

ZONING USE PERMIT APPLICATION

4. OVERALL DESCRIPTION OF PLANNING BOARD REVIEW PROCESS FOR NORDIC ZONING USE PERMIT.

Chapter 102, Zoning, Article V, District Regulations, Division 19, Route One South Business Park district, identifies a land-based aquaculture use as a permitted activity subject to review by the Belfast Planning Board. Following is a synopsis of the process associated with the Planning Board's review of Nordic's application for a Zoning Use Permit.

ISSUE #1 THAT IS THE SUBJECT OF THIS APPEAL.

The Board invited and relied upon hearsay.

The Planning Board, as part of its deliberations on Nordic's Final Plan application, reviewed the draft and final Orders from the Board/Department of Environmental Protection on the Nordic project, including the Natural Resources Protection/Site Location of Development Act (NRPA/SLODA) Permits, the Maine Pollution Discharge Elimination System (MPDES) Permit, and the Minor Air Emissions License/Permit. The Board, in its deliberations, also considered the technical review of these permits that were performed by either Mandy Olver, Olver Associates, or Matt Reynolds, Drumlin Environmental.

Upstream Watch has described and objected to the Board's use of hearsay evidence in its appeal of others of this group of Nordic permits. Those arguments are incorporated as if fully set forth herein.

5. SPECIFIC FINDINGS OF THE BELFAST PLANNING BOARD ON OVERALL ZONING USE PERMIT REQUIREMENTS.

The Planning Board made findings regarding the applicability of certain Chapter 102, Zoning requirements regarding the Nordic application for a Zoning Use Permit. These include, Significant Water Intake and Significant Water Discharge/Outfall Pipes, Right, Title or interest, Site Plan Permit, and Shoreland Zoning Permits. Upstream's Issues and objections taken to those permits re incorporated by reference as if fully set forth herein.

6. SPECIFIC FINDINGS OF THE BELFAST PLANNING BOARD, NORDIC COMPLIANCE WITH USE AND DIMENSIONAL STANDARD REQUIREMENTS.

6.1 Nordic Activities in the Route One South Business Park zoning district.

ISSUE #2 THAT IS THE SUBJECT OF THIS APPEAL.

The project does not meet the dimensional requirements.

b) The Board found that the site on which Nordic will develop the aquaculture facility satisfies the dimensional requirements identified for a lot in the Route One South Business Park zoning district. The Nordic site is about 56 acres in size (2 acre minimum required), and the property has about 860 feet of frontage on U.S. Route One (minimum of 250 feet required); reference Section 102-684.

c) The Board found that the Nordic project can satisfy the minimum structure setbacks for all nonresidential structures identified in Section 102-684, Dimensional Standards, Subsection (b)(1).

- The front setback requirement is 75 feet. Nordic wastewater treatment facility is setback more than 75 feet.

The 75 foot front setback is violated by Nordic's proposed pipes which are structures and which are proposed to proceed through the front setback area without regulatory authority or variance.

f) The maximum structure height established in Section 102-684(e) is 45 feet, as measured by the City definition of height. The Board determined that Nordic presented evidence to the City that none of its new buildings will be greater than 45 feet in height, and that the existing Belfast Water District offices are considerably less than 45 feet in height.

ISSUE #3 THAT IS THE SUBJECT OF THIS APPEAL

Smokestacks are not chimneys.

The Board, consistent with direction provided by Wayne Marshall, Project Planner, found that the chimneys (exhaust stacks) that Nordic intends to construct to manage emissions for its on-site generators are exempt from City height standards because the chimneys, per the City definition of height in Chapter 66, qualify as 'other appurtenances that do not have a habitable floor area, and as such, are not considered a structure. The Board noted that public comment was made during the Planning Board's review of issues related to air emissions regarding the 66' height for these chimneys, and how such height was prohibited by City Ordinances.

The regulations limit the height of non-architectural features to 45 feet. Nordic proposed 8 smokestacks. Originally there were no smokestacks proposed. The original application showed rooftop vent discharges that were well below 45 feet. When for air pollution reasons Nordic raised the potential release height of the exhaust smoke, in an attempt to meet the Clean Air Act requirements, to raise the exhaust to a height that exceeded the allowed zoning height, they had to do so in a smokestack, but, because the smokestacks are illegal – Nordic ignored the plain meaning of the words and changed from a process unit, a "smokestack", to an architectural feature a "chimney", because the regulations potentially allow for chimneys (and other architectural features like steeples) to exceed the height restriction for obvious architectural reasons. If so, under that theory, anyone in Belfast can build an exhaust tower as high as they might want for any purpose, anywhere in Belfast, as long as they call it a "chimney". That is not the law. A smokestack that cannot be enclosed to look like a chimney for air quality dispersion reasons, and that will be two to three times the height of the building cannot be considered included as an architectural feature, such as a chimney. That is the opposite of an added architectural feature. The ZBA must reverse it.

