

Order 250-16/17

Amended to add to the Decision in section 9, at the end of the second paragraph and at the end of the sentence that reads: "Staff considers that the location is grandfathered," the words, "for a period of one year from the abandonment of the previous license": 8-0 (Mavodones absent) on 5/15/2017

Passage as amended: 8-0 (Mavodones absent) on 5/15/2017

Effective 5/25/2017

ETHAN K. STRIMLING (MAYOR)
BELINDA S. RAY (1)
SPENCER R. THIBODEAU (2)
BRIAN E. BATSON (3)
JUSTIN COSTA (4)

CITY OF PORTLAND
IN THE CITY COUNCIL

DAVID H. BRENERMAN (5)
JILL C. DUSON (A/L)
PIOUS ALI (A/L)
NICHOLAS M. MAVODONES, JR (A/L)

**ORDER APPROVING AND ADOPTING
THE RECORD AND WRITTEN DECISION RE: BONFIRE LLC APPLICATION
FOR AN ENTERTAINMENT WITH DANCING AND AFTER HOURS
ENTERTAINMENT LICENSE**

ORDERED, that the record compiled by Corporation Counsel of the April 5, 2017 hearing on the application by Bonfire, LLC at 37 Wharf Street for an Entertainment with Dancing and After Hours Entertainment License, with a final City Council decision on April 5, 2017, is hereby approved as the official record; and

BE IT FURTHER ORDERED, that the written decision attached hereto as Attachment A is approved as the final written decision of the City Council regarding the application by Bonfire, LLC at 37 Wharf Street for an Entertainment with Dancing and After Hours Entertainment License.

**DECISION OF THE PORTLAND CITY COUNCIL DENYING
THE APPLICATION FOR A LIVE ENTERTAINMENT LICENSE**

IN THE MATTER OF BONFIRE, LLC

On April 5, 2017, the City of Portland City Council held a public hearing on the application of Bonfire, LLC for an entertainment with dance license pursuant to the City of Portland Code of Ordinances § 4-51. The following are the Council's findings and conclusions.

THE RECORD

The written record submitted in this matter is as follows:

1. Written cover letter from Tanner Herget on behalf of Bonfire Country Bar, requesting to move the entertainment license previously held by 51 Wharf Street and Ultra Lounge;
2. Application and associated materials submitted by Bonfire Country Bar;
3. Memorandum by Anne Torregrossa, Associate Corporation Counsel, addressing the differences between the corporate structure of 51 Wharf Street and Ultra Lounge and Bonfire LLC;
4. Memorandum from Ann Machado, Zoning Administrator, addressing the restrictions contained in City of Portland Code of Ordinances § 14-330.13; and
5. Memorandum from Jessica Hanscombe, Business License Specialist, addressing the restrictions contained in City of Portland Code of Ordinances § 4-57.5, with attachments.

At the hearing, the City Council also heard the following testimony:

6. Joseph Goodman, Esq., attorney for the applicant, addressed the Council and explained that his client obtained its entertainment license in August of 2006, as a result of the previous business at that location, Salsa, having an entertainment license. The applicant is seeking to move the license one door down.

Citing to the preamble of the relevant ordinance, Attorney Goodman testified that allowing the applicant to move the license would comply with the spirit of the ordinance because it would not be increasing density in that area. Attorney Goodman took the position that the applicant met the exception in § [14-]330.13.

Mr. Goodman pointed out that the definition of ownership under the ordinance is broad and includes ownership interests.

7. Tanner Herget, representative for the applicant, also addressed the Council with a diagram of the area. He explained that 51 Wharf had been a 300-person nightclub, and he is seeking to move the entertainment license from that location

down the road to the much smaller Bonfire. He is currently operating Bonfire Country Bar as a bar without entertainment.

Mr. Herget explained that he has been a conscientious bar owner in the City for a number of years, even serving on committees to improve the safety of the City's nightlife.

8. In a statement, and in response to Council questions, Ms. Hanscombe explained that Bonfire is located within the B-3 Zone, which has a dispersal requirement of 100' between businesses with an entertainment license. Bonfire is located 35' from Oasis, which has an entertainment license.

