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City of South Portland  
Planning & Development

Chair & Members of the Planning Board  
City of South Portland  
P. O. Box 9422  
25 Cottage Road  
South Portland, Maine 04106

Re: Summary of Remarks to Planning Board on Initiated Ordinance

Dear Planning Board Members:

I addressed the Planning Board on behalf of "Protect South Portland." I am also the author of the original version of the initiated ordinance, which would be barely recognizable in the Initiated Ordinance, as it is much improved, and far more defensible than the original draft which prohibited Tar Sands Oil, and dealt with pipeline safety as well as the zoning aspects. I am providing a written summary of the comments I expect to deliver concerning the Initiated Ordinance during public hearing in case they are missed by me or the Board during my presentation.

I understand that the focus of your last meeting was on alleged drafting problems with the ordinance. I have no pride of authorship in the final product, but I can assure you that there are no REAL flaws in the Initiated Ordinance that cannot be avoided through proper administration of it by City staff, and that the Courts of the State of Maine will almost always defer to the local interpretation of a local ordinance.

**1. The Requirement of Consistency with the Comprehensive Plan Is Met.**

The Board appears focused upon the question of whether the Initiated Ordinance is consistent with the 2012 Comprehensive Plan.

- The findings of fact in the Initiated Ordinance refer to, and rely upon the City's Comprehensive Plan.

- The Initiated Ordinance actually advances the overall goals of the Comprehensive Plan by bringing the Zoning Ordinance *closer* to the transformative vision of the 2012 Comprehensive Plan, while preserving existing uses during the transition to more diverse, and less petroleum-dependent uses. Foreclosing the reversal of flow of the pipeline to Montreal is a necessary first step in that vision.
- To do NOTHING risks *another* approval of the expansion of petroleum handling facilities to accommodate tar sands oil<sup>1</sup>, with additional combustion stacks like those to burn the VOC's from the chemical slurry which dilutes the bitumin to make it flow through the pipeline. That 2009 approval, given before the adoption of the 2012 Comprehensive Plan has fortunately expired, and it is time to move forward with the new vision embodied in the Comprehensive Plan.
- The Initiated Ordinance clearly meets the legal standards for consistency with the Comprehensive Plan. The Ordinance actually advances the competing goals of accommodating, while gradually beginning the elimination of petroleum-based industrial uses in these shoreland areas.
- It should be noted that the Courts defer to local judgment as to consistency of a zoning ordinance with its comprehensive plan.
- There has NEVER been any successful Law Court challenge to any ordinance enacted by any municipality in the State of Maine due to inconsistency with a pre-existing comprehensive plan.
- Another reason why the Initiated Ordinance will be upheld if challenged on this basis is that every comprehensive plan contains internal inconsistencies, and competing goals.
- ***Basic harmony with the Comprehensive Plan is all that is required of any zoning ordinance.*** In Vella v. Town of Camden, 677 A.2d at p. 1054 the

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<sup>1</sup> Tar Sands Oil is a misnomer, as a reversed flow pipeline would carry the bitumin through South Portland in a slurry made by the addition of a blend of 25% to 55% of various chemical diluent ("dilbit"), rather than any *oil*. Loading dilbit onto ships would require burning off volatile organic compounds (VOC's) in the chemical slurry, the effect of which upon air quality ought to be of concern.

Law Court summing up the legal standard as being whether the zoning amendments were in basic harmony with the Town's comprehensive plan.

- **CONCLUSION:** The validity of the Initiated Ordinance is not compromised by the minor inconsistencies with the Comprehensive Plan noted at the last meeting. If any of those “inconsistencies” are troubling to this Board, the remedy after the Initiated Ordinance is voted upon by the People, is plain: you can either revise the Comprehensive Plan, or suggest amendments to go to the voters.

2. **§3 Prohibits the Loading of Petroleum on Vessels as a Principal Use In the Shipyard Zone.**

- §3 amends existing §27-922 to make only the unloading of petroleum products from ships docking in the Shipyard Zone, a permitted use. If there is a problem in this change it arises through §27-924, which makes any use not listed as *permitted* or *conditional*, a prohibited use.
- The effect of limiting petroleum transfers to unloading of vessels is applicable only to the Shipyard Zone. The Commercial Zone is unaffected by this change.
- Even in the Shipyard Zone, any existing use involving the loading of petroleum onto vessels is not affected by the limitation to unloading, as *existing uses are grandfathered under §§301 and 302*.
- Even in the Shipyard Zone, new petroleum-based activities can be established, provided they are not the principal use. Accessory uses continue to be allowed by §922(k), and the elastic definition of accessory use in §201.<sup>2</sup>
- §4's prohibition is reasonably necessary to ensure that none of these exceptions do not allow the creation of facilities for the combustion of tar sand-related combustion stacks.
- **CONCLUSION:** Only the loading of petroleum products as a principal use in the Shipyard Zone is prohibited by the change made by §3 of the Initiated Ordinance.

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<sup>2</sup> §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 . . .”

