

**CITY OF PORTLAND, MAINE**  
**PLANNING BOARD**

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Carol Morrissette, Chair  
Stuart O'Brien, Vice Chair  
Timothy Dean  
Bill Hall  
Joe Lewis  
David Silk

March 8, 2012

Ted Haytkal  
522 Island Avenue  
Peaks Island, ME 04108  
90-AA-4

Keith Ivers  
512 Island Avenue  
Peaks Island, ME 04108  
90-AA-1,25

Dear Mr. Haytkal and Mr. Ivers:

On February 28, 2012, the Planning Board considered Mr. Haytkal's appeal of the administrative determination made by Alexander Jaegerman, Planning Division Director, on November 30<sup>th</sup>, 2011, which determined that the appeal submitted by Mr. Ted Haytkal on November 28, 2011 specifically appealing the decision of the Zoning Board of Appeals was not within the authority of the Planning Board to consider. The Planning Board voted unanimously (4-0, Hall and Lewis absent) on the following motion:


On the basis of the plans, reports and other information submitted by the applicant, findings and recommendations contained in Planning Board Report # 9-12 relevant to the Portland's Land Use Code and other regulations, and the testimony presented at the Planning Board hearing, the Planning Board found:

The Planning Authority determination made on November 30, 2011 that Mr. Haytkal's appeal was not within the authority of the Planning Board to consider and thus, was not timely, is correct and Mr. Haytkal's appeal is denied.

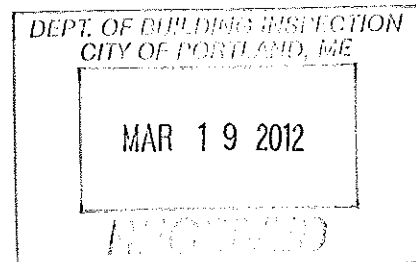
This is a final determination by the Planning Board and may only be appealed to superior court as provided in Portland's Land Use Code, Section 14-29.

If there are any questions, please contact Barbara Barhydt, Development Review Services Manager at (207) 874-8699.

Sincerely,



Carol Morrissette, Chair  
Portland Planning Board



**Attachments:**

**1. Planning Board Report #9-12**

**Electronic Distribution:**

Greg Mitchell, Acting Director of Planning and Urban Development Department  
Alexander Jaegerman, Division Director, Planning Division  
Barbara Barhydt, Development Review Services Manager, Planning Division  
Philip DiPierro, Development Review Coordinator, Planning Division  
Marge Schmuckal, Zoning Administrator, Inspections Division  
Tammy Munson, Plan Reviewer, Inspections Division  
Lannie Dobson, Administration, Inspections Division  
Michael Bobinsky, Director, Public Services  
Katherine Earley, Engineering Services Manager, Public Services  
Bill Clark, Project Engineer, Public Services  
David Margolis-Pinco, Deputy City Engineer, Public Services  
Jane Ward, Administration, Public Services  
Capt. Keith Gautreau, Fire Department  
Jeff Tarling, City Arborist, Public Services  
Tom Errico, P.E., T.Y. Lin Associates  
Dan Goyette, P.E., Woodard & Curran  
Assessor's Office  
Approval Letter File



## PLANNING BOARD REPORT PORTLAND, MAINE

### APPEAL OF PLANNING AUTHORITY DETERMINATION MR. TED HAYKAL, APPELLANT

Submitted to: Portland Planning Board Public Hearing Date: February 28, 2012 Planning Board Report Number:# 9-12	Prepared by: Barbara Barhydt, Development Review Services Manager Prepared Date: February 24, 2012
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#### I. Introduction

The Planning Board will hold a public hearing on Ted Haykal's appeal of the Planning Authority's November 30, 2011 determination that stated Mr. Haykal's appeal of a Zoning Board of Appeals decision, filed on November 28, 2011 is not within the authority of the Planning Board to consider and that an appeal of the Planning Authority site plan approval was not filed within the required time frame. Mr. Haykal submitted an appeal regarding 512 Island Avenue.

Notices were sent to 94 property owners and the interested citizen list. The legal ad appeared on February 20 and 21 in the Portland Press Herald.

#### II. Chronology Of The Review And Appeals For Peaks Island Fuel At 512 Island Avenue

1. Keith Ivers, Owner/President of Peaks Island Fuel, submitted an application for a Level I: Site Alteration site plan review on June 6, 2011 for Peaks Island Fuel. The project description stated:

Utilize commercial property for parking of delivery and service trucks, fill in site and add two driveways.

