

**CITY OF BELFAST  
ZONING BOARD OF APPEALS**

UPSTREAM WATCH

Appellant,

v.

CITY OF BELFAST,

Appellee,

and

NORDIC AQUAFARMS, INC.

Applicant.

**NORDIC AQUAFARMS, INC. REPLY  
TO UPSTREAM WATCH APPEAL OF  
SHORELAND ZONING PERMIT**

Nordic Aquafarms, Inc. (“Nordic”) responds to Upstream Watch’s (“Upstream”) appeal to the City of Belfast Zoning Board of Appeals (“ZBA”) claiming that the City of Belfast Planning Board wrongly issued Nordic’s Shoreland Zoning Permit (“Shoreland Permit”). As discussed in detail below, Upstream’s appeal is without merit and the ZBA must uphold the Planning Board’s decision.

**PLANNING BOARD DECISION**

The Planning Board issued all permits for construction of Nordic’s state-of-the-art land-based commercial aquaculture facility in Belfast, Maine on and around property currently owned by the Belfast Water District. Nordic will produce 33,000 metric tons of salmon (roughly 7% of current domestic demand per year), at roughly one-third of the carbon footprint as compared to imported salmon, with all wastewater processed through a state-of-the-art treatment plant, at a facility expected to add 100 or more direct jobs and drive economic development via synergies with businesses, educational institutions and governmental entities (the “Project”). (*See Site Plan*

Permit at 2.) The Planning Board approved the Project to use up to 1,205 gallons per minute of fresh water from three sources and 3,925 gallons per minute of salt water from Penobscot Bay. (Site Plan Permit at 2.)

On June 11, 2019 after over a year of preliminary discussions with the City and submission of a pre-application to the City Code and Planning Department, Nordic submitted a Preliminary Site Plan application and applications for four additional related permits (a Zoning Use Permit, Significant Water Intake and Significant Water Discharge/Outfall Pipes Permit, Shoreland Zoning Permit, and Significant Ground Water Wells Permit). (Site Plan Permit at 4.) Planning Board Project permit review took eighteen months and included 22 public hearing and 23 public meetings. (Site Plan Permit at 7-8). Following Planning Board approval of the Preliminary Site Plan application, the Planning Board held 16 more public meetings over six more months of review before conditionally approving each of the five Project permits on December 17 and December 22, 2020. (Site Plan Permit at 17-18). Upstream engaged in this process every step of the way.

### **JURISDICTION AND STANDARD OF REVIEW**

Local ordinance and state law authorize the ZBA to review appeals of final, written Planning Board decisions. *See* 30-A M.R.S.A. § 2691(4); Belfast, Me. Code (“Ordinance”) § 102-132. The Ordinance mandates that ZBA review is “appellate.” Ordinance § 102-134(f). This means that the ZBA may only review evidence considered by the Planning Board and “determine if the evidence of record compels the [ZBA] to find that all or part of the decision on appeal was arbitrary or capricious and compels a contrary decision based on substantial evidence in the record.” Ordinance § 102-134(f). In other words, the ZBA “*must* affirm the [Planning Board’s] findings of fact if they are supported by *any* competent evidence in the record, even if evidence contrary to the result reached by the agency exists.” *Town of Kittery v. Dineen*, 2017 ME 53, ¶

25, 157 A.3d 788, 794 (emphasis added); accord *Carryl v. Dep't of Corr.*, 2019 ME 114, ¶ 8, 212 A.3d 336, 339. Thus, the party seeking to overturn the Planning Board decision (Upstream) bears the burden of proving that the Planning Board's decision is unsupported by substantial evidence and must be overturned. *Lane Construction Corp. v. Town of Washington*, 2008 ME 45, ¶¶ 13, 21, 942 A.2d 1202 (“the party that sought to overturn the Planning Board's finding . . . bears the burden of showing the Board's initial determination was not supported by substantial evidence in the record.”). For Upstream to prevail in its challenges to the Planning Board findings, it must prove to the ZBA that those findings are not supported by a single shred of competent evidence. As detailed below, Upstream doesn't even attempt to carry this burden and its appeal thus fails.

