STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. BCD-21-257

RUSSELL BLACK, et al.

Appellees/Cross-Appellants

v.

BUREAU OF PARKS AND LANDS, et al.

Appellants/Cross-Appellees

On Appeal from Business and Consumer Court
Docket No. BCDWB-CV-2020-00029

BRIEF OF APPELLANTS/CROSS-APPELLEES CENTRAL MAINE POWER COMPANY AND NECEC TRANSMISSION LLC

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LEGAL, FACTUAL, AND PROCEDURAL BACKGROUND

I. The law governing Maine's public lands.

A. The origins of public reserved lands.

The practice of reserving land in Maine for productive uses dates back to the 18th century, when the Commonwealth of Massachusetts reserved lands in each of its townships, including those located in what is now Maine, for the support of schools and churches. *See Opinion of the Justices*, 308 A.2d 253, 254 (1973) (describing history). The policy of "reserving" lands reflected government policy that "it was in the best interest of the people to dispose of the public lands, primarily in order to bring about settlement and development." L. Schepps, *Maine's Public Lots: Emergence of a Public Trust*, 26 Me. L. Rev. 217 (1974). *See also State v. Mullen,* 97 Me. 331, 338, 54 A. 841, 844 (1903) (recognizing the purpose of reservation to be "the settling of inhabitants in sufficient numbers to require the expenditure of money for public schools").

The Articles of Separation, which governed the terms of Maine's 1820 separation from Massachusetts and form Article X of the Maine Constitution, obligated Maine to maintain existing public lot reservations "for the benefit of Schools, and of the Ministry, as have heretofore been usual" and to continue that policy for all townships created after separation. *Opinion of the Justices*, 308 A.2d at 254 (quoting Maine Const. art. X, Schedule, § 7). As a result, "public lots" were reserved from substantially all of the townships of Maine. *Id.* Since 1850, the public lots in unincorporated areas have been owned and managed by the State, which long has

enjoyed authority to lease such lands for a variety of public uses, including utility infrastructure. *Id.* at 255 (explaining evolution of legal regime governing public lots); P.L. 1915, ch. 306, § 1 (1915 legislation authorizing "lots reserved for public uses" to be leased as camp sites); P.L. 1951, ch. 146, § 11 (1951 legislation authorizing leases public lots for the "right to set poles and maintain utility service lines").

B. The 1973 Act.

In 1973, the Legislature adopted a comprehensive statute governing the management of Maine's public lands, containing many of the features present in current law.[1] *See* P.L. 1973, ch. 628 (the "1973 Act"). For example, the 1973 Act required the Forest Commissioner to manage public reserved lands under the principle of "multiple use," which the legislation defined broadly to include, among other things, using the land for "public purposes" and "without impairing the productivity of the land." *Id.* § 14. The multiple use standard has persisted through various recodifications of the Maine code and governs the Bureau of Parks and Lands' ("BPL's") management of public reserved lands today. *See* 12 M.R.S. § 1845 (setting forth standard). Notably, the same section of the 1973 Act establishing the multiple use standard maintained the State's specific authority to "[l]ease the right, for a term of years not exceeding 25, to set poles and maintain utility lines" without legislative approval, which authority exists today. *Compare* P.L. 1973, ch. 628 § 15 *to* 12 M.R.S.

[1] Today, the Maine code uses the term "public reserved lands" to refer to the original public lots Maine inherited from Massachusetts, as well as certain other lands subsequently acquired by the State. *See* 12 M.R.S. § 1801(8).

§ 1852(4). The relationship between the 1973 Act's multiple use standard and its leasing authorization reflected the Legislature's judgment that the power to grant leases for utility facilities served as an important tool the executive could use in realizing its responsibility to manage public lands pursuant to the multiple use standard. Put another way, the Legislature would not have enacted the general multiple use standard and the specific authorization for the issuance of utility facilities leases *in the same code section* if the Legislature did not view such leasing authority to complement the multiple use standard. Prior to its enactment, the Court thoroughly reviewed the 1973 Act in the *Opinion of the Justices* and opined the act did not violate the Articles of Separation or the United States Constitution. *See* 308 A.2d at 268-73.

C. The adoption of Article IX, section 23 in 1993 and its implementing legislation in 1994.

In 1993, the Legislature adopted, and the people of Maine ratified, an amendment to the Maine Constitution, found at Article IX, Section 23, stating:

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

The legislative history of the proposed amendment evidences no intent by the Legislature to restrict or scale back on the executive's authority to lease public lands. *See, e.g.,* 4 Legis. Rec. S-733 (1st Reg. Sess. 1993) (senator describing the bill as "prohibit[ing] the sale of State parks and historic site lands unless the proceeds were

then used to purchase or acquire additional land for State parks or historic sites"). Article IX, section 23 accordingly contains no express prohibition on leasing authority—indeed, it does not refer to leasing authority at all—in contrast to its express reference to sales of public lands. *See* Me. Const. art IX, § 23.

Article IX, section 23 contains two additional features of relevance. First, rather than detail the specific executive actions that would require legislative approval, the amendment specifies one type of transaction concerning land as requiring legislative approval—instances where land would be "reduced"—and then sets forth only a general standard for when certain uses would require the same approval—instances where the uses of land would be "substantially altered." *See id.* Second, the amendment expressly contemplates future "legislation implementing" its terms. *See id.* Article IX, section 23 thus serves only as one portion of the law governing the disposition of public lands, with the Legislature intending to exercise its traditional constitutional power to pass legislation to provide additional laws concerning the management of these lands.

After the voters ratified Article IX, section 23 in 1994, the same Legislature that drafted and adopted the amendment enacted the amendment's contemplated implementing legislation. That legislation, "An Act to Designate Certain Lands under the Constitution of Maine, Article IX, Section 23," P.L. 1993, ch. 639 § 1 (the "Designated Lands Act"), was codified where it currently resides at 12 M.R.S. Ch. 202-D (containing Sections 598, 598-A, and 598-B). The Designated Lands Act

began filling in the blanks left by Article IX, section 23, including by identifying the specific types of lands—*e.g.*, public reserved lands or state park lands—that would be subject to the amendment and by defining what constitutes a "substantially altered" use of such land. *Id.* § 1 (codified at 12 M.R.S. §§ 598, 598-A, 598-B).[2]

The Designated Lands Act tied the concept of a "substantially altered" use to the multiple use standard first established in the 1973 Act discussed above. In the case of public reserved lands, the Designated Lands Act defined "substantially altered" to mean, in part, "changes in use" that would frustrate the "improvement of those lands" for the "multiple use objectives" then set forth in 12 M.R.S. § 585. *Id.* For purposes of Article IX, section 23, the Legislature thus articulated that a "substantially altered" use would mean a significant deviation from the breadth of uses authorized by 12 M.R.S. § 585. Notably, 12 M.R.S. § 585 then provided both a definition of the general multiple use standard at 12 M.R.S. § 585(2)(A), authorizing the use of public reserved lands for "public purposes" and with the aim of maximizing "the productivity of the land," and specific authorization for leases for utility facilities, at 12 M.R.S. § 585(4)(C). In short, the Designated Lands Act defined "substantial alteration" to mean only those uses of land which exceeded the broad uses of public reserved land authorized by 5 M.R.S. § 585, realized in part by leases of such land for utility infrastructure. Pursuant to this legislative framework, leases of

[2] The Designated Lands Act also defined "reduced" to mean a reduction in acreage and, expressly, to exclude a reduction in value or an easement. *See* 12 M.R.S. § 598(4) (definition).

public reserved lands for utility infrastructure cannot "frustrate" the purposes for which the State holds public reserved lands; such leases are, in fact, a valuable tool for advancing those purposes.

D. The 1997 BPL Act.

In 1997, Legislature enacted P.L. 1997, ch. 678, "An Act to Reorganize and Clarify the Laws Relating to the Establishment, Powers and Duties of the Bureau of Parks and Lands" (the "BPL Act"), which created today's BPL and provided the statutory framework governing BPL's administration of public lands. The BPL Act maintained the multiple use standard first set forth in the 1973 Act and, in a provision codified at 12 M.R.S. § 1852, provided broad authority to BPL to lease public reserved lands for a variety of uses of public benefit, including electric power transmission lines, consistent with the State's historical authority. *See* P.L. 1997, ch. 678 § 13 (codified at 12 M.R.S. § 1852(4)).

In furtherance of the Legislature's oversight responsibilities, the BPL Act required BPL to provide an annual report detailing all of BPL's activities with respect to public reserved lands, which BPL has fulfilled dutifully. *See* 12 M.R.S. § 1853 ("Annual report dealing with public reserved lands"); ARVII[3] (annual reports). The BPL Act did not go so far, however, as to require BPL to adhere to any specific

[3] Where Appellants cite to material in the Administrative Record omitted from the Appendix, we use the convention "AR" followed by a roman numeral and a page number, noting the volume of the Administrative Record at issue and the page number of that volume. Where Appellants cite to the Record Addendum, we use the convention "Add." followed by the relevant page number.

procedures when making leasing decisions for public reserved lands, in clear contrast to the Legislature's imposition of a detailed scheme governing BPL's leases of submerged lands. *See* 12 M.R.S. § 1862(2) ("Submerged lands leasing program"). Nor has the Legislature ever required BPL to adopt any rules governing its procedures for reaching leasing decisions for public reserved lands, in contrast to the Legislature's requirement of such rules with respect to submerged lands. *See* P.L. 1983, ch. 819, § 10; *see also* 01-670 C.M.R. ch. 53 (submerged lands rules). Accordingly, BPL has not adopted any rules regarding leasing of public reserved lands. *See generally* 01-670 C.M.R. ch. 1-10, 15, 18, 51-57, 160 (BPL rules).