As part of the application Mr. Ivers included a cover letter, which describes a 4,200 square parking area for seven service vehicles at 512 Island Avenue. The site lies within the Island Residential I-R2 zone and the Island Business I-B zone. A single family home is located within the IR-2 zone, which is Mr. Ivers' residence. The proposed parking area is located within the IB zone.

The application was distributed for review on June 10, 2011.

2. A site visit was conducted by City staff on Friday, July 1, 2011. The staff participants included Erick Giles, Planner, David Margolis-Pineo, Deputy City Engineer, Barbara Barhydt, Development

Review Services Manager, and Alexander Jaegerman, Planning Division Director. Approximately 40 residents met the City staff members at the site.

3. Erick Giles, Planner, prepared a review of the application dated July 15, 2011, which included the review comments from other departments and third party reviews.
4. A revised plan was submitted to the Planning Division for review on August 8, 2011.
5. Marge Schmuckal Zoning Administrator, prepared a written determination regarding whether the use is permitted in the Island Business zone on August 18, 2011. Ms. Schmuckal concluded the following:

Mr. Iver's proposed parking lot is not a truck terminal. This is because his trucks are not warehoused or stored on the site. The trucks are also not filled, fueled and no product will [be] dispensed on the site. Instead, the trucks are just parked on this site for active use as needed in Mr. Ivers' propane and oil delivery business. The other vehicles that will be parked on the site are also for active use with Mr. Ivers' heating repair business. Mr. Ivers' business has been active through four generations and has garnered many clients on Peaks Island.

6. An Interpretation Appeal of Marge Schmuckal's determination was submitted on September 16, 2011. The appeal was submitted by twenty (27) entities, including Mr. Haykal.
7. The Zoning Board of Appeals held a public hearing on the Interpretation Appeal on October 13, 2011. The Zoning Board of Appeals approved the findings on October 20, 2011. The decision is as follows:

The Board finds that the Appellants have NOT satisfactorily met their burden of demonstrating that the August 18, 2011 determination of the City's Zoning Administrator was incorrect or improper, and therefore DENIES the appeal.

8. On October 27, 2011, the Level I: Site Alteration Application for 512 Island Avenue was approved by the Planning Authority with three conditions of approval (Attachment 6). Three waivers were granted as part of the approval that waived the requirement for 2 bicycle spaces, waived the 20 foot driveway width to 12 feet and waived parking lot dimensions to allow a 28 foot aisle and four parking spaces of 12 x22.
9. Ted Haykal submitted his appeal to Alexander Jaegerman, Planning Division Director, on November 28, 2011 (Attachment 1), which stated the following:

I am writing to notify you that I wish to appeal the decision of the Board of Zoning Appeals on October 13, 2011 in the matter of 512 Island Avenue, Peaks Island, Keith Ivers, prospective

buyer, Tax Map 090, Block AA, Lots 001, 002 & 005, I-B Island Business Zone, in which the applicants challenged the Zoning Administrator's determination that the proposed parking of fuel trucks and other trucks is permitted in the I-B zone as "off-street parking."

The basis of the appeal is that the Board committed errors of law in interpreting City of Portland ordinances, that the decisions was not adequately supported in the facts, and was arbitrary and capricious.

10. Alexander Jaegerman responded to Mr. Haykal's appeal on November 30, 2011 (Attachment 2), stating the following:

The Planning Board cannot accept the appeal you submitted on Monday, November 28, 2011 requesting an appeal of the 2011 Determination by the Zoning Board of Appeal (letter included as Attachment 1) dated October 13, 2011. The Planning Board is not authorized to consider an appeal of a Zoning Board of Appeals decision. An appeal of a Zoning Board of Appeals decision must be submitted to the Maine Superior Court under Rule 80B, Sec 30-A M.R.S.A., section 2691 (3)(G). The Planning Board is, however, authorized to consider an appeal within 30 calendar days of an administrative decision for a site plan (Land Use Code, Sec. 14-30 (o) and 14-529). In this case, the Planning Authority approved the Level I: Site Alteration site plan for 512 Island Avenue on October 27, 2011. Consequently, the time to appeal the aforementioned site plan approval was Monday, November 28, 2011.

11. Mr. Haykal questioned this response. A letter was sent to Ted Haykal from Alexander Jaegerman on December 7, 2011, advising him of his rights to appeal the Planning Authority's administrative determination (Attachment 3).

