STATE OF MAINE
WALDO COUNTY, SS.
DOCKET NO. AP-2020-03

SUPERIOR COURT
CIVIL ACTION

JEFFREY R. MABEE and
JUDITH B. GRACE, individually
and as joint tenants of certain real property
that is the subject of this action;
FRIENDS OF THE HARRIET L. HARTLEY CONSERVATION AREA,
a Non-Profit Corporation registered in
the State of Maine,
Petitioners,

v.

BOARD OF ENVIRONMENTAL PROTECTION;
Respondents,

AND
NORDIC AQUAFARMS, INC., a
Foreign Corporation registered in the
State of Delaware,
Permit(s) Applicant.

N TO:

PETITIONERS' MOTION TO STAY PERMITTING PROCEEDINGS IN THE BOARD OF ENVIRONMENTAL PROTECTION PURSUANT TO NEW PRECEDENT ISSUED ON JULY 7, 2020 AND RULE 80B(b)

EF

is

Involved)

Pursuant to new precedent issued by the Maine Supreme Judicial Court on July 7, 2020, in *Tomasino v. Town of Casco,* 2020 ME 96, Petitioners, by and through their counsel, Kimberly J. Ervin Tucker, Esq., hereby move for a stay, pursuant to M.R. Civ. P. 80B(b),[1] of all permitting and licensure proceedings pending in the Board of Environmental Protection[2] relating to Nordic

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[1] Rule 80B(b) relating to: "Review of Governmental Action" provides in relevant part as follows:

> . . . Except as otherwise provided by statute, the filing of the complaint does not stay any action of which review is sought, but ***the court may order a stay upon such terms as it deems proper***. . . .

(emphasis supplied).

[2] Hereinafter referred to as: "BEP" or "the Board".

Aquafarms, Inc. ("NAF") until the Waldo County Superior Court has determined the parameters and validity, if any, of the easement ostensibly granted to NAF by the Eckrotes.

The permit and license proceedings Petitioners seek the Court to stay include the following:

- 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

GRAVAMEN OF THE *TOMASINO* HOLDING

In the Law Court's July 7, 2020 decision in *Tomasino v. Town of Casco,* 2020 ME 96, ¶10-¶15 (decided July 7, 2020)*,* the Maine Supreme Judicial Court set out, for the first time, that a permit applicant cannot demonstrate the requisite administrative standing to proceed in an administrative permitting process, by relying solely on an easement, the parameters of which have not yet been decided by a court of competent jurisdiction. The Law Court also made clear that administrative permitting authorities lack the subject matter jurisdiction to make such factual (or legal) determinations relating to the parameters of such easements.

Specifically, the Law Court held in relevant part that:

> [N]one of these decisions [referenced below in footnotes 4 and 5] supports the proposition that administrative standing may be conferred merely by possessing any kind of easement on the property at issue. Unlike title owners, easement owners are subject to a second layer of necessary authority – what the easement itself allows – in addition to what the applicable ordinances and statutes allow. . . ***Whatever minimum "right, title or interest" is required*** [to have administrative standing to obtain a permit]. . ., ***we conclude that, in the face of a dispute between private property owners, that requirement is not met by an easement whose parameters have not been factually determined by a court with jurisdiction to do so***.

Tomasino v. Town of Casco, 2020 ME 96, ¶15 (emphasis supplied).

In *Tomasino,* permit applicants challenged a Zoning Board's determination that they demonstrated ***insufficient*** title, right or interest ("TRI") in the property at issue to obtain a permit to remove trees from property owned by the abutting property owner (a land trust) over which the Tomasinos claim a deeded easement. The zoning board reasoned that, without a court's formal ruling on the parameters of the easement, it was not possible for the zoning board to determine where the easement was vis-a-vis the location of three trees that the applicant sought to remove. The Law Court agreed.

In *Tomasino*, the Court determined that the parameters of the easement on which the applicants relied in asserting "sufficient TRI" were unclear on two significant factual points: (i) whether the easement allowed the Tomasinos to cut trees from the land owned by the Trust without the express permission of the Trust; and (ii) whether all three of the trees that the Tomasinos sought to cut were within the boundaries of the easement that the Tomasinos had been granted. The Law Court stated that these factual determinations could only be resolved by a Court of competent jurisdiction, and resolution of such factual matters relating to the parameters of the easement were beyond the Zoning Board's subject matter jurisdiction to resolve.