Ms. Hanscombe further explained that Mr. Herget has closed 51 Wharf Street, and is seeking to transfer the license to 37 Wharf Street, which staff does not believe is allowed.

In response to questions, Ms. Hanscombe explained that the location at 51 Wharf Street remains grandfathered and that a new business with entertainment could go in, so long as it was within one year of 51 Wharf abandoning its license.

9. Attorney Torregrossa, in response to questions by the Council, explained that a business other than 51 Wharf had held an entertainment license at 51 Wharf Street, prior to the deadline to be "grandfathered" under § 14-330.13. When that business closed and 51 Wharf opened in the same location, 51 Wharf was able to take advantage of that grandfathered entertainment license.

In response to questions, Attorney Torregrossa explained that staff's interpretation is that the location at 51 Wharf is grandfathered under the terms of the ordinance and there is no way for the Council to terminate that right without changing the ordinance. Staff considers that the location is grandfathered for a period of one year from the abandonment of the previous license.

She further explained the position in her memorandum that 51 Wharf Street and Ultra Lounge, Inc. and Bonfire LLC are separate corporate entities that cannot be disregarded and Maine law does not typically allow owners or others to disregard the corporate form.

10. Michael Sauschuck, Chief of Police, also spoke about the public safety concerns behind the dispersal requirement, particularly eliminating a single massive crowd being created at closing time with the bars in the Old Port. In Chief Sauschuck's experience, the issues they see at bar time increase when there are large masses.
11. No other members of the public spoke in favor of or against the application.

FINDINGS OF FACT

The City Council, therefore, finds as follows:

12. The applicant is Bonfire, LLC, which owns Bonfire Country Bar, located at 37 Wharf Street.

13. 37 Wharf Street is located within the Downtown Entertainment Overlay Zone.
14. It is also located within 100' of Oasis, which is another business that currently holds an entertainment license.
15. 51 Wharf Street and Ultra Lounge, Inc. previously operated a bar by that name at 51 Wharf Street.
16. 51 Wharf Street and Ultra Lounge, Inc. held an entertainment license at that location, which it obtained as a result of a prior business at that location being eligible for the exemption from the dispersal requirements in § 14-330.14.
17. 51 Wharf Street and Ultra Lounge, Inc. and Bonfire, LLC share a common owner, the Herget Group, LLC.
18. However, the entities are not the same; they are different corporate entities, and are even different types of corporate entities.

CONCLUSIONS OF LAW

19. The applicant is located within 100' of another business with an entertainment license and, therefore, does not meet the dispersal requirements of § 14.330-13.
20. The applicant does not meet the standards to be exempted from the dispersal requirements of § 14-330.14 because it is the location at 51 Wharf Street that is exempt, and not the business.
21. Even if it was the business that was exempt, Bonfire still does not qualify for the exemption because Bonfire, LLC and 51 Wharf Street and Ultra Lounge, Inc. are not the same corporate entity, and Maine law generally does not allow an owner to disregard the corporate structure when it is convenient.

ORDER

Therefore, the City Council denies the application of Bonfire, LLC for an entertainment license at 37 Wharf Street.

Dated: May 15, 2017

Ethan Strimling, Mayor

Spencer Thibodeau, District 2

Justin Costa, District 4

Pious Ali, At-Large

Nicholas M. Mavodones, Jr., At-Large

Belinda S. Ray, District 1

Brian E. Batson, District 3

David Brenerman, District 5

Jill C. Duson, At-Large

Bonfire, LLC
37-39 Wharf Street
Portland, Maine 04101

December 8, 2016

City of Portland
389 Congress Street
Portland, Maine 04101

Dear Mayor Strimling and Members of the City Council:

I, Tanner Herget, would like to move my entertainment license with dance and after-hours entertainment from 51 Wharf Restaurant & Ultra Lounge Inc located at 45-51 Wharf Street to Bonfire LLC located two doors down to 37-39 Wharf Street

51 Wharf Restaurant & Ultra Lounge Inc, owned by The Herget Group, LLC has been in business for 11 years providing a safe venue with live entertainment. I would like to move this entertainment license to provide country singers and bands to be able to provide enjoyment of both locals and visitors which will add to the culture and ambience of the City of Portland.

