



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JOHN ELIAS BALDACCIO
GOVERNOR

DAWN R. GALLAGHER
COMMISSIONER

March 5, 2004

Nathan H. Smith, Mayor
And the Portland City Council
City of Portland
389 Congress Street
Portland, ME 04101-3503

RE: Proposed Conditional Rezoning, Proprietors of Custom House Wharf, Applicant

Dear Mayor Smith and City Council:

I am writing as a follow-up to a recent Department review of material pertaining to the above referenced proposed conditional rezoning matter. After reviewing the material provided by the City, the Department concurs with the Planning Board's negative recommendation.

The City of Portland Land Use Code (Ordinance) is consistent with the State of Maine Guidelines for Municipal Shoreland Zoning Ordinances (Guidelines) in that it currently prohibits new non-functionally water dependent uses in structures on Custom House Wharf. The Department urges the Council to uphold the current zoning by denying the request to rezone the proposed building area to allow for non-functionally water dependent uses in the upper floors of the structure. Coastal wharves and piers should be preserved for those uses supporting traditional commercial fisheries and marine related activities.

In addition, a recent visit to the proposed rezoning site revealed the existence of a large second floor deck on the easterly end of the building and numerous balconies along the southerly side of the structure. It is the Department's opinion that such accessory structures must not be considered functionally water dependent. We understand that the Planning Board conditionally approved the project in 1999 requiring that the project site plan include a note listing the permitted uses (restricted to marine related uses only) as the upper floors, including the decks, had a non-water dependent use appearance. Should the Council ultimately approve this conditional rezoning request, the Department strongly recommends that the Council consider reducing the non-functionally water dependent use of the building by requiring the removal of the deck and balcony areas. Such accessory structures would undoubtedly be prohibited in all other non-conforming structure circumstances and should have been denied originally by the Planning Board.

Further, after conferring with other Department staff it appears that the owner has never received Department approval for the project under the Natural Resources Protection Act (NRPA) and therefore is a violation under the NRPA. After a cursory review of the

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(207) 941-4570 FAX: (207) 941-4564

PORTLAND
312 CANCO ROAD
PORTLAND, MAINE 04103
(207) 822-6300 FAX: (207) 822-6303

FRESQUE ISLE
1235 CENTRAL DRIVE, SKYWAY PARK
FRESQUE ISLE, MAINE 04769-2094
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provided material, staff acknowledged that although after-the-fact NRPA approval for the building may be possible for strictly functionally water dependent uses, the project would likely be denied for non-functionally water dependent uses and would be required to be removed. The U.S. Army Corps of Engineers is also reviewing the matter to determine if the existing structure is a violation of Federal Regulations.

The Department hopes the Council finds the above guidance useful when considering this proposal. Should you have any questions about the Department's position, please do not hesitate to contact me. I may be reached at 822-6328, or by electronic mail at michael.j.morse@maine.gov.

Sincerely,



Mike Morse
Assistant Shoreland Zoning Coordinator
Bureau of Land and Water Quality
Department of Environmental Protection

cc: Bill Needelman, Senior Planner, City of Portland
Linda Kokemuller, MDEP SMRO Licensing Coordinator
Fred Gallant, MDEP Enforcement

Subject: Custom House
From: Barbara Vestal <vestal@maine.rr.com>
Date: Fri, 12 Mar 2004 17:35:32 -0500
To: Karen Geraghty <kareng@maine.rr.com>
CC: Anne Pringle <Oldmayor@aol.com>

Karen & Anne: This is the additional information I have been able to obtain from the DEP:

The DEP letter was apparently written by Mike Morse (DEP, Shoreland Zoning, Portland office, 822-6328) raising concerns about compliance with shoreland zoning, and, somewhat as an aside I think (I haven't seen the letter yet), raising issues about compliance with NRPA. However, based on my conversation with Mike, I think NRPA may be more of a problem for Mr. Macgowan than shoreland zoning.

You probably both know this, but the Mandatory Shoreland Zoning Act requires municipalities to adopt zoning ordinances for the shoreland zone area that are in compliance with the goals of the act. There is suggested guidance, but municipalities are allowed to address the goals in a more creative way as long as the result is the same. Many years ago, I was on a committee that worked with Rich Baker, director of the shoreland zoning program, to develop some "sidebar guidance" on more creative ways to meet the mandatory requirements. I think we included as an example some kind of very restricted mixed use zoning similar to the WCZ contract zone provisions as a possible option. However that "sidebar guidance" was never officially adopted. In a separate action, Portland's waterfront zones, including the WCZ with its contract zone provisions were certified as meeting the mandatory minimum standards of the shoreland zoning act. So my understanding from Mike is that while they have significant reservations about two stories of non-marine use on Custom House Wharf, they may feel somewhat estopped to challenge a contract zone as long as the council applies the standards in the ordinance in a good faith way (my words, not his) because the DEP did certify Portland's ordinance as being in compliance. Regardless, in my opinion, the concerns of the DEP Shoreland Zoning staff are ammunition for the position that the Council must pay strict attention to the provisions in the WCZ which are protective of WDU's, including the requirement of "no adverse impact on marine uses" (14-313.5) and the detailed standards for granting a contract zone, including the requirement that "without the proposed development, the site could not otherwise support an economically viable water-dependent use" (14-315.3(c).) In my opinion, Portland is in compliance with shoreland zoning only so long as the Council follows the intent and the letter of the ordinance.

BUT DEP's position on NRPA seems like it is more black and white, depending upon whether this is considered a replacement structure (in which case there are no use restraints) or a new structure (in which case there are use restrictions). (But there might be a mixed answer to this, like part of it is replacement and part of it is new). I talked with Fred Gallant (DEP NRPA Enforcement, Portland office, 822-6351) this afternoon. He was just beginning to look at Custom House Wharf. His review was triggered by Portland giving Shoreland Zoning the required notice of the proposed contract zone; Fred then learned of the project from Mike. Fred is just in the information gathering stage. However, my understanding is that if it is a new structure or a non-grandfathered structure, it needs a NRPA permit because it is a building in/on/above a wetland of special significance (coastal waters). As it was explained to me, pursuant to Chapter 310 Wetlands Protection rule 5 (A) (06-096 CMR 310(5)(A)), essentially no new structure is permitted in wetlands of special significance except 6 specific uses, one of which is "water dependent uses." (The others are those necessary for health and safety, crossings by road, rail or utility lines, expansion of certain existing facilities if constructed prior to 9/1/96, mineral excavation or walkways.) It is my understanding that a building would have to be entirely dedicated to water dependent uses in order to qualify. So if this is classified as a new structure, it looks like non-WDUs would be precluded by NRPA. This assumes that there is a practicable alternative to locating general office and light manufacturing in/on/over the water.

Two caveats: This does appear to produce disparate results between Shoreland Zoning and NRPA for new construction. Mike acknowledges that, but says the more restrictive trumps. But this seems to be a question of first impression, and I would not be surprised if I did not completely understand what they said or if positions evolve. Second, on its face I have some difficulty with Fred's interpretation that rule 5(A) only allows those 6 uses. It looks like there might be an argument that before one gets to the conclusion that there can only be a WDU, DEP might have to find that there will be damage to the environment. I know that this e-mail is very detailed, but in case you want the actual wording it is:

"No activity shall be permitted if there is a practicable alternative to the project that would be less damaging to the environment. . . .In wetlands of special significance, projects for which no practicable alternative may exist are limited to those necessary for [the 6 uses listed above, including WDUs]. But it seems to me there might be a prior question: if a one story building causes the same environmental consequences as a 3 story building, does one even get into the practicable alternatives analysis? Fred said yes. I am not sure. But he is the expert.

DEP NRPA enforcement is not yet in a position to give any opinion on this project, nor could Fred predict how long their action might take. Will the Council want to go ahead with this question unanswered? It is conceivable that NRPA could deny permits for the structure unless it was entirely for WDUs. Similarly, it is my understanding that NRPA permits were also required for the pier work. The outcome of that could affect conditions one would want to build into the contract zone. This is very tangled.

- (3) The first floor elevation or openings of all buildings and structures including basements shall be elevated at least one foot above the elevation of the 100 year flood, the flood of record, or in the absence of these, the flood as defined by soil types identified as recent flood plain soils.
- (4) The total area of all structures, parking lots and other non-vegetated surfaces, within the shoreland zone shall not exceed twenty (20) percent of the lot or a portion thereof, located within the shoreland zone, including land area previously developed, except in the General Development District adjacent to tidal waters and rivers which do not flow to great ponds classified GPA, and in the Commercial Fisheries/Maritime Activities District, where lot coverage shall not exceed seventy (70) percent.
- (5) Notwithstanding the requirements stated above, stairways or similar structures may be allowed with a permit from the Code Enforcement Officer, to provide shoreline access in areas of steep slopes or unstable soils provided: that the structure is limited to a maximum of four (4) feet in width; that the structure does not extend below or over the normal high-water line of a water body or upland edge of a wetland, (unless permitted by the Department of Environmental Protection pursuant to the Natural Resources Protection Act, Title 38, Section 480-C); and that the applicant demonstrates that no reasonable access alternative exists on the property.

C. Piers, Docks, Wharves, Bridges and Other Structures and Uses Extending Over or Beyond the Normal High-Water Line of a Water Body or Within a Wetland.

- (1) Access from shore shall be developed on soils appropriate for such use and constructed so as to control erosion.
- (2) The location shall not interfere with existing developed or natural beach areas.
- (3) The facility shall be located so as to minimize adverse effects on fisheries.
- (4) The facility shall be no larger in dimension than necessary to carry on the activity and be consistent with existing conditions, use, and character of the area.
- (5) No new structure shall be built on, over or abutting a pier, wharf, dock or other structure extending beyond the normal high-water line of a water body or within a wetland unless the structure requires direct access to the water as an operational necessity.
- (6) No existing structures built on, over or abutting a pier, dock, wharf or other structure extending beyond the normal high-water line of a water body or within a wetland shall be converted to residential dwelling units in any district.
- (7) Except in the General Development District and Commercial Fisheries/Maritime Activities District, structures built on, over or abutting a pier, wharf, dock or other structure extending beyond the normal high-water line of a water body or within a wetland shall not exceed twenty (20) feet in height above the pier, wharf, dock or other structure.

NOTE: Permanent structures projecting into or over water bodies shall require a permit from the Department of Environmental Protection pursuant to the Natural Resources Protection Act, Title 38 M.R.S.A., Section 480-C.



Maine Department of Environmental Protection

Issue Profile

Mandatory Shoreland Zoning Act

date: September, 2003 contact: 207-287-2111

- Rich Baker - MIKE NEWSC
- license - cannot license non-wetlands under NAPA
- DEPT could enter into

Background

The Mandatory Shoreland Zoning Act was enacted by the Legislature in 1971. The current law, as amended, requires municipalities to establish land use controls for all land areas within 250 feet of ponds and non-forested freshwater wetlands that are 10 acres or larger; rivers with watersheds of at least 25 square miles in drainage area; coastal wetlands and tidal waters; and all land areas within 75 feet of certain streams.

What is the intent of the law?

The law's intent is (1) to protect water quality, wildlife habitat, wetlands, archaeological sites and historic resources, and commercial fishing and maritime industries; and (2) to conserve shore cover, public access, natural beauty, and open space. It does this by controlling land uses, and placement of structures within the shoreland area.

How is the law implemented?

Your local shoreland zoning ordinance and map serve to implement the law. To assist towns in developing ordinances, the state has drafted a model *State of Maine Guidelines for Municipal Shoreland Zoning Ordinances* containing the standards to be included.

Who adopts, administers and enforces shoreland zoning ordinances and maps?

Municipalities are empowered to by law adopt, administer, and enforce their own shoreland zoning ordinance and map.

The state's primary role, through the Department of Environmental Protection, is to provide technical assistance in the adoption, administration, and enforcement of these local ordinances.

If a municipality has not adopted its own shoreland zoning ordinance, the state will adopt the model ordinance for that municipality. Of the more than 450 municipalities with shoreland zoning ordinances, approximately 60 currently have "state-imposed" ordinances.

What is the state's model ordinance?

As noted above, the state has developed a model ordinance that contains "minimum guidelines." Although it does not have the force of law in communities that have adopted a shoreland zoning ordinance, it is used by the state to determine whether a municipality has complied with the Mandatory Shoreland Zoning Act. Local ordinances may be more restrictive, but not less restrictive, than the model ordinance.

A municipality may achieve the intent and purpose of the model ordinance through other land use regulations. However, as noted above, if a community does not adopt its own ordinance, the state model will be imposed.

The model ordinance approved by the Board of Environmental Protection divides the shoreland zone into six land use districts: resource protection, limited residential, limited commercial, general development, commercial fisheries/maritime activities, and stream protection. The ordinance includes a table which lists specific land use activities and indicates, for each land use district, whether that activity is prohibited; allowed without a formal permit; or allowed with a permit from the Code Enforcement Officer, the Planning Board, or the Local Plumbing Inspector.

What types of controls are contained in the model ordinance?

The model ordinance contains numerous standards for shoreland development activities, including:

- minimum lot area and frontage;
- structure setbacks;
- clearing limitations;
- timber harvesting limitations;
- erosion and sedimentation control;
- sewage disposal; and
- provisions for nonconforming uses, nonconforming lots, and nonconforming structures.

According to the ordinance, all land use activities -- even those that don't need a permit -- must comply with all the applicable land use standards described in the ordinance.

How has the law been amended in recent years?

The following significant additions to the law are included in recent amendments:

- The requirement that land within 250 feet of the upland edge of coastal wetlands and non-forested freshwater wetlands and land within 75 feet of certain streams, be included in the shoreland zone (under the law, a stream is defined as a free-flowing body of water from the outlet of a great pond, or the confluence of two perennial streams as shown on the most recent USGS topographic map to the point where that body of water becomes a river or enters another waterbody or wetland) (1989);
- Expansions are limited on structures that do not meet the waterbody or wetland setback requirement. Expansions on nonconforming structures are limited to less than 30% of a structure's floor area and volume (1989);
- Later the legislature adopted an optional alternative method of limiting expansions for those municipalities that choose to adopt it. The alternative method of limiting expansions is based on a maximum floor area allowance and a height limitation, in relation to the structure's setback distance (1998);
- The allowance for a Planning Board to issue a permit for a single-family residence in a Resource Protection District under certain limited conditions (1993);
- A basement has been defined as "any portion of a structure with a floor-to-ceiling height of 6 feet or more and having more than 50% of its volume below existing ground level (1998);
- Recreational boat storage buildings have been declared not to be "functionally water-dependent uses" (1998);
- When a property is being considered by the municipality for placement in a Resource Protection District, the landowners must be provided with written notification (1996);
- A municipality, by ordinance, may allow limited timber harvesting in a Resource Protection District adjacent to a great pond (1999); and
- A permit is not required for an archaeological excavation that is within the shoreland zone as long as the excavation is conducted by an archeologist listed on the Maine Historic Preservation Commission Level 1 or Level 2 approved list, and adequate erosion and sedimentation controls are implemented (2001).

Do certain provisions in the law override a local ordinance?

Yes. The following specific provisions in the law override local ordinances if the language contained in those ordinances is less restrictive:

- All structures - principal, accessory, temporary, or permanent - must meet the water setback requirement, except structures requiring direct access to the water as an operational necessity, such as piers, docks, or retaining walls. A structure located next to the water for convenience does not meet the test of operational necessity. A recreational boat storage building is not functionally water-dependent, and must meet water setback requirements.
- Clearing of vegetation is prohibited within 75 feet of the normal high-water line of a great pond zoned for resource protection. Timber harvesting is also prohibited within 75' of the normal high-water line of a great pond zoned Resource Protection unless permitted by ordinance under certain limited conditions.
- Where clearing of vegetation and timber harvesting are permitted, selective cutting of not more than 40% of the trees 4 inches or more in diameter (measured at 4½ feet above ground level) in any 10-year period is allowed provided a well-distributed stand of trees and other natural vegetation remains. The exception to this rule applies where timber harvesting is permitted within 75' of a great pond zoned Resource Protection. Here, harvesting is limited to no more than 30% of the volume of trees over six inches in diameter.
- To provide for screening between development activities and the water, cleared openings are prohibited within a strip extending 75 feet inland from the normal high-water line, except for approved construction such as a boat access-way, and a well-distributed stand of vegetation must remain.
- Municipalities must appoint or reappoint a Code Enforcement Officer by July 1 of each year.
- Public utilities cannot hook up to a new structure in the shoreland zone without written authorization from local officials.
- Substantial expansion of principal and accessory structures within the shoreland zone must meet the water setback requirements. A substantial expansion is one that increases either the volume or floor area by 30% or more. Structures located less than the required setback from the normal high-water line may not be expanded toward the water.
- Alternately, a municipality may choose to limit expansions of nonconforming structures based on floor area and structure height limitations as set forth in 38 MRSA § 439-A.4-A.
- Amendments to ordinances adopted under the Mandatory Shoreland Zoning Act are not effective until approved by the DEP Commissioner.
- Municipal code enforcement officers must, on a biennial basis, submit a report of shoreland zoning transactions to the DEP.

Can municipalities regulate structures that extend over a waterbody or wetland?

Yes. The Mandatory Shoreland Zoning Act permits a municipality to enact ordinances that regulate structures that extend or are located over the water or are placed on land lying between high and low waterlines or within wetlands.

What should I do if I suspect a shoreland zoning violation?

The provisions of a municipal shoreland zoning ordinance are enforced by the municipality. If you suspect a violation, contact the Code Enforcement Officer of the town where the alleged violation has occurred.

However, if the complaint is against a town for failing to enforce or administer its shoreland zoning ordinance, you should call the Department's Shoreland Zoning Coordinator at (207) 287-2111, or write to:

Shoreland Zoning Coordinator
Department of Environmental Protection
State House Station 17
Augusta, ME 04333-0017

If you have difficulty contacting the town, contact DEP's Shoreland Zoning staff, who will forward the information to the town and follow up on the situation.

Questions-

- Did DEP approve Proximal's WEZ as consistent w/ goals + objectives?
- Any special treatment of X zone provision? Adequate standards to protect WDUs if applied correctly per maps.
- Going to be viewing as applied?
- Anybody from Shoreland zoning planning to be at City Council meeting?
- What is approach to a building w/ possibly ground floor WDU & upper story non marine general office/night industrial. So part functionally WCU but upper stories aren't.
- Believe it is fair to allow to take credit for "improvements already made to wharf when trying to claim public benefit to WDUs?"

Subject: Custom House
From: Barbara Vestal <vestal@maine.rr.com>
Date: Thu, 01 Apr 2004 18:11:51 -0500
To: Karen Geraghty <kareng@maine.rr.com>

Hi Karen. Maybe you already know this information, but I talked to Fred Gallant of the DEP again today for a status report on the NRPA permits. He told me that contrary to the earlier information he gave me, they did find a permit application and permit granted to Custom House Wharf. It was an application for a permit by rule for replacement of an existing structure, with plans attached showing exactly what was built. It was handled by a staff person who is no longer there. Fred is still gathering evidence, and has been in touch with Marge Schmukal and Bill Needleman on the issue of whether it is an actual replacement building (yet unresolved). If it is a replacement building, NRPA does not look at use. I am not entirely clear on what happens if they were to find that it was not really a replacement building (e.g. had a bigger volume or was on a larger footprint) but was built in conformance with the plans submitted with the granted application. I understand this will be back before the Council May 3rd and told Fred Gallant I would check with him again prior to that meeting.

With regard to historic preservation, I hope you got the message I left earlier. I was away and missed your last meeting due to a death in my family. I am catching up from being away for that, so cannot meet with Deb A. to look at the draft amendment until 4/8. I believe there are fine points that need to be finalized -- both in terms of the PB/HPC interaction and the minimum requirements for being a CLG -- before this proposal is ready for circulation. Sorry for the delay. I also continue to be very concerned about the optimal timing and the risk of backlash from the business/developer community, who, once the issue is on the table, may very well propose eliminating HPC review of major development. That is why I think it is important to take the time necessary to craft the amendments so they make only those changes absolutely required to be a CLG and do not further complicate the review process. Barbara

Subject: custom house wharf

From: Barbara Vestal <vestal@maine.rr.com>

Date: Thu, 01 Apr 2004 16:47:46 -0500

To: Anne Pringle <Oldmayor@aol.com>, Elizabeth Sheehan <mes@ceimaine.org>

Anne & Elizabeth -- It gets more convoluted. I just spoke with Fred Gallant of the DEP, NRPA Division. He said that contrary to his earlier statements, they subsequently found out that Custom House had in fact applied for a permit and been granted a permit. DEP couldn't find anything previously because they were looking for a full NRPA application. What they actually applied for was a permit by rule (a shortened process) in which Custom House said they were replacing a structure with a similar structure (and attached plans for exactly what they built). A representative discussed the matter with a DEP staffer who is no longer there who allowed the permit to issue. My understanding is that Fred has been talking with Marge Schmukal and Bill Needleman, but that they do not have documentation that he considers good/adequate of the original size of the building and whether this is a change in the footprint and/or volume. And there is some flexibility for a building to move farther back from the protected resource without violating the standards. I would think this might have been generated as part of the lawsuit filed by the Portland Pier owners but do not know who was involved with that. Do either of you? It is unclear to me what happens if the DEP determines it was not a replacement structure, particularly if the plans were submitted with the application. He is doing more research. I said I would check back toward the end of the month. Barbara

Elizabeth: Thanks for your Architalx invite. I will be away for the first couple so can't make it.

