

SHORELAND ZONING PERMITS

3. OVERVIEW OF CITY SHORELAND ZONING REQUIREMENTS AND NORDIC ACTIVITIES IN THE SHORELAND ZONE.

The portion of the Nordic site located on the northwesterly side of Route One is located in the General Development District of the Shoreland Zone. The General Development District specifically allows land-based aquaculture uses, reference Chapter 82, Shoreland, Article IV, Districts, Section 82-135, Table of Uses, clause (14) Aquaculture, c. Land based. The only uses that Nordic proposes in the General Development District include: converting the current Belfast Water District offices to a Visitor's Center, using the existing parking area and access road to provide parking for the Visitor's Center and public use of the Little River Trail, and the installation of infrastructure associated with the use of surface water from the Little River.

The Ekrote easement area is located in the Limited Residential District of the Shoreland zone. Nordic proposes to install both a significant water discharge pipe and two significant water intake pipes in the Ekrote easement area. The Limited Residential District allows land-based aquaculture uses, reference Chapter 82, Shoreland, Article IV, Districts, Section 82-135, Table of Uses, clause (14) Aquaculture, c. Land based, and significant water intake or discharge/outfall pipes, reference clause (39) identified in the above Table of Uses.

4. CITY REVIEW PROCESS FOR NORDIC SHORELAND PERMIT.

ISSUE #1 THAT IS THE SUBJECT OF THIS APPEAL

The application was incomplete.

The Board, at its meeting of July 15, approved Nordic's Preliminary Site Plan application and adopted Findings of Fact that describe its decision. This action allowed Nordic to submit a Final Site Plan application and also led to the process whereby the Board would review the specific requirements of the other 4 Permits the Nordic project requires from the Planning Board, including the Shoreland Permit.

Nordic's application was not complete and should not have been approved. The application was incomplete in one or more of the following regards:

1. Nordic never disclosed in its application that it would dredge the Intertidal zone Nordic claims belongs to the Eckrotes, as well as the submerged land below the low water line.
2. Nordic never disclosed in its application that it would remove 20 to 50 feet of soil over a 35 acre portion of the subject property and bring in replacement soils with the disruption to the environment and the traffic that project implies.

ISSUE #2 THAT IS THE SUBJECT OF THIS APPEAL

The Board received and relied upon hearsay.

The Planning Board, through-out all stages of its review of the Nordic applications, considered issues associated with standards identified in Chapter 82, Shoreland. The Board, in its deliberations, considered the following: information in the Nordic application, particularly Attachment 6; additional information provided at Planning Board meetings by Nordic and its consultants; public testimony offered by all Par-

ties-in-Interest and by the general public (oral and written comment); information in the DEP Site Location of Development Act/Natural Resources Protection Act and Maine Pollutant Discharge Elimination System Permits that are relevant to City Shoreland requirements; the assessment of the Nordic application provided by Mandy Olver, Olver Associates (City third-party review experts); comments offered by William Kelly, City Attorney, and Wayne Marshall, Project Planner, Code and Planning Department; and comments offered by individual Board members during the public review process.

Upstream Watch repeats its objection to the hearsay testimony of various consultants cited before as if fully explained herein.

5.

6. PLANNING BOARD REVIEW OF SECTION 82-56, STANDARDS FOR REVIEW OF SHORELAND PERMITS.

Section 82-56 stipulates that the Code Enforcement Officer or Planning Board shall review a completed application and shall approve, approve it with conditions, or deny an application based on its findings regarding conformance with the following standards, reference (1) – (12) below. The Planning Board reviewed each of the following standards and made the following overall findings. The Board notes that its Findings regarding Nordic's compliance with the Article V, Land Use Standards, provide additional information regarding its specific Findings regarding compliance with Shoreland requirements. The Board also notes that many of its Findings address Nordic's overall project development, rather than the limited activities that are proposed to occur in the Shoreland Zone.

(1) Will not result in water pollution, erosion, or sedimentation to surface waters.

ISSUE #3 THAT IS THE SUBJECT OF THIS APPEAL

The proposed project will result in water pollution to surface waters.

