STATE OF MAINE

DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY

BUREAU OF PARKS AND LANDS

IN RE: APPLICATION OF NORDIC AQUAFARMS, INC.

Submerged Lands Lease No. 2141-L-48
Dredging Lease No. 05-21-DL

MOTION FOR STAY OR DISMISSAL PURSUANT TO NEW PRECEDENT DECIDED ON JULY 7, 2020

SUBMITTED BY:
JEFFREY MABEE AND JUDITH GRACE; THE FRIENDS OF THE HARRIET L. HARTLEY CONSERVATION AREA;
THE MAINE LOBSTERING UNION AND LOBSTERING REPRESENTATIVES DAVID BLACK AND WAYNE CANNING

COUNTY OF WALDO,
CITY OF BELFAST AND
TOWNS OF NORTHPORT
SEARSPORT, MAINE

DATE: July 13, 2020

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 or dismissal of all lease application proceedings pending in the Bureau of Parks and Lands, Submerged Land Program, relating to Nordic Aquafarms, Inc. ("NAF"), until determination by the Waldo County Superior Court, of the parameters and validity, *if any*, of the easement option NAF was granted by the August 6, 2018 NAF-Eckrote Easement Purchase and Sale Agreement. Such questions are before the Waldo County Superior Court in the pending Declaratory Judgment action to quiet title and resolve other property rights, captioned *Mabee and Grace, et al. v. Nordic Aquafarms, Inc., et al,* Docket No. RE-2019-18.

The lease application proceedings Petitioners seek the Bureau to stay or dismiss include the submerged lands lease application(s) on which the following leases are based:

- Submerged Lands Lease No. 2141-L-48; and
- Dredging Lease No. 05-21-DL

This motion for stay or dismissal is submitted on behalf of: **Jeffrey Mabee and Judith Grace** ("Mabee-Grace"), true owners[1] of a portion of the intertidal land that NAF fraudulently[2] asserts a right to use in these Bureau proceedings; the **Friends of the Harriet L. Hartley Conservation Area** ("Friends"), a Maine-registered nonprofit corporation[3] and 501c3 organization, and Holder of a portion of the intertidal land that NAF fraudulently asserts a right to use in these Bureau proceedings; the **Maine Lobstering Union**[4] ("IMLU"), a cooperative corporation registered with the Maine Division of Corporations that has members who would be directly, adversely impacted by the Nordic Aquafarms, Inc. project as proposed; and Belfast Lobstermen **David Black** and **Wayne Canning** (who is also the Zone D Lobster Zone Council Representative for District 11 lobstermen) (collectively referred to herein with the IMLU as the

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[1] Waldo County Registry of Deeds Book 1221, Page 347; Book 683, Page 283; Book 24, Page 34; Book

[2] Pursuant to Maine Supreme Judicial Court precedents:

> A person is liable for fraud if the person (1) makes a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance on it, and (5) the other person justifiably relies on the representation as true and acts upon it to the damage of the plaintiff.

Sherbert v. Remmel, 2006 ME 116, §4, 908 A.2d 622, 623, citing, *Grover v. Minette-Mills, Inc.,* 638 A.2d 712, 716 (Me. 1994). Here, the Bureau has relied on NAF's knowingly false representations about it easement rights, under the easement option granted by the Eckrotes and Petitioners (and Maine's taxpayers) have suffered significant damages as a consequence of NAF's fraudulent representations to the Bureau.

[3] The Charter Number for the Friends of the Harriet L. Hartley Conservation Area is: 20200085ND. The Friends interest as Holder of the HLHCA is recorded at WCRD Book 4367, Page 273; Book 4435, Page 344; and Book 24, Page 54.

[4] The Maine Lobstering Union is Local 207, in District 4 of the International Association of Machinists and Aerospace Workers ("IAMAW") and is referred to herein as "the IMLU" or "the Maine Lobstering Union." The Charter Number for this Cooperative Corporation in good standing is: 20140002CP.

"Lobstering Representatives"). Collectively the Interested Parties submitting this Motion to Stay or Dismiss are referred to herein as "Petitioners" or, where appropriate, by their specific name(s).

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 clarified, 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 factual (or legal) determinations relating to the parameters of such easements.

