

**STATE OF MAINE
WALDO, ss.**

**CITY OF BELFAST
ZONING BOARD OF APPEALS**

UPSTREAM WATCH,)	
)	
Appellant,)	
)	APPELLANT UPSTREAM WATCH'S
v.)	BRIEF ON RTI AND PREHEARING
)	SUMMARY/STATEMENT ON KEY
CITY OF BELFAST PLANNING)	ISSUES/ARGUMENTS
BOARD ,)	
)	
Respondent,)	
)	
and)	
)	
NORDIC AQUAFARMS, INC.,)	
)	
Permittee / Party-In-Interest.)	

I. INTRODUCTION

Pursuant to the December 14, 2023 Procedural Order, Appellant Upstream Watch (“Upstream”) submits this brief: (a) addressing Nordic Aquafarms, Inc’s. (“Nordic”) lack of right, title and interest (“RTI”) with a recommended course of action, and (b) stating its summary statement on the key issues/arguments in the appeals from the five Planning Board issued permits on December 22, 2020. For the reasons stated below, this Board should reverse the Planning Board’s decisions with instructions that the Planning Board vacate Nordic’s permits and that Nordic’s applications be returned to Nordic due to Nordic’s undisputable lack of RTI to the property that it proposes to develop. To the extent this Board goes further, and reviews each of the substantive decisions on the five permits that the Planning Board issued, this Board must reverse those decisions as well due to errors of law, findings unsupported by the record, and abuse of discretion.

II. STANDARD OF REVIEW

This Board has “the power to hear and decide administrative appeals where it is alleged that there is an error in any order, requirement, decision, or determination made by, or failure to act by, the ... Planning Board in the enforcement or administration” of Chapter 90. Ordinance, c. 90, Sec. 90-14. This Board hears an appeal from a Planning Board decision on an appellate basis. As described in Chapter 102-134(f):

Standard of review on appeal. In all administrative appeals, except appeals from actions of the code enforcement officer, the Zoning Board of Appeals shall act as an appellate Board which shall entertain all evidence of record submitted in the underlying hearing, including any transcripts, findings of facts, and decisions made by the [Planning] board of original fact-finding jurisdiction. The Zoning Board of Appeals shall review the entire record and determine if the evidence of record compels the Zoning Board of Appeals 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. In such administrative appeals, the Zoning Board of Appeals is hereby authorized to take the following action:

1. Approve the decision below.
2. Reverse in part or in total the decision from below.
3. Remand to the fact-finding board of original jurisdiction for further proceedings necessary to either:
 - a. Complete the record in the event that the board finds it unable to render a decision due to the absence of critically important factual information; or
 - b. Remand for further proceedings consistent with the order of the Zoning Board of Appeals.

Ordinance, c. 102, Sec. 102-134(f) (emphasis in original).

III. GIVEN IT IS UNDISPUTED THAT NORDIC LACKS RTI, THE PLANNING BOARD’S DECEMBER 22, 2020 DECISIONS SHOULD BE REVERSED

The decision in *Mabee v. Nordic Aquafarms, Inc.*, 2023 ME 15, 290 A.3d 79 (“*Mabee*”) demonstrates without any doubt that Nordic never had the RTI necessary to seek approval of the five land use permits issued to Nordic by the Planning Board (“PB”). (A copy of the *Mabee* decision is attached hereto as **Exhibit 1.**) Given Nordic’s undisputed lack of RTI, this Board

should reverse the PB’s decision and remand this matter to the PB with instructions that the PB vacate all five permits.

A. The RTI Record before the PB

The Ordinance Section 102(102) requires “a written statement by the applicant that shall include the following: (a) Evidence by the applicant of his title and interest in the land for which the application is made.” Part of Nordic’s development proposal was dependent on Nordic discharging water into Penobscot Bay through a pipe that Nordic would place across land (including tidal land) claimed to be owned by others (“Eckrote Property”). To show control of this land, Nordic asserted in its applications that it held an option to acquire an easement over the Eckrote Property. *See* City of Belfast, Permit Application, Vol. 1 (Oct. 19, 2019, Nordic Application) at Attachment 5. There is no dispute that without this easement, Nordic could not proceed with its development.

On July 25, 2019, Upstream submitted to the PB a memorandum with supporting documents showing that Nordic’s presented option to acquire an easement over the Eckrote Property was a sham—because the Eckrotes did not own the land.¹ (Upstream Mem. Regarding Nordic Aquafarms, Inc.’s Lack of Right, Interest and Title (July 25, 2019) & Exs. A, B, C, D, E & F thereto.) Among other information included with Upstream’s memorandum was the fact that Nordic’s own surveyor said the same thing.

¹ In addition to the Upstream July 25, 2019, submittal, by letter dated June 25, 2019, Attorney Tucker submitted to the PB a detailed analysis showing: (i) the Eckrotes did not own the intertidal land abutting the Eckrotes’ upland and Nordic had no rights based on their easement agreement with the Eckrotes to use the intertidal land for installing Nordic’s pipes, (ii) the surveying analysis by surveyor Donald Richards showing that the intertidal land was owned by Mabee-Grace and was subject to a conservation easement granted by Mabee-Grace to Upstream Watch, (iii) the Eckrotes’ upland was subject to a “residential use” only restriction that prohibited Nordic from laying its pipes on the upland, and (iv) a copy of a survey by Gusta Ronson of Good Deeds—who was the Eckrotes’ surveyor at the time the land was conveyed into them—which showed that the Eckrotes did not own the intertidal land. Accordingly, the PB erred when it granted the five permits as it had before it evidence from two surveyors agreeing that the Eckrotes did not own the intertidal land. *See* Upstream Mem. (July 25, 2019) & Exs. C, D, E.

Upstream and others also alerted the PB that Nordic's proposed placement of pipes in the mud flats was prohibited by a conservation easement of record² and that Nordic's proposed use of the Eckrote Property violated a restrictive covenant that ran with the land limiting uses thereon to just residential. On April 29, 2019, Jeffrey Mabee and Judith Grace ("Mabee-Grace") granted a conservation easement to Upstream Watch which prohibited Nordic from installing its intake and discharge pipes within the intertidal land owned by Mabee-Grace. On June 25, 2019, Attorney Kim Tucker and, on July 25, 2019, Upstream both submitted to the PB a copy of the conservation easement recorded in the Waldo County Registry of Deeds at Book 4367, Page 273, and each told the PB that Nordic's proposed use of the intertidal land violates the express provisions of the conservation easement that were placed on that land. The conservation easement defeated any argument that Nordic had the RTI necessary to proceed with its proposed project, as Nordic could not operate its plant without access to Penobscot Bay for the discharge of its wastes.

Upstream intended to present and review at the PB's August 5, 2019, meeting its July 25, 2019 memorandum and its additional TRI submission made by it on July 29, 2019, through Maine Land Surveyor Donald Richards. But the PB refused to hear Mr. Richards, refused to hear Upstream, refused to examine the validity and scope of Nordic's alleged easement rights on and over the Eckrote Property and adjacent intertidal land, and refused to hold in abeyance the proceedings until the issues then pending in court were resolved. *See* PB Record, Tab: 2 PP, ##5, 7, 17-20 & 31 (Adopted Minutes of Aug. 5 & 19, 2019³; *see also* Kim Irvin Tucker Comment

² A copy of the conservation easement granted to Upstream Watch is attached hereto as **Exhibit 2**.

³ *See also* video recordings of five meetings held August 5 & 12, 2020; October 21 & 28, 2020; and November 19, 2020, for which there are no adopted written minutes available. *See* PB Record, Tab: 22 FP, Table of Contents, Adopted Written Planning Board Meeting Minutes-Final Plan.

(June 25, 2019) and Request To Dismiss/Stay (July 14, 2020)(reviewed by PB (Aug. 12, 2020); PB Record, Tab: 3 PP-PB Mtg Video Record-Preliminary Plan, August 5, 2019 PB Mtg Videos, video recording of August 5, 2019 – 4 Nordic Permit.mp4; PB Record, Tab: 22 FP, Table of Contents, Folder 23 FP, PB Meeting Video Recording – Final Plan, video recording of August 12, 2020).

The PB's stated reason for refusing to consider the material presented was the pendency of a quiet title action⁴ regarding title to the Eckrote Property and adjacent intertidal land on which Nordic's easement rights, the conservation easement and the restrictive covenant were all irrelevant, all the PB had to see was the sham document Nordic submitted claiming an option of an easement over the Eckrote Property. *See* PB Record, Tab: 2 PP, #5 (Adopted Minutes of Aug. 5, 2019) at 6-7 (finding that Nordic submitted sufficient evidence of RTI to the land for which they have submitted an application ("Motion adopted 4-1")); PB Record, Tab: 3 PP-PB Mtg Video Record-Preliminary Plan, August 5, 2019 PB Mtg Videos, video recording of August 5, 2019 – 4 Nordic Permit.mp4).

The PB erred as a matter of law in not staying the proceedings and abused its discretion in not hearing and considering Upstream's documentation and witnesses that showed the option was a sham, and of the restrictions imposed by the conservation easement and restrictive covenant. In *Tomasino v. Town of Casco*, 2020 ME 96, 237 A.3d 175, the Law Court held that when an applicant's claimed RTI is the subject of a dispute as to whether the claim is valid, the local board should not act on the application until a "court with jurisdiction to do so" resolves the

⁴ The quiet title action is the means to determine in court the validity of Nordic's alleged easement rights on and over the Eckrote Property and adjacent intertidal land of the conservation easement and of the restrictive covenant. The PB was well aware that such an action was pending, said action having been filed on July 15, 2019.

dispute. The court stated that a local board should not proceed until it is established that the applicant actually has been granted sufficient right (control) to use the land as proposed. *Id.* ¶ 15.

In 2020, the PB was advised of *Tomasino* and was well aware of the pendency of the quiet title action. *See* PB Record, Tab: 2 PP, ##5, 7, 17-20 & 31 (Adopted Minutes of Aug. 5 & 19, 2019; Dec. 18, 2019; Jan. 8, 15 & 22, 2020; July 8, 2020)⁵; *see also* PB Record, Tab 22 FP, Adopted Minutes ##35-38 & ## 41 through 48 (Sept. 30, 2020; Oct. 7, 8 & 14, 2020; Nov. 4, 12, & 19, 2020; Dec. 3, 9, 16, 17 & 22, 2020); *see also* Kim Irvin Tucker Comment (June 25, 2019) and Request To Dismiss/Stay (July 14, 2020)(reviewed by PB (Aug. 12, 2020). The PB erred as a matter of law by not stopping all work on the application until the *Mabee* case was resolved. Thousands and thousands of taxpayer money would have been not paid to City lawyers had the PB followed what the Law Court instructed local boards to do when a dispute exists.

In *Mabee*, the Law Court pulled the rug out from Nordic's sham option to obtain an easement. Decided on February 16, 2023, the Law Court decision stated that the Eckrotes never owned any intertidal land between the Eckrotes' upland and Penobscot Bay. *Mabee*, 2023 ME 15, ¶¶ 10, 29-45, 60, 290 A.3d 79. Because the Eckrotes did not own any intertidal land, they could not grant Nordic any right to install its industrial pipes through the intertidal land between the Eckrotes' upland and into Penobscot Bay. The Law Court also ruled that the conservation easement granted to Upstream Watch by Mabee-Grace was valid and encumbered the intertidal land. Finally, the Law Court stated that the Eckrotes' upland is burdened by a valid restrictive covenant prohibiting non-residential use. *Id.* ¶¶ 53, 56-58, 290 A.3d 79. That restriction precludes installation of industrial pipes. Because of that restriction, Nordic as a matter of law

⁵ Twenty-one meeting minutes of PB for meetings held Aug. 14 & 26, 2019; Sept. 4, 8 & 23, 2019; Oct. 9 & 16, 2019; Nov. 6 & 20, 2019; Dec. 4, 2019; Jan. 29, 2020; Feb. 5, 26 & 27, 2020; May 6, 7, 13, 14 & 27, 2020; June 17, 2020; and July 15, 2020. *See* PB Record, Tab: 2 PP, Table of Contents at p. 2.

could not install its industrial pipes through the Eckrotes' land from Route 1 to the high-water mark of the Penobscot Bay.

In other words, everything that Upstream and others told the PB regarding Nordic's lack of RTI was 100% correct. Any one of these *Mabee* findings **as a matter of law** showed Nordic did not have, and never had, RTI to pursue the development it proposed. Now this Board has no choice but to reverse the approvals and remand with instructions to the PB for it to vacate the permits and return to Nordic all five of Nordic's applications.⁶

The PB also abused its discretion when it denied Upstream, a party to the proceedings, and others, an opportunity to be heard on this issue. At its July 11, 2019, meeting the PB considered the process to be used for evaluating Nordic's application. *See* PB Record, Tab: 2 PP, #3 (Adopted Minutes of July 11, 2019) at 3-4; *see also* First Procedural Order (July 15, 2019). City Planner Wayne Marshall and City Attorney William Kelly stated that it was anticipated that all parties would have an opportunity to present their case to the PB. *See* PB Record, Tab: 2 PP, #5 (Adopted Minutes of Aug. 5, 2019) at 6-7. They then explicitly recommended to the PB an exception to this rule on the issue of RTI. *Id.* On RTI, Mr. Marshall stated that, "it is generally our intent not to have a hearing on title, right or interest." *See* PB Record, Tab: 2 PP, Table of Contents (in the electronic submission provided to the Court. Folder 3 PP, PB Meeting Video Recording – Preliminary Plan, video recording of July 11, 2019 PB at 2:12:00 – 2:12:50). The PB accepted the recommendation and wrongfully refused to hear evidence on the validity of the

⁶ On June 26, 2019, Nordic made a supplemental filing in which Nordic made the strange argument that, even if the Eckrotes did not own the intertidal land and therefore could not grant Nordic an easement, Nordic has RTI from so-called "Heirs of Harriet Hartley." Just by making this argument, the PB should have realized it needed to wait until the court resolved these title issues. The Law Court's *Mabee* decision rejected any notice that Harriet Hartley (who had conveyed her land in the 1940s) had retained any intertidal land after she sold off her upland. *Mabee*, 2023 ME 15, 290 A.3d 79. Nordic entirely ignored evidence in the record that the Eckrotes' upland was subject to a residential use only restriction.

easement, including hearing from surveyor Donald Richards. *See* PB Record, Tab: 2 PP, #5 (Adopted Minutes of Aug. 5, 2019) at 6.

