IN THE MATTER OF

NORDIC AQUAFARMS, INC. Belfast, Northport **and Searsport** Waldo County, Maine A-1146-71-A-N L-28319-26-A-N L-28319-TG-B-N L-28319-4E-C-N L-28319-L6-D-N L-28319-TW-E-N W-009200-6F-A-N	) APPLICATIONS FOR AIR EMISSION,) SITE LOCATION OF DEVELOPMENT,) NATURAL RESOURCES PROTECTION ACT, and) MAINE POLLUTANT DISCHARGE ELIMINATION) SYSTEM (MEPDES)/WASTE DISCHARGE) LICENSES)) **MGL COMMENT IN OPPOSITION TO AIR**) **EMISSIONS PERMIT STAFF**) **RECOMMENDATIONS AND RENEWED**) **MOTION FOR STAY OR DISMISS FOR**) **LACK OF STANDING AND JUSTICIABILITY**) **SUBMITTED BY MGL INTERVENORS AND**) **INTERESTED AND AGGRIEVED PERSON THE**) **FRIENDS OF THE HARRIET L. HARTLEY**) **CONSERVATION AREA**

Dated: August 16, 2020

Petitioners, MGL Intervenors and Interested and Aggrieved Person Friends of the Harriet L. Hartley Conservation Area ("Friends") files their Comment and Objection to the July 17, 2020 staff recommendation on the Air Emissions permit application submitted by Nordic Aquafarms, Inc. ("NAF"). In particular, Petitioners object to the staff's failure to base its determination of NAF's claim of "title, right or interest" on: (i) the controlling precedent issued by the Maine Supreme Judicial Court on July 7, 2020, in *Tomasino v. Town of Casco,* 2020 ME 96; (ii) the Waldo County Superior Court's June 4, 2020 Order in RE-2019-18 (Exhibit 10 to this Comment), relating to the unresolved disputes regarding the factual parameters and legal validity of the August 6, 2018 NAF-Eckrote easement option pending in that Superior Court action; and

(iii) the Superior Court's July 14, 2020 Order in *Mabee and Grace, et al. v. BEP, et al,* AP-2020-03 (Exhibit 13 to this Comment).[1]

Petitioners, by and through their counsel, Kimberly J. Ervin Tucker, Esq., hereby file this Comment and renew Petitioners' motion to the Full Board of Environmental Protection for a stay or dismissal of all permit and license applications, including the Air Emissions permit application, pending in the Board of Environmental Protection,[2] relating to Nordic Aquafarms, Inc. ("NAF"), until determination by the Waldo County Superior Court of the factual parameters and legal validity of the easement option granted to NAF by the August 6, 2018 NAF-Eckrote Easement Purchase and Sale Agreement.[3] 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.

This Comment and objection and renewed motion to stay or dismiss NAF's permit and license applications in the Board is submitted on behalf of: **Jeffrey Mabee and Judith Grace** ("Mabee-Grace"), true owners[4] of a portion of the intertidal land that NAF fraudulently[5] asserts a

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[1] A copy of this Order is Attached hereto and incorporated herein as Exhibit 13.

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

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

[4] Waldo County Registry of Deeds Book 1221, Page 347; Book 683, Page 283; Book 24, Page 34; Book 4425, Page 165.

[5] 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 Board and Department have 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 Board and Department.

right to use in these Board proceedings; the **Friends of the Harriet L. Hartley Conservation Area** ("Friends"), a Maine-registered nonprofit corporation[6] and 501c3 organization, and Holder of a portion of the intertidal land that NAF fraudulently asserts a right to use in these Board proceedings; the **Maine Lobstering Union**[7] ("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 "Lobstering Representatives"). Collectively the Interested Parties submitting this Motion to Stay or Dismiss (without prejudice) are referred to herein as "Petitioners" or, where appropriate, by their specific name(s).

BASIS FOR THE STAFF TRI RECOMMENDATION

Like the Department's June 13, 2019 TRI determination, the staff recommendations relating to the Air Emissions permit concerning whether NAF has submitted "sufficient" proof of title, right or interest to have standing to proceed in the permit process is based, in relevant part, on the August 6, 2018 Easement Purchase and Sale Agreement between NAF and Richard and Janet Eckrote. On January 22, 2019, the Department rejected this same easement option agreement as insufficient proof of TRI – noting that, by its own terms, in Exhibit A of that 8-6-2018 Agreement, the easement's waterside boundary terminates at the Eckrotes' high water mark, granting NAF no rights to use the intertidal land on which the Eckrotes' lot fronts. (See,

[6] 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.

[7] 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.

e.g. Exhibit 2 (January 22, 2019 Department Letter) and Exhibit 1 (January 18, 2019 Letter from the Bureau of Parks and Lands reaching the same conclusion).

Inexplicably, the Department reversed this finding on June 13, 2019, although the record provided to the Department *by NAF* and Petitioners Mabee and Grace demonstrated that the factual parameters and validity of the 8-6-2019 NAF-Eckrote Easement Option Agreement was in dispute and, on its face, the defined boundaries of Easement option did not include the intertidal land on which the Eckrotes' lot fronts (Exhibits 3-6).

