

**Zoning 101: A Stakeholder's Guide to Understanding the
Zoning Decisions Impacting Shellfish Aquaculture
Permitting**



AMANDA NICHOLS
OCEAN AND COASTAL LAW FELLOW

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**AGRICULTURAL & FOOD
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I. Executive Summary

With the commercial aquaculture industry rapidly growing in size and popularity in the United States, shellfish aquaculturists often encounter barriers outside of typical permitting and leasing difficulties. Local laws can pose real challenges for aquaculture stakeholders, as they vary from state-to-state and municipality-to-municipality. Zoning, in particular, is one category in which aquaculturists often encounter the most trouble. Aquaculturists must be aware of the significance of local zoning laws, as well as the barriers they may pose, in order to have the best chance of successful operation.

It is important for aquaculture stakeholders to consider several key points when examining how zoning laws can impact the industry. First, not all zoning ordinances impact all aquaculturists, either because of constitutionality, applicability, interpretation, or terminology issues, or due to the presence of state right-to-farm legislation. Second, aquaculturists wishing to operate under special circumstances often face a myriad of additional barriers to successfully obtaining a variance, non-conforming use permit, or conditional use permit. Furthermore, re-zoning, while sometimes beneficial for aquaculturists, may, in effect, frustrate local growth of the industry. Third, the types of ordinances municipalities choose to enact can often impact proposed aquaculture sites. For example, local ordinances related to dock access, shoreline and floodplain development, and agri-tourism are often enacted by municipalities wishing either to limit or foster aquaculture endeavors. Finally, even if aquaculturists are able to navigate local zoning laws successfully, they still face the possibility of retaliatory litigation initiated by neighboring landowners.

This guide is meant to educate stakeholders regarding zoning law in general as well as local zoning challenges commonly encountered in the aquaculture industry. Specifically, the guide offers accessible legal explanations as well as multiple, real-world examples that both illustrate the issues and aid stakeholders in contemplating potential strategies for success.

I. Zoning in General

Zoning can factor into decisions made both on and off dry land. In particular, zoning can impede landowners' ability to establish shellfish aquaculture sites in some marine and riparian areas. In order for aquaculture stakeholders to have the best chance of successfully establishing functional farms, interested parties must stay abreast of all applicable zoning ordinances and legal developments in their respective localities. However, to truly comprehend the impact of zoning, it is first important for stakeholders to understand how zoning laws work as well as the terminology involved.

a. History and Purpose of Zoning Laws

“Zoning” is the legislative process that divides land for different uses. Zoning ordinances regulate the use of that land as well as the structures built upon it. Before zoning became common practice, cities generally used nuisance laws to regulate what could be built. Under this approach, those wishing to contest offending land uses could bring a challenge in court, with the ultimate decision left up to a judge. However, as buildings became higher and

numbers of factories and warehouses in metropolitan areas increased throughout the early twentieth century, citizens demanded that localities initiate more uniform systems of regulation.

New York City responded in 1916 with the nation's first comprehensive zoning code, which regulated building design and established separate residential and business districts throughout the city. However, as the popularity of zoning codes grew in other localities, so did the legal challenges. The constitutionality of zoning ordinances was upheld in 1926 in a landmark Supreme Court case entitled *Euclid v. Ambler Realty*. After the *Euclid* decision, zoning laws became much more prevalent throughout the country. Zoning is now ubiquitous throughout the United States, with counties, cities, and other localities having created zoning codes that determine what owners can build on their land.

b. Creating Zoning Law

i. *Comprehensive Plans*

Localities do not simply enact zoning ordinances whenever they see fit, hoping to bundle them together piecemeal into a system that, hopefully, works. Instead, urban planners utilize “comprehensive plans” to serve as the backbone for local zoning laws. A comprehensive plan is the culmination of a planning process that establishes the official land use policy of a community as well as presents goals and a vision for the community's future. Comprehensive plans are not legally binding, but rather serve as guidance documents around which local governments make planning decisions. Comprehensive plans are created through a collaborative effort of planning professionals, the public, city staff, the city's planning commission, and the city's governing body (as well as neighboring communities, sometimes). The plan includes information regarding land development trends and issues, community resources, and public needs for transportation, recreation, and housing. While zoning is only one method for implementing the goals of a comprehensive plan, having a well-established plan ensures that collective forethought precedes any zoning decisions.

Comprehensive plans are generally created through a formal process enabled by state statute. While such statutes are not universal, they generally require that localities first solicit input from citizens and other interested parties regarding how a community should evolve. City staff then uses the input to create a draft plan, either alone or in conjunction with a planning consultant. The draft is then given to the city planning commission, who reviews it, and then forwards it to the city council with a recommendation for approval once deemed satisfactory. The council then makes the final decision of whether to implement the plan, deny it, or seek further public input. Once a comprehensive plan is successfully established, a locality can begin to implement specific zoning ordinances.

Municipalities can choose to support certain local goals by including them in their comprehensive plans. For example, a locality may implement a comprehensive plan in which commercial aquaculture plays a significant part, therefore recognizing the continued growth and support of the industry as an important objective. As noted later in this document,¹ the

¹ See Island Seafood example on pg. 22.

conscious inclusion of aquaculture in a comprehensive plan can be quite beneficial for communities wishing to foster the industry locally, from both a planning and legal perspective.

ii. Zoning Ordinances

Zoning ordinances are the specific, local regulations that govern land uses and structures within a local government's boundaries. Zoning codes are made up of ordinances. Ordinances can be established at both the county and municipality levels, and seek to affect the goals outlined in the comprehensive plan. However, unlike comprehensive plans, zoning ordinances are legally binding. Therefore, localities must ensure their ordinances comply with the law before enactment. Failure to do so could be met with legal retaliation contesting an ordinance's enforceability.

The ordinance creation process is very similar to that of the formal comprehensive plan—requiring drafting, public input, review, and final approval. There are generally three types of zoning ordinances, including those that: 1) define different types of use districts (i.e., commercial districts and residential districts); 2) define regulations that apply uniformly to all districts (i.e., parking and noise standards); and 3) outline procedures for requests under the ordinance.

However, ordinances are not set in stone. Localities can choose to amend ordinances through a process that generally mirrors creation. Furthermore, localities can issue temporary stops—called “moratoriums”—while making amendments. Moratoriums temporarily halt development that, while lawful under the current ordinance, would be prohibited under an impending amendment. However, moratoriums must be reasonable. In evaluating the reasonableness of a moratorium, a court will consider whether it advances a legitimate government interest, is being made in good faith, and doesn't deprive the landowner of all reasonable use for too long. Failure to meet these criteria may result in the moratorium effecting a “regulatory taking,” for which landowners are entitled to compensation (discussed below). For example, it may be reasonable for a municipality to adopt a six-month moratorium on the development of stores larger than 80,000 square feet, using the time to review and make changes to local planning and zoning rules governing big box retailers. However, if the municipality increased the length of the moratorium from six months to two years, a court may hold the moratorium to be unreasonable and a regulatory taking if the city failed to provide adequate compensation to those retailers affected.

c. Districts and Uses

There are many different types of zoning. Use-based zoning is the most common. Zoning codes that utilize this type of zoning divide land by what purpose it can be used for. By far the most common type of use-based zoning in the United States is single-use or “Euclidian” zoning. This type of zoning controls land uses by dividing a community into specific, territorial districts and prescribing the uses that are permitted or not permitted in each district.

i. Districts

In any type of zoning, the first step is to establish districts. District boundaries in areas utilizing Euclidian zoning are fixed by law with reference to a map, and every square foot of the community exists within a fixed zone on the map that is assigned a different land use category—broadly, either commercial, residential, industrial, or agricultural. However, zoning ordinances may include other types of districts for use in special circumstances, such as mixed-use districts, planned use districts (PUDs), historic districts, waterfront districts, overlay districts, and floating districts.

Common land use districts include:

- **Commercial Districts:** Primarily used for businesses (such as shops, offices, theaters, and restaurants), and are often locted on the main streets of smaller towns. In larger communities, there may be multiple commercial districts, often with more specialized functions. For example, the central business district of a large city may house multiple offices and professional buildings, while the financial district may house a stock exchange or several bank headquarters.
- **Residential Districts:** Primarily used for housing, although types of permitted housing may vary greatly between and through single residential zones. For example, a municipality may choose to zone certain areas for single-family housing, multi-family residential housing, or mobile housing. Residential districts may also exclude business and industry altogether, although many permit some services or work opportunities for the benefit of the community as a whole.
- **Industrial Districts:** Primarily used to house and foster (typically heavy) industrial development. Industrial zones are usually located on the edges of the main residential area of a city, and close to transport facilities (such as highways, railroads, airports, and marine ports). Among other benefits, the placement of industrial districts ideally helps reduce the environmental and social impacts of heavy industrial uses (such as excessive noise and pollution).
- **Agricultural Districts:** Primarily used to conserve and protect open land uses, foster orderly growth in rural areas, and prevent urban agricultural land use conflicts. Lots in agricultural districts must typically be of a larger minimum acreage, so as to discourage the development of small lot or residential subdivisions where governmental services may become difficult to access. Agricultural districts can often house more than just farms, with municipalities typically allowing other uses requiring larger parcels of land, such as parks, churches, utility facilities, and hospitals.

A wide range of special districts are used by localities across the country to address special or unique community needs. Some examples of special districts include:

- **Mixed-use districts** allow for a combination of typical uses, and are often utilized in downtown areas. For example, a downtown area may be zoned for both commercial and residential uses, allowing shopkeepers and residential tenants to rent and use property for their own respective purposes.