I thank you for your time and consideration.

Sincerely,

Tanner Herget

Portland, Maine



Yes. Life's good here.

Permitting and Inspections Department
 Michael A. Russell, MS, Director
 389 Congress St. Room 307 • Portland, ME 04101 • (207) 874-8557
www.portlandmaine.gov

Application for Food Service Establishment with Alcoholic Beverages License

Business Information			
Business Name (d/b/a):	Bonfire Country Bar	Phone:	877.653-7678
Location Address:	37 Wharf Street, Portland, ME	Zip:	04101
If new, what was formerly at this location:			
Mailing Address:	37 Wharf Street, Portland, ME	Zip:	04101
Contact Person:	Tanner Herget	Phone:	877-243-7438 x9
Contact Person Email:	Tanner@OldPortNightlife.com		
Manager of Establishment:	Tanner Herget	Date of Birth:	07/23/1982
		Phone:	877-243-7438 x9
Owner of Premises (Landlord):	428 Fore Street LLC		
Address of Premises Owner:	42 Chamberlain Ave, Portland, ME	Zip:	04101

Sole Proprietor/Partnership Information (If Corporation, leave blank)

Name of Owner(s)	Date of Birth	Residence Address

Corporate/LLC/Non-Profit Organization Applicants (If Sole Proprietor or Partnership, leave blank)

Corporate Name		Corporate Mailing Address	
Bonfire LLC		37 Wharf Street, Portland, ME	Zip: 04101
Contact Person:	Tanner Herget	Phone:	877.243.7438 x9
Principal Officers			
Title	Date of Birth	Residence Address	
The Herget Group, LLC	Sole-Member	04-11-2013	1712 Pioneer Ave, #120, Cheyenne, WY 82001

About Your Establishment

Class of Liquor License:	Class X		
Type of food served:	Appetizers, Burgers		
Please circle all that will be served:	Beer <input checked="" type="checkbox"/>	Wine <input checked="" type="checkbox"/>	Liquor <input checked="" type="checkbox"/>
Projected percentage of sales:	Generated from Food: 200,000.00	Generated from Alcohol: 500,000.00	
Hours & days of operation:	M-F 4pm-1am S-S 2pm-1am		

QUESTIONS	Y/N
Will full-course meals, only capable of consumption with the use of tableware, be served the entire time the establishment is open?	Y <input checked="" type="checkbox"/>
If No, please explain: <i>Full course meals will not be provide all hours of operation</i>	
Is the establishment less than 300 feet from a school, dormitory, church or parish house, or similar establishment?	Y <input checked="" type="checkbox"/>
If yes, give the distance:	
Will you have entertainment on the premises? (If yes, a Supplemental Application for Dancing & Entertainment is required.)	Y <input checked="" type="checkbox"/>
Will you permit dancing on the premises?	Y <input checked="" type="checkbox"/>
Will you permit dancing after 1:00 a.m.?	Y <input checked="" type="checkbox"/>
Will you have outside dining? (If yes, an Outdoor Dining Application is required)	Y <input checked="" type="checkbox"/>
If yes, will the outside dining be on PUBLIC or PRIVATE property (circle one).	
Will you have any amusement devices (pinball, video games, juke box)?	Y <input checked="" type="checkbox"/>
If yes, please list: # of pinball machines: _____ # of amusements: <u>1</u> # of pool tables: _____	
What is your targeted opening date?	
Does the Issuance of this license directly or indirectly benefit any City employee(s)?	Y <input checked="" type="checkbox"/>
If Yes, list name(s) of employee(s) and department(s):	
Have any of the applicants, including the corporation (if applicable), ever held a business license with the City of Portland?	Y <input checked="" type="checkbox"/>
If Yes, please list business name(s) and location(s):	
Is any principal officer under the age of 21?	Y <input checked="" type="checkbox"/>
Have applicant, partners, associates, or corporate officers ever been arrested, indicted, or convicted for any violation of law?	Y <input checked="" type="checkbox"/>
If Yes, please explain:	

I, Tanner Herget do hereby swear and affirm that every employee in my establishment that serves alcohol to the public has attended server training, or will attend server training within 90 days of their hire. I also understand that at any time the City license administrator can, upon request, require me to produce Server Training certificates for each employee that serves alcohol to the public in my establishment. Failure to meet the training requirement imposed by section 15-41 may result in the denial of a liquor license pursuant to 28-A M.R.S.A. § 653 (2) (G).