### **ARGUMENT**

Several of the issues Upstream raises in its appeal of the Shoreland Permit are duplicative of those in its appeal of the Site Plan Permit. While we list each of the issues raised, in the interest of efficiency, Nordic does not repeat its substantive response here. Instead, Nordic provides a cross reference to the location of the substantive response in Nordic's Response to Upstream's Appeal of the Site Plan Permit. For purposes of appeal, Nordic incorporates by reference those substantive responses as if they were repeated in full.

**I. The Hearsay Rule doesn't apply to Planning Board proceedings and, even if it did, it doesn't prohibit reliance on administrative decisions or expert opinions as Upstream claims.**

Please see Nordic's Response to Upstream's Appeal of Nordic's Site Plan Permit, pages 5-7 for a detailed discussion of this issue.

**II. The Planning Board correctly determined that the Ordinance exempts buried Significant Intake and Outfall pipes from setback requirements.**

Please see Nordic's Response to Upstream's Appeal of Nordic's Site Plan Permit, pages 13-14 for a detailed discussion of this issue.

**III. Upstream failed to timely appeal the Planning Board determination that Nordic’s application was complete and the ZBA cannot consider this argument now.**

Upstream opens its Shoreland Permit appeal with an untimely challenge to the Planning Board’s completeness determination. As noted in the Shoreland Permit, Nordic submitted its applications to the Code and Planning Department and Planning Board on June 11, 2019 and the department found the applications complete for Planning Board review. (Shoreland Permit at 3). The Ordinance allows thirty days to challenge a completeness determination. Ordinance § 102-134(a). Upstream’s appeal of the completeness determination comes years too late and cannot be considered.

If the ZBA reviews this Upstream claim even though it is untimely, which it should not, none of the evidence Upstream presents supports the conclusion that the applications were incomplete.<sup>1</sup> All of the issues Upstream raises were specifically discussed: marine sediment removal for installation of the Project piping and excavation of site soils for Project construction are discussed in detail in the Shoreland Permit. (Shoreland Permit at 14-15.) Further, the Planning Board crafted approval conditions specifically addressing these issues. (Site Plan Permit at 25-26, 64-65). Therefore, even if the ZBA considers this argument, it must reject it because the Planning Board’s decision is supported by substantial evidence.

**IV. The Planning Board determination that the Project would not result in pollution to surface waters is supported by competent evidence.**

The Planning Board found that the Project “will not result in water pollution, erosion or sedimentation to surface waters.” (Shoreland Permit at 8). To carry its burden of proof and prevail on appeal, Upstream must demonstrate that the Planning Board did not rely on a single

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<sup>1</sup> Upstream asserts that Nordic failed to disclose certain soil and marine sediment removal. (Upstream Appeal of Shoreland Permit at 1). While these assertions are false, to the extent Upstream seeks to end run around the prohibition on new evidence, Nordic reiterates and incorporates by reference herein its Motion to Strike New Evidence dated February 12, 2021.

shred of competent evidence in the record to support this finding. *Town of Kittery*, 2017 ME 53, ¶ 25, 157 A.3d 788; *Lane Construction Corp.*, 2008 ME 45, ¶¶ 13, 21, 942 A.2d 1202. The Shoreland Permit references Nordic’s erosion and sedimentation control and stormwater management submissions as well as Planning Board commissioned expert peer review of those submissions by Olver Associates. (Shoreland Permit at 5, 6, 8).<sup>2</sup> This is competent evidence. Planning Board reliance on competent evidence in making a finding of fact means that the ZBA cannot overturn that finding and must reject Upstream’s appeal.

**V. The Planning Board determination that Nordic adequately provided for disposal of all wastewater is supported by competent evidence.**

The Planning Board found that Nordic “will adequately provide for the disposal of all wastewater.” (Shoreland Permit at 8; Site Plan Permit at 20-21, 24, 28-29, 56-57). Upstream again fails to demonstrate that the Planning Board didn’t rely on competent evidence in making this finding. *Town of Kittery*, 2017 ME 53, ¶ 25, 157 A.3d 788; *Lane Construction Corp.*, 2008 ME 45, ¶¶ 13, 21, 942 A.2d 1202. In addition to its well supported factual finding, the Planning Board also mandated that, as a condition to the Shoreland Permit, Nordic must comply with all requirements of DEP’s Maine Pollutant Elimination Discharge System (“MPDES”) Permit and Waste Discharge License which regulate Nordic’s treated wastewater discharge to Penobscot Bay. Because this Planning Board finding is supported by competent record evidence, the ZBA cannot overturn it.

