

South Portland City Council
Position Paper of the Interim City Manager

Subject:

ORDINANCE #2-16/17 – Amending the Code of Ordinances establishing Chapter 32, “Pesticide Use Ordinance”. Passage requires majority vote.

Position:

On June 8, 2015, the nonprofit group Protect South Portland sponsored a presentation to the City Council about the harmful effects of pesticide use on public health and the environment, and the benefits of alternative land care practices. During this workshop the City Council voiced support for pursuing a pesticide ordinance.

Following a second workshop on July 13, 2015 to review the policy landscape and different types of ordinances, the City Council directed staff to develop a draft ordinance that would greatly restrict or eliminate the use of pesticides throughout the City. The City Manager appointed a committee consisting of Sustainability Coordinator Julie Rosenbach, Parks Superintendent Sarah Neuts, and Stormwater Program Coordinator Fred Dillon to develop a draft ordinance.

The staff committee reviewed numerous documents and solicited input and guidance from a variety of stakeholders including policy makers, advocates, practitioners, and land care professionals to develop the draft ordinance. Staff also worked with Jay Feldman, Director of Beyond Pesticides and Chip Osborne, of Osborne Organics as consultants.

Proposed ordinance language was presented and discussed at a February 29, 2016 workshop and submitted to the Council for a first reading on April 4, 2016. In response to questions and comments at and after the first reading, staff continued to work on the Pesticide Use Ordinance. Because changes proposed by staff were substantive, the ordinance went back to a workshop on August 8, 2016. At that workshop, staff reviewed proposed changes and received guidance to move forward with a first reading on Monday, August 15, 2016.

All of the documents included in the packet for first reading can be reviewed on the City’s website at: <http://www.southportland.org/departments/sustainability-office/pesticide-use/south-portlands-proposed-pesticide-use-ordinance/>.

Requested Action:

Council passage of Ordinance #2-16/17.

A handwritten signature in black ink that reads "Donald H. Gurish". The signature is written in a cursive style with a large initial "D".

Interim City Manager



CITY OF SOUTH PORTLAND

THOMAS E. BLAKE
Mayor

DON GERRISH
Interim City Manager

EMILY F. CARRINGTON
City Clerk

SALLY J. DAGGETT
Jensen Baird Gardner & Henry

District One
CLAUDE V. Z. MORGAN

District Two
PATRICIA A. SMITH

District Three
EBEN C. ROSE

District Four
LINDA C. COHEN

District Five
BRAD FOX

At Large
MAXINE R. BEECHER

At Large
THOMAS E. BLAKE

IN CITY COUNCIL

ORDINANCE #2-16/17

THE COUNCIL of the City of South Portland hereby ordains as follows:

Section 1. Findings.

WHEREAS, the State of Maine is one of only seven states, and the District of Columbia, that allows local governments to restrict the use of pesticides, and so this is an opportunity for the City to affect positive change;

WHEREAS, the United States Environmental Protection Agency (EPA), the Committee on Environmental Health of the American Academy of Pediatrics, the National Academy of Sciences, and the President's Cancer Panel have all concluded that exposure to many synthetic pesticides is linked to reproductive disorders, birth defects, learning disabilities, neurological disease, endocrine disorders, and cancer;

WHEREAS, the EPA acknowledges, along with the esteemed Mt. Sinai Children's Environmental Health Center, that children, with their still-developing bodies and brains, are especially vulnerable to the harmful effects of lawn and garden pesticides; and children's behavior (*e.g.*, hand to mouth interactions, proximity to the ground, walking or running through lawns instead of paved sidewalks, especially where there are none), exposes children to far more contact with lawn pesticides than adults;

WHEREAS, many synthetic pesticides are harmful to pets, wildlife, including threatened and endangered species, soil microbiology, plants, and natural ecosystems;

WHEREAS, the City has five streams designated by the Maine Department of Environmental Protection (MEDEP) as "urban impaired" for failing to meet state water quality standards primarily due to adverse impacts from surrounding development;

WHEREAS, all of these “urban impaired” streams drain to Casco Bay, which is widely recognized as a natural asset of significant ecological and economic value;

WHEREAS, water quality testing by Friends of Casco Bay has demonstrated that pesticides are known to migrate off lawns and other properties and flow into the Casco Bay estuary;

WHEREAS, in some cases these pesticides were detected in stormwater flowing into Casco Bay in amounts that the Environmental Protection Agency has determined may be harmful to fish and other aquatic life;

WHEREAS, scientists have stated that crustaceans, including amphipods and lobsters, face numerous risks from pesticide exposures, even at low levels;

WHEREAS, the use of pesticides known or suspected to cause serious health problems is not necessary to create and maintain green lawns and landscapes, given the availability of viable alternative practices and products;

WHEREAS, many citizens desire to be protected from exposure to pesticides in the air, water or soil that inevitably results from chemical drift and contaminated runoff; and

WHEREAS, a growing number of communities and municipalities are embracing a precautionary approach to the use of pesticides in order to adequately protect people and the environment from their harmful effects.