4/28/04 - call to Fred Gallant. In the field. Left a message asking to (2) back.

4/28/04 - call to Bill Needleman -
DEP treating as replacement structure

Amendment

- 50% of total sq foot non-marine
 - 75% of wharf space for commercial marine use
 - Relocating 6 interior parking spaces off site somewhere.
- Anything more than 50' feet cant be non-marine anyway.

→ Non-marine related parking = conditional use

Chris Varistez →

→ David Hourie → Superior Court. Lost

- views - bulk + height - 20' commitment in value
- parking - accessory to marine!

The Corps must first define the "basic project purpose". The basic project purpose guides the analysis of practicable alternatives to avoid filling waters and wetlands. The Corps uses a sequential approach of first analyzing off-site alternatives. Second, we review on-site project modifications to avoid and minimize wetland impacts. Third, we look at compensatory mitigation to replace functions and values of wetlands unavoidably impacted. For more information on wetland functions and values, please see the Guidance for Section 404 Permit Applicants at the end of this pamphlet.

Note that for non water dependent projects, there is a presumption that practicable alternatives are available that do not involve filling wetlands and other special aquatic sites. The applicant must overcome this rebuttable presumption. When unavoidable impacts occur, the Corps requires all appropriate and practicable action be taken to mitigate such impacts. Modifying your project to avoid unnecessary wetland filling may qualify your project for a general permit, which may expedite the permitting process.

A project with dredging and disposal of marine sediments may require sampling and testing of the sediments proposed to be removed. Applicants should initiate contacts with the Regulatory Division early in their planning stages so that an acceptable sampling plan can be developed that will meet all federal testing protocols.

Step-by-Step Procedure for Evaluating a Typical Individual Permit

1. Pre-application meeting
2. Applicant submits ENG Form 4345 or equivalent joint state/federal application to Corps regulatory office
3. Corps receives application and assigns identification number
4. Corps notifies applicant if additional information is required
5. Public notice issued within 15 days of receiving all required information. The public notice seeks comments from the general public, adjacent property owners, interested groups and individuals, local agencies, state agencies, and federal agencies

6. Normally, a 30 day comment period, depending upon nature of activity
7. 404(b)(1) determination
8. Corps conducts Public Interest Review, allowing applicant to respond to public comments
9. The Corps may ask applicant to provide additional information
10. Corps considers all comments and applicant's responses
11. Public hearing held, if needed
12. Corps makes decision

Forms of Authorization

An individual permit may be issued as either a Standard Permit (ENG Form 1721) or as a Letter of Permission.

A standard permit is issued when the typical review procedure is completed including public notice, opportunity for a public hearing, and receipt of comments.

A Letter of Permission (LOP) may be issued if work is minor or routine with minimum impacts, and objections are unlikely. A LOP can be issued much more quickly than a standard permit since public notice is not required. The Corps can usually reach a decision in less than 30 days. The local Corps office will notify you if your proposed activity qualifies for a LOP.

Fees

Fees are required for most individual permits. The current fee is \$10.00 for a permit for a non-commercial activity and \$100.00 for a permit for a commercial or industrial activity. These fees are subject to change. The Corps decides the amount of the fee. Do not send a fee when you submit an application. When the Corps issues a permit, you will be notified and asked to submit the required fee payable to FAO, New England District.

Fees are not charged for general permits, transferring a permit from one property owner to another, for Letters of Permission, or for permits to governmental agencies or non-profit agencies.

§ 06-096 CMR 310

Admin Code

06 Department of Environmental Protection

Department Unit 096 Department of Environmental Protection / General

06-096 CMR 310

Chapter 310: Wetlands Protection

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06-096 DEPARTMENT OF ENVIRONMENTAL PROTECTION

Chapter 310: WETLANDS AND WATERBODIES PROTECTION

1. Preamble. The Legislature has found that the State's freshwater wetlands, great ponds, coastal wetlands, rivers, streams, and brooks are resources of state significance, that these resources have great scenic beauty and unique characteristics, unsurpassed recreational, cultural, historical, and environmental value of present and future benefit to the citizens of the State, and that uses are causing the rapid degradation and, in some cases, the destruction of these critical resources, producing significant adverse economic and environmental impacts and threatening the health, safety and general welfare of the citizens of the State. The Legislature has also found that the cumulative effect of frequent minor alterations and occasional major alterations of these resources poses a substantial threat to the environment and economy of the State and its quality of life. The terms "wetland", "wetlands", "waterbody", and "waterbodies" are used interchangeably and collectively in this rule to refer to freshwater wetlands, great ponds, rivers, streams, brooks, coastal wetlands, and the areas adjacent to them.

In recognition of the important roles of wetlands in our natural environment, the Board of Environmental Protection supports the nation-wide goal of no net loss of wetland functions and values. In some cases, however, the level of mitigation necessary to achieve no net loss of wetland functions and values through construction of replacement wetlands will not be practicable, or will have an insignificant effect in protecting the State's wetlands resources. In other cases, the preservation of unprotected wetlands or adjacent uplands may achieve a greater level of protection to the environment than would be achieved by strict application of a no net loss standard through construction of replacement wetlands. Therefore, the Board recognizes that a loss in wetland functions and values may not be avoided in every instance.

The purpose of this rule is to ensure that the standards set forth in Section 480-D of the Natural Resources Protection Act, Section 464, Classification of Maine Waters and Section 465, Standards for Classification of Fresh Surface Waters are met by applicants proposing regulated activities in, on, over or adjacent to a wetland or water body.

2. Applicability

A. This rule applies to the alteration of a coastal wetland, great pond, freshwater wetland, river, stream, or brook, as defined in 38 M.R.S.A. Sec. 480-B of the Natural Resources Protection Act (NRPA), that requires an individual permit or is eligible for Tier 2 or Tier 3 review. In addition, Sections 3 and 4 apply to the alteration of a freshwater wetland eligible for Tier 1 review.

B. For Tier 2 and 3 applications, wetland boundaries must be delineated using the methods described in the "Corps of Engineers Wetlands Delineation Manual" (1987).

C. This rule does not apply to an activity that is exempt from permit requirements under the NRPA, or that qualifies for a general permit or permit by rule.

D. This rule does not apply to any application accepted as complete by the department prior to the effective date of this rule.

3. **Definitions.** The following terms, as used in this rule, have the following meanings, unless the context indicates otherwise.

NOTE: The following terms are defined by statute: coastal sand dune systems; coastal wetlands; freshwater wetlands; great ponds; normal high water line; permanent structure; river, stream or brook; and significant wildlife habitat. A copy of these definitions will be included in a packet with this rule for informational purposes.

A. **Adjacent to a Protected Natural Resource.** The area within 75 feet, measured horizontally, of the normal high water line of a great pond, river, stream or brook or the upland edge of a coastal wetland or freshwater wetland.

B. **Alteration.** Dredging; bulldozing; removing or displacing soil, sand, vegetation or other materials; draining or dewatering; filling; or any construction, repair or alteration of any permanent structure.

On a case-by-case basis and as determined by the department, the term "alteration" may not include:

- (1) An activity disturbing very little soil such as installing a fence post or planting shrubs by hand;
- (2) The addition of a minor feature to an existing structure such as a bench or hand rail; and
- (3) The construction, repair or alteration of a small structure with minimal impact such as a nesting box, pasture fence, or staff gauge.

C. **Aquatic Vegetation.** Plants that usually grow on or below the surface of the water for most of the growing season in most years.

D. Compensation. Replacement of a lost or degraded wetland function with a function of equal or greater value.

E. Creation. An activity bringing a wetland into existence at a site where it did not formerly occur for the purpose of compensation.

F. Critically Imperiled Natural Community (S1). An assemblage of plants, animals and their common environment that is extremely rare in Maine or vulnerable to extirpation from the state due to some aspect of its biology. An example of an S1 community that occurs in freshwater wetlands is the Outwash Plain Pondshore community.

G. Emergent Marsh Vegetation. Plants that: 1. are erect, rooted and herbaceous; 2. grow in saturated to permanently flooded areas; and 3. do not tolerate prolonged inundation of the entire plant. Examples of emergent marsh vegetation include cattails, burreed, tussock sedge, rice cut grass, pickerel weed, arrowhead and bulrush.

H. Enhancement. An activity increasing the net value of a wetland.

I. Fill. a. (verb) To put into or upon, supply to, or allow to enter a wetland or water body any earth, rock, gravel, sand, silt, clay, peat or debris; b. (noun) material, other than structures, placed adjacent to a wetland or water body; or material placed in a wetland or water body with the result of a change in the bottom elevation or character or boundaries of the wetland or water body. This term also includes roads, paths and other projects consisting of uncontained material regardless of how long the material remains in the wetland or water body.

J. Functions. The roles wetlands serve which are of value to society or the environment including, but not limited to, flood water storage, flood water conveyance, ground water recharge and discharge, erosion control, wave attenuation, water quality protection, scenic and aesthetic use, food chain support, fisheries, wetland plant habitat, aquatic habitat and wildlife habitat.

K. Health or Safety Project. An activity undertaken to protect or improve public health and safety, or to lessen the risk of injury in a public area through the modification of existing or potentially hazardous conditions. Public health projects and safety projects include, but are not limited to, measures taken to provide or enhance a potable public water supply, to provide fire protection, to control flooding, to provide for safe disposal of solid waste and waste water, and to construct, upgrade, or repair public roads, bridges, airports, railroads and other transportation facilities.

L. Imperiled Natural Community (S2). An assemblage of plants, animals and their common environment that is rare in Maine or vulnerable to further decline. Examples of S2 communities that occur in freshwater wetlands are Atlantic White Cedar Swamp, Alpine Bog-Meadow, Circumneutral Fen, Maritime Slope Bog and Coastal Plain Pocket Swamp.

M. Maintenance. Activities required to assure continuation of a wetland or the accomplishment of project goals after a restoration or creation project has been technically completed, including, but not limited to, water level manipulations and control of non-native plant species.

N. Mitigation. Actions taken to off-set potential adverse environmental impact. Such actions include the following:

- (1) Avoiding an impact altogether by not taking a certain action or parts of an action;
- (2) Minimizing an impact by limiting the magnitude or duration of an activity, or by controlling the timing of an activity;
- (3) Rectifying an impact by repairing, rehabilitating, or restoring the affected environment;
- (4) Reducing or eliminating an impact over time through preservation and maintenance operations during the life of the project; and
- (5) Compensating for an impact by replacing affected resources or environments.

O. Mitigation Banking. Wetland restoration, enhancement, preservation or creation for the purpose of providing compensation credits in advance of future authorized impacts to similar resources.

P. Peatland. A freshwater wetland, typically called a bog or fen, dominated by ericaceous shrubs (heath family), sedges and sphagnum moss and usually having a saturated water regime.

Q. Persistence. The overall ability of a wetland to be self-sustaining, continue to exist, and to serve intended functions over an indefinite period of time, although its vegetation, soils, hydrologic characteristics and precise boundaries may change.

R. Practicable. Available and feasible considering cost, existing technology and logistics based on the overall purpose of the project .

S. Preservation. The maintenance of a wetland area or associated upland areas that contribute to the wetland's functions so that it remains in a natural or undeveloped condition. Preservation measures include, but are not limited to, conservation easements and land trusts.

T. Restoration. An activity returning a wetland from a disturbed or altered condition with lesser acreage or fewer functions to a previous condition with greater acreage or function.

U. Utility Line. A pipe, cable or wire, along with appurtenant facilities, used to transmit or transport a commodity, service or waste product including, but not limited to, water, oil, natural gas, electricity, communications and sewage. Appurtenant facilities include, but are

not limited to, supporting structures such as, poles, pump stations, storage tanks and cleared rights-of-way. Not included as part of a utility line are buildings, generating stations and transmission substations.

V. [Repealed]

W. **Water Dependent Use.** A use which cannot occur without access to surface water. Examples of uses which are **water dependent** include, but are not limited to, piers, boat ramps, marine railways, lobster pounds, marinas and peat mining. Examples of uses which are **not water dependent** include, but are not limited to, boat storage, residential dwellings, hotels, motels, restaurants, **parking lots, retail facilities and offices.**

X. Wetland Value. The importance of a wetland with respect to the individual or collective functions it provides.

NOTE: A wetland may have different values for different functions. For example, a wetland may have a high value for wildlife habitat, but little value for flood storage.

4. Wetlands of Special Significance. All coastal wetlands and great ponds are considered wetlands of special significance. In addition, certain freshwater wetlands are considered wetlands of special significance.

A. Freshwater Wetlands of Special Significance. A freshwater wetland of special significance has one or more of the following characteristics.

(1) Critically imperiled or imperiled community. The freshwater wetland contains a natural community that is critically imperiled (S1) or imperiled (S2) as defined by the Natural Areas Program.

(2) Significant wildlife habitat. The freshwater wetland contains significant wildlife habitat as defined by 38 M.R.S.A. § 480-B(10).

(3) Location near coastal wetland. The freshwater wetland area is located within 250 feet of a coastal wetland.

(4) Location near GPA great pond. The freshwater wetland area is located within 250 feet of the normal high water line, and within the same watershed, of any lake or pond classified as GPA under 38 M.R.S.A. § 465-A.

(5) Aquatic vegetation, emergent marsh vegetation or open water. The freshwater wetland contains under normal circumstances at least 20,000 square feet of aquatic vegetation, emergent marsh vegetation or open water, unless the 20,000 or more square foot area is the result of an artificial ponds or impoundment.

(6) Wetlands subject to flooding. The freshwater wetland area is inundated with floodwater during a 100-year flood event based on flood insurance maps produced by the Federal

Emergency Management Agency or other site-specific information.

(7) Peatlands. The freshwater wetland is or contains peatlands, except that the department may determine that a previously mined peatland, or portion thereof, is not a wetland of special significance.

(8) River, stream or brook. The freshwater wetland area is located within 25 feet of a river, stream or brook.

B. Permit Process. Alterations of wetlands of special significance usually require an individual permit. However, some alterations of freshwater wetlands of special significance may be eligible for Tier 1 or 2 review if the department determines, at the applicant's request, that the activity will not negatively affect the freshwater wetlands or other protected natural resources present. In making this determination, the department considers such factors as the size of the alteration, functions of the impacted area, existing development or character of the area in and around the alteration site, elevation differences and hydrological connection to surface water or other protected natural resources, among other things.

C. Seasonal Factors. When determining the significance of a resource or impact from an activity, seasonal factors and events that temporarily reduce the numbers or visibility of plants or animals, or obscure the topography and characteristics of a wetland such as a period of high water, snow and ice cover, erosion event, or drought, are taken into account. Determinations may be deferred for an amount of time necessary to allow an assessment of the resource without such seasonal factors.

5. General Standards. The following standards apply to all projects as described in Section 2.

A. Avoidance. No activity shall be permitted if there is a practicable alternative to the project that would be less damaging to the environment. Each application must provide an analysis of alternatives (see Section 9(A)) in order to demonstrate that a practicable alternative does not exist.

In wetlands of special significance, projects for which no practicable alternative may exist are limited to those necessary for:

- (1) Health and safety;
- (2) Crossings by road, rail or utility lines;
- (3) Water dependent uses;
- (4) Expansion of a facility or construction of a related facility that cannot practicably be located elsewhere because of the relation to the existing facility, if the existing facility was constructed prior to September 1, 1996;

(5) Mineral excavation and appurtenant facilities; or

(6) Walkways.

B. Minimal Alteration. The amount of wetland to be altered must be kept to the minimum amount necessary.

C. Compensation. Compensation is the off-setting of a lost wetland function with a function of equal or greater value. The goal of compensation is to achieve no net loss of wetland functions and values. Every case where compensation may be applied is unique due to differences in wetland type and geographic location. For this reason, the method, location and amount of compensation work necessary is variable.

In some instances, a specific impact may require compensation on-site or within very close proximity to the affected wetland. For example, altering a wetland that is providing stormwater retention which reduces the risk of flooding downstream will likely require compensation work to ensure no net increase in flooding potential. In other cases, it may not be necessary to compensate on-site in order to off-set project impacts. Where wetland priorities have been established at a local, regional or state level, these priorities should be considered in devising a compensation plan in the area to allow the applicant to look beyond on-site and in-kind compensation possibilities.

(1) When required. Compensation is required when the department determines that a wetland alteration will cause a wetland function or functions to be lost or degraded as identified by a functional assessment (see paragraph 2 below) or by the department's evaluation of the project. If a functional assessment is not required under this rule, no compensation will be required unless the department identifies wetland functions that will be lost or degraded.

(2) Functional assessment. Resource functions that will be lost or degraded are identified by the department based upon a functional assessment done by the applicant and by the department's evaluation of the project. The functional assessment must be conducted in accordance with Section 9(B)(3) for all activities except for those listed in Section 5(C)(6) below.

(3) Location of compensation projects. The compensation must take place in a location:

(a) On or close to a project site as necessary to off-set direct impacts to an aquatic ecosystem;

(b) Otherwise, compensation may occur in an off-site location where it will satisfy wetland priority needs as established at the local, regional or state level to achieve an equal or higher net benefit for wetland systems, if approved by the department.

(4) Types of compensation. Compensation may occur in the form of:

- (a) Restoration of previously degraded wetlands;
- (b) Enhancement of existing wetlands;
- (c) Preservation of existing wetlands or adjacent uplands where the site to be preserved provides significant wetland functions and might otherwise be degraded by unregulated activity; or
- (d) Creation of wetland from upland.

More than one method of compensation may be allowed on a single project. Preference is generally given to restoration projects that will off-set lost functions within, or in close proximity to, the affected wetland. However, other types of compensation may be allowed by the department if the result is an equal or higher overall net benefit for wetland systems.

(5) Compensation amounts. The amount of compensation required to replace lost functions depends on a number of factors including: the size of the alteration activity; the functions of the wetland to be altered; the type of compensation to be used; and the characteristics of the compensation site. Compensation shall be performed to meet the following ratios at a minimum, unless the department finds that a different ratio is appropriate to directly off-set wetland functions to achieve an equal or higher net benefit for wetlands:

- (a) 1:1 for restoration, enhancement or creation to compensate for impacts in wetlands not of special significance;
- (b) 2:1 for restoration, enhancement or creation to compensate for impacts in wetlands of special significance;
- (c) 8:1 for preservation, including adjacent upland areas, to compensate for impacts in all wetlands.

(6) Exceptions. Neither a functional assessment nor compensation is required for the following single, complete projects:

(a) Freshwater wetlands

- (i) Alterations of less than 500 square feet in a freshwater wetland of special significance provided that the department determines that there will be only a minimal effect on freshwater wetland functions and values, significant wildlife habitat or imperiled or critically imperiled community due to the activity;
- (ii) Alterations of less than 20,000 square feet in a freshwater wetland not of special significance, provided that the department determines that there will be only a minimal effect on freshwater wetland functions and values due to the activity;
- (iii) Alterations in a freshwater wetland for a road, rail or utility line crossing of a river,

stream or brook for a distance of up to 100 feet from the normal high water line on both sides, measured perpendicular to the thread of the river, stream or brook, provided:

a. Any affected freshwater wetland does not contain significant wildlife habitat or a critically imperiled or imperiled community; and

b. The total project affects 500 square feet or less of the channel.

(b) Coastal Wetlands. A coastal wetland alteration that does not cover, remove or destroy marsh vegetation, does not fill more than 500 square feet of intertidal or subtidal area, and has no adverse effect on marine resources or on wildlife habitat as determined by the Department of Marine Resources or the Department of Inland Fisheries & Wildlife as applicable.

(c) Great Ponds. A great pond alteration that does not place any fill below the normal high water line, except as necessary for shoreline stabilization projects, and has no adverse effect on aquatic habitat as determined by the Department of Inland Fisheries & Wildlife or the Department of Environmental Protection.

(d) Rivers, streams or brooks. A river, stream or brook alteration that does not affect more than 150 feet of shoreline for a private project or more than 300 feet of shoreline for a public project.

(e) Walkways/Access structures. A wetland alteration consisting of a walkway or access structure for public educational purposes or to comply with the Americans with Disabilities Act.

(7) Waiver. The department may waive the requirement for a functional assessment, compensation, or both. The department may waive the requirement for a functional assessment if it already possesses the information necessary to determine the functions of the area proposed to be altered. The department may waive the requirement for compensation if it determines that any impact to wetland functions and values from the activity will be insignificant.

D. No Unreasonable Impact

(1) Even if a project has no practicable alternative and the applicant has minimized the proposed alteration as much as possible, the application will be denied if the activity will have an unreasonable impact on the wetland. "Unreasonable impact" means that one or more of the standards of the Natural Resources Protection Act, 38 M.R.S.A. § 480-D, will not be met. In making this determination, the department considers:

(a) The area of wetland that will be affected by the alteration and the degree to which the wetland is altered, including wetland beyond the physical boundaries of the project;

(b) The functions and values provided by the wetland;

- (c) Any proposed compensation and the level of uncertainty regarding it; and
 - (d) Cumulative effects of frequent minor alterations on the wetland.
- (2) Activities may not occur in, on or over any wetland of special significance containing threatened or endangered species unless the applicant demonstrates that:
- (a) The wetland alteration will not disturb the threatened or endangered species; and
 - (b) The overall project will not affect the continued use or habitation of the site by the species.