Given that RTI is a standing requirement for an applicant, the PB's denial of interested parties' opportunity to be heard was a due process violation. "A party before an administrative board is entitled to a fair and unbiased hearing under the Due Process Clauses of the United States and Maine Constitution." *Land Construct. Corp. v. Town of Washington*, 2008 ME 45, ¶ 29, 942 A.2d 1202. Basic fairness requires an opportunity to be heard. *Mutton Hill Estates, Inc. v. Town of Oakland*, 468 A.2d 989, 992 (Me. 1983). By denying Upstream and others the ability to present evidence to the PB on whether Nordic through the easement could in fact use the Eckrote Property in the manner for which approval was sought, whether the conservation easement barred the laying of the pipes in the mud flats and whether the residential use restriction barred Nordic's industrial development, the PB violated basic fairness.

We all now know that Nordic had no easement rights whatsoever on and over the Eckrote Property and adjacent intertidal land. Had the PB waited as it should have, the PB would have had no choice but to return to Nordic all of its applications on the basis that Nordic did not have RTI in all of the property needed for its approvals.⁷ The PB erred in not hearing the evidence.

In summary, Nordic proposed: (i) to place its discharge and intake pipes and pump stations for an industrial purpose on the Eckrotes' upland which was restricted to residential only uses, (ii) to install its discharge and intake pipes on intertidal land owned by Mabee-Grace who

⁷ By letter dated July 23, 2019, Mabee-Grace's attorney, Kim Tucker, requested that the PB stay the proceedings because a lawsuit was pending in the Waldo County Superior Court which would prove that Mabee-Grace owned the intertidal land, and the intertidal land was encumbered by a conservation easement which prohibited Nordic from laying pipes in the intertidal land. *See* PB Record, letter "EMERGENCY Objection to August 5 TRI Process and Request for Amendment of Process for August 5 TRI 'Hearing' to Include Oral Presentation, including Expert Testimony" dated July 23, 2019, to Richard (Declan) O'Connor, Acting Chair, David Bond, Member, Wayne Corey, Member, Kimberly "Daisy" Beal, Assoc. Member, Geoffrey Gilchrest, Member, Hubert Townsend, Alt. Member[], Belfast Planning Board from Kim Ervin Tucker, Esq. at 2.

objected to the use of their land, and (iii) to violate a conservation easement on the intertidal land by installing the pipes in an area protected from industrial activities.

The PB did not allow a public hearing on the issue of RTI. At its August 5, 2019, hearing, the PB heard testimony on RTI only from City Attorney William Kelly and City Planner Wayne Marshall. On that same day, the PB voted 4-1 as follows: Motion made by Wayne Corey, second by David Bond to make a finding that Nordic Aquafarms has submitted sufficient evidence of RTI to the land for which they have submitted an application. *See* PB Record, Tab: 2 PP, #5 (Adopted Minutes of Aug. 5, 2019) at 6-7 (finding that Nordic submitted sufficient evidence of RTI to the land for which they have submitted an application (“Motion adopted 4-1”)); PB Record, Tab: 3 PP-PB Mtg Video Record-Preliminary Plan, August 5, 2019 PB Mtg Videos, video recording of August 5, 2019 – 4 Nordic Permit.mp4.

B. The Law Court’s Decision finding that Nordic Lacks RTI Demonstrates that the PB’s Finding on RTI was Clear Error

This case is presently before this Board on remand from the Superior Court to which the case was remanded by the Maine Supreme Court sitting as the Law Court.⁸ The issue on remand is, in the words of the Law Court, “consideration on the merits of Upstream’s appeal from the Planning Board decision,” and the Superior Court remand, in accordance with the Law Court remand, to “consider the merits of Upstream’s appeal from the Planning Board decision, consistent with the attached Opinion of the Law Court.” *See* 2023 ME 43, ¶ 28, 299 A.3d 25; *see also* Order Of Remand, No. AP-2021-03 (Me. Super. Ct., Waldo Cnty., Aug. 30, 2023).

⁸ *Upstream Watch v. City of Belfast*, 2023 ME 43, 299 A.3d 25 (“*Upstream Remand Decision*”); *Upstream Watch v. City of Belfast*, No. AP-2021-03, Order Of Remand (Me. Super. Ct., Waldo Cnty., Aug. 30, 2023).

By requiring this Board to consider the merits of Upstream’s appeal consistent with the Opinion of the Law Court in *Mabee*, the Superior Court called attention to the first two footnotes in the *Upstream Remand Decision*. Footnote 1 in the *Upstream Remand Decision* provides:

We note that although this case is closely related to our recent decision in *Mabee v. Nordic Aquafarms, Inc.*, 2023 ME 15, 290 A.3d 79, the permits at issue here are distinct from those at issue in *Mabee*. While our decision in *Mabee* may have an effect on the ultimate viability of the permits at issue here, our ruling today relates only to a threshold standing issue. We remand the matter to the ZBA to address the merits of the permits, *and we leave it to the ZBA to address the impact of our decision in Mabee*.

2023 ME 43, ¶ 1 n.1, 299 A.3d 25 (emphasis added).

At footnote 2, the Law Court further noted that: “We adjudicated the issues surrounding the conservation easement and the ownership of the intertidal lands in *Mabee*, 2023 ME 15, 290 A.3d 79.” *Id.* ¶ 4 n.2. By directing this Board to address the impact of *Mabee*, and by reminding everyone that the Law Court decided certain key issues regarding the conservation easement, restrictive easement, and ownership of the intertidal land in *Mabee*, the Superior Court has directed this Board to address the impact of *Mabee* on the Planning Board permits. This does not require the taking of new evidence but simply calls for this Board to take into account the decisions and apply the law stated therein to decide whether the permits should have issued given the Law Court’s decision in *Mabee*. There is no doubt that the answer is no.

Nordic was required to demonstrate RTI in all the land necessary to accomplish the goals for which the permits were sought. As its proof of RTI, Nordic claimed passage through the Eckrotes’ upland by grant of an easement from Eckrotes, access to the ocean via the intertidal lands between the Eckrotes’ upland and Penobscot Bay—which Nordic falsely claimed the Eckrotes owned—and that Nordic could ignore both the conservation easement created by *Mabee-Grace* and the residential use only restriction contained in the Eckrotes’ chain of title.

All elements of Nordic's claim of RTI were eliminated by the Law Court in *Mabee*. If the PB had known that Nordic's easement agreement with the Eckrotes conveyed no rights, the Eckrotes' upland is subject to a "residential use only" restriction, and the conservation easement prohibits Nordic from laying its pipes, then the PB would have been compelled as a matter of law to deny Nordic's permit applications of its proposed project based on Nordic's lack of RTI. Likewise, this Board is now compelled by the *Mabee* decision to hold that the PB's decision to approve and issue the five permits must be reversed and vacated because Nordic lacked and still lacks the necessary RTI to obtain them.

C. Nordic Failed to Submit Competent Evidence of RTI

A showing of RTI is required by Section 7.4 of the Belfast Final Site Plan Permit Application. At the time that the PB made its finding on RTI, there was no competent evidence in the record showing that Nordic had any right to use the intertidal land for its discharge pipes. The survey evidence by Donald Richards (*see* Upstream's July 29, 2019, submission) showed conclusively that the Eckrotes did not own the intertidal land. The Good Deeds survey performed by Gusta Ronson for the Eckrotes showed that the Eckrotes did not own the intertidal land. The Eckrotes did not represent nor warrant in the easement purchase agreement that the Eckrotes owned the intertidal land. Nordic did not in any way address the argument by Mabee-Grace's attorney that the Eckrotes' upland was subject to a deed restriction that prohibited non-residential activities on the Eckrotes' upland. Nordic did not rebut in any manner the arguments by Upstream and Mabee-Grace that the intertidal land was subject to a conservation easement that prohibited Nordic from using the intertidal land for industrial purposes. Nordic failed in all respects to demonstrate RTI.

D. Nordic is Required to Maintain RTI Throughout all Phases of these Administrative Proceedings

Maine law requires that Nordic maintain RTI throughout the appeal period that followed the issuance of the Nordic permits. The application processing period does not end when the permit is approved, and an appeal is filed. In *Madore v. Maine Land Use Regulation Com'n*, the Law Court, discussing the justiciability of a proceeding, held: “A litigant must possess a present right, title, or interest in the regulated land which confers lawful power to use that land or control its use when invoking the jurisdiction of the court *and throughout any period of appellate review.*” 1998 ME 178, ¶ 17, 715 A.2d 157 (emphasis supplied). Given that the Law Court has determined that Nordic lacks RTI in the intertidal land, Nordic’s permits are clearly invalid, *as a matter of law*.

A board has no authority to adjudicate an application when not supported by RTI. *See Murray v. Inhabitants of Town of Lincolnville*, 462 A.2d 40, 43 (Me. 1983)(“An applicant for a license or permit to use property in certain ways must have the kind of relationship to the site that gives him a legally cognizable expectation of having the power to use that site in the ways that would be authorized by the permit or license he seeks.”); *see also Madore v. Maine Land Use Regulation Com'n*, 1998 ME 178, ¶¶ 9-14, 715 A.2d 157; *Southridge Corp. v. Board of Environmental Protection*, 655 A.2d 345, 348 (Me. 1995); *Rancourt v. Town of Glenburn*, 635 A.2d 964, 965-66 (Me. 1993); *Walsh v. City of Brewer*, 315 A.2d 200, 205-207 (Me. 1974).

During the adjudicatory process, the PB refused to consider evidence that the Easement Purchase Agreement did not grant Nordic any rights in the intertidal land and ignored both the residential use only restrictions and the conservation easement restrictions. Despite compelling evidence offered,⁹ the PB blindly accepted its lawyer’s legal advice that the bar for showing RTI

⁹ As noted in *Mabee*, three surveyors had told Nordic that the Eckrotes did not own the intertidal land. *Mabee*, 2013 ME 15, ¶ 44 n.9, 290 A.3d 79.

was low (very low...) and the PB refused to consider the overwhelming evidence that Nordic had insufficient RTI to proceed with its project.

The PB also refused to follow the Law Court's decision in *Tomasino v. Town of Casco*, 2020 ME 96, 237 A.3d 175, that instructed administrative agencies that when questions are raised whether the proffered RTI actually allows the applicant to make use of the property in the manner allowed if they were granted a permit to do so, and rights have not been factually determined by a court with jurisdiction to do so, then the permitting process should not proceed until a court declaration issued. *Id.* ¶¶ 7-15. Despite knowing a quiet title action was pending on all issues relating to RTI, the PB ignored *Tomasino* and proceeded to act and vote on Nordic's permit applications and now must comply with the Law Court's adverse—to Nordic—decision in the *Mabee* quiet title action.

E. The parties have Stipulated that the Conservation Easement has Not been Amended nor Extinguished and the Conservation Easement Bars Nordic's Claim of RTI

Nordic has falsely claimed in other proceedings that an eminent domain proceeding by the City of Belfast may someday create the necessary RTI for Nordic after the issuance of the permits by the PB.¹⁰ Nordic's effort to cure its RTI issues fails because it is undisputed that an eminent domain action does not terminate or amend the conservation easement which defeats Nordic's ability to install pipes in the intertidal land.

Nordic, the City of Belfast, Mabee-Grace, Upstream, Friends of Harriet Hartley and the State of Maine all stipulated to entry of judgment in the pending eminent domain case, Docket No. RE-2021-007, Waldo County Superior Court, that the conservation easement held by Friends

¹⁰ Nordic is barred from making such arguments as the record before the ZBA lacks any evidence on the eminent domain proceeding. And the eminent domain proceeding is subject to multiple challenges which has resulted in the proceeding being remanded to the City Council. As the Law Court has stated: "Accordingly, rights must be declared upon the existing state of facts and not upon a state of facts that may or may not arise in the future." *Madore*, 1998 ME 178, ¶ 7, 715 A.2d 157.

of Harriet Hartley has not been terminated nor amended by the eminent domain taking conducted by the City of Belfast. Accordingly, the conservation easement continues to prohibit Nordic from laying pipes within the intertidal land. A copy of the Superior Court's order and parties stipulation in RE-2021-007 is attached hereto as **Exhibit 3**.

In a parallel case, the Law Court remanded to the Maine Department of Agriculture, Conservation and Forestry/Bureau of Parks and Land (the "Bureau") the RTI issues in Mabee-Grace's appeal of the Bureau's permits. The Law Court directed the Bureau to determine what it would have done had that body known the Law Court's Opinion in *Mabee* when it decided the RTI issue.

On September 7, 2023, the Bureau rescinded its Decision regarding Nordic's submerged lands dredging lease based on Nordic's lack of RTI in the intertidal land. The Bureau ruled at page 4 of its Decision:

Pursuant to *Mabee I*, Mabee, not the Eckrotes, owned the Relevant Intertidal Land while the Bureau was processing Nordic's application, and the Conservation Easement is valid. Per its plain language, the Conservation Easement prohibits the Pipes on the Relevant Intertidal Land. And pursuant to the Stipulated Judgment, the Condemnation did not terminate or amend the Conservation Easement. Nordic contends that the Pipes Easement conveys to Nordic the right to construct, operate and maintain the Pipes. The Bureau disagrees. Although the Pipes Easement purports to convey such rights to Nordic, the Pipes Easement is subordinate to the Conservation Easement, and the Conservation Easement prohibits the Pipes. Taken together, *Mabee I*, the Conservation Easement, and the Stipulated Judgment render materially incorrect Nordic's claim of RTI for Submerged Lands Lease No. 2141-L-49 and Submerged Lands Dredging Lease No. 05-22DL.