3. **The Drafting of §4(a) Will Not Pose Problems if Properly Administered.**

- To analyze the effect of the Initiated Ordinance we must look at other sections of the existing zoning ordinance, which are either amended or unaffected.
- §§ 27-301, and 27-302 (the grandfathering sections) not only allow the continuation of any lawful use existing at the time of the adoption of an amendment to the zoning ordinance. These provisions also allow the *improvement* of buildings and structures which house such grandfathered uses.
- The grandfathering ordinances create problems in achieving the transformative goals in §4(a), but also operate as a safety-valve as to §4(b) and (c), if properly administered. That is to say that the potential for the *expansion* of the petroleum-based uses (that are supposed to be gradually eliminated over time), and could frustrate a principal goal of the Initiated Ordinance, and of the 2012 Comprehensive Plan, unless trumped by the *nevertheless* language in §4(a). To put it another way, the *notwithstanding* language in §4(a), and the definition of *expansion* of petroleum distribution facilities<sup>3</sup> in 4(c) are designed to avoid expansion of existing nonconforming uses under the *improvement* provision.
- The *notwithstanding* language of §4(a) is also necessary to trump existing *notwithstanding* language appearing in §27-1517, which might otherwise justify the expansion of storage tanks, even beyond the Shipyard Zone, provided such property is contiguous and comes under common ownership. (Although §27-1517 purports to establish *standards* for above ground oil storage tanks, the provisions of §27-1517, with its own *notwithstanding* clauses, could allow the unlimited expansion of oil tanks into areas contiguous to any existing tank facility.<sup>4</sup>

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<sup>3</sup> The prohibition on new or expanded facilities being constructed on an existing pier located in the Shipyard District does not apply to the Commercial District.

<sup>4</sup> Sec. 27-1517. Standards for Above Ground Storage Tanks. (A) **Notwithstanding any provision of this Chapter to the contrary**, no new above ground storage tanks (in excess of

- The *notwithstanding* language of §4(a) does not override every other provision of the Zoning Ordinance, as Professor Owen opined in an e-mail to the Planning Director.
- CONCLUSION: The *notwithstanding* language of §4 and the definition of *expansion*,<sup>5</sup> are reasonably necessary to override the otherwise applicable *improvement* language of the grandfathering ordinances, and the *notwithstanding* language of §27-1517, which could otherwise justify expansion of petroleum-based industry in derogation of the Initiated Ordinance and the Comprehensive plan.

4. **The Drafting of §4(b) and 4(c) Will Not Pose Problems if Properly Administered by the Staff.**

- Although §§4 (b) and (c) of the Initiated Ordinance would have been clearer had they included the limiting word “petroleum” as was obviously intended by their position, as they merely elaborate on §4(a)’s prohibition on such facilities, thereby giving opponents of the Initiated Ordinance another opportunity to distract the Board, and the public from the need for, and the salutary goals of the Initiated Ordinance.
- A limitation to petroleum-based industrial facilities is implied in the context of the Ordinance. I have had the opportunity to review an e-mail from Professor Owen to Tex Haeuser concerning this particular question. Although reasonable minds can differ as to reasoning, the better result is to imply a

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f 25 , 000 gallons capacity either individually or in the aggregate) for petroleum based products may be erected or used on any parcel of real property in any zoning district other than on real property actually being used and so improved for such purpose as of the applicable effective date of this sub-§(A) (1) For purposes of this sub-§, the phrase "actually being used and so improved" shall be interpreted to mean all contiguous land, in single record ownership as of the applicable effective date of this sub-§, any portion of which is in fact developed with and being actively used for such petroleum storage tanks on such date . Nothing in this sub-§ shall be construed to prohibit maintenance or replacement of existing tanks on such properties nor the construction of new tanks on such properties provided any such maintenance , replacement or new construction complies with all other applicable provisions of law.

<sup>5</sup> The definition of *expansion* is designed to prevent circumvention of the new rules by PPL and the City Staff calling *structures* “machinery”, as apparently happened in 2009.

limitation to petroleum facilities to harmonize §4(b) and (c) with §4(a), the Initiated Ordinance as a whole; and with the rest of the Zoning Ordinance and with the Comprehensive Plan. These all, as well as common sense, support Professor Owen's result.

- It should be noted that these provisions elaborating on (a) appeared justified in light of the history of the 2009 approval of the construction of tar sands oil-related combustion stacks in excess of the height limitation applicable to structures on piers, despite the broad Zoning Ordinance definition of *structure*, by calling them something other than structures.
- For your purposes tonight, the omission of an express limitation to petroleum handling facilities does not make the overall purpose and scope of the Ordinance inconsistent with the Comprehensive Plan, and will pose no difficulty if the City staff applies the Initiated Ordinance reasonably.
- Any ordinance, no matter how well written can be destroyed by unreasonable administration of it. I am sure that if this ordinance is adopted by the People, the administration will interpret it reasonably, including limiting the application of §§4(b) and (c) to new or expanded petroleum facilities.
- Finally, the Courts will almost certainly defer to any reasonable decision of the City in administering a local ordinance, making successful appeal of any decision limiting the scope of these provisions to petroleum-based facilities extremely unlikely.
- CONCLUSION: §4(b) and 4(c) are tied to the prohibition on new and expanded petroleum-based facilities in §4(a). If the staff administering the Ordinance adopts the implicit limitation to petroleum-based facilities which is the most reasonable interpretation of §4 as a whole, the Initiated Ordinance will not pose problems to anyone who does not seek to significantly expand their petroleum-based industries in a manner contrary to the 2012 Comprehensive Plan.