As a result, the Court affirmed the judgment of the Casco Zoning Board that the Tomasino's easement was ***insufficient*** proof to demonstrate the requisite title, right or interest to establish the Tomasino's administrative standing to obtain a permit, in the absence of a factual determination by a Court of competent jurisdiction of the parameters of the easement.[3]

[3] Because the Superior Court acted in its intermediate appellate capacity, the Law Court reviewed the operative decision of the municipality directly. *Tomasino v. Town of Casco,* 2020 ME 96, ¶10-¶15 (decided July 7, 2020), citing, *Lakeside at Pleasant Mountain Condo. Ass'n v. Town of Bidgton*, 2009 ME 64, ¶ 11, 974 A.2d 893.

Significantly, in making its ruling, the Law Court distinguished disputes relating to whether an applicant for permits has "sufficient title, right or interest" that arise between private property owners when the applicant asserts that he/she/it has "title" to the disputed property (by deed, purchase option or adverse possession), [4] from disputes between a private property owner and an applicant claiming "sufficient title, right or interest" based on a mere easement, the parameters of which have not been determined by a Court of competent jurisdiction.[5]

As will be shown below, this ruling is directly applicable to NAF's applications pending in the Board, as well as various other local and State permitting authorities, seeking permits, licenses and leases authorizing NAF to install three industrial pipelines across upland property owned by Richard and Janet Eckrote and into the intertidal land on which the Eckrotes' lot fronts. In all of these pending local and State permitting proceedings, NAF has relied on its easement option from the Eckrotes as the basis on which NAF claims to have sufficient title, right or interest to obtain the necessary permits, licenses and leases, required to construct its proposed land-based salmon farm – including the three pipelines a mile into Penobscot Bay.

The issues relating to the parameters and validity, *if any*, in the 2018 NAF-Eckrote easement are already being directly litigated in this Court, in *Mabee and Grace, et al. v. Nordic*

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[4] *See, e.g. Tomasino v. Town of Casco,* 2020 ME 96, ¶10-¶15 (decided July 7, 2020), citing, *Walsh v. City of Brewer,* 315 A.2d 200, 205 and 207 (Me. 1974) (the requisite right, title or interest in property to confer administrative standing is the "lawful power to use [the [property], or control its use" in the manner sought through the [permitting] action"); *Murray v. Inhabitants of Town of Lincolnville,* 462 A.2d 40, 43 (Me. 1983) ("an applicant for a license or permit to use property in certain ways must have 'the kind of relationship to the site,' that gives him a legally cognizable expectation of having the power to use that site in the ways that would be authorized by the' . . . license he seeks." (internal citations omitted)); and *Southridge Corp. v. Bd. of Environmental Prot.,* 655 A.2d 345, 347-48 (Me. 1995) ("a pending action [in a parallel Superior Court quiet title case] claiming ownership by adverse possession was sufficient to confer standing to seek state regulatory permits for the property at issue").

[5] *Rancourt v. Town of Glenburn,* 635 A.2d 964, 965-966 (1993) (applicant did not establish that the scope of her right-of-way included the ability to construct a dock on the property; therefore the municipal board correctly determined that she had not satisfied the right, title or interest requirements to allow her permit application to proceed).

Aquafarms, Inc., et al., Waldo County Superior Court civil action Docket No. RE-2019-18.

The Law Court's July 7, 2020 holding in *Tomasino,* mandates that all permitting proceedings stop, including those in the Board, until this Court resolves the factual and legal issues relating to the parameters and validity, *if any*, of the easement on which NAF bases its claim of title, right or interest and, thus, its administrative standing. In the absence of a ***prior*** resolution by this Court in the parallel Declaratory Judgment action regarding the parameters of that easement, the administrative agencies, including the Board, lack the subject matter jurisdiction to proceed to consider or act on NAF's myriad, voluminous permit, license and lease applications.

