IN THE MATTER OF NORDIC AQUAFARMS INC.

NORDIC AQUAFARMS, INC. Belfast, Northport **and Searsport** Waldo County, Maine A-1146-71-A-N L-28319-26-A-N L-28319-TG-B-N L-28319-4E-C-N L-28319-L6-D-N L-28319-TW-E-N W-009200-6F-A-N	)	APPLICATIONS FOR AIR EMISSION, SITE LOCATION OF DEVELOPMENT, NATURAL RESOURCES PROTECTION ACT, and MAINE POLLUTANT DISCHARGE ELIMINATION SYSTEM (MEPDES)/WASTE DISCHARGE LICENSES **MOTION TO VACATE THE BOARD'S 11-19-2020 ORDERS GRANTING PERMITS AND LICENSES TO NORDIC AQUAFARMS INC. BASED ON LACK OF ADMINISTRATIVE STANDING AND JUSTICIABILITY SUBMITTED BY MGL INTERVENORS AND INTERESTED AND AGGRIEVED PARTY THE FRIENDS OF THE HARRIET L. HARTLEY CONSERVATION AREA**

Dated: July 5, 2020

This matter is before the Board of Environmental Protection ("Board" or "BEP") on remand from the Law Court of the 80C appeal of the Board's 11-19-2020 Orders, in BCD-22-48. On remand, Jeffrey R. Mabee and Judith B. Grace (Mabee-Grace" or "Mabee and Grace"), the Maine Lobstering Union and commercial crab and lobster license holders David Black and Wayne Canning ("the Lobstering Representatives") (together "MGL Intervenors") and Interested and Aggrieved party the Friends of the Harriet L. Hartley Conservation Area ("Friends) (collectively herein "Petitioners" or "MGLF"), move to vacate the Board's 11-19-2020 Orders, granting Nordic Aquafarms Inc. ("Nordic") the above-referenced permits and licenses.

This motion is filed based on Nordic's lack of title, right or interest ("TRI") in all land sought by Nordic to be used for development and use. The Law Court's 2-16-2023 Decision in *Mabee v. Nordic Aquafarms Inc.,* 2023 ME 15, 290 A.3d. 79, determined as a matter of law, that Nordic has never had the TRI in all land proposed for development to obtain of maintain permits or licenses from the Board. Further, Nordic's lack of TRI means that Nordic has always lacked the administrative standing to present the Board with a justiciable issue on which to act.

Here, because ***Nordic has always lacked administrative standing***, Nordic never presented a justiciable issue to the Board for substantive action. Thus, the prior Orders entered by the Board on 11-19-2020 should be vacated because those Orders were entered based on: (i) errors of law (revealed in part by the Law Court 2-16-2023 Decision, 2023 ME 15) and (ii) a lack of evidence in the Administrative Record supporting Nordic's claim of title, right or interest in all land for which it seeks (and was erroneously granted) permits and licenses from the Board.

In addition, Nordic cannot demonstrate TRI currently exists based on the either the 8-12-2021 Condemnation Order entered by the City of Belfast or the 9-3-2021 easement granted to Nordic by the City of Belfast ("9-3-2021 City-to-Nordic easement"; WCRD Book 4704, Page 158). Indeed, in pursuing its ultra vires use of eminent domain to benefit Nordic, the City of Belfast has even illegally attempted to take land that is outside the municipal boundaries of Belfast, pursuant to the definition of "mouth of a river" established by the Law Court in its 2-16-2023 Decision. *Mabee v. Nordic Aquafarms Inc.,* 2023 ME 15, ¶¶ 34-35.

I. Background

Chapter 2, Section 11(D) defines the requisite title, right or interest TRI") that an Applicant seeking permits or licenses from the Department must have *and maintain*, in relevant part as follows:

> D. **Title, Right or Interest.** Prior to acceptance of an application as complete for processing, *an applicant shall demonstrate to the Department's satisfaction sufficient title, right or interest in all of the property that is proposed for development or use. An applicant must maintain sufficient title, right or interest throughout the entire application processing period.* Methods of proving title, right or interest include, but are not limited to, the following:
>
> (1) When the applicant owns the property, a copy of the deed(s) to the property must be supplied;
>
> (2) When the applicant has a lease or easement on the property, a copy of the lease or easement must be supplied. The lease or easement must be of sufficient duration and terms, as determined by the Department, to permit the proposed construction and reasonable use of the property, including reclamation, closure and post closure care, where required. *If the project requires a submerged lands lease from the State, evidence must be supplied that the lease has been issued, or that an application is pending*;
>
> (3) When the applicant has an option to buy or lease the property, a copy of the option agreement must be supplied. *The option agreement must be sufficient, as determined by the Department, to give rights to title, or a leasehold or easement of sufficient duration and terms to permit the proposed construction and use of the property including closure and post closure care, where required;*

> (4) When the applicant has eminent domain power over the property, *evidence must be supplied as to the ability and intent to use the eminent domain power to acquire sufficient title, right or interest to the site of the proposed development or use*;
>
> *The Department may return an application, after it has already been accepted as complete for processing, if the Department determines that the applicant did not have, or no longer has, sufficient title, right or interest*. No fees will be refunded if an application is returned for lack of continued title, right or interest.

(emphasis supplied).

The Law Court defines the "permitting process" during which TRI must be maintained by an applicant as including the period of judicial review of an 80C appeal of permitting decisions by an agency.[1]

Here, the Decision of the Law Court entered on February 16, 2023 made determinations that establish, *as a matter of law*, that Nordic has always lacked TRI in all of the land proposed for development or use, including: (i) upland Lot 36; and (ii) the intertidal land adjacent to Lot 36. As a result, the Board should return Nordic's application that was erroneously accepted as complete, and vacate the 11-19-2020 Orders granting Nordic permits and licenses.

A. Law Court Decision on Disputed Title Claims

On February 16, 2023, the Law Court determined that: "Mabee and Grace own the intertidal land abutting their own upland property and the intertidal land abutting the upland properties of the Schweikerts, the Eckrotes, and Morgan [Lots 37, 36 and 35 respectively].

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[1] *Madore v. Maine Land Use Regul. Comm'n*, 1998 ME 178, ¶ 17, 715 A.2d 157, 162 (A litigant must possess a present right, title, or interest in the regulated land which confers lawful power to use that land or control its use when invoking the jurisdiction of the court and throughout any period of appellate review.).

The Law Court has consistently held that a party may not seek judicial (or administrative) action concerning land use without having an interest in the property at issue. *See Halfway House, Inc.*, 670 A.2d 1377, 1379 (Me. 1996); *Walsh v. City of Brewer*, 315 A.2d 200, 207 (Me. 1974). Absent that interest, the applicant does not present an actual controversy to be resolved by judicial (or administrative) action. *Madore v. Maine Land Use Regulation Comm'n*, 1998 ME 178, ¶9, 715 A.2d. 157, 160-161. *See also, Homeward Residential, Inc. v. Gregor,* 2015 ME 108, ¶24, 122 A.3d 947, 954-955 ("The court could not decide the merits of the case when the plaintiff lacked standing. . . . Instead, the court could only dismiss the action. Because the court addressed the merits of the complaint for foreclosure in its judgment, we vacate the judgment in its entirety and remand for an entry of a dismissal without prejudice."); *Witham Family Ltd. P'ship*, 2015 ME 12, ¶7, 110 A.3d 642 ("Courts can only decide cases before them that involve justiciable controversies."); *Bank of Am., N.A. v. Greenleaf,* 2015 ME 127, ¶7-¶9, 124 A.3d 1122, 1124-1125; *Conservation Law Found. v. LePage,* 2018 Me. Super. LEXIS 156, *9-10.

Mabee and Grace's property is outlined in the solid and dashed green lines in Figure 5." *Mabee v. Nordic Aquafarms, Inc., et al.,* 2023 ME 15, ¶¶ 14 and 17 (image of Figure 5 below).

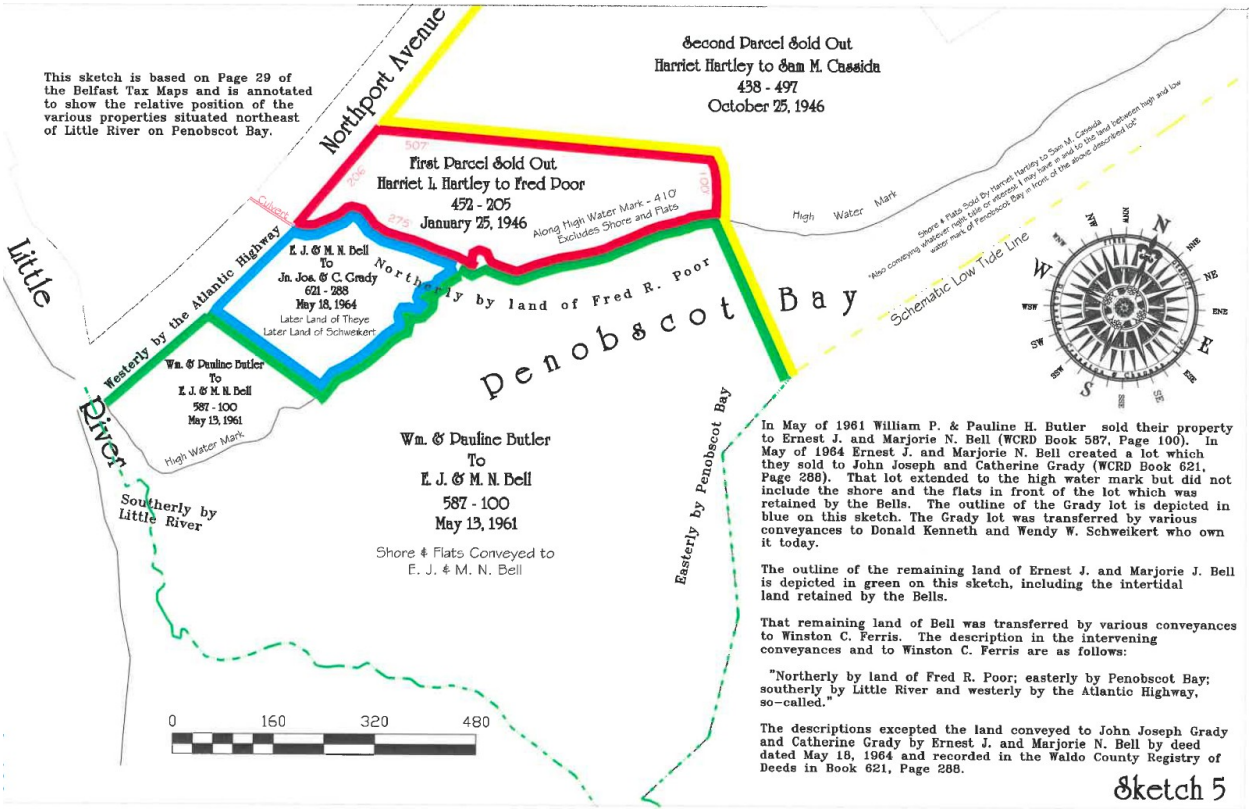

FIGURE 5

The Law Court also determined that Mabee and Grace created an enforceable conservation easement on their intertidal land on April 29, 2019, that is held by Friends (*Id.* at ¶¶ 59, 61); and that a restriction, imposed in the 1946 deed from Mabee-Grace's predecessor-in-interest Harriet L. Hartley to the Eckrotes' predecessor-in-interest Fred R. Poor, limiting the use of the Poor parcel (which today includes Lot 36 and much of Lot 35) to "residential purposes only," benefiting the holder of the land now owned by Mabee and Grace, ***runs with the land conveyed to Poor***, binding Poor's successors. *Mabee v. Nordic Aquafarms, Inc., et al.,* 2023 ME 15, ¶ 58 and f.n. 13. That restriction expressly prohibits and "for-profit" business being conducted on this parcel without the agreement of Harriet L. Hartley, her heirs or assigns. (WCRD Book 452, Page 205 at 206).

Holders of land benefitted by Hartley's "residential purposes only" servitude with the right to enforce that restriction include Mabee-Grace and Friends. Successors of Poor bound by the "residential purposes only" servitude include the Eckrotes, the City of Belfast and Nordic.

The 2-16-2023 Law Court Decision establishes, *as a matter of law*, that Nordic does not have, *and never could have had*, actual title, right or interest to use Belfast Tax Map 29, Lot 36 and the adjacent intertidal land in the manner authorized by the permits and licenses granted by the Board of Environmental Protection ("Board" or "BEP") in November 2020. Thus, Nordic never presented the Board with a justiciable issue and the 11-19-2020 Orders should be vacated.[2]

Contrary to Nordic's assertions, as discussed in more detail below, the legal impediments to the use of Lot 36 and the adjacent intertidal land have not been, and *cannot* be, removed -- *even by the ultra vires use of eminent domain by the City of Belfast to benefit Nordic*.[3] Accordingly, Nordic cannot cure its lack of TRI and administrative standing based on the ultra vires exercise of eminent domain by the City to benefit Nordic. Rather, vacation of the 11-19-2020 Orders by the Board is necessary.

