

October 11, 2013

Mayor and Members of the City Council, City of South Portland  
South Portland City Hall  
25 Cottage Road  
South Portland, ME 04106

RE: Waterfront Protection Ordinance

Dear Mayor Blake, and City Councilors:

We are writing on behalf of the Natural Resources Council of Maine, as well as in our capacities as concerned attorneys with friends and clients who are South Portland voters. The Natural Resources Council of Maine is a nonprofit membership organization protecting Maine's environment, with more than 400 members who live in South Portland.

We write to address two issues of interpretation of Sections 3 and 4 of the proposed Waterfront Protection Ordinance (the "Ordinance"), which we believe opponents of the Ordinance have clearly misinterpreted.

The proposed language for the two sections in issue is not complex. The misinterpretations advanced by opponents of the Ordinance appear to be intended to raise alarm about passage of the Ordinance, without paying due regard to basic legal principles of statutory construction and enforcement. This letter will outline the perceived issues, and then explain why reasonable statutory interpretation should prevail to dispel the arguments of those who oppose its passage as a citizens' referendum for any reason other than its stated purpose.

## **I. THE LANGUAGE OF THE ORDINANCE IN ISSUE.**

As you know, two changes to the current South Portland zoning ordinance are in issue:

Section 3. Section 3 of the Waterfront Protection Ordinance amends existing, permitted uses in the Shipyard District. It merely specifies that two current and existing *unrestricted* uses for petroleum businesses be limited to "the unloading of petroleum products from ships docking in South Portland." The current and historic petroleum businesses in the Shipyard District are businesses that unload petroleum products – from ships docking in South Portland. These businesses will continue to enjoy these permitted uses.

Section 4. Section 4 of the Ordinance adds a section that applies to petroleum transportation and storage businesses in the Shipyard District and to the 250 foot shoreland overlay zone of the Commercial District, and restricts only the enlargement and expansion of existing petroleum facilities. It clearly does not prohibit existing uses, and cannot be rationally read to restrict

existing uses upon passage (nor to limit ongoing repair, maintenance, or modernization of existing petroleum facilities so long as these do not constitute expansions). It also cannot be rationally read to apply to any companies other than those who are in the business of transportation or storage of petroleum products.

Here is the language of the Ordinance, just described:

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

Section 27-922(g) and (n) of Chapter 27 are hereby amended as follows:

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

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

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

**Section 4: Section Added to Code:**

Section 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 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).

## II. LEGAL ANALYSIS

As you can see, the language of Section 3 does not shut down existing petroleum business uses, as some opponents of the Ordinance have initially claimed, but rather preserves them and allows them. As the language itself says, "the unloading of petroleum products from ships docking in South Portland" is now, and will remain, permitted use. What will *not* be permitted are *new* uses of petroleum business, i.e. those that would not be confined to uses and accessory uses involving the unloading of petroleum products from ships docking in South

Portland, or that do not involve the storing and handling facilities for such unloaded petroleum products.

**i. The Waterfront Protection Ordinance Does Not Apply To Marinas or Yacht Clubs – These Uses Will Continue to Be Permitted and Promoted.**

There is no sensible basis to any claim that the Ordinance will “shut down the waterfront.”

There are two marinas and a yacht club in the Shipyard District. Some people have contended that the ordinance will restrict their activities. There is no merit to such assertions. The purpose of the Shipyard District zone, which is quoted in the Ordinance, is “to promote the Shipyard area...as a robust waterfront center...” Section 27-921 (Code of Ordinances, City of South Portland, Maine). The purpose of the zone and the Waterfront Protection Ordinance is to promote a robust waterfront center (not a center, we might add, exclusively for Petroleum businesses).

The Shipyard District includes permitted uses of Marine Uses, and Piers and Wharves used for Marine Uses. (Section 27-922(i) and (j)). These permitted uses will not change when the Waterfront Protection Ordinance passes. They are not affected in any way. This means that Marine Uses and Piers and Wharves devoted to Marine Uses are specifically allowed to exist and to be developed in the future. The Waterfront Protection Ordinance amends the permitted uses of *petroleum businesses* only. One need only to look at the list of “Permitted Uses” set forth in the *whole* Shipyard District zone to reach this rather basic conclusion – one that opponents seem to ignore.