MEMORANDUM OF LAW AND ARGUMENT FOR STAY

To date, the Board and other local and State regulatory entities from which NAF is seeking permits, licenses and leases, have cited the Law Court's prior decision in *Southridge Corp. v. Bd. of Environmental Prot.,* 655 A.2d 345, 347-48 (Me. 1995) to support the conclusion that permitting proceedings may continue, despite Petitioners' challenges to the sufficiency of the easement on which NAF relies to demonstrate it TRI and despite Petitioners' pending Superior Court challenge relating to NAF's claims of title, right or interest in Declaratory Judgment action RE-2019-18. However, the Law Court expressly addressed, clarified and limited its prior holding in *Southridge,* in the *Tomasino* case.

Pursuant to the clarifying holding in *Tomasino, supra,* the Board (and any similarly situated local and State permitting entities) must stay, or dismiss, NAF's pending permit, license and lease applications as incomplete, due to ***insufficient*** title, right or interest, until this Court rules on the issues relating to NAF's and the Eckrotes' easement and ownership claims and makes a determination regarding the parameters and validity, if any, of the NAF-Eckrote

easement.

Here, this suit was filed pursuant to Rule 80B, challenging the Board's subject matter jurisdiction and repeated failure or refusal to make a determination regarding the sufficiency of NAF's proof in support of its claims of TRI based on NAF's easement option from the Eckrotes. Further, the Board has repeatedly denied the Petitioners' requests to stay its consideration of the substance of NAF's permit and license applications pending resolution of the Declaratory Judgment action to quiet title by this Court. Thus, Petitioners' only avenue for a stay, to prevent the Board from continuing to act on NAF's permit and license applications in the absence of subject matter jurisdiction, is to request a stay from the Court, pursuant to M.R. Civ. P. 80B(b). Petitioners do so now.

The basis of Petitioners' challenges to the Board's subject matter jurisdiction to consider or process NAF's permit and license applications have nothing to do with the pending dispute in the Superior Court regarding who ***owns*** the intertidal land on which the Eckrotes' lot fronts and on which NAF proposes to place its industrial pipes into Penobscot Bay. However, Petitioners "TRI" challenges have had everything to do with the parameters and validity of the easement between NAF and the Eckrotes.

Resolution of the Petitioners' challenges to NAF's "sufficient TRI" claims in the State agencies, including the Board, are based on Petitioners' assertion that the easement granted to NAF by the Eckrotes, by its own terms, terminates at the high water mark of the Eckrotes' lot – granting no right to NAF to use the intertidal land on which the Eckrotes' lot fronts. Thus, like the easement at issue in *Tomasino,* the parameters of the NAF-Eckrote easement are disputed and require factual and legal resolution by this Court, which already has jurisdiction over these issues.

This challenge to NAF's TRI claims does not require the Board (or any other similarly situated local or State permitting authority) to resolve competing *ownership* claims by the relevant private property owners relating to this intertidal land. This challenge does require a determination regarding the plain meaning and parameters of the easement option that NAF obtained from the Eckrotes -- the exact issue which the Court in *Tomasino* stated ***must be resolved in the Superior Court prior to a permitting authority, like the Board, having subject matter jurisdiction*** to consider the permit, license and lease applications of applicant NAF.

Previously, Petitioners have asserted that the Board (and other local and State administrative agencies) need only review the easement documents NAF has submitted – ***or not submitted*** – to see that NAF has failed to demonstrate that it has a legally cognizable expectation to use the intertidal land it proposes to use for placement of its pipes, in the manner that the permits, licenses and leases sought by NAF would authorize.[6] However, pursuant to the *Tomasino* decision, the Law Court has now clarified that it is ***this Court***, not any State or local agency, board, bureau or executive official, that *must* ***first*** make such a determination regarding the parameters of NAF's easement ***before*** NAF may rely on its easement option as proof of "sufficient" title, right or interest in the subject property to proceed in any administrative permitting proceedings.

And, pursuant to *Tomasino,* until and unless ***this Court*** makes a ruling regarding the parameters of the NAF-Eckrote easement, in the parallel pending Declaratory Judgment action (RE-2019-18), the easement must be determined by the Board, and other similarly situated local and State permitting agencies, to be ***insufficient*** proof of TRI for NAF to proceed in the permit proceedings.

