

Renewed Motion to Stay or Dismiss NAF's pending application(s) for permits

Kim Ervin Tucker <k.ervintucker@gmail.com>

Tue 7/14/2020 10:27 AM

To: Public Hearing <public@cityofbelfast.org>; Kelly William <bkelly11@bluestreakme.com>; Erin Herbig <citymanager@cityofbelfast.org>; Wayne Marshall <wmarshall@cityofbelfast.org>
Cc: Joanna B. Tourangeau <JTourangeau@dwmlaw.com>; Kallin David M. <DKallin@dwmlaw.com>; David Losee <David@loseelaw.com>; Strout Dana <dfspcc@gmail.com>; David Perkins <dperkins@curtisthaxter.com>; Kristin M. Racine <kracine@curtisthaxter.com>

 8 attachments (6 MB)

Tomasino v Casco 2020-ME-96.pdf; FINAL_SAP_Nordic_Aquafarms_NAE-2019-01481.pdf; BEP Motion for Stay- Tomasino.pdf; BPL Motion for Stay- Tomasino.pdf; 80B Motion for Stay-Tomasino FINAL sig.pdf; NAF BPB Notice and cover Letter. 6-25-2019-1docx.pdf; Exhibit A Eckrote Easement.pdf; HLHCA Survey By Donald R. Richard WCRD Bk 24 Pg 54.pdf;

The attached filing is submitted to the City of Belfast, Belfast Planning Board, and officials, on behalf of Intervenor Jeffrey Mabee and Judith Grace and the Lobstering Representatives (The Maine Lobstering Union, Wayne Canning (who is the Zone D Lobster Council representative for District 11 lobster and crab license holders) and David Black), as well as Interested and Aggrieved Party Friends of the Harriet L. Hartley Conservation Area — the Holder of the Conservation Easement that includes the intertidal land on which Belfast Tax Map 29, Lots 38, 37, 36 and most of 35 front. The above parties and entities will jointly be referred to a "Petitioners" in the summary below, unless referred to (as appropriate) by their respective specific names.

The attached summary renews the Petitioners' request to STAY or DISMISS the applications that NAF currently has pending before the City of Belfast's Planning Board. This Motion is based on a jurisdictional challenge to the Board's subject matter jurisdiction to accept, consider or act on the permit applications submitted to the City of Belfast by NAF. Jurisdiction is not a matter of discretion — a permitting authority either has it or does not. Where subject matter is lacking or absent, the permitting authority must refuse or cease all consideration of the permit application until and unless the jurisdictional impediment is removed.

On July 7, 2020, the Maine Supreme Judicial Court clarified its prior holdings relating to the proof needed for an applicant to demonstrate "sufficient" administrative standing to obtain a permit from a local or State permitting authority. In that decision, *Tomasino v. Town of Casco*, 2020 ME 96, the Law Court held in relevant part that:

[N]one of these decisions [listed below] supports the proposition that administrative standing may be conferred merely by possessing any kind

of easement on the property at issue. Unlike 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. . . ***Whatever minimum “right, title or interest” is required*** [to have administrative standing to obtain a permit]. . . , ***we conclude that, in the face of a dispute between private property owners, that requirement is not met by an easement whose parameters have not been factually determined by a court with jurisdiction to do so.***

Tomasino v. Town of Casco, 2020 ME 96, ¶15 (emphasis supplied).

CASES REFERENCED BY THE SLC:

See, e.g. *Tomasino v. Town of Casco*, 2020 ME 96, ¶10-¶15 (decided July 7, 2020), citing, ***Walsh v. City of Brewer***, 315 A.2d 200, 205 and 207 (Me. 1974) (the requisite right, title or interest in property to confer administrative standing is the “lawful power to use [the [property], or control its use” in the manner sought through the [permitting] action”); ***Murray v. Inhabitants of Town of Lincolnville***, 462 A.2d 40, 43 (Me. 1983) (“an applicant for a license or permit to use property in certain ways must have ‘the kind of relationship to the site,’ that gives him a legally cognizable expectation of having the power to use that site in the ways that would be authorized by the’ . . . license he seeks.” (internal citations omitted)); ***Southridge Corp. v. Bd. of Environmental Prot.***, 655 A.2d 345, 347-48 (Me. 1995) (“a pending action [in a parallel Superior Court quiet title case] claiming ownership by adverse possession was sufficient to confer standing to seek state regulatory permits for the property at issue”); and ***Rancourt v. Town of Glenburn***, 635 A.2d 964, 965-966 (1993) (applicant did not establish that the scope of her right-of-way included the ability to construct a dock on the property; therefore the municipal board correctly determined that she had not satisfied the right, title or interest requirements to allow her permit application to proceed).

