

CITY OF BELFAST BOARD OF APPEALS

UPSTREAM WATCH APPEAL OF PERMITS ISSUED BY THE PLANING BOARD TO NORDIC AQUAFARMS, INC.

PRE-HEARING BRIEF OF THE CITY OF BELFAST PLANNING BOARD

February 1, 2024

This Brief is submitted on behalf of the City of Belfast Planning Board to address issues raised regarding the Planning Board's determination that Nordic Aquafarms, Inc. ("Nordic") had right, title and interest in the real property and easement rights needed for its inland aquaculture project.

Please note that this Brief is submitted by the City Attorney to explain and contextualize the Planning Board's 2020 permit findings. To be clear, the Planning Board has neither met nor discussed issues related to Nordic's right, title and interest ("RTI") since the December 22, 2020 date of permit issuance. In submitting this Brief, the Planning Board cannot and does not intend to address on the merits any argument by the Appellant that intervening decisions by the courts or by state agencies have suspended or removed Nordic's right to its permits.

I. The ZBA's Authority to Consider Upstream's Arguments regarding RTI.

The ZBA has "the power to hear and decide administrative appeals where it is alleged that there is an error in any order, requirement, decision, or determination made by, or failure to act by, the...Planning Board in the enforcement or administration of [Chapter 90]." City Code § 90-14. The ZBA applies an appellate standard of review, "which shall entertain all evidence of record submitted in the underlying hearing, including any transcripts, findings of facts, and decisions made by the board of original fact-finding jurisdiction." § 102-134(f). Taken together, this means that the ZBA considers whether the Planning Board made the correct determination *at the time of its vote, based on the information available to it at the time of its vote*. The Board of Appeals should not consider any materials not available to the Planning Board at the time of its vote, which includes the decisions of the Maine Superior and Maine Supreme Judicial Courts on the issue of title to the intertidal property.

II. The Planning Board's Findings on RTI.

In determining whether an applicant has standing to apply through a presentation of right, title or interest, the Planning Board must find that the evidence of legal interest presented by the applicant gives it a "legally cognizable expectation" of having the power to use the property in the ways that would be authorized by the permit if approved." Maine Municipal Association Planning Board Manual, at 13, citing *Murray v. Town of Lincolnville*, 462 A.2d 40 (Me. 1983). A title dispute does not deprive an applicant of standing. *Southbridge Corp. v. Board of Environmental Protection*, 655 A.2d 345 (Me. 1995). As the Maine Municipal Association advises:

The board has no legal authority to resolve boundary or title disputes as part of its decision on an application. *Rockland Plaza Realty Corp. v. LaVerdiere's Enterprises*, 531 A.2d 1272 (Me. 1987)...If the board is presented with credible written expert evidence by both the applicant and an opponent which is in direct conflict and which involves a title/boundary issue, the board probably 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 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 required burden of proof.

It has been the consistent practice of the Belfast Planning Board that it does not attempt to resolve boundary or title disputes. Instead, it uses the approach listed by MMA as option #2, finding standing as long as the documents presented demonstrate on their face a credible claim to title.

It is important to remember that at the time of the Planning Board's review, no court had heard or resolved any title claims related to the intertidal land. The Planning Board was not in a position to evaluate the parties' competing claims and therefore left those issues for the courts to resolve.¹ The Appellant has not asserted that any of the documents presented by Nordic in support of its RTI were deficient on their face. Indeed, the fact that the Maine Superior Court found that Eckrote property included title to the intertidal area should be demonstration enough that the documents were facially sufficient to demonstrate the relatively low threshold for RTI. It is unreasonable for the Appellant to suggest that the Planning Board – a volunteer board with no legal training- should be required to conduct a full hearing of any title dispute, to include the hearing of witnesses and weighing of competing evidence.

III. Conditions Imposed by the Permits.

The Site Plan Permit and Use Permit each make it clear that the Planning Board relied upon the submitted option agreement and deed, each having been reviewed by the Board's attorney, in finding that Nordic had submitted sufficient information to demonstrate that it had right, title and interest. The materials relied upon included the findings contained within orders by the Department of Environmental Protection and the Department of Agriculture, Conservation and Forestry. The Planning Board interpreted the requirement under Section 90-42(10) of the Belfast City Code, which addresses RTI in site plan applications, as requiring "a legally cognizable expectation to use the properties for the intended uses." Site Plan Permit at 75. It relied upon the Easement Purchase and Sale Agreement presented by Nordic as being sufficient to meet that standard; however, "being mindful that" the title suit was pending, the Planning Board placed Condition #37.1 on the approval. The condition provides that (1) no construction would be permitted until the deeds and easements relied upon for RTI were recorded in the Waldo County Registry of Deeds, and (2) Nordic would be required to "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 (sic) property" if a final judgment terminated Nordic's claimed

¹ See Site Plan Permit at p. 9, citing Attorney Kelly's review of the record materials as to right, title and interest and his statement that, "this ultimately is a decision of the court."

legal rights. In such case, the condition further calls for the suspension of “all permits issued by the Planning Board” until the Planning Board could act on a subsequent amendment or application to re-issue or issue appropriate use permits. Condition 37.2 also prohibits work in the Eckrote intertidal area until issuance of a final judgment confirms Eckrote/Nordic’s claim of title to that area. These conditions are listed under Condition #9 in the Intake/Discharge Permit and in Condition #10 to the Shoreland Zoning Permit.

The Site Plan Permit correctly found right, title and interest based upon the option agreement, deeds and surveys before the Planning Board at the time. It also prudently ensured that Nordic would not be able to proceed with its project if its basis for RTI was invalidated by a court. Where the appellant claims that Nordic now lacks RTI because of the court’s decision in the title case, its remedy is found within the Site Plan permit: Nordic’s permits are suspended unless and until it can establish another basis for RTI to the entire project parcel. The Appellant’s concerns about RTI are not properly addressed as an appeal of the Planning Board’s Site Plan Permit, as they rely upon the title decision made after permit issuance. The permits addresses what becomes of them in this scenario. The Appellant’s concerns are more appropriately addressed as a request for action to deem the permit suspended, or to block any attempt by Nordic (which has not yet been made) to seek building permits or otherwise perform work in reliance on its Planning Board permits, but not as an appeal of the original finding of RTI, which was appropriately made.

IV. Conclusion

The title issues raised by Upstream Watch and other project opponents during the Planning Board’s review were complex enough that the Superior Court and Supreme Judicial Court each reached different conclusions on them. Faced with competing arguments, the Planning Board appropriately neglected to put on a title trial and instead relied upon long-established principles of law that a determination of standing based upon RTI requires only a showing of a cognizable interest in the property, as established on the face of deeds and other legal instruments. Looking only at the materials submitted by Nordic, as the Board of Appeals must, it is clear that the Planning Board correctly found that sufficient evidence of RTI had been submitted to meet the threshold test for standing.

Respectfully submitted.



Kristin M. Collins, Bar No. 9793
City Attorney and Counsel to the Planning Board
Preti, Flaherty, Beliveau & Pachios, LLC
45 Memorial Circle
Augusta, ME 04330
kcollins@preti.com