Section 2. The text of Chapter 32, “Pesticide Use Ordinance,” of the “Code of Ordinances of the City of South Portland, Maine” be and hereby is enacted as shown below (additions are underlined):

Chapter 32

PESTICIDE USE ORDINANCE

Sec. 32-1. Title.

This ordinance shall be known as the “City of South Portland Pesticide Use Ordinance.”

Sec. 32-2. Purpose.

The purpose of this ordinance is to safeguard the health and welfare of the residents of the City and to conserve and protect the City’s waterways and natural

resources by curtailing the use of pesticides for turf, landscape and outdoor pest management.

Sec. 32-3. Definitions.

The following words, terms and phrases, when used in this ordinance, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Broadcast application. The spreading of pesticides over an entire area.

Commercial Agriculture. The production of crops for sale, crops intended for widespread distribution to wholesalers or retail outlets and any non-food crops.

EPA. The United States Environmental Protection Agency.

FIFRA. The Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.*

Golf course. An area of land laid out for playing the game of golf with a series of 9, 18 or more holes. Mini-golf courses are not considered golf courses.

Golf course playing surfaces. The tees, fairways, greens and roughs of a golf course.

Golf course non-playing areas. Areas of golf courses that are not golf course playing surfaces, such as lawns, driveways, paths, patios, trees, shrubs, ornamental plantings and gardens.

Inert ingredient. Any substance (or group of structurally similar substances if designated by the EPA), other than an active ingredient, that is intentionally included in a pesticide product.

Invasive Species. A plant or insect that is not native to a particular ecosystem, and whose introduction does or is likely to cause economic or environmental harm or harm to human health. Invasive species include those plants listed under the Maine Department of Agriculture, Conservation and Forestry's Natural Areas Program as currently invasive, potentially or probably invasive, and highly likely but not currently invasive, as well as those insects listed by the Maine Forest Service as threats to Maine's forests and trees.

Natural, organic or "non-synthetic." A substance that is derived from mineral, plant, or animal matter and does not undergo a "synthetic" process as defined in the Organic Foods Production Act, 7 U.S.C. § 6502(21), as the same may be amended from time to time.

Organic pest management. An extension of the principles and practices of organic agriculture to the care of turf and landscape.

Person. Any individual natural person, partnership, joint venture, society, association, company, club, trustee, trust or corporation; or any officer, agent, employee, or personal representative of any thereof, in any capacity acting either for her or himself or for any other person under either personal appointment or pursuant to law.

Pest. This term shall have the same meaning as the term set forth in 40 C.F.R. § 152.5, as the same may be amended from time to time.

Pesticide. Any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest; any substance or mixture of substances intended for use as a plant regulator, defoliant or desiccant. It does not include multicellular biological controls such as mites, nematodes, parasitic wasps, snails or other biological agents not regulated as pesticides by the EPA. Herbicides, fungicides, insecticides and rodenticides are considered pesticides.

Pests of significant public health importance. Pests listed by the EPA, in conjunction with the U.S. Department of Health and Human Services and the U.S. Department of Agriculture, as pests of significant public health importance.

Preemptive application. The application of pesticides as a measure against something possible, anticipated or feared, *i.e.*, as a preventive or deterrent measure.

Public utility. Any transmission and distribution utility, telephone utility, water utility, gas utility, or natural gas pipeline utility that is subject to the jurisdiction of the Maine Public Utilities Commission.

Synthetic. A substance that is formulated or manufactured by a chemical process or by a process that chemically changes a substance extracted from naturally occurring sources, except that such term shall not apply to substances created by naturally occurring biological processes.

Water body. Any great pond, river, stream or tidal area as those terms are defined in the City's Zoning Ordinance, Chapter 27 of the Code of Ordinances.

Wetland. A coastal or shoreland freshwater wetland as those terms are defined in the City's Zoning Ordinance, Chapter 27 of the Code of Ordinances.

Sec. 32-4. Pest Management Advisory Committee (PMAC).

(A) Composition; appointment; terms of office.

The Pest Management Advisory Committee (PMAC) is hereby established. The PMAC shall consist of seven members as follows:

- (i) The City's Stormwater Program Coordinator;
- (ii) One practicing agronomist appointed by the City Council;
- (iii) Two Maine Board of Pesticides Control-licensed landscape professionals, at least one of whom has experience in organic land care management and is accredited by the Northeast Organic Farming Association in Organic Land Care, each appointed by the City Council; and
- (iv) Three resident or taxpayer representatives appointed by the City Council.

The terms of office of the six PMAC members appointed by the City Council shall be three year terms, except that the initial appointments after the establishment of the PMAC shall be such that the terms of office of no more than two members shall expire in any single year. The terms of office for the City employee PMAC member shall be for as long as the employee holds said employment position.

(B) Duties.