When considering whether a single activity is reasonable in relation to the direct and cumulative impacts on the resource, the department considers factors such as the degree of harm or benefit to the resource; the frequency of similar impacts; the duration of the activity and ability of the resource to recover; the proximity of the activity to protected or highly developed areas; traditional uses; the ability of the activity to perform as intended; public health or safety concerns addressed by the activity; and the type and degree of benefit from the activity (public, commercial or personal).

6. Wetland Compensation Standards. Where compensation is required, the following standards apply:

NOTE: If the department's requirements for compensation are otherwise met, additional areas of compensation required by U.S. Army Corps of Engineers do not also have to meet the department's requirements for compensation.

A. Expertise. The applicant shall demonstrate sufficient scientific expertise to carry out the proposed compensation work.

B. Financial Resources. The applicant shall demonstrate sufficient financial resources to complete the proposed compensation work, including subsequent monitoring and corrective actions.

C. Persistence. For restoration, enhancement and creation projects, on the basis of an updated functional assessment, a minimum of 85% of the compensation area must successfully replace the altered wetland's functions after a period of three years unless otherwise approved by the department. If this level is not achieved, or if evidence exists that the compensation site is becoming less effective, the department may require additional monitoring and corrective action, or additional wetland restoration, enhancement or creation in order to achieve the compensation ratio as originally approved.

D. Monitoring. The applicant shall set forth a plan for interim reporting and remediation measures during monitoring of the restored or created wetland over a minimum of five years, which shall include contingency plans for replanting, contouring or other corrections if the project fails to meet project goals during that time.

E. Maintenance. A compensation project that will naturally maintain itself without active intervention is preferred. However, the permittee may be required to conduct activities to assure continuation of the wetland, or the accomplishment of compensation goals, after a compensation project has been technically completed. Such activities may include, but are not limited to, water level manipulations and control of non-native plant species.

F. Protection

(1) A compensation project involving restoration, enhancement or creation must provide for covenant and restriction or a conservation easement conveyed to a qualified holder that requires maintenance of the area as a coastal wetland, freshwater wetland or great pond in perpetuity. The conservation easement must list the department as an enforcing agent. Regardless of the size of the compensation area, any future alterations in, on or over it must be approved by the department.

(2) A compensation project involving preservation must provide for a conservation easement conveyed to a qualified holder or covenant and restriction so that the parcel will remain undeveloped in perpetuity. The easement must list the department as an enforcing agent. Compensation areas may be deeded to local or state conservation groups or agencies, but any land management practices must be approved by the department.

G. Source of Water (Creation Only). For a creation project, the department prefers that the created wetland be located adjacent to an existing wetland or waterbody.

H. Implementation Schedule. A schedule for implementing the compensation plan must be submitted. Generally, compensation will be required to be completed prior to, or concurrent with, the permitted alteration. For on-going or long-term alterations, such as mining, compensation must be completed no later than within the first year of operation unless otherwise approved by the department.

7. Mitigation Banking

A. Purpose. A public or private entity may apply to the department to undertake wetland compensation projects for the purposes of off-setting one or more alteration projects proposed at that time or in the future. The ratios set forth in Section 5(C)(5) above will be used as guidance to determine the amount of credit required for any proposed alteration.

B. Location. Compensation work must take place in the same watershed or in the project vicinity of the future alteration work, if feasible. Otherwise, the work must occur as close to the wetland alteration site or sites as feasible.

C. Effectively Functioning. A project to be used for compensation credit must be functioning as proposed in the mitigation banking application, as demonstrated by an updated functional assessment, in order to qualify as an offset to a proposed activity.

D. Limitation. No person may use mitigation banking to compensate for more than 25 acres of wetland alteration in any one year period.

E. Expertise. The applicant is required to show a combination of expertise, experience and resources sufficient to undertake and maintain land placed in mitigation banking.

8. Terms and Conditions. The department may, as a term or condition of approval, establish any reasonable requirement to ensure that the proposed development will meet the standards of Title 38 M.R.S.A. Sec. 480-D, such as:

A. Design changes to help insure the success of the project;

B. Buffer requirements;

C. Project supervisory requirements;

D. Monitoring requirements;

E. Mid-course correction or maintenance capability;

F. Bonding or other assurances of continued financial resources to complete compensation requirements; and

G. Timing requirements for all or portions of a project.

9. Application Requirements. In addition to broader information required for a Natural Resources Protection Act permit and Water Quality Certification, an application for a wetland alteration activity must contain the following information, unless the department determines that more or less information is needed to evaluate a specific project, based on the nature of the alteration proposed.

A. Alternatives Analysis. A report that analyzes whether a less environmentally damaging practicable alternative to the proposed alteration, which meets the project purpose, exists. Determining whether a practicable alternative exists includes:

(1) Utilizing, managing or expanding one or more other sites that would avoid the wetland impact;

(2) Reducing the size, scope, configuration or density of the project as proposed, thereby avoiding or reducing the wetland impact;

(3) Developing alternative project designs, such as cluster development, that avoid or lessen the wetland impact; and

(4) Demonstrating the need, whether public or private, for the proposed alteration.

B. Site Characteristics Report. A report that contains the following:

- (1) A plan at a scale of a minimum of 1 inch equals 100 feet, that shows two-foot contour intervals, existing wetland boundaries, the area of wetland to be altered, and project dimensions. All components of the project impacting wetlands or other protected natural resources must be included;
- (2) Existing wetland characteristics including water depths, vegetation and fauna;
- (3) If required, a functional assessment of the wetland to be altered, conducted by a qualified professional, that analyzes the wetland's value based on the functions it serves and how the wetland will be affected by the proposed alteration. The functional assessment must be conducted by a qualified professional(s) using an acceptable methodology approved by the department. If other than an established methodology is proposed, the applicant must submit documentation describing how the methodology was developed, how the wetland functions and values are determined using the methodology, and how much field testing the technique has undergone.

In cases where the size of the wetland alteration or other factors make the use of an established assessment methodology impracticable or inappropriate, the department may instead accept the best professional judgment of a qualified professional. The applicant must notify the department if he or she intends to use best professional judgment; and

NOTE: For great ponds, a functional assessment is not usually required. Information requirements are determined by the department on a case-by-case basis.

- (4) Current photographs of the wetland to be altered that show its characteristics. Photographs may be taken from the air or ground but should be taken during the growing season.

C. Activity Description. A description of the overall proposed activity with particular reference to its impact on the wetland, including the precise location of the project activity, its dimensions, the amount of fill (if any proposed), any proposed drainage, the timing and procedures proposed for the alteration, and any efforts proposed for reducing impacts.

D. Compensation Plan. A plan for the proposed compensation work, if any, including a topographic map at a scale of a minimum of 1 inch equals 100 feet showing two-foot contour intervals and proposed wetland boundaries. This plan must also include:

- (1) Proposed boundaries and characteristics of the compensation site, including elevation, sources of water, and proposed vegetation;
- (2) A narrative describing the specific goals of the compensation work in terms of particular wetland functions and values as related to those of the original wetland. This narrative must also identify the criteria by which to measure success of the compensation work (e.g. water

level within tolerances as defined in the proposal, percent survival of plants, etc.);

(3) A narrative describing the available literature or experience to date (if any) for carrying out the compensation work;

(4) Proposed implementation and management procedures for the compensation work;

(5) A description of the short-term and long-term sources of water for the wetland, including the water quality of these sources;

(6) Plans for re-planting, including a description of plant species, sizes and sources of plant material, numbers of each species/size, proposed spacing of plants, and explanation of how, when and where seeding or planting will take place;

(7) Proposed buffers or protective measures such as sediment control methods;

(8) Plans for monitoring the compensation work, identifying criteria which require mid-course corrections (e.g. less than 75% plant survival after 2 years). A description of proposed remediation measures and a construction schedule for them shall be included unless otherwise approved by the department; and

(9) Plans, if any, for control of non-indigenous plant species.

E. Covenant and Restriction or Conservation Easement. For compensation projects involving a covenant and restriction or a conservation easement, the proposed deed or easement language, developed in accordance with Section 6(F) above, must be submitted. Additionally, any agreements or terms necessary to execute the restriction or easement, such as an agreement for the holder of the easement, must also be included.

NOTE: The applicant is strongly encouraged, but not required, to meet with the department staff in order to establish the wetland's classification and the overall adequacy of the proposal before drafting actual plans.

F. Additional Information. Because of the site-specific nature of activities and potential impacts, more or less information may be required by the department on a case-by-case basis, in order to determine whether the standards are met. If the Project Manager identifies particular information needed to review the project, that information must be included when the application is submitted to the department or the application will not be accepted as complete for processing. Also, additional information may be required by the department during the review process to determine whether the standards are met. Failure to provide any requested additional information necessary for the processing of the application may result in the denial of the application.

10. Severability. Should any provision of these rules be held invalid or ineffective by a court of law, the decision shall not invalidate any other provision of these rules.

AUTHORITY: 38 M.R.S.A. Sec. 341-D(1)

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NOTE -
Zone line
includes all
lots - to
be on
commission
line.



Central Waterfront Context Map



Prepared by the City of Portland Planning Division from data produced by the GIS Work Group
For study purposes only. April 2005

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DIVISION 18. WATERFRONT CENTRAL ZONE*

*Editor's note--Ord. No. 168-93, § 2, adopted Jan. 4, 1993, repealed former Divs. 18, 18.5 and 18.7, §§ 14-306--14-320.2, which pertained to waterfront zones, and enacted new provisions as Divs. 18, 18.5 and 18.7 to read as herein set out. Formerly, such provisions derived from Ord. No. 426-83, § 1, adopted Apr. 25, 1983; Ord. No. 427-83, § 1, adopted Apr. 25, 1983; Ord. No. 355-85, § 1, adopted Jan. 7, 1985; Ord. No. 438-86, § 1, adopted Apr. 7, 1986; Ord. No. 189-87, § 3, adopted Feb. 7, 1987; Ord. No. 174-87, 's; 1, 2, adopted Mar. 4, 1987; Ref. of May 5, 1987; Ord. No. 385-87, adopted Apr. 6, 1987; Ord. No. 36-89, §§ 1, 2, adopted June 28, 1989; and Ord. No. 15-92, §§ 22, 23, adopted June 15, 1992.

Sec. 14-313. Purpose.

The waterfront central zone was created to protect and nurture water-dependent and marine-related support uses so that they may grow and prosper in an environment and area dedicated to this purpose. The following priority of uses is recognized:

- (a) The first priority of this zone is to protect and nurture existing and potential water-dependent uses;
- (b) The second priority is to encourage other marine and marine-related support uses so long as they do not interfere with water-dependent uses, either directly by displacement or indirectly by placing incompatible demands on the zone's infrastructure;
- (c) Other specified uses are encouraged only if they do not interfere with and are not incompatible with first and second priority uses.

Other specified uses are beneficial to the waterfront economy because they provide the financial return to property owners necessary for the maintenance and improvement of the marine infrastructure. However, water-dependent and marine-related support uses by their nature have activities and operational needs that are unique to this area and are not shared by other commercial and industrial uses in the city. These first and second priority uses and related activities may result in noise, odor, dust, hours of operation, parking and traffic patterns and traffic control needs that are necessary for the convenient and successful conduct of such uses. Other

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uses may not be compatible with these types of effects. Other specified uses are permitted under certain circumstances in the waterfront central zone, provided that they do not significantly interfere with the activities and operation of water-dependent and marine-related support uses. Such uses must be, and are assumed to be, aware of the impacts associated with marine uses and therefore must accept and be tolerant of them. Other specified uses in the zone shall accommodate to those patterns and needs of the higher priority uses so long as those higher priority uses do not have a substantially adverse effect on public health and safety and the higher priority activities are conducted in accordance with sound practices or practices customary in the trade.

(Ord. No. 168-93, § 2, 1-4-93)

Sec. 14-313.5. No adverse impact on water-dependent marine uses.

No use shall be permitted, approved or established in this zone if it will have an impermissible adverse impact on future marine development opportunities. A proposed development will have an impermissible adverse impact if it will result in any one (1) or more of the following:

- (a) The proposed nonwater-dependent use will displace an existing water-dependent use, or replace a water-dependent use that previously existed within the last two years;
- (b) The proposed nonwater-dependent use is proposed to be located on a portion of the site that is physically suited for a water-dependent use;
- (~~c~~) The proposed use will reduce existing commercial vessel berthing space;
- (~~d~~) The proposed nonwater-dependent use, structure or activities, including but not limited to access, circulation, parking, dumpsters, exterior storage or loading facilities, and other structures, will unreasonably interfere with the activities and operation of existing water-dependent uses or significantly impede access to vessel berthing or other access to the water by water-dependent uses; or
- (~~e~~) The siting of a proposed nonwater-dependent use will

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substantially reduce or inhibit existing public access to marine or tidal waters.

(Ord. No. 168-93, § 2, 1-4-93)

Sec. 14-314. Permitted uses.

Subject to a determination that the proposed use meets the standards of section 14-313.5 (no adverse impact on water-marine uses dependent uses), the following uses are permitted in the waterfront central zone:

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(a) *Marine:*

1. Marine products, wholesaling, distribution and retailing;
2. Marine repair services and machine shops;
3. Tugboat, fireboat, pilot boat and similar services;
4. Harbor and marine supplies and services, chandleries, and ship supply such as fueling and bunkering of vessels;
5. Marine industrial welding and fabricating;
6. Shipbuilding and facilities for construction, maintenance and repair of vessels;
7. Commercial marine transport and excursion services, including ferries, captained charter services, sport fishing and water taxis;
8. Cargo handling facilities, including docking, loading and related storage;
9. Boat repair yards;
10. Boat storage facilities, excluding rack storage facilities;
11. Seafood processing;
12. Seafood packing, ~~and~~ packaging, and retailing;
13. Seafood loading and seafood distribution;
14. Fabrication, storage and repair of fishing equipment;
15. Ice-making services;
16. Facilities for marine construction and salvage;
17. Facilities for marine pollution control, oil

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spill cleanup, and servicing of marine sanitation devices;

18. Fabrication of marine-related goods;
19. Fishing and commercial vessel berthing;
20. Noncommercial berthing of less than fifty (50) linear feet per pier;
21. Marine office, including but not limited to offices of owners of wharves or their agents, and naval architects, and seafood brokers;
22. Public landings;
23. Marine research, education, and laboratory facilities; ~~;~~
24. Parking supporting an on-site marine related or water-dependent use.

Editor's note: all parking in the WCZ for non marine-related uses are subject to conditional use provisions found in section 14-315.

~~(b)~~ (b) Commercial uses above the ground floor level in buildings in existence on January 4, 1993: Subject to sections 14-314(f)1 and 14-315(a), the following uses shall be permitted above the ground floor level; provided that the total floor area of the building used for all uses permitted only above the ground floor area does not exceed fifty (50) percent of the total floor area of the building:

1. Professional, business, government, and general offices;
2. Business service establishments;
3. Cabinet and carpentry shops, studios for artist and crafts people (excluding dance studios and performing arts spaces) and accessory retail sales of only those products that are produced on the premises;

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4. Intermodal transportation facilities;
 5. Cold storage facilities.
- (c) *Industrial uses above the ground floor level of buildings in existence on January 4, 1993:* Subject to sections 14-314(f)1 and 14-315(a), the following uses shall be permitted above the ground floor level, ~~provided that the total floor area of the building used for all uses permitted only above the ground floor area does not exceed fifty (50) percent of the total floor area of the building:~~
1. Warehousing and wholesaling;
 2. Industrial uses which meet the performance standards of the I-M~~2~~ zone.
- (d) *Public:* Subject to section 14-314(f)1 and 14-315(a), the following uses shall be permitted:
- ~~1. Utility substations, including sewage collection and pumping stations, water pumping stations, transformer stations, telephone electronic equipment enclosures and other similar structures, provided that such structures are located more than one hundred (100) feet from the water;~~
 12. Landscaped pedestrian parks, plazas and other similar outdoor pedestrian spaces, including without limitation pedestrian bicycle trails;
 - ~~3. Municipal office uses located above the ground floor level, provided that the total floor area of the building used for all uses permitted only above the ground floor area does not exceed fifty (50) percent of the total floor area of the building unless approved pursuant to section 14-315. Other municipal uses which need to be located on the ground floor level because of operational necessity may be so located on city-owned property.~~

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- ~~4. Street vendors licensed pursuant to Chapter 19 are a permitted use, but only in the following area of the waterfront central zone: on Commercial Street from the westerly side of the Maine State Pier to the easterly side of the International Marine Terminal.~~

NOTE: Re-write of the "35-foot rule"

- (e) ~~Commercial uses in any area of a building existing on January 4, 1993 or having a valid, unexpired site plan on January 4, 1993, and located within thirty five feet of the southerly edge of Commercial Street between Maine Wharf and the city fish pier:~~

Commercial uses in existing buildings located along Commercial Street between the easterly edge of Maine Wharf and the easterly edge of the City fish pier.

Buildings meeting the following criteria may house the uses listed below:

1. The subject building existed as of (date of adoption); and

2. The subject building is located between the easterly edge of Maine Wharf and the easterly edge of the City fish pier; and

3. The subject building is located in part or in whole within 35 feet of the southerly sideline of Commercial Street; and

4. The ground floor portions of buildings housing non-marine uses allowed under this section may not extend further than 100 feet from the southerly sideline of Commercial Street; and

5. Expansions of uses permitted under this section are subject to conditional use review under 14-315, or conditional or contract rezoning under 14-315.3.

Subject to section 14-314(f)1 and 14-315(a), the following uses shall be permitted:

1. Professional, business, government, and general

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offices;

2. Retail and service establishments, including craft and specialty shops. Convenience stores with gas pumps shall not be permitted under this section;
3. Restaurants, Restaurants provided that that full course meal food service e—and consumption shall be the primary function of the restaurant, and shall be continued up until the hours of closing;
4. Banking services;
5. Laundry and dry cleaning services;
6. Cabinet and carpentry shops, studios for artists and crafts people, and accessory retail sales of products produced on the premises;
7. Intermodal transportation facilities;
8. Cold storage facilities;
9. Museums and art galleries.

(f) *Other: Accessory uses:*

1. Notwithstanding sections 14-331, 14-334, 14-404 or any other provision of this Code, parking for uses other than those set forth in section 14-314(a) {marine uses} shall not be considered a permitted accessory use on-site and shall be subject to the provisions of section 14-315(a).
2. Except as provided in subsection 1a. above, accessory uses customarily incidental and subordinate to the location, function and operation of permitted uses. Food service establishments, newsstands and other similar retail and service support uses shall only be permitted as accessory uses if they are part of and located within the lot lines of a use set forth in section 14-314(a)1, 7, or 22; that such uses do not exceed two thousand (2,000) square

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feet in total floor area of the building, or twenty-five (25) percent of the total floor area of the building, whichever is less, and that each individual use does not exceed one thousand (1,000) square feet in total floor area of the building; and further provided that such accessory uses provide goods or services that are supportive of the principal use and its clientele.

3. Interior meeting or classroom space accessory to uses permitted in section 14-314(a)(23) (marine research, education, and laboratory facilities) may be rented out for meeting use by marine-related or non-marine-related groups or organizations, or the general public, and such accessory uses shall not be subject to the limitations contained in paragraph 2, but shall only be permitted as accessory uses if the total of all accessory retail and service support uses, including interior meeting or classroom space, does not exceed three thousand (3,000) square feet in total floor area per building, or fifteen (15) percent of the total floor area per building, whichever is less.

4. Street vendors licensed pursuant to Chapter 19.

(Ord. No. 168-93, § 2, 1-4-93; Ord. No. 131-01/02, § 1, 1-23-02; Ord. No. 309-01/02, § 1, 7-15-02; Ord. No. 38-02/03, § 1, 9-4-02)

Sec. 14-315. Conditional uses.

The following uses shall be permitted as conditional uses in the waterfront central zone, provided that, notwithstanding section 14-471(c), section 14-474(a), or any other provision of this Code, the Planning Board shall be substituted for the board of appeals as the reviewing authority, and further provided that in addition to the provisions of section 14-474(c)(2), section 14-313.5, and any other conditions specified under the particular use below, they shall also meet the following conditions:

- i. The proposed use shall be compatible with existing and potential marine uses in the

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vicinity;

ii. The proposed use shall not impede access to the water by existing or potential marine uses; and

iii. For conditional uses that propose or require twenty (20) or more parking spaces, the proposed conditional use, when considered in conjunction with past, present and reasonably foreseeable future development, specifically including but not limited to development and uses occurring in this district in structures within thirty-five (35) feet of the southerly edge of Commercial Street, shall meet the standards of section 14-526(a)(1) {traffic circulation}. For purposes of application of this standard only, in evaluating congestion, any private way or access road serving as the primary means of land access to a pier or wharf shall be deemed to be included within the term "street" at the intersection of such private way or access road with Commercial Street.