The Board found that the Nordic project will not result in water pollution, erosion or sedimentation to surface waters. The Board thoroughly reviewed and considered each of the above issues in the information and testimony it considered through-out its review of Nordic's Preliminary and Final Site Plan applications, including the technical review of Nordic's plans offered by Mandy Olver, Olver Associates. The Board specifically noted that Nordic has prepared specific erosion and sedimentation control plans and stormwater management plans for its project, and that the Board has adopted Conditions of Approval that require Nordic to implement preventative measures identified in these plans. Further, the DEP has established similar Conditions in its NRPA/SLODA Permits, and has established discharge limits and accompanying monitoring and reporting requirements as part of the Maine Pollutant Elimination Discharge System (MPDES) Permit granted Nordic for the disposal of effluent to Belfast Bay.

Nordic admits and DEP confirms, Nordic will discharge pollution into Penobscot Bay. The DEP/MPDES standard is not that there will be no pollution discharged into the Bay. It is that the State of Maine will allow the discharge of pollution into the Bay at a level and concentration approved by it. The city standard is different. It says the project will not result in pollution to surface waters. The Nordic application admits that the Nordic project violates that standard, and the Board has no waiver mechanism.

(2) Will adequately provide for the disposal of all wastewater.

ISSUE #4 THAT IS THE SUBJECT OF THIS APPEAL

Nordic did not “adequately provide for the disposal of all wastewater.”

The Board found that Nordic will adequately provide for the disposal of all wastewater. The Board, noting that it has limited authority and no specific standards to manage wastewater discharges to Belfast Bay, particularly those that occur outside of waters within the City’s municipal boundaries, particularly relied on the Findings and Conditions the DEP identified in its Maine Pollutant Discharge Elimination System (MPDES) Permit and Waste Discharge License (issued November 19, 2020) in rendering its Findings. The Board also relied upon the review of the above DEP permit conducted by Mandy Olver, Olver Associates, and information in Nordic’s Site Plan application to the Planning Board and additional information submitted by Nordic at Board meetings, as well as public testimony offered by Parties-in-Interest and the general public. The Board established a specific Condition of Approval in its Site Plan Permit that requires Nordic to comply with the DEP MPDES Permit requirements, and to make information from its monitoring of its wastewater discharges available to the Code and Planning Department for review.

On March 2, 2020, Nordic revealed its plan to dredge a channel in which to place its pipes. The dredge spoils would be hauled by barge to Searsport. The spoils would be dewatered on the barges into Penobscot Bay. That discharge is a release of a substance into the “waters of the United States” and requires an MPDES permit, for which Nordic has not even applied, nor notified Searsport or Belfast. Further, the receiving facility in Searsport is not licensed to receive the waste dredge sludge. Further, the sludge will be hauled to an on-shore disposal site. The on-shore disposal site must issue a permit to dispose the material at the facility and Nordic has not sought such a permit.

7. PLANNING BOARD REVIEW OF ARTICLE V, LAND USE STANDARDS FOR A SHORELAND PERMIT.

The Planning Board is responsible for making a finding regarding project compliance with the Article V, Land Use Standards. The Planning Board made the following specific findings regarding Nordic’s compliance with requirements identified in the Article V, Land Use Standards.

**DIVISION 3. Structures, including Sections 82-201 through 82-206.
Section 82-201. Setbacks, maximum height and lot coverage.**

ISSUE #4 THAT IS THE SUBJECT OF THIS APPEAL

Upstream repeats its Issue and concern regarding the Planning Board’s unlawful waiver of the setback requirements expressed in its appeal of the Zoning Permit as if fully set forth herein.

There is only one above ground structure, the existing Belfast Water District offices that will be converted to a Visitors Center, that is located in a Shoreland Zone; the General Development district. The minimum structure setback requirement for this building is 25 feet from the High Annual Tide. The existing building does not conform to this setback requirement. Thus, this building is a nonconforming structure and any proposed expansion of this structure must comply with the Nonconforming expansion provisions identified in Article III of Chapter 82; reference Planning Board Condition 3 of this Shore-

land Permit.

The Board determined that the Belfast Water District offices are less than 50 feet in height, thus, the offices comply with the height requirements for the General Development district.