Although the BPL Act moved the authorization to lease public reserved lands for utility facilities to a different code section than housed the general multiple use standard—as the 1973 Act previously combined the two in then-12 M.R.S. § 585—the act continued to evidence the Legislature's judgment that such leases would not be subject to Article IX, section 23. For instance, the BPL Act enacted 12 M.R.S. § 1851 to authorize the BPL to sell public reserved lands. In so doing, the BPL Act expressly stated that such transactions would be subject to 12 M.R.S. § 598-A, which incorporated and implemented the two-thirds voting requirement of Article IX, section 23. *See* 12 M.R.S. § 1851(1) (referring to Section 598-A). By contrast, 12 M.R.S. § 1852 does not make the leasing authority set forth therein subject to 12 M.R.S. § 598-A or Article IX, section 23. Taken together, the BPL Act's distinction between sales and leases for public reserved lands and unreserved public lands shows

a consistent pattern that the Legislature did not view Article IX, section 23 as limiting BPL's leasing authority.

Finally, to guide the realization of BPL's multiple use standard, the BPL Act requires BPL to consult with a variety of state agencies with expertise in land use matters to a create a "comprehensive management plan for the management of public reserved lands … that will enhance the timber, wildlife, recreation, **economic** and other values of the land." P.L. 1997, ch. 678, § 13, codified at 12 M.R.S. § 1847(2) (emphasis added). BPL fulfilled this obligation in 2000, when it created its "Integrated Resource Policy." *See* Bureau of Parks and Lands, Integrated Resource Policy, https://www.maine.gov/dacf/parks/publications_maps/docs/irp.pdf (last visited November 10, 2021). The BPL Act also required BPL to create a specific action plan for each unit of public reserved lands within the overall framework set forth by the comprehensive management plan, which BPL created in 2019 with respect to the lots at issue when it adopted its "Upper Kennebec Region Management Plan." *See* ARII0003.[4]

[4] The Upper Kennebec Region Management Plan addresses specific actions with respect to each parcel of land within the Upper Kennebec Region, and incorporates and provides substance to the "comprehensive management plan" established by BPL in 2000 through the Integrated Resource Policy. *See* ARII0016. The Plan specifically describes and sets forth objectives for the Johnson Mountain and West Forks Plantation lots. A.489. As the Plan explains, the primary use of these lots is for timber harvesting. *Id.* The Plan also identifies both the pre-existing Jackman Tie Line, the 2014 Lease, and the proposed NECEC Project as existing and future uses of the lots. *Id.* Plaintiff Grignon participated as a member of the Upper Kennebec Region Advisory Committee, ARII0129, and Plaintiff Towle likewise provided public comment with respect to the Management Plan's treatment of Cold Stream Forest. *See* Bureau of Parks and Lands, Summary of Scoping Comments, https://www.maine.gov/dacf/parks/get_involved/planning_and_acquisition/management_plans/

E. Subsequent legislative activity.

Legislative activity since 1997 confirms the Legislature's intention to authorize BPL to lease public reserved lands without first seeking legislative approval.

In 1999, the Legislature considered changes to 12 M.R.S. § 1852(7), the provision authorizing leases of public reserved lands to the federal government. As initially adopted via the BPL Act, Section 1852(7) required only the Governor and the Commissioner of Conservation to approve leases to the federal government before the BPL could issue them. *See* P.L. 1997, ch. 678 § 13. In 1999, the Legislature revised Section 1852(7) to add the requirement of legislative approval of such leases. *See* P.L. 1999, ch. 240 § 3. Notably, the same Legislature considered and rejected an earlier bill, L.D. 383, that would have required a two-thirds legislative vote for approval of such leases, having determined the legislation's two-thirds vote requirement rendered the bill out of order after an extensive review of the Maine Constitution and having been advised by the Revisor's Office that such two-thirds requirement would violate the Maine Constitution, conclusions clearly at odds with the view that the two-thirds threshold of Article IX, section 23 already governed the statute. *See* 1 Legis. Rec. H-369-370 (1st Reg. Sess. 1999) (ruling on L.D. 383); An Act to Require Legislative Approval to Lease Land to the Federal Government: Hearing on L.D. 2092 Before the Comm. on State & Local Govt., 118th Legis. (1999)

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docs/Upper%20Kennebec_ScopingCommentSummary.pdf (last visited November 10, 2021) (summarizing emails from Towle "focused on Cold Stream Forest"). There is no record of either objecting to the use of the land for a transmission line.

(testimony of Herb Hartman,[5] Deputy Director of the Bureau of Parks and Lands) ("The Revisor's Office has now determined that the 2/3 majority approval provision of L.D. 383 was unconstitutional."). Accordingly, the Legislature did not tie Section 1852(7) to 12 M.R.S. § 598-A or Article IX, section 23, as it did previously with respect to sales of public reserved lands under 12 M.R.S. § 1851. Instead, approval of leases under Section 1852(7) requires only a majority vote, not the two-thirds vote required by Article IX, section 23. *See* Summary, Comm. Amend. to L.D. 2092 (119th Legis. 1999) ("This amendment clarifies the bill's intent that the legislature approve the leasing of certain lands to the Federal Government. In the absence of a requirement other than a simple majority, the bill does not need to state anything other than that legislative approval is required.").

Most recently, in 2020, the Legislature considered but did not adopt revisions to 12 M.R.S. § 1852 that sought to make leases issued thereunder subject to the two-thirds approval requirement of Article IX, section 23. *See* L.D. 1893 (129th Legis. 2020). The foregoing bill would not have been necessary if leases under 12 M.R.S. § 1852(4) already are subject to Article IX, section 23.

F. Subsequent BPL activity.

Since the adoption of Article IX, section 23 and its subsequent implementing legislation, BPL has issued hundreds of leases for public land for a variety of purposes

[5] It appears Deputy Commissioner of the Department of Conservation, Dawn Gallagher, delivered the recorded testimony on behalf of Director Hartman.

ranging from residential camp lots to utility infrastructure. *See* BPL Fiscal Year 2020 Annual Report (Mar. 1, 2021) at 30-31, https://www.maine.gov/dacf/parks/publications_maps/docs/2020LandsAnnualReport.pdf (last visited Nov. 10, 2021). Although BPL's annual reports do not clearly identify leases on public reserved and nonreserved lands, as opposed to leases of park and historic lands,[6] no party identified any practice of BPL seeking legislative approval for leases of any kind, except in response to specific statutory requirements, such as leases to the federal government under 12 M.R.S. § 1852(7), or in unusual circumstances, such as with respect to leases administered by BPL but previously granted by the Legislature through special legislation. Nor have Appellants located any instance where the Legislature objected to BPL's practice of granting leases without legislative approval, despite clear notice to the Legislature of such leases through BPL's annual reports.

II. BPL's lease to CMP.

A. The 2014 Lease.

In the summer of 2014, CMP approached BPL with a request to lease a portion of adjacent public lots in Johnson Mountain Township and in West Forks Plantation

[6] BPL governs a variety of state lands, including public reserved lands, nonreserved public lands, submerged lands, and parks and historic sites. *See* 12 M.R.S. Ch. 220 (outlining BPL authority). The statutes governing sales and leases of nonreserved public lands, 12 M.R.S. §§ 1837-38, mirror those governing sales and leases of public reserved lands, 12 M.R.S. §§ 1851-52, in that, in each instance, the statute governing sales expressly requires approval under Article IX, section 23, while the statute governing leases does not. Nonreserved public lands and public reserved lands are both designated lands under 12 M.R.S. § 598-A. *See* 12 M.R.S. §§ 598-A(2-A)(D) and (E) (designating lands).

to construct an electric transmission line. ARIII0001, 0008. The lots are original public lots originally reserved by Massachusetts before Maine's separation, title to which has been held by Maine since at least 1850, and part of a significantly larger, mostly contiguous portion of public reserved lands in the Upper Kennebec Region comprising 43,023 acres in total. Appendix ("A.") 489; ARII0013. Unlike the adjacent Cold Stream Forest unit, which BPL specifically acquired with a view towards "special protective measures for riparian areas, given the significance of the fisheries resource," ARII0053, the Johnson Mountain Township and West Forks Plantation lots contain no known "special status or unique wildlife," A.489. The so-called Jackman Tie Line, an existing transmission line which delivers electricity to Jackman, has run along the boundary between the Johnson Mountain Township and West Forks Plantation lots since 1963. *Id.*

On August 1, 2014, BPL Director Tom Morrison assigned BPL Chief of Planning and Acquisitions Kathy Eickenberg to work with CMP in negotiating the proposed lease. ARIII0008. In a memorandum drafted in late August 2014, BPL observed its intention to exclude the proposed transmission line from the Cold Stream Forest parcel that BPL was then in the process of acquiring, so as to reduce "potential impacts of loss of shade and warm runoff, as well as visual impacts on the stream corridor." A.494.

