

## CITY OF BELFAST BOARD OF APPEALS

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

#### PRE-HEARING REPLY BRIEF OF THE CITY OF BELFAST PLANNING BOARD

February 28, 2024

The Planning Board generally agrees with and incorporates by reference the position taken by Nordic Aquafarms in response to the briefs submitted by Appellant Upstream Watch, and additionally submits the following:

#### I. Conditions #37.1 and 37.2

As to the propriety of Condition #37.1, it should first be noted that an option agreement satisfies the test for RTI sufficient to make a land use application. See *Madore v. Maine Land Use Regulation Commission*, 1998 ME 178, 715 A.2d 157. However, it is reasonable for a planning board to be clear that the permit does not authorize an entity to commence work until it has the optioned lease or deed in hand. That is all that Condition #37.1 requires. Its existence does not mean that the Planning Board was implicitly holding that Nordic did not have standing at the time of application. Condition 37.1 is simply a housekeeping measure that would have been placed on any application presented under an option agreement. It is intended to make it clear that the permit is not condoning the start of work before the applicant has the legal right to undertake it.

Condition #37.2 similarly does not implicitly find that Nordic did not have standing at the time of the application. As explained in the Planning Board's initial Brief, that condition was simply a way of acknowledging that there was a title dispute and that the permit was not condoning work that, depending on the resolution of the title case, could end up not being legal because of the title status.

#### II. Maintenance of Administrative Standing

The Planning Board appropriately found standing both at the time of the initial vote on standing and at the time of the decision to issue the permits. The status of Nordic's option agreements and the status of title to the subject property remained unchanged during that time, and the Planning Board was correct in finding standing at both junctures. Conditions 37.1 and 37.2 did not undermine, but rather supported the finding of standing. Upstream essentially argues in the alternative that either a project should not be found to have standing (which runs counter to MMA guidance and the case law), or that failure to maintain right, title and interest throughout the life of a project should result in a permit being canceled or revoked. While an applicant must maintain standing (RTI) through the lifecycle of the administrative review process, it is the duty of each permitting authority within that process to make a determination of standing based upon the facts before it at the time of the review. The Planning Board determined standing as of the time of its review. Following permit issuance, it ceded jurisdiction to the next stage in the review process, during which the Code Enforcement Officer will determine whether

Nordic has standing at the time of making any application for building permits. Because of the failsafe imposed by Conditions 37.1 and 37.2 and the Code Enforcement Officer's independent authority to review standing prior to any construction work, the Planning Board appropriately insured against any *loss* of right, title and interest.

### III. Expiration of Permits

The ZBA simply does not have jurisdiction to determine whether a permit has been voided through failure to meet start and completion deadlines under the ordinances. It may only "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. Because neither the Planning Board nor the Code Enforcement Officer has decided whether Nordic's permits have expired, that question is not properly before this Board. Upstream would clearly like this issue to be resolved, and so is arguing that the ZBA decide it so as to avoid issuing an "advisory decision." The fact that a permit *could* be deemed void by another municipal official has no bearing on the ZBA's job to decide the appeal before it on its merits. It is indisputable that only the Code Enforcement Officer can determine whether Nordic's Planning Board permits remain valid, and that decision would be made by the CEO at either the start of work or the seeking of building permits in reliance on the Planning Board approvals. The ZBA cannot usurp the CEO's jurisdiction and cannot speculate on what the CEO might rule if this issue properly comes before him.<sup>1</sup>

### IV. Conclusion

Upstream misunderstands and conflates the roles of the Planning Board, Code Enforcement Officer and Zoning Board of Appeals, which are all intentionally distinct under the City Code. The Planning Board in this case properly determined that Nordic had made a threshold showing of standing as required. The Board of Appeals' jurisdiction is constrained only to reviewing that decision based upon the evidence available to the Planning Board at the time. Moving forward, the Code Enforcement Officer will have sole jurisdiction to determine whether Nordic remains in compliance with its permits and any applicable ordinance deadlines and whether it has standing to apply for any CEO-issued permits. Upstream's arguments would suggest that any cloud on title should be the basis for denial or revocation of a permit. This is contrary to well-established case law, and also simply impractical. Planning Boards determine standing as a threshold matter, and from there title issues properly rest with the respective property owners for resolution. Conditions 37.1 and 37.2 recognized the title dispute, but were not placed with the intent to defer or undermine the conclusions that the applicant had demonstrated sufficient right, title and interest to make the application. Those conclusions were well-supported based upon the evidence of RTI in the record.

Respectfully submitted.

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<sup>1</sup> It is noted that Upstream requested an advisory decision from the Planning Director and CEO on this issue and that it has recently submitted a separate appeal challenging those officials' response.



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