

Notice of Decision

Upstream Watch v. Belfast Planning Board, et al.

Date of Vote on Original Decision: December 9, , 2024

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INTRODUCTION

This Notice of Decision concerns five appeals by Upstream Watch (“Upstream”) regarding conditional permit approvals issued by the Belfast Planning Board on a land-based aquaculture facility pursued by Nordic Aquafarms Inc. (“Nordic”) (as detailed in the conditional approvals and related application materials, the “Project”).

For the reasons stated below, the Belfast Zoning Board of Appeals (“BOA”) denies all five administrative appeals and affirms the Planning Board’s permit decisions as detailed herein.

BACKGROUND & PROCEDURAL HISTORY

Upstream challenges five conditional permit approvals issued by the Belfast Planning Board (“Planning Board”) in December 2020, which are:

1. A Zoning Use Permit;
2. Site Plan Permit;
3. Significant Groundwater Wells Permit;
4. Significant Water Intake and Significant Water Discharge/Outfall Permit; and
5. Shoreland Zoning Permit.

The BOA previously determined Upstream did not have standing and dismissed the five appeals without addressing the merits. Upstream then appealed that standing determination.

In *Upstream Watch v. City of Belfast*, the Law Court concluded the BOA committed an error and determined Upstream did have standing to pursue administrative appeals of the Planning Board permit approvals. The Law Court made this decision in August 2023, after the *Mabee* decision referred to below.

The Law Court remanded the appeals back to the BOA with direction to address the merits and left to the BOA to address the impact of the Law Court’s prior *Mabee* decision (from February 2023) on the permits at issue. *Upstream Watch v. City of Belfast*, 2023 ME 43 ¶ 1, n.1, 299 A.3d 25. The Law Court’s footnote reads:

We note that although this case is closely related to our recent decision in *Mabee v. Nordic Aquafarms Inc.*, 2023 ME 15, 290 A.3d 79, the permits at issue here are distinct from those at issue in *Mabee*. While our decision in *Mabee* may have an effect on the

ultimate viability of the permits at issue here, our ruling today relates only to a threshold standing issue. We remand the matter to the ZBA to address the merits of the permits, and we leave it to the ZBA to address the impact of our decision in *Mabee*.

Id.

Following the Law Court's remand, the BOA consolidated all five appeals for the purposes of the BOA's continued appellate review. The parties submitted extensive briefing on issues raised in the appeal, in addition to the prior written filings in 2021, and conducted oral presentations of the parties' positions and arguments on the appeals. Interested persons were also afforded an opportunity to provide comments on the appeals. The BOA then conducted lengthy deliberations to review issues in all five appeals and rendered a final decision on the appeals by vote on December 9, 2024, with this written Notice of Decision adopted by the Board on December 9, 2024.

I. SUBJECT MATTER JURISDICTION, STANDING, & STANDARD OF REVIEW.

The BOA has subject matter jurisdiction to review any decision by the Planning Board, here five conditionally approved permits, and Upstream has standing as determined in *Upstream Watch v. City of Belfast*.

When reviewing decisions of the Planning Board, the BOA acts in an appellate capacity as stated in Chapter 102-134(f):

Standard of review on appeal. In all administrative appeals, except appeals from actions of the code enforcement officer, the Zoning Board of Appeals shall act as an appellate Board which shall entertain all evidence of record submitted in the underlying hearing, including any transcripts, findings of facts, and decisions made by the [Planning] board of original fact-finding jurisdiction. The Zoning Board of Appeals shall review the entire record and determine if the evidence of record compels the Zoning Board of Appeals 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. In such administrative appeals, the Zoning Board of Appeals is hereby authorized to take the following action:

1. Approve the decision below.
2. Reverse in part or in total the decision from below.
3. Remand to the fact-finding board of original jurisdiction for further proceedings necessary to either:
 - a. Complete the record in the event that the board finds it unable to render a decision due to the absence of critically important factual information; or
 - b. Remand for further proceedings consistent with the order of the Zoning Board of Appeals.

City Code, § 102-134(f).

Under this appellate standard, the BOA (i) reviews factual findings to determine whether they are supported by substantial evidence; (ii) interprets ordinance provisions independently; and (iii) otherwise reviews a Planning Board decision under an arbitrary, capricious, abuse of discretion, or other reasons appropriately recognized in an appellate standard of review.

II. APPEAL ISSUES.

A. RIGHT, TITLE, AND INTEREST.

Upstream challenges the Planning Board's determination that Nordic had sufficient right, title, and interest ("RTI") for all five Planning Board permits.

As an initial matter, the BOA concludes RTI is a requirement for all five permits because the Belfast Ordinances do not contain any express language negating the RTI requirement (and in one instance expressly states RTI *is* required). Absent such express language, RTI is "implicitly a valid pre-condition of 'standing' to be a proper 'applicant'". *Walsh v. City of Brewer*, 315 A.2d 200, 207 n.4 (Me. 1974). Nordic must therefore demonstrate RTI for each type of permit approval.

RTI challenged here focuses on the intertidal area adjacent to the Eckrote property in relation to property at the 282 Northport Avenue location. While this property does not itself involve the proposed wells under the Significant Groundwater Well Permit, the Planning Board's conditions of approval intertwined all five permits with each other so they essentially "stand or fall together" from a conditional approval standpoint. Thus, for the purposes of this Notice of Decision, the BOA treats RTI as required for all five permits as it relates to all property at or associated with 282 Northport Avenue.

To demonstrate RTI, an applicant must have "the kind of relationship to the site that gives a legally cognizable expectation of having the power to use that site in the ways that would be authorized by the permit or license [the applicant] seeks." *Murray v. Inhabitants of the Town of Lincolnville*, 462 A.2d 40, 43 (Me. 1983). Since local administrative boards lack authority to adjudicate private property rights, a showing of RTI is primarily to ensure the reviewing authority does not waste time and resources to process an application. *Id.* (stating an underlying purpose of the RTI requirement is to "prevent an applicant from wasting an administrative agency's time by applying for a permit or license that he would have no legally protected right to use.").

Past examples of sufficient RTI evidence range from recorded deeds, purchase and sale agreements, options to purchase, and claims of adverse possession. See e.g., *Southridge Corp. v. Bd. of Env'tl. Prot.*, 655 A.2d 345, 348 (Me. 1995). As an example of insufficient RTI, in *Walsh v. City of Brewer*, the Law Court determined the applicant did not have administrative standing since the record in the proceeding did not support the "authority" assertion advanced by the applicant in relation to the RTI for the land in question.

This RTI requirement has been further refined when the scope of an easement is at issue, such as in the *Tomasino* case where the Law Court stated, "[u]like 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.” *Tomasino v. Town of Casco*, 2020 ME 96 ¶ 15, 237 A.2d 175.¹

Here, in the early stages of its application reviews, the Planning Board determined Nordic did have sufficient RTI and included in its decisions an acknowledgement that title to the intertidal land adjacent to the Eckrote property was in dispute (along with other real property issues amongst private parties) and included specific conditions of approval related to that ongoing dispute. In significant part, the title dispute of the intertidal area was later resolved in *Mabee v. Nordic Aquafarms, Inc.*, 2023 ME 15, 290 A.3d 79, where the Law Court determined Mabee and Grace, not the Eckrotes, owned the intertidal area in dispute (overruling the lower court’s decision). The Law Court further determined that Mabee and Grace have an enforceable servitude over the Eckrotes’ upland area regarding a residential use only restriction, and that Friends of the Harriet L. Hartley Conservation Area hold an enforceable conservation easement over the intertidal land in question. *Id.* at ¶ 61. This determination occurred in February 2023, just over two years after the Planning Board issued conditional permit approvals in December 2020.