Even the evidence submitted by NAF to the Department on June 10, 2019, in support of NAF's TRI claims,[8] contradicted the claim that the Eckrotes owned the intertidal land on which this lot fronts – demonstrating that there was significant doubt (based on NAF's evidence) that the Eckrotes had the necessary ownership interest in this intertidal land to grant NAF an easement to use the intertidal land on which the Eckrotes' lot fronts. Specifically, the June 4, 2019 Dorsky survey plan, submitted by NAF (p. 3 of the 144-page pdf) claimed that so-called "Heirs of Harriet L. Hartley" had a "partial Interest" in this intertidal land – not the Eckrotes; and the April 2, 2018 Good Deeds survey attached as page 4 of the 144-page June 10, 2019 pdf alerts NAF to a discrepancy in the deed language and cautions that the Estate of Phyllis J. Poor (and by extension the Eckrotes) may have no ability to grant an easement below the high water mark based on the deed language in prior deeds.[9]

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[8] https://www.maine.gov/dep/ftp/projects/nordic/applications/TRI%20supplement/19-06-10%20Tourangeau%20-%20Loyzim.pdf

[9] The face of the 4-2-2018 Good Deeds survey, commissioned by NAF and filed by NAF on June 10, 2019, states in relevant part in all capital letters:

> 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

On July 13 and 20, 2020, Petitioners filed renewed challenges to NAF's standing to proceed in the permitting process for any permit of license from the Department or Board. The basis of those renewed motions was the recent holding by the Maine Supreme Judicial Court in *Tomasino v. Town of Casco*, 2020 ME 96, in which the Law Court clarified that an easement, the factual parameters of which have not been determined by a court of competent jurisdiction, is insufficient to provide standing to proceed in a permitting process.

The Department attempts to circumvent this holding in *Tomasino* by asserting in relevant part that: "The Board finds that the evidence reflects no dispute between the parties to the easement as to its scope or location." (Draft Air Emissions Permit, p. 3).

However, as evidenced by the attached June 4, 2020 Order of the Waldo County Superior Court, in the pending Declaratory Judgment Action to quiet title in this property (Docket No. RE-2019-18) (Exhibit 10), the Superior Court has already determined that there are significant factual issues that must be resolved by the Court relating to the parameters of the 8-6-2018 NAF-Eckrote easement. Specifically, there are factual questions relating to whether a restrictive covenant in the 1946 deed from Harriet L. Hartley to Fred R. Poor limits the use of the Eckrotes' upland property to residential uses only, prohibiting the placement of pipes for a for-profit business on the upland parcel; and whether the Eckrotes' property terminates at their high water mark, based on the 1946 Hartley-to-Poor deed. In addition, the meaning of the NAF-Eckrote

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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

easement, and whether it terminates by its own terms, at the Eckrotes' high water mark is before the Superior Court.

Resolving any question relating to the meaning of the easement between these parties is not a matter within the subject matter jurisdiction of the Board or Department, pursuant to *Tomasino*. Rather, until resolution of the questions relating to the factual parameters and legal validity of NAF-Eckrote easement by a court of competent jurisdiction, NAF lacks the standing to proceed in the Board's permitting process for the Air Emissions permit – or any other permit or license.

Further, Petitioners have repeatedly requested that the Department require NAF to produce the November 14, 2018 survey plan of the intertidal land that NAF commissioned Jim Dorsky, P.L.S. to prepare, as well as all revisions Mr. Dorsky has done to that plan since 11-14-2018. Repeatedly, the Department, Board and/or Presiding Officer have denied these requests by Petitioners. However, in response to discovery requests in the pending litigation (RE-2019-18), Petitioners have obtained the 11-14-2018 Dorsky survey and the ***seven*** (7) revisions by Mr. Dorsky to this plan. All of these survey plans and revisions refute NAF's claim that the Eckrotes own the intertidal land on which the Eckrotes' lot fronts and have given NAF a valid easement to use the intertidal land on which this lot fronts.

Specifically, Mr. Dorsky (NAF's surveyor) concludes that the 1946 deed from Harriet L. Hartley to Fred R. Poor (Janet Eckrote's grandfather) severed the upland lot from the intertidal flats, with Harriet Hartley retaining ownership of the intertidal flats (Exhibits 16 and 17) and has drafted multiple survey plan revisions reflecting this conclusion (Exhibits 14, 15 and 18). NAF has withheld this information from the Department and the Board to bolster its false claim of "sufficient" title, right or interest in the intertidal land on which the Eckrotes' lot fronts based on

the easement option from the Eckrotes (albeit an option that terminates by its own terms at the Eckrotes' high water mark). However, pursuant to NAF's own surveyor's opinion and survey plan and revisions, the Eckrotes do not own this intertidal land. The following documents prepared by NAF's surveyor, but withheld by NAF from its filings to the Board and Department, refute NAF's claims of TRI in this intertidal land:

- The 11-14-2018 Dorskey survey plan (Exhibit 14);
- The 11-15-2018 Dorsky revision to the 11-14-2018 survey plan (Exhibit 15);
- The 1-25-2019 Dorsky revision to the 11-14-2018 survey plan (*Id.*);
- The 2-22-2019 Dorsky revision to the 11-14-2018 survey plan (*Id.*);
- The 5-14-2019 Dorsky revision to the 11-14-2018 survey plan (*Id.*);
- The 5-16-2019 Dorsky Surveyor's Opinion letter to Erik Heim (Exhibit 16);
- The 6-4-2019 Dorsky revision to the 11-14-2018 survey plan (Exhibit 15);
- The 8-2-2019 Dorsky sketch illustrating the 5-16-2019 opinion, with 7-31-2019 and 8-2-2019 email explanations (Exhibit 17); and
- The 7-24-2019 Dorsky revision to the 11-14-2018 survey plan that states "ownership unclear" for the intertidal parcel on which the Eckrotes' lot fronts (Exhibit 18).[10]

If the Eckrotes do not own this intertidal land, the Eckrotes cannot grant NAF an easement to use this intertidal land. Thus, in addition to the issue of whether the easement grants any right to use the intertidal land or terminates at the Eckrotes' high water mark (see Exhibit A of Exhibit 3 (the 8-6-2018 Easement Purchase and Sale Agreement)), there is also a question the Court must resolve as to whether the Eckrotes have the legal right to grant NAF an easement to use the intertidal land on which their lot fronts.

[10] All of these documents are attached hereto and incorporated herein and submitted to demonstrate the scope of the disputes remaining related to the factual parameters and validity of the easement on which NAF bases its claim of TRI and standing. In the absence of standing, there is no justiciable issue before the Board on which to proceed in the permit and license process and NAF is precluded from invoking the jurisdiction of the Board to proceed to process its applications.

The Department's staff also reference a so-called "common law presumption of conveyance of the intertidal area along with an upland conveyance" in the TRI section of the recommendation on the Air Emissions permit application. However, the Waldo County Superior Court has also already rejected the assertion of such a presumption in this case and rejected NAF's argument that the reference in the relevant deeds to the waterside boundary being "along high water mark of Penobscot Bay" being a "call to the water meaning the low water mark. See June 4, 2020 Order, pp. 11-22 (Exhibit 10) and *Almeder v. Town of Kennebunkport,* 2019 ME 151, ¶¶ 28-38.

Here, there is a factual determination that the Superior Court will make regarding the location of the termini points of the sideline boundaries of the Eckrotes' lot. If both termini are determined by the Court to be at or above the high water mark, the Eckrotes own no intertidal land and can grant NAF no easement to use this intertidal land (Exhibit 10, p. 21). Until resolution of these factual questions by the Superior Court, NAF lacks administrative standing to proceed in any permit or license proceedings and is precluded from invoking the Board's jurisdiction to proceed, and the Board lacks a justiciable issue before it to consider. See e.g. *Tomasino,* 2020 ME 96, ¶15.

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. *Id.* at ¶8.

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),[11] 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 by a Court of competent jurisdiction.[12]

Specifically, the Law Court held in relevant part that:

> [N]one of these decisions [referenced in footnotes 11 and 12] 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

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[11] *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").

[12] *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).

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 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.[13] Because the Casco Zoning Board properly determined that the applicants lacked standing, the appeal of this decision was an appeal of "final agency action."

[13] 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.

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, including in the Board, 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 NAF proposes to place a mile out into Penobscot Bay.

The issues relating to the parameters and validity, *if any*, of 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.

The Law Court's July 7, 2020 holding in *Tomasino,* mandates that all permitting proceedings stop, including those in the Board, 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 (and validity) of that easement, NAF's lack of administrative standing renders its myriad, voluminous permit, license and lease applications non-justiciable, precluding NAF from *invoking* the jurisdiction of the various the administrative agencies, including the Board.

CLARIFICATION IN THE 7-14-2020
SUPERIOR COURT ORDER IN AP-2020-03

NAF's Lack of Standing Renders NAF's Applications Nonjusticiable

The Superior Court's 7-14-2020 Order in AP-2020-03 and the case precedents cited therein provide important guidance to the Board and the parties on the substantive issues raised in the Motion for Stay that is now pending before this Board. As noted above, the MGL Intervenors have amended their Motion to Stay or Dismiss to conform to this guidance from the Superior Court.

As an initial matter, in *Homeward Residential, Inc. v. Gregor,* 2015 ME 108, ¶ 20, 122 A.3d 947, 954 – a case cited with favor by the Superior Court in its July 14 Order in AP-2020-03 -- the Supreme Judicial Court held that, like jurisdiction, matters of standing will be entertained at any time. Specifically, the Court stated in relevant part that:

> Just as a court may notice and act on issues of jurisdiction at any time, so may a court notice and act on issues relating to its authority at any time, on its own motion or on the motion of a party. *Francis v. Dana-Cummings*, 2007 ME 16, P20, 915 A.2d 412; *see also Nemon v. Summit Floors, Inc.*, 520 A.2d 1310, 1312 (Me. 1987) ("We will entertain a question of standing at any time.").

