability, predictability, consistency, and finality. These pervasive and enduring principles and rules preclude isolated, arbitrary, inconsistent actions on the same matter. They especially preclude unfairly belated attempts to undo governmental actions upon which parties have relied to their considerable detriment.

These principles and rules travel under various names in various settings, but they are all ultimately grounded in the same set of values. They include, perhaps among other things, constitutional prohibitions against *ex post facto* laws, or bills of attainder, or double jeopardy, or impairments of contract, or deprivations of due

process. *See, e.g., State v. Letalien*, 2009 ME 130, 985 A.2d 4 (*ex post facto*)(barring retroactive application of amendment to sex offender registration law); *Doe XLVI v. Anderson*, 2015 ME 3, 108 A.3d 378 (bill of attainder); *State v. Dechaine*, 572 A.2d 130, 136 (Me. 1990) (double jeopardy)(barring dual murder convictions for single homicide); *Hoag v. Dick*, 2002 ME 92, ¶ 1, 799 A.2d 391 (impairment of contract)(barring retroactive application of Uniform Premarital Agreement Act to agreement executed prior to effective date), *Danforth v. State Dep't of Health & Welfare*, 303 A.2d 794, 798 (Me. 1973) (due process)(requiring appointment of counsel for indigent parent in termination of parental rights proceeding).

Belated changes in the rules are uniformly understood to be the antithesis of the process that is due, i.e., regular order. They include principles and rules of finality ranging from *stare decisis* to *res judicata* to collateral estoppel. They are also manifested in equity proceedings in laches and equitable estoppel. And they operate as promissory estoppel in damage actions at law and specific performance suits in equity. *See McGarvey v. Whittredge*, 2011 ME 97, ¶ 54, 25 A.3d 620 (*stare decisis*); *Beegan v. Schmidt*, 451 A.2d 642, 643–644 (Me. 1982) (*res judicata*, collateral estoppel); *Baxter v. Moses*, 77 Me. 465, 478 (Me. 1885) (laches); *Dept. of Health & Human Servs. v. Pelletier*, 2009 ME 11, ¶ 17, 964 A.2d 630 (equitable estoppel); *Chapman v. Bomann*, 381 A.2d 1123, 1127 (Me. 1978) (promissory estoppel).

The central point has long been that material belated changes of position to the detriment of another, by private actors or by the government itself, are fundamentally

unfair and are prohibited without substantial justification, if permitted at all. Where the detriment is loss of a vested legal right, it amounts to a denial of due process, a violation of the contracts clause, and after administrative or judicial decisions, an impermissible disregard of separation of powers.

If there is any case in which the fundamental unifying sense and spirit of these principles and rules of stability, regularity, predictability, and finality protect the permit holder, it is this one. Conversely, to deny effect to the settled law of vested rights here would require overruling all the cases that have recognized it.

The second general point, shown in Affidavit of Dana F. Connors, appended hereto, (in the Business Court record but not the Appendix), is that the American free enterprise system in a government of ordered liberty demands faithful adherence to these principles of stability, predictability, integrity, and finality because every decision about any potential or prospective future investment necessarily always involves a predictive judgment of risk and reward. Obviously, the greater the investment, the more important the predictive judgment. And, equally obviously, an investor and its legal advisors can make reasonably confident predictions of the outcome of any permitting process under current law, but nobody can forecast the effects of retroactive application of the unknown words in laws not yet written. To allow revocation by referendum of any permit after construction is well under way will require every entrepreneur hereafter to adjust the forecasts of risk and reward in ways that can only be chilling to future investment and damaging to the Maine economy.

The known unknown of potential retroactive nullification of otherwise lawful permits, even after millions of dollars have been invested in lawful construction, will demand a much more cautious or conservative approach to every future investment decision that requires a permit. Retroactive application of this Initiative to this Project is not only legally impossible, but it will be destructively unwise.

Judicial analysis of these questions of prospectivity or retroactivity may be seen as a choice of law problem requiring not the usual choice between the different laws of two or more jurisdictions, but a choice between incompatible rules of law enacted and effective in Maine at different times. The range of permissible judicial choices is bounded by legal rules and guided by legal standards. Like other judicial choices bounded by legal and constitutional rules, a choice to apply legislation retroactively in a specific case is constrained by transactional facts and fundamental legal rules. The choice is guided or limited by principles of fairness and justice with due regard for the effects of any choice on the interests of the litigants and the decision's reasonably anticipated future effects on other citizens contemplating or engaging in similar activities. In this case, the historic principles and business realities sketched above legally preclude a choice to apply this Initiative retroactively because it would be constitutionally and legally wrong to destroy vested legal rights.

The overriding point is that statutory law is seldom operational or applicable retroactively, and that retroactivity is legally possible only if retroactive operation or application will not materially impair or divest legal rights that had become vested

before the statute became effective. Stated otherwise, legislation in Maine is generally applicable or operational only prospectively, but may be applicable or operational retroactively if, but only if, its retroactive effect does not violate or divest the vested legal rights of the affected party. Denial of injunctive relief below cannot be reconciled with settled Maine law on the undisputed facts.

### C. The Maine Law of Vested Rights

On behalf of the State Defendants, Maine's Attorney General argued below that the statute is presumed to be constitutional. That is not the point. The question is whether the Initiative may lawfully be applied retroactively. As in all cases, retroactivity in this case must be evaluated on the unique and undisputed physical and economic facts of this Project.