The BOA concludes the Planning Board had sufficient evidence in the record and did not commit any errors of law, abuse its discretion, or act in an arbitrary or capricious manner, when it made a positive determination on Nordic’s demonstration of RTI in December 2020.² At the time the Planning Board made its decision, it was uncertain what the outcome of the *Mabee* litigation would be. The Planning Board had, amongst a large volume of materials, signed agreements typically used to demonstrate RTI for administrative application purposes. There was also record evidence asserting the contrary. As *Mabee* revealed, it was not necessarily the scope of those agreements at issue, as in *Tomasino*, but their underlying validity and any enforceable servitudes or easements springing therefrom.

Regarding conflicting record evidence, which the BOA notes exists, the Planning Board was tasked with weighing the credibility and persuasiveness of that evidence at the time in question. Key to the BOA’s appellate review on such evidentiary matters is whether the Planning Board relied on “substantial” evidence – that is, evidence that a reasonable mind

¹ *Tomasino* has since been interpreted at least once, articulating the distinction between the validity of a possessory interest in land vs. whether a possessory interest in land authorizes a particular activity. See *Nextera Energy Resources LLC v. Maine Dept. of Environmental Protection*, No. KEN-AP-20-27, 2021 WL 9349108, at *4 (Me. Super. Jan. 8, 2021) (“Whether a possessory interest in land is valid and whether a possessory interest in land authorizes a particular activity are different questions. The fact that an applicant’s TRI is based on a possessory interest that might later be invalidated by a court does not mean the applicant lacked TRI to proceed before the DEP.”) (citing *Southridge Corp. v. Bd. of Env’tl. Prot.*, 655 A.2d at 348).

² Upstream raised a procedural due process claim regarding the Planning Board’s process when the Planning Board ruled Nordic had sufficiently demonstrated RTI to warrant further processing Nordic’s applications. Specifically, Upstream asserts the Planning Board erred by not allowing testimonial evidence and argument, but allowing written submissions of evidence and argument. Upstream further asserts the Planning Board erred by refusing to consider all written submissions of evidence and argument. From a jurisdictional standpoint, the Board acknowledges it does not have authority to adjudicate Constitutionally based claims, but notes appellants and appeal participants are obligated to raise issues for preservation purposes. Without ruling on the procedural due process claims, the Board notes the Planning Board did provide notice and opportunity for participants to submit written evidence (testimony and documents) as well as argument on RTI. The Planning Board had all submitted materials and then ruled on the sufficiency of Nordic’s RTI, which as explained above in Part II.A was not an error of law or based on findings unsupported by substantial evidence in the record.

would rely on as sufficient to support a conclusion. The BOA concludes the evidence relied upon by the Planning Board on RTI meets the substantial evidence test. The possibility of drawing two inconsistent conclusions, as occurred post-facto on title issues by the Superior Court and Law Court, does not render evidence in prior administrative proceedings context insubstantial. Further, similar to post-*Mabee* decisions by other administrative agencies³, namely the Maine Department of Environmental Protection and Bureau of Parks and Lands, the BOA concludes *Mabee* does not result in an error of law by the Planning Board in its prior decisions before *Mabee* was conclusively decided by the Law Court.⁴

However, the BOA notes, consistent with the Law Court's *Mabee* decision and its remand directive to the BOA, that Nordic plainly does not have the requisite possessory right or interest to occupy, construct, or operate its land-based aquaculture facility as fully proposed and conditionally approved by the Planning Board given the outcome in *Mabee* (and, moreover, conditions related to state and federal permits are outstanding), and any activities undertaken in contradiction to those conditionally approved permits are subject to enforcement actions by the City without restraint imposed by any Planning Board condition that may be interpreted to impact or limit the City's enforcement authority.⁵ Stated differently, the impact of *Mabee* on the viability of the Planning Board's permits does not in a retroactive manner negate the Planning Board's RTI determination in December 2020 based on the record evidence the Planning Board had before it, but does relate to the viability of those permits such that Nordic is unable to proceed with its Project as proposed and conditionally approved by the Planning Board without a change of circumstances that may, or may not, come to fruition.

³ The Commissioner of the Maine DEP acted to "suspend" Nordic's DEP licenses in June 2023 until sufficient RTI is provided. This suspension action in response to a request to suspend or revoke the DEP licenses previously issued to Nordic. Ultimately, the Commissioner of Maine DEP, acting in a discretionary function under the Department's rules, suspended Nordic's DEP licenses until (a) final disposition of all challenges related to the City's eminent domain action, and (b) final disposition of any action to amend or terminate the conservation easement.

Also following the *Mabee* decision in September 2023, the Maine Bureau of Parks and Lands rescinded its decision to approve submerged lands leases previously granted to Nordic. Unlike Maine DEP regulations that provide authority on suspension or revocation of licenses, the Bureau of Parks and Lands regulations state that when a holder of a submerged lands conveyance loses RTI in the adjacent upland "then the lease or easement shall be invalid, and all leasehold or easement interest in the Submerged Lands shall be extinguished." 01-670 CMR Ch. 53, §6.B.1.b. In rescinding its decision, the Bureau noted that the quiet title action decided by the Law Court did not translate to an error in its prior decision (since *Mabee* had not been decided at that time) but under its regulatory regime and as trustee of publicly owned lands it was justified in rescinding the prior decision authorizing the submerged lands leases.

⁴ The BOA also notes, subsequent to the Planning Board's December 2020 conditional permit approvals, the City issued a condemnation order that is currently under pending litigation(s). That condemnation order did not exist at the time the Planning Board made its decisions, and is therefore not part of the administrative record considered by the Planning Board (since it did not exist). The BOA notes, as occurred in *Mabee*, the result of that litigation could have an impact on the Planning Board permits, but consistent with this Notice of Decision that would not otherwise validate or result in an error of the Planning Board's RTI determination in December 2020, but could impact the enforcement matters.

⁵ The BOA notes Upstream has filed a separate pending appeal regarding the status/expiration of the Planning Board permits, which has been stayed until resolution of these consolidated appeals and a hearing date is scheduled on that separate appeal.

B. STRUCTURE SETBACKS

Upstream challenges whether the intake/discharge pipes as proposed satisfy the structure setbacks of the Belfast Ordinances, as the Planning Board determined. The BOA concludes the structure setbacks are met, and the Planning Board did not commit a reversible error or make findings unsupported by substantial evidence, though the BOA had different reasons than those articulated by the Planning Board.

The intake/discharge pipes are located in the Residential II District, which has the following setback standards:

- The minimum rear and side setback is 15 feet for all buildings. *City Code, § 102-424(4)*.
- The minimum setback shall be 25 feet from the road right-of-way line as determined by either measuring a distance from the center of the traveled way that equals $\frac{1}{2}$ the right-of-way distance plus 25 feet, or determining the right-of-way boundary by a survey at the owner's expense, and adding 25 feet. *City Code, § 102-424(6)*.

The property in question, 282 Northport Avenue, is also located in the Shoreland Zoning Limited Residential District, which requires a setback of 100 feet for structures. Shoreland Zoning contains an exception to setback requirements for structures that require direct access to water as an operational necessity (such as piers, docks, and retaining walls) and other functionally water-dependent uses.

The Planning Board determined that while the pipes are structures, they do not need to comply with a front or rear structure setback when the sole purpose of the pipe is to convey water and wastewater across the property from Route One to Belfast Bay. In making this determination, the Planning Board stated the imposition of front and rear setbacks would nullify the main intent of the Ordinance amendments that allow such pipe facilities, and that the City had never imposed such setback requirements on other service lines such as water, sewer, or electrical lines. Although it determined the pipes did not need to comply, the Planning Board decided to impose a 15-foot side setback as a Condition of Approval. On the Shoreland Zoning requirements, the Planning Board determined the pipes were a functionally water-dependent use and therefore the structure setbacks did not apply.

Section 102-424 contains standards specific to rear and side setbacks of "all buildings", which is 15 feet. A "building" is defined in the Zoning Ordinance as:

"Any structure having a roof supported by columns or walls and intended for the shelter, housing, or enclosure of persons, animals or chattel. Each portion of a building separated from other portions by a firewall shall be considered a separate building except in the Downtown Commercial District."