The Cit of Belfast relied on the Southridge decision in denying Petitioners’ earlier challenges to the sufficiency of NAF’s claims of TRI. However, because NAF’s claims of “sufficient TRI” are grounded in an easement, the parameters and validity of which have not been determined by a court of competent jurisdiction, the Law Court’s holding requires reconsideration of this prior determination. More specifically, the holding in *Tomasino* requires the Belfast Planning Board, as well as the State permitting authorities, to find NAF’s pending permit applications incomplete due to insufficient TRI. Because NAF has insufficient TRI to have administrative standing to seek the permit for which it has applied, the City of Belfast’s Planning Board lacks the subject matter jurisdiction to consider or grant any permits to NAF, until the Superior Court rules on the parameters (and validity) of NAF’s easement from the Eckrotes.

BACKGROUND

Nordic Aquafarms, Inc. ("NAF") has falsely attempted to obtain permits from The City of Belfast to take and use for its own profit the intertidal land on which Belfast Tax Map 29, Lot 36 fronts. NAF has sought these permits to facilitate putting three large industrial pipes almost a mile out into Penobscot Bay.

Intervenors/Petitioners Mabee and Grace claim ownership of the Intertidal land on which Lots 38, 37, 36 and most of 35 front. The Mabee-Grace ownership interest is grounded in recorded deeds and a prior court judgment by the Waldo County Superior Court in favor of their predecessor-in-interest Winston C. Ferris in *Ferris v. Hargrave*, Docket No. 11275, recorded in the Waldo County Registry of Deeds ("WCRD") at Book 683, Page 283.

From the outset of proceedings in the City of Belfast, in June 2019, Mabee-Grace have asserted their ownership interest in the intertidal land on which NAF seeks permits from the City of Belfast and have challenged the sufficiency of NAF's claims of "sufficient title, right or interest". At all times NAF has asserted that it had "sufficient" title, right or interest to have administrative standing to obtain permits from the City of Belfast by relying on the easement option NAF obtained from Janet and Richard Eckrote, through an Easement Purchase and Sale Agreement, dated 8-6-2018.

From the outset, as revealed by the attached filing from June 25, 2019, Intervenors/Petitioners Mabee and Grace and the Intervenors/Petitioners who are Lobstering Representatives have challenged NAF's claims of sufficient TRI by noting that: (i) the Easement granted to NAF by the Eckrotes, by its own terms in Exhibit A to the Easement Purchase and Sale Agreement, defines the boundaries of the easement as terminating at the Eckrotes' high water mark, conferring no right to NAF to use the intertidal land on which the Eckrotes' lot fronts; (ii) the Eckrotes own no intertidal land, pursuant to the 1946 conveyance from Harriet L. Hartley to Janet Eckrote's grandfather, Fred R. Poor and thus can give NAF no easement in the intertidal land on which their lot fronts; and (iii) all of the intertidal land to which Intervenors/Petitioners Mabee and Grace claim ownership are protected by a Conservation Easement that prohibits the uses NAF that the permits NAF seeks from the City would authorize.

These issues, and more relating to the parameters and validity, *if any*, of NAF's easement option from the Eckrotes — as well as other issues of property rights and ownership, are included in the Declaratory Judgment action to quiet title, captioned

Mabee and Grace, et al. v. NAF, et al., Docket No. RE-2019-18, pending since last July in the Waldo County Superior Court.

In August of 2019, the Planning Board, denied Intervenors'/Petitioners' challenge to NAF's TRI claims — relying on advice provided by City Attorney Bill Kelly (who is compensated by NAF for all work performed on matters relating to NAF — an obvious conflict of interest).

On July 7, 2020 the Law Court entered judgment clarifying what constitutes "sufficient TRI" to have administrative sanding to seek local or State permits, when an easement is the basis for claiming TRI. That holding requires that the parameters of the easement be first determined by a court with jurisdiction to do so, before the permitting authority can have the subject matter necessary to consider or rule on any permit application(s).

