

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-CIV-2021-00058

NECEC TRANSMISSION, LLC, et al.,
Plaintiffs & Intervenors,
v.
BUREAU OF PARKS AND LANDS, et al.
Defendants & Intervenors.

ORDER DENYING PLAINTIFFS'
MOTION FOR
RECONSIDERATION

In the wake of the Law Court's decision in this case, *NECEC Transmission LLC, et al. v. Bureau of Parks and Lands, et al.*, 2022 ME 48, 281 A.3d 618, Plaintiffs (along with Intervenors aligned with Plaintiffs) have asked the Court to reconsider its Order Denying Plaintiffs' Motion for Preliminary Injunction. *See* M.R. Civ. P. 7(b)(5). The Court heard oral argument on October 19, 2022. Plaintiffs argue that the Law Court has essentially decided the case, and thus this Court should vacate its prior Order. For the reasons discussed below, the Court disagrees with Plaintiffs' analysis.

Contrary to Plaintiffs' arguments, the Law Court did not determine that Plaintiffs have vested rights to complete construction of the New England Clean Energy Connect project (the Project); did not determine it is likely that Plaintiffs will succeed on the merits; and did not otherwise telegraph that Plaintiffs will prevail. Instead, the Law Court clarified its vested rights jurisprudence, announced a new

legal standard for determining the existence of vested rights, and returned the case to this Court for factfinding: “To be clear, we do not decide whether NECEC performed substantial construction in good faith according to a schedule that was not created or expedited for the purpose of generating a vested rights claim.” *NECEC Transmission*, 2022 ME 48, ¶ 51, 281 A.3d 681.

Plaintiffs nevertheless focus on the next sentence in the Law Court’s decision: “Although it appears from the limited record developed in connection with the request for preliminary injunctive relief that NECEC did so, it is up to the trial court to make those factual determinations on remand.” *Id.* Rather than advance Plaintiffs’ argument, however, the quoted language highlights the absence of a vested rights determination by the Law Court and the need for factfinding.

The Law Court declined to find (or reject) vested rights due to what it characterized as the limited record developed in connection with the request for preliminary injunctive relief. That same limited record is what is before this Court. In that regard, it is worth noting that the record is limited in two ways. First, the record was developed before the new legal standard was articulated by the Law Court, and thus the record does not allow resolution of the question now presented. Second, the record consists only of affidavits and attachments. All parties waived their right to an evidentiary hearing on the motion for preliminary injunction. As a consequence, there has not yet been any testimony in this case, and Defendants have not had any opportunity to probe whether Plaintiffs’ construction schedule was created or expedited for the purpose of generating a vested rights claim.

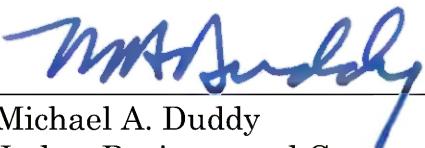
Since the Law Court did not determine whether Plaintiffs have vested rights to complete construction of the Project, there is no reason for this Court to reconsider its analysis of the other three preliminary injunction considerations. Although Plaintiffs have warned about an approaching tipping point, after which completion of the Project will no longer be feasible, Plaintiffs have not argued the tipping point will occur while this case is being litigated in the trial court. This matter is currently on a fast track for trial in April 2023 and a prompt trial court decision thereafter. At that point Plaintiffs will either prevail, and be able to resume construction on the Project, or not. If not, Plaintiffs can appeal and seek an injunction from the Law Court. *See* M.R. Civ. P. 62(g) (“The provisions in this rule do not limit any power of the Superior Court or Law Court during the pendency of an appeal to suspend, modify, restore, or grant an injunction or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.”). It follows, therefore, that Plaintiffs will not suffer any irreparable injury while this matter proceeds to factfinding and resolution in the trial court.

For all of these reasons, Plaintiffs’ request for reconsideration is denied.

So Ordered.

Pursuant to M.R. Civ. P. 79(a), the Clerk is instructed to incorporate this Order by reference on the docket for this case.

Dated: 10/21/2022



Michael A. Duddy
Judge, Business and Consumer Court

Entered on the docket: 10/21/2022