CITY OF BELFAST
ZONING BOARD OF APPEALS

UPSTREAM WATCH Appellant, v. CITY OF BELFAST, Appellee, and NORDIC AQUAFARMS INC. Applicant.	**NORDIC AQUAFARMS INC. INITIAL REMAND BRIEF**

As required by the court remand and the procedural orders of this Zoning Board of Appeals ("ZBA") Nordic Aquafarms Inc. ("Nordic") provides a short issue summary on the merits of Upstream Watch's ("Upstream") appeals to the ZBA of all five permits issued by the Planning Board for the Nordic project ("Planning Board Permits") and a complete discussion of the impact of the recent quiet title decision on those Planning Board Permits.

First, changes in property ownership do not retroactively impact the Planning Board Permits or invalidate their prior proceedings. As an initial matter, the Ordinance limits where the Planning Board must consider right, title and interest ("RTI") to their review of the Significant Groundwater Well Permit and none of those wells are on the property impacted by the Quiet Title Decision. Regardless of these points, the Planning Board carefully addressed all the issues raised regarding property ownership (which were already in court) in meticulously documented findings on RTI. These findings are supported by substantial evidence, which the ZBA cannot overturn. Further, the Planning Board Permits provide an express process for Nordic to follow in the event of developments like the Quiet Title Decision. Even if it wished to, the ZBA isn't authorized to take responsibility for the Planning Board's express process for addressing property ownership

issues like the Quiet Title Decision and the City's use of eminent domain. Nor is the ZBA authorized to look at materials outside the Planning Board record to overturn the Planning Board Permits.

Second, all of Upstream's other arguments are either irrelevant (because they do not go to an applicable Ordinance standard) or are challenges to the evidence relied on by the Planning Board. The ZBA's review of those challenges is straightforward:

(1) is there an applicable ordinance standard and, if so, what does it say;

(2) what finding(s) in the Planning Board Permits address the applicable standard;

(3) are those finding(s) supported by substantial evidence.

If there is no applicable standard, the ZBA's job is done. If there is an applicable standard, and the Planning Board's finding(s) rely on substantial evidence, then the ZBA's job is likewise done. Here, although Upstream's "briefs" are anything but brief, the ZBA's task is simple. The Planning Board Permits were carefully crafted after years of painstaking review. Every single applicable standard is set forth and includes detailed findings supported by reams of evidence.

For these reasons, as discussed in some detail here and extensively in Nordic's original briefs responding to each of Upstream's appeals[1], the ZBA must deny each of Upstream's appeals. In an effort to simplify review, rather than rehash its prior briefs, Nordic addresses the RTI issues, particularly as to the impacts of the Quiet Title Decision and, for the balance of Upstream's claims, provides a very brief summary of the legal argument and then simply provides a chart which lists the Upstream claim, the applicable Ordinance requirement (if any), and the relevant finding(s) in the Planning Board Permits detailing the substantial evidence upon which the Planning Board based its decisions. We hope that the ZBA finds this approach useful.

[1] Nordic incorporates by reference those briefs here.

HISTORY OF THE PROJECT

In 2017, Nordic began discussions with the City regarding siting a land based aquaculture facility in Belfast. The Planning Board Permits establish that Nordic's construction of a state-of-the-art land-based commercial aquaculture facility in Belfast, Maine will comply with each and every applicable Ordinance requirement. As approved, Nordic's project will produce 33,000 metric tons of salmon (roughly 7% of current domestic demand per year), at roughly one-third of the carbon footprint for imported salmon, with all wastewater processed through a state-of-the-art treatment plant, at a facility expected to add 100 or more direct jobs and drive economic development via synergies with businesses, educational institutions and governmental entities ("Project"). (*See* Site Plan Permit at 1-2). The Planning Board approved Project use of up to 1,205 gallons per minute of fresh water from three sources and 3,925 gallons per minute of salt water from Penobscot Bay. (Site Plan Permit at 1).