Significantly, in making its ruling, the Law Court distinguished administrative standing 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), [5] from administrative standing 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

[5] *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").

by a Court of competent jurisdiction.[6]

Specifically, the Law Court held in relevant part that:

> [N]one of these decisions [referenced in footnotes 5 and 6] 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 Law 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

[6] *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).

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.[7]

As will be shown below, this ruling is directly applicable to NAF's applications pending in the Bureau, 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, including the Bureau, NAF has relied on its easement option from the Eckrotes (as well as the March 3, 2019 Letter Agreement, allegedly clarifying the meaning of the 8-6-2018 easement) 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 the Superior Court, in *Mabee and Grace, et al. v. Nordic Aquafarms, Inc., et al.,* Waldo County Superior Court civil action Docket No. RE-2019-18.

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[7] 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.

The Law Court's July 7, 2020 holding in *Tomasino,* mandates that all permitting proceedings stop, including those in the Bureau, until the Superior Court resolves the pending 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 the Superior Court in the pending Declaratory Judgment action regarding the parameters of that easement, the administrative agencies, including the Bureau, 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 SUMMARY OF THE ARGUMENT FOR STAY

To date, the Bureau 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 lease application proceedings may continue, despite Petitioners' pending Superior Court challenge relating to NAF's claims of title, right or interest in 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 Bureau (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 the Waldo County Superior Court makes a determination of the parameters of the NAF-Eckrote easement.

The basis of Petitioners' challenges to the Bureau's subject matter jurisdiction to consider or process NAF's lease application(s) ***have nothing to do with the pending dispute in the Superior Court regarding who owns the intertidal land on which the Eckrote lot fronts and NAF proposes to place its industrial pipes into Penobscot Bay***. However, these challenges have

everything to do with the parameters of the easement between NAF and the Eckrotes.

Resolution of the Petitioners' challenge to NAF's "sufficient RTI" claims in the Bureau are based on the 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. This challenge does not require the Bureau (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.[8] This challenge requires a determination regarding the plain meaning and parameters of the easement option that NAF obtained from the Eckrotes.

Petitioners have asserted that the Bureau 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 Bureau's leases would authorize.[9] However, pursuant to the *Tomasino* decision, the Law Court has clarified that it is *the Superior Court*, not any State agency, board,

[8] Notably, the pending dispute over ownership of the intertidal land on which the Eckrotes' lot fronts does not involve NAF – NAF has no *legitimate* claim of ownership to this intertidal land. Fraudulent unrecorded instruments were submitted to DEP by NAF (but not directly submitted by NAF in the Bureau proceedings). Those faux "release deeds" were drafted by NAF's counsel and executed by unknown persons, whose identifying information (including the names, locations and alleged relationship to "Harriet A. [sic] Hartley" of the alleged Grantors) NAF has blacked out – making them un-recordable in Maine.

In these instruments the so-called Grantors claim to have conferred to NAF any interest the "Grantors" may have, *if any*, in the land referenced in the August 27, 1934 deed from Genevieve Hargrave to her sister Harriet L. Hartley and Arthur Hartley, as joint tenants. These unrecorded and un-recordable documents do not constitute a *legitimate* claim of ownership by title by NAF in the intertidal land on which the Eckrotes' lot fronts. Indeed, as drafted, these instrument do not convey title to any land pursuant to the controlling precedent of the Maine Supreme Judicial Court in *Sargent v. Coolidge,* 399 A.2d 1333 (Me. 1979) (a quitclaim deed merely of "a right, title and interest" in land is not a grant of the land itself nor of any particular estate in the land, and is not prima facie evidence of title), citing, *Hill v. Coburn,* 105 Me. 437, 452, 75 A. 67 (1909); *Butler v. Taylor,* 86 Me. 17, 23, 29 A. 923 (1893); *ash v. Bean,* 74 Me. 340 (1883); *Coe v. Person Unknown,* 43 Me. 432 (1857).

[9] 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.

bureau or executive official, that *must **first*** make such a determination of the meaning and scope (i.e. "parameters") of this 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 permitting proceedings. And, pursuant to *Tomasino,* until and unless *the Court that has jurisdiction to do so* 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 Bureau to be ***insufficient*** proof of TRI (as the Bureau did in January of 2019).

Further, pursuant to *Tomasino,* the Bureau now lacks subject matter jurisdiction to consider, process or make determinations on NAF's 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 lease applications. See, Exhibits 4 and 7.