It seems clearly to be the settled law in Maine that even an avowedly retroactive statute is ineffective to reverse or nullify or invalidate a final judgment, or effective to order or compel an administrative body to vacate or reverse its final decision in a closed case. *See Avangrid Networks, Inc.*, 2020 ME 109, ¶ 36, 237 A.3d 882 ("Directing an agency to reach findings diametrically opposite to those it reached based on extensive adjudicatory hearings and a voluminous evidentiary record, affirmed on appeal, is not 'mak[ing] and establish[ing]' a law.")(citing Me. Const. art. IV, pt. 3, § 1); *Lewis v. Webb*, 3 Me. 326, 332-33 (1825).

If permitted to have retroactive effect, however, this Initiative, operationally, would nullify the CPCN, notwithstanding this Court's two decisions. That is exactly

what this Court has said may not constitutionally be done. *See Avangrid Networks, Inc. v. Secretary of State, supra.* Because retroactivity would nullify the CPCN and reverse two Law Court decisions, retroactivity is precluded as a matter of law. The analysis therefore could end here.

It was of course always understood that the CPCN would alone not be sufficient authorization to construct and operate the Project. Complete construction requires other permits including the DEP license that is now on appeal before the Board of Environmental Protection ("BEP" or Board"). And, to complete this longitudinal Project, it was necessary to lease a small portion of public land. That lease, executed before the Initiative, is the subject of an appeal now pending in the Law Court in *Black v. Bureau of Parks & Lands*, Docket No. BCD-21-257.

In summary, the state of play before this Initiative became statutory law in December 2021 was that Avangrid and NECEC LLC had a vested legal right to construct and operate the Project that was subject to divestment *only* in then-pending appeals under the then-current law. It has never been, and must not become, the law of Maine that even substantial construction under a valid permit vests no rights unless and until all legal appeals have been exhausted or become time barred. Even more so, it has never been the law that a permit does not authorize construction until after all potential citizen initiatives have not occurred or become precluded by operation of some law. No statute so declares, and no case so holds. If such a rule were now to be

declared in the Law Court, every permit would be tentative or contingent indefinitely if not forever and nothing could ever sensibly or reliably be constructed.

There must be, as a matter of due process, a knowable point at which the permit precludes further process, particularly when the further process is especially undue. It cannot be denied or doubted that the promoters and funders of this Initiative are the same interests that unsuccessfully opposed every permit in every administrative proceeding, lost numerous motions for stays, failed on a first try at an initiative, and lost twice so far in this Court. Their Initiative was enacted into law long after the due process had run its proper course, subject only to the remaining appeals under the original law. But, if this Initiative is applied retroactively on these facts, there will no longer be any principled limit on retroactive permit revocation by referendum.

Projects like this one with both private and public benefits, both monetary and environmental, are enormously complicated and expensive even to propose, much less to build and operate. The business case for incurring the so-called "soft costs" of engineers, architects, site planners, economists, accountants, lawyers, and others, simply to complete an application suitable for hearing, must include a well-grounded expectation that, if the submission is well prepared and consistent with the law in place during the permitting process, the permit will be issued and once issued will authorize the work. For that reason, in some cases as a matter of substantive equity jurisprudence retroactive effect may, on particular facts, be denied to laws at odds

with the legitimate expectations of permit applicants or permit holders who had not yet begun construction.

***Equity and Expectations***

Before considering further, the precedent relating to the important principle that vested legal rights may not be divested by retroactive application of subsequent legislation, it is important to note the separate but important and helpful decisions concerning the protection of legitimate expectancies on the part of good faith permit applicants who do not yet have vested rights, but whose projects are targeted by bad faith changes in the law intended to defeat the pending applications. In other words, even parties whose rights have not yet vested, unlike the case here, may be protected. In short, there may be instances in which an applicant, or perhaps a permit holder who has not commenced construction, may have an equitable right to defeat retroactivity and get the vested legal right. It is well to consider those cases separately but in conjunction with the vested rights cases like this one.

In 1978, the Law Court identified various equitable considerations for determining whether rights had vested. *Thomas v. Zoning Bd. of Appeals*, 381 A.2d 643, 647 (Me. 1978). For example, in the course of explaining its decision adverse to that appellant, the *Thomas* Court explained that an applicant for a building permit may have vested rights to get that permit "by virtue of a substantial good faith change made in reliance on the zoning law in effect at the time of the application, or on the probability of the issuance of a permit approval." *Id.* at 647.

The *Thomas* Court also noted that vested rights are to be protected from zoning changes aimed at defeating specific planned projects. *Id.* The Court noted that a "bad faith or discriminatory enactment of a zoning ordinance for the purpose of preventing a legal use by the applicant may confer vested rights on the applicant." *Id.* (citing *Commercial Properties, Inc. v. Peternel*, 418 Pa. 304, 211 A.2d 514 (1965); *Anderson v. City Council of Pleasant Hill*, 229 Cal.App.2d 79, 40 Cal. Rptr. 41 (1964)). The Pennsylvania case, cited by the *Thomas* Court, *Commercial Properties, Inc. v. Peternel*, addresses a situation like the one currently before the Court.