There can be no finding of "sufficient" title, right or interest, where the applicant has been judicially determined to have no actual title, right or interest in the land proposed for development and use.

This is particularly the case where, as here, the Law Court has definitively determined that: (i) ***the Eckrotes never owned the intertidal land on which Lot 36 fronts*** and therefore the Eckrotes never had the legal capacity to grant Nordic an easement or option to use that intertidal land;[4] (ii)

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[2] *Homeward Residential, Inc. v. Gregor,* 2015 ME 108, ¶24, 122 A.3d 947, 954-955 ("The court could not decide the merits of the case when the plaintiff lacked standing. . . . Instead, the court could only dismiss the action. Because the court addressed the merits of the complaint for foreclosure in its judgment, we vacate the judgment in its entirety and remand for an entry of a dismissal without prejudice."); *Witham Family Ltd. P'ship*, 2015 ME 12, ¶7, 110 A.3d 642 ("Courts can only decide cases before them that involve justiciable controversies."); *Bank of Am., N.A. v. Greenleaf,* 2015 ME 127, ¶7-¶9, 124 A.3d 1122, 1124-1125; *Conservation Law Found. v. LePage,* 2018 Me. Super. LEXIS 156, *9-10.

[3] The evade the legal consequences of an adverse ruling by the State Courts in the title claims case (BELSC-RE-2019-18 and Law Court Docket No. WAL-22-19), the City of Belfast and Nordic entered an ultra vires contract in which the City agreed to use its eminent domain powers to "take" Mabee-Grace's intertidal land adjacent to Lot 36 and their right to enforce the "residential purposes only" servitude. The 8-12-2021 Condemnation Order, entered based on the 4-12-2021 ultra vires contract, was recorded on 8-16-2021 in Waldo County Registry of Deed (WCRD Book 4693, Page 304). Petitioners and Intervenor Upstream Watch filed a lawsuit challenging the City's use of eminent domain on the same day in the Waldo County Superior Court in RE-2021-007. (WCRD Book 4693, Pages 303).

[4] The Law Court has long held that: "One can only convey, *or grant an easement in*, land that he has received." *Dorman v. Bates Mfg. Co.*, 82 Me. 438, 19 A. 915, 916 (1890). *See also,* "[A] grantor may not convey more than

Lot 36 has been burdened since 1946 by a "residential purposes only" servitude, that *runs with the land* and binds Fred R. Poor's successors in interest (including the Eckrotes, the City of Belfast and Nordic) prohibiting these successors from conducting any for-profit business on Lot 36 in the absence of agreement of the current holders of Harriet L. Hartley's retained dominant estate (including Mabee-Grace and Friends) – *and* ***Mabee-Grace and Friends do <u>not</u> agree,*** (*Mabee v. Nordic Aquafarms Inc.,* 2023 ME 15, ¶ 58 and n. 13); and (iii) the Conservation Easement on the intertidal land adjacent to Lot 36 has been judicially-determined to be enforceable by the Law Court (*Mabee v. Nordic Aquafarms Inc.,* 2023 ME 15, ¶¶ 59-61).[5]

Consequently, the Law Court's 2-16-2023 Decision conclusively established, *as a matter of law*, that Nordic never had TRI in all of the land proposed for development and use at the time that the Board granted Nordic permits and licenses in November 2020. Indeed, the Law Court's determinations in the 2-16-2023 Decision in *Mabee v. Nordic Aquafarms Inc.,* 2023 ME 15, 290 A.3d 79, establish, *as a matter of law*, that ***Nordic still lacks TRI*** in all of the land for which Nordic seeks, and previously obtained, permits and licenses from the Board. Accordingly, the prior 2020 Orders must be vacated by the Board on remand from the Law Court, and Nordic's pending applications should be dismissed as incomplete and returned pursuant to 06-096 C.M.R. ch. 2, § 11.D.

The Board repeatedly argued to the Law Court, in briefs, filings and motions drafted by AAG Bensinger, that TRI ceases to be relevant after the Department (Board) has entered Orders granting permits and licenses to an applicant. Petitioners have consistently argued that AAG Bensinger's supposition is in contravention of the Law Court's prior precedents which define the permitting process as including all stages of the Rule 80C litigation challenging final agency action granting permits, licenses and leases. *See,* footnote 1, *supra.*

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what he or she owns;" *Almeder v. Town of Kennebunkport*, 2019 ME 151, ¶ 28, 217 A.3d 1111, 1121, *citing, Eaton v. Town of Wells*, 2000 ME 176, ¶ 19, 760 A.2d 232.

[5] Additionally, a review of Schedule B of the 8-12-2021 Condemnation Order reveals that the City did not even attempt to extinguish Friends right to enforce the "residential purposes only" servitude on Lot 36. Further, in a 3-2-2022 Stipulated Judgment in RE-2021-007, the Waldo Superior Court determined that the Conservation Easement is *still* enforceable after the filing of the 8-12-2021 Condemnation Order, because the Conservation Easement was not and could not be amended or terminated by eminent domain and/or the recording of the 8-12-2021 Condemnation Order. See discussion, *infra*.

On June 29, 2023, in denying the Board's Motion for Reconsideration of the May 10, 2023 Remand Order, the Law Court rejected the Board's arguments advanced by AAG Bensinger, ironically citing a prior case handled by AAG Bensinger (Margaret B. McClosky), "*Hannum v. Board of Environmental Protection,* 2003 ME 123, ¶ 17 (remanding to the BEP where the Court could not ascertain from the BEP decision whether the BEP would have reached a different conclusion in the absence of a finding that the Court found unsupported by evidence in the record)." May 10, 2023 Law Court Remand Order, p. 3.

In sum, the Law Court has remanded] this case to the Board to require the Board to re-evaluate its prior TRI determinations based on the Law Court's 2-16-2023 Decision. Specifically, the May 10, 2023 Order states in relevant part as follows:

> Under the doctrine of primary jurisdiction, "courts should avoid ruling, on appeal, on matters committed by law to the decision-making authority of an administrative agency before the administrative agency has first had an opportunity to review and decide the facts on the merits of the matter at issue." *Christian Fellowship & Renewal Ctr. v. Town of Limington,* 2006 ME 44, ¶ 40, 896 A.2d 287, 298. When, as here, it is unclear whether an approval challenged on appeal would have been issued given intervening circumstances, the appropriate response is to remand the matter ot the agency that issues the approval to make that determination. *Cf. Hannum v. Board of Environmental Protection,* 2003 ME 123 ¶ 17 (remanding to the BEP where the Court could not ascertain from the BEP decision whether the BEP would have reached a different conclusion in the absence of a finding that the Court found unsupported by evidence in the record).
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> We therefore remand these two appeals to the Superior Court in turn to remand the matters to the BPL and the BEP so that the agencies may determine the impact, if any, on *Mabee I* [2023 ME 15] on the challenged approvals. The agencies may choose to make their determinations on the existing administrative records or expand the records to include materials such as a reference subsequent conveyance after the exercise of eminent domain power that Nordic suggests should result in no change to the viability of the approvals. We leave to the BPL and the BEP to determine the scope of the proceedings on remand.
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> We do not retain jurisdiction, nor should the Superior court or the Business and Consumer court. . . . Upon the issuance of the Agencies' determinations on remand regarding the viability of the approvals, any party is free to raise in a new appeal any argument raised previously and any new argument arising from the agency proceedings on remand.

May 10, 2023 Law Court Remand Order, pp. 3-4.

B. Other Grounds for Vacating the 11-19-2020 Orders

Further, here, vacation of the 11-19-2020 Orders is required because Nordic's lack of TRI and/or the ability to use the land proposed for development in the manner the permits and licenses would authorize extends to land on both sides of Route 1, including a 12.5-acre parcel on the inland (western) side of Route 1 that is burdened by restrictions, imposed in 1973 by the State of Maine for the protection of a municipal water shed.

As discussed in more detail below, Nordic lacks the ability to use this 12.5-acre parcel on the western (inland) side of Route 1, that was acquired from the Belfast Water District ("BWD") on March 10, 2022, in the manner authorized by the Board's 11-19-2020 Orders. Nordic acquired the 11-19-2020 Orders from the Board, without truthfully, accurately, and fully apprising the Board of restrictions placed on that 12.5-acre parcel by the State of Maine, in a 1973 deed executed by the Governor and Council of the State of Maine. The restrictions in that deed expressly "run with the land" and were imposed on this 12.5-acres for "the protection of a municipal water shed."

Evidence submitted with this Motion, obtained recently from the BWD by FOAA, reveals that Nordic has known about these restrictions on the 12.5-acre parcel – where Nordic has proposed to clear-cut a mature forest, fill in wetlands and a brook, and construct Building #1 (which is the length of several football fields) – since no later than February 21, 2018. *See, e.g.* Exhibit A attached hereto and incorporated herein. Further, evidence submitted with this Motion shows that Nordic misrepresented to DEP staff in November 2018 that these restrictions had be released or revoked, pursuant to a then-unrecorded Deed of Vacation from the Commissioner of DOT to the City of Belfast, dated 4-9-2018 – thirty-one (31) years after the City of Belfast had conveyed all of its TRI in the 12.5-acre parcel to the BWD.[6] (AR00691-00692; Composite Exhibit B (12.5 Acres First Amended Complaint and Exhibits 1-16), at Exhibit 13).

Petitioners Mabee-Grace and Friends and abutter Martha Block have filed a Declaratory Judgment action to determine the vitality of the restrictions in the Waldo County Superior Court,

[6] While the 11-5-2018 email thread from Nordic Agent and counsel Joanna Tourangeau to DEP Attorney Kevin Martin and the attached *unrecorded* 4-9-2018 Deed of Vacation was included in the Board's Administrative Record, produced by the Board's counsel and staff in April 2021 (after the 11-19-2020 Orders were entered), the potential for the 12.5-acre parcel being burdened by restrictions that would prohibit the uses proposed by Nordic of this parcel, these deeded restrictions were never a matter addressed in any public proceeding by the Board nor provided to Intervenors before, during or after the February 2020 hearings or the issuance of the 11-19-2020 Orders.

Docket No. CV-2023-6, in which the City of Belfast, Nordic and the Maine Department of Transportation are named as parties (*See,* Exhibit B attached hereto and incorporated herein).

The deeds and other Exhibits to that litigation, especially Exhibits 13 and 14, demonstrate that Nordic misrepresented and/or failed to fully disclose, all relevant information regarding restrictions imposed by the State of Maine for the protection of a municipal water shed that *run with the land* of this 12.5-acre parcel – on which Nordic has sought and obtain permits and licenses from the Board that would expressly violate the 1973 restriction against placing any buildings on this land and requirement to maintain this parcel in its natural condition. Nordic's omission of such critical information requires that the 11-19-2020 SLODA and NRPA permits and licenses be vacated.

II. Due Process Requires Creation of a Firewall and Assignment of Independent Counsel to Advise the Board on Remand

Now that the Law Court has denied the Motion for Reconsideration filed by AAG Bensinger, it is time for the Board to comply with the May 10, 2023 Remand Order from the Law Court and do a proper evaluation of the impact of the Law Court's 2-16-2023 Decision in the title claims case on the November 2020 BEP Orders. However, a *proper* evaluation of those impacts cannot occur, as long as the Board is being advised by the same legal counsel who is responsible for drafting every erroneous decision entered by the Board and/or Commissioner on the subject of Nordic's false claims of title, right or interest since January 25, 2019.

Pursuant to 5 M.R.S. § 9055 and the Law Court's holding in *Narowetz v. Bd. of Dental Prac.,* 2021 ME 46, ¶¶ 33-34, 259 A.3d 771, 781–82, as well as basic constitutional principles of Due Process, Petitioners move that independent counsel be appointed by the Attorney General to represent the Board in this matter. In making this motion, Petitioners specifically reference the following quote from *Narowetz*:

> [¶33] In sum, given the language, purpose, and history of section 9055, along with constitutional considerations, we conclude that the intent of the Legislature in enacting the statute was, consistent with legislatures enacting administrative procedure acts elsewhere, to segregate the advisory function from the investigatory and advocacy functions in adjudicatory matters before state agencies.

3. The Scope of Section 9055's Restrictions

> [¶34] The separation of the advocacy function mandated by section 9055 does not preclude the entire Office of the Attorney General from having individual assistant attorneys general perform different roles. *See Superintendent of Ins. v. Att'y Gen*., 558 A.2d 1197, 1201-02 (Me. 1989) (assistant attorneys general are not subject to the same conflict-of-interest rules as other attorneys); see also *Mallinckrodt LLC v. Littell*, 616 F. Supp. 2d 128, 143 (D. Me. 2009) (noting that the Attorney General has sufficient personnel to maintain a firewall and avoid the appearance of bias). In this instance, for example, three assistant attorneys general participated in the case and could have divided up the separate functions among them in a manner that would have avoided the overlap of the advisory function with the investigatory and prosecuting functions.

