City of Portland

Memo

To: Mayor Strimling and Members of the Portland City Council

cc: Jon Jennings, City Manager; Danielle West-Chuhta, Corporation Counsel

From: Michael I. Goldman, Associate Corporation Counsel

Date: June 12, 2018

Re: Portland Downtown District Proposed Expansion

As you are aware, on June 1, 2018, Sarah Schindler, the owner of the property at 130 Spring Street (and a professor at the University of Maine School of Law) emailed comments to the City in response to the proposed Portland Downtown District (the "District") expansion. Professor Schindler's property is located within the expanded area that Portland Downtown has proposed for inclusion in the expanded District. In her email, Ms. Schindler summarizes her concerns as follows:

> 1) It is very uncommon for purely residential properties to be included/assessed within the District, especially when those property owners are not given a direct vote on the matter;
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> 2) To the extent that purely residential properties are going to be included within the District expansion, those properties should be assessed at a lower rate than mixed use and commercial properties; and
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> 3) My analysis of the relevant state law and local approvals suggests that it is possible to assess these properties differently, despite what the District has been told. Regardless, this is an issue that must be resolved before any expansion is approved.

As a result of her concerns, Ms. Schindler requests that the City Council:

> A) Deny the expansion; or
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> B) Refuse to include purely residential properties within the new expanded the District's borders; or
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> C) Only approve the expansion on the condition that purely residential properties be assessed at a lower rate than mixed use and commercial properties.

For the reasons explained in this memo, we are aware of no legal prohibition on the proposed expansion of the District or the inclusion of residential property in the District. Each of Prof. Schindler's concerns are addressed in order below.

1. **Although it might be uncommon for purely residential properties to be included in a development district, such as the District, nothing in the applicable statutes prohibits the inclusion of residential property in a district.**

Amending/expanding a development district (as the City is being asked to do here) is subject to the same considerations and conditions that are required for the creation of a development district. 30-A M.R.S. § 5226(5). In amending/expanding the District, the Council must consider:

> whether the proposed district or program will contribute to the economic growth or well-being of the municipality or plantation or to the betterment of the health, welfare or safety of the inhabitants of the municipality or plantation. Interested parties must be given a reasonable opportunity to present testimony concerning the proposed district or program at the hearing provided for in section 5226, subsection 1. If an interested party claims at the public hearing that the proposed district or program will result in a substantial detriment to that party's existing business in the municipality or plantation and produces substantial evidence to that effect, the legislative body must consider that evidence. When considering that evidence, the legislative body also shall consider whether any adverse economic effect of the proposed district or program on that interested party's existing business in the municipality or plantation is outweighed by the contribution made by the district or program to the economic growth or well-being of the municipality or plantation or to the betterment of the health, welfare or safety of the inhabitants of the municipality or plantation.

30-A M.R.S. § 5223(2). Section 5223(3) further provides the following relevant conditions for approval of a development district:

> A. At least 25%, by area, of the real property within a development district must meet at least one of the following criteria:
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> > (1) Must be a blighted area;
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> > (2) Must be in need of rehabilitation, redevelopment or conservation work including a fisheries and wildlife or marine resources project; or
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> > (3) Must be suitable for commercial or arts district uses.
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> B. The total area of a single development district may not exceed 2% of the total acreage of the municipality or plantation. The total area of all development districts may not exceed 5% of the total acreage of the municipality or plantation.
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> C. The original assessed value of a proposed tax increment financing district plus the original assessed value of all existing tax increment financing districts within the municipality or plantation may not exceed 5% of the total value of taxable property within the municipality or plantation as of April 1st preceding the date of the commissioner's approval of the designation of the proposed tax increment financing district.

A thorough review of the considerations and conditions for approval of a development district listed above (as well as the entire statutory scheme governing development districts), reveals that the Legislature did not include any prohibition on including residential properties within a development district. Furthermore, the term "downtown" is defined in the definitions section of Chapter 206 as "the traditional central business district of a community that has served as the center of socioeconomic interaction in the community, characterized by a cohesive core of commercial and mixed-use buildings, often interspersed with civic, religious and residential buildings and public spaces, that are typically arranged along a main street and intersecting side streets and served by public infrastructure." 30-A M.R.S. 5222(8) (emphasis added).

