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State of Maine
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United States Supreme Court
U.S. Circuit Court First Circuit
U.S. District Court Northern District of Florida
U.S. District Court Middle District of Florida
U.S. District Court District of Maine

June 25, 2019

Stephen Ryan, Chair
Richard (Declan) O'Connor, Member
Geoffrey Gilchrest, Member
Wayne Corey, Member
Belfast Planning Board
City Hall, Council Chambers
131 Church Street
Belfast, Maine 04915

David Bond, Member
Stephen Ryan, Alternate Member
Hubert Townsend, Alternate Members
Kimberly "Daisy" Beal, Alternate Members

RE: Nordic Aquafarms, Inc. – Lack of Title, Right or Interest

Dear Chairman Ryan and Members of the Belfast Planning Board,

In anticipation of the Planning Board's June 26, 2019 Meeting, at which the above-referenced project's permit applications will begin, I am filing this letter, a Notice from Jeffrey R. Mabee and Judith B. Grace, and supporting materials relating to Nordic Aquafarms, Inc.'s lack of title, right or interest in all land required to construct their proposed land-based salmon farm, as currently proposed. This letter and all supporting deeds, surveys, expert opinions and other materials, are jointly submitted on behalf of Jeffrey R. Mabee and Judith B. Grace, Upstream Watch, and the Maine Lobstering Union.

All of the information submitted supports one conclusion: Nordic Aquafarms, Inc. ("NAF") cannot demonstrate title, right or interest ("TRI") in all property it proposes to develop or use in the City of Belfast. The defects in NAF's TRI are numerous, well-documented, fatal and incurable.

NAF bases its claims of title, right or interest to construct the three pipelines -- that are essential accessory structures for NAF's proposed facility -- on an option to acquire an easement from Janet and Richard Eckrote, owners of the lot located a Tax Map 29, Lot 36. (A copy of a portion of Tax Map 29, with the names of the property owners in the area of the proposed pipelines, is attached to the email transmitting this letter and incorporated herein.).

NAF has been on notice that the Eckrotes do not own the intertidal land on which their lot fronts, and that the Eckrotes could not obtain that title from the Estate of Phyllis J. Poor (Janet Eckrote's mother), since at least April 2, 2018. That is the date when the survey NAF commissioned by Good Deeds was submitted to NAF. That survey, attached to and incorporated in this letter, has a notation from the surveyor highlighting deed language that makes clear that neither the Eckrotes, nor their predecessors in interest have an ownership interest in the intertidal land on which their lot fronts. In his note, the Good Deeds' surveyor expressly questions the ability of the Eckrotes to grant an easement to land beyond their high water mark for this reason.

NAF has stated on their Facebook page that they "withheld" the multiple surveys conducted on this property, which include the August 31, 2012 survey incorporated by reference in the October 15, 2012 Poor-Eckrote deed and the April 2, 2018 survey commissioned by NAF, from the public because of what the surveys revealed about who did and did not own the shore property. However, these two Good Deeds surveys were finally submitted to the State by NAF, at the State's request, on May 16 and June 10, 2019. Both surveys verify that the Eckrotes do not own the intertidal land on which their property fronts. Thus, the Eckrotes cannot grant NAF an easement to use this intertidal land, which actually belongs to Jeffrey Mabee and Judith Grace.

Despite NAF's knowledge that they could not obtain actual title, right or interest in the intertidal land needed to site their pipelines from the Eckrotes, NAF has attempted to use a language change made by Attorney Lee Woodward, in the description of the waterside boundary of the Eckrotes' lot, contained in the deed dated October 15, 2012, to claim that NAF had "color of title" that was "sufficient" to demonstrate TRI. The October 15, 2012 deed was granted by the personal representatives of the Estate of Phyllis J. Poor (R. Kenneth Lindell and Barbara Gray)[1] to Richard and Janet Eckrote, However, even the October 15, 2012 deed, as clarified by the August 31, 2012 Good Deeds survey, confirms that the Eckrotes' waterside boundary is "along high water" and excludes any ownership by the Eckrotes in the adjacent intertidal land.

NAF's proposed project is dependent upon placing three large pipelines — two 30" intake pipes and one 36" outfall (discharge) pipe — into Penobscot Bay. These accessory structures are essential to operation of this project. To date, NAF has proposed three routes for its pipelines to State regulators. The first two routes were rejected by the State or abandoned by NAF for lack of title, right or interest in all land on which NAF proposed to site its pipelines. The third route is still being assessed by the Bureau of Parks and Lands and has been challenged for lack of TRI. However, as revealed by the evidence submitted with this submission, NAF lacks the required TRI for their third proposed route too.

The one common denominator for all of the proposed pipeline(s) routes is that they all originate from a lot owned by Janet and Richard Eckrote, located at Belfast Tax Map 29, Lot 36. However, neither Richard and Janet Eckrote, nor their predecessors in interest back to 1946, have any ownership interest in the intertidal land on which their lot fronts. As a consequence, the Eckrotes have no right or ability to grant NAF an easement to place their pipelines on, over, or under the intertidal land on which the Eckrotes' lot fronts.