Narowetz v. Bd. of Dental Prac., 2021 ME 46, ¶¶ 33-34, 259 A.3d 771, 781–82; see also, *Mallinckrodt LLC v. Littell,* 616 F. Supp. 2d 128, 143 (D. Me. 2009) ("[T]he Court rejects the proposition . . . [and] bald assertions that the Office of the Attorney General lacks sufficient personnel to maintain a firewall . . . or create an appearance of bias."); *Wash. Med. Disciplinary Bd. v. Johnston,* 99 Wash.2d 466, 663 P.2d 457, 465 (1983) (deciding that the assignment of a single assistant attorney general to both prosecute a case and advise the hearing officer would impair at least the appearance of fairness of the tribunal, but that the potential problem would be resolved by the appointment of different attorneys general for the performance of disparate functions); *Hladys v. Commonwealth,* 235 Va. 145, 366 S.E.2d 98, 99-100 (holding that "the institutional connection between ... two assistant attorneys general ... did not, *per se,* impair the right of [the plaintiff] to procedural due process").

All of the 2020 BEP Orders contain determinations regarding TRI that were based on errors of law — a fact made plain by the Law Court's Decision in the title claims case. The drafts and final versions of those Board Orders were drafted by AAG Bensinger.

AAG Bensinger likewise participated in: (i) the drafting of the erroneous TRI determination issued by the Commissioner on June 13, 2019; (ii) advising the Board to deny the appeal of the Commissioners' TRI determination to the Board; (iii) advising the Board not to include TRI as a hearing issue; (iv) advising the Board on denying Petitioners' TRI challenge after a telephonic oral argument conducted by a portion of the Board in April 2020 to belatedly consider the ***threshold*** issue of TRI; (v) advising the Presiding Officer and drafting every order denying Petitioners' TRI challenges entered by the Presiding Officer; (vi) advising the Board and drafting every draft and final order entered by the Board relating to TRI; (vii) representing the Board in the 80B and 80C appeals of those Orders in the Waldo County Superior Court, BCD Court and Law

Court; (viii) advising the Commissioner on the recent motions to suspend or revoke Nordic's permits and licenses pursuant to 38 M.R.S. § 342(11-B); and (ix) drafting the Commissioner's Order denying Upstream's and Petitioners' separate requests to revoke Nordic's permits and licenses, granting Nordic's request to suspend only, and leaving the MEPDES license in place.

The appearance of AAG's bias and undue influence on the Board's consideration of the issues sent to the Board on remand is highlighted by her recent email to Upstream Watch's counsel David Perkins on June 28, 2023, which presumes that Board's interpretation of the TRI requirement before and in the absence of any public meeting on the Law Court's remand or vote on this subject by the Board, stating in relevant part that:

> *The question of the Board's interpretation (**which is consistent with the Commissioner's interpretation**) of the TRI requirement* and the findings on that issue are being litigated in the 80C appeals of the permits, as you know, and we are hopeful that the Law Court will grant our motion for reconsideration, withdraw the remand, and schedule the 80C appeals for oral argument. I note that the Law Court in its remand order did not vacate the permits that were issued. If the remand stays in place the TRI question posed by the Court will be addressed by the Board and a party unsatisfied with the Board's determination would have the opportunity to appeal that as stated in the Law Court's remand order.

Exhibit C attached hereto and incorporated herein.

There seems little doubt that as long as the same AAG is providing legal counsel to both the Commissioner and the Board, that both the Commissioner and Board will share a common legal interpretation of TRI – ***a legal interpretation that has been rejected by the Law Court in denying the Motion for Reconsideration submitted by AAG Bensinger and in entering the May 10, 2023 Remand Order***.

AAG Bensinger has at all times since 2018 ignored that ***Nordic had submitted no evidence in the Administrative Record before either the Commissioner or Board that supported their claims of "sufficient" TRI*** to either obtain and/or maintain permits and licenses from the Board and ignored Nordic's lack of TRI based on the 8-6-2018 Easement Option Agreement when the 11-19-2020 Orders were obtained, as determined by the Law Court's 2-16-2023 Decision. As a consequence, AAG Bensinger has provided erroneous legal counsel regarding the law and the sufficiency of the factual Record to both the Commissioner and Board.

Indeed, each and every document submitted in the Record by Nordic expressly contradicted Nordic's claims of TRI, because those documents expressly demonstrated, *as a matter or law*, that the Eckrotes did not own the intertidal land on which their lot fronts. Rather, the documents submitted in the Record *by Nordic* have at all times demonstrated that the Eckrotes had no ownership in the intertidal land adjacent to their lot and no right to grant Nordic an easement to use Belfast Tax Map 29, Lot 36, for the purpose of placing three industrial pipes that are essential accessory structures to Nordic's proposed for-profit salmon factory.

As discussed in greater detail below, the 6-13-2019 Commissioner's TRI determination, signed by the Commissioner's designee Attorney Martin, and all subsequent TRI determinations by the Presiding Officer and the Board, were thus based on erroneous legal determinations regarding: (i) the Eckrotes' intertidal ownership; (ii) the interpretation of the 10-15-2012 Estate of Poor-to-Eckrotes deed; (iii) the application of the so-called "colonial presumption" of ownership to low water (which the Law Court expressly held did not apply in this case under the plain meaning of the unambiguous deeds in the Eckrotes and Mabee-Grace's chains of title — all of which were previously provided to the BEP), see, *Mabee v. Nordic Aquafarms Inc.,* 2023 ME 15, ¶¶ 10, 17, 22-45, 61; (iv) the interpretation of the surveys submitted by all parties, all of which expressly showed the Eckrotes owned no intertidal land (including the surveys Nordic submitted by surveyors commissioned by Nordic or the Eckrotes); (v) the plain meaning of the 8-6-2018 Easement Option Agreement, the 3-3-2019 Letter Agreement (which did not amend the boundaries defined in the 8-6-2018 EAO to extend beyond the Eckrotes' high water mark), and the 12-23-2019 Amendment of the 8-6-2018 EAO (which did not amend the boundaries of the easement option and stated expressly that the Eckrotes neither represented or warranted any ownership in the intertidal land adjacent to their parcel).

Thus, under the plain meaning of the contract between Nordic and the Eckrotes (the 8-6-2018 Easement Option Agreement), the Eckrotes never actually granted Nordic TRI in the intertidal land adjacent to Lot 36. Rather, Nordic falsely claimed that the 8-6-2018 EOA conveyed them TRI in the intertidal land adjacent to Lot 36, and AAG Bensinger made an error of law in interpreting this contract to grant Nordic TRI in the intertidal land adjacent to Lot 36. Based on AAG Bensinger's erroneously legal interpretations of that contract and all subsequently submitted TRI-related documents, the Commissioner and Board erroneously entered Orders on TRI and

granted Nordic permits and licenses based on the errors of law made by the common counsel who advised the Department (both the Commissioner and Board).

Accordingly, *the 11-19-2020 Orders should be vacated because they were entered based on errors of law. See, e.g. 5 M.R.S. § 11007(4)(c)(4).* Further, before consideration of the Remanded permits and licenses, the Board should request and require assignment of independent counsel from the Office of Attorney General, protected from AAG Bensinger's considerable influence by the Attorney General's imposition of a proper firewall, lest the taint of bias and impropriety of process taint the Board's consideration of the TRI issues on remand from the Law Court.

III. No Evidence in the Board's Administrative Record Supports The Board's 2020 Determinations that Nordic had "Sufficient" TRI

In the Board's 2020 Orders, the Board described the bases for its determination that Nordic had demonstrated sufficient TRI to obtain permits and licenses from the Department. All of the Final Orders use essentially identical language and reasoning, as all of the Final permits and licenses were drafted by common legal counsel (AAG Bensinger). The Air license describes the TRI analysis as follows:

> Pursuant to Chapter 2, the Department may return an application after it has been accepted as complete for processing if the Department determines that the applicant did not have, or no longer has, sufficient TRI. Invoking this provision, intervenors have requested multiple times that the Department, and then the Board, return the application for lack of TRI. The Department initially addressed these requests in its June 13, 2019 letter accepting the applications, and the Board denied subsequent similar requests throughout the proceeding, including: in the 2nd Procedural Order (responding to July 12, 2019 motion), in the 5th Procedural Order (responding to a filing entitled "Notice of NAF's Lack of [TRI]" based on a remand in a Bureau of Public Lands proceeding), in the 9th Procedural Order (following a request to return the applications based on statements made in an oral argument in related quiet title proceedings), in the 20th Procedural Order (following a request that the applications be returned based on the Maine Supreme Court decision in *Tomasino v. Town of Casco*, 20 ME 96), in a vote following oral argument at an April 16th Board meeting (in response to February 14 & 18, 2020 motions to return the applications), and in a letter from the Presiding Officer dated August 27, 2020 (responding to the August 16, 2020 "Renewed Motion to Stay the Board's Proceedings or Dismiss Nordic's Applications"). An appeal of the Board's April 16, 2020 decision was filed in Waldo County Superior Court and subsequently dismissed by the Court on July 14, 2020.
>
> In its June 13, 2019 acceptance letter, the Department addressed and interpreted its TRI requirements as follows:

> A determination that an applicant has demonstrated TRI sufficient for an application to be processed requires a showing of a legally cognizable expectation of having the power to use the site in the ways that would be authorized by the permits being sought. The purpose of this requirement is to allow the Department to avoid wasting its finite resources reviewing applications for projects that can never be built. If the applicant is unable to show a sufficient property interest in the site proposed for the project, pursuant to the TRI threshold requirement in Chapter 2 §11(D), the Department can return the application at the outset without devoting time and resources to its processing. In any TRI analysis under Chapter 2, the Department may look beyond an applicant's initial submissions and may request additional information and consider submissions of interested persons as necessary to judge whether adequate credible evidence has been submitted by the applicant and a sufficient showing of TRI has been made to warrant expending Department resources to process the application. The TRI provision cannot, however, be interpreted as compelling the Department to perform an exacting legal analysis of competing ownership claims to determine the ultimate ownership of the property. That ultimate conclusion can only be made by a court. Moreover, the Department rejects any such interpretation as directly counter to the purpose of the TRI provision and cannot afford to allow its permitting proceedings to be transformed into the equivalent of an administrative agency quiet title action. So long as the applicant is able to make a showing of TRI in the subject property that is sufficient to justify the processing of the application, the Department will generally consider this threshold requirement to be satisfied and move to evaluate the merits of the application.
>
> With respect to the intertidal portion of the property proposed for use, the Department finds that the deeds and other submissions, including NAF's option to purchase an easement over the Eckrote property and the succession of deeds in the Eckrote chain of title, when considered in the context of the common law presumption of conveyance of the intertidal area along with an upland conveyance, constitute a sufficient showing of TRI for the Department to process and take action on the pending applications.

The Intervenors raised the issue of whether the Purchase and Sale Agreement between Janet and Richard Eckrote and Nordic applied to the intertidal zone. The Board examined the evidence pertaining to the Purchase and Sale Agreement and finds that the initial Purchase and Sale Agreement, dated August 6, 2018, together with the March 3, 2019 letter from Ed Cotter of Nordic with an acknowledgement signed by Janet and Richard Eckrote extending the deadline for the closing and clarifying the intent of the parties to the easement as to its scope and location are a sufficient demonstration of the scope of the easement agreement between the Eckrotes and Nordic for the purposes of processing the permit applications. The Board finds that the evidence reflects no dispute between the parties to the easement as to its scope or location.

The Board continues to concur with the Department's interpretation of Chapter 2's TRI provisions and its analysis with respect to the intertidal portion of the property proposed

> for use as set forth in the June 13, 2019 acceptance letter. As explained in the Department's acceptance letter, this conclusion is not an adjudication of property rights and does not grant legal ownership or right to use land. That determination can only be made by a court. The Board has reviewed the evidence in the record and has again considered the arguments raised regarding TRI pursuant to the Department's Chapter 2 and its TRI provisions. Pursuant to the Board's interpretation of these TRI provisions, the Board finds that the applicant has made a sufficient showing of TRI to develop the property as proposed for the applications to be processed and decided. As the Department found in its June 13, 2019 acceptance letter, the deeds and other submissions, including Nordic's options to purchase, and the analysis of the chain of title remain unchanged and remain a sufficient showing for the Board to act on the applications.

Final Air License Decision, granting A-1146-71-A-N, dated 11-19-2020 at pp. 2-4.[7]

However, contrary to prior assertions by Nordic and the Board that "substantial" evidence existed in the BEP Administrative Record to support a conclusion that Nordic had demonstrated "sufficient TRI" to obtain permits and licenses, the Board's Record is ***devoid of <u>any</u> evidence*** to ***support Nordic's TRI claims*** or the Board's 11-19-2020 determination that Nordic had "sufficient" TRI to obtain permits and licenses.[8]

On 12-18-2018 and 1-7-2019 (A.R.Docs. 0075, 0089 and 0090), Upstream Watch and the Lobstering Representatives moved to dismiss Nordic's MEPDES Application for lack of administrative standing because the 8-6-2018 EOA failed to grant Nordic TRI to use the intertidal land on which Lot 36 fronts (A.R.Doc. 0906d; A: 0988-1002 @ 0990).

On 1-22-2019, the Department acknowledged that: "…the Easement Purchase Agreement depicts the easement terminating at the high-water mark. . ." (*See*, 1-22-2019 letter to Nordic from Brian Kavanaugh (A.R.Doc. 0095; A: 1152-1154).

