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February 20, 2024

VIA FEDERAL EXPRESS and VIA EMAIL (directorplanning@cityofbelfast.org and jpottle@eatonpeabody.com)

Peter Nesin, Chair, Zoning Board of Appeals
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Peter Nesin, Chair, Zoning Board of Appeals
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Bangor, ME 04401

Re: *In Re: Upstream Watch Appeals of Permits Issued
by the Belfast Planning Board, December 22, 2020*

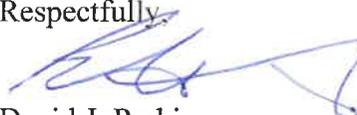
Dear Chair Nesin:

Enclosed for submission to the Zoning Board of Appeals, please find the following:

1. Appellant Upstream Watch's Reply Brief To The Brief Of City Of Belfast
2. Appellant Upstream Watch's Reply Brief To The Brief of Nordic Aquafarms, Inc.'s Brief with attached Exhibits A, B and C.

Copies of the enclosed are being served upon counsel noted below via electronic mail.

Respectfully,


David J. Perkins

Robert Papazian
Bar No. 6491
on behalf of

Enclosures

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STATE OF MAINE
WALDO, ss.

CITY OF BELFAST
ZONING BOARD OF APPEALS

UPSTREAM WATCH,)	
Appellant,)	
)	
v.)	APPELLANT UPSTREAM WATCH'S
)	REPLY TO THE BRIEF OF
CITY OF BELFAST PLANNING)	THE CITY OF BELFAST
BOARD,)	
Respondent,)	
)	
and)	
)	
NORDIC AQUAFARMS, INC.,)	
Permittee/Party-In-Interest.)	
)	

Upstream Watch replies to the City of Belfast's brief as follows:

- A. *The City's Brief ignores Tomasino, which held that a board should not act on a permit application until the court decides whether the applicant actually possesses a present legally enforceable interest in the land to be developed.*

Quoting from a 2017 publication from the Maine Municipal Association ("MMA"), the City tells this Board that the Planning Board ("PB") did not commit legal error when in 2020 it refused to stay any action on Nordic's five permit applications until the court determined whether the Eckrote Option Easement Purchase and Sale Agreement ("Option Agreement") was legally enforceable.¹ In so doing, the City ignores that in 2020 the Law Court's decision *Tomasino v. Town of Casco*, 2020 ME 96, 237 A.3d 175, rendered the MMA's guidance obsolete.²

¹ The City identifies neither the date nor title of the MMA publication that it quotes at the top of the second page of its brief. The MMA publication is titled *Manual of Local Planning Boards: A Legal Perspective*, and it was last updated in February, 2017. The quote is from page 34 of the Manual.

² Even if the MMA guidance is still relevant, the PB violated the guidance due to the fact that Nordic failed to present substantial, relevant and credible written expert evidence on RTI. The MMA guidance cited by the City states: "If the board is presented with credible written expert evidence by both the appellant and an opponent which is in direct conflict and which involves a title/boundary dispute issue, the board has three options: (1) tabling action pending the resolution of the title or boundary dispute by the parties (either voluntarily or by court order); (2) approving the application on the basis that the applicant has provided substantial, relevant and credible evidence and

Tomasino made clear that when a board is presented with conflicting evidence on whether the applicant's claim of RTI, here whether the Option Agreement is legally enforceable, and there is litigation pending to resolve that issue, the board must hold off acting on the application until the court resolves the issue. *See* Upstream's Initial Br. at 13. The reason for this rule is rooted in not wasting time and money to process a permit application when the applicant has not demonstrated a legally protected right to use the property in the manner sought, here to lay large industrial discharge pipes in the mudflats that Nordic claimed that the Eckrotes owned. The PB erred in not staying action on the applications until the "suit to determine the ownership of the intertidal lands, and application of private deed covenants, regarding the Eckrote property"³ was resolved.

B. *The City's Brief ignores Site Plan Permit Condition 37.1 which states the permits could not become "valid" until Nordic demonstrated RTI.*

Administrative standing "is intended to prevent an applicant from wasting an administrative agency's time by applying for a permit or license that he [or she] would have no legally protected right to use." *Murray v. Inhabitants of the Town of Lincolnville*, 462 A.2d 40, 43 (Me. 1983); *see also Walsh v. City of Brewer*, 315 A.2d 200, 207 n.4 (Me. 1974) ("[G]overnmental officials and agencies should not be required to dissipate their time and energies in dealing with persons who are 'strangers' to the particular governmental regulation and control being undertaken."). The RTI must be a "present" and not a future interest (*Madore v. Maine Land Use Regulation Com'n*, 1998 ME 178, ¶ 17, 715 A.2d 157 ("A litigant must possess a *present* right, title, or interest in the regulated land which confers lawful power to use

letting the parties pursue the matter further in court; or (3) denying approval on the basis that the board is unable to find that the applicant has met the burden of proof." City Br. at 2.

³ Identified by the PB in the Adopted Site Plan Permit as "Mabee Grace *et al* v. NAF, Waldo County Superior Court, Docket No. RE 2019-18." *See* Adopted Findings of Fact Final Site Plan Permit Application (Dec. 22, 2020) at 75.

that land or control its use when invoking the jurisdiction of the court *and throughout any period of appellate review*)” (emphasis supplied)) and “*must be legally enforceable.*” *Murray*, 462 A.2d at 43 (quotation marks omitted) (emphasis supplied).

The PB knew that what Nordic presented as RTI (the Option Agreement) was neither a present right nor a legally enforceable interest. Site Plan Permit Condition 37.1 (Adopted Findings of Fact Final Site Plan Permit Application (Dec. 22, 2020) (“Site Plan Permit”) at 76) states that none of the permits that the PB issued “shall be valid” unless and until Nordic obtained and recorded those property interests Nordic relied on to show RTI, including the Option Agreement, as stated in Attachment 8 to Nordic’s Site Plan application. Until that recording occurred, Nordic lacked a present legally enforceable interest to use the flats. The recording has not occurred and, in light of *Mabee*,⁴ will not occur because the Eckrotes have no interest in the flats to convey to Nordic.

The fact that the PB in Condition 37.1 required Nordic to show that Nordic had a present legally enforceable interest to use the Eckrote upland and the intertidal land in order for the permits to be valid shows that in August 2019 the PB erred in finding RTI requirements were met. Condition 37 to the Site Plan Permit approval at page 75 states:

37. Right, Title and Interest:

Chapter 90, Site Plan, Section 90-42(10) of the Belfast Code of Ordinances provides that an applicant must demonstrate right title or interest, which is interpreted by the Planning Board as requiring a legally cognizable expectation to use the properties for the intended uses. The Application dated June 11, 2019 contains in Attachment 8, a number of Options to Purchase or Lease real property rights from multiple owners of real property, including the Belfast Water District, Samuel E. Cassida, Goldenrod Properties, LLC, and Richard and Janet Ekrote. Several Parties-in-Interest have submitted Motions and multiple requests for the Planning Board to adjudicate disputed claims relating to the right to cross and use the upland and intertidal lands of Richard and Janet Ekrote. The Planning Board has found the evidence of title and the "Easement Purchase And Sale Agreement"

⁴ *Mabee v. Nordic Aquafarms, Inc.*, 2023 ME 15, 290 A.3d 79 (“*Mabee*”).

(Attachment 8, Exhibit 1, as clarified by a letter dated March 3, 2019 from Nordic and signed by the Ekrote) to be sufficient to process this administrative application. The Planning Board is also mindful that a suit to determine the ownership of the intertidal lands, and application of private deed covenants, regarding the Ekrote property. (See, Mabee Grace *et al* v. NAF, Waldo County Superior Court, Docket No. RE 2019-18).

The PB then imposed on Nordic the self-contradictory requirement that it “fully” demonstrate that it had RTI, a present legally enforceable interest that it could use the properties for the intended uses, before the permits would become valid.⁵ Condition 37.1 of the Site Plan Permit at page 76 states:

37.1 Requirement to Fully Demonstrate Right, Title and Interest. No permit issued by the Belfast Planning Board, and no construction activity thereby permitted, shall be valid or commence until such time as Nordic has obtained and recorded, in the Waldo County Registry of Deeds, the deeds, easements and lease interests for which it has the options to purchase, as described in Attachment 8, and which are required for the permitted uses to be conducted. Nordic shall provide the Belfast Code and Planning Department and City Attorney with copies of the recorded instruments reflecting the fee, easement and lease rights conveyed to Nordic, as soon as the recording information is available.