Attached hereto as **Exhibit 4** is a true copy of the Bureau's decision.

The legal logic of the Bureau's ruling applies directly to the appeal pending before this Board. The *Mabee* decision, the conservation easement, and the Stipulated Judgment all compel the finding that Nordic has no standing to proceed with its permits under the City's ordinances due to a lack of RTI.

IV. SUMMARY STATEMENT OF KEY ISSUES/ ARGUMENT IN THE APPEALS

Nordic applied to the PB for five land use permits: Zoning Use Permit; Shoreland Zoning Permit; Significant Water Intake and Significant Water Discharge Permit; Ground Water Well Permit; and Site Plan Permit. These permits are all necessary for Nordic to construct and operate a very large facility in which it would raise salmon from smolt to mature fish in indoor steel tanks. As presented to PB, the facility would contain a slaughterhouse for processing the mature fish, and office, a wastewater treatment plant, and a power plant. *See* City of Belfast, Permit Application, Vol. 1, Attachment 2 (Project Description) at p. 4. The power plant would consist of eight diesel generators accompanied by a cluster of eight approximately 66-foot smokestacks. *See* PB Record, Tab: 22 FP, Table of Contents; Tab 23 FP, PB Meeting Video Recording-Final Plan, video recording of December 9, 2020 PB, Item 2 at 01:19:00-01:19:10). The wastewater treatment plant would process and discharge, at full operation, 7.7 million gallons of wastewater per day, all year long, into Penobscot Bay at a depth of at least 34 feet, less than 3800 feet offshore. *See* PB Record, Tab: 22 FP, Table of Contents, Folder 23 FPP, PB Meeting Video Recording-Final Plan, video recording of October 14, 2020 PB, Item 4 at 00:04:39-00:04:42); *see also* City of Belfast, Permit Application (Civil-Pipeline Drawings, CS101); PB Record, Tab: 20.4 FP (Adopted findings of fact & conditions of approval for Significant Water Intake/Water Discharge Pipe Permit (Dec. 22, 2020)) at 7.

The PB conducted public hearing sessions commencing on July 10, 2019, and ending on December 22, 2020. *See* PB Record, Tab: 2 PP, Adopted Minutes for Planning Board Meetings & Public Hearings (“Table of Contents”); *see also* PB Record, Tab: 22 FP, Adopted Written Planning Board Meeting Minutes-Final Plan (“Table of Contents”). Thereafter the PB closed the

record and commenced deliberations, yet it continued to seek additional information from Nordic, which information was generally not provided. *Id.*

Nonetheless on December 22, 2020, without discussion, the PB awarded all five permits to Nordic. *See* PB Record, Tab: 2 PP, Adopted Minutes (Dec. 22, 2020); *see also* PB Record, Tabs: 20.1 FP (Adopted findings of fact & conditions of approval for the Site Plan Permit (Dec. 22, 2020)), 20.2 FP (Adopted findings of fact & conditions of approval for Zoning Use Permit (Dec. 22, 2020)), 20.3 FP (Adopted findings of fact & conditions of approval for Significant Groundwater Well Permit (Dec. 22, 2020)), & 20.4 FP (Adopted findings of fact & conditions of approval for Significant Water Intake/Water Discharge Pipe Permit (Dec. 22, 2020)).

As detailed below, the PB abused its discretion, made unsupported findings, and committed errors of law when it approved Nordic's applications given Nordic failed to meet its burden of proof to show it had satisfied all of the Ordinance requirements. *See* City Code of Ordinances, Article IV, Final Plan, especially but not limited to Section 90-42.

In summary:

1. Nordic failed or refused to comply with the Ordinance dimensional requirements including setback and buffering requirements. Chapter 102, Zoning, Section 102-138(3); PB Record, Tab: 8.5 PP (City Ordinance Chapter 102), Sec. 102-684.
2. Nordic failed or refused to demonstrate that its proposed wastewater discharge to Penobscot Bay will not degrade water quality in the Bay. PB Record, Tab: 8.3 PP (City Ordinance Chapter 90), Sec. 90-42(b)(1).
3. Nordic failed or refused to demonstrate that its demand for fresh water will not unduly burden the City water supply. PB Record, Tab: 8.3 PP (City Ordinance Chapter 90), Sec. 90-42(b)(3).
4. Nordic failed or refused to demonstrate that its withdrawal of groundwater by its "Significant Groundwater Wells" will not compromise the water quantity or quality of private wells in the area. PB Record, Tab: 8.3 PP (City Ordinance Chapter 90), Sec. 90-42(b)(12).

5. Nordic failed or refused to demonstrate that it had sufficient groundwater availability to operate its proposed three on-site wells. PB Record, Tab: 8.5 PP (City Ordinance Chapter 102), Sec. 102-107.
6. Nordic failed or refused to demonstrate it had arranged for the storage and disposal of solid waste and its subset, hazardous waste. PB Record, Tab: 8.3 PP (City Ordinance Chapter 90), Sec. 90-42(b)(18) (Solid Waste) and 90-42(b)(29) (Waste Disposal) and 90-42(b)(26) (Hazardous Waste).
7. Nordic failed or refused to demonstrate that it had adequate financial capacity to develop the project in a manner consistent with state and local performance, environmental and technical standards. PB Record, Tab: 8.3 PP (City Ordinance Chapter 90), Sec. 90-42(b)(10).
8. Nordic failed or refused to demonstrate that the on-site soils are adequate for the intended purpose. PB Record, Tab: 8.5 PP (City Ordinance Chapter 102), Sec. 102-1136 (Soils); Division 14, Natural Resources, Section 82-431. Protection of Soils.
9. Nordic failed or refused to demonstrate it had adequate electric service to operate its project either during normal times or during a power outage. Site Plan Approval, Condition 12.2.
10. Without authority, the Planning Board converted application requirements to permit conditions.

V. ARGUMENT

1. **The Planning Board erred when it approved Nordic's application given Nordic failed to meet all of the relevant Ordinance requirements.**

The PB conditioned its approval of Nordic's applications on Nordic submitting proof after the fact of material necessary for Nordic to meet the Ordinance requirements. By so doing, the PB granted Nordic its permits without requiring that Nordic meet the application requirements. The PB lacked any legal authority to do so. *Cope v. Inhabitants of Town of Brunswick*, 464 A.2d 223, 225 (Me. 1983).

For the PB to issue approvals, the PB had to make findings that Nordic met its burden to show it complied with all the applicable requirements. *Davis v. SBA Towers II, LLC*, 2009 ME 82, 979 A.2d 86; *Gensheimer v. Town of Phippsburg*, 2005 ME 22, ¶ 18, 868 A.2d 161; *Kurlanski v. Portland Yacht Club*, 2001 ME 147, ¶ 13, 782 A.2d 783.¹¹ That the PB imposed conditions of approvals on Nordic—essentially requiring Nordic post approval to fulfill application requirements and demonstrates that Nordic failed to meet—improperly altered the applicant’s burden of proof. That burden requires an applicant to demonstrate full compliance with all applicable requirements in order to obtain a permit. Section 90-42(b) states: “No development shall be approved unless the planning board makes an affirmative finding that the development meets or exceeds the following enumerated criteria[.]”¹² *See* PB Record, Tab: 8.3 PP (City Ordinance Chapter 90), Sec. 90-42(b) at 28.

The PB had no authority to rewrite the Ordinance and change the burden of proof so as to allow Nordic to obtain a permit without Nordic fulfilling all legal requirements. Section 90-43 of the Ordinance states: “In order for the ... planning board to grant approval, the [board] ... must make an affirmative finding that the development meets or exceeds each of the review criteria.” *Id.* Section 90-43; *see also* PB Record, Tab: 8.2 PP (City Ordinance Chapter 82 (Shoreland)), Sections 82-55 and 82-133.

Permit conditions are steps required of an applicant to assure the permit granting board that post approval the applicant performs as it said it would when applying for the permits. That is, when the permit application requirements are met, and the PB wants assurance of the

¹¹ For example, to obtain a shoreland permit under the Ordinance, the applicant “shall have the burden of proving that the proposed land use activity is in conformity with the purposes and provisions of this chapter.” *See* PB Record, Tab: 8.2 PP (City Ordinance Chapter 82) at Section 82-55.

¹² The criteria listed includes 30 specific items.

applicant's fidelity to its plans and representations, the PB may attach permit conditions such as progress reports that would allow the PB to monitor the applicant's fidelity. Permit conditions may be attached to assure compliance with the plans.

And here that is what the Ordinance allows the PB to do. Section 102-106(b)(3) says that “[a]ny [Board] conditions of approval shall be those necessary to ensure that the provisions of this chapter are followed.” PB Record, Tab: 8.5 PP (City Ordinance Chapter 102), Sec. 102-106(b)(3) (emphasis added). It does not say “to ensure that the requirements of the Ordinance are met.” *Id.* The PB had no authority to relieve Nordic from meeting its burden of proof to show it has met all the applicable code requirements. *Compare Fitandes v. City of Saco*, 2015 ME 32, 113 A.3d 1088 (conditions of approval permitted under Ordinance when necessary “to further the purposes of this Ordinance”) *with* Section 102-106(b)(3).

Here, Nordic failed to comply with the application requirements in the first instance and tried to “paper over” its omissions by creating improperly named post permit award conditions. Nowhere in the adopted Ordinance is the Board authorized to grant a permit where the applicant has failed to meet all the application requirements. Nowhere in the Ordinance is the PB allowed to pick and choose which application requirements a particular applicant must meet to be granted approval and which application requirements an applicant may satisfy at a later time as a permit condition.

In the seminal case of *Waterville Hotel Corp. v. Board of Zoning Appeals*, 241 A.2d 50 (Me. 1968), the Law Court declared that any discretionary authority granted to an administrative agency by a legislative body must be accompanied by “definite standards for the guidance and control of the permit issuing officers.” The court stated:

We find that the weight of authority holds that where a zoning ordinance attempts to permit municipal officials to grant or refuse permits without the guidance of any standards, equal protection is denied the citizens.

Without definite standards an ordinance becomes an open door to favoritism and discrimination, a ready tool for the suppression of competition through the granting of authority to one and the withholding from another. A zoning ordinance cannot permit administrative officers or boards to pick and choose the recipients of their favors.

Id. at 52 & 53. *See also Bass v. Town of Wilton*, 512 A.2d 309 (Me. 1986), *Chandler v. Town of Pittsfield*, 496 A.2d 1058 (Me. 1985); *Barnard v. Zoning Board of Appeals of the Town of Yarmouth*, 313 A.2d 741 (Me. 1974).

As the above recitation reveals, the PB without authority exercised discretion to effectively waive certain application requirements in favor of after-the-fact permit conditions, so-called, when the PB had no such authority. Even if it had that authority, the authority was not delineated by standards provided by the legislative body. In so doing it exceeded its authority and usurped the legislative function of the Legislature and/or City Council.

Each of the permits the PB granted included improper and illegal “conditions.”

Final Site Plan Permit Application

Section 90-42(b)(1) Pollution: The PB allowed Nordic to ignore the application requirements under Section 90-42(b)(1) and instead substituted Condition 8 in the Final Site Plan Permit as well as relevant conditions from the Significant Groundwater Well Permit. Condition 8 requires Nordic to comply with all state and federal permits and to provide the City with copies of all issued permits.

Section 90-42(b)(2) Sufficient water: The PB allowed Nordic to ignore the application requirements under Section 90-42(b)(2) and instead substituted Conditions 3, 8, 27, and 28 in the Final Site Permit Plan, as well as all conditions established in the Significant Groundwater Well

Permit. Under Condition 28.1, Nordic is required to "submit compelling evidence to the Planning Board that it has Right, Title and Interest subject to the future receipt of any and all federal, state and City permits, to install any piping and other needed infrastructure to extract surface water from the Little River should the Lower Reservoir Dam be removed at a future date." Nordic has failed to meet its burden to show, and provided no basis for the PB to find that it has RTI to install this infrastructure to extract surface water from the Little River.

Section 90-42(b)(4) Soil erosion and sediment control: The PB allowed Nordic to ignore the application requirements under Section 90-42(b)(4) and instead substituted Condition 21. Condition 21 in the Final Site Plan Permit itself refers to Condition of Approval 23 in the Natural Resources Protection Act/Site Location of Development Act Permit. Nordic has failed to meet its burden to show, and provided no basis for the PB to find that there will be no "unreasonable soil erosion or reduction in the land's capacity to hold water so that a dangerous or unhealthy condition results." Further, the PB specifically notes that it has considered "issues related to the potential dispersal of mercury located in the bottom sediments of Belfast Bay during construction of the intake/discharge pipes" (Final Site Plan Permit, p. 25). Nordic has failed to meet its burden to show and provided no basis for the Board to opine on potential mercury dispersal in regard to this requirement.

Section 90-42(b)(5) Highway or public road congestion: The PB allowed Nordic to ignore the application requirements under Section 90-42(b)(5) and instead substituted Condition 23 in the Final Site Plan Permit, as well as relevant conditions in the Zoning Use Permit. Nordic has failed to meet its burden to show and provided no basis for the PB to find that "the proposed development will not cause unreasonable highway or public road congestion or unsafe conditions with respect to the use of the highways or public roads existing or proposed."

Section 90-42(b)(6) Sewage waste disposal: The PB allowed Nordic to ignore the application requirements under Section 90-42(b)(6) and instead substituted Condition 8 in the Final Site Plan Permit, which requires compliance with all approved state and federal permits. Nordic has failed to provide reasonable assurances that the project will provide "adequate sewage waste disposal in compliance with federal, state and local laws, rules, ordinances and regulations."

Section 90-42(b)(7) Municipal solid waste and sewage waste disposal: The PB allowed Nordic to ignore the application requirements under Section 90-42(b)(7) and instead substituted Conditions 10, 14, 15, 16, 17, and 18. Nordic has failed to meet its burden to show, and provided no basis for the PB to find that the project will not cause an "unreasonable burden" on the City's ability to dispose of solid waste and sewage, e.g. impacts to long-term capacity of the treatment plant impacts to waste disposal and sewage rates.