Beyond that, the Planning Board reasoned that chimneys are "other appurtenances that do not have habitable floor area." Therefore, they are exempt. But the Planning Board still adheres to a height requirement for Smokestacks, or there would not have been the need to pretend Nordic's smokestacks are chimneys. No one lives in a smokestack (I hope). They are not habitable. There is no habitable floor space in a smokestack. Why then is there a 45 foot height limit on smokestacks? Under "Height

of a Structure” smokestacks should be exempt. This ridiculous problem is the result of a transparent attempt to give Nordic something for which it does not qualify.

6.2 Nordic Activities in the Residential II zoning district.

Nordic has an option to acquire certain easement rights to the Ekrote property (282 Northport Ave) that is located easterly of Route One. The purpose of the Nordic easement on the Ekrote property is to allow the construction of 2 significant water intake pipes and 1 significant water discharge pipe. The easement area is 40 feet in width, and spans the depth of the Ekrote property; from Route One to Belfast Bay. The construction of significant water intake pipes and a significant water discharge pipe is the only activity that Nordic proposes on the Ekrote property. The Board made the following findings with respect to this easement and Nordic’s proposed use.

ISSUE #4 THAT IS THE SUBJECT OF THIS APPEAL

Violation of setback requirements

c) The Board determined that a submerged intake and discharge pipe, while it is a structure, does not need to comply with a front or rear structure setback when the sole purpose of the pipe is to convey water and wastewater across the property from Route One to Belfast Bay. The imposition of front and rear structure setback requirements would nullify the main intent of the Ordinance amendment which was to allow the transport of water to serve a facility such as the Nordic Aquafarms project. Further, the City has never imposed a similar requirement on any other service line, such as a water, sewer, or electrical line, because such a requirement would result in few, if any, properties in Belfast being connected to any public service. The Board, however, decided that the Nordic intake/discharge pipes must comply with the side setback requirement of 15 feet that applies to a structure in the Residential II zone, and established a Condition of Approval in the Significant Water Intake/Discharge Pipe Permit that it issued to Nordic to require this amount of setback.

d) The Board determined that the construction of submerged pipes does not require the establishment of a minimum bufferyard area and accompanying planting (Board noted that Nordic is required to revegetate all of the easement area that is disturbed by construction of the pipes), that said pipes do not result in any lot coverage (all of the restored area will be a pervious surface), and that a submerged pipe does not involve any structure height.

The Planning Board determined that the setback requirements do not apply to the pipes. That is wrong as a matter of law. The Planning Board determined that the setback requirements do not apply to subsurface structures. By the plain language of the regulations, the Planning Board is incorrect. The Planning Board determined that since the pipes are designed to convey water, the setbacks do not apply. That conclusion is found nowhere in the regulations.

Further, the PB found the pipes are an approved use in the Shoreland residence zone where Eckrote is located but a second use is only be allowed if it is accessory to a primary use on the same lot. The primary use is Eckrot’s house - residential. The pipes are accessory to the fish factory across Route 1 on a different parcel, so the pipes are not allowed on Eckrot’s lot as an accessory use. Acknowledging this problem, the Pipes were defined as a primary use in that zone. That almost solved the problem. But the Maine Supreme Court agrees with Upstream’s argument that you can’t have 2 primary uses of the same lot? So the installation of Nordic’s pipes on the Eckrote’s residential lot is unlawful.

7. SPECIFIC FINDINGS OF PLANNING BOARD, NORDIC COMPLIANCE WITH ARTICLE VIII, SUPPLEMENTARY DISTRICT REGULATIONS.

The Board determined that the Nordic project must comply with certain standards identified in the Chapter 102, Article VIII, Supplementary District Regulations. The Board made the following specific Findings regarding Nordic's compliance with applicable standards.

Division 7. Significant Groundwater Wells.

The Planning Board acknowledged that these standards apply to the Nordic project. The Board referenced its approval to issue a Significant Groundwater Well Permit to Nordic at its meeting of December 22, 2020. The Board's Findings and Conditions for this Permit is a separate document and are incorporated by reference in the Board's consideration of this Zoning Use Permit.

The Issues and responses of Upstream Watch in its appeal of the Significant Groundwater Well permit are incorporated as well.