The title of Condition 37.1 tells it all: “**Requirement to Fully Demonstrate [RTI].**” If the PB already determined in August 2019 that what Nordic initially presented met the RTI requirement for administrative standing, there would have been no need for the PB to then require Nordic to “fully demonstrate” RTI any further. Condition 37.1 plainly shows that Nordic lacked RTI to seek the permits in the first instance.

Condition 37.2 (Site Plan Permit at 76) also shows the PB was aware that Nordic had not demonstrated sufficient RTI to install its industrial discharge pipes in the flats. The Site Plan permit as issued prohibited Nordic from doing any work on that land until a court first determined that Nordic had RTI to that land. Obviously if Nordic had demonstrated through the

⁵ Chapter 90, Site Plan, Section 90-42(10) of the City of Belfast Code of Ordinances actually only requires that the applicant demonstrate financial and technical ability to carry out the development if approved. It did not require a showing of RTI. That requirement comes from the Law Court’s cases on administrative standing.

Option Agreement that it had a present legally enforceable interest to lay its pipes in the flats, the condition prohibiting any work until the court decided whether Nordic had a present legally enforceable interest shows that Nordic failed to make that showing as part of its application.

37.2 Additional Requirements Regarding Ekrote Easement Area and Construction of Intake/Discharge Pipes. No work on the intake or discharge pipes that Nordic proposes to locate within the intertidal area adjacent to the Ekrote property shall commence until a final judgment issued by the Waldo County Superior Court, Docket No. RE-2019-18, effectively determines that Ekrote and/or Nordic have sufficient legal right, title or interest in and to the intertidal area that is sufficient for Nordic to engage in the uses approved in the City permits. Additionally, prior to the commencement of construction, Nordic shall record a deed in the Waldo County Registry of Deeds which grants and conveys sufficient right, title or interest from Ekrote to Nordic that entitles Nordic to use the Ekrote property (upland and intertidal) for the uses approved in the City permits.

These conditions rendering the permits on issuance invalid until Nordic demonstrated a present legally protected interest in the property to make use of the permits necessarily show that in August 2019 the PB lacked any basis to find that Nordic had standing to seek the permits. The later conditions flat out contradict the PB's August 2019 finding that Nordic had administrative standing to seek the permits. *If Nordic could not use the permits when issued due to lack of RTI, it lacked RTI to seek the permits.*

C. *The City ignores the fact that Nordic must maintain administrative standing throughout the administrative process, which is still ongoing with the remand.*

The City incorrectly asserts that this Board reviews the PB's decision on Nordic's administrative standing to seek the permits just at the time "of its vote" on RTI, without identifying which vote, the vote on August 5, 2019, or the vote on December 22, 2020, to issue the permits (when the PB stated that the permits were not valid until Nordic "fully demonstrate[d]" a present legally enforceable interest to use the land in the manner authorized by the permits).

Simply stated, for the PB to say that the permits once issued were not valid until Nordic “fully demonstrate[d]” RTI could only mean that the PB erred in 2019 in finding that Nordic had shown it had administrative standing to seek the permits. Otherwise, there would have been no need for a “full” demonstration of Nordic’s RTI as a condition to give Nordic a right to proceed with the permits. One either meets the standard or fails. Since Nordic prior to issuance of the permits had not fully demonstrated RTI, the record compels the conclusion that the PB erred in processing and on December 22, 2020, in issuing the permits.

As stated in Upstream’s Initial Brief at 12, a party seeking a land use permit must throughout the administrative process possess a present right, title, or interest in the regulated land which confers lawful power to use that land or control its use. Administrative standing is an ongoing requirement. And that is why the Superior Court in its remand order told this Board to consider in light of the *Mabee* decision whether Nordic has standing to seek the permits.

- D. *To avoid issuing an advisory opinion, which this Board has no power to do, the Board should also determine whether all permits but the Site Plan permit are now void due to the undisputable fact that the improvements identified in the permits were not completed within two years of the date the permits were issued.*

All of the five permits were issued on December 22, 2020. Other than for the Site Plan, the Ordinance provisions on expiration of those permits provide that they automatically become void if improvements identified in the permit are not completed within two years of the date the permit was issued.

a. Shoreland Zoning Permit

The Shoreland Zoning Permit was issued on December 17, 2020 (with a formal date of approval to be the date of the PB’s approval of the Site Plan Application (Dec. 22, 2020)).

Section 82-58 of the Ordinance captioned “Expiration of permit” provides: “A shoreland permit

shall lapse and become void if no substantial start is made in construction or in the use of the property within one year of the date of *the permit is issued, or if the improvements identified in the permit are not* completed within two years of the date the permit is issued.” See Ordinance, Section 52-58 (emphasis added). It is undisputed that Nordic has not made a substantial start in construction within one year nor completed the improvements identified in the permit within two years of December 22, 2020. Nordic did not obtain a stay of the Ordinance deadline. See *Cobbossee Dev. Group v. Town of Winthrop*, 585 A.2d 190 (Me. 1991). The Shoreland Zoning Permit is therefore void.

b. Zoning Use Permit

The Zoning Use Permit was issued on December 17, 2020 (with formal date of approval to be the date of the PB’s approval of the Site Plan Application (Dec. 22, 2020)). A so-called condition of approval, number 6, states that the Zoning Use Permit shall expire on December 22, 2025, if Nordic has not initiated substantial construction and development on the project site. The PB has no power to override the express terms of the Ordinance, Section 102-90 which for Zoning Use Permits provides: “A permit secured under the provisions of this division shall expire if the work or change is not commenced within one year after the date on which the permit is granted, or if so commenced if the work or change is not substantially completed within two years after the date on which the permit is granted.”

It is undisputed that Nordic has not commenced a substantial start within one year nor completed the improvements identified in the permit within two years of the December 22, 2020, issuance. Nordic did not obtain a stay of the deadline. See *Cobbossee Dev. Group v. Town of Winthrop*, 585 A.2d 190 (Me. 1991). The Zoning Use Permit is therefore void.

c. Significant Water Intake and Significant Water Discharge Permit

The Significant Water Intake and Significant Water Discharge Permit was issued on December 22, 2020. The governing provisions referenced in the permit are to Chapter 102, Zoning, and Chapter 82, Shoreland. *See* page 10 of PB Adopted Findings of Fact Significant Water Intake And Significant Water Discharge/Outfall Pipes Permit (Dec. 22, 2022). As noted above, Chapter 102 and Chapter 82 have the identical provision on expiration of permits. *Compare* Section 82-58 (“A shoreland permit shall lapse and become void if no substantial start is made in construction or in the use of the property within one year of the date of the permit is issued, or if the improvements identified in the permit are not completed within two years of the date the permit is issued.”) *with* Section 102-90 (“A permit secured under the provisions of this division shall expire if the work or change is not commenced within one year after the date on which the permit is granted, or if so commenced if the work or change is not substantially completed within two years after the date on which the permit is granted.”).

It is undisputed that Nordic has not commenced the substantial start within one year nor completed the improvements identified in the permit within two years of the December 22, 2020, issuance. Nordic did not obtain a stay of the deadline. *See Cobbossee Dev. Group v. Town of Winthrop*, 585 A.2d 190 (Me. 1991). The Significant Water Intake and Significant Water Discharge Permit is therefore void.

d. Significant Ground Water Well Permit

The Significant Ground Water Well Permit was issued on December 22, 2020. The governing provisions referenced in the permit were Chapter 102, Zoning, Article VIII, Supplementary District Regulations, Division 7, Significant Groundwater Well Permit. *See* Adopted Findings of Fact Significant Ground Water Wells Permit at 12. Section 102-90

captioned “Expiration” provides: “A permit secured under the provisions of this division shall expire if the work is not commenced within one year after the date on which the permit is granted, or if so commenced if the work or change is not substantially completed within two years after the date on which the permit is granted.”

It is undisputed that Nordic has not commenced the work within one year nor completed the improvements identified in the permit within two years of the December 22, 2020, issuance. Nordic did not obtain a stay of the deadline. *See Cobbossee Dev. Group v. Town of Winthrop*, 585 A.2d 190 (Me. 1991). The Significant Ground Water Well Permit is therefore void.

The fact that the permits issued to Nordic had conditions of approval does not excuse Nordic’s failure to comply. The time period to achieve substantial completion commenced to run on the date of approval and issuance, not when conditions were met. As stated in *Cobbossee Dev. Grp. v. Town of Winthrop*, 585 A.2d 190, 193 (Me. 1991):

We have said that conditions do not suspend the date of approval or change its nature. *Burr v. Town of Rangeley*, 549 A.2d 733, 734 (Me.1988) (routine conditions did not suspend approval); *Ballard v. City of Westbrook*, 502 A.2d 476, 481 (Me.1985) (nature of approval not changed by section that allows conditions). Even conditions that are not within the applicant's control have been held to be valid and not change the fact of approval. *Gulick v. Board of Env'tl. Protection*, 452 A.2d 1202, 1210 (Me.1982) (changes to public street condition of approval).

