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State of Maine
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United States Supreme Court
U.S. Circuit Court First Circuit
U.S. District Court Northern District of Florida
U.S. District Court Middle District of Florida
U.S. District Court District of Maine

July 23, 2019

Richard (Declan) O'Connor, Acting Chair
Wayne Corey, Member
Geoffrey Gilchrest, Member
David Bond, Member
Kimberly "Daisy" Beal, Associate Member
Hubert Townsend, Alternate Members
Belfast Planning Board
City Hall, Council Chambers
131 Church Street
Belfast, Maine 04915

RE: Nordic Aquafarms, Inc. – Denial of Due Process
EMERGENCY Objection to August 5 TRI Process and Request for Amendment of Process for August 5 TRI "Hearing" to Include Oral Presentation, including Expert Testimony

ACTION REQUESTED ON THIS OBJECTION AND REQUEST AT THE 7-24-2019 PLANNING BOARD MEETING

Dear Acting Chair O'Connor and Members of the Belfast Planning Board:

I represent Judith Grace and Jeffrey Mabee in connection with opposing the Application filed by NAF for permits from local, State and federal agencies and boards, including the Belfast Planning Board ("BPB" or "the Board"). Jeffrey and Judith are long-time residents and taxpayers of the City of Belfast – who have made this community their home for more than four decades. They have found themselves thrust into the maelstrom of hostility created by the Nordic Aquafarms, Inc. ("NAF") project for doing nothing more than defending their ownership rights in the intertidal property that they own from misappropriation and destruction by NAF. As if NAF's attempts to take Judith and Jeffrey's land was not stressful enough -- Now, they find themselves in the position of having *their own City* attempt to deny them the right to due process in the "hearing" that will consider NAF's false claims that it has title, right and interest ("TRI") in the intertidal land on which Richard and Janet Eckrotes' lot fronts (Tax Map 29, Lot 36) and Lot 35 (where Dr. Lyndon Morgan's lot fronts).

My clients own the Little River Center property (Tax Map 29, Lot 38) and the intertidal land on which Tax Map 29, Lots 35, 36, 37 and 38 front (see Tax Map excerpt attached). My clients' predecessor in interest (Winston C. Ferris) obtained a quiet title judgment adjudicating his ownership of this land from the Waldo County Superior Court on June 26, 1970 in *Ferris v. Hargrave* (Docket No. 11,275), recorded in the Waldo County Registry of Deeds at Book 683, Page 283). The land covered by the *Ferris v. Hargrave* judgment was Lot 38 and the intertidal land on which Lots 35, 36, 37 and 38 front according to the legal description of the land to which title was quieted.

This forty-nine year old Maine superior court judgment *should* be sufficient proof of a ***judicial*** determination of ownership of this land to resolve any question regarding my clients' fee simple

ownership of the land covered by that judgment – which included upland Lot 38 (the Little River Center) and the intertidal land on which Lots 35, 36, 37 and 38 front – but providing the judgment to NAF *and City officials* has not ended NAF's false claims of title, right or interest in Judith and Jeffrey's intertidal land.

Indeed, even after City officials were provided the complete case file on this litigation from the Maine State Archives, on June 25, 2019, they have inexplicably continued to push this permit process forward in this Board, and repeatedly made statements to the Board on July 11, down-playing the significance of the evidence submitted in support of my clients' property rights. It is dismaying that City officials made statements suggesting to this Board that the parties have submitted competing evidence of equal weight on the issue of TRI. We have submitted: recorded deeds, surveys, expert opinions and a prior judgment in a quiet title action. NAF has submitted: surveys from Good Deeds dated August 31, 2012 and April 2, 2018 that confirm our contention that the Eckrotes property terminates at the high water mark, an unrecorded option to purchase an Easement that, on its face, terminates at the high water mark, from property owners whose deeds back to 1946 demonstrate that they only own to the high water mark, a letter from Erik Heim to those property owners stating that NAF has the same right to place pipelines in the intertidal land and U.S. Route 1 that the property owners have (without saying the property owners have any right to do that themselves), and unrecorded, and un-recordable, heavily redacted "release deeds" from persons whose identities, location and relationship to prior land owners are concealed, but who purport to be "heirs" of "Harriet A. Hartley"—a person who appears on no deed in the chain of title for this property.