As a result, the Department initially requested additional information from Nordic to support its claim of TRI by February 6, 2019. *Id.* This deadline was put "on hold" by then-Acting Commissioner Loyzim *after an ex parte meeting with Nordic on January 25, 2019* and after the exertion of political interference in the permitting process by the Governor's brother,

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[7] DEP Major Projects website at:
https://www.maine.gov/dep/ftp/projects/nordic/final-signed-orders/Air%20signed%20order%2011-19-20.pdf

[8] "Substantial evidence exists when a reasonable mind would rely on that evidence as sufficient support for a conclusion." *Doane v. Dep't of Health & Hum. Servs*., 2021 ME 28, ¶ 38, 250 A.3d 1101 (quotation marks omitted); *Ouellette v. Saco River Corridor Comm'n*, 2022 ME 42, ¶ 20, 278 A.3d 1183, 1190–91.

Peter Mills – who objected to Brian Kavanaugh's 1-22-2019 letter in emails sent to the Governor and then-DEP Commissioner nominee Jerry Reid.

Specifically, although then AAG Reid advised the Governor and her brother on 1-25-2019 that Nordic had a "non-trivial TRI problem" that it had not resolved, after the 1-25-2019 communications with Governor Mills and her brother Peter, and the 1-25-2019 *ex parte* meeting with Nordic, AAG and DEP Commissioner-nominee Reid and DEP Acting Commissioner Loyzim, the TRI issue was put "on hold" until submission of all of Nordic's applications to DEP. Those applications were submitted in May 2019.

In May and June 2019, Nordic, Petitioners and Upstream Watch all submitted additional evidence to the Department relating to whether Nordic had "sufficient" RTI to obtain permits and licenses from DEP. Specifically, Nordic submitted the Letter Agreement dated March 3, 2019 ("3-3-2019 Letter Agreement"; A.R.Doc. 906e) and: (i) all of the deeds in the chains of title for the Eckrotes, Mabee-Grace, Morgan and the Theyes (i.e. the owners of the upland lots designated as Belfast Tax Map 29, Lots 38, 37, 36 and 35; A.R.Doc. 0178); (ii) the *unrecorded* 8-31-2012 Good Deeds survey plan, commissioned by the Eckrotes in 2012 and incorporated by reference in the 10-15-2012 Deed from the Estate of Phyllis J. Poor to the Eckrotes ("2012 Est. of Poor-to-Eckrotes Deed;") (A.R.Doc. 0935j); (iii) the *unrecorded* 2018 Good Deeds Survey commissioned by Nordic ("2018 Good Deeds Survey") (A.R.Doc. 0178, p. 4); (iv) the *unrecorded* 6-4-2019 survey by James Dorsky, P.L.S. commissioned by Nordic ("6-4-2019 Dorsky Survey"; A.R.Doc. 0178, p. 3); and (v) the 5-16-2019 Opinion Letter from James Dorsky to Nordic's then-President Erik Heim ("5-16-2019 Dorsky Opinion Letter") (A.R.Doc. 0178, pp. 87-89).[9]

None of these submissions support the Board's determinations that Nordic had "sufficient" RTI in the intertidal land on which Lot 36 fronts, because ***all*** of these submissions establish, as a matter of law, that: (i) the Eckrotes and/or their predecessors-in-interest had no ownership interest in the intertidal land adjacent to Lot 36; and, thus, (ii) the Eckrotes had no

[9] DEP Major Projects Website (Applications): https://www.maine.gov/dep/ftp/projects/nordic/applications/TRI%20supplement/19-06-10%20Tourangeau%20-%20Loyzim.pdf

legal capacity to grant Nordic an easement (or easement option) to use this intertidal land adjacent to Lot 36. *See, e.g.* footnote 4, *supra*.

A. The Eckrotes' Predecessors-in-Interest never received Title to the Intertidal Land on which Lot 36 Fronts

One can only convey, *or grant an easement in*, land that he has received. *Dorman v. Bates Mfg. Co.*, 82 Me. 438, 19 A. 915, 916 (1890). A determination of whether a party owns the intertidal land adjacent to their upland waterfront property requires a "meticulous" review of *all of the deeds in the relevant title chain* to determine the boundaries of the property and what the claimant's predecessors-in-interest owned and conveyed. *Almeder v. Town of Kennebunkport,* 2019 ME 151, ¶ 28, 217 A.3d 1111, 1122. In *Almeder,* the Law Court concluded that the Beachfront Owners did not benefit from the Colonial Ordinance presumption where their source deeds do not include a call to the water or even to the shore. Further, the Law Court held that one cannot *resurrect* the Colonial Ordinance presumption to support a claim of ownership of the intertidal land by including a call to the water in a later deed. *Almeder v. Town of Kennebunkport,* 2019 ME 151, ¶ 38, 217 A.3d at 1124. The same result applies here.

Here, the Law Court's 2-16-2023 Decision makes clear that the Board erred, *as a matter of law*, in concluding that the Eckrotes had title to the intertidal land on which Lot 36 fronts, based only on an *incomplete* review of the 10-15-2012 deed from the Estate of Phyllis J. Poor to the Eckrotes, without any review or consideration of the plain meaning of the Eckrotes' source deeds and the 8-31-2012 Good Deeds survey plan, incorporated by reference in the 10-15-2012 Est. of Poor-to-Eckrotes deed.

A meticulous review of the unambiguous source deeds in the Record from the Eckrotes' title chain (provided to the Department on June 10, 2019 *by Nordic* (A.R.Doc. 0178), was done by the Law Court in its *de novo* review of those deeds. That review resulted in the Law Court's determination that the Eckrotes' Predecessor (Fred R. Poor) never received title to any land seaward of the high-water mark. *Mabee v. Nordic Aquafarms Inc.* 2023 ME 15, ¶¶ 10, 17, 25-45 and 61. The 1946 Hartley-to-Poor deed (WCRD Book 452, Page 205); 6-10-2019 Nordic TRI Supplement (url provided in f.n.3), A.R.Doc. 0178 at pp. 48-49), 1971 Poor-to-Poors deed from Frederic [Fred] R. Poor to his son and daughter-in-law (William O. Poor and Phyllis J. Poor) (WCRD Book 691, Page 44; A.R.Doc. 0178, p. 50), and the 1991 Poors-to-Poor deed (WCRD Book 1228, Page 346; A.R.Doc. 0178, pp. 64-65) unambiguously limit the conveyance "along the high-water mark of Penobscot Bay" –

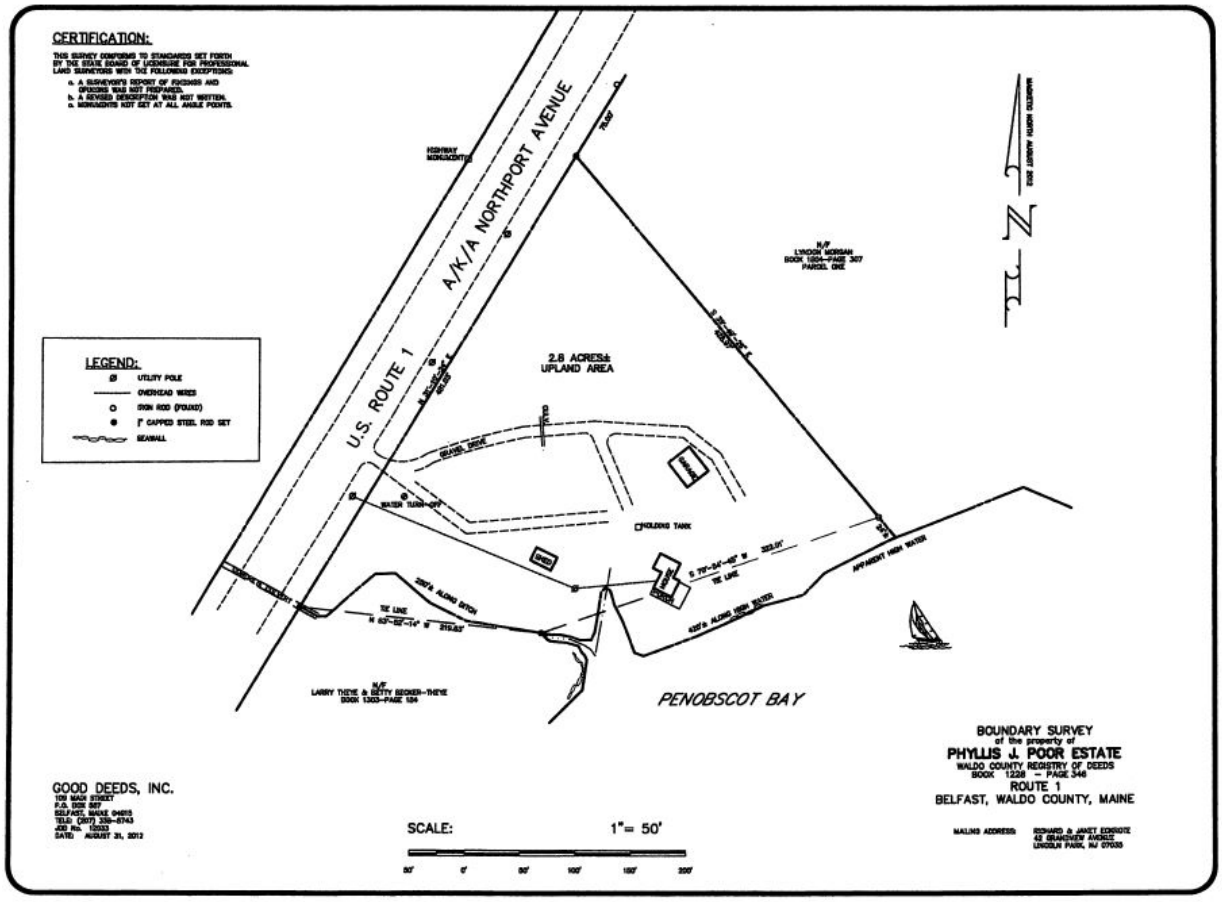
conveying no land seaward of the high-water mark of Lot 36. Thus, no presumption of ownership by the Eckrotes to the low water mark applies, since the Eckrotes' unambiguous source deeds establish a seaward boundary that terminates at the high-water mark of Penobscot Bay. *Mabee v. Nordic Aquafarms Inc.,* 2023 ME 15, ¶¶ 10, 17, 22-45, 61. See also, e.g. *Almeder,* 2019 ME 151, ¶ 38.

Inclusion of the words "along said Bay" in the 10-15-2012 deed, from the Estate of Phyllis J. Poor to the Eckrotes (A.R.Doc 0178, pp. 84-86), could not and did not resurrect title to the low water mark in the Eckrotes nor trigger the presumption of ownership to low water pursuant to the Colonial Ordinance, by changing the eastern boundary to "along said Bay" from the prior eastern boundary call of: "along high water mark of Penobscot Bay" (compare A.R.Doc. 0178, pp. 49, 50, 64, and 86). See also, *Almeder v. Town of Kennebunkport,* 2019 ME 151, ¶ 38, 217 A.3d at 1124.

Accordingly, the Board should vacate its 11-19-2020 Orders as unsupported by the Record evidence and dismiss Nordic's applications for permits and licenses for lack of administrative standing.

B. The Land Conveyed by the 10-15-2012 Deed Terminates "ALONG HIGH WATER" and does not include any Intertidal Land

Similarly, the Board erred, *as a matter of law*, in determining that the Eckrotes' 10-15-2012 deed contains a "call to the water" triggering the Colonial Ordinance presumption of ownership to the low water mark. *Mabee v. Nordic Aquafarms Inc.,* 2023 ME 15, ¶¶ 10, 17, 27-45, and 61; *Almeder v. Town of Kennebunkport,* 2019 ME 151, ¶ 38, 217 A.3d at 1124. The description of the land conveyed by the 2012 Est. of Poor-to-Eckrotes deed incorporates the 8-31-2012 Good Deeds Survey plan by express reference as the "basis" for the deed description (WCRD Book 3697, Page 5, at p. 7; A.R.Doc. 0178, p. 86).



The *unrecorded* 2012 Good Deeds Survey plan, submitted in the BPL Record by Nordic in May 2019, and subsequently submitted by Petitioners to BEP (A.R.Doc. 0935j), expressly depicts the seaward boundary of the land owned by the Estate of Phyllis J. Poor and conveyed to the Eckrotes as "425' ± ALONG HIGH WATER."

To the extent that the 8-31-2012 Good Deeds survey plan differs from the language in the 2012 deed description (which includes the phrase "along said Bay" implying a seaward boundary at the *low* water mark), ***the survey plan controls***.[10] Thus, *even under the 10-15-2012 Est. of Poor-to-Eckrotes deed*, the Eckrotes were not conveyed title to the intertidal land on which Lot 36 fronts. The Board erred in holding to the contrary, based on only the words in the 10-15-2012 Est. of Poor-to-Eckrotes deed, without consideration of the controlling 8-31-2012 survey plan, incorporated by reference in that deed.