For the foregoing reason and based on this precedent clarifying the City of Belfast's lack of subject matter jurisdiction to issue a permit to NAF, under the circumstances of this case, Petitioners renew their request for a stay or dismissal of NAF's permit applications by the Planning Board, pending resolution of the questions relating to the easement by the Waldo County Superior Court.

SEDIMENT TESTING AND MERCURY

Secondly, a stay of further proceedings is appropriate because NAF has been required to do sediment testing for contaminants, including buried HoltraChem mercury, along the route for the pipelines that NAF proposes to dredge, excavate, trench and blast. Due to the presence of significant quantities of buried mercury dumped in the Penobscot River by HoltraChem beginning in 1969, Petitioners have asserted that NAF's project, as proposed should not be approved because of the risk it posed of re-suspending this buried mercury and causing an environmental and economic disaster in the upper Penobscot Bay and Midcoast region.

State agencies vested with the responsibility of enforcing the Clean Water Act ("CWA") and protecting our water quality, aquatic environment, fisheries and fishing industries (e.g. DEP, BEP, DME and BPL) have been woefully inadequate in performing their jobs — to the point of being so irresponsible that bureaucrats and functionaries in these agencies even claimed that they did not know of any mercury in this area.

Such foolish claims were made despite to findings of neutral experts, appointed by the federal court in Bangor, confirming the presence of this buried mercury in all parts of Penobscot Bay north of the southern tip of Islesboro and all the way up the

River to Orrington (where HoltraChem's abandoned facility is located). The Penobscot River Mercury Study ("PRMS") conducted more than a decade long study of this mercury and its findings are available online to the public and DEP even has a link to the PRMA report. Here is the link to the court documents, previously provided to the City:

<https://www.nrdc.org/resources/mallinckrodt-case-documents>

While the State agencies failed comply with the requirements in NRPA (38 M.R.S. §480-E(3)) to require NAF to conduct sediment testing of all material it proposed to dredge, prior to the DEP commencing consideration of NAF's applications and the BEP denied Petitioners related demands to require such sediment testing pursuant to Section 404 of the CWA, on June 22, 2020, the US Army Corps of Engineers and US EPA issued a SAP (Sediment and Analysis Plan) to NAF requiring NAF to take sediment tests under a protocol issued by the federal agencies along the proposed pipeline route.

That SAP is attached below for your information and use. The Planning Board should note that, contrary to the specious claims of State regulators, the federal regulators acknowledge the significant risks posed by the mercury in this area and acknowledged the PRMS findings.

Petitioners also renew their motion to stay further consideration of the NAF project permit applications until the sediment testing required by Section 404 of the CWA and the SAP are completed so the Planning Board can properly consider the potential adverse impacts of this project, as proposed by NAF.

A more formal filing will be submitted by the Petitioners but, because of the urgency of rectifying the City's lack of subject matter jurisdiction and the need to assist the City in preserving limited public resources and time — so as not to waste any more precious time and resources on a project like NAF in which the applicant lacks the requisite administrative standing to seek or obtain the permits now requested from the City — Petitioners file this summary to renew its Motion to Stay or Dismiss now by email.

Thank you for your consideration.

Respectfully submitted, Kim Ervin Tucker (Maine Bar No. 6969) on behalf of the Petitioners

Begin forwarded message:

From: Kim Ervin Tucker <k.ervintucker@gmail.com>

Subject: Submission to Belfast Planning Board relating to NAF's lack of TRI for 6-26-2019 BPB Meeting

Date: June 25, 2019 at 4:15:33 PM EDT

To: PB Hearing <public@cityofbelfast.org>

Cc: "Joanna B. Tourangeau (JTouangeau@dwmlaw.com)" <JTouangeau@dwmlaw.com>, Bill Kelly <bkelly11@bluestreakme.com>, Joseph Slocum <citymanager@cityofbelfast.org>

Dear Mr. Marshall:

Attached is the first email with the attachments for our submission. Thank you for your assistance. Kim Ervin Tucker (202-841-5439)

Cover Letter with Legal Argument

Exhibit A to Eckrote Easement

Eckrote Chain of Title with Deeds