Continuing in this permit process, despite irrefutable evidence that my clients own this intertidal land and that NAF lacks the necessary TRI to have administrative standing to obtain permits, is not done without cost or damage to my clients. In addition to litigation expenses and stress, my clients' title to their property has been clouded and continues to be slandered by NAF's false claims of TRI and by NAF's pursuit of City, State and federal permits and leases. This is diminishing the value and marketability of my clients' Little River property.

To protect their intertidal land, my clients have placed a recorded Conservation Easement (Waldo County Registry of Deeds at Book 4367, Page 273) on the intertidal land on which Lots 36, 37 and 38 front. The Conservation Easement is intended to preserve this intertidal land in its natural condition. This too has been provided to, but ignored by, City officials who are continuing to process this application despite knowing that NAF does not have TRI in this intertidal land. As a result, my clients have filed a Declaratory Judgment action, in the Waldo County Superior Court (Docket No. RE-2019-18) to quiet title to their intertidal land on which Lots 35 and 36 front – since apparently a 49-year old quiet title judgment in their predecessor-in-interest's favor is not good enough to stop NAF's attempted taking. The new quiet title action was filed on July 15, 2019 and is submitted to the Board for your information and review.[1]

Respectfully, we submit that the most prudent response by this Board would be to **stay all further action on NAF's application until all litigation of this pending quiet title lawsuit is completed, rather than this Board wading into this TRI dispute**. Such a stay will have no prejudicial impact on NAF, because they still don't have any of their state or federal permits and won't have them anytime soon. In fact, the City could encourage NAF to join us in moving for an

[1] Exhibits are omitted because they are duplicative of prior exhibits you have received.

expedited resolution of the quiet title suit – which will ultimately be resolved in the Law Court. However, if you choose to conduct a hearing on TRI, it is imperative that the hearing be fairly conducted in accordance with my clients' due process rights.

This letter is filed to object to, and seek reconsideration and correction of, the process imposed by this Board – at the suggestion of Board advisor Wayne Marshall and City Attorney Bill Kelly -- for evaluation of NAF's TRI on August 5, 2019. Specifically, the process that has been announced for the August 5, 2019 Planning Board "hearing" on the subject of title, right and interest violates the procedural and substantive due process rights of Jeffrey Mabee and Judith Grace, because it denies them the right to be ***heard by this Board***, to present evidence including expert testimony, to respond to NAF's claims and evidence, and to have an impartial fact-finder evaluate their case. *In re Kristy Y.,* 2000 ME 98 ¶7, 752 A.2d 166, 2000 Me. LEXIS 103, •6-7. In addition, we object to the City Attorney's participation as a legal advisor to this Board on NAF, especially on the issue of TRI, for the reasons more fully stated below.

I. Due Process Requires An Opportunity To Be Heard

Although during the July 11, 2019 Planning Board meeting on the process that would be used for evaluating the NAF application, Wayne Marshall and City Attorney William Kelly stated that it was anticipated that all parties would have an opportunity to present their case to the Board – they inexplicably recommended an exception to this principle on the critical jurisdictional question that this Board must assess – title, right and interest.

On Title, right and interest, Mr. Marshall stated that: "It is generally our[2] intent not to have a hearing on right, title and interest." 7-11-2019 BPB Meeting video at 2:12:00-2:12:50).

This process was recommended by the Board's advisor and counsel after I had formally provided notice of NAF's TRI defects to the Board and City officials on June 25, 2019, including a copy of the prior Superior Court judgment of quiet title. Thus, the Board's legal counsel knew or should have known that significant evidence existed that NAF lacked TRI. Despite this, NAF was granted over three hours to orally present an uninterrupted overview of its 2,000-page permit application to this Board, that included false claims that it has TRI in my clients' land.

Notwithstanding my clients' right to be treated on an equal level with NAF, by being aggrieved persons whose property rights are proposed to be extinguished by this permitting process at NAF's request, on July 16, 2019 a public notice was issued that announced that no oral comments would be permitted on the subject of title, right or interest. This process dictates that only written comments could be submitted by July 30 at 2 p.m. and reviewed by Attorney Kelly, and that Attorney Kelly would make recommendations to the Board on how to rule on the question NAF's TRI – based on *his evalua*tion of the written submissions.