On June 11, 2019, after over a year of preliminary discussions with the City that included a lengthy process revising local ordinance to encompass the project, Nordic submitted its pre-application to the City Code and Planning Department, these included a Preliminary Site Plan application and applications for four additional related permits (a Zoning Use Permit, Significant Water Intake and Significant Water Discharge/Outfall Pipes Permit, Shoreland Zoning Permit, and Significant Ground Water Wells Permit together the "Planning Board Permits"). (Site Plan Permit at 9-11). The Planning Board began review of the Nordic Project on June 26, 2019. Planning Board review included 22 public hearings and 23 public meetings. (Site Plan Permit at 11-17). Following Planning Board approval of the Preliminary Site Plan application on July 15, 2020, the Planning Board conducted 16 more public meetings over six more months of review before approving each of the Planning Board Permits with conditions on December 17 and December 22,

2020. (Site Plan Permit at 14-17). Upstream engaged in this process every step of the way and the Planning Board considered every argument Upstream presented. *See* Appellant Upstream Watch's Brief on RTI and Prehearing Summary/Statement on Key Issues/Arguments ("Upstream Initial Remand Brief"). Now, Upstream brings those arguments, already rejected by the Planning Board, to the ZBA asking that the ZBA substitute its own judgment for that of the Planning Board. That is not the ZBA's role. The ZBA's review is limited to whether the Planning Board Permits findings on each applicable ordinance requirement are supported by substantial evidence, and because Upstream concedes there is evidence supporting each challenged finding (arguing instead that the Planning Board should have relied on different evidence), the ZBA can only reject Upstream's appeals.

JURISDICTION AND STANDARD OF REVIEW

Local ordinance and state law authorize the ZBA to review appeals of final, written Planning Board decisions. *See* 30-A M.R.S.A. § 2691(4); Belfast, Me. Code of Ordinance ("Ordinance") § 102-132(6). The Ordinance mandates that ZBA act only in an "appellate" capacity. Ordinance § 102-134(f). This means the ZBA may only review the Planning Board's record and "determine if the evidence of record compels the [ZBA] to find that all or part of the decision on appeal was arbitrary or capricious and compels a contrary decision based on substantial evidence in the record." Ordinance § 102-134(f). In other words, the ZBA "must affirm the [Planning Board's] findings of fact if they are supported by <u>any competent evidence in the record</u>, even if evidence contrary to the result reached by the agency exists." *Town of Kittery v. Dineen*, 2017 ME 53, ¶ 25, 157 A.3d 788, 794 (emphasis added); accord *Carryl v. Dep't of Corr.*, 2019 ME 114, ¶ 8, 212 A.3d 336, 339. Put simply, Upstream can only prevail if it shows the ZBA that there is <u>not a shred of competent evidence</u> supporting the Planning Board Permits. *See e.g. Lane*

Construction Corp. v. Town of Washington, 2008 ME 45, ¶¶ 13, 21 , 942 A.2d 1202 ("the party that sought to overturn the Planning Board's finding . . . bears the burden of showing the Board's initial determination was not supported by substantial evidence in the record."). While Upstream takes issue with everything the Planning Board did or didn't do, Upstream doesn't even try to argue that the Planning Board Permits aren't supported by substantial evidence. Instead, Upstream ignores the ZBA's charge and asks the ZBA to instead decide that the Planning Board should have relied on the evidence that Upstream presented to the Planning Board instead of the evidence that the Planning Board found more convincing. Because the ZBA lacks authority to order the Planning Board to look at different evidence, the ZBA must reject the Upstream appeals.

DISCUSSION

Planning Board Attorney Bill Kelly explained it best when Upstream's appeal was in court:

> Upstream's approach of claiming that almost every substantive review criteria was bungled by the Planning Board also does the Planning Board members a great disservice; the video record and the carefully adopted Findings and Decisions on the five Permits issued demonstrate an heroically comprehensive and thoughtful effort by these volunteer appointed citizens. They listened to all perspectives. Upstream lost for a single reason — the record compelled it.

