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Memorandum

To: Emily Jacobs, Chair, Long Island Planning Board
Jim Thibault, Chair, Long Island Board of Appeals

Cc: Jim Nagle, CEO and Member of the Long Island Board of Selectmen

From: Robert J. Crawford, Esq.

Date: January 29, 2008

Re: Application of John Wary for Permission to Convert the Spar Premises to Multifamily/Residential Condominium Properties

Emily and Jim:

I write to summarize a few of points that you have asked me to address in regards to the applications before the Planning Board for Site Plan and Subdivision approval and before the Board of Appeals (the "BOA") for a Conditional Use approval. Since the questions may impact both of the Boards which you Chair I have elected to combine my comments.

Background:

John Wary, the owner of the Spar property (the "Property"), has approached the Planning Board and the Board of Appeals requesting authorizations under the Site Plan Review, Subdivision Review and conditional use approval procedures to obtain the authorizations required to convert and re-develop the Spar property.

The Property is currently used for the Town's post office, includes the former premises of the Spar restaurant and bar and also has residential quarters. The residential use of the property apparently dates back to when the Town was still a part of the City of Portland. Some concerns have been raised as to when or if the residential quarters on the Property were ever the subject of review and required authorizations from the City of Portland and whether these residential uses of the Property ever satisfied the then effective Portland zoning, building and safety codes or the current codes and standards under the Long Island codes and ordinances. The redevelopment Mr. Wary proposes is to renovate the existing

residence and post office and to redevelop the current restaurant area into residential condominium units.

The Town, effective May 12, 2007, approved the amendment of the Land Use Ordinance to authorize multifamily dwellings as a conditional use in the I-B zone. The amendment authorized the use and established new lot size criteria for the use. Multifamily Dwellings require a minimum lot area of 10,000 square feet for each bedroom and a minimum lot size of 60,000 square feet. Mr. Wary submitted his original application for a Building Permit to develop the condominiums before these amendments were in place. The CEO, Jim Nagle, denied that application because multifamily dwellings were not then allowed as permitted or conditional uses in any zone on the Island. Mr. Wary appealed the CEO's refusal to issue the building permit to the BOA and the BOA did not grant the appeal.

In addition to these amendments authorizing the multifamily dwelling use, by letter of June 29, 2007 the Maine Department of Environmental Protection (DEP), in its capacity as administrator of statewide minimum shoreland zoning standards, provided comments on allowing multifamily dwellings in the shoreland areas of the Town. The DEP has advised that it finds acceptable the conditional use of multifamily dwellings for lots located within the shoreland zone. Initially, the DEP has also advised that the minimum lot frontage of 150 feet of shore frontage required under section 4.17(M) for residential development adjacent to tidal areas, applies for each unit in the multifamily dwelling. The DEP, by later letter dated November 16, 2007, has since modified its position indicating that it may have overstepped preferred protocols to include land standards in local shoreland ordinances and advised that its June 29th announcement that 150 feet of shoreline is required for each residential unit proposed on a lot is no longer binding, at least from the DEP's perspective.

The Current Applications:

Site Plan:
While I am not sure I have reviewed or examined all of the application materials submitted in support of authorizations to re-develop and convert the current Spar property into residential condominiums, I have reviewed the application materials and submissions to the Planning Board including the project overview and application letter to the Planning Board dated October 5, 2007 with accompanying undated application, GIS plan, sketch plans, copies of Town tax maps, architectural sketches of a proposed condominium building, the lot's elevation certificate, the overboard wastewater permit and related communications from the DEP and the deed for the Spar property.

Article 10 of the Land Use Ordinance (the "Ordinance") governs the Site Plan Review process. Section 10.2 (E) of the Article requires Site Plan Review when there is a change of use and the total floor area exceeds 750 square feet. The Planning Board administers the Site Plan Review process. Applications for Site Plan Review necessarily include a lot of detail and must, unless waived by the Planning Board, include all of the materials, submissions and information required as set forth in Section 10.3(D) and Section 10.4 of the Ordinance.