In *Commercial Properties*, the purpose of a change in an existing law was to prevent a particular party from completing a particular project. The *Commercial Properties* court rejected the attempt, noting that the record showed that there was a targeted attempt to thwart the project. That court found that the attempt was made "not in good faith, but [was] contrived for the sole purpose of preventing the legal use by plaintiffs of their property, and therefore constituted arbitrary and unreasonable intermeddling with the private ownership of property," which the Pennsylvania Supreme Court had condemned in other cases. *Id.*, 418 Pa. at 311, 211 A.2d at 518. (Internal quotation marks omitted.) The court found that the change involved was "special legislation, unjustly discriminatory, arbitrary, unreasonable, and confiscatory in its application, in that it was aimed at this particular piece of property." *Id.* (citing *Shapiro v. Zoning Board of Adjustment*, 377 Pa. 621, 628 (1954)). The court found that

since this was a targeted attempt, the law "could have no effect upon the plaintiffs' right to the permits sought." *Id.*

*Commercial Properties* is very similar to this case. Here, the carefully (one might say cynically) drawn chronology in the Initiative obviously targets this Project. The illegitimate motive is not in dispute. Its promoters made clear that *this* Initiative was put forth to prevent *these* Plaintiffs from completing *this* Project. (Verified Compl. ¶¶ 88-102, A. 100-107.) Its proponents made clear that the Initiative was designed and promoted to shut down the NECEC Project after many failed attempts in multiple administrative and judicial proceedings. Even, or especially, vested legal rights are protected for the additional reason that any targeted attempt to stop a single project is impermissible.

***Vested Rights are Broadly Protected in Maine***

In Maine there is no absolute prohibition against retroactive application of legislation to events preceding its effecting date. There is a statutory rule of construction that has no application here because this legislation is explicitly intended to operate retroactively, indeed targeted to defeat this Project. *See* 1 M.R.S. § 302. Retroactivity analysis is not a rule only for building permits. It has many applications. Maine law has long recognized that the Legislature may retroactively change statutory remedies, so long as that intention is explicit. *See, e.g., Miller v. Fallon*, 134 Me. 145, 147, 183 A. 416, 417 (1936)("There is no constitutional inhibition against the enactment of retroactive legislation which affects remedies only.")(noting that statute of limitations

changes were remedial in nature)(overruled in part on other grounds); *Sabasteanski v. Pagurk*o, 232 A.2d 524, 525 (Me. 1967). The premise is that no substantive right is necessarily materially impaired or destroyed merely because the manner of its enforcement is adjusted. This Initiative, obviously, is not remedial in any sense of the term, but cuts to the substantive heart of the vested legal right to build the transmission line and, not insignificantly, impairing the obligations of numerous contracts.

For more than a century, Maine law has more broadly recognized that retroactive changes, whether classified as remedial or substantive, must not violate a constitutional provision or vested right. *See, e.g., Berry v. Clary*, 77 Me. 482, 485-86, 1 A. 360, 361 (1885)(citing *Coffin v. Rich*, 45 Me. 507 (1858); *Read v. Frankfort Bank*, 23 Me. 318 (1843); *Oriental Bank v. Freeze*, 18 Me. 109 (1841))("Retroactive laws, remedial in their nature, are not obnoxious to the objection of being in contravention of the constitution, *unless they impair vested rights, or create personal liabilities*.")(emphasis added); *Miller*, 134 Me. at 147, 183 A. at 417 (overruled in part on other grounds by *Norton v. C.P. Blouin, Inc.*, 511 A.2d 1056 (Me. 1986) ("There can be no well-grounded dissent from the settled rule that the legislature has full power and authority to regulate and change the form of remedies in actions *if no vested rights are impaired or personal liabilities created*.")(emphasis added); *Bowman v. Geyer*, 127 Me. 351, 355, 143 A. 272, 274(1928)("if the legislative intent to give a statute a retrospective operation is plain, such intention must be given effect, unless to do so will violate some constitutional

provision."); *Merrill v. Eastland Woolen Mills, Inc.*, 430 A.2d 557, 560 n.7 (Me. 1981)("The legislature has no constitutional authority to enact retroactive legislation if its implementation *impairs vested rights or imposes liabilities that would result from conduct pre-dating the legislation*.")(emphasis added)(finding that a change of forum within which a remedy could be sought was constitutional because the change did not affect a vested substantive right; it did not change the legal consequences of the settlement contract).

Perhaps the most instructive of the vested rights cases are *Bowman v. Geyer*, *supra*, and *Sabasteanski v. Pagurk*o, *supra*, which have similar facts but contrasting results, based on whether vested rights were disrupted. Both *Bowman* and *Sabasteanski* involve challenges to the validity of real estate deeds that were not under seal and therefore invalid under older Maine law. Subsequent statutory changes would have retroactively validated the unsealed deeds.

In *Bowman*, the plaintiff challenged the validity of an 1893 real estate deed executed by his grandmother to the wife of the defendant because the deed bore no seal, and claimed he should have title by inheritance and adverse possession acquiesced to by the defendant. *Bowman*, 127 Me. at 352-353, 143 A. at 273. The Court, however, held that a 1927 statute that validated otherwise invalid deeds that were not sealed could be applied retroactively to convey title because the plaintiff had failed to show vested title in himself. *Id.* 355. Because the plaintiff had no vested rights to title of the property, the 1927 law could be applied retroactively to validate the defendant's 1893 deed.