Thus, that the PB may have said on approval and issuance the permits are not “valid” until Nordic “fully demonstrate[d] RTI” does not nullify that the permits were issued on December 22, 2020, and automatically become void within two years from that date if the work was not substantially completed.

As an initial matter, this Board should address whether all of the permits but the Site Plan permit are now void to avoid this Board impermissibly issuing an advisory ruling. With respect to the Site Plan permit, and to the extent this Board concludes the other four permits are not void, this Board should hold that the PB erred in August, 2019 in finding Nordic had standing to seek

issuance of the permits as that finding cannot stand given the PB's further finding in December, 2020 in issuing the permits, that none of them were valid until Nordic "fully" demonstrated RTI. The PB made clear with its further finding that Nordic had not fully demonstrated RTI and thus its earlier finding of RTI was in error, that at no time had Nordic shown to the PB that it had a present legally enforceable interest to lay its pipes in the flats. Because Nordic never had administrative standing to seek the permits, this Board must vacate the PB's December 22, 2020, approvals and remand to the PB with instructions that the PB vacate those approvals and return Nordic's applications to Nordic due to Nordic's lack of administrative standing to seek the permits.

Respectfully submitted,

Dated: February 20, 2024



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that the Law Court in *Mabee v. Nordic Aquafarms, Inc.*, 2023 ME 15, 290 A.3d 79 (“*Mabee*”), confirmed that Nordic lacks RTI, this Board must direct the PB to vacate its December 22, 2020, approvals of the five permits due to Nordic’s lack of standing to seek the permits.

A. Nordic’s Easement Purchase and Sale Agreement with the Eckrotes Did not Provide Any Basis for A Finding of RTI.

Nordic confirms in its brief that Nordic’s evidence of RTI before the PB was the Easement Purchase and Sale Agreement dated August 6, 2018, with the Eckrotes (the “Easement Agreement”). The Easement Agreement, by its express terms, granted Nordic the option to obtain an easement over only the Eckrotes’ upland (*see* Exhibit A to the Easement Agreement submitted by Nordic in support of RTI¹, a copy is attached hereto as Exhibit A). The Easement Agreement did not grant any rights in the intertidal land.

By letter dated March 3, 2019, Nordic had the Eckrotes agree to the following: “You intended a broad easement over your property, including any rights you have to US Route 1 and the intertidal zone such that Nordic Aquafarms can build and site its pipes anywhere in those areas where you have rights.” (*see* attached Easement Agreement and March 3, 2019, letter amendment agreement thereof submitted by Nordic in support of RTI,² copies of which are attached hereto as Exhibit B)(emphasis added).

But Nordic failed to submit to the PB any competent evidence that the Eckrotes owned the intertidal land. The Eckrotes never represented that they owned or had any interest in the intertidal land in their agreements with Nordic. They simply agreed that **if** they had rights to the intertidal land they would grant Nordic rights.

¹ <https://www.cityofbelfast.org/413/Nordic-Aquafarms-Permit-Applications> (last visited: Feb. 15, 2024) (“Right, Title, and Interests, ° Nordic Aquafarms Application”).

² *See* footnote 1.

The only competent evidence in the PB's record demonstrates that the Eckrotes did not own or have any interest in the intertidal land abutting their upland property. Upstream and Jeffrey Mabee and Judith Grace ("Mabee/Grace"), the plaintiffs in *Mabee*, submitted a surveying opinion by Donald Richards and title work proving that the Eckrotes did not own the intertidal land. Nordic never offered surveying or expert evidence that the Eckrotes owned or had any interest in the intertidal land. Nordic could not present such evidence, *because Nordic's own survey by James Dorsky showed the Eckrotes did not own the intertidal land*. The Eckrotes' survey by Gusta Ronson also showed that the Eckrotes did not own the intertidal land.

Upstream and Mabee/Grace also submitted evidence to the PB showing that the intertidal land was encumbered by a Conservation Easement which prohibited Nordic from laying its pipes in the intertidal land. The Conservation Easement was duly recorded in the Waldo Registry of Deeds on April 29, 2019, and by the easement's clear language prohibited Nordic from installing its industrial pipes in the intertidal land.

Upstream and Mabee/Grace also provided evidence to the PB that the Eckrotes' land was encumbered by a "residential use only" restriction which prevented Nordic from using the Eckrotes' land for industrial purposes. Again, Nordic submitted no evidence refuting the residential use only restriction and the PB failed to address how Nordic could install industrial improvements on land that was limited to only residential use.

Given this record, the PB clearly erred in finding that Nordic had the required RTI to obtain approval for its permits.

B. With its Reply Brief, Nordic Fails to Demonstrate that Nordic Complies with RTI Requirements.

In response to the indisputable evidence that Nordic lacked RTI at every stage of its project, Nordic advances arguments which make no sense.

First, Nordic argues that changes in property ownership do not retroactively impact the PB permits. But there has been no change in property ownership in this matter. It is undisputed that the Eckrotes never owned the intertidal land. The Eckrotes never represented that they owned the intertidal land. Nordic's option to obtain from them an easement for use of the intertidal land was always defective, given the fact that Mabee/Grace owned the intertidal land and they refused to grant Nordic any use of their land. Nordic's proposed use of the Eckrote land and the intertidal land for industrial purposes was always prohibited by the restrictions on record before the PB (the conservation easement and the residential use only restrictive covenants).

Second, Nordic argues that it submitted substantial evidence of RTI resulting in "meticulously documented findings of RTI." As set for above, the RTI evidence submitted by Nordic to the PB consisted of the Option Agreement with the Eckrotes. The PB was promptly put on notice that the Eckrotes did not own the intertidal land and the Eckrotes' upland was subject to the residential use only restriction. The Eckrotes did not represent in any agreement or filing that they owned the intertidal land. Nordic later submitted to the PB a copy of its submission to the DEP which included a survey by Nordic's surveyor, James Dorsky, which showed that the Eckrotes *did not own the intertidal land*. The PB clearly did not issue "meticulously documented findings of RTI." Site Plan permit Condition 37.1 which required that Nordic "fully demonstrate" RTI before the permits become valid shows that the PB recognized Nordic that did not have RTI, a present legally cognizable right to use the land in the manner permitted by a permit when issued.

Third, Nordic acknowledges that this Board is not authorized to look at materials outside of the PB record. But then Nordic tries to address Nordic's lack of credible evidence of RTI by submitting purported documentation of an eminent domain taking by the City of Belfast which

does not appear in the record. If the eminent domain proceeding documents were allowed, Upstream would show that the Waldo County Superior Court entered an order stipulated to by Nordic providing that the eminent domain proceeding did not amend or alter the Conservation Easement (*see Exhibit C*).

The Law Court has clearly required that an applicant for a permit must have RTI at the time of the application to the administrative body and throughout the process. An applicant like Nordic cannot apply for a permit without having the present legal rights to use the property needed for the project with the hope that Nordic will someday get RTI for its project. And a board like the PB cannot issue a permit without the applicant first “fully demonstrate[ing]” RTI.

The Law Court explains:

A justiciable controversy involves a claim of present and fixed rights based upon an existing state of facts. “ ‘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.’ ” *Campaign for Sensible Transp. v. Maine Turnpike Auth.*, 658 A.2d 213, 215 (Me.1995) (quoting *Connors v. International Harvester Credit Corp.*, 447 A.2d 822, 824 (Me.1982)).

Hence we have consistently held that a party may not seek judicial (or administrative) action concerning land use without having an interest in the property at issue. *See Halfway House, Inc.*, 670 A.2d [1377] at 1379; *Walsh v. City of Brewer*, 315 A.2d 200, 207 (Me.1974). Absent that interest, the applicant does not present an actual controversy to be resolved by judicial action.

Madore v. Maine Land Use Regul. Comm'n, 1998 ME 178, ¶¶ 7, 9, 715 A.2d 157.

Fourth, Nordic acknowledges that this Board may reverse the PB decision if part of the decision was “arbitrary or capricious and compels a contrary decision based on substantial evidence in the record.” Ordinance, Section 102-134(f). Nordic then states: “Upstream doesn’t even try to argue that the Planning Board Permits aren’t supported by substantial evidence.” Nordic Br. at 5.

