

ISSUE REGARDING ALL 5 PERMITS

The Planning Board allowed Nordic to ignore application requirements and substituted therefore “Permit Conditions”.

The Planning Board has no authority or discretion to do that.

Specifically, the Planning Board allowed:

Final Site Plan Permit Application

- Sec 90-42(b)(1) Pollution: The Board allowed Nordic to ignore the application requirements under Sec 90-42(b)(1) and instead substituted Condition 8 in the Final Site Plan Permit as well as relevant conditions from the Significant Groundwater Well Permit. Condition 8 requires Nordic to comply with all state and federal permits and to provide the City with copies of all issued permits. However, as of the date of this appeal, Nordic is still missing an approved Section 404/10 permit from the U.S. Army Corps of Engineers.
- Sec. 90-42(b)(2) Sufficient water: The Board allowed Nordic to ignore the application requirements under Sec 90-42(b)(2) and instead substituted Conditions 3, 8, 27, and 28 in the Final Site Permit Plan, as well as all conditions established in the Significant Groundwater Well Permit. Under Condition 28.1, Nordic is required to “submit compelling evidence to the Planning Board that it has Right, Title and Interest subject to the future receipt of any and all federal, state and City permits, to install any piping and other needed infrastructure to extract surface water from the Little River should the Lower Reservoir Dam be removed at a future date.” Nordic has failed to provide reasonable assurances to the Board to demonstrate that it has Right, Title and Interest to install this infrastructure to extract surface water from the Little River.
- Sec. 90-42(b)(4) Soil erosion and sediment control: The Board allowed Nordic to ignore the application requirements under Sec 90-42(b)(4) and instead substituted Condition 21. Condition 21 in the Final Site Plan Permit itself refers to Condition of Approval 23 in the Natural Resources Protection Act/Site Location of Development Act Permit. Nordic has failed to provide reasonable assurances to the Board that there will be no “unreasonable soil erosion or reduction in the land’s capacity to hold water so that a dangerous or unhealthy condition results.” Further, the Board specifically notes that it has considered “issues related to the potential dispersal of mercury located in the bottom sediments of Belfast Bay during construction of the intake/discharge pipes” (Final Site Plan Permit, p. 25). Nordic has failed to provide reasonable assurances to the Board regarding potential mercury dispersal in regards to this requirement.
- Sec. 90-42(b)(5) Highway or public road congestion: The Board allowed Nordic to ignore the application requirements under Sec 90-42(b)(5) and instead substituted Condition 23 in the Final Site Plan Permit, as well as relevant conditions in the Zoning Use Permit. Nordic has failed to provide reasonable assurances to the Board that “the proposed development will not cause unreasonable highway or public road congestion or unsafe conditions with respect to the use of the highways or public roads existing or proposed.”
- Sec. 90-42(b)(6) Sewage waste disposal: The Board allowed Nordic to ignore the application requirements under Sec 90-42(b)(6) and instead substituted Condition 8 in the Final Site Plan Permit, which requires compliance with all approved state and federal permits. Nordic has failed to provide reasonable assurances that the the project will provide “adequate sewage waste disposal in compliance with federal, state and local laws, rules, ordinances and regulations.”
- Sec. 90-42(b)(7) Municipal solid waste and sewage waste disposal: The Board allowed Nordic to ignore the application requirements under Sec 90-42(b)(7) and instead substituted Conditions 10, 14, 15, 16, 17, and 18. Nordic has failed to provide reasonable assurances to the Board that the project will not cause an “unreasonable burden” on the city’s ability to dispose of solid waste and sewage, e.g. impacts to long-term capacity of the treatment plant impacts to waste disposal and sewage rates.
- Sec. 90-42(b)(10) Financial and technical capacity: The Board allowed Nordic to ignore the ap-

plication requirements under Sec 90-42(b)(10) and instead substituted Conditions 12, 20, 21, 35, 36, and relevant conditions in the Significant Groundwater Well Permit. Nordic has failed to provide reasonable assurances to the Board regarding its “adequate financial and technical ability to develop the project.” As the Board states in the Final Site Plan Permit, “Nordic does not currently have specific financing in place for the project” (p. 32).

