

AGENDA TOPIC

TO: Mayor & City Council
FROM: Wayne Marshall, Project Planner
DATE: March 1, 2023
RE: Second Reading & Public Hearing - Proposed Ordinance Amendments

RECOMMENDED COUNCIL ACTIONS

The Council is scheduled to conduct a public hearing on two proposed amendments to the City Code of Ordinances that have been recommended by the Belfast Planning Board, including: amendments to Chapter 102, Zoning, Article III, Nonconformance, and amendments to Chapter 82, Shoreland, regarding the establishment of specific standards for the regulation of aquaculture operations in intertidal waters, and revisions to the current definitions of aquaculture. The Council, at its meeting of February 7, 2023, voted to schedule the above amendments for Second Reading and public hearing at your March 7 meeting.

I recommend that the Council take the following actions at the March 7 meeting:

- 1) Provide me an opportunity to make an initial presentation regarding the two amendments. I also ask that I have ample time to present information regarding the newly proposed standards for the local regulation of aquaculture in marine waters (proposal to include no local standards) compared to those presented at your meeting of February 7, and the proposed revisions to the Nonconforming provisions, with a focus on the Type 2 Nonconforming standards that apply to residential structures.
- 2) Conduct the public hearing that is scheduled for the Second Reading. To date, the only public comment that has been received are the comments from the Harbor Committee, however, I will look for comment submitted by email until the time of the Council meeting and will provide such to the Council in advance of the meeting.
- 3) Post the public hearing the Council should discuss the proposed amendments and ask any questions that you may have. As this is the Second Reading of both amendments, you will be asked to decide if you want to adopt the amendments as presented, to reject either or both amendments, to make revisions to either proposal, or to table further action on either or both proposals. I also ask that you make separate motions on the 2 proposals. I have provided potential motions for the two proposals at the end of this memorandum (see page 5).

I also will add that the Planning and Codes Department discussed both of these proposals with the Planning Board at their most recent February 25 meeting. The Board expressed its ongoing support for the amendments to Article III, Nonconformance per its December 14 recommendation, and as recommended by Department staff, acknowledged that the standards for

aquaculture operations are subject to further guidance from both the Maine Department of Marine Resources (DMR) and the Maine Department of Environmental Protection (DEP).

CHAPTER 82, SHORELAND - MARINE AQUACULTURE AMENDMENTS

The Planning Board and Planning and Codes Department have proposed a wide range of amendments and updates to the current City Shoreland Ordinance (Chapter 82) to make such more consistent with current State Model Shoreland Regulations (municipalities are required to adopt and enforce Shoreland Zoning by State law, and local Ordinances must be consistent with State requirements). One of the issues the Board reviewed was the prohibition on all aquaculture operations in Belfast Bay that has been in the City Shoreland Ordinance since at least 1991. The Board proposed allowing all marine aquaculture operations except finfish, and proposed standards for the regulation of such operations. The Department, beginning in October, 2022, reached out to the Department of Environmental Protection (DEP) regarding the Board's proposed standards, and the Board made revisions to its initial proposal based on a December 14 email received from the DEP (See Aquaculture, Document #3).

At the February 7 Second Reading and public hearing regarding the Shoreland amendments, Andrew Peters, Vertical Bay Marine, raised a number of concerns regarding the proposed aquaculture standards. The Council chose to table action on the proposed amendments, rescheduled the Second Reading for the Council's March 7 meeting, and asked Department staff to address the concerns that were raised. Post the February 7 meeting I have had 2 hour long conversations with Andrew Peters and separately with Kathy Givens, Harbormaster, and have reached out to both the DEP and Department of Marine Resources (DMR) regarding our proposed standards. Meredith Mendelson, Deputy Commissioner, DMR, responded to our inquiry (reference Aquaculture, Document #3), and Bub Fournier and I spoke with her on February 28.

The long and short of our conversation with Deputy Commissioner Mendelson is --- DMR has the exclusive authority to regulate aquaculture operations in marine waters, and she stated that the DEP (including their Attorney General) now concurs with DMR's interpretation of State law (contrary to the position identified in the December 14 email from the DEP, reference Aquaculture, Document # 3). While I do not agree with all of the interpretations identified by the Deputy Commissioner, and I find it a bit befuddling that the DEP, for over 30 years, in their model Shoreland Guidelines for all Maine municipalities, has provided incorrect guidance that municipalities shall regulate aquaculture activities through its Shoreland Ordinance, Bub Fournier and I both agree that the best current course of action is for the City to make significant changes regarding the initial amendments proposed by the Planning Board.

The revisions the Department is now proposing for Council consideration at the Second Reading would do the following:

- 1) The proposed Division 21, Marine and Freshwater Aquaculture Operation standards would be eliminated from the proposed amendments (reference Aquaculture Document # 1).
- 2) The Use Table for Chapter 82, Shoreland, would be revised for marine aquaculture operations. The revised language for Footnote # [mm] would be included in the Footnotes to the Use Table to indicate that aquaculture operations in intertidal marine waters are permitted

subject to the applicant obtaining a DMR lease. These changes are identified in Aquaculture, Document #1. I note that this means that the City will not require a Shoreland Permit or conduct any review of such for an aquaculture operation in intertidal waters (or anywhere in Belfast Bay), and that any local concerns regarding the issuance of a DMR aquaculture lease would need to be expressed through the DMR permitting process (initial scoping session with the Harbormaster and a subsequent local public hearing).