On November 3, 2014, BPL Senior Planner David Rodrigues emailed BPL Director Tom Morrison, copying several staff members, observing that he and current

BPL Director Andy Cutko—then acting in his capacity as Ecologist with the Maine Natural Areas Program—had walked the area to be leased and identified "no natural communities of concern." A.497. Rodrigues observed, however, that "the crossing of Tomhegan Stream is of concern" because "[t]he majority of the trees in this location are mostly large trees, so when the corridor is cut for the utility corridor, the stream will be entirely unshaded for the 300 foot width of the corridor." *Id.* Rodrigues concluded by explaining CMP was examining alternative locations in order to avoid any adverse impacts to the stream. *Id.* The next day, Eickenberg called Sarah Demers at the Maine Department of Inland Fisheries & Wildlife ("MDIFW") and sought input concerning best management practices for mitigating the impacts of the proposed transmission line on habitats. ARIV0002.

On November 5, 2014, Cutko emailed Rodrigues memorializing their site walk of the Johnson Mountain parcel the previous week. A.507. Cutko explained that they had audited the timber in the proposed section and identified the potential crossing of Tomhegan Stream as "the only real concern" because of its status as brook trout habitat. A.507-508. On November 14, 2014, Rodrigues emailed Morrison concerning the location of the leased parcels, explained that CMP had proposed a routing that would avoid crossing of Tomhegan Stream, and that BPL would be "reviewing their proposal and seeking fisheries guidance from" MDIFW. A.208-209. On November 25, 2014, MDIFW sent a 4-page email to Rodrigues summarizing the Department's recommendations with respect to provisions in the lease for protection

of sensitive habitats and species, recommended performance standards relevant to these sensitive habitats and species, and observing that MDIFW would participate in the anticipated DEP review of the entire corridor project "to see that potential impacts to these valuable resources are avoided or minimized to the extent practicable." A.501-505.

By December 1, 2014, BPL and CMP agreed upon a new corridor route that would avoid any stream crossings on the public reserved lands. A.501 ("all the mapped streams on the leased area are now avoided with the new route").

On December 15, 2014, BPL leased 32.39 acres of public reserved lands (300 feet wide by approximately 4700 feet long) to CMP (the "2014 Lease"), without first seeking or obtaining approval from the Legislature. A.447. The leased area amounts to approximately 2.6% of the combined 1,241 acres of the Johnson Mountain Township and West Forks Plantation lots. A.458 (identifying acreage). The 2014 Lease was non-exclusive, meaning that all other Maine people can access and use it in accordance with their right of public access and applicable BPL rules. A.447. The lease expressly incorporated MDIFW recommended performance standards for inland waterfowl and wadingbird habitats, riparian buffers in overhead utility ROW projects, and deer wintering areas in overhead utility ROW projects. A.450, 460-72. And the Lease required a future colocation of the Jackman Tie Line with the New England Clean Energy Connect ("NECEC Project") in the event that a rebuild of the Jackman Tie Line takes place. A.452. Finally, the Lease mandated 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," and that "Lessee further shall not construct, alter or operate the described Premises in any way until all necessary permits and licenses have been obtained for such construction, alteration or operation." A.451-52.

CMP obtained the lease for the purpose of erecting a small portion of the NECEC Project on the leased premises. The NECEC Project is a 145-mile electricity transmission line that will bring clean, hydro-generated energy from Québec into Maine and New England's electricity grid. *See NextEra Energy Res., LLC v. Maine Pub. Utils. Comm'n*, 2020 ME 34, ¶ 1, 227 A.3d 1117.

B. Public report and disclosure of the 2014 Lease.

BPL and CMP reported the 2014 Lease publicly, and to numerous of the Appellees themselves, through a variety of forums and on multiple occasions.

BPL reported the lease to the Legislature's ACF committee in the first annual report it issued after entering into the 2014 Lease, in March 2016. *See* ARVII0158 (report). At that time, Plaintiff Black served on the ACF Committee and received BPL's report. *See* https://ballotpedia.org/Russell_Black (last visited Sep. 2, 2021) (setting forth Plaintiff Black's previous committee assignments). The lease subsequently arose in BPL's public proceedings around the adoption of the Plan, which began in 2016 and in which Plaintiffs Grignon and Towle participated. *See* ARII0129. On September 27, 2017, CMP itself reported the lease upon the

commencement of the proceedings of the Public Utilities Commission ("PUC") concerning CMP's petition for a certificate of public convenience and necessity ("CPCN"), and later produced the lease in those proceedings in which Plaintiffs NRCM and Buzzell participated. *See* Add. at 31-32, 78. And CMP again reported the lease in the permitting proceedings held by the Department of Environmental Protection ("DEP") beginning on September 27, 2017, in which Plaintiffs NRCM, Buzzell, and Haynes also participated. *See* DEP Order at 34, App'x B-2.[7]

C. The 2020 Lease.

On March 25, 2020, CMP and BPL commenced negotiations for an amended lease[8] to address the rental payments owed under the lease, "the assignment language to facilitate the necessary transfer of [the] lease from CMP to NECEC Transmission LLC as required by" the PUC's CPCN, and "a new description of the leased property based on a now completed survey." ARIV0120. BPL executed an "Amended and Restated Transmission Line Lease" (the "2020 Lease") on June 23, 2020. A.413. The 2020 Lease expressly terminated the 2014 Lease. A.422. While the Amended and Restated Lease reflects a more precise description of the leased lands and an increased rental amount, it does not reflect any change in the uses to which the land would be

[7] On May 11, 2020, DEP issued an order approving CMP's applications for several permits for the NECEC Project. *See* Department of Environmental Protection, Findings of Fact and Order, Site Location of Development Act and Natural Resources Protection Act Order ("DEP Order") at 3. The DEP Order is available at https://www.maine.gov/dep/ftp/projects/necec/2020-05-11-final-department-order.pdf (last visited November 10, 2021).

[8] CMP and BPL previously executed an amendment to the lease in 2015, as contemplated by the 2014 Lease's original terms concerning future adjustments to the rent amount. A.473.

put, the actions allowed on the land, or any other factor relevant to the substantial alteration analysis that had been conducted in 2014.

As with the 2014 Lease, BPL did not seek or obtain legislative approval before issuing the 2020 Lease, consistent with its standard practices. On January 4, 2021, CMP assigned its interest in the 2020 Lease to NECEC Transmission LLC. A.28 n.1.

III. Proceedings Before the Superior Court.

Notwithstanding the numerous disclosures of the 2014 Lease to multiple of the Plaintiffs over the course of several years, no Plaintiff took any steps to challenge the 2014 Lease until commencing this litigation on June 23, 2020. A.110. Plaintiffs' complaint claimed the 2014 Lease was void for two reasons: (1) BPL issued it before the PUC issued a CPCN for the NECEC Project, and (2) BPL issued it without first obtaining legislative approval under Article IX, section 23 of the Maine Constitution. A.123-28. Plaintiffs styled their challenge as a purely civil claim for declaratory and injunctive relief, without reference to Rule 80C or the Maine Administrative Procedure Act ("MAPA"). A.123-29.

The same day Plaintiffs initiated this lawsuit, BPL issued the 2020 Lease. A.129, 424. Plaintiffs thereafter amended their initial complaint to challenge the 2020 Lease, dropping their count concerning the grant of the 2014 Lease before the PUC's issuance of a CPCN and, in fact, dropping from their prayer for relief any request concerning the 2014 Lease. A.168-74. Plaintiffs' First Amended Complaint ("FAC") characterized their action against BPL and CMP as a traditional civil claim seeking

declaratory and injunctive relief (Counts I and II), while pleading a Rule 80C administrative appeal of BPL's decision to issue the 2020 Lease only as an "alternative" theory (Count III), with Plaintiffs expressly stating their view that Rule 80C and MAPA did not govern their challenge. A.172, ¶ 80.

BPL moved to dismiss Plaintiffs' civil claims and for the Court to characterize Plaintiffs' challenge as one governed exclusively by Rule 80C and MAPA. CMP moved for the same relief, and also moved to dismiss Plaintiffs' claims concerning the 2020 Lease on the grounds Plaintiffs lacked standing. Plaintiffs opposed both motions and, in doing so, asked the Superior Court to clarify that their claim should proceed only as a civil claim and not as an administrative appeal.

The Superior Court first ruled Plaintiffs had standing, before addressing whether MAPA exclusively governed their challenge. A.101-108. In unusual fashion, the Superior Court then ordered BPL to file its administrative record, explaining that it wished to review the record in the course of determining whether MAPA applied in the first place. A.109. Notwithstanding all parties' agreement that the Superior Court should treat Plaintiffs' challenge as *either* a civil claim *or* an administrative appeal, the Superior Court ultimately declined to dismiss Plaintiffs' civil claim but also proceeded to consider Plaintiffs' administrative appeal. A.90-100. In short, over the parties' objections, the Superior Court proceeded to adjudicate the case both as a trial court and as an appellate court at the same time.