Upstream’s position on RTI could not be clearer: Nordic’s permits are not supported by substantial evidence of RTI, as the Eckrotes could not grant a valid easement to the flats and the upland. Site Plan permit Condition 37.1 shows that at the end of the day the PB knew that Nordic had not presented credible evidence that Nordic had a present legally enforceable right to use the Eckrotes’ property and adjacent flats in the manner the permits would allow. The PB made the permits invalid until Nordic made that showing, a showing that can never happen, because the Eckrotes never owned the flats. Thus Nordic can never record an easement from the Eckrotes for use of the flats.

Fifth, Nordic argues that the Ordinance only requires a showing of RTI for the properties where there are significant groundwater wells. Section 102(102)(2) of the Ordinance 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.” As stated above, caselaw in Maine is clear that an applicant must have RTI to obtain administrative standing to seek approval. Thus, Nordic had to show RTI to proceed with all its permit approvals.

Sixth, Nordic argues that the *Tomasino* case is irrelevant to the Nordic application which is based on an easement where the grantor of the easement (the Eckrotes) did not own the land relating to the easement. The *Tomasino* case, however, is entirely applicable to this case, as the Law Court determined that claiming an easement is not enough. The applicant must demonstrate that the easement, in fact, presently allows the proposed use.³ Here, Nordic indisputably failed to

³ As the Law Court states in *Tomasino v. Town of Casco*, 2020 ME 96, ¶¶ 14-15, 237 A.3d 175 (emphasis added):

Unlike title owners, easement owners are subject to a second layer of necessary authority—what the easement itself allows—in addition to what the applicable ordinances and statutes allow. In this matter, even assuming that the Tomasinos demonstrated that they had *some* interest in the particular portion of property at issue, they failed to demonstrate that they have the kind of interest that would allow them to cut the trees if they were granted a permit to do so. Whatever minimum “right, title or interest” is required by ordinance, Casco, Me., Code, § 215-9.36(C)(2), we conclude that, in the face of a dispute between private property owners, that requirement is not met by an easement whose

establish that it had the present right to use the intertidal land on which it claimed the Eckrotes owned and thus could grant to Nordic an easement.

Seventh, Nordic argues that the PB properly found that Nordic demonstrated RTI when the PB found that Nordic “submitted sufficient information to demonstrate that they have [RTI] to the property that they propose to develop for the purposes of PB review of all Permit applications (Site Plan Permit at 9).” Nordic also argues that the “Planning Board specifically noted its consideration of the written comments and evidence it received, as well as the affirmative RTI findings made by DEP related to the Project permits.” Nordic Br. at 13.

If all of this was true, there would have been no need for the PB to make all five permits invalid until Nordic “fully demonstrate[d] RTI.” But that requirement was imposed because the record demonstrated Nordic lacked the present right to use the upland and intertidal area in the manner for which the permits were issued. *If Nordic could not use the permits when issued due to lack of RTI, it lacked RTI to seek the permits.*

Eighth, Nordic argues that this Board cannot consider the fact that the Law Court in the Quiet Title Action determined that Nordic lacks RTI. This is incorrect. The Board is required to consider the Law Court’s findings in *Mabee* on RTI. Nordic is required to have RTI at the time of the application for its permits and throughout any appeal of the permits. *See Madore v. Maine Land Use Regul. Comm’n*, 1998 ME 178, ¶ 7, 715 A.2d 157.

Ninth, Nordic argues that Site Plan Permit Condition 37.1 allows the unlawful and erroneous PB decision on RTI to be ignored, because although approved, the permits are

parameters have not been factually determined by a court with jurisdiction to do so. We therefore discern no error in the Board's refusal to grant the Tomasinos a shoreland zoning permit to cut trees located wholly or partially on the disputed property.

“invalid” until Nordic has obtained and recorded the deeds, easements and lease interests which are required for the permitted uses to be conducted. At page 14 of its brief, Nordic highlights the following provision in the permit that takes effect if a court determines that Nordic lacks RTI:

“All permits by the Planning Board shall thereby be immediately suspended relating to permitted uses on each and all of the properties described in Attachment 8, until such time as the Planning Board has acted on a subsequent amendment or application to re-issue appropriate use permits.”

The fact that the PB recognized that Nordic lacked RTI with Site Plan Permit Condition 37.1 does not excuse Nordic’s failure to demonstrate RTI before the PB. Upstream timely appealed the PB’s decision so the PB’s approval of the permits is now before the Appeals Board. The questions before the Appeals Board are whether: (i) the PB had credible evidence of RTI to grant the permit approvals to Nordic, (ii) the PB should have stayed acting on the applications pending judicial resolution of whether the Eckrotes had any rights in the flats, the enforceability of the Conservation Easement and residential use restriction, and (iii) Nordic has maintained the required RTI to proceed with its project.

Plain as day, Condition 37.1 demonstrates that the PB recognized that Nordic had not presented credible evidence of RTI, which is why the PB stated on issuance that the permits were invalid until Nordic “fully demonstrate[d]” RTI. As the Law Court has ruled in *Tomasino* and *Madore*, the PB cannot issue approvals and permits when the applicant fails to have and maintain that RTI required to do the work in the manner authorized by the permit sought.

C. The PB Erred by Failing to Make Nordic Comply with all Permit Requirements.

With its initial brief, Upstream identified numerous instances in which the Ordinance required a specific demonstration of competence or efficacy on the part of the applicant, but the

Ordinance requirement was not satisfied as of the date of the PB approval of the permits. Instead, the PB improperly allowed Nordic to meet Ordinance requirements sometime in the future.

An application requirement cannot be met by a condition to be satisfied after the application for permit is granted. Deferring application requirements to post-permit compliance conditions denies the public the ability to test the application at a public hearing, critical to avoiding a municipal due process violation. “An applicant before an administrative board is entitled under the due process clause of the United States and Maine Constitutions to a fair and unbiased hearing.” *Gorham v. Town of Cape Elizabeth*, 625 A.2d 898, 902 (Me. 1993). The Law Court will “vacate an agency’s action if it results in *procedural unfairness*.” *Hopkins v. Dept. of Human Services*, 2002 ME 129, ¶ 12, 802 A.2d 999, 1002 (emphasis in original).

Nordic claims the substantial evidence test is met when it agrees to a permit condition allowing it to demonstrate the application requirement long after the permit is issued. That would constitute unauthorized legislation prohibited under *Waterville Hotel Corp. v. Board of Zoning Appeals*, 241 A.2d 50 (Me. 1968). When the applicant has the burden to show it has met all applicable Ordinance requirements, an unmet permit requirement cannot be papered over by torturing the Maine rule on substantial evidence.

The permit condition to supply evidence in the future is not evidence at all, much less substantial evidence. In fact, had the applicant provided substantial evidence of compliance at the outset of its application as required it would not be necessary to ask the board for permit conditions allowing the applicant to supply evidence of compliance months or years into the future.⁴ Attached to its brief as exhibit C, Nordic supplied a chart which it suggests demonstrates how Nordic complied with the application conditions. At the Board hearing, Upstream will

⁴ Nordic claims, “substantial evidence exists when the Planning Board findings ‘are supported by any competent evidence in the record, even if evidence contrary to the result reached by the agency exists’” and Nordic supports that

demonstrate that Nordic failed to meet many approval conditions including the requirement to show adequate electrical service.

CONCLUSION

For the above reasons, to the extent some or all of the issued permits are not now void, Upstream requests that the Board find that the PB abused its discretion in finding that Nordic had standing to seek the permits and in not staying the proceedings pending court resolution of whether the Eckrotes had any rights to the flats, that Nordic presently does not have the RTI necessary to proceed with its project, that Nordic failed to meet the other requirements for its approvals, and that the matter be remanded to the Planning Board to revoke the permits.

Dated: February 20, 2024



Robert Papazian
Bar No. 6491
on behalf of

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

Dated: February 20, 2024



Robert Papazian
Bar No. 6491
on behalf of

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

definition by citing *Town of Kittery v. Dineen*, 2017 ME 53, ¶ 25, 157 A.3d 788. Omitted by Nordic in its *Dineen* quotation is the further requirement found in *Dineen* that substantial evidence must be of such character that “a reasonable mind would rely on that evidence as sufficient support for a conclusion.” *Id.* ¶¶ 25, 26. A reasonable man would not find an absence of evidence to support a conclusion, and for the PB to do so is an abuse of discretion.

EASEMENT PURCHASE AND SALE AGREEMENT

This Easement Purchase and Sale Agreement (this "Agreement"), dated as of this 6th day of August, 2018, is by and between RICHARD AND JANET ECKROTE, 42 Grandview Avenue, Lincoln Park, New Jersey 07035 (the "Seller"), and NORDIC AQUAFARMS, INC., a Delaware corporation having an address of c/o Nordic Aquafarms AS, Oraveien 2, 1630 Gml Fredrikstad, Norway (the "Buyer").

