

**CITY OF EASTPORT
SPECIAL CITY COUNCIL MEETING
WEDNESDAY, JULY 15th, 2019
22 WASHINGTON STREET – EASTPORT CITY HALL - 5:00 P.M.
(Fish Trap Application Submitted by Earl Small)**

The Eastport City Council has called for and scheduled this Special Council meeting for this 15th day of July, 2019 at 5:00 p.m. at 22 Washington Street at Eastport City Hall for the purpose of Consideration of a Fish Trap application brought forth to Council from Earl Small.

City Council Attendance: Councilor Hailley Bradbury, Councilor Jeanne Peacock, Councilor Peter Small, and Council President, Roscoe Archer, III. Also present were City Manager, Ross Argir, and City Clerk, Ella Kowal. ***Those Absent:*** Councilor Scott Emery.

Attendees in the Audience: Earl Small, Gary Small, James Smith, Chris Bartlett, Richard Clark, Chris Gardner, Walter Cummings, Howard Johnson, I, John Lewis, Robert Scott, Bob Lewis, Elijah Brice, Butch Harris, Vicki Morang, Dave Morang, Edward French, Michael Morse, Deidre Whitehead, and Will Bradbury.

I. CALL TO ORDER

Council President, Roscoe Archer, III, called the meeting to order at 5:00 p.m.

II. PUBLIC HEARING

- Fish Trap Application (*for Earl Small*)

Council President declares the public hearing open at 5:01 p.m. and explains that the purpose of this hearing is to give consideration to a fish trap application submitted by Earl Small and opens up the floor to the public for questions and/or comments.

James Smith from the audience speaks to say that for anyone who may be interested, he offers up copies of the law for review on the matter being considered this evening. He proceeds with handouts to those interested. He then asks that they be allowed a few minutes to review what it says before Council goes anything further with this and possibly a discussion.

Council President reminds him that it is open right now for discussion. Earl Small introduces himself to the audience and addresses the Council in that he is the person who has the application for the fish trap before Council. He gives a brief history that in the past his family has been involved in weirs and what not. He continues to say that over the last few years when lobster baiting came hard to get he came more into the herring fishing versus the lobster fishing. He continues on that it goes both ways and speaks that if he does continue with the lobster fishing he can get his own bait and it saves him money. He explains what he has done is that last year he built a Rhode Island fish trap and he tried putting it himself in a salmon pen and attached it over to Treats Island which it seemed to be where the fish is.

Councilor Jeanne Peacock asks for clarification that he put the trap in the salmon pen. Mr. Small responds "yes" and refers to the few pictures that he provided the Council. Mr. Small continues to say that he went through the laws and there are two different sections in the fishing laws and that there is nothing to show floating fish traps in the State of Maine and he wanted to try something new. He went down through the laws and spoke with Robert Scott about it and the other part was the weir driving stakes which really didn't jive with the ordinance and with the law. He thought it was more with stop sand and it was made to be portable. It can be picked up, cleaned up, and moved to another location. He continues on and updates that he met with DMR (Dept. of Marine Resources) and said that they came over and they did a lot of research and that it did say trap in Title 38 Section 1022 and this is why we are all here as he applied for an application so that he can continue to fish his fish trap over to Treats Island. He speaks that the law is vague and if one reads down through it - it specifically states about all stakes and brush and continues to say that the trap can almost be classified as weir and feels that this is something that the legislature will pick up to try and straighten this out and be more specific to a floating trap. He believes that this may be adjusted to a floating fish trap. He continues further to say that what he is trying to do is catch some bait and that this trap is made to be picked up, cleaned up, with nothing left there when he is done. He is anticipating it will be August when the season will be all done and he will be picking it up and it will look as if he wasn't even there.

Councilor Hailley Bradbury addresses Mr. Small and if he has a mooring attached to bottom out there. Mr. Small responds that he has an anchor and that it is almost like a big ship anchor type deal. The analogy he gives is that it is like if you were to go fishing you would throw the anchor and pull it. He states the size is two-ton and that it is pretty heavy but that he has the equipment to move it. He has a 60-foot boat, a 42-foot boat, and also has wenches to move it if need be.

Councilor Jeanne Peacock asks Mr. Small how often he harvests. Mr. Small responds that he checks it every day to be sure everything is there and safe. He also comments that if there are fish there, they will take them right there and it all depends on the fish. For example, there were fish last week and when he checked last night, there was nothing.