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[6] Because, by its own terms, the easement's boundaries terminate at the Eckrotes' high water mark it should be apparent that NAF has failed to demonstrate sufficient TRI to proceed in the permit, lease and license proceedings.

Further, pursuant to *Tomasino,* the Board, and other similarly situated local and State permitting agencies, lack subject matter jurisdiction to consider, process or make determinations on NAF's permit, license or lease applications and/or the parameters of NAF's easement (including the effect of the March 3, 2019 Letter Agreement and December 23, 2019 Easement Amendment on the parameters of the 2018 easement boundaries in Exhibit A of the 2018 Easement Purchase and Sale Agreement), and must cease further consideration of NAF's permit, license and lease applications until this Court makes all necessary factual, and legal, determinations regarding the parameters of NAF's easement from the Eckrotes.

In this case, the parameters of the easement on which NAF relies to demonstrate sufficient TRI are even more in doubt, ambiguous and in need of factual (and legal) determinations by this Court than the easement at issue in *Tomasino.* Indeed, in this case, the Court has already determined in the parallel Declaratory Judgment action that there are significant factual issues regarding the parameters of NAF's easement that must be resolved.[7] See, e.g. June 4, 2020 Order on Summary Judgment Motions, in RE-2019-18.

Here, there are even questions relating to the parameters of the easement that place in doubt whether NAF's Grantors, the Eckrotes, have the ability to grant NAF an easement to use their upland lot ***<u>or</u>*** the intertidal flats on which their lot fronts – intertidal flats that Petitioners Mabee and Grace assert that they own in fee simple and to which Petitioner Friends is the Holder

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[7] The issues in Docket No. RE-2019-18 relating to the parameters and validity, if any, of the NAF-Eckrote easement option include, but are not limited to: (i) the location of the sideline termini of the 1946 Hartley-to-Poor conveyance, which would determine whether the Eckrotes' waterside boundary is "along high water" or low water, whether the Eckrotes own the intertidal land on which their lot fronts, and whether the Eckrotes can grant any easement to use this intertidal land; and (ii) whether a restrictive covenant exists on the Eckrotes' upland lot that prevents the Eckrotes from granting an easement to NAF to use the Eckrotes' upland property for the business purposes proposed.

of a Conservation Easement.[8]

In addition to the question of who *owns* the intertidal flats (and therefore who has the ability to grant an easement to use the flats), the factual issues relating to the parameters of NAF's easement already identified by the Court include: (i) whether NAF's Grantors' (the Eckrotes') have the ability to grant NAF an easement over their upland property or if language in the 1946 deed from Hartley-to-Poor creates a restrictive covenant that limits the use of the Eckrotes' upland lot to residential purposes only;[9] and (ii) whether the Eckrotes' waterside (eastern) boundary ends at their high water mark, requiring further factual determinations relating to the location of the sideline termini referenced in the 1946, 1971 and 1991 deeds.[10]

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[8] Even the surveyor who issued the April 2, 2018 survey, commissioned by NAF, cautioned NAF – in ALL CAPS on the face of that survey that the Eckrotes may not have the ability o grant NAF any easement below the Eckrotes' high water mark because of language indicating that the Eckrotes' waterside boundary terminates at the high water mark. See, e.g. April 2, 2018 Good Deeds survey by Clark Staples, P.L.S., commissioned by NAF, attached hereto as Exhibit 8. See also, August 31, 2012 Good Deeds survey, commissioned by the Eckrotes and incorporated by reference in the Eckrotes deed from the Estate of Phyllis J. Poor (Schedule A) (WCRD Book 3697, Page 5), which states that the Eckrotes' waterside (eastern) boundary is "along high water". (Attached hereto as Exhibit 9).