The Waterfront Protection Ordinance does not change the definition of Marine Uses. That definition, provided in Section 27-201, is:

*Marine uses.* Marine uses include only the following: boat sales, service, storage, and rental; marine transport, including ferries, water taxis, public landings, ramps, docks, and charter services; marine equipment sales and rental; marine repair services; marine manufacturing; shipbuilding and repair; canvas fabrication and distribution for boats; marine retail; commercial fishing; commercial cultivation of aquatic life, such as fish, shellfish, and seaweed; indoor boat storage; and, **marinas, including facilities for water storage, servicing, holding tank pump-outs, fueling**, berthing, securing and launching,.....(emphasis added)

The term “marina” is also defined to mean: “*Marina.* A business establishment having frontage on navigable water and, as its principal use, providing for hire offshore moorings or docking facilities for boats, and **which may also provide accessory services such as** boat and related sales, boat repair and construction, indoor and outdoor storage of boats and marine equipment, bait and tackle shops, **and marine fuel service facilities.** (emphasis added).”

We have highlighted in these quotations the references to fueling, because some have conjectured that boat fueling could no longer take place under the Waterfront Protection Ordinance, or that future development of recreational fueling docks would be prohibited. To the

contrary, the Shipyard District is intended to promote marine uses, including marinas. Marine uses and related piers are permitted without restriction, and both Marine Uses and Marinas are specifically defined to include facilities for fueling boats.

**ii. The Waterfront Protection Ordinance Only Applies to Petroleum Business Uses.**

The Ordinance clearly only applies to petroleum businesses – companies whose primary business is the transportation and storage of petroleum products. To suggest otherwise contravenes one of the most basic rules of interpretation of zoning laws and statutes – the rule that requires South Portland’s Code and zoning laws to be read as a harmonious whole.

Section 4 of the Ordinance consists of three substantive paragraphs. Paragraph (a) prohibits enlargement and expansion of the Shipyard District’s petroleum uses. Paragraphs (b) and (c) of that section quite obviously explain and relate to restrictions of Paragraph (a): Paragraph (b) declares that “[n]o new or expanded facility shall be constructed on an existing pier located in or extending seaward of the Shipyard District,” and Paragraph (c) defines “expansion” as it is used in Paragraph (a).

Bizarrely, some opponents of the Ordinance apparently contend that Paragraph (b) will prevent any future development on *any* pier in the Shipyard District, such as the two marinas or the yacht club. This argument strains legal credulity and is contrary to a harmonious reading of the whole South Portland Code. Indeed, it would be arbitrary and unreasonable for City officials charged with enforcing Section 4 of the Waterfront Protection Ordinance to apply it to restrict activities by marinas and a yacht club. Such a position would be patently inconsistent with the overall purpose of the Shipyard District in the zoning ordinance and by the overall statutory scheme, as well as unsupported by the express wording in issue. As the Maine Law Court has often noted, “[s]tatutory construction is a holistic process: we construe the whole statutory scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved.” *Estate of Fortier v. City of Lewiston*, 997 A.2d 84, 88 (Me. 2010) (quoting *McPhee v. Me. State Ret. Sys.*, 980 A.2d 1257, 1265 (Me. 2009)). This is the standard by which this strained interpretation by opponents must ultimately be judged.

Put simply, Section 4 does not apply to any type of facility that could be constructed on a pier. Rather, it applies to facilities *for the uses specified in subsection (a)*—that is, for petroleum facilities maintained or constructed by businesses whose primary business relates to the storage or transportation of petroleum products.

While the following logical rationale about what “facility” means in Section 4(b) may seem, at times, technical, this fundamental rule of statutory construction is always one of common sense. Courts will not read individual words in linguistic isolation, and they will prefer common-sense readings that advance the evident purposes of an enactment over highly technical readings that produce manifestly unreasonable, or as the courts sometimes characterize it, “bizarre” results. Maine courts will not construe the Waterfront Protection Ordinance, with its

findings emphasizing the importance of a robust waterfront center and traditional marine uses, as having an unintended effect of freezing all development of any kind on the piers that serve these marine uses. Such a strained and convoluted reading would ignore the plain statutory language and context of Section 4(b), and would produce manifestly unreasonable results that are directly contrary to the express purposes of the section and overall statutory scheme.

Both the definitions in the zoning chapter itself and the linguistic context of Section 4(b) limit the word “facility” to facilities that logically give rise to the uses enumerated in Section 4(a) – that is, petroleum businesses.