City Code, Ch. 66-1(c) "Definitions".

A "structure" is separately defined as:

Anything built for the support, shelter or enclosure of persons, animals, goods or property of any kind, together with anything constructed or erected with a fixed location on or in the ground, exclusive of fences, utility poles and associated appurtenances, sidewalks and handicap ramps. The term includes structures permanently or temporarily located, such as decks, signs (see the City sign ordinance), gas or liquid storage tanks that are principally stored above ground and satellite dishes. The term includes any building having a roof supported by columns or walls. Structures separated only by party walls or abutting walls without openings shall be deemed to be separate structures.

City Code, Ch. 66-1(c) "Definitions".

These definitions show that while all buildings are "structures", not all structures are buildings for the purposes of the Zoning Ordinance.

The BOA interprets the above setback requirements to apply to buildings, and since the pipes are not "buildings" as used in that ordinance language those setbacks do not apply. While that may be the case, the BOA notes Nordic has proposed the pipes to be at least 15 feet from sidelines and does not challenge the imposition of a 15-foot sideline setback, and thus must adhere to that representation as conditionally approved by the Planning Board. Regarding shoreland zoning setbacks, the BOA also, independently, interprets the pipes to be a functionally dependent water use as their purpose is to draw or discharge water, and therefore the 100-foot structure setback for shoreland zoning purposes does not apply.

C. HEIGHT REQUIREMENTS.

Upstream challenges whether the smokestacks associated with on-site generators violate the Belfast Ordinance height requirements. The BOA concludes the height requirements are met, and the Planning Board did not commit a reversible error or make findings unsupported by substantial evidence.

The Zoning Ordinance for the Route One South Business Park District states the maximum structure height for a nonresidential structure is 45 feet. This height requirement does not apply to a water standpipe storage tank, a utility pole, a storage silo for an agricultural use, and structures similar in function and design to the above structures. *City Code, § 102-684(d)*.

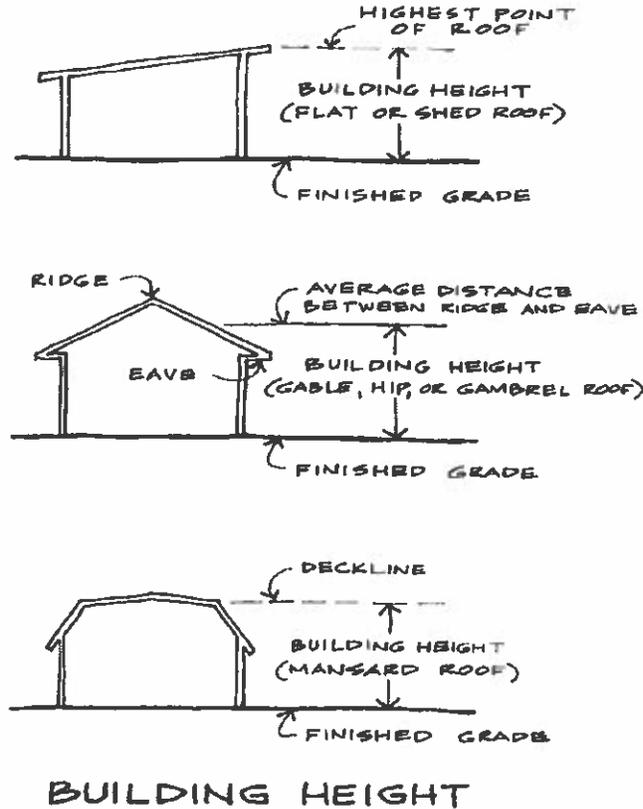
The Planning Board determined that Nordic had proposed chimneys (exhaust stacks) that are exempt from City height standards because chimneys do not have habitable floor area and are therefore not a structure.

"Height of a Structure" in the Zoning Ordinance⁶ is defined as:

The vertical measurements from the average finished grade of the ground to the highest roof beams on a flat or shed roof, to the deck level on a mansard roof, and the average distance between

⁶ Height of a Structure has a different definition in the Site Plan Ordinance.

the eaves and the ridge level for gable, hip and gambrel roofs. Said measurements of structure height shall exclude chimneys, antennas, solar panels, steeples or cupola-like architectural enhancements that do not result in an increase in the usable amount of floor area of a structure, and similar appurtenances which have no usable floor area. Figure 1, below, is a diagram of how building height is measured.



City Code, § 66-1(c) "Definitions".

"Floor Area" is defined in the Zoning Ordinance as:

The sum of the horizontal areas of the floors of a structure enclosed by exterior walls, plus the horizontal area of any unenclosed portions of a structure, such as porches and decks.

City Code, § 66-1(c) "Definitions".

The BOA, in interpreting the above provisions, correlates usable floor area to occupiable area (i.e., not just habitable area) on whether a type of structure (or portion thereof) is subject to the height requirement. Here, the proposed smokestacks do not constitute "usable floor area"

as they are not occupiable (or habitable),⁷ and therefore do not violate the Ordinance height requirements.

D. WASTEWATER DISCHARGE.

The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic's proposed discharge will result in degradation of Penobscot Bay. *City Code, § 90-42(b)(1)*. The BOA notes the Planning Board had record evidence regarding wastewater discharge and related technical analyses, and also conditioned its approval to State approval of the discharge.⁸ The BOA notes the attachments included in the Nordic application; the City Engineer/s review and testimony; and the Maine Pollutant Discharge Elimination System (MEPDES) permit and its related findings by the Maine DEP and BEP.

E. WATER SUPPLY.

The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated that its demand for fresh water would not unduly burden the City water supply. *City Code, § 90-42(b)(3)*.

The relevant ordinance standard provides: "Municipal water supply. The proposed development will not cause an unreasonable burden on an existing municipal water supply, if one is to be used." The BOA notes the Planning Board had record evidence regarding municipal water supply and related technical analyses. The Planning Board detailed extensively their findings and evidence relied on from numerous engineering firms and city consultants who analyzed this question including testimony of the City's special expert Matt Reynolds of Drumlin Engineering and the Belfast Water District Capacity Evaluation by A.E. Hodson Engineers. The Planning Board also received evidence from the Superintendent of the Belfast Water District and the Maine Public Utilities Commission.

F. WITHDRAWAL OF GROUNDWATER.

The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence when it determined the Project would not compromise the water quantity or quality of private or public water sources in in the Area. *City Code, § 90-42(b)(12)*.

Record evidence included hydrogeologist studies/reports, including independent peer review by an expert retained by the Planning Board, that the water supply would not be unduly burdened. The BOA notes the extensive City expert review and testimony of Matt Reynolds, Drumlin Engineering who was hired by the City specifically to look at this issue and ordinance requirement. There was further expert evidence including a licensed geologist report titled "Hydrogeologic report and monitoring plan" as well as evidence from MDEP and BEP.

⁷ The record evidence describes the smokestacks' primary purpose for air emission discharges associated with on-site diesel generators, an area not reasonably "occupiable" when compared to, for example, area used for storage of equipment or goods.

⁸ The BOA notes, as of the date of this Notice of Decision, the MDEP wastewater discharge license is subject to judicial review under a pending appeal.

Condition 27 of the Site Plan Permit and condition 27 of the Zoning Use Permit also address water use and the Planning Board issued a separate Significant Groundwater Wells Permit which includes findings and detailed evidence that those wells will not compromise the water quantity or quality of private wells in the area, including conditions 2-12 of the Groundwater Wells Permit.

G. AVAILABLE GROUNDWATER.

The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated that it had sufficient groundwater availability to operate its proposed three on-site wells. *City Code, § 102-1079*. The BOA notes the Planning Board had record evidence regarding water supply and related technical analyses including evidence of Matt Reynolds, P.E., Drumlin Environmental who was a consultant on behalf of the Planning Board. The Significant Groundwater Wells Permit includes detailed evidence that those wells will not compromise the water quantity or quality of private wells in the area, including conditions 2-12 of the Groundwater Wells Permit.