Section 90-42(b)(10) Financial and technical capacity: The PB allowed Nordic to ignore the application requirements under Section 90-42(b)(10) and instead substituted Conditions 12, 20, 21, 35, 36, and relevant conditions in the Significant Groundwater Well Permit. Nordic has failed to meet its burden to show and provided no basis for the PB to find Nordic had "adequate financial and technical ability to develop the project." As the PB states in the Final Site Plan Permit, "Nordic does not currently have specific financing in place for the project" (p. 32).

Section 90-42(b)(11) Surface waters; outstanding river segments: The PB allowed Nordic to ignore the application requirements under Section 90-42(b)(11) and instead substituted Condition 22 in the Final Site Plan Permit, as well as relevant conditions in the NRPA/SLODA Permits. Nordic has failed to meet its burden to show and provided no basis for the PB to find

that the proposed project "will not adversely affect the quality of that body of water or unreasonably affect the shoreline of that body of water."

Section 90-42(b)(12) Groundwater: The PB allowed Nordic to ignore the application requirements under Section 90-42(b)(12) and instead substituted relevant conditions in the Significant Groundwater Well Permit. Nordic has failed to meet its burden to show, and provided no basis for the PB to find that the proposed project will not "alone or in conjunction with existing activities, adversely affect the quality or quantity of groundwater or any public or private water source."

Section 90-42(b)(13) Flood areas: The PB allowed Nordic to ignore the application requirements under Section 90-42(b)(13) and instead substituted Condition 22, as well as relevant conditions in the NRPA/SLODA Permits. Nordic has failed to meet its burden to show, and provided no basis for the PB to find that the proposed project is or is not located in a "floodprone area" and that all structures will be constructed with their lowest floor at least two feet above the 100-year elevation.

Section 90-42(b)(16) Stormwater: The PB allowed Nordic to ignore the application requirements under Section 90-42(b)(16) and instead substituted Condition 20, Condition 20 Stormwater Management requires Nordic to "construct all stormwater management improvements identified on the approved Site Plan to the standards identified in the Nordic Plans." Nordic has failed to meet its burden to show and provided no basis for the Board to find that the "standards identified in the Nordic Plans" comply with local, state, and federal requirements for stormwater management. Condition 20 also references conditions in the NRPA/SLODA Permits, specifically regarding third-party inspections under Condition 23 and engineer oversight of stormwater infrastructure installation under Condition 26. Condition 20.4

requires Nordic to be "responsible for maintaining all stormwater improvements in good working condition," however the condition does not establish timelines for maintenance. Nordic has failed to meet its burden to show, and provided no basis for the PB to find that stormwater management practices and structures will be maintained over the life of the project.

Section 90-42(b)(18) Solid waste management: The PB allowed Nordic to ignore the application requirements under Section 90-42(b)(18) and instead substituted Conditions 14, 15, 16, 17, and 18. Nordic has failed to meet its burden to show, and provided no basis for the PB to find that the proposed project will provide for the "adequate disposal of solid wastes."

Section 90-42(b)(19) Exterior lighting: The PB allowed Nordic to ignore the application requirements under Section 90-42(b)(19) and instead substituted Condition 25.

Section 90-42(b)(21) Noise: The PB allowed Nordic to ignore the application requirements under Section 90-42(b)(21) and instead substituted Condition 19. Nordic has failed to meet its burden to show, and provided no basis for the PB to find that the proposed project will "not create unreasonable interference with use and enjoyment of neighboring properties."

Section 90-42(b)(23) Landscaping: The PB allowed Nordic to ignore the application requirements under Section 90-42(b)(23) and instead substituted Condition 26. Nordic has failed to meet its burden to show and provided no basis for the PB to find that the proposed project "breaks up parking areas, softens the appearance of the development and protects abutting properties from any significant adverse impacts of the development" in compliance with the standards enumerated in Chapter 98.

Section 90-42(b)(25) Location of off-street parking: The PB allowed Nordic to ignore the application requirements under Section 90-42(b)(25) and instead substituted Condition 24.

Nordic has failed to provide reasonable assurances that the proposed project complies with the standards enumerated in Chapter 98.

Section 90-42(b)(26) Hazardous waste: The PB allowed Nordic to ignore the application requirements under Section 90-42(b)(26) and instead substituted Condition 17. Nordic has failed to provide reasonable assurances that the proposed project is "in compliance with state and federal laws and when hazardous waste is generated or stored on-site," particularly in light of the identified potential mercury dispersal in Belfast Bay (Final Site Plan Permit, p. 25).

Section 90-42(b)(27) Prevention or control of air pollution: The PB allowed Nordic to ignore the application requirements under Section 90-42(b)(27) and instead substituted Condition 12. The requirements of Section 90-42(b)(27) specifically state that "It is not the intent of this provision to merely require compliance with state or federal air quality standards, but rather to enforce a standard which may be more encompassing and strict than those state and federal standards as presently constituted." Under Condition 12.2, the PB specifically acknowledges that "[t]o date, however, Nordic has provided no specific information regarding the extent of improvements required to CMP's facilities, how such improvements (or lack thereof) could impact electrical service to Belfast and surrounding communities, when such improvements may be constructed and who will pay for such, and how such improvements may interface with Nordic's on-site power generation facilities." Further, the PB under Condition 12.2 goes on to state that "...only limited information has been provided to date to the Planning Board regarding Nordic's use of electricity..." Nordic has failed to meet its burden to show, and provided no basis for the PB to find that the proposed project will not create "a substantial risk of air pollution, whether by dust, chemicals, odor or otherwise, which would pose a significant risk of harm to

local populations within the city or injury to wildlife, vegetation or to property, or harm to use and enjoyment or surrounding property."

Section 90-42(b)(29) Adequacy of waste disposal: The PB allowed Nordic to ignore the application requirements under Section 90-42(b)(29) and instead substituted Conditions 10, 14, 15, 16, 17, and 18. Nordic has failed to meet its burden to show, and provided no basis for the PB to find that "all quantities and types of waste generated by the proposed use can be dealt with and disposed of while maintaining safe and healthful conditions."

Section 90-42(b)(30) Additional standards: The PB allowed Nordic to ignore the application requirements under Section 90-42(b)(30) and instead substituted Condition 8, as well as referencing all relevant conditions in the Site Plan Permit, Zoning Use, Shoreland, Significant Groundwater Well, and Intake/Discharge Permits.

Significant Groundwater Well Permit

City Performance Standards identified in Chapter 102, Zoning, Article VIII, Supplementary District Regulations, Division 7, Significant Groundwater Well Permits, Section 102-1079, Performance Standards — Requirement 7 as identified in Significant Groundwater Well Permit: The PB allowed Nordic to ignore the application requirements under Requirement 7 and instead substituted Condition 9. This performance standard specifically authorizes the Board to "establish the maximum daily, weekly, monthly and annual quantity of groundwater that may be extracted." Nordic has failed to provide reasonable assurances that it will comply with the extraction rate identified by the City under Condition 9.

City Performance Standards identified in Chapter 102, Zoning, Article VIII, Supplementary District Regulations, Division 7, Significant Groundwater Well Permits, Section 102-1079, Performance Standards — Requirement 8 as identified in Significant Groundwater

Well Permit: The PB allowed Nordic to ignore the application requirements under Requirement 8 and instead substituted Condition 12 and Condition 35 in the Final Site Plan Permit. Nordic has failed to provide reasonable assurances or "demonstrate that it possesses the expertise and financial resources to construct and operate the requested significant groundwater wells and to adhere to the conditions of Approval adopted by the City Planning Board."

Intake/Discharge Permit

Chapter 102, Zoning, Section 102-1138(2) and Chapter 82, Shoreland, Division 17(2):

The PB allowed Nordic to ignore the application requirements under Chapter 102, Zoning, Section 102-1138(2) and Chapter 82, Shoreland, Division 17(2) and instead substituted Conditions 6 and 7 of the Intake/Discharge Permit. Nordic has failed to provide reasonable assurances that it will restore the area disturbed by installation of the intake/discharge pipe "so as to prevent both short-term and long-term soil erosion and sedimentation and the area is revegetated to present a natural appearance that is consistent with the surrounding area."

Chapter 102, Zoning, Section 102-1138(4) and Chapter 82, Shoreland, Division 17(4):

The PB allowed Nordic to ignore the application requirements under Chapter 102, Zoning, Section 102-1138(4) and Chapter 82, Shoreland, Division 17(4) and instead substituted Condition 1. As stated previous regarding Condition 8 of the Final Site Plan Permit, as of the date of this appeal, Nordic is still missing an approved Section 404/10 permit from the U.S. Army Corps of Engineers. Nordic has failed to provide "evidence" or reasonable assurances "that they can or have obtained any and all state and federal permits associated with the location and operation of the proposed water intake or discharge, including ongoing monitoring, that may be required."

Zoning Use Permit

Chapter 102, Article VIII, Supplementary District Regulations

- Division 2, Section 102-940, Supplementary District Regulations — Screening of Outside Storage Areas — Dumpsters: The PB allowed Nordic to ignore the application requirements under Section 102-940 and instead substituted Condition 14.
- Division 3, Section 102-961, Supplementary District Regulations — Off-Street Parking Facilities — Required Facilities: The PB allowed Nordic to ignore the application requirements under Section 102-961 and instead substituted Condition 24 in this permit and the Site Plan Permit.
- Division 7, Significant Groundwater Wells: The PB allowed Nordic to ignore the application requirements under Division 7 and instead substituted all conditions under the Significant Groundwater Well Permit.

Chapter 102, Zoning, Article IX, Performance Standards, Division 2, Environmental Performance Standards

- Section 102-1123 Erosion control: The PB allowed Nordic to ignore the application requirements under Section 102-1123 and instead substituted Condition 21.
- Section 102-1124 Control of stormwater run-off: The PB allowed Nordic to ignore the application requirements under Section 102-1124 and instead substituted Condition 20.
- Section 102-1125(a) and (b) Wastewater pollution: The PB allowed Nordic to ignore the application requirements under Section 102-1125(a) and (b) and instead substituted Condition 10. Nordic has failed to provide reasonable assurances that wastewater discharged into the City's sewers "shall be in such quantities and/or of such quality as to be compatible with federal and state standards and in compliance with Chapter 62, Article II (of the City Code of Ordinances)."
- Section 102-1125(c) Wastewater pollution: The PB allowed Nordic to ignore the application requirements under Section 102-1125(c) and instead substituted Condition 8, as well as relevant conditions in the Significant Groundwater Well Permit, Intake/Discharge Permit, Site Plan Permit, and Shoreland Permit. As of the date of this appeal, Nordic is still missing an approved Section 404/10 permit from the U.S. Army Corps of Engineers.
- Section 102-1126 Air pollution: The PB allowed Nordic to ignore the application requirements under Section 102-1126 and instead substituted Condition 12 and 39. Nordic has failed to meet its burden to show, and provided no basis for the Board to find that the proposed project would not "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."

- Section 102-1127 Odors: The PB allowed Nordic to ignore the application requirements under Section 102-1127 and instead substituted Conditions 14, 15, 16, 17, and 18. Nordic has failed to meet its burden to show, and provided no basis for the Board to find that the proposed project will not "produce noxious or harmful odors perceptible beyond the lot lines, either at ground or habitable elevation."
- Section 102-1128 Glare: The PB allowed Nordic to ignore the application requirements under Section 102-1128 and instead substituted Condition 25.
- Section 102-1129 Noise: The PB allowed Nordic to ignore the application requirements under Section 102-1129 and instead substituted Condition 19.
- Section 102-1130 Gravel extraction: The PB allowed Nordic to ignore the application requirements under Section 102-1130 and instead substituted Condition 21. Nordic has failed to meet its burden to show, and provided no basis for the PB to find that the proposed project will comply with the Site Location Law, 38 M.R.S. §§ 481-490, and department of environmental protection regulations pursuant to the Site Location Development Law, 38 M.R.S. chapters 371-377, and the provisions of Chapter 90, pertaining to site plan review.
- Section 102-1131 Heating systems and oil storage tanks: The PB allowed Nordic to ignore the application requirements under Section 102-1131 and instead substituted Condition 31.
- Section 102-1134 Uses in wetlands: The PB allowed Nordic to ignore the application requirements under Section 102-1134 and instead substituted Condition 22.
- Section 102-1135 Uses in floodplains: The PB allowed Nordic to ignore the application requirements under Section 102-1135 and instead substituted Condition 29 and relevant conditions in the Shoreland Permit.
- Section 102-1137 Significant Water Intake and Significant Water Discharge/Outfall Pipes: The PB allowed Nordic to ignore the application requirements Under Section 102-1137 and instead substituted relevant conditions in the Intake/Discharge Permit.

Shoreland Permit

Section 82-56(1) Will not result in unsafe conditions: The PB allowed Nordic to ignore the application requirements under Section 82-56(1) and instead substituted Condition 29 in the Site Plan Permit and Zoning Use Permit. Nordic has failed to meet its burden to show, and

provided no basis for the PB to find that the proposed project will "not result in unsafe conditions," particularly in regard to the Upper Reservoir Dam on the Little River.

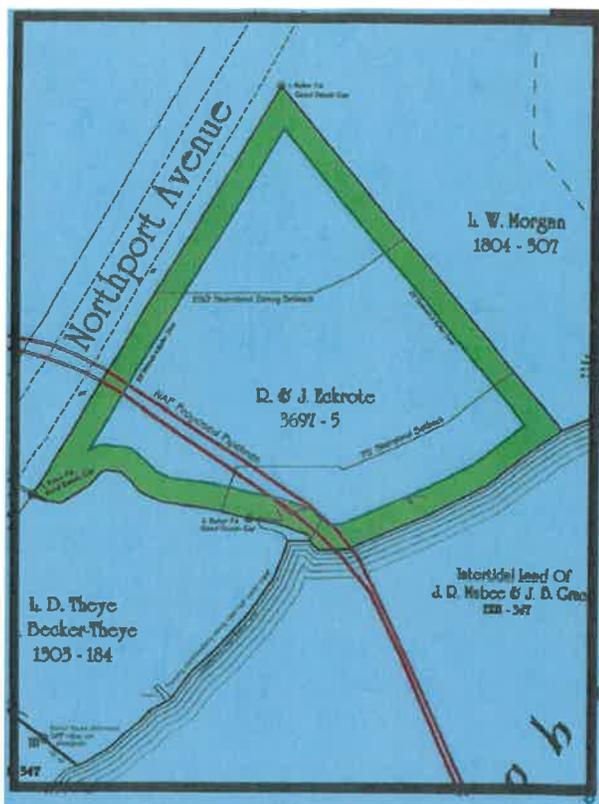
Section 82-56(2) Will not result in water pollution, erosion, or sedimentation to surface waters: The PB allowed Nordic to ignore the application requirements under Section 82-56(2) and instead substituted relevant conditions in this Permit regarding erosion and sediment control as well as stormwater management.

