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November 24, 2015

Ann Machado
Inspections Division,
Planning and Urban Development
City of Portland
389 Congress St.
Portland ME 04101

RECEIVED

DEC - 7 2015

Dept. of Building Inspections
City of Portland Maine

(1035)

Re: 1035 Ocean Avenue (415-B-003), I-M Zone; Request for Zoning Determination

Dear Ann:

Linda Kate Lobster, Inc. (Linda Kate) has asked me to write for a determination of whether it may operate, at 1035 Ocean Avenue, a retail outlet selling lobster, lobster meat, and prepared lobster products.

This parcel is subject to the attached 5/23/2014 determination letter from your department, and to Permit 2015-01217, the latter permitting a build out for retail space.

retail spot - ancillary lobster business - no inspection to date.

Presently there is a wholesale lobster operation on the site. The owner plans to add a catering kitchen. The existing and planned operations are permitted under 143-247(m), "Food and seafood processing for human consumption." We take the position that the retail outlet would be ancillary to the existing lobster wholesale operation and ancillary to the planned catering kitchen.

*14-247
Commercial
Kitchen -
not proposed
for center
on premises.*

The proposed outlet would be located within the existing structure. For both operations, there would be a simple unlit sign by the road, compliant with the ordinance. There is ample room off the street for cars to pull off safely and to reenter the road. The sightlines are good. The speed limit is 35 mph. The applicant believes that it would see a maximum of about a dozen cars in an hour. Parking for up to 20 cars is available. There would be no odor, minimal noise, negligible emissions from the cars pulling in, and no other negative impacts.

1. Lobster. Linda Kate harvests lobster with its own boats, and buys live lobster. It keeps the lobsters in indoor tanks located at 1035 Ocean Avenue. From 1035 Ocean Avenue Linda Kate ships live lobster to various markets, generally out of state. This

*permitted
etc.
wholesale
lobster
processing*

summer it plans to handle 10,000 – 20,000 pounds of lobster per week, of which it will catch in the neighborhood of 1,000 to 3,000 pounds.

Only stronger, harder lobsters are suitable for shipping. Weaker lobsters, and lobsters which have recently shed, tend to die in transit and are unsuitable for shipping. The problem is worse in the late spring and summer, because in that period shedders comprise a much bigger fraction of the catch than in the cooler months, but it exists throughout the year.

Linda Kate carefully picks through its lobsters prior to putting together a shipment, culling lobsters which are soft shelled or which appear weak. When it puts together a shipment Linda Kate rejects as unshippable as much as 25% to 50% of the lobsters in its tanks.

The unshippable lobsters remain in demand for local consumption. Linda Kate needs an outlet for these lobsters. For this reason it proposes to operate a retail outlet, with no on-site consumption of product.

At present Linda Kate cooks and picks unshippable lobster on site for the wholesale trade. However, the profit margin on wholesale lobster meat is less than half the margin on live lobster sold at retail. In short, selling lobsters retail allows the economical liquidation of lobsters that cannot be shipped, and is thus ancillary to the permitted wholesale lobster operation.

2. Commercial Kitchen. Linda Kate plans to open a commercial kitchen which will support a catering business. The primary items sold will be lobster salad, lobster bisque, lobster rolls and other lobster products. There will be no on-site consumption of product.

There are two aspects to the proposed retail operations, both ancillary to the catering kitchen. First, the catering operation will produce prepared foods, such as party platters of cooked lobsters, lobster salad, lobster rolls etc. Customers will enter the building to pay for and pick up their orders, at a retail counter.

In addition, any catering operation produces an excess of food for a given catered event, to ensure enough for an event which has attendees in excess of the estimated number. Typically the caterer operates a retail establishment to serve as an outlet for excess product which would otherwise end up in the garbage. Black Tie Catering of South Portland operates Union Portland, a restaurant on Exchange Street. A manager of Black Tie Catering told me “when we have a function, the uneaten food often ends up as a special at Union.” The caterer Aurora Provisions operates a restaurant/bakery on Pine Street, with a similar function. There are countless other examples. For a caterer, a retail outlet allows the economical liquidation of the inevitable excess product and increases the profitability of the enterprise – it can be the difference between a business which hardly breaks even and one which is profitable and able to employ more people. The ability of the applicant to sell excess product in this manner is absolutely ancillary to the catering operation.

in
retail
outlet

My client and I are happy to meet with you, to respond to any questions you may have. Thanks very much.

Very truly yours,

Nicholas H. Walsh

NHW/ss

Enclosure

cc: Linda Kate Lobster, Inc.