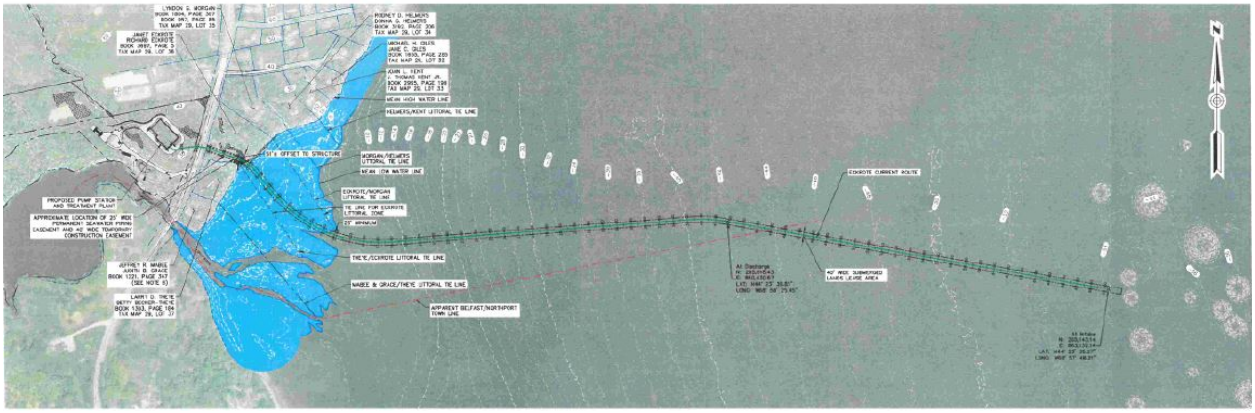
[10] A survey or plan will ordinarily control an inconsistent call in a deed. *Kinney v. Cent. Maine Power Co.,* 403 A.2d 346, 351 (Me. 1979), citing, *Liebler v. Abbott*, 388 A.2d 520, 522 (Me. 1978) and *Ilsley v. Kelley*, 113 Me. 497, 501, 94 A. 939, 940 (1915).

C. The 8-6-2018 Easement Option Agreement Terminated At the High Water Mark of Penobscot Bay, By Its Own Terms

On August 6, 2018, the Eckrotes granted an option to Nordic Aquafarms Inc. (hereinafter "Nordic") to acquire a 40-foot wide construction easement and a 25-foot wide permanent easement across their upland property ("Lot 36"), along the southern boundary of Lot 36 shared with Lot 37, for the purpose of placing three industrial pipes (Exhibit D).

Nordic's pipes are essential accessory structures for the operation of a proposed land-based salmon factory – a for-profit business Nordic proposed to construct in Belfast, Maine.

Nordic's two seawater-intake pipes and one wastewater-discharge pipe were proposed to extend almost a mile into Penobscot Bay, crossing Lot 36, then-owned by the Eckrotes, and the intertidal land on which Lot 36 fronts (as illustrated in the image below from Nordic's Site Location of Development Act (SLODA) application to the Maine Department of Environmental Protection MEPDES permit application).



https://www.maine.gov/dep/ftp/projects/nordic/applications/SLODA/Intake%20and%20Discharge%20Pipeline%20Engineering%20Drawings/2019.05.02%20-%200231714.00%20Cianbro%20-%20Maine%20Aquaculture.pdf

DEP Major Projects Webpage for Nordic Aquafarms Inc. Project (SLODA Permit)

The 8-6-2018 Eckrotes-to-Nordic Easement Option Agreement ("8-6-2018 EOA") did not define the boundaries of the easement to be granted along the southern boundary of Lot 36 by metes and bounds, but defined the boundaries of the easement by an image attached as

Exhibit A to the 8-6-2018 EOA (Exhibit A image below).

On the face of Exhibit A to the 8-6-2018 EOA (shown above) the construction and permanent easements to be granted to Nordic both terminate at the high water mark of Lot 36. Neither the text of the 8-6-2018 EOA nor Exhibit A to the EOA state that the easement to be granted to Nordic by the Eckrotes extends into the abutting intertidal land or grants Nordic the right to use the intertidal land adjacent to Lot 36 for any purpose, including burying its industrial pipes.

Despite Nordic's obvious deficiency in TRI under the 8-6-2018 EOA, the Commissioner and Board both ultimately based their respective and repeated determinations that Nordic had demonstrated "sufficient" TRI on the 8-6-2018 EOA. After the Lobstering Representatives and Upstream Watch challenged Nordic's TRI based on this obvious deficiency, discernible by any lay person viewing the 8-6-2018 EOA, Brian Kavanaugh initially rejected Nordic's TRI claim on 1-22-2019 (A.R.Doc. 0095). However, after the exertion of political pressure by the Governor's brother on Nordic's behalf and an ex parte meeting with Nordic's President by Acting Commissioner Loyzim and In-coming Commissioner Reid, on January 25, 2019, the Department

abandoned its request for additional TRI support from Nordic (A.R.Doc. 103, 104, 106-108). After a meeting in the Governor's office with DEP and BPL staff at 1:00 p.m. on 6-13-2019 -- for the stated purpose of: ***". . . discussiing] communications around TRI for Nordic. Prior to Friday's deadline, it would be helpful to get everyone on the same page from a messaging standpoint"*** – the Commissioner's designee reversed that prior interpretation of the 8-6-2018 EOA and issued a letter declaring Nordic had demonstrated "sufficient" TRI. (Exhibit E and A.R.Doc. 0191).

The Board should vacate the 11-19-2020 Orders because the 8-6-2018 EOA, by it plain terms, never demonstrated that Nordic had TRI to use the intertidal land adjacent to Lot 36 and the Law Court's 2-16-2023 Decision makes clear that the Eckrotes never had the legal capacity to grant an easement or easement option to use either upland Lot 36 or the adjacent intertidal land for placement of pipes for its for-profit salmon factory. *See, Mabee v. Nordic Aquafarms Inc*., 2023 ME 15, ¶¶ 10, 17, 22-45, 53-58 and 61).

D. 3-3-2019 Letter Agreement

In response to the DACF-BPL letter, on March 22, 2019, Nordic submitted a letter agreement to DACF-BPL, dated March 3, 2019 ("3-3-2019 Letter Agreement"), that states that Nordic had the same right to place its pipes in the intertidal land adjacent to the Eckrotes' lot that the Eckrotes had. The 3-3-2019 Letter Agreement was signed by Nordic's then-President Erik Heim and addressed to the Eckrotes. The 3-3-2019 Letter Agreement had an acknowledgement attached to it, signed by the Eckrotes, dated February 28, 2019. *Id.* (A.R.Doc. 0906e).

The 3-3-2019 Letter Agreement was also submitted to the Department of Environmental Protection as additional proof of Nordic's title, right or interest in the intertidal land abutting Lot 36. Specifically, the text of the 3-3-2019 Letter Agreement stated in relevant part:

> . . . The [8-6-2018 EOA] P&S is clear that as long as Nordic Aquafarms avoids the driveway and the barn as agreed in the P&S, Nordic Aquafarms could build and site its pipes and related equipment in the wet sand ("intertidal zone") and within US Route 1 adjacent to or within your upland property (so long as the limits on the impacts such as your driveway are respected). You intended a broad easement over your property, including any rights you have to US Route 1 and the intertidal zone such that Nordic Aquafarms can build and site its pipes anywhere in those areas where you have rights. . . .
>
> By signing the acknowledgement on the accompanying page, this letter clarifies that the easement area delineated in the P&S includes the entirety of your rights in the intertidal zone and US Route 1 and amends the Closing Date.

The 3-3-2019 Letter Agreement did not state that the Eckrotes have, or claim to have, any ownership in or to the intertidal land on which their lot fronts. The 3-3-2019 Letter Agreement did not amend the boundaries of the easement 8-6-2018 EOA, as defined in Exhibit A of that Agreement. The 3-3-2019 Letter Agreement amended the Closing Date in the 8-6-2018 EOA from 8-16-2019 to 1-1-2020. The 3-3-2019 Letter Agreement "*clarifies that the easement area delineated in the P&S includes the entirety of your* [the Eckrotes'] *rights in the intertidal zone.*" *Id.* The 3-3-2019 Letter Agreement neither warranted nor represented that the Eckrotes had any ownership rights in the intertidal zone land adjacent to their lot, by deed or any other statutory or common law theory.

The 3-3-2019 Letter Agreement did not modify or amend the boundaries of the easement option to be granted to Nordic by the Eckrotes from the area depicted in Exhibit A of the 8-6-2018 EOA. Thus, the 3-3-2019 Letter Agreement did not change the fact that the easement option to be granted by the Eckrotes "terminated at the high water mark," by its own terms as depicted in Exhibit A to the 8-6-2018 EOA. Notably, the failure of the 3-3-2019 Letter Agreement to reference or warrant that the Eckrotes own any intertidal land adjacent to Lot 36 was acknowledged by both Nordic and the Eckrotes in the Second WHEREAS Clause to the 12-23-2019 Amendment of the 8-6-2018 EOA.[11]

The Board erred, *as a matter of law*, in ignoring the plain meaning of the 8-6-2018 EOA, the 3-3-2019 Letter Agreement, and the 12-23-2019 Amendment to the 8-6-2018 EOA in making its 11-19-2020 determinations that Nordic had demonstrated "sufficient" TRI to obtain permits and licenses from the Board. On remand, the Board should vacate its 11-19-2020 Order as unsupported by sufficient Record evidence to demonstrate Nordic's TRI and administrative standing, or present a justiciable issue to the board for resolution.

E. 2018 Good Deeds Survey

The *unrecorded* 2018 Good Deeds survey (commissioned and submitted to the Department by Nordic) (6-10-2019 Nordic TRI Supplement, p. 4; A.R.Doc. 0178, p. 4), like

[11] The Second WHEREAS Clause in the 12-23-2019 Amendment to the 8-6-2018 EOA states:

> WHEREAS, as specified in the March 3, 2019 Letter Agreement, any easement rights Seller grants with respect to the intertidal zone and U S Route 1 adjacent to their real property are limited to whatever ownership rights we may have in said areas, and no representation or warranty is made as to any such ownership rights;

the 2012 Good Deeds Survey (commissioned by the Eckrotes prior to their acquisition of land from the Estate of Phyllis J. Poor) depicts the seaward boundary of Lot 36 as the "High Water Observed" mark and does not include any intertidal land in the Eckrotes' parcel. This survey plan also expressly cautioned Nordic about the discrepancy in the deed description in the 10-15-2012 deed and the owner of that parcel's ability to grant an easement below the high water mark. (A.R.Doc. 0178, p. 4).

The plain meaning of the 2018 Good Deeds survey plan and the caution it contained was ignored by the Commissioner and Board in their prior TRI determinations. On remand, the Board should vacate its 11-19-2020 Order as unsupported by sufficient Record evidence to demonstrate Nordic's TRI and administrative standing, or present a justiciable issue to the board for resolution.

F. 5-16-2019 Dorsky Opinion Letter and 6-4-2019 Dorsky Survey Plan

Both James Dorsky's 5-16-2019 Opinion Letter to Nordic President Erik Heim (6-10-2019 Nordic TRI Supplement, pp. 87-89) and Surveyor Dorsky's 6-4-2019 survey plan (6-10-2019 Nordic TRI Supplement, p. 3), both commissioned by and prepared for and at the request of Nordic and submitted in the Department's Administrative Record by Nordic, conclude that the Eckrotes own no intertidal land adjacent to Lot 36.

Indeed, no survey plan prepared by any surveyor, including the three surveyors retained by either the Eckrotes or Nordic (i.e. Gusta Ronson, PLS; Clark Staples, PLS; or James Dorksy, PLS) – all of which were filed in the Board's Administrative Record – depicts the Eckrotes owning any intertidal land. *See, e.g.* A.R.Doc 906e. Rather, every survey plan in the Administrative Record (A.R.Doc. 0178, pp. 3 and 4; 0906e), and/or submitted to the Board but excluded by the Presiding Officer (A.R.Doc. 0935o, 0935p, 0935r and 0935s) and every Surveyors' opinion letters and/or affidavit in the Administrative Record (0178, pp. 87-89, 0935q) conclude that the Eckrotes owned no intertidal land abutting Lot 36.

Accordingly, in the absence of ***any*** Record evidence – even evidence submitted *by the Applicant Nordic* – supporting Nordic's claim of TRI, the Board's 11-19-2020 TRI determinations and Orders should be vacated. ***No*** TRI cannot constitute "*sufficient*" TRI.

IV. The "Residential Purposes Only" Servitude on Lot 36 Prohibits Nordic from Any Commercial or Industrial Development of Lot 36

In the 1946 deed from Harriet L. Hartley to the Eckrotes' predecessor-in-interest Fred R. Poor (Janet Eckrote's grandfather), Harriet Hartley included restrictions regarding the use of the parcel conveyed to Poor, stating:

> The lot or parcel of land herein described is conveyed to Fred R. Poor with the understanding it is to be used for residential purposes only, that no business for profit is to be conducted there unless agreed to by Harriet L. Hartley, her heirs or assigns.

WCRD Book 452, at Page 206.