As discussed in more detail below, this intertidal land is owned by Jeffrey R. Mabee and Judith B. Grace in fee simple. The assertion of fee simple ownership in this intertidal land by Jeffrey Mabee and Judith Grace was established by a final judgment of quiet title, entered on June 26, 1970, by the Waldo County Superior Court.(Justice Silsby), in *Ferris v. Hargrave*, Docket No. 11,275. Notice of this quiet title judgment is recorded in the Waldo County Registry of Deeds at Book 683, Page 283. (a copy of that judgment and the complete case file from the Maine Stte

[1] R. Kenneth Lindell was convicted of theft, fraud and tax evasion for misappropriating over $3 million from the estates of two elderly women, including the Estate of Phyllis J. Poor. Now NAF is attempting to use a deed issued by R. Kenneth Lindell to take the intertidal land owned by Jeffrey Mabee and Judith Grace, without payment of compensation or their consent. https://bangordailynews.com/2019/04/23/news/midcoast/ex-lawmaker-gets-10-years-for-stealing-more-than-3-million-from-widows/

Archives is attached to the transmitting email.). In addition, Mr. Mabee and Ms. Grace have placed a Conservation Easement on their intertidal land, including the intertidal land on which NAF proposes to place its pipelines. This Conservation Easement is intended to protect the Mabee-Grace intertidal land, in perpetuity, in its natural condition and expressly prohibits any structures, dredging, or other violation of this fragile estuary land. Upstream Watch is named as the Holder of this Conservation Easement. (attached to the transmitting email and recorded in the Waldo County Registry of Deeds, at Book 4367, Page 273).

REASONS THAT NAF LACKS THE REQUIRED TRI

(i) Janet and Richard Eckrote, the owners of the residential upland lot across and under which NAF proposes to place its three industrial accessory pipelines (Tax Map 29, Lot 36) do not, and never did, own the intertidal land on which their lot fronts and therefore cannot, and never could, grant NAF an Easement to place its pipelines on, over or under this intertidal land.

(ii) The Eckrotes' upland lot is encumbered by a covenant that states this lot or parcel "is to be used for ***residential purposes only***" and "***no business for profit*** is to be conducted there unless agreed to by Harriet L. Hartley, her heirs or assigns." (emphasis supplied). This covenant was imposed by a deed executed in 1946 between Harriet L. Hartley and Fred R. Poor (a predecessor in interest to the Eckrotes and Janet Eckrote's grandfather). See, Waldo County Registry of Deeds at Vol. 452, Page 205, attached in the Eckrote chain of title attached to the transmitting email. This covenant runs with the land *in perpetuity*. As a result, the Eckrotes cannot, and never could, grant NAF an Easement to place its industrial accessory structure pipelines – which are essential accessory structures to their for-profit business -- on, over or under any portion of the Eckrotes' upland lot without prior approval from Harriet Hartley's heirs and/or assigns, which approval has not been sought or granted. Indeed, Jeffrey Mabee and Judith Grace have given written notice to the Eckrotes that they do not consent to this violation of the 1946 "residential use only" Hartley covenant.

(iii) The true owners of the intertidal land on which the Eckrotes' upland lot fronts, are Jeffrey R. Mabee and Judith B. Grace. Their property rights in fee simple, were established by the *Ferris v. Hargrave* quiet title action. The judgment in that case extinguished the rights of any other claimants to claim title, right, interest or estate in this land and expressly barred all future claims, including those of heirs of Genevieve Hargrave (who include all heirs and relative of her sister Harriet L. Hartley).

(iv) Judith Grace and Jeffrey Mabee do not consent to the placement of NAF's industrial pipelines on any portion of their intertidal land. To ensure the protection and preservation of their intertidal land, Jeffrey R. Mabee and Judith B. Grace have placed the portion of their intertidal land from the Little River to the North side of the Eckrote upland lot under a Conservation Easement to protect and preserve this land in its current natural condition, free of any commercial or industrial, accessory or principal structures, *in perpetuity*. The Holder of that Conservation Easement is Upstream Watch.

The Eckrote Easement Does Not Authorize Any Use Beyond the Eckrotes' High Water Mark: The Eckrotes have given NAF an unrecorded option to purchase an easement for a 25-foot wide strip of land on the southside of their lot. This Easement option, if exercised, would purportedly grant NAF the right to bury its three industrial pipelines — accessory structures for its for-profit, land-based salmon farm — on and under the Eckrotes' upland lot. However, ***by its own terms, this Easement does not grant NAF any right to use the intertidal land on which the Eckrotes' lot fronts***.

Rather, Exhibit A of the Eckrote Easement shows the boundaries of the Easement granted and the waterside boundary, as shown on Exhibit A, terminates at the high water mark of the Eckrote lot. This Easement must terminate at the high water mark of the Eckrotes' lot, because the Eckrotes do not own the intertidal land on which their lot fronts. (A copy of Exhibit A to the Eckrote Easement is attached below as "Exhibit A" and is included as an attachment to the TRI response from NAF to the Belfast Planning Board ("BPB"). See May 17, 2019 letter to Brian Kavanaugh, page 16 of 59). However, NAF cannot claim TRI in the intertidal land on which the Eckrotes' lot fronts based on this Easement Agreement.

Because of this obvious defect in the Easement Agreement, the Bureau of Parks and Lands required NAF to submit additional proof of TRI in the intertidal land they proposed to use by April 18 2019. In late March, 2019, NAF attempted to demonstrate to the Bureau of Parks and Lands that the Eckrote Easement was not intended to terminate at the high water mark. NAF submitted a letter from Erik Heim to the Eckrotes, dated March 3, 2019, that was characterized as an amendment to the Eckrote Easement. The second page of the letter is signed by the Eckrotes on February 28, 2019, acknowledging that they agree to the contents of a letter of an unspecified date, from Ed Cotter of NAF — but no letter from Ed Cotter to the Eckrotes was ever submitted to the State. The two versions of this strange letter are attached as pages 17-22 of 59 to the Brian Kavanaugh letter submitted to the BPB. Below, the two versions of this same letter, as submitted to DACF are attached, with the email thread from NAF's Counsel and Attorney Lee Woodward.