Nordic responded to each of those individual arguments in the original briefs Nordic filed on Upstream's five appeals two years ago. Here, as directed by the ZBA and the court order remanding this matter to the ZBA, Nordic first addresses the RTI issue and second—because the ZBA must uphold the Planning Board Permits if they are supported by substantial evidence—provides a chart listing each of the substantive Upstream arguments,[2] whether there is a relevant

[2] Upstream sought and obtained an increase of the page limits for its summary brief from 25 to 70 pages and used nearly all of them including a laundry list of nearly every applicable ordinance requirement which was copied and pasted verbatim from its prior briefing. Upstream Initial Remand Brief at 20-30. Such cursory lists are insufficient to preserve an argument on appeal and can be disregarded by the ZBA. The Law Court routinely holds that "an issue that is barely mentioned in a brief is in the same category as an issue not mentioned at all." *Melhorn v. Derby,* 2006 ME 110, ¶ 11, 905 A.2d 290 (citing *Holland v. Sebunya,* 2000 ME 160,¶ 9 n.6, 759 A.2d 205).

Ordinance standard, and the contested Planning Board Permit finding(s). Each of these findings speak for themselves- the Planning Board Permits address every applicable standard by carefully detailing the substantial evidence which the Planning Board found most convincing.

I. The Planning Board Permits Go Above and Beyond the Requirements of the Ordinance to Address RTI, the Planning Board must Accept RTI Evidence at Face Value, Planning Board Permit Findings regarding RTI are Supported by Substantial Evidence, and the Planning Board Permits Establish the Planning Board Process for Addressing Changes in RTI.

In February 2023 the Law Court decided *Mabee v. Nordic Aquafarms, Inc.*, 2023 ME 15 ("Quiet Title Decision"). In the Quiet Title Decision, the Law Court held that the deed conveying land over which the Eckrotes later granted Nordic the right to cross with intake and discharge pipes did not convey the intertidal land with the upland. The Quiet Title Decision states that the intertidal land was eventually conveyed to Mabee/Grace. In addition, the Law Court held that Mabee/Grace hold an enforceable "residential purposes only" servitude that runs with the land (Residential Purposes Restriction) on the related upland property. The Quiet Title Decision also states that a conservation easement over the intertidal land created by Mabee/Grace in 2019 (Conservation Easement), which was granted to Upstream, who later assigned it to Friends, is enforceable. Prior to the Quiet Title Decision, the Superior Court held the opposite- that Mabee/Grace never owned the intertidal, that there was no conservation easement on the intertidal and no use restriction on the upland.

Finally, Nordic does not separately respond to Upstream's argument regarding the alleged Talbot Well contamination (though there are extensive findings regarding groundwater quality in the Planning Board Permits). That argument is waived. Upstream admits it filed a motion to add this information to the Planning Board record after that record closed- which motion the Planning Board denied. Then, it filed a similar motion to augment the record with the ZBA, withdrew that motion the afternoon before oral argument before the ZBA, then improperly included discussion of the non-record materials in its brief. The last three paragraphs of Section V(1)(E) on pages 48-49 of the Upstream Initial Remand Brief should be stricken. If the ZBA nonetheless intends to consider Upstream's untimely motion to augment the record, Nordic must first be given the opportunity to brief that issue.

Regardless, the City became the owner of the Eckrotes' property by deed recorded in the Waldo County Registry of Deeds in Book 4679 at Page 157. Finally, the City exercised eminent domain over the property interests that were the subject of the Quiet Title Decision by condemnation order recorded in Book 4693 at Page 304 ("Belfast Condemnation" a copy of which is attached hereto as Exhibit A). The City granted, and Nordic recorded, a temporary construction easement allowing all work necessary for the Nordic Project and a permanent easement allowing Project operation and maintenance ("City/Nordic Easement" a copy of which is attached as Exhibit B).

Upstream argues that even though the Supreme Court sent this matter to the ZBA, it must send everything back to the Planning Board, which would then be compelled to find that RTI never existed and the Planning Board Permits are void. Upstream misstates the authority of the ZBA, misstates the applicable Ordinance requirements, misstates the function of the RTI requirement and that there is substantial evidence supporting the RTI findings in the Planning Board Permits, and ignores the plain language of the Planning Board Permits themselves which establish a process Nordic must initiate with the Planning Board to address issues like the Quiet Title Decision.