- PUDs are a type of mixed-use development with a cohesive design plan. For example, an area may be zoned for residential, retail, and office purposes to encourage growth in the area. To encourage the feasibility of PUDs, cities may waive or modify regulations that would otherwise be required of individual uses—thus allowing for flexibility in the development’s design.
- Historic districts are created to preserve structures that are historically, architecturally, or culturally significant. Ordinances in these districts limit demolition of or modification to such structures, and require that new construction conform to certain requirements. For example, a historic district may require that all buildings use primarily red brick in order to preserve the architectural ambiance of the area.
- Waterfront districts can foster many different water-dependent uses in localities where they are utilized. For example, a city may establish a waterfront district along a downtown section of river in order to enhance and diversify commercial and residential development in the area as well as preserve the aesthetically pleasing views a waterfront often provides. Municipalities may also use waterfront districts to encourage recreational activity, allowing for the installation of structures such as boat docks and fishing piers. Furthermore, waterfront districts are often established by municipalities seeking to regulate the siting of shellfish aquaculture farms.
- Overlay districts are created to encompass one or more previously established zoning districts, imposing additional or stricter standards and criteria for covered properties in addition to those of the underlying zoning district. Municipalities often use overlay districts to protect special features such as historic buildings, wetlands, steep slopes, and waterfronts. Overlay zones can also be used to promote specific development projects, such as mixed-use developments, waterfront developments, or affordable housing. For example, a residential district zoned for single-family housing may also exist within a hillside overlay zone. Therefore, while families are permitted to construct homes in the residential district according to the district’s standards, the hillside overlay zone standards may prevent construction until a family can obtain a geo-technical report.
- Floating districts are those that are permitted under a zoning ordinance, but haven’t yet been placed on the zoning map. They’re often used for unique purposes anticipated in the future, but for which no specific location has yet been identified. In essence, the zone floats over the community until a use meeting its criteria comes to fruition and a site can be identified. For example, major entertainment centers and arenas are often zoned as floating districts if not yet existing. If a professional sports team were to move into a city with one of these districts, it would fall into the floating zone until a site for the construction could be identified.

ii. Uses

Once district categories are established, zoning ordinances then denote the uses that are permitted within each district. If a use conforms with the district type as well as the strictures of applicable zoning ordinances, the locality may issue a permit. There are three typical types of uses: 1) permitted uses; 2) special uses; and 3) accessory uses.

Permitted uses are expressly listed and permitted as a matter of right. For example, owning and living in a family home in a residential district would be a permitted use.

Special use permits (SUPs) are permanent and given at the discretion of a municipality so long as certain conditions are met. SUPs are needed where a use could negatively impact neighboring properties unless it operates under certain conditions. For example, a SUP can limit the hours a liquor store can operate so as to avoid an influx of late-night drinkers roaming the streets of the district in question.

Accessory uses are uses that exist in addition to a parcel's principal use. For example, an accessory use permit may be required in a residential district if a homeowner wishes to build a garage, deck, swimming pool, or storage shed on their property. In aquaculture, laws governing accessory uses can have a significant impact on the type of ancillary business activity one may engage in on their property. For example, structures utilized for boat building, shellfish processing, and gear storage are accessory uses that could be prohibited if applicable provisions are not included in zoning codes or if property owners do not obtain the appropriate permit. Without obtaining authorization for its accessory uses, an aquaculture operation may not be able to operate effectively or at all.

d. Special Circumstances

In some special circumstances, a property owner may request a waiver to a zoning ordinance. There are three basic types of waivers, including: 1) variances; 2) non-conforming use permits; and 3) conditional use permits.

Variations permit a property owner to use their land in a way not normally allowed. Variations are granted at a city's discretion when strict compliance with zoning regulations would result in a practical difficulty or unnecessary hardship for a property owner. Variance requests are usually reviewed by a "zoning board of adjustment" or "board of adjustment and appeals," typically appointed by the local governing body. In some communities (if allowed under state law) the authority to hear and decide variations is conferred upon planning commissions or reserved to the governing body itself. Variations are typically only available for exceptions to physical regulations, not uses, however some jurisdictions allow for use-based variations. For example, a variance may be granted if an ordinance requires that commercial buildings be set back fifty feet from the property line when a new office building has already been erected and is only positioned forty feet away. Moving the building would result in a practical difficulty and unnecessary hardship, so the city may decide to grant a variance, which would allow the building to remain as is without penalty.

Non-conforming use permits are typically used to "grandfather in" properties that were legally zoned under a previous ordinance, but that became non-compliant after enactment of current law. Permitted, non-conforming uses are lawful and may continue after an ordinance changes, however they face certain restrictions in light of the ordinance's current language. For example, non-conforming use permits apply only for as long as a business stays open and do not transfer to a new business in the same location, even an identical one.

Conditional uses are those uses that require "special attention." A list of these uses is set forth in the zoning ordinances of each district. Conditional uses may not be the primary intended

use for a district, and may have some negative aspects, but can be beneficial to a community if made to comply with certain conditions. For example, allowing a gas station to be built in a residential area may be valuable to that area so long as the potentially negative aspects of the use can be minimized. If a permit applicant requests to engage in a conditional use that is listed in the zoning ordinance and they accept the district's conditions to that use, they must be granted a conditional use permit.

Looking past the typical three categories of special circumstances, there is one final circumstance in which property owners may be able to overcome zoning laws—rezoning. Rezoning changes a property's zoning district, but to do this, a property owner must make an application for rezoning. The process of rezoning acts as an amendment to the district map, and, therefore, follows the same procedure as making an ordinance amendment. Rezoning applications may be judged not only by their compliance with the ordinance, but also by their compliance with the comprehensive plan. However, property owners will not succeed in rezoning merely for their own benefit—a practice known as “spot-zoning.” Instead, rezoning is typically only permitted when a varying use serves a public benefit or other useful purpose for the surrounding locality. For example, rezoning a parcel of land in a residential neighborhood to allow for the construction of a school would likely provide a public benefit.

e. Enforcement

Violating zoning laws can have serious financial implications for the offender—including the imposition of civil penalties as well as mandatory removal of the illegal structure or addition (often at a significant cost). Offenders can also be pursued criminally, risking additional fines or even imprisonment as a result. Furthermore, violations can cause a local zoning agency to refuse to issue permits to the offender in the future.

Property owners do have some recourse when subjected to unfavorable zoning decisions. Owners may first contest the decision by appealing to the appropriate zoning agency, or, additionally, may seek some form of waiver that would make the violating use allowable. As noted above, a zoning agency may grant such a waiver in certain special circumstances. While many localities require property owners to exhaust these administrative remedies first, subjects of unfavorable zoning decisions may also file lawsuits in the event they are unsatisfied by the administrative process.

Filing a lawsuit often requires considerable time and money, so few property owners will typically choose to utilize such a remedy. Those that do choose to engage in the legal process can allege that the imposition of a zoning ordinance, amendment, or moratorium has affected a regulatory taking in violation of the Fifth Amendment. Regulatory takings occur when a governmental regulation effectively deprives a landowner of all economically reasonable use or value of their property without adequate compensation. Localities must compensate landowners for the loss in land value caused by such an unreasonable ordinance or moratorium. If a court finds that landowners weren't compensated or were given unreasonable compensation, the municipality will be held legally responsible.

If a landowner is unable to successfully contest the zoning agency's decision either administratively or through a successful lawsuit, they will not be issued a permit, and will be prohibited from completing their construction project under threat of the civil and criminal penalties discussed above.

II. Zoning Shellfish Aquaculture

Zoning and local land use decisions can impact shellfish aquaculture projects in multiple ways. The decisions a municipality makes as to the types and locations of its districts can either pave the way for shellfish aquaculture or cut off the possibility that a farm may be sited in a certain area. Municipalities may also enact ordinances that either aid or limit aquaculture. A municipality may, for example, pass a shoreline development ordinance that restricts commercial development near protected shorelines. Such an ordinance might limit possible siting locations for aquaculturists wishing to operate in the area. On the other hand, a municipality might adopt helpful legislation, such as an ordinance creating an overlay zone that provides protections for water-dependent uses, such as aquaculture. Aquaculture stakeholders should be cognizant of the ability localities have to make decisions about the uses of land within their jurisdictions as well as the limits on that decision-making power.

a. The Limits of Municipal Authority

Municipalities are essentially corporations created by the state to exercise subordinate governmental powers and administer the public affairs of a community. They have no inherent power of their own, and are given their rulemaking power by the state. The state both grants and limits this municipal rulemaking power through the passage of state legislation drafted under one of two legal theories: 1) home rule or 2) Dillon rule.

In the minority of states utilizing the "home rule" theory, an article or amendment to the state constitution grants cities, municipalities, and/or counties the ability to pass laws to govern themselves as they see fit, so long as they abide by state and federal constitutional law. For example, Georgia's Constitution authorizes cities to adopt plans and exercise zoning power, but allows the General Assembly to enact laws establishing procedures for the exercise of that power. Furthermore, Georgia's General Assembly has reserved for itself the power to enact laws that restrict land uses in order to protect and preserve the natural resources, environment, and vital areas of the state.²

In the remaining majority of states utilizing the "Dillon Rule," only limited authority is granted to local governments through the passage of enabling statutes. In these states, a locality must first obtain permission from the state legislature if attempting to pass a law or ordinance that is not specifically permitted under existing state legislation. For example, Virginia's utilization of the Dillon Rule prevents local governments from doing such things as opening public schools before Labor Day or establishing moratoriums on rezoning land without a preceding act of the General Assembly. Among other limitations, Virginia's enabling act also restricts what provisions may be included in local zoning ordinances.³

² GA. CONST. Art. IX, Sec. VI, Par. II.