The curious "amendment" letter states in relevant part that:

> "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."

However, since the Eckrotes have ***no*** ownership interest in the intertidal land on which their lot fronts, the only rights that they can convey to NAF is the right all Mainers have in this land — to fish, fowl and navigate. The Eckrotes have no rights to build and site pipes in this intertidal land, so Nordic Aquafarms has no such rights to do so through this March 3 letter. This is simply another deceptively crafted document that creates the illusion of TRI without any actual TRI existing.

Such artifices have been used to keep NAF in the permitting process, in the absence of the administrative standing to obtain the permits that they are requesting. Such machinations have slandered the Mabee-Grace title and continue to damage the value and marketability of their property. It is imperative that the BPB put a stop to such destructive behavior that is needlessly costing significant private and taxpayer resources — reviewing voluminous permit applications submitted by an applicant improperly invoking the jurisdiction of local State and federal agencies.

The Eckrote Chain of Title: Every deed in the Eckrotes' chain of title, ***including the October 15, 2012 deed,*** confirms that the Eckrotes do not have any ownership interest in the intertidal land on which their lot fronts. (Copies of all of the deeds in the Eckrote chain of title are attached below.). These deeds reveal that neither the Eckrotes, nor their predecessors in interest back to 1946, have any ownership right in the intertidal land on which their lot fronts.

- The 1946 Harriet L. Hartley-to-Fred R. Poor deed states that the waterside boundary is "**along high water of Penobscot Bay**" (i.e. words of exclusion under Maine case law that grant no ownership in the intertidal land);
- The 1971 Frederick R. Poor-to-William O. and Phyllis J. Poor deed states that the waterside boundary is "**along high-water of Penobscot Bay**" (i.e. granting no ownership in the intertidal land);
- The 1991 William O. Poor-to-Phyllis J. Poor deed states that the waterside boundary is "**along high-water of Penobscot Bay**" (i.e. granting no ownership in the intertidal land); and
- The October 15, 2012 deed from the Estate of Phyllis J. Poor to Richard and Janet Eckrote states that the deed's description is based on the August 31, 2012 survey done by Good Deeds. That survey was not recorded. However, on May 16, 2019, NAF finally filed this survey with the DACF's Bureau of Parks and Lands. The 8-31-2012 Good Deeds survey states that the waterside boundary of the Eckrotes' lot is "**along high water**" (i.e. granting no ownership in the intertidal land) (This survey is attached at end of this email).

In filing its permit applications with the Belfast Planning Board, NAF attached this survey as page 59 of 59 in the materials attached to the May 17, 2019 Letter to Brian Kavanaugh. We have included that survey at the bottom of the transmitting email.

In the State permitting process, NAF has asserted that it has demonstrated "sufficient TRI" to proceed in the permitting process. However, the standard under the Belfast Ordinance is simply "title and right." In the State process, NAF has attempted to rely on the erroneous words that Lee Woodward, Esquire, included in the legal description of this lot in the October 15, 2012 deed, issued by the Personal Representative of the Phyllis J. Poor Estate, R. Kenneth Lindell to Janet and Richard Eckrote to create a claim of "color of title" in the intertidal land on which the Eckrotes' lot fronts.

Specifically, Mr. Woodward changed the description of the waterside boundary from "along high water mark of Penobscot Bay" (the description in all prior deeds) to "**along said Bay**." The latter phrase contains words of "inclusion" that Maine case law interprets to convey ownership down to the low water mark.

However, Mr. Woodward's erroneous use of these words in the legal description does not create an ownership interest in the Eckrotes to these intertidal lands and does not create actual title or right in the intertidal lands on, over and under which NAF seeks to place its pipelines. These intertidal lands are owned in fee simple, in deeded rights, by Jeffrey Mabee and Judith Grace. And a prior 1970 quiet title judgment bars the Eckrotes from now claiming any title, right, interest or estate in the land covered by that quiet title judgment, including all of he intertidal land on which their lot fronts.

First, Mr. Woodward's scrivener's error cannot take ownership in this property from the true owners, because a person cannot convey that which they do not own. Thus, the Estate of Phyllis Poor could not, and did not, convey land that Phyllis Poor (and her predecessors in interest back to 1946) never owned by simply including the wrong words in the legal description. *Calthorpe v. Abrahamson,* 441 A.2d 284, 287 (Me. 1982) (A grantor can convey effectively by deed only that real property which he owns. See *May v. Labbe,* 114 Me. 374, 96 A. 502 (1916); 6 U. Thompson, Commentaries on the Modern Law of Real Property § 2935 (1962).); *Dorman v. Bates Mfg. Co.,* 82 Me. 438, 448 (1890) (One cannot convey what he does not own. One cannot convey land, nor create an easement in it unless he owns it. An attempt to do so may render him liable on the covenants in his deed, but neither the land nor the easement will pass.); *Eaton v. Town of Wells,* 2000 ME 176 (a person can convey only what is conveyed into them. See *May v. Labbe,* 114 Me. 374, 380 (1916) (However much they may have intended to convey, they conveyed no more than the deeds properly construed conveyed.).