Conversely, in *Sabasteanski*, the Law Court held that a similar curative statute enacted in 1965[1] could not be applied retroactively to validate the defendant's deed that had no seal because that plaintiff had a subsequently recorded, sealed, and therefore valid, deed conveying vested legal title. *Sabasteanski*, 232 A.2d at 525-526. In that case, the executors of a deceased couple's estate gave two separate deeds to the same three-acre parcel in South Harpswell to two separate parties on the same day in 1960. The deed conveying land to the defendant was not under seal but was recorded first at the registry of deeds. *Id.* At 524-525. The deed conveying land to the plaintiff had a seal but was recorded second. *Id.* At 525. Under Maine law in 1960, deeds were required to have a seal, but the legislature enacted a new law effective in 1965 that retroactively validated previously invalid deeds without seals from prior to 1961. *Id.* The Law Court held that because "plaintiff was first to receive and record a valid deed [under seal] of the three-acre parcel and as a third party purchaser with vested rights, his title cannot be destroyed by the validating statute." *Id.* at 526.

Of all the cases cited above, each one that rejected retroactive application of a new law did so on ground that the retroactive change would have violated the constitutional right to preservation of the vested rights of the party who would have been adversely affected by the retroactive application. *See Lewis*, 3 Me. at 325 (holding

[1] The curative statute at issue in *Bowman*, P.L. 1927, ch. 212, § 2, was later amended to become the statute at issue in *Sabasteanski*, 33 M.R.S. § 353 (1965), but at the time the deeds at issue in *Sabasteanski* were executed in 1960, the version of the law then in effect applied only to defective deeds made prior to January 1, 1957 and did not apply to the 1960 deeds. *See* P.L. 1957, ch. 332, § 3, http://lldc.mainelegislature.org/Open/Laws/1957/1957_PL_c332.pdf.

that a special resolve passed by the legislature in 1824 to give appellants a new right to appeal could not apply retroactively because the appellants had missed their original appeal deadline for a probate court debt judgment against him from 1819 and therefore the creditors rights under that judgment had vested); *Miller*, 134 Me. at 148-153, 183 A. at 417-419 (holding that the statute of limitations for a medical malpractice cause of action that had accrued in 1929 could not be retroactively be reduced by a 1931 law from six years to two years).

Of those foregoing cited cases that allowed retroactive application of a new law, they each did so either because the relevant party had not yet acquired vested rights or because the new law was merely remedial or procedural so that vested rights were not disrupted. *See Merrill*, 430 A.2d at 561 (holding that a 1979 amendment that granted the Workers Compensation Commission authority rather than the Superior Court to decide petitions to annul compensation agreements could be applied retroactively because it changed only the forum in which a petition would be addressed, not the legal consequences of the agreement); *Berry*, 77 Me. at 486 (holding that an 1880 statute that allowed contracts entered into on Sundays to be voided if consideration was restored could have been applied retroactively to an 1876 horse sale (only the horse was not returned in this case) because the statute affected only to future remedies for contract disputes not the rights and obligations under the contract itself); *Coffin*, 45 Me. at 514-516 (holding that an 1856 statute that repealed the personal liability of corporate shareholders for corporate debt could apply

retroactively because, though the plaintiff creditor had a pending lawsuit against the corporation when the new statute passed, the plaintiff had not yet obtained a judgment nor initiated an action against the defendant shareholder); *Read*, 23 Me. at 321 (holding that a pair of statutes enacted in 1841 to dissolve a bank's charter and to specify the procedure for creditors to bring claims against the insolvent bank could be applied retroactively to end the plaintiffs' pending lawsuit because the repealing statutes provided them with an alternative remedy by which to satisfy their claims); *Oriental Bank v. Freeze*, 18 Me. 109 (1841) (holding that an 1839 statute that changed the notice procedure and evidence required to prove a debtor had taken oath to satisfy a jail bond could be applied retroactively to dismiss the plaintiff's suit to recover 1838 jail bond debt under the old laws because the new law changed only procedure and did not impair the parties' obligations under the contract).

There is no Maine case holding that retroactivity is permissible when it will destroy vested rights. Every retroactive application to date has required either that the protesting party had no vested rights, or that the vested rights were not disturbed by the retroactive application.

***Sahl v. Town of York is the Most Relevant Precedent***

The Order on Report is inconsistent with all the decided cases to date. One case deserves added attention because there, as here, a single project was distinctively affected by ordinance changes after issuance of a permit and after substantial construction had begun. *Sahl v. Town of York,* 2000 ME 180, 760 A.2d 266 held that a

property owner could complete construction of its motel, despite an ordinance change that occurred mid-construction, because the property owner had received the proper permit and had been encouraged by the Town to pursue phased development of the project, and because that construction had been initiated and the first phase completed two years prior to the ordinance change. The *Sahl* court found that this evidence supported a determination that: (1) the property owners "had a valid permit; (2) they made substantial changes by completing Phase I and incurred substantial expenses in its completion; (3) the construction was undertaken in good faith as supported by the later phasing agreement; and (4) the [property owners] relied upon both the ordinances in existence at the time the 1991 permit was issued and the 1995 agreement to phase the project." *Id.* ¶ 14. The Court found that this was ample evidence to support the zoning board's conclusion that the property owner's right to complete all phases of construction of the motel had vested. In other words, the prior law and permit authorized the work and the work done generated a vested right to continue.

The *Sahl* case is legally and logically indistinguishable from the Project at issue here. Indeed, the much larger sums expended here demand the *Sahl* result *a fortiori*. The *Sahl* plaintiffs acquired a valid permit after extensive vetting by government agencies, under the laws existing at the time the permit was granted; they incurred substantial expenses in completing the first phase of a multiphase project; the construction was undertaken in good faith and with ample communication with the

State throughout; and the plaintiffs relied upon the existing laws when the permit was issued, and when the work began. The expenditures made by the *Sahl* developers are negligible compared to the financial investments made by these Plaintiffs for this Project.

