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Post 8/26/19  
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Declan O'Connor, Acting Chair  
Belfast Planning Board  
c/o Wayne Marshall, Director  
Code and Planning Department  
131 Church Street  
Belfast, Maine 04915

RE: Nordic Aquafarms Permit Applications

Mr. Chairman:

I write as a member of Upstream Watch to offer a further comment on the "Buffers, including bufferyard areas" topic that was a subject of the Planning Board's Public Hearing on August 19, 2019. Clearly, like any of us, the Applicant must comply with the "buffer" or setback requirements contained in the Belfast Zoning Regulations. To that end:

Section 102-5 of the Zoning Regulations, "Compliance with chapter", provides:

- (a) No building or structure shall be erected, altered, enlarged, rebuilt, moved or used and no premises shall be used unless in conformity with the provisions of this chapter, except those existing which by the provisions of this chapter become legally

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nonconforming and which meet the requirements of Article III of this chapter.”

Section 66-1 of the zoning regulations, Definitions, provides:

(a)Structure. 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 temporarily or permanently 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.” (emphasis supplied)

As these regulations make clear, the pipeline is a structure, and a structure cannot be constructed without complying with “this chapter” (Zoning). The Chapter provides both Setback/Buffering Requirements and Accessory Use Requirements. The Applicant complies with neither.

#### SETBACK/BUFFER REQUIREMENTS

The Route 1 South Dimension regulations, Sections 102- 1243-1245, provide for setbacks in cases of non-residential uses in the “Route 1 South” District as follows:

Sec. 102-1243: Front Setback, structure less than 5000’ square: 30 feet

Sec. 102-1244: Side Setback, structure less than 5000’ square: 15 feet

Sec. 102-1245: Rear Setback, structure less than 5000” square: 20 feet

The setback areas are to be maintained as "Buffer Yards" and must have a landscape plan prepared by a landscape architect licensed by the State of Maine, must meet certain planting requirements and must preserve specimen trees. See Sec, 102-1249. "The amount of the buffer yard must be located on property owned or controlled by the owner, and shall not include any of the land located within an established right of way for determining the amount of buffer yard. The only structures permitted in the buffer yard, when there is no practical alternative as determined by the code enforcement officer or planning board, are utilities and essential services." (emphasis supplied). Perhaps the Nordic pipeline is an essential service for Nordic located across Route 1, but it is not "essential" to the residential use of the Lot by the Eckrotes, so it is not exempted from the buffering/setback rule.

The Eckrote easement, and thus the area where the Applicant's pipes are to be installed, begins at the western bound of the Eckrote lot at Route 1, providing zero front setback and zero buffering, runs along the Theye property on the south side with a setback and buffering that diminishes to zero, and ends at the high water line of Penobscot Bay, with zero rear setback or buffer. There is no lawful way to build a structure from Route 1 to the Bay. No matter how one attempts it, it can't be done without violating the Zoning setback and buffering requirements at least as to the front lot and rear lot requirements. If the current proposed easement is employed, Applicant's proposed pipeline structure will also violate the side setback and buffering requirement. See the setback and easement sketch by surveyor Don Richards attached.

When this was raised at the Public Hearing, (along with the question of accessory use) you were advised that the setback regulations didn't apply in this case because, first, the pipes were intended to be placed in the ground, not on the ground, and second, that if the setback regulations applied, utilities would not be able to place their wires, cables and pipes throughout the city as needed.

### Advice No 1: In-ground structures are not regulated

As to the first advice: that structures in the ground are not regulated by the setback regulations, your attention is directed to Section 66-1 which defines "structures" and includes "anything constructed....in the ground". Pipes are structures and their placement is regulated even if they are in the ground.

Zoning governs use. The use above ground or below ground is still the use. Just because you don't see it when it is completed doesn't mean that the lot isn't being used for that purpose, that the setback area and buffer area can be violated by making them a construction site; that construction equipment can operate in the setback area , or that the applicant can create a very large excavation, and lay pipes which remain as structures fulfilling an industrial purpose in the side yard setback/buffer area of a residential lot. "The only structures permitted in the buffer yard are...utilities and essential services" Sec.102-1249.

### Advice No. 2: Utilities couldn't serve the town residents if setbacks/buffers were observed.

This is not so. Cables, pipes and other utilities are placed within utility easements along public or private roads, not within private property boundaries unless separate private easements are obtained. More importantly, the definition of "structure" excludes utilities. It is structures that may not be placed in setback/buffer areas. Utilities are not structures and are not so regulated.

The Applicant has no "right" to use the setback/buffer land of the Eckrote lot to construct its pipelines.

### ACCESSORY USE

At the same Public Hearing Upstream Watch raised the issue of "Accessory Use.

The definitions section, 66-1 provides:

Accessory Use: The Belfast Zoning Regulations at section 66-1 (c) allow accessory uses but the accessory use must be accessory and complimentary to the primary

use on the lot. Section 66-1(c) provides definitions for use in the Zoning Regulations.

“Principal Building/ Structure” means “The building or structure occupied by the chief or principal use on the premises.”

“Principal Use” means “A use other than one which is wholly incidental or accessory to another use on the same premises.”

“Accessory Structure or use” means “A use customarily incidental and subordinate to the principal building or use and located on the same lot with such principal building or use.”