Second, an incorporated survey in a deed is controlling in determining a legal description. *Kinney v. Central Maine Power Co.,* 403 A.2d 346, 351 (Me. 1979) (The theory behind the Liebler-Ilsley rule holds that when a grantee takes under a deed which specifically refers to a certain survey or plan, he is chargeable with notice of what the plan or survey contains); *Bradstreet v. Winter,* 119 Me. 30, 38 (1920, citing, *The Proprietors of the Kennebec Purchase v. Tiffany,* 1 Maine 219 and McElwee v. Mahlman, 117 Maine 406 (When a grant or deed conveyance of land contains as express reference to a certain plan, such plan, in legal construction, becomes a part of the deed, and is subject to no other explanations by extraneous evidence than if all the particulars of the description had been actually inserted in the body of the grant or deed); *Danforth v. Bangor,* 85 Me. 423, 428 (1893) (Where the plan is referred to in a deed our doctrine is, that as to the boundaries of the land and what there is upon the plan affecting the location of the premises conveyed, it is sufficient to prove the plan and its contents); *Eaton v. Knapp,* 29 Me. 120, 122 (1848) (The plan is referred to in the description and makes a necessary part of the description, and cannot be disregarded).

Here, the August 31, 2012 survey establishes the waterside boundary of the Eckrote property as "along high water." In fact, here, the 10-15-2012 Deed says that the legal description is based on the 8-31-2012 survey and two of the prior deeds in the Eckrote chain of title. Thus, any confusion caused by Lee Woodward's inexplicable alteration of the waterside boundary description to be "along said Bay," rather than "along high water" or "along high-water mark of Penobscot Bay" (as all prior deeds stated), is contradicted and nullified by the incorporated-survey's determination that the boundary is "along high water."

Neither Upstream-IMLU, Mabee-Grace, the public nor State agencies had access to the August 31, 2012 survey until May 16, 2019. Neither the Estate of Phyllis J. Poor nor the Eckrotes had recorded this 2012 survey and NAF, who had apparently obtained a copy of the survey from Lee Woodward, Esq., refused to release this survey or any of the subsequent surveys they had had performed in 2018. But on May 16, 2019, NAF's counsel filed the August 31, 2012 Good Deeds survey with DACF's Bureau of Parks and Lands in response to Upstream-IMLU's challenge to TRI and direction from DACF.

Without having access to the August 31, 2012 survey, Donald R. Richards, P.L.S., L.F. prepared his Second Opinion letter in which he concluded that, *if the survey had also made the false determination that the waterside boundary of the Eckrotes' lot was to low water,* Mr.

Woodward's "clearly erroneous" description "creates a color of title which in reality is only a semblance of a title based on a defective description."

In his second opinion letter, prepared before we were provided access to the 8-31-2012 Good Deeds survey, Mr. Richards states in relevant part as follows:

> . . . This [language added by Lee Woodward to the legal description in the 10-15-2012 deed] is clearly erroneous. The new description was based on an August 31, 2012 survey by Good Deeds, Inc. It may be that the unrecorded survey was erroneous or that the scrivener [Lee Woodward, Esq.] of the description was careless or uninformed by the Estate of Phyllis J. Poor did not own the shore and the flats adjoining her property under her deed. The court has made it clear that in matters of real estate you cannot convey that which you do not own. [footnoted cases omitted.] The deed to Eckrote creates a color of title [footnoted cases omitted] which in reality is only a semblance of a title based on a defective description. That erroneous change in the description did not increase the land area that Phyllis J. Poor could rightfully convey to the Eckrotes. Her estate could not convey land owned by Jeffrey R. Mabee and Judith B. Grace. Furthermore the court has held that the simple recording of the deed would not diminish the ownership of Mabee and Grace who had no actual notice of the error [footnoted cases omitted].

(Don Richards' Second and Third opinions are attached below).

However, once NAF filed the 8-31-2012 Good Deeds survey on May 16, 2019, proving that the survey *correctly* confirmed the Eckrotes' waterside boundary is "along high water" — as stated in all of the prior deeds and as required by all deeds back to 1946 — NAF lost the ability to assert that it had even a "colorable" claim of title in the intertidal land on which the Eckrote lot fronts.

Similarly, the April 2, 2018 Good Deeds Survey that NAF produced for the first time on June 10, 2019, also placed NAF on notice that the Eckrotes did not and could not have an ownership interest in the intertidal lad on which their lot fronts. On that document there is an express statement from the surveyor that the October 15, 2012 deed contains a significant error in the legal description. As a consequence of this error in the description, the surveyor questions the "ability of the Estate of Phyllis J. Poor to grant an easement below the high water mark." Specifically, the 3-2-2018 survey notation states in all caps:

> SHADED AREA DEPICTS LANDS LOCATED BELOW THE HIGH TIDE LINE. THE DEED FROM THE ESTATE OF PHYLLIS J. POOR TO RICHARD AND JANET ECKROTE DATED OCTOBER 15, 2012, AND RECORDED IN BOOK 3697. PAGE 5 CONTAINS THE LANGUAGE. "...THENCE GENERALLY SOUTHWESTERLY ALONG SAID (PENOBSCOT) BAY A DISTANCE OF FOUR HUNDRED TWENTY-FIVE (425) FEET...."
>
> THE PREVIOUS DEED FROM WILLIAM O. AND PHYLLIS J. POOR TO PHYLLIS J. POOR DATED JULY 1, 1991, RECORDED IN BOOK 1228, PAGE 346 CONTAINS THE LANGUAGE, "....THENCE EASTERLY AND NORTHEASTERLY ALONG HIGH-WATER MARK OF PENOBSCOT BAY FOUR HUNDRED TEN (410) FEET...."
>
> I SUGGEST A LEGAL OPINION OF THE ABILITY OF THE ESTATE OF PHYLLIS J. POOR TO GRANT AN EASEMENT BELOW THE HIGH WATER MARK.

As noted above, the unrecorded Easement option, also drafted by Mr. Woodward, identifies the boundaries of the Eckrote Easement terminating at the high-water mark of the Eckrotes' lot. This Easement, *on its face*, does ***not*** grant any rights to NAF to use the intertidal land on which this lot fronts, and does not assert any ownership of the Eckrotes in the intertidal land. (attached to the transmitting email). Similarly, the curious March 3, 2019 letters do not assert any ownership interest in the intertidal by the Eckrotes.

