

Meeting of August 5, 2013

SOUTH PORTLAND CITY COUNCIL
POSITION PAPER OF THE CITY CLERK

SUBJECT:

CITIZEN INITIATED ORDINANCE #1-13/14 – Second reading and public hearing on the citizen initiated proposed waterfront protection ordinance. Passed first reading on 7/1/13. ROLL CALL VOTE. Passage requires at least five affirmative votes.

POSITION:

On June 17, 2013, a citizen initiative petition was submitted to the City Clerk's office requesting amendment of the South Portland Code of Ordinances to include a so-called "waterfront protection ordinance." On July 1, 2013, I determined that the petition contained the required number of valid signatures and that each paper had a valid statement of the circulator, and so I forwarded the petition to the City Council.

Once a certified initiative petition is received by the City Council, the City Council is required by Section 1107 of the Charter to have the proposed ordinance read and to hold a public hearing on it. Accordingly, the proposed ordinance was placed on the July 1, 2013 agenda for an initial reading and to schedule the public hearing for August 5, 2013. As the proposed ordinance includes proposed amendments of Chapter 27 (the City's Zoning Ordinance), State law requires that the Planning Board conduct a public hearing on the proposed ordinance too. A referral of the proposed ordinance to the Planning Board was made at the July 1 City Council meeting.

The Planning Board scheduled its public hearing for July 23, 2013 and posted and published the required public notices related to the same. All was fine. However, shortly before the Planning Board's July 23, 2013 public hearing, it was brought to the City's attention that the text of Citizen Initiated Ordinance #1-2013/14 that was given first reading on July 1, 2013 was slightly different than the text of the draft signed by the citizen petitioners: namely, it adds a comma that does not appear in the text of the proposed ordinance as submitted with the signed citizen petitions. In other words, the only difference between Citizen Initiated Ordinance #1-2013/14 and the version as submitted on the signed citizen petitions is that the latter version does not contain a comma after the term "other facility" in Section 4(c) of the proposed ordinance.

Arguably, this substantively affects the meaning of that sentence. As of July 19, 2013, both versions have been available on the City's website. As of July 23, 2013, the City has posted notice about the comma issue on the City's website.

Due to an error by one of the petitioners in the submittal of a Word version of the proposed ordinance to the City Clerk's Office, the comma in Section 4(c) after the term "other facility" was inadvertently (and wrongly) included in the text of Citizen Initiated Ordinance #1-2013/14. However, it is the text of the ordinance as submitted on the signed citizen petitions that is the legally operative version of the proposed ordinance, and so it is the second version (without the comma in Section 4(c) of the proposed ordinance) that constitutes the official text of this proposed ordinance. Accordingly, I ask that the City Council act to correct Citizen Initiated Ordinance #1-2013/14, as the text of the ordinance as submitted by the petitioners is what the City Council is required to act upon pursuant to Article XI of the City Charter.

The proposed motion to correct the text would be as follows:

I move that Citizen Initiated Ordinance #1-2013/14 be corrected to delete the comma after the term "other facility" in Section 4(c) of the proposed ordinance in order to correct an error caused by one of the petitioners in the submittal of a Word version of the proposed ordinance to the City Clerk's Office.

The Planning Board conducted its public hearing on July 23, 2013 and took comment on both versions – the one with the comma and the one without (although, again, it is the version without the comma that controls). At least one property owner affected by the proposed ordinance feels that the placement of the comma in the text is an important issue and raised an issue about which version of the proposed ordinance was "noticed" for purposes of the July 23rd Planning Board public hearing. Accordingly, and in consultation with the Corporation Counsel, the Planning Board has not yet acted to develop its recommendation to the City Council on the proposed ordinance; it has scheduled and published notice of a second public hearing on the proposed ordinance (without the comma after the term "other facility" in Section 4(c) of the proposed ordinance) for August 13, 2013.

As a result of the slight delay in the Planning Board proceedings on the proposed ordinance, the City Council's consideration of the proposed ordinance will need to be delayed slightly as well. I recommend that the City Council commence the public hearing on the proposed ordinance on August 5th, but then "recess" the public hearing to August 19, 2013, at which time the City Council can conclude its public hearing and take action on Citizen Initiated Ordinance #1-2013/14. (This can be done in one of two ways: (i) open the public hearing on August 5th and immediately recess it to August 19, 2013, or (ii) open the public hearing on August 5th, take some public input, and then recess the public hearing to August 19, 2013.)

This slightly revised schedule still has the City Council completing its work on the proposed ordinance within the required 60-day time period to act on the proposed ordinance. The Corporation Counsel advises that this slight delay will reduce the likelihood of a subsequent legal challenge to the procedures – at least based on the “extra comma” – associated with both the Planning Board and City Council’s consideration of the proposed ordinance.

REQUESTED ACTION:

That the City Council act to (1) conduct second reading and correct Citizen Initiated Ordinance #1-2013/14 to delete the comma after the term “other facility” in Section 4(c) of the proposed ordinance; and (2) commence the public hearing on the proposed ordinance on August 5, 2013 but recess the public hearing to August 19, 2013.


CITY CLERK



CITY OF SOUTH PORTLAND

THOMAS E. BLAKE
Mayor

JAMES H. GAILEY
City Manager

SUSAN M. MOONEY
City Clerk

SALLY J. DAGGETT
Jensen Baird Gardner & Henry

IN CITY COUNCIL

CITIZEN INITIATED ORDINANCE #1-13/14

THE COUNCIL of the City of South Portland hereby ordains that "Code of Ordinances of the City of South Portland, Maine" be and hereby is amended as follows:

Waterfront Protection Ordinance

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

District One
MICHAEL R. POCK

District Two
PATRICIA A. SMITH

District Three
MELISSA E. LINSKOTT

District Four
LINDA C. COHEN

District Five
GERARD A. JALBERT

At Large
ALAN R. LIVINGSTON

At Large
THOMAS E. BLAKE

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 (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).

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.

Explanatory Note (not part of ordinance): This is a citizen initiated ordinance; the entire text is proposed to be added as new text to the Code of Ordinances. Pursuant to City Charter Section 1107, "a proposed initiative ordinance shall be read and provision shall be made for a public hearing upon the proposed ordinance."

Dated: August 5, 2013