In this case, the parameters of the easement on which NAF relies to demonstrate sufficient RTI are even more in doubt, ambiguous and in need of factual (and legal) determinations by the Superior Court than the easement at issue in *Tomasino.* Indeed, in this case, the Superior Court has already determined in the pending Declaratory Judgment action that there are significant factual issues regarding the parameters of NAF's easement that must be resolved prior to further consideration or action by the Bureau on NAF's lease application. See, e.g. June 4, 2020 Order on Summary Judgment Motions, in RE-2019-18 (attached as Exhibit 10).

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 ***or*** 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 of a Conservation Easement.[10] 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 Superior 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;[11] 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.[12]

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[10] 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 to 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., attached hereto as Exhibit 8. See also, August 31, 2012 survey, commissioned by the Eckrotes and incorporated by reference in the Eckrotes deed from the Estate of Phyllis J. Poor (Schedule A), which states that the Eckrotes' waterside (eastern) boundary is "along high water". (attached hereto as Exhibit 9).

[11] As the Superior 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.

[12] As the Superior 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

Accordingly, because the Bureau lacks subject matter jurisdiction to consider, process or grant NAF any leases, until the pending factual and legal questions relating to the parameters of NAF's easement option from the Eckrotes are resolved by the Waldo County Superior Court, a stay or dismissal of all Bureau proceedings is mandated by the Law Court's holding in *Tomasino*. Because the Bureau has repeatedly denied Petitioners' requests for such a stay or dismissal, Petitioners renew their prior motions for imposition of this stay or dismissal now based on the controlling new precedent in *Tomasino v. Town of Casco, supra*.

BACKGROUND

As the Bureau is well aware, Petitioners have consistently challenged the subject matter jurisdiction of the Bureau to proceed with its consideration of NAF's lease applications since January of 2019. The Bureau is also well aware that the Petitioners have a Declaratory Judgment action to quiet title, enforce property rights and enforce the Conservation Easement pending in the Waldo County Superior Court, *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 Petitioner Friends of the Harriet L. Hartley Conservation Area (Friends) hold under a Conservation Easement created and record by

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existence) of the artificial monuments described in the boundary description and how those monuments relate to the high-water mark. *Id.* at p. 22.

The Superior 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.

Petitioners Mabee and Grace on April 29, 2019.[13] In all of these administrative forums, including the Bureau, Petitioners have continually opposed the sufficiency of NAF's claims of right, title or interest in the intertidal land on which the Eckrotes' lot fronts and to which Petitioners Mabee and Grace claim title.

In all of the local, State and federal administrative proceedings in which NAF has pursued permits, licenses and leases, including the Bureau, NAF has claimed that is has "sufficient" right, title or interest ("RTI") in the intertidal land on which it seeks permits and leases to place its three industrial pipes, based on the August 6, 2018 Easement Purchase and Sale Agreement, between NAF and Richard and Janet Eckrote.[14] That Agreement grants NAF an option to purchase a 25-foot wide permanent easement along the southern boundary of the Eckrotes' lot, Belfast Tax Map 29, Lot 36. However, by its own terms, the waterside (eastern) boundary of the easement option granted to NAF by the Eckrotes ***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

[13] Waldo County Registry of Deeds ("WCRD") Book 4367, Page 273.

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

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 forums, including the Bureau, that the easement, even if executed, fails to give NAF administrative standing to seek any permits, leases or licenses because the easement 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 this easement to demonstrate sufficient RTI to proceed in the permitting, licensing and lease proceedings in these agencies. (See, e.g. Exhibits 1 and 2 attached hereto and incorporated herein). Specifically, in the January 18, 2019 letter from the Bureau of Parks and Lands, Submerged Lands Program, to NAF's counsel, the Bureau rejected the August 6, 2018 Easement Purchase and Sale Agreement as sufficient proof of TRI, stating in relevant part that:

> This letter serves as the Bureau of Parks and Lands, Submerged Land's Program's formal request that Nordic Aquafarms provide evidence that Nordic Aquafarms had established right, title or interest in the intertidal land where the pipelines are proposed. *As the Submerged Lands Program (the SLP) communicated during our conversation with David Kallin on January 16, 2019,* ***the Easement Purchase and Sale Agreement submitted by Nordic Aquafarms defines the easement area by reference to an Exhibit A that depicts the easement area as stopping at the high-water mark.***

Petitioners' Exhibit 1 (emphasis supplied).

