

May 23, 2017

Via Email: manager@barharbormaine.gov

Cornell Knight, Town Manager

Town of Bar Harbor

93 Cottage Street

Bar Harbor, ME 04609

Re: Proposed Land Use Ordinance Amendments #12 and #13

Dear Cornell:

I have reviewed Bar Harbor's existing ordinance, in particular its Shoreland Zoning Provisions found at 125-68; the two proposed amendments to the ordinance and the recent history involving the terms upon which the State of Maine is prepared to transfer the ferry terminal property which is located in the Shoreland District to the Town of Bar Harbor.

In my review I have attempted to determine whether the two amendments would coexist and allow for development of a facility like the one envisioned by the drafters of Amendment #12. In other words, would Amendment #13 essentially trump the intentions of the drafters of Amendment #12, if both Amendments were to be approved by the voters.

As you know, the State of Maine and the Town of Bar Harbor have recently entered into an Option Agreement which contemplates that the Town of Bar Harbor will purchase the land, together with buildings and improvements thereon commonly known as the Bar Harbor Ferry Terminal located at 121 Eden Street. The State of Maine has conditioned this option upon an affirmative vote against what it refers to as "the cruise ship moratorium referendum commonly referred to as the Citizens Petition Land Use Ordinance", i.e. Amendment #13. As I understand it this condition is consistent with the State's position dating back at least to March 15, 2016 when the Executive Director of the Maine Port Authority sent a letter to the town explaining that use of the property as a cruise ship berthing port was not negotiable. Specifically, the letter reads:

"As you know, the Department of Transportation and the Maine Port Authority have long viewed the terminal as a logical location for not only the resumption of the Ferry Terminal Service in Bar Harbor, but also the appropriate facility to berth cruise ships visiting Bar Harbor."

It is my understanding that, with the State's unambiguous position in mind, and with an intention of serving the cruise ship industry, the Town Council instructed the Planning Board to review and recommend an amendment to the shoreland zoning provisions of the Land Use Ordinance which would allow for the development of a passenger terminal and berthing facility for cruise ships. The Planning Board's review eventually led to the proposal known as Amendment #12

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which will be voted on by the citizens of Bar Harbor in June. Under Maine's Municipal Guide to Shoreland Zoning, Chapter 1000, a municipality may create a Shoreland District, in this instance, the proposed Shoreland Maritime Activities District, on a single parcel of land to facilitate uses and structures necessary for a deep water port. The proposal to create the passenger terminal at this particular location is consistent with Chapter 1000 and has been vetted by the Maine Department of Environmental Protection which has indicated that it would be willing to approve the amendment if passed by the voters in June.

I have purposely noted the facts in the preceding paragraph because I believe they equate to legislative history, so to speak, which would explain the rationale for the passage of Amendment #12. Now, in the event that both Amendment #12 and Amendment #13 should gain voter approval, it will, in my opinion, create a conflict between the unfettered use or development of a passenger terminal in the Shoreland Maritime Activities District by imposing arbitrary limits on the scope of that development which are counter to the objectives of the Shoreland Maritime Activities District and development of a cruise ship passenger terminal facility and deep water port. While one may argue that the two amendments can co-exist, despite the arbitrary limitation on the length of cruise ships that may berth at the facility under Amendment #13, imposing the length limit, requires that we ignore the legislative history that supports Amendment #12.

There is also an internal inconsistency in Amendment #13's proposed revision to Shoreland Zoning standards contained in the Land Use Ordinance at Section 125-68B(6)(d). The section presently provides that "the facility shall be no larger in dimension than necessary to carry on the activity," This would suggest that with the passage of Amendment #12, a passenger terminal for the cruise ship operations would be "the activity" to be carried on at 121 Eden Street. Yet, Amendment #13 imposes a 300 foot limit on ship length which is inconsistent with the activity contemplated in the Shoreland Maritime Activities District.