H. SOLID WASTE.

The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated it had arranged for the storage and disposal of solid waste and its subset, hazardous waste. *City Code, § 90-42(b)(18), (26), and (29)*.

The BOA notes the Planning Board had record evidence regarding waste disposal including Nordic Application Attachment 21 demonstrating capacity letters from various vendors specifically for solid waste disposal as well as testimony at the October 9, 2019 public hearing. Further, Conditions 14-18 of the Site Plan Permit explicitly address this standard and provide for on-site dumpsters; fish waste and waste associated with operation of wastewater treatment plan; order management; hazardous waste management; and an emergency response plan for catastrophic events such as fish die-offs.

I. FINANCIAL CAPACITY.

The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated that it had adequate financial capacity to develop the Project in a manner consistent with state and local performance, environmental, and technical standards. *City Code, § 90-42(b)(10)*.

The BOA notes the Planning Board had record evidence regarding financial capacity including Nordic Application Attachment 9; Testimony from Nordic's CFO; testimony at the August 5, 2019 public hearing; review and testimony by Mandy Olver, City Engineer on the DEP findings re: Financial and Technical Capability for the state SLODA permit; letters from financial institutions and stock information. Further conditions 35 and 36 of the Site Plan Permit address financial capacity.

J. SOILS.

The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated that the on-site soils are adequate for the intended purposes. *City Code, § 102-113 and 82-431*.

The BOA notes the Planning Board had record evidence regarding the on-site soils. This included Nordic's Application Attachment 12—Soils Report, and Attachment 13—Geotechnical Report by Ransom Engineering Professional Geotechnical Engineer. Further, At the public hearing on September 4th there was testimony from Nodic and their Atlantic Resource consultants Andy Johnston, PE and Gilbane Building Co. regarding phasing and erosion control for all site work, excavation, and backfill operations. There was also testimony from Mandy Olver, the City Engineer as to the soil adequacy.

The BOA notes the Planning Board also recognized the requirement for third-party inspectors established by both the City and the DEP regarding all soil and erosion control measures and the requirement for regular construction meeting between Nordic and the City Code Enforcement Officer. Condition 21 of the Site Plan Permit and Condition 21 of the Zoning Use Permit address soil management further.

K. ELECTRIC SERVICE.

The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated it had adequate electric service to operate its Project, which under City Ordinances relates to air emission standards and under the Planning Board permits included certain conditions for electrical inspections.

The BOA notes the Planning Board imposed Condition 12 of the Zoning Use Permit and Condition 12 of the Site Plan Permit that address electrical supply including on and off-site electrical service and generation which included the authorization for the Code Enforcement Officer to obtain third-party professional services to conduct required electrical inspections. Further, the BOA notes Nordic obtained a DEP Minor Air Emissions Permit to operate 8 onsite generators to provide both peak shaving and emergency power for Nordic's operations, and that any change in this permitting would require an approved amendment from the Planning Board due to a change in air emissions from the generators. Lastly, Nordic application Attachment 31 includes expert design data for generators as well as a CMP letter of availability dated February 20, 2014, and public hearing testimony from expert witnesses on December 18 and 19, 2019, and December 9, 2020.

L. APPLICATION REQUIREMENTS CONVERTED TO PERMIT CONDITIONS.

The Appellants contend that the Planning Board erred by converting numerous application/ordinance requirements into conditions such that the Applicant failed to meet its burden of proof or that no record evidence existed to support any factual findings on standards. Upon review, the BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence when it imposed conditions on the Project, all as detailed below regarding each specific standard.

The BOA notes that the Shoreland Ordinance authorizes "approval with conditions" (Sec 82-54); the Site Plan Ordinance authorizes approval "upon terms and conditions" (Sec 90-74(3) and 90-105); and the Zoning Use Ordinance authorizes the Planning Board to "approve with conditions" (Sec 102-101). The BOA also notes that many of the imposed conditions were in response to concerns raised in the review process, and further that certain imposed conditions arguably go beyond what the Ordinances can lawfully support but are not otherwise challenged by Nordic.

M. DETAILED REVIEW OF SITE PLAN STANDARDS

i. § 90-42(b)(1), Pollution

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project would not result in undue water or air pollution.
2. The BOA notes the Planning Board had extensive record evidence regarding pollution including Nordics application—extensive stormwater management systems, testimony at public hearings, findings and conditions in the DEP MPDES Permit and MDEP Minor Air Emissions license, information by City consultants (Mandy Olver, Olver Associates and Matthew Reynolds Drumlin Engineering), information by the Belfast Water District, particularly Keith Pooler, its Superintendent and the U.S. ACOE authority to regulate the discharge of effluents to Belfast Bay.
3. Based on the detailed and extensive record evidence discussed above regarding pollution, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (condition 8) simply furthered the ordinance by requiring Nordic to comply with all state and federal permits it has or will obtain. The Planning Board did not convert this ordinance standard to a condition.

ii. § 90-42(b)(2), Sufficient water

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project had sufficient water available for the reasonably foreseeable needs of the development and would not unreasonably affect other existing local drinking water resources.
2. The BOA notes the Planning Board had extensive record evidence regarding water supply including Nordic's application—attachments 23 and 24; testimony at numerous hearings, particularly Keith Pooler, Superintendent, Belfast Water District; testimony of City special consultant Matt Reynolds, Drumlin Environmental, and specific calculations on available water found in the Planning Board's findings.
3. Based on the detailed and extensive record evidence discussed above regarding water supply, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the conditions imposed (conditions 3, 8, 27 and 28) simply furthered the ordinance by requiring Nordic to comply with all state and federal permits it has or will obtain. Condition 3 simply requires Nordic to comply with all City permits issued (since 5 were received for this Project but this standard falls under Site Plan Ordinance only); Condition 8 simply requires Nordic to comply with State and Federal permits; Condition 27 simply requires Nordic to go back to the Planning Board should their maximum amount of water use exceed what is included within the application and deals with monitoring water use and river flows; and Condition 28 anticipates usage of the dam and spells out what must happen should the dam be removed, including returning the Planning Board, City Council or Code Enforcement Officer. The Planning Board did not convert this ordinance standard to a condition.

iii. § 90-42(b)(4), Soil erosion and sediment control

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project would not cause unreasonable soil erosion or a reduction in the land's capacity to hold water so that a dangerous or unhealthy condition results.
 2. The BOA notes the Planning Board had extensive record evidence regarding soil erosion and sediment control including Nordic's application; testimony to the Planning Board at the September 4, 2019 meeting; and review by Mandy Olver, Olver Associates (City Engineer) as to the suitability of the plan.
 3. Based on the detailed and extensive record evidence discussed above regarding soil and erosion control, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (Condition 21) simply identifies the findings made by the BEP in regard to the State NRPA/SLODA permits issued by DEP and incorporates those third-party inspection requirements into the Planning Board decision as well as requiring Nordic to come to the Planning Board again should they alter their soil and erosion control measures and to report to the CEO on progress generally. The Planning Board did not convert this ordinance standard to a condition.
- iv. § 90-42(b)(5), Highway or public road congestion
1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project would not cause unreasonable highway or public road congestion.
 2. The BOA notes the Planning Board had extensive record evidence regarding road congestion including Nordic's application—Attachment 17; the Traffic Study dated June 3, 2019, prepared by Diane Morabito; testimony at the January 15, 2020 public hearing and information presented by Wayne Marshall, Director of Code and Planning.
 3. Based on the detailed and extensive record evidence discussed above regarding highway or public road congestion, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (Condition 23) simply provides further notification/reporting and timing requirements for various phases of construction activities to address concerns raised in the review process. The Planning Board did not convert this ordinance standard to a condition.
- v. § 90-42(b)(6), Sewage waste disposal
1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project would provide adequate sewage waste disposal in compliance with federal, state, and local laws.
 2. The BOA notes the Planning Board had extensive record evidence regarding sewage waste disposal including Nordic's application; the BEP MPDES and Wastewater Discharge Licenses; Mandy Olver, Olver Associates' testimony and review of the application; sewage through the City Wastewater Treatment Plant; and several public hearings.
 3. Based on the detailed and extensive record evidence discussed above regarding sewage waste disposal, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (Condition 8) simply

requires Nordic to comply with State and Federal permits. The Planning Board did not convert this ordinance standard to a condition.

