

1. Agenda

Documents: [AGENDA 10-2-14.PDF](#)

2. 18-24 Marginal Way Interpretation Appeal

Documents: [APPLICATION.PDF](#)

CITY OF PORTLAND, MAINE

ZONING BOARD OF APPEALS

APPEAL AGENDA

The Board of Appeals will hold a public hearing on Thursday, October 2, 2014 at 6:30 p.m. on the second floor in room 209 at Portland City Hall, 389 Congress Street, Portland, Maine, to hear the following appeal:

1. Old Business

A. Interpretation Appeal:

18-24 Marginal Way, Northern Pride Auto Wash, owner, Tax Map 113, Block A, Lot 025, B7 Mixed Development District Zone: The appellant is challenging the Zoning Administrator's determination dated June 27, 2014 that Northern Pride Auto Wash could not retain the drive-through if the use was changed from a carwash. Representing the appeal is the applicant's lawyer, Natalie A. Burns.

2. Other Business

Election of Chair and Secretary for the Zoning Board of Appeals.

3. Adjournment

Department of Planning & Urban Development

Marge Schmuckal
Zoning Administrator

Jeff Levine
Director Planning & Urban Development



RECEIVED

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CITY OF PORTLAND
ZONING BOARD OF APPEALS

Dept. of Building Inspections
City of Portland Maine

Interpretation Appeal Application

APPLICANT INFORMATION:

Natalie L. Burns, attorney for

NAME

Northern Pride Auto Wash

BUSINESS NAME

P.O. Box 4510, Portland, ME 04112

ADDRESS

775-7271 (attorney)

TELEPHONE #

Owner

APPLICANT'S RIGHT, TITLE OR INTEREST
(eg; owner, purchaser, etc)

B-7

CURRENT ZONING DESIGNATION

EXISTING USE OF PROPERTY:

Car wash

SUBJECT PROPERTY INFO:

20 Marginal Way

PROPERTY ADDRESS

Tax Map 113, Block A, Lot 25
CHART/BLOCK/LOT (CBL)

PROPERTY OWNER INFO (If Different):

Northern Pride Auto Wash

NAME

20 Marginal Way

ADDRESS

Portland, ME

Disputed Provisions from Section 14:

14-296(a), 14-382(d), 14-384,
14-385(b)

Order, decision, determination or
interpretation under dispute:

Interpretation by Zoning

Administrator, dated June 27,
2014 (attached)

TYPE OF RELIEF REQUESTED:

The applicant requests that the Board overturn the decision of the
Zoning Administrator and determine that the applicant is allowed to change
the use of the existing building and maintain the existing drive-through,
either for a restaurant or for a bank.

NOTE: If site plan approval is required, attach preliminary or final site plan.

The undersigned hereby makes application for an appeal as described above, and certifies that the information herein is true and correct to the best of his OR her knowledge and belief.

Natalie L. Burns

SIGNATURE OF APPLICANT

7-25-14

DATE



KENNETH M. COLE III
NICHOLAS S. NADZO
DAVID J. JONES
MICHAEL A. NELSON
RICHARD H. SPENCER, JR.
LAWRENCE R. CLOUGH
RONALD A. EPSTEIN
WILLIAM H. DALE
F. BRUCE SLEEPER
DEBORAH M. MANN
LESLIE E. LOWRY III
PATRICIA M. DUNN
MICHAEL J. QUINLAN

R. LEE IVY
ROGER P. ASCH
NATALIE L. BURNS
SALLY J. DAGGETT
BRENDAN P. RIELLY
NICHOLAS J. MORRILL
MARCIA G. CORRADINI
KATHLEEN T. KONKOLY
MARK A. BOWER
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(1908-2002)

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(1914-1987)

M. DONALD GARDNER
(1918-2003)

YORK COUNTY
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11 MAIN STREET, SUITE 4
KENNEBUNK, MAINE 04043

(207) 985-4676 (Phone)
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July 24, 2014

Chair Smith and Members of the Zoning Board of Appeals
City of Portland
389 Congress Street
Portland, Maine 04101

Re: Northern Pride Auto Wash, 20 Marginal Way/Tax Map 113, Block A, Lot 025

Dear Board Members:

This letter is intended to summarize the appeal by Northern Pride Auto Wash of the June 27, 2014 determination by the Zoning Administrator made in response to Northern Pride Auto Wash's request for a determination of whether it could change the use of its existing structure to either a restaurant or a bank, while retaining the existing drive-through.