Subdivision:
Since Mr. Wary is seeking to develop more than three separate units, his proposal also required Subdivision Review and approval under Article 11 of the Ordinance. Subdivision

Review proceeded contemporaneously with Site Plan Review at the Planning Board. The requirements for submittals in support of applications for subdivision approval are set out in detail in Article 11, Sections E and F of the Ordinance. To streamline the application process, applicants can generally request the Planning Board to refer to submissions and materials included in the Site Plan application (and vice versa). Section D of Article 11 authorizes pre-application meetings with the Planning Board to help applicants understand what submissions will be required. Since part of the review will be a determination if the proposed project complies with the bulk, space and siting standards, it is essential that plans and similar submissions are prepared or at least certified by individuals competent to certify to the accuracy of the information depicted.

Conditional Use:
My understanding is that Mr. Wary has also submitted certain communications and a partial application to the Board of Appeals requesting a conditional use approval for the proposed residential condominium development. Multifamily dwellings are permitted uses in the I-B Zone but only as a conditional use, review and approval of which are under the jurisdiction of the Board of Appeals. My understanding is that Mr. Wary did provide certain materials to the BOA in connection with his appeal of the CEO's denial of his building permit application but may not have adequately supplemented these materials in support of the change of use application.

Section 13.6(B) of the Ordinance sets forth the submissions required in an application for a conditional use approval. The submission requirements are detailed and, among other things, include the requirement that the party seeking conditional use approval provide either a preliminary or final site plan approved by the Planning Board. The review process for approval of a conditional use focuses on examining potential impacts of the proposed conditional use on the public at large and on the pre-existing legal activities in the immediate vicinity of the proposed use. It would be difficult if not impossible for the BOA to make such determinations without first having the benefit of the Planning Board's review and approval of the project under the Site Plan and Subdivision Review procedures.

Completeness of Applications:

The proceedings for Mr. Wary's requested Site Plan, Subdivision and Conditional Use approvals have been ongoing for some time. The question has come up as to how to address what some Board members believe to be incomplete applications and just how much time an applicant should be given to complete the required submissions Ordinance application procedures. The application process is not open ended: if it were, the process would eat up the time of Board volunteers and Town staff. Just as an applicant has the right to some reasonably expediency in proceedings, reviewing bodies have the right to limit the opportunities to apply, resubmit, revise and continue proceedings. What due process requires is a fair opportunity.

Section 10.3 governs the review process for Site Plan Approval. Subsection D.7., directs the Planning Board to make a finding of completeness on applications and further directs that incomplete applications that "do not include the submissions, studies or documents required by the Planning Board or under this Article will not be scheduled for hearing or review by the Planning Board. Such applications are to be returned to the applicant.

Section 10.4 governs submissions for Site Plan approval. Subsection J. directs that the Planning Board may waive any of the submission criteria upon its determination (made on the record and supported by a motion adopted) that the "scope or scale of the proposed project or activity is of such a nominal magnitude that the risks from the proposed activity to public safety, adjacent property owners or the Town is so minimal as to make the information or submissions unnecessary or that the proposed activity by its scope, nature or location does not necessitate review of certain criteria." The standard anticipates that if a submission requirement is waived the Planning Board will be thoughtful and deliberate in its findings that the submission is not necessary for the Planning Board to make an informed decision on whether the proposed activity meets the standards required for Site Plan Review and under the Ordinance in general.

The Subdivision procedures under Article 11 are similarly very thorough in regards to submission criteria. The obvious purpose of the detailed submission criteria and documentation is to give the Planning Board adequate means to understand precisely what is proposed so the Planning Board can make the necessary determination of the impacts, whether the development satisfies the subdivision criteria and what conditions should be required to direct the development so it fits the zoning and community standards.

Implied from the Site Plan Subsection 10.3 discussed above, and I think inherent in the discretion of the Planning Board overall, is the option for the Planning Board to make a finding on the completeness issue for both the Site Plan and Subdivision applications at this juncture. My understanding is that the proceedings and discussions on the Site Plan and Subdivision applications have been ongoing for months. If the Planning Board thinks the applications are incomplete it can either vote to deny the application for the reason that the applicant has not adequately and timely addressed the submission requirement or following the finding of incompleteness send a directive to the applicant as to what is missing and give a date when the submissions must provided to the Planning Board. The Planning Board would also be with in its powers to table the application. However, if the application is tabled, it should be to a date certain (a set date) and one not too distant in the future. The concept is to give a break but not such a long period that the applicant feels there is an unnecessary delay and the BOA members forget to many of the details.