A. The Ordinance only Requires Evidence of RTI for the Significant Groundwater Well Permit.

The Ordinance does not require that an applicant establish "right, title or interest" ("RTI") for each of the five Planning Board Permits. *Compare* Ordinance § 90-72 (Site Plan) (silent as to "RTI") *with* Ordinance § 82-52 (Shoreland) ("applications shall be signed by the owner of the property or other person authorizing the work, certifying that the information in the application is complete and correct. If the person signing the application is not the owner or lessee of the property, then that person shall submit a letter of authorization from the owner or lessee") *with*

Ordinance § 102-102 (Zoning Use) (Planning Boad "may require[3]" a statement of "title or interest") *with* Ordinance § 102-1077(c)(1) (applications for Significant Groundwater Wells "shall include" "evidence of the Applicant's right, title and interest in and to the properties from which water is to be extracted."). Put simply, the Ordinance only requires substantial evidence of RTI for the properties where Nordic obtained approval to locate Significant Groundwater Wells permits. None of those wells are on the former Eckrote, now City owned, property impacted by the Quiet Title Decision. *See* Significant Groundwater Well Permit at page 5, §6(b). Thus, Upstream's argument that the Quiet Title Decision voids all of the Planning Board Permits is based on a misstatement of the applicable Ordinance requirements. Even if it were true that the Quiet Title Decision somehow retroactively voided the Planning Board Permits, which it isn't, Upstream's argument that the Quiet Title Decision means the permits are void still fails because the Ordinance only required RTI for the properties where there are significant groundwater wells, which are not in the area impacted by the Quiet Title Decision.

B. When RTI is Required, the Planning Board does not Conduct Substantive Review of Property Rights, it Simply Confirms that the Evidence Presented Relates to the Property and Activities for which the Permit is Sought.

The Planning Board record from dozens of meetings over a more than a year of review is full of Upstream's and others RTI arguments. *See* Upstream Initial Remand Brief at 1-14. The Planning Board considered each of these arguments and determined that Nordic provided sufficient evidence of RTI. Upstream's renewed claim that *Tomasino v. Town of Casco,* 2020 ME 96, 237 A.3d 175 requires something more, or different, is wrong. Establishing RTI for the purposes of having enough of an interest in the property to justify the City considering whether to

[3] Upstream misquotes the language of 102-102 (Zoning Use) claiming that this section uses the word shall- meaning submissions are mandatory. Upstream Initial Remand Brief at 3 and 11. It does not. The introductory language to Section 102-102 states "For any application under section 102-101(Site Plan) the planning board of the code enforcement officer may require any or all of the following information."

issue permits or not is a low bar. To show RTI to seek a permit, an applicant must only demonstrate "the kind of relationship to the site that gives [it] a legally cognizable expectation of having the power to use that site in the ways that would be authorized by the permit or license [it] seeks.'" *Southridge Corp. v. Board of Envtl. Prot.*, 655 A.2d 345, 348 (Me. 1995) (quoting *Murray v. Inhabitants of the Town of Lincolnville*, 462 A.2d 40, 43 (Me. 1983) (internal quotations omitted). Any "legally cognizable expectation" is enough to establish RTI for permit application purposes. *See Murray*, 462 A.2d, at 43; *Southridge Corp*., 655 A.2d, at 348. "A permit applicant's TRI" is "an issue that is legally distinct from actual ownership." Order Dismissing 80B Pet. at 4, *Mabee v. Bd. Envtl. Prot., AP-20-3* (Me. Super. Ct., Waldo Cty., Jul. 14, 2020).

The facts in *Tomasino* were different, making that analysis irrelevant, but *Tomasino* doesn't change the standard the Planning Board was supposed to apply to its review of RTI. When an ordinance requires an applicant to establish RTI, the reviewing board is not authorized to conduct a substantive review of competing title claims. RTI is not a "quiet title" showing. Maine courts regularly distinguish RTI from property disputes between neighbors—while a planning board might be required to determine if an applicant can demonstrate RTI, "a municipal zoning case is not the proper forum for a private property dispute between neighbors." *Tomasino*, 2020 ME 96, ¶ 8, 237 A.3d 27 175 (citations omitted). *Tomasino* addressed a special case when the only evidence of RTI is an access easement of undefined scope. Importantly, *Tomasino* did not alter the analysis regarding use restrictions like those addressed in the Quiet Title Decision including both the conservation easement and the residential use restrictions. Those type of use restrictions (like deed restrictions or conservation easements) "have no influence or part in the administration of a zoning law" and cannot destroy administrative standing. *Our Way Enterprises, Inc. v. Town of Wells*, 535 A.2d 442, 444 (Me. 1988); *Whiting v. Seavey*, 159 Me. 61, 188 A.2d 276 (1963); *see*

also Lakes Env't Ass'n v. Town of Naples, 486 A.2d 91, 96 n. 1 (Me. 1984). That simple rule was not disturbed by *Tomasino.*