Northern Pride is the longtime owner of property located at 20 Marginal Way. The property is now, and has been for many years, operated as a drive-through car wash. With the many positive developments that have occurred on Marginal Way over the last several years, Northern Pride is interested in pursuing a change of use because the grandfathered car wash use is not consistent with those new developments. However, the provisions of the B-7 zoning district impose requirements that do not work for this smaller site (.3509 acres). In particular, the property does not have sufficient area for parking if a new, significantly larger structure were built.

Based upon these factors, Northern Pride sought a zoning determination from the Zoning Administrator. Her determination was that Northern Pride could not retain the drive-through if the car wash use were changed. A copy of her decision is included in your packet.

Northern Pride requests that this Board overturn the decision for the following reasons:

1. The Zoning Administrator's treatment of the drive-through solely as an accessory use that will be lost if the nonconforming principal use is discontinued ignores the fact that the drive-through is an integral part of the existing structure and not simply a separate use that will go away if the principal use is changed. Therefore, the provisions of Section 14-295(e)(1) are inapplicable here. The Zoning Administrator's determination effectively means that if the car

wash use is discontinued, Northern Pride must tear down, or at a minimum, substantially reconstruct the building in order to create a new use on the site. Specifically, the Zoning Administrator has ruled that if a bank is to be established on the site with a drive-through, it must meet all of the requirements of Section 14-296(a)(1)(c) (conditional uses) and all dimensional requirements applicable to the B-7 zone, notwithstanding the fact that there is an existing building. Section 14-296(a)(1)(c) requires that a bank drive-up must be accessory to a banking service occupying a minimum floor area of 4,000 square feet, that the banking area must be located in a building that has at least 20,000 square feet and that it meet certain other design criteria. Due to the small size of this lot, a structure of this size would not allow for adequate parking. However, the size of the site is appropriate for a retail bank use, similar to the bank branch with a drive-through on the opposite side of Marginal Way. Retail bank operations require a drive-through window.

According to the Zoning Administrator, even if the existing building could be renovated in some manner, all aspects of the drive-through would have to be removed and rebuilt. Northern Pride maintains that it is allowed to reuse the existing structure, including the drive-through, because the structure is nonconforming in that it does not meet the requirements of Section 14-296(a). It cannot be the intent of the Ordinance to require a property owner to completely tear down a building because an aspect of it is nonconforming.

Section 14-385(b)¹ allows for the restoration or reconstruction of a building within its existing footprint and previous shell and that will not create a new nonconformity. In this case, a new bank in the building would be nonconforming as to the dimensional requirements applicable to banks with drive-throughs. In addition to these provisions, Section 14-382(d) provides:

Alteration, modification or addition may be made to a building which is lawfully nonconforming as to space and bulk or any dimensional requirement where the proposed changes in existing exterior walls and/or roofs would be within the existing shell of the building and would not create any new nonconformity nor increase any existing nonconformity.

The retention of the existing drive-through would be allowed under either of these nonconforming provisions if a bank use were to be established on the site.

Further, the change of use will result in a reduction of the current number of drive-through facilities located in the building, which would make the structure less nonconforming.

2. Northern Pride also appeals the decision of the Code Enforcement Officer that neither a restaurant with a drive-through nor a bank with a drive-through would be allowed under the provisions of Section 14-384. Section 14-384 allows a change of a nonconforming use in a

¹ The Zoning Administrator correctly notes in her opinion that my original request to her contained a typographical error in its reference to Section 14-385(f).

business zone from any use permitted in an industrial zone to any use permitted in a business zone.

First, car washes are allowed in the I-M Industrial zone as performance-based uses. Although the Zoning Administrator disagreed that car washes are allowed as a performance-based use in the I-M Industrial zone, this position is inconsistent with Section 14-248, which states that a use that is not expressly permitted in the district or not expressly prohibited may be permitted if it meets the following established standards:

- (a) The proposed development is consistent with the purposes of this zone.
- (b) The proposed development is designed and operated so that it will prevent undue adverse environmental impacts, substantial diminution of the value or utility of neighboring structures, or significant hazards to the health or safety of neighboring residents by controlling noise levels, emissions, traffic, lighting, odor, and any other potential negative impacts of the proposal.