NAF's counsel and Mr. Woodward (who drafted the March 3 letter according to the email thread sent to DACF and attached to the Brian Kavanaugh letter and the transmitting email) well know that the Eckrotes, like their predecessors in interest back to 1946, have no ownership rights in this intertidal land. The bizarre letters that NAF's counsel and Mr. Woodward drafted in March of 2019, and submitted to DACF-BPL to support a claim of TRI, did not change the boundaries of the Easement and, significantly, did not assert that the Eckrotes had or have any ownership interest in the intertidal land on which their lot fronts. All these letters did was reiterate that NAF has the same rights in the intertidal and to U.S. Route 1 that the Eckrotes have.

However, since the Eckrotes have no ownership rights in either U.S. Route 1 or the intertidal land on which their lot fronts, NAF has no such rights either. The Eckrotes' rights in the intertidal are limited to fishing, fowling and navigation – like all other Mainers. NAF has these same limited rights. Placing three industrial pipelines, even when those pipes are accessory structures to a fish factory, do not constitute fishing, fowling or navigation. Consequently, placement of these pipelines would not be allowed, by the Eckrotes or NAF, even prior to the imposition of a conservation easement by the true owners of the intertidal land (Jeffrey Mabee and Judith Grace).

Here, with the imposition of the Mabee-Grace Conservation Easement, naming Upstream Watch as the Holder of that Easement, this intertidal estuary land has an even greater level of protection, in perpetuity. See, Waldo County Registry of Deeds, at Book 4367, Page 273. (attached to the transmitting email).

1946 Hartley Covenant: Harriet Hartley included a covenant in the 1946 deed to Fred R. Poor – a covenant that was to run with the land and impose limits on the use of the parcel acquired by Fred R. Poor, in perpetuity. See, Waldo County Registry of Deeds, Vol 405, at Page 206; and Donald R. Richards' Second Opinion Letter, pp. 3-4. Specifically, the covenant states as follows:

> 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. . . .

See p. 206 of the Deed recorded in the Waldo County Registry of Deeds, Vol. 452, Page 205.

Harriet Hartley's wisdom of imposing, by covenant in the 1946 Deed, the conditions of her understanding with Fred R. Poor when she agreed to sell her land to him, is all the more clear today. While Harriet L. Hartley and Fred R. Poor had an understanding about how this parcel could be used, which was honored during Fred Poor's lifetime, only inclusion of a covenant that runs with the land, conferring benefits on the Grantor's heirs and assigns, can protect this land in perpetuity, as Harriet Hartley intended when she sold this parcel to Janet Eckrote's grandfather, Fred R. Poor.

Jeffrey Mabee and Judith Grace are assigns of Harriet L. Hartley, by virtue of the transfer of all of Harriet L. Hartley's interests in her property to Mabee-Grace's predecessors-in-interest and ultimately to them. As assigns, Jeffrey Mabee and Judith Grace have given notice to the Eckrotes that they do not agree with the proposed non-residential use of this lot by NAF, a for-profit business.

The Eckrotes cannot convey a right to NAF by Easement that the Eckrotes do not have. And, pursuant to the 1946 Hartley covenant the Eckrotes lack the right to place accessory structures for a for-profit business on the Eckrote lot over the objections of Harriet L. Hartley's assigns. Here, the Eckrotes and NAF lack title, right or interest to place NAF's pipelines on or under the Eckrotes's lot because of the 1946 Hartley covenant.

While Maine case law states that a zoning authority can grant a permit that violates the terms of a restrictive covenant – leaving the enforcement of the covenant to the courts through a covenant enforcement action – Maine law prevents any permit from being issued in the absence of the applicant's administrative standing by having title, right or interest to use and develop the land as requested. *Whiting v. Seavey,* 159 Me. 61; 188 A.2d 276; 1963 Me. LEXIS 12. Accordingly, the 1946 Hartley covenant denies the Eckrotes and NAF from having the title, right or interest to use the Eckrotes' upland property to conduct any portion of NAF's for-profit business. Because this applicant has no TRI, granting any permit to it would violate this Board's jurisdictional limits.

Ferris v. Hargrave Quiet Title Action: On or about April 10, 1970, Winston C. Ferris filed a quiet title action against Genevieve Hargrave in the Waldo County Superior Court. A clerk's certificate for this complaint is recorded in the Waldo county Registry of Deeds at Book 680, Page 1112. Final Judgment in this action was entered on June 26, 1970 and is recorded in the Waldo County Registry of Deeds at Book 683, Page 283.

The 1970 quiet title action was filed by Winston G. Ferris in April of 1970 (during the period that Fred R. Poor still owned the Eckrote property conveyed by Harriet L. Hartley, M.D. to Fred R. Poor in 1946). Waldo County Registry of Deeds at Book 452, Page 205.

The 1970 quiet title action was styled:

> "***Winston G. Ferris v. Genevieve E. Hargrave,*** whereabouts unknown but whose last address was in Philadelphia, County of Philadelphia, State of Pennsylvania, her heirs, legal representatives, devisees, assigns, trustees in bankruptcy, disseizors, creditors, lienors, and grantees, and ***any and all other persons unascertained, not in being or unknown or out of State,*** and ***all other persons whomsoever who claim or may claim any right, title, or interest or estate, legal or equitable, in the within described land and real estate through or under said defendants***."

(emphasis supplied).