Put simply, *Tomasino* does not say what Upstream claims it says. In *Tomasino*, the applicants applied for and received a shoreland permit allowing the removal of certain trees from lands owned by the abutting owner. *Tomasino*, 2020 ME 96, ¶ 3, 237 A.3d 175. That town ordinance required that all permit applications needed to "be signed by an owner or individual who can show evidence of right, title or interest in the property or by an agent, representative, tenant, or contractor of the owner with authorization from the owner to apply for a permit." *Id.* ¶ 6. To demonstrate sufficient right, title, or interest allowing the permitted tree removal, those applicants presented an easement allowing them "'a right of way over a strip of the other's land six (6) feet in width' along a portion of their common boundary." *Id.* ¶ 2. On appeal of the permit, the local board of appeals determined that RTI insufficient and the matter was appealed, eventually reaching the Law Court. *Id.* ¶ 4. In upholding that local board's determination, the Law Court first noted that as a factual, "evidentiary matter," the local board determined that "the language of the deeds does not disclose whether and to what extent the easement includes the right to remove trees, and, as a procedural matter in this municipal zoning case, the [owner] has challenged the [applicants'] right to remove the trees." *Id.* ¶ 7. That the grantor and grantee of the easement were in open dispute over the scope of that easement was essential to the Law Court's holding, which concluded that it was "in the face of a dispute" between those parties that there was the need for the courts to step in and construe the scope of that easement. *Id.* ¶ 15.

The Court distinguished *Tomasino* from *Walsh*, *Murray*, and *Southridge Corp*., which "involved the question of whether the applicants had sufficient connections to the title to the properties to seek municipal or agency permits on those properties." Id. ¶ 14. In *Southridge Corp*.,

the Law Court held that even where RTI is premised upon a pending claim of adverse possession that could fail and require revocation of the permit, there is enough RTI to meet the administrative standing requirement. *Southridge Corp.*, 655 A.2d at 348. Thus, the Law Court's ruling in *Tomasino* is a narrow one that does not apply here.

Upstream argues that *Tomasino* implements a per se rule that RTI findings by the Planning Board cannot be based on an easement challenged by a third party until a court rules on the legitimacy of title that underlies the easement grant. Upstream's argument flies in the face of years of precedent and would require the Planning Board to look beyond the face of documentary submissions and determine the legal effect of the documents' content- i.e. conduct substantive review of title issues. The *Tomasino* court did not vest the Planning Board with this authority (even assuming the Ordinance required RTI for all of the Planning Board Permits which it doesn't). Instead, *Tomasino* states only that a court determination is necessary "in the face of a dispute between private property owners" over whether the face of the document they created allows the thing for which the permit is sought. *Tomasino*, 2020 ME 96, ¶ 15, 237 A.3d 175; see also Smith, James C. Neighboring Property Owners § 7:8.50 (2020) (construing *Tomasino's* holding as "[a] dispute between the easement owner and the servient owner over tree removal may require judicial action"). There is no such dispute here. *Tomasino* does not support Upstream's argument that the Planning Board needed to do more than it did, which was to determine, based on the face of RTI documentation Nordic submitted, that those documents evidenced an interest in using the land in the manner authorized by the Planning Board Permits.

C. Even Though The Ordinance Did Not Require It, the Planning Board Permits Include RTI Findings Supported By Substantial Evidence.