Because a car wash is not listed as a prohibited use, it would be allowed in the I-M zone as of right as long as it demonstrated compliance with those standards. We respectfully disagree with the Zoning Administrator's position that a car wash is inconsistent with the purpose of the I-M zone.² In fact, the purpose section states that the I-M zones "are intended to provide zones in areas of the city in which light and moderate impact industries and transportation-related uses will coexist" and that "uses may be highway-oriented and transportation-related."³ Further, it states that allowed uses are to be located on arterials or collectors so that they will protect residential neighborhoods from drive-through traffic." (Section 14-246). A car wash clearly falls within the purpose section and would be a permitted use in the I-M zone if it met the required performance standards.

Second, restaurants and drive-throughs are permitted uses in business zones. In this case, the existing car wash falls within the definition of a drive-through facility set forth in Section 14-47:

A commercial facility which provides a service directly to a motor vehicle occupant and where the customer drives a motor vehicle onto the premises and to a window or mechanical device through

² We also respectfully disagree with the Zoning Administrator's determination that we are required to give supporting evidence defending our assertion that a car wash use meets the I-M purpose statement. The pending application is not for a car wash in the I-M zone. Instead, it seeks an interpretation of the Ordinance. This is a question of law and not of fact, and so no evidence is required on this point.

³ For example, one of the permitted uses in the I-M zone is automotive repair, which is similar in nature to a car wash.

Jensen Baird
Gardner Henry

July 24, 2014
Page 4

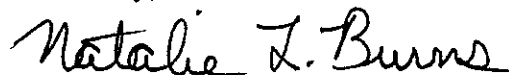
or by which the customer is served with or without exiting the vehicle. Drive-throughs do not include major or minor auto service stations.

Both restaurants and drive-throughs associated with a permitted use are listed as permitted uses in the B-2 zones, provided that the drive-through is not adjacent to any residential use or zone (Section 14-182(b)(4), (18)(19)). Banks are allowed uses in the B-3 zones and drive-up banking services are allowed as a conditional use. (Sections 14-217(b)(1)(a)(xiii), 14-218(b)(2)). They are allowed in the same manner in the B-5 zones (Sections 14-230.1(a)(8), 14-230.2(a)(4)) and the B-6 zones (Sections 14-269(a)(7), 14-270(a)(1)(c)).

Because either proposed change of use is from one allowed in an industrial zone (car wash) to a use permitted in a business zone (restaurant or bank), it is our opinion that the proposed change is expressly allowed by the provisions of Section 14-384(a). Further, even with a drive-through, either proposed use is less intensive (the bank use would be substantially less intensive) and more consistent with the purposes of the B-7 zone than the existing car wash.

We thank the Board and the Zoning Administrator for their review of this complicated issue.

Sincerely,

A handwritten signature in black ink that reads "Natalie L. Burns". The signature is written in a cursive, flowing style.

Natalie L. Burns

Enclosure

cc: William DeSena (via email)
Joe Malone (via email)



Planning & Urban Development Department

Jeff Levine, AICP, Director

Marge Schmuckal, Zoning Administrator

June 27, 2014

Natalie L. Burns, Esq.
c/o Jensen-Baird Garner-Henry
Ten Free Street
P.O. Box 4510
Portland, Maine 04112-4510

RE: 20 Marginal Way - 113-A-025 – Northern Pride Auto Wash (the “Property”) – B-7 Zone

Dear Natalie:

I am in receipt of your request of a determination letter concerning the Property.

The Property is an approved car wash considered to be a legal nonconforming use. My research shows that the B-7 Mixed Use Development District Zone was placed on the Property (along with other properties along the Marginal Way corridor) when it was created and approved by City Council on April 19, 2006. The B-7 Zone does not list car washes in either the permitted uses or conditional uses. It is noted that under 14-295(e)1 accessory uses are described and prohibit all drive-up services for all retail or drive-up repair facilities except for bank drive-up services, where permitted. Bank drive-up services are considered a conditional use to the Planning Board in the B-7 Zone.