Jeff Levine, AICP, Director
Marge Schmuckal, Zoning Administrator
May 23, 2014

Nicholas H. Walsh
Attorney At Law
120 Exchange Street, suite 202
Portland, Maine 04101

RE: 1035 Ocean Avenue – 415-B-003 – (the "Property") – I-M Zone

Dear Attorney Walsh,

I am in receipt of your request for a determination letter concerning the Property and the request to allow a temporary 8' x 20' exterior stand for the retail sale of lobster. The Property is located within the I-M, Moderate Industrial Zone. It is noted that there is an issued permit on record #2013-01157 for lobster processing and wholesaling as allowed under 14-247(m) and (d). If the work is complete, the final stage of this permit, a certificate of occupancy, should be requested and the permit finalized.

Your first argument regards section 14-248, Performance Based Uses. It is my reading of the Land Use Ordinance that 14-247, 14-248 and 14-249 are concerning *principal* uses, as to whether they are allowed by right, allowed by performance base criteria or prohibited. The selling of lobsters or retail in the I-M is specifically listed as a prohibited principal use. Therefore, I do not agree with your argument that the temporary lobster stand is allowed under 14-248 as a principal use.

Section 14-407(a), Temporary Stands, offers me other guidance concerning your proposed temporary lobster retail stand. The section reads: "No premises shall be used for business purposes consisting of temporary stands, booths, platforms, or vehicles intended for the sale of merchandise or other mercantile purposes, if any part of such stand, booth, platform or vehicle is proposed to be located nearer than one hundred twenty-five (125) feet to any residence zone, except that stands for the sale of agricultural products shall be permitted as specified in division 2 of this article." The City's Zoning map shows that the R-3 residential zone line falls midway of Ocean Avenue. Using your sketch and the City's GIS maps, the proposed temporary stand is well within the one-hundred twenty-five (125) feet of a residential zone. Therefore, the temporary lobster retail stand would be in violation of 14-407(a) and is prohibited by Ordinance.

Although you have not asked specifically in your request, I will offer that since the use of lobster processing and wholesaling is established as a legal use on the property, I would entertain the retail trade of lobsters as an ancillary use [as allowed under 14-249(b)] *within* the current building. I would want assurances, with a permit, that the retail trade of lobster within the building is actually ancillary. Floor plans showing how and where the retail trade would be located would be essential to my review of the ancillary use.

Jeff Levine, AICP, Director

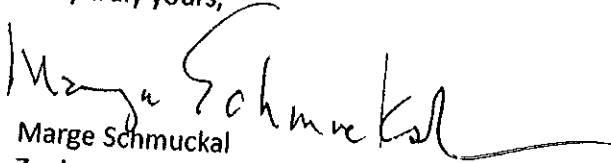
Marge Schmuckal, Zoning Administrator

PG 2.

In conclusion, I have determined that the 8' x 20' temporary lobster retail stand as proposed is not allowed and would be in violation of the Land Use Zoning Ordinance.

You have the right to appeal my decision concerning this matter. If you wish to exercise your right to appeal, you have 30 days from the date of this letter in which to appeal. If you should fail to do so, my decision is binding and not subject to appeal. Please contact this office for the necessary paperwork that is required to file an appeal. If you have any questions concerning this matter, please do not hesitate to contact me at (207) 874-8695.

Very truly yours,



Marge Schmuckal
Zoning Administrator
City of Portland, Maine

CITY OF PORTLAND
DEPARTMENT OF PLANNING & URBAN DEVELOPMENT

389 Congress Street
Portland, Maine 04101

INVOICE OF FEES

Application No: 0000-2558	Applicant: NAPPI NICHOLAS P & BRENT N
Project Name: 1025 OCEAN AVE	Location: 1025 OCEAN AVE
CBL: 415 B003001	Application Type: Determination Letter
Invoice Date: 12/07/2015	

Previous Balance	-	Payment Received	+	Current Fees	-	Current Payment	=	Total Due		
\$0.00		\$0.00		\$150.00		\$150.00		\$0.00		
										Payment Due Date On Receipt

Previous Balance

\$0.00

Fee Description	Qty	Fee/Deposit Charge
Zoning Determinations	1	\$150.00
		\$150.00
Total Current Fees:	+	\$150.00
Total Current Payments:	-	\$150.00
Amount Due Now:		\$0.00

CBL 415 B003001
Bill To: NAPPI NICHOLAS P & BRENT N NAPPI JTS
1035 OCEAN AVE
PORTLAND, ME 04103

Application No: 0000-2558
Invoice Date: 12/07/2015
Invoice No: 51749
Total Amt Due: \$0.00
Payment Amount: \$150.00

Make checks payable to the *City of Portland*, ATTN: Inspections, 3rd Floor, 389 Congress Street, Portland, ME 04101.
Check the status of your permit or schedule an inspection on-line at <http://www.portlandmaine.gov/792/Permit-Status>

[Click Here to Pay On Line](#)