The City Manager, Ross Argir, speaks that as Council reviews this application and that everyone is in agreement that Title 38 Section 1022 is the applicable section and this is why we are having the public hearing, and he notes that this section is split into certain requirements and believes that it may be helpful to go through each requirement and present what has been brought forth by Mr. Small and discuss each requirement as we move forward so that there is a clear chain there. He continues to say that the first requirement is that the applicant shall apply in writing to the municipal officers of the City or Town which is the Eastport City Council stating the location of the weir, the boundaries of which the weir will be constructed as identified on the map prepared by the Commissioner of the Department of Marine Resources, limits and boundaries as near as they may be of the intended direction of the weir or extension of the weir or the fish trap and asking for license for the intended construction. He informs that Mr. Small has submitted an application that identifies as a fish trap, identifies that he wants a license, identifies the location with directional coordinates, identifies the size of the structure, and then has identified the location on the map available on the Department of Marine Resources website. He continues to say that the second requirement is that the applicant must notify all parties that may be directly affected by the proposed construction and he turns to Mr. Small to ask who he has notified. Mr. Small responds that he contacted Deidre Whitehead with Maine Heritage Coast Trust and that she is here this evening.

Councilor Hailley Bradbury asks Mr. Small if he had notified her after he had established the fish trap. Mr. Small responds yes and that she had called and that the fish trap was there. Ms. Bradbury asks Mr. Small when he had put the trap in place. Mr. Small responds that it was last Saturday. She asks for clarification that nothing was out there prior to that and he responds with a “no”.

James Smith of the audience speaks to that he has photographic evidence that is dated at least two weeks before today that this was out there and it seems to him that the law says one must go through all these steps before any erection or extension of any wharf, fish weir, or fish trap. He reiterates that it has been weeks that this has been out there and that he has this on his phone and he can show everybody if anyone wants to see it and the dates that the pictures were taken.

The City Manager comments to say that he consulted with the City's municipal attorney and there is no debate that the fish trap as it currently stands is “an illegal” fish trap and that it is not within the City's jurisdiction to enforce the laws that fall to Marine Resources and that the same attorney which was Michael Stoltz with the Maine Municipal Association indicated that it would not be a violation to license the trap “ex post facto” after the fact.

Councilor Hailley Bradbury responds that DMR states that this is under City government and she said that they have no right to take action because it comes under municipal ruling.

The City Manager responds that the license itself is under City government but the enforcement of that law falls under Marine Resources.

Councilor Bradbury speaks that DMR gave permission for it to still exist “illegally” and that Mr. Small is able to check it continually while it is still an illegal fish trap. The City Manager responds that he cannot speak to DMR but what he knows is that DMR was told truthfully by the City that there is no municipal license in place. He continues to say that the lieutenant with DMR for Division II for this area, Troy Dow, is aware of that and that he had told him himself so it is up to DMR of their choice relative to a decision but that they are not under the impression that that a municipal license has been granted because one has not been granted.

Councilor Hailley Bradbury asks Mr. Small if he had spoken with the land owner prior to the establishment of the fish trap. Mr. Small responds “no”. He stated that the way he understood it is that it was no different than stop sinking and that is when you set the net, harvest the fish, and pick the net back up and felt that this is what he was falling under. Realizing his mistake he spoke with Troy Dow and gave him his explanation. They have allowed him to leave it there until the hearing was held and a decision was rendered. Should he get a license tonight, he will continue fishing. He informs that he has not taken a fish out and that this has been on hold. He notes that there are fish in the trap right now but that he cannot touch them and that this was agreed upon by all and that he has not yet harvested fish from that trap yet. Should he not get his license tonight, he will be picking the trap up tomorrow and it will be taken up.

James Smith of the audience asks if the fish have been closed in the trap and Mr. Small responds with a “no” that they are open so that the fish can come in and out. Mr. Smith further expounds that his Google search took him less than five minutes to find the law and figure out what it meant and that it is not difficult to understand and that it is not new and that the last amendment was in 2011.

Councilor Hailley Bradbury asks for clarification from Mr. Small that he is a member of the Port Authority board and Mr. Small that he is. She comments to say that she finds it troubling that he was unaware that he needed any of this prior to establishing this fish trap. He responds that everybody interprets the law differently and that this was his mistake and we are now holding this public hearing to coincide with the law involved. He emphasizes again that he has not harvested a fish and if he is found in the wrong and should he not get a license, he will pick it up and it will be done and he will move forward from here.

Gary Small from the audience confers that they have spoken with the man from DMR and they came to an agreement. Councilor Hailley Bradbury asks what the agreement was and Gary Small responds that it was that there would be no fish taken and the trap would stay in place and that the Public Hearing would be held for consideration of the license and once this was held they would see where they were at.

James Smith from the audience comments to say that it seems to him that should the Council approve of this, the City of Eastport would be using a technicality to circumvent State law, and he believes this sets a dangerous precedence.