Section 14-384, Change of nonconforming use, does state that “A lawful nonconforming use in a structure not designed for a use permitted in the zone in which it is located shall not be changed to any use other than to a use permitted in the zone in which the use is located *or* to any use other than a nonconforming use of a more restricted zone, as set forth in the following schedule, *provided* that in no such case shall any structural alterations be made in any building except those required by law, ordinance or other regulations.” You have outlined that you believe that the change of use circumstances of the car wash to a Dunkin’ donuts drive through falls under (a) of the listed schedule: “In a business zone, from any use permitted in an industrial zone to any use permitted in a business zone”. It is true that the Property is located in a business zone (B-7). However, I disagree with the assertion that the car wash is an allowed use in an industrial zone. You have stated that the car wash use would fall under an allowable use in the I-M zone using 14-248, “Performance based uses”. I disagree that a car wash could be considered an allowable use under the Performance based uses. I do not agree that a car wash would be consistent with the purposes of the I-M zone. It is clearly not a light or moderate impact industry use. You have not given any supporting evidence defending your assertion that a car wash use meets the I-M zone purpose statement. Since the car wash is not a use permitted in an industrial zone, 14-384(a) cannot be used as a vehicle to allow a change of nonconforming car wash use to a Dunkin’ Donuts drive-thru. Furthermore, none of the other exception (b) through (d) can be used to allow a Dunkin’ Donuts drive-thru. Therefore, any change of the nonconforming use must be changed to a use that is permitted in the B-7 Zone as required under 14-384.



Planning & Urban Development Department

Jeff Levine, AICP, Director

Marge Schmuckal, Zoning Administrator

PG 2

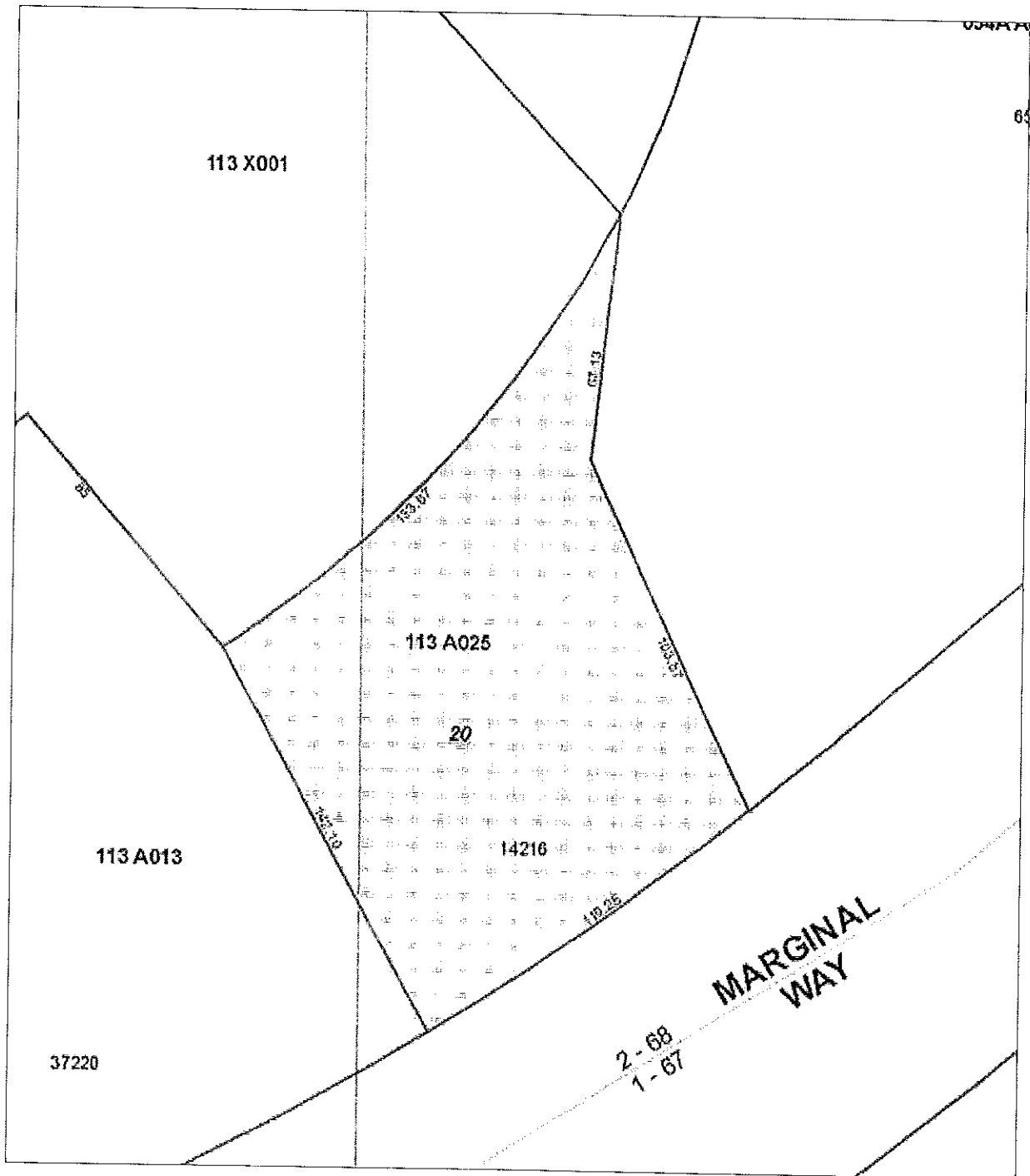
You also request an opinion of whether a bank with a drive-through could be created on the site. Based solely on allowable use, yes, a bank with a drive-through (drive-up) is allowed as a conditional use to the Planning Board under section 14-296(a)1c. However, the B-7 zone, as you know, contains other dimensional requirements, such as minimum building height and minimum floor area. I understand that the site may be challenging. When developing a lot in any zone, *all* the requirements of the underlying zone must be met.