The duties of the PMAC include serving in an advisory capacity to the City Council and the Sustainability Coordinator to oversee this ordinance through the following:

- (i) Advising the City Council and the Sustainability Coordinator of any problems encountered or amendments that may be required to achieve the full and successful implementation of this ordinance;
- (ii) Reviewing and acting upon waiver applications when applicable;
- (iii) In coordination with the Sustainability Coordinator, developing and implementing outreach and education as specified in this ordinance;
- (iv) Seeking the participation, advice and counsel of experts in the fields of organic turf and landscape management, maintenance of trees and shrubs, and organic pest protocol;
- (v) Encouraging broad community participation, from parents, schools, advocates, and local arboriculture and landscaping businesses, in the activities of the PMAC;
- (vi) Reviewing annual data and issuing a summary report annually to the City Council;
- (vii) On or before May 1, 2019, and every three years thereafter, conducting an evaluation of this ordinance, including a review of pilot project results and reporting data, and providing recommendations to the City Council and the Sustainability Coordinator for any ordinance amendments it deems appropriate; and

(viii) Additional responsibilities as may be deemed necessary by the City Council.

(C) Officers, meetings and records.

(i) The members shall annually elect a chair from their membership. If not provided to the PMAC by the City Manager, the members shall also annually elect a secretary for the purpose of taking minutes and related duties.

(ii) All meetings of the PMAC shall be open to the public. Notice of each meeting shall comply with the City's notice policies and Maine's Freedom of Access Act.

(iii) A quorum shall consist of four members.

(iv) The PMAC shall meet regularly.

(v) Minutes shall be kept of all meetings with a copy filed with the City Clerk. An annual report of the PMAC's activities shall be submitted to the City Council in March of each year.

(vi) The chair and one other member, at least one of whom must be a Maine Board of Pesticides Control-licensed landscape professional, shall serve as the Waiver Committee, authorized to review and decide waiver applications. The PMAC shall annually designate the two members who shall serve as the Waiver Committee for the ensuing year.

Sec. 32-5. Applicability of Ordinance.

(A) Allowed and prohibited pesticides.

Subject to the applicability dates set forth in Sec. 32-14 herein, for turf, landscape and outdoor pest management activities in the City, the following shall apply:

(i) Synthetic substances are prohibited unless specifically listed as "allowed" on the U.S. Department of Agriculture's National List of Allowed and Prohibited Substances (the "National List");

(ii) Non-synthetic substances are allowed unless specifically listed as "prohibited" on the National List;

(iii) Pesticides determined to be "minimum risk pesticides" pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and listed in 40 C.F.R. § 152.25(f)(1) or (2), as may be amended from time to time, are allowed; and

(iv) The use or application of pesticides (whether natural, organic, "non-synthetic," synthetic or otherwise) within 75 feet of of a water body or wetland is prohibited.

(B) Exempt pesticides.

- (i) The following activities or materials are exempt from the provisions of this ordinance (and so are allowed):
 - (a) Commercial agriculture;
 - (b) Pet supplies, such as shampoos and tick and flea treatments, when used in the manner specified by the manufacturer;
 - (c) Disinfectants, germicides, bactericides, miticides and virucides, when used in the manner specified by the manufacturer;
 - (d) Insect repellents when used in the manner specified by the manufacturer;
 - (e) Rat and rodent control supplies when used in the manner specified by the manufacturer;
 - (f) Swimming pool supplies when used in the manner specified by the manufacturer; and
 - (g) General use paints, stains and wood preservatives and sealants when used in the manner specified by the manufacturer.

- (ii) The following applications are exempt from the provisions of this ordinance (and so are allowed):
 - (a) Specific health and safety application – Prohibited pesticides may be used to control plants that are poisonous to the touch, such as poison ivy; pests of significant health importance such as ticks and mosquitoes; and animals or insects that may cause damage to a structure, such as carpenter ants or termites;
 - (b) Golf course playing surfaces application – Prohibited pesticides may be used on non-City owned golf course playing surfaces and on the tees and greens of City-owned golf courses provided that the course is designated through Audubon International as a Certified Audubon Cooperative Sanctuary;
 - (c) Invasive insect application – Prohibited pesticides may be used to control the Emerald Ash Borer, Asian Longhorned Beetle, Hemlock Woolly Adelgid, Browntail Moth and other insects identified as invasive by the Maine Forest Service; and
 - (d) Right-of-way spraying – Prohibited pesticides may be used by a public utility that maintains a right-of-way through the City.

Sec. 32-6. Waivers.

- (A) In situations that threaten the public health and safety or for the control of invasive species that pose a threat to the environment, persons may apply to the PMAC for a waiver from the provisions of this ordinance prior to the use of a prohibited product or prior to the conduct of a prohibited application.

(B) The waiver application shall be filed with the PMAC, on a form prescribed by the PMAC, and shall include the following: the proposed location(s); details on the timing(s) of use, substance(s) and amounts to be applied; date(s) of application; management plan that excludes broadcast and preemptive applications; a pest identification and threshold report; and reason for requesting the use/application of a prohibited pesticide. In order to approve a waiver application, the PMAC must first find that