In the Law Court's 2-16-2023 Decision, the Law Court determined that "this servitude is not unreasonable, either on its face or in the context of the specific land on which the limitation is imposed." (See, *Mabee,* 2023 ME 15, ¶ 57). The Law Court also held in relevant part that:

> [¶ 58] In sum, the restriction to "residential purposes only," benefiting the holder of the land now owned by Mabee and Grace, runs with the land conveyed to Poor, binding Poor's successors.
>
> [F.N. 13] As successors in interest to Hartley's benefitted property, Mabee and Grace have standing to enforce the covenant. *See* Restatement (Third) of Prop.: Servitudes § 1.3 cmt. d ("[I]f the benefit runs with land, a successor to the land may enforce without assignment ").

The Poor parcel conveyed by the 1946 Hartley-to-Poor deed included Lot 36. Mabee-Grace and Friends are holders and successors in interest to Hartley's benefitted property with standing to enforce the "residential purposes only" servitude on Lot 36. The Eckrotes, the City of Belfast and Nordic are successors of Fred R. Poos bound by the "residential purposes only" servitude on Lot 36. All of the land benefitted by the 1946 servitude is depicted in Figure 3, outlined in green (including the intertidal land Harriet L. Hartley owned in 1946 and retained when she conveyed the parcel to Fred. R. Poor. See Figure 3 (Sketch 2) below.

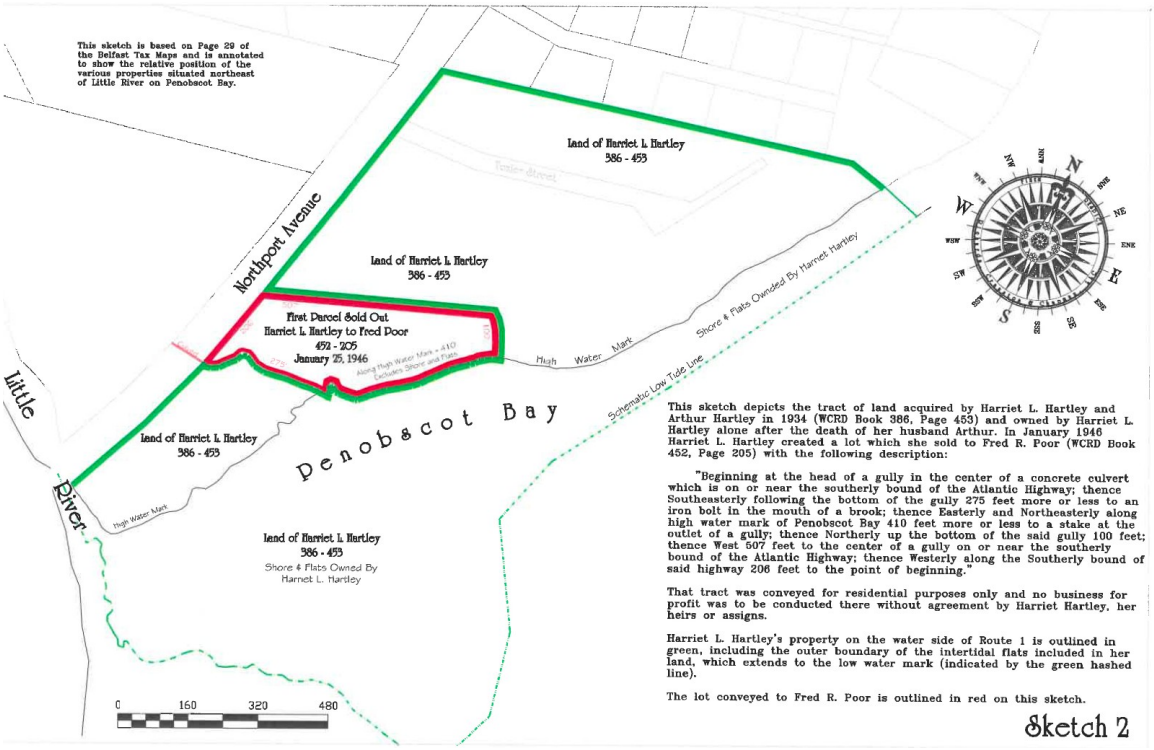


Figure 3

On or about 6-13-2019, Petitioner Mabee, on behalf of himself and his wife Judith Grace, told Janet Eckrote by email that Mabee-Grace did not agree with the proposed use of Lot 36 by Nordic to install its industrial and commercial infrastructure essential for the operation of its for-profit business. Janet Eckrote then forwarded that email to Nordic, placing Nordic on notice that Mabee-Grace did not agree to the proposed use, pursuant to the 1946 "residential purposes only" servitude. (Exhibit F).

Although the City of Belfast has attempted to benefit Nordic by using eminent domain to "take" Mabee-Grace's right to enforce the "residential purposes only" servitude on Lot 36, the City did not "take" Friends' right to enforce this servitude. See, e.g. 8-12-2021 Condemnation Order, at Schedule B (WCRD Book 4673, Page 304 at 313; Exhibit G). More importantly, in the Law Court's 2-16-2023 Decision, the Law Court expressly determined that successors of Fred R. Poor, which include the Eckrotes, the City of Belfast and Nordic, are bound by the restrictions in the 1946 servitude on Lot 36 *Mabee v. Nordic Aquafarms Inc.,* 2023 ME 15, ¶ 58.

Consequently, the City of Belfast has no legal capacity, pursuant to the Law Court 2-16-2023 Decision, to grant Nordic an easement to use upland Lot 36 for installation of its industrial pipes in contravention of the 1946 "Residential Purposes Only" servitude. Accordingly, the Board should vacate the 11-19-2020 Order based on the impact of the 2-16-2023 Law Court Decision relating to the validity and scope of the 1946 "Residential Purposes Only" servitude on Lot 36. Pursuant to this holding in the Decision, Nordic previously lacked TRI to use upland Lot 36 for its pipes under the Eckrotes' 8-6-2018 EOA; and still lacks TRI under the 9-3-easement from the City of Belfast (Exhibit H).

V. IMPEDIMENTS TO NORDIC'S TRI OCCURRING OR REVEALED AFTER 11-19-2020 AND NOT CONSIDERED BY THE LAW COURT IN ITS 2-16-2023 DECISION

A. Nordic failed to *maintain* TRI Even Under the *Ultra Vires* 8-6-2018 EOA

The Law Court has held that: (i) standing is a *threshold* issue that is required for a litigant to present a justiciable issue to a court *or administrative entity* regarding land use;[12] (ii) it is error to consider or enter judgment on substantive issues in the absence of standing;[13] and (iii) standing must be maintained by an applicant throughout an 80C challenge and, where TRI in any portion of the land subject to regulation is lost during an 80C appeal, the applicant's standing and

[12] A party may not seek judicial (or administrative) action concerning land use without having an interest in the property at issue. *See Halfway House, Inc.*, 670 A.2d 1377, 1379 (Me. 1996); *Walsh v. City of Brewer*, 315 A.2d 200, 207 (Me. 1974).

[13] *Bank of Am., N.A. v. Greenleaf,* 2015 ME 127, ¶7-¶9, 124 A.3d 1122, 1124-1125 ("Here, the court could not have entered a judgment on remand addressing the merits of the Bank's foreclosure claim because the Bank failed to show the minimum interest that is a predicate to bringing that claim in the first place. Under these circumstances, the court properly disposed of the case by entering a dismissal without prejudice." (emphasis supplied)). See also, *Wells Fargo Bank, N.A. v. Girouard,* 2015 ME 116, ¶8, 123 A.3d 216, 218; *Homeward Residential Inc. v. Gregor*, 2015 ME 108, ¶¶ 15-20, 122 A.3d 947; and *In re M.M.,* 2014 ME 15, ¶ 7, 86 A.3d 622, 625 ("[T]he question of the Petitioners' standing, once raised by the father in his motion to dismiss, should have been determined before the court reached any other issue.").

Homeward Residential, Inc. v. Gregor, 2015 ME 108, ¶24, 122 A.3d 947, 954-955 ("The court could not decide the merits of the case when the plaintiff lacked standing. . . . Instead, the court could only dismiss the action. Because the court addressed the merits of the complaint for foreclosure in its judgment, we vacate the judgment in its entirety and remand for an entry of a dismissal without prejudice."). *See also*, *Witham Family Ltd. P'ship*, 2015 ME 12, ¶7, 110 A.3d 642 ("Courts can only decide cases before them that involve justiciable controversies.").

justiciability are likewise lost because the matter has become moot, rendering any judgment on the substantive issues merely advisory.[14]

Here, the Eckrotes conveyed Lot 36 to the City of Belfast in a deed dated 6-23-2021, delivered to the City on or before July 15, 2021, and recorded in the Waldo County Registry of Deeds on 7-16-2021 ("6-23-2021 Eckrotes-to-City deed;" WCRD Book 4679, Page 157) (Exhibit I). The conveyance from the Eckrotes to the City occurred prior to Nordic exercising the 8-6-2018 EAO and there was no reservation of the right to obtain the easement described in the 8-6-2018 EOA from the City in the 6-23-2021 Eckrotes-to-Nordic deed.

Consequently, the 8-6-2018 EOA – on which Nordic's claims of TRI were based in all applications submitted to the Department and on which the Board's TRI determinations in all of the 11-19-2020 Orders was based – was nullified by the 6-23-2021 Eckrotes-to-City Deed. Accordingly, the Board must vacate the 11-19-2020 Orders based on Nordic's lack of administrative standing pursuant to the grounds claimed by Nordic and cited in the Board's prior Orders (i.e. the 8-6-2018 EOA).

B. Nordic Lacks TRI in the 12.5-Acre Parcel On the Western (Inland) Side of Route 1

In addition to the defects in Nordic's TRI in the intertidal land adjacent to Lot 36, Nordic also lacks the ability to use a 12.5-acre parcel acquired on March 10, 2022 from the Belfast Water District in the manner proposed and authorized by the 11-19-2020 Orders.

Since 2018, Nordic and its counsel have known full-well that 12.5-acres of the Belfast Water District ("BWD") land, proposed for development and use on the inland side of Route One, has at all times since 1973 been burdened by conditions and restrictions, *imposed by the State of Maine for the protection of a municipal water shed*. Those State-imposed conditions and restrictions include prohibiting construction of *any building* on this 12.5-acre parcel and a requirement to maintain this parcel in its "*natural condition*."

[14] *Madore v. Maine Land Use Regul. Comm'n*, 1998 ME 178, ¶¶ 7-11, 715 A.2d 157, 160–61 (The Madores lacked standing because they had not *maintained* right, title, or interest in the parcel, a property necessary to their proposed development, *throughout the existence of the litigation.* The court therefore dismissed both counts of the Madores' 80C complaint. On appeal, the Law Court affirmed the dismissal of the 80C case on *mootness* grounds.). *See also*, *Lund ex rel. Wilbur v. Pratt*, 308 A.2d 554, 559 (Me. 1973) (". . . [W]hat a party must show, in order to invoke the Superior Court's jurisdiction, is a justiciable controversy and standing to litigate it.").

Here, Nordic obtained permits and licenses from the Board by misrepresenting or failing to disclose fully all relevant facts to the Commissioner and/or the Board regarding the deeded restrictions on the use of this 12.5-acre parcel.

In the Fall of 2018, DEP staff legal counsel Kevin Martin contacted Nordic's counsel Joanna Tourangeau by phone regarding the conditions and restrictions on this 12.5-acre parcel. DEP attorney Kevin Martin had discovered these restrictions during an independent review of the deeds for the BWD land proposed for development and use by Nordic. Nordic had not provided the relevant deeds to the Department with it MEPDES application. (Exhibit B, pp. 140-143; AR00690-00692).

Pursuant to the express and unambiguous language in the 1973 deed from the State of Maine, through the Governor and Council, to the City of Belfast, this parcel was conveyed for and subject to the purpose of "protection of a municipal water shed." (WCRD Book 710, Page 1153; Exhibit B, pp. 67-70) The restrictions in the 1973 deed expressly ***run with the land***, and state in relevant part that: (i) no buildings were permitted to be built on this parcel; and (ii) the parcel was required to be kept in its "natural condition." (WCRD Book 710, Page 1154; Exhibit B, p. 68). In 1987, the City conveyed the parcel to the Belfast Water District, re-stating that it was burdened by the restrictions in the 1973 State-to-City deed (WCRD Book 1093, Page 145 (Exhibit B, pp. 71-72).

Attorney Tourangeau deflected DEP Attorney Kevin Martin's questions regarding whether Nordic could clear-cut and build on this parcel by claiming that the restrictions had been vacated, released and extinguished by an unrecorded "Deed of Vacation" from the Department of Transportation, signed by the Commissioner of DOT, to the City of Belfast, dated April 9, 2018 (Exhibit B, pp. 140-143; AR00690-00692). At the time that the 4-9-2018 Deed of Vacation was issue to the City, the City had not owned this 12.5-acre parcel *for thirty-one (31) years* (See, Exhibit B, pp. 71-72); thus, releasing the City from restrictions on land they had not owned in more than three decades had no legal affect at all.