Despite Professor Schindler's position that it is very uncommon for purely residential properties to be included in business improvement districts, nothing in the applicable statutes prevents the inclusion of such properties in the District. With that said, nothing in the statutes requires the inclusion of any particular property in the District either. As such, the proposed boundary for the District could be amended by the Council to exclude certain properties (like residential properties, etc.), but the practicalities and policy reasons of doing so should be considered in detail first. For example, one practicality to consider is if an excluded residential property is located on a block that otherwise receives sidewalk snow removal services through the District, would the sidewalk in front of that excluded property be left unplowed?, etc.

2. **To the extent that purely residential properties are going to be included within the proposed District expansion, those properties cannot be assessed at a lower rate than the mixed use and commercial properties within the District.**

Title 30-A M.R.S. § 5228 provides that a municipality may make three (3) types of assessments for development districts: development assessments, maintenance assessments and implementation assessments. As set forth in proposed Order 244-17/18, the assessments currently before the Council for consideration are maintenance assessments and implementation assessments. With respect to such assessments, section 5228 provides as follows:

> B. A maintenance assessment upon all lots or property within the development district. The assessment must be assessed equally and uniformly on all lots or property receiving benefits from the development program and the continued operation of the public facilities. The total maintenance assessments may not exceed the cost of maintenance and operation of the public facilities within the district. The cost of maintenance and operation must be in addition to the cost of maintenance and operation already being performed by the municipality or plantation within the district when the development district was adopted; and
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> C. An implementation assessment upon all lots or property within the development district. The assessment must be assessed equally and uniformly on all lots or property receiving benefits from the development program. The implementation assessments may be used to fund activities that, in the opinion of the municipal or plantation legislative body, are reasonably necessary to achieve the purposes of the development program. The activities funded by implementation assessments must be in addition to those already conducted within the district by the municipality or plantation when the development district was adopted.

30-A M.R.S. § 5228(1)(B) & (C) (emphasis added). The plain language of section 5228 requires that all lots or property within a development district be subject to any maintenance or implementation assessments and that such assessments be assessed equally and uniformly on all lots, regardless of their use, receiving the benefits of the District. Contrary to Professor Schindler's assertions in the second and third points in her email, applicable Maine law does not allow the City to assess residential properties in the District at a lower rate than mixed-use or commercial properties.[1]

Conclusion

Pursuant to 30-A M.R.S. § 5228, and for the reasons detailed above, the City is unable to exempt residential properties that are within the District from applicable maintenance and implementation assessments, and it is also unable to assess such properties at a rate that is lower than commercial or mixed-use properties in the District. Although Professor Schindler's email might set forth a policy argument for excluding certain residential properties from District assessments, those policies are contrary to the current provisions of the Maine law which governing development districts, and as such, her arguments should be directed to the Maine Legislature and not the Council. Of course, as mentioned above, the proposed boundary for the District could be amended to exclude certain properties, but the practicalities and policy reasons for doing so should first be considered.

If you have questions or require further information about the issues addressed in this memo, please let me know.

[1] Professor Schindler also states that unlike maintenance and implementation assessments, development assessments on properties in the District are not required to be assessed equally and uniformly on all lots or property in the District. She cites to section 5228(1)(A) in making this argument. This sub-section provides as follows:

> A. A development assessment upon lots or property within the development district. The assessment must be made upon lots or property that have been benefited by improvements constructed or created under the development program and may not exceed a just and equitable proportionate share of the cost of the improvement . . .

30-A M.R.S. § 5228(1)(A) (emphasis added). Professor Schindler is arguably correct that the absence of the word "all" before "lots or property" and the absence of the words "equally and uniformly" might indicate that municipalities may assess *development assessments* on fewer than all properties within a development district and at different rates for different properties. With that said, though, development assessments are for physical improvements constructed or created in a district, and no such assessments are currently before the Council for consideration. As explained above, the Council is only considering implementation and maintenance assessments at this time. Consequently, this argument is irrelevant to this discussion.