The Planning Board is authorized to consider an appeal of an administrative determination within 30 calendar days of an administrative determination (Land Use Code, Sec. 14-30 (o). Specifically, you have the right to submit a letter requesting to appeal the November 30, 2011 determination by the Planning Authority that stated the appeal you submitted was not within the authority of the Planning Board to consider and thus, the request for an appeal is not timely (Attachment 1). You must submit a letter within the appeal period that outlines the points of the Planning Authority November 30th determination that you are appealing.

12. On December 30, 2011, Mr. Haykal submitted an appeal of Alex Jaegerman's determination along with attachments (Attachment 4). Mr. Haykal submitted a handwritten appeal and additional documents on December 30, 2011. He submitted a typed version of his appeal on January 3<sup>rd</sup>. In these letters he states:

This letter is written as an appeal to your decision of November 30, 2011.

The appeal I submitted on November 28, 2011 was incorrectly stated. The appeal I submitted was not within the authority of the Planning Board to consider.

I hope you will reconsider my appeal to the Planning Board.

The attachments to Mr. Haykal's appeal seek an appeal of the Level I: Site Alteration Site Plan for 512 Island Avenue.

### III. Planning Board Authority To Consider An Appeal Of A Determination

The Planning Board is being asked to determine if there is an error in Alexander Jaegerman's November 30, 2011 letter (Attachment 2) determining that the appeal submitted by Mr. Ted Haykal on November 28, 2011 specifically appealing the decision of the Zoning Board of Appeals was not within the authority of the Planning Board to consider. Mr. Haykal is seeking to correct the statement of the November 28, 2011 appeal from an appeal of the Zoning Board of Appeals decision to an appeal of the site plan approval to the Planning Board, and to rely on the timeliness of the November 28, 2011 appeal letter as meeting the appeal filing requirement for such an appeal.

The City Code specifies that the Planning Board has the authority to:

- (o) To hear, review and decide appeals where it is alleged there is an error in any decision, requirement, or determination made by the planning authority.

City Code, Chapter 14, section 14-30. This section does not grant the Planning Board the authority to hear, review or decide appeals of decisions of the Zoning Board of Appeals.

The City Code makes it clear that Zoning Board of Appeals decisions must be appealed according to Section 14-553:

An appeal from any final decision of the board of appeals may be taken by any aggrieved party to the superior court in accordance with Rule 80B of the Maine Rules of Civil Procedure.

It is also important to note that administrative decisions for a site plan may be appealed to the Planning Board as follows:

- (a) When the planning authority has approved with conditions or denied a site plan, any person aggrieved may appeal the decision to the planning board within thirty (30) calendar days of the date of the written decision of the planning authority. Upon the taking of such an appeal, the application shall be reviewed as a new application.
- (b) When the planning board has finally approved, approved with conditions, or disapproved a site plan, any person aggrieved or the City may appeal the decision to the superior court, pursuant to Rule 80B of the Maine Rules of Civil Procedure within thirty (30) days of the vote on the original decision by the planning board.

In this case, Mr. Haykal did not submit a timely appeal of the Planning Authority's October 27, 2011 decision. Danielle West-Chuhta, Associate Corporation Counsel, has provided a memorandum concerning the appeal, which is included as Attachment 5.

Overall, as a result of the above, Mr. Haykal's appeal should be denied.

#### **IV. Proposed Motion**

On the basis of the plans, reports and other information submitted by the applicant, findings and recommendations contained in Planning Board Report # 9-12 relevant to the Portland's Land Use Code and other regulations, and the testimony presented at the Planning Board hearing, the Planning Board finds:

- A. The Planning Authority determination made on November 30, 2011 that Mr. Haykal's appeal was not within the authority of the Planning Board to consider and thus, was not timely, is correct and Mr. Haykal's appeal is denied.**

**Or**

- B. The Planning Authority determination November 30, 2011 that Mr. Haykal's appeal was not within the authority of the Planning Board to consider and thus, was not a timely appeal of the site plan approval, is incorrect and Mr. Haykal's appeal is granted. Mr. Haykal's appeal of the Planning Authority's approval of the Level I: Site Alteration site plan for 512 Island Avenue shall be scheduled for a public hearing on April 10, 2012.**

#### **Attachments:**

1. Ted Haykal Appeal – November 28, 2011
2. Planning Authority Determination to Ted Haykal– November 30, 2011
3. Planning Authority Letter to Ted Haykal – December 7, 2011
4. Ted Haykal Appeal – December 30, 2011
5. Danielle P. West-Chuhta, Associate Corporation Counsel, February 23, 2012
6. Approval Letter, 512 Island Avenue, dated October 27, 2011