



Planning & Urban Development Department

Jeff Levine, AICP, Director

Ann Machado, Zoning Administrator

TO: Zoning Board of Appeal Chair and Members
FROM: Ann Machado, Zoning Administrator
SUBJECT: 50 Industrial Way – 326-B-008, 009 & 010
DATE: December 30, 2015
RE: Interpretation Appeal

50 Industrial Way is located in the I-M Industrial Zone. § 14-247(a) allows low impact industrial uses which includes breweries. Allagash Brewing Company built the original brewery (12,350 sf) in 2006 under permit #06-1434. In 2010 a 40' x 130' addition to the brewery was added on the right side under permits #10-1138 and #2011-01-247. In 2012 (#2012-09-4996) a 5,900 sf addition was added that included a "retail space" for accessory tasting and sales.

§ 14-247 (Permitted Uses) and § 14-248.1 (Conditional Uses) do not list retail as a use. § 14-247(s) does allow "Incidental accessory uses". Attorney Smith seems to argue that the "accessory tasting room and accessory retail sales of beer, clothing and other items associated with the brewery" approved under permit #2012-09-4996 were approved using this section. The "retail space" for "accessory tasting and sales" were approved under section § 14-249(b). § 14-249 lists the uses that are specifically prohibited in the zone. Sub-section (b) prohibits "retail trade that is not ancillary to a permitted use". The "accessory tasting room and sales" as listed on the certificate of occupancy (Exhibit A) for permit #201248397 (#2012-09-4996) issued on 7/9/13 was approved as "retail trade that is ancillary to a permitted use". Chapter 14 of the City Code does not specifically define the word ancillary. In *A Glossary of Zoning, Development and Planning Terms* published by the American Planning Association in 1999 and edited by Fay Dolnick and Michael Davidson, under the term ancillary use it says "See accessory use". § 14-47 defines accessory use as "Uses which are customarily incidental and subordinate to the location, function and operation of permitted uses". Under this definition, the tasting room and sale of beer in the "retail space" would be ancillary to the permitted use as a brewery. Note that the certificate of occupancy allowed "accessory tasting & sales". It did not specifically list "retail sales of beer, clothing and other items". "Clothing and other items" that advertise the brewery are not directly produced in the space and therefore are not "subordinate to the location, function and operation of the permitted use" as a brewery.

When Allagash Brewing Company applied for a Food Service Establishment without Preparation License from the City Clerk's Office to sell pre-packaged snack food the Zoning office was notified because zoning has to approve the use. Zoning denied the license because just as the sale of clothing and other items are not a direct product of the brewery, neither is providing snacks in the tasting room. Attorney Smith argues that the proposed area for the packaged food is subordinate to the existing tasting room and retail sales. The proposed size of the area is not the point. The sale of pre-packaged snacks is not incidental to the function and operation of the permitted use as a brewery because it is not a direct product of it.



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Attorney Smith also argues that the "availability of food is directly related and beneficial to the existing tasting room accessory use". He goes on to say that Allagash would like to offer food "to temper the potential effects of alcohol during a day of sampling beer". A tasting room traditionally provided free, small samples of beer that was produced on site. In this context, food would not be necessary to "temper the potential effects of alcohol" because only a small amount would be sampled and the customer would not stay there all day drinking samples. Attorney Smith concludes that state law requires that bars "offer food at all times that liquor is for sale". A tasting room is not a bar and is not licensed as such.

Attorney Smith's third argument is that many of the "tasting rooms" in Portland make snacks available and therefore the Zoning office "determination is inconsistent with the reality of commonly accepted industry practices". This is not a valid argument. If other breweries in the I-M zone are selling pre-packaged snacks in their tasting room, they are not in compliance with the permitted uses or with the ancillary uses to a permitted use.

Attorney Smith's final argument is that the "pre-packaged snack service" is allowed under § 14-248, Performance based uses (Exhibit B). Under this section two criteria must be met. Sub-section (a) states: "The proposed development is consistent with the purposes of this zone". § 14-246 outlines the purpose of this zone (Exhibit C). It is to "provide zones in areas of the city in which light and moderate impact industries and transportation-related uses will coexist". The zone is "intended to provide for larger industrial buildings and for the limited or controlled use of areas outside of structures for storage of materials and machinery. ...Often uses may be high-way oriented and transportation related." The sale of pre-packaged food in the "retail space" of the brewery is neither a light or moderate industrial use nor a transportation related use. It does not meet the first standard of this section.

In conclusion, a tasting room and the retail sale of beer are ancillary uses to the permitted use as a brewery. The sale of pre-packaged food is not accessory to the brewing of beer.

Exhibit A.



Certificate of Occupancy

CITY OF PORTLAND, MAINE

Department of Planning and Urban Development
Building Inspections Division



Location: 50 Industrial Way

Issued To: 50 Industrial Way LLC

CBL: 326 B009001

Issued Date: 07/09/2013

This is to certify that the building, premises, or part thereof, at the above location, built-altered-changed as to use under Building Permit No. 201248397 has had a final inspection, has been found to conform substantially to the requirements of the Building Code and the Land Use Code of the City of Portland, and is hereby approved for occupancy or use, limited or otherwise, as indicated below.