(a) Parking: Notwithstanding sections 14-317(hg), 14-331, 14-334 and article V (site plan) of this chapter, no parking shall be allowed in this zone for conditional uses, non marine uses allowed in buildings located within 35 feet of Commercial Street, and uses permitted only above the ground floor level, unless the applicant can demonstrate that the number of parking spaces on-site exceeds the number of parking spaces required for marine uses that are permitted ~~required~~ by section 14-314(a). The remainder of parking required for such uses shall be provided off-site and in other zones where parking is a permitted use.

(b) Marine:

(1) Noncommercial vessel berthing of fifty (50) linear feet or greater per pier along the edges of piers existing on January 4, 1993, provided that:

a. Such use does not decrease the amount of,

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nor diminish the quality of, existing on-site berthing space, as measured along the pier, float or wharf edge, which could be used for commercial vessels in its current condition. In assessing the impact on quality of berthing space, the Planning Board shall consider the following: cost, access, maneuverability, depth for various-sized vessels, loading/unloading areas, lease terms, availability of utilities, parking and safety.

NOTE: Consider removing, per sub-committee recommendation.

- (2) Fish by-products processing, provided that:
- a. Any fish by-products processing facility has a valid rendering facility license under chapter 12; and
 - b. The processing of other material wastes or by-products shall not be deemed a lawful accessory use under any other provision of this article.

NOTE: Consider removing, per sub-committee recommendation.

- (3) Boat rack storage facilities, provided that:

Parking shall be provided for one hundred (100) percent of the demand generated by the use, and such parking shall be provided off-site, in another zone permitting such use.

- (c) Expansion of a non-water dependent, non-marine related use permitted under 14-314(e) (Commercial uses in buildings existing on (date of adoption) January 4, 1993 or having a valid, unexpired site plan on January 4, 1993 and located within thirty-five feet of the southerly edge of Commercial Street between the easterly edge of Maine Wharf and the easterly edge of the eCity fish pier.) into contiguous and newly created building space of no more than 2000 sq. ft., total, shall be allowed only as follows:

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NOTE: Staff suggested edit

(1) the use may occupy ~~ground~~ any floor area provided the contiguous and newly created building space in which the non-water dependent, non-marine related use is located within 35 feet of the southerly sideline of Commercial Street; and/or

(2) the use may occupy a ground floor area of no more than 1250 square feet beyond 35 feet from the southerly sideline of Commercial Street; and

—————(3) as of September 7, 2000, an existing building that qualifies for a non-water dependent, non-marine related use under 14-314 shall be no less than 500 square feet; and

(4) The expansion of the use shall be reviewed by the Planning Board under the Site Plan standards and shall otherwise meet the requirements of the Waterfront Central Zone and this Code.

—————(d) Residential: The "primary" owner of a marine related business may occupy space within the upper story of a building in existence on January 4, 1993, provided the following conditions are met:

(1) the residential living space shall not exceed one thousand (1,000) square feet;

(2) the occupancy of said space shall be limited to the primary owner of the marine related business. The residential use is not transferable to friends, family or anyone other than the primary business owner. No such residential space shall be leased out by or allowed to be used for occupancy by other than the primary owner of the marine related business;

(3) the residential use shall be limited to one unit per wharf;

(4) the residential use shall be year round use only, and shall not be used on a seasonal

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basis; and

(5) upon the vacancy in excess of three (3) months of the residential living space by the primary owner of the marine related business, the residential use shall automatically terminate and shall not be continued without new conditional use approval under this subsection.

For purposes of this subsection, "primary owner of the marine related business" shall mean a person who legally owns fifty percent (50%) or more of the marine related business.

NOTE: Edit suggested by sub-committee, staff suggested text

(e) Utility Sub Stations

Public utility substations, including but not limited to electrical transformers, sewage and stormwater pumps, and telecommunication switching stations, are permitted under the following conditions:

- i. The facility is located more than 100 feet from the water's edge,
- ii. The facility occupies no more than 500 square feet of structure above ground,
- iii. The facility provides no dedicated on-site parking and all subsurface elements of the facility are installed and operated such that land occupied by the facility is otherwise usable and made available for marine related uses, including but not limited to parking, travel ways, and/or storage.

NOTE: Subcommittee suggested other uses, staff language to be provided at the meeting. Please see also Conditional Rezoning Standards

NOTE: Staff suggested edit - Upper Floor Non-marine expansion, similar to the "Sapporo Amendment", subject to State NRPA and Shoreland review.

(g) Expansion of an upper floor non water-dependent, non

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marine-related use permitted under 14-314(b) or (c).

Expansion of a non-water dependent, non-marine related use permitted under 14-314(b) or (c) (Commercial and industrial uses in buildings existing on January 4, 1993) into contiguous and newly created building space of no more than 2000 sq. ft., total, shall be allowed only as follows:

- (1) the use may occupy upper floor areas provided the contiguous and newly created building space {in which the non-water dependent, non-marine related use is located} is more than 75 feet (TEST THIS NUMBER) from the water's edge or the edge of any pier perimeter, or as otherwise required to meet applicable State environmental or shoreland requirements; and
- (2) newly created ground floor area in a building utilizing this section must be dedicated entirely to marine-related or water-dependent uses, excepting circulation areas, such as unoccupied vestibules, elevator cores, and/or stair landings serving upper floors, only where such circulation areas occupy no more than 300 square feet; and
- (3) as of January 4, 1993, an existing building that qualifies for a non-water dependent, non-marine related use under 14-314 shall be no less than 500 square feet; and
- (4) The expansion of the use shall be reviewed by the Planning Board under the Site Plan standards and shall otherwise meet the requirements of the Waterfront Central Zone and this Code.

(Ord. No. 168-93, § 2, 1-4-93; Substitute Ord. No. 00-42, 8-7-00; Ord. No. 73-01/02, § 1, 10-15-01, Ord. No. 131-01/02, § 2, 1-23-02)

Sec. 14-315.3. Contract or conditional rezoning.

Except as authorized in section 14-314(~~cd~~) and (g), an applicant may only locate a nonmarine use in a structure which was not in existence on January 4, 1993, if a rezoning is

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approved pursuant to division 1.5 of this article. A conditional or contract rezoning shall only be approved if, after public hearing and opportunity for public comment, the reviewing body finds that the applicant has carried the burden of proof to show that the proposed development meets the standards of section 14-313.5 and all of the following standards:

- (a) Each proposed upper story nonmarine use is a use which would be permitted above the ground floor level in a structure existing on January 4, 1993, pursuant to section 14-314(b), (c) or (d).

NOTE: Language under development that would allow certain first floor mixed uses in a conditional rezoning.

- (b) The ground floor of the proposed structure either:
 - i. consists entirely of one (1) or more marine uses as set forth in section 14-314(a) and 14-315(b); or,
 - ii. if a majority of a new or existing building footprint is located within 35 feet of the southerly sideline of Commercial Street, up to 2500 square feet of ground floor space may be used for any of the following non-marine related uses, subject to the conditions set forth in sections 14-313.5 (the no adverse impacts on water-dependent uses,) and 14-317 (performance standards):-
 - a.
 - b. other.....

NOTE: Staff suggested edits:

- (c) The proposed development is consistent with the comprehensive plan ~~and, without the proposed development, the site could not otherwise support an economically viable water-dependent use.~~
- (d) Any physical or legal impediments which preclude functional access from the site of the proposed development to the water's edge are not the result of action taken by the current owner, the applicant for rezoning, or any prior owner after January 4, 1993.

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NOTE: Staff recommends consideration of removing the provision below or quantifying the benefits to provide a basis for decision making.

- (e) The project's public benefits outweigh its potential negative impacts, taking into consideration as public benefits protection of existing water-dependent uses, preservation of future water-dependent use development opportunities.
- f. The project contributes to the development of and/or on-going maintenance of the marine infrastructure for commercial vessels (either on-site or off-site. Such contribution may include but is not limited to dredging and pier edge improvements, the value of which shall be proportionate in value to the area/cost of non-marine investment, either 5% of the total project cost or \$10.00 dollars per square foot of non-marine use space, whichever is greater. If such investment in marine infrastructure is not available on-site, a financial contribution to the City's waterfront infrastructure fund may be stipulated as a condition of the rezoning.) ~~and visual and physical access to the waterfront for the general public.~~
- (f) The proposed development responds to any unique physical conditions and development opportunities along the shoreline.

Note: Consider deletion of (g) below, understanding that these same issues are addressed (less stringently) in the Site Plan standards.

- (g) The proposed development does not significantly restrict air, light, or water views of other structures located in the vicinity, and does not create significant adverse local climatic effects such as increased winds, shadowing, or less efficient traffic, parking or circulation patterns.
- (h) The proposed development is consistent with the Portland Waterfront Public Access Design Guidelines, a copy of which is on file in the department of planning

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and urban development; and, - the project contributes to the extent possible to the visual and physical access to the waterfront for the general public.

Note: Consider stating specifics for this provision

- (i) The proposed rezoning contains adequate provisions and/or conditions to ensure that the water-dependent use is not abandoned after the project is developed.

(Ord. No. 168-93, § 2, 1-4-93)

Sec. 14-315.5. Prohibited uses.

Uses which are not enumerated in either section 14-314 or 14-315 as permitted or conditional uses are prohibited. Those uses that are prohibited shall include, without limitation:

- a. Except as provided in section 14-315, residential uses (not in existence on May 5, 1987).
- b. Hotels, motels or boatels.
- c. Auditoriums, civic centers, convention centers or other meeting facilities.
- d. Drinking establishments.

Note: Staff suggested edit

- e. Ground mounted telecommunication towers, antennas, and/or disks.

(Ord. No. 168-93, § 2, 1-4-93; Ord. No. 73-01/02, § 2, 10-15-01)

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Sec. 14-316. Dimensional requirements.

In addition to the provisions of article III, division 25, of this Code, lots in the waterfront central zone shall be subject to the following requirements:

- (a) *Minimum lot size:* None.
- (b) *Minimum frontage:* None.
- (c) *Minimum yard dimensions:*

Front setback: None.

Side setback: None.

Rear setback: None

Note: **Staff suggested edit**

Setback from pier line: Notwithstanding the above requirements, a minimum setback of ~~five~~ twelve (12~~5~~) feet from the edge of any pier, wharf or bulkhead shall be required for any structure located less than 14 feet in elevation above the working pier deck. The setback area may be utilized for activities related to the principal uses carried on in the structure, subject to the provisions of sections 14-313 and 14-314, but shall not be utilized for off-street parking. The edge of any pier, wharf or bulkhead shall include any attached apron(s).

- (d) *Maximum lot coverage:* One hundred (100) percent.

Note: **Staff suggested edits**

- (e) *Maximum building height:* ~~Forty-five~~Thirty-five (45~~35~~) feet, except that within two hundred (200) feet of the southerly sideline of the Commercial Street right of way, the maximum building height is fifty (50) feet for a building whose primary purpose and use is as a marine research, education, and laboratory facility.

- (f) *Minimum ground floor clearance:* Fourteen (14) feet. First floor space for any building proposed to be larger than 300 square feet shall

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provide no less than 14 feet of floor to ceiling vertical clearance to promote marine industrial use potential.

(Ord. No. 168-93, § 2, 1-4-93; Ord No. 309-01/02, § 2, 7-15-02)

Sec. 14-317. Performance standards.

All uses in the waterfront central zone shall comply with the following standards:

- (a) *Outdoor storage of materials:* Outdoor storage of commodities and materials accessory to normal conduct of business, except pilings and/or cranes, shall be permitted to a maximum height of forty-five (45) feet, and such materials shall be entirely contained, including runoff contaminants and residual material, within a designated area within the lot boundaries.
- (b) *Noise:* The level of sound, measured by a sound level meter with frequency weighting network (manufactured according to standards prescribed by the American National Standards Institute, Inc.), inherently and recurrently generated within the waterfront central zone shall not exceed seventy-five (75) decibels on the A scale at the boundaries of any lot, except for sound from construction activities, sound from traffic on public streets, sound from temporary activities such as festivals, and sound created as a result of, or relating to, an emergency, including sound from emergency warning signal devices. In measuring sound levels under this section, sounds with a continuous duration of less than sixty (60) seconds shall be measured by the maximum reading on a sound level meter set to the A weighted scale and the fast meter response (L maxfast). Sounds with a continuous duration of sixty (60) seconds or more shall be measured on the basis of the energy average sound level over a period of sixty (60) seconds (LEQ₁).
- (c) *Vibration:* Vibration inherently and recurrently generated shall be imperceptible without instruments at lot boundaries. This shall not apply to vibration resulting from activities

aboard a vessel or from railroad vehicle activities, or from activities on a pile supported pier.

- (d) *Federal and state environmental regulations:* All uses shall comply with federal and state environmental statutes and regulations regarding emissions into the air, except where provisions of this Code are more stringent.
- (e) *Discharges into harbor areas:* No discharge into harbor water areas shall be permitted, unless permitted by the Maine Department of Environmental Protection under a waste discharge license and as approved by the department of parks and public works in accordance with chapter 24, article III of this Code. All private sewage disposal or private wastewater treatment facilities shall comply with the provisions of chapter 24, article II of this Code and federal and state environmental statutes and regulations regarding wastewater discharges.
- (f) *Storage of vehicles:* Storage of any unregistered automotive vehicle on the premises for more than sixty (60) days shall not be permitted.
- (g) *Landfill of docking and berthing areas:* Landfill of docking and berthing areas shall be governed by 38 M.R.S.A. Sections 471 through 478, and permitted only if the landfill does not reduce the amount of linear berthing areas or space, or berthing capacity. If approved, construction shall be undertaken using methods approved by the department of parks and public works and shall be accomplished in accordance with the provisions of division 25 of this article and in a manner so as to ensure that a stable and impermeable wall of acceptable materials will completely contain the fill material and will not permit any fill material to leach into docking areas or navigable waters.
- (h) *Off-street parking:* Except as provided in section 14-315 or as required pursuant to article V (site plan), off-street parking is required at fifty (50) percent of the required number of parking

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spaces for specified uses as otherwise provided in division 20 of this article.

- (i) *Off-street loading:* Off-street loading is required as provided in division 21 of this article.
- (j) *Shoreland and flood plain management regulations:* Any lot or portion of a lot located in a shoreland zone as identified on the city shoreland zoning map or in a flood hazard zone shall be subject to the requirements of division 26 and/or division 26.5.
- (k) *Lighting:* All lighting on the site shall be shielded such that direct light sources shall not unreasonably interfere with vessels transiting the harbor nor have an unreasonable adverse impact on adjacent residential zones.
- (l) *Signs:* Signs shall be permitted as set forth in division 22 of this article.
- (m) *Storage of pollutants and oily wastes:* On-premises storage of pollutants and oily wastes shall not be permitted for more than forty-five (45) days.
- (n) *Compatibility of nonmarine uses with marine uses:* Nonmarine uses, structures and activities, including but not limited to access, circulation, parking, dumpsters, exterior storage and loading facilities or other structures shall neither unreasonably interfere with the existence or operation of marine uses nor significantly impede access to vessel berthing or other access to the water by existing or potential marine uses as set forth in section 14-314(a). Siting of a use not set forth in section 14-314(a) shall not substantially reduce or inhibit existing public access to marine or tidal waters.

Note: Staff suggested edit as discussed briefly with some members of the subcommittee.

Question: Should the Fish Pier be required to promote "urban design" along Commercial Street? (As was required

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for North Atlantic Seafood)

- (o) Construction of new structures located within thirty-five feet of the southerly edge of Commercial Street between the easterly edge of Maine Wharf and the westerly edge of the city fish pier: Construction of new structures located within thirty-five (35) feet of the southerly edge of Commercial Street between Maine Wharf and the city fish pier shall conform to the guidelines set forth in the Downtown Urban Design Guidelines, unless such structures are also located within one hundred (100) feet of the water. Such structures that are also located within one hundred (100) feet of the water shall conform to the extent practicable to the Downtown Urban Design Guidelines.

(Ord. No. 168-93, § 2, 1-4-93)

**CITY OF PORTLAND, MAINE
CITY COUNCIL AGENDA REQUEST FORM**

TO: Sonia Bean, Senior Administrative Assistant

FROM: Bill Needelman, Senior Planner

DATE: November 10, 2005

SUBJECT: Council action on a potential text change to the Waterfront Central Zone to allow expansion of Becky's Diner restaurant.

Sponsored by: Planning Board

1) Council Meeting at which action is requested:

1st Reading: November 21, 2005
Final Action: December 5, 2005

2) Can action be taken at a later date? YES NO

I. SUMMARY OF ISSUE

Rebecca Rand, proprietor of Becky's Diner at 390 Commercial Street, requests Council action on a potential text change to the Waterfront Central Zone to allow expansion of the diner.

II. REASON FOR SUBMISSION (What issue/problem will this address?)

The subject structure is located at the southerly side of Commercial Street located at the head of Hobson's Wharf and adjacent to the easterly bulkhead of Berlin Mills Wharf. The property is in the Waterfront Central Zone (WCZ). Restaurant uses are not permitted in this portion of the WCZ, and an expansion of the existing facility requires an amendment to the current language of the zone.

The proposal includes the addition of 3400 square feet to the existing one-story diner, including an expanded first floor, a new second floor, and second-floor exterior dining.

III. INTENDED RESULT (How does it resolve the issue/problem?)

The proposed amendment would treat 390 Commercial Street (Becky's) similarly to those buildings currently located east of the City Fish Pier and sited along Commercial Street (buildings that can currently house non-marine uses.) Such treatment would shift the status of the diner use from "non-conforming" to "permitted". The amendments would also allow for greater expansion of such permitted non-marine uses, therefore allowing the expansion of Becky's Diner. The expansion amendment also allows incremental increase in the expansion potential of other non-marine uses located between Hobson's Wharf and Maine Wharf. Currently, such non-marine uses may expand up to 2000 square feet. Under the amendment, this potential increases to

3400 square feet.

IV. FINANCIAL IMPACT

There will be no immediate financial impact to the City resulting from Council action on this amendment to the WCZ. Presumably, as applicable buildings expand, there would be a corresponding increase in taxable value for impacted properties

V. STAFF ANALYSIS & RECOMMENDATION

Please see City Council Report #65-05 for a complete analysis of the proposal within the context of the Waterfront Central Zone. Given the ongoing evaluation of the Waterfront Central Zone, Staff did not provide a specific recommendation on the rezoning to the Planning Board.

The Planning Board held a public hearing on this item on October 25 and voted 3 to 2 to recommend the text change (Beal, Patterson, Tevanian for; Anton and Silk against; Lowry abstained; Odakara absent.)

The in the course of their deliberations, Planning Board members expressed mixed feelings regarding the propriety of expanding a non-conforming use in the WCZ. Simultaneously, the Board stated a general agreement that the proposed expansion could be designed in a way that meets the requirements of the "no adverse impact" clause and they recognized the role that Becky's Diner has played as part of the waterfront community.

Ultimately, a majority of Board members voted in favor of the recommendation, recognizing that City Council was the appropriate forum for discussion of the project's timing and relationship to the broader WCZ policy discussion. Board members Anton and Silk, in voting against the recommendation, stated discomfort with the concept of expanding non-conforming uses in apparent conflict with the purpose and intent of the zone.

VI. SPONSOR

Planning Board

3) Index of Supplemental Material

Proposed amendment
City Council Report #65-05

cc: Elizabeth Boynton, Associate Corporation Counsel

**WATERFRONT CENTRAL ZONE
TEXT AMENDMENT**

**REBECCA RAND, PROPRIETOR BECKY'S DINER
APPLICANT**

Submitted to:
Portland City Council
Portland, Maine
October 21, 2005

Submitted by:
Bill Needelman, Senior Planner

1. **Introduction:**

Rebecca Rand, proprietor of Becky's Diner at 390 Commercial Street, requests Council action on a potential text change to the Waterfront Central Zone to allow expansion of the restaurant.

The Planning Board held a public hearing on this item on October 25 and voted 3 to 2 to recommend the text change (Beal, Patterson, Tevanian for; Anton and Silk against; Lowry abstained; Odakara absent.)

Project Overview

The subject structure is located at the southerly side of Commercial Street located at the head of Hobson's Wharf and adjacent to the easterly bulkhead of Berlin Mills Wharf. The property is in the Waterfront Central Zone (WCZ). Restaurant uses are not permitted in this portion of the WCZ, and an expansion of the existing facility requires an amendment to the current language of the zone.

The proposal includes the addition of 3400 square feet to the existing one-story diner, including an expanded first floor, a new second floor, and second-floor exterior dining.

Process Background

The rezoning was originally applied for in late 2004 and after a hiatus the process restarted in October of this year. During early workshops, the Planning Board was introduced to Ms. Rand's goals for the property and explored options for achieving those goals within the policies of the City's waterfront zoning. Staff and Ms. Rand's attorney, Natalie Burns, then provided a series of text changes to the Waterfront Central Zone (WCZ) to achieve these objectives. The Board had provided feedback on these changes, and the proposal was to be scheduled in early 2005 for Public Hearing with a number of edits.