Your request goes on to state that the reconstruction of the existing nonconforming structure would be allowed under 14-385(f). I think that you have misstated the appropriate section number for the allowance to rebuild. 14-385(f) relates to nonconforming buildings located in the R-6 zone. I think that you may be referring to section 14-385(b) which states: "Where the restoration or reconstruction will occur entirely within the existing footprint and previous shell of the building and will not create a new nonconformity;" 14-385(c) goes on to state that the reconstruction must happen within one (1) year. I have not been able to follow your argument concerning the allowance to do alterations and modifications of a building. I do not believe the section number has been correctly stated. I can cite 14-382(b) which states: "A building whose use is wholly nonconforming shall not be altered so as to increase the cubical content or the degree of nonconformity." Certainly the current building use is wholly nonconforming. Therefore, I believe this section would apply to the Property. Because section 14-382(b) concerns the nonconforming use of the structure, I believe it would prevail over section 14-382(d) which only speaks to nonconformity of space and bulk requirements and not to the nonconformity of building use.

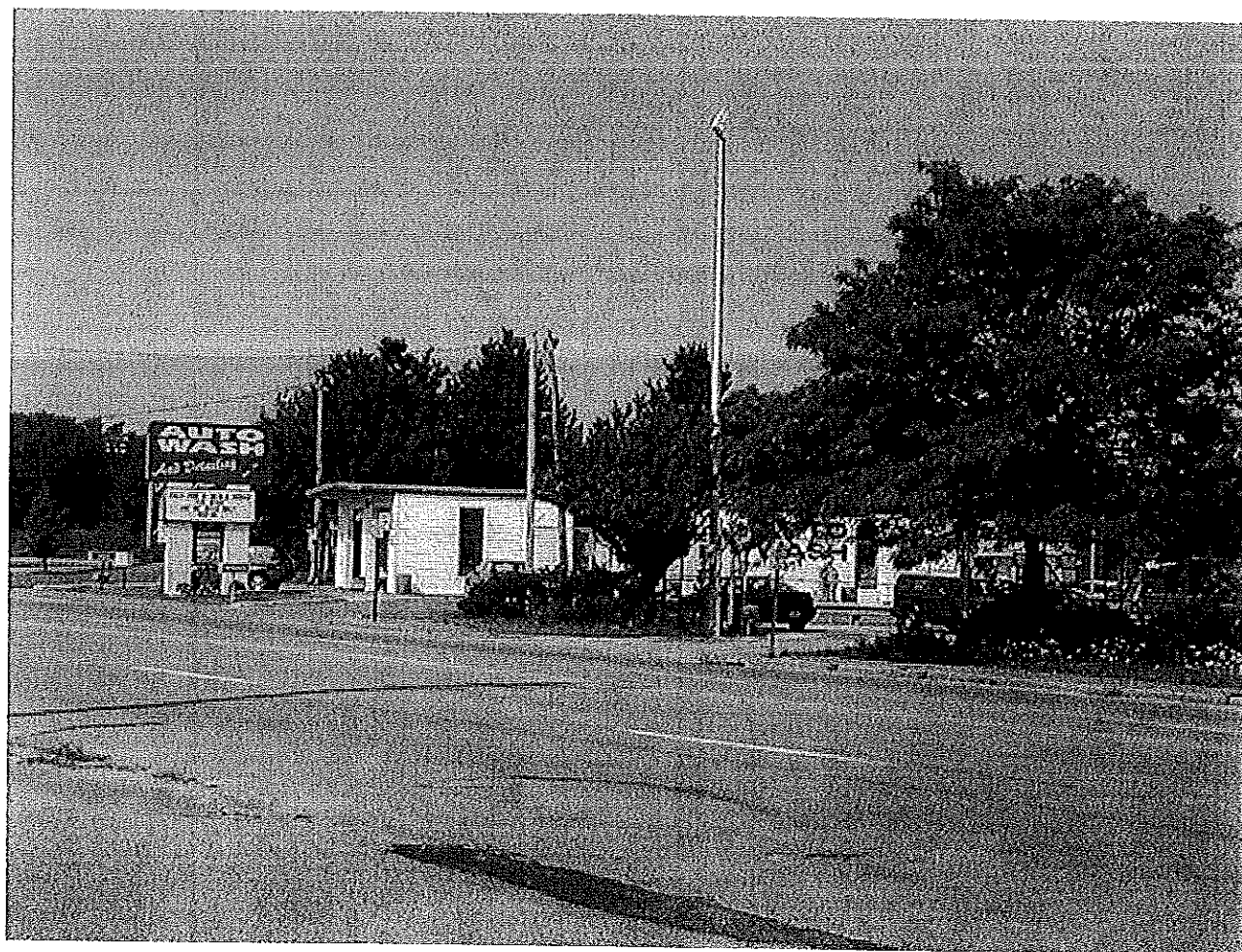
