

MEMO

TO: Belfast Planning Board

FR: William S. Kelly, City Attorney

RE: Pending Motion to Stay/Dismiss filed by Party in Interest Mabee Grace, et al.

DA: August 4, 2020

This memo is intended to provide legal guidance for the Planning Board's consideration of the Amended Motion to Stay/Dismiss, dated July 20, 2020. For the reasons described below, I concur with the July 30, 2020 denial of a near identical Motion filed with the Maine Board of Environmental Protection in the consolidated docket of pending permit applications at the State level.

The Amended Renewed Motion for Stay or Dismissal, dated July 20, 2020 and filed in this matter on behalf of Parties in Interest Mabee and Grace, *et al*, argues two points: 1. that the case of Tomasino v. Town of Casco, 2020 ME 96, strips this Board of "subject matter jurisdiction" and that a permit applicant such as NAF "cannot demonstrate the requisite administrative standing to proceed in an administrative permitting process, by relying solely on an easement, the parameters of which have not yet been decided by a court of competent jurisdiction"; and 2. a request to stay proceedings now that federal authorities who administer the Clean Water Act have required more sediment sampling and analysis.

I. Subject Matter Jurisdiction. The original legal claim by the Moving parties alleging of lack of subject matter jurisdiction of this Board was misplaced and has been re-oriented in the Amended Motion after review of Justice Murray's Decision of July 14, 2020, which is attached as Exhibit A to the NAF response dated July 17, 2020, and submitted on July 27, 2014. That speaks for itself regarding the requirement of standing as an element of the justiciability of a pending permit by a Board, and I will not go into detail here, as the analysis below provides that NAF's standing as previously found by this Board, has not been impacted by the Tomasino case.

The Tomasino case focused on the exact meaning of language within a recorded easement that provided for joint use of a camp road by abutting property owners. Importantly, the permit applicant in Tomasino relied on an existing easement that did not include language that trees could be cut within the right of way – thus the very activity they sought to have permitted was not provided for in the scope of the easement language, as the easement merely provided for "a right of way over a strip of [the other's] land six (6) feet in width" along a portion of a their common boundary. ((¶ 2) Thus, the Court found that the applicant "... failed to demonstrate that they have the kind of interest that would allow them to cut the trees if they were granted a permit to do so." (¶ 15)

In Tomasino, the Court referenced the significant case law precedent, which generally provides that if an applicant can demonstrate the existing (deed or easement) or future (Purchase and Sale Agreement) rights to use property in the way the Applicants intends if the permit is granted, then the Applicant has standing, and the Planning Board should proceed to review based on the facts presented which are then applied to the ordinance review criteria. In referencing the Board's ability to delve deeper into discerning the meaning/interpretation of deeds, easements or future rights under a purchase and sale agreement, the Court reiterated long-standing precedent: "[T]hese are matters that are well outside the

Board's jurisdiction, authority, or expertise, which is instead limited to the interpretation and application of ordinance provisions," ¶ 7 citing 30-A MRS 2691(4); "local zoning boards, like municipalities, have no inherent authority to regulate the use of private property" and are instead limited to those powers conferred upon the town by the state," Cope v. Town of Brunswick 464 A.2d 223, 225 (Me. 1983); "a municipal zoning case is not the proper forum for a private property dispute between neighbors, and a private property dispute between neighbors is precisely what was before the Board here," (¶ 8); and, "[T]he rights and obligations of parties to private covenants are to be determined in appropriate actions to enforce or to be relieved of the burden of, such covenants; they are not to be determined by reference to the zoning restrictions applicable to the land...," citing Whiting v Seavey, 159 ME 61, 67 (Me. 1963). The Tomasino Court went on to say that a Declaratory Judgment action filed in Superior court was the vehicle to definitively resolve disputes as to deed or easement interpretation, and it was perplexed as to why that had not happened, and the all the authorities the Tomasino's relied upon were all Court findings in contested matters and not adjudication of real property rights by a Planning Board.

