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**AUG 06 2013**

City of South Portland  
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August 2, 2013

Molly Butler Bailey, Chair  
Planning Board  
City of South Portland  
25 Cottage Road  
South Portland, ME 04106

RE: Proposed Citizen Initiated Waterfront Protection Ordinance

Dear Chair Bailey:

This letter follows up on the Planning Board's July 23, 2013 public hearing, to address three issues that arose during that hearing.

First, the proponents of the WPO argued that the WPO would not prevent normal maintenance and repairs of existing operations and structures at most facilities used for storing and handling of petroleum or petroleum products in the Shipyard District and the shoreland area of the Commercial District, and that such a restriction would apply only to facilities that would handle tar sands oil. In fact, the language of the WPO belies this claim. Please see the attached annotated version of the WPO, demonstrating the breadth of the WPO. It is clear from a critical review of the language of the WPO that, no matter what the drafters' intent may have been, the WPO would prevent virtually any change to existing operations and structures of any facility used for storing and handling of any petroleum or petroleum products in those locations, including even replacing existing equipment with new equipment as part of normal maintenance and repairs.

Thus, the WPO would have catastrophic consequences for South Portland's existing waterfront oil terminal operations, marinas, and any other facilities that handle petroleum products. It is clear from the face of the WPO that it seeks over the long term to shut down petroleum handling operations on the South Portland waterfront, by making them nonconforming uses and preventing normal repair and expansion. The shut down could be more immediate if facilities are unable to comply with near-term upgrades mandated by state and federal regulations.

Second, the proponents of the WPO argued that the WPO would not prevent upgrades required by state and federal regulations. In fact, the "waiver or variance" provision in proposed Section 27-922.5(d) would in theory allow upgrades required by state and federal regulations, but only such upgrades required to comply with the ADA, fire codes, or pollution control regulations. Covered facilities would not be able to make upgrades required by OSHA or other regulatory bodies, or upgrades that may be required by federal and state environmental agencies that may not qualify as "pollution control regulations,"

which is an undefined term. Further, and in any case, voluntary upgrades to enhance environmental protections would be prohibited.

Also, although the WPO provides for a waiver or variance in the limited circumstances listed, it provides no guidelines for how such a waiver or variance would be processed, who would consider it, or what the standards are for granting it. If the standard zoning ordinance variance requirements apply, it would be almost impossible to obtain such a variance, because the variance test is extremely stringent, requiring "practical loss of all beneficial use of the land." *Lewis v. Town of Rockport*, 2005 ME 44, ¶ 14. The language therefore leaves uncertain under what circumstances a waiver or variance would be available.

Third, there was some discussion at the Planning Board's July 23 hearing of the possibility of recommending that the Council adopt the WPO as written so that it would not need to be sent to the voters, and then amending it to "fix" it. There are several problems with this idea:

1. Adopting the WPO as written would violate the state law that prevents adoption of zoning ordinances that are inconsistent with the Comprehensive Plan. 30-A M.R.S. § 4352(2). I explained in my July 18 letter to you why the WPO is inconsistent with the South Portland Comprehensive Plan, and even the proponents admitted at the Planning Board's July 23 hearing that the WPO is inconsistent with the Comprehensive Plan. The Council cannot adopt an ordinance it knows to violate state law, and it would not solve that problem to say that the Council is adopting it in order to "fix" it.
2. Adopting the WPO as written would violate other state and federal laws, as discussed in my July 18 letter to you.
3. Adopting the WPO as written and then amending it likely would violate the petitioners' rights under the South Portland Charter, even if, as Corporation Counsel stated, such Council action is not expressly forbidden by the Charter. Charter Section 1108 requires the Council to send the WPO to the voters unless the Council adopts it without change. Charter Section 1113 prohibits the Council from amending any ordinance proposed by petition and adopted by vote of the people, "unless such ordinance shall otherwise expressly provide." Because adopting and then amending the WPO would circumvent Charter sections 1108 and 1113, allowing the Council to prevent an ordinance proposed by petition from ever reaching the voters and thus becoming un-amendable under Section 1113 if approved by the voters, it is likely that a court would rule against the City and require the original WPO to be sent to the voters. Such a lawsuit, based on deprivation of federal constitutional rights, could result in the City being required to pay the plaintiffs' attorneys fees.
4. There would be some unknown period of time during which the WPO would be effective and thus would have the adverse consequences discussed in my July 18 letter to you.
5. There is no way to know whether an acceptable "fix" to the WPO could be achieved. As pointed out in my July 18 letter to you, the WPO is fundamentally flawed, and it is unlikely it can be fixed.