[9] As the Court noted in its June 4, 2020 Order denying Plaintiffs Mabee and Grace's First amended Motion for Partial Summary Judgment regarding language Plaintiffs assert constitutes a "restrictive covenant," the Court concluded in relevant part that:

> "Because the deed as a whole is ambiguous regarding whether the residential use restriction was intended to burden all subsequent grantees of lot 36, or just Fred Poor, and because the scant extrinsic evidence present in the summary judgment record does not provide any insight into Hartley's intent in 1946, Plaintiffs' amended first motion for summary judgment must be denied. . . . As the foregoing analysis impliedly details, however, nothing in the 1946 deed (nor the 1945 will) compels a judgment in Defendants' favor. The parties could assist the Court in this case at an eventual trial on the issue by locating and presenting any other evidence regarding the parties' intent at the time Hartley conveyed the parcel to Poor." (6-4-2020 Order Denying Summary Judgments, in RE-2019-18, pp. 9-10, attached as Exhibit 10 hereto and incorporated herein).

[10] As the Court noted in its June 4, 2020 Order denying Plaintiffs Mabee and Grace's Second amended Motion for Partial Summary Judgment regarding whether the Eckrotes' waterside boundary is the high water mark of their lot, meaning that they have no ownership interest in the intertidal land on which their lot fronts and thus no ability to grant NAF an easement to use the intertidal land on which their lot fronts, the Court noted in relevant part that: "The second ambiguity relates to the location (or existence) of the artificial monuments described in the boundary description and how those monuments relate to the high-water mark. *Id.* at p. 22.

Accordingly, because the holding in *Tomasino* makes clear that the Board lacks subject matter jurisdiction to consider, process or grant NAF any permits, licenses or leases, until the pending factual and legal questions relating to the parameters of NAF's easement option from the Eckrotes are resolved by this Court in the parallel Declaratory Judgment action (RE-2019-18), a stay (or dismissal for lack of sufficient TRI) of all Board proceedings is mandated by the Law Court's holding in *Tomasino*. Because the Board has repeatedly denied Petitioners' requests for such a stay pending resolution of the parallel Declaratory Judgment action, including as recently as July 9, 2020,[11] Petitioners move for imposition of this stay by this Court, pursuant to Rule 80B(b) and/or the Court's inherent authority regarding matters of subject matter jurisdiction.

The Court also noted in relevant part that:

> "[I]f the iron bolt and stake are both at or above the high-water mark, combined with the call along the high-water mark of Penobscot Bay, it would seem likely that the Court would have to apply 'the rule that where the two ends of a line by the shore are at high water mark, in the absence of other calls or circumstances showing a contrary intention, the boundary will be construed as excluding the shore.'" [citations omitted]; *Id.* at p. 21.

[11] The Board's Chair and Presiding Officer have denied Petitioners' multiple requests for stay of proceedings pending resolution of the TRI issues, from the outset of the Board assuming jurisdiction of NAF's permit and license applications as a project of statewide significance, pursuant to 38 M.R.S. § 341-D(2). In addition to the June 17, 2019 Letter from Board Chair Draper denying Petitioners Mabee and Grace's TRI challenge to NAF's TRI at the outset of the Board taking jurisdiction over NAF's various permit and license applications, the following Procedural Orders by the Presiding Officer deny Petitioners' TRI-related stay requests: the 2nd P.O. (dated 8-23-2019); the 3rd P.O. (dated 11-1-2019 denying Petitioners' request for TRI to be a hearing topic resolved before any other hearing topics proceed); the 4th P.O. (dated 11-8-2019); the 5th P.O. (dated 11-26-2019); the 9th P.O. (dated 1-31-2020); the 12th P.O. (dated 3-2-2020); the 13th P.O. (dated 3-16-2020); and the 14th P.O. (dated 4-3-2020).

The July 9, 2020 denial of stay by the Board's Presiding Officer was not related to TRI. On July 9, 2020, the Board's Presiding Officer denied Petitioners' request for a stay of substantive action by the Board on NAF's pending permit and license applications, pending NAF's completion of sediment testing along the proposed pipeline route for mercury and other contaminants, required by Section 404 of the Clean Water Act and ordered *on June 22, 2020* by the U.S. Army Corps of Engineers (USACE) with the approval of the U.S. Environmental Protection Agency (EPA) *and the Maine Department of Environmental Protection (DEP)*. The Board's Presiding Officer had previously denied Petitioners' requests that the Board require NAF to do such sediment testing pursuant to Section 404 of the Clean Water Act in the 13th, 14th, 15th, 16th, 17th and 19th Procedural Orders, and ordered that his denial of Petitioners' requested sediment testing was made in a Procedural Order without any opportunity for appeal by Intervenors/ Petitioners of this decision to the full Board for that denial.