As a result, NAF was requested to provide the Bureau with additional proof of TRI by April 18, 2019.

In response, in March 2019, NAF submitted a one-page letter, prepared by counsel for NAF and the Eckrotes, attached to a signed acknowledgement by the Eckrotes, dated February 28, 2019. That March 3, 2019 "Letter Agreement" purported to "clarify" NAF's rights under the 8-6-2018 Easement Purchase and Sale Agreement. The March 3, 2019 Letter Agreement states in relevant part as follows:

> . . . 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.
>
> * * *
>
> . . .[T]his letter clarifies that the easement area delineated in the [8-6-2018 Easement] P&S includes the entirety of your [the Eckrotes'] rights in the intertidal zone and US Route 1 and amends the Closing Date.

Curiously, the March 3, 2019 Letter Agreement did not amend the boundaries of the Easement option as defined in Exhibit A of the 8-6-2019 Easement Purchase and Sale Agreement, which defined the waterside boundary of the easement option granted by the Eckrotes to NAF as terminating at the high water mark of the Eckrotes' property.

However, based on the March 3, 2019 Letter Agreement submitted by NAF to the Bureau of Parks and Lands, the Bureau reversed its earlier determination that the easement provided sufficient proof of NAF's TRI in April 2019, and the Bureau found that the NAF applications were "complete" for processing.[15] Petitioners asserted at the time that this decision was inexplicable because: (i) nothing in the March 3, 2019 Letter agreement stated what, if any, legal rights the Eckrotes had in the intertidal land on which their lot fronts; and (ii) the Letter

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

Agreement did not amend Exhibit A of the 8-6-2018 Easement Purchase and Sale Agreement that, by its own terms, shows that the easement the Eckrotes have given NAF terminates at the high water mark of the Eckrotes' lot.

Despite Petitioners' repeated attempts in the Bureau, to challenge the determination by the Bureau that NAF had demonstrated "sufficient RTI" to proceed, the Bureau has denied all of the Petitioners' requests to stay its consideration of the substance of the pending NAF lease application or dismiss the application until the Waldo County Superior Court rules in the pending Declaratory Judgment action to quiet title and determine the parties' respective property rights. The Bureau refused Petitioners' challenges to the sufficiency of NAF's 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 (attached hereto as Exhibit 7), p. 1.[16]/[17]

[16] https://www.maine.gov/dacf/parks/docs/SL-2020-01-10-2.-Eckrote-Extension-web.pdf

[17] The Eckrotes' counsel sent a letter in the NAF January 10, 2020 filing that makes the following statement regarding about the meaning of the Second WHEREAS Clause in the 12-23-2019 Amendment stating in relevant part as follows:

> . . . The Eckrotes are aware that certain opponents have argued that language in this extension agreement stating the parties[‘] understanding that the upland owners make no representation or warranty regarding ownership of the intertidal is the same and conceding that they do not own the land. To the contrary, my clients are fully defending their intertidal ownership interest in the pending litigation. The referenced language in the extension agreement merely confirms the understanding of the parties to that agreement that my clients are not making any representations or warranties regarding the outcome of that litigation. Such a representation and warranty has no effect on ownership, which is governed by deed language and is currently pending before the Superior Court.

The Law Court's holding on July 7, 2020, in *Tomasino* now mandates that the Bureau stay or dismiss the NAF lease applications based on the insufficiency of NAF's right, title or interest and requires all review of NAF's lease application by the Bureau to be suspended until the Waldo County Superior Court determines the parameters of the NAF-Eckrote easement.

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 Bureau on NAF's pending applications to cease, until the Waldo County Superior Court rules on the parameters and validity, *if any*, of the NAF-Eckrote easement in the pending Declaratory Judgment action (RE-2019-18). Accordingly, Petitioners move for an immediate stay or dismissal of NAF's lease application and that the Bureau cease all review and proceedings on the above-referenced lease applications.

Respectfully submitted this 13th day of July 2020.

Kimberly J. Ervin Tucker
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[1-10-2020 Gilbert Letter, pp. 1-2].

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