This sham instrument is now the subject of another Declaratory Judgment action, challenging the legal validity of the ultra vires Deed of Vacation from DOT's Commissioner, who lacked the legal capacity under Maine law (23 M.R.S. § 61) to release the State's restrictions on this parcel, imposed by a Governor's deed, by issuing a Commissioner's Deed of Vacation granted

to the City of Belfast *31-years after* the City of Belfast had conveyed its interests to this parcel to the Belfast Water District (Exhibit B, pp. 1-63). No release was ever granted to the actual parcel owner BWD.[15] (Exhibit B).

More importantly, when Nordic was finally conveyed this 12.5-acre parcel on March 10, 2022 by the Belfast Water District, its deed expressly states that Nordic takes this parcel "SUBJECT TO" the "terms, conditions and restrictions" in the 1973 State-to-City deed (WCRD Book 710, Page 1153) and the 1987 City-to-BWD deed (WCRD Book 1092, Page 145) ("BWD-to-Nordic deed"; WCRD Book 4776, Page 210, at Page 222 (second numbered ¶ "2)") (*See*, Exhibit B, p. 105 (second numbered ¶ "2)")) Prior to the March 2022 conveyance of this 12.5-acre parcel to Nordic, BWD was never released by the State of Maine from the restrictions in the 1973 State-to-City deed or by the City of Belfast from the restrictions in the 1987 City-to-BWD deed.

On March 17, 2022 – seven (7) days *after* the BWD-to-Nordic deed was executed and delivered -- the City of Belfast recorded the 4-9-2018 DOT-to-City Deed of Vacation (WCRD Book 4778, Page 34) (Exhibit B, p. 107) and executed and delivered a Deed of Vacation to Nordic, dated 3-15-2022, purporting to "vacate, release and extinguish" the 1973 conditions and restrictions from the 12.5-acre parcel (WCRD Book 4778, Page 35) (Exhibit B, p. 106). This second sham instrument is also the subject of the Declaratory Judgment action CV-2023-6, filed by Mabee and Grace, Martha M. Block and Friends, challenging the legal capacity of the City of Belfast to release the State's restrictions on this parcel, imposed in 1973 by a Governor's deed, and the unambiguous deed from the Belfast Water District to Nordic, by issuing a Deed of Vacation to Nordic 35-years after the City of Belfast had conveyed its interests to this parcel to the Belfast Water District.

[15] Petitioners Mabee-Grace, Friends and abutter Martha Block have filed a declaratory judgment action in the Waldo County Superior Court challenging the legality of the ultra vires Deeds of Vacation issued to the city of Belfast on 4-9-2018 by the Commissioner of DOT (WCRD Book 4778, Page 34) and issued on 3-15-2021 by the Belfast City Manager to Nordic (WCRD Book 4778, Page 35). Both of these legally dubious instruments were concealed from the Public and recorded in the Waldo County Registry of Deeds without any prior public process and without approval from the Belfast City Council in a public session. Petitioners assert that neither of these instruments was executed by an official with the legal capacity to release the restrictions imposed by the State of Maine in the 1973 State-to-City deed (WCRD Book 710, Page 1152), the restrictions transferred by deed from the City of Belfast to the Belfast Water District in 1987 (WCRD Book 1092, Page 145**),** or the restrictions conveyed to Nordic by the BWD in the 3-10-2022 deed (WCRD Book 4776, Page 210).

Petitioners submit their First Amended Complaint and sixteen (16) incorporated exhibits, filed by Petitioners Mabee-Grace and Friends, and Martha M. Block, in BELSC-CV-2023-6, in support of their Petition for revocation (Composite Exhibit B). These submissions demonstrate that the conditions and restrictions, *as a matter of law*, are still in effect on this 12.5-acre parcel requiring revocation of the permits and licenses granted to Nordic that would authorize Nordic to clear-cut this parcel, fill the brook and wetlands on this parcel, and place enormous buildings on this parcel.

Revocation of the NRPA and SLODA permits and licenses, issued by the Board on 11-19-2020, is appropriate and necessary because Nordic and its counsel misrepresented and/or failed to fully disclose relevant facts relating to the restrictions and conditions on this parcel to the Commissioner's staff counsel in 2018 and, thereafter, withheld this information from the Board at all times prior to the Board entering the orders granting Nordic permits and licenses. Because the permits and licenses granted by the Board would authorize Nordic to undertake development and uses of the 12.5-acre parcel that are in direct contravention of the conditions and restrictions in the 1973 State-to-City deed, 1987 City-to-BWD deed and 2022 BWD-to-Nordic deed, the 11-19-2022 NRPA and SLODA Orders should be vacated by the Board as exceeding the Board's statutory authority to grant and based on errors of law. See, 5 M.R.S. § 11007(4)(C)(2)-(4).

VI. The Conservation Easement Prohibits Nordic from Any Dredging or Commercial or Industrial Development of Lot 36 And Was Not Amended or Terminated by the City's Condemnation Order

The 2-16-2023 Law Court Decision determined that Petitioners Mabee and Grace had created an enforceable conservation easement on their intertidal land on which Belfast Tax Map 29, Lots 38, 37, 36 and 35 front, and that Petitioner Friends holds that Conservation Easement. *Mabee v. Nordic Aquafarms Inc.,* 2023 ME 15, ¶¶ 59-61.

Additionally, a Stipulated Judgment was entered on 3-2-2022 in the pending eminent domain action (*Mabee and Grace, et al. v. City of Belfast*, et al., Docket No. BELSC-RE-2021-007, signed by counsel for all parties including Nordic, that held in relevant part that:

A. Pursuant to Maine's conservation easement statute, 33 M.R.S. §§ 477-A(2)(B) and 478, the City is prohibited from unilaterally amending or terminating the Conservation Easement, if valid, which may be accomplished only by a court in an action in which the Attorney General is made a party; and

B. The City's actions, including its Condemnation efforts with respect to the Conservation Easement and the Intertidal Land, did not amend or terminate the Conservation Easement because they were not approved by a court in an action in which the Attorney General was made a party.

(Stipulated Judgment, p. 3; Exhibit J, attached hereto and incorporated herein).

Further, an Order was entered by the Waldo County Superior Court in the same case (RE-2021-007) on June 12, 2023, setting the Future Course of Proceedings relating to the Conservation Easement and Role of the Attorney General. In that Order, *proposed by the Attorney General's Office*, the Court held in relevant part that:

> No action to maned or terminate the conservation easement shall proceed, and the Court will stay any such claims, until there is a final judgment by this court as to all claims challenging the validity of the eminent domain order.

6-12-2023 Order in RE-2021-007, p. 2 (Exhibit K, p. 2).

In other words, no action can proceed to amend or terminate the Conservation Easement held by Friends until and unless the City of Belfast prevails in the pending challenges to its use of eminent domain to benefit Nordic. Thus, the City's dubious use of eminent domain to benefit Nordic has failed to amend or terminate the enforceable Conservation Easement held by Friends.

Finally, the 8-12-2021 Condemnation Order entered by the City did not even attempt to extinguish Friends' right to enforce the "Residential Purposes Only" servitude on Lot 36, as a holder of land benefitted by Hartley's 1946 servitude. (See, WCRD Book 4693, Page 304, at 313, Schedule B; Exhibit G, pp. 10-11).

In combination, these four prior Orders -- entered after the 11-19-2020 Board Orders and outside the Record before the Law Court's for its 2-16-2023 Decision -- establish that: (i) the protections and restrictions in Friends' Conservation Easement are still in full force and effect and are still enforceable; (ii) the protections and prohibitions in the Conservation Easement will stay in full force and effect without amendment or termination possible, until and unless the City of Belfast prevails in the pending eminent domain case; and (iii) Friends retains the right, as a matter of law, to enforce the "residential purposes only" servitude on upland Lot 36.

As a result, the City of Belfast lacks the legal capacity to grant Nordic an easement that would authorize any activity that would violate the protections and prohibitions in the Conservation Easement or would violate the "residential purposes only" servitude on Lot 36. Accordingly, the 9-3-2021 City-to-Nordic easement (Exhibit H) cannot be used by Nordic to demonstrate TRI in upland Lot 36 or the adjacent intertidal land. To the extent the 9-3-20 purports to grant Nordic the right to violate the Conservation Easement in the intertidal land adjacent to Lot 36, or to conduct any for-profit business (including the installation of commercial or industrial infrastructure essential for the construction and operation of its for-profit business) on upland Lot 36, those claims are without merit or support as a matter of law, pursuant to the above-referenced Orders.

Accordingly, Nordic cannot demonstrate "sufficient" TRI currently in either upland Lot 36 or the adjacent intertidal land, necessary to retain the permits and licenses granted on 11-19-2020 and the 11-19-2020 Orders should be vacated by the Board.

VII. The 8-12-2021 Condemnation Order Includes Intertidal Land Outside the Municipal Boundaries of the City Of Belfast

The 8-12-2021 Condemnation Order includes an unsealed and unsigned drawing with a logo from Gartley & Dorsky. (Exhibit G, p. 9). On information and belief, this image was drawn by Surveyor James Dorsky, P.L.S., Nordic's retained expert in the Title Claims trial. This image does not reveal the municipal boundary lines for the City of Belfast as determined by a statute adopted in 1813. *Id.* In contravention of 32 M.R.S. § 18226 (Seals; stamps), the City of Belfast relied on this unsealed and unsigned document to "take" intertidal land adjacent to Lot 36 owned by Mabee and Grace, for Nordic's benefit. The unsealed and unsigned drawing by Gartley & Dorsky, dated June 29, 2021, labeled "Exhibit 1" highlights the intertidal land on which Lot 36 fronts and states that this parcel contains 5.1 acres of intertidal land.

Schedule A of the Condemnation Order falsely describes the land being condemned as:

> The parcel described herein is the intertidal portion of that land conveyed from the Estate of Phyllis J. Poor to Janet and Richard Eckrote as described in a deed recorded in Book 3697, Page 5 of the Waldo County Registry of Deeds. See also Deed from Janet and Richard Eckrotes to the City of Belfast as recorded in Book 4679 Page 157 of the Waldo County Registry of Deeds.

Exhibit G, p. 8; Schedule A, WCRD Book 4693, Page 311).

The Dorsky image of the land allegedly being taken is depicted in EXHIBIT 1 to Schedule A of the Condemnation Order. This image erroneously references the Eckrotes' deed from the Estate of Phyllis J. Poor (WCRD Book 3697, Page 5) in the area identified by a bold outline as the intertidal land to be taken. *See* Exhibit G, p. 9; WCRD Book 4693, Page 312. However, the Law Court's 2-16-2023 decision held that the 1946 Hartley-to-Poor deed (WCRD Book 452, Page 205): "conclusively establishes that Hartley did not convey any intertidal land to Poor, and, therefore, that the Eckrotes and Morgan do not own the intertidal land abutting their respective upland properties." *Mabee v. Nordic Aquafarms. Inc.,* 2023 ME 15, ¶¶ 10, 25-45, 61.

Thus, the City's description or the land to be taken and the image in Exhibit 1 reveal that the City's taking is based on an error of law, rejected by the Law Court in its 2-16-2023 Decision.

The image of the land being taken in EXHIBIT 1 to Schedule A of the Condemnation Order is not signed or sealed by a licensed surveyor in the State of Maine, and does not reveal the identity or professional credentials of the person who prepared this document or the deed description in Schedule A. Thus, the City's use of, and reliance on, EXHIBIT 1 to Schedule A of the Condemnation Order to take private property violates the express prohibitions in 32 M.R.S. § 18226 (Seals; stamps), subsection 1(C), which states:

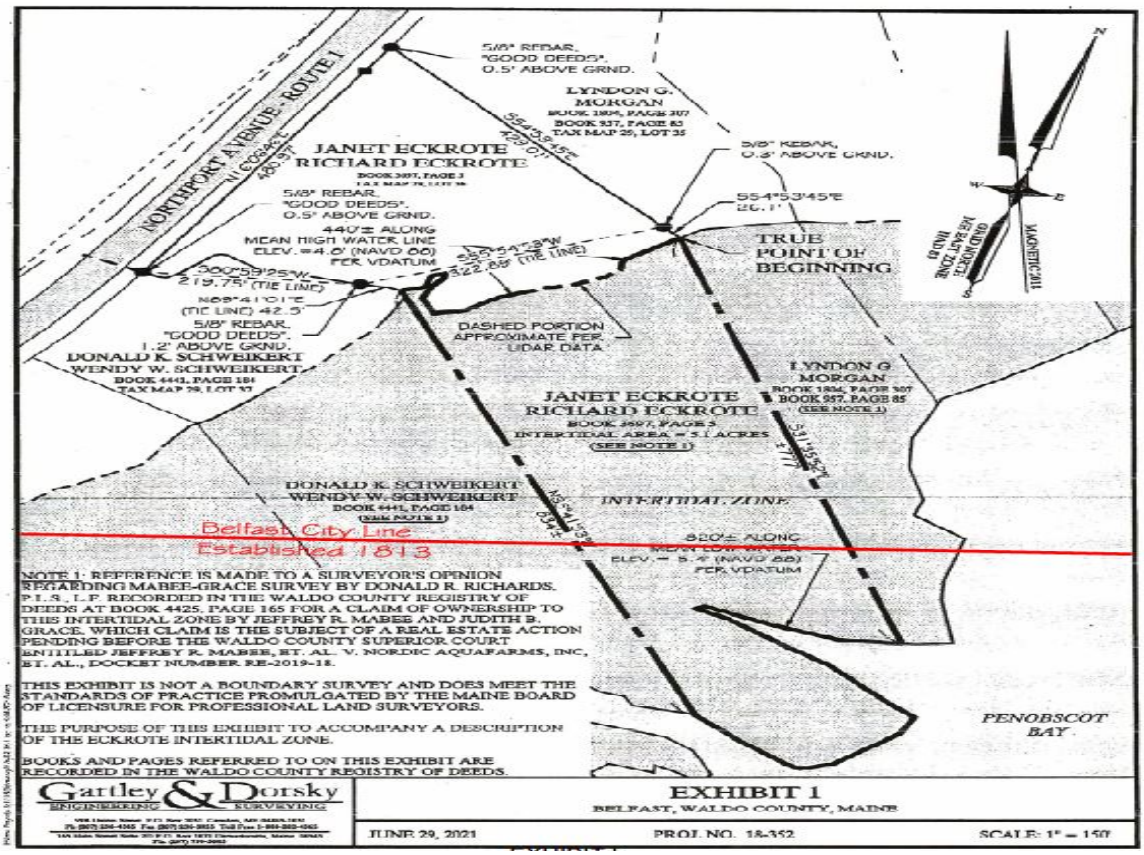
> C. An official of this State, or of any city, county, town or village in the state, charged with the enforcement of laws, rules, ordinances or regulations may not accept or approve any plans or other documents prepared within the meaning and intent of this chapter [Chapter 141: Professional Land Surveyors] that are not sealed and signed by the professional land surveyor under whose responsible charge they were completed.

