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July 27, 2020

Declan O'Connor, Chair
City of Belfast Planning Board
c/o Wayne Marshall, Director of Planning and Codes
City Hall, Council Chambers
131 Church Street
Belfast, Maine 04915

RE: Nordic Response to MGL Requests to Enjoin Administrative Proceedings

Dear Chairman O'Connor and Planning Board Members:

Nordic Aquafarms, Inc. ("Nordic") hereby responds[1] to the July 13 and 20, 2020 submissions of Jeffrey Mabee, Judith Grace, The Friends of the Harriet L. Hartley Conservation Area ("Friends"), the Maine Lobstering Union and Lobstering Representatives David Black and Wayne Canning (collectively, "Petitioners") seeking to stop the City of Belfast Planning Board ("Board") consideration of Nordic's permit applications. Petitioners request is without support in the law or available process. Instead, this is nothing more than another attempt by Petitioners to stop or delay Board review of the Nordic project.

Petitioners' restate the same arguments they've brought before the Board *ad nauseam* and which the Board patiently, and repeatedly, considered and rejected. Petitioners make much of the Law Court's recent decision in *Tomasino* 2020 ME 96, __ A.3d __, but as Justice Murray said in dismissing an identical request from Petitioners in the context of dismissing their

[1] While Nordic is happy to respond as directed by the Board, Nordic respectfully notes that Petitioners stay request is entirely out of order.

impermissible appeal of the Maine Board of Environmental Protection's decision on right, title and interest ("TRI"), that case doesn't mean what Petitioners say it means. *Mabee et al. v. Board of Env'l Protection*, Dkt. No. AP-20-3 (Waldo Sup. Ct. July 14, 2020) (attached as Exhibit A) (hereinafter "Court Dismissal"). After *Tomasino,* the Board is still obligated to review and render a decision regarding Nordic's TRI. *Tomasino* did not render an easement insufficient proof of TRI nor did it mandate that any Board decision await Justice Murray's decision quieting title.

## I. The Board Reviewed TRI as Required by *Tomasino* (which changed nothing).

Nordic demonstrated that it has sufficient TRI in the intertidal lands at issue based on the easement granted to it by the owners of that land, Richard and Janet Eckrote. The Board already considered every argument raised by Petitioners and voted, nearly a year ago, that Nordic's TRI submissions met the requirements of City ordinances. As this Board may be aware, at the same time as filing these stay requests with this Board, Petitioners filed the same request before Waldo County Superior Court in the midst of its review of Petitioners appeal of the Board of Environmental Protection's decision on TRI. On July 14, 2020, Justice Murray dismissed the appeal of that Board's TRI decision saying:

> [...B]ecause Petitioners seek to circumvent the administrative process, Petitioners have not filed a proper petition for judicial review. There has not yet been a final agency action, and Rule 80C is the proper procedural avenue for review when such final agency action has been taken. The writs of prohibition and certiorari do not serve as means for judicial intervention in an ongoing state agency administrative process. *Tomasino* does not change this, Petitioners' motion for a stay is denied, and the petition is dismissed.

Court Dismissal at 7.

In other words, Petitioners are well aware, as of the filing of their June 20, 2020 restatement of their stay request to this Board, that Justice Murray already rejected their

argument that *Tomasino* required the Board proceedings to grind to a halt. Instead, Justice Murray held that the Board's decision on TRI is fully, and properly, reviewable after this Board makes its final decision on the merits of Nordic's applications.[2] The only explanation is the obvious- that Petitioners seek to delay or stop review of Nordic's project by any means necessary.

## II. Petitioners falsely claim *Tomasino* held that the Board cannot consider an easement as proof of TRI and that the Board must delay proceedings on Nordic's applications pending Justice Murray's decision quieting title.

Petitioners' July 13, 2020 filing with the Board may be an excusable misreading of *Tomasino* as the Court Dismissal hadn't issued. Petitioners restated filing on July 20, 2020 is inexcusable. On June 20, instead of voluntarily withdrawing their request for the Board to stop substantive review of Nordic's applications based on *Tomasino,* Petitioners' doubled down, writing:

> the Superior Court's July 14 Order in AP-2020-03 heightens and highlights the burden on, and responsibility of, the Board, and all similarly situated administrative agencies before which NAF has pending applications for leases, licenses and permits, to ***dismiss*** NAF's pending applications (without prejudice), based on NAF's lack of administrative standing.