vi. § 90-42(b)(7), Municipal solid waste and sewage waste disposal

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project would not cause an unreasonable burden on the City's ability to dispose of solid waste and sewage.
2. The BOA notes the Planning Board had extensive record evidence regarding waste disposal including Nordics application Attachment 21, the fact that Nordic will not be utilizing the City transfer station for the disposal of any solid waste or sewage; capacity letters from various vendors specifically for solid waste and sewage disposal as well as testimony at the October 9, 2019 public hearing; evidence from the City Wastewater Treatment Plant, Olver Associates (City Engineer), the Public Works Department and the Code and Planning Department.
3. Based on the detailed and extensive record evidence discussed above regarding solid and sewage waste disposal, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the conditions imposed (Conditions 10, 14, 15, 16, 17, and 18) provide for on-site dumpsters; fish waste and wastes associated with operation of wastewater treatment plan; order management; hazardous waste management; and an emergency response plan for catastrophic events such as fish die-offs. The Planning Board did not convert this ordinance standard to a condition.

vii. § 90-42(b)(10), Financial and technical capacity

1. See Discussion Above: "Section I: Financial Capacity" for the detailed evidence relied on by the Planning Board.
2. Based on the detailed and extensive record evidence discussed above regarding financial and technical capacity, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the conditions imposed (Conditions 12, 20, 21, 35, and 36) provide reasonable and effective safeguards and performance guarantees that the City can use should Nordic be unable to complete the Project for any reason. The Planning Board did not convert this ordinance standard to a condition.

viii. § 90-42(b)(11), Surface waters; outstanding river segments

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project would not adversely affect the quality of any pond or lake within 250 feet of the Project or unreasonably affect the shoreline of that body of water.
2. The BOA notes the Planning Board had extensive record evidence regarding surface waters including the evidence that none of the on-site wetlands that are proposed to be disturbed on the main site are located in the Shoreland Zone; DEP permits (SLODA and NRPA) and findings including payment in lieu of wetland fee (\$760,000) and ACOE jurisdiction; mitigation required by the DEP Site Plan Permit; Nordic application—Attachments 34 (Wetland and Stream Surveys) and Attachment 15 (Stormwater Management).
3. Based on the detailed and extensive record evidence discussed above regarding surface waters, the Planning Board did not err in finding that Nordic

satisfied this ordinance standard, and the condition imposed (Condition 22) simply requires Nordic to provide evidence to the Code and Planning Department and Planning Board of any amendment to the issued State permits that affect wetlands. The Planning Board did not convert this ordinance standard to a condition.

ix. § 90-42(b)(12), Groundwater

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project would not, alone or in conjunction with existing activities, adversely affect the quality or quantity of groundwater or any public or private water source.
2. The BOA notes the Planning Board had extensive record evidence regarding groundwater including the evidence in Nordics application—attachment 23; testimony at the September 23, 2019, May 27, 2020, and August 5, 2020 public hearings; a review of the Nordic application, DEP/BEP information, and City Ordinance requirements by City special consultant Matt Reynolds, P.E., Drumlin Environmental; DEP staff memos and BEP review by Dr. John Hopeck; extensive performance guarantees and information in the groundwater extraction permit and findings.
3. Based on the detailed and extensive record evidence discussed above regarding groundwater, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the conditions imposed provide reasonable and effective safeguards. The Planning Board did not convert this ordinance standard to a condition.

x. § 90-42(b)(13), Flood areas

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic determined the 100-year flood elevation and flood hazard boundaries within the development and that any structures in the flood area be at least two feet above the 100-year elevation.
2. The BOA notes the Planning Board had extensive record evidence regarding flood areas including the evidence in Nordics application—attachment 19; that Nordic is not proposing to construct any new structures in any FEMA map areas; and the fact that there was no testimony offered at the October 16, 2019 Planning Board hearing about flooding.
3. Based on the detailed and extensive record evidence discussed above regarding flood areas, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (Condition 22) simply requires Nordic to provide evidence to the Code and Planning Department and Planning Board of any amendment to the issued State permits that affect wetlands. The Planning Board did not convert this ordinance standard to a condition.

xi. § 90-42(b)(16), Stormwater

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project will provide for adequate stormwater management.
2. The BOA notes the Planning Board had extensive record evidence regarding stormwater including the evidence in Nordic's application—attachments 15 and 16; presentations by Ransom Consulting to the Planning Board at the September

4, 2019 hearing; a review of Nordic's application by the City consultant, Mandy Olver, Olver Associates, including that Ms. Olver reviewed all stormwater information submitted to DEP; the fact that no public comment was made at the public hearing regarding stormwater; and the NRPA/SLODA Permit issued by DEP.

3. Based on the detailed and extensive record evidence discussed above regarding stormwater, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (Condition 20) simply requires third-party inspection during construction of all stormwater improvements and regular monitoring post construction and reporting to the City. The Planning Board did not convert this ordinance standard to a condition.

xii. § 90-42(b)(18), Solid waste management

1. See Discussion Above: "Section H: Solid Waste" for the detailed evidence relied on by the Planning Board.
2. Based on the detailed and extensive record evidence discussed above regarding solid waste management, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the conditions imposed (Conditions 14-18) reasonably provide for on-site dumpsters; fish waste and wastes associated with operation of wastewater treatment plan; odor management; hazardous waste management; and an emergency response plan for catastrophic events such as fish die-offs. The Planning Board did not convert this ordinance standard to a condition.

xiii. § 90-42(b)(19), Exterior lighting

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project will provide for adequate exterior lighting to provide for the safe use of the development in nighttime hours if the use is contemplated.
2. The BOA notes the Planning Board had extensive record evidence regarding exterior lighting including the evidence in Nordic's application—attachment 18; the height of the light poles and the fact that only one house is within 150 feet of any building; only one building on the Nordic property will be within 150 feet of any public right-of-way; and that no public comment was offered to the Planning Board regarding site lighting issues.
3. Based on the detailed and extensive record evidence discussed above regarding exterior lighting, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (Condition 25) reasonably requires Nordic to comply with the lighting plan in its application and measures that Nordic should take to implement and manage the amount of light on adjacent properties, roads and the night sky. The Planning Board did not convert this ordinance standard to a condition.

xiv. § 90-42(b)(21), Noise

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project will control noise levels such that it will not create unreasonable interference with use and enjoyment of neighboring properties.
2. The BOA notes the Planning Board had extensive record evidence regarding noise including that noise is subject to DEP regulation and that DEP noise regulation is generally stricter than the City noise standards; that no regular

operations will exceed noise levels in the ordinance; and testimony at the October 9, 2019 Planning Board hearing.