Section 82-56(3) Will adequately provide for the disposal of all wastewaters: The PB allowed Nordic to ignore the application requirements under Section 82-56(3) and instead substituted conditions identified in the MEDPES Permit and Waste Discharge License (issued November 19, 2020) and relevant conditions in the Site Plan Permit requiring Nordic to comply with its MEPDES Permit.

These conditions are unlawful, violate equal protection of the laws, exceed the authority of the PB and are thus arbitrary, and capricious and must be set aside. Without the benefit of the actions to set aside, the permits cannot stand. This Board must reverse the PB approvals.

- 2. The PB erred in concluding Nordic's discharge pipes to be located on the Eckrote Property were a legally permitted use on that shoreland parcel and the construction of the pipes did not need to meet setback requirements.**

The PB approved Nordic's application premised on Nordic's use of the Eckrote Property even though Nordic's proposed use of that site for industrial purposes was not permitted and the location of the discharge pipes on the parcel did not meet the setback requirements for that parcel. The Eckrote Property is located in the Shoreland Zone, in the Limited Residential District.



The Ordinance (Shoreland) Section 82-51 states:

No Person shall, without first obtaining a permit, engage in any activity or use of land or structure requiring a permit in the district in which such activity or use would occur; or expand, change or replace an existing use or structure; or renew a discontinued nonconforming use.

See PB Record, Tab: 8.2 PP (City Ordinance Chapter 82), Sec. 82-51 at 9.

Also, Section 82-133 states:

Except as specified in this chapter, no building, structure or land shall hereafter be used or occupied, and no building or structure or part thereof shall hereafter be erected, constructed, expanded, moved or altered, and no new lot shall be created, except in conformity with all of the regulations specified in this chapter for the district in which it is located, unless a variance is granted.

Id. Sec. 82-133 at 21.

Relative to the Eckrote Property, Ordinance (Shoreland) Section 82-201(a)(2) and Section 102-684, Dimensional Standards, subsection (b)(1), both require a 75-foot front yard

setback. *See* PB Record, Tab: 8.2 PP (City Ordinance Chapter 82), Sec. 82-201 at 30; PB Record, Tab: 8.5 PP (City Ordinance Chapter 102), Sec. 102-684 at 15-17.

No “structures” are to be placed within the setback area¹³. The record and findings of fact reveal that Nordic’s three large industrial pipes violate the 75-foot front yard setback as they run from the wastewater treatment facility on the West through Nordics front yard, to and under Route 1 and thence through the Eckrote Property to the east and into Penobscot Bay. *See* City of Belfast Permit Application, Vol. 1, Attachment 8 at pp. 62-81; *see also* PB Record, Tab: 20.4 FP (adopted findings of fact & conditions of approval for Significant Water Intake/Water discharge Pipe Permit (Dec. 22, 2020)) at pp. 5, 7 & 8.

Similarly, as the pipes pass from Route 1 onto the Eckrote Property the pipes violate the Eckrote’s front yard setback requirement, because they run along the property line, and they violate the Eckrote’s side yard setback requirement. As they leave the Eckrote Property to enter Penobscot Bay they violate the Eckrote’s rear yard setback requirement.

The Route 1 South Dimension regulations, Sections 102-1243, 102-1244 & 102-1245, provide for setbacks in cases of non-residential uses in the “Route 1 South” District as follows:

Sec. 102-1243: Front Setback, structure less than 5000’ square: 30 feet

Sec. 102-1244: Side Setback, structure less than 5000’ square: 15 feet

Sec. 102-1245: Rear Setback, structure less than 5000” square: 20 feet

¹³ Section 102-5 of the Zoning Regulations, “Compliance with chapter”, provides:

- (a) No building or structure shall be erected, altered, enlarged, rebuilt, moved or used and no premises shall be used unless in conformity with the provisions of this chapter, except those existing which by the provisions of this chapter become legally nonconforming and which meet the requirements of article III of this chapter.”

PB Record, Tab: 8.5 PP (City Ordinance, Chapter 102) at 1.

See City of Belfast, Part II: Code of Ordinances, Subpart B Land Use Regulations, Chapter 102 Zoning, Art. IX Performance Standards, Div. 4, Sections 102-1243, 102-1244, 102-1245.

Sec 82-201((a)(2) that shows 75-foot setback from normal highwater.

Sec. 82-201 Setbacks, maximum height and lot coverage.

(a) All new principal and accessory structures and expansions of existing principal and accessory structures shall satisfy the following minimum requirements.

District	Amount Setback (feet)	of Maximum Height (feet)	Lot Coverage (percent)
(1) Resource protection	100	35	20
(2) Limited residential	100 ¹ 75 ²	35	20

See PB Record, Tab: 8.2 PP (City Ordinance Chapter 82), Sec. 82-201 at 30.

The setback areas are to be maintained as “Buffer Yards” and must have a landscape plan prepared by a landscape architect licensed by the State of Maine, must meet certain planting requirements and must preserve specimen trees. See City of Belfast, Part II: Code of Ordinances, Subpart B Land Use Regulations, Chapter 102 Zoning, Art. IX Performance Standards, Div. 4, Section 102-1249. “The amount of the buffer yard must be located on property owned or controlled by the owner and shall not include any of the land area located within an established right-of-way for determining the amount of buffer yard. The only structures permitted in the buffer yard, when there is no practical alternative as determined by the code enforcement officer or planning board, are utilities and essential services.” *Id.* ¶ (a) (emphasis supplied). Perhaps the Nordic pipeline is an essential service for Nordic located across Route 1, but it is not “essential” to the residential use of the Lot by the Eckrotes, so it is not exempted from the buffering/setback rule.

The PB stated that since the pipes would be located in the subsurface, they are not “structures” and are thus not subject to the dimensional constraints. See PB Record, Tab: 20.4 FP

(adopted findings of fact & conditions of approval for Significant Water Intake/Water discharge Pipe Permit (Dec. 22, 2020)) at p. 8. This was an error of law.

The Ordinance defines “structure” as “[a]nything built for the support, shelter or enclosure of persons, animals, goods or property of any kind, *together with anything constructed or erected with a fixed location on or in the ground*, exclusive of fences, utility poles and associated appurtenances, sidewalks and handicap ramps.” *See* PB Record, Tab: 8.1 PP (City Ordinance Chapter 66), Sec. 66-1(c) at 35 (emphasis supplied). Clearly the proposed discharge pipes were structures under this definition given Nordic proposed to construct a pipeline in the ground on the Eckrote Property. The only structures permitted in the buffer set back are “utilities and essential services.” *See* City of Belfast, Part II: Code of Ordinances, Subpart B Land Use Regulations, Chapter 102 Zoning, Art. IX Performance Standards, Div. 4, Sec. 102-1249. Nordic made no claim it is a utility, or its use falls within the definition of “essential services.”

The PB ignored these requirements on the basis the discharge pipes somehow were exempt from dimensional requirements such as setbacks as water dependent use. Leaving aside there does not appear to be such a provision in the official online Code available on the City’s website, regardless under both the City’s Shoreland Zoning and Site Plan standards there is a conflict provision that says if regulations conflict, the “more restrictive provision shall control.” *See* PB Record, Tab: 8.2 PP (City Ordinance Chapter 82), Sec. 82-8 at 6; *see also* PB Record, Tab: 8.3 PP (City Ordinance Chapter 90), Sec. 90-4 at 20 (“that which is more restrictive ... standards or requirements shall govern”).

The PB found that the use of the Eckrote Property for the installation of industrial pipes serving an industrial facility on the other side of Route 1 was lawful because “pipes are an approved use” in the Shoreland Limited Residential zone. *See* PB Record, Tab: 20.4 FP (adopted

findings of fact & conditions of approval for Significant Water Intake/Water Discharge Pipe Permit (Dec. 22, 2020)) at pp. 5-6, #5.2 – 5.4. The Board erred as a matter of law.

The Table of Land Uses for uses permitted in the Shoreland Zone, Ordinance, Section 82-135(a) and Table I, does not list as a permitted or allowable use in the Limited Residential Zone “Significant Water Intake or Significant Water Discharge/Outfall Pipe.” *See* Ordinance, Section 82-1 (“Definitions”). Industrial and commercial uses are prohibited in that zone. There was no legal basis for the PB to issue a shoreland permit for Nordic to place its discharge pipes on the Eckrote Property.

The Eckrote Property is generally zoned as residential as well and is situated between Route 1 and Penobscot Bay. Its principal use is and always has been residential. In addition to the above, nowhere did Nordic show that the Ordinance permits two principal uses on the same residential parcel.

The Belfast Zoning Regulations at Chapter 66, Section 66-1(c) allows accessory uses but the accessory use must be accessory and complimentary to the primary use on the lot. Section 66-1(c) provides definitions for uses in the Zoning Regulations:

Principal Building/ Structure means “The building or structure occupied by the chief or principal use on the premises.”

Principal Use means “A use other than one which is wholly incidental or accessory to another use on the same premises.”

Accessory Structure or Use means “A use customarily incidental and subordinate to the principal building or use and located on the same lot with such principal building or use.”

See PB Record, Tab: 8.1 PP (City Ordinance Chapter 66), Sec. 66-1(c) at 2, 3, 27.

In this case the accessory use is a trio of industrial discharge pipes, 2 pipes 30” and 1 pipe 36” in diameter, accessory to the Nordic wastewater treatment plant across Route 1, not

accessory to anything on the Eckrote Property. Industrial pipes from a different lot are not accessory use to a residential lot. The courts have supported this view. “An accessory use may be lawful if it is dependent on a principal use, has a reasonable relationship with that principal use, and is by custom, commonly, habitually, and by long practice established as reasonably associated with the principal use.” *Town of Shapleigh v. Shikles*, 427 A.2d. 460, 465 (Me. 1981). *See also Boivin v. Town of Sanford*, 588 A.2d. 1197, 1200 (Me. 1991). There is absolutely nothing to suggest that there exists an established, customary, habitual, relationship between the Eckrotes’ domestic dwelling and three industrial pipes encased in a 5’ high wall of stone or blasted into the bedrock below.

Moreover, there can be only one principal use of a lot. Merriam Webster defines principal as “most important, consequential, or influential.” Not one of the most. The most. As in one. Most other towns spell out that there can be but one principal use on a lot. All others are accessory. Belfast’s own definition of “Accessory use” defines it in relation to “the principal ...use.” *See* PB Record, Tab: 8.1 PP (City Ordinance Chapter 66), Sec. 66-1(c) at 3 (definition: Accessory Structure Or Use). It does not say, “relation to one of the principal uses.”

The Superior Court has determined that a lot can have only one primary or principle use unless the lot has sufficient area to allow for a second principal use. *See Bell v. Town of Gray*, No. AP-2014-45, 2014 WL 10399943, *5 (Me. Super. Ct., Aug. 2, 2014). The court held the property owner was prohibited from maintaining a second principal use, a paving company, on a residential lot with a residential home, given the lot was not adequate in size to allow for a second principal use.

That is exactly what the Ordinance (Shoreland) here requires:

If more than one residential dwelling unit or more than one principal commercial or industrial structure is constructed on a single parcel, the minimum lot size and

minimum shore frontage standards shall be met for each additional dwelling unit or principal structure. This standard shall not apply to the Waterfront Development District.

See PB Record, Tab: 8.2 PP (City Ordinance Chapter 82), Sec. 82-181(e) at 29.

There is nothing in the record to show that the PB made any finding that the Eckrote Property has sufficient area and frontage to support a second principal use, Nordic's discharge pipes, on the Eckrote Property even assuming Nordic's discharge pipes could be considered to be an allowable use in the shoreland zone. The table of allowable uses, Section 82-135(a) shows clearly it is not even permitted. *See* Ordinance, Sec. 82-135(a), Table 1, Land Uses in The Shoreland Zone.

The law also forbids Nordic's proposed use of the Eckrote Property as an accessory use as that use is clearly unrelated to the principal use of the lot, residential. The PB therefore erred as a matter of law when it approved Nordic's application premised on Nordic's massive pipes being deemed either an allowable principal use on the Eckrote Property or being an accessory use to the existing principle residential use on the Eckrote Property.

3. The PB Board erred in granting approval given Nordic's Final Site Plan did include all of the permits and activities proposed by the applicant.

On July 15, 2020, the PB approved Nordic's preliminary site plan application and adopted findings of fact that attempted to support its decision. Nordic's application was not complete at that point because at least two critical aspects of the project had not been disclosed to the PB or to the public at this point:

- a. Nordic's plan to dredge Penobscot Bay to install its pipes, and although no permit has been sought to do so, deposit the liquid dredge spoils back into the Bay, and

b. Nordic's plan to remove 20 to 50 feet of soil over a 35-acre portion of the subject property and then bring in replacement soils with the disruption to the environment and the traffic that that project implies.

These substantial projects were not part of the application the PB deemed complete.

These plans required approval of other agencies. The PB could not award any of the permits that Nordic sought until Nordic showed it acquired all of its other required permits for these activities. *See* PB Record, Tab: 8.3 PP (City Ordinance Chapter 90), Sec. 90-42(b)(1) Pollution at 28.

A. Water Pollution. The PB abused its discretion in finding that Nordic's wastewater discharge into Penobscot Bay will not result in undue water pollution.

