

**CITY OF BELFAST
ZONING BOARD OF APPEALS**

UPSTREAM WATCH

Appellant,

v.

CITY OF BELFAST,

Appellee,

and

NORDIC AQUAFARMS, INC.

Applicant.

**NORDIC AQUAFARMS, INC.’S REPLY
TO UPSTREAM WATCH APPEAL OF
SIGNIFICANT GROUND WATER
WELLS PERMIT**

Nordic Aquafarms, Inc. (“Nordic”) responds to Upstream Watch’s (“Upstream”) appeal before the City of Belfast Zoning Board of Appeals (“ZBA”) of Nordic’s Significant Ground Water Wells Permit (“Groundwater Permit”) from the City of Belfast (“the City”) Planning Board (“Planning Board”). As discussed in detail below, Upstream’s appeal is without merit and the ZBA must uphold the Planning Board 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 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 4). The Planning Board began its review of the Project on June 26, 2019, and proceeded to conduct 22 public hearing and 23 public meetings regarding the Project. (Site Plan Permit at 7-8). Following the Planning Board’s approval of the Preliminary Site Plan application on July 15, 2020 the Planning Board conducted 16 more public meetings over six more months of review of the Project before approving each of the five permits with conditions 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”). Therefore, 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 Upstream’s claims in appealing the Groundwater Permit duplicate claims made in its appeals of Nordic’s Site Plan Permit or Shoreland Permit. Each of those arguments is listed below with a cross-reference that incorporates by reference, but does not repeat verbatim, Nordic’s substantive response as set forth in Nordic’s response to Upstream’s appeals of the Site Plan and Shoreland Permits. The remaining issues are discussed in detail below.

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 opinion as Upstream claims.

Please see Nordic’s Response to Upstream’s Site Plan Permit Appeal at pages 5-6 for a detailed discussion of this issue.

II. Upstream failed to timely challenge the Planning Board’s completeness determination thus the ZBA cannot consider this argument.

Please see Nordic's Response to Upstream's Appeal of Nordic's Shoreland Permit, page 4 for a detailed discussion of this issue.

III. The Planning Board finding that Nordic's application included a hydrogeologic report is supported by competent evidence.

The Ordinance requires that an applicant for a groundwater permit include: "a hydrogeologic investigation report stamped by a Maine certified professional geologist or Maine registered professional engineer" that includes: (1) a map "of the entire topographic drainage basin associated with the water extraction well(s);" (2) "a map that identifies the location of all public and private wells located within 1,000 feet of the proposed extraction wells;" and (3) "an assessment of how the short-term and long-term rate and amount of groundwater extraction are estimated to impact local and regional groundwater levels." Ordinance § 102-1077(c). The Planning Board referenced Nordic's hydrogeological report and the City's expert peer review of Nordic's report in support of its conclusion that Nordic met this standard. (Groundwater Permit at 5-6). This is competent evidence. Thus, ZBA review of the Planning Board's work could stop here.

Proceeding to Upstream's argument on appeal, Upstream does not argue, as it must to prevail, that Nordic failed to submit a hydrogeological report or that Nordic's hydrogeological report did not include the Ordinance required information. Instead, Upstream argues that the Planning Board decision is wrong because Upstream's experts came to different conclusions than Nordic's and the Planning Board's. (Upstream Appeal of Groundwater Permit at 2). This is not the Ordinance standard, as noted above. And, even if it were, as also discussed herein, Maine law prohibits the ZBA from substituting its judgment for that of the Planning Board. Thus, even if the ZBA were inclined to agree with Upstream's experts instead of Nordic's and the Planning

Board's, it can't do so. *See Seider v. Board of Examiners of Psychologists*, 2000 ME 118, ¶ 29, 754 A.2d 986 (reviewing body will “not substitute our judgment for that of an administrative board and we affirm findings of fact if they are supported by substantial evidence in the record”).

IV. The Planning Board determination that surrounding properties would not be unreasonably impacted by Nordic's use of groundwater is supported by competent evidence.

Upstream challenges three Planning Board findings regarding Nordic compliance with the performance standards established in Ordinance § 102-1079. (Upstream Appeal of Groundwater Permit at 2-4). Each of Upstream's three arguments boil down to its belief that the Planning Board didn't rely on the evidence Upstream wanted it to- not that the Planning Board didn't rely on competent evidence. In fact, the Planning Board cites competent evidence for each of its findings. As such, Upstream fails to meet its burden of proof and ZBA review could stop there.

First, Upstream argues that it wasn't enough for the Planning Board to find that the Project would not cause “unreasonable impacts to ground water flow patterns” or “substantially lower the water table beyond the [applicant's] property lines” by implementing Groundwater Permit conditions that require Nordic to rigorously monitor and report ground water levels and take specific measures to remediate any adverse impacts on neighboring wells by reducing its withdrawal rate and specifying that if that does not fix the problem then Nordic must drill the impacted party a new well, installation a water treatment system, and/or connect them to public water. (Upstream Appeal of Groundwater Permit at 3). Upstream argues that “[t]he requirement is not that the applicant address the damage to nearby homeowners' wells.” (Upstream Appeal of Groundwater Permit at 3.) Instead, Upstream claims that these standards mean that the Planning Board must find that the Project would have no impact at all. The plain language of the

Ordinance standards prohibits impacts that are “substantial” or “unreasonable.” Ordinance § 102-1079. Put simply, Upstream disagrees with the Planning Board’s interpretation of the plain language of the Ordinance but provides no citations of law supporting its conclusion that “no unreasonable” doesn’t mean what it says and instead means absolutely no impacts at all. The language of the ordinance is plain, and the Planning Board carefully weighed Project impacts and found that the impacts were not unreasonable or substantial based on competent evidence, which is precisely what the Ordinance requires.

Next, Upstream argues that the Planning Board erred in determining that there was minimal risk of saltwater intrusion that would affect groundwater in surrounding properties arising from the project. (Upstream Appeal of Groundwater Permit at 3). The Planning Board noted first that Nordic’s expert hydrogeologic assessment (which the Planning Board’s expert peer reviewed) established that the Project could operate at its anticipated rate of groundwater uptake without causing unreasonable adverse impacts to surrounding areas, including saltwater intrusion. (Groundwater Permit at 6). The Planning Board further found that the only area identified for which saltwater intrusion was even a potential concern was in “a limited area near Route 1” that contains no properties that utilize groundwater wells. (Groundwater Permit at 7). This Planning Board determination is supported by competent evidence.

Last, Upstream argues that Nordic failed to demonstrate that it will not cause “unreasonable adverse diminution in water quality or quantity of the aquifer or surrounding surface/ground water.” (Upstream Appeal of Groundwater Permit at 4). The Planning Board relied on Nordic’s expert hydrogeologist, as peer reviewed by the Planning Board expert, with regard to specific choices as to where and how to site its wells in finding that the Project met this Ordinance standard. The Planning Board further implemented conditions of approval requiring

that Nordic continually monitor, report and remediate any adverse impacts to groundwater so that the Project will not “adversely affect the quality or quantity of groundwater in the area or any public or private water source.” (Groundwater Permit at 7). The Planning Board determination on this point is therefore founded on competent evidence and cannot be overturned.

CONCLUSION

Upstream’s appeal, while lengthy, and comprised of numerous overlapping, poorly argued points, does not even claim that any portion of the Groundwater 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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