The Court then *sua sponte* ordered the parties to brief whether "utility leases, pursuant to 12 M.R.S. 1852(4), are exempt under Article IX, section 23 of the Maine Constitution." *See* Order for Briefing and on The Course of Future Proceedings at 1 (January 19, 2021). Consistent with the plain language of 12 M.R.S. § 1852(4) and its decades-long and unchallenged practice of issuing leases of public reserved lands without seeking legislative approval, BPL argued it had the authority to issue the 2020 Lease without seeking legislative approval. CMP argued the same. The Superior Court ultimately sided with Plaintiffs, holding that Article IX, section 23 required BPL to determine on a case specific basis whether the uses of leased land might be "substantially altered" by CMP's proposed use of the land and, if so, to have submitted the lease to the Legislature for approval before granting it. A.74-89.

On April 21, 2021, the Superior Court issued an order determining the scope of the record to govern Plaintiffs' claims. A.57-73. In that order, the Superior Court struck from the record a memorandum prepared by BPL in September 2020 memorializing and articulating its basis for granting the 2014 and 2020 Leases, leaving the Superior Court without any written findings of fact or conclusions of law from BPL.[9] *Id.*

The Superior Court next considered whether BPL in fact decided the substantial alteration question, concluding in its order of August 10, 2021, that BPL

[9] CMP and BPL sought interlocutory review from the Court following the Superior Court's April 21, 2021, order. The Court dismissed that appeal on June 8, 2021.

failed to do so. A.27-56. This order served as the Superior Court's final judgment in the case and included both a ruling concerning the 2014 Lease on Plaintiffs' declaratory judgment claim under Count I of the FAC, and a ruling concerning the 2020 Lease on Plaintiffs' administrative appeal under Count III of the FAC. Concluding BPL made a procedural error when it failed to make the substantial alteration determination prior to granting the 2020 Lease, the Superior Court took the unprecedented step of simply reversing BPL's decision, rather than remanding it to the agency. A.55-56.[10]

BPL and NECEC appealed on August 13, 2021. Plaintiffs filed a cross-appeal on August 20, 2021.

ISSUES ON APPEAL

This appeal presents the following issues:

1. Should the Court affirm BPL's decision to grant the 2020 Lease because the Plaintiffs lack standing to challenge that decision?

2. Should the Court affirm BPL's decision to grant the 2020 Lease because Maine law does not require BPL to have sought legislative approval of that lease?

3. Should the Court affirm BPL's decision to grant the 2020 Lease because BPL determined the lease would not substantially alter the uses of the land at issue?

[10] CMP and BPL previously moved to dismiss Plaintiffs' claim under Count II of the FAC, which sought injunctive relief with respect to BPL's leasing decision. The Superior Court deferred ruling on that motion and, when Plaintiffs failed to pursue it further, deemed it waived. A.55, 107.

4. Should the Court remand the proceedings to BPL if the Court determines BPL failed to make the substantial alteration determination?

5. Should the Court reverse the Superior Court's grant of declaratory judgment, where the Court lacks jurisdiction to consider the 2014 Lease, questions concerning that lease are moot, and the substance of the Superior Court's declaration does not comport with existing Maine law governing public reserved lands?

ARGUMENT

I. The Superior Court erred when it failed to adjudicate Plaintiffs' challenge in accordance with principles of Maine administrative law.

The Superior Court's administration of this litigation failed to adhere to fundamental principles of administrative law in several of its orders. Appellants discuss the Superior Court's specific errors throughout this brief, but emphasize at the outset the following principles of administrative law which should guide the Court's analysis of the issues on appeal:

Exclusivity. A plaintiff may not obtain review of an administrative decision through a civil claim, including a claim for declaratory judgment, where the same relief may be obtained through an administrative appeal. *See Fair Elections Portland v. City of Portland*, 2021 ME 32, ¶ 19, 252 A.3d 504 (noting Superior Court's dismissal of independent civil claims "duplicative of the Rule 80B appeal"). Where Rule 80C and MAPA provide a plaintiff with the plaintiff's sought-after relief when challenging final agency action, a plaintiff may not obtain that same relief through a civil claim. *See*

Kane v. Comm'r of Dep't of Health & Human Servs., 2008 ME 185, ¶ 30, 960 A.2d 119 (stating principle). Here, BPL's decision to issue both the 2014 Lease and the 2020 Lease constituted "final agency action" under MAPA, *see* 5 M.R.S. § 8002 (defining final agency action), thus limiting Plaintiffs to MAPA's procedures for judicial review, *see* 5 M.R.S. Ch. 375, Subch. 7 ("Judicial Review – Final Agency Action"). *See also Estate of Pirozzolo v. Dep't of Marine* Res., 2017 ME 147, ¶ 4, 167 A.2d 552 (treating appeal from Department of Marine Resources' issuance of a lease as subject to Rule 80C after dismissal of duplicative claims for declaratory relief).

The need to review written agency findings. Judicial review of state agency or municipal decisions requires a written statement setting forth the agency or the town's decision. *See Narowetz v. Bd. of Dental Practice*, 2021 ME 46, ¶¶ 16-18, --- A.3d --- (remanding 80C appeal to agency where state board did not set forth adequate findings). Accordingly, where the reviewing court lacks such a statement, it will remand the case to the state agency or town for the creation of relevant findings of fact and conclusions of law. *See Appletree Cottage, LLC v. Town of Cape Elizabeth*, 2017 ME 177, ¶¶ 10-12, 169 A.3d 396 (remanding decision where unaccompanied by appropriate findings of fact and conclusions of law); *Mills v. Town of Eliot*, 2008 ME 134, ¶¶ 19-20, 955 A.2d 258 (same). In limited circumstances, the Court has sanctioned review in the absence of clear written findings, where those findings can be inferred. *See Glasser v. Town of Northport*, 589 A.2d 1280, 1282 (Me. 1991) (foregoing remand where record as a whole implicitly reveals underlying findings). In no event,

however, may a court review an administrative agency or town's decision without understanding and crediting the agency or town's decision because of the risk such an approach poses to the principles of separation of powers. *See Chapel Rd. Assoc., LLC v. Town of Wells*, 2001 ME 178, ¶ 30, 787 A.2d 137 (reviewing court risks "judicial usurpation of administrative functions" when it reviews agency action without agency findings).

Standard of Review. A court reviewing final agency action must affirm the agency's decision where *any* competent record evidence exists which may sustain it. *See Fair Elections Portland*, 2021 ME 32, ¶ 20, --- A.3d ---. Agency factual determinations receive significant deference, as one challenging such findings "cannot prevail unless he shows that the record *compels* contrary findings." *Kroeger v. Dep't of Envtl. Prot.*, 2005 ME 50, ¶ 8, 870 A.2d 566 (emphasis added). The separation of powers principles set forth in the Maine Constitution forbid a court reviewing an agency decision from reassessing the "weight and significance given the evidence by the administrative agency." *Friends of Lincoln Lakes v. Bd. of Envtl. Prot.*, 2010 ME 18, ¶ 14, 989 A.2d 1128.

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Application of the foregoing principles to Plaintiffs' challenge to both the 2014 Lease and 2020 Lease leads to certain inescapable conclusions. Pursuant to the Court's exclusivity jurisprudence, the Superior Court erred when it did not treat Plaintiffs' challenge to both the 2014 Lease and the 2020 Lease solely as an

administrative appeal governed by Rule 80C and MAPA. Pursuant to the Court's jurisprudence concerning review of agency findings, the Superior Court erred when it did not consider and review BPL's findings of fact and conclusions of law in the form of BPL's September 2020 memorandum. And, finally, pursuant to the Court's standard of review jurisprudence, the Superior Court erred when it did not defer to BPL's factual determinations. Appellants discuss each of these points in greater detail below in the context of specific orders entered by the Superior Court.

II. Plaintiffs lack standing to challenge the 2020 Lease.[11]

The Superior Court erred when it failed to dismiss Plaintiffs' challenge to the 2020 Lease for lack of standing. The Court, which reviews standing de novo as a matter of law, *Blanchard v. Town of Bar Harbor*, 2019 ME 168, ¶ 8, 221 A.3d 554, should correct that error, reverse the Superior Court's judgment, and affirm BPL's decision to grant the 2020 Lease. To do otherwise would expand without boundary the scope of standing to challenge an administrative decision in Maine.

Plaintiffs bear the burden of establishing standing. *See Bank of Am., N.A. v. Greenleaf*, 2014 ME 89, ¶ 7, 96 A.3d 700 (stating principle). Only a person "aggrieved" by final agency action may challenge such an action in Maine courts. *See* 5 M.R.S. § 11001(1) (standing requirement). A person is "aggrieved" for purposes of a MAPA challenge only where that person has suffered a particularized injury, "that is, if the

[11] Plaintiffs also lack standing to challenge the 2014 Lease, for the same reasons set forth herein. *See also infra* p. 45 n.24.

agency action operated prejudicially and directly upon the party's property, pecuniary or personal rights." *Nelson v. Bayroot, LLC*, 2008 ME 91, ¶ 10, 953 A.2d 378. In keeping with the Maine Constitution's bar on the judiciary offering advisory opinions, harms experienced generally "by the public at large" are not particularized and do not suffice to confer standing. *Ricci v. Superintendent, Bureau of Banking*, 485 A.2d 645, 647 (Me. 1984).

