

**CITY OF BELFAST  
ZONING BOARD OF APPEALS**

UPSTREAM WATCH

Appellant,

v.

CITY OF BELFAST,

Appellee,

and

NORDIC AQUAFARMS INC.

Applicant.

**NORDIC AQUAFARMS INC. REMAND  
REPLY BRIEF**

As required by the court remand and the procedural orders of this Zoning Board of Appeals (“ZBA”) Nordic Aquafarms Inc. (“Nordic”) responds the Upstream Watch (“Upstream”) arguments on appeal to the ZBA of all five permits issued by the Planning Board for the Nordic project (“Planning Board Permits”).

**SUMMARY**

Throughout both its reply briefs<sup>1</sup>, Upstream mixes two issues the ZBA must keep separate: (1) whether the Planning Board properly determined there was sufficient evidence of RTI to process the applications for the Planning Board Permits; and (2) the impact of the Planning Board’s inclusion of Condition 37 in the Planning Board Permits, which automatically suspended Nordic’s ability to construct when the Law Court issued the Quiet Title Decision.

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<sup>1</sup> Please bear in mind when reviewing this reply and the fact that Upstream failed to timely object to Condition 37, that it was not for lack of filings with this ZBA. Despite having filed hundreds of pages in its original five appeals to the ZBA each of which was supported by an individual brief, Upstream requested and received an additional 50 pages for its Initial Brief, over and beyond the 25 pages agreed to in the December 14, 2023 ZBA Procedural Order. The Planning Board filed a 3 page Initial Brief while Nordic’s Initial Brief was 16 pages. The December 14, 2023 ZBA Procedural Order allowed one 10 page reply brief. Upstream, without advance leave, filed two separate replies which included 10 pages replying to the Planning Board and 10 more pages replying to Nordic. Upstream subsequently, perhaps endeavoring to generate new grounds to challenge Condition 37 and avoid waiver, filed a new appeal with the ZBA seeking to appeal correspondence refusing to take action on the Planning Board Permits, which action would implicate Condition 37, without a Nordic application.

Both issues are easily addressed. The Planning Board record contains sufficient evidence of RTI for the Planning Board to have engaged in a substantive review thus the Planning Board Permits are supported by substantial evidence and the ZBA must uphold them. This is all that is required, and this board need only to find that substantive review was made, not to reconsider those issues. The second issue is also simple—Upstream never before complained about Condition 37 to the Planning Board or in its appeal to the ZBA. Presumably that is because the Planning Board did exactly what Upstream wanted at that time—automatically suspend Nordic’s ability to construct in the event of an adverse Quiet Title Decision. Having failed to challenge it then, Upstream cannot challenge Condition 37 now.

Specifically, in response to the Planning Board, Upstream asks the ZBA to exceed its jurisdiction and decide that the Planning Board Permits are void because Condition 37 did not automatically suspend Nordic’s ability to construct. Therefore, Upstream argues, the timelines to start or substantially complete construction are passed. In addition to being outside the jurisdiction of the ZBA until there is an appealable decision regarding the Condition 37 suspension, any challenge to Condition 37 is waived because it was not included as part of the appeal. Indeed, Condition 37 possesses the nearly unique distinction of being one of the very few provisions of the Planning Board Permits that Upstream did not complain about in its original appeals. Maine law provides that this failure means that Upstream waived the right to appeal the automatic suspension and other provisions of Condition 37 to the Planning Board Permits. The ZBA is without authority to make condition-compliance or interpretative determinations under Condition 37 and Upstream’s waiver means that the ZBA cannot review its challenge to the imposition of Condition 37 in the first instance.

Upstream's response to Nordic is similarly circular. On the one hand, Upstream claims that even if the Eckrote Easement might once have been substantial evidence of RTI supporting the Planning Board Permits, it is no longer substantial evidence because the Quiet Title Decision, issued years after the Planning Board Permits, found that the Eckrotes did not actually own the intertidal adjacent to their upland. On the other hand, Upstream argues that Condition 37 to the Planning Board Permits is illegal because it is some sort of admission that the Planning Board knew at the time of its decision that there wasn't proper RTI. Both these things cannot be true. The ZBA must evaluate RTI based on the state of the Planning Board's understanding of its record at the time, it did so and those decisions are supported by substantial evidence and that is the end of the ZBA's appellate review. That is an entirely separate analysis from the automatic suspension of Condition 37 triggered by the Quiet Title Decision. Upstream's appeals must fail.