Of particular significance to the Board's resolution of the pending Amended Motion to Stay or Dismiss in this administrative forum, is the Superior Court's analysis of the distinctions between the concepts of "jurisdiction" and "justiciability" as it relates to standing to *invoke* the Board's jurisdiction over NAF's permits, stating in relevant part as follows:

> In the analogous judicial context, the Law Court has recently attempted to address distinctions between concepts of jurisdiction and justiciability, particularly as it relates to standing to invoke a court's jurisdiction. This is because "the words 'jurisdiction' and 'jurisdictional' are understood to have '"many, too many, meanings,'" and . . . '[c]ourts "have been less than meticulous" in using the term[s].'" *Homeward Residential, Inc. v. Gregor,* 2015 ME 108, ¶ 17, 122 A.3d 947 (quoting *Landmark Realty v. Leasure,* 2004 ME 85, ¶ 7, 853 A.2d 749 (quoting *Kontrick v. Ryan,* 540 U.S. 443, 454 (2004))). "'[J]urisdiction' most properly encapsulates only prescriptions delineating the

> classes of cases (subject-matter jurisdiction) and the person (personal jurisdiction) falling within a court's adjudicatory authority." *Id*. (quotation marks omitted).
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> Issues of justiciability have been termed "jurisdictional" in the sense of how they relate to a court's ability to hear the case in front of it, not whether the court broadly has subject matter jurisdiction. *See id. ¶¶ 18-19; see also Bank of Am., N.A. v. Greenleaf,* 2015 ME 127, ¶ 7, 124 A.3d 1122 (citations and quotation marks omitted) ("Although standing related to the court's subject matter jurisdiction, it is an issue theoretically distinct and conceptually antecedent to the issue of whether the court has subject matter jurisdiction . . . . Subject matter jurisdiction is a principle of adjudicatory authority that refers to the power of a particular court to hear the type of case that is the before it."). "[A] party's lack of standing is not a jurisdictional problem, but rather it is an issue of justiciability that precludes a party from *invoking* the court's jurisdiction." *Wells Fargo Bank, N.A. v. Girouard,* 2015 ME 116, ¶ 8 n.3, 123 A.3d 216. The fact that a case is not justiciable does not mean that the court lacks subject matter jurisdiction. *See Greeleaf,* 2015 ME 127, ¶ 8, 124 A.3d 1122 (citations omitted) ("When discovered, a standing defect does not affect, let alone destroy, the court's authority to decide disputes that fall within its subject matter jurisdiction. A Plaintiff's lack of standing renders that plaintiff's complaint nonjusticiable – i.e. incapable of judicial resolution.").
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> Here, Petitioners do not contend that the BEP lacks subject matter jurisdiction over review of such permit applications generally, nor could they. *See* 38 M.R.S. §§ 341-A-349-B. Instead, in the analogous judicial context, a party's lack of standing would be an issue relating to the justiciability of the case, not the subject matter jurisdiction of the court. *See Me. Civil Liberties Union v. City of S. Portland,* 1999 ME 121, ¶ 8, 734 A. 2d 191 (quotation marks omitted) ("A justiciable controversy is a claim of present and fixed rights, as opposed to hypothetical or future rights, asserted by one party against another who has an interest in contesting the claim."); *see also Madore v. Me. Land Use Regulation Comm'n,* 1998 ME 178, ¶ 8, 715 A.2d 157 (explaining that party has standing when it has a "sufficient personal stake" in the issue when the case commences). This is important because a permit applicant's TRI – notably, an issue that is legally distinct from actual ownership – is a determination that is reviewable *after* final agency action. *See Southridge Corp. v. Bd. of Envtl. Prot.,* 655 A.2d 345, 348 (Me. 1995); *cf.* 3 Harvey ¶ Merritt, Maine Civil Practice § 80C:1 at 463-64 (3d, 2018-2019 ed. 2018) ("the equivalent of the 'final judgment' rule applies to the review of administrative action or nonaction.").

7-14-2020 Sup. Ct. Order (AP-2020-03), p. 3-4.

Further, the full relevant quote from the Maine Supreme Judicial Court's decision in *Greenleaf* – a case cited with favor by the Superior Court in its July 14, 2020 Order – should provide the Board with important additional guidance in resolving the "justiciability" question

raised by the MGL Intervenors' pending (amended) Motion to Stay or Dismiss based on the applicability of *Tomasino* to NAF's claims of "administrative standing" based on its disputed easement. In *Greenleaf*, the Law Court held in relevant part as follows:

> [*P7] Although standing "relates to the court's subject matter jurisdiction," *JPMorgan Chase Bank v. Harp*, 2011 ME 5, ¶ 7, 10 A.3d 718, it is an issue theoretically distinct and "conceptually antecedent" to the issue of whether the court has subject matter jurisdiction, *Nichols v. City of Rockland*, 324 A.2d 295, 296 (Me. 1974) (quotation marks omitted). Subject matter jurisdiction is a principle of adjudicatory authority that "refers to the power of a particular court to hear the type of case that is then before it." *Hawley v. Murphy*, 1999 ME 127, ¶ 8, 736 A.2d 268 (quotation marks omitted). ***Standing is a condition of justiciability that a plaintiff must satisfy in order to invoke the court's subject matter jurisdiction in the first place.*** *Wells Fargo Bank, N.A. v. Girouard*, 2015 ME 116, ¶ 8 n.3, 123 A.3d 216.
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> [*P8] ***Because standing is "a threshold concept dealing with the necessity for the invocation of the [c]ourt's power to decide true disputes," it is an issue cognizable at any stage of a legal proceeding, even after a completed trial.*** *Nichols*, 324 A.2d at 296. When discovered, a standing defect does not affect, let alone destroy, the court's authority to decide disputes that fall within its subject matter jurisdiction. *Homeward Residential, Inc. v. Gregor*, 2015 ME 108, ¶ 19, 122 A.3d 947. ***A plaintiff's lack of standing renders that plaintiff's complaint nonjusticiable—i.e., incapable of judicial resolution.*** *See id.* ¶ 24.
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> [*P9] ***Here, the court could not have entered a judgment*** on remand addressing the merits of the Bank's foreclosure claim ***because the Bank failed to show the minimum interest that is a predicate to bringing that claim in the first place. Under these circumstances, the court properly disposed of the case by entering a dismissal without prejudice.***

Bank of Am., N.A. v. Greenleaf, 2015 ME 127, ¶7-¶9, 124 A.3d 112, 1124-1125 (emphasis supplied).

Similarly, in *Wells Fargo Bank, N.A. v. Girouard,* 2015 ME 116, ¶8, 123 A.3d 216, 218, the Court held that: "As we have recently reiterated, however, a party's lack of standing is not a jurisdictional problem, but rather it is an issue of justiciability that precludes a party from *invoking* the court's jurisdiction. *Homeward Residential Inc. v. Gregor*, 2015 ME 108, PP 15-20, 122 A.3d 947."

While it is true that, if this Board chooses to ignore this Supreme Judicial Court holding in *Tomasino* and proceeds to consider and grant permits and licenses to NAF, Petitioners cannot file an interlocutory appeal of those erroneous determinations – the Superior Court held that in its July 14, 2020 Order in AP-2020-03 (Exhibit 13). However, Petitioners have a right to file an appeal of final agency action entered in the absence of NAF's standing and the absence of a justiciable issue before the Board. *Id.* All decisions renders in the absence of NAF's standing and a justiciable issue before the Board will be vacated by the Court. As a result, in the interest of not wasting limited taxpayer resources, staying further action on NAF's applications until completion of the pending Superior Court case is the appropriate action by the Board.

MEMORANDUM OF LAW AND
SUMMARY OF THE ARGUMENT FOR STAY

To date, the Board, Department, 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, permit and license application proceedings may continue, despite Petitioners' pending Superior Court challenge relating to NAF's claims of title, right or interest in RE-2019-18. The June 13, 2019 TRI determination by the Department was based on *Southridge.* 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 must dismiss (without prejudice) 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. See, also *Gregor, supra* at ¶24; and *Greenleaf, supra* at ¶9. A stay of proceedings would suffice as an alternative resolution.

Curiously, the draft staff recommendation on the Air Emissions permit cites no case law to support the TRI recommendation staff has made -- instead, citing only the Department's rule (Chapter 2 §11(D)) and the June 13, 2019 Department TRI determination (which was based on *Southridge*) to support the TRI recommendation. Similarly, the Presiding Officer's 20th Procedural Order denied Petitioners' renewed motion for stay or dismissal based on *Tomasino*, declaring that *Tomasino* was "factually and procedurally distinguishable" without stating how this precedent is distinguishable.

Throughout the pendency of the Board's consideration of NAF's applications, the Board and NAF have repeatedly stated that only a Court can make a determination of ownership – a proposition with which the MGL Intervenors and Petitioner Friends do not disagree. *See*, June 13, 2019 DEP Letter finding that NAF had demonstrated "sufficient" TRI; *see also*, April 16, 2020 BEP Transcript, p. 3, lines 20-22.

The basis of Petitioners' challenges to NAF's administrative standing and the justicability of NAF's applications in the Board, and other similarly situated administrative bodies, are related to 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, as well as the factual parameters and validity of the NAF-Eckrote easement. However, Petitioners believed that their challenges to NAF's TRI did *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.[14]

[14] 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 on June 10, 2019. 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

Rather, resolution of the Petitioners' challenge to NAF's "sufficient TRI" claims in the Board, and previously in the Department, 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 requires a determination regarding the plain meaning and parameters of the easement option that NAF obtained from the Eckrotes. As such, these challenges – ***have everything to do with the parameters of the easement between NAF and the Eckrotes not ownership of the intertidal land, per se***.

Prior to *Tomasino,* Petitioners asserted that the Board 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 Department's permits and licenses would authorize.[15] However, pursuant to the *Tomasino* decision*,* the Law Court has clarified that it is *the Superior Court*, not any State or local agency, department, board, bureau or executive official, that *must **first*** make such a determination of the meaning and scope (i.e. "parameters")

Grantors) NAF has blacked out in the submission to DEP on June 10, 2019 – 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 instruments 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). Again, the meaning and validity of these "release deeds" is a matter before the Superior Court in the quiet title action.

[15] 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.

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. The Board, and other similarly situated administrative agencies, lack subject matter jurisdiction to make any determinations regarding the factual parameters of NAF's easement (including the effect of the March 3, 2019 Letter Agreement (Exhibit 4) and the December 23, 2019 Easement Amendment (Exhibit 7) 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 and license applications due to NAF's lack of administrative standing and therefore lack of a justiciable issue before the Board. See, Exhibits 4 and 7.