Applicant, by signature below, agrees to abide by all laws, orders, ordinances, rules and regulations governing the above licensee and further agrees that any misstatement of material fact may result in refusal of license or revocation if one has been granted. Applicant agrees that all taxes and accounts pertaining to the premises will be paid prior to issuance of the license.

It is understood that this and any application(s) shall become public record and the applicant(s) hereby waive(s) any rights to privacy with respect thereto. I/We, hereby authorize the release of any criminal history record information to the City Clerk's Office or licensing authority. I/We, hereby waive any rights to privacy with respect thereto.

Signature  Title Manager Date 12/08/2016

For more information about Liquor Licenses, see Portland City Code Chapter 15 at www.portlandmaine.gov and M.R.S.A. Title 28-A at www.maine.gov.

Portland, Maine



Yes. Life's good here.

Permitting and Inspections Department
Michael A. Russell, MS, Director

389 Congress St. Room 307 • Portland, ME 04101 • (207) 874-8557

www.portlandmaine.gov

Supplemental Application for Dancing and Entertainment License

License accompanies a City of Portland Food Service Establishment or Food Service Establishment with Alcohol license.

<input type="checkbox"/> Entertainment without Dancing: \$281	<input checked="" type="checkbox"/> Entertainment with Dancing: \$504	<input checked="" type="checkbox"/> After-Hours (1 a.m. to 3 a.m.): \$567
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Business Information			
Business Name (d/b/a):	Bonfire Country Bar	Phone:	877.653.7678
Location Address:	37 Wharf Street, Portland, ME		Zip: 04101

About Your Establishment

Describe in detail the type and nature of the business and proposed entertainment: <i>Live bands and singers</i>	
Will music be electric, acoustical, or both? (Circle)	
Will amplification be used?	<input checked="" type="checkbox"/> Y <input type="checkbox"/> N
if yes, where and at what level? <i>Inside and out at a level acceptable to city ordinances</i>	
Will music be played (Circle all that apply): <input checked="" type="checkbox"/> Inside <input checked="" type="checkbox"/> Outside	
Will you permit dancing on the premises?	<input checked="" type="checkbox"/> Y <input type="checkbox"/> N
Will you permit dancing after 1:00 a.m.?	<input checked="" type="checkbox"/> Y <input type="checkbox"/> N
What is the distance to the nearest residential dwelling unit both inside and outside the building from where the entertainment will take place? <i>10 feet</i>	
What is your targeted opening date? <i>Currently open</i>	
Does the issuance of this license directly or indirectly benefit any City employee(s)?	<input checked="" type="checkbox"/> Y <input type="checkbox"/> N
If Yes, list name(s) of employee(s) and department(s):	

Applicant, by signature below, agrees to abide by all laws, orders, ordinances, rules and regulations governing the above license and further agrees that any misstatement of material fact may result in refusal of license or revocation, if one has been granted. Applicant agrees that all taxes and accounts pertaining to the premises will be paid prior to issuance of the license.

It is understood that this and any application(s) shall become public record and the applicant(s) hereby waive(s) any rights to privacy with respect thereto.

I/ We hereby authorize the release of any criminal history record information to the City Clerk's Office or licensing authority. I/ We hereby waive any rights to privacy with respect thereto.