The Superior Court order that Petitioners are referencing is Justice Murray's dismissal of Petitioners' TRI appeal and rejection of their request to stay (i.e. enjoin) the state Board's proceedings. *See* Exhibit A. In reality, Justice Murray wrote:

> *Tomasino*—which, notably, involved a Rule 80B appeal of a municipal decisionmaker after the conclusion of all administrative proceedings, not during—in no way stands for the proposition that it is appropriate for a court to enjoin ongoing administrative proceedings over an issue of dispute between the parties that is the very subject of the administrative proceeding.

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[2] Note that because this Board is making a municipal decision, not that of a state agency, the proper avenue will be Maine Rule of Civil Procedure 80B- not 80C.

Court Dismissal at 7. Put simply, Petitioners are asking this Board to do what Justice Murray refused to do. It should go without saying that this Board should proceed according to the Administrative Procedures Act and City ordinances, review Nordic's applications on the merits, and render a final decision at which point Petitioners' appeal right will vest.

Moreover, *Tomasino* involved a permit to cut trees and the local board found that the easement did not discuss tree cutting. Here, the Board considered the scope of the easement and found that Nordic's option to purchase an easement from the Eckrotes contemplates burying of seawater pipes in the easement area—indeed that is the sole purpose of the easement. The pending lawsuit between Petitioners and the Eckrotes is a meritless land-grab regarding newly-invented *ownership* claims to the intertidal zone. The Eckrotes defended with their own claims vesting title in the Eckrotes by deed as well as alternative claims by adverse possession and/or acquiescence. The TRI issue is thus controlled entirely by *Southridge Corp. v. Bd. of Envtl. Prot.*, 655 A.2d 345 (Me. 1995), and is unchanged by *Tomasino*. Nordic established sufficient TRI for the Board to process permits, and any review of that determination must await a final decision on those permits. There is nothing in *Tomasino* that would permit, let alone require, revisiting those decisions.

In sum, Petitioners' request is entirely without merit and should be summarily rejected.

Sincerely,

*/s/ Joanna Tourangeau*
Joanna B. Tourangeau, Me. Bar No. 9125
Counsel for Nordic Aquafarms, Inc.

cc: William Kelly, Esq.
Hon. Erin Herbig, City Manager
Attorney Tucker, MGL

**EXHIBIT A**

STATE OF MAINE
WALDO, ss.

SUPERIOR COURT
DKT. NO. AP-20-3

JEFFREY R. MABEE, et a.,

Petitioners,

v.

BOARD OF ENVIRONMENTAL PROTECTION,

Respondent,

NORDIC AQUAFARMS, INC.,

Party in interest.

**ORDER DISMISSING 80B PETITION**

On May 15, 2020, Jeffrey Mabee, Judith Grace, and the Friends of the Harriet L. Hartley Conservation Area (Petitioners) filed a Rule 80B "Petition for Review of the Failure or Refusal to Act by the Board of Environmental Protection." The Board of Environmental Protection (BEP) moves to dismiss the petition on the bases that (1) no final agency action has yet occurred, and (2) the petition is improperly brought as a Rule 80B petition due to the BEP's status as a state agency. Additionally, the BEP requests that the Court issue a stay of the administrative appeal deadlines. The permit applicant before the BEP, Nordic Aquafarms, Inc. (NAF), joins the BEP's motion to dismiss and adds additional arguments in favor of dismissal, but opposes the BEP's request for a stay. As the Court prepared to issue its order on these motions, Petitioners filed a motion requesting that the Court effectively enjoin the ongoing administrative process before the BEP based on a recent Law Court decision. *See Tomasino v. Town of Casco*, 2020 ME 96, ___A.3d___. The Court issues the following order.

