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October 29, 2012

Amanda L. Stearns, AICP
Community Development Director
Town of Falmouth
271 Falmouth Rd.
Falmouth, ME 04105

RE: Amendments to Ordinance Proposal on Ground Floor Tenant Space

Dear Amanda:

The Town Council held a public hearing in September 2012 on proposals to establish ground floor tenant space limits and make certain other changes in the SB1 District. These proposals are contained in the document, "Draft Zoning Amendment, Chapter 601 Zoning and Site Plan Review Ordinance" dated July 19, 2012, rev. 8-06-12. (I shall refer to this as Version #1.) After the hearing, the Council discussed the proposals but did not vote on them. Based upon the Council discussions, you have drafted changes to the document that went to public hearing. Those changes are contained in a document with the same title but having a last revision date of 10-21-12. (I shall refer to this as Version #2.) You have provided me with copies of both documents.

You have now asked for my advice with respect to whether the Council is required to hold another public hearing before voting upon Version #2. My advice is that the Council is not *required* to hold another hearing. The Council can, of course, choose to have another public hearing.

The Falmouth Charter, Sec. 213 provides that proposed ordinances (except emergency ordinances) must have a public hearing that follows by at least 14 days a published notice of the time and place of the hearing and the text of the proposed ordinance or a "title descriptive of its contents and purpose." It then goes on to say:

> After the hearing the Council may adopt the ordinance with or without amendment or reject it; but in no case shall the ordinance be adopted or rejected in less than 14 days after the public hearing. If an ordinance is amended *so as to change substantially its meaning*, the Council may not adopt it until the ordinance or its amended sections have been subjected to all the procedures hereinbefore required in the case of a newly introduced ordinance. (emphasis added)

The question here is whether the changes proposed in Version #2 "change substantially," as that term is used in section 213, the meaning of Version #1.

Obviously, technical changes in the nature of edits do not require a new hearing because they do not involve any change in the meaning of the ordinance. They are at one end, if you will, of the continuum of changes. At the other end of the continuum are changes that make major differences in the purpose and effect of the proposed ordinance amendment. For example, if the ordinance that went to public hearing would re-zone an area of town from Residential A to Residential B were amended to re-zone the area to Industrial (if Falmouth has an industrial zone), that would be a major change that was outside the reasonably anticipated scope of Council action on the original proposal. It is likely that property owners in the affected area who did not care very much about the proposal, as advertised, and who did not come to the hearing, would care a lot about the matter and come to the hearing if they knew that a change to Industrial was being considered. This concern about informing the public of what is being considered and giving them an opportunity to be heard is what is central to the Section 213 requirements.

The language of Section 213 – "may adopt the ordinance with or without amendment" – clearly contemplates that the Council may make changes after the public hearing that affect the meaning of the ordinance. After all, receiving the public's reactions and suggestions for amendments is a vital part of having a public hearing. If every change that affected in any way the original proposal required another public hearing the business of the Council in its role as legislators would become burdensome and difficult. Thus, in this context, I read the term "change substantially" to refer to amendments that make the amended version so different from the original version that it is outside the reasonably anticipated scope of Council action on the proposal that was "noticed," i.e., advertised.

Here, we have a change from a 30,000 sq. ft. limitation to a 50,000 sq, ft. limitation on first floor tenancy in the SB1. (There are also "grandfathering" and space reallocation provisions). The issue of limiting the size of first floor tenancies in the SB1 was the heart of the proposal that went to public hearing. Some members of the public supported the original limits and others opposed it. Increasing the limit to 50,000 sq. ft. is certainly not outside the anticipated scope of Council action on the original ordinance proposal. For that reason, I do not believe that a new public hearing is required.

I would also point out that in this case the changes in Version #2 make the ordinance less restrictive when viewed from the property owner's perspective. While the property owners in the SB1 may not want any first floor occupancy limits and might welcome another opportunity to make that point at a public hearing, it would seem incongruous for them to argue that Version #2, which moves in the direction which they supported at the public hearing, must be the subject of another public hearing.

Please let me know if you have further questions on this subject.

Very truly yours,

William L. Plouffe
WLP/ap

Cc: Nathan A. Poore