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February 18, 2021

Peter Nesin, Chairperson
Belfast Zoning Board of Appeals
City of Belfast
131 Church Street
Belfast, ME 04915

RE: Appeal of Nordic Aquafarms, Inc. Permit Approvals by Upstream Watch

Dear Mr. Nesin;

I am providing limited comments on a few legal and jurisdictional issues raised in the Appellant's appeal, as these are issues within the Planning Board record, and may not be readily discernable without this summary. I represented the Planning Board and will appear before the ZBA with the (then) Chair of the Planning Board, Declan O'Connor, who procedurally managed the Nordic Permit Applications process. My comments are purposefully limited, as the role of the Planning Board before the ZBA is as a mandatory party before the ZBA pursuant to Maine statutory law and the Belfast Code of Ordinances; the record speaks for itself, and the Planning Board does not intend to unreasonably infuse itself into the Zoning Board of Appeals' independent review process.

Therefore, there are three primary topics regarding the Planning Board actions that I address in this writing in response to the Appeal Application filed by Upstream Watch:

1. the purpose and authority for adoption of conditions of approval imposed by the Planning Board;
2. the admission of alleged "hearsay" evidence; and,
3. the review of jurisdictional issues of Nordic's right, title, and interest in the Ekrote property.

1. **Conditions of Approval**:

The record reflects that the Planning Board fully considered each review criteria necessary for approval for each Permit Application; each Permit issued has substantial additional requirements identified as conditions of approval. The Board imposed the Conditions to ensure that the broad review criteria in City Ordinances are met and supported with additional assurances as applied to the specific facts and circumstances of this development project. Said conditions address the use, construction, lot development, public access, environmental impact, public safety and a myriad of other performance requirements. This is necessary for the reason that each permit that the Planning Board reviews is different and that each requires individual mechanisms regarding meeting criteria, and ensuring that the standards of review as applied by the Planning

Board are maintained over time.

For example, the Site Plan Review Ordinance applies to any development from as little as 3,000 square feet of structural floor space to the Nordic project of many acres of such floor space. It would be irresponsible of the Planning Board to fail to require development-specific conditions that are consistent with the Comprehensive Plan, the physical development of the land in question, and the operation of the property., as expressly authorized by Title 30-A.

Importantly, the Planning Board is repeatedly authorized and informed by the Zoning Ordinance (Section 102-101), the Site Plan Ordinance (Sections 90-74 and 90-105), and the Shoreland Zoning Ordinance (Section 82-54), which specifically authorize and vest the Planning Board with authority to "approve with conditions" any applications that it reviews. Additionally, Title 30-A MRS § 4352 specifically authorizes a City to adopt land use ordinances that apply conditions of approval that relate to the "physical development or operation" of the property. That is what the Planning Board did.

It is almost automatic in any development these days, and certainly one the size of the Nordic project, that detailed conditions of approval are required to assure clear developmental and operational compliance with the relevant permit review criteria. As you will see, related State of Maine permits issued by Board of Environmental Protection/Department of Environmental Protection and the Bureau of Land Management (submerged lands lease) all contain detailed conditions of approval; permit conditions identify how the City enforces permit requirements.

A 1968 case entitled Waterville Hotel Corp. V. Board of Zoning Appeals; 241 A.2d 50 (ME 1968) has been referenced by the Appellant as legal authority for the premise that conditions of approval are invalid and beyond the scope of the Planning Board authority. The case does not support the argument; the statute that authorizes approval conditions was enacted in 1989 and the Belfast Code of Ordinances that authorizes "approval conditions" was adopted subsequent to 1968. The case actually stands for the proposition that in a zoning ordinance in which a use is listed as "permitted", but there are no standards of review criteria to guide the board in its review of the application, a review board cannot make up its own standards. Such an Ordinance would violate the equal protection clause. ("*We find that the weight of authority holds that where a zoning ordinance attempts to permit municipal officials to grant or refuse permits without the guidance of any standards, equal protection is denied the citizens.*" Id, at 52.)

No such situation existed for the Belfast Planning Board. To the contrary, the Belfast Planning Board had detailed review criteria in each applicable section of the Belfast Code of Ordinances, which it applied to the facts and the testimony in its permit approvals. Importantly, the approval conditions adopted by the Planning Board are rigorous, robust and require Nordic's substantial staff time and resources to comply, and will require close monitoring of project construction and monitoring operations after the development is constructed.