This process was voted on and adopted by the Planning Board during the July 11, 2019 meeting, without Mr. Kelly informing the Board of the requirements in Maine case law and precedents of the U.S. Supreme Court, guaranteeing property owners -- like my clients -- the right to be heard by an administrative body – like this Board -- before actions are taken that impact their property rights. The result is that the process adopted will deny the Planning Board the opportunity to hear from the property owners whose legal rights in their property are being violated by NAF and deny

[2] It appears that Mr. Marshall was referring to himself and the City Attorney when using the word "our."

the property owners the procedural and substantive due process rights to which they are guaranteed by the Fourteenth Amendment of the U.S. Constitution and Article I, § 6-A of the Maine Constitution, to put on their case to this Board.

The basis for denying my clients an opportunity to present testimony and an oral explanation of the voluminous materials presented to the Board was that this material is "dry" and "legal". However, the fact that this material is "dry" on paper is precisely WHY due process guarantees the property owners the right to an oral presentation *from the aggrieved parties' legal representative, witnesses and expert(s) to the Board*. Curiously, during the July 11 PBP meeting, Mr. Marshall suggested that NAF would have yet another opportunity, on August 5, to present another un-rebutted monologue on the issue of TRI, while my clients and their legal representative and expert are muzzled by the July 11 process.

As the property owners of the intertidal land that NAF is attempting to misappropriate for its own use and profit, without the owners' consent or compensation, Jeffrey Mabee and Judith Grace have an absolute constitutional right, pursuant to the Fourteenth Amendment to the U.S. Constitution and Article I, §6-A of the Maine Constitution, ***to be heard by this Board*** in any "hearing" that will substantially impact their property rights.[3] A "hearing" on TRI is supposed to afford them due process – but that is not what the "hearing" process adopted on by the Board on July 11 will do.

Memorandum of Relevant Due Process Case Law

In the context of municipal planning boards, the Law Court has stated that due process entitles a party "to a fair and unbiased hearing." *Lane Constr. Corp. v. Town of Washington*, 2008 ME 45, P 29, 942 A.2d 1202.

> [W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.

Duffy v. Town of Berwick, 2013 ME 105, P16-P17, 82 A.3d 148, 155, 2013 Me. LEXIS 107, *13-14, 2013 WL 6328477, citing, *Hannah v. Larche*, 363 U.S. 420, 442, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960); *see also In re Me. Clean Fuels, Inc.*, 310 A.2d 736, 745-48 (Me. 1973).

Applied to hearing processes where significant rights are at stake, due process requires: notice of the issues, ***an opportunity to be heard***, the right to introduce evidence and present witnesses, the right to respond to claims and evidence, and an impartial factfinder. *In re Kristy Y.,* 2000 ME 98 ¶7, 752 A.2d 166, 2000 Me. LEXIS 103, •6-7. The process announced for the August 5, 2019 BPB proceeding on TRI satisfies ***none of these criteria*** other than notice.

As noted by the York County Superior Court in *Pierce v. Town of Kennebunk,* 2007 Me.Super, LEXIS 215, *10:

> Due process has been defined as:
>
> > that process that protects against the exercise of arbitrary governmental power and guarantees equal and impartial dispensation of law according to

[3] *H.E. Sargent, Inc. v. Town of Wells,* 676 A.2d 920, 926 n.4 (Me. 1996) (*citing Penobscot Area Hous. Dev. Corp. v. City of Brewer,* 434 A.2d 14, 24 n.9 (Me. 1981)) ("We long have adhered to the principle that the United States and Maine Constitutions declare identical concepts of due process.").

> the settled course of judicial proceedings or in accordance with fundamental principles of distributive justice.

Id., *quoting Mutton Hill Estates, Inc. v. Town of Oakland,* 468 A.2d 989, 993 (Me. 1983).

As the Law Court noted in *Mutton Hill Estates, Inc. v. Oakland,* 468 A.2d at 990, 1983 Me. LEXIS 854, *7-8:

> It is essential to a party's right to procedural due process that he be given notice of ***and an opportunity to be heard at proceedings in which his property rights are at stake***. *Peaslee v. Pedco, Inc.*, 388 A.2d 103, 106 (Me. 1978), *appeal after remand*, 414 A.2d 1206 (Me. 1980). Without notice to Mutton Hill, or a right for it to be heard, to invite admittedly biased opponents of the application to participate in the factfinding compilation is to determine conclusively, by an *ex parte* proceeding, Mutton Hill's property rights in violation of this constitutional guarantee. *Bennett v. Davis*, 90 Me. 102, 104-05, 37 A. 864 (1897). It cannot be determined from the record of the Planning Board if new evidence was taken at those meetings or if the opponents unduly influenced members of the Board in making findings of fact unfavorable to the applicant's proposal. For this reason, the Superior Court properly vacated the Board's order.