The Planning Board took extensive comment and evidence on the RTI issue, and no more was required. Upstream argues that the Planning Board Permits are unsupported by substantial

evidence on the RTI issue because the Planning Board did not accept all the evidence that Upstream wished to present. The Planning Board record, as documented in the Planning Board Permits, demonstrates the falsity of Upstream's argument. The Planning Board reviewed extensive documentary evidence, including agreements between Nordic and each of the owners of record of the properties that were the subject of the Project applications, findings made by the Maine Department of Environmental Protection ("DEP") and Maine Department of Agriculture, Conservation, and Forestry ("DACF"), and extensive written public comment on the RTI issue both in advance of its initial RTI determination, and then upon consideration of a motion to dismiss on RTI grounds made by certain project opponents. (*See* August 5, 2019 Planning Board Meeting, 0:30:00-0:35:10). Upstream submitted written comment on this issue on July 25 and July 29, which the Planning Board specifically noted in their considerations of the RTI issue. (*See* August 5, 2019 Planning Board Meeting, 0:34:10). Moreover, the Planning Board conducted nearly two dozen public hearings over the course of its consideration of Nordic's permits, and Upstream concedes that it and others addressed the RTI issue many times over the course of "twenty-one meeting minutes of PB." Upstream Initial Remand Brief at fn. 5.[4]

[4] Upstream also claims, puzzlingly, that even though it was afforded many opportunities to address RTI before the Planning Board and even though it admits that the Planning Board had all of the RTI arguments before it that the Planning Board also denied it due process on the RTI issue. This is false. Even if RTI were a standard applicable to each of the applications -- which it isn't – and even if RTI were a standard that the Planning Board was authorized to review substantively – which it also isn't – the Planning Board provided Upstream far more process than is required. "[W]hat constitutes due process in a planning board hearing, particularly one which is not adjudicating disputes between private parties but is attempting to gather facts for the review of a permit application depends primarily upon the nature of the proceedings and the possible burden upon that proceeding." *Duffy v. Town of Berwick*, 2013 ME 105, ¶ 16, 82 A.3d 148 (quoting *Cunningham v. Kittery Planning Bd.*, 400 A.2d 1070, 1079 (Me.1979)). Due process in such settings is a "flexible concept" which "stems from the need of municipal bodies to play a variety of roles, akin to those of government agencies." *Id*. Thus, due process is generally satisfied when the "public had a full and fair opportunity to comment on an application." *Id*. ¶ 17. This does not mean that individuals must be allowed to make oral comment at every deliberation—only that they be given at least one opportunity to be heard. Here, while no one was allowed to make oral comment on the RTI issue during the Planning Board's deliberations, every member of the public, including Upstream, was afforded ample opportunity to enter comment into the record—an opportunity which Upstream took advantage of twice. Upstream is due no other process.

Finally, because Upstream is the party asking the ZBA to "overturn the [Planning Board's] decision," the burden of proof is on Upstream. *Tomasino* didn't change that burden- Upstream must prove that the Planning Board Permits aren't supported by any shred of competent evidence -- "that the evidence compels a contrary conclusion." *Tomasino*, 2020 ME 96, ¶ 5, 237 A.3d 175. It fails to carry that burden here. The Planning Board found that Nordic "submitted sufficient information to demonstrate that they have [RTI] to the property that they propose to develop for the purposes of Planning Board review of all Permit applications." (Site Plan Permit at 9). The Planning Board specifically noted its consideration of the written comment and evidence it received, as well as affirmative RTI findings made by DEP related to Project permits. (*Id.)*. Standing alone, these Planning Board findings show sufficient record evidence of RTI to support its review of the Planning Board Permits, which satisfies the ZBA's appellate standard of review. The Planning Board reviewed hundreds of pages of documentation, took written argument at two different meetings, considered multiple motions on the RTI issue, and decided that the documentation Nordic provided was sufficient for it to proceed to review the application and issue the Planning Board Permits. Upstream does not carry its burden that the evidence reviewed by the Planning Board "compels a contrary conclusion."

D. The Planning Board Established a Clear Process for Addressing Property Issues Like the Quiet Title Decision.

Perhaps because the Planning Board Permits were meticulously prepared and written with exquisite attention to underlying supporting evidence, Upstream focuses on an argument that the ZBA must send the Planning Board Permits back to the Planning Board because of the Quiet Title Decision and other lawsuits they and other project opponents filed. But these developments all happened after the Planning Board process had concluded, and the Ordinance does not authorize the ZBA to look at materials outside the record before the Planning Board. Upstream does not

point to any Ordinance provision authorizing the ZBA (or the Planning Board for that matter) to do what Upstream asks based on developments that post-date its decision -- "finding that Nordic has no standing to proceed with its permits under the City's ordinances due to a lack of RTI," Upstream Initial Remand Brief at 14, or "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 undisputed lack of RTI to the property that it proposes to develop." Upstream Initial Remand Brief at 61.