8. SPECIFIC FINDINGS OF THE PLANNING BOARD REGARDING NORDIC COMPLIANCE WITH CHAPTER 102, ZONING, ARTICLE IX, ENVIRONMENTAL PERFORMANCE STANDARDS.

Chapter 102, Zoning, Article IX, Performance Standards, Division 2, Environmental Performance Standards, identifies overall performance standards that any development in both the Route One South Business Park zoning district and the Residential II zoning district must satisfy. The Board, in making its Findings on these standards, specifically noted that the concerns addressed in these standards frequently are similar to requirements identified in Chapter 90, Site Plan. As such, the Board often relied upon its Findings on the Nordic Site Plan Permit to address concerns identified in the Division 2, Environmental Standards. Further, the Board chose to adopt the same Conditions of Approval that it adopted for the Site Plan Permit is issued to Nordic on December 22, 2020, as requirements (Conditions of Approval) for this Zoning Use Permit.

Sec. 102-1125 Wastewater pollution.

(c) **The disposal of wastewater by means other than a public system must comply with the laws of the state.**

The majority of the wastewater generated by Nordic's operations will be processed through Nordic's on-site Water Treatment/Wastewater Treatment facility and will be discharged to Belfast Bay. The Board determined that the Maine DEP, as well as the ACOE, and not the City, has the jurisdictional authority to regulate Nordic's discharge of wastewater to the Bay. The Board found that the DEP, at the Board of Environmental Protection meeting of November 19, 2020, has issued the required MPDES Permit and Waste Discharge License to Nordic to allow the discharge of its effluent to the Bay, subject to conditions identified in the MPDES Permit. Nordic's permits to the ACOE are pending. The City established Conditions of Approval in this Zoning Use Permit, and in its Site Plan Permit, Significant Water Intake and Significant Water Discharge/Outfall Pipe Permit, and in the

Shoreland Permit that it issued to Nordic in December 2020 (issuance concurrent with this Zoning Use Permit) that require Nordic to comply with all requirements of the DEP and ACOE Permits regarding the location, construction, and operation of the intake/discharge pipes, and the discharge of effluent, including the regular monitoring of such discharges. The Board specifically references Condition of Approval 8, Compliance with State and Federal Permits, included in this Zoning Use Permit.

Thus, the Board found that Nordic is required to comply with the standard identified in Subsection c).

The Issues raised and arguments advanced by Upstream watch regarding Nordic's wastewater generation and its effect on Penobscot Bay, including Nordic's omission of a permit to discharge the water from dewatering dredge spoils as set forth in Upstream watch's Issues and discussion in its appeal of Nordic's Final Site Plan Permit are incorporated herein.

Sec. 102-1126 Air pollution.

Uses which would cause emission of dust, fly ash, fumes, vapors or gases which will have an adverse impact on human health, animals, vegetation, or property, or strain persons or property, at any point beyond the lot line of the commercial or industrial establishment creating that emission shall be prohibited. All such activities shall also comply with applicable federal and state regulations. Construction is not a use for the purposes of this section.

The Board specifically noted that Nordic has obtained a Minor Air Emissions License from the DEP (November 19, 2020) regarding air emissions associated with its operation of on-site generators. Thus, the Board found that the Nordic project is in compliance with the requirement that the operation (applicant) obtain required federal and state permits and that it be in compliance with applicable state and federal regulations. The Board, in Condition of Approval 12, Electrical Service, in this Zoning Use Permit, established a requirement that Nordic must obtain the review and approval of the Belfast Planning Board if Nordic proposes to exceed limitations regarding the use of its generators that are established in the DEP Minor Air Emissions Permit.

While this standard identifies that air pollution concerns associated with project construction are essentially exempt from this standard, the Board notes that it established provisions in Condition of Approval 39, Site Maintenance During Project Construction, that should assist in managing dust generated during project construction.

The Board found that Nordic's overall operations, with the exception of the operation of its on-site generators, should not result in the emission of dust, fly ash, fumes, vapors or gases, that would have an adverse effect on human health, animals, vegetation, or property.

The Issues raised and arguments advanced by Upstream Watch regarding Nordic's Minor Air Emission Permit are incorporated herein in its appeal of the Final Site Plan Permit and elsewhere.

Sec. 102-1127 Odors.

No land use or establishment shall be permitted to produce noxious or harmful odors perceptible beyond the lot lines, either at ground or habitable elevation.