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For these reasons, we again request that the Planning Board (1) recommend that the South Portland City Council not adopt the WPO, and (2) adopt a resolution urging the voters of South Portland to vote against the WPO.

Thank you for your consideration of this additional letter. I look forward to discussing these issues with you at the hearing on August 13, 2013. Please let me know if you have questions or need additional information.

Sincerely,



Matthew D. Manahan

cc: City Council members  
James Gailey  
Tex Haeuser  
Patricia Doucette  
Sally Daggett, Esq.  
Larry Wilson, PPLC  
Ken Cannell, C.N. Brown  
Dana Fraktman, Global  
Jamie Py, MEMA  
Burt Russell, Sprague Energy  
Roger Hale, Turners Island

INITIATED ORDINANCE

## Waterfront Protection Ordinance

The People of South Portland do ordain and enact the following ordinance which shall be incorporated in the municipal code as follows:

**Section 1: Findings:**

Whereas, South Portland is a waterfront community that borders on Portland Harbor and Casco Bay; and

Whereas, the City has adopted a Comprehensive Plan to guide the City's future growth and development; and

Whereas, a portion of the City's waterfront is designated in the zoning ordinance as an industrial district named Shipyard District (S), which has as its purpose "to promote the Shipyard area in South Portland as a robust waterfront center for office complexes, commercial uses, marine uses, and light industrial activities"; and

Whereas, the adopted Comprehensive Plan identifies the Shipyard area as an area where, in the short term, the impacts of industrial uses on adjacent residential areas should be minimized, and envisions a transition to more of a mixed-use area preserving the opportunity for traditional marine uses while accommodating recreational, business, and even residential uses; and

Whereas, the City has established a Shoreland Area Overlay District, applicable to the first 250 feet from upland edge of a coastal wetland, in order to prohibit development that would adversely affect water quality, biological ecosystems or scenic and natural values; and

Whereas, there are residential uses including a high rise condominium development and a 123 unit senior citizen facility, as well as recreational and scenic resources, adjacent to land designated as Shipyard District (S); and

Whereas, there are currently four marinas and a yacht club located in and adjacent to the Shipyard District and recreational uses of the waterfront area continue to expand; and

Whereas, fifty nine cruise ships carrying over 95,000 passengers and crew visited Portland Harbor in 2012, and many of those passengers visited South Portland, providing significant economic benefits to the area; and

Whereas, shoreland areas in the Shipyard District border Casco Bay, which has been designated as an "Estuary of National Significance," by the U.S. Environmental Protection Agency, supporting some 850 species of marine life; from microscopic plants to migrating pilot whales, and 150 species of waterbirds; and

Whereas, South Portland is a gateway to and from the Gulf of Maine, an area described by the Gulf of Maine Research Institute as a "global treasure," rich with aquatic life, remarkable natural beauty, and deeply rooted maritime traditions that has extraordinary combination of miles of scenic shoreline, abundant recreational opportunities and world-premier fishing grounds; and

Whereas, Bug Light and Spring Point Light, two of the City's most important historical landmarks and tourist attractions, are located in and near the Shipyard District; and

Whereas, the South Portland Campus of Southern Maine Community College is located on a campus the college describes as "one of the most picturesque points on the Maine coast"; a few hundred feet from the Shipyard District; and

Whereas, the City is committed to create a sustainable South Portland that includes economic development and job creation through energy conservation and sustainable technologies, has passed a landmark sustainability resolution, No.1-10/11 and signed the U.S. Mayors' Climate Protection Agreement; and

Whereas, the City's Comprehensive Plan incorporates the Ferry Village Neighborhood Plan and the Willard Neighborhood Plan, development plans for neighborhoods proximate to the Shipyard District, which plans call for "development in the Shipyard District S to be compatible with the neighborhood"; and

Whereas, the City desires to encourage traditional marine uses and to prevent the intensification or expansion of existing incompatible industrial uses in the Shipyard District; and

Whereas, industrial development in the Shipyard District is limited to light industrial development and construction of equipment or facilities to load oil on tanker ships is not a light industrial use.

#### Section 2: Purpose:

This Ordinance is enacted to protect and ensure the welfare of the people of the City of South Portland, including protection of property rights, aesthetic values, and economic interests, to promote scenic views and scenic vistas on the waterfront, to protect the environment, and to promote comprehensive land use planning and compatible land uses in and near the Shipyard District and portions of the Commercial District.