The City Manager, Ross Argir, speaks in response to Mr. Smith's comment as City Manager is the fact that we are sitting here and having this hearing shows that we are complying with the law and this is the process set out in the law and instead of granting a license or granting a provisional license, we are here. He continues to say that he discussed this at length with the Maine municipal attorney and if someone doesn't get permits, it doesn't require them to remove it so as far as they could acquire a permit they haven't violated any restriction. If it could be constructed with a permit they could get it later and this was the analogy used to apply to this. He further comments to say that the requirements of the Statute are still being followed and that Mr. Small has submitted the required \$5,000.00 bond as well as the completed application. He further notes that the Statute does provide two particular factors for the Council to consider during the Public Hearing and those are the potential impact and obstruction to navigation and the injury to the rights of others that such an application of such a fish trap would cause and these are two things that if either one of those are found to be the case, or if it is found that there is an obstruction of navigation or it injures the rights of others; the Council must deny the application. The City Manager encourages the Council to solicit any testimony or opinions on those matters.

Councilor Jeanne Peacock addresses Deidre Whitehouse with the Maine Coast Heritage Trust and asks if there are any issues with this structure by the island. She responds that it is their policy to support local economy but cannot do that if it is against the law and not done correctly. She further notes that she looked at it together and does not feel that it imposes a problem with navigation and saw no issues with the lines. That being said, they are not in the business of giving permits. She is here to further educate herself as to what the laws are.

James Smith from the audience comments to say that he a licensed Captain who operates in this area and that he operates the pilot boat for the local Port and he also operates the Lubec to Eastport Ferry and on a regular basis, multiple times a day, he would travel pass the very site where this is and he always gives a little blurb of the Maine Coast Heritage Trust and the great things that they are doing for this area. He notes that the trap sits almost between two sets of ledges but

that it does extend further out from the ledges at low water and he knows that there is long standing laws that are upheld from colonial times that gives you the right to fish fowl and navigate within inter tidal zones. He feels it would alter what he would have to do and what he would like to do and the information that he likes to give people and to get in close and be able to show them Treats Island which belongs to Maine Coast Heritage Trust.

Port Director, Chris Gardner, addresses Council and reports that he has received no complaints on navigation or any restrictive use of waters in that area. He defers to the Harbor Master that there have been no reports. Mr. Gardner also notes that there are no navigational hazards as pertained to shipping activities.

Councilor Hailley Bradbury comments to say that the purpose of the Public Hearing is to address any concerns prior to the establishment of such a fish trap and she feels that this is important to note that Mr. Small didn't feel it necessary to contact the landowner or acquire a permit prior to establishing the fish trap. She continues to say that it is a dangerous precedent for the City to set and the same way we do not want buildings constructed prior to permits being obtained. She feels it is not the right way for the City to do business. She addresses Mr. Small in that he is a lobster man primarily and that this is secondary to his income. She feels in the name of equality and accountability she does not feel it is in good conscience for the City to allow this after the fact.

James Smith addresses the Council to say that he has no problem with anyone making a living and it is great that Mr. Small is trying to do a herring harvest which is a long standing tradition of the town and the area and notes that members of his family have made their living the same way. That being said, to go about this without following proper rules and procedures; he does not feel that it should be allowed to happen.

Gary Small from the audience reminds that the City Manager had spoken with the attorney

Edward French from the audience speaks that as Chair of the Historic Review Board for over thirty years that they sometimes issue permits after the fact and it is not uncommon to happen.

Port Director, Chris Gardner, speaks to disclosure and that Mr. Small is on the Port board and it is important that we speak to all the relationships and wants to be sure that this is on record. He continues further to say that people feeling that this was being done without any knowledge is not really true. He continues to say that the US Customs officials had a meeting in the Port office prior to this being undertaken because Earl Small and Gary Small were trying to follow the law. It was a number of laws that they were trying to navigate through while meeting

with Customs to be sure that they were following the various rules to bring fish in across the border, etc. He further comments to say that they have made a reasonable attempt at trying to follow the law as well as in the spirit of the law.

James Smith responds to say that a few people have turned around the idea that we do not make people take down or erections that they have done without proper permitting and this is what he meant by setting a dangerous precedence because it sounds like people in this room are saying that anybody can go and do whatever they want and that it can be made right afterward and to him that is wrong.

The City Manager comments to say that in a normal circumstance as Edward noted with a fine if the City had a municipal policy on the licensing of wharfs, piers, and weirs; then a fine for an ex post factor application would be appropriate. He has determined that this will be addressed at the next Council meeting as part of what has happened here and that the City does not have a local policy on this as many cities along the coast do and because of that no one in the municipality was on notice that such a license was needed. He continues further to say that we are unable to collect an application fee in this case as there is no municipal policy on this but states that an “ex post factor” could be addressed in a policy.

Councilor Jeanne Peacock addresses the City Manager and asks to be sure that the policy includes a mobile installation. The City Manager responds that the Statute is clear and that the policy would be to assist with accepting applications under Title 38 Section 1022.