See also, *DiVeto v. Kjellgren*, 2004 ME 133, ¶21, 861 A.2d 618, 2004 Me. LEXIS 153, •14 (Concluding "that an interpretation of section 946-A that would allow the government to take property through a process providing neither notice nor an opportunity to challenge an erroneous lien would run afoul of the basic concepts of due process embedded in the Fourteenth Amendment), citing, *Grannis v. Ordean ,* 234 U.S. 385, 394, 58 L.Ed. 1363, 34 S.Ct. 779 (1914) (stating that the fundamental requisite of due process is ***the right to be heard***; the fact that notice constitutes due process within the meaning of the Fourteenth Amendment to the U.S. Constitution is no longer open to question).

Procedural due process also assumes that Board findings will be made only by those members who have heard the evidence and assessed the credibility of the various witnesses. *Pelkey v. Presque Isle,* 577 A.2d 341, 343-344, 1990 Me. LEXis 186, *6-7, citing, *Mutton Hill Estates, Inc. v. Oakland,* 468 A.2d at 992. The United States Supreme Court when describing administrative proceedings observed that:

> [T]he weight ascribed by the law to the findings -- their conclusiveness when made within the sphere of the authority conferred -- rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. ***The one who decides must hear.***

Morgan v. United States, 298 U.S. 468, 481, 56 S. Ct. 906, 80 L. Ed. 1288 (1936) (emphasis supplied).

Under the process announced for the August 5, 2019 "hearing " on TRI, there will be no hearing of the argument of the property owners that any member of the Planning Board will hear prior to being required to make a decision on this critical ***jurisdictional*** issue. Indeed, the property owners

are being prohibited from testifying or putting on the testimony of any expert witness on the property ownership issues or meaning of the deeds and how they relate to one another.

Here, my clients have a need and right to provide this Board with expert testimony regarding the ownership issues, including (i) the meaning of the deeds, surveys, and prior judicial orders establishing my clients' ownership in fee simple of the intertidal land proposed for development by NAF; (ii) the Eckrotes' lack of ownership in this intertidal land; (iii) the Eckrotes' inability to grant NAF an easement to use their upland lot (pursuant to a 1946 covenant in which my clients are the beneficiaries as assigns of the original Grantor); (iv) the Eckrotes failure and inability to grant NAF an easement to use my clients' intertidal land on which the Eckrotes' lot fronts; and (v) the relevance of the December 10, 1951 determination of the Register of Wills of the County of Philadelphia to nullify NAF's fabricated and slanderous claims of obtaining title, right or interest to my clients' intertidal lands on which Tax Map 29, Lots 35 and 36 front from so-called "heirs of Harriet A. Hartley."

This is the process that Parties in Interest will be allegedly afforded for all other aspects of NAF's permit application in this Board. *Why is a different process appropriate for the most important, jurisdictional determination that this Board will be asked to make?!*

This process is contrary to Jeffrey Mabee and Judith Grace's procedural and substantive due process rights and must be changed to conform the requirements of law.

The City Attorney Cannot Be the
Planning Board's Advisor on the NAF Matter

The other problem with the process adopted for the August 5, 2019 BPB "hearing" on TRI is the City Attorney's participation. We must object to the City Attorney's participation in any way with the resolution of the TRI question. We do not do this lightly and in filing this objection we do not intend to impugn Attorney Kelly's personal integrity. However, his role as City Attorney makes his representation of the Planning Board inappropriate, particularly with respect to the resolution of the jurisdictional question of title, right or interest.[4]

This is particularly true because of the disparate process inexplicably recommended by the City Attorney and Board advisor for the "hearing" on TRI.

Under this process, it is the City Attorney who will evaluate the submissions of the parties and recommend a decision by the Planning Board – so the Planning Board is reduced to little more than a rubber stamp for the City Attorney's own opinion, and his opinion alone, regarding the weight to be accorded the evidence NAF and the property owners have submitted. No public evaluation by the Board of the evidence will be provided and no witnesses will be allowed for the Board to consider independently.

[4] Indeed, it was the inherent appearance of a conflict of interest in having the same attorney that represents the Town or City, represent the Planning Board, which led to Attorney Kelly's former partner (Kristin Collins) being retained to represent the Searsport Planning Board. Searsport officials recognized that the same attorney should not give counsel on a large project like this to both the Board of Selectmen (of City Council) and the Planning Board. Attorney Kelly mentioned this DCP Midstream LPG tank matter on July 11, 2019, so he should remember the reason for Ms. Collins' retention.