Put simply, the ZBA must uphold the Planning Board Permits findings on RTI because everyone agrees that the record included the Eckrote Easement and that the Planning Board Permits include Condition 37, which automatically suspended the permits upon issuance of the Quiet Title Decision. The Eckrote Easement (and other Nordic RTI documentation) is substantial evidence sufficient for the Planning Board to move forward with a substantive review. Separately, Condition 37 to the Planning Board Permits sets the mechanism for the Planning Board (not the ZBA) to address changes to the actual property rights (whether due to the Quiet Title Decision or otherwise) and that condition automatically suspended any right or obligation to construct when the Quiet Title Decision issued. Condition 37 suspends the start of construction or substantial completion of construction provisions of the Ordinance and maintains the Planning Board Permits pending execution of the Condition 37 process. The Condition 37 mechanism is consistent with the

Ordinance and Maine common law including *Tomasino* as discussed below and in Nordic's Initial Brief.

### **DISCUSSION**

Upstream's failure to contest Condition 37 in any filing predating Nordic's initial brief to this ZBA on February 2, 2024 means that it waived appeal of that Condition and thus that portion of the Planning Board Permits is not properly appealed to the ZBA now. Condition 37 automatically suspended Nordic's rights and obligation to construct upon issuance of the Quiet Title Decision. Moreover, Upstream's reply brief asks the ZBA to go beyond its jurisdiction and decide that the Planning Board Permits are void because Nordic did not timely start construction (i.e. Upstream asks the ZBA to void Condition 37 out of the Planning Board Permits). ZBA jurisdiction does not include the authority to decide, in the first instance, whether and how to implement Condition 37—that authority is reserved to the Planning Board, which has yet to act.

The Planning Board was not required to delay its proceedings on the Planning Board Permits until after resolution of property disputes. Decisions in those property disputes do not, after the fact, somehow transform the evidence upon which the Planning Board relied into something other than the substantial evidence required to uphold those permits. The Planning Board's inclusion of Condition 37, which established a mechanism to address future changes to actual property rights—including automatic suspension of the right and obligation to commence construction under those permits—is specifically authorized by the Ordinance and demonstrates thoughtful consideration of opposition arguments at the time. The use of conditions of approval by Planning Boards has long been upheld by Maine courts and is a reasonable mechanism for addressing *Tomasino*.

## **I. Upstream Waived Its Right to Appeal Condition 37.**

Upstream did not challenge Condition 37 at any point prior to its reply brief filed in February, 2024- years after passage of the appeal period. The Law Court states “with a regularity bordering on the monotonous, that arguments not raised in an opening brief are waived,” *Lincoln v. Burbank*, 2016 ME 138, ¶ 41, 147 A.3d 1165 (internal citations omitted).” As eloquently stated by the First Circuit and then quoted by the Law Court: [A] litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace. *Melhorn v. Derby*, 2006 ME 110, ¶ 11 n.6, 905 A.2d 290 (quoting *U.S. v. Zannino*, 895 F.2d 1, 17 (1<sup>st</sup> Cir. 1990) ). Challengers to an administrative decision (like that of the Planning Board) “are expected to raise any objections they have before the agency in order to preserve these issues for appeal.” *New England Whitewater Center, Inc. v. Dep’t of Inland Fisheries and Wildlife*, 550 A2d 56, 58 (Me. 1988). This rule, based on the doctrine of exhaustion of administrative remedies, is necessary to ensure that administrative agencies have “the first opportunity to pass upon the claims of the litigants.” *Id.* at 60.

Despite hundreds of pages of filings with the ZBA and thousands more before the Planning Board, Upstream made no mention at all of Condition 37 until its February 20, 2024 reply brief. Upstream’s failure to timely object to the automatic suspension provisions of Condition 37 means that it waived its right to appeal that suspension. *Tomer v. Maine Hum. Rts. Comm’n*, 2008 ME 190, ¶1 n.1, 962 A.2d 335; *Cent. Maine Power Co. v. Pub. Utils. Comm’n*, 2014 ME 56, ¶ 20, 90 A.3d 451; *Carrier v. Sec’y of State*, 2012 ME 142, ¶ 18, 60 A.3d 1241, 1247 (“Issues not raised at the administrative level are deemed unpreserved for appellate review.”).

