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July 28, 2015

Perry A. Ellsworth
Town Manager
180 Main Street
South Berwick, Maine 03908-1535

Re: Mobile Vending Food Business in the Transitional Residential (R3) District

Dear Perry,

You have asked me to review the South Berwick Zoning Ordinance (“the Ordinance”) in relation to a mobile vending food business currently operating in the Transitional Residential (R3) District.

The following is my understanding of the facts as presented in your package dated July 16, 2015:

The property is located at the intersection of Route 236, Old South Road and Route 91 in South Berwick where a business has operated in a building on the lot since at least the early 1950’s – and is currently operated as a flower shop. In 2011, a mobile vending food business called the Barbeque Shack was separately located on the same lot, which was not required to have a permit by the Code Enforcement Officer (“CEO”). The Barbeque Shack closed in 2012 and the shack was removed from the site.

In October, 2014, a trailer was placed next to the flower shop. The owner of the trailer discussed operating a mobile vending food business with the CEO that same month, and was told he did not need a permit to operate.

In December, 2014, the Town Council adopted amendments to the Ordinance that amended the definitions of “restaurant,” “restaurant take-out/fast-food” and “retail business”, amended the performance standards for restaurants and take-out restaurants, and adopted a new performance standard for outdoor sales of food or merchandise that occur in conjunction with restaurants, take out/fast food restaurants, and retail businesses. Those amendments went into effect in January, 2015.

A sign appeared on the trailer in April, 2015 indicating that the "Chuck Wagon" would be open for business on May 1, 2015. The business continues to operate today.

The Town Council appealed the CEO's decision to the Board of Appeals on June 25, 2015. The Board voted that the Council did not have standing, and that the appeal was not appropriately before the Board. It is my understanding that the Town Council has not appealed the Board of Appeals' decision to Superior Court.

The R3 District, where the Chuck Wagon is located, permits "restaurant use" subject to major site plan review by the Planning Board, but explicitly prohibits "restaurant, take-out" and "retail" uses. Section 140-17, Table A. The Ordinance does not contain a separate use category for mobile vending, food trucks, or any other temporary, non-permanent or stationary food service vending units. Any use which is not listed as a permitted use or a use requiring site plan review is prohibited. Section 140-18.

Definitions are found in Section 140-9 of the Ordinance. "Restaurant" is defined as:

An establishment, located in an enclosed building, which may provide additional outdoor seating, where meals are prepared on the premises and served to the public for consumption on the premises; and where no food or beverages are served directly to occupants of motor vehicles or directly to pedestrian traffic from an exterior service opening or counter, or any combination of the foregoing; and where customers are not encouraged by the design of the physical facilities, by advertising or by the servicing or packaging procedures to take out food or beverages for consumption off of the premises.

"Restaurant, Take-out/Fast-Food" is defined as

An establishment, located in an enclosed building, which may provide additional outdoor seating, where food is prepared on the premises and where the normal operation of the business is described substantially by the following factors:

- A. The establishment offers both "eat-in" and "take-out" service.
- B. Customers place their orders at a counter or window (including drive-up windows) rather than at a table served by a waiter or waitress.
- C. The predominant method of delivery is that customers pick up their own orders at a counter or window and then either carry the orders to a table or seating area within the restaurant or take the orders out of the restaurant for consumption outside of the building (table service by the establishment's staff during limited hours or occasional delivery of food items to a customer table or seating area will not be deemed to be the predominant method of delivery).
- D. The manner in which the food is prepared, presented and packaged is essentially the same whether the customer chooses "eat-in" or "take-out."

“Retail Business” is defined as:

A business establishment operating from an enclosed building on the premises, engaged in the sale, rental or lease of goods or services to the consumer for personal use or household consumption and not for resale.

The Ordinance also contains certain performance standards for restaurant and take-out restaurants, including sewer, parking and restroom requirements. Section 140-58.

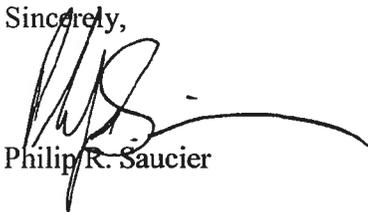
Based on my understanding of the business and my reading of the Ordinance, the new mobile vending food business would not qualify as a “restaurant” primarily because customers are sold food from an exterior service opening or counter, and would not meet the performance standards in Section 140-58. Even if the business would qualify as a “restaurant, take-out/fast food” or “retail” use, those uses are explicitly prohibited in the R3 District. As previously noted, the Ordinance does not contain separate use categories for mobile vending, food trucks, or any other temporary, non-permanent or stationary food service vending unit, and thus such uses are also prohibited in the R3 District pursuant to Section 140-18.

Finally, under Section 140-5(A) & (C)(1) of the Ordinance, if a nonconforming use is discontinued for a period of more than 12 months, the lot may not be again devoted to a nonconforming use. Section 140-5(A) & (C)(1). In this case, the prior mobile vending food business closed in 2012 while the current business opened in 2015 –thus would not be considered the continuation of a nonconforming use.

Since the current use was not in lawful existence at the time the R3 District regulations were in place (including the most recent amendments), the nonconformance provisions in Section 140-5 do not apply. Thus the owner may not expand the use, may not allow another nonconforming use to resume within 12 months after the current food business is discontinued, and may not change the nonconforming use to another nonconforming use.

I hope this is helpful. Please let me know if you have any further questions.

Sincerely,



Philip R. Saucier

PRS/rl