³ See VA. CODE ANN. § 15.2-2286 (West).

Determining what legal theory a state follows is important for stakeholders, as state limits on municipal authority can limit what zoning powers a locality can exert.

b. Authority to Lease and Zone Waters for Shellfish Aquaculture

Municipalities are granted zoning authority by the state, but what authority do both states and localities have to zone their waters for shellfish aquaculture? To begin to answer this question, it is first important to understand the implications of the Submerged Lands Act (SLA)⁴—a statute enacted in response to a federal case entitled *United States v. California*.⁵ In that 1947 case, the United States successfully argued that the three nautical miles of ocean seaward of California’s shoreline belonged to the federal government, with the court holding that the federal government’s responsibility for defense of the marginal seas and the conduction of foreign relations outweighed the interests of individual states. The SLA was enacted in 1953 to grant title to the natural resources located within three miles of each state’s coastline to the states.⁶ While the federal government retains the power to regulate commerce, navigation, power generation, national defense, and international affairs throughout state waters, the states now have authority to manage, develop, and lease resources throughout the water column as well as on and under the seafloor, within the boundaries defined by the SLA.

States, therefore, have the clear authority to regulate state waters under the SLA. What then is left in the way of municipal jurisdiction? Municipal authority to regulate state waters varies from state to state. States have the power to “preempt” laws in localities that are inconsistent with state law. This means that the higher authority—state law—displaces the law of the lower authority—municipal law—when the two authorities come into conflict. However, state laws and local laws may, and often do, coexist. One Virginia case, *Jennings v. Board of Supervisors of Northumberland County*, is a great example of this phenomenon.⁷ In that case, the issue before the court was whether the county’s zoning regulations could extend to regulate the construction of additional mooring slips and piers that would lie seaward of the mean low-water mark in the state’s tidal navigable waters. While it was undisputed that the state had regulatory authority over the seafloor, the Virginia Supreme Court concluded that the proposed mooring slips and piers fell within the jurisdiction of the county and its zoning powers. First, the court found that the Virginia Code allowed the municipal boundaries to include all wharves, piers, docks, and other structures erected along the waterfront of the locality, and extending into the Chesapeake Bay as well as its tidal tributaries. Second, the Court held that Virginia’s state jurisdiction was not exclusive because the regulatory authority granted to it by the General Assembly contemplated that the authority over such structures could be concurrent—meaning that the state and the municipality could simultaneously possess jurisdiction. This case exemplifies that local regulation is not necessarily preempted when a state has regulatory authority over the same area. Most states, in fact, are silent in their shellfish leasing and permitting regulations as to the allowable breadth of local zoning authority. Although the extent of authority varies by state, many coastal municipalities have

⁴ 43 U.S.C. §§1301-1315 (2002).

⁵ *United States v. California*, 332 U.S. 804, 68 S. Ct. 20, 92 L. Ed. 382 (1947).

⁶ Texas and the Gulf Coast of Florida provide exceptions to this, with their state boundaries each extending out to nine nautical miles.

⁷ *Jennings v. Board of Supervisors of Northumberland County*, 281 Va. 511, 708 S.E.2d 841 (2011).

some jurisdiction over activities occurring in waters along their shores. The remainder of this report focuses on local regulation of land-based activities, but aspects of aquaculture operations occurring in the water may also be subject to local regulation.

c. Examples of State Approaches

i. *Washington*

Washington serves as an example of a state with a clearly defined structure for local regulation of shoreline activities—codified in its Shoreline Management Act (SMA) (a statute implemented to carry out state responsibilities encouraged by the federal Coastal Zone Management Act (CZMA)). The SMA assigns primary responsibility for administering the program to local governments, with a significant oversight role taken on by the state Department of Ecology. Most notably, it requires that all Washington counties as well as most towns and cities with shorelines develop and implement Shoreline Master Programs (SMPs). These local SMPs translate the broad policies of the SMA into standards for regulating shoreline uses, and guide local governments in writing, adopting, and implementing local shoreline programs. SMPs combine both planning and regulation. The planning aspect of an SMP presents a comprehensive vision of how shoreline areas will be used and developed over time, while regulations (such as zoning regulations) provide standards that shoreline projects and uses must meet. Local governments can modify their SMPs to reflect changing local circumstances, new information, or improved shoreline management approaches, but must involve the public.

Each local government has also established a permitting system for shoreline development under the SMA. Substantial development permits are required for projects that either cost over \$2,500 or materially interfere with the public’s use of the waters (subject to certain exemptions). Local governments may also issue conditional use permits or variances under the SMA to allow for flexibility and consideration of special circumstances. However, the state Department of Ecology must approve all conditional use and variance permits, and also insures compliance through a variety of means, including technical assistance visits, notices of correction, orders, and penalties.

Most relevant to aquaculture, the SMA establishes the “preferred uses” concept, which seeks to balance the public’s enjoyment of shorelines with the overall best interests of the state and its people. This concept requires that localities give preference to uses that: 1) are consistent with control of pollution; 2) are consistent with prevention of damage to the natural environment; or 3) are unique to or dependent upon use of the state’s shoreline. To this, future development along shorelines must protect the environment and give priority to the following uses in order of importance: 1) water-dependent and associated water-related uses; 2) mixed-use development that includes and supports water-dependent uses; 3) water-related and water-enjoyment uses; and 4) single-family residential uses where appropriate.

Aquaculture benefits from this concept in two primary ways. First, aquaculture is defined as a “water-dependent use”⁸ in Washington’s SMP Guidelines, and its water dependent status has been affirmed in cases before the state’s Shoreline Hearings Board. In fact, the SMP guidelines specifically recognize aquaculture as a preferred use. Therefore, local governments must give top priority according to the preferences listed above. Second, the SMP guidelines categorize aquaculture as an “interest of statewide significance” and note that it could result in long-term benefits over time. These categorizations help prioritize aquaculture along “shorelines of statewide significance”—certain state-designated marine areas, streams, rivers, and lakes in Washington where statewide interests take priority and specific uses are preferred.

However, it is also important to recognize that localities are still free to enact zoning ordinances that may, in effect, limit aquaculture. In fact, zoning ordinances stricter than the requirements contained in a locality’s SMP may co-exist with it, so long as not directly conflicting.⁹ For example, a municipality could not enact an ordinance declassifying aquaculture as a preferred use. However, it may enact an ordinance that, say, limits the type of gear aquaculturists are allowed to use. Aquaculturists must contend with both local SMPs and such zoning ordinances in order to find success in operating an aquaculture site.

ii. *Massachusetts*

In Massachusetts, the state has delegated wetlands¹⁰ permitting to local “Conservation Commissions.” Municipalities, therefore, have permitting authority over aquaculture operations in local waters, in addition to their traditional land use and zoning authorities.

Conservation Commissions serve to promote and develop natural resources as well as protect the watershed resources of the towns in which they reside. Conservation Commissions are responsible for the implementation of the provisions found in the Massachusetts Wetlands Protection Act. New aquaculture facilities located within 100 feet of a wetland resource must first file a Notice of Intent with the local Conservation Commission. Once the applicant has submitted the necessary information, including any additional requested information, the Commission then schedules a public hearing, reviews all relevant information, and issues a local permit when appropriate—termed an “Order of Conditions.” An Order of Conditions either approves or denies the project, and may contain a myriad of requirements and performance standards aquaculturists must abide by in order to begin operations.

Massachusetts municipalities also have the authority to enact local zoning bylaws that affect permissible uses and construction. Increasingly, Massachusetts towns have passed bylaws that include environmental and growth management restrictions. For example, the town of

⁸ Water-dependent uses, by their very nature, must be located next to shorelines. Examples other than aquaculture include docks, marinas, and sewer outfalls.

⁹ See *City of Bremerton v. Sesko*, 100 Wash. App. 158, 995 P.2d 1257 (2000).

¹⁰ In Massachusetts, “wetlands” include both coastal and inland wetlands. Coastal wetlands include land under the ocean; coastal beaches; salt marshes; land under salt ponds; land containing shellfish; coastal dunes; coastal banks; banks of or land under the ocean, ponds, streams, rivers, lakes, or creeks that underlie certain fish runs; rocky intertidal shores; and barrier beaches. Inland wetlands include banks, bordering vegetated wetlands, land under water bodies and waterways, land subject to flooding, and riverfront areas.

Duxbury, Massachusetts limits shellfish aquaculture leases to a maximum of three acres, although authorized by the state to grant licenses for areas up to ten acres. A number of municipalities have also adopted ordinances aiding aquaculture development, by doing such things as establishing wetlands and floodplain overlay districts as well as watershed and aquifer overlay districts. Such actions have held some success for shellfish aquaculturists. For example, the town of Dennis, Massachusetts successfully established an Aquaculture Development Area in Cape Cod Bay in 2001 that allows for easy siting of private aquaculture projects in an area already known to be well-suited to shellfish aquaculture. In response, larger towns such as Falmouth, Massachusetts have contemplated implementing similar programs in order to replicate Dennis's success. Municipalities' ability to implement streamlining programs such as these can have significant benefits for aquaculturists wishing to operate in the state.

iii. North Carolina

Few states have such straightforward structures as Washington and Massachusetts' relatively robust frameworks governing shellfish aquaculture permitting. In many states, the state legislature hasn't directly authorized local governments to take action regarding the regulation of shellfish aquaculture. In such states, localities must find their own permissible means of regulating aquaculture in the absence of a statewide planning mandate. In some states, the state legislature has even forbidden localities to exert zoning authority over some land uses. North Carolina serves as a great example of such a state.