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<sup>2</sup> Ordinance § 82-5 notes that “[the Shoreland ordinance] chapter applies to all land areas depicted on the City official shoreland zoning map that are within 250 feet, horizontal distance, of the normal high-water line of any great pond, river or salt-water body; within 250 feet, horizontal distance, of the upland edge of a coastal or freshwater wetland; and within 75 feet, horizontal distance, of the normal high-water line of a stream.” Areas outside of this area therefore fall outside of the scope of the Planning Board’s review. As the Planning Board noted, the City “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.” Shoreland Permit at 8. Such concerns are properly the subject of state and federal permitting.

**VI. The Planning Board determination that the planned construction and Soil and Erosion Control Plan complies with the terms of Ordinance § 82-431 is supported by competent evidence.**

In construing the requirements of Ordinance § 82-431, which requires among other things that “[a]ll land uses shall be located on soils or upon which the proposed uses or structures can be established or maintained without causing adverse environmental impacts . . . whether during or after construction[,]” the Planning Board found that “Nordic’s approach to managing construction was an effective way to control erosion and sedimentation.” (Shoreland Permit at 23.) The Planning Board decision considered the concerns raised by members of the public that significant amounts of soils may need to be removed, but relied on the competent assessment of DEP and its own independent consultant in concluding that Nordic’s soil and erosion control plan effectively prevents adverse environmental impacts. (Shoreland Permit at 23.) Compliance with the soil and erosion control plan is required as a condition of Site Plan approval. (Site Plan Permit at 64.) The record reflects that the Planning Board relied upon competent evidence in making its finding. Therefore the ZBA cannot overturn that finding.

**VII. Neither the Planning Board nor ZBA can do as Upstream asks and assume DEP’s jurisdiction and determine whether the Project impacts Penobscot Bay’s water quality classification. The Planning Board properly relied on DEP Water Quality Permits as competent evidence supporting its water quality findings of Ordinance compliance.**

Upstream again asks for what the ZBA cannot do- assume the jurisdiction of a state agency and second guess its judgment. Upstream appealed the DEP Project permits to court and only that court can decide whether DEP did its job. Specifically, Upstream challenges the Planning Board’s determination that the Project will not impair the water classification of Penobscot Bay by arguing that the DEP wrongly determined that the Project would not impair the SB water quality classification of the Bay. (Upstream Appeal of Shoreland Permit at 6.) The Planning Board can properly rely on permits issued by the DEP regarding state water quality

standards as competent evidence- even if DEP did get it wrong. Thus, Upstream’s claim is without merit and the ZBA must uphold this Planning Board finding.

**VIII. Upstream bears the burden of proof on appeal- not the Planning Board.**

Upstream closes with the assumption that the ZBA must overturn all of the Planning Board decisions because the applicable Ordinance standards “are met only if all of Upstream Watch’s claims of error are disproved.” (Upstream Appeal of Shoreland Permit at 6.) This represents a fundamental misunderstanding of Upstream’s job before the ZBA. As discussed in replying to each of Upstream’s permit appeals, the ZBA must uphold the Planning Board permits unless Upstream proves to the ZBA that there is not a shred of evidence supporting what the Planning Board did. Ordinance § 102-134(f). This distinction is significant because it means that even if the ZBA were to find that one of Upstream’s claims is correct, the ZBA cannot disturb the Planning Board’s finding unless the ZBA also determines that the Planning Board decision didn’t have any evidentiary support whatsoever. This is, by design, a very high bar—because it is ultimately the role of the Planning Board, not the ZBA, to act as the factfinder in this case.

**CONCLUSION**

Upstream’s appeal, while lengthy, and comprised of numerous overlapping, poorly argued points, does not even claim that any portion of the Shoreland Permit is unsupported by competent record evidence. Thus, Upstream fails to carry its burden and its appeal fails.

Dated: February 22, 2021

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