- Sec. 90-42(b)(11) Surface waters; outstanding river segments: The Board allowed Nordic to ignore the application requirements under Sec 90-42(b)(11) and instead substituted Condition 22 in the Final Site Plan Permit, as well as relevant conditions in the NRPA/SLODA Permits. Nordic has failed to provide reasonable assurances to the Board regarding whether the proposed project “will not adversely affect the quality of that body of water or unreasonably affect the shoreline of that body of water.”

- Sec. 90-42(b)(12) Groundwater: The Board allowed Nordic to ignore the application requirements under Sec 90-42(b)(12) and instead substituted relevant conditions in the Significant Groundwater Well Permit. Nordic has failed to provide reasonable assurances to the Board that the proposed project will not “alone or in conjunction with existing activities, adversely affect the quality or quantity of groundwater or any public or private water source.”

- Sec. 90-42(b)(13) Flood areas: The Board allowed Nordic to ignore the application requirements under Sec 90-42(b)(13) and instead substituted Condition 22, as well as relevant conditions in the NRPA/SLODA Permits. Nordic has failed to provide reasonable assurances to the Board that the proposed project is or is not located in a “floodprone area” and that all structures will be constructed with their lowest floor at least two feet above the 100-year elevation.

- Sec. 90-42(b)(16) Stormwater: The Board allowed Nordic to ignore the application requirements under Sec 90-42(b)(16) and instead substituted Condition 20. Condition 20 Stormwater Management requires Nordic to “construct all stormwater management improvements identified on the approved Site Plan to the standards identified in the Nordic Plans.” Nordic has failed to provide reasonable assurances to the Board that the “standards identified in the Nordic Plans” are in compliance with local, state, and federal requirements for stormwater management. Condition 20 also references conditions in the NRPA/SLODA Permits, specifically regarding third-party inspections under Condition 23 and engineer oversight of stormwater infrastructure installation under Condition 26. Condition 20.4 requires Nordic to be “responsible for maintaining all stormwater improvements in good working condition,” however the condition does not establish timelines for maintenance. Nordic has failed to provide reasonable assurances to the Board to ensure that stormwater management practices and structures will be maintained over the life of the project.

- Sec. 90-42(b)(18) Solid waste management: The Board allowed Nordic to ignore the application requirements under Sec 90-42(b)(18) and instead substituted Conditions 14, 15, 16, 17, and 18. Nordic has failed to provide reasonable assurances to the Board that the proposed project will provide for the “adequate disposal of solid wastes.”

- Sec. 90-42(b)(19) Exterior lighting: The Board allowed Nordic to ignore the application requirements under Sec 90-42(b)(19) and instead substituted Condition 25.

- Sec. 90-42(b)(21) Noise: The Board allowed Nordic to ignore the application requirements under Sec 90-42(b)(21) and instead substituted Condition 19. Nordic has failed to provide reasonable assurances to the Board that the proposed project will “not create unreasonable interference with use and enjoyment of neighboring properties”?

- Sec. 90-42(b)(23) Landscaping: The Board allowed Nordic to ignore the application requirements under Sec 90-42(b)(23) and instead substituted Condition 26. Nordic has failed to provide reasonable assurances to the Board that the proposed project “breaks up parking areas, softens the appearance of the development and protects abutting properties from any significant adverse impacts of the development” in compliance with the standards enumerated in Chapter 98.

- Sec. 90-42(b)(25) Location of off-street parking: The Board allowed Nordic to ignore the application requirements under Sec 90-42(b)(25) and instead substituted Condition 24. Nordic has failed to provide reasonable assurances that the proposed project is in compliance with the standards enumerated in Chapter 98.

- Sec. 90-42(b)(26) Hazardous waste: The Board allowed Nordic to ignore the application require-

ments under Sec 90-42(b)(26) and instead substituted Condition 17. Nordic has failed to provide reasonable assurances that the proposed project is “in compliance with state and federal laws and when hazardous waste is generated or stored on-site,” particularly in light of the identified potential mercury dispersal in Belfast Bay (Final Site Plan Permit, p. 25).

