

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.,**

*Plaintiffs-Appellants*

v.

**BUREAU OF PARKS AND LANDS, et al.**

*Defendants-Appellees*

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

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**BRIEF OF *AMICUS CURIAE* CITY OF LEWISTON**

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## **INTRODUCTION AND STATEMENT OF INTEREST**

*Amicus Curiae* the City of Lewiston (“Lewiston” or “the City”) is a municipality located within Androscoggin County, Maine. As discussed further in the Statement of the Facts and Argument sections, *infra*, Lewiston has significant reliance interests in the completion of the New England Clean Energy Connect (“NECEC”) project. Lewiston is a city in the process of rejuvenation, but struggles, as many municipalities do, to balance the need to raise tax revenue in order to fund its operations with the need to keep the tax burden low, in order to encourage growth.

The NECEC project called for the construction of a converter station in Lewiston. This station—on which construction has begun—represents a significant addition to the Lewiston tax base. For the past several years, Lewiston has planned and budgeted in reliance on this anticipated construction. It has a significant interest in seeing the project completed. Accordingly, it submits this *amicus curiae* brief to offer its perspective on the importance of the reliance interests at stake in this matter.

## **STATEMENT OF THE FACTS**

Lewiston adopts the statement of facts offered in Appellants’ opening brief. Lewiston also offers the following additional facts to inform the Court’s understanding of the larger implications and issues in this case.

Like a number of New England municipalities, Lewiston was historically a mill town with a vibrant economy; through much of the 19th and 20th centuries, it

thrived on textile production and was one of Maine’s largest economic centers. As this industry waned, Lewiston struggled—as many New England cities have—to maintain its population, services, and economy. *See* Douglas I. Hodgkin, “A Brief History of Lewiston,” *available at* <https://www.lewistonmaine.gov/421/History-of-Lewiston> (accessed March 25, 2022). Though Lewiston has been fortunate to benefit from state, federal, and private grants, as well as an influx of additional residents (many of whom are new Mainers seeking asylum), the challenge of maintaining necessary city services while keeping tax rates from driving residents away remains a delicate balance for a city hoping to achieve major revitalization in the immediate future. While struggling to achieve this balance, Lewiston has consistently had one of the highest mill rates in the state and substantially exceeds the state average. *See* “Estimated Full Value Tax Rates,” *available at* <https://www.maine.gov/revenue/sites/maine.gov.revenue/files/inline-files/fullvaluerates.pdf> (accessed March 25, 2022). And even these rates have not been sufficient to keep up with necessary costs. Currently, the City’s municipal government must make do with 65 fewer full-time equivalent positions than it had at its peak, and therefore must consistently figure out how to do more with less.

Enter NECEC. In 2017, representatives from Avangrid’s subsidiary Central Maine Power (“CMP”) approached Lewiston concerning this project. Specifically, the project called for the construction of a converter station to convert direct current

power to alternating current power. A. 113, ¶ 114. CMP considered both Lewiston and nearby Greene, but ended up choosing Lewiston in part due to the presence of an existing CMP substation within the City limits.

Lewiston was supportive of the project at all stages, including rezoning and review by the appropriate local authorities. The contract zone that allowed the converter station to be constructed was recommended for approval by the Lewiston Planning Board (“Board”) on August 9, 2019. The Board approved the project on January 11, 2021. *See* “Lewiston Planning Board approves converter station for New England Clean Energy Connect,” *Lewiston Sun Journal*, January 11, 2021, *available at* <https://www.sunjournal.com/2021/01/11/lewiston-planning-board-approves-converter-station-for-new-england-clean-energy-connect/> (accessed March 25, 2022). *See also* A. 95, ¶ 71. Notably, this approval occurred more than a month before the 2021 referendum was certified by the Secretary of State, which occurred on February 22, 2021. A. 103, ¶ 98. Additional approvals followed by the Board in April of 2021.<sup>1</sup>

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<sup>1</sup> The City was poised to issue the building permit for the converter station when the referendum passed, so ultimately it was not issued in recognition of the fact that with the passage of the referendum, the project could not go forward at that time. However, City staff had reviewed the plans and the City was ready to issue the permit.