3. Based on the detailed and extensive record evidence discussed above regarding noise, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (Condition 19) reasonably applies stricter noise requirements than the Project is subject to. The Planning Board did not convert this ordinance standard to a condition.

xv. § 90-42(b)(23), Landscaping

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project will provide for landscaping that protects abutting properties from any significant adverse impacts of the development.
2. The BOA notes the Planning Board had extensive record evidence regarding landscaping including Nordic's application—attachment 28; supplemental information submitted by Nordic; presentations at the August 26 and December 18, 2019 hearings as well as the September 30, 2020 hearing; review of the plans by Wayne Marshall, Director, Code and Planning; and findings associated with standard 90-42(b)(20)—buffering of adjacent uses.
3. Based on the detailed and extensive record evidence discussed above regarding landscaping, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (Condition 26) reasonably requires Nordic to install plantings on private properties adjacent to the Project (at the request of the owners). The Planning Board did not convert this ordinance standard to a condition.

xvi. § 90-42(b)(25), Location of off-street parking

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project will provide for the location of off-street parking (see chapter 98).
2. The BOA notes the Planning Board had extensive record evidence regarding off-street parking including that Nordic's application proposes an adequate number of parking spaces for Project operations, including handicap spaces; that Nordic will provide parking for persons who will use the Little River Trail System; that parking is well distributed and screened properly; and that the technical standards were met.
3. Based on the detailed and extensive record evidence discussed above regarding parking, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (Condition 24) simply requires Nordic to provide the amount of parking identified in their application and that any request to change the parking plan by greater than 10 percent is considered an amendment to the Site Plan Permit that requires Planning Board review and approval. The Planning Board did not convert this ordinance standard to a condition.

xvii. § 90-42(b)(26), Hazardous waste

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project will comply with federal and state laws in relation to any hazardous waste that is generated or stored on site.

2. The BOA notes the Planning Board had extensive record evidence regarding hazardous waste including that Nordic's operations will not result in the generation of hazardous wastes.
3. Based on the detailed and extensive record evidence discussed above regarding hazardous waste, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (Condition 17) simply states that hazardous waste will not be on site but if it is discovered the City and DEP must be notified. The Planning Board did not convert this ordinance standard to a condition.

xviii. § 90-42(b)(27), Prevention or control of air pollution

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project will prevent or control air pollution.
2. The BOA notes the Planning Board had extensive record evidence regarding air pollution including that the City does not have specific standards to regulate air emissions; Nordic obtained a DEP Minor Air Emissions Permit on November 19, 2020; DEP has the regulatory authority regarding air emissions; Nordic application—attachment 31; and presentations at the December 18, 2019 public hearing.
3. Based on the detailed and extensive record evidence discussed above regarding air pollution, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (Condition 12) simply addresses electrical supply including on and off-site electrical service and generation which included the authorization for the Code Enforcement Officer to obtain third-party professional services to conduct required electrical inspections. The Planning Board did not convert this ordinance standard to a condition.

xix. § 90-42(b)(29), Adequacy of waste disposal

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project will have adequate waste disposal.
2. The BOA notes the Planning Board had extensive record evidence regarding waste disposal including DEP SLODA/NRPA Permit and MPDES Permit; Nordic Application Attachment 21 demonstrating capacity letters from various vendors specifically for solid waste disposal, as well as testimony at the October 9, 2019 public hearing.
3. Based on the detailed and extensive record evidence discussed above regarding waste disposal, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the conditions imposed (Conditions 10, 14, 15, 16, 17, and 18) reasonably provide for on-site dumpsters; fish waste and wastes associated with operation of wastewater treatment plan; order management; hazardous waste management; and an emergency response plan for catastrophic events such as fish die-offs. The Planning Board did not convert this ordinance standard to a condition.

xx. § 90-42(b)(30), Additional standards⁹

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project will meet certain State standards such as SLODA.
2. The BOA notes the Planning Board had extensive record evidence regarding these state standards including permits issued by DEP/BEP.
3. Based on the detailed and extensive record evidence discussed above regarding state standards, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (condition 8) simply furthered the ordinance by requiring Nordic to comply with all state and federal permits it has or will obtain. The Planning Board did not convert this ordinance standard to a condition.

N. DETAILED REVIEW OF SIGNIFICANT GROUNDWATER WELL PERMIT

i. § 102-1079, Performance Standards, Requirement 7

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project will meet maximum daily, weekly, monthly, and annual quantity of groundwater that may be set by the Planning Board.
2. The BOA notes the Planning Board had extensive record evidence regarding these standards and that the Planning Board set standards for the amount of gallons per minute, day, week, month and year; Nordic application—attachment 23; testimony at hearings; information in the DEP SLODA/NRPA permit regarding groundwater and water use; the assessment of the Nordic application provided by City special consultant Matt Reynolds, Drumlin Environmental and Mandy Olver, Olver Associates (City third-party review expert); comment by William Kelly, City Attorney and Wayne Marshall, Project Planner, Code and Planning Department.
3. Based on the detailed and extensive record evidence discussed above regarding water usage, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (condition 9) simply requires that the maximum rate of extraction be consistent with the application and max amounts set by the Planning Board. The Planning Board did not convert this ordinance standard to a condition.

ii. § 102-1079, Performance Standards, Requirement 8

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated it has the expertise and financial resources to construct the groundwater wells.
2. The BOA notes the Planning Board had extensive record evidence regarding financial capacity including the Nordic application which provided information on the qualifications and experiences of their team to develop construct and manage a Project that involves the use of groundwater extraction wells; and testimony from the Nordic CFO and application materials demonstrating financial capacity.

⁹ The Board notes that Section 90-43 requires findings under applicable standards of Maine's Site Location of Development Act, and that the Maine DEP had conditionally approved Nordic's application pursuant to those standards that was submitted to the Belfast Planning Board.

3. Based on the detailed and extensive record evidence discussed above regarding financial and technical capacity, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (condition 12) simply requests that Nordic provide an initial \$250,000 long-term performance guarantee for quality water service. The Planning Board did not convert this ordinance standard to a condition.

O. DETAILED REVIEW OF INTAKE/DISCHARGE PERMIT

i. § 102-1138(2); § 82, Division 17(2), Restoration of Area

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated it would restore the area disturbed by the installation of the water intake and pipe so as to prevent soil erosion and sedimentation as well as revegetate the area by the pipes.
2. The BOA notes the Planning Board had extensive record evidence regarding the pipes and their installation and erosion controls including testimony at numerous public hearings; final orders from the BEP/DEP for the Project including the MPDES Permit; Nordics application; ACOE Permits; assessment performed by Mandy Olver, Olver Associates; comment by William Kelly, City Attorney and Wayne Marshall, Project Planner, Code and Planning Department; review by Matt Reynolds, Drumlin Environmental (city third-party expert).
3. Based on the detailed and extensive record evidence discussed above regarding water intake pipes, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the conditions imposed (conditions 6 and 7) are reasonable requirements—Condition 6 requires that Nordic comply with the soil, erosion, and sedimentation controls in its Site Plan application and that Nordic's pipes will be subject to monitoring by an independent inspector approved by the City and the CEO (which Nordic will pay for), and Condition 7 require revegetation to be consistent with Nordics application and the CEO is response to oversee the revegetation and for it to occur as soon as possible. The Planning Board did not convert this ordinance standard to a condition.

ii. § 102-1138(4); § 82, Division 17(4), Federal and State Permits

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated it can or has obtained any and all state and federal permits associated with proposed water intake or discharge.
2. The BOA notes the Planning Board had extensive record evidence regarding the pipes and their installation including testimony at numerous public hearings; final orders from the BEP/DEP for the Project including the MPDES Permit; Nordics application; ACOE Permits; assessment performed by Mandy Olver, Olver Associates; comment by William Kelly, City Attorney and Wayne Marshall, Project Planner, Code and Planning Department; review by Matt Reynolds, Drumlin Environmental (city third-party expert); the fact that Nordic has applied for and received a Submerged Land Lease Permit from DACF; Nordic has a DEP MPDES and Waste Discharge license from DEP as well as SLODA and NRPA; and that Nordic has applied for all required ACOE permits.
3. Based on the detailed and extensive record evidence discussed above regarding water intake pipes, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (condition 1) is a reasonable

requirement—by requiring all state and federal permits to be submitted to the Planning Board prior to the start of construction. The Planning Board did not convert this ordinance standard to a condition.

