

SIGNIFICANT WATER INTAKE AND SIGNIFICANT WATER DISCHARGE/OUTFALL PIPES PERMIT

ISSUE # 1 THAT IS THE SUBJECT OF THIS APPEAL

The Planning Board admitted, encouraged, and relied on hearsay, a form of evidence so unreliable that it is disallowed in court and other proceedings.

The Planning Board, through-out all stages of its review of the Nordic application, considered issues associated with Nordic's construction of the water intake and discharge pipes, and how the location and construction of said pipes may adversely affect coastal resources, private property owners in the area, and persons who use area waters for commercial fishing and recreation. The Board, in its deliberations, considered the following: information in the Nordic application; additional information provided at Planning Board meetings by Nordic and its consultants; public testimony offered by all Parties-in-Interest and by the general public (oral and written comment); information in the DEP MPDES Permit; information Nordic submitted to the Army Corps of Engineers (ACOE) for the ACOE Permits, particularly information related sampling of the Bay for mercury and how construction of the pipes may dislodge mercury; the assessment of the Nordic application and MPDES Permit performed by Mandy Olver, Olver Associates, during the Board's review of Nordic's Final Site Plan application; comments offered by William Kelly, City Attorney, and Wayne Marshall, Project Planner, Code and Planning Department; and comments offered by individual Board members during the public review process.

The Board invited and relied on assessments and analyses of the DEP findings and decisions by two consultants, the City Attorney and the City Planner, none of whom were present at the DEP proceedings. To each of them, information received about the DEP decision making process was hearsay. When those consultants offered their opinions to the Planning Board those opinions became double hearsay. Hearsay is so unreliable that it is disallowed in court and other proceedings.

5. SPECIFIC FINDINGS OF THE BELFAST PLANNING BOARD ON OVERALL SIGNIFICANT WATER INTAKE AND SIGNIFICANT WATER DISCHARGE/OUTFALL PIPE PERMIT REQUIREMENTS.

The Planning Board made the following findings regarding the applicability of certain zoning and shoreland standards for the Nordic application for a Significant Water Intake and Significant Water Discharge/Outfall Pipe Permit:

ISSUE # 2 THAT IS THE SUBJECT OF THIS APPEAL

The application did not meet the performance standards.

5.4 The Board reviewed the performance standards identified in Chapter 102, Zoning, Article IX, Performance Standards, Division 2, Environmental Standards, Section 102-1138, Significant Water Intake or Significant Water Discharge/Outfall Pipe, and those identified in Chapter 82, Shoreland, Article V, Land Use Standards, Division 17, Significant Water Intake or Significant Water Discharge/Outfall Pipe, and found that the Nordic application satisfied these respective performance standards. The Board's specific findings are identified in Section 6 of these Findings, see below.

Nordic's specific failure to meet the performance standards are enumerated, standard by standard, below.

6. SPECIFIC FINDINGS OF THE BELFAST PLANNING BOARD ON THE CHAPTER 102, ZONING, SECTION 102-1138, AND CHAPTER 82, SHORELAND, DIVISION 17, PERFORMANCE STANDARDS.

The Planning Board is responsible for making a finding regarding project compliance with performance standards identified in both Chapter 102, Zoning and Chapter 82, Shoreland, regarding the construction and location of Significant Water Intake/Discharge Pipes. The performance standards in Chapter 102 and Chapter 82 are the same, thus, the Board, in its Findings, references both standards (at the same time) in its Findings regarding compliance with specific Performance Standards.

The Planning Board is permitted to allow the construction and location of a significant water intake and/or significant water discharge/outfall pipe permit subject to Applicant compliance with the following standards.

Chapter 102, Zoning, Section 102-1138, (3) and Chapter 82, Shoreland, Division 17, (3):

The location of any above ground structures associated with the intake or/discharge/outfall pipes complies with the minimum structure setback requirement for the respective Shoreland District, subject to consideration of structure setback requirements that apply to a structure that is a water dependent activity.

The pipes are not exempt from the setback requirements.

The Planning Board found that the intake and discharge pipes are exempt from Shoreland setback requirements for a structure from the High Annual Tide line. First, the pipes will be constructed underground in the Shoreland Zone, and the setback requirement in this standard only applies to above-ground structures.

The above statement that the setback requirement only applies to aboveground structures is not supported anywhere in the regulations. The setback and buffer requirements for nonresidential uses make no mention of or distinction between above ground and below ground structures, and this is appropriate. Recall the definition of “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 offenses utility poles and associated appurtenances, sidewalks and handicap ramps.” Under the city’s rules a structure is a structure and it must comply with the setback and buffering requirements for its district.

The requirement imposed by condition number five of a 15 foot setback contradicts the notion that the setback requirements only apply to aboveground structures. In their condition the planning board imposed a setback on a below ground structure underscoring the point that neither the pipes or any other structure are “exempt”.

Secondly, the Board determined that the pipes are a functionally water dependent activity, and as such, Shoreland setbacks do not apply. The prime purpose of the pipes is to transport water and effluent to and from Belfast Bay.

Nowhere do the regulations provide that a “functionally water dependent activity” is exempt from the setback or buffering requirements. That exemption simply does not exist.

The Planning Board also considered setback requirements for both the Route One South Business Park zoning district and the Residential II zoning district that may apply to the location of the pipes. The Board, based on its finding that the pipe is a structure, determined that the pipes, even though they are located underground, should observe the required 15 foot minimum side setback requirement from a property line for a structure located in the Residential II zoning district. The Board, noting that the pipes are intended to transport water across the Ekrote property from Route One to Belfast Bay determined that the pipes do not need to satisfy either a front or rear structure setback requirement. The Board determined that the imposition of such a setback requirement would nullify the intent of Chapter 102, Zoning, to allow water intake/discharge pipes for the purpose for which they are intended. The Board also determined that the location of the pipes was greater than the amount of side setback requirement for a structure in the Route One South Business Park zoning district.

Either the setback and buffering requirements are waived in which case Condition 5. below is a nullity and anyone claiming a water dependent use in either the Route One S. Business Park zoning district or the residential II zoning district can violate the setback and buffering requirements for their property with impunity or the planning board could read the law the way it's written and enforce it.

In anticipation that the board may offer the argument that the setbacks and buffering requirements were repealed by implication when the extraordinary zone changes of 2018 were imposed, the planning board should recall that the zone changes and regulatory changes that occurred at that time were comprehensive. The drafters of the 2018 comprehensive changes to the zoning regulations elected not to change the setback or buffering requirements. Legislative bodies are presumed to know what they are doing when they draft laws and regulations. One can only conclude that the drafters of the zone changes intended to leave the setback and buffering requirements in place. It is now for the Planning Board and the ZBA to enforce the law.

5. Pipes to Comply with Side Setback Requirement for Residential II Zone.

The location of the underground Intake and Discharge pipes shall comply with the minimum side structure setback requirement of fifteen (15) feet that applies to the Residential II zoning district. Thus, the Intake and Discharge Pipe must be located a minimum of fifteen (15) feet from the property line of the property located at 286 Northport Avenue, Map 29, Lot 37.

ISSUE # 3 THAT IS THE SUBJECT OF THIS APPEAL

Nordic failed to provide evidence that all permits were obtained or could be obtained.

Chapter 102, Zoning, Section 102-1138, (4) and Chapter 82, Shoreland, Division 17, (4): A person who proposes to install a significant water intake or significant water discharge/outfall pipe shall provide evidence to the City that they can or have obtained any and all state and federal permits associated with the location and operation of the proposed water intake or discharge, including ongoing monitoring, that may be required.

The Board noted that most of the intake and discharge pipe will be located in waters in Belfast Bay that are not subject to City Shoreland jurisdiction. Thus, the City largely will rely upon the DEP and ACOE to regulate the location, construction and operation of the intake/discharge pipes in areas located outside the intertidal zone.

Nordic has applied for and received a conditional Submerged Land Lease Permit from the State Department of

Agriculture, Conservation and Forestry to locate the proposed pipes in State waters. Nordic has applied for and received (November 19, 2020) a DEP MPDES and Waste Discharge License from the DEP, as well as a NRPA/SLODA Permit, that are associated with the location, construction and operation of the proposed 3 pipelines. Lastly, Nordic has applied for required ACOE permits, however, to date, the ACOE has not acted on the permit applications. The Belfast Planning Board has established Condition of Approval 1 in this Permit that requires Nordic to provide evidence to the Board of its receipt of all required State and Federal Permits prior to the start of any project construction, and Nordic compliance with all such permit requirements.

The Board notes that it considered information that Nordic submitted to the State Dept of Agriculture, Conservation and Forestry, the DEP and the ACOE, in acting on this and other City Permits, as well as terms of the Submerged Land Lease, MPDES, and SLODA/NRPA Permits that have been granted to date.

Although almost 2 years have passed since its application was filed, Nordic still has not obtained essential permits from the Corps of Army Engineers. There is an additional permit needed for the discharge of fluids from the dewatering of the dredge spoils associated with the installation of the pipes, for which Nordic has not even applied. In addition, the permits that Nordic obtained from the DEP are currently on appeal in the Superior Court. Further, Right Title or Interest to the land through which Nordic wants to install its pipes will be decided in a quiet title action currently on file in the Superior Court, a matter which has not even been scheduled for trial. As consequence Nordic could not say nor can they currently say that they can or “have obtained any and all state and federal permits associated with the location and operation of the proposed water intake or discharge, including ongoing monitoring, that may be required.”

See Attachment A and B

Submitted
Post 8/26/19
mfg

DAVID B. LOSEE
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Declan O'Connor, Acting Chair
Belfast Planning Board
c/o Wayne Marshall, Director
Code and Planning Department
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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

Handwritten marks: 'b' and '0'