- Sec. 90-42(b)(27) Prevention or control of air pollution: The Board allowed Nordic to ignore the application requirements under Sec 90-42(b)(27) and instead substituted Condition 12. The requirements of 90-42(b)(27) specifically state that “It is not the intent of this provision to merely require compliance with state or federal air quality standards, but rather to enforce a standard which may be more encompassing and strict than those state and federal standards as presently constituted.” Under Condition 12.2, the Board specifically acknowledges that “[t]o date, however, Nordic has provided no specific information regarding the extent of improvements required to CMP’s facilities, how such improvements (or lack thereof) could impact electrical service to Belfast and surrounding communities, when such improvements may be constructed and who will pay for such, and how such improvements may interface with Nordic’s on-site power generation facilities.” Further, the Board under Condition 12.2 goes on to state that “...only limited information has been provided to date to the Planning Board regarding Nordic’s use of electricity...” Nordic has failed to provide reasonable assurances to the Board that the proposed project will not create “a substantial risk of air pollution, whether by dust, chemicals, odor or otherwise, which would pose a significant risk of harm to local populations within the city or injury to wildlife, vegetation or to property, or harm to use and enjoyment or surrounding property.”

- Sec. 90-42(b)(29) Adequacy of waste disposal: The Board allowed Nordic to ignore the application requirements under Sec 90-42(b)(29) and instead substituted Conditions 10, 14, 15, 16, 17, and 18. Nordic has failed to provide reasonable assurances to the Board that “all quantities and types of waste generated by the proposed use can be dealt with and disposed of while maintaining safe and healthful conditions.”

- Sec. 90-42(b)(30) Additional standards: The Board allowed Nordic to ignore the application requirements under Sec 90-42(b)(30) and instead substituted Condition 8, as well as referencing all relevant conditions in the Site Plan Permit, Zoning Use, Shoreland, Significant Groundwater Well, and Intake/Discharge Permits.

Significant Groundwater Well Permit

- City Performance Standards identified in Chapter 102, Zoning, Article VIII, Supplementary District Regulations, Division 7, Significant Groundwater Well Permits, Section 102-1079, Performance Standards – Requirement 7 as identified in Significant Groundwater Well Permit: The Board allowed Nordic to ignore the application requirements under Requirement 7 and instead substituted Condition 9. This performance standard specifically authorizes the Board to “establish the maximum daily, weekly, monthly and annual quantity of groundwater that may be extracted.” Nordic has failed to provide reasonable assurances that it will comply with the extraction rate identified by the City under Condition 9.

- City Performance Standards identified in Chapter 102, Zoning, Article VIII, Supplementary District Regulations, Division 7, Significant Groundwater Well Permits, Section 102-1079, Performance Standards – Requirement 8 as identified in Significant Groundwater Well Permit: The Board allowed Nordic to ignore the application requirements under Requirement 8 and instead substituted Condition 12 and Condition 35 in the Final Site Plan Permit. Nordic has failed to provide reasonable assurances or “demonstrate that it possesses the expertise and financial resources to construct and operate the requested significant groundwater wells and to adhere to the conditions of approval adopted by the City Planning Board.”

Intake/Discharge Permit

- Chapter 102, Zoning, Section 102-1138, (2) and Chapter 82, Shoreland, Division 17, (2): The Board allowed Nordic to ignore the application requirements under Chapter 102, Zoning, Section 102-1138, (2) and Chapter 82, Shoreland, Division 17, (2) and instead substituted Conditions 6 and 7 of the Intake/Discharge Permit. Nordic has failed to provide reasonable assurances that it will restore the area disturbed by installation of the intake/discharge pipe “so as to prevent both short-term and long-term soil erosion and sedimentation and

the area is revegetated to present a natural appearance that is consistent with the surrounding area.”

- Chapter 102, Zoning, Section 102-1138, (4) and Chapter 82, Shoreland, Division 17, (4): The Board allowed Nordic to ignore the application requirements under Chapter 102, Zoning, Section 102-1138, (4) and Chapter 82, Shoreland, Division 17, (4) and instead substituted Condition 1. As stated previous regarding Condition 8 of the Final Site Plan Permit, as of the date of this appeal, Nordic is still missing an approved Section 404/10 permit from the U.S. Army Corps of Engineers. Nordic has failed to provide “evidence” or reasonable assurances “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.”