After this approval, work began in earnest on the converter station. The parties' appendix provides greater detail on this point, but by way of example, in February 2021, workers began relocating certain distribution facilities, in June 2021, cutting and access road construction began, and in July 2021, blasting and excavation began. A. 115, ¶ 120; A. 243, ¶ 55. Additionally, various component parts were reported to be nearing completion. *Id.*

This work has already begun to pay dividends for Lewiston. Prior to CMP's work, the parcel in question had a taxable valuation of \$47,700. This year, NECEC offered Lewiston an assessed value of \$110 *million* for the parcel, factoring in existing and planned improvements, permitting, engineering, and design costs, and equipment on order. It is no stretch to say that this is a massive infusion for Lewiston's tax base. And in the event that Avangrid is able to complete construction of the converter station and place it into operation, the assessed value is likely to increase dramatically, approaching \$300 million. As it stands, the current increase has already made a significant dent in Lewiston residents' tax bills. In June 2021, Lewiston announced that the increase in total valuation provided by the construction to date would permit it to lower the mill rate by 41 cents. *See* "Lewiston drops property tax rate after largest valuation increase in more than a decade," *Lewiston Sun Journal*, June 29, 2021, *available at* <https://www.sunjournal.com/2021/06/29/lewis-ton-drops-property-tax-rate-after->



[valuation-increase/](#) (accessed March 25, 2022). This was even more notable than it otherwise might have been, given that absent this infusion of tax base, the rate was slated to *increase* by approximately \$1. *Id.* The ultimate result is a mill rate that is \$1.41 lower than it otherwise would have been.

The fiscal benefits to Lewiston and its residents do not end with the mill rate reduction, however. Lewiston also planned to utilize a Tax Increment Financing (“TIF”) district in conjunction with the converter station. A TIF is an economic development tool designed to assist municipalities in increasing employment opportunities, broadening their tax base, and improving the state economy. 30-A M.R.S. § 5221(1). Utilizing a TIF permits municipalities to designate a portion of new tax revenue from a project to offset development costs, which may include costs related to economic development. *Id.* § 5225(1)(C). Use of a TIF means that the budget for these costs is separate from the municipality’s general fund, and thus, the mill rate need not be increased to meet them. Lewiston has used TIFs successfully in the past. For example, it used a TIF in connection with the 2006 construction of a Wal-Mart distribution center, revenues from which have been used to fund positions in Lewiston’s Economic Development Department. That TIF is set to expire soon, but by using a TIF in connection with the NECEC converter station, Lewiston will be able to continue funding those positions without dipping into the general fund.

The expansion of Lewiston's tax base is also critical for another reason: revaluation. Lewiston has not conducted a revaluation for many years, but with the general increase in market values of property in Maine, it is in the process of doing so in order to comply with Maine's constitutional and statutory requirements that assessments reflect market value. *See* Maine Const. Art. IX, § 8; 36 M.R.S § 327. The revaluation process imposes both direct and indirect costs on cities and their residents. Directly, the reevaluation process is time consuming and expensive. Indirectly, the changes in value can in turn cause increases to the tax bills of residents, depending on how residential property values change. The infusion of \$100 million dollars into Lewiston's tax base—with significantly more on the horizon—addresses both of these concerns. Newly-added revenue can cover the administrative costs of the revaluation.

In short, the converter station has been (and if the project goes forward, will continue to be) a major economic boon to Lewiston. It has factored significantly into Lewiston's budgeting and planning for the coming years. If it reaches fruition, it will offer Lewiston fiscal stability and the capacity to invest further in the future of the City.

All of this is threatened by the passage of the referendum that is at issue in this lawsuit. If the referendum stands, CMP will not complete its converter station, and the dramatic increase in Lewiston's tax base will be followed by an equally

dramatic decrease; there is little value to a parcel prepped for use as a converter station when there is no actual need for that station.

## STATEMENT OF THE ISSUES

Whether the Business Court erred in assessing the public interest factor in denying Plaintiffs' request for a preliminary injunction when it failed to take into account the interests of affected municipalities.

## ARGUMENT

In considering the motion for a preliminary injunction, the Business Court was required to consider four factors: likelihood of success on the merits, likelihood of irreparable harm, balance of harms, and the public interest. *See Dep't of Env. Protection v. Emerson*, 563 A.2d 762, 768 (Me. 1989). Lewiston files this brief in connection with the final factor, to direct the Court's attention to the broader public interest, and in particular, how the Court should consider fairness concerns as they relate to Maine's municipalities.