Earl Small updates Council that he did meet with Robert Scott six months ago and set down and talked about it and that it was discussed.

Harbor Master, Richard Clark, addresses the City Manager and asks if they will have tow Harbor Ordinances and asks how this will work. The City Manager responds that this would be a policy specifically pertaining to applications received under the Statute and nothing else. He explains that the State DMR is responsible for enforcement and the City does the licenses.

Butch Harris updates Council that no one has ever heard of a Rhode Island fish trap and had no knowledge of what it was and comments to say how do you get a permit for something when they do not know what it is. He notes that it took the DMR twenty-four hours to figure it out.

James Smith reiterates that it took him five minutes doing a google search to find this law that pertains directly to what Mr. Small is doing and people keep claiming that we didn't know this or that.

Chris Gardner brings to the table that Earl Small did come to the City six months and if one argues that we didn't know, that could go both ways. Councilor Hailley

Bradbury responds that this is certainly an issue. Mr. Gardner says it is problematic and that all parties involved was not aware of, including the DMR, but we are all here to do the right thing and to do whatever is necessary to fix it and move forward.

The City Manager comments to say that the question of whether who knew and who should have known is not directly related to following the Statute. He reminds us that the application is before us and the Statute gives us guidelines to look at when approving the application.

James Smith speaks to the City giving notice as well as examination at or near the site as asks if any of the municipal officials done so. He states that this must be part of the public notice as well. The City Manager updates that with the blessing of the Maine Municipal attorney to hold the Public Hearing here because it is not practical to transport people for a Public Hearing to an uninhabited island and that there are maps available for review. He continues to say that the Statutory provision included "near". Mr. Smith adds that there are people within the community who make their living not only fishing but other commercial purposes and that there an inner basin of boats and that people would have been willing to take a trip out to look at this and have a better idea and understanding of what is actually being considered and discussed.

Councilor Jeanne Peacock refers to the picture and that it is clear to what it is. Mr. Smith responds that this is merely perspective and reiterates that it extends outside the ledges at low tide in the small cove that it is in and that one picture looking out towards the island does not give the full perspective.

Council President responds that he is well aware of the site location.

Chris Bartlett speaks to the two considerations that the City Manager spoke to and he does not see this as a hazard to navigation as he has been by it and can see it from his home. He has no concerns there. In terms of the second one in terms of injuring the rights of others, it does not apply to him and supports the application.

Michael Morse reminds everyone that this is very time sensitive in terms of how much limit of the herring that can be caught and the window of opportunity is not going to be there long once the limit is caught. Earl Small anticipates that it will be the middle of August and the quota will be caught. He reminds that there is no herring in the bay now but he is hoping they come back in on the next set of tides.

Deidre Whitehead asks about lighting at night. Earl Small responds that there are two lights at night that automatically turn on and are activated and an orange flash appears. It is a illuminated light and has his name on it. He also notes that it has his commercial fishing license number on it as well.

Councilor Hailley Bradbury asks the Harbor Master, Richard Clark, if this was included in the Harbor Ordinance that it would require his inspection prior to installation. He responds no as this is not considered aquaculture. Mr. Gardner said it was just missed by both the City as well as the Port Authority and we do our best to maintain within the Ordinance but that this requirement was not there.

Council President calls for final comments and Mr. Smith reiterates that there are long standing laws in place from Colonial times that give the right to fish fowl and navigate and in his opinion this would impede his right with the trap where it is to navigation. Council President calls for any further discussion from the public before closing the Public Hearing.

Council President declares the Public Hearing closed at 5:35 p.m.

The City Manager adds that the Statute provides that Council has up to ten days make a decision and this is the time frame given in that the Public Hearing is concluded.

Council President then asks if there is any discussion from the City Council members. Council Jeanne Peacock comments to say that they could get on a boat and go look and come back and vote. She states she believes she knows what it looks like and Council President says that he is good with it and knows where he is as he has been there.

The City Manager comments to say that it is important that the members of the public feel that they have an adequate understanding of where this is located.

Edward French states that he went by it today by boat and saw no issues.

James Smith asks if Council has closed the hearing and the Council President responds “yes” and that he called for any further comments and there were none.

Chris Gardner clarifies that the decision is up to ten days and that it does not require ten days

Council President makes a final call for comment or discussion from the City Council. There was none.

III. ACTION on PUBLIC HEARING
MOTION PEACOCK **SECOND** SMALL **(PASSED 3-1)**
Councilor Bradbury Voted “NO”
To approve the fish trap application submitted by Earl Small.

IV. ADJOURN
MOTION SMALL **SECOND** PEACOCK **(PASSED 4-0)**
To adjourn.