Restrictions of a Zoning Ordinance, including a Shoreland Zoning Ordinance, run counter to the common law, which allows a person to do virtually whatever he or she wants with his or her land. The Ordinance, therefore, must be strictly interpreted so as not to unnecessarily limit a property owners rights. Where provisions in an Ordinance appear to be in favor of a property owner, an ordinance should be interpreted in the owner's favor. Thus if Section 128(B)(D)(6) on the one hand allows for construction of a facility as necessary to carry on a permitted activity, an arbitrary limitation on that activity, such as accommodating ships of no greater than 300 feet in length, might not be applicable to the proposed use. However, the mere fact that the competing provisions exist would have a chilling effect on anyone who might contemplate development of a passenger terminal. Whether such use would be allowed would undoubtedly be the subject of expensive and protracted litigation that would easily delay development a couple years longer than it would otherwise take. In the end, my expectation is that the terminal facility (without 300 feet limitation) would probably be found permissible by the Court, but the viability of the project could be significantly impacted by the delay that would be caused by passage of Amendment #13 be approved.

In the event both Amendment #12 and #13 pass, there may be confusion or ambiguity in determining what regulations control activities at 121 Eden Street. On one hand, the Shoreland Maritimes Activities District will exist by virtue of Amendment #12's passage and the mere passage of Amendment #13 doesn't repeal passage of Amendment #12. However, if the property can't be used as a Passenger Terminal and deepwater port facility, then its limited use as a facility for cruise ship less than 300' in length may very well be unlawful "spot zoning." Although Chapter 1000 allows single use of property for deep water port facility, there is no such provision for a single use zone that is buttressed by properties of differing zoning district designation. It could, therefore, be subject to an argument that the effect of passage of both Amendments will result in illegal spot zoning.

Another concern raised by Article 13 is that it does not apply to the entire parcel, it only impacts that portion of the parcel located in the Shoreland area. It does not address that portion of the property that is in the Bar Harbor Gateway District, which includes the current terminal. As such the cruise ship tendering activities would not be able to extend its footprint to that portion of the property outside the Shoreland District. It would not, therefore, allow any sort of cruise ship operation to occur at this site, not even ships less than 300 feet in length could effectively utilize the portion of the property that is within only the Shoreland Zone.

Another thing to note about Amendment #13 is that the amendment only applies to new applications for site plans and building permits and has no effect whatsoever on the municipal pier and its ongoing operations. Specifically, the passenger cap contemplated by Amendment #13 would not be imposed upon any existing activities, because it is plainly tied to the "site plans and building permit applications for cruise ship tendering/berthing facilities, passenger terminals" The current means of regulating passenger caps, i.e., through action of the Town Council, would remain in effect until there is an application for and development of a new passenger terminal facility. In fact, it is not clear that the current regulatory scheme for establishing passenger caps is affected at all by the adoption of Amendment #13. Nothing in this Amendment calls for repeal of the existing regulatory scheme.

However, it is entirely possible for one to argue that "passenger terminal," a term which if Amendments #12 and #13 both pass would be applicable to all Shoreland Districts, implicates other users such as Whale Watch Tours and day trip providers, whose passengers would be counted determining the daily passenger caps because, despite not being in the Shoreland Maritimes Activities District, their activities are plainly described in the definition of Passenger Terminal, ... "transportation to passengers for hire by land or sea." I don't know what impact this might have on existing business operations, but I suspect it could be significant.

Finally, while I am not inclined to exchange legal opinions with attorney Arthur Greif, a supporter of Amendment #13 and, who in that role, has put forth arguments as to why the two proposals are in harmony with one other, and why it's appropriate to regulate passenger caps through the Land Use Ordinance, I do want to make brief comment on his March 21, 2017 letter to me.

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In the first substantive paragraph of that letter, Mr. Greif suggests that it is appropriate for the Land Use Ordinance to be the vehicle through which a passenger cap is established and managed. His sole support for that notion is that the Land Use Ordinance should be in conformity with the Town's Comprehensive Plan which calls for limits on the number of cruise ship passengers per day and restricting the timing and activities of ships to minimize conflicts with the community and maximize advantages to local retailers and restaurants. Simply because controlling the number of passengers who may disembark a cruise ship is a goal of the Comprehensive Plan, does not necessarily mean that it should be regulated through the Land Use Ordinance. The Town's current means of regulating cruise ship passenger numbers is through the Town Council and I have not been advised of any problems the Council's oversight has created or that such oversight has been inconsistent with the goals or strategies of the Comprehensive Plan.

Sincerely,



Edmond J. Bearor
EJB/leb