An 1813 statute, enacted when Maine was still a part of the Commonwealth of Massachusetts, sets the municipal boundaries of the City of Belfast using the mouth of the Little River as a monument. (Exhibit L, p. 2-3, 17-18, 20 and 24, ¶¶ 5-6, and Exs. 3 and 4).

At the time that the image attached as Exhibit 1 to the 8-12-2021 Condemnation Order was drawn in June 2021, Surveyor Dorsky opined in the title claims trial (which occurred on June 22-24, 2021) that the mouth of a brook or river was not located where the freshwater body ceases to be "pent in" by its banks, but he believed that it was where the channel of the fresh water could no longer be seen within the salt water body at low tide. However, since that time, the Law Court rejected surveyor Dorsky's interpretation of the location of the mouth of a brook, stream or river in its 2-16-2023 Decision. *Mabee v. Nordic Aquafarms Inc.,* 2023 ME 15, ¶¶ 34-35.

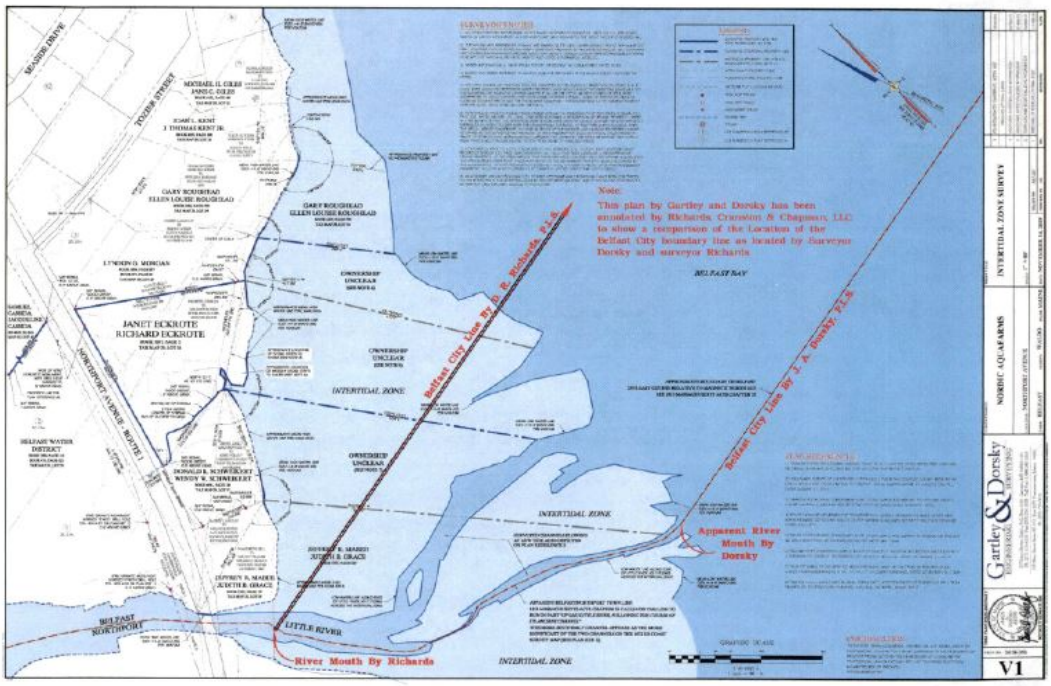
Attached hereto and incorporated herein as Exhibit L is an affidavit of Donald L. Richards, P.L.S., L.F., dated May 31, 2023. Surveyor Richards described and showed the difference of opinion in where he locates the municipal boundary of the City of Belfast and where Surveyor Dorsky locates that boundary, based on their difference of opinion on the location of the mouth of the Little River. (Exhibit L, pp. 4, 7-9, 20, 24, ¶¶ 7-13, 27, 28, 30-33 and Exs. 4 & 6).

Surveyor Richards superimposed a redline showing the actual Belfast municipal boundary on Exhibit 1 of the Condemnation Order.



That red line shows that the intertidal land the City purports to have taken from Mabee and Grace includes intertidal land that is outside the municipal boundaries of the City of Belfast.

No law provides the City of Belfast the right or authority to use eminent domain to take land from a private party that is located outside the City's municipal boundaries. The difference in the placement of the municipal boundaries as located by Surveyor Richards (using the same definition of "mouth of a river, stream or brook" adopted by the Law Court in its 2-16-2023 Decision), and where Surveyor Dorsky testified previously that he located that boundary are shown on the signed and sealed survey plan by Surveyor Dorsky, attached to Surveyor Richards' May 31, 2023 affidavit as Exhibit 4. (Exhibit L, p. 20).



Based on Surveyor Dorsky's error of law regarding the location of the "mouth of the Little River" – Surveyor Dorsky did not, and could not have, accurately located the municipal boundaries of the City of Belfast, which is based on the 1813 statute setting those boundaries using the mouth of the Little River as a monument. Accordingly, the City did not "take" Mabee-Grace's ownership interest in the intertidal land seaward of the red line indicating the limits of Belfast's municipal boundaries. Further, the City of Belfast could not grant Nordic an easement to use intertidal land it could not lawfully take by eminent domain, because located outside its municipal boundaries.

Accordingly, Nordic cannot rely on the City's alleged taking of Mabee-Grace's intertidal land by eminent domain or the easement the City granted to Nordic as a basis for TRI now. Because, pursuant to the Law Court's 2-16-2023 Decision, the description of the property taken and the definition of "mouth" of the Little River that form the basis for this dubious exercise of eminent domain were based on errors of law.

CONCLUSION

The Board should vacate its 11-19-2020 Orders, pursuant to the Law Court's Decision in *Mabee v.* 2023 ME 15, 290 A.3d 79, and the additional facts submitted in support of this motion, because Nordic lacks TRI and/or the ability to develop or use all land in the manner which the Board's prior Orders authorized. The land in which Nordic lacks TRI and/or the ability to develop or use in the manner BEP authorized includes:

(i) The upland lot on the eastern (waterside) of Route 1 designated as Belfast Tax Map 29, Lot 36 (hereinafter "Lot 36"), which the Law Court determined is subject to a "residential purposes only" servitude, that runs with the land for the benefit of the retained portion of Harriet L. Hartley's estate in 1946, a portion of which is owned and or held by Mabee-Grace and Friends (*Mabee v. Nordic Aquafarms Inc.,* 2023 ME 15, ¶ 58 and f.n.13);

(ii) The intertidal land adjacent to Lot 36, which the Law Court determined has been owned by Mabee-Grace since 1991 and is currently held by Friends pursuant to an enforceable conservation easement created by Mabee-Grace on 4-29-2019 (WCRD Book 4367, Page 273 and Book 4435, Page 344) (See, e.g. *Mabee v. Nordic Aquafarms Inc.,* 2023 ME 15, ¶¶ 10, 17, 25-45, 53-61);

(iii) A 12.5-acre parcel on the western (inland) side of Route 1 that is burdened by restrictions in the 1973 deed from the State of Maine to the City of Belfast (WCRD Book 710, Page 1152), a 1987 deed from the City of Belfast to the Belfast Water District (WCRD Book 1092, Page 145), and the 3-10-2022 deed from the BWD to Nordic (WCRD Book 4776, Page 210, at Page 221); and

(iv) A portion of the intertidal land adjacent to Lot 36, that the City of Belfast claims to have taken by eminent domain, is outside the municipal boundaries of the City of Belfast and thus, could not have been taken by the City but remains in the ownership of Mabee and Grace, pursuant to the 2-16-2023 Law Court Decision in *Mabee v. Nordic Aquafarms Inc, supra*.

Dated this 5th day of July, 2023.

/s/ Kimberly J. Ervin Tucker
Kimberly J. Ervin Tucker, Bar No. 6969
Counsel for Petitioners
48 Harbour Pointe Drive, Lincolnville, ME 04849
P: 202-841-5439; k.ervintucker@gmail.com

From: Loyzim, Melanie <Melanie.Loyzim@maine.gov> on behalf of Loyzim, Melanie
Sent on: Wednesday, June 12, 2019 5:35:54 PM
To: Reid, Jerry <Jerry.Reid@maine.gov>
Subject: Fwd: Belfast fish farm communications next steps

Get HYPERLINK "https://aka.ms/ghei36" Outlook for Android

From: Abello, Thomas
Sent: Wednesday, June 12, 2019 1:23:59 PM
To: Loyzim, Melanie; Madore, David; Beal, Amanda; Cutko, Andy; Ogden, Scott
Subject: Belfast fish farm communications next steps
Hello everyone – Based on a few conversations with ACF and DEP, I am hoping we can get together tomorrow at 1 pm (here at the Governor's office) to discuss communications around TRI for Nordic. Prior to Friday's deadline, it would be helpful to get everyone on the same page from a /messaging standpoint. Please feel free to invite the right folks from your respective offices.
Thanks
Tom
Thomas Abello
Senior Policy Advisor
Natural Resources, Transportation
Office of the Governor
State House Station 1
Augusta, Me. 04333
207-620-2168

Brenda Chandler

From: Redacted - SPI
Sent: Thursday, June 13, 2019 2:29 PM
To: Brenda Chandler; Elizabeth M. Ransom; Janet Exkrote
Subject: Fw: Land of Harriet L. Hartley

Hi Brenda and Elizabeth

We're forwarding you an email we received from Jeff Mabee for you review. We have also shared this email with Lee Woodward to keep him in the loop. We are not responding to Jeff and would rather this play out with Nordic and the attorneys. We are concerned about this and the constant appearance of our name in the news though and would welcome your thoughts.

Regards

The Eckrotes

---- Forwarded Message ----
From: Janet Eckrote <Redacted - SPI
To: ace ventura <Redacted - SPI
Sent: Thursday, June 13, 2019, 12:44:40 PM EDT
Subject: Fwd: Land of Harriet L. Hartley

Sent from my iPad

Begin forwarded message:

From: Jeffrey Mabee <jrmabee@gmail.com>
Date: June 13, 2019 at 9:05:02 AM EDT
To: janet.Redacted - SPI
Subject: Land of Harriet L. Hartley

Janet & Richard,

Harriet L. Hartley, MD created and imposed a covenant on your land, when this lot was conveyed to Janet's grandfather, Fred R. Poor in 1946. The Hartley covenant in the 1946 Deed states in relevant part that your lot: "is to be used for residential purposes only, that no business for profit is to be conducted there unless agreed to by Harriet L. Hartley, her heirs or assigns." This covenant paragraph was removed from the deed by Lindell and/or Woodward when the land was conveyed to you. That covenant runs with the land for the benefit of Harriet L. Hartley, as well as her heirs and assigns. Judith and I are assigns of Dr. Hartley by virtue of her transfer of her Little River homestead property to our successors in interest starting with the Butlers.

Judith and I do not agree to the proposed non-residential use of your lot by Nordic Aquafarms, Inc. for its pipelines, which will adversely impact the value, use and enjoyment of our property and threaten our intertidal land.

EXHIBIT 16

EXHIBIT F

We are very sorry that there should be any conflict between us. Every bit of this conflict has been created by Woodward/Lindell and Nordic Aquafarms.

Regards,

Jeffrey & Judith

—
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"When you open yourself to the continually changing, impermanent, dynamic nature of your own being and of reality, you increase your capacity to love and care about other people and your capacity to not be afraid. You're able to keep your eyes open, your heart open and your mind open." -Pema Chodron

EXHIBIT 16

EXHIBIT F