The *Sahl* Court focused on the impact to the vested rights of the developers. The analysis should be the same here. Unless the holding of *Sahl* is overruled, this Project is unaffected by the Initiative as a matter of law because the Plaintiffs' rights to complete construction of this Project are legally vested. In this matter, the size and complexity of the Project and the corresponding scale of the required permitting make protection of vested rights all the more important.

Every investor's assessment of risk obviously occurs prior to beginning the process and is based on the state of the law governing the proposed project and permitting processes at that time. It is difficult to imagine that any business – even one with a high risk-tolerance – would undertake a significant investment if the risk-assessment had to include an open-ended and inherently incalculable risk that project opponents could accomplish a change in law to apply retroactively to bar the project even after issuance of all the permits and millions of dollars in sunk costs for labor and materials.

This is particularly true in the energy sphere, where permission to construct essential infrastructure to meet growing demand and environmental challenges must be obtained from several administrative agencies and the investments required are

enormous. Simply put, the risk that would be created by a system that allows years of legally sound administrative and substantive project work to be negated after the fact by a retroactive change in the law would greatly outweigh any benefits to any potential business. Modern business leaders no longer resist regulation, but they do expect to be able to trust it. There is no presumption that multiple permits, issued after extensive expert analysis, are invalid or not a sound basis to begin construction to meet contractual deadlines. To the contrary, this Court's deferential standards of appellate review of agency action show beyond question that reliance on the permits pending judicial review is entirely reasonable. The reasonableness of that judgment is buttressed by DEP, BEP, and court denials of multiple stay applications, for insufficient likelihood of success on the merits. (A. 22, 91.) No party should be punished for respecting the professionalism, competence, or lawfulness of Maine's extensive permitting processes.

***Kittery Retail and Fisherman's Wharf are Inapposite***

The proponents of the Initiative have been contending that retroactive application of even this legislation is permissible, pointing to decisions such as *Portland v. Fisherman's Wharf Assoc. II*, 541 A.2d 160 (1988) and *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, 856 A.2d 1183. However, neither of these cases is on point, except to confirm in *dicta* that all permissible retroactive applications must not disturb vested rights. Those parties did not have vested rights. These Plaintiffs do.

In *Kittery*, the citizens' petition for a vote on an ordinance change was filed only four days after the developer submitted its site plan application to the town and before any permit had issued or review of the application had even begun. The ordinance change passed by a vote on June 13, 2000, and the developer's application was *accepted for review* only one day before the ordinance was effective. That application was never approved. There was *no* permit upon which to rely. There was no vested right to build. Obviously, with no permit, there was no construction at all. These are all crucially distinguishing facts in any vested rights analysis.

In this case, a lease and multiple permits were duly issued, and hundreds of millions of dollars have been spent or committed in good faith reliance on the permits and in the exercise of the legal rights created by them. The *Kittery* project never broke ground. The NECEC Project was under construction before the Initiative petition signatures were certified and months before the election. The *Kittery* developer was aware of the pending ordinance change when it filed its completed application, whereas the Initiative at issue here was filed long after the Project had worked its way through several state and federal agency approval processes, one failed initiative effort, and two Law Court decisions.

The *Kittery* Court discussed *Thomas* at ¶¶ 23-31. The *Kittery* Court found that the town officials in that case did not act in bad faith when making the ordinance change, essentially because so much retail development was happening so fast that the

ordinance was not targeted at any one new shopping center. Therefore, equity did not demand that that developer acquire vested rights.

As discussed above, the current Initiative is a bad faith effort to defeat this Project, promoted and funded by parties and interests that have had had a full and fair opportunity to be heard. Although not a necessary factor in the analysis, the intractable persistence of the defeated opponents and their fossil fuel funders is an added reason not to disturb Plaintiffs' vested legal rights. It is also an important factor in determining that injunctive relief is necessary to protect those vested rights and to prevent the bad faith conduct from succeeding.

The *Fisherman's Wharf II* case is similarly distinguishable from the present matter. The major focus of the opinion was the proper construction of 1 M.R.S. § 302 but it also considered the analysis outlined in *Thomas*. The citizen-initiative ordinance amendment was pending when the Planning Board approved the project only a week before the election approving the pending ordinance change. Despite having approval, however, in that case no construction had begun. NECEC, however, proceeded (successfully) within the legal framework that existed throughout, had all its permits, and had already expended millions of dollars on legally authorized construction before the Secretary of State certified the signatures submitted to place this Initiative on the ballot. Unlike those cases, there has been more than enough legally permitted, contractually required construction in this case to establish vested rights that preclude retroactivity as a matter of settled law.

***The Weight of Maine Authority***

To summarize, no case prohibits injunctive relief or authorizes retroactive application in the face of substantial lawful construction pursuant to valid permits. *Sahl* and other decisions preclude retroactivity and support injunctive relief. The cases allowing retroactivity are careful to say there is no effect on vested rights or there are no vested rights. In this case, retroactive application of this Initiative is precluded by vested rights. *Kittery* and *Fisherman's Wharf II* are inapposite because there had been no construction and because they also could not make the factual case needed for equitable vesting under *Thomas*. Every Maine case, whatever its outcome, recognizes that vested rights preclude retroactive application of a statute as a fundamental limiting principle. On this record, there is the added point that this Initiative deliberately attempts to oust the legally vested legal rights of a specific party and defeat a specific Project after investment of many millions on authorized construction under all necessary permits under the only law that may be applied as a matter of due process and the contracts clause.