None of the Plaintiffs claim standing based on traditional property rights or a nexus to BPL's decision. No Plaintiff alleges having sought or been denied a lease from BPL for the land at issue. A.156-62. And no Plaintiff alleges holding any property rights in the leased land, any land abutting the leased land, any portion of the broader 1,241 acres of the Johnson Mountain Township or West Forks Plantation public reserved lands, any land abutting those lands, or any land anywhere in Johnson Mountain Township or West Forks Plantation generally. *Id.*

Plaintiffs fall into four groups: (1) current members of the Maine Legislature (Plaintiffs Black, Bennett,[12] Ackley, Berry, Grignon, O'Neil, and Pluecker), (2) former members of the Maine Legislature (Plaintiffs Saviello and Harlow), (3) private citizens (Plaintiffs Buzzell, Caruso, Cummings, Haynes, Johnson, Joseph, Nicholas, Smith, Stevens, and Towle), and (4) the National Resources Council of Maine. None of these groups enjoys standing.

[12] Plaintiff Bennett gained election to the Legislature in the 2020 general election, after having previously served in the Legislature several years earlier. A.156.

Current legislators. None of the current legislator plaintiffs alleges any personal connection to the leased land. A.156-59. Instead, each alleges suffering a harm in the form of having "been deprived" of his or her alleged "constitutional right to vote" on the 2020 Lease. A.156-59. These plaintiffs thus premise their claim to standing on the theory that they are sufficiently "aggrieved" by virtue of BPL's alleged failure to seek legislative approval of the 2020 Lease. Plaintiffs' claim in this regard cannot be considered a claim of individualized injury sufficient to support standing, but, rather, only a claim of "institutional injury" suffered by one or both houses of the Legislature as a whole, not any legislator personally. *See Raines v. Byrd*, 521 U.S. 811, 821 (1997) (individual legislators challenging line item veto did not enjoy standing because "claim of standing is based on a loss of political power, not loss of any private right" and because plaintiffs "have not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies"). *See also Arizona State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 800–801 (2015) (affirming *Raines*); *Kerr v. Hickenlooper*, 824 F.3d 1207, 1214 (10th Cir. 2016) (individual legislators alleging institutional injury do not have standing).

Maine courts have not approved of efforts by legislators to claim standing based solely on their election to office. *See, e.g.*, *Carson v. Comm'r of the Dep't of Health and Human Servs.*, No. AP-1848, 2019 WL 4248247, at *2 (Me. Super. Ct. June 27, 2019) (noting no reported Maine case "has held that a state Legislator has standing to seek enforcement of enacted legislation"). And rightly so: granting each legislator

standing to challenge any action by the executive is a recipe for governmental chaos that not only seeks to invite the judiciary into purely political disputes between the two political branches of government, but which opens the door for the judiciary to involve itself in disputes among legislative factions with different views on a given executive action. While the Court has allowed a chamber of the Legislature, as a body, to initiate litigation to vindicate institutional rights and prerogatives, neither the Maine House nor the Maine Senate, or even anything approaching a majority of either body, has brought suit here. *See Maine Senate v. Sec'y of State*, 2018 ME 52, ¶ 25, 183 A.3d 749 (assuming without deciding Maine Senate enjoyed standing to challenge executive branch's implementation of rank choice voting). The legislator plaintiffs thus seek to arrogate to themselves the authority to prosecute claims properly held by the Legislature as a whole or, at a minimum, by each house of the Legislature, without any authorization to do so. Put in terms the Court has stated, the legislator plaintiffs, like the legislators in *Raines*, are not the best suited plaintiffs to bring this action. *See Bank of Am., N.A. v. Greenleaf*, 2014 ME 89, ¶ 7, 96 A.3d 700 ("[W]e may limit access to the courts to those best suited to assert a particular claim.").

Former legislators. All of the foregoing applies with greater force to those plaintiffs who formerly served in the Legislature but do not do so now. Not only do these plaintiffs lack an individualized injury, they do not stand to gain anything material from prosecuting their claims even if the Court accepts their theory of a personal "right to vote" on the 2020 Lease. Given that these plaintiffs currently do

not sit in the Legislature, they cannot exercise any purported "right to vote" on the 2020 Lease in the event the Court affirms the Superior Court's decision. Accordingly, BPL's decision to issue the 2020 Lease has not operated "prejudicially and directly" upon any of these plaintiffs' "property, pecuniary or personal rights." *See also Collins v. State*, 2000 ME 85, ¶ 6, 750 A.2d 1257 ("a party must show they suffered an injury … likely to be redressed by the judicial relief sought.").

Private citizens. As with the legislator plaintiffs, none of the private citizen plaintiffs allege any interest in the leased land or the public lots. A.159-62. *See also Nergarrd v. Town of Westport*, 2009 ME 56, 973. A.2d 735 (members of the public do not have standing absent particularized harm). Instead, below, the private citizen plaintiffs premised their claim to standing on their alleged historical use of the leased land. These allegations withstand little scrutiny, however, as most of these plaintiffs have not alleged *any* use of either the leased land itself or the broader public lots in Johnson Mountain Township or West Forks Plantation. A.159-60 (allegations of Plaintiffs Cummings, Haynes, Johnson, Joseph, Nicholas, Smith, and Stevens failing to reference any use of the leased land or public lots).[13] The remaining three private

[13] The FAC uses semantic sleight of hand to leave the impression Plaintiffs enjoy a close nexus to the leased land. For instance, Plaintiff Stevens alleges that the "transmission line corridor abuts the lands Mr. Stevens uses to operate his business and would be visible to his customers." A.161, ¶ 25. But the "transmission line" is proposed to be 145 miles long, and Plaintiff Stevens does not allege that the less-than-one mile span at issue is one that he abuts. Plaintiff John R. Nicholas, Jr. similarly alleges that he "owns property in Upper Enchanted Township approximately two miles from the proposed transmission line corridor," *id.* at ¶ 23, without alleging his proximity to the land at issue. Numerous others plaintiffs do not get even this far. *See, e.g.*, A.160 at ¶ 21 (Plaintiff Cathy Johnson alleging she "has spent her leisure time hiking … in Maine's North Woods since 1971").

citizen plaintiffs—Buzzell, Caruso, and Towle—make only vague allegations concerning their historical use of the land. Plaintiff Buzzell alleges he "has worked" as a guide "in and around the public reserved lands that are the subject of BPL's Lease with CMP." A.159. Plaintiff Caruso alleges the same. A.159-60. Plaintiff Towle alleges even less, only that he "has used the public reserved lands" at issue at some point in the past. A.162.[14] Each of these three plaintiffs fails to provide any facts concerning the frequency and nature of their use of the land, and each fails to make clear whether he used the leased area itself or only some portion of the broader 1,241 acres comprising the Johnson Mountain Township or West Forks Plantation public lots.

Below, Plaintiffs sought to shoehorn their allegations into the framework provided by the Court's pre-MAPA decision in *Fitzgerald v. Baxter State Park Authority* ("Baxter"), 385 A.2d 189 (Me. 1978), where the Court held that plaintiffs with private property interests in Baxter State Park and who had demonstrated "substantial" historical and future use of the park enjoyed standing to challenge the Park Authority's use of park land. Plaintiffs do not meet the criteria set forth in *Baxter*, for two reasons. First, the Court deemed the *Baxter* plaintiffs to enjoy their own personal, private property interests in Baxter State Park as a result of the specific deeds of trust

[14] Plaintiff Towle alleges the "proposed transmission line corridor" will affect the temperatures of Cold Stream Pond to the detriment of trout habitat and, accordingly, affect his business as a guide. A.162. But Cold Stream Pond is not on the leased lands or even on the broader area of the Johnson Mountain Township or West Forks Plantation, and so these allegations do not relate to BPL's leasing decision at all. A.425-29, 488-89.

Governor Baxter gave to Maine when creating the park. *Baxter*, 385 A.2d at 192. Plaintiffs here enjoy no such property interest in the leased land.[15] Second, the five plaintiffs in Baxter demonstrated "substantial" historical and future intended use of the park, whereas, here, Plaintiffs Buzzell, Caruso, and Towle have alleged only vague, unquantified, and unspecified past use. *Baxter* provides the private citizen plaintiffs with no foundation for their claim to standing.

NRCM. NRCM alleges its members "have used, and plan to continue to use, the public reserved land in and around Johnson Mountain Township and West Forks Plantation for outdoor recreation, such as fishing, hunting, and hiking, as well as in their work as outdoor guides." A.159. *See also Conservation Law Found. v. Town of Lincolnville*, No. AP-00-3, 2001 WL 1736584 at *6 (Me. Super. Ct. Feb. 28, 2001) (Hjelm, J.) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 180 (2000)) (standard for associational standing). As none of the private citizen plaintiffs who claim to be NRCM members has standing in his or her own right for the reasons set forth above, NRCM cannot establish standing on the basis of these individual co-plaintiffs. NRCM's allegations otherwise draw no connection between NRCM or its members and the leased land, and NRCM does not plead any injury it or

[15] Here, the Articles of Separation, not specific deeds of trust, serve as the ultimate source of the State's trust responsibilities with respect to public reserved lands. *See Cushing v. State*, 434 A.2d 486, 500 (Me. 1981) ("The State holds title to the public reserved lots as trustee and is constrained to hold and preserve these lots for the 'public uses' contemplated by the Articles of Separation.").

its members suffered directly as a result of BPL's decision. Accordingly, NRCM lacks standing as well.