Winston Ferris' stated reason for filing this quiet title action against Genevieve Hargrave and the other enumerated defendants was as follows:

> 4. Your Plaintiff is concerned that some person or persons may claim that the said Defendant, Genevieve E. Hargrave, was not a single person at the time of the conveyance by her to Arthur Hartley and Harriet L. Hartley, as joint tenants, on August 27, 1934, which the Plaintiff denies but which the Plaintiff cannot prove

without the production of certain evidence. Your Plaintiff is apprehensive that in the event the said Genevieve E. Hargrave was not a single person at the time of the aforesaid conveyance but was a married woman, that some person may claim some right, title interest or estate in the land which is the subject of this action.

WHEREFORE, the Plaintiff demands judgment against the Defendants that

1. They and every person claiming through or under them be barred from all claims to any right, title, interest or estate in the above described real property of the Plaintiff.

2. The Plaintiff is vested with title to the above described real property in fee simple, free and clear of all claims by the Defendant or any person claiming by through or under her, which judgment shall operate directly on the land and shall have the force of a release made by or on behalf, of the Defendant and all persons claiming by, through or under her of all claims inconsistent with the title established or declare hereby.

Ferris v. Hargrave Complaint (Waldo County Superior Court Docket Number 11275, pp. 4-5.

On June 19, 1970, pursuant to 14 M.R.S.A. § 6656,[2] the Superior Court appointed a *Guardian Ad Litem*, Roger F. Blake, Esquire, of Belfast, Maine, to represent all of the defendants in this quiet title action "for any Defendants who have not been actually served with process and who have not appeared in this action." (Order appointed Robert F. Blake, Esq. as *Guardian Ad Litem* and Acceptance of Appointment, p. 2). Mr. Blake filed an answer denying all allegations in the Complaint on behalf of all defendants and moved to dismiss the Complaint. Subsequently, the Superior Court (The Honorable William S. Silsby, Justice presiding) entered Final Judgment in favor of the Plaintiff, Winston Ferris, on June 26, 1970.[3]

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[2] 14 M.R.S.A. §6656 provides a follows:

§6656. Service on missing defendant; agent; expenses

Service in such action shall be as provided in section 6653. Notice given under this section shall be constructive service on all the defendants. If, after notice has been given or served as ordered by the court and the time limited in such notice for the appearance of the defendants has expired, the court finds that there are or may be defendants who have not been actually served with process and who have not appeared in the action, it may of its own motion, or on the representation of any party, appoint an agent, guardian ad litem or next friend for any such defendant, and if any such defendants have or may have conflicting interests, it may appoint different agents, guardians ad litem or next friends to represent them. The cost of appearance of any such agent, guardian ad litem or next friend, including the compensation of his counsel, shall be determined by the court and paid by the plaintiff, against whom execution may issue therefor in the name of the agent, guardian ad litem or next friend.

[3] Both recorded documents from the Waldo County Registry of Deeds and the complete case file of the *Ferris v. Hargrave* case are attached to this filing for your use and convenience.

The property that was the subject of the quiet title action is the current Mabee-Grace parcel, including all intertidal flats retained by the predecessors in interest of Mabee-Grace.

This final judgment, ORDERED, ADJUDGED AND DECREED that:

> 1. The defendants and every person claiming by, through or under them, be barred from all claims to any right, title, interest or estate in the following described land and real estate:
>
> A certain lot or parcel of land, together with the buildings thereon, commonly known and designated as The Little River Inn, situated in Belfast, in the County of Waldo and State of Maine, on the easterly side of the Atlantic Highway, and being bounded and described as follows, to wit:
>
> Northerly by land of Fred R. Poor; Easterly by Penobscot Bay;[4] Southerly by Little River and Westerly by the Atlantic Highway, so called.

The description only excepted a single parcel of land that had been included in the original 1934 deed from Genevieve E. Hargrave to Arthur and Harriet L. Hartley as joint tenants. See, Waldo County Registry of Deeds, at Book 386, Page 453. Specifically, the description excluded the lot that had been previously conveyed on May 18, 1964 to John Joseph Grady and Catherine E. Grady from Ernest J. Bell and Marjorie E. Bell, recorded in the Waldo County Registry of Deeds at Book 621, Page 288. The current owners of this excepted parcel are Larry Theye and Betty Becker-Theye. See, Theye Chain of Title, Book 1303, Page 184. As note above, the waterside boundary of this property, as conveyed by Bell to Grady, and thereafter conveyed through to the current Theye deed, terminates at the high water mark of Penobscot Bay. Accordingly, the excepted Theye lot includes no intertidal rights, other than the common law rights retained by the public to fish, fowl and navigate in this intertidal area, as protected under the Colonial Ordinance of 1641-1647.

The June 26, 1970 Final Decree declared that the Plaintiff, Winston Ferris, "is vested with title to the above described land and real estate in fee simple."

Thus, this 1970 quiet title judgment removed any asserted ambiguity in the deeds and definitively establishes that Jeffrey Mabee and Judith Grace, as successors in interest to Winston Ferris, own, in fee simple, all of the intertidal land from the mouth of the Little River to the Northern waterside boundary of the Morgan-Helmers lots (which was the Northern waterside boundary of the intertidal land retained by Dr. Harriet L. Hartley in the Harriet L. Hartley-Fred R. Poor 1946 conveyance, as shown on the 1963 tax map). See, e.g. Second and Third Opinion Letters of Donald R. Richards, P.L.S., L.F. (previously submitted).

NAF's Claims Relating to Releases From "Hartley Heirs": To support its claims of TRI in the DEP proceedings, NAF submitted unrecorded and heavily redacted "release deeds" to the Department with its June 10, 2019 filing. While these "releases" have not yet been filed in the Belfast proceedings, we have no doubt hat they will be. So we address the defects in these instruments here. (copies of the releases are attached to the transmitting email).