**I. In considering the public interest in the context of a statewide construction contract, courts should consider fairness toward non-parties who nonetheless have significantly relied on the contract.**

As Appellants point out, several doctrines and sources of law support their position here, including the vested rights doctrine, due process clause, and contracts clause. All these principles and doctrines share a common thread: a basis in fundamental fairness and the importance of settled expectations. Courts in Maine

and various other jurisdictions have cited this common thread in analyzing these doctrines. *See, e.g., Finch v. State*, 1999 ME 108, ¶ 9, 736 A.2d 1043; *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (relating to retroactivity); *Friends of Yamhill County, Inc. v. Bd. of Comr's of Yamhill County*, 238 P.3d 1016, 1023 (Ore. App. 2010) (“The policy underlying the notion of vested rights is basically one of fairness.”); *Bailey v. State*, 500 S.E.2d 54, 65 (N.C. 1998); *Vashon Island Cmte. For Self-Government v. Wash. Boundary Rev. Bd. for King County*, 903 P.2d 953, 957 (Wash. 1995) (“The vested rights doctrine is based on constitutional principles of fundamental fairness.”); *Hickey v. Pension Bd.*, 106 A.2d 233, 238 (Pa. 1954) (“The impairment of contractual obligations by the Legislature is ... abhorrent because such impairment changes the blueprint of a bridge construction when the spans are half way across the stream.”).

In a typical case, the question would be one of fairness to the rights holder. But this is not a typical case. At issue is not a small-scale local building permit dispute, but—as the Business Court noted in recommending interlocutory review—a billion-dollar infrastructure project. A. 14. Indeed, in its order denying the preliminary injunction, the Business Court acknowledged that there were “substantial interests and stakes on each side of the dispute” and the “resolution of the dispute carries regional and national implications.” A. 18.

Because of the weighty implications of this case, in considering the public interest—and weighing the fairness concerns that undergird the merits question—the Business Court should have considered fairness not only to the parties to the various contracts at issue, but fairness to other entities, such as municipalities like Lewiston. These entities have relied significantly on the project’s approval, only to see the proverbial rug pulled out from under them by way of a retroactive referendum. In this way, the instant matter is quite *unlike* a typical vested rights case that pits “the public” against a private entity seeking to claim vested rights. It is true, as the Business Court noted, that one manifestation of the public interest is the results of a referendum. A. 66–67. But this case is illustrative of the fact that this is not *the only* manifestation of that interest. The peoples’ representatives in local government also represent the public interest. And when an initiative targets a project that spans numerous municipalities that have made decisions in reliance on regulatory approval of that project, that reliance should merit consideration in analyzing the public interest. Indeed, in discussing the legal standard, the Business Court correctly noted that consideration of the public interest required it to “inquire whether there are public interests beyond the private interests of the litigations that would be affected by the issuance or denial of injunctive relief.” A. 66 (citing *Everett J. Prescott, Inc. v. Ross*, 383 F. Supp. 2d 180, 193 (D. Me. 2005)).

Unfortunately, the Business Court’s analysis of the public interest factor gave *no* consideration to the interest of municipalities, and instead viewed the referendum’s passage as dispositive of the public interest question. A. 67 (“Thus, in the Court’s view, the people of Maine have declared their interest in this litigation”). A closer examination of that logic, however, exposes its flaws. As this Court has made clear several times, “a citizens’ initiative constitute[s] legislative action.” *Avangrid Networks, Inc. v. Sec’y of State*, 2020 ME 109, ¶ 26, 237 A.3d 882 (citing *League of Women Voters v. Sec’y of State*, 683 A.2d 769, 771 (Me. 1996) (brackets added)). And “the Maine Constitution, citizen-enacted legislation, and legislatively enacted legislation reflect the will of the people.” *Opinion of the Justices*, 2017 ME 100, ¶ 7 162 A.3d 188. Because both citizen-enacted legislation and legislatively enacted legislation are equally considered “the will of the people,” the Business Court’s reasoning would assume that the public interest *always* favors denying a preliminary injunction against enforcement of a law, which cannot be the case. Instead, consideration of the public interest must be broader, and in the context of a project with statewide implications affecting individual citizens, businesses, and municipalities, the interests of all should be considered.