To approve Nordic's application the PB was required to find that the development meets or exceeds the criteria set forth in Ordinance Chapter 90, Sec. 90-42(b). The first standard, relates to "Pollution" and states:

Pollution. The proposed development will not result in undue water or air pollution. In making this determination, consideration shall be given to:

- a. The elevation of the land above sea level and its relation to the floodplain (compliance with chapter 78, article II).
- b. The nature of soils and subsoils and their ability to adequately support waste disposal.
- c. The slope of the land and its effect on effluents.
- d. The availability of streams for disposal of effluents.
- e. The applicable state and local health and water resource rules, regulations and codes.

See PB Record, Tab: 8.3 PP (City Ordinance Chapter 90), Sec. 90-42(b)(1) Pollution at 28.

Relative to Section 90-42(b)(1)(e) there are several applicable state water resources rules, regulations and codes and they are discussed below.

The last standard, Section 90-42(b)(30), relates to "Additional standards for development that may substantially affect the environment." This standard also incorporates several other

standards.¹⁴ The record does not support a finding that Nordic’s discharge into Penobscot Bay of 7.7 million gallons of wastewater per day “will not result in” water pollution, erosion or sedimentation to surface waters. *See* PB Record, Tab: 20.1 FP (Adopted findings of fact & conditions of approval for Site Plan Permit (Dec. 22, 2020)) at pp. 19-21 (Sec. 90-42(b)(1)), 24-25 (Sec. 90-42(b)(4))).

Relative to Section 90-42(b)(1)(e) the record before the PB compels the conclusion that Nordic’s proposed discharge will result in a denigration of the water quality of the bay.

Here is why that is. The State establishes the classification of Maine’s waters under 38 M.R.S. § 464 and has stated that “[a]ll estuarine and marine waters lying within the boundaries of Waldo County and that are not otherwise classified are Class SB waters.” *See* 38 M.R.S. § 469(6). The proposed discharge area, Penobscot Bay is classified as an SB water, which is the second highest classification. *See* 38 M.R.S. § 469. An SB classification requires that:

[W]aters must be of such quality that they are suitable for the designated uses of recreation in and on the water, fishing, aquaculture, propagation and harvesting of shellfish, industrial process and cooling water supply, hydroelectric power generation, navigation and as habitat for fish and other estuarine and marine life. The habitat must be characterized as unimpaired.

38 M.R.S. § 465-B(2)(A). Further, Maine law requires that:

Discharges to Class SB waters may not cause adverse impact to estuarine and marine life in that the receiving waters must be of sufficient quality to support all estuarine and marine species indigenous to the receiving water without detrimental changes in the resident biological community.

¹⁴ Section 90-42(b)(30) provides:

Additionally, if the proposed development meets the definition of development that may substantially affect the environment, as defined in 38 M.R.S.A. § 481 et seq., then section 484, Standards for Development, chapter 371, Definition of Terms used in the Site Location of Development Law and Regulations, chapter 372, Policies and procedures, chapter 373, Financial Capacity Standard, chapter 374, Traffic Movement Standard, chapter 375, No Adverse Environmental Effect Standard, chapter 376, Soil Types Standard, and chapter 377, Review of Roads and/or Major Development, and the provisions of section 90-17 shall apply.

See PB Record, Tab: 8.3 PP (City Ordinance Chapter 90), Sec. 90-42(b)(30) at 31-32.

38 M.R.S. § 465-B(2)(C).

Maine’s antidegradation policy requires that “[e]xisting in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected.” 38 M.R.S. § 464(4)(F)(1). State law prohibits a discharge that will result in a lowering of the existing water quality. 38 M.R.S. § 464(4)(F)(3). To the same effect is federal law as set forth in the Clean Water Act. Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1251-1376.

Here, the record shows that Nordic failed to meet its burden to show that its proposed discharge release into Penobscot Bay would not contain nitrogen levels in excess of the antidegradation standard necessary to maintain Penobscot Bay’s water quality classification as “SB”. Nordic failed to provide any basis for the PB to find that the discharge from Nordic’s plant will not lower the quality of Penobscot Bay. In other words, would not result in undue water pollution when consideration is given (as the PB must) to the State’s water rules, regulations and codes.

Penobscot Bay already contains elevated levels of nitrogen. *See* Krueger/Gulezian Report. Nordic’s proposed discharge concentration for total nitrogen was stated by Nordic to be

fixed at 23 mg/l.¹⁵ Nordic cannot change that.¹⁶ Even when Nordic inexplicitly altered the dilution factor, Nordic still could not show that its proposed discharge would not exceed the applicable ceiling for nitrogen so as to not cause a degradation in Penobscot Bay’s water quality classification. Nordic could only show at best it would exceed the limit by 8%, still above the ceiling imposed in order to prevent impermissible degradation.¹⁷

Because the record compels the conclusion that Nordic’s nitrogen discharge would result in a degradation of the water quality of Penobscot Bay, the PB abused its discretion in finding that Nordic’s application would not result in undue pollution of Penobscot Bay.

In addition, Nordic failed to provide reasonable assurances that its wastewater treatment plant discharge filter is sufficient to remove viruses. Nordic claimed to use an ultraviolet light treatment to remove viruses, but the record provides no information about the type, size, efficiency or efficacy of the ultraviolet light treatment proposed without which the PB was incapable of rendering a conclusion. This also violates Ordinance Section 82-432.

¹⁵ Nathan Dill’s Far Field Dilution memo October 2, 2018, Table 1: From this chart nitrogen is 23.02.

Table 1. Effluent Concentrations for proposed discharge and background concentrations.

	Total Suspended Solids (TSS)	Biochemical Oxygen Demand (BOD)	Total Nitrogen (TN)	Ammonium Nitrogen (NH ₄)	Phosphorus (P)
Daily Discharge (kg)	185	162	673	0.07	5.8
Concentration (mg/l)	6.33	5.55	23.02	0.0024	0.20
Assumed Background Concentration (mg/l)	17	2.0	0.17 [†]	0.075 [†]	0.013

[†]Not detected at the reporting limit for all samples

¹⁶ Per Nordic, “[f]urther discharge reductions are not feasible with current available technologies.” See PB Record, Nordic’s “Overall Project Development and Discharge Summary.”

¹⁷ See PB Record [???], Response to October 10, 2020 Report: Nordic Aqua Farms Wastewater Discharge Review dated: October 15, 2020. The difference between 21 and 23 is 8%. What this means is that the nitrogen levels will be 8% higher than recommended to protect the SB classification of Penobscot Bay. This increase is accumulative as well. The SB classification will not be met.

B. Wastewater.

To approve Nordic's application the PB was required to find that the development meets or exceeds the criteria set forth in Ordinance Section 90-42(b). Ordinance Section 90-42(a).

Section 90-42(b)(29) states:

Adequacy of waste disposal. The applicant shall clearly demonstrate to the planning board that all quantities and types of waste generated by the proposed use can be dealt with and disposed of while maintaining safe and healthful conditions.

See PB Record, Tab: 8.3 PP (City Ordinance Chapter 90), at 31.

In its application Nordic failed to even mention its dredge spoils discharge and this did not offer any basis on which the PB could conclude that Nordic met these standards. The PB was made aware that as a part of installing the discharge pipes in the intertidal zone Nordic proposed to remove about 100 barge loads of dredge sludge; then dump the water from that sludge into Penobscot Bay and dispose the sludge at an undisclosed on land. Despite the absence of any information in the record on the dredge spoil discharge, the PB found that "Nordic" "demonstrated that it can manage all types of waste generated by the proposed development and maintain safe and healthful conditions." *See* PB Record, Tab: 20.1 FP (Adopted findings of fact & conditions for approval for the Site Plan Permit (Dec. 22, 2020)), Sec. 90-42(b)(29) at 45-46. Such PB action constitutes an abuse of discretion.

C. Protection of Soils: Inappropriate Site Selection.

Nordic selected a site on which the soils are incapable of supporting the project. City Ordinance, Chapter 82, Section 82-431 entitled "protection of soils" provides "[a]ll 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." *See*

PB Record, Tab: 8.2 PP (City Ordinance Chapter 82), Sec. 82-431 at 47. This is a site selection criterion. It means Nordic was supposed to propose a project that is appropriate to the soils on the site it has selected.

The Ordinance section does not say “the applicant shall make the site work by bringing in appropriate soils.” It says the development shall be appropriate for the soils found on site. Were the meaning of the statute that compliance could be obtained by removing all the soil away (at a depth of between 20-50 feet)¹⁸ and bringing in different soil, the requirement would be unnecessary. Removal of soil is not protection of soil.

The soils on the site will not support the weight of Nordic’s extraordinarily large buildings and massive steel tanks filled with water and fish. *See* PB Record, Tab: 2 PP, Table of Contents (in the electronic submission provided to the Court. Folder 3 PP, PB Meeting Video Recording – Preliminary Plan, video recording of August 26, 2019 PB, Items 4 through 7, at 02:14:40 (excavate out that unsuitable soil), 02:14:43 (that needs to come out so that we can), 02:14:45 (build a foundation on firm), 02:14:48 (firm soil that needs to then be), 02:14:51 (stabilized either through), 02:14:53 (crushed stone or gravel or other), 02:14:56 (materials)). That means Nordic selected the wrong site. The permit should have been denied for failure to meet the requirements of Section 82-341. The PB plainly misread and misapplied the standard.

D. On-Site Ground Water Wells.

Nordic’s proposed groundwater wells will diminish the water in nearby homeowners’ wells and will cause saltwater intrusion. The record shows that Nordic failed to demonstrate sufficient water availability. Significant Ground Water Well Permit, Chapter 102, Section 102-

¹⁸ Nordic proposed to remove the natural soils over a 35-acre portion of the site to depths over 50-feet (SLODA Apl., Sect. 20, Text, p. 1-2).

1077. Section 102-1079 provides that in order to approve a significant groundwater well permit Nordic had to show:

a) The quantity of water to be taken from the ground water source will not substantially lower the water table beyond the property lines, cause saltwater intrusion that would affect groundwater located on a property not owned by the applicant, cause unreasonable impacts to ground water flow patterns, or cause unreasonable ground subsidence beyond property lines.

b) Any proposed use shall not cause unreasonable adverse diminution in water quality or quantity of the aquifer or surrounding surface/ground water...

See PB Record, Tab: 8.5 PP (City Ordinance Chapter 102), Sec. 102-1079(a) & (b) at 24.

When Nordic conducted pump tests on its new on-site wells, the water level in the domestic and/or agricultural wells of the neighbors was diminished by 10 to 15 feet depending on the well. The Hydrogeologic Investigation Report Nordic submitted to the PB states:

MMA found that the numerical groundwater flow model generally supports a proposed withdrawal scenario of 455 gpm from three wells (PW-1 at 250 gpm, GWW-103 and 175 gpm, and DRX-102 at 30 gpm). Under this scenario, drawdown is expected to be approximately 200 feet at PW-1, and up to 15 feet at a nearby private water supply well (WSW-4) once steady-state groundwater flow conditions are reached.

See City of Belfast Permit Application, Vol. 3, Attachment 23A (Hydrogeologic Investigation Report at p. 35).

In addition, one of the wells revealed saltwater intrusion when it was tested. *See* PB Record, Tab: 2 PP, Table of Contents (in the electronic submission provided to the Court. Folder 3 PP, PB Meeting Video Recording – Preliminary Plan, video recording of February 26, 2020 PB at Item 3A, Cotter, 1:34:19-1:35:22). The PB specifically asked Nordic “[Y]ou must have an idea where salt intrusion might happen, if it did happen, compared to that well you saw the signature. Do you have well monitors in that zone where that worst case scenario would most likely be?” *See* PB Record, Tab: 2 PP, Table of Contents (in the electronic submission provided

to the Court. Folder 3 PP, PB Meeting Video Recording – Preliminary Plan, video recording of February 26, 2020 Planning Board at 02:27:32). Additionally, at another PB meeting, E. Cotter with Nordic stated:

We do know that at least one of the wells, one in particular, showed an antecedent saltwater signature when we tested, Ransom tested the water quality in the well. So, in that particular case, it's not a matter of causing saltwater intrusion as much as there is already an existing condition that may not change as it's pumped. It's a matter of where that well receives its waters as it's pumped...

See PB Record, Tab: 2 PP, Table of Contents (in the electronic submission provided to the Court. Folder 3 PP, PB Meeting Video Recording – Preliminary Plan, video recording of May 27, 2020 PB at 01:58:08).

Nordic offered no information to demonstrate that uncontroverted 200 feet in one well and 10 to 15-foot drop in the water level in nearby homeowners' domestic wells was "reasonable". Nordic merely said that if the homeowners well was diminished, Nordic would "consider" whether Nordic was responsible. *See* PB Record, Tab: 20.3 FP (Adopted findings of fact & conditions of approval for Significant Groundwater Well Permit (Dec. 22, 2020)) at 6-7.

With regard to the saltwater intrusion Nordic asserted that the saltwater was already at that well location when it installed their well and tested. Above, and (*See* PB Record, Tab: 2 PP, Table of Contents Folder 3 PP, PB Meeting Video Recording – Preliminary Plan, video recording of May 27, 2020 PB at 01:58:08, incorporated by planning board consultants). Nordic never demonstrated how or why saltwater, in defiance of gravity and in spite of the hydraulic head of water pushing it toward the ocean, would have moved of its own volition up gradient where Nordic supposedly "found" it.

Further the Ordinance requires that Nordic submit a hydrologic report from a licensed Maine professional geologist verifying the availability of water in the quantity Nordic projects.