Signature

Title

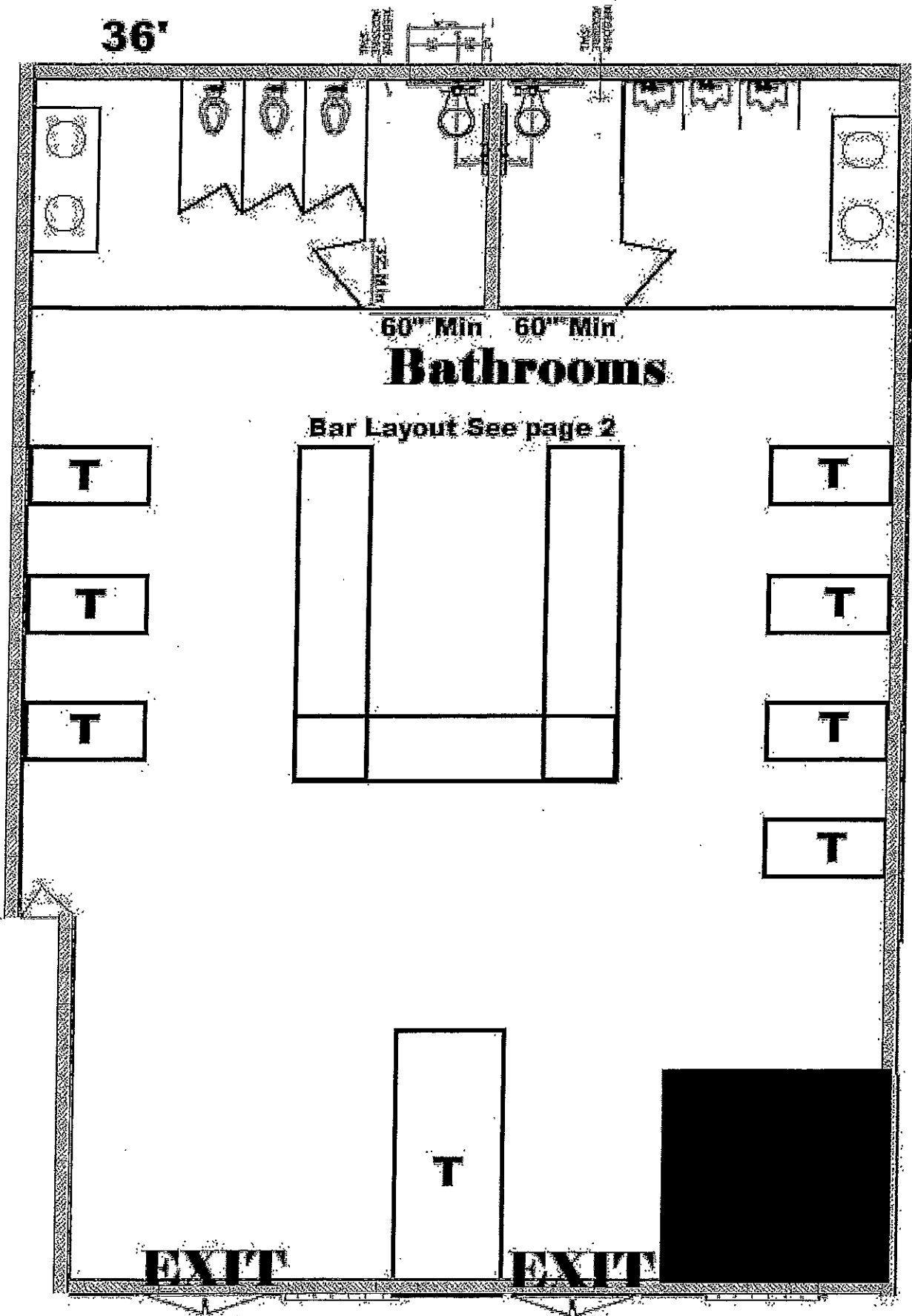
Manager

Date

12/08/2016

For more information, refer to the City Code of Ordinance: Chapter 4 Amusements, at www.portlandmaine.gov

36'



■ = Stage Area for live entertainment

Bonfire



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MEMORANDUM

TO: City of Portland City Council; Mayor Strimling
FROM: Anne Torregrossa, Associate Corporation Counsel
DATE: March 6, 2017
RE: Bonfire, LLC Entertainment License

Bonfire, LLC ("Bonfire") has applied for an entertainment license for Bonfire Country Bar, which is located at 37 Wharf Street, which is in the Entertainment Overlay Zone. Under the City Code, the City Council must hold a public hearing on each application for an entertainment license before granting it, and may choose to grant it, deny it, or grant it with conditions.