RECITALS

A. Seller is the owner of approximately 2.78 acres of land located at 282 Northport Avenue, Belfast, Maine, identified on the City of Belfast Tax Map 29 as Lot 36, and the building and improvements thereon, and all rights and interests appurtenant thereto (the "Premises").

B. Seller desires to sell and Buyer desires to purchase a perpetual, subsurface easement (the "Easement") under a portion of the Premises for the purpose of constructing, maintaining, owning and operating water pipes and related equipment (the "Utilities") on the terms and subject to the conditions set forth herein. The portion of the Premises that will be burdened by the Easement is referred to herein as the "Easement Area."

C. Accordingly, for the consideration hereinafter named, and for other good and valuable consideration, receipt and sufficiency of which is hereby acknowledged, the parties do hereby agree as follows:

AGREEMENT

1. Purchase Price. Buyer shall pay to Seller the sum of [REDACTED], as follows:

a. \$[REDACTED] as security for Buyer's performance hereunder (together with all interest earned thereon, the "Deposit") within three (3) business days after the full execution of this Agreement to Seller's counsel, Lee Woodward, Jr. ("Escrow Agent"), who shall deposit it in a federally insured interest-bearing money market account and disburse it according to the terms of this Agreement. The Deposit shall be non-refundable to Buyer, except in the event of Seller's default hereunder, and shall be applied in reduction of the Purchase Price payable at the Closing or as otherwise provided under this Agreement.

b. \$[REDACTED] cash proceeds on the Closing Date, in lawful currency of the United States of America in immediately available funds by certified funds or by wire transfer to an account or accounts designated by Seller.

c. In addition to the foregoing cash consideration, Buyer shall, at Buyer's expense, perform the various improvements listed in Section 3(b) below.

In addition to the Deposit, within three (3) business days after the full execution of this Agreement, Buyer shall also pay to Seller (or directly to Lee Woodward, Jr., for Seller's benefit), the sum of [REDACTED] as reimbursement for legal fees incurred by Seller in connection with the transaction memorialized by this Agreement.

2. Closing. The Closing shall occur on August 16, 2019 or such earlier date as shall be mutually agreed by the parties hereto (the "Closing Date"), at Law Offices of Lee Woodward Jr., 56 Main Street, Belfast, Maine 04915, or such other location as mutually agreed by the parties. Buyer shall have the right to accelerate the Closing to an earlier date upon not less than ten (10) business days prior written notice to Seller.

3. Grant of Easement. (a) Easement Agreement. Seller shall convey the Easement to Buyer or its nominee or designee pursuant to mutually acceptable, commercially reasonable easement agreement (the "Easement Agreement") containing usual and customary terms for perpetual, subsurface utility easements, which shall include, without limitation, the right of Buyer and its contractors and agents to access the Premises with men, equipment and machinery, as reasonably necessary for the initial installation of the Utilities and related construction activities, (x) provided Buyer shall communicate with Seller and coordinate Buyer's activities so as to avoid unreasonable interference with Seller's use of the Premises (particularly to the extent any activities are undertaken during summer months when Seller and its guests or invitees are using the Premises); and (y) subject to Buyer's obligation to restore any portions of the Premises disturbed by such construction and to perform the improvements set forth in Section 3(b) below. The Easement Agreement shall convey a good and clear record and marketable title to the Easement, insurable on the current ALTA Standard Owners Form at standard rates, with standard printed exceptions for parties in possession and mechanics' liens deleted, free from all mortgages and monetary liens and all other encumbrances prohibiting or making unfeasible Buyer's use of the Easement for its intended purposes, and shall be in proper form for recording and shall be duly executed, acknowledged and delivered by Seller at the Closing. Seller shall obtain any third party consents that may be required to grant the Easement to Buyer, such as the consent of any mortgage lender. Buyer's counsel shall prepare the Easement Agreement for review and comment by Seller and Seller's counsel.

(b) Improvements to Seller's Premises. Buyer covenants to perform the following improvements to the Premises, at Buyer's cost and expense, either after the Closing and contemporaneously with Buyer's construction activities or during Buyer's diligence activities as Buyer deems expedient:

a. Install a new underground water pipe running from Route 1 along the Premises' existing drive way to the existing camp building on the Premises.

b. Install a new underground electrical conduit running from Route 1 along the Premises' existing drive way to the existing camp building on the Premises.

c. Unearth and "reset" the two (2) existing drainage pipes under the existing driveway on the Premises.

d. Remove the large oak tree overhanging the camp and thin out dead trees in the pine grove in the northwest part of the Premises.

e. Place large, excavated stones to strengthen existing retaining walls, to the extent feasible and practicable.

f. Dismantle the boathouse on the Premises and, upon Seller's request, and to the extent feasible and practicable, salvage old barn boards from the boathouse. In the event Seller elects to retain any salvaged barn boards, Seller shall be responsible to removing such boards from the Premises, and/or storing and securing such boards on Premises ty from Buyer, and acceptance of such boards by Seller shall be deemed a waiver of any claims against Buyer related thereto.

g. Perform test bores in front of the garage on the Premises to determine the feasibility of installing a basement or septic system is feasible. Any reports produced in connection therewith shall be promptly delivered to Seller.

h. Plant a reasonable amount of shrubbery on the new easement area after the installation and related work is complete.

i. Add fresh gravel at the driveway entrance when the Buyer's construction is complete.

Notwithstanding anything to the contrary, if any of the foregoing improvements to be performed by Buyer for the benefit of Seller requires any governmental or regulatory approvals (including, without limitation, those related to work upon or impacting any wetlands), Seller shall be responsible for obtaining any such approval, at Seller's cost and expense. Seller and Buyer shall communicate, cooperate and coordinate so as to cause such work to be performed expeditiously and efficiently without interfering with Seller's use of the Premises or the pursuit of Buyer's installation of the Utilities in the Easement Area to facilitate Buyer's Project and/or Buyer's Project more generally.

4. Location of Easement Area. A drawing of the proposed location of the permanent Easement Area and a temporary construction easement area is attached hereto as Exhibit A. Seller and Buyer acknowledge and agree that the final location of the Easement Area (and corresponding temporary construction easement area) may be subject to adjustment based on the result of Buyer's inspections and to Buyer's receipt of all applicable governmental and regulatory approvals necessary for Buyer's use of the Easement for its intended purposes, provided Buyer agrees that the Easement Area shall be located to the south of the old barn and existing driveway entrance. If Buyer determines that it is impractical or not feasible to locate the Easement south of the old barn and existing driveway entrance, and the parties are unable to agree on another, mutually acceptable location, this Agreement shall terminate and the Deposit shall be retained by Seller.

5. Buyer's Inspections.

a. Seller acknowledges the Buyer intends to conduct certain investigations of the Premises to determine the suitability for Buyer's purposes, including title searches; obtaining a survey; geotechnical, environmental and hydrogeological tests (including geotechnical borings, sampling, and drilling); and determining the compliance of the Easement Area with all applicable laws, rules, codes and regulations. Buyer and Buyer's agents and contractors shall have the rights to enter onto the Premises with vehicles, equipment and machinery to conduct such inspections as Buyer deems appropriate, including for Buyer's engineering inspection(s), site evaluations, and such other inspections and investigations as Buyer deems appropriate.

b. Buyer shall provide reasonable notice of any such entry and coordinate the same with Seller so as to schedule its testing activities to the extent practical and feasible for times Seller and its invitees or guests are not using the Premises, and in all cases to avoid unreasonable interference with the use of the Premises by Seller, and its invitees or guests.

c. In conducting any inspections, Buyer and its agents and representatives: (i) (together with the equipment or machinery of any such party) shall have a license to access the Premises at all reasonable times for the purpose of conducting such inspections; (ii) not unreasonably interfere with Seller's use of the Premises and endeavor to schedule its testing activities for times Seller and its invites and guest are not using the Premises; (iii) comply with all applicable laws; (iv) promptly pay when due the costs of all inspections and tests, (v) not permit any liens to attach to the Premises by reason of the exercise of its rights hereunder; and (vi) promptly repair any damage to the Premises not resulting from the actions of Seller or its invitees or guests, and restore any areas disturbed resulting directly from any such inspections, investigations or tests substantially to their condition prior to the performance of such due diligence.

d. In order to facilitate Buyer's due diligence, Seller will promptly upon Buyer's request therefor, supply Buyer with any and all information relating to the Premises (including, without limitation, title information, surveys, environmental reports, engineering studies, tax bills, legal notices, permits, approvals and such other information as Buyer may reasonably request) in Seller's possession or under Seller's control.

e. Except as arising from Seller's negligence, gross negligence, or willful misconduct or any matter arising from the mere discovery of a pre-existing condition at the Premises, Buyer hereby agrees to indemnify and hold Seller harmless from, all third-party claims, liabilities, damages, losses, costs, expenses (including, without limitation, reasonable attorneys' fees), actions, and causes of action arising out of personal injury and/or property damage directly caused by any entry onto the Premises by, or any inspections or tests performed by Buyer, its agents, independent contractors, servants and/or employees.

f. Buyer shall obtain and maintain, at its expense: (i) statutory Worker's Compensation and Employers Liability Insurance with available limits of not less than \$1,000,000.00, which insurance must contain a waiver of subrogation; (ii) Commercial General Liability coverage with available limits of not less than \$2,000,000.00 in combined single limits for bodily injury and property damage and covering the contractual liabilities assumed under this Agreement; (iii) business automobile liability insurance with available limits of not less than \$1,000,000 combined single limit for bodily injury and/or property damage per occurrence; and (iv) such other insurance as Seller may reasonably require. Such policy(s) shall provide primary (and not merely contributory coverage) to Seller. Buyer shall provide Seller with evidence of such insurance policies upon the request of Seller.