I note that it is entirely unusual for an abutting Appellant, who is not the Applicant, to argue that approval conditions are not authorized or helpful, particularly where the great bulk of approval conditions were adopted to protect abutters and the public during and after development – based on the actual concerns the public brought to the Planning Board. If the Planning Board had

failed to impose conditions of approval, it would have been a gross dereliction of its duty.
In support of these comments, it is appropriate to reference some of the Code provisions and Planning Board's required actions and review, which are all reflected in the record. The Planning Board's issuance of the Permits and conditions of approval included requirements of the City Code of Ordinances for the Planning Board to address the decisions of state and federal agencies, particularly the BEP/DEP, on permits subject to State jurisdiction. Following are examples of a few of the many issues that the Planning Board appropriately considered, which by necessity involved decisions by other permitting authorities:

a. Section 90-42(b)30 of Chapter 90, Site Plan, specifically required the Planning Board to consider requirements of the State Natural Resources Protection Act and Site Location Law in rendering a decision on the Nordic project.

b. Chapter 102, Zoning, Article IX, Division 2, Performance Standards, require the Board to ensure that the applicant has obtained a State NRPA Permit to address wetland requirements; there is no other local requirement than compliance with the State law.

c. The Planning Board needed to consider jurisdictional issues under both Chapter 90, Site Plan and Chapter 82, Shoreland, to determine who was responsible for the regulation of certain impacts associated with the effluent being discharged to Belfast Bay. In most cases, the DEP and ACOE had jurisdictional authority, however, the Board was required to consider if 'pollution' from the Nordic operation would have an adverse impact on the environment, public health and similar concerns.

d. It should be noted that Upstream Watch, in the testimony it provided to the Planning Board at many of the Board's public hearings, routinely referenced DEP Permitting Standards and their concerns regarding how the DEP was not protecting the public interest.

e. The Planning Board also reviewed the Conditions of Approval adopted by the DEP to determine if there were opportunities to coordinate state and local monitoring of Nordic's compliance with both State and Local Ordinance standards.

2. **Hearsay**:

The Appellant has stated that the Planning Board erroneously admitted "hearsay" evidence through the introduction of the various permits issued by the State of Maine. It was entirely appropriate for the Planning Board record to include the related Permits issued by state agencies. The introduction of these documents into the Planning Board record is not hearsay; the Maine Rules of Evidence do not apply to the Planning Board, or to the ZBA. The standard for creation of findings of facts relied upon by a Planning Board in its Permit approvals is one of information, testimony and documentation that reasonable people may rely upon.

Final Permits issued by the State of Maine are information that reasonable people may rely upon, as they do every day. The Planning Board relied upon its own record to determine its facts and legal conclusions.

3. **Right, Title and Interest**:

The jurisdictional issue of right, title and interest has been raised by the Appellant regarding the Ekrote property, which is a shoreland property and intertidal area under which water intake and effluent discharge pipes to the Bay are to be located. Each state, federal and local (Belfast) permitting authority has rejected the argument that Nordic did not have sufficient right, title and interest to pursue its permits through the administrative application processes. The standard the Planning Board applied is tried and true under Maine law. Through its Options to Purchase land and easements, Nordic has demonstrated that it has a "legally cognizable expectation of having the power to use that site in the ways that would be authorized by the permit or license" it seeks. See, Murray v. Inhabitants of Lincolnville, 462 A.2d 40, 43 (Me. 1983)

Additionally, in the pending lawsuit in Waldo County Superior Court, which will address ownership of the Ekrote intertidal area, the Justice has concurred that the requirements for standing to proceed with the Nordic applications for land use permits are not dependent on present actual ownership, and the mere existence of a lawsuit disputing ownership of the intertidal area does not affect the right to proceed with an administrative application for use permits, as Nordic has done under its Option to Purchase an easement from Ekrote. (See, Mabee and Grace v. Nordic et al., Waldo County Superior Court, Docket No. RE-19-18; *Order on NAF's Special Motion to Dismiss*, dated 12-20-19, pg. 7, fn 6; Citing, Southridge Corp. V. Bd. o of Envtle. Prot., 655A.2d 345, 348 (Me. 1995)).

Further, the ZBA should recognize that the Planning Board established specific and often detailed Conditions of Approval in its respective permits to require that Nordic cannot proceed to construction until it produced evidence of its actual ownership of all needed property and easement rights.

For ease of reference, I attach my MEMO to the Planning Board dated August 4, 2020, which is in the Planning Board record, as it then addressed a second Motion to Dismiss the Planning Board jurisdiction regarding the Ekrote property, which motion was denied. This record MEMO provides more detail on the information the Planning Board had before it regarding its finding of the sufficiency of Nordic's standing to proceed at the Planning Board level.

Thank you for your consideration. This letter should be included in the ZBA record.

Sincerely,

KELLY & ASSOCIATES, LLC

William S. Kelly, Esq.

Cc: City of Belfast Code and Planning Office

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 in 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.