Nordic did so. Nordic's hydrological report (*see* PB Record, City of Belfast, Permit Application, Vol. 3, Attachment 23) is predicated on a model of the site in its present undeveloped state and reports that recharge of the groundwater from which the wells will extract water is provided primarily by rainfall. Yet, in its storm water management plan, Nordic proposed as part of that plan to alter the hydrology of the site by diverting rainfall on the site into a series of catch basins and perimeter drains that discharge below the site near the ocean. Thus, that rainwater will be precluded from recharging the groundwater. The PB never addressed how the storm water management system impacted the credibility of the recharge model, but it does.¹⁹

Apparently acknowledging that Nordic's pumping of its on-site wells will negatively adversely impact the neighbors' wells, the PB essentially found that the standard could be met because if neighbor's wells were rendered useless, Nordic may fix the problem. The Ordinance section does not say that negatively adversely impacting a neighbor's well is permitted as long as the applicant suggests it may be willing to "fix it." The Ordinance says an applicant has to show its onsite wells and proposed water usage therefrom will not have an adverse impact on a neighbor's well.

Nordic has suggested an appropriate circumstance it might be willing to connect to public water the home of one who lost its well. Nordic did not offer to pay for that connection. Nordic did not offer to pay the ongoing water bills which would be imposed on the homeowner as a result of being connected to public water, which is especially concerning in the case of

¹⁹ Nordic said 70% of the rainfall on the site finds its way into the ground and can be relied on for future use. But that modeling did not reflect the post development changes in flows from to be added impervious surfaces and drainage swales that are designed to diverted rainwater to a perimeter drainage system and be directed offsite. The analysis should have been performed on post development modeling and not modeling inexplicably allowed Nordic to rely on predevelopment model knowing that Nordic's stormwater management plan diverted a great deal of the rainwater from the site so as to reduce the 70% to 30% post-development. *See* PB Record, Nordic's Permit Application (Stormwater Management Plan).

agricultural wells where the homeowner’s “free” water for agricultural purposes from his own well will now result in a substantial bill from the Belfast Water District.

The record compels the conclusion that Nordic did not meet its obligations under this section of the Ordinance. The PB committed an error of law and abused its discretion in applying a different standard that allowed Nordic to create an adverse impact with some unenforceable suggestion it will “fix” the problem at a later date.

E. Undue burden on existing municipal water supply.

Nordic proposed to rely on the Belfast Water District (“District”) to meet some of Nordic’s massive water needs. The PB erred in finding that Nordic’s proposed use of District supplied water would not have an undue burden on the existing municipal water supply.

Section 90-42(b)(3) requires the applicant to demonstrate that “[t]he proposed development will not cause an unreasonable burden on existing municipal water supply, if one is to be used.” *See* PB Record, Tab: 8.3 PP (City Ordinance Chapter 102), Sec. 90-42(b)(3) at 28. Nordic and the Board relied on a report by A. E. Hodsdon to find that Nordic met this requirement. *See* PB Record, Permit Application, Vol. 3, Attachment 24. The report was not credible. That report omitted or failed to disclose critical material facts that preclude use of the municipal Goose River water supply as proposed in the report, and necessary to support a conclusion that there will be no adverse impact on the municipal water supply.

Based on the Hodsdon report, the PB found that the District has sufficient water capacity to provide to Nordic 500 gallons of water per minute, 24 hours per day, 365 days per year. The Hodsdon report said that in order to do so, and at the same time for the District to continue to maintain and furnish a reliable source of potable water for Belfast residents, it would be

necessary for the District to use the “new” (2005) Talbot well. *See* PB Record, Permit Application, Vol. 3, Attachment 24 (Capacity Evaluation at p. 6) at p. 11.

During the latter stages of the PB’s review of the final site plan application, Upstream submitted a motion to the PB requesting that the PB open the record to accept testimony regarding the proximity of the Talbot well to the former Town of Swanville landfill and hear that the unlicensed well had never passed a test to show that it could meet quality and quantity water standards. In other words, the well had never been subject to any required testing in order to be considered capable of receiving a license for public drinking water purposes. That the report used this well as if it was on standby to meet the District increased water needs simply was not credible. The PB refused to consider the information.

Upstream also wanted the PB to learn that 26 years ago a plume of contamination from the landfill was detected 460 feet away from the landfill in the direction of the Goose River aquifer in which the Talbot well is located. No updated testing is available in the state records to demonstrate how far that plume of contamination has advanced toward the Talbot well nor has testing been accomplished to determine whether pumping the Talbot well will draw those landfill leachate contaminants into the Talbot well which according to the Hodsdon report “communicates” with the existing “Smart Road”—meaning that without testing, it is impossible to know if pollution of the Talbot well will pollute the drinking water of Belfast and Northport.

Nordic was required to show, and the PB was required to find, that Nordic’s proposed public water consumption would not result in an unreasonable burden on existing municipal water supply. The PB abused its discretion when it refused to hear Upstream’s information showing the assumption of the report presented—that the Talbot well could be used to meet the increase demand—was fundamentally unsound. The information was clearly relevant to the

issue. The PB refused to hear Upstream’s evidence and denied the motion. That denial was an abuse of the discretion. No reasonable person would assume an unlicensed and untested well located in close proximity a plume emanated from a nearby land fill is readily available to provide suitable drinking water to the public.

F. Financial Capability.

Nordic never provided any financial commitment whatsoever. Section 90–42(b)(10) provides the applicant must demonstrate:

The developer has adequate financial and technical ability to develop the project in a manner consistent with state and local performance, environmental and technical standards.

See PB Record, Tab: 8.3 PP (City Ordinance Chapter 102), Sec. 90-42(b)(3) at 29.

Section 90-13 requires that with “the application for final plan approval the developer shall provide one of the following performance guarantees for an amount of 110% of the total construction cost.” *Id.* Sec. 90-13 at 22. No performance guarantee has been provided. Section 90-42(b)(30), additional standards for development that may substantially affect the environment, provides that the standards of the Maine Department of Environmental Protection, 38 M.R.S. § 481 et seq., then ... [06-096 C.M.R.] chapter 373, Financial Capacity Standard, ... shall apply. *Id.* Sec. 90-42(b)(30) at 31-32.

Chapter 373, supplemented by the associated Site Location of Development Act, 38 M.R.S. § 484(1), permit application, specifically requires the following widely recognized submissions in order to demonstrate adequate financial capacity:

- Accurate and complete cost estimates of the development (06-096 C.M.R. c. 373, § 2(B)(1)),
- A time schedule for construction of all phases (*Id.* § 2(B)(2)),
- A letter from a financial institution, governmental agency, or other funding entity indicating a commitment or intent to fund (*Id.* § 2(B)(3)(a)),

Evidence describing the applicant's corporate structure and demonstrating that the proposed financing is clearly linked from the financing institution to the applicant (*Id.*). [Nordic has indicated that the Maine entity will be an LLC.]

Nordic failed to submit any of the documents required by 38 M.R.S. §484(1) and Chapter 373. Brenda Chandler (Nordic's CFO) stated outright at the PB February 5, 2020 meeting that Nordic had not submitted the required documents; "we haven't shown what the application requirements say and we know that." She also said that "what we have shown in all of the testimony is that we have the confidence." Confidence is not the standard. Nordic's "confidence," does not demonstrate credible capacity, as evidenced by submissions to the PB, Application Attachment 9.0, Financial Capacity:

9.1 Estimated costs – A brief chart with insufficient detail and no source information to demonstrate whether estimates are "accurate and complete" or realistic as required by Chapter 373.

9.2 Financing – A generalized discussion that the project will be financed by an undisclosed ratio of equity, debt (with no evidence of interest by any banks), and cash flow from operations (with no supporting cash-flow projections).

Appendix 9-A – Letter from CEO and CFO of Nordic Aquafarms, AS, stating that "funding is contingent upon receipt and review of final permits," and listing the largest current shareholders and stock issues to date.

Appendix 9-B – An unsigned letter from Carnegie Bank and Pareto Securities, two banks that are not financially independent of Nordic, stating an opinion that Nordic will be "well positioned to secure the required funding."

Appendix 9-C – A "letter of interest" from EKF, a Danish government export guarantee authority, stating "Should a formal request for the issuance of an export guarantee be submitted we will need to analyze the project in detail."

Appendix 9-D, An audit report from BDO Bank verifying the stock issue information provided in Appendix 9-A.

Appendices 9 E-F, Certificates of Good Standing from Delaware and Maine.

These documents can not in any way be construed as credible evidence that Nordic can secure adequate funding to construct and operate this complex and expensive facility.

Recognizing that Nordic failed to meet the requirement, the PB created "condition 36" requiring Nordic to provide an irrevocable letter of credit before it begins construction, with no

parameters to assure that the amount of credit is based on realistic cost estimates. That removes Nordic's compliance with the financial capacity requirement from public scrutiny. It is not only an abuse of discretion and error of law; it is also a violation of due process.

G. Other information reasonably required by the Planning Board.

Section 102-102(3)(j) requires the applicant to provide "[a]ny other information reasonably required by the planning board and/or the code enforcement officer to determine whether the provisions of this chapter will be met." *See* PB Record, Tab: 8.5 PP (City Ordinance Chapter 102), Sec. 102-102(3)(j) at 5. During the session of the public hearing conducted in September 2020 when Upstream expressed concern about unanswered PB member questions that Nordic declined to answer, the PB Chair asked Upstream to compile a list of those questions and present them to the PB at the next meeting. *See* PB Record, Tab: 22 FP, #35 (Minutes (Sept. 30, 2020)) at ¶ 6.2 at 2-3. When Upstream presented that list, Nordic's representative said that they had responded to "at least a dozen of these" to which the chairman responded, "well what about the other 80?" Schedule B is a consolidation and enumeration of the questions asked by PB members or PB staff that remained unanswered at the time the PB voted to grant the permits.

Here is the list of questions.

8/5/2019

- 1) Chairman asks, "When will your financing grow to fruition?"
- 2) Chairman asks, "How will the construction financing take shape? Is Phase 1 a distinct component? What is the guaranteed funding?"
- 3) Ms. Beal asks, "What happens if some kind of environmental damage happens?"
- 4) Chairman asks, "is there a full letter of commitment from a financial institution and some kind of loan the system?"

8/19/2019

- 5) Chairman advises the Board, "We will see if all questions have been resolved and then we will make decisions based on that."
- 6) Board requests information about NAF experience in the U.S. or elsewhere.

- 7) Board asks for evidence that this technology can "scale up" as Nordic represents.
- 8) Mr. Marshall tells board he will meet with NAF about issues raised and make the responses public on the website.

8/26/2019

- 9) Ms. Beal asks the impact of the intake pipe on fish populations. (Nordic/Normandeau says a study would be required to answer that and they have not done it.)
- 10) Planning Board requests a winter visual from the hiking trail and from Perkins Road.
- 11) Mr. Corey requested an illustration of the height of the proposed smokestacks visible above existing roof lines (Elizabeth Ransom claims no visual impact).
- 12) Mr. Corey request visual from McClellan poor.
- 13) Planning Board presented a list of requests to NAF about visual effects (no response noted in the record).
- 14) Board requested a display of tree removal areas along with a survey of what trees are there now that are currently healthy specifically in the areas where the pipeline is going in the bypass is going.
- 15) Ms. Beal asks for a plan to maintain the replacement forest.

1/15/2020

- 16) Mr. Marshall asked for a copy of the January 15, 2020 PowerPoint
- 17) the chairman asked the destination of the removed soils and how many yards would be removed.
- 18) Mr. Corey asked if there would be an on-site concrete batch plant.
- 19) Mr. Corey asked if Stone crushing will be done on site (to be decided later).
- 20) Mr. Corey requested the amount of concrete to be used on the site (will be provided later).
- 21) Mr. Corey requested a summary of traffic estimated from construction and normal operation. (Mr. Cotter agreed to do that.)

1/22/2020

- 22) Mr. Cotter agreed to submit responses to various questions in writing prior to January 29, 2020.
- 23) Chairman asked for a spreadsheet regarding construction traffic at the January 29, 2020 meeting.
- 24) Mr. Gilcrest asked for a specific breakdown of the number and type of trucks (Mr. Cotter said he would provide that).
- 25) Mr. Gilcrest requested additional information on saltwater intrusion and on erosion control during the excavation for the installation of pipes 40 feet below the ground surface.

- 26) Mr. Gilcrest requested better understanding of the two dams and an analysis of what would happen in a "worst-case scenario" that the upper dam fails.
- 27) Chairman asked about the blasting impact on the dams and the nature of the structural assessments to be done before blasting.
- 28) Chairman asked about the removal of the buffer along Route one.
- 29) Chairman asked about disturbance of the birding habitat.
- 30) A Board member asked about the plan for the disturbance of Mercury.
- 31) Mr. Gilchrist asked about Nordic's promise of "green roofs" and wondered when additional information would be available from NAF.
- 32) Chairman asked NAF to produce a better buffer for Perkins Road and to do a and analysis about bird species in that area.
- 33) Mr. Gilchrist asked about Nordic's technical ability and asked Nordic to demonstrate why their problems in Frederickstad Norway would not recur in Belfast.
- 34) Mr. Gilchrist asked about the capacity of Central Maine Power and requested a letter saying the Central Maine Power understood the power needs of Nordic and that they could supply those needs.
- 35) Mr. Bond requested a better analysis of the dams in a plan for their, for their future given that both are in dangerous condition; who is responsible?
- 36) Mr. Bond requested explanation about zoning regulations affecting the pipe through the Eckrote property in the conflict with setback rules as well as engineering plans for the rerouting of Route 1.
- 37) Mr. Bond asked if Nordic would put up a performance bond to cover the cost of removing the structure if they left mid project.
- 38) Ms. Beal asked where the promised solar panels are.
- 39) Mr. Bond asked how the smokestacks associated with the generators could be higher than zoning allowed.
- 40) Mr. Townsend asked if Nordic would need water from the upper reservoir and the minimum amount of water needed altogether and a contingency plan.
- 41) Mr. Townsend asked for an alternate Route 1 by-pass plan to sacrifice fewer trees.
- 42) Mr. Townsend asked Nordic to do a presentation for how their entire system would work and to fund an independent review.
- 43) Various board members again asked the total amount of water necessary and the circumstances impacting that number.
- 44) a board member asked to them to demonstrate that RAS is an appropriate system; to provide assurance that RAS systems are allowed by city zoning; and that the RAS system is within appropriate carbon emissions limits.
- 45) Mr. Corey again asked for verification that funding was in place and committed.