## D. Retroactivity Analysis is Not Limited to Municipal Permits and The Pending Appeals Do Not Authorize Retroactivity

Because the settled law of Maine is that retroactivity is defeated by vested rights, the questions now before this Court appear to be: (1) whether that settled law is for some reason applicable only to vested rights flowing from municipal permits and not state permits, or (2) whether these Plaintiffs had lawfully and reasonably

commenced construction and continued it in a way that vested, i.e. protected, their legal rights from retroactive confiscation, by manifesting a serious intent to complete it.

Before proceeding any further with the analysis, it is perhaps useful to make explicit reference to the magnitude of the work that has been done about which there seems to be no serious disagreement. The affidavit evidence is unimpeached and uncontradicted. (A. 31-33, 109-126.) This is not an equitable claim to be granted a right that had not previously vested, as where permits are denied because of a change in the law while the applications were pending. Here, the legal rights were vested by the construction lawfully done as authorized by the permits.

Developers for one reason or another might rush to get a building permit, usually in circumstances not requiring the elaborate multiagency permit process in effect here, break ground, put up a construction fence, and otherwise do nothing or very little. In such cases, it may be appropriate for a court to disregard the modest investment involved in the groundbreaking and the fence as merely pretextual to try to generate an appearance of vested rights.

It is obvious to every observer, that this process has gone on for years and has not been rushed by anybody. These Plaintiffs have important contractual commitments, not the least of which is to achieve commercial operation by a contractual deadline. Nothing about the huge investments that have been made here can be shown to be anything other than a good faith effort to get this job done on

time. The magnitude of the investment militates strongly against disregarding it for any reason.

It is apparent from this record that these Plaintiffs have complied with all applicable laws in real time to construct a very important energy infrastructure project in accordance with legal contractual obligations. Multiple agencies diligently and professionally evaluated the Project and found it lawful over vigorous vocal opposition. The construction was lawful and essential to meeting the contract deadline. It is also apparent that the funders and promoters of this Initiative, to the extent that their actions have not been surreptitious, are known to be fossil fuel polluters whose market share is at risk if the Clean Energy Project should succeed. To the extent that this Court is engaged in any kind of balancing of any equities relevant to granting injunctive relief to protect legal rights, the balance obviously and decidedly favors the Plaintiffs. Indeed, absent a plain complete and adequate remedy at law, a party with vested legal rights, is entitled to injunctive relief to prevent destruction of those rights.

The denial of injunctive relief in the case now on Report does not at all seem to be based on the idea that the Plaintiffs acted in bad faith or that the investments were not substantial, but rather it seems to rest upon a determination either that circumstances precluded the vesting of the rights or that circumstances justify the divestment of rights that have vested. Neither of those alternatives is legally tenable. The Order on Report should be vacated because it rests upon two errors of law.

***Vested Rights Preclude Retroactive State Laws***

The first error is that the vested rights doctrine does not operate as a limit on the retroactive operation or application of a state statute with respect to a state permit or license, as distinguished from retroactive effect of a municipal ordinance on a municipal permit or license. There is no principled reason why a state statute should have unlimited retroactive applicability or effectiveness, notwithstanding tens of millions or hundreds of millions of dollars of investment by the holder of permits that are facially valid and effective. Indeed, many or most of this Court's precedents deal with state statutes, if not state permits.

Municipalities are subdivisions of the State. Me. Const. Art. IV, Pt. 3, § 14. They have broad home rule powers. Me. Const. Art. VIII, Pt. 2, §§ 1-2; 30-A M.R.S. §§ 2101-2109. They are exercising state authority when they act because it is the only authority they have. There is no reason for distinguishing municipal exercise of the State's powers from direct state action. If there were to be a distinction it would run the other way because state permits generally involve more extensive and more expensive processes than pulling a municipal building permit. It is more not less appropriate for vested rights to preclude retroactive revocation by referendum of state permits.

It adds nothing to the analysis to speak of the State's "police power." Plaintiffs have not challenged the State's "police power" to enact general laws for the public good, including Maine's robust array of zoning, environmental, and public utility

regulations. Indeed, the compliance here has been exemplary. The "police power" does not authorize a state to target a specific otherwise lawful transaction, after millions have been invested to accomplish substantial construction in justifiable reliance on state permits, to apply a statute retroactively to strip the vested rights that have accrued to the party being adversely affected. The "police power" does not override vested rights. Its retroactive exercise is limited by vested rights.

In the Order on Report here, the trial court appears to draw from *dicta* in *Baxter v. Waterville Sewerage Dist.*, 79 A.2d 585 (Me. 1951) to read the case to stand for the proposition that the exercise of state "police power" may always defeat vested legal rights. (A. 39.) That is not what that case says. In *Baxter*, the plaintiffs – fourteen residents of Waterville – challenged new laws creating the Waterville Sewerage District, a quasi-municipal corporation, and allowing Waterville to exceed its debt limit to improve the city sewer system. *Baxter*, 79 A.2d at 586-587. They argued that the new laws were unconstitutional on ground that a city ordinance permitting individuals to connect to the sewer system granted them vested contractual rights that were violated by the new laws. *Id.* The Law Court held that the plaintiffs did not have a contract, but only a permit or license, and therefore had no vested legal rights. *Id.* at 589. In so holding, the Court mentioned the "police power" in the specific context of saying that a municipality's legislative authority, or ability to delegate that authority to a quasi-municipal corporation, cannot be "bargained or granted away" by contracts with individuals. *Id.*

In *Baxter*, the complaining citizens had no vested rights. They were like the complaining parties in *Kittery Retail* and *Fisherman's Wharf II*. Passing *dicta* in one 1951 case cannot be read to hold that when vested rights have been acquired, they may be overridden by any statute denominated an exercise of the "police power." All the vested rights cases before and after 1951 show that vested rights are a limit on *retroactive* application of laws that may otherwise be within the "police power" if applied wholly prospectively.