Similarly, I think the BOA also has inherent powers to make s determination on the completeness of the application or submissions for Conditional Use Approval. Again, it is my understanding that the hearings and process for the application has been ongoing for some time. If the BOA find that the submissions are not complete it would be within its prerogative to either dismiss the application for want of completeness or issue a directive to Mr. Wary on what is missing and when it must be received by the BOA. The BOA could also theoretically table the application but should set a date certain to reconvene on the application in the not too distant future.

It has also been raised by both the Planning Board and BOA members that perhaps no further proceedings should be undertaken by either body for the reason that some members believe that based on the submissions to date that the proposed development may not satisfy the use or bulk and space criteria under the Ordinance. More specifically, it has been raised that the development, proposed with five residential units, would not be able to meet the dimensional requirements under Section 3.9(E) of the Ordinance.

Part (E)(1)(a)iii. of Section 3.9 requires 10,000 square feet for each bedroom in a multifamily dwelling and 60,000 square foot minimum lot size for the development. As proposed the development would have 15 bedrooms, requiring therefore, 150,000 square feet of area on the lot to support the proposed development. While there is no current survey of the lot that I am aware of, my understanding is that the lot size is much smaller in area.

Mr. Wary apparently believes that the lot size or other bulk and space limitations are not limiting factors. While I am not exactly sure of the basis for his conclusion, I thought perhaps is was due to an impression that since the Spar property is a nonconforming lot of record that therefore the conversion to multifamily use would be allowed. Regarding the Property's status and the potential options for its redevelopment as a nonconforming lot of record, Section 3.9(E)(1) establishes the lot size and density criteria for multifamily use. The section specifically references exceptions to the standards in deference to the standards set out in Article 6 for non-conforming structures, uses or lots. Article 6, section 6.5(C), however applies to the development undeveloped "solitary" nonconforming lots of record (if the lot was already developed, it would be governed by the general provisions of Section 6.1, 6.2 and as applicable, Section 6.3). The section directs that such nonconforming lots of record (as of the date the Ordinance was adopted or amended) may be developed so long as the lot is in separate ownership from contiguous lots (to reinforce the application of the merger requirement of Section 6.5(A)), is a minimum of 20,000 square feet in area or otherwise buildable under state wastewater disposal rules, that the proposed structure can be sited consistent with the bulk and space standards in the zone except the frontage on minimum lot size standards, and finally, no lot less than 10,000 square feet may be built upon that requires a waste disposal system for the intended structure. Notable is that the exceptions from the bulk and space criteria do not affect the standards for other density requirements (such as the minimum 60,000 square feet and 10,000 square feet of land area per bedroom for multifamily use).

While it may turn out that the bulk and space criteria are limiting or prohibitive of the proposed five-unit multifamily development, I would caution the Planning Board that the Ordinance terms governing multifamily housing have not been tested or interpreted at this juncture. Though the Boards could, within their respective authorities, make such a finding, but I would suggest that in light of the application criteria still being in a state of flux and the applications having not been finally reviewed or acted on to date that such a finding should therefore not be the only reason to deny the applications. Without a completed review of the applications it would seem that such an announcement could appear to be based on an incomplete review of the circumstances. While the Boards or their members might see this as a technical issue, courts are sometimes upset by findings that they determine are conclusory in nature and not based on thorough, systematic and complete reviews.

Finally, the question has also been raised as to what standards govern the final dispassion of the applications if the applications are tabled until after the annual Town Meeting and at the Town Meeting there is enacted a change to the Ordinances. In the normal case, any application that is "pending", this term has been judicially defined to mean that at least one substantive review has taken place, will proceed under the standards in effect at the time the review of the application started. 1 M.R.S.A. section 302 specifically covers the issue by

directing that "actions and proceedings pending at the time of the passage, amendment or repeal of an Act or ordinance are not affected thereby."

However, as determined by Maine Courts this provision may be superseded if the article which sets forth the proposed ordinance amendment or repeal, expressly directs that if the new provisions are adopted that they are deemed retroactive in nature. All that is necessary to make this happen is to insert language into the warrant article directing as follows "Notwithstanding Title 1, section 302, the terms of this ordinance apply to all actions and proceedings pending on [a specified date]". With this authority in mind, I think that if an amendment is being proposed that could impact the pending applications that it would be a good idea to include this express retroactive language if that is the intent of the amendment.