It is important to note that the Tomasino Court applied, and did NOT overrule, the normal test for standing in an administrative zoning permit application, and referenced a case decided in 1983: "[A]n applicant for a license or permit to use property in certain ways must have a **legally cognizable expectation of having the power to use that site in the ways that would be authorized by the permit or license he seeks.**" (Murray v. Inhabitants of Lincolnville, 462 A.2d 40, 43 (Me 1983) The Court in Tomasino then reached the important issue upon which it found that the applicant had not demonstrated sufficient right, title and interest **to cut trees within property owned by the abutter's half of the camp road**, because the easement deed was silent on that issue. Thus, the Tomasino Court agreed that, as an evidentiary matter, the record "was unclear as to the Tomasino's right to cut trees without permission of [the neighbor]". (¶ 4) Stated another way, the easement deed relied upon by the permit applicant to demonstrate that it had a "legally cognizable interest" to cut the trees (the sole activity sought under the permit application) did not provide that the applicant could cut trees, and was very vague in only referencing a mere six foot "right of way". Thus, when the Tomasino Court applied the long standing test of whether or not the applicant had demonstrated the "legally cognizable expectation" to do what the applicant sought to do, in the event the permit was issued, it denied that the applicant had submitted evidence to demonstrate that it had a "legally cognizable interest" to use the property as intended, and again adopted long-standing precedent: "[O]ur conclusion – that the applicant must demonstrate not just any right, title or interest in the property but a right, title or interest in the property that allows the property to be used in the manner for which the permit is sought – is consistent with (prior decisions). (¶ 12, citing Rancourt v. Town of Glenburn, 635 A.2d 964, 965 (Me, 1993) (See also, Southridge Corp v. BEP, 655 A.2d 345, 347-48 (Me. 1995) wherein a pending action for a claim of adverse possession was sufficient to confer standing). Thus, the permit applicant in Tomasino solely relied upon an existing easement that did not include language that trees could be cut – thus the very activity they sought to permit was not stated in the scope of the easement; "... they failed to demonstrate that they have the kind of interest that would allow them to cut the trees if they were granted a permit to do so." (¶ 15).

Applying Tomasino to the record in this matter regarding RTI for the Ekrote property, it is clear that the resolution of competing interpretations of historic deeds is properly in the Superior Court, and absolutely not an issue for this Board to determine. It is also clear from cases cited in Tomasino that a pending legal action in Superior Court does not strip this Board of its authority to proceed – to the

contrary the Court encourages such an action, but does not make the court's final decision of a legal dispute a jurisdictional prerequisite to a zoning permit application, so long as the applicant has demonstrated the minimal burden of a "legally cognizable interest" to use the property as intended. If this Board were to adopt the position argued by Mabee Grace, no zoning permit application would ever be able to proceed until any legal challenge as to easement right, title and interest was finally resolved in court.

In the pending NAF record, there is a Purchase and Sale Agreement with Ekrote, supplemented by a clarifying letter of agreement, which collectively provide the right of NAF to purchase upland and intertidal easement rights to install and maintain the discharge and intake pipes. This is a classic demonstration of a "legally cognizable interest" in and to the property that will allow the applicant to use the property, if permits are granted, for the purposes described in the pending permit applications. This is exactly what was lacking in the Tomasino case. Had the Ekrote Purchase and Sale Agreement, for example, merely provided for the right to purchase a mere "right of way" without any specific rights enumerated, then holding in the Tomasino case would be relevant for further consideration.

In summary, when we apply the same test applied in Tomasino, NAF has met its burden to demonstrate a "legally cognizable interest" in the Ekrote property for the intended uses, and the pending Motion to Stay/Dismiss has not demonstrated any change in the law or litmus test that would change this Board's prior finding of NAF's sufficient right, title and interest to proceed; to the contrary, Tomasino confirms your findings. Whatever the Waldo County Superior Court may do with its interpretation of the historic deeds, that matter will proceed separate and side from this Board's work, as it should. I would note for the Board that, if there was ever any doubt as to the legal expertise required for thorough interpretation of the deeds in question, the Court's June 4, 2020 denial of the Mabee Grace Motion for Summary Judgment (Docket No. RE-19-18), is instructive as to the legal complexities of analysis which are beyond the jurisdiction and collective ken of this Board.

II. Sediment Testing. The United States Army Corps of Engineers has authority to administer and apply the Clean Water Act. It is my understanding that the Army Corps is requiring additional sediment testing. The second request in the pending Motion to Dismiss/Stay requests "a stay to get the results of the sediment testing by NAF and amendments to the filed application to conform to the current proposal." This Board has no jurisdiction nor expertise in applying the Clean Water Act. The Board must apply the criteria in the Site Plan review and Shoreland Zoning Ordinance as it sees fit when it comes time for final review of the pending permits, based on the facts and expert opinions in the Planning Board record. I assume that, if the Planning Board approves the relevant permits, it will include typical conditions requiring compliance with all required State and Federal permits. Those are the extent of my comments on the second issue.