There is no contention here, for example, that issuance of a permit to build a shopping mall and its construction preclude subsequent application of new laws for the public health and welfare, say a mask mandate in a pandemic. It seems clear that the Business Court wrongly thought that vested rights protect only municipal permits from retroactive revocation by referendum but do nothing to protect state or federal permits. That is reversible error.

The second error was to eviscerate the vested rights doctrine by disregarding the fact that all the work was lawfully done. The vested rights of the permit holders were improperly disregarded because the Business Court considered it important that it was possible to anticipate a successful initiative by opponents. The idea that every possible adverse contingency is enough to prevent rights from vesting or to justify divestment of vested rights renders the vested rights doctrine a meaningless operational nullity. If that is to be the result in this case, the Court will need to overrule multiple cases decided over more than a century and declare for the first time

that there is no vested rights limit on any retroactive operation of any state statute notwithstanding the contracts clause, notwithstanding the due process clause, and notwithstanding the most fundamental principles of fairness and justice.

It is useful to consider how the Business Court's model would be operationalized in practice. One example that needs to be acceptable for the Business Court's analysis to be correct is that all holders of all lawful permits, either as a matter of law or as matter of prudent risk management or both, will need to defer lawfully permitted construction, even at the risk of failing to meet contract deadlines, because it is *possible* that a successful revocation by referendum might occur, even though it is *always approximately or exactly equally possible* that an effort at revocation by referendum might fail for lack of signatures or lose on election day. A holder of a valid permit who has substantially commenced construction but stops, because petitions are being circulated by five disgruntled people, is placed at risk of losing substantial profits and commercial advantages, not to mention reputational harm, by incurring all the disadvantages and costs of demobilization until election night when, after all that, the referendum is defeated. The phrase "economic waste" comes to mind to describe such a scenario. In short, it is not a workable rule of law that substantial investments made in accordance with lawfully issued permits do not preclude retroactive applicability. The true rule has been and must remain that mere prospect of a successful referendum cannot legitimately, that is to say, constitutionally, be the dispositive factor in judging whether a party has acquired vested rights by paying for

tens or hundreds of millions of dollars of good faith construction activity pursuant to lawfully issued permits.

The true rule is that the permit authorizes the construction, and the construction vests the rights, and the vested rights preclude retroactivity.

***The Pending Appeals Are Not Relevant to Vested Rights Analysis***

The second error of law requiring reversal here is the erroneous supposition that the inherent but minor risk of an adverse outcome on administrative or judicial review of an issued permit is itself sufficient to disqualify the permit holder from acquiring or keeping any vested rights. The correct analysis is that the issuance of the permit (unless stayed) grants a legal right to commence and continue construction, that the right vests on commencement of construction in good faith pursuant to the permit(s), and that the vested right is subject to divestment only if found on direct appeal to have been erroneously issued under the law in effect when the application was reviewed and granted.

A decision to undertake that risk, however, neither logically nor legally nor equitably nor constitutionally nor otherwise can also expose the permit holder to the completely different risk of revocation by vigilante initiative. The two discrete risks are unrelated and the error in the Order now on Report was to conflate them and to fail to recognize the enormous economic, logical, and legal distinction between them. Such a rule, if adopted, would make every permit tentative until it is no longer

possible for project opponents to mount an initiative campaign. This rule cannot sensibly operate in the American economy and must not by adopted by this Court.

The linear logic of this situation is that the permits were issued and were not stayed. The permits therefore granted legal rights to do all the work that was done. The work that was done was undertaken in good faith reliance on the permits and directed toward the successful completion and ultimate operation of the Project. That work was neither pretextual nor insubstantial. It was not prohibited by any law at the time it was done. It was in conformity with all required permits from every state or federal agency with jurisdiction. The money that was spent was exposed only to the exceptionally small risk that the permits still on appeal would be found to have been fatally deficient as contrary to the pre-Initiative law, or as unsupported by substantial evidence, or as tainted by an abuse of discretion. The permits and those investments were not legally subject to divestment in the form of revocation *ab initio* by retroactive application of new law. Forfeiture or confiscation of the value of all the work that was done and destruction of multiple rights (and their value) under multiple contracts is violation of due process and inconsistent with every apposite Law Court precedent.

**E. A Decision Applying This Initiative Retroactively Will Make New Law**

Among the most important elements of the judicial role in a government of ordered liberty is *stare decisis*. That usually, as above, involves a discussion about the past decisions as a guide to deciding the present case. *Stare decisis*, however is also important as a limit on judicial power. Respect for precedent has its forward-looking

role in limiting but not preventing judicial innovation. Judges in common law courts recognize that every novel judicial decision then *becomes* the precedent for future similar cases. Precedent affects not only judicial decision-making but guides private planning because prudent private actors shape their conduct and plan their affairs in conformity with the "state of the law" at the time they act or plan to act.