Generally, North Carolina cities can zone agricultural operations within their corporate limits. However, when the state extended authority to adopt zoning ordinances to counties in 1959, the legislation exempted "bona fide farming" activities from such zoning regulation.¹¹ Such "bona fide farm purposes" according to a 2006 amendment to North Carolina's code, now include aquaculture.¹² Therefore, according to the language of North Carolina's state law, county zoning regulations cannot affect aquaculture sites (if actually used for aquaculture purposes). Furthermore, in 2011 the bona fide farm exemption was amended to exclude land being used for farm purposes from municipal extraterritorial jurisdiction. As a result, farm activities in these areas are not subject to city zoning, subdivision, or other municipal development regulations. This gives many aquaculturists in North Carolina increased freedom to farm, but significantly restricts the authority both counties and cities have over the activities taking place in their own backyards.

III. General Issues with Zoning Shellfish Aquaculture

a. Constitutionality

One challenge facing municipalities when enacting new zoning ordinances is that of constitutionality. Municipal ordinances, like federal and state law, are subject to constitutional constraints. For example, ordinances cannot authorize municipalities to restrict free speech or discriminate against federally protected classes of people. Zoning ordinances,

¹¹ N.C. GEN. STAT. § 153A-340(b).

¹² N.C. GEN. STAT. § 106-581.1(4).

too, cannot legally restrict citizens' constitutional rights. Opponents of local ordinances may seek to challenge them in court on the grounds that they are unconstitutionally vague, discriminatory, preempted, or effect a regulatory taking, for example. Most local ordinances are challenged in state court alleging violations of state constitutions, but such challenges can reach the federal court system if infringing on rights reserved for citizens in the U.S. Constitution.

A good example of a constitutional challenge to an aquaculture-related law involving local authority can be found in *Jones v. Chiles*, a Florida case from 1995.¹³ Disappointed applicants filed a lawsuit challenging the constitutionality of a state statute granting counties veto power over issued submerged land leases. After being trained as part of a program designed to train unemployed oyster harvesters in aquaculture, the complainants attempted to get leases that would allow them to farm oysters on one submerged acre of Apalachicola Bay each. However, a section of Florida's state law provides that "no lease shall be granted...where there is filed...a resolution of objection adopted by a majority of [a] county commission."¹⁴ The county off which the submerged land was situated filed such an objection, and the state refused to grant the leases as a result. In response, the applicants argued that the relevant provision of Florida law violated Article III, Section 1 of the Florida Constitution (concerning the vesting of legislative power in the state) because, by giving the county authorization to decide if and when to ban the aquaculture activities of a particular lease applicant, it improperly granted power to determine what the law should be to counties. However, the complainants were ultimately unsuccessful, with the appellate court holding, among other things, that intentionally leaving important policy questions up to county commissioners does not run afoul of Florida's Constitution.

b. Applicability

Applicability is also a factor to consider when evaluating the impact a local ordinance may have on a shellfish aquaculturist. Depending on the exact language of an ordinance coupled with the factual circumstances of each aquaculturist, a local law simply may not apply. As a result, the same laws can apply quite differently from one aquaculturist to another.

Consider, for example, *de Tienne v. Shoreline Hearings Board*, a Washington case from 2016.¹⁵ de Tienne, the owner of a parcel of property designated as a shoreline of statewide significance sought review of a Shoreline Hearings Board (SHB) decision reversing the initial grant of a permit to operate a commercial geoduck farm on five acres of his property. Among other things, de Tienne contested the SHB's interpretation of a County zoning provision that was drafted to give shoreline areas having prerequisite qualities for aquacultural uses preferences and priorities in order to protect the county's aquacultural potential. Had de Tienne's site had the necessary prerequisite qualities, he could have been able to benefit from this zoning provision. However, the court held that the provision only gave projects preferences and priorities if they were situated in shoreline areas well-suited for aquaculture. Because de Tienne's farm would have been located in a high-energy subtidal environment

¹³ *Jones v. Chiles*, 654 So. 2d 1281 (Fla. Dist. Ct. App. 1995).

¹⁴ *Id.* at 1283.

¹⁵ *de Tienne v. Shorelines Hearings Bd.*, 197 Wash. App. 248, 391 P.3d 458 (2016).

bordering a protected eelgrass bed, the court agreed with the SHB that it was not located in an area well-suited for aquaculture, and, therefore, the privileges could not apply. This exemplifies how factual circumstances, such as the physical location of a potential aquaculture farm, can limit the applicability of a zoning ordinance.

c. Interpretation

Just as factual circumstances may limit the impact zoning laws have from one farm to the next, the interpretation of those laws may also yield significant impacts. Local governments are given great latitude in interpreting their own ordinances. These interpretations can have great bearing on how local laws apply to aquaculturists, either for the better or worse.

An excellent example of this comes in the 2014 Virginia case, *County of York v. Bavuso*, which was decided by the Virginia Supreme Court.¹⁶ In this case, York County argued that Bavuso, an oyster farmer, needed a special use permit to facilitate oyster harvesting on his property located in a “resource conservation” zone, as oyster aquaculture is considered a “principal use”¹⁷ in the county and not permitted on property simultaneously being used for residential purposes. According to York County’s code, a principal residential use cannot legally occupy the same lot with any other principal use in a resource conservation zone, requiring any dual-use properties to obtain a special use permit authorizing an exception. Bavuso, however, argued that his aquaculture activity was not a principal use and, thus, allowed on his residential property as a matter of right without a special use permit. The Virginia Supreme Court sided with York County’s interpretation of the code, however, and ruled that living on the property and operating an aquaculture business constituted competing principal uses, which the county prohibits in resource conservation zones without special approval. While the court ruled that Bavuso could continue his aquaculture operations as an accessory use, it noted that Bavuso would still be required to obtain a special use permit to do so. This holding solidified York County’s understanding of its own code provisions, and exemplifies the heavy weight courts give to local governments’ interpretation of their own laws.

d. Definitions

While general content is important in determining the applicability of municipal zoning laws to aquaculturists, specific definitions also carry great weight. Sometimes, the fate of a potential aquaculture project hinges on how local governments or courts interpret and apply the definitions in a relevant statute. It is important for aquaculturists to recognize this, as local governments generally have the power to put forth their own definitions in local laws—definitions that may not always match those typically used in connection with a term.

Carter v. Garrett exemplifies the influence definitions can have in deciding the outcome of a lawsuit.¹⁸ Gregory Garrett operated an oyster farming business on his waterfront residential property, which Virginia’s York County had zoned “rural residential” (RR). Garrett began

¹⁶ *Bavuso v. Carter*, 2014 WL 3510293 (Va. Jan. 3, 2014).

¹⁷ With a few exceptions, a “principal use” for a property is considered to be its primary use.

¹⁸ *Carter v. Garrett*, No. 130144, 2014 WL 11398526 (Va. Jan. 3, 2014).

raising oysters on his property, knowing the County’s zoning provisions permitted “crop/livestock farming” in RR districts. However, the zoning administrator soon notified Garrett that he was in violation of the county zoning code, and would need to obtain a special use permit in order to continue his aquaculture activities. After the York County Board of Zoning and Subdivision Appeals upheld this determination, Garrett appealed to the Circuit Court of York County, which ruled that Garrett was engaged in “crop/livestock farming,” and could, therefore, conduct his oyster operation on his property without a special use permit. In response, the county appealed to the Supreme Court of Virginia.

The Supreme Court of Virginia reversed the Circuit Court’s decision, finding that Garrett would, in fact, need to obtain a special use permit to continue farming oysters on his property. In making this decision, the court first focused on the definition of “livestock.” While Garrett argued that his oysters met the definition, thus eliminating the need to obtain a special use permit, the court went deeper and looked at the definition of “animal” as written in York County’s zoning ordinances. The court found that York County’s definition included any nonhuman vertebrate species *except fish*. Garrett responded by alleging that the more specific term of “animal, agricultural” instead applied to his oysters. However, the court did not agree with this argument, noting that York County defined that term to include only livestock and poultry. The court reasoned that the term “livestock” was limited to “animals,” and because “animals” was limited to “nonhuman vertebrate species,” invertebrate oysters could not be “animals” under the relevant zoning ordinances. Therefore, the court ruled that Garrett’s oyster farming could not be classified as livestock farming, and he would have no right to continue his oyster operations in an RR district as such. To continue farming, the court required him to obtain a special use permit from York County, as originally ordered. This ruling is important because it goes against common sense for many. Despite oysters being scientifically classified as animals, the court decided to look to the whole body of York County’s ordinances for the definitions and interpretation used in its final ruling. Had the definition been different, the case could have turned in Garrett’s favor, allowing him to continue his aquaculture activities.

e. Right-to-Farm Laws

State right-to-farm statutes can also have an impact on municipal zoning laws as applied to shellfish aquaculture. In general, “right-to-farm” legislation protects agricultural operations from nuisance lawsuits when certain conditions are satisfied, however protections can also apply to unfavorable zoning decisions. As of 2018, twenty-seven states expressly included fish or aquaculture within the scope of their right-to-farm protections.¹⁹ Generally, right-to-farm protections only apply to farms that have been operating for a certain number of years, and often only to farms in agricultural zones. While the exact language contained in right-to-farm legislation varies from state to state, aquaculturists may be able to take advantage of the statutes to avoid the negative impacts that municipal zoning laws can often have on their operations—especially as more states begin to expressly recognize aquaculture as an agricultural activity.