6. Conditions to Closing

a. Buyer's Conditions to Closing. Without limiting any other conditions to Buyer's obligations to close set forth in this Agreement, the obligations of Buyer under this Agreement are subject to the satisfaction at or before the time of Closing of each of the following conditions (any of which may be waived in whole or in part by Buyer, in writing, at or prior to Closing):

i. There shall be no final judgment materially affecting the ability of Seller to perform its obligations rendered against Seller, or if, within thirty (30) days after entry thereof, such judgment shall have been discharged or execution thereof stayed, or if, within thirty (30) days after the expiration of any such stay, such judgment shall have been discharged.

ii. Seller shall have performed, observed and complied with all material covenants and agreements required by this Agreement to be performed by Seller at or prior to Closing.

iii. Buyer shall have obtained all permits necessary or desirable for the development and operation of the land-based aquaculture facility that Buyer intends to construct across the public right-of-way from the Premises (the "Project"), and Buyer shall have determined, in its sole discretion, that the Easement Area is suitable for use in connection with the Project.

If any of Buyer's foregoing conditions is not fully satisfied on or before the Closing Date, Buyer shall have the option to either (x) terminate this Agreement by notice to Seller, in which event this Agreement shall terminate and all obligations of the parties hereto shall cease without further recourse or remedy of the parties hereunder, and the Deposit shall be retained by Seller, or (y) waive such condition and proceed to consummate the transaction contemplated hereby in accordance with the provisions of this Agreement. Notwithstanding the foregoing, in the event that the failure to satisfy any condition precedent to Closing is caused by a breach by Seller of its obligations set forth in this

Agreement, Seller shall be deemed to be in default hereunder, in which event the provisions of Section 9 below shall apply.

b. **Seller's Conditions to Closing.** Without limiting any other conditions to Seller's obligations to close set forth in this Agreement, the obligations of Seller under this Agreement are subject to the satisfaction at the time of the Closing of each of the following conditions (any of which may be waived in whole or in part by Seller at or prior to Closing):

i. There shall be no final judgment materially affecting the ability of Buyer to perform its obligations rendered against Buyer, or if, within thirty (30) days after entry thereof, such judgment shall have been discharged or execution thereof stayed, or if, within thirty (30) days after the expiration of any such stay, such judgment shall have been discharged.

ii. Buyer shall have performed, observed and complied with all material covenants and agreements required by this Agreement to be performed by Buyer at or prior to Closing.

If any of Seller's foregoing conditions is not fully satisfied on or before the Closing Date, Seller shall have the option to either (x) terminate this Agreement by notice to Buyer, in which event the Deposit shall be retained by Seller, and this Agreement shall terminate and all obligations of the parties hereto shall cease without further recourse or remedy of the parties hereunder, or (y) waive such condition and proceed to consummate the transaction contemplated hereby in accordance with the provisions of this Agreement. Notwithstanding the foregoing, in the event that the failure to satisfy any condition precedent to Closing is caused by a breach by Buyer of its obligations set forth in this Agreement, Buyer shall be deemed to be in default hereunder, in which event the provisions of Section 10 below shall apply.

c. **Closing Costs.** Each of Seller and Buyer shall be responsible for their own legal expenses incurred in connection with this Agreement. Seller and Buyer agree to allocate closing costs as follows:

i. Transfer/conveyance taxes (if applicable) shall be divided evenly between Seller and Buyer.

ii. Buyer's title insurance expenses and premiums shall be paid by Buyer.

iii. If applicable, the cost of an update to the most recent survey of the Easement Area or of a new survey and any related surveyor's certificate shall be paid by Buyer.

iv. The cost of preparation and recordation of any releases and termination statements as may be required in connection with the title policy described in Section 3 hereof shall be paid by Seller.

v. The cost of preparation of the Easement Agreement shall be paid by Buyer.

vi. The costs of performing Closing and of any escrow charges shall be paid by Buyer.

d. Condition of Premises at Closing and Closing Inspection. At Closing, but without limiting any of the other conditions to Closing hereunder, full possession of the Easement Area, free of all tenants and occupants and of all personal property located on Easement Area and owned by Seller is to be delivered to Buyer at the Closing, the Premises to be then in the same condition as on the date hereof, reasonable use and wear excepted. Buyer and its agents, employees, representatives or independent contractors shall be entitled to an inspection of the Easement Area prior to the Closing in order to determine whether the condition thereof complies with the terms of this Section.

7. Entire Agreement Herein. The parties understand and agree that their entire agreement is contained herein, and that no warranties, guarantees, statements, or representations shall be valid or binding on either party unless set forth in this Agreement. It is further understood and agreed that all prior understandings and agreements heretofore had between the parties are merged in this Agreement which alone fully and completely expresses their agreement and that the same is entered into after full investigation, neither party relying on any statement or representation not embodied in this Agreement. This Agreement may be changed, modified, altered or terminated only by a written agreement signed by the parties hereto.

8. Condemnation. If all or a material part of the Easement Area is taken by condemnation, eminent domain or by agreement in lieu thereof, or any proceeding to acquire, take or condemn all or part of the Premises is threatened or commenced, Buyer may either terminate this Agreement (in which event Buyer shall be entitled to a return of the Deposit), or purchase the Easement Area (as may be relocated or adjusted pursuant the mutual agreement of Buyer and Seller) in accordance with the terms hereof, without reduction in the Purchase Price, together with an assignment of Seller's rights to any award paid or payable by or on behalf of the condemning authority. Otherwise Buyer shall complete the transaction and shall receive an assignment of Seller's rights to the award therefor at Closing. If Seller has received payments from the condemning authority and if Buyer elects to purchase the Easement Area, Seller shall credit the amount of said payments against the Purchase Price at the Closing. For the purposes hereof, a part of the Premises shall be deemed "material" if in Buyer's judgment the taking thereof would adversely affect the Easement Area's usefulness with respect to the Project and/or the Buyer's ability to pursue the Project.

9. Maintenance; New Leases or Agreements, Etc. Between the date hereof and the Closing:

a. Seller shall maintain the Easement Area in at least the same condition as the same is in at the date hereof, reasonable wear and tear and the consequences of any taking by eminent domain excepted. Seller shall maintain insurance on the Premises as currently insured.

b. Seller shall not enter into any lease, license or other occupancy agreement of all or any part of the Easement Area or any other agreement affecting the Easement Area, without Buyer's prior written consent (which Buyer may withhold in its sole and absolute discretion).

c. Seller shall not make any commitments or representations to any governmental authorities, any adjoining property owners, and civic association or interest groups concerning the Easement Area to this Agreement that would be binding upon Buyer in any manner.

d. Seller shall promptly deliver to Buyer copies of any notices or other correspondence it receives from any governmental authorities regarding the Premises.

10. Default; Remedies. Either party shall be in default hereunder if they fail to fulfill their obligations as set forth in this Agreement.

a. In the event of a material default by Seller hereunder, Buyer shall have the right to exercise any one of the following as its sole and exclusive remedies:

i. terminate this Agreement by written notice to Seller, in which event the Deposit shall be returned to Buyer, and all obligations of the parties under this Agreement shall terminate;

ii. seek specific performance of this Agreement; or

iii. waive the default and proceed to consummate the transaction contemplated hereby in accordance with the provisions of this Agreement.

b. In the event of a material default by Buyer hereunder, Seller shall have the right to terminate this Agreement by written notice to Buyer, in which event the Deposit shall be paid to Seller as its sole remedy, at law or in equity, and all obligations of the parties under this Agreement shall terminate.