III. Leases for electric transmission lines do not require legislative approval.

The Superior Court erred when it concluded in its March 17, 2021, order that the 2020 Lease was subject to legislative approval in the event BPL determined the lease gave rise to a substantial alteration in the use of land. Neither the Maine Constitution nor the specific statutory provision authorizing BPL to lease public reserved lands, 12 M.R.S. § 1852, requires BPL to submit any lease for transmission lines or utility infrastructure to the Legislature for approval, and the Superior Court's decision to the contrary upends the historical relationship between the Legislature and the executive branch with respect to the administration of public lands. Consistent with the plain text of the Maine Constitution and relevant statutes, the Court should hold BPL was not required to seek legislative approval before granting CMP the 2020 Lease. Upon such a holding, the Superior Court's final judgment must be reversed and BPL's decision to grant the lease affirmed.

First, the plain language of Article IX, section 23 does not require legislative approval before the executive can lease state land. *See Payne v. Sec'y of State*, 2020 ME 110, ¶ 17, 237 A.3d 870 (requiring that courts construe constitutional provisions first by reference to the plain language). At the time the Legislature drafted and adopted Article IX, section 23, the executive's authority to lease lands without legislative approval had been the law in Maine for more than four decades—having been

granted by the Legislature itself. *See* P.L. 1951, ch. 146 § 11 ("The commissioner, under the direction of the governor and council, . . . may lease . . . the right to set poles and maintain utility service lines."). Despite this long practice, the legislative history of Article IX, section 23 reveals no intention to reduce the executive's leasing authority. *See generally,* 4 Legis. Rec. S-684, S-733, H-92, H-679 (1st Reg. Sess. 1993) (evidencing no floor debate or comments with respect to authorization for leasing). If the Legislature had sought to target the executive's long-standing leasing authority with Article IX, section 23, it could have done so in plain terms. It did not. *See State v. Bragdon*, 2015 ME 87, ¶ 10, 120 A.3d 103 ("[H]ad the Legislature intended to curtail such a well-established and commonly-used practice, it would have said so.").

Second, BPL's governing statutes provide the relevant authority. It is axiomatic that the Legislature may pass laws it deems necessary in the absence of express prohibitions in the Maine or United States constitutions. *See Opinion of the Justices*, 623 A.2d 1258, 1262 (Me. 1993) ("The Legislature of Maine may enact any law of any character or on any subject, unless it is prohibited, either in express terms or by necessary implication, by the Constitution of the United States or the Constitution of this State.") (quoting *Baxter v. Waterville Sewerage Dist.*, 146 Me. 211, 215, 79 A.2d 585, 588 (Me. 1951); Me. Const. art. IV, Pt. 3, § 1 (legislative authority). Article IX, section 23 not only omits any requirement that leases of public reserved lands receive a two-thirds vote, it expressly contemplates the Legislature would pass future "implementing legislation" to give life to the amendment in practice, consistent with the typical

arrangement whereby legislatures pass laws within the general boundaries of a constitutional document. Article IX, section 23 thus sets forth a general standard—"substantially altered"—which the Legislature may define and administer through legislation.

Third, the legislation enacted in the immediate aftermath of the adoption of Article IX, section 23 makes clear leases of public reserved lands for utility facilities do not require legislative approval under Article IX, section 23. With respect to public reserved lands, the Designated Lands Act, adopted by the same Legislature that drafted and adopted Article IX, section 23, defined the constitutional standard of "substantially altered" to mean a use that would frustrate the "multiple use objectives established in [then] section 585." P.L. 1993, ch. 639, § 1 (codified at 12 M.R.S. § 598(5) (1993)). As discussed *supra* pp.5-6, the multiple use standard of Section 585 envisioned a wide variety of uses of public reserved land, including for "public purposes," cautioning only that such uses should be pursued "without impairing the productivity of the land." 12 M.R.S. § 585(2)(A) (1993); 12 M.R.S. § 1845(1) (same standard). In furtherance of the multiple use standard, Section 585 authorized the executive to issue leases, without legislative approval, to "set and maintain utility poles, electric power transmission and telecommunication transmission facilities, roads, bridges, and landing strips." 12 M.R.S. § 585(4)(C) (1993). Accordingly, under the definition of "substantially altered" adopted by the Legislature, leases of public reserved land for utility infrastructure cannot "frustrate" the "essential purposes" for

which the State holds public reserved lands because the Legislature authorized such leases specifically to assist the State in realizing the multiple use standard. Actions authorized by the Legislature for the fulfillment of the Legislature's identified policy objectives cannot be said to "frustrate" those objectives. The Legislature clearly intended that leases for utility facilities would not constitute a "substantially altered" use in public reserved land that would require legislative approval pursuant to Article IX, section 23.[16]

Fourth, the Legislature's adoption of the BPL Act, which set forth the current statute authorizing BPL to lease public reserved lands codified at 12 M.R.S. § 1852, confirms the Legislature's intention. No provision of 12 M.R.S. § 1852 requires BPL to obtain legislative approval of utility facility leases before granting them. In that regard, BPL's authorization to lease public reserved lands in Section 1852 differs from its authorization to *sell* public reserved lands in the neighboring statute, 12 M.R.S. § 1851(1), which expressly ties sales of public reserved lands to compliance with the two-thirds approval requirement of Article IX, section 23 via the implementing legislation set forth in 12 M.R.S. § 598-A. Sections 1851 and 1852 in turn mirror the statutes governing sales and leases of nonreserved public lands, in that the statutory scheme requires legislative approval of the *sale* of such lands but does not require it

[16] While the Legislature's adoption of the BPL Act reorganized the statutes concerning the governance of public reserved lands and moved the executive's leasing authority into a new code section, separate from the multiple use standard, the Legislature expressly stated this change was ministerial and not substantive, as the Superior Court correctly observed below. A.85.

for *leases* of it. *See* 12 M.R.S. §§ 1837 and 1838 (statutes governing sales and leases of nonreserved public lands). Under fundamental principles of statutory interpretation, the Court must infer the Legislature intended the distinctions in the foregoing statutes and, thus, intended to authorize BPL to issue leases of public reserved land for the uses specified in 12 M.R.S. § 1852 without legislative approval. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotations omitted). The legislative history of 12 M.R.S. § 1852(7), where the Legislature issued a parliamentary ruling that a two-thirds vote requirement in Section 1852 would violate the Maine Constitution and where the Revisor's Office reached the same conclusion, further underscores this point. *See supra* pp.9-10. Although the Court would be bound to defer to the BPL's reasonable interpretation of 12 M.R.S. § 1852 were it ambiguous, there is no such ambiguity here: by design, Section 1852(4) does not require legislative approval of BPL leasing decisions. *See Passadumkeag Mountain Friends v. Bd. of Envtl. Prot.*, 2014 ME 116, ¶ 12, 102 A.3d 1181 ("When reviewing an agency's interpretation of a statute that it administers, we defer to the agency's construction unless the statute plainly compels a contrary result.").

Fifth, the Court must infer from the Legislature's long awareness of BPL's practice of leasing public reserved lands without first seeking legislative approval that

the Legislature shares BPL's historical understanding of the law. *See Maine Green Party v. Sec'y of State*, 1997 ME 175, ¶ 9, 698 A.2d 516 ("This combination—congressional awareness of an existing administrative praxis coupled with a concomitant unwillingness to revise that praxis—strongly implies legislative approval.") (quoting *Strickland v. Comm'r, Maine Dep't of Hum. Servs.*, 96 F.3d 542, 547 (1st Cir. 1996)). *See also Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("[T]raditional ways of conducting government give meaning to the Constitution.") (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952)) (internal quotation marks and alteration omitted) (Frankfurter, J., concurring). This precept should apply with greater force here, where BPL has issued hundreds leases of public lands without receiving legislative approval under Article IX, section 23, disclosed the existence of those leases to the Legislature, and apparently has received no legislative opposition whatsoever.

Finally, recognizing BPL's authority to lease public reserved lands without legislative approval accords with the historical legal regime governing public reserved lands. As discussed *supra* pp.1-2, Massachusetts required the reservation of public lots, including the two lots at issue, to stimulate the development of frontier lands, not for purposes of conservation. When Maine separated from Massachusetts, Maine committed via the Articles of Separation to maintain Massachusetts's policy with respect to the lots reserved and remains bound by that commitment. *See Opinion of the Justices*, 308 A.2d at 270 (explaining that Article X of the Maine Constitution, which

includes the Articles of Separation, "bound" Maine to the reservations made prior to the separation); *Cushing v. State*, 434 A.2d 486, 500 (State bound to administer public lots in a manner "contemplated by the Articles of Separation"); Tinkle, *The Maine State Constitution* 179 (2d ed. 2013) (describing Articles of Separation as "superconstitutional"). In short, Maine's own Constitution requires the State to use the original public lots for "beneficial uses." *Opinion of the Justices*, 308 A.2d at 270. The upshot of Plaintiffs' argument—impeding Maine's ability to put public lots to use for the benefit of the public—flies in the face of these historical and constitutional obligations.[17] *See also* 12 M.R.S. § 1804(6) (BPL may restrict access to lands under its jurisdiction where necessary to protect the State's "economic interests" in the land).