Petitioners' petition faults the BEP for purportedly failing to adequately address Petitioners' challenges to NAF's administrative standing in an ongoing permit application process before the

BEP.[1] It is clear from the relief sought in the petition that Petitioners are seeking to have this Court intervene in the ongoing administrative process by either reversing the BEP's preliminary determination regarding NAF's sufficient title, right, or interest (TRI) in the intertidal zone at issue, or usurping the BEP's authority and instructing the BEP that NAF lacks sufficient TRI before the administrative process concludes. (Pet. ¶¶ 95-96.) In response to the BEP's and NAF's respective arguments for dismissal, i.e., arguments relating to the impropriety of Rule 80B for an appeal from a state agency and the lack of a final agency action, Petitioners contend a Rule 80B appeal is proper because the relief they seek would have been available by way of the extraordinary writs of prohibition or certiorari. Petitioners contend these writs, which are pursuable through Rule 80B, are properly invoked here because the BEP lacks "subject matter jurisdiction" over NAF's application. This is so, Petitioners argue, because NAF does not have the requisite administrative standing in the proceedings before the BEP because NAF has not demonstrated sufficient TRI. This alleged absence of administrative standing deprives the BEP of "subject matter jurisdiction," according to Petitioners. The Court notes that terming the issue as relating to the BEP's "subject matter jurisdiction" does not properly capture the deficiency Petitioners find with the process.

In the analogous judicial context, the Law Court has recently attempted to address distinctions between concepts of jurisdiction and justiciability, particularly as it relates to standing to invoke a

[1] There is a companion civil case involving Petitioners Mabee and Grace's claim of ownership to a portion of the intertidal zone of Penobscot Bay through which NAF seeks to lay intake and outtake pipes for the salmon aquaculture facility it is attempting to build in Belfast. In that case, Petitioners Mabee and Grace originally sought, in part, to enjoin NAF from proceeding with the permitting process before administrative agencies because they alleged that NAF did not have the necessary interest in the intertidal zone to lay the pipes due to Petitioners' alleged fee simple ownership. NAF filed an anti-SLAPP motion to dismiss pursuant to 14 M.R.S. § 556. The Court concluded that "Mabee and Grace's claims against NAF that seek to directly impact the administrative proceedings—namely, those seeking to prevent NAF from pursuing the necessary approvals based on claims of sufficient title, right, or interest in the relevant intertidal area—are undoubtedly based on NAF's petitioning activities before those administrative decisionmakers." *Jeffrey Mabee, et al. v. Nordic Aquafarms, Inc., et al.*, RE-19-18, slip op. at 7 (Me. Sup. Ct., Wal. Cty., Dec. 20, 2019). Therefore, the Court dismissed the claims in the complaint relating to Petitioners' attempts to throttle the administrative process.

court's jurisdiction. This is because "the words 'jurisdiction' and 'jurisdictional' are understood to have "'many, too many, meanings,'" and . . . '[c]ourts "have been less than meticulous" in using the term[s].'" *Homeward Residential, Inc. v. Gregor*, 2015 ME 108, ¶ 17, 122 A.3d 947 (quoting *Landmark Realty v. Leasure*, 2004 ME 85, ¶ 7, 853 A.2d 749 (quoting *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004))). "'[J]urisdiction' most properly encapsulates only prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Id.* (quotation marks omitted).

Issues of justiciability have been termed "jurisdictional" in the sense of how they relate to a court's ability to hear the case in front of it, not whether the court broadly has subject matter jurisdiction.[2] *See id.* ¶¶ 18-19; *see also Bank of Am., N.A. v. Greenleaf*, 2015 ME 127, ¶ 7, 124 A.3d 1122 (citations and quotation marks omitted) ("Although standing relates to the court's subject matter jurisdiction, it is an issue theoretically distinct and conceptually antecedent to the issue of whether the court has subject matter jurisdiction . . . . Subject matter jurisdiction is a principle of adjudicatory authority that refers to the power of a particular court to hear the type of case that is then before it."). "[A] party's lack of standing is not a jurisdictional problem, but rather it is an issue of justiciability that precludes a party from *invoking* the court's jurisdiction." *Wells Fargo Bank, N.A. v. Girouard*, 2015 ME 116, ¶ 8 n.3, 123 A.3d 216. The fact that a case is not justiciable does not mean that the court lacks subject matter jurisdiction. *See Greenleaf*, 2015 ME 127, ¶ 8, 124 A.3d 1122 (citations omitted) ("When discovered, a standing defect does not affect, let alone destroy, the court's authority to decide disputes that fall within its subject matter jurisdiction. A plaintiff's lack of standing renders that plaintiff's complaint nonjusticiable—i.e., incapable of judicial resolution.").