The Chamber has no doubt that destruction of the vested rights limit on retroactivity will have an enormous chilling effect on investment in Maine. Prudent modern investors can make judgments of business risk measured by the law they can read. They cannot make rational business judgments about hypothetical future laws, not yet written by their business competitors, that may never be enacted. The only way to assess or manage that kind of open-ended risk is to pass on the opportunity and look for different opportunities elsewhere, where vested rights are protected.

Capital is mobile. It is unquestionably less likely that prudent rational investors will choose projects in Maine if the Maine Law Court rules that a Maine permit is continuously vulnerable to revocation by referendum, without regard for the extent of the permit holder's lawful good faith construction activity. Firm contractual commitments to commence commercial operation of major utility infrastructure cannot sensibly be made in the face of open-ended risks of serial retroactive referenda targeted at killing the project.

Every permit applicant runs the risk that a permit will be overturned on appeal on a disputed interpretation of the law that was in effect throughout the permitting

process. The applicant can mitigate or eliminate that risk with good legal work and good design work. No permit holder, or permit applicant, can rationally assess, or design a proposal to meet, the risk of retroactive application of entirely new law written by project opponents and the applicants' business competitors after rights have vested.

Retroactive application of this Initiative cannot be justified by any precedent of the Maine Law Court. That reality is important to the Plaintiffs and all intervenors supporting the Plaintiffs. The equally important point for the Chamber, however, is that retroactive application of this Initiative will then become the controlling precedent going forward to create virtually unlimited new authority in the Legislature, and the electors using the legislative power, to ignore vested rights and revoke any permit long after construction begins for any reason or for no reason. Prudent investors will have to price that risk into their planning and the consequences will be devastating to the Maine economy, especially if other states continue to respect vested rights.

## CONCLUSION

The Judgment of the Business Court must be reversed.

The Court should declare in unambiguous terms that the vested rights doctrine applies to state permits, that permits convey or grant legal rights, that the good-faith investment by the permit holders in substantially commencing and continuing construction of the permitted project vests those legal rights, and that, if any

balancing is even needed, multiple millions of dollars in lawful construction is more than sufficient to outweigh the intransigence of their business competitors, or potential referenda because the contract clause and the due process clause still mean what they have always seemed to mean. The Initiative cannot be applied retroactively to the NECEC Project without overruling generations of precedent and violating the Constitution's protections of vested rights that underlie all those precedents.

Respectfully submitted,

FEBRUARY 16, 2022
Date

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STATE OF MAINE
Cumberland, ss.

BUSINESS AND CONSUMER DOCKET
Civil Action
Docket No: BCD-CIV-2021-00058

NECEC Transmission, LLC et al.,

Plaintiff,

v.

Bureau of Parks and Lands, et al.,

Defendants.

AFFIDAVIT OF DANA F. CONNORS

The undersigned Dana F. Connors, duly sworn does depose and say as follows:

1. I am Dana F. Connors, President of the Maine State Chamber of Commerce. All statements made herein are made on personal knowledge except as indicated as made on information and belief in which case I do believe, based on information available to me, that the statement is true.

2. In the past 54 years, I have held three jobs – 16 years as city manager for the City of Presque Isle, 11 years as the commissioner of the Maine Department of Transportation, and 27 years as president of the Maine State Chamber of Commerce.

3. In each of those positions, there were two common goals: to grow the economy and create jobs. Likewise, in each instance, the message from potential investors held a common theme: stability and predictability in the regulatory process is critical.

4. Early in my tenure at the Maine State Chamber, we created Maine & Company to assist employers looking to relocate to Maine or expand within Maine.

5. Maine & Co. is a private, non-profit corporation with members and a board comprised of senior executives from Maine's top businesses, the president of the Maine State Chamber of Commerce and the commissioner of Maine's Department of Economic & Community Development.

6. Until this Initiative, the message of consistency has remained clear and true. No employer disputes the need for a regulatory process that is stable and predictable. This consistency fosters future investments and better long-term planning for increasing jobs and expanding the state's economic opportunities.

7. Conversely, uncertainty deters investment, especially substantial uncertainty about permits for substantial investment.

8. In this case, the permits were issued, and the conditions were met.

9. The project was reviewed by state and federal regulators and permitting agencies and received every required regulatory approval at state and federal levels. In addition, the project has already received municipal approvals from 20 out of the 24 Maine municipalities that require permits for the project.

10. In reliance on the permits, many millions of dollars have been invested in clearing and construction.

11. If a law can be enacted, long after permits have been issued and millions have been invested, to stop the project – which brings with it economic, energy, and environmental advantages – it sends a clearly negative message to all investors about the

lack of stability and predictability for future projects in Maine. It also sends a clear message about the instability and unpredictability of job opportunities for Maine people.

Dated this 17 day of November 2021

Dana F. Connors

Personally appeared before me the above-named Dana F. Connors and made oath that the foregoing statements are true based upon based knowledge, information, and belief.

Notary Public/~~Attorney at Law~~

DATED: 11/17/21

Patricia Harriman
Notary Public, State of Maine
My Commission Expires October 13, 2027

## CERTIFICATE OF SERVICE

I, Gerald F. Petruccelli, hereby certify that on this 16th day of February 2022, by agreement of the parties, I served all parties through their counsel as set forth below via electronic mail:

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