IV. BPL determined the 2020 Lease would not substantially alter the uses of the land.

If the Court finds the 2020 Lease may require approval by the Legislature in the event BPL deems it to give rise to a substantial alteration, the Court nevertheless should reverse the Superior Court's August 10, 2021, order finding BPL never reached the substantial alteration question and remand these proceedings to the Superior Court to determine whether the record evidence supports BPL's finding that the 2020 Lease does not work a substantial alteration of the uses of the land.

BPL stated its substantial alteration findings and conclusions in its memorandum of September 24, 2020, which amply reflects the "findings and

[17] The PUC has ruled, and this Court has affirmed, that the NECEC Project serves the public interest. *See NextEra Energy Res., LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, ¶ 30, 227 A.3d 1117.

determination" BPL made after "reviewing the project in 2014" and conducting "field observations." A.474-84. BPL "confirmed and made again these same findings and determination" when BPL issued the 2020 Lease.[18] A.481. The memorandum goes on to state a number of observations confirming the proposed lease would not substantially alter the uses of the leased area and the Johnson Mountain Township and West Forks Plantation lots. Specifically, the memorandum observed the lease's temporary and non-exclusive nature; the primary use of the lots for timber harvesting, rather than wildlife and recreation; the increased opportunities for deer hunting; the presence of an existing transmission line on the leased land in the form of the Jackman Tie Line; and the quantitatively and qualitatively limited way in which an additional transmission line would affect the existing habitat of the Johnson Mountain Township and West Forks Plantation lots. A.481-83.

Notwithstanding all of the foregoing, the Superior Court refused to consider BPL's memorandum because BPL created it *ex post—i.e.*, after it made its substantial alteration determination.[19] A.67-69. As the Court held less than two month ago,

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[18] The Superior Court correctly held "Plaintiffs have not really attempted to make a showing of bad faith or improper behavior, and the Court does not find that the Plaintiffs have made a sufficient showing of bad faith or improper behavior given the Law Court's [previous precedent]." A.66. Accordingly, there is no reason to doubt the veracity of any statement set forth in the BPL memorandum.

[19] The Superior Court relied primarily on *Rhea Lana, Inc. v. U.S. Dep't of Labor*, 925 F.3d 521 (D.C. Cir. 2019). But the court in *Rhea Lana* reviewed an *ex post* supplementation of the administrative record; it did not exclude the proffered material, as the Superior Court did here. *Id.* at 524. The Superior Court also observed it could not identify any Maine cases where a reviewing court considered *ex post* materials, neglecting each of the numerous cases where a Maine court has remanded a case to a town or agency to provide written findings of fact after the fact. For instance,

however: "It is black letter law that meaningful judicial review of a decision requires that the decision contain findings of fact sufficient to apprise the reviewing court of the decision's basis … ." *LaMarre v. Town of China*, 2021 ME 45, ¶ 6, --- A.3d ---. That BPL did not wait for a remand before creating the September 2020 memorandum only underscores the lengths to which it went to properly support and document its decision. Accordingly, the Superior Court's refusal to include BPL's September 2020 memorandum in the administrative record was error the Court should reverse.[20] Once considered, the memorandum clearly demonstrates BPL's findings and conclusions concerning substantial alteration, as described above.

Plaintiffs' arguments below are unavailing. For instance, Plaintiffs pointed to BPL's failure to use the words "reduce" or "substantially altered" in its assessment of the lease proposal in 2014, but this fails to recognize the Legislature has not required BPL to follow any specific procedures before reaching its leasing decisions. In contrast to its treatment of BPL's authority to lease submerged lands, the Legislature never has adopted a statute requiring BPL to follow any particular procedures when reaching its leasing decisions concerning public reserved lands and never has adopted

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in the decisions just this year in *Narowetz*, *LaMarre*, and *Fair Elections Portland v. City of Portland*, 2021 ME 32, 252 A.3d 504, the Court remanded the proceedings so the agency or municipality could, *ex post*, clearly state its findings in such a fashion as to permit judicial review.

[20] While the Court could remand these proceedings to the Superior Court with instructions to consider the September 2020 memorandum, this Court would review any subsequent Superior Court decision on a *de novo* basis, such that review of the memorandum by the Court now would be appropriate and more efficient.

a statute requiring BPL to promulgate rules setting forth such procedures.[21] *See* P.L. 1983, ch. 819, § 10 ("The director *shall promulgate* whatever rules are necessary and appropriate to administer this section" governing submerged lands leasing program) (emphasis added); 01-670 C.M.R. ch. 53, § 1.7 (effective March 15, 1986) (establishing "Application Review Procedures and Standards" for leases of submerged lands). Accordingly, no statute or rule requires BPL to issue an order or other written findings in connection with its leasing decisions and, to the best of Appellants' knowledge, BPL's ordinary practice does not involve the creation of a contemporaneous writing summarizing its considerations or analyses with respect to leases of public reserved lands. Given the foregoing, there is no reason to expect BPL's consideration in 2014 to have reflected the sort of specific nomenclature or procedures Plaintiffs claim to be missing.

Plaintiffs' arguments also fail to consider the record evidence reflecting BPL's contemporaneous analysis and consideration of the proposed lease. As discussed above, any substantial alteration analysis consists of determining whether a proposed use of land falls accords with BPL's multiple use standard. *See supra* pp.5-6. The record evidence demonstrates BPL performed exactly this analysis. Specifically, prior to issuing the 2014 Lease, the record demonstrates BPL considered in detail the appropriate routing for the NECEC Project, so that the leased premises would not

[21] MPA provides remedies to those aggrieved by an agency's lack of rules, but Plaintiffs never have pursued any of them in this litigation or elsewhere. *See, e.g.*, 5 M.R.S. §§ 8055 ("Petition for adoption or medication of rules") and 8058 (authorizing actions for agency's failure to adopt required rules).

touch sensitive habitats or wildlife areas, such as Tomhegan Stream and the then-proposed Cold Stream Forest lands. *See supra* pp.12-14. BPL staff also physically travelled to the leased land and walked it, observing its characteristics and suitability for the lease. *Id.* Finally, BPL conferred with MDIFW about the impact of the proposed transmission line on the leased lands and, as a result, required compliance with MDIFW's various recommended performance standards concerning wildlife, vernal pools, and riparian buffers. *Id.* If BPL was not undertaking to analyze whether the proposed uses of the leased land either would accord with the multiple use standard or give rise to a substantial alteration in the uses of that land then none of BPL's efforts would have had any purpose. Accordingly, even if the Court agrees with the Superior Court's refusal to consider the BPL's September 2020 memorandum itself, the record evidence demonstrates BPL in fact engaged in such an analysis and provides ample basis to infer the findings otherwise set forth in BPL's September 2020 memorandum.[22]

V. The Superior Court erred when it failed to remand the matter to BPL.

Even if the Superior Court correctly decided each of the foregoing issues, it nevertheless erred when it "reversed" BPL's decision to grant the 2020 Lease, rather than remanding these proceedings to BPL to make the substantial alteration determination. A.56.

[22] The only alternative to reviewing an agency's written findings is to infer those findings where they are "implicit" in final agency action and "revealed by the record as a whole." *Glasser v. Town of Northport*, 589 A.2d 1280, 1282 (Me. 1991). The Superior Court declined to do this as well. A.51.

Appellants cannot locate one reported case where a Maine court reviewing an administrative action found a purely procedural error, such as the Superior Court found here, and failed to remand the proceedings to the town or agency so that it may address the error. The clear thrust of authority in Maine demonstrates remand to be the appropriate remedy in such circumstances. *See, e.g., Zegel v. Bd. of Soc. Worker Licensure*, 2004 ME 31, ¶ 19, 843 A.2d 18 (where board imposed costs without making required inquiry into ability to pay, remanding to Board with instructions to conduct said inquiry).

Federal law takes the same view. "[I]f the agency has not considered all relevant factors … the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). This is referred to as the "ordinary remand" rule, *Gonzales v. Thomas*, 547 U.S. 183, 187 (2006), and it constitutes a foundational principle of administrative law. *See, e.g.*, *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration.").

The ordinary remand rule ensures the reviewing court does not encroach on the authority entrusted to the executive branch by the legislature and allows the administrative agency to bring its expertise to bear. *I.N.S. v. Orlando Ventura*, 537 U.S.

12, 16-17 (2002) (discussing principle).[23] Failure to undertake required procedures, such as the Superior Court found here, triggers the rule. *See, e.g., Meister v. U.S. Dep't of Agric.*, 623 F.3d 363, 380 (6th Cir. 2010) (remanding to trial court to direct agency to "adopt a plan that complies with the law" where agency failed to follow required procedures in developing forest management plan); *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002) ("[n]ormally when an agency so clearly violates the APA we would … simply remand for the agency to start again").

The Superior Court's decision ultimately makes clear its reason for failing to remand the matter—the Superior Court's desire for this Court to review the Superior Court's rulings on legal and constitutional questions, including the issue concerning the application of Article IX, section 23, before any remand to BPL. A.55. Such review necessarily will occur here and, in the event the Court does not reverse the Superior Court's judgment, the Court should remand the matter to BPL to conduct the substantial alteration analysis.