¹⁹ These states include: Alaska, Arkansas, California, Florida, Georgia, Hawaii, Idaho, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Washington, and Wisconsin.

For example, Hawaii’s Right to Farm Act notes that farming operations conducting aquaculture on land zoned for nonagricultural use may not, by reason of that zoning, fall beyond the definition of a “farming operation,” provided that those farming operations form an integral part of operations that otherwise meet the requirements of the definition.²⁰ This provision helps retain legal protections for aquacultural operations in spite of a municipality’s zoning decisions. However, some right-to-farm statutes also specifically reserve to municipalities the ability to make zoning decisions. For example, South Carolina’s legislation states that counties may determine whether an agricultural use is permitted under the county’s land use and zoning authority.²¹

Municipalities are also often free to enact local right-to-farm ordinances. These ordinances reaffirm and often restate a state’s right-to-farm law, and are often included to show support for local farms and agriculture. They often declare farming as an accepted and valued activity within the community. However, municipal right-to-farm ordinances may contain additional limiting language for farmers. For example, some municipal ordinances require that farmers notify prospective buyers of adjacent parcels about the possible negative impacts of agricultural activities. Municipalities with such requirements hope that new residents, especially those unfamiliar with rural living, would effectively learn about the realities of modern farming beforehand and be less inclined to retaliate as a result.

IV. Special Circumstances

a. Variances

As noted above, variances grant property owners a waiver to use their land in a way not normally allowed. More specifically, variances are used as a means of correcting the occasional inequities that are created by general zoning ordinances. In the event that an aquaculturist cannot get their project authorized by the municipal zoning board, they may be able to obtain a variance. The variance application process varies from municipality to municipality, and the party seeking a variance bears the burden of proving their special circumstances to the local zoning board’s satisfaction. Furthermore, some municipalities have chosen to do away with variances altogether, requiring that those with special circumstances to seek special use permits instead. In localities utilizing variances, aquaculture-related variances may be issued for such things as building an otherwise prohibited pier for offloading and processing or constructing a small processing building on residentially zoned property.

Generally, states are guided by the Standard State Zoning Enabling Act (SZEa) when providing for variances in their own state enabling acts. The SZEa sets forth the following four requirements that should be considered in making a variance decision: 1) the variance must not be contrary to the public interest; 2) there must be special conditions that pertain to the land; 3) literal enforcement of the ordinance must result in unnecessary hardship, and 4) the spirit of the ordinance must be observed and justice done. Under a strict reading of these

²⁰ HAW. REV. STAT. § 165-4 (West).

²¹ S.C. CODE ANN. § 46-45-60(B).

requirements, only owners with land uniquely and severely impacted by a zoning ordinance are entitled to a variance, and then only if the variance is in the public interest. The exact language of these requirements as well as the significance they are given varies from state to state. However, they have become the standard criteria for determining whether to grant a variance both in state zoning enabling acts and in judicial reviews of variance decisions.

There are two general types of variances: 1) area variances; and 2) use variances. Area variances are the most common, and address landowner difficulties in complying with the physical requirements set forth in zoning ordinances. Area variances are issued to avoid denying landowners the same rights and use of their property as is enjoyed by neighboring landowners. For example, a house built on an oddly-shaped lot may require an area variance if it makes it onerous for the landowner to comply with standard building setbacks specified in the local zoning code. Use variances are far less common, and authorize land uses not normally permitted by zoning ordinances. For example, a use variance may allow an aquaculturist to conduct oyster farming and processing activities on his own residential property, where such a dual use is otherwise forbidden by the local zoning code.

Although the application procedures for variances vary widely, a property owner typically must first submit a request to a zoning enforcement officer or building inspector, who will then make a decision based on a strict reading of local zoning laws. If denied, the applicant can then appeal the decision to the local zoning board of appeals. The board will weigh the hardship that the local regulations present for the property owner against the negative impact of the proposed building on the district or neighborhood. While rules governing the issuance of variances differ from one municipality to the next, the standards are often similar. For area variances, property owners must show that the restrictions unreasonably deny a permitted use of the owner's property. For use variances, property owners have the more difficult burden to demonstrate that, unless granted a variance, they will have no viable use for their property. As part of their decision-making process, local governments can also seek input from other members of the community. This can become an obstacle for property owners if community members feel the project may somehow harm them personally (because of an impact to aesthetics, noise levels, property value, etc.).

Property owners should be aware of the type of variance they are seeking as well as any additional documentary requirements a municipality has implemented in order to have the best chance of successfully obtaining a variance. Creating a "record" involves compiling documents that explain a property owner's special circumstances and the unnecessary hardship that would otherwise result if a variance were not approved. A record may become part of the findings of the official who approves or denies a variance, and can be utilized by a court if a decision regarding a variance faces a legal challenge.

Property owners who are unhappy with the decision made as to their variance may often, within a designated time frame, commence a special proceeding to challenge a zoning board's determination in court based on the record presented. Additionally, aggrieved neighbors may oftentimes challenge in court a zoning board's decision to grant a variance they feel was unwarranted. While few of these challenges rise above the municipal level, appeals can take cases up through the county's superior court all the way to the highest court of the state.

However, zoning boards are usually given ample discretion in deciding whether or not to grant a variance. A board's decision will not be overturned unless the decision is "arbitrary and capricious" or an "abuse of discretion."²²

Aquaculture stakeholders can look to *Isle Harbor Homeowners v. Town of Bolton Zoning Board of Appeals* as a good example of an (unsuccessful) proceeding challenging a zoning board's initial determination.²³ In this case, a landowner was initially denied an area variance to build a mobile metal dock to replace the stationary wooden dock that had been destroyed by ice on her property. The Supreme Court in her county dismissed the application, and so she appealed to the Supreme Court of New York. In the appeal, the board argued that a metal dock would potentially create more noise than a wooden dock, that sunlight reflected off a metal dock would be a potential nuisance for the landowner's neighbors, and that the physical appearance of the dock did not aesthetically conform with the surroundings. The board also argued that the landowner's hardship was self-created and that the benefit they sought could be feasibly obtained (since the board indicated it would not oppose an application to rebuild the destroyed wooden dock). Unfortunately for the landowner, the Supreme Court agreed with these points and upheld the zoning board's initial refusal to grant a variance, noting that the board properly considered the relevant statutory factors and balanced the proposed benefit to the petitioner against the potential detriment to the surrounding community.

Although an older case, *Strauss v. Zoning Board of Review of City of Warwick* remains a good example of an appeal made by a neighboring landowner in response to a granted variance.²⁴ In this case, the City of Warwick's zoning board had granted a landowner's application for a variance to expand his wholesale shellfish business. Those in opposition to the variance had initially argued that granting the landowner's application would: 1) result in obnoxious odors; 2) attract flies, thereby affecting public health as well as the comfort and use of nearby properties and the beach; 3) increase truck traffic and hazards to children at play; and 4) decrease property and rental values. The aggrieved neighbors first alleged that the landowner's variance application was so incomplete, indefinite, and irregular that it insufficiently supported the variance decision. Second, the neighbors argued that the board's decision exceeded its lawful authority under the ordinance. Finally, the neighbors contended that the granting of the variance was arbitrary, having no relation to the protection of the public health, safety, and welfare, and was an abuse of discretion. The court agreed with these arguments, finding that there was no competent evidence to support the board's conclusion that enforcement of the ordinance would result in unnecessary hardship to the applicant, as distinguished from that suffered by all owners of property in that district. Accordingly, the court revoked the variance and reversed the board's decision, holding that it was arbitrary and in excess of the board's authority under the ordinance.

²² An "arbitrary and capricious" finding requires that a zoning board's decision constituted a clear error of judgment that was not based upon the consideration of relevant factors. A zoning board's decision will be termed an "abuse of discretion" if it failed to exercise sound, reasonable, and legal decision-making skills in making its determination.

²³ *Isle Harbor Homeowners v. Town of Bolton Zoning Bd. of Appeals*, 16 A.D.3d 830, 790 N.Y.S.2d 585 (2005).

²⁴ *Strauss v. Zoning Bd. of Review of City of Warwick*, 72 R.I. 107, 48 A.2d 349 (1946).

b. Non-Conforming Uses

As mentioned briefly above, non-conforming uses are uses of land or structures that were legally established according to the applicable zoning and building laws of the time, but do not meet current zoning and building regulations. Because zoning laws are not retroactive, these uses are often “grandfathered in” in order to continue operating normally in light of new changes. In aquaculture, an example of such a use could be continuing to operate a shellfish aquaculture processing facility in an area that was recently re-zoned residential. However, certain showings must be made in order to obtain a non-conforming use permit, and such uses may not continue in perpetuity.

In order to qualify for a non-conforming use permit, a property owner must successfully demonstrate that their actual use of the property conformed with or was otherwise allowed under the prior zoning law. Furthermore, property owners must show the property has been used in the same way both before and after the zoning change. For example, a building being used as an aquaculture processing area must continue its aquaculture processing activity. It could not, for example, transition into a seafood restaurant. If property owners decide to alter the use of their land, they must do so in conformance with the new zoning ordinance unless otherwise permitted. In general, substantial alterations to the nature of a business, the addition of new equipment that is not a replacement but a subterfuge to expand the use of the property, or the construction of a new building will be seen as illegal expansion or extension of a non-conforming use property, causing the permit to be revoked.