P. DETAILED REVIEW OF ZONING USE PERMIT

i. § 102-940, Screening of Outside Areas – Dumpsters

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated it would screen outside dumpsters.
2. The BOA notes the Planning Board had extensive record evidence regarding the screening of dumpsters including Nordic's application and its attachments; further the Planning Board determined that the dumpsters proposed do not require four-sided solid fence as Nordic will provide sufficient screening to shield them from public view because the location of the dumpsters on-site are located in areas in which they will not be visible from abutting properties or a public or private road.
3. Based on the detailed and extensive record evidence discussed above regarding dumpsters, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (condition 14) reasonably requires that should dumpsters be moved, they must be screened, and authorizes the CEO to review and approve proposed revisions to the locations for the identified dumpsters. The Planning Board did not convert this ordinance standard to a condition.

ii. § 102-961, Off-Street Parking Facilities – Required Facilities

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated it would provide an adequate number of parking spaces.
2. The BOA notes the Planning Board had extensive record evidence regarding parking including that Nordic's application proposes an adequate number of parking spaces for Project operations, including handicap spaces; that Nordic will provide parking for persons who will use the Little River Trail System; that parking is well distributed and screened properly; and that the technical standards were met.
3. Based on the detailed and extensive record evidence discussed above regarding parking, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (Condition 24) simply requires Nordic to provide the amount of parking identified in their application and that any request to change the parking plan by greater than 10 percent is considered an amendment to the Site Plan Permit that requires Planning Board review and approval. The Planning Board did not convert this ordinance standard to a condition.

iii. § 102-1123, Erosion Control

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project would have adequate erosion controls.
2. The BOA notes the Planning Board had extensive record evidence regarding erosion control including the Nordic application; testimony at the September 4, 2019 meeting; review of the application by Mandy Olver, Olver Associates (City engineer); and state permits.

3. Based on the detailed and extensive record evidence discussed above regarding erosion control, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (Condition 21) simply identifies the findings made by the BEP in regard to the State NRPA/SLODA permits issued by DEP and incorporates those third-party inspection requirements into the Planning Board decision as well as requiring Nordic to come to the Planning Board again should they alter their soil and erosion control measures and to report to the CEO on progress generally. The Planning Board did not convert this ordinance standard to a condition.
- iv. § 102-1124, Control of stormwater run-off
1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project would have adequate stormwater management.
 2. The BOA notes the Planning Board had extensive record evidence regarding stormwater including the evidence in Nordics application—attachments 15 and 16; presentations by Ransom Consulting to the Planning Board at the September 4, 2019 hearing; a review of Nordic’s application by the City consultant, Mandy Olver, Olver Associates including that Ms. Olver reviewed all stormwater information submitted to DEP; the fact that no public comment was made at the public hearing regarding stormwater; and the NRPA/SLODA Permit issued by DEP
 3. Based on the detailed and extensive record evidence discussed above regarding stormwater, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (Condition 20) reasonably requires third-party inspection during construction of all stormwater improvements and regular monitoring post construction and reporting to the City. The Planning Board did not convert this ordinance standard to a condition.
- v. § 102-1125(a) and (b), Wastewater pollution
1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project would comply with federal and state wastewater standards if discharged into city sewers.
 2. The BOA notes the Planning Board had extensive record evidence regarding wastewater including that Nordic, per requirements of the Belfast Wastewater Treatment Facility, will only send its sanitary wastes to the City Wastewater Treatment facility through the connection Nordic is constructing to the City sewer system.
 3. Based on the detailed and extensive record evidence discussed above regarding wastewater, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (Condition 10) reasonably requires that Nordic comply with the plans in its application and obtain a Sewer Connection and Service Use Permit from the City, a performance guarantee and an irrevocable letter of credit, and also that Nordic can only send waste acceptable to the treatment facility. The Planning Board did not convert this ordinance standard to a condition.
- vi. § 102-1125(c), Wastewater pollution
1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic

demonstrated its Project would comply with the laws of the state if utilizing disposal other than a public system.

2. The BOA notes the Planning Board had extensive record evidence regarding wastewater including that the majority of wastewater generated by Nordic will be processed through Nordic's on-site wastewater treatment facility and discharged into Belfast Bay; that DEP and ACOE have jurisdiction over wastewater to the Bay; that DEP has issued the MPDES Permit and Waste Discharge License; that the ACOE permit has been applied for; and application materials and testimony to the Planning Board.
3. Based on the detailed and extensive record evidence discussed above regarding wastewater, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (Condition 8) simply furthered the ordinance by requiring Nordic to comply with all state and federal permits it has or will obtain. The Planning Board did not convert this ordinance standard to a condition.

vii. § 102-1126, Air pollution

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project will prevent or control unreasonable air pollution.
2. The BOA notes the Planning Board had extensive record evidence regarding air pollution including that the City does not have specific standards to regulate air emissions; Nordic obtained a DEP Minor Air Emissions Permit on November 19, 2020; DEP has the regulatory authority regarding air emissions; Nordic application—attachment 31; and presentations at the December 18, 2019 public hearing.
3. Based on the detailed and extensive record evidence discussed above regarding air pollution, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the conditions imposed (Conditions 12 and 39) simply address electrical supply including on and off-site electrical service and generation which included the authorization for the Code Enforcement Officer to obtain third-party professional services to conduct required electrical inspections. Further, the condition provides for standards applicable during construction activity as the ordinance standard exempted construction use. The Planning Board did not convert this ordinance standard to a condition.

viii. § 102-1127, Odors

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project will prevent or control odors beyond the property lines.
2. The BOA notes the Planning Board had extensive record evidence regarding odors including Nordic's application related to management of solid wastes and other wastes, including those associated with a catastrophic event such as a fish die-off; Nordic presented extensive waste management measurements.
3. Based on the detailed and extensive record evidence discussed above regarding solid waste management and order, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the conditions imposed (Conditions 14-18) reasonably provide for on-site dumpsters; fish waste and wastes associated with operation of wastewater treatment plan; order management; hazardous waste management; and an emergency response plan for

catastrophic events such as fish die-offs. The Planning Board did not convert this ordinance standard to a condition.

ix. § 102-1128, Glare

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project will provide for adequate exterior lighting to provide for the safe use of the development in nighttime hours if the use is contemplated such that glare will not impair the vision of drivers or produce light that interferes with neighboring properties.
2. The BOA notes the Planning Board had extensive record evidence regarding exterior lighting and glare including the evidence in Nordics application— attachment 18; the height of the light poles and the fact that only one house is within 150 feet of any building; only one building on the Nordic property will be within 150 feet of any public right-of-way; and that no public comment was offered to the Planning Board regarding site lighting issues.
3. Based on the detailed and extensive record evidence discussed above regarding exterior lighting/glare, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (Condition 25) reasonably requires Nordic to comply with the lighting plan in its application and measures that Nordic should take to implement and manage the amount of light on adjacent properties, roads and the night sky. The Planning Board did not convert this ordinance standard to a condition.

x. § 102-1129, Noise

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project will control noise levels such that it will not create unreasonable interference with use and enjoyment of neighboring properties.
2. The BOA notes the Planning Board had extensive record evidence regarding noise including that noise is subject to DEP regulation and that DEP noise regulation is generally stricter than the City noise standards; that no regular operations will exceed noise levels in the ordinance; and testimony at the October 9, 2019 Planning Board hearing.
3. Based on the detailed and extensive record evidence discussed above regarding noise, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (Condition 19) reasonably applies stricter noise requirements than the Project is subject to. The Planning Board did not convert this ordinance standard to a condition.

xi. § 102-1130, Gravel extraction

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project will comply with SLODA requirements if gravel is to be extracted.
2. The BOA notes the Planning Board had extensive record evidence regarding construction and any gravel extraction and determined that Nordic's construction activities are not a gravel extraction operation, as such are regulated by DEP; and that Nordic obtained its SLODA/NRPA permit from DEP.
3. Based on the detailed and extensive record evidence discussed above regarding gravel extraction, the Planning Board did not err in finding that Nordic satisfied

this ordinance standard, and the condition imposed (Condition 21) reasonably requires stricter requirements to manage impacts associated with construction activities the Project is subject to, particularly the maximum amount of the site that can be open at any one time. The Planning Board did not convert this ordinance standard to a condition.