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 Board to be ***insufficient*** proof of TRI (as the Bureau of Parks and Lands and the Department did in January of 2019), and NAF has no standing to *invoke* the jurisdiction of the Board. See e.g., Exhibits 1 and 2.

Further, pursuant to *Tomasino,* NAF's lack of administrative standing (due to insufficient TRI) renders NAF's applications non-justiciable – i.e. incapable of resolution by the Board -- and prevents the Board from considering, processing or making determinations on NAF's permit and license applications. (Exhibit 13).

In this case, the parameters of the easement option on which NAF relies to demonstrate sufficient TRI 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 parallel Declaratory Judgment action that there are significant factual issues regarding the parameters of NAF's easement that must be

resolved. 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, even 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.[16] (Exhibits 8, 9 and 14-18).

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;[17] and (ii) whether the Eckrotes'

[16] 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).

[17] 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

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.[18] (Exhibit 10).

Thus, it is impossible to determine if NAF's easement option – even if it includes the intertidal land on which the Eckrotes' lot fronts – until and unless it is first determined by the Superior Court in RE-2019-18 if the Eckrotes own the intertidal land on which their lot fronts, since one cannot grant an easement on land that he/she/it does not own. *Dorman v. Bates Mfg. Co.,* 82 Me. 438,448, 19 A. 915 (1890) ("One can not convey land, nor create an easement in it, unless he owns it.).

Accordingly, because the NAF lacks administrative standing, pursuant to the Law Court's controlling holding in *Tomasino,* there is no justiciable issue on which the Board may act. Until the Superior Court determines that the parameters and validity, if any, of NAF's easement option, NAF's applications are not justiciable by the Board. The lack of justiciability of NAF's applications means that the Board may not consider, process or grant NAF any permits of licenses; and until the pending factual and legal questions relating to the parameters of NAF's

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time Hartley conveyed the parcel to Poor." (6-4-2020 Order Denying Summary Judgments, in RE-2019-18, pp. 9-10.

[18] 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 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.

easement option from the Eckrotes are resolved by the Waldo County Superior Court, a stay or dismissal of all Board proceedings is mandated by the Law Court's holding in *Tomasino,* and guidance from the Superior Court in its July 14, 2020 Order in AP-2020-03.

BACKGROUND

As the Board is well aware, Petitioners have consistently challenged the "jurisdiction" of the Board to proceed with its consideration of NAF's permit and license applications since January of 2019. The Board 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 Petitioners Mabee and Grace on April 29, 2019.[19]

In all of these administrative forums, including the Board, Petitioners have continually opposed the sufficiency of NAF's claims of title, right 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 Board, NAF has claimed that is has "sufficient" title, right or interest ("TRI") 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

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

Sale Agreement, between NAF and Richard and Janet Eckrote.[20] 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 NAF has been granted an option to acquire 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 "waterside" 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 Board and Department, that

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

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. (Exhibit 4). 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, this determination was reversed by the Bureau in April 2019, and the Bureau found that the NAF applications were "complete" for processing.[21]

Similarly, on January 22, 2019, the Department determined that the boundary of the easement to be granted by the 2018 NAF-Eckrote option "terminated at the high water mark" of the Grantors' property and did not include an easement to use the intertidal land on which the Grantors' lot fronts. Exhibit 2. As a result, NAF was requested to provide the Department with additional proof of TRI by February 6, 2019,[22] but notably, NAF *never* submitted any

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

[22] In relevant part, the Department expressly requested the following additional proof from NAF relating to TRI:

> 1) A clarification from the parties to the Eckrote purchase and sale agreement that the easement contained in the agreement expressly includes intertidal rights and applies to the adjoining intertidal zone. ***This Department request, which echoes a similar request made by BPL, may be satisfied through an amendment, modification, or clarification of the agreement (or its attached Exhibit A) by the parties to that agreement***.
>
> 2) The survey providing the basis for the Eckrotes' intertidal boundaries.

documentation that amended the boundaries of the easement option to include the intertidal land on which the Eckrotes' lot fronts.

Despite the failure of NAF to provide any proof to the Department – through submission of an "***amendment, modification, or clarification of the agreement (or its attached Exhibit A) by the parties to that agreement"*** -- of a legally cognizable expectation to use this intertidal land in the manner the permits sought would authorize, on June 13, 2019 the Department reversed this determination, stating in relevant part that:

> . . . With respect to the intertidal portion of the property proposed for use, the Department finds that the deeds and other submissions, ***including NAF's option to purchase an easement over the Eckrote property and the succession of deeds in the Eckrote chain of title***, when considered in the context of the common law presumption of conveyance of the intertidal area along with an upland conveyance, constitute sufficient showing of TRI for the Department to process and take action on the pending application. This determination is not an adjudication of property rights and may be reconsidered by the Department at any time during processing as applicants must have adequate and sufficient TRI throughout the application process. Accordingly should a court adjudicate any property disputes or rights in a way that affects NAF's interest in the proposed project lands while the applications are being processed, the Department may revisit the issue of TRI and return the applications if appropriate.