BACKGROUND

As the Court is well aware, Petitioners in this Rule 80B action, challenge the subject matter jurisdiction of the Board of Environmental Protection to proceed with its consideration of NAF's permit and license applications since January of 2019. The Court is also well aware that the Petitioners have a Declaratory Judgment action to quiet title, enforce property rights and enforce the Conservation Easement on all intertidal land in which Petitioners Mabee and Grace claim fee simple title. That Declaratory Judgment action includes issues relating to the intertidal land on which the Eckrotes lot fronts and NAF claims to have an easement right to place its pipes into Penobscot Bay, as well as the parameters of NAF's easement from the Eckrotes. That Declaratory Judgment action is pending in this Court and is captioned: *Mabee and Grace, et al v. NAF, et al.,* Docket No. RE-2019-18.

In addition, Petitioners have participated as Intervenors or Interested Parties in multiple local and State (and federal) administrative proceedings in which NAF is seeking permits, licenses and leases that -- *if granted* -- would authorize NAF to take and use intertidal land that Petitioners Mabee and Grace assert that they own, and that Petitioner Friends of the Harriet L. Hartley Conservation Area (Friends) hold under a Conservation Easement created and recorded by Petitioners Mabee and Grace on April 29, 2019.[12]

In all of the local, State and federal administrative proceedings in which NAF has pursued permits, licenses and leases, NAF has claimed that it has "sufficient" title, right or interest ("TRI"), and thus the requisite administrative standing to proceed in the permit process,

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[12] The Conservation Easement is defined in a document recorded at WCRD Book 4367, Page 273; and Petitioner Friends' assignment as Holder of that Conservation Easement from Upstream Watch, the original Holder, is recorded at WCRD Book 4425, Page 165. The recorded survey defining the current boundaries of the Harriet L. Hartley Conservation Area, created by the Conservation Easement, is recorded at WCRD Book 24, Page 54.

based on the August 6, 2018 Easement Purchase and Sale Agreement between NAF and Richard and Janet Eckrote.[13] That Agreement grants NAF an option to purchase a 25-foot wide permanent easement, within a 40-foot construction easement area along the southern boundary of the Eckrotes' lot, Belfast Tax Map 29, Lot 36. However, by its own terms in Exhibit A to the Easement Agreement, the waterside (eastern) boundary of the easement option that the Eckrotes have granted to NAF ***terminates at the Eckrotes' high water mark***.

Specifically, the easement NAF is granted an option to acquire in the August 6, 2018 Easement Purchase and Sale Agreement is not described by metes and bounds, but rather is depicted by a Google Earth image of the Eckrotes' lot with the boundaries of the easement highlighted by yellow lines. The yellow highlighting defining the easement shows that the easement goes along the southern boundary of the Eckrotes' lot, starting at U.S. Route 1 and terminating at the high water mark of the Eckrotes' lot.

That Google Earth image is attached to the Easement Purchase and Sale Agreement as Exhibit A. The image depicted in Exhibit A includes a 40-foot wide construction easement, within which the Eckrotes permit NAF to bury its three industrial pipes in a 25-foot wide permanent easement along the southern boundary of the Eckrotes' lot. The waterside (eastern boundary of the easement (the easement's end point) is shown to terminate at the Eckrotes' high water mark. Thus, the Eckrotes-to-NAF easement, as defined, includes no intertidal land and grants no easement to NAF to use the intertidal land on which the Eckrotes' lot fronts.

Because the easement, by its own terms, terminates at the Eckrotes' high water mark, Petitioners have repeatedly alleged in multiple administrative forums that the easement, even if executed, fails to give NAF administrative standing to seek any permits, leases or licenses

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[13] Attached hereto and incorporated herein as Exhibit 3.

because the easement, *as defined by NAF and the Eckrotes in their 2018 Easement Purchase and Sale Agreement, the March 3, 2019 "Letter Agreement" and December 23, 2019 Easement Amendment*, is ***insufficient*** to give NAF a legally cognizable expectation to use the intertidal land on which the Eckrotes' lot fronts in the manner the permits, leases and licenses would authorize. This deficiency renders the easement ***insufficient*** to demonstrate that NAF has sufficient TRI to use this intertidal land – regardless of whether the Eckrotes own this intertidal land or not.