Here, Petitioners do not contend that the BEP lacks subject matter jurisdiction over review of

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[2] The Law Court has termed the filing deadlines of the Administrative Procedure Act as "jurisdictional." *See Mutty v. Dep't of Corr.*, 2017 ME 7, ¶ 8, 153 A.3d 775.

such permit applications generally, nor could they. *See* 38 M.R.S. §§ 341-A-349-B. Instead, in the analogous judicial context, a party's lack of standing would be an issue relating to the justiciability of the case, not the subject matter jurisdiction of the court. *See Me. Civil Liberties Union v. City of S. Portland*, 1999 ME 121, ¶ 8, 734 A.2d 191 (quotation marks omitted) ("A justiciable controversy is a claim of present and fixed rights, as opposed to hypothetical or future rights, asserted by one party against another who has an interest in contesting the claim."); *see also Madore v. Me. Land Use Regulation Comm'n*, 1998 ME 178, ¶ 8, 715 A.2d 157 (explaining that party has standing when it has a "sufficient personal stake" in the issue when the case commences). This is important because a permit applicant's TRI—notably, an issue that is legally distinct from actual ownership—is a determination that is reviewable *after* final agency action. *See Southridge Corp. v. Bd. of Envtl. Prot.*, 655 A.2d 345, 348 (Me. 1995); *cf.* 3 Harvey & Merritt, *Maine Civil Practice* § 80C:1 at 463-64 (3d, 2018- 2019 ed. 2018) ("The equivalent of the 'final judgment' rule applies to the review of administrative action or nonaction.").

As far as it pertains to the propriety of Rule 80B, the Court disagrees with Petitioners' interpretation of the Rules of Civil Procedure. There is no dispute that "[t]he writs of prohibition[ and] certiorari . . . are abolished. Review of any action or failure or refusal to act by a governmental agency, including any department, board, commission, or officer, shall be in accordance with procedure prescribed by Rule 80B." M.R. Civ. P. 81(c). Rule 80B directs that,

> [w]hen review by the Superior Court, whether by appeal or otherwise, of any action or failure or refusal to act by a governmental agency, including any department, board, commission, or officer, is provided by statute or is otherwise available by law, proceedings for such review shall, except to the extent inconsistent with the provisions of a statute and *except for a review of final agency action or the failure or refusal of an agency to act brought pursuant to 5 M.R.S.A. § 11001 et seq. of the Maine Administrative Procedure Act as provided by Rule 80C*, be governed by these Rules of Civil Procedure as modified by this rule."

M.R. Civ. P. 80B(a) (emphasis added).

Not surprisingly, Rule 80B excepts state agency actions which are covered by the

Administrative Procedure Act (APA) (i.e., Rule 80C actions). The petition expressly alleges that a state agency failed or refused to act on Petitioners' challenge regarding the agency's "jurisdiction," which is precisely what the APA governs. (Pet. ¶¶ 67-71.); *see also* 5 M.R.S. § 11001(2) ("Any person aggrieved by the failure or refusal of an agency to act shall be entitled to judicial review thereof in the Superior Court."). Therefore, by its own allegations, this appeal is expressly excepted from Rule 80B's purview. *Cf.* 3 Harvey & Merritt, *Maine Civil Practice* § 80B:1 at 434-35 (3d, 2018- 2019 ed. 2018) (emphasis added) ("While the substantive rights to review embodied in the extraordinary writs still remain, Rule 80B is the only procedural avenue to vindication of such rights against a governmental agency *outside of state government.*").

Whether the extraordinary writs would have applied in the circumstances of a court directing an executive agency to do or not do something during an ongoing administrative process—a dubious proposition that carries with it separation of powers implications, *cf. Schmidt v. Town of Northfield*, 534 A.2d 1314, 1317 (Me. 1987) ("An administrative agency should be protected from judicial interference until the parties are affected in a concrete way by a formalized administrative decision.")—is irrelevant by the terms of Rule 80B(a). As Harvey states,

> Rule 80C does not contain the reference found in Rule 80B to review "otherwise available at law." Therefore, consideration of the scope of the historical extraordinary writs is not an issue under 80C. *A common-law attack on an agency decision or failure to act is not available when review under the Administrative Procedure Act is available.*

3 Harvey & Merritt, *Maine Civil Practice* § 80C:1 at 463 (3d, 2018- 2019 ed. 2018) (emphasis added). Review of the BEP's decision on the permit application will be available under the APA. 38 M.R.S. § 346(1) ("[A]ny person aggrieved by any order or decision of the board or commissioner may appeal to the Superior Court . . . in accordance with Title 5, chapter 375, subchapter 7.").