The zoning chapter of the South Portland Code of Ordinances defines “facility” as “the physical buildings, structures and equipment built, installed, or established *to effect or facilitate a particular use.*” Section 27-201 (emphasis added). Thus “facility,” by definition, must refer to some particular use. The only “particular uses” referenced anywhere else in the Waterfront Protection Ordinance are those “uses” listed in Section 4(a), and amended in Section 3.<sup>1</sup> These references to particular uses, repeated twice in the ordinance, quote the exact language of two permitted uses in the existing ordinances, and these are the only two “particular uses” to which the “facilities” in Section 4(b) relate.

Because the context and language of Section 4(b) supplies the “particular uses,” the only reasonable interpretation of “facility” in Section 4 are those facilities referenced in Section 4 and the other parts of the Waterfront Protection Ordinance – i.e., facilities that “effect or facilitate” the particular uses described in these sections and the overarching purpose of the Waterfront Protection Ordinance and South Portland Code. No other reading is rational.

**iii. The Waterfront Protection Ordinance Will Not Stop Any Existing Business or Prevent Any Existing Business From Continuing Any Current Business Activity.**

Finally, as noted above, a few who currently oppose the passage of this Ordinance, have tried to raise alarm that its passage might “shut down” the waterfront. But the alarm ignores reality: under the Waterfront Protection Ordinance, *existing* petroleum businesses in the Shipyard District and within 250 feet of the Fore River in the areas zoned Commercial, will be unaffected – they will be “grandfathered,” in the sense that their existing uses will remain permitted uses. Future enlargement and expansion of petroleum businesses will be restricted, but the businesses may continue their current operations as permitted uses. (As discussed above, businesses other than petroleum businesses are neither affected, nor restricted even from enlargement or expansion.)

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<sup>1</sup> Specifically, the references are to “petroleum storage tank farms and accessory piers, pumping and distribution facilities, or facilities for the storing and handling of petroleum and/or petroleum products.”

Petroleum transport and storage businesses have raised the question of whether they could commence new procedures – such as mixing ethanol with fuels, or other similar activities – if the initiative passes. Their concerns fail to acknowledge the doctrine of accessory use, which is expressly allowed under the South Portland zoning ordinances. The zoning chapter, Section 27-201, defines *Accessory use* as: “A use customarily incidental and subordinate to the principal building or use and located on the same lot with such principal building or use . . . .” Thus, “accessory uses” are permitted uses in all zones, and would clearly not be affected by the Waterfront Protection Ordinance. (*See* Section 27-780(h), accessory uses in Commercial zone, and Section 27-922(k) accessory uses in Shipyard District).

No reasonable reading of the provisions in issue in the Waterfront Protection Ordinance would suggest that it prohibits or restricts an existing business that wants to undertake some new procedure as part of or ancillary to an existing operation. Likewise, the ordinance does not prevent the repair or maintenance of machinery or equipment, or capital expenditures for upgrades to comply with pollution control or other legal requirements. (*See* Section 4(d) of the Waterfront Protection Ordinance.) Again, no reasonable reading of any ordinance’s balance between restricted uses and permitted uses should lead one to any concern that accessory uses become suddenly prohibited, or that existing, grandfathered, or permitted uses cannot be appropriately maintained or repaired to proper standards.

### **III. CONCLUSION**

Thus, the Waterfront Protection Ordinance cannot be read to apply to marinas or to yacht clubs or other non-petroleum businesses. Suggesting that the ordinance would have broad negative impacts on existing waterfront businesses is an exaggeration and not credible. It does not prohibit the continued current existing uses of the petroleum industry. It will restrict petroleum businesses from new uses related to loading petroleum onto boats or from expansion of uses near the shore. Petroleum businesses whose primary use relates to unloading petroleum from boats will continue to enjoy the existing uses that are permitted right now.

In the final analysis, we are concerned that opponents of the Waterfront Protection Ordinance have chosen to shift debate from the policies and wisdom supporting the Ordinance’s passage, to unfounded fear and alarm based upon imagined readings and ungrounded misinterpretations of the Ordinance language – misinterpretations that would never be indulged by a court of law, and that we trust would not be indulged by City officials charged with the ordinance enforcement once it is passed.

We hope that this legal analysis will assist you and the voters of the City of South Portland by clarifying your understanding of the provisions in issue in the Waterfront Protection Ordinance.

Very truly yours,

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