Concurrently with the Board's review of the diner expansion, the City Council began discussions regarding the conditions and land use policies of the WCZ. In February of 2005, Mayor Duson officially established the Waterfront Central Zone Taskforce with the charge of evaluating the physical and economic conditions of the zone, and determining whether zone language changes would be needed.

In light of the Council's decision to comprehensively study the zone, Staff recommended to Ms. Rand that she hold her application until the results of the study were complete. Ms. Rand agreed to hold the application, but she now asks that she receive a decision from the Council. Ms. Rand expressed to the Planning Board that she worries that an extended WCZ study process will create a problem for her project regarding the pending reconstruction of Commercial Street. Commercial Street is scheduled for repaving in

May of next year and if Ms. Rand's utility work is not completed prior to final paving, her project would be subject to significant street opening fees for excavation in a "moratorium" street.

Given the ongoing evaluation of the full zone, Staff did not provide a specific recommendation to the Planning Board on the rezoning.

The Council should note that the text change submitted with this Report is the specific request of the applicant and is drafted by Ms. Burns with the smallest edits needed to achieve Ms. Rand's goals for the diner

2. Property Description:

Becky's Diner occupies a +/- 10,000 square foot parcel of land located at the southerly edge of the Commercial Street right of way and along the westerly edge of the access drive to Hobson's Wharf. The site is currently improved with an 1800 square foot single-story concrete block building housing the diner. The diner provides +/- 12 parking spaces on-site with these spaces informally used as stacked spaces, resulting in somewhat expanded capacity. The diner also controls seven leased spaces on an adjoining property.

The diner site has direct water access at the rear of the existing building. This access is to very shallow water (mudding out at low tide) located between Hobson's and Berlin Mills Wharves and is currently unutilized for marine use. One should note that the subject deed of the property retains the right to construct and maintain a 15x15 foot float in this area, recognizing that while marine use may not currently be active, provisions for future land/water access have been retained for the property.

3. Development History:

In the early 1990's, Becky's Diner was established as a marine use facility. After considerable process, the diner was allowed as a permitted use because of its service to the fishing fleet. While the table service diner would not have been allowed on its own, the restaurant provided supplies to fishing boats for short and medium length trips. These same fishing employees and boat owners would use the diner as a meeting place, and the restaurant quickly established itself as an integral part of the working waterfront community.

Over the years, changes in the fishing economy and the make-up of the fishing fleet have reduced the volume of Becky's direct service to fishing boats. At the same time, the diner has seen its restaurant business grow, serving a wide range of area residents. According to the applicant, the fishing community still uses the diner in an informal capacity as a meeting place; and the diner does its best to accommodate this clientele through hours of operation and maintenance of a bulletin board.

4. Zoning Review:

Zoning Administrator, Marge Schmuckal, has provided the follow comments for the Board's consideration.

"Becky's Diner was approved by the previous zoning administrator, Bill Giroux, as a conforming use in the WCZ zone. Our microfiche has the correspondence from Becky explaining that she prepared packaged meals for fishermen who went out for several days/weeks and that sometimes there were leftovers that she wanted to serve to the public. This is a very generalized reduction of the correspondence. The bottom line is that the use was approved at that time as a permitted use in this zone.

This property is located within a WCZ, Waterfront Central Zone. There are no required setbacks except for a 5' setback requirement from the edge of a pier or wharf. I cannot determine exactly that there is 5' to the existing pier line because the submitted plans are not to scale. It appears to be ok, but only a scaled plan can finalize that.

There is a 35' maximum height. Again, I have no scaled plans. It appears the maximum height can be met, but only a scaled plan can finalize that.

The parking requirements are at 50% of the uses outlined in the parking section 14-317. Based on trying to figure out the scale that is given in the sketches, it appears that nine (9) off-street parking spaces are required. Again, the plans are deficient. The site plan shows no parking spaces to confirm what is available.

The new addition may also fall within an A2 flood zone as outlined on panel 13 of the FEMA maps. The applicant shall give this office a plan showing when the flood zone lines fall. If the building falls within the A2 flood zone the first floor elevation shall be 2 feet above the given elevation of 10 feet."

Ms. Schmuckal has additionally related to Staff that she does not interpret the proposed expansion described below as an expansion of a permitted use in the WCZ. At the previous workshop, the Board inquired as to whether the existing use was currently considered a permitted use given the diner's reduction of direct business in vessel supply. Ms. Schmuckal currently interprets the Becky's use as non-conforming in the zone.

The Board should note that the applicant has determined that the finished floor elevation of the diner is above the requirements of the Flood Plane ordinance.

5. Proposed Expansion:

As stated in the introduction, Ms. Rand requests permission to expand the diner use. There would be a 900 square foot first-floor expansion of the kitchen and seating area and an 1800 foot second floor added to the structure. The second floor would have eight tables for outside seating (over the first-floor addition) and a new second floor over the existing building. The new second floor would have a meeting room, a bakery and an office for the diner. Please see attachment 6 for a site sketch, attachment 7 for floor plans (existing and proposed) and attachment 8 for rendered elevation sketches. Project architect, David Lloyd, has provided the following breakdown of the expansion.

First Floor: Code compliant toilets, kitchen area, 43 more seats,
New second floor: Office, baking, toilets and meeting room
for 25, and general upgrade to building exterior.

First Floor existing: 1,800sq. Ft.
Addition 1st floor: 900 sq ft
Total 1st floor: 2,700 sq. ft.

Addition 2nd floor: 2100 sq ft

Total addition (with deck) 3,000 sq ft
Total bldg 4,800 sq. ft.

Existing restaurant 72 seats to become 115 seats [add of 43 seats]

2nd floor meeting room 25 seats

Deck 30 seats

Total addition of 98 seats

Existing parking 12 plus 7 leased equal 19 existing

2,504 square feet dining area divided by 150 sq ft equals 17 cars
required

6. WCZ Text changes

Please see the both the proposed text amendments (Attachment 1A) and the full WCZ text (Attachment 1B) attached to the end of this memo.

The revisions achieve the goals of the applicant by extending the geographic range of the "35 foot" rule and changing the conditional use restrictions of the so-called "Sapporo amendment."

The "35 foot rule", 14-314 (e)

Currently, existing buildings that are located between Maine Wharf (Ri Ra) and the City Fish Pier and located within 35 feet of Commercial Street may house certain non-marine uses (including restaurant) as a use by right. By expanding this allowance westerly as far as Hobson's Wharf, Becky's Diner would become a permitted use in the WCZ. The draft changes to 14-314 (e) are highlighted as follows:

- (e) *Commercial uses in any area of a building existing on January 4, 1993 or having a valid, unexpired site plan on January 4, 1993, and located within thirty-five feet of the southerly edge of Commercial Street between Maine Wharf and the*

~~City Fish Pier easterly edge of Berlin Mills Wharf~~: Subject to section 14-314(f)1 and 14-315(a), the following uses shall be permitted:

1. Professional, business, and general offices;
2. Retail and service establishments, including craft and specialty shops. Convenience stores with gas pumps shall not be permitted under this section;
3. Restaurants provided that food service and consumption shall be the primary function of the restaurant;
4. Banking services;
5. Laundry and dry cleaning services;
6. Cabinet and carpentry shops and accessory retail sales of products produced on the premises;
7. Intermodal transportation facilities;
8. Cold storage facilities;
9. Museums and art galleries.

The first edit would extend the geographic area of the "35 foot rule" to include 390 Commercial Street. The Board should note that the list of uses above would all be available to the current or future owners of the structure, not just the restaurant use.

Please see attachment 2 for a photo inventory of all of the impacted properties along Commercial Street. The inventory includes an estimated "expansion potential" for each building based on 3400 sq ft of total expansion allowance (as drafted) with any previous expansion subtracted.

Conditional Use Parking 14-315 (a)

Within the WCZ, non-marine parking is considered a conditional use subject to certain restrictions. This provision is clearly stated in the accessory use section within the permitted use list, 14-314(f). However, within the conditional use list, non-marine uses using the "35 foot rule" are not listed with the uses required to apply for conditional use parking review. The following amendment clarifies this requirement and more clearly documents the City's current practice. While applicable to the Becky's review, the following amendment is more procedural housekeeping than a necessary requirement of the applicant.

- (a) Parking: Notwithstanding sections 14-317(g), 14-331, 14-334 and article V of this chapter, no parking shall be allowed in this zone for conditional uses, ~~non-marine uses allowed in buildings located within 35 feet of Commercial Street~~ and

uses permitted only above the ground floor level, unless the applicant can demonstrate that the number of parking spaces on-site exceeds the number of parking spaces required for marine uses that are required by section 14-314(a). The remainder of parking required for such uses shall be provided off-site and in other zones where parking is a permitted use.

Sapporo Amendment, 14-315 (c)

Currently, non-marine uses in buildings located within 35 feet of Commercial Street may expand on the ground floor only. Expansions are also limited to 2000 square feet, 1250 of which may be located more than 35 feet away from Commercial Street. The attached amendments remove the ground floor restriction and increase the total amount of non-marine use expansion allowed to 3400 square feet.

Please note that the applicant's total building expansion plans show 3000 square feet of new interior building space. Combined with the proposed exterior seating area and exterior stairways, the expansion limit would need to be increased to 3400 square feet.

- (c) Expansion of a non-water dependent, non-marine related use permitted under 14-314(e) (Commercial uses in buildings existing on January 4, 1993 or having a valid, unexpired site plan on January 4, 1993 and located within thirty-five feet of the southerly edge of Commercial Street between Maine Wharf and the ~~the city fish pier easterly edge of Berlin Mills Wharf~~) into contiguous and newly created building space of no more than ~~2000~~ 3400 sq. ft., total, shall be allowed only as follows:
- (1) the use may occupy ~~ground floor area of~~ contiguous and newly created building space in which the non-water dependent, non-marine related use is located within 35 feet of the southerly sideline of Commercial Street; and/or
 - (2) the use may occupy a ground floor area of no more than 1250 square feet beyond 35 feet from the southerly sideline of Commercial Street; and
 - (3) as of September 7, 2000, an existing building that qualifies for a non-water dependent, non-marine related use under 14-314 shall be no less than 500 square feet; and
 - (4) The expansion of the use shall be reviewed by the Planning Board under the Site Plan standards and shall otherwise meet the requirements of the Waterfront Central Zone and this Code.

7. Waterfront Central Zone Policy:

The applicant is requesting to allow non-marine uses on new ground floor and second floor space in the WCZ. The Board will need to find that the proposal is compatible with the current Comprehensive Plan and provisions of the Waterfront Central Zone. When looking at the existing and potentially expanded diner, if the Board considers these uses

compatible with existing and potential marine use of the area, the above described text changes are supportable.

Comprehensive Plan: *Waterfront Alliance Recommendations* and Current Zoning

In April of 1992, the Waterfront Alliance produced a policy document titled "Waterfront Alliance Recommendations to the City of Portland." This report outlines the position that properties with direct water access should be limited to water dependent and marine related uses, but that other portions of the waterfront (upper stories, and properties without water access) can and should accommodate "marine compatible" uses to help support the maintenance of pier infrastructure. As stated in the report's preamble,

"Water-dependent users are the lifeblood of Portland's waterfront and their interests must be protected above all others. We further recognize that diversity is the key to the economic stability of the working waterfront, the proper maintenance of its infrastructure and its long term growth."

The City Council used this document as the policy basis for the current waterfront zoning, as enacted on January 4, 1993. Simultaneously adopting the Council Report as part of the Comprehensive Plan in Council Order 168-93, the 1993 zoning amendments followed the Waterfront Alliance report by putting a priority on the preservation of berthing and working pier deck space for existing and potential marine uses. The Purpose and No Adverse Impact sections of the WCZ text, included below, fully express the intent of the zone and the underlying policy.

Waterfront Central Purpose

The following text is excerpted from the WCZ language. A copy of the full WCZ text is attached to this Report.

Sec. 14-313. Purpose.

The waterfront central zone was created to protect and nurture water-dependent and marine-related support uses so that they may grow and prosper in an environment and area dedicated to this purpose. The following priority of uses is recognized:

- (a) The first priority of this zone is to protect and nurture existing and potential water-dependent uses;*
- (b) The second priority is to encourage other marine and marine-related support uses so long as they do not interfere with water-dependent uses, either directly by displacement or indirectly by placing incompatible demands on the zone's infrastructure;*

- (c) *Other specified uses are encouraged only if they do not interfere with and are not incompatible with first and second priority uses.*

Other specified uses are beneficial to the waterfront economy because they provide the financial return to property owners necessary for the maintenance and improvement of the marine infrastructure. However, water-dependent and marine-related support uses by their nature have activities and operational needs that are unique to this area and are not shared by other commercial and industrial uses in the city. These first and second priority uses and related activities may result in noise, odor, dust, hours of operation, parking and traffic patterns and traffic control needs that are necessary for the convenient and successful conduct of such uses. Other uses may not be compatible with these types of effects. Other specified uses are permitted under certain circumstances in the waterfront central zone, provided that they do not significantly interfere with the activities and operation of water-dependent and marine-related support uses. Such uses must be, and are assumed to be, aware of the impacts associated with marine uses and therefore must accept and be tolerant of them. Other specified uses in the zone shall accommodate to those patterns and needs of the higher priority uses so long as those higher priority uses do not have a substantially adverse effect on public health and safety and the higher priority activities are conducted in accordance with sound practices or practices customary in the trade.

(Ord. No. 168-93, § 2, 1-4-93)

In implementing the goals stated in the purpose statement above, the WCZ establishes the following "no adverse impact on marine uses" standards. These standards establish thresholds for any non-marine use in the zone.

No Adverse Impacts

All uses in the WCZ, even marine related uses (as distinct from *water-dependent* uses), need to adhere to the provisions of the "no adverse impact" clause. The intent of the clause is to provide a framework to evaluate how the priority of uses established in the purpose is applied. Provision (c) below has the greatest application to the subject rezoning.

The complete text of the no-adverse-impact clause is included below. Staff comments are included in *italics*.

Sec. 14-313.5. No adverse impact on marine uses.

No use shall be permitted, approved or established in this zone if it will have an impermissible adverse impact on future marine development opportunities. A proposed development will have an impermissible adverse impact if it will result in any one (1) or more of the following:

- (a) The proposed nonwater-dependent use will displace an existing water-dependent use;

No marine related uses are currently on-site.

- (b) The proposed use will reduce existing commercial vessel berthing space;

No commercial berthing currently exists, and without dredging, the potential is limited by water depth.

- (c) The proposed nonwater-dependent use, structure or activities, including but not limited to access, circulation, parking, dumpsters, exterior storage or loading facilities, and other structures, will unreasonably interfere with the activities and operation of existing water-dependent uses or significantly impede access to vessel berthing or other access to the water by water-dependent uses; or

The access to Hobsons Wharf is adjacent to the diner property and is not impacted by the existing diner or proposed expansion. Any future increase in parking for the diner would be subject to conditional use review and reviewed for adherence to this provision.

- (d) The siting of a proposed nonwater-dependent use will substantially reduce or inhibit existing public access to marine or tidal waters.

There is no public access to the water in this area.

8. Planning Board Recommendation

As stated in the introduction, given the ongoing evaluation of the Waterfront Central Zone, Staff did not provide a specific recommendation on the rezoning to the Planning Board.

The in the course of their deliberations, Planning Board members expressed mixed feelings regarding the propriety of expanding a non-conforming use in the WCZ. Simultaneously, the Board stated a general agreement that the proposed expansion could be designed in a way that meets the requirements of the "no adverse impact" clause and they recognized the role that Becky's Diner has played as part of the waterfront community.

Ultimately, a majority of Board members voted in favor of the recommendation, recognizing that City Council was the appropriate forum for discussion of the project's timing and relationship to the broader WCZ policy discussion. Board members Anton and Silk, in voting against the recommendation, stated discomfort with the concept of expanding non-conforming uses in apparent conflict with the purpose and intent of the zone. All Board members expressed a hope that if the Becky's expansion moves forward with the approval of the Council, that the City work to avoid a situation where the project would be subject to onerous street opening fees caused by the reconstruction of Commercial Street.

Attachments:

- 1.A Proposed text change language
- 1.B. Current WCZ language
1. Application
2. Photo Inventory of Impacted Properties
3. Letter of Support
4. Subject Deed
5. Photos
6. Site Plan
7. Floor Plans, existing and proposed
8. Proposed elevations
9. Aerial photo with notes
10. Piers and Properties in the WCZ

PROPOSED AMENDMENTS TO WATERFRONT CENTRAL ZONE
§§ 14-314, 14-315

Sec. 14-314. Permitted uses.

Subject to a determination that the proposed use meets the standards of section 14-313.5 (no adverse impact on marine uses), the following uses are permitted in the waterfront central zone:

- (e) *Commercial uses in any area of a building existing on January 4, 1993 or having a valid, unexpired site plan on January 4, 1993, and located within thirty-five feet of the southerly edge of Commercial Street between Maine Wharf and the ~~City Fish Pier~~ easterly edge of Berlin Mills Wharf.* Subject to section 14-314(f)1 and 14-315(a), the following uses shall be permitted:
1. Professional, business, and general offices;
 2. Retail and service establishments, including craft and specialty shops. Convenience stores with gas pumps shall not be permitted under this section;
 3. Restaurants, provided that food service and consumption shall be the primary function of the restaurant;
 4. Banking services;
 5. Laundry and dry cleaning services;
 6. Cabinet and carpentry shops and accessory retail sales of products produced on the premises;
 7. Intermodal transportation facilities;
 8. Cold storage facilities;
 9. Museums and art galleries.

Sec. 14-315. Conditional uses.

The following uses shall be permitted as conditional uses in the waterfront central zone, provided that, notwithstanding section 14-471(c), section 14-474(a), or any other provision of this Code, the Planning Board shall be substituted for the board of appeals as the reviewing authority, and further provided that in addition to the provisions of section 14-474(c)(2),

section 14-313.5, and any other conditions specified under the particular use below, they shall also meet the following conditions:

- i. The proposed use shall be compatible with existing and potential marine uses in the vicinity;
- ii. The proposed use shall not impede access to the water by existing or potential marine uses; and
- iii. For conditional uses that propose or require twenty (20) or more parking spaces, the proposed conditional use, when considered in conjunction with past, present and reasonably foreseeable future development, specifically including but not limited to development and uses occurring in this district in structures within thirty-five (35) feet of the southerly edge of Commercial Street, shall meet the standards of section 14-526(a)(1). For purposes of application of this standard only, in evaluating congestion, any private way or access road serving as the primary means of land access to a pier or wharf shall be deemed to be included within the term "street" at the intersection of such private way or access road with Commercial Street.

- (a) Parking: Notwithstanding sections 14-317(g), 14-331, 14-334 and article V of this chapter, no parking shall be allowed in this zone for conditional uses, non marine uses allowed in buildings located within 35 feet of Commercial Street and uses permitted only above the ground floor level, unless the applicant can demonstrate that the number of parking spaces on-site exceeds the number of parking spaces required for marine uses that are required by section 14-314(a). The remainder of parking required for such uses shall be provided off-site and in other zones where parking is a permitted use.
- (c) Expansion of a non-water dependent, non-marine related use permitted under 14-314(e) (Commercial uses in buildings existing on January 4, 1993 or having a valid, unexpired site plan on January 4, 1993 and located within thirty-five feet of the southerly edge of Commercial Street between Maine Wharf and the city fish pier easterly edge of Berlin Mills Wharf) into contiguous and newly created building space of no more than ~~2000~~ 3400 sq. ft., total, shall be allowed only as follows:
 - (1) the use may occupy ~~ground floor area~~ of contiguous and newly created building space in which the non-water dependent, non-marine related use is located within 35 feet of the southerly sideline of Commercial Street; and/or
 - (2) the use may occupy a ground floor area of no more than 1250 square feet beyond 35 feet from the southerly sideline of Commercial Street; and

ATT. 1A .3

- (3) as of September 7, 2000, an existing building that qualifies for a non-water dependent, non-marine related use under 14-314 shall be no less than 500 square feet; and
- (4) The expansion of the use shall be reviewed by the Planning Board under the Site Plan standards and shall otherwise meet the requirements of the Waterfront Central Zone and this Code.

DIVISION 18. WATERFRONT CENTRAL ZONE*

*Editor's note--Ord. No. 168-93, § 2, adopted Jan. 4, 1993, repealed former Divs. 18, 18.5 and 18.7, §§ 14-306--14-320.2, which pertained to waterfront zones, and enacted new provisions as Divs. 18, 18.5 and 18.7 to read as herein set out. Formerly, such provisions derived from Ord. No. 426-83, § 1, adopted Apr. 25, 1983; Ord. No. 427-83, § 1, adopted Apr. 25, 1983; Ord. No. 355-85, § 1, adopted Jan. 7, 1985; Ord. No. 438-86, § 1, adopted Apr. 7, 1986; Ord. No. 189-87, § 3, adopted Feb. 7, 1987; Ord. No. 174-87, 's; 1, 2, adopted Mar. 4, 1987; Ref. of May 5, 1987; Ord. No. 385-87, adopted Apr. 6, 1987; Ord. No. 36-89, §§ 1, 2, adopted June 28, 1989; and Ord. No. 15-92, §§ 22, 23, adopted June 15, 1992.