In this case the accessory use is a trio of industrial pipes, 2 pipes 30” and 1 pipe 36” in diameter, accessory to the Nordic wastewater treatment plant across Route 1, not accessory to anything on the Eckrote lot. Industrial pipes from a different lot are not accessory to a residential lot. The courts have supported this view. “An accessory use may be lawful if it is dependent on a principal use, has a reasonable relationship with that principal use, and is by custom, commonly, habitually, and by long practice established as reasonably associated with the principal use.” Shapleigh v. Shikles, 427 A.2d. 460,465, (Me. 1981), Boivin v. Town of Sanford, 588 A.2d. 1197,1200 (Me 1991). There is absolutely nothing to suggest that there exists an established, customary, habitual, relationship between the Eckrotes domestic dwelling and three industrial pipes encased in a 5’ high wall of stone or blasted into the bedrock below.

At the Public Hearing on August 19, 2019, you were advised that the three industrial pipes were allowed in the Route 1 South District as a principal use, so they didn’t have to be accessory to the Eckrotes’ primary residential use. They could be a second principal use on the Eckrote lot.

There can be only one principal use of a lot. Merriam Webster defines principal as “most important, consequential, or influential.” Not one of the most. The most. As in one. Most other towns spell out that there can be but one principal use on a lot. All others are accessory. Belfast’s own definition of “Accessory use” defines it in relation to “the principal ...use.” It does not say, “relation to one of the

principal uses". See Bell v. Gray, No. AP-14-45, August 7, 2015 where the property owner was prohibited by the court and by the town from maintaining a second principal use, a paving company, on a residential lot with a residential home, the principal use, affirming the principle of land use law in Maine that there can be but one principal use of a lot, although, there can be more than one residential unit on a principally residential lot or more than one commercial or industrial structure on a single lot, where, the minimum lot size and the minimum shore frontage standard shall be met for each additional dwelling unit or principal structure. See Sec. 82-182(e). The advice provided to you was that a lot could host two different principal uses, not structures, and there is no support for that proposition.

The law forbids the use of a lot for an accessory use not related to the principal use of the lot. The Applicant has no right to use the Eckrote lot for its pipes as an accessory use to its wastewater treatment plant across Route 1 on a different lot.

At its meeting/Public Hearing conducted on August 5, 2019, the Planning Board dealt with the threshold issue of "title, right or interest". At that meeting the Planning Board concluded that, given the "extraordinarily low bar" it was advised to apply, the Nordic application demonstrated sufficient "title, right or interest" to proceed with the process of evaluating the application. As part of that evaluation, the Planning Board learned that a lawsuit had been commenced to determine ownership of the intertidal land between the Eckrote lot and Penobscot Bay and the effect of the covenant restricting the Eckrote lot to non-business uses. It seemed to be a consensus that the court was a better place to try issues of title or interests in land than the Planning Board, and so, prudence suggested awaiting a court decision on those issues. Almost overlooked was the question of "right"; the right to use the land for the applicant's intended purpose.

That analysis is critical and is well within the capability of the Planning Board. The Planning Board makes such determinations all the time. See sections 82-54 (Shoreland) and 90-41 (Site Plan). For example, should an applicant wish to obtain approval for a building for a house of prostitution, the Planning Board could and would determine that prostitution was not a permitted use in (probably) any

District, and must deny the application. This denial for lack of “right” to use the lot for that purpose would be correct irrespective of whether the applicant owned the lot outright (“title”) or had a proper lease to it (“interest”). The “right” fails so the permit application must be denied. Similarly, the Nordic application must be reviewed for compliance with the Belfast Zoning Regulations because no one has the right to use their lot for illegal purposes or in an illegal way.

The Applicant lacks “title, right and interest” because the Applicant has no “right” to use the lot as applied for. Even if the Applicant possessed uncontested fee simple title to the Eckrote lot and to the intertidal land most probably owned by Mabee/Grace, Applicant would have title and interest, but not the right to use the lot for the intended purpose. The whole purpose of the title, right or interest threshold inquiry is to prevent the government from having to commit extensive resources to a complete investigation of the application, conduct extensive hearings with pre-filed exhibits, pre-filed witness lists and witness statements, many days of hearings and perhaps years of appeals only to learn that the proposed use is, as in this case, illegal, and so the entire effort was for naught and a horrid waste of Board members time and taxpayer money..

The Belfast Planning Board has been courteous, deliberate and open to the public as well as to the Applicant and interested parties. There could be a very long road ahead. That long road need not be traveled were the Planning Board to revisit the title, right or interest issue again, focusing simply on the applicant’s right to use the permits it seeks. Interested Party, Upstream Watch, urges the Belfast Planning Board to do so and will cooperate in that effort in any way requested by the Planning Board or its Chair.

Respectfully submitted,

David B. Losee

For Upstream Watch

September 9, 2019

Cc: Joanna Tourangeau, Esq.

William Kelly, Esq.

Northport Avenue

L. W. Morgan  
1804 - 307

R. & J. Eckrote  
3697 - 5

Intertidal land of  
J. R. Mabce & J. B. Grace  
1221 - 347

L. D. Theye  
Becker-Theye  
1303 - 184

1. Rebar Fd.  
Good Deeds Cap

250' Shoreland Zoning Setback

25' Setback & Buffer Zone

25' Setback & Buffer Zone

75' Shoreland Setback

NAF Proposed Pipelines

1. Rebar Fd.  
Good Deeds Cap

1. Rebar Fd.  
Good Deeds Cap

Stairs

turning northeasterly along said high water mark  
Found rebar high tracer pipe

Stairs

Rebar found disturbed  
5/8" rebar set  
alongside

B

347

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