You have the right to appeal my decision concerning this matter if you wish to exercise your right to appeal, you have thirty (30) days from the date of this letter in which to appeal. If you should fail to do so, my decision is binding and not subject to appeal. Please contact this office for the necessary paperwork that is required to file an appeal.

Very truly yours,

Marge Schmuckal
Zoning Administrator
City of Portland, Maine



This excerpt from the City of Portland Index No. F9NW, April 1 2011 fy2012



QUITCLAIM DEED WITHOUT COVENANT
(Release Deed)
(Bubble-Up Car Wash, Marginal Way, Portland, Maine)

KNOW ALL MEN BY THESE PRESENTS, that CASCO NORTHERN BANK,
N.A. a national banking association having its principal place
of business in Portland, Maine, in consideration of One Dollar

(\$1.00) and other valuable consideration, paid by ~~William R.~~
~~Wash, a Maine corporation~~ ^{Northern Pride LLC}
~~Be-Be~~ having a mailing address of 233 East 70th Street, New

York, NY, ("Grantee"), the receipt whereof is hereby
acknowledged, does hereby remise, release, bargain, sell and
convey, and forever quit-claim unto the said Grantee, its
successors and assigns forever, all of its right, title and
interest, if any, in and to the following described real estate:

PARCEL ONE:

A certain lot or parcel of land with the buildings
thereon, situated in the City of Portland, County of
Cumberland, State of Maine, bounded and described as
follows:

Beginning at a point on the northerly sideline of the
Marginal Way, said point being at the intersection of said
northerly sideline and the easterly sideline of land now or
formerly of Portland Terminal Company as conveyed to its
predecessor in title, the Portland and Rochester Railroad,
by William W. Thomas by deed dated June 30, 1891 and
recorded in Cumberland County Registry of Deeds in Book
582, Page 72; thence North 24° 41' West a distance of one
hundred four and one tenth (104.1) feet to a point; thence
South 49° 08' West to a point ten (10) feet northeasterly
from, measured normal to, the center line as now located of
a track of Portland Terminal Company known as Track Number
Twenty (20) in Yard Seven (7); thence southeasterly on a
line parallel with and ten (10) feet northeasterly from,
measured normal to, said center line, to the northerly
sideline of the Marginal Way; thence easterly along said
northerly sideline of the Marginal Way to the point of
beginning.

MAINE REAL ESTATE TRANSFER TAX PAID

Meaning and intending to describe that portion of the land described in the aforesaid deed of Willaim W. Thomas which lies northeasterly of a line drawn parallel with and ten (10) feet northeasterly from, measured normal to, said center line of Track Number Twenty (20) as now located; said parcel of land contains 6,050 square feet, more or less.

Meaning and intending to describe the same property which was conveyed to Bertha Silverman by Deed from A. R. Wright Company dated October 15, 1964 and recorded at the Cumberland County Registry of Deeds in Book 2861, Page 51.

PARCEL TWO:

A certain lot or parcel of land in the City of Portland, County of Cumberland, and State of Maine, bounded and described as follows:

Beginning at a point in the northerly sideline of Marginal Way at its intersection with the easterly sideline of land of Central Maine Power Company, said point being the southeasterly corner of land conveyed to said Central Maine Power Company by Cumberland County Power & Light Company by deed dated December 3, 1942 and recorded in Cumberland County Registry of Deeds in Book 1699, Page 476;

Thence northerly, along said easterly sideline of said Central Maine Power Company land, 140 feet, more or less, to its intersection with the southeasterly line of land described in a deed from Portland Terminal Company to the State of Maine dated February 18, 1971 and recorded in said Registry of Deeds in Book 3164, Page 867;

Thence northeasterly, along said southeasterly sideline of said land of the State of Maine, one hundred forty-one (141) feet, more or less, to a point, said point being the intersection of said southeasterly sideline of said land of the State of Maine with the westerly sideline of land of Jannette G. Kaplan and Constance Hoffert;

Thence southerly, along said westerly sideline of said land of Kaplan and Hoffert, a distance of sixty-six (66) feet, more or less, to a point, said point being the northerly corner of other land of the Grantee;

Thence southwesterly along the northwesterly sideline of said other land of the Grantee, a distance of ninety-five (95) feet, more or less, to the westerly corner of said other land of the Grantee;

Thence southeasterly, along the southwesterly sideline of said other land of the Grantee, a distance of one hundred eight (108) feet more or less to its intersection with the northerly sideline of Marginal Way;

Thence westerly, along the northerly sideline of Marginal Way a distance of eighty-eight (88) feet, more or less, to the point of beginning.

The parcel of land described herein contains ten thousand six hundred ninety-five (10,695) square feet, more or less.

Meaning and intending to describe the same property which was conveyed to Bertha Silverman by Deed from Portland Terminal Company dated December 12, 1980, recorded at the Cumberland County Registry of Deeds in Book 4715, Page 338.

The premises hereby described are subject to the restriction that they shall not be used for the sale of batteries, lubrication, oil, alignment, and front-end parts, tune-ups, brakes, shock absorbers, exhaust parts and systems until July 15, 2002, and that they shall not be used for the sale of tires, tubes and gasoline for so long as Century Tire Co. or any successor (by sale or otherwise) of said company occupies the property owned by Bertha Silverman located at 185 Kennebec Street, Portland, Maine. The foregoing restriction shall run with the land.

The premises hereby described have the benefit of the covenant running with that certain land and improvements owned by Bertha Silverman located at 185 Kennebec Street, Portland, Maine, that such Silverman property shall not be used for car washing or car waxing, as contained in the deed of Bertha Silverman hereafter referred to.

Parcels One and Two comprise the same premises conveyed by Bertha Silverman to Intown Car Wash, Inc. by quitclaim with covenant deed.