xii. § 102-1131, Heating systems and oil storage tanks

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence when it determined this section was not applicable to the Project.
2. The BOA notes that this standard is intended to regulate home heating oil systems, and therefore does not apply to this Project.
3. Based on the detailed and extensive record evidence discussed above regarding storage of materials, energy and electricity, the Planning Board did not err in finding that this standard was not applicable, and the condition imposed (Condition 31) reasonably requires any on-site storage of oxygen or fuel comply with the site plan application and state and federal laws and that if there is a change to any storage facility or capacity by more than 10% Nordic must go for review and approval by the Planning Board. The Planning Board did not convert this ordinance standard to a condition.

xiii. § 102-1134, Uses in wetlands

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic demonstrated its Project would comply with the provisions of NRPA if any use is located in a wetland.
2. The BOA notes the Planning Board had extensive record evidence regarding wetlands including the evidence that none of the on-site wetlands that are proposed to be disturbed on the main site are located in the Shoreland Zone; DEP permits (SLODA and NRPA) and findings including payment in lieu of wetland fee (\$760,000) and ACOE jurisdiction; mitigation required by the DEP Site Plan Permit; Nordic application—Attachments 34 (Wetland and Stream Surveys) and Attachment 15 (Stormwater Management).
3. Based on the detailed and extensive record evidence discussed above regarding wetlands, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (Condition 22) reasonably requires Nordic to provide evidence to the Code and Planning Department and Planning Board of any amendment to the issued State permits that affect wetlands. The Planning Board did not convert this ordinance standard to a condition.

xiv. § 102-1135, Uses in floodplains

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic complied with the provision of chapter 78, article II.
2. The BOA notes the Planning Board had extensive record evidence regarding flood areas including the evidence in Nordic's application—attachment 19; that Nordic is not proposing to construct any new structures in any FEMA map areas; and the fact that there was no testimony offered at the October 16, 2019 Planning Board hearing about flooding.

3. Based on the detailed and extensive record evidence discussed above regarding flood areas, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (Condition 29) reasonably requires Nordic to have a dam safety report and contingency plans should in Phase II of construction it establish a Visitors Center near the dam. The Planning Board did not convert this ordinance standard to a condition.

Q. DETAILED REVIEW OF SHORELAND PERMIT.

i. § 82-56(1), Will not result in unsafe conditions

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic's Project will not result in unsafe conditions.
2. The BOA notes the Planning Board had extensive record evidence regarding the safety of this Project and found that the Project will be constructed in compliance with all City, State, and Federal guidelines and permits; the evidence included the Nordic application and its attachments, particularly the Wright Pierce dam reports, the permits issued by DEP, and review of the application by Olver Associates (city expert) and the Project planner for the code and planning department.
3. Based on the detailed and extensive record evidence discussed above regarding safety, the Planning Board did not err in finding that Nordic satisfied this ordinance standard, and the condition imposed (Condition 29) reasonably requires Nordic to have a dam safety report and contingency plans should in Phase II of construction it establish a Visitors Center near the dam. The Planning Board did not convert this ordinance standard to a condition.

ii. § 82-56(2), Will not result in water pollution, erosion, or sedimentation to surface waters

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordics Project will not result in water pollution, erosion or sedimentation to surface waters.
2. The BOA notes the Planning Board had extensive record evidence regarding the water pollution, erosion and sedimentation controls for this Project and found that the Project will be constructed in compliance with all City, State, and Federal guidelines and permits; the evidence included the technical review for the City by Mandy Olver, Olver Associates; the Nordic specific erosion and sedimentation control plans and stormwater managements plans; and the DEP NRPA/SLODA permits and MPDES permit.
3. Based on the detailed and extensive record evidence discussed above regarding water pollution, erosion or sedimentation, the Planning Board did not err in finding that Nordic satisfied this ordinance standard. The Planning Board did not convert this ordinance standard to a condition.

iii. § 82-56(3), Will adequately provide for the disposal of all wastewaters

1. The BOA determined the Planning Board did not commit a reversible error or have findings unsupported by substantial evidence on whether Nordic's Project will provide for the adequate disposal of wastewater.
2. The BOA notes the Planning Board had extensive record evidence regarding the wastewater (discussed in more detail above in this decision) including the DEP MPDES Permit and Waste Discharge License issued on November 19, 2020;

review by Many Olver, Olver Associates; Nordic's site plan, and testimony at public hearings.

3. Based on the detailed and extensive record evidence discussed above regarding wastewater, the Planning Board did not err in finding that Nordic satisfied this ordinance standard. The Planning Board did not convert this ordinance standard to a condition.

R. ADDITIONAL ISSUES.

- i. The Ordinance prohibits two principal uses on lots (in reference to the Eckrote property).

The Board determined the Residential II Zoning District does not contain any express prohibition on two principal uses on a lot or, alternatively, if there is more than one use that the lot size and other applicable dimensional requirements must be met for each respective principal use. As a result, more than one principal use is allowed. Further, to the extent there are two principal uses as part of Nordic's proposed Project (one being intake/discharge pipes, and the other being a residential use), the Eckrote property has sufficient lot area and frontage to meet the dimensional standards for both principal uses.

- ii. The Planning Board cannot award any permits until other required permits are acquired.

As detailed above, the Planning Board did not err in approving conditional permits for the Nordic Project. The Record contains numerous permits issued during the pendency of the Planning Board's review and information that demonstrates Nordic could obtain other required permits (e.g., Section 404/Section 10 permit(s) from the U.S. Army Corps of Engineers). Further, the Planning Board specifically conditioned its approved permits on the requirement that Nordic obtain and maintain all required State and Federal permits.

- iii. § 102-102(3)(j), Other information requested by Planning Board to determine whether Ordinance provisions are met.

The Board determined that information requested by the Planning Board was part of the overall review processes of the applications that substantively relate to whether the Planning Board was satisfied Nordic presented sufficient, credible Record evidence to demonstrate compliance with standards. As detailed above, the Board determined each of the standards challenged on a factual record evidentiary basis satisfies the substantial evidence test.¹⁰

¹⁰ The Board notes that Section 102-103(3)(j) specifically relates to submission requirements in order to have a complete application for further processing to conduct a substantive review.

ORDER and INSTRUCTIONS

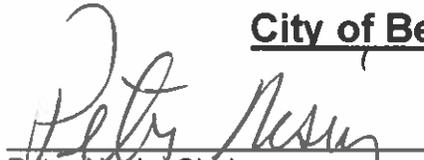
The Belfast Zoning Board of Appeals denies all five administrative appeals filed by Upstream challenging the Belfast Planning Board's decisions to conditionally approve a (i) Zoning Use Permit, (ii) Site Plan Permit, (iii) Significant Groundwater Wells Permit, (iv) Significant Water Intake and Significant Water Discharge/Outfall Permit, and (v) Shoreland Zoning Permit.

BE IT ORDERED, that the Planning Board's decisions to conditionally approve these permits are hereby affirmed consistent with this Notice of Decision and Order.

The City Clerk shall record this Notice of Decision and Order and cause it to be sent to all necessary and appropriate parties.

Dated this 9th day of December, 2024, in Belfast, Maine.

City of Belfast Zoning Board of Appeals


Peter Nesin, Chair


Doug Smith


John Cronin


Dana Keene

NOTICE:

Any party may take an appeal, within 45 days of the date of the vote on the Belfast Zoning Board of Appeals' original decision, which occurred on December 9, 2024, to Superior Court in accordance with the Maine Rules of Civil Procedure, Rule 80B.