Sec. 14-313. Purpose.

The waterfront central zone was created to protect and nurture water-dependent and marine-related support uses so that they may grow and prosper in an environment and area dedicated to this purpose. The following priority of uses is recognized:

- (a) The first priority of this zone is to protect and nurture existing and potential water-dependent uses;
- (b) The second priority is to encourage other marine and marine-related support uses so long as they do not interfere with water-dependent uses, either directly by displacement or indirectly by placing incompatible demands on the zone's infrastructure;
- (c) Other specified uses are encouraged only if they do not interfere with and are not incompatible with first and second priority uses.

Other specified uses are beneficial to the waterfront economy because they provide the financial return to property owners necessary for the maintenance and improvement of the marine infrastructure. However, water-dependent and marine-related support uses by their nature have activities and operational needs that are unique to this area and are not shared by other commercial and industrial uses in the city. These first and second priority uses and related activities may result in noise, odor, dust, hours of operation, parking and traffic patterns and traffic control needs that are necessary for the convenient and successful conduct of such uses. Other uses may not be compatible with these types of effects. Other specified uses are permitted under certain circumstances in the waterfront central zone, provided that they do not significantly interfere with the activities and operation of water-dependent and marine-related support uses. Such uses must be, and are assumed to be, aware of the impacts associated with marine uses and therefore must accept and be tolerant of them. Other specified uses in the zone shall accommodate to those patterns and needs of the higher priority uses so long as those higher priority uses do not have a substantially adverse effect on public health and safety and the higher priority activities are conducted in accordance with sound practices or practices customary in the trade.

Sec. 14-313.5. No adverse impact on marine uses.

No use shall be permitted, approved or established in this zone if it will have an impermissible adverse impact on future marine development opportunities. A proposed development will have an impermissible adverse impact if it will result in any one (1) or more of the following:

- (a) The proposed nonwater-dependent use will displace an existing water-dependent use;
- (b) The proposed use will reduce existing commercial vessel berthing space;
- (c) The proposed nonwater-dependent use, structure or activities, including but not limited to access, circulation, parking, dumpsters, exterior storage or loading facilities, and other structures, will unreasonably interfere with the activities and operation of existing water-dependent uses or significantly impede access to vessel berthing or other access to the water by water-dependent uses; or
- (d) The siting of a proposed nonwater-dependent use will substantially reduce or inhibit existing public access to marine or tidal waters.

(Ord. No. 168-93, § 2, 1-4-93)

Sec. 14-314. Permitted uses.

Subject to a determination that the proposed use meets the standards of section 14-313.5 (no adverse impact on marine uses), the following uses are permitted in the waterfront central zone:

- (a) *Marine:*
 - 1. Marine products, wholesaling, distribution and retailing;
 - 2. Marine repair services and machine shops;
 - 3. Tugboat, fireboat, pilot boat and similar services;
 - 4. Harbor and marine supplies and services, chandleries, and ship supply such as fueling and bunkering of vessels;
 - 5. Marine industrial welding and fabricating;
 - 6. Shipbuilding and facilities for construction, maintenance and repair of vessels;

7. Commercial marine transport and excursion services, including ferries, captained charter services, sport fishing and water taxis;
8. Cargo handling facilities, including docking, loading and related storage;
9. Boat repair yards;
10. Boat storage facilities, excluding rack storage facilities;
11. Seafood processing;
12. Seafood packing and packaging;
13. Seafood loading and seafood distribution;
14. Fabrication, storage and repair of fishing equipment;
15. Ice-making services;
16. Facilities for marine construction and salvage;
17. Facilities for marine pollution control, oil spill cleanup, and servicing of marine sanitation devices;
18. Fabrication of marine-related goods;
19. Fishing and commercial vessel berthing;
20. Noncommercial berthing of less than fifty (50) linear feet per pier;
21. Marine office, including but not limited to offices of owners of wharves or their agents, and naval architects, and seafood brokers;
22. Public landings;
23. Marine research, education, and laboratory facilities.

(b) *Commercial uses above the ground floor level in buildings in existence on January 4, 1993:* Subject to sections 14-314(f)1 and 14-315(a), the following uses shall be permitted above the ground floor level, provided that the total floor area of the building used for all uses permitted only above the ground floor area does not exceed fifty (50) percent of the total floor area of the building:

1. Professional, business, and general offices;
2. Business service establishments;

3. Cabinet and carpentry shops and accessory retail sales of only those products that are produced on the premises;
 4. Intermodal transportation facilities;
 5. Cold storage facilities.
- (c) *Industrial uses above the ground floor level of buildings in existence on January 4, 1993:* Subject to sections 14-314(f)1 and 14-315(a), the following uses shall be permitted above the ground floor level, provided that the total floor area of the building used for all uses permitted only above the ground floor area does not exceed fifty (50) percent of the total floor area of the building:
1. Warehousing and wholesaling;
 2. Industrial uses which meet the performance standards of the I-2 zone.
- (d) *Public:* Subject to section 14-314(f)1 and 14-315(a), the following uses shall be permitted:
1. Utility substations, including sewage collection and pumping stations, water pumping stations, transformer stations, telephone electronic equipment enclosures and other similar structures, provided that such structures are located more than one hundred (100) feet from the water;
 2. Landscaped pedestrian parks, plazas and other similar outdoor pedestrian spaces, including without limitation pedestrian bicycle trails;
 3. Municipal office uses located above the ground floor level, provided that the total floor area of the building used for all uses permitted only above the ground floor area does not exceed fifty (50) percent of the total floor area of the building unless approved pursuant to section 14-315. Other municipal uses which need to be located on the ground floor level because of operational necessity may be so located on city-owned property.
 4. Street vendors licensed pursuant to Chapter 19 are a permitted use, but only in the following area of the waterfront central zone: on Commercial Street from the westerly side of the Maine State Pier to the easterly side of the International Marine Terminal.
- (e) *Commercial uses in any area of a building existing on January 4, 1993 or having a valid, unexpired site plan on January 4, 1993, and located within thirty-five feet of the southerly edge of Commercial Street between Maine Wharf and the city fish*

pier: Subject to section 14-314(f)1 and 14-315(a), the following uses shall be permitted:

1. Professional, business, and general offices;
2. Retail and service establishments, including craft and specialty shops. Convenience stores with gas pumps shall not be permitted under this section;
3. Restaurants, provided that food service and consumption shall be the primary function of the restaurant;
4. Banking services;
5. Laundry and dry cleaning services;
6. Cabinet and carpentry shops and accessory retail sales of products produced on the premises;
7. Intermodal transportation facilities;
8. Cold storage facilities;
9. Museums and art galleries.

(f) *Other*: Accessory uses:

1. Notwithstanding sections 14-331, 14-334, 14-404 or any other provision of this Code, parking for uses other than those set forth in section 14-314(a) shall not be considered a permitted accessory use on-site and shall be subject to the provisions of section 14-315(a).
2. Except as provided in subsection a. above, accessory uses customarily incidental and subordinate to the location, function and operation of permitted uses. Food service establishments, newsstands and other similar retail and service support uses shall only be permitted as accessory uses if they are part of and located within the lot lines of a use set forth in section 14-314(a)1, 7, or 22; that such uses do not exceed two thousand (2,000) square feet in total floor area of the building, or twenty-five (25) percent of the total floor area of the building, whichever is less, and that each individual use does not exceed one thousand (1,000) square feet in total floor area of the building; and further provided that such accessory uses provide goods or services that are supportive of the principal use and its clientele.

3. Interior meeting or classroom space accessory to uses permitted in section 14-314(a)(23) (marine research, education, and laboratory facilities) may be rented out for meeting use by marine-related or non-marine-related groups or organizations, or the general public, and such accessory uses shall not be subject to the limitations contained in paragraph 2, but shall only be permitted as accessory uses if the total of all accessory retail and service support uses, including interior meeting or classroom space, does not exceed three thousand (3,000) square feet in total floor area per building, or fifteen (15) percent of the total floor area per building, whichever is less.

(Ord. No. 168-93, § 2, 1-4-93; Ord. No. 131-01/02, § 1, 1-23-02; Ord. No. 309-01/02, § 1, 7-15-02; Ord. No. 38-02/03, § 1, 9-4-02)

Sec. 14-315. Conditional uses.

The following uses shall be permitted as conditional uses in the waterfront central zone, provided that, notwithstanding section 14-471(c), section 14-474(a), or any other provision of this Code, the Planning Board shall be substituted for the board of appeals as the reviewing authority, and further provided that in addition to the provisions of section 14-474(c)(2), section 14-313.5, and any other conditions specified under the particular use below, they shall also meet the following conditions:

- i. The proposed use shall be compatible with existing and potential marine uses in the vicinity;
 - ii. The proposed use shall not impede access to the water by existing or potential marine uses; and
 - iii. For conditional uses that propose or require twenty (20) or more parking spaces, the proposed conditional use, when considered in conjunction with past, present and reasonably foreseeable future development, specifically including but not limited to development and uses occurring in this district in structures within thirty-five (35) feet of the southerly edge of Commercial Street, shall meet the standards of section 14-526(a)(1). For purposes of application of this standard only, in evaluating congestion, any private way or access road serving as the primary means of land access to a pier or wharf shall be deemed to be included within the term "street" at the intersection of such private way or access road with Commercial Street.
- (a) Parking: Notwithstanding sections 14-317(g), 14-331, 14-334 and article V of this chapter, no parking shall be allowed in this zone for conditional uses and uses permitted only above the ground floor level, unless the applicant can demonstrate

that the number of parking spaces on-site exceeds the number of parking spaces required for marine uses that are required by section 14-314(a). The remainder of parking required for such uses shall be provided off-site and in other zones where parking is a permitted use.

(b) Marine:

(1) Noncommercial vessel berthing of fifty (50) linear feet or greater per pier along the edges of piers existing on January 4, 1993, provided that:

a. Such use does not decrease the amount of, nor diminish the quality of, existing on-site berthing space, as measured along the pier, float or wharf edge, which could be used for commercial vessels in its current condition. In assessing the impact on quality of berthing space, the Planning Board shall consider the following: cost, access, maneuverability, depth for various-sized vessels, loading/unloading areas, lease terms, availability of utilities, parking and safety.

(2) Fish by-products processing, provided that:

a. Any fish by-products processing facility has a valid rendering facility license under chapter 12; and

b. The processing of other material wastes or by-products shall not be deemed a lawful accessory use under any other provision of this article.

(3) Boat rack storage facilities, provided that:

Parking shall be provided for one hundred (100) percent of the demand generated by the use, and such parking shall be provided off-site, in another zone permitting such use.

(c) Expansion of a non-water dependent, non-marine related use permitted under 14-314(e) (Commercial uses in buildings existing on January 4, 1993 or having a valid, unexpired site plan on January 4, 1993 and located within thirty-five feet of the southerly edge of Commercial Street between Maine Wharf and the city fish pier.) into contiguous and newly created building space of no more than 2000 sq. ft., total, shall be allowed only as follows:

(1) the use may occupy ground floor area provided the contiguous and newly created building space in which the non-water dependent, non-marine related use is located within 35 feet of the southerly

sideline of Commercial Street; and/or

- (2) the use may occupy a ground floor area of no more than 1250 square feet beyond 35 feet from the southerly sideline of Commercial Street; and
 - (3) as of September 7, 2000, an existing building that qualifies for a non-water dependent, non-marine related use under 14-314 shall be no less than 500 square feet; and
- (4) The expansion of the use shall be reviewed by the Planning Board under the Site Plan standards and shall otherwise meet the requirements of the Waterfront Central Zone and this Code.
- (d) Residential: The "primary" owner of a marine related business may occupy space within the upper story of a building in existence on January 4, 1993, provided the following conditions are met:
 - (1) the residential living space shall not exceed one thousand (1,000) square feet;
 - (2) the occupancy of said space shall be limited to the primary owner of the marine related business. The residential use is not transferable to friends, family or anyone other than the primary business owner. No such residential space shall be leased out by or allowed to be used for occupancy by other than the primary owner of the marine related business;
 - (3) the residential use shall be limited to one unit per wharf;
 - (4) the residential use shall be year round use only, and shall not be used on a seasonal basis; and
 - (5) upon the vacancy in excess of three (3) months of the residential living space by the primary owner of the marine related business, the residential use shall automatically terminate and shall not be continued without new conditional use approval under this subsection.

For purposes of this subsection, "primary owner of the marine related business" shall mean a person who legally owns fifty percent (50%) or more of the marine related business.

(Ord. No. 168-93, § 2, 1-4-93; Substitute Ord. No. 00-42, 8-7-00; Ord. No. 73-01/02, § 1, 10-15-01, Ord. No. 131-01/02, § 2, 1-23-02)

Sec. 14-315.3. Contract or conditional rezoning.

Except as authorized in section 14-314(d), an applicant may only locate a nonmarine use in a structure which was not in existence on January 4, 1993, if a rezoning is approved pursuant to division 1.5 of this article. A conditional or contract rezoning shall only be approved if, after public hearing and opportunity for public comment, the reviewing body finds that the applicant has carried the burden of proof to show that the proposed development meets the standards of section 14-313.5 and all of the following standards:

- (a) Each proposed upper story nonmarine use is a use which would be permitted above the ground floor level in a structure existing on January 4, 1993, pursuant to section 14-314(b), (c) or (d).
- (b) The ground floor of the proposed structure consists entirely of one (1) or more marine uses as set forth in section 14-314.
- (c) The proposed development is consistent with the comprehensive plan and, without the proposed development, the site could not otherwise support an economically viable water-dependent use.
- (d) Any physical or legal impediments which preclude functional access from the site of the proposed development to the water's edge are not the result of action taken by the current owner, the applicant for rezoning, or any prior owner after January 4, 1993.
- (e) The project's public benefits outweigh its potential negative impacts, taking into consideration as public benefits protection of existing water-dependent uses, preservation of future water-dependent use development opportunities, contribution to the development of and/or on-going maintenance of the marine infrastructure for commercial vessels (either on-site or off-site) and visual and physical access to the waterfront for the general public.
- (f) The proposed development responds to any unique physical conditions and development opportunities along the shoreline.
- (g) The proposed development does not significantly restrict air, light, or water views of other structures located in the vicinity, and does not create significant adverse local climatic effects such as increased winds, shadowing, or less efficient traffic, parking or circulation patterns.
- (h) The proposed development is consistent with the Portland Waterfront Public Access Design Guidelines, a copy of which is on file in the department of planning and urban development.
- (i) The proposed rezoning contains adequate provisions and/or conditions to ensure that the water-dependent use is not abandoned after the project is developed.

Sec. 14-315.5. Prohibited uses.

WCZ Current Text ATT.1B. 10

Uses which are not enumerated in either section 14-314 or 14-315 as permitted or conditional uses are prohibited. Those uses that are prohibited shall include, without limitation:

- a. Except as provided in section 14-315, residential uses (not in existence on May 5, 1987).
- b. Hotels, motels or boatels.
- c. Auditoriums, civic centers, convention centers or other meeting facilities.
- d. Drinking establishments.
(Ord. No. 168-93, § 2, 1-4-93; Ord. No. 73-01/02, § 2, 10-15-01)

Sec. 14-316. Dimensional requirements.

In addition to the provisions of article III, division 25, of this Code, lots in the waterfront central zone shall be subject to the following requirements:

- (a) *Minimum lot size:* None.
- (b) *Minimum frontage:* None.
- (c) *Minimum yard dimensions:*

Front setback: None.

Side setback: None.

Rear setback: None

Setback from pier line: Notwithstanding the above requirements, a minimum setback of five (5) feet from the edge of any pier, wharf or bulkhead shall be required for any structure. The setback area may be utilized for activities related to the principal uses carried on in the structure, subject to the provisions of sections 14-313 and 14-314, but shall not be utilized for off-street parking. The edge of any pier, wharf or bulkhead shall include any attached apron(s).

- (d) *Maximum lot coverage:* One hundred (100) percent.
- (e) *Maximum building height:* Thirty-five (35) feet, except that within two hundred (200) feet of the southerly sideline of the Commercial Street right of way, the maximum building height is fifty (50) feet for a building whose primary purpose and use is as a marine research, education, and laboratory facility.

(Ord. No. 168-93, § 2, 1-4-93; Ord No. 309-01/02, § 2, 7-15-02)

Sec. 14-317. Performance standards.

All uses in the waterfront central zone shall comply with the following standards:

- (a) *Outdoor storage of materials:* Outdoor storage of commodities and materials accessory to normal conduct of business, except pilings and/or cranes, shall be permitted to a maximum height of forty-five (45) feet, and such materials shall be entirely contained, including runoff contaminants and residual material, within a designated area within the lot boundaries.
- (b) *Noise:* The level of sound, measured by a sound level meter with frequency weighting network (manufactured according to standards prescribed by the American National Standards Institute, Inc.), inherently and recurrently generated within the waterfront central zone shall not exceed seventy-five (75) decibels on the A scale at the boundaries of any lot, except for sound from construction activities, sound from traffic on public streets, sound from temporary activities such as festivals, and sound created as a result of, or relating to, an emergency, including sound from emergency warning signal devices. In measuring sound levels under this section, sounds with a continuous duration of less than sixty (60) seconds shall be measured by the maximum reading on a sound level meter set to the A weighted scale and the fast meter response (L maxfast). Sounds with a continuous duration of sixty (60) seconds or more shall be measured on the basis of the energy average sound level over a period of sixty (60) seconds (LEQ₁).
- (c) *Vibration:* Vibration inherently and recurrently generated shall be imperceptible without instruments at lot boundaries. This shall not apply to vibration resulting from activities aboard a vessel or from railroad vehicle activities, or from activities on a pile supported pier.
- (d) *Federal and state environmental regulations:* All uses shall comply with federal and state environmental statutes and regulations regarding emissions into the air, except where provisions of this Code are more stringent.
- (e) *Discharges into harbor areas:* No discharge into harbor water areas shall be permitted, unless permitted by the Maine Department of Environmental Protection under a waste discharge license and as approved by the department of parks and public works in accordance with chapter 24, article III of this Code. All private sewage disposal or private wastewater treatment facilities shall comply with the provisions of chapter 24, article II of this Code and federal and state environmental statutes and regulations regarding wastewater discharges.

- (f) *Storage of vehicles:* Storage of any unregistered automotive vehicle on the premises for more than sixty (60) days shall not be permitted.
- (g) *Landfill of docking and berthing areas:* Landfill of docking and berthing areas shall be governed by 38 M.R.S.A. Sections 471 through 478, and permitted only if the landfill does not reduce the amount of linear berthing areas or space, or berthing capacity. If approved, construction shall be undertaken using methods approved by the department of parks and public works and shall be accomplished in accordance with the provisions of division 25 of this article and in a manner so as to ensure that a stable and impermeable wall of acceptable materials will completely contain the fill material and will not permit any fill material to leach into docking areas or navigable waters.
- (h) *Off-street parking:* Except as provided in section 14-315 or as required pursuant to article V (site plan), off-street parking is required at fifty (50) percent of the required number of parking spaces for specified uses as otherwise provided in division 20 of this article.
- (i) *Off-street loading:* Off-street loading is required as provided in division 21 of this article.
- (j) *Shoreland and flood plain management regulations:* Any lot or portion of a lot located in a shoreland zone as identified on the city shoreland zoning map or in a flood hazard zone shall be subject to the requirements of division 26 and/or division 26.5.
- (k) *Lighting:* All lighting on the site shall be shielded such that direct light sources shall not unreasonably interfere with vessels transiting the harbor nor have an unreasonable adverse impact on adjacent residential zones.
- (l) *Signs:* Signs shall be permitted as set forth in division 22 of this article.
- (m) *Storage of pollutants and oily wastes:* On-premises storage of pollutants and oily wastes shall not be permitted for more than forty-five (45) days.
- (n) *Compatibility of nonmarine uses with marine uses:* Nonmarine uses, structures and activities, including but not limited to access, circulation, parking, dumpsters, exterior storage and loading facilities or other structures shall neither unreasonably interfere with the existence or operation of marine uses nor significantly impede access to vessel berthing or other access to the water by existing or potential marine uses as set forth in section 14-314(a). Siting of a use not set forth in section 14-314(a) shall not substantially reduce or inhibit existing public access to marine or tidal waters.

- (o) *Construction of new structures located within thirty-five feet of the southerly edge of Commercial Street:* Construction of new structures located within thirty-five (35) feet of the southerly edge of Commercial Street shall conform to the guidelines set forth in the Downtown Urban Design Guidelines, unless such structures are also located within one hundred (100) feet of the water. Such structures that are also located within one hundred (100) feet of the water shall conform to the extent practicable to the Downtown Urban Design Guidelines.

(Ord. No. 168-93, § 2, 1-4-93)



City of Portland, Maine
Department of Planning and Development
Zone Change Application

Att 1.1

Application ID: 653 Application Date: 09/14/2004 CBL: 042 D004001 Property Location: 390 Commercial St

Applicant Information:

Rand Rebecca B
Name

Business Name

3 Pine Grove Way
Address

Falmouth, ME 04105
City, State and Zip

207-781-4477
Telephone Fax

Applicant's Right, Title or Interest in Subject Property:
Owner

Current Zoning Designation: WREZ

Existing Use of Property:
Marine use/restaurant.