[23] The ordinary remand rule is particularly applicable with respect to the Superior Court's finding that BPL failed to engage in a public administrative process to make its substantial alteration determination, but where neither the Superior Court nor the agency have defined the contours of that process. *See* A.55. The "remand rule exists, in part, because ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps involves difficult policy choices that agencies are better equipped to make than courts." *Negusie v. Holder*, 555 U.S. 511, 523 (2009) (internal quotations omitted).

VI. The Court should reverse the Superior Court's declaratory judgment on Count I of Plaintiffs' First Amended Complaint.

In addition to reversing BPL's decision to grant the 2020 Lease, the Superior Court granted judgment to Plaintiffs on their request for a declaratory judgment concerning the 2014 Lease. The Superior Court's declared only as follows however:

> the BPL Director who signed the lease was required prior to deciding to enter into the lease and prior to executing it, to provide a public administrative process, and make a public, pre-execution determination as to whether the lease would result in a reduction or substantial alteration of the uses of the public land. BPL was also required to use the definitions of reduction/substantial alteration established by the Legislature. In addition, the decision had to have been made in such a way that permitted any member of the public or a legislator with standing to be able to exercise their rights to judicial review of the decision.

A.49.

Correctly determining the 2014 Lease to be "effectively void" given its termination by BPL and CMP through the execution of the 2020 Lease, the Superior Court expressly declined to grant any other relief with respect to the 2014 Lease, such as specifically declaring it void *ab initio* or unlawful or otherwise addressing Plaintiffs' arguments concerning the issuance of the lease vis-à-vis the PUC's issuance of a CPCN. A.37 n.10, 49-50.

Nevertheless, the Superior Court should not have entered any judgment concerning the 2014 Lease for multiple reasons. First, for the same reasons discussed

supra Argument Section II, Plaintiffs lack standing to challenge the 2014 Lease.[24] Second, for the same reasons described *supra* Argument Section III, BPL need not have sought legislative approval for the 2014 Lease under any circumstances, and so Plaintiffs' challenge to that lease fails as a matter of law. Three additional points merit discussion.

A. MAPA bars Plaintiffs' challenge to the 2014 Lease.

As discussed *supra* Section I, the exclusivity principle of Maine administrative law requires dismissal of a civil claim challenging an agency decision, including a declaratory judgment action, where MAPA provides for the same relief. In short: Plaintiffs' request for a declaration concerning the legality of the 2014 Lease must be dismissed in favor of a MAPA challenge, which, with respect to the 2014 Lease, Plaintiffs never asserted within the jurisdictional time limit and which Plaintiffs themselves ultimately dropped through the FAC. A.173-74.

MAPA requires any person aggrieved by final agency action who is not a party to the proceeding to file her challenge within 40 days "from the date the decision was rendered." 5 M.R.S. § 11003(3). Plaintiffs indisputably failed to meet this deadline, depriving the Court of jurisdiction to hear their challenge to the 2014 Lease. *See*

[24] Plaintiffs lack standing to challenge the 2014 Lease whether one characterizes Plaintiffs' challenge as a civil action, as the Superior Court did erroneously, or as an administrative appeal, as Appellants urged before the Superior Court and continue to urge herein. In each type of proceeding, Plaintiffs must allege a particularized injury, which they have not done. *Compare Nelson v. Bayroot, LLC*, 2008 ME 91, ¶ 10, 953 A.2d 378 ("[a] person is aggrieved within the meaning of the APA if that person has suffered particularized injury") *with Collins v. State*, 2000 ME 85, ¶ 6, 750 A.2d 1257 (in declaratory judgment action, "injury must be particularized" to enjoy standing).

Fournier v. Dep't of Corr., 2009 ME 112, ¶ 2, 983 A.2d 403 ("The time limit for filing a petition for review of final agency action pursuant to [MAPA] is jurisdictional."); *Britton v. Dep't of Conservation*, 2009 ME 60, ¶ 12, 974 A.2d 303 (affirming dismissal of challenge to BPL lease where appeal was untimely).

B. Plaintiffs' challenge to the 2014 Lease is moot because the 2014 Lease no longer exists.

The Superior Court should not have issued any declaration concerning the 2014 Lease because that agreement was "effectively void" long before the Superior Court ruled. A.49. Accordingly, no ruling on the 2014 Lease could confer, deny, or alter any person's legal rights or obligations concerning that agreement, rendering any opinion on the 2014 Lease an impermissible advisory opinion prohibited by the Maine Constitution. *See Dodge v. Town of Norridgewock*, 577 A.2d 346, 347 (Me. 1990) (advisory opinions prohibited by the Maine Constitution).

Although the trial court found Plaintiffs' challenge to the 2014 Lease justiciable on three independent grounds, the "extraordinary circumstances" required to avoid the mootness doctrine do not exist here. *A.I. v. State*, 2020 ME 6, ¶ 8, 223 A.3d 910. First, the Superior Court found "sufficient practical effects" flow from resolving the legality of the 2014 Lease because the facts concerning the 2014 Lease relate to those concerning the 2020 Lease. A.39. But the Court can review those facts in the course of adjudicating the 2020 Lease, and their mere existence does not require a ruling concerning the 2014 Lease. Similarly, the "public interest" exception to mootness

does not apply because the same public interest concerns are presented by both leases—namely, what administrative processes BPL must undertake before leasing public reserved lands. Accordingly, any determination needed "in the interest of providing future guidance to the bar and public" can and will occur with respect to review of the 2020 Lease. *See Halfway House, Inc. v. City of Portland*, 670 A.2d 1377, 1380 (Me. 1996). Finally, the mootness exception for issues "capable of repetition but [which] evade review" does not apply, because there is no evasion of review: the legality of BPL's leasing processes will be adjudicated in connection with the 2020 Lease. *See Sparks v. Sparks*, 2013 ME 41, ¶ 9, 65 A.3d 1223.

C. The Superior Court erred in crafting its declaration.

The substance of the Superior Court's declaration does not arise from any of constitutional or statutory provision in Maine law, and simply invents administrative procedures from whole cloth. If the Court does not reverse the Superior Court's declaration under Count I for the jurisdictional reasons set forth above, it should reverse the Superior Court's declaration because its terms are contrary to law.

Specifically, the Superior Court erred when it declared BPL was required to make a substantial alteration determination "pursuant to a public administrative process," suggesting, through a citation but without further explanation, that such process should have consisted of an adjudicatory proceeding. A.45, 47 (citing to 5 M.R.S. § 9051-A(1)-(2)). The Superior Court similarly erred when it suggested this proceeding should have taken the form of a multi-step process, where BPL first

makes a substantial alteration determination before executing any lease and in such a way as to allow "any citizen of Maine (including legislators with standing) to obtain judicial review of decisions in which no reduction or substantial alteration is found."[25] A.47. As any substantial alteration determination before the issuance of a lease would not constitute final agency action under MAPA, the Superior Court presumably envisions, although it did not explain, that aggrieved persons be permitted to challenge a leasing decision a second time, after execution of the lease.

None of the foregoing comports with existing law governing BPL's administration of public reserved lands. Beyond relying on decades-old cases from Hawaii and Idaho to support its decision, the Superior Court held that its devised procedures "arise by implication from Article IX, Section 23." Article IX, section 23 prescribes no procedures at all, however, but, rather, clearly intended for the Legislature to adopt specific implementing legislation to provide the remaining law governing public lands. As discussed *supra* p.7, the Legislature has granted BPL broad authority to make decisions concerning leases of public reserved lands without the requirement that BPL follow any specific procedures before doing so, in contrast to the Legislature's clear directive that BPL adopt such procedures with respect to leases of submerged lands. *See* 12 M.R.S. § 1862(2) ("Submerged lands leasing program"). In short, the Legislature never has required any of the measures the Superior Court

[25] The Superior Court's declaration that "any citizen of Maine" be permitted to challenge a BPL leasing decision is not only practically unworkable, but completely unmoored from MAPA's standing requirement and this Court's precedent, as discussed *supra* Argument Section II.

has sought to impose, and the Superior Court exceeded its authority under the Maine Constitution when it prescribed such procedures. *See Forest Ecology Network v. Land Use Regulation Comm'n*, 2012 ME 36, 39 A.3d 74 (vacating Superior Court decision imposing procedures on state agency not required by statute or rule).

Finally, affirmance of the Superior Court's declaration that BPL should have conducted a "public administrative process" prior to issuing the leasehold interest at issue dooms to invalidity each lease BPL has issued of public reserved lands since the agency's inception in 1997, as Appellants are not aware of any historical instance where BPL conducted such a process prior to issuing a lease. Affirmance of the Superior Court's judgment will effect a radical outcome on hundreds of third parties.

CONCLUSION

The Court should affirm BPL's grant of the 2020 Lease upon finding either that Plaintiffs lack standing to challenge it or that Maine law did not require BPL to obtain legislative approval before granting it. Alternatively, the Court should affirm the 2020 Lease upon finding BPL appropriately determined the lease would not substantially alter the uses of the land at issue. In the event the Court affirms the substance of the Superior Court's orders, it nevertheless should remand the proceedings to BPL. Finally, the Court should reverse the Superior Court's order concerning the 2014 Lease.

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CERTIFICATE OF SERVICE

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