Other than changing a property’s use, non-conforming use status can be terminated in several other ways. First, a non-conforming use permit can be terminated if a property owner demonstrates their intent to discontinue the use for a long period of time. Intent can be shown here if the property owner leaves the property for a certain number of years without taking advantage of the non-conforming use. Discontinuance because of repairs, acts of war or nature, government controls, foreclosure, condemnation, or injunctions are not regarded as manifesting intent to abandon the non-conforming use if the situation is beyond the property owner’s control. Additionally, some states revoke non-conforming use status as the value of the property becomes depleted, a process known as “amortization.” For example, such a state may assess the value of the property at the time the new zoning regulation went into effect, and continue to reassess until the property value has been depleted entirely. Then, the municipality will terminate the permit. Similarly, if a non-conforming use is physically destroyed to the point where more than 50% of its value is lost, it cannot be rebuilt in the same manner—effectively terminating the non-conforming use permit.

A good example of a case involving non-conforming uses exists in *Pacific County Department of Community Development v. Driscoll*, a 2018 case heard in front of the Court of Appeals of Washington.²⁵ In this case, the county appealed a superior court’s decision reversing a district court ruling, which held that a landowner, Dan Driscoll, had committed a zoning infraction in operating his seafood market business. Specifically, the district court ruled that although Driscoll’s operation of a seafood market was a lawful non-conforming use, selling beer and wine and operating a food establishment with indoor seating constituted

²⁵ *Pac. Cty. Dep’t of Cmty. Dev. v. Driscoll*, No. 49467-1-II, 2018 WL 1737180 (Wash. Ct. App. Apr. 10, 2018).

unlawful expansions of that non-conforming use. Most relevantly, the Court of Appeals held that the district court erred in making its conclusion, as Driscoll's changes were lawful intensifications of his non-conforming use. In making its decision, the court explicitly distinguished "intensifications"—doing more of the same thing—from "expansions"—doing something new or different. While a non-conforming use permit holder is authorized to intensify their current use, they are not allowed to expand without legal repercussions. Importantly, the court noted that Driscoll's beer and wine sales did not comprise a significant part of his business, and the additional seating the county challenged consisted of only a few deck chairs. Had Driscoll transitioned his seafood market in such a way that he was earning a majority of his profits from the sale of beer and wine, the court may have seen this as an expansion, thereby rendering Driscoll unable to retain his non-conforming use permit.

c. Conditional Uses

Seeking a conditional use permit (CUP) is also an option for aquaculturists with special circumstances. CUPs authorize uses on a permanent basis within a district so long as the local governing body's conditions are met. As noted above, permitted conditional uses are expressly listed for each district in the municipality's zoning ordinances. While these uses may harm the surrounding district if allowed to operate without constraints, a city will impose restrictions that minimize the use's impact while still allowing the district to enjoy the use. CUPs are given at the discretion of municipalities, and are usually intended for uses that are beneficial or necessary for the surrounding community.

To apply for a CUP, a property owner must file a petition before the local zoning board, which will then call for a public hearing. At the hearing, the property owner will first orally present their request and answer questions about their application. Opponents to the proposed conditional use will then have an opportunity to speak before the board. Although there are many factors in granting a CUP, the board will usually determine whether or not a proposed conditional use will materially alter the neighborhood, and if the change has a positive impact. If approved, a CUP will be issued along with a list of conditions the property owner must meet in order to legally operate. If denied, property owners may still appeal the decision, but must comply with local procedure. Depending on local rules, property owners may also have the option of wholly resubmitting their application. In some localities, applicants who were initially denied a CUP are barred from reapplying for a period of months or years, however, in others, property owners may be able to reapply as soon as one day after the initial denial.

Decisions made regarding CUPs are often met with resistance, either from applicants or neighbors. Permit applicants may find the conditions that are attached to a CUP too restrictive, arguing that they unduly burden their use of the property. Furthermore, those in opposition to the issuance of a CUP may argue that the city's conditions are insufficient to protect against the use's negative impacts.

An example of this controversy can be seen in Clallam County, Washington, where the locality attempted in 2017 to update its SMP to allow for in-water net pen aquaculture through the issuance of CUPs. Washington citizens became more concerned about the

impacts of net-pen aquaculture following the massive Cooke Aquaculture salmon escape that occurred in state waters in August 2017. Prior to the collapse, Cooke proposed to move one of its operations from one part of Clallam County to another, which would require that they obtain a new permit. Clallam County's revised SMP would allow Cooke's project to proceed subject to a CUP, where the previous shoreline plan required only a substantial development permit. Despite this attempt to seemingly increase regulatory authority over projects like Cooke's, seventeen of twenty-eight speakers objected to the change at the county's public hearing regarding the SMP update, and multiple news outlets published stories written about the controversy. Although Cooke's permit was eventually cancelled by the state, this exemplifies the type of opposition that can arise in response to CUP decisions—even when such decisions are policy-based and not made in relation to a specific permit.

d. Re-zoning

Rezoning is the final option that may be available to aquaculturists wishing to operate under special circumstances. As noted previously, rezoning is the act of changing a property's use district to a different district that permits the applicant's desired use. As with CUPs, rezoning is typically only permitted when a varying use serves a public benefit or other useful purpose for the surrounding area. However, the process to successfully initiate rezoning is quite difficult, and community pushback against rezoning decisions is common.

To successfully initiate rezoning, property owners must first comply with the application procedures outlined in the locality's applicable zoning ordinance. These procedures can include such things as meeting with potentially impacted neighbors, meeting with city staff to discuss potential issues with the project, or paying application fees. Second, rezoning must generally comply with the municipality's comprehensive plan. However, because the plan is a guiding document (as opposed to a binding document), the city may exercise some flexibility in determining compliance. In making a rezoning decision, a local zoning board will hold a public hearing similar to that for a CUP where neighboring owners who have objections will be given the opportunity to offer their comments and concerns. After the culmination of this hearing, the zoning board will make its decision.

In making rezoning decisions, municipalities must take care to avoid spot-zoning. Spot-zoning occurs when a single parcel of land is zoned differently than surrounding uses for the benefit of the landowner—an unlawful practice. Although property may be lawfully zoned to be unlike surrounding uses pursuant to guiding planning documents, policies, and zoning ordinances, such varying uses are typically permitted only when they yield a public benefit for the surrounding properties. If rezoning does not comply with a city's comprehensive plan, it is usually considered to be spot-zoning. However, municipalities may choose to remedy this problem by amending the comprehensive plan and associated ordinance to authorize the proposed use before rezoning occurs.

Controversy surrounding rezoning usually arises as a result of a landowner's application to rezone, however, similar disgruntlement may arise in response to a locality's own decision to rezone a parcel of land by amending its zoning ordinances. Organized opposition to zoning decisions based on the assertion that a new use will negatively impact objecting parties'

properties is commonly called the “not in my backyard,” or NIMBY, phenomenon. NIMBY participants are most often residential property owners who object to uses they believe will negatively impact their homes. In considering these protests, cities will try to balance what is best for the public as a whole with the desires of residential property owners.

i. *Example—Island Seafood*

One example of such a controversy occurred with a Virginia county’s reaction to a rezoning request for a parcel of land owned by an oyster aquaculture business. In mid-2018, Kevin and Susan Wade, the owners of Island Seafood, requested to have their off-water residential lot rezoned to waterfront business in order to have storage and work space for equipment used in harvesting oysters. The Wades expressed to the Mathews County Planning Commission that rezoning the parcel would allow them to store large equipment such as a forklift, lawnmowers, and aquaculture gear, and would also give them space to work on that gear. Importantly, the Wades intended to keep their equipment out of sight of the public. However, during a June public hearing regarding the matter, many neighbors voiced objections to the rezoning, citing the impacts a business use for the lot would have in a residential area—including increased traffic, decreased property values, and a negative effect on tourism. Furthermore, city planning staff received multiple, informal letters written in opposition to the project and heard numerous negative comments during the public comment period. These complaints caused the Planning Commission to table the action, delaying the decision for up to seventy days. Despite the amount of controversy surrounding the Wades’ application, a decision was eventually made to approve the rezoning on August 28, 2018, due in large part to the Planning Commission’s July recommendation that the Mathews County Board of Supervisors approve the action. It also helped the Wades’ case that aquaculture played a significant part in the municipality’s comprehensive plan. However, the length of time taken in reaching this decision exemplifies the temporal impacts that NIMBY complaints can impose in addition to the often significant amount of time typically needed to reach a decision regarding a rezoning application.

ii. *Example—Nordic Aquafarms*

NIMBY opposition to rezoning decisions can yield more severe impacts than mere decision-making delays. The city of Belfast, Maine experienced this in 2018, as it attempted to amend its zoning ordinances in a way that would allow a large land-based aquaculture facility to move forward with constructing one of the world’s largest indoor salmon farms. When Nordic Aquafarms, an international company headquartered in Norway, expressed interest in siting their over \$450 million aquaculture project in Belfast, the City Council unanimously approved several zoning ordinance changes that would allow them to do so. Specifically, the city made amendments to three categories of ordinances, including those related to: 1) general zoning; 2) shorelands; and 3) Future Land Use Plan amendments. As to rezoning, the amendments expanded the boundaries of the industrial zone in which the project would be sited into a zone previously categorized as residential, and modified the uses allowed in that specific zone to include aquaculture and its related activities. Before passing the ordinance changes, the City Council heard from numerous citizens during a four-hour council meeting, many of whom expressed concerns that the zoning changes were happening too quickly and

urging councilors to reject the proposal. Specifically, many citizens voiced concerns about development of the wooded area where the salmon farm was proposed to be sited, the potential impacts of discharge from the plant, and the size of the project. Despite these comments, Belfast moved ahead with the approval of the zoning changes, noting that any environmental questions would be better addressed through state and federal permit review, while noise, odor, building height, setback, visual buffers, and other concerns could be taken up by the city's Planning Board.