Entertainment licenses are required where a business with a liquor license also wishes to play live music, allow dancing, or have any other sort of entertainment. However, as set forth in the memoranda from the Business Licensing Specialist and Zoning Administrator (hereinafter "City staff"), entertainment licenses are limited in the Downtown Entertainment Overlay Zone. Within this zone, a business with an entertainment license may not be located within 100' of another business with an entertainment license. There are certain exemptions for businesses that held an entertainment license prior to January 3, 2006.

Bonfire is located within 100' of another business with an entertainment license in the Downtown Entertainment Overlay Zone, and has not previously held an entertainment license in order to qualify for the above described ordinance exemption. However, Bonfire does share common owners with another entity, 51 Wharf and Ultra Lounge, Inc. ("51 Wharf"); the Herget Group, LLC is the sole member of Bonfire, and 51 Wharf is also owned by the Herget Group, LLC.

51 Wharf also did hold an entertainment license for its bar at 51 Wharf Street, until the time it closed in the fall of 2016. As a result, Bonfire is now taking the position that it is allowed to move the entertainment license that 51 Wharf previously held to Bonfire's location at 37 Wharf Street because the two entities are, essentially, one.

Bonfire and 51 Wharf are not the same corporate entity, even if they share common owners. Under Maine law, and as a matter of public policy, corporations are separate legal entities.¹ In fact, Bonfire and 51 Wharf are not only separate entities, but are also separate types of entities – one is a limited liability company ("LLC") and one is a corporation. Maine courts also will not allow an owner of a company to ignore the corporate entity, simply because an owner finds it is convenient to do so.² Therefore, Bonfire cannot take advantage of 51 Wharf's entertainment license, simply because they share common owners, and as City staff recommended that the entertainment license application be denied.

¹ *Johnson v. Exclusive Props. Unlimited*, 1998 ME 244, ¶ 5, 720 A.2d 568, 571 (citations omitted).

² What Bonfire now asks for is akin to "reverse piercing" of the corporate veil, which is where a shareholder seeks to disregard the corporate entity. However, reverse piercing has never been recognized in Maine. The only Law Court case to address it, specifically found that "the weight of authority is against reverse piercing." *Sturtevant v. Town of Winthrop*, 1999 ME 84, ¶ 21, 732 A.2d 264, 270. The case goes on to quote additional authority explaining that, "a person who has voluntarily adopted the corporate form to engage in business is precluded from asking courts to disregard that form merely because the person is disadvantaged by its use," and "a sole shareholder may not choose to ignore the corporate entity when it suits his or her convenience." *Id.*, citing 1 FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.70, at 686, § 41.35, at 672-73.



Permitting and Inspections Department
Michael A. Russell, MS, Director

Ann Machado, Zoning Administrator

TO: City of Portland City Council: Mayor Strimling
FROM: Ann Machado, Zoning Administrator *AM*
SUBJECT: Bonfire LLC, 37 Wharf Street (428 Fore) - 032-R-001
DATE: March 7, 2017

Bonfire, LLC has applied for an entertainment license for their business located at 37 Wharf Street. 37 Wharf Street is located in the B-3 Downtown Business Zone and within the Downtown Entertainment Overlay Zone. Division 19.8 of Chapter 14 of the City of Portland Code of Ordinances outlines the requirements for the overlay zone. Section 14-330.13 addresses "dispersal requirements for facilities with entertainment license in downtown entertainment overlay zone". It states:

A business with an entertainment license as required or authorized by section 4-51(a) of this code located within the downtown entertainment overlay zone may not be located within 100 feet of another business with an entertainment license, as measured along or across public ways from the main entrance or entrances of each.
(Ord. No. 164-06/07, 4-4-07)

It is my understanding that Oasis located at 42 Wharf Street has an entertainment license. The door to Oasis is located thirty-five feet from the door to Bonfire, LLC.

Section 14-330.14 of Division 19.8 does discuss an exemption to section 14-330.13. It states:

(a) A business with an entertainment license located in the downtown entertainment overlay zone on or before January 3, 2006 shall not have to comply with the requirements of this section and if located within 100 feet of another licensee shall be considered a non-conforming use controlled by chapter 14, division 23 of this code. Such a business is considered an entertainment business for the purpose of calculating dispersion requirements under section 14.330.13 for a new or relocating entertainment business in the downtown entertainment overlay zone.

