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December 27, 2004

Jeff Kobrock
City Manager, City of Gardiner
Gardiner City Hall
6 Church Street
Gardiner, Maine 04345

Re: Cindy Sirois Complaints

Dear Jeff:

At your request, I have reviewed the fax correspondence and materials submitted by Cindy Sirois in response to your December 17th letter to Ms. Sirois. You have asked me specifically to review the items identified in your December 17th letter as nos. (1), (9) and (13). My comments on these items follow:

(1) Permit Expiration and Bonding Requirements. Ms. Sirois has raised questions concerning bond requirements and expiration of the MacMasters' April 18, 1991 conditional use permit issued under the City's prior land use ordinance, authorizing operation of an auto repair business.

Unfortunately, Ms. Sirois bases her questions on provisions of the current Land Use Ordinance. The current Land use Ordinance was not in effect in 1991 when the MacMasters' conditional use permit was issued. In addition, Ms. Sirois' complaint is based on a misreading of the current Land Use Ordinance.

The City's current Land Use Ordinance took effect on June 28, 2003. Any conditional use permit issued to the MacMasters' would have been issued under the prior land use ordinance. As indicated in Barbara McPheters' memo, the current Land Use Ordinance no longer characterizes certain uses as "conditional uses", but instead requires site plan review for the uses concerned. Expiration dates for a conditional use permit issued under the prior ordinance would need to be determined under the prior ordinance.

As a general matter, an expiration date on a land use permit normally would apply to specific development activities contemplated by the permit, e.g., clearing, building construction, etc. If these activities are started and completed in the time allowed by the permit, the owner's right to continue the underlying land use normally does not "expire".

Operation of a junkyard is an exception to this general rule. Junkyards, automobile graveyards, and automobile recycling businesses require a separate permit from the municipal officers under 30-A MRSA sec. 3753. Under that section, automobile graveyard and junkyard permits expire annually, in October, and must be renewed to continue operations. A permit to operate an “automobile recycling” business is a five year permit, renewable upon expiration. However, the MacMasters’ conditional use permit is a separate and additional permit to any permits that may be required under 30-A MRSA sec. 3753.

The bond requirement and three year expiration provision to which Ms. Sirois refers do not apply to land use permits generally, but are part of the performance standard for **Earth-Moving Activity** under section 3(H) of the current Land Use Ordinance. In other words, under the current ordinance, a permit for earth-moving activity, when required by the ordinance, expires three years after issuance and also requires posting of a bond or other security as may be required by the Planning Board. These provisions apply *only* to section 3(H), and do not impose bond requirements or expiration periods on land use permits issued for other types of activities under the current Land Use Ordinance.

Ms. Sirois’ fax also questions whether the MacMasters’ 1991 building permit was validly issued, given the lack of a treasurer’s signature on that permit. For the reasons indicated below, my opinion is that the lack of a Treasurer’s signature on the City’s file copy of the 1991 permit is not a sufficient basis on which to question the validity of the original permit, thirteen years after its issuance.

(a) The Treasurer’s signature appears to have been required solely to certify payment of the required permit fee. The Treasurer’s signature does not appear to have been required for any other purpose, since the Treasurer is not the official designated in the City’s present or former ordinances as the issuing authority for building permits. An unpaid building permit fee would be an unsecured general receivable for the City, and as such would be subject to the general six year statute of limitations applicable to most civil proceedings in Maine. Therefore, the period in which the City could have initiated a collection action expired in 1997.

(b) The document provided by Ms. Sirois appears to be a photocopy of the Code Enforcement Department’s copy of the building permit. The original permit would have been issued to the MacMasters. It is quite possible that they received the original permit from the CEO, went over to the Treasurer, paid the fee, obtained the Treasurer’s signature, and then proceeded with construction. The lack of any contrary notation in the file suggests that this may have been the case. The bottom line is that the information provided by Ms. Sirois does not positively show either payment or non-payment.

Based in part on her contention that the 1991 building permit is invalid, Ms. Sirois asks that the City’s officials “immediately” shut down the MacMasters’ auto repair business. On November 16, 2004, the City’s acting code enforcement officer issued a notice of violation to the MacMasters, in accordance with section 4(E)(1) of the current Land Use Ordinance, alleging a number of violations of the 1991 conditional use permit.

However, in most cases, *enforcement* of a notice or order issued by the code enforcement officer requires filing of a land use complaint in the district or superior court, as provided in section 4(E)(2) of the Land Use Ordinance. In the event they fail to take corrective action within the time allowed in the notice of violation, the MacMasters will still be entitled to a court hearing, before the City can “shut down” their existing business.

(9) Fence Location. The 1991 conditional use permit requires the MacMasters to construct a fence on both sides of the designated parking area, with a ten foot side setback from their property boundary. Ms. Sirois apparently believes that the required fence has been built on her property, and has questioned who determines the location of the property line for this purpose.

The City’s code enforcement officer is responsible, in the first instance, for determining whether the fences built by the MacMasters comply with the requirements of the 1991 conditional use permit. In determining whether the fences as constructed have been set back the required ten feet from the MacMasters’ property lines, the Code Enforcement Officer must rely on the property line locations as shown in the sketch attached to the 1991 permit. The November 16, 2004 notice of violation includes an alleged violation of the 1991 conditional use permit as it relates to the fence requirement; however the violation alleged in the notice is not a setback violation.

A fence that strayed over onto an abutting property would be a civil trespass, which could be prosecuted by the abutting owner in court. The City’s Code Enforcement Department is not the proper forum for litigating disputed boundary line locations. If Ms. Sirois believes that the MacMasters’ fence, as constructed, strays over onto her property, or that her property line is at a different location than that depicted in the 1991 permit sketch, it would be up to her to engage a surveyor to determine the actual fence and boundary line locations, and to prosecute a civil trespass action in court.

(13) Police Response. Ms. Sirois has expressed concern over what she perceives to be a “lack of support” from the Gardiner Police Department. Your December 17th letter recites some of the recent response history by the Gardiner Police Department. In the event Ms. Sirois continues to believe that her complaints to the Gardiner Police Department are not being handled appropriately, she may address those complaints to the Maine State Police, the Kennebec County District Attorney, or the Maine Attorney General’s office. My understanding is that Ms. Sirois has already contacted one or more of these agencies / offices.

Please call me if you have additional questions concerning this matter.

Sincerely

Erik M. Stumpfel
City Solicitor,
City of Gardiner