PORTION OF BUILDING OR PREMISES
ENTIRE

APPROVED OCCUPANCY
USE GROUP F-2/B/M
TYPE 2B
BREWERY/WAREHOUSE/ACCESSORY
TASTING & SALES
MUBEC '09

LIMITING CONDITIONS: NONE

Approved:

Inspector

Inspection Division Director

Notice: This certificate identifies the legal use of the building or premises, and ought to be transferred from owner to owner upon the sale of the property.

Exhibit B

City of Portland
Code of Ordinances
Sec. 14-247

Land Use
Chapter 14
Rev. 9-15-2014

Sec. 14-248. Performance based uses.

Uses not expressly permitted as provided in section 14-247 or expressly prohibited in section 14-249 may be permitted if they meet the following conditions and standards:

(a) The proposed development is consistent with the purposes of this zone.

(b) The proposed development is designed and operated so that it will prevent undue adverse environmental impacts, substantial diminution of the value or utility of neighboring structures, or significant hazards to the health or safety of neighboring residents by controlling noise levels, emissions, traffic, lighting, odor, and any other potential negative impacts of the proposal.

(Ord. No. 164-97, § 7, 1-6-97)

Sec. 14-248.1. Conditional uses.

The following use shall be permitted only upon the issuance of a conditional use permit, subject to the provisions of section 14-474 (conditional uses), and any special provisions, standards or requirements specified below:

(a) Temporary wind anemometer towers, as defined in Sec 14-47, are permitted provided the following standards are met in addition to Sec 14-430:

1. Towers may be installed for the purpose of wind data collection for no more than two (2) years after the issuance of a Certificate of Occupancy for the tower. At the conclusion of the aforementioned two (2) years, the tower must be dismantled and removed from the site within sixty (60) days; and
2. Towers shall be constructed according to plans and specifications stamped by a licensed professional engineer, which shall be provided to the Board of Appeals with the application; and
3. Towers shall be set back from habitable buildings by a distance equal to 1.1 times the tower height; and

Exhibit C

City of Portland
Code of Ordinances
Sec. 14-236

Land Use
Chapter 14
Rev. 1-6-1997

(i) *Radiation:* Radiation at a site shall comply with all applicable state and federal regulations.

(j) *Discharge into sewers:* No discharge shall be permitted at any point into any private sewage disposal system, or stream, or into the ground of any materials in such a way or of such nature or temperature as to contaminate any water supply, or otherwise cause the emission of dangerous or objectionable elements, except in accordance with standards approved by the health authority or by the public works authority.

(k) *Lighting:* All lighting shall be designed and installed with cut-off fixtures to direct illumination onto the site and to prevent illumination from such fixtures on neighboring properties.

(Ord. No. 164-97, § 6, 1-6-97)

Sec. 14-237. thru 14-245. Reserved.

DIVISION 14. I-M, I-Ma AND I-Mb INDUSTRIAL ZONES*

*Editor's note—Ord. No. 164-97, § 7, passed Jan. 6, 1997, repealed div. 14, §§ 14-246-14-251 of this article and enacted new provisions as herein set out. Formerly, such provisions pertained to the I-2 and I-2b industrial zones and derived from §§ 602.12.A-602.12.F of the 1968 Code as amended by Ord. No. 499-74, § 5, adopted Aug. 19, 1974; Ord. No. 334-76, §§ 2, 3, adopted Jul. 7, 1976; Ord. No. 234-88, adopted Feb. 1, 1988; Ord. No. 330-90, § 2, adopted May 7, 1990; Ord. No. 15-92, § 18, adopted Jun. 15, 1992; Ord. No. 193A-93, § 2, adopted Feb. 17, 1993; and Ord. No. 154-96, § 15, 12-16-96.

Sec. 14-246. Purpose.

The moderate impact industrial zones are intended to provide zones in areas of the city in which light and moderate impact industries and transportation-related uses will coexist.

The moderate impact industrial (I-M and I-Ma) zones are located on arterials or collectors. The I-Mb zones are similarly located on the peninsula. These locations provide for direct access onto arterials, thereby protecting residential neighborhoods from drive-through traffic.

The I-M, I-Ma and I-Mb industrial zones are intended to

provide for larger industrial buildings and for the limited or controlled use of areas outside of structures for storage of materials and machinery. These facilities often require large volumes of imported materials and products which result in large volumes of shipping and receiving. Often uses may be highway-oriented and transportation-related, thus relying on citywide and regional transportation infrastructure.

Industrial uses in the moderate impact industrial zones may require separation from higher impact uses, which should be directed to the high impact industrial zone.
(Ord. No. 164-97, § 7, 1-6-97)

Sec. 14-247. Permitted uses.

The following uses are permitted whether provided by private or public entities in the I-M moderate impact industrial zone, the I-Ma and the I-Mb zone:

- (a) Low impact industrial uses, including but not limited to bakeries, breweries, bottling, printing and publishing, pharmaceuticals, machine shops, musical instruments, precision instruments, watchmakers, toys and sporting goods, wood products, jewelry, assembly of electrical components, tool and die shops and the packaging of food.
- (b) Research and development and back office uses.
- (c) Building contractors and construction and engineering services.
- (d) Wholesale trade.
- (e) Warehousing and distribution facilities, including outdoor storage.
- (f) Intermodal transportation facilities and transportation terminals.
- (g) Repair services, including all types of automotive repair services.
- (h) Indoor amusement or recreational centers.
- (i) Plant and tree nurseries, including associated recycling activities.