- 46) Ms. Beal asked Nordic to provide expert testimony on the overall ecological impact of the project.
- 47) Ms. Beal asked Nordic's plans for the two dams in the contingency plan should a dam fail and flood the Nordic site.
- 48) Ms. Beal asked for an explanation of how the impounded water, well water, and the aquifers interact specifically addressing Nordics water needs.
- 49) A PB member again asked for a performance guarantee so that if the project wasn't completed the city would have money to repair the site.
- 50) A PB member asked Nordic about greenhouse gases and how would affect the city's carbon impact especially regarding the state's mandatory limits.
- 51) A PB member was concerned about fish kill and ask what is the waste control plan if there is a sudden die off?
- 52) Members requested a breakdown of what would be in the effluent: would it be purely excrement, waste from the fish slaughter, or are there different waste streams feeding into it.
- 53) A Member wanted to know the composition of the fish food and if Nordic were unwilling to commit to a fish food to be used in the future to provide a breakdown of the fish food that they're currently using in Norway.
- 54) A Member asked for an explanation of the difference between Nordics RAS and Sustainable Blue and why Sustainable Blue technology could not be used in Belfast.
- 55) Chairman asked what the plan is if phase 2 is never built?
- 56) Chairman asked about other routes for the pipeline to avoid traffic disruption in the bypass?
- 57) Chairman asked for a spreadsheet outlining the construction plan over time.
- 58) Chairman said Nordic a discussed new modeling of the discharge plume and requested that information.
- 59) A PB member asked what happened if local wells go dry?
- 60) A PB Member expressed concern about the buffers on Route one and Perkins Road.
- 61) A PB Member asked Nordic to provide the number of kilowatts to be supplied by Nordics solar array.

2/5/2020

- 62) The PB asked a number of questions about Nordic's finances. What is the minimum money required before breaking ground what we do if you don't get additional money? Is this operation sustainable at Phase I only? Please provide a balance sheet. What is NAF's current financing plan now that we are nearing the end of the permit process? What is the financing structure of California and how does it relate to the financing structure in Maine? Isn't the debt issuer and the debt holder the same in California and Maine? What have they told the lenders about the amortization of the facility? Why is the

- Casida lease not a purchase? Who is financially liable if either California or Maine fails? Is there a loan guarantor and is at the same for both facilities?
- 63) The PB asked a number of questions about water. What happens if NAF has to change the composition of where the water comes from? What if there isn't enough water? What is the future ownership of the lower dam? Demonstrate that they can take 250 gallons per minute with the dam structures currently in place and without those structures. What specifically will Nordic do if private wells in the area fail after Nordic starts to pump?

2/26/2020

- 64) The PB asked (because BEP asked) Nordic for the minimum amount of freshwater they need. Nordic said the production manager would have to answer that, but no answer has ever been provided.
- 65) A PB member asked for assurance that the water volumes that are needed would be available.
- 66) A PB member asked if they if Nordic intended to buy the lower dam. The Nordic representative said they should purchase it and they should use it. Where will they get the money and use it for what purpose?
- 67) What is the effect of the ocean discharge when the freshwater sources are used in different proportions?
- 68) A PB member wanted to know what "short-term" meant because Nordic's and representatives use the term frequently.

2/27/2020

- 69) A PB member asked for more information on the Route 1 buffer plan specifically what are they planting? Mr. Cotter said there was a list and he would provide it but there is no evidence that he did.
- 70) PB Member is your final engineering plan for the bypass available?
- 71) Mr. Corey quoted Mr. Cotter as saying Nordic needed 1205 gallons per minute to operate and therefore needed the water from the lower reservoir. Mr. Cotter denied that. The Chairman requested a "comprehensive plan/schedule of use?" Mr. Cotter said they were working on a letter and the board would have it shortly.

5/6/2020

- 72) Ms. Beal asked how Nordic would handle a worst-case scenario such as a large fish die off?
- 73) Chairman has reviewed a plan for removal of trees for the Route 1 bypass but wants to see a complete plan of restoration.

5/14/2020

- 74) Nordic was asked whether the DEP permitting contemplates extraction of surface water with the dam in place or without the dam or both?

- 75) Another PB Member asked again about safety in relation to the upper dam and asked if a study had been done. The answer was no.
- 76) At this point the Chairman asked the PB Members about their current concerns. One PB Member asked for a proper study about odors and how the RAS system worked. Ms. Beal wants to know what nutrients will be in the effluent and their effect on existing ecological systems.
- 77) Chairman asked for a "overall spreadsheet showing who and when we do the inspections monitoring etc. where the reports would go and how often"?
- 78) Chairman again asked for specific final plans concerning the need for surface water and the future of the dams.

5/27/2020

- 79) Mr. Corey asked how the facility would run if there were no lower dam and what the financial impact would be.
- 80) Attorney Kelly thought NAF should affirm to the board that the plans the Boards is considering are the same as those before the DEP.
- 81) Chairman said "we need to see Plan B for surface water technology without dam with a free-flowing river"; we need assurances from NAF that this will work.
- 82) Mr. Corey asked again for assurance that Nordic can obtain 1205 gallons of water per minute and needs to see a demonstration of how that can be accomplished.
- 83) Mr. Townsend asked for a better study of the likely effect on private wells and monetary performance guarantees. He recommended Planning Board consider monetary performance guarantees for final approval.
- 84) Mr. Townsend asked for specific numbers and money to back them up because he felt that "a promise is not enough from NAF".

7/8/2020

- 85) The Chairman asked how a person whose well is destroyed by Nordics pumping might prove the relationship and get compensated for his well problems.
- 86) Mr. Corey wanted Nordic to tell him what would happen to property owners who lost their well if Nordic failed.
- 87) The Chairman asked Mr. Cotter for a letter on Nordic letterhead with the general engineering solution and a detailed study with regard to water use.
- 88) Mr. Corey asked for proof of money in hand for Phase 1 and Phase 2 along with detailed financial and technical capabilities proof. Planning Board expressed a need for professional opinion and third-party review of the RAS plan. The board asked again for a detailed description of how the RAS system would work.
- 89) The Chairman felt the clearing of trees on the bypass is not properly shown on the plan and asked Nordic to show additional buffering and to

demonstrate what will happen in times of snow as well as identifying all removal and replacement greenery in the bypass.

- 90) Another Member asked Nordic to explain in detail how they can obtain the necessary water and to do so in writing.

8/5/2020

- 91) Member was concerned about lowering wells and the saltwater intrusion impact and wanted a plan in writing from Nordic to address those issues.
- 92) The Chairman asked what would mitigation (for destroyed wells) look like, would it be a bond or connection to a public water supply or new well?
- 93) Chairman asked about the extent the Nordic's extraction would draw down the Little River and whether there should be any limit on that given that there is no data.

H. Solid Waste: Management of Solid Waste On-Site.

Section 90-42(b)(18) requires Nordic to “provide for adequate disposal of solid wastes. All solid waste will be disposed of at a licensed disposal facility having adequate capacity to accept the project’s waste.” *See* PB Record, Tab: 8.3 PP (City Ordinance Chapter 90), Sec. 90-42(b)(18) at 30. Nordic claimed no waste will be stored on site but will be constantly removed from the site by licensed haulers. *See* PB Record, Tab: 22 FP, Table of Contents, Folder 23 FP, PB Meeting Video Recording –Final Plan, video recording of Nov. 12, 2020 PB, Items 5-7, (Cotter 01:21:05 to 01:21-26); *see also* City of Belfast, Permit Application, Vol. 3, Attachment 21 (Tables). In a wonderful fit of contradiction “the planning board found that Nordic can successfully manage all types of solid waste generated by their proposed operation, and that Nordic and maintain self and healthful conditions.” *Id.* “The Board recognized that the Nordic project will routinely generate a significant amount of waste that requires off-site disposal, and that Nordic’s operations could result in a significant event, such as a fish die off that results in specific one-time waste disposal concerns.” *Id.*

Instead of requiring Nordic to present a Solid Waste Management Plan, the PB allowed the matter to be dealt with by a “Condition” later. The PB determined that the best way to

address waste generation and disposal activities was to establish specific conditions of approval that Nordic must satisfy. The PB established the following specific conditions in the site plan permit.

- 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 Associates with Operation of a Wastewater Treatment Plan. 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.

See PB Record, Tab: 20.1 (Adopted findings of fact & conditions of approval for Site Plan Permit (Dec. 20, 2020)) at 37-38.

As set forth above, these “conditions” are in fact application requirements, satisfaction of which needed to be demonstrated before a permit could be issued. The PB lacked any authority to grant an application unless all of the standards were met. In addition, by impermissibly converting application requirements into post-approval conditions, these important matters are not subject to scrutiny by the PB and the public.

Especially concerning is Condition 17 where Nordic is to create a Hazardous Waste Management Plan. The federal Resource Conservation and Recovery Act (RCRA) requires that every waste generator determine whether any part of its waste is a hazardous waste and, if so, the generator is required to segregate that waste and manage it under the RCRA (hazardous waste)

regulations.²⁰ A large component of Nordic's waste will be fish excrement and fish food waste. Nordic has refused to disclose what fish food it will use or the constituents thereof.

Fish food waste, or as found in excrement, has been determined in other instances to be a hazardous waste depending upon the fish food components. As a consequence, it is not possible to determine whether Nordic has conducted a proper waste stream analysis. More importantly, without knowing the fish food make up, no reasonable person could conclude that the food waste and excrement did not contain hazardous waste. It was Nordic's burden to show that its proposed use met or exceeded all applicable standards. Nordic's refusal to disclose the content of its food made it impossible for any reasonable person to conclude Nordic met this standard.

The record is clear that Nordic did not submit any plan for dealing with any hazardous waste component as required under RCRA. This failure is a violation of Section 90-42(b)(26) "[t]he applicant shall demonstrate compliance with federal and state laws and regulations when hazardous waste is generated or stored on-site." *See* PB Record, Tab: 8.3 PP (City Ordinance Chapter 90), Sec. 90-42(b)(26) at 31. And it means the record compels the conclusion that Nordic failed to meet this standard.

In addition, with regard to nonhazardous solid waste, the record is clear that Nordic did not offer any plan for storage on site of solid waste in the event of an emergency, for example an ice storm or hurricane. Under such circumstances normal business will stop. "Just in time" removal and transportation of solid waste would stop, perhaps for a few days. Nordic made no provision for on-site storage of several days' waste products.

²⁰ 42 U.S.C. § 6901 *et seq.*

Allowing solid and hazardous waste planning and management to be deferred from an application requirement to a permit condition is an abuse of discretion and a violation of due process.

I. AIR POLLUTION under the Ordinance and SLODA.

The PB refused to consider any of Nordic's air pollutions sources except Nordic's generators. Thus, the PB erred in issuing the permits.

Section 90-42(b)(27) prevention or control of air pollution, provide:

No use shall be allowed which creates a substantial risk of air pollution, whether by dust, chemicals, odor or otherwise, which would pose a significant risk of harm to local populations within the City or injury to wildlife, vegetation or to property, or harm to use and enjoyment of surrounding property....

See PB Record, Tab: 8.3 PP (City Ordinance Chapter 90), Sec. 90-42(b)(27) at 31. The statutory basis and authority for the code section is SLODA, 06-096 C.M.R. c. 375, which imposes an additional standard that there be "No Adverse Environmental Effect Standards Of The Site Location Of Development Act."

The PB noted that Nordic had filed for an air emissions permit from DEP and the DEP had issued a permit for the proposed eight generator power plant that Nordic would install. That does not relieve the PB from conducting its own independent review.

The PB failed to consider emissions from the Nordic wastewater treatment plant, the massive buildings housing the fish tanks and support mechanisms, the slaughterhouse and fish rendering and processing plant, the office facility, and the truck loading and unloading areas.²¹ Nordic did not show any of these sources of emission were exempt. Again, it was Nordic's burden to show compliance. And it clear that there would be emission from these activities.

²¹ Obviously, the PB recognized there would be odorous emissions, see Condition 16 imposed by the PB which required Nordic to after the fact prepare and provide a plan to address fish odors.

There must be air exchanges occurring in these buildings for obvious reasons (a fish slaughterhouse and tank holding thousands of fish).

The PB erred as a matter of law and abused its discretion when it refused to determine whether these uses would create a “substantial risk of air pollution, whether by dust, chemicals, odor or otherwise” as required by the Ordinance. *See* PB Record, Tab: 8.3 PP (City Ordinance Chapter 90), Sec. 90-42(b)(27) at 31.

Further, in connection with Nordic’s attempt to minimize its air pollution imposition, after modeling its air pollution emissions from the generators (and ignoring all of the other air emission sources on-site), Nordic found it necessary to increase the height of its standalone eight smokestacks from 42 feet, which meets the maximum allowed under the City’s regulations, to 66 feet, in order to mitigate the impact of its pollution emissions.

Under the Ordinance, smokestacks as a structure cannot exceed 42 feet in height, but chimneys, being “architectural features” are unregulated in height. So, Nordic changed the name of its eight 66-foot air pollution emissions facilities from smokestack to chimneys. When the Board allowed that desperate defiance of logic and common sense it committed an error of law and abused its discretion.

VI. CONCLUSION

For all the above reasons, this Board must reverse the Planning Board’s December 22, 2020 decisions and remand to the Planning Board with instructions that Nordic’s permits be vacated, and Nordic’s applications be returned to Nordic due to Nordic’s undisputable lack of RTI to the property that it proposes to develop.

Dated: January 26, 2024



David B. Losee, Bar No. 6500
DAVID B. LOSEE, LLC
7 Highland Avenue
Camden, Maine 04843
(860) 707-3215
david@loseelaw.com

Dated: January 26, 2024



David J. Perkins, Bar No. 3232
David P. Silk, Bar No. 3136
Curtis Thaxter LLC
One Canal Plaza, Suite 1000; P.O. Box 7320
Portland, ME 04112-7320
dperkins@curtisthaxter.com
dsilk@curtisthaxter.com

Attorneys for Upstream Watch