Community members in opposition to Belfast's zoning changes not only voiced their disapproval, but also took further, legal action. On July 11, 2018, two neighboring property owners, Donna Broderick and Ellie Daniels, filed a lawsuit in Belfast Superior Court alleging that city officials made procedural errors when adopting zoning changes for the facility. Specifically, Broderick and Daniels claim that the council adopted zoning changes that were inconsistent with the city's comprehensive plan, then changed the plan after the fact. Furthermore, they allege that the council bypassed legally required citizen participation procedures, including the appointment of a planning committee that would hold its own public hearings to solicit public comment. In Broderick and Daniels' opinions, the City Council made efforts to purposefully avoid citizen participation and Planning Board review in amending Belfast's comprehensive plan, with its actions resulting in councilors having sole responsibility for the planning process at a time when they had already recommended the project and committed the city to utilizing funds and land to facilitate its construction. The lawsuit concludes by arguing that the city went beyond its legal home rule authority in making the ordinance amendments. In response, Belfast's city attorney called the lawsuit a typical NIMBY issue, stating that the city went to great lengths to invite public comment—by publishing multiple notices as well as soliciting comments from neighbors through mail—and received comments from 150 to 200 citizens. Depending on the outcome of this case, Nordic Aquafarms' project could be severely affected or even derailed entirely, at least as initially proposed and sited in Belfast. Similar NIMBY lawsuits, if successful, can have also have significant impacts on proposed aquaculture projects elsewhere in the United States.

V. **Common Zoning Ordinances Impacting Shellfish Aquaculture**

a. Dock Access Ordinances

Dock access is, for obvious reasons, quite important to most aquaculturists. Authorization to farm shellfish often means nothing if farmers do not have the ability to bring their harvest onto land for processing and eventual sale. However, local ordinances sometimes attempt to limit dock access for aquaculturists when municipalities discover they have little influence in state-led aquaculture leasing and permitting processes. This can frustrate aquaculturists in such municipalities, causing farmers to transport their harvest miles out of the way to docks not limited by local ordinances, spend large amounts of money building private docks, or re-site altogether.

While localities generally have zoning authority to make such decisions, it is important to remember that a locality's power is granted by the state and the state may choose to limit that power. In some circumstances, state courts have directly held that municipalities do not have

the requisite authority to regulate docks.²⁶ States may also choose to preempt specific, local zoning decisions if they frustrate state goals (such as the growth of the aquaculture industry).²⁷ States can manifest their intent to preempt local dock access ordinances by adopting statutes that either expressly or impliedly limit municipal zoning power. For example, if a state passes a statute granting public dock access to all aquaculturists operating in state waters, a local ordinance directly contradicting the intent of such a statute would not stand. In some states, preemption can also be accomplished by referendum. California, for example, provides for the creation of initiative statutes or referendums through popular vote, requiring that supporters of a proposed ordinance submit an initiative petition signed by the requisite number of voters, at which time the proposed ordinance can be put to a public vote. California's initiative process can be utilized for those seeking to change state, county, or city laws, and, if successful, could prevent a city ordinance limiting dock access for aquaculturists from going into effect.

Localities may also attempt to limit dock access by adopting moratoriums. As previously noted, a moratorium is an interim, emergency ordinance that creates a temporary ban on the issuance of a certain type of permit while the zoning board determines what steps it will take to regulate the requested activity. However, a municipality's ability to adopt and maintain a moratorium is also limited. A moratorium must be reasonable both in the reasons for which it is adopted and the length of time for which it is imposed. If found to be unreasonable, a court may rule that the adoption of a moratorium has caused an unconstitutional regulatory taking if a municipality fails to provide just compensation to those negatively affected.

A good example of a municipality's attempt to enact a moratorium limiting dock access for aquaculturists can be seen in St. Mary's County, Maryland. In 2018, the county proposed an 18-month moratorium on the use of commercial docks to land oysters from any newly issued aquaculture leases in local waters. In Maryland, the county has no direct role in the approval of state-issued aquaculture leases, and shellfish aquaculture recently rebounded in the quickly-growing county, generating friction with waterfront homeowners. The president of the county's Board of Commissioners stated that local officials proposed the moratorium in response to complaints regarding the proliferation of oyster cages and floats in local waters. Specifically, waterfront homeowners pushing for the moratorium expressed concern that cages and floats could pose safety or navigation hazards and limit or prevent recreational activities such as fishing, hunting, or water skiing. Some proponents also voiced fears that the property value of their homes could drop or that aquaculturists' use of marinas and commercial docks to land their products could pose a food safety risk. However, critics of the moratorium cite oysters' positive effect on water quality and fish habitat and warn against the measure's potentially far-reaching effects on local jobs and industry. Moratoriums such as these are often hotly contested, and can spur legal retaliation from local citizens who do not agree with either their implementation or withdrawal.

²⁶ See *Town of Carmel v. Melchner*, 105 A.D.3d 82, 962 N.Y.S.2d 205 (2013); and *Rapoport v. Zoning Bd. of Appeals of City of Stamford*, 301 Conn. 22, 19 A.3d 622 (2011).

²⁷ See *Lakeside Lodge, Inc. v. Town of New London*, 158 N.H. 164, 960 A.2d 1268 (2008).

b. Floodplain and Shoreline Development Ordinances

Municipal ordinances may also restrict development on or near protected shorelines, which can pose problems for aquaculturists. One way localities can achieve this is by enacting floodplain management programs pursuant to guidelines and standards set forth by the Federal Emergency Management Agency (FEMA). Floodplain management, in general, is the operation of a community program of preventive and corrective measures to reduce the risk of current and future flooding. Such measures generally include zoning requirements. Communities are free to enact floodplain management ordinances as they see fit, but are only *required* to implement floodplain management programs if participating in FEMA's National Flood Insurance Program (NFIP). Above all else, FEMA notes that such community programs should aim to reduce flood damage as well as preserve and restore the floodplain's natural and beneficial resources.

How a community chooses to accomplish these goals may conflict with the goals of aquaculture. For example, implementing structural flood control measures (such as constructing dams, levees, floodwalls, and other detention measures) may impact both current and potential aquaculture sites, especially in areas at high risk of flooding where damage prevention is prioritized.

Communities may also enact shoreline development ordinances that restrict industrial growth in certain areas. These ordinances are often created by municipalities wishing to impose additional restrictions on new projects in shoreline areas in order to preserve the area's natural integrity as much as possible. The language of these ordinances can vary widely from locality to locality. For example, Miami-Dade County in Florida has enacted a shoreline development ordinance applicable to Biscayne Bay that declares it in the public interest to provide a unified management system for the shoreline area that preserves the natural, recreational, and aesthetic values of the area.²⁸ To achieve this, the county requires that all proposed developments (with the exception of detached single family or duplex homes) that are within the shoreline review boundary be reviewed by the city's Shoreline Development Review Committee. Because the committee explicitly works to preserve the aesthetic value of the area in part, one can imagine that applications to operate stereotypically "ugly" aquaculture sites may be rejected for that reason alone. The existence of ordinances such as these exemplifies the need to become knowledgeable about how shoreline development standards vary from place to place. Aquaculturists may find one locality quite favorable to another based on the possible barriers a specific shoreline development ordinance may present.

c. Ordinances Related to Agri-Tourism

"Agri-tourism" is defined as "a commercial enterprise at a working farm, ranch, or agricultural plant conducted for the enjoyment of visitors that generates supplemental income for the owner."²⁹ Agri-tourism enterprises can include activities such as outdoor recreation, educational experiences, entertainment, hospitality services, or even on-farm direct sales.

²⁸ Miami-Dade County, Florida, Code of Ordinances, § 33D-31.

²⁹ Desmond Jolly, *What is Agritourism?*, UNIVERSITY OF CALIFORNIA SMALL FARM PROGRAM, <http://sfp.ucdavis.edu/agritourism/factsheets/what/>.

While activities related to terrestrial agriculture are the most common, aquaculturists may also engage in agri-tourism by offering additional experiences open to the public such as shellfish tasting rooms, facility tours, or restaurants serving a portion of the farm's harvest. Such endeavors have grown in popularity in recent years as members of the aquacultural community seek to expand their operations and raise profits. With this new growth, however, often comes a healthy amount of community pushback, generally for NIMBY reasons. Municipalities may respond to community pressure by creating ordinances limiting agri-tourism activities either directly or through the imposition of additional zoning restrictions. Additionally, states can choose to regulate agri-tourism, with thirty-three states having passed related legislation as of 2016.³⁰ Aquaculturists who conduct unpermitted agri-tourism activities in localities or states limiting agri-tourism can be held subject to fines, additional permitting requirements, cease and desist orders, or other penalties as determined by the relevant governing body.