Petition Exhibit 9, pp. 15 (emphasis supplied). When Petitioners' challenged this decision to the Board, the Board refused to rule on this jurisdictional challenge and proceeded with its own substantive review of NAF's permit applications in the absence of a resolution of Petitioners' challenge to the Board's and the Department's subject matter jurisdiction over NAF's permit applications. See, Exhibits 11 and 12.

Despite Petitioners' repeated attempts in the Board, to challenge the determination by the Board that NAF had demonstrated "sufficient TRI" to proceed, the Board and Board's Presiding Officer have denied all of the Petitioners' requests to stay the Board's consideration of the substance of the pending NAF permit and license application or dismiss the applications until the

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Petition Exhibit 2, p. 2.

Waldo County Superior 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 submissions in support of its claims of TRI, 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.[23]

The Law Court's holding in *Tomasino* and the July 14 Superior Court holding in AP-2020-03 should end this debate. Pursuant to the Law Court's holding in *Tomasino,* NAF's 2018 easement option from the Eckrotes is ***insufficient*** proof to demonstrate the requisite title, right or

[23] 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 (Exhibit 11), 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.

interest to establish NAF's administrative standing to obtain a permit or license from this Board, in the absence of a ***prior*** factual determination of the factual (and legal) parameters of the easement by a Court of competent jurisdiction (i.e. the Waldo County Superior Court in RE-2019-18). And, pursuant to the guidance provided by the Superior Court in its July 14, 2020 Order in AP-2020-03, NAF's lack of administrative standing renders NAF's permit and license applications nonjusticiable by the Board – i.e. incapable of administrative resolution by the Board.[24]

The Law Court's holding on July 7, 2020, in *Tomasino* now mandates that the Board stay or dismiss the NAF lease applications based on the ***insufficiency*** of NAF's title, right or interest -- because NAF relies only on an easement, the parameters of which have not been determined by a court of competent jurisdiction after factual inquiry by the Court, to establish its claim of "sufficient TRI." The clarification issued on July 7, 2020 by the Law Court, in *Tomasino,* requires all review of NAF's permit and license applications by the Board be stayed, and/or NAF's pending applications be dismissed, until the Waldo County Superior Court determines the parameters ad validity, *if any*, of the NAF-Eckrote easement, because NAF lacks administrative standing and the Board lacks any justiciable issue(s) before it to consider.

To be clear, Petitioners submit that any actions that the Board takes on NAF's pending permit and license applications prior to this Court's determination of the parameters of the NAF-Eckrote easement are a ***nullity***, because such determinations and action will have been undertaken by the Board in the absence of any standing by the applicant to invoke the Board's

[24] *See, e.g.* 7-14-2020 Sup. Ct. Order (AP-2020-03), p. 3, *citing, Bank of Am., N.A. v. Greeleaf,* 2015 ME 127, ¶ 8, 124 A.3d 1122 (citations omitted) ("When discovered, a standing defect does not affect, let alone destroy, the court's authority o decide disputes that fall within its subject matter jurisdiction. A Plaintiff's lack of standing renders that plaintiff's complaint ***nonjusticiable*** – i.e. **incapable of judicial resolution**.") (emphasis supplied).

jurisdiction and any justiciable issue before the Board to make such substantive decisions. Indeed, all substantive action on NAF's permit, license and lease applications, undertaken by the Board, and all other similarly situated local and State permitting authorities, after the clarification of the limits of subject matter jurisdiction and applicant standing by the Court in *Tomasino,* will be a ***nullity***.

As noted in the authorities cited by the Superior Court in its July 14, 2020 Order, dismissal without prejudice is the appropriate action where, as here, the applicant lacks standing, as a matter of law. See, e.g. *Homeward Residential, Inc. v. Gregor,* 2015 ME 108, ¶24, 122 A.3d 947, 954-955 ("The court could not decide the merits of the case when the plaintiff lacked standing . . . Instead, the court could only dismiss the action. Because the court addressed the merits of the complaint for foreclosure in its judgment, we vacate the judgment in its entirety and remand for an entry of a dismissal without prejudice."). *See also*, *Witham Family Ltd. P'ship*, 2015 ME 12, ¶7, 110 A.3d 642 ("Courts can only decide cases before them that involve justiciable controversies.").

As noted by the dissent in *Tomasino:* "administrative standing 'is intended to prevent an applicant from wasting an administrative agency's time by applying for a permit or license that he [or she] would have no legally protected right to use.'" *Tomasino v. Town of Casco,* 2020 ME 96, ¶ 20, citing, *Murray v. Inhabitants of the Town of Lincolnville,* 462 A.2d 40, 43 (Me. 1983); and *Walsh,* 315 A.2d at 207 n. 4 ("[G]overnment officials and agencies should not be required to dissipate their time and energies in dealing with persons who are 'strangers' to the particular governmental regulations and control being undertaken.").