#### Section 3: Amendment to Existing Section (new language is underlined):

Section 27-922(G) and (H) of Chapter 27 are hereby amended as follows:

Permitted Uses. The following uses are permitted in the Shipyard District S....

(E) Petroleum storage tank farms and accessory piers, pumping and distribution facilities for the unloading of petroleum products from ships docked in South Portland, as governed by all applicable sections of the Code....

(H) Facilities for storing and handling of petroleum and/or petroleum products that have been unloaded from ships docked in South Portland, subject to the provisions of Ord. Section 27-1517, excluding automobile filling stations.

#### Section 4: Section Added to Code:

Sect 27-922.5 is hereby added to the Municipal Code to read:

(A) Notwithstanding any other provision of this Code, there shall be no enlargement or expansion of existing petroleum storage tank farms and accessory piers, pumping and distribution facilities, or facilities for the storing and handling of petroleum and/or petroleum products in the Shipyard District or within the Shoreland Area of any Commercial District(C).

(B) No new or expanded facility shall be constructed on an existing pier located in or extending seaward of the Shipyard District.

(C) "Expansion" as used in this section includes, but is not limited to, construction, reconstruction or alteration of any existing facility to change the function or capacity of such facilities; construction of any new combustion units, stacks, vapor recovery systems, equipment, structure, or machinery for

This would prohibit in the Shipyard District tank farms that don't unload petroleum products from ships.

This would prohibit in the Shipyard District handling of any petroleum products that have not been unloaded from ships. This could prohibit facilities used for boat fueling operations.

This means that this restriction trumps all other provisions of the Zoning Ordinance.

This would prohibit new equipment or structures -- including for normal maintenance and repair -- at facilities for handling or storage of petroleum in the Shipyard District and in the shoreland area of the Commercial District.

transportation or storage of petroleum, including any pumping, distribution or other facility for loading tankers or other ships instead of unloading ships.

(d) This prohibition is not subject to waiver or variance under any provision of this Code unless necessary to comply with the Americans for Disabilities Act (ADA), fire codes, or pollution control regulations imposed on existing facilities with respect to their existing use as provided in Section 27-302(e)(1).

This would prevent virtually any change to existing operations and structures of any facility used for storing and handling of petroleum or petroleum products in those locations, including even replacing existing equipment with any new equipment. This could include facilities used for boat fuel.

**Section 5: Applicability:**

The regulations applicable to the Commercial District (C), the Shipyard District (S), and the Shoreland Area within said zoning districts established hereby shall apply to the areas within said zoning districts as they existed on May 1, 2013, and shall not be affected by any change in district or designation thereafter unless approved by the voters of the City as an amendment to this Ordinance.

**Section 6: Violations:**

Violation of this Ordinance shall be subject to a minimum penalty of \$1,000 per day for each violation, or such greater amount as may be authorized from time to time for the enforcement of land use ordinances under state statute. The City's remedies by penalty are declared not to be plain, complete, or adequate in the case of continuing or repeated violation of this Ordinance. The City shall seek, and any court of competent jurisdiction shall grant injunctive relief as well as applicable penalties, costs and reasonable attorneys' fees to the City in the event of any repeat or continuing violation.

**Section 7: Retroactivity:**

Notwithstanding 1 M.R.S.A. §302, this Ordinance shall apply to any proceeding pending at the time of its enactment, unless such proceeding was commenced before May 1, 2013. Any permit or approval issued or rendered by the City after May 1, 2013 purporting to authorize any use or structure prohibited or regulated hereby shall be rendered null and void upon enactment of this Ordinance.

**Section 8: Inconsistent Ordinances:**

Pursuant to Charter Article XI and notwithstanding Zoning Ordinance Sec. 27-115, or any other ordinance of the City of South Portland, this Ordinance is not required to be reviewed by the South Portland Planning board prior to enactment, and shall control over any other procedural or substantive provisions of any conflicting ordinance of the City of South Portland.

**Section 9: Consistency with Comprehensive Plan:**

This ordinance amends the Shipyard District Zone S in the South Portland zoning ordinance to be consistent with the Comprehensive Plan of the City of South Portland, as adopted October 15, 2012.

**Section 10: Severability**

The provisions of this Ordinance are severable. If any provision of this Ordinance is found to be invalid for any reason whatsoever by any court of competent jurisdiction such invalidity shall not affect any other provision of this Ordinance.

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