Perry Raso's experience illustrates the difficulties that municipal agri-tourism ordinances and consequential NIMBY pushback from community members can present. Raso, a prominent restaurant owner and aquaculturist in South Kingston, Rhode Island, made the local news in 2016 as he attempted to gain approval from South Kingston's planning board to hold four private events at his joined farm and personal residence later in the year. Recognizing that South Kingston would require additional permits for these agri-tourism activities, he submitted a request to the board to hold the events as permitted accessory uses to his farming activities. However, the board denied Raso's request, with voting members citing an incomplete application as well as concerns that the events would negatively impact Raso's neighborhood. In making its decision, the board considered testimony from two of Raso's neighbors, who voiced concerns that Raso had hosted unpermitted events in the past which had extended beyond his property lines and caused issues related to noise levels, parking, and lighting. After the Planning Board's initial denial, Raso attempted to receive approval with stipulations, but was again denied. Instead of immediately cancelling all of the events, Raso proceeded with hosting one of the scheduled weddings on his property and consequently received a notice of violation from the local zoning enforcement officer. While he appealed the decision under this LLC's name, Captain Wombat, he dropped the appeal in May 2017 and hasn't hosted any known events since.

Kerian and Kristin Fennellys' experience with the Westport Point Zoning Board of Appeals in Massachusetts is also informative. In May 2018, the Fennellys, a couple working and living in Westport Point, Massachusetts, made an informal request to the city Building Department to expand their Bay Breeze Oysters wholesale business operation to include a tasting room and some related retail sales. When the Building Department failed to respond to the request within the required thirty-five days, the Fennellys appealed to the local Zoning Board of Appeals, which declined to act on the couple's request for a finding of fact on the proposed project, stating it did not have the necessary jurisdiction to do so. Town Counsel had previously met with the Board of Appeals and advised it not to proceed with a scheduled

³⁰ These states include: Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin.

public hearing, noting that there was not yet an official ruling from the building commissioner to be appealed. Town Counsel also noted that the Building Department's failure to respond in a timely fashion was neither an order nor a denial. In response to the board's decision, the Fennellys withdrew their initial fact-finding request in order to seek a second hearing on the suitability of the proposed expansion. Despite the town counsel's advice, the Board of Appeals went ahead with the public hearing, and received almost all positive comments regarding the proposed expansion from community members who were present. However, as of September 2018, the town had still not reached a decision. This exemplifies how, even without strong community pushback, local regulators can delay or even completely derail proposed agri-tourism endeavors. Because aquaculture-related agri-tourism activities are fairly novel in many areas, aquaculturists should be aware of these potential setbacks when contemplating similar proposals.

VI. **Legal Retaliation**

Community members often retaliate in the wake of local zoning decisions due to perceived losses in property value, impacts to aesthetics, or any number of other personal reasons. Aquaculturists face some of the biggest barriers to successful operation when these community members choose to escalate their complaints to lawsuits as a retaliatory measure. The Nordic Aquafarms case is an excellent example of this, with community members' lawsuit having the potential to disrupt or halt the progress of a project worth hundreds of millions of dollars that could potentially funnel ample jobs and financial resources into the local economy. While retaliatory lawsuits seldom put so much at stake, aquaculturists should be aware of the possibility that an action as simple as an appeal of a local zoning board decision can, in some cases, rise through the court system, requiring the parties involved to expend valuable time and money litigating.

One of the most common causes for legal retaliation is aquaculture's impact on the aesthetic value of neighbors' land. Shellfish aquaculture operations often require the use of floating cages and/or racks, and almost always require that boats travel to and from the site to perform maintenance and harvest yield. Neighbors who pay elevated prices to enjoy waterfront vistas often see these activities as "ugly," and contest zoning decisions they feel will increase aquaculture activity within their sightlines. Local zoning boards of appeal assess these claims on a case-by-case basis, and sometimes side with neighboring landowners, especially if community pushback is great. This can result in amendments to municipal zoning laws or refusals to grant permits to aquaculturists operating under special circumstances. Some courts, however, have ruled against NIMBY complainants and held that aquaculture does not materially impact aesthetics. For example, one Washington court held that the visual presence of a proposed aquaculture development would be unobtrusive when viewed from shore (although this lawsuit involved submerged net pens used for salmon aquaculture).³¹ The court also ruled that the presence of a thirty-foot work boat and its nighttime navigation lights would mean little considering the pens in question would be fully submerged, as light and minimal boat activity with only slight associated noise would not result in material harm to neighbors' view from the shore. In another case, the same Washington court ruled that aquaculture uses do not aesthetically displease any particular

³¹ *Puget Sound Mussels, Inc. v. Kitsap Cty.*, 1991 WL 55611.

percentage of the population—no greater of a percentage, in fact, than would be offended by a sizeable pier, dock, or marina development that may be within view from the shoreline or upland areas in dispute.³² More specifically, the court held that a blue mussel aquaculture site using four reasonably sized rafts did not interfere with the enjoyment of the physical and aesthetic qualities of the shorelines, as the visual impact would be minimal to the casual or educated observer.

NIMBY complainants also often contest the perceived diminution in property value that aquaculture activity can trigger. Again, those who pay elevated prices for waterfront properties desire the ability to resell those properties for an equal or greater amount. In some owners' opinions, the "ugly" aquaculture installations that potentially obscure their view can also deter future buyers due to noise, odor, or other nuisances sometimes associated with the aquaculture industry. *Harding v. Commissioner of Marine Resources*, though an older case, is a good example of such a NIMBY challenge.³³ In this case, a landowner appealed a lower court's decision granting two aquaculture leases for mussel farms because the court refused to let him present evidence of the diminution in property value that allowing the projects to proceed would cause. The landowner argued that this refusal was improper and erroneous. However, the Supreme Judicial Court of Maine did not agree. Maine's aquaculture leasing statute provides a list of factors that the commissioner of marine resources must consider before granting a submerged lands lease in state waters. This list does not include property value diminution among the criteria to be examined. Because of this, the court held that the commissioner must ensure only that a proposed project does not unreasonably interfere with navigation, fishing, the ingress and egress of riparian owners, or other uses of the area and is not in conflict with applicable zoning laws. Furthermore, the court held that the public trust doctrine does not compel consideration of property value by implication. Therefore, the lower court's decision was allowed to stand, and the commissioner was directed to grant the two shellfish aquaculture leases. While the ruling in this case turned on an interpretation of Maine law, it exemplifies that NIMBY complaints regarding reductions in property value are not, by any means, impossible to refute.

VII. **Conclusion**

Although municipal zoning ordinances often pose problems for aquaculturists, successful navigation of the law is not impossible. Aquaculture stakeholders should do their best to stay abreast of local laws and any related amendments, but may also find it beneficial to consider the following "tips for success":

- Be aware of how zoning applies to shellfish aquaculture, including the terms and categorizations typically utilized in local zoning ordinances;
- Understand how the language of zoning ordinances as well as prevailing state and/or federal law can render them inapplicable in some cases;
- Recognize how to proceed and what to expect if special circumstances influence a proposed aquaculture project;

³² *Matter of a Shoreline Substantial Development and Conditional Use Permit Denied by Island County v. Island County and Lorene Hofstrand*, 1984 WL 264541.

³³ *Harding v. Comm'r of Marine Res.*, 510 A.2d 533 (Me. 1986).

- Recognize the most common local zoning ordinances that affect aquaculturists and how they do so; and
- Take steps to prevent legal retaliation.

To this final point, the most important thing aquaculture stakeholders can do to prevent legal retaliation is to become familiar with current local zoning laws and any changes to those laws. However, aquaculturists can engage in other preventative practices to help avoid becoming embroiled in a legal battle. One of the most important decisions an aquaculturist can make is the choice of what district to site a potential project in. Although aquaculturists are sometimes limited by availability, financial resources, or other factors, siting in a zone where one is less likely to suffer community pushback can help prevent NIMBY complaints and any associated lawsuits. To this, aquaculturists should first look to districts where successful aquaculture operations already exist. If no such sites yet exist, some general categories of districts may be more hospitable to aquacultural activity than others. For example, municipalities may utilize overlay districts to foster specific projects, such as non-residential coastal development. If a community uses an overlay district to aid in the growth of the local aquaculture industry, siting there would likely be the wisest choice, absent special circumstances. On the other hand, aquaculturists should avoid siting in zones with a large potential for NIMBY complaints, such as residential districts. While aquaculture operations may be able to successfully obtain a variance, non-conforming use permit, or conditional use permit to operate in such an area, neighboring property owners may appeal the issuance of such due to the alleged noise, odors, or increased traffic that commercial aquaculture may bring.

Aquaculturists should also use common sense to operate sites in a way that does not invite NIMBY complaints. For example, farms should make every effort to keep gear clean and out of sight when not in use, and should limit loud activities when possible—especially in residential districts. Failure to perform preventative measures such as these could open the door to complaints regarding an operation’s odor (stemming from uncleaned algae or shellfish detritus left on equipment), aesthetic impact (due to equipment improperly stored after use), or elevated noise levels.

Similarly, municipalities can aid aquaculturists in ways that help streamline siting processes and discourage lawsuits. Promoting commercial shellfish aquaculture as an industry can add both jobs and revenue to local communities while providing important ecosystem services to marine resources—benefits that should not be overlooked due to comparatively minor concerns such as potential aesthetic impact. To this, municipalities valuing growth of the industry should not attempt to enact ordinances that unnecessarily restrict dock access, impose restrictions on agri-tourism, or otherwise hinder aquacultural activity. Instead, municipalities should consider creating zoning districts where commercial aquaculture is encouraged, such as overlay districts. Proactive municipal actions such as these can ideally limit potential NIMBY complaints from neighboring landowners as well as lawsuits challenging the constitutionality, applicability, or interpretation of local ordinances.