11. Continuation of Representations, Indemnifications and Covenants. All provisions, covenants, representations, warranties, indemnifications and covenants of the parties contained herein are intended to be and shall remain true and correct as of the time of Closing.

12. Recording. It is agreed hereby that this Agreement shall not be filed for recording with the Register of Deeds for the County of Waldo or with any other governmental body but that a memorandum of this Agreement may be recorded at any party's request.

13. Notices. Any notice or communication which may be or is required to be given pursuant to the terms of this Agreement shall be in writing (from either a party hereto or its counsel) and shall be sent to the respective party at the address set forth in the first paragraph of this Agreement, by hand delivery, by postage prepaid certified mail, return receipt requested, by a nationally recognized overnight courier service that provides tracing and proof of receipt of items mailed, or to such other address as either party may designate by notice similarly sent. Notices shall be effective upon receipt or attempted delivery if delivery is refused or the party no longer receives deliveries at said address and no new address has been given to the other party pursuant to this paragraph. A copy of any notice to Buyer shall also be simultaneously sent to Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., One Financial Center, Boston, Massachusetts 02111, Attention: Daniel O. Gaquin, Esq. A copy of any notice to Seller shall also be simultaneously sent to Lee Woodward, Jr., Esquire, 56 Main Street, Belfast, ME 04915. Notices by any party may be sent by such party's counsel.

14. Broker. Each party represents hereby to the other that it dealt with no broker in the consummation of this Agreement and each party shall indemnify and save the other harmless from and against any claim arising from the breach of such representation by the indemnifying party. The provisions of this Section shall survive the Closing or, if applicable, the termination of this Agreement.

15. Captions. The captions in this Agreement are inserted only for the purpose of convenient reference and in no way define, limit or prescribe the scope or intent of this Agreement or any part hereof.

16. Successors and Assigns.

a. This Agreement shall be binding upon the parties hereto and their respective successors and assigns.

b. Buyer may not assign this Agreement and the rights or benefits hereof, except that Buyer may assign this Agreement, without Seller's consent, to an entity that directly or indirectly controls, is controlled by or is under common control with Buyer or any institutional investor partner of Buyer. The term "control" means the power to direct the management of such entity through voting rights, ownership or contractual obligations.

17. Governing Law. The laws of the State of Maine shall govern the validity, construction, enforcement and interpretation of this Agreement.

18. Title Matters. Any matter or practice arising under or relating to this Agreement which is the subject of a title standard or practice standard of the Maine State Bar Association shall be governed by such standard to the extent applicable.

19. Multiple Counterparts. This Agreement may be executed in any number of

identical counterparts. If so executed, each of such counterparts shall constitute this Agreement. In proving this Agreement, it shall not be necessary to produce or account for more than one such counterpart.

[Remainder of page intentionally left blank]

IN WITNESS WHEREOF, the parties hereto have executed this Easement Purchase and Sale Agreement as an instrument under seal as of the day and year first written above

SELLER:

R 8/6/18

RICHARD ECKROTE

JANET ECKROTE

Janet Eckrote 8/6/18

BUYER:

NORDIC AQUAFARMS, INC'

By _____
Name
Title.

IN WITNESS WHEREOF, the parties hereto have executed this Escrow Purchase and Sale Agreement as an instrument under seal as of the day and year first written above.

SELLER

Richard Eckrote 8/6/18

RICHARD ECKROTE

Janet Eckrote 8/6/18

JANET ECKROTE

BUYER

NORDIC AQUARMS, INC.

By: *[Signature]*

Name: *Erin HEIN*

Title: *CEO*

Exhibit A

Proposed Easement Area

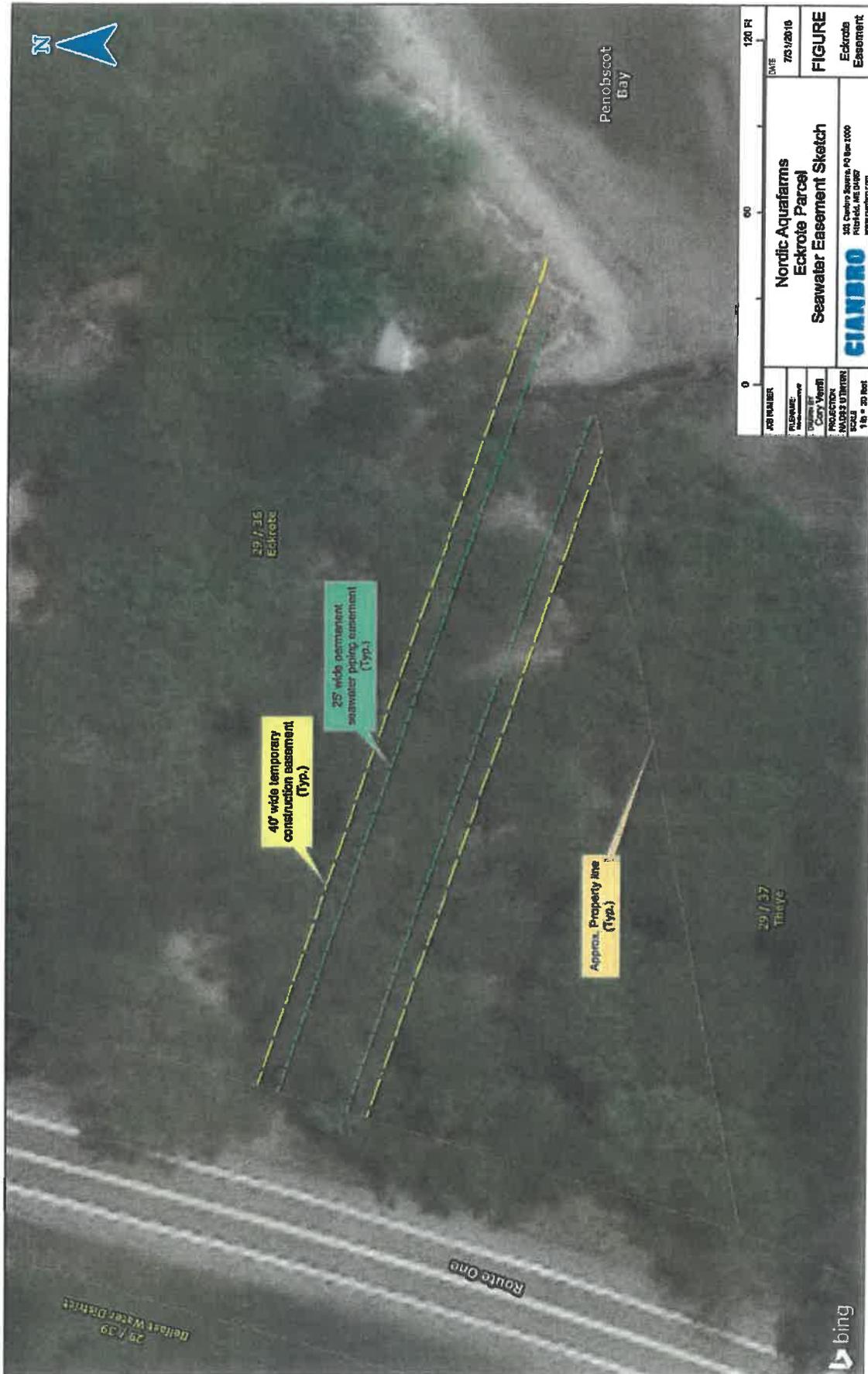


EXHIBIT A



March 3, 2019

Richard & Janet Eckrote
42 Grandview Ave.
Lincoln Park, NJ 07035

Re: Rights in Easement

Dear Mr. & Mrs. Eckrote:

This letter will follow up on the Easement Purchase and Sale Agreement you signed with Nordic Aquafarms, Inc. on August 6, 2018 (the "P&S"). As you know, the P&S discusses the location of where the easement is allowed, and includes an overhead map of the easement over the dry land, landward of the high tide line (the "upland").

The P&S discusses the location of the easement in the upland, carefully discussing the easement in relation to the driveway entrance and the old barn. These limits on the easement area were specifically detailed in the P&S because the placement of the easement in the upland was important to you, and Nordic Aquafarms was happy to accommodate those desires in the upland.

The P&S is clear that as long as Nordic Aquafarms avoids the driveway and the barn as agreed in the P&S, Nordic Aquafarms could build and site its pipes and related equipment anywhere in the wet sand ("intertidal zone") and within US Route 1 adjacent to or within your upland property (so long as the limits on impacts such as to your driveway are respected). You intended a broad easement over your property, including any rights you have to US Route 1 and the intertidal zone such that Nordic Aquafarms can build and site its pipes anywhere in those areas where you have rights.