While the public purpose in preserving limited *public* resources enunciated by the Court in *Murray* and *Walsh* is important, equally important should be the recognition by public

permitting agencies, like the Board, of the need in preserving the *private* resources of property owners whose property is threatened with regulatory taking, for the benefit of another private party (a permit applicant) whose legally cognizable interest in the property over which it seeks permits, licenses and/or leases from the government, has been credibly challenged and requires determination by a court of competent jurisdiction prior to permitting proceeding.

Private property owners defending their deeded property rights should not be expected to bankrupt themselves in a multi-front battle, waged simultaneously in multiple local and State administrative permitting proceedings, to prevent a corporation from seeking and obtaining permits to use land to which the corporation has only a dubious, disputed claim, grounded in an easement the parameters and validity of which have not been determined as a matter of law or fact, by a court vested with the subject matter jurisdiction to do so. The Law Court's holding in *Tomasino* is based on this principle.

At its core, Petitioners' challenges to the Board's consideration of NAF's permit and license applications prior to resolution of the issues relating to the factual parameters and validity of NAF's easement and the Eckrotes' ability to grant an easement are, and always has been, grounded in the constitutionally guaranteed right of all landowners to protect their property from an unlawful regulatory taking. As the Law Court noted in *Brown v. Warchalowski,* 471 A.2d 1026, 1029, 1984 Me. LEXIS 600, •5-8:

> Article 1, section 21, of the Constitution of Maine provides that "private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." This constitutional guarantee surrounding the acknowledged right of ownership of private property necessarily implies from its mere declaration that private property cannot be taken through governmental action for private use, with or without compensation, except by the owner's consent. *Paine v. Savage*, 126 Me. 121, 123, 136 A. 664, 665 (1927); *Haley v. Davenport*, 132 Me. 148, 149, 168 A. 102, 103 (1933). The exigencies of particular individuals in the enjoyment of their own property will not in and of themselves suffice to permit state, county or municipal, action in appropriating

> the land of another for road purposes. . . . The constitution protects the owner of property to the extent of "churlish obstinacy", said Justice Kent in *Bangor & Piscataquis R.R. Co. v. McComb*, 60 Me. 290, 295 (1872):
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> > As between individuals, no necessity, however great, no exigency, however imminent, no improvement, however valuable, no refusal, however unneighborly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require any man to part with an inch of his estate.
> >
> > . . . ***In order to result in a constitutional "taking," it is not necessary that the owner of property actually be removed from his property or completely deprived of its possession, but merely that an interest in the property or in its use and enjoyment be seriously impaired***, such as when inroads are made upon an owner's title or an owner's use of the property to an extent that, as between private parties as in this case a servitude will attach to the land. *Foss v. Maine Turnpike Authority*, 309 A.2d 339, 344 (Me. 1973); *United States v. Dickinson*, 331 U.S. 745, 748, 67 S. Ct. 1382, 1385, 91 L. Ed. 1789 (1947). *See also Cushman v. Smith*, 34 Me. 247, 260 (1852); *Estate of Waggoner v. Gleghorn*, 378 S.W.2d 47, 50 (Tex. 1964).

(emphasis supplied).

In *Tomasino,* the Court has struck a proper balance of public and private rights by requiring a permit applicant seeking permits, based on nothing more than a disputed easement, to first obtain a judicial determination of the parameters of that easement by a court of competent jurisdiction. It is imperative that the parameters of NAF's easement option be determined first by this Court in the parallel Declaratory Judgment action (RE-2019-18) prior to more costly, protracted permit proceedings being undertaken by a multitude of local and state entities.

While the Superior Court undertakes the legal and factual inquiries necessary to properly determine the parameters and validity, *if any*, of NAF's easement from the Eckrotes, and the Petitioners' and the Eckrotes' claims of ownership of the disputed intertidal land, neither the taxpayers nor Petitioners should be required to dissipate their respective limited resources in continued permit proceedings filed by an applicant that, as a matter of law under the circumstances of this case, lacks sufficient title, right or interest to have the requisite administrative standing to proceed in the permitting process. This is the holding of the Supreme

Judicial Court in the July 7, 2020 *Tomasino* decision regarding what constitutes "sufficient title, right or interest" for an applicant, that is relying on an easement, the parameters of which have not been determined by a court of competent jurisdiction. And the Law Court precedents cited by the Superior Court in its July 14, 2020 Order in AP-2020-03, provide additional support for the dismissal without prejudice of NAF's applications (or, at a minimum, a stay of all DEP and BEP consideration, processing or action of NAF's applications), until the Waldo County Superior Court has determined the parameters and validity, if any, of NAF's easement option from the Eckrotes and determined whether NAF has the administrative standing necessary for NAF's applications to be justiciable in the Board.

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 the Waldo County Superior Court determines 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 without prejudice of NAF's permit and license applications currently pending in the Board. Such a stay would include the Board ceasing all review and proceedings on the above-referenced permit and license applications and ceasing efforts to issue draft permits in the absence of a justiciable issue before the Board.

Respectfully submitted this 17th day of August 2020.

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Kimberly J. Ervin Tucker
Counsel for Petitioners Jeffrey Mabee and Judith Grace
and the Friends of the Harriet L. Hartley Conservation Area
Maine Bar No. 6969
48 Harbour Pointe Drive
Lincolnville, Maine 04849
P: 202-841-5439
k.ervintucker@gmail.com

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