Petitioners do not point to any cases where the Superior Court entertained a Rule 80B appeal on the basis of an extraordinary writ to direct a state agency to do something during the course of an

ongoing proceeding. Petitioners do point to one case where the Law Court permitted an extraordinary writ to be used to review state agency action by way of Rule 80B. *See Carlson v. Oliver*, 372 A.2d 226 (Me. 1977). However, the case predates the creation in 1983 of the separate Rule 80C governing review of state agency action or inaction. *See* M.R. Civ. P. 80C 1983 Advisory Committee's Note to New Rule 80C (emphasis added) ("Rule 80C is added to provide a separate rule for proceedings to review final agency action or the failure or refusal of an agency to act brought pursuant to 5 M.R.S.A. § 11001 *et seq.* of the Maine Administrative Procedure Act (APA). The rule is an exercise of the independent power to adopt rules for such appeals as set forth in 5 M.R.S.A. § 11008(2). *Prior to the adoption of this rule, APA appeals as well as non-APA appeals were governed by Rule 80B.*"). Even then, the Law Court case cited by the Petitioners involved an inmate's petition to review a disciplinary decision made by the prison that was not interlocutory like the Petitioners' is; the inmate sought to use Rule 80B for Superior Court review *after* the final decision was made by the agency.

At bottom, Petitioners give no cogent explanation as to why the BEP's determination regarding NAF's TRI (whether affirmative or negative) would not be reviewable by an aggrieved party on a properly filed Rule 80C appeal at the conclusion of the permitting process. Instead, they summarily contend such review would be "inadequate." *Cf.* 5 M.R.S. § 11001(1) ("Preliminary, procedural, intermediate or other nonfinal agency action shall be independently reviewable *only if review of the final agency action would not provide an adequate remedy.*"). As noted above, an applicant's administrative standing before the BEP is reviewable on an 80C petition. *See Southridge Corp.*, 655 A.2d at 348. Review after final agency action would be adequate.

Petitioners' motion to stay the proceedings before the BEP based on *Tomasino* suffers from related defects to the petition itself. First, Petitioners continue to conflate issues of standing and subject matter jurisdiction. That a permit applicant may lack sufficient TRI to obtain a permit does not deprive the administrative body of jurisdiction over the subject matter. *See* pp. 2-4, *supra*. Crucially,

*Tomasino*—which, notably, involved a Rule 80B appeal of a municipal decisionmaker *after* the conclusion of all administrative proceedings, not during—in no way stands for the proposition that it is appropriate for a court to enjoin ongoing administrative proceedings over an issue of dispute between the parties that is the very subject of the administrative proceeding. *See Tomasino*, 2020 ME 96, ¶¶ 2-4, ___A.3d___. Instead, *Tomasino* firmly supports the position that a review of administrative standing on the basis of a TRI determination, whether favorable to the permit applicant or not, is properly reviewed *after* the conclusion of the administrative process. *Id.*; *see also Lingley v. Me. Workers' Comp. Bd.*, 2003 ME 32, ¶ 9, 819 A.2d 327 (explaining that "a refusal to take a requested action is not identical to a refusal to act"). Lastly, nothing in *Tomasino* stands for the proposition that Rule 80B is an appropriate avenue for interlocutory review of a preliminary determination by a state agency.

In sum, because Petitioners seek to circumvent the administrative process, Petitioners have not filed a proper petition for judicial review. There has not yet been a final agency action, and Rule 80C is the proper procedural avenue for review when such final agency action has been taken. The writs of prohibition and certiorari do not serve as means for judicial intervention in an ongoing state agency administrative process. *Tomasino* does not change this, Petitioners' motion for a stay is denied, and the petition is dismissed. The BEP's motion for a stay is moot.

The entry is:

1. Petitioners' motion to stay the ongoing proceedings before the BEP is **DENIED**.
2. Petitioners' Rule 80B petition is **DISMISSED**.
3. The BEP's motion for a stay is **MOOT**.
4. The Clerk is directed to incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

Dated: 7/14/2020

The Hon. Robert E. Murray
Justice, Maine Superior Court