Proposed Use of Property:

The restaurant will continue with its present use. The first floor addition will allow a more functional and code compliant and toilets with a seating increase. The second floor will provide office space, baking space and meeting room.

Property Owner:

Rand Rebecca B
Name

3 Pine Grove Way
Address

Falmouth, ME 04105
City, State and Zip

Telephone Fax

Amendment A

Amendment B

Amendment C

Section 14: _____

Requested: _____

Planning Approval

REVIEW TYPE: Committee Review

RECOMMENDATION DATE: _____ APPROVAL DATE: _____ ENACTMENT DATE: _____

AH 1.2



APPLICATION FOR ZONING AMENDMENT
City of Portland, Maine
Department of Planning and Development
~~Portland Planning Board~~

1. Applicant Information:

Rebecca Rand
Name

Address
3 Pine Grove Way
Falmouth, ME 04105

207-781-4477
Phone

207-773-7070
Fax

* Contact: David Lloyd - Archetype - 772-6022

3. Property Owner: Applicant Other

Name

Rebecca Rand
Address

3 Pine Grove Way
Falmouth, ME 04105

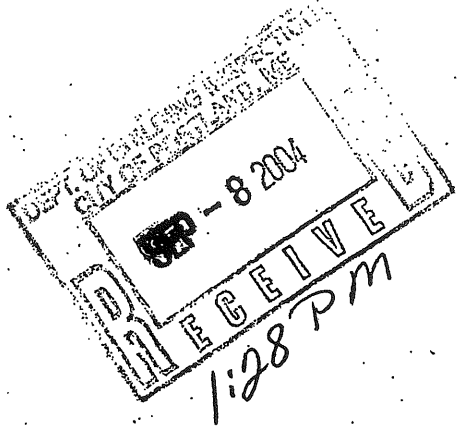
207-781-4477
Phone

207-773-7070
Fax

2. Subject Property:

Becky's Diner
Address
390 Commercial Street
Portland, ME 04101

42-D-4
Assessor's Reference (Chart-Block-Lot)



Right, Title, or Interest: Please identify the status of the applicant's right, title, or interest in the subject property:

Owner

Provide documentary evidence, attached to this application, of applicant's right, title, or interest in the subject property. (For example, a deed, option or contract to purchase or lease the subject property.)

Vicinity Map: Attach a map showing the subject parcel and abutting parcels, labeled as to ownership and/or current use. (Applicant may utilize the City Zoning Map or Parcel Map as a source.)

441.3

6. Existing Use:

Describe the existing use of the subject property:

Marine use/restaurant

7. Current Zoning Designation(s): WCZ Zone

8. Proposed Use of Property: Please describe the proposed use of the subject property. If construction or development is proposed, please describe any changes to the physical condition of the property.

The restaurant will continue with its present use. The first floor addition will allow a more functional and code compliant and toilets with a seating increase. The second floor will provide office space, baking space and meeting room.

9. Sketch Plan: On a separate sheet please provide a sketch plan of the property, showing existing and proposed improvements, including such features as buildings, parking, driveways, walkways, landscape and property boundaries. This may be a professionally drawn plan, or a carefully drawn plan, to scale, by the applicant. (Scale to suit, range from 1"=10' to 1"=100'.)

10. Proposed Zoning: Please check all that apply:

A. Zoning Map Amendment, from _____ to _____

B. _____ Zoning Text Amendment to Section 14-

For Zoning Text Amendment, attach on a separate sheet the exact language being proposed, including existing relevant text, in which language to be deleted is depicted as crossed out (example), and language to be added is depicted with underline (example).

C. Conditional or Contract Zone

A conditional or contract rezoning may be requested by an applicant in cases where limitations, conditions, or special assurances related to the physical development and operation of the property are needed to ensure that the rezoning and subsequent development are consistent with the comprehensive plan and compatible with the surrounding neighborhood. (Please refer to Division 1.5, Sections 14-60 to 62)

AH 1.9

11. **Application Fee:** A fee for must be submitted by check payable to the City of Portland in accordance with Section 14-54 of the Municipal Code (see below). The applicant also agrees to pay all costs of publication (or advertising) ~~of the Workshop and Public Hearing Notices as required for this application. Such amount will be billed to the applicant following the appearance of the advertisement.~~

Zoning Map Amendment \$2,000.00

Zoning Text Amendment \$2,000.00

Contract/Conditional Rezoning
Under 5,000 sq. ft. \$1,000.00
5,000 sq. ft. and over \$3,000.00

Legal Advertisements percent of total bill

Notices .55 cents each
(receipt of application, workshop and public hearing)

NOTE: Legal notices placed in the newspaper are required by State Statue and local ordinance. Applicants are billed directly by the newspaper for these notices.

12. **Signature:** The above information is true and accurate to the best of my knowledge.

9-8-04
Date of Filing


Signature of Applicant

Further Information:

Please contact the Planning Office for further information regarding the rezoning process. Applicants are encouraged to make an appointment to discuss their rezoning requests before filing the application.

Applicants are encouraged to include a letter or narrative to accompany the rezoning application which can provide additional background or context information, and describe the proposed rezoning and reasons for the request in a manner that best suits the situation.

In the event of withdrawal of the zoning amendment application by the applicant in writing prior to the submission of the advertisement copy to the newspaper to announce the public hearing, a refund of two-thirds of the amount of the zone change fee will be made to the applicant by the City of Portland.

Portland Planning Board
Portland, Maine

Effective: July 6, 1998

PROPOSED AMENDMENTS TO WATERFRONT CENTRAL ZONE
§§ 14-314, 14-315

Sec. 14-314. Permitted uses.

Subject to a determination that the proposed use meets the standards of section 14-313.5 (no adverse impact on marine uses), the following uses are permitted in the waterfront central zone:

(e) *Commercial uses in any area of a building existing on January 4, 1993 or having a valid, unexpired site plan on January 4, 1993, and located within thirty-five feet of the southerly edge of Commercial Street between Maine Wharf and the City Fish Pier easterly edge of Berlin Mills Wharf:* Subject to section 14-314(f)1 and 14-315(a), the following uses shall be permitted:

1. Professional, business, and general offices;
2. Retail and service establishments, including craft and specialty shops. Convenience stores with gas pumps shall not be permitted under this section;
3. Restaurants, provided that food service and consumption shall be the primary function of the restaurant;
4. Banking services;
5. Laundry and dry cleaning services;
6. Cabinet and carpentry shops and accessory retail sales of products produced on the premises;
7. Intermodal transportation facilities;
8. Cold storage facilities;
9. Museums and art galleries.

Sec. 14-315. Conditional uses.

The following uses shall be permitted as conditional uses in the waterfront central zone, provided that, notwithstanding section 14-471(c), section 14-474(a), or any other provision of this Code, the Planning Board shall be substituted for the board of appeals as the reviewing authority, and further provided that in addition to the provisions of section 14-474(c)(2), section 14-313.5, and any other conditions specified under the particular use below, they shall also meet the following conditions:

- i. The proposed use shall be compatible with existing and potential marine uses in the vicinity;
- ii. The proposed use shall not impede access to the water by existing or potential marine uses; and
- iii. For conditional uses that propose or require twenty (20) or more parking spaces, the proposed conditional use, when considered in conjunction with past, present and reasonably foreseeable future development, specifically including but not limited to development and uses occurring in this district in structures within thirty-five (35) feet of the southerly edge of Commercial Street, shall meet the standards of section 14-526(a)(1). For purposes of application of this standard only, in evaluating congestion, any private way or access road serving as the primary means of land access to a pier or wharf shall be deemed to be included within the term "street" at the intersection of such private way or access road with Commercial Street.

(a) Parking: Notwithstanding sections 14-317(g), 14-331, 14-334 and article V of this chapter, no parking shall be allowed in this zone for conditional uses, non marine uses allowed in buildings located within 35 feet of Commercial Street and uses permitted only above the ground floor level, unless the applicant can demonstrate that the number of parking spaces on-site exceeds the number of parking spaces required for marine uses that are required by section 14-314(a). The remainder of parking required for such uses shall be provided off-site and in other zones where parking is a permitted use.

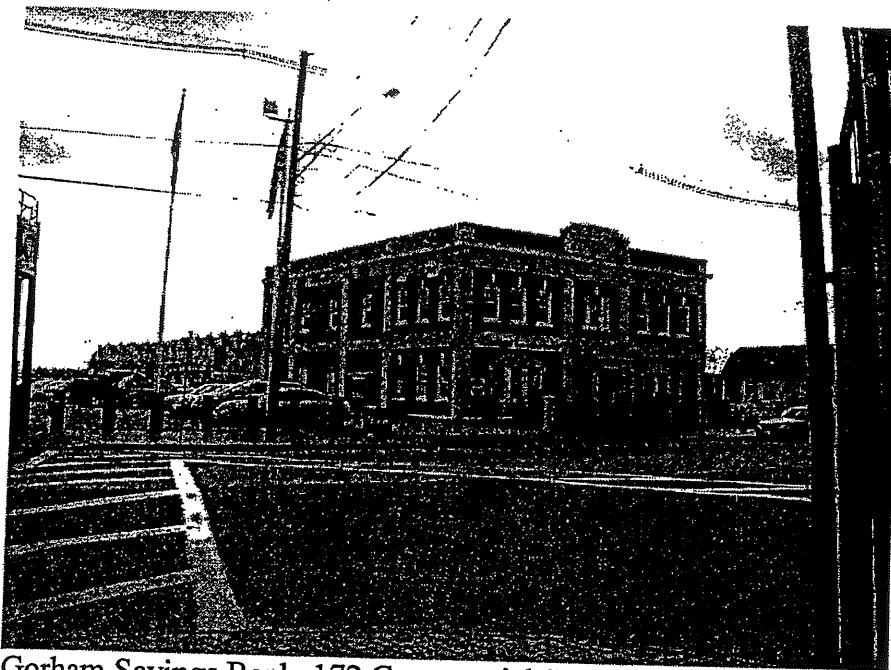
(c) Expansion of a non-water dependent, non-marine related use permitted under 14-314(e) (Commercial uses in buildings existing on January 4, 1993 or having a valid, unexpired site plan on January 4, 1993 and located within thirty-five feet of the southerly edge of Commercial Street between Maine Wharf and the ~~city fish pier~~ easterly edge of Berlin Mills Wharf) into contiguous and newly created building space of no more than ~~2000~~ 3400 sq. ft., total, shall be allowed only as follows:

- (1) the use may occupy ~~ground floor area of~~ contiguous and newly created building space in which the non-water dependent, non-marine related use is located within 35 feet of the southerly sideline of Commercial Street; and/or
- (2) the use may occupy a ground floor area of no more than 1250 square feet beyond 35 feet from the southerly sideline of Commercial Street; and
- (3) as of September 7, 2000, an existing building that qualifies for a non-water dependent, non-marine related use under 14-314 shall be no less than 500 square feet; and
- (4) The expansion of the use shall be reviewed by the Planning Board under the Site Plan standards and shall otherwise meet the requirements of the Waterfront Central Zone and this Code.



RiRa, Flat Bread Building, 68-72 Commercial

- Previously expanded with +/-900 sq ft rear deck
- Potential for second story deck with amendment
- 2500 sq ft non-marine expansion potential (assuming 3400 sq ft allowance), mostly upper floor.



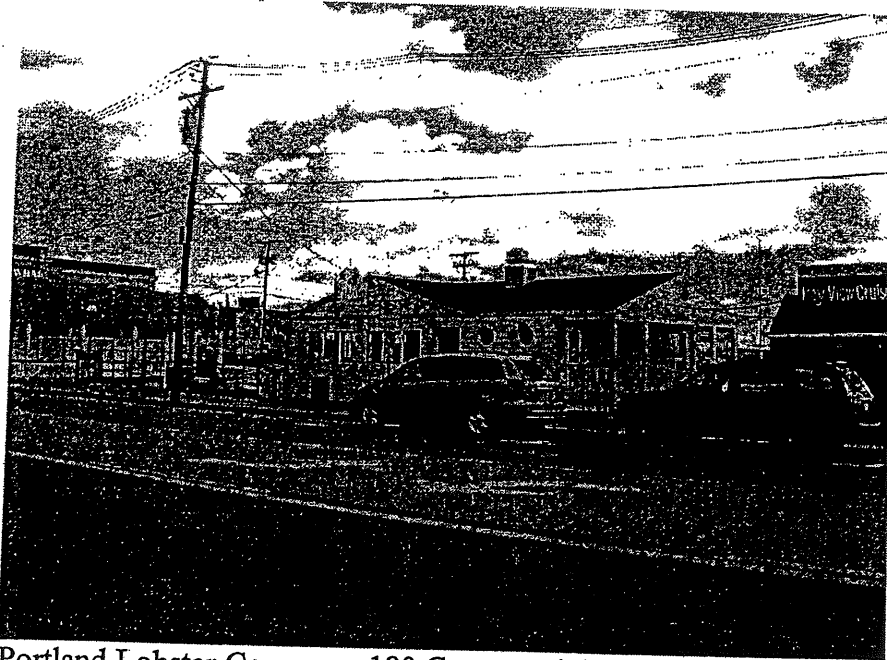
Gorham Savings Bank, 172 Commercial Street

- No previous expansions
- Potential for expansion is not limited by current use or property constraints
- 3400 sq ft non-marine expansion potential



Long Wharf Excursion Kiosk, 174 Commercial Street

- Not eligible due to small size (less than 500 sq ft)



Portland Lobster Company, 180 Commercial Street

- Previously expanded to include 1500 sq ft of exterior seating with maximum use of the 1250 sq ft allowed more that 35 feet from Commercial Street.
- 1900 sq ft non-marine expansion potential, mostly upper floor.



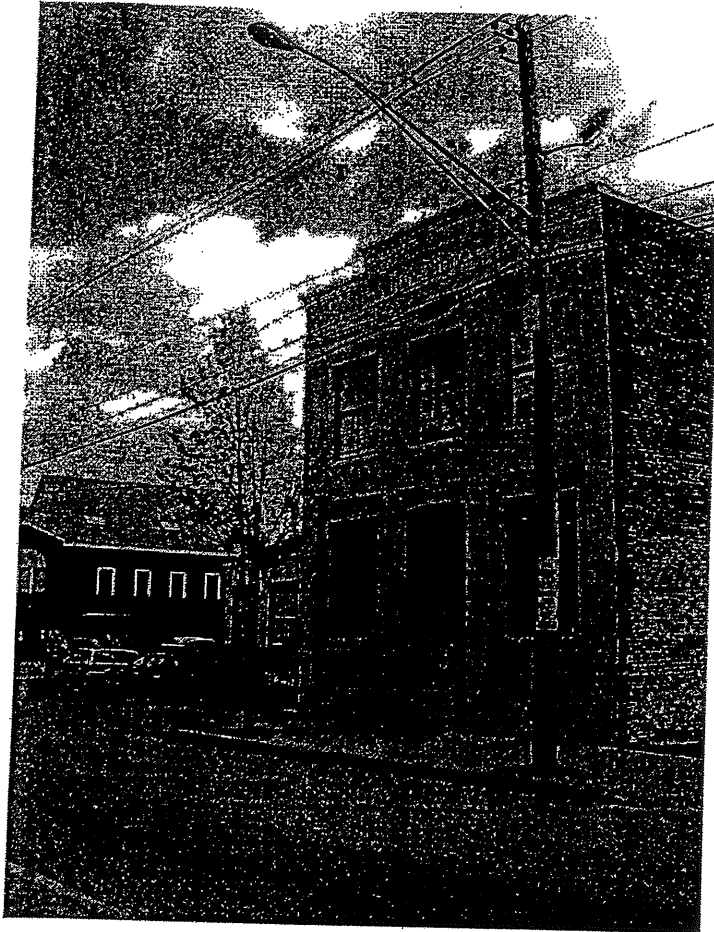
Sapporo Building, 230 Commercial Street

- Previously expanded with 1162 sq ft building addition and 616 sq ft outside seating area
- 1622 sq ft non-marine expansion potential.



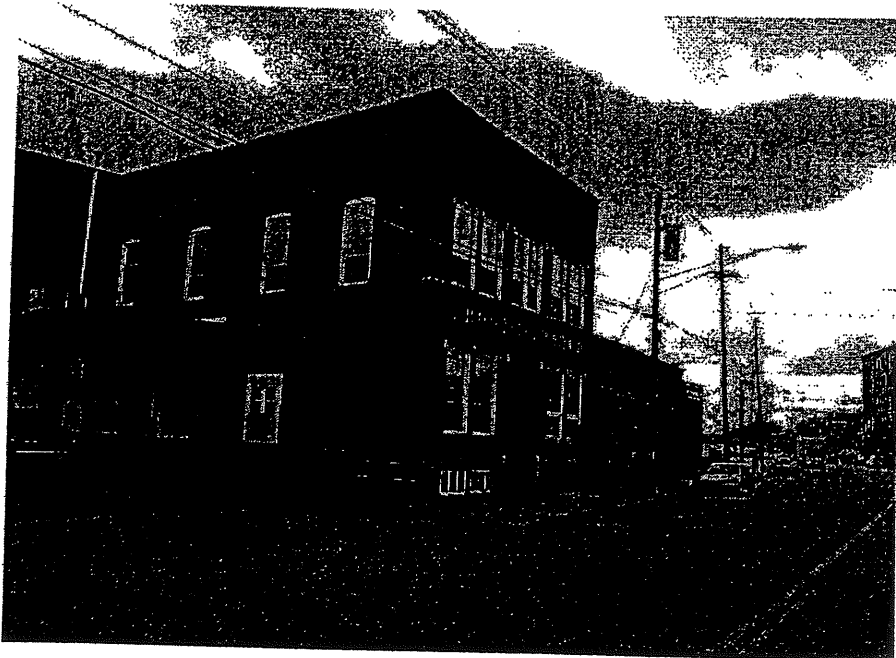
Union Wharf Market, 1 Union Wharf

- Not previously expanded under the "Sapporo Amendment"
- 3400 sq ft non-marine potential expansion capacity



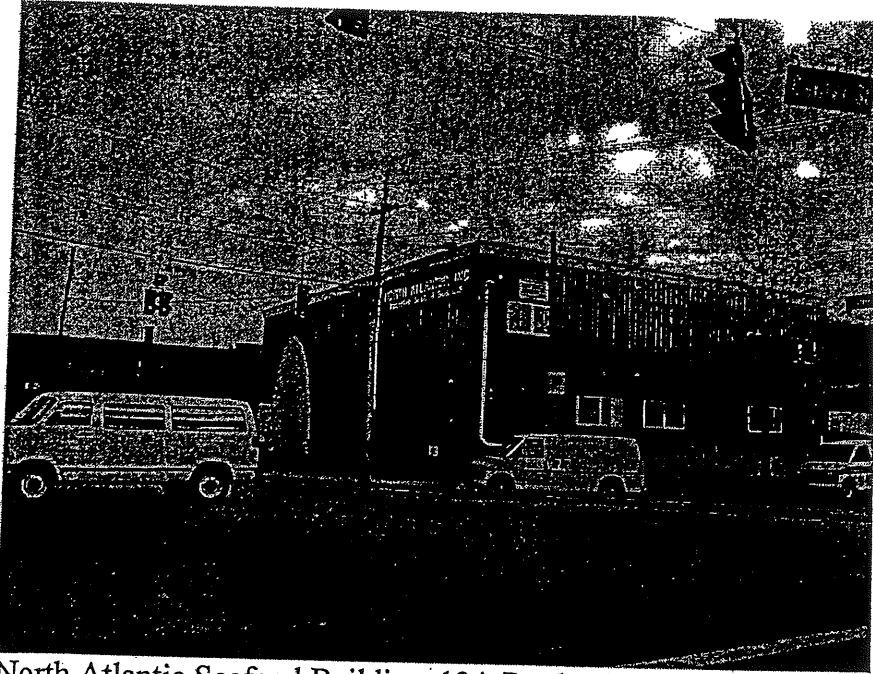
250 Commercial Street

- Not previously expanded
- 3400 sq ft non-marine expansion potential

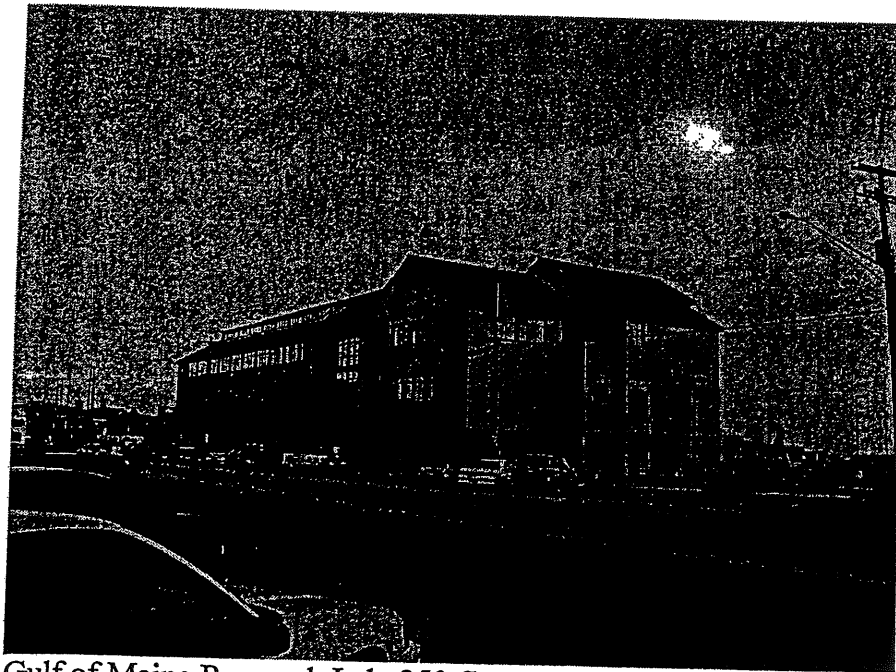


Browne Trading Co.
260 Commercial St

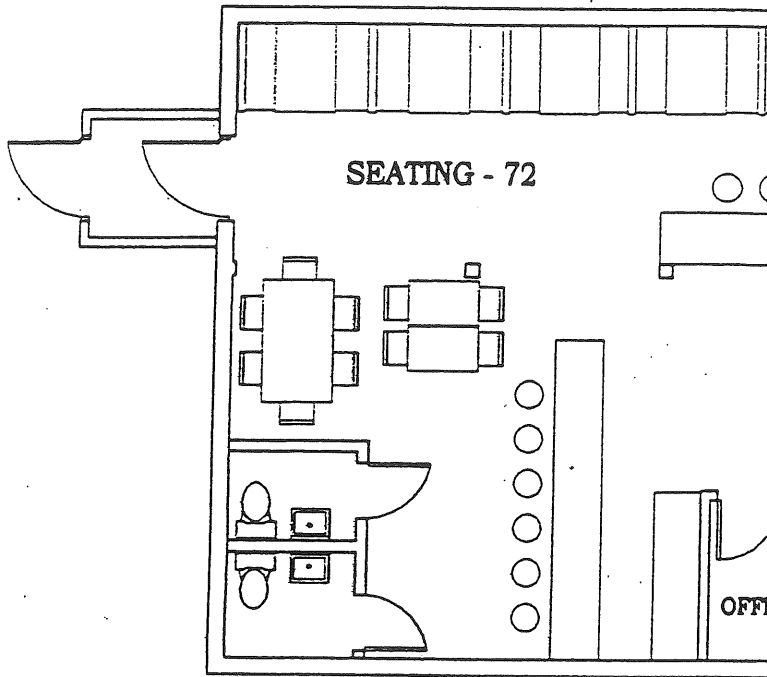
- Currently mostly marine use with storefront retail.
- No previous expansion of non-marine use.
- 3400 sq ft non-marine expansion potential