The Planning Board has already imposed a process for addressing these types of post-decision developments in property rights. Anticipating this potential Quiet Title Decision, and seeking to be protective of resources, the Planning Board imposed Site Plan Permit Condition 37.1 which states that:

> 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. Being mindful of the pending dispute over real property rights relating to Nordic's use of the Ekrote property, in the event that a final judgment is issued by a Court of competent jurisdiction which effectively terminates all or a part of Nordic's executory or perfected/vested legal rights necessary to use the Ekrote property, then in that event Nordic shall cease all work, construction, and/or uses hereby permitted relating to uses on, over or under the upland and/or intertidal areas of the Ekrote property. <u>All permits issued 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 or issue appropriate use permits.</u> In the event that Nordic's work, construction, and/or uses are terminated in part or in whole by said final Court Order, then in that event, Nordic shall immediately stabilize any ongoing construction and uses related to the "required improvements" described in Condition 36.1 of the Financial Conditions. In the event that Nordic does not immediately stabilize the construction of required improvements, based on the best practices and permitted construction methods, the Belfast Code and Planning

> Department may immediately and unilaterally use the "required improvement" and performance guarantee funds described in Condition 36.1 to stabilize and complete construction of required improvements.

Site Plan Permit at 76; Zoning Use Permit at 47. In other words, none of the Planning Board Permits (Site Plan, Shoreland, Intake/Discharge, Zoning Use and Significant Groundwater Wells) become effective until Nordic records all the necessary property rights. Further, on February 16, 2023- the date of issuance of the Quiet Title Decision- any right or obligation to construct the project under the Planning Board Permits was suspended. This condition to the Planning Board Permits is clear, applies to all five permits, will only be triggered by a Nordic reactivation request to the Planning Board, and reserves reactivation to the Planning Board. The ZBA has no authority to step into the process the Planning Board set under this condition. Further, Upstream failed to timely object to this provision in any of its many grounds for this appeal. Thus, this provision addressing the impact of the Quiet Title Decision is final, outside the ZBA's appellate review, and addresses each of Upstream's claims regarding RTI.

II. All of Upstream's Claims are Irrelevant or Without Merit because the Planning Board Permits are Supported by Substantial Evidence.

Upstream's arguments on the merits of the Planning Board Permits fall into two categories -- irrelevant and/or wrong. Arguments are irrelevant when they ask the ZBA to impose a standard that isn't in the Ordinance. Arguments are wrong when they ask the ZBA to overturn or second guess the Planning Board Permits when those permits are supported by substantial evidence. *Tremblay v. Land Use Regulation Comm'n*, 2005 ME 110, ¶ 15, 883 A.2d 901 (ZBA appellate review does not include substituting fact-finder's judgment when record is sufficient to support finding). 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." *Town of Kittery v. Dineen*, 2017 ME 53, 1 25, 157 A.3d 788, 794. All of the evidence

relied upon by the Planning Board as detailed in the Planning Board Permits is the kind of evidence upon which reasonable persons are accustomed to rely as required by the Maine Administrative Procedure Act, 5 MRSA § 9057(2) ("reliable evidence"). To demonstrate this, we attach as Exhibit C a chart listing Upstream's substantive arguments, the applicable Ordinance standard (if any), and the relevant finding in the Planning Board Permits. This chart clearly documents that the Planning Board made findings on each and every applicable Ordinance standard. No fact finder is required to do more and, indeed, even Upstream's own appeals concede their case arguing only that the Planning Board should have relied on Upstream instead. Even if the ZBA did agree with Upstream's evidence, it does not have the authority on appeal to substitute its judgment for that of the Planning Board.

CONCLUSION

Upstream's appeals fail on every point. The ZBA can only overturn or remand the Planning Board Permits if they are not supported by substantial evidence. Upstream does not even argue that the Planning Board Permits are not supported by substantial evidence. Consequently, all the ZBA can do is uphold the Planning Board Permits.

Dated: February 1, 2024

_/s/Joanna B. Tourangeau_____

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