In January of 2019, both the Bureau of Parks and Lands and the Department of Environmental Protection agreed with Petitioners' challenge regarding the ***insufficiency*** of the 2018 NAF-Eckrote easement to demonstrate sufficient TRI to proceed in the permitting, license and lease proceedings in these agencies. (See, e.g. Exhibits 1 and 2 attached hereto and incorporated herein). However, based on the March 3, 2019 Letter Agreement submitted by NAF to the Bureau of Parks and Lands and Department, these determinations were reversed in April and June, respectively, and both agencies found that the NAF applications were "complete" for processing.[14]

Despite Petitioners' repeated attempts in the Board of Environmental Protection, to challenge the Department's June 13, 2019 determination that NAF had demonstrated sufficient TRI to proceed – culminating in this Rule 80B challenge to the Board's subject matter jurisdiction being filed – the Board has denied all of the Petitioners' requests to stay its consideration of the substance of the pending NAF permit and license applications until this Court rules in the pending Declaratory Judgment action to quiet title and determine the parties' respective property rights. The Board refused Petitioners' challenges to the sufficiency of NAF's

[14] Exhibits 4, 5 and 6 to this Motion, incorporated herein.

submissions in support of its claims of RTI, even after NAF submitted the December 23, 2019 Amendment to the NAF-Eckrote Easement Purchase and Sale Agreement, containing a WHEREAS clause that stated as follows:

> 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 and to said areas, if any, and *no representation or warranty is made as to any such ownership rights*.
>
> 12-23-2020 Easement Amendment, p. 1.[15]

Petitioners respectfully assert that the Law Court's holding on July 7, 2020, in *Tomasino, supra,* now mandates that the Board stay the NAF permit and license applications based on the insufficiency of NAF's title, right or interest and requires all review of NAF's permit and license applications by the Board be suspended (or dismissed as incomplete) until this Court determines the parameters (and validity) of the NAF-Eckrote easement in the parallel Declaratory Judgment action. Pursuant to Rule 80B(b) Petitioners move that the Court impose a stay on the Board, halting all substantive consideration of NAF's permit and license applications until the Court makes the needed determinations regarding the parameters and validity of the NAF-Eckrote easement in the parallel Declaratory Judgment action.

CONCLUSION

The Law Court's July 7, 2020 holding in *Tomasino v. Town of Casco, supra*, that: "***in the face of a dispute between private property owners, that requirement is not met by an easement whose parameters have not been factually determined by a court with jurisdiction to do so***", requires all further consideration by the Board on NAF's pending applications to cease, until this Court rules on the parameters of the NAF-Eckrote easement in the pending Declaratory Judgment action (RE-2019-18). Accordingly, Petitioners move for an immediate stay of all

[15] Attached hereto and incorporated herein as Exhibit 7.

permitting proceedings in the Board of Environmental Protection on the above-referenced permit and license applications., pursuant to the Law Court's holding in *Tomasino* and Rule 80B(b).[16]

Respectfully submitted this 13th day of July 2020.

____

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NOTICE

Any opposition to this motion must be filed not later than twenty-one (21) days after the filing of this motion unless another time is provided by Rule 7(b)(1) of the Maine Rules of Civil Procedure or set by the court. Failure to file timely opposition will be deemed a waiver of all objections to this motion, which may be granted without further notice or hearing.

CC: AAG Peggy Bensinger
AAG Lauren Parker
AAG Scott Boak
AAG Laura Jensen
David Kallin, Esq.
Joanna Tourangeau, Esq.
David Perkins, Esq.
Kristin Racine, Esq.
Sara Gilbert, Esq.
William Kelly, Esq.
Peter Tischbein, USACE
Dana Strout, Esq.

[16] Petitioners are also filing parallel motions to stay and or dismiss NAF's permit, license and lease applications in all local and State permitting proceedings, based on the Law Court's holding in *Tomasino*.