[4] These are words of inclusion that include ownership of all of the intertidal land (flats), between the high and low water mark.

NAF asserts that these unrecorded instruments in some way release to NAF, whatever retained rights in the intertidal land that the unidentified persons executing them, identified as heirs of "Harriet ***A.*** Hartley" (not Harriet ***L.*** Hartley) have in the intertidal land on which the Eckrotes' lot fronts.

However, there is no Harriet A. Hartley appearing in the chain of title to any of the properties of interest in this matter. Thus, "heirs" of "Harriet A. Hartley" (who had no children) can therefore have nothing to convey that has any bearing on the NAF application. The "Release Deeds" recently filed by NAF are immaterial to the application and should not be included in the record, except perhaps, as evidence of what NAF submitted in its attempt to remedy its lack of TRI problem.

Assuming that the "release deeds" are a mis-drafted attempt to portray something conveyed by "Harriet L. Hartley," NAF similarly accomplishes nothing. The only retained rights that Harriet L. Hartley's heirs have under the controlling deeds is a right to enforce the "residential use only" covenant on the Eckrotes' upland property, which requires the agreement of Harriet L. Hartley, her heirs or assigns to conduct any "for profit business" on this lot. (Waldo County Registry of Deeds at Book 452 at Page 206). Curiously, in obtaining the "releases," NAF has failed to secure any agreement from the alleged Hartley heirs that would grant the Eckrotes a right to violate the "residential use only" covenant by placing accessories structures for a for-profit business on the Eckrotes' lot. Nothing in the redacted releases attached at pages 135-144 of the June 10, 2019 DEP filing conveys any such agreement.[5]

Rather, the releases claim to give whatever title, right and interest that these unidentified Hartley heirs have in the intertidal land. (Stating in relevant part: "Meaning and intending to convey, and hereby conveying any and all right, title and interest which I have in and to said lands by virtue of being [blacked out]"). ***However, like the Eckrotes, no Hartley heirs – real or imagined – have any retained rights in the intertidal land on which the Eckrotes' lot front to convey to NAF.***

Even actual heirs of Harriet L. Hartley have no title, right or interest in these intertidal lands to convey to NAF for two reasons.

First, Harriet L. Hartley conveyed all of her interest in her Little River homestead, including all rights in the intertidal flats, to William P. and Pauline H. Butler on September 22, 1950. The only mention of Hartley heirs in the deed conveying this property to the Butlers states in relevant part that:

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[5] Further, neither the Eckrotes nor NAF have sought or obtained agreement from Harriet L. Hartley's assigns to allow a non-residential use of the Eckrotes upland lot for the placement of industrial pipelines that are essential accessory structures of a for-profit business on this lot in contravention of the express covenant in the deed from Harriet L. Hartley to Fred R. Poor, dated January 25, 1946. Book 452, Page 206. Those assigns include Jeffrey Mabee, Judith Grace, Larry Theye and Betty Becker-Theye.

Black's Law Dictionary defines "assigns" as: "Assignees; those to whom property shall have been transferred. Now seldom used except in the phrase, in deeds, "heirs, administrators, and assigns." Grant v. Carpenter, 8 R. I. 36; Baily v. De Crespigny, 10 Best. & S. 12."

https://thelawdictionary.org/assigns/

> . . . And I do covenant with the said grantees, heirs and assigns, that I am lawfully seized in fee of the premises; that they are free of all incumbrances; that I have good right to sell and convey the same to the said Grantees to hold as aforesaid; and that ***I and my heirs shall and will warrant and defend the same to the said Grantees, the heirs and assigns of the survivor of them, forever, against the lawful claims and demands of all persons.***

(Waldo County Registry of Deeds, at Book 474, Page 387) (emphasis supplied).

Thus, the alleged releases from "Hartley heirs", if provided by actual heirs of Harriet L. Hartley, would be a repudiation and violation of the obligations of these heirs under the Harley-Butler deed – obligations and covenants that were intended to run with the land from Harriet L. Hartley and her true heirs.

Second, the Release deeds that NAF obtained from the supposed heirs of Harriet A. Hartley are based on the Hargrave deed that was the subject of the 1970 *Ferris v. Hargrave* quiet title action. Specifically, the release deeds all contain the same language from each "Hartley heir" stating in relevant part that, as Grantors, the release deeds are based on: "all of the Grantor's right, title and interest in and to certain lands in Belfast, Waldo County, Maine, being described in a deed from Genevieve E. Hargrave to Arthur Hartley and Harriet L. Hartley dated August 27, 1934 and recorded in the Waldo County Registry of Deeds in Book 386, Page 453."

Thus, the Hartley heirs acknowledge that they are basing any claims they have to land covered by the Hargrave deed that was the subject of this 1970 judgment. Yet the Hartley heirs are also Hargrave heirs – since Genevieve Hargrave was Harriet L. Hartley's sister and these heirs are precisely the type of claimants, asserting claims through and under the Hargrave deed as "heirs" that the Ferris quiet title action was filed to, and did, extinguish. (See, e.g. 1900 U.S. Census Documents, attached to the transmitting email referencing the relationship between Harriet L. Hargrave Brierly Hartley and Genevieve Hargrave) As such, these "Hargrave heirs" are bound by the Ferris quiet title action and Final Decree. Consequently, by operation of the express terms in the Final Decree entered on June 26, 1970, any and all Hartley heirs are barred from any and all claims of title, right, interest or estate in any lands covered by the Hargrave deed, pursuant to the Final Decree entered on June 26, 1970. See, Waldo County Registry of Deeds, at Book 683, Page 283.