(b) A business with an entertainment license that does not allow amplified entertainment shall not have to comply with the dispersal requirement of section 14-330.13.
(Ord. No. 164-06/07, 4-4-07; Ord. No. 68-09/10, 10-19-09)

It is my understanding that Bonfire occupied the space at 37 Wharf Street in 2014. Since this is after January 3, 2006, this exemption does not apply.

Under the Land Use Ordinance, Bonfire, LLC located at 37 Wharf Street cannot be granted an entertainment license because it is located within one hundred feet of an existing business that has an entertainment license and it does not meet the exemption of having had an entertainment license since January 3, 2006.

Portland, Maine



Yes. Life's good here.

Permitting and Inspections Department
Michael A. Russell, MS, Director

TO: Mayor Ethan K. Strimling
Members of the Portland City Council

FROM: Jessica Hanscombe, Business License Specialist *Jobs*

SUBJECT: Bonfire, LLC, 37 Wharf Street

DATE: March 3, 2017

Any business that has live Entertainment and serves liquor is required to have a license per Maine State Law, Title 28-A 1054. The City of Portland also has an Ordinance in Chapter 4 Sec 4-51 to regulate Music, Dancing and Special Entertainment. Bonfire, LLC, 37 Wharf Street applied for an Entertainment with Dance License on March 3, 2017 as required. Bonfire, is located in the B-3c, which is a restricted location for Entertainment licenses pursuant to Sec 4-57.5.

Sec. 4-57.5. Restricted locations. Notwithstanding any other provision of this article, no new licenses shall be issued in the B-3c zone to drinking establishments and chemical-free night clubs, as defined in section 14-47. For purposes of this section, renewal of an existing license by the party holding the license on the date of enactment shall not be considered a new license. Any transfer of ownership shall be considered a new license. (Ord. No. 47-97, 8-4-97)

Our division is recommending that Bonfire is not issued an Entertainment License, as they are located within one hundred feet of an existing business with an Entertainment License. This is in direct violation of our ordinance. I have enclosed a document with the distance listed.

Enclosure

CC: Michael Russell, Director of Permitting and Inspections
Anne Torregrossa, Associate Corporation Counsel

Measured Distance from Bonfire (37 Wharf Street) to Oasis (42 Wharf Street) on March 3, 2017. Distance from one door is 35 Feet. From the second door is 48 feet. This includes any steps up into the businesses.



Looking down Wharf Street. The two entrances to Bonfire on the right. Oasis on the left.



Bonfire's 2 entrances.



Oasis main entrance (Green Doors)

Portland, Maine



Yes. Life's good here.

Permitting and Inspections Department
Michael A. Russell, MS, Director

March 3, 2017

Bonfire LLC
Tanner Herget
37 Wharf Street
Portland ME 04101

Re: Bonfire LLC dba Bonfire Country Bar. Application for Entertainment with Dancing and After Hours Entertainment at 37 Wharf Street.

Dear Tanner Herget,

This letter shall serve as a reminder of the Public Hearing before the Portland City Council on **Wednesday April 5, 2017 at 5:30 p.m.**, for the review of your application for Entertainment with Dancing and After Hours Entertainment at 37 Wharf Street. The meeting will take place in Council Chambers on the 2nd floor of City Hall, 389 Congress Street, Portland, ME 04101.

You or a representative of the business must be present at this meeting in the event that the City Council has questions regarding the license application. If there is no representation and questions arise, the issue could be postponed.

Should you have any questions or concerns, please do not hesitate to contact our office directly at (207) 874-8557 or by email, jhanscombe@portlandmaine.gov

Sincerely,

Jessica Hanscombe
Business License Specialist
207-874-8783
jhanscombe@portlandmaine.gov

**Legal Advertisement
Notice of Public Hearing
City of Portland**

A Public Hearing will be held on April 5th at 5:30 P.M., in City Council Chambers, 389 Congress St., Bonfire LLC dba Bonfire Country Bar. Application for Entertainment with Dancing and After Hours Entertainment at 37 Wharf Street. Sponsored by Michael Russell, Director of Permitting and Inspections.