The amount of the Nordic property that is in the General Development district is about 2 acres. The maximum lot coverage for the General Development district is 70%, or about 32,000 square feet. The Board determined that the amount of impervious surface located on the portion of the Nordic site that is in the General Development district is considerably less than 32,000 square feet, and that the project complies with this standard.

Nordic also intends to construct significant water intake and discharge pipes within the bounds of the Ekrote easement area. These pipes are located in the Limited Residential district of the Shoreland Zone. The Board, in its decision on a Zoning Use Permit, determined that the pipes constitute a structure. That said, the Board, as part of this same Permit, determined that underground pipes do not need to satisfy minimum front or rear structure setbacks requirements stipulated in Chapter 102, Zoning. In the case of this Shoreland Permit, the Board determined that the underground pipes do not need to satisfy the minimum structure setback of 75 feet from the High Annual Tide (HAT) of Belfast Bay, finding that the pipes are a functionally water dependent use and as such, are exempt from a structure setback requirement. The Board noted that the basic purpose of the Nordic pipes is to convey water from or to Nordic's Water Treatment facility, across Route One, over the Ekrote easement and to Belfast Bay.

DIVISION 14. Natural Resources.
Section 82-431. Protection of Soils.

ISSUE #5 THAT IS THE SUBJECT OF THIS APPEAL
On-site soils are unsuitable for the project.

Nordic's application included a Class B High Intensity Soil Map prepared in accordance with the soil survey standards of the Maine Association for Professional Soil Scientists by Broadwater Environmental, LLC, whose owner is a Certified Soil Scientist in Maine; reference application Attachment 12. Nordic's application also included a full Geotechnical Investigation and Report. The geotechnical report identifies several specific conditions present at the site which cause limitations that the design must address. The most significant concern relates to the discovery of a glaciomarine deposit of silt and clay of varying thickness throughout the site. This layer of material is unsuitable for heavy loadings as will be encountered in the process of constructing on-site buildings, and the material will be removed and replaced with suitable structural fill per the engineers recommendations. Unsuitable soils will be trucked off-site and disposed of at a properly licensed and registered facility. Some native silt and clay soils may be suitable for reuse as common fill on the site, provided the moisture content can be controlled and compaction can be achieved. The report concluded that excavation and replacement of the glaciomarine soils with compacted structural fill, and/or design of the buildings to bear at elevations corresponding to suitable bearing soils are geotechnically feasible alternatives to allow construction of the proposed buildings on conventional spread footing foundation systems; reference application Attachment 13.

The Planning Board found that Nordic's approach to managing construction was an effective way to control erosion and sedimentation. The Board based its findings on its review of the Nordic application materials, its consideration of information presented to the Board by Nordic representatives at the Board meeting of September 4, 2019, the review of the Nordic application by Mandy Olver, Olver Associates

(City Engineer), its review of the DEP SLODA/NRPA Permit Findings and Conditions, its consideration of comment offered by Parties-in-Interest and the general public at the Board's September 4, 2019 public hearing. A particular concern raised at the public hearing were impacts associated with the depth of construction activities and the removal of significant amount of soils. The Board acknowledged this concern, but determined that project construction warranted the removal of existing on-site soils and that Nordic had identified a good quality approach to managing potential soil and erosion control risks. The Board established Conditions of Approval in several City Permits to require Nordic to comply with provisions of its soil and erosion control plan.

Chapter 82, Shoreland Zoning, contains Division 14 entitled Natural Resources. Therein, Section 82-341, Protection of Soils, deals with the suitability of soils.

"All land uses shall be located on soils in or upon which the proposed uses or structures can be established or maintained without causing adverse environmental impacts, including severe erosion, mass soil movement, improper drainage, and water pollution, whether during or after construction. Proposed uses requiring subsurface waste disposal, and commercial or industrial development and other similar intensive land uses, shall require a soils report based on an on-site investigation and be prepared by state-certified professionals. Certified persons may include Maine certified soil scientists, Maine registered professional engineers, Maine state-certified geologists and other persons who have training and experience in the recognition and evaluation of soil properties. The report shall be based upon the analysis of the characteristics of the soil and surrounding land and water areas, maximum groundwater elevation, presence of ledges, drainage conditions, and other pertinent data which the evaluator deems appropriate. The soils report shall include recommendations for a proposed use to counteract soil limitations where they exist."