**II. The interests of Lewiston and other municipalities favor injunctive relief.**

Consideration of the interests of the municipalities affected by the NECEC project might well have led to a different ruling, and Lewiston’s situation is

particularly relevant given its reliance on the project. In January 2021 all state and federal permits either had issued or were to issue imminently, A. 83, ¶ 34 – A. 94, ¶ 69, and in reliance on that, Lewiston took the necessary steps (Planning Board approvals) to give CMP the go-ahead to build the converter station. At the time Lewiston gave its approval, the project had met the regulatory requirements, had survived a court challenge, and was supported by the Governor’s office. What more could Lewiston reasonably have expected for assurances before letting the project move forward, and, accordingly, making fiscal plans around it?

The 2021 referendum gravely threatens all of these reliance interests. To reiterate: Lewiston has seen an infusion to its tax base of over \$100 million, with the likelihood that this will grow to \$300 million. If the initiative remains in place, however, this expectation will evaporate. Lewiston has also planned to use a TIF in connection with the project, which will replace an expiring TIF that is currently providing significant funding to its economic development department. If the initiative remains in place, Lewiston will no longer be able to use the TIF funds for these positions, and will instead be forced to rely on its already overstretched general fund; as noted above, Lewiston employs significantly fewer full-time equivalent employees than it ideally would. Lewiston has planned to use revenues from the project to implement an overdue revaluation. And Lewiston has relied on the expected new tax base to lower its mill rate, cushioning the blow of the expected

revaluation and permitting it to keep its already high property tax rates in check. All of these possibilities will vanish if the initiative is permitted to remain in place.

The proper balance of taxation and spending is one of the greatest challenges Maine municipalities face. Maine has the oldest average age of any state in the union, and a recent census report concludes that individuals older than 65 make up nearly 20% of the state population, *see* “Census: Maine’s population still the oldest in the nation,” *Maine Public*, September 14, 2018, *available at* <https://www.mainepublic.org/maine/2018-09-14/census-maines-population-still-the-oldest-in-the-nation> (accessed March 25, 2022). Many of these individuals are on fixed incomes, making property tax increases a significant hardship. Moreover, Maine currently is experiencing declining internal population growth, and has been relying on migration from other states to grow its population. *See* Jessica Piper, “Migration fueled another year of population growth in Maine in 2021,” *Bangor Daily News*, March 24, 2022, *available at* <https://bangordailynews.com/2022/03/24/news/migration-fueled-another-year-of-population-growth-in-maine-in-2021/> (accessed March 25, 2022). But much of this growth may be attributed to a pandemic influx, which is not likely to continue. *See id.* Managing property tax rates, both to attract newcomers and to ensure that individuals currently living in Maine can manage, is in some ways the most challenging task presently facing municipal governments. In order to keep rates low



but maintain revenues, municipalities must necessarily seek out any opportunities available to increase the tax base. Lewiston successfully did so here, yet now faces the loss of millions of dollars of tax revenue due to a referendum destroying years of careful planning and permitting.

While Lewiston files this brief only on its own behalf, the concerns underlying it apply to municipalities throughout Maine. Indeed, they apply with greater force to smaller municipalities with even more uncertain tax conditions. The loss of the converter station will be economically painful for Lewiston, but likely not ruinous; the City is large enough and diversified enough that it will weather the storm, though the next few years may be economically challenging. But this case will decide not only the fate of the NECEC project, but the degree of stability municipalities can count on in future investments. Small towns in desperate need of tax revenue may be forced to put all their eggs in one basket, so to speak, and if a development project faces the constant risk of shutdown in the event that it becomes politically disfavored, investment in the state will become proportionately less likely.

In denying the preliminary injunction, the Business Court described the initiative as reflecting the desire of the citizens of Maine to “require stricter scrutiny of certain transmission line projects.” A. 58. If that were all it were, municipalities could conform their actions to that greater scrutiny. But by applying retroactively, to projects that had already been permitted, and on which municipalities were relying

for significant revenues, the initiative did much more than that, and has greater consequences. The question municipalities must now ask before budgeting in reliance on new projects is not whether a given project meets existing legal requirements, but whether it is likely to fall into political disfavor with the state at large. That is not a model that will encourage investment in Maine, and it is not one around which municipalities can realistically plan.

### CONCLUSION

For the foregoing reasons, *amicus curiae* the City of Lewiston respectfully requests that this Court reverse the decision of the Business Court and remand with instructions to enter a preliminary injunction.

Dated: March 30, 2022

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