Prior *Ex Parte* Communications

First, while the members of Planning Board received extensive admonitions from the City Attorney regarding *their* obligations to only review evidence in public, to have no *ex parte* communications, to do no independent research, and to conduct all deliberations in the public – the City Attorney by the nature of his job is not so constrained, could not be so constrained, and has not been so constrained throughout the extensive interactions with NAF and its representatives over more than a year. Indeed, the City has expended and committed extensive resources to promoting the NAF project. Several of the City Councilors have engaged in a very public and acrimonious campaign to denigrate and discredit anyone opposing this project. Thus, the City Attorney is well aware that his primary client – the City Counsel – has only one outcome it wants in this permitting process: a quick approval.

The inconvenient truth that stands as an obstacle to that is that neither the Eckrotes nor NAF have title, right or interest in the intertidal land on which their lot fronts. Indeed, a 1946 covenant prevents the Eckrotes from using their upland lot for anything but "residential purposes only" without the agreement of the heirs or assigns of the original Grantor, Harriet L. Hartley. (WCRD at Book 452, Page 206). My clients are assigns, through property transfer, of Harriet L. Hartley and they have already advised the Eckrotes in writing that they do not agree with the use of this upland property by NAF, a for profit business, for its industrial pipelines. So neither the Eckrotes nor NAF have the TRI to use the Eckrotes' upland lot either for the proposed use.

Over the past year, the City Attorney has likely had extensive *ex parte* communications with this applicant, in relation to: zoning amendments and the subsequent litigation; fielding FOAA requests from and countering the objections of the opposition; efforts at outreach to the community and proponents; and logistics and timing of filing these applications – *ex parte* communications that he cannot unknow or unhear. That is why the City Attorney is not a proper, impartial legal advisor to the Planning Board for an application of this nature and is the wrong person to make recommendations to the Planning Board, particularly on the TRI issue, since failure to identify or acknowledge defects in TRI earlier in the process would mean that a significant amount of taxpayer resources were expended on a project that is seeking permits to use someone else's land who does not consent to that use.

Fees: Appearance of Impropriety

Second, the unusual fee arrangement that the City has with this applicant – where NAF is paying the City Attorney's fees – makes participation of the City's Attorney in the resolution of this jurisdictional question particularly improper. While reimbursement of technical expert fees by applicants is common, allowing an attorney who is paid by the hour to take such an integral role in deciding whether or not jurisdiction exists when the applicant – not the City -- is paying the attorney's fees is an affront to due process. The appearance of impropriety of such an arrangement undermines public confidence in the fairness of the process. Regardless of the integrity of the attorney, doubt will exist that his resolution of the TRI jurisdictional question was influenced by the fee arrangement.

If the answer to the TRI question is that NAF lacks TRI this matter ends and all consideration of this permit terminates by the Planning Board and the City of Belfast. If the answer is that sufficient TRI exists to proceed with consideration of the permit application a significant amount of attorney time will need to be expended by the attorney assisting the Board. Normally, a City's attorney who is funded by the taxpayers has an inherent incentive to keep taxpayer-borne expenses

in check by rejecting applications filed by applicants who lack TRI. However, that incentive appears to be lacking where the applicant is funding the lawyer advising the Planning Board.

The fact that a determination by he attorney that TRI exists could result in a significant pecuniary gain for the counsel, should be avoided (regardless of who is paying the attorney as hourly rate). However, when the entity paying the City's lawyer is the applicant who wants the permitting process to continue despite its lack of TRI – and the answer to the TRI question means the difference between the project proceeding or all work on this matter stops – the applicant-funded counsel's participation in the jurisdictional question creates the appearance of impropriety that will taint the rest of this process moving forward and will be the subject of legal challenges in the future due to the inherent unfairness of such a process.

CONCLUSION

For the foregoing reasons, property owners Jeffrey Mabee and Judith Grace petition for amendment of the process for the August 5, 2019 Planning Board hearing on title, right and interest to permit:

- An opportunity for them to be heard;
- The right to introduce evidence and present witnesses, including expert testimony;
- The right to respond to claims and evidence submitted and presented by NAF or others; and
- An impartial fact-finder in the form of the Planning Board, assisted by the advice of a neutral legal advisor that is experienced in property law and not affiliated with the City of Belfast or NAF and who is compensated by the taxpayers of the City of Belfast.

Respectfully Submitted,

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