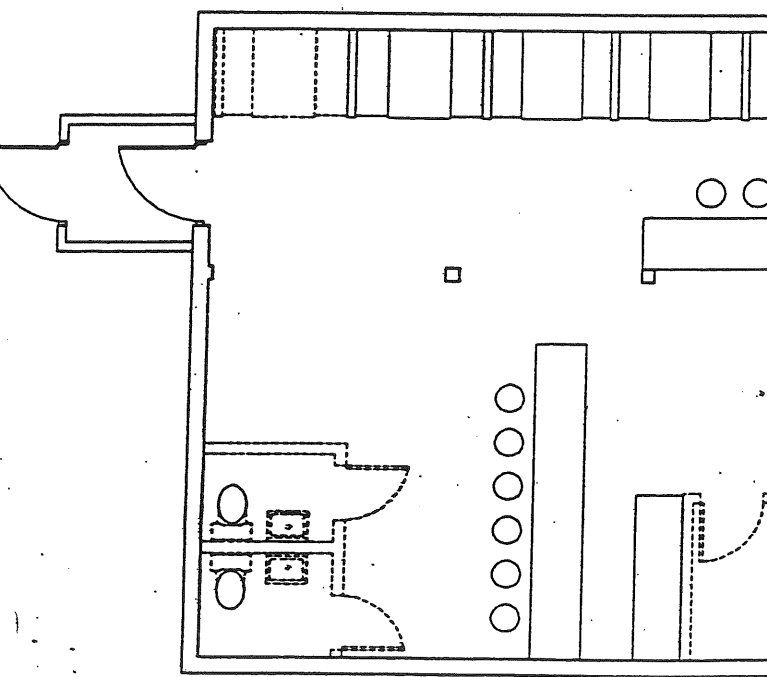
North Atlantic Seafood Building, 12A Portland Fish Pier
Not eligible as a new building



Gulf of Maine Research Lab, 350 Commercial Street
Not eligible as a new building



(A) EXISTING FLOOR PLAN
SCALE: 1/4" = 1'-0"



(B) DEMOLITION PLAN
SCALE: 1/4" = 1'-0"

LEGEND

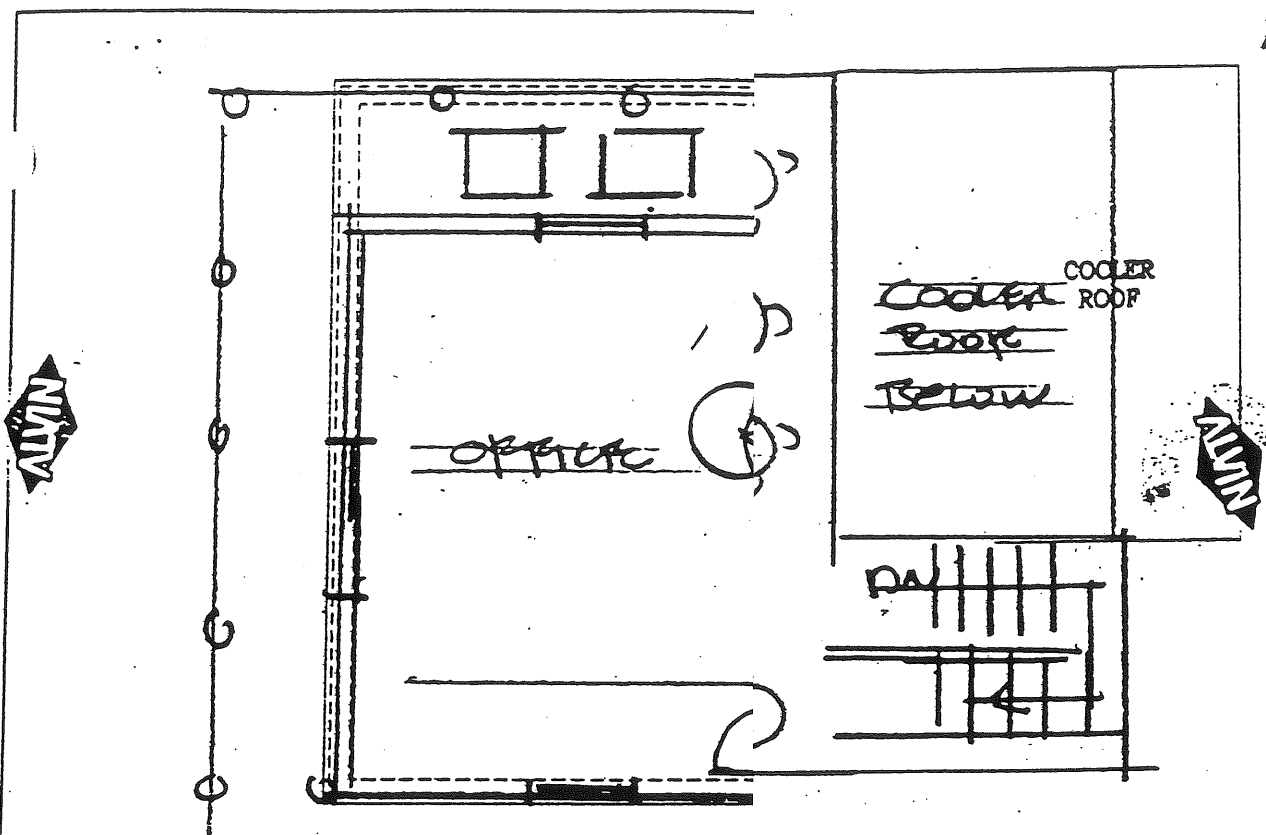
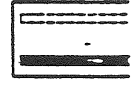
	DEMOLITION
	NEW WALLS

<p>Arch 7.1</p>													
<p>Owner:</p>													
<p>Contractor:</p>													
<p>ARCHETYPE, P.A. ARCHITECTS 48 Union Wharf Portland, Maine 04101 (207) 772-6022 Fax (207) 772-4056</p>													
<p>EXISTING & DEMO PLANS</p>	<table border="1"> <tr> <td>Date</td> <td>Scale</td> </tr> <tr> <td>Drawn By:</td> <td>1/4" = 1'-0"</td> </tr> <tr> <td>Checked By:</td> <td></td> </tr> <tr> <td>Revisions</td> <td></td> </tr> <tr> <td></td> <td></td> </tr> <tr> <td></td> <td></td> </tr> </table>	Date	Scale	Drawn By:	1/4" = 1'-0"	Checked By:		Revisions					
Date	Scale												
Drawn By:	1/4" = 1'-0"												
Checked By:													
Revisions													
<p>BECKY'S DINER COMMERCIAL STREET PORTLAND, MAINE</p>													
<p>A1</p>													

Exhibit - C

AH 7.2

LEGEND



② SECOND FLOOR PLAN
SCALE: 1/8" = 1'-0"

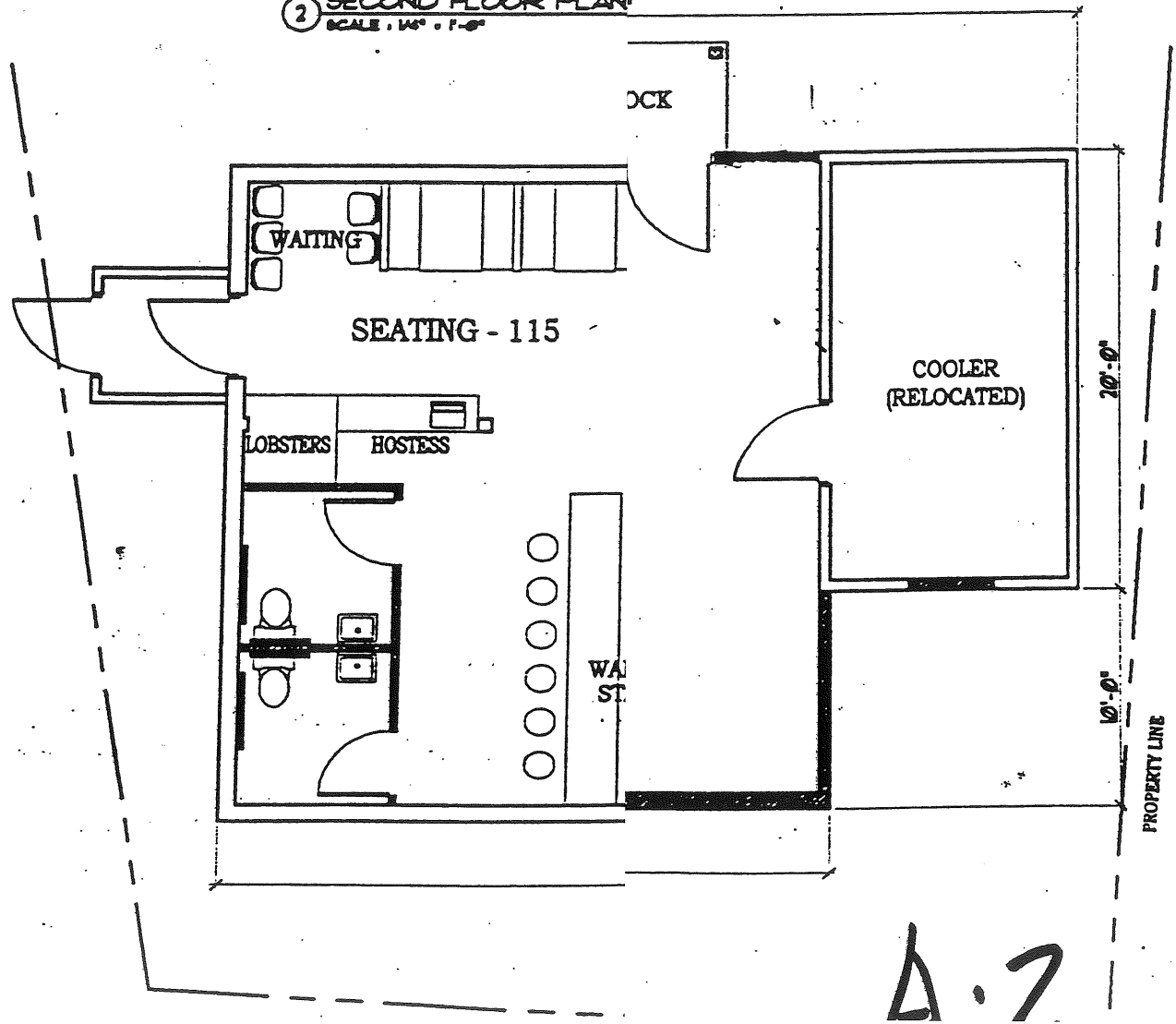
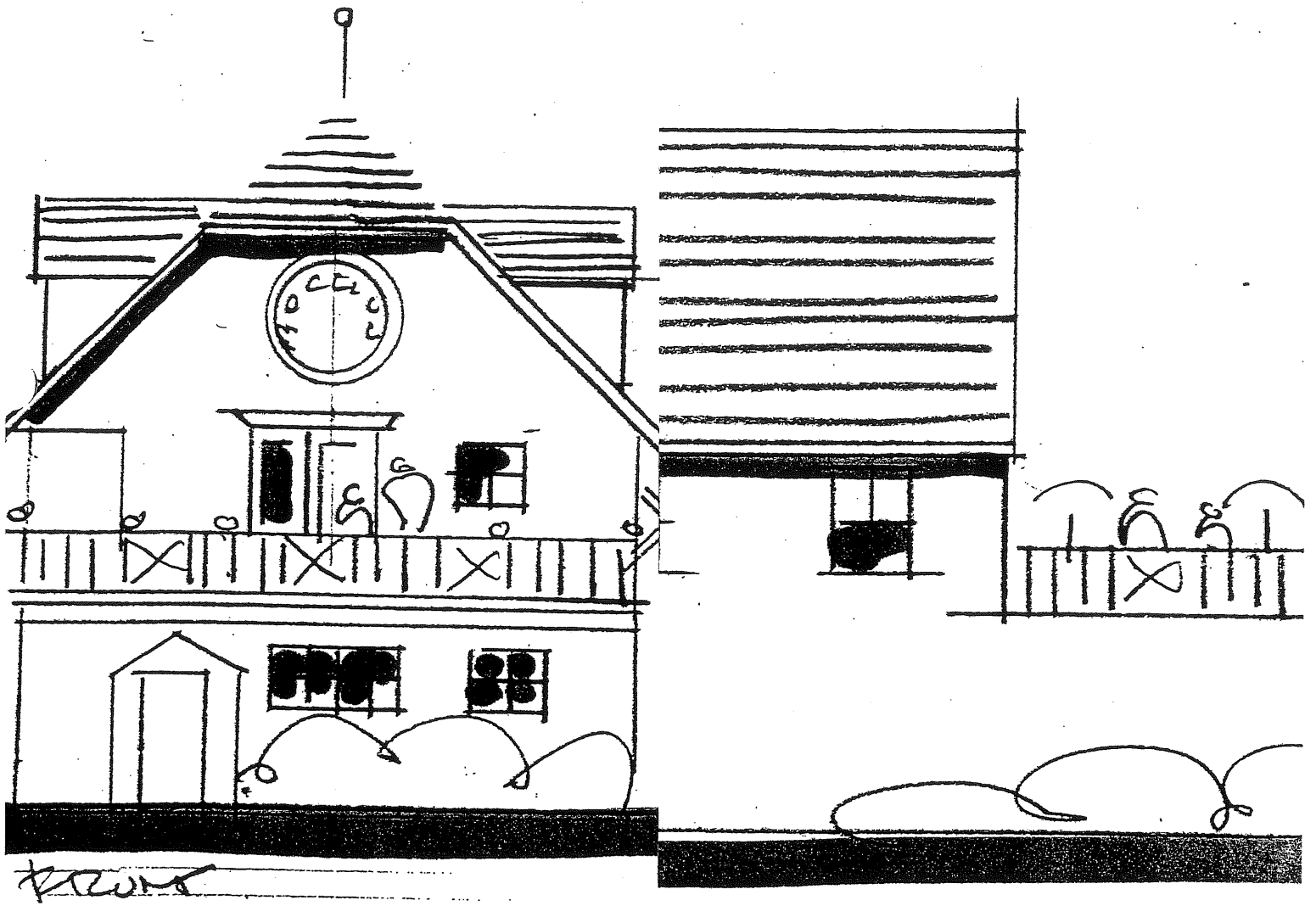


Exhibit-C

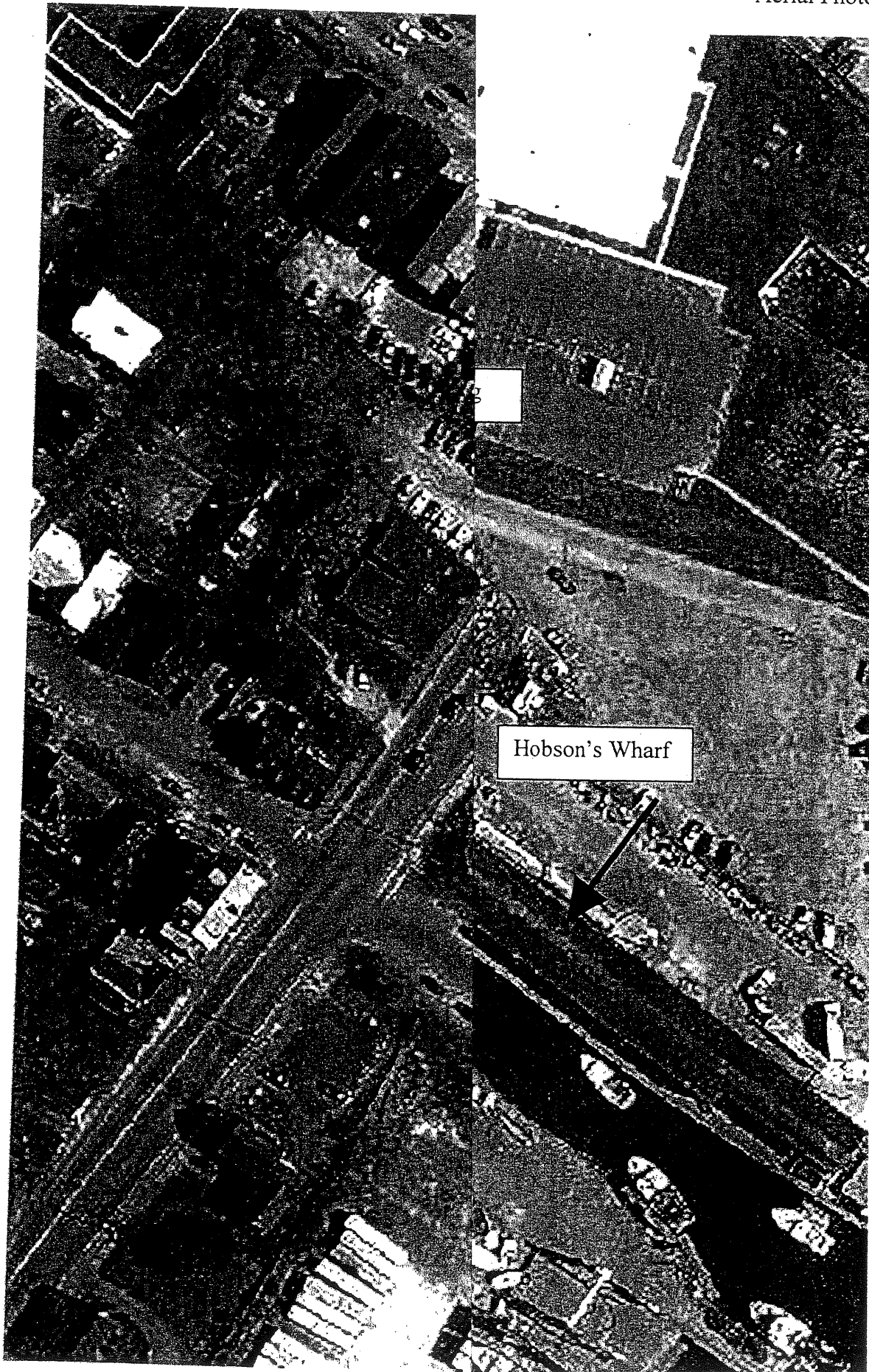
A.7

A# 8



A-3

Exhibit-C



Att. 10



Piers and properties in the Waterfront Central Zone

Prepared by the City of Portland Planning Division from data produced by the GIS Workgroup.
May 2005