The ZBA cannot review issues Upstream waived.

## **II. The ZBA Doesn’t Have Jurisdiction to Implement Condition 37.**

Even if the issue weren’t waived (it is), the ZBA lacks jurisdiction to interpret or opine on how the Planning Board might implement Condition 37 in the future. 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) (emphasis added). The Ordinance mandates that ZBA act only in an “appellate” capacity. Ordinance § 102-134(f) (emphasis added).

In order to do as Upstream asks in its reply briefs, and void the Planning Board Permits based on Upstream’s contention that Nordic did not start timely start construction, the ZBA would exceed its jurisdiction by stepping into the shoes of the Planning Board and making a Condition 37 determination.<sup>2</sup> As discussed in Nordic’s Initial Brief, the plain language of Condition 37 (that language is replicated in the Initial Brief) automatically suspended Nordic’s right and obligation to construct under all of the Planning Board Permits the moment that the Quiet Title Decision issued. Site Plan Permit at Condition 37 on page 76 (“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.”). Doing as Upstream asks and finding that the Planning Board Permits are void because Nordic failed to timely start or substantially complete construction cannot be determined by simply looking at the Ordinance language Upstream points to. It requires interpretation and implementation of the terms of Condition 37. It requires the ZBA to overturn the automatic suspension that Condition 37 implemented. This is beyond the ZBA’s appellate jurisdiction. The ZBA won’t have jurisdiction over this issue unless and until there is a ZBA appealable decision implementing Condition 37.

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<sup>2</sup> Upstream devotes an entire section of its reply to the Planning Board arguing that Nordic did not timely start construction or timely substantially complete construction based solely on reference to the Ordinance. Condition 37 controls these timelines, was not the subject of any Upstream appeal and, as discussed herein, is therefore waived.

### **III. The Quiet Title Decision does Not Retroactively Disqualify the Eckrote Easement from having been Substantial Evidence Upon which the Planning Board Properly Relied.**

Establishing RTI is a low bar.<sup>3</sup> To show RTI, 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 Env'tl. 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. Env'tl. Prot.*, AP-20-3 (Me. Super. Ct., Waldo Cty., Jul. 14, 2020). *Tomasino* didn’t change what constitutes RTI. When an ordinance requires an applicant to establish RTI (as discussed in Nordic’s initial brief, here the Ordinance doesn’t) the reviewing board is not authorized to conduct a substantive review of competing title claims “a municipal zoning case is not the proper forum for a private property dispute between neighbors.” *Tomasino v. Town of Casco*, 2020 ME 96, ¶ 8, 237 A.3d 27 175 (citations omitted).

Substantial RTI 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. The evidence relied upon by the Planning Board in support of RTI, 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

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<sup>3</sup> As discussed in Nordic’s Initial Brief, the applicable Ordinances do not all mandate a showing of RTI and thus the process, findings and conclusions and inclusion of Condition 37 in the Planning Board Permits were above and beyond the requirements of the Ordinance and Maine law.

Administrative Procedure Act, 5 MRSA § 9057(2) ("reliable evidence"). Because Upstream is the party asking the ZBA to “overturn the [Planning Board's] decision,” Upstream bears the burden of proving that the record is devoid of any shred of competent evidence supporting the Planning Board’s findings. *Tomasino*, 2020 ME 96, ¶ 5, 237 A.3d 175.

Upstream fails to carry that burden. 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 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 detail sufficient record evidence of RTI to support its review of the Planning Board Permits. The Planning Board also 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’s argument, that the Quiet Title Decision retroactively altered the Eckrote Easement, does not establish that the evidence reviewed by the Planning Board—the Eckrote Easement—“compels a contrary conclusion.”