- 3) Corresponding changes would be made to the definitions of aquaculture that are included in both Chapter 82, and by necessity, to the same definitions that are in Chapter 66 (this will require a future Council hearing as the Council adopted the Chapter 66 amendments at your meeting of February 7). These changes are identified in Aquaculture, Document #1.

I also have included Aquaculture, Document #2, that identifies proposed revisions to the February 7 Second Reading Division 21, Marine Aquaculture standards that I prepared for review by a number of parties. The February 15, Draft #2 standards are included because they are discussed in both the email from Deputy Commissioner Mendelson, DMR, and the comments received from the Belfast Harbor Committee.

In our conversation with Deputy Commissioner Mendelson, she stated that she would reach out to the DEP and ask them to identify their position in writing regarding the applicability of Shoreland Zoning to marine aquaculture operations. If we receive a written statement from the DEP prior to the March 7 Council meeting, we will provide such to the Council.

One of our key areas of disagreement with Deputy Commissioner Mendelson is that while the City, through its Shoreland Ordinance (and I assume, by extension, that the DEP, through its Natural Resources Protection Act requirements), has the authority to regulate the construction and impacts of a dock, wharf, or pier that is connected to shore, the DMR asserts that the City does not have the authority to consider any aquaculture operations that may be connected to said structure in the issuance of a locally required dock permit. That said, I believe that issues such as these are ones that the DEP (as the State agency entrusted by the legislature to manage the State Shoreland Zoning program) and the DMR should address in the longer term, as the guidance that all Maine municipalities has received regarding the regulation of aquaculture through Shoreland Zoning has been very muddled (incorrect).

A few additional comments:

- 1) As the revisions to the proposed standards generally accomplish the recommendation of the Harbor Committee (reference Aquaculture, Document #4), I have chosen not to respond to any of their specific comments.
- 2) While the Council, at the February 7 Second Reading, focused its attention on the aquaculture standards included in Chapter 82, Shoreland, your final action will need to consider the adoption of all of the Chapter 82 amendments as presented on February 7, as such may be amended at your March 7 meeting. The full text of the Chapter 82, Shoreland amendments is included in the original Notebook provided to you in December; reference Tab # 16.

Clearly, the Planning Board's and Department's intent to amend current Shoreland Ordinance provisions that includes an outright ban on marine aquaculture activities has taken some

unanticipated twists and turns. I hope that the end result works for all. I would be happy to answer any questions.

ARTICLE III, NONCONFORMANCE AMENDMENTS

The Planning Board, at its meeting of December 14, 2022, recommended a series of significant changes to the current Article III, Nonconformance provisions in Chapter 102, Zoning. The Council conducted a public hearing on these amendments at the January 17, 2023 First Reading, and at this meeting, voted to table action on the amendments. The Council also directed me to work with Ned Lightner, BEL-TV, to make a televised presentation to describe the proposed changes to the Type 2 Nonconforming standards. I made the presentation with Ned on January 28, and the presentation, as well as supporting information, has been available on the City website and previously provided to the Council. Department staff have also met with the two property owners who offered public comment regarding the proposals, and one of these parties now has an application pending before the Planning Board. The originally proposed amendments to the Article III standards are now back before you because of your February 7 vote to schedule such for Second Reading and public hearing on March 7.

The proposed amendments would make comprehensive changes to the current Nonconforming standards. The specific changes are summarized on pages 1 - 3 of the Second Reading Ordinance Amendments, reference Document #A. I will refrain from describing the numerous changes in this memorandum, but will state that both the Planning Board and Department believe that the amendments warrant your support and adoption. We readily agree that the provisions in the current Ordinance and the proposed amendments are very technical in nature, are difficult to describe in a few words, and the application of such may vary widely for different properties. That said, that is the nature of the beast regarding nonconformities under Maine law. Maine law, unlike many states, establishes a very high bar for most property owners to obtain a variance from the Zoning Board of Appeals. Thus, the main avenue available to municipalities to address nonconformities is to establish specific and consistent standards that the Planning Board will apply to address issues such as structures that do not conform to setback requirements and how to replace a nonconforming structure.

If the Council chooses to adopt the Article III Amendments, the Department is requesting that the effective date of the amendments be May 1, 2023. The main reason is that there is one nonconforming application currently scheduled for Planning Board review on March 8, and there is at least one and likely two applications that soon will be submitted to the Board. All applications are based on the current standards, because those are the standards that were in place when they began the application process.

You have previously received copies of the information included in this packet regarding the Nonconforming provisions. The attachments include:

- Document A - The draft amendments for the March 7 Second Reading. Again, this is the same language as presented at the January 17 First Reading.
- Document B - A comparison between the current Type 2 Residential Structure Nonconforming Standards and the proposed standards.

- Document C - The diagrams I used in my January 28 presentation on BEL-TV regarding the proposed nonconforming standards. I note that the property illustration I used in the January 28 presentation is the same as shown in Document B.

I will be happy to address any questions.

Potential Motions

Motion # 1: The City Council, at its meeting of March 7, 2023, hereby adopts the following amendments to Chapter 82, Shoreland, as such were presented at the February 7 Second Reading, and as the proposed standards in the Table of Uses, Division 21, Marine Aquaculture Operations, and definitions of aquaculture were amended at the March 7, 2023 Second Reading, said amendments to take effect on March 15, 2023.

Motion # 2: The City Council, at its meeting of March 7, 2023, hereby adopts the amendments to Chapter 102, Zoning, Article III, Nonconformance, as such were presented at the March 7, 2023 Second Reading, said amendments to take effect on May 1, 2023.