You are also hereby amending provision 2. Closing to allow for closing "by January 1, 2020 or such other date as shall be mutually agreed by the parties hereto." This new language will replace the existing language of provision 2. Closing, which states "on August 16, 2019 or such earlier date as shall be mutually agreed by the parties hereto."

By signing the acknowledgement on the accompanying page, this letter clarifies that the easement area delineated in the P&S includes the entirety of your rights in the intertidal zone and US Route 1 and amends the Closing Date.

Thank you for your cooperation.

Sincerely,

Erik Heim
Nordic Aquafarms, Inc.

Encl. (acknowledgement page)

Nordic Aquafarms, Inc. 511 Congress Street, Suite 500 Portland, Maine 04101

EXHIBIT B

Ed Cotter
Nordic Aquafarms, Inc.

Encl. (acknowledgement page)

ACKNOWLEDGEMENT

I have read the letter from Ed Cotter of Nordic Aquafarms, Inc. dated [insert], and agree:

Dated: 2/20/19

Dated: 2-28-19



Richard Eckrote



Janet Eckrote

The parties' voluntary dismissal without prejudice of the Attorney General's Count II and the City's counterclaim set forth in the Stipulation complies with M.R. Civ. P. 41(a)(1) because all parties to this action have signed the Stipulation. Moreover, because the Court is separately entering the Stipulation, the dismissal without prejudice of those counts in the Stipulation also complies with M.R. Civ. P. 41(a)(2). The Attorney General's Count II and the City's counterclaim are hereby dismissed without prejudice under the terms of the Stipulation.

Dated: _____

3/2/22



JUSTICE, Superior Court

STATE OF MAINE
WALDO, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. WALSC-RE-2021-007

JEFFREY R. MABEE, JUDITH B. GRACE,)
 THE FRIENDS OF THE HARRIET L.)
 HARTLEY CONSERVATION AREA, and)
 UPSTREAM WATCH,)
)
) Petitioners/Plaintiffs,)
)
) and)
)
) AARON M. FREY, ATTORNEY GENERAL)
)
) Intervenor-Plaintiff,)
)
) v.)
)
) CITY OF BELFAST, MAINE,)
)
) Respondent/Defendant,)
)
) and)
)
) NORDIC AQUAFARMS, INC.,)
)
) Intervenor-Defendant.)

**STIPULATED JUDGMENT
AND DISMISSAL WITHOUT
PREJUDICE**

WHEREAS, Intervenor-Plaintiff Aaron M. Frey, Attorney General (the AG), filed a complaint in this matter on December 23, 2021 (the AG's Complaint) that pleaded two counts for declaratory relief involving the conservation easement recorded in the Waldo County Registry of Deeds, Book 4367, Page 273 (the Conservation Easement);

WHEREAS, the Conservation Easement was conveyed by Plaintiffs Jeffrey R. Mabee and Judith B. Grace to Plaintiff Upstream Watch and later assigned to Plaintiff The Friends of the Harriet L. Hartley Conservation Area;

WHEREAS, the Conservation Easement states that it applies to certain intertidal land (the Intertidal Land) that Intervenor-Defendant Nordic Aquafarms, Inc. (Nordic) proposes to use as part of its proposed land-based aquaculture system;

AG

WHEREAS, the Intertidal Land is also the subject of condemnation proceedings by Respondent City of Belfast, Maine (the City), as described in the AG's Complaint;

WHEREAS, ownership of the Intertidal Land and the validity of the Conservation Easement are disputed and are the subject of a separate judgment by this Court in *Mabee v. Nordic Aquafarms, Inc.*, RE-2019-18 (Super. Ct., Waldo Cty.), which judgment has been appealed to the Maine Supreme Judicial Court, Dkt. No. WAL-22-19;

WHEREAS, Count I of the AG's Complaint involves the process for amending or terminating the Conservation Easement, assuming it is valid, pursuant to Maine's conservation easement statute, 33 M.R.S. § 477-A(2) & (2)(B), and Count II of the AG's Complaint involves alleged violations of the Conservation Easement, assuming it is valid;

WHEREAS, the City answered the AG's Complaint on January 11, 2022, and pleaded a Counterclaim against the AG (the City's Counterclaim) seeking alternative relief with respect to the modification or termination of the Conservation Easement, assuming it is valid;

WHEREAS, the parties expect that the validity of the Conservation Easement will be finally determined by the Maine Supreme Judicial Court in Dkt. No. WAL-22-19, and in the meantime seek to streamline this action and stipulate to the process for any amendment or termination of the Conservation Easement should it be finally determined to be valid;

WHEREAS, by this filing the parties stipulate to: judgment in favor of the AG and against the City on Count I of the AG's Complaint; certain declarations regarding the process required for any amendment or termination of the Conservation Easement, assuming it is valid; and dismissal without prejudice of Count II of the AG's Complaint and the City's Counterclaim;

NOW, THEREFORE, upon agreement of and stipulation by the above-named parties, the Court ORDERS and DECREES as follows:

1. The Court has jurisdiction over the AG's Complaint pursuant to 4 M.R.S. § 105, 14 M.R.S. §§ 5951-5963, 14 M.R.S. § 6051(13), and 33 M.R.S. §§ 477-A(2) and 478.

2. Count I of the AG's Complaint states a claim upon which relief may be granted.

3. Judgment is entered in favor of the AG and against the City on Count I of the AG's Complaint and the Court declares as follows:

- a. Pursuant to Maine's conservation easement statute, 33 M.R.S. §§ 477-A(2)(B) and 478, the City is prohibited from unilaterally amending or terminating the Conservation Easement, if valid, which may be accomplished only by a court in an action in which the Attorney General is made a party; and
- b. The City's actions, including its Condemnation efforts with respect to the Conservation Easement and the Intertidal Land, did not amend or terminate the Conservation Easement because they were not approved by a court in an action in which the Attorney General was made a party.

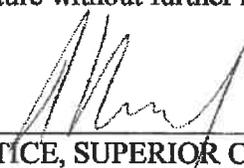
4. Count II of the AG's Complaint and the City's Counterclaim are each dismissed without prejudice.

5. Except as specified herein, the parties reserve all of their respective rights and arguments with respect to the Conservation Easement. If the Conservation Easement is finally determined to be valid, the AG may freely intervene in this case without leave of Court to address any issues regarding the Conservation Easement, and the City may freely amend its pleadings without leave of Court to involve the AG as a party with respect to any proposed amendment or termination of the Conservation Easement.

6. The parties have entered into this Stipulated Judgment and Dismissal Without Prejudice voluntarily and waive any right they may have to appeal from any part of it.

7. The parties agree that this Stipulated Judgment and Dismissal Without Prejudice may be presented to the Court for entry and signature without further notice.

Dated: 3/2, 2022

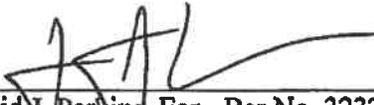


JUSTICE, SUPERIOR COURT

The UNDERSIGNED PARTIES, with knowledge of the terms of this stipulated judgment as to the AG's Count I and dismissal without prejudice of the AG's Count II and the City's Counterclaim, agree to those terms and to entry of this Stipulated Judgment and Dismissal Without Prejudice.

FOR PETITIONERS/PLAINTIFFS JEFFREY MABEE, JUDITH GRACE, THE FRIENDS OF HARRIET L. HARTLEY CONSERVATION AREA, AND UPSTREAM WATCH

Dated: February 15, 2022



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Dated: February __, 2022

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Dated: February __, 2022

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The UNDERSIGNED PARTIES, with knowledge of the terms of this stipulated judgment as to the AG's Count I and dismissal without prejudice of the AG's Count II and the City's Counterclaim, agree to those terms and to entry of this Stipulated Judgment and Dismissal Without Prejudice.

FOR PETITIONERS/PLAINTIFFS JEFFREY MABEE, JUDITH GRACE, THE FRIENDS OF HARRIET L. HARTLEY CONSERVATION AREA, AND UPSTREAM WATCH

Dated: February __, 2022

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Dated: February ¹²14, 2022

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FOR INTERVENOR-PLAINTIFF AARON M. FREY, ATTORNEY GENERAL

Dated: February 17, 2022



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FOR RESPONDENT/DEFENDANT CITY OF BELFAST, MAINE

Dated: February 10, 2022



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FOR INTERVENOR-DEFENDANT NORDIC AQUAFARMS, INC.

Dated: February ____, 2022

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FOR RESPONDENT/DEFENDANT CITY OF BELFAST, MAINE

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FOR INTERVENOR-DEFENDANT NORDIC AQUAFARMS, INC.

Dated: February 9, 2022



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