Upstream does not argue that if the Law Court upheld the Superior Court’s decision that the Eckrotes owned their intertidal then that land wouldn’t have been included in the Eckrote Easement. No more is required for RTI. In other words, to constitute substantial evidence of RTI supporting the Planning Board Permits the Eckrote Easement simply needed to include the relevant property at a time that the Eckrotes had a cognizable claim to that property- which it (and they) did until the Law Court issued the Quiet Title Decision. The Quiet Title Decision does not retroactively invalidate the Planning Board’s decision to substantively review (and approve with

conditions) the permits. Indeed, the Planning Board’s conditional approval expressly contemplated the potential of this Quiet Title Decision. Thus, Condition 37 automatically executed suspension of the Planning Board Permits. Upstream points to no provision of the Ordinance or law mandating otherwise. Consequently, the ZBA must uphold the Planning Board Permits.

#### **IV. Condition 37 Established a Clear Process to Address RTI Changes.**

Upstream takes the position that Planning Board inclusion of Condition 37 equals a concession that the Planning Board Permits are unsupported by substantial evidence of RTI. However, the Ordinance specifically empowers the Planning Board to “approve, approve with conditions, or disapprove” a land use permit application. Ordinance § 102-106(b)(3) (emphasis added). It is well settled in Maine law that “[a] planning board has inherent authority to attach conditions to its approval of an application.” Maine Municipal Association, *A Manual for Local Planning Boards: A Legal Perspective* 44 (2017). This inherent authority arises from a local board’s authority to deny a permit application. The Law Court rejected an argument identical to Upstream’s explaining that: “[a] series of disapprovals pending the applicant's correction of deficiencies in its proposal would achieve the same effect as conditional approval.” *In re Belgrade Shores, Inc.*, 371 A.2d 413 (Me. 1977). Thus, conditions of approval are acceptable so long as they are reasonable and directly related to the review standards that govern the permit. *See Kittery Water District v. Town of York*, 489 A.2d 1091, 1093-94 (Me. 1985); *Boutet v. Planning Board of the City of Saco*, 253 A.3d 53, 55 (Me. 1969).

Condition 37 is reasonable, goes above and beyond what the Planning Board was required to do, and instituted a practical mechanism for addressing Upstream’s claims regarding the requirements of *Tomasino*. RTI is not a review standard for which the Planning Board was required

to ensure ongoing Ordinance compliance.<sup>4</sup> Condition 37 constitutes both a proper and useful function of conditions of approval, which allowed the Planning Board to approve the project so long as the condition is met, rather than the unwieldy process of denying the permit and requiring resubmission as described in *Belgrade Shores*. Nor is this an example of impermissible delegation or constitutional vagueness, which was the concern articulated by the Law Court in *Waterville Hotel Corp. v. Board of Zoning Appeals*, 241 A.2d 50 (Me. 1968) and its progeny. (See Upstream Nordic Reply Br. pgs. 8-10). That case was concerned with the specificity and definiteness of the standards themselves, and not the reasonable conditions which may be imposed on an applicant to ensure compliance with those conditions. *Waterville Hotel Corp.*, 241 A.2d at 53. Indeed, Condition 37 effectively addresses the *Tomasino* issue Upstream repeatedly raises by automatically suspending the Planning Board Permits upon issuance of the Quiet Title Decision until suspension is lifted via submission of updated information.

### **CONCLUSION**

Upstream waived its right to appeal Condition 37 including its automatic suspension of Nordic's rights and obligations to construct under the Planning Board Permits. Even if Upstream hadn't waived, the ZBA can't do as it asks and ZBA appellate jurisdiction to make a Condition 37 determination (to void automatic suspension and thereby void the Planning Board Permits) on its own. The Quiet Title Decision does not retroactively rewrite the Eckrote Easement such that it is not one piece of the substantial evidence of RTI supporting the Planning Board Permits. The

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<sup>4</sup> Nordic has not yet requested that the City lift the Condition 37 suspension. While the City became the owner of the Eckrotes' property by recorded deed Book 4679 at Page 157, 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"), and 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"), Nordic considers this one of several pathways to move forward with the project. One practical effect of Condition 37 that it holds the Planning Board Permits in suspended status while litigation is resolved thereby allowing the City to avoid unnecessary and premature expenditure of resources.

Planning Board carefully crafted Condition 37 to address future changes in RTI. Upstream's appeals present no basis on which the ZBA can do anything by uphold the Planning Board Permits.

Dated: February 28, 2024

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