That means what the plain meaning suggests: that the site selection must be governed by whether or not the existing on-site soils, the natural soils, are suitable for the intended use of the site, (perhaps with minor modification). If, as the Planning Board affirms above, the selected site is unsuitable, the permit must be denied. Of course, the Planning Board is correct: the on-site soils are so unsuitable Nordic wants to excavate them to a depth of 20-50 feet over the entire footprint of the project. If the above language means that if the existing on-site soils are unsuitable, you can just remove them and bring in other soils, why have the requirement? The Section is called Protection of soils. Soils are not protected if they are removed. The only reason for Section 82-341 is to cause a preselection evaluation of the on-site soils to determine if the project can proceed and in that process the soils, in some appropriate manner, can be "Protected".

Section 82-432. Protection of Water Quality.

ISSUE #6 THAT IS THE SUBJECT OF THIS APPEAL

The proposed Nordic discharge of wastewater into Penobscot Bay will degrade the water quality of the Bay or a significant portion thereof from classification SB to a lower classification.

The Planning Board found that the Nordic project will not deposit into the ground or discharge into the waters of the state any pollutant that, by itself or in combination with other activities or substances, will impair designated uses or the water classification of the water body. The Board found that the main risk to water quality is associated with Nordic's discharge of effluent from its wastewater treatment

facility to Belfast Bay via a discharge pipe. The DEP, as well as the ACOE, and not the City, are primarily responsible for the regulation of discharges to off-shore waters. The Planning Board reviewed the MPDES permit issued by the DEP to Nordic for its proposed discharge to the Bay, including information submitted to the DEP and the DEP's Permit Findings and Conditions. Mandy Olver, Olver Associates, review of this information on behalf of the Board and other written comment to the Board during the Board's review of the Nordic Final Site Plan Permit and this Shoreland Permit. The Board, primarily based on the above information, as well as its own deliberations, found that the Nordic project would adequately provide for the protection of water quality.

The DEP staff confirmed that the Nordic discharge would degrade the water quality in Penobscot Bay from Classification SB to a lower classification. Upon DEP revealing that data to Nordic, Nordic representatives called DEP and asked the staff to change the numbers which, shockingly, DEP staff did. But that doesn't alter the reality. The Nordic discharge will lower the water classification in Penobscot Bay. This permit must be denied. See the Krueger/Galesian report in the Planning Board Record and attached.

DIVISION 17. Significant Water Intake or Significant Water Discharge/Outfall Pipe.

ISSUE #7 THAT IS THE SUBJECT OF THIS APPEAL

In its appeal from the award of a Significant Water Intake and Significant Water Discharge/Outfall Pipe, Upstream Watch enumerated several instances of error by the Planning Board regarding the pipes. Those errors invalidate any Division 17 approval.

The Planning Board found that Nordic will be constructing and operating a significant water discharge/outfall pipe in the Limited Residential district of the Shoreland Zone. The pipe is located in an easement granted to Nordic by the Ekrot's and will be located in the adjacent waters of the intertidal zone. The Board determined that a significant water intake/discharge pipe is a permitted use in the Limited Residential district, and requires the issuance of a specific permit from the Belfast Planning Board. The Board found that the Planning Board issued the required Significant Water Intake/Discharge Pipe at its meeting of December 22, 2020, and determined that the Board decision on this Permit constitutes a Finding that Nordic has complied with requirements of Division 17.

The requirements of Division 17 are met only if all Upstream Watch's claims of error are disproved. If not, Division 17 precludes issuance of the Shoreland Zoning Permit.

DECISIONS OF BELFAST PLANNING BOARD

The City of Belfast Planning Board, at its meeting of December 17, 2020, took the following actions on Nordic's Shoreland Permit application:

DECISIONS OF THE PLANNING BOARD THAT ARE ADDRESSED BY AND INCONSISTENT WITH ISSUES RAISED BY UPSTREAM WATCH ABOVE ARE NOT WAIVED OR CONCEDED BUT ARE NOT REPEATED HEREIN.