PARCEL THREE:

Being a certain lot or parcel of land as shown on a Department of Transportation Right of Way Map entitled "State Highway '295' Portland, Cumberland County, Federal Aid Project No. I-295-3 (29) & (30) dated January, 1967 on file in the office of the Department of Transportation, at Augusta, S.H.C. File No. 3-185.

Beginning at a point in the present southeasterly right of way line of State Highway '295', said point being

one hundred twenty-five (125) feet southeasterly from and as measured along a line normal to the ramp F.A.-7 control edge base line at about Sta. 2+25;

Thence northwesterly by a direct course along the right-of-way established for State Highway '295' under Federal Aid Project I-295-3 (29) twenty-five and twenty-one hundredths (25.21) feet to a point, said point being one hundred (100) feet southeasterly from and as measured along a line normal to the Ramp F.A.-7 control edge base line at about Sta. 2+23;

Thence northeasterly by a direct course about one hundred thirty-three (133) feet to a point in the present southeasterly right-of-way line of State Highway '295', said point being that point formed by the intersection of the said southeasterly right of way line and the southwesterly line of line formerly of Jannette G. Kaplan and Constance Hoffert now believed to the United States Postal Service, said point also being one hundred twenty-five (125) feet southeasterly from and as measured along a line normal to the Ramp F.A.-7 Base Line at about Sta. 3+08;

Thence southwesterly by a three hundred twenty (320) feet radius curve to the right about one hundred thirty-six (136) feet to the point of beginning.

Said lot or parcel contains about 2,140 square feet.

Being a portion of the land acquired by the State of Maine by Quit-claim deeds of Portland Terminal Co., and Central Maine Power Co., recorded in the Cumberland County Registry of Deeds in Book 3169, Page 867, and Book 3523, Page 84.

Being the same parcel of land conveyed to Intown Car Wash, Inc. by the State of Maine by Quit-claim deed dated December 30, 1982 and recorded in Cumberland County Registry of Deeds in Book 6112, Page 58.

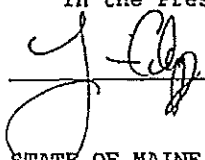
Being the same premises conveyed to Kabbani, Inc. by deed of Intown Car Wash, Inc. dated January 27, 1988 and recorded in the Cumberland County Registry of Deeds in Book 7049, Page 265.

TO HAVE AND TO HOLD the same, together with all the privileges and appurtenances thereunto belonging to the said Grantee, its successors and assigns forever.

THE PROPERTY HEREBY CONVEYED IS SOLD AS IS, WHERE IS.
CASCO NORTHERN BANK, N.A. MAKES NO REPRESENTATIONS OR
WARRANTIES, EITHER EXPRESS OR IMPLIED, AS TO FITNESS FOR A
PARTICULAR PURPOSE, MERCHANTABILITY, HABITABILITY, OR AS TO ANY
OTHER MATTER. FURTHERMORE, CASCO NORTHERN BANK MAKES NO
REPRESENTATIONS OR WARRANTIES REGARDING THE NUMBER, QUANTITY OR
COUNT OF ANY ITEMS OF PERSONAL PROPERTY.

IN WITNESS WHEREOF, Casco Northern Bank, N.A. has caused
this instrument to be executed and delivered in its name by
Kevin M. Meyer, its Assistant Vice President hereunto duly
authorized this 28 day of June, 1991.

SIGNED, SEALED AND DELIVERED
In the Presence of:


STATE OF MAINE
CUMBERLAND, SS.

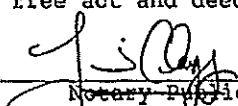
CASCO NORTHERN BANK, N.A.

By: 
Kevin M. Meyer
Its Asst. Vice President

June 28, 1991

Personally appeared the above-named Kevin M. Meyer, an
Assistant Vice President of Casco Northern Bank, N.A. and
acknowledged the foregoing instrument to be his free act and
deed in his said capacity, and the free act and deed of said
Casco Northern Bank, N.A.

Before me,


Notary Public
Attorney at Law
JEANNE CLEGG

Printed Name:

ACCEPTED: William R. De Sena
By: William R. De Sena
JRS: President
WPPDCK3372

Recorded
Cumberland County
Registry of Deeds
07/02/91 11:35:57AM
Robert P. Titcomb
Register