Even in the absence of the 1970 Final Decree these remote heirs would not have the legal authority to grant title, right or interest to NAF in the intertidal lands owned by Jeffrey Mabee and Judith Grace. These heirs cannot convey title, rights and interests that they do not themselves have. See authorities cited, *infra*.

The doctrines of *res judicata* and *collateral estoppel* bar any collateral claim to title, right or interest in the intertidal land covered by the June 26, 1970 Final Judgment, as this intertidal land was included in the land described in this quiet title action, and alleged heirs, the Eckrotes and NAF were defendants within the scope and meaning of the 1970 quiet title action. The interests of all parties who fall within the enumerated scope of the defendants in the 1970 action were represented and asserted by the *Guardian Ad Litem* appointed by the Superior Court at that time, Roger F. Blake, Esquire. Consequently, the purported Hartley heirs, the Eckrotes and NAF are all

barred from asserting any claim of title, right, interest or estate in this land, pursuant to the plain meaning of the Final Judgment entered in that action.[6]

Whether NAF and its agents were unaware of this Final Judgment in the *Ferris* quiet title action or have withheld it in their submissions to the Planning Board is of no relevance to resolution of the issue of TRI. Under no circumstances could heirs of Harriet L. Hartley defeat the fee simple title, right and interest of the true owners of this intertidal land – Jeffrey Mabee and Judith Grace – by granting a release deed to NAF. It is telling that NAF submitted no case authority to the State to suggest to the contrary – as no such authority exists. It has never been the law in his State or this nation, that rights in real property, conveyed by and recorded in deeds and other legal instruments, can be defeated by an unrecorded release of unknown, unsworn and unverified claims of title, right and interest, provided by grantors whose identities, standing and relationship to the land and the parties who had prior title, right or interest in said land are concealed. This is particularly true where, as here, the release is made in a heavily redacted, unrecorded instrument, asserting an interest through or under a person who is not on any prior deed (Harriet A. Hartley, not Harriet L. Hartley) and all relevant information about the persons issuing the releases is concealed from public scrutiny, without any explanation or justification for concealing the identities of those allegedly granting the releases.

In sum, if the so-called release deeds are submitted in these proceedings they must be rejected, pursuant to the final judgment in *Ferris v. Hargrave, supra*.

CONCLUSION:

It is contrary to the public interest for the limited resources of the Belfast Planning Board and the City of Belfast to be expended reviewing the voluminous permit applications submitted by this applicant, when this applicant lacks "the kind of relationship to the site that gives him a legally cognizable expectation of having the power to use the site in ways that would be authorized by the permit or license he seeks." *Walsh v. City of Brewer,* 315 A.2d 200, 207 (Me. 1974); *Murray v. Inhabitants of the Town of Lincolnville*, 462 A.2d 40 (Me. 1983). Proceeding to consider permits on, over, or under this intertidal land is slandering the title to land owned by Mabee and Grace and injuring the value and marketability of their property. Granting permits that would allow NAF to misappropriate the intertidal land owned in fee simple by Jeffrey Mabee and Judith Grace,

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[6] See the discussion of the doctrines of *res judicata*, issue preclusion and *collateral estoppel* in the Law Court's decision in *Pushard v. Bank of Am., N.A.,* 2017 ME 230, P19, 173 A.3d 103, 111, 2017 Me. LEXIS 262, *12, 2017 WL 6334177:

> "The doctrine of res judicata . . . is a court-made collection of rules designed to ensure that the same matter will not be litigated more than once." *Beegan v. Schmidt*, 451 A.2d 642, 643-44 (Me. 1982). The term "res judicata" encompasses two different legal theories: claim preclusion, or "bar"; and issue preclusion, or "collateral estoppel." *Id.* at 644; *see Wilmington Tr. Co. v. Sullivan-Thorne*, 2013 ME 94, ¶ 7, 81 A.3d 371. Claim preclusion "prohibits relitigation of an entire 'cause of action' between the same parties or their privies, once a valid final judgment has been rendered in an earlier suit on the same cause of action"; and issue preclusion "prevents the reopening in a second action of an issue of fact actually litigated and decided in an earlier case." *Beegan*, 451 A.2d at 644; *see Macomber v. MacQuinn-Tweedie*, 2003 ME 121, ¶ 22, 834 A.2d 131 (HN15 "The collateral estoppel prong of res judicata is focused on factual issues, not claims . . . .").

would constitute a regulatory taking of privately owned land for the benefit of another private corporate entity. Such a taking is contrary to public policy in this State and, without prior payment of just compensation, would violate the Fifth Amendment to the U.S. Constitution and Article I, Section 21 of the Maine Constitution. See, *Knick v. Township of Scott*, 588 U.S. ___ (June 21, 2019).

For the forgoing reasons, Jeffrey Mabee and Judith Grace, Upstream and the Maine Lobstering Union respectfully assert that the Belfast Planning Board lacks jurisdiction to conduct a substantive review of the above-referenced permit applications because the applicant does not have title right or interest in the intertidal lands on which they propose to put their three pipelines. NAF's defects in TRI for its current (third) proposed pipelines route are fatal and incurable. A court already has made a determination and entered a judgment declaring that Winston C. Ferris, a predecessor in interest of Jeffrey Mabee and Judith Grace, owns all of the land described by that suit, which includes all of the intertidal land at issue here, in fee simple. That judgment must be given effect and honored.

We request that the Planning Board conduct a hearing on the specific issue of NAF's TRI, prior to expending any further public resources on the substantive review of NAF's permit applications. These permit applications should not be accepted as complete, because NAF lacks the necessary Title, Right or Interest in all of the land proposed for use and development.

Respectfully submitted,

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