The Planning Board mostly discussed odors in relation to Nordic's management of solid wastes and other wastes, including those associated with a catastrophic event such as a fish die-off. The Board established specific Conditions of Approval in this Zoning Use Permit and in its Site Plan Permit that address measures Nordic must implement to help manage wastes. The Board makes note of the following Conditions:

- a) Condition 14. On-Site Dumpsters. Regulates the location of on-site dumpsters, how such must be screened, and the type of wastes that can be collected in such dumpsters.
- b) Condition 15. Fish Waste and Wastes Associated with Operation of a Wastewater Treatment Plant. Identifies standards for the collection and disposal of these wastes.
- c) Condition 16. Odor Management. Establishes standards regarding the regulation/management of odors, some of which may be associated with the management of waste materials.
- d) Condition 17. Hazardous Wastes and Management of Hazardous of Special Materials. Identifies standards for the handling of Special Wastes.
- e) Condition 18. Emergency Response Plan. Identifies the requirement for Nordic to prepare an emergency response plan for catastrophic events such as fish die-offs, a requirement to implement the plan if an event occurs, and to report to the Code and Planning Department regarding how Nordic managed the event.

The Board, based on the waste management conditions it has established, found that Nordic's operations are required to implement good quality measures to manage odors that may be generated on-site, and that if odors issues do arise, measures that Nordic must implement to abate such odors.

Upstream Watch relies on its discussion of Odor issues in its Appeal of the Final Site Plan Permit as if fully set forth herein.

Sec. 102-1129 Noise.

Noise may be equal to but not exceed, during any consecutive eight-hour period, an average of 75 dB(A) (re 20 microneutons/m²) measured at any boundary line. During the peak activity of 60 minutes in a twenty-four-hour period a noise may not exceed 115 dB(A) when measured at the source.

The Board found that Nordic has demonstrated the ability to successfully manage noise levels associated with the operation of the Nordic facility. The Board specifically noted that no regular operations are projected to exceed noise levels identified in the Chapter 102, Zoning, Article IX, Division 2, Environmental Standards that govern noise levels associated with any activities in the Route One South Business Park zoning district. The Board also noted that noise is an activity that is subject to DEP regulation, and that DEP noise regulations generally are stricter than the City noise standards.

The Planning Board conducted a public hearing on this issue at its meeting of October 9, 20129. An issue that was raised at the hearing was the amount of noise associated with project construction. The City typically applies its Noise standard to operational concerns for a project, and not to construction activities. The Board also made note that the City Code of Ordinances, Chapter 34, Noise and Public Conduct Ordinance, identifies that construction activities are generally exempt from the amount of noise generated between the hours of 5:00 am and 10:00 pm. Further, the Noise and Public Conduct Ordinance identifies City 'police powers', and is not a standard that is enforced through the Zoning Ordinance.

The Planning Board, based on issues identified during its review of the Nordic Preliminary Site Plan application, decided to impose Condition of Approval 19, Noise, in the Zoning Use Permit and Final Site Plan Permit. This Condition generally establishes stricter requirements to manage the amount of noise associated with project

construction activities than are allowed pursuant to Chapter 34, City Noise and Public Conduct Ordinance. The Planning Board opted to implement standard DEP noise requirements regarding project construction and project operations. Condition 19 also identifies some exemptions to this standard. The Board Condition also allows certain construction activities that occur wholly within an enclosed building to occur outside these construction windows.

Upstream Watch relies on its discussion of Noise Issues in its appeal of the Final Site Plan Permit as if fully set forth herein.

Sec. 102-1136 Soils.

Soils must be adequate for the intended purpose.

ISSUE #5 THAT IS THE SUBJECT OF THIS APPEAL

The Board noted that Nordic's project involves an extensive amount of soils/earth removal associated with the construction of on-site buildings. The intent is to use soil materials that are more appropriate for the construction of on-site buildings. The Board, recognizing that Nordic is installing soils that can support the intended construction, found that the soils Nordic intends to use will be adequate for their intended purpose.

Upstream Watch relies on its discussion of Soil Suitability in its appeal of the Shoreland Zoning Permit as if fully set forth herein.

Sec. 102-1137. Significant Water Intake and Significant Water Discharge/Outfall Pipes.

The Board found that it issued a specific Significant Water Intake and Significant Water Discharge/Outfall Pipe Permit to Nordic at its meeting of December 22, 2020, and that the Board's Findings on this Permit, and the Conditions of Approval it established that Nordic must satisfy identify, address the requirements of this standard.

The issues identified by Upstream Watch and comments offered in its Appeal of the Significant Water Intake and Significant water Discharge/Outfall permit are incorporated herein.