Zoning Use Permit

- Chapter 102, Article VIII, Supplementary District Regulations
 - o Division 2. Sec. 102-940, Supplementary District Regulations – Screening of Outside Storage Areas – Dumpsters: The Board allowed Nordic to ignore the application requirements under Sec. 102-940 and instead substituted Condition 14.
 - o Division 3. Sec. 102-961, Supplementary District Regulations – Off-Street Parking Facilities – Required Facilities: The Board allowed Nordic to ignore the application requirements under Sec. 102-961 and instead substituted Condition 24 in this permit and the Site Plan Permit.
 - o Division 7. Significant Groundwater Wells: The Board allowed Nordic to ignore the application requirements under Division 7 and instead substituted all conditions under the Significant Groundwater Well Permit.
- Chapter 102, Zoning, Article IX, Performance Standards, Division 2, Environmental Performance Standards
 - o Sec. 102-1123 Erosion control: The Board allowed Nordic to ignore the application requirements under Section 102-1123 and instead substituted Condition 21.
 - o Sec. 102-1124 Control of stormwater run-off: The Board allowed Nordic to ignore the application requirements under Section 102-1124 and instead substituted Condition 20.
 - o Sec. 102-1125(a) and (b) Wastewater pollution: The Board allowed Nordic to ignore the application requirements under Section 102-1125(a) and (b) and instead substituted Condition 10. Nordic has failed to provide reasonable assurances that wastewater discharged into the City’s sewers “shall be in such quantities and/or of such quality as to be compatible with federal and state standards and in compliance with Chapter 62, Article II (of the City Code of Ordinances).”
 - o Sec. 102-1125 (c) Wastewater pollution: The Board allowed Nordic to ignore the application requirements under Section 102-1125(c) and instead substituted Condition 8, as well as relevant conditions in the Significant Groundwater Well Permit, Intake/Discharge Permit, Site Plan Permit, and Shoreland Permit. As of the date of this appeal, Nordic is still missing an approved Section 404/10 permit from the U.S. Army Corps of Engineers.
 - o Sec. 102-1126 Air pollution: The Board allowed Nordic to ignore the application requirements under Section 102-1126 and instead substituted Condition 12 and 39. Nordic has failed to provide reasonable assurances to the Board that the proposed project would not “cause emission of dust, fly ash, fumes, vapors or gases which will have an adverse impact on human health, animals, vegetation, or property, or strain persons or property, at any point beyond the lot line of the commercial or industrial establishment creating that emission.”
 - o Sec. 102-1127 Odors: The Board allowed Nordic to ignore the application requirements under Section 102-1127 and instead substituted Conditions 14, 15, 16, 17, and 18. Nordic has failed to provide reasonable assurances to the Board that the proposed project will not “produce noxious or harmful odors perceptible beyond the lot lines, either at ground or habitable elevation.”
 - o Sec. 102-1128 Glare: The Board allowed Nordic to ignore the application requirements under Section 102-1128 and instead substituted Condition 25.
 - o Sec. 102-1129 Noise: The Board allowed Nordic to ignore the application requirements under Section 102-1129 and instead substituted Condition 19.

- o Sec. 102-1130 Gravel extraction: The Board allowed Nordic to ignore the application requirements under Section 102-1130 and instead substituted Condition 21. Nordic has failed to provide reasonable assurances to the Board that the proposed project will comply with the Site Location Law, 38 M.R.S.A. §§ 481-490, and department of environmental protection regulations pursuant to the Site Location Development Law, 38 M.R.S.A. chapters 371-377, and the provisions of chapter 90, pertaining to site plan review.
- o Sec. 102-1131 Heating systems and oil storage tanks: The Board allowed Nordic to ignore the application requirements under Section 102-1131 and instead substituted Condition 31.
- o Sec. 102-1134 Uses in wetlands: The Board allowed Nordic to ignore the application requirements under Section 102-1134 and instead substituted Condition 22.
- o Sec. 102-1135 Uses in floodplains: The Board allowed Nordic to ignore the application requirements under Section 102-1135 and instead substituted Condition 29 and relevant conditions in the Shoreland Permit.
- o Sec. 102-1137. Significant Water Intake and Significant Water Discharge/Outfall Pipes: The Board allowed Nordic to ignore the application requirements under Section 102-1137 and instead substituted relevant conditions in the Intake/Discharge Permit.

Shoreland Permit

- Section 82-56(1) Will not result in unsafe conditions: The Board allowed Nordic to ignore the application requirements under Section 82-56(1) and instead substituted Condition 29 in the Site Plan Permit and Zoning Use Permit. Nordic has failed to provide reasonable assurances to the Board that the proposed project will “not result in unsafe conditions,” particularly in regards to the Upper Reservoir Dam on the Little River.
- Section 82-56(2) Will not result in water pollution, erosion, or sedimentation to surface waters: The Board allowed Nordic to ignore the application requirements under Section 82-56(2) and instead substituted relevant conditions in this Permit regarding erosion and sediment control as well as stormwater management.
- Section 82-56(3) Will adequately provide for the disposal of all wastewater: The Board allowed Nordic to ignore the application requirements under Section 82-56(3) and instead substituted conditions identified in the MEDPES Permit and Waste Discharge License (issued November 19, 2020) and relevant conditions in the Site Plan Permit requiring Nordic to comply with its MEPDES Permit.
- Section 82-56(5) Will conserve shoreland vegetation: The Board allowed Nordic to ignore the application requirements under Section 82-56(5) and instead substituted conditions in the Shoreland Permit and the Site Plan Permit that require the City’s purchase of land adjacent to the lower reservoir of the Little River (24 acres in Belfast and 16 acres in Northport). Nordic has failed to provide reasonable assurances that the proposed project “will conserve shoreland vegetation.”
- Section 82-56(10) Will avoid problems associated with floodplain development and use: The Board allowed Nordic to ignore the application requirements under Section 82-56(10) and instead substituted Condition 29.

ARGUMENT:

It is axiomatic that administrative agencies have only that authority provided to them by the legislative bodies that created them. Administrative agencies have no “inherent” powers.

The Belfast Planning Board is charged with the duty to review land-use applications and to determine if those applications meet the application requirements of the Code sections under which applications are filed. The various sections of the Belfast Code provide application requirements. Where an applicant fails to submit sufficient information to demonstrate it meets all the application requirements, the board must deny the application. Where an applicant submits to the planning board sufficient information to demonstrate it meets all of the application requirements of the code sections under which

it is applying the board must approve or approve with conditions the application. The planning Board may attach conditions to approvals as such conditions may have been authorized by the code section under which approval is sought. Such permit conditions are meant to insure compliance with the permit, not to allow an applicant to qualify for a permit after the permit has been issued.

Nowhere in the Belfast Code is the Planning Board authorized to determine a permit may be granted where the applicant has failed to meet all of the application requirements. Nowhere in the Belfast Code is authority granted to the Planning Board to decide which application requirements a particular applicant must meet in order to be granted approval and which application requirements an applicant may satisfy at a later time as a permit condition. Yet in the Nordic application the Belfast Planning Board, without authorization and contrary to law, allowed Nordic to meet application requirements by agreeing to satisfy application requirements by permit conditions, so-called, to be satisfied long after the application was granted.

The authority to insist upon compliance with application requirements or to defer compliance with application requirements to permit conditions to be satisfied after the award of the permit does not exist. Nor can it.

There is no delegation of that deferral authority to the Planning Board by the legislative body of the city of Belfast. The Planning Board does not have that authority as an "inherent" power. There is an important reason for that.

In the seminal case of Waterville Hotel Corp. v. Board of Zoning Appeals, 241 A.2d 50, (1968) the Maine Supreme Court declared that any discretionary authority granted to an administrative agency by a legislative body must be accompanied by "definite standards for the guidance and control of the permit issuing officers." The Maine Supreme Court continued, "without definite standards an ordinance becomes an open door to favoritism and discrimination, a ready tool for the suppression of competition through the granting of authority to one in the withholding from another. A zoning ordinance cannot permit administrative officers or boards to pick and choose the recipients of their favors."

"We find that the weight of authority holds that were zoning ordinance attempts to permit municipal officials to grant or refuse permits without the guidance of any standards, equal protection is denied the citizens."

As the above enumeration reveals, the Belfast Planning Board exercised discretion to effectively waive certain application requirements in favor of after-the-fact permit conditions when the board had no such authority. Even if it had that authority, the authority was not delimited by standards provided by the legislative body. In so doing it exceeded its uthority and usurped the legislative function of the City Council.

Each of the above enumerated actions of the Planning Board are unlawful and violate equal protection of the laws and must be set aside. Without the benefit of the actions so set aside the permits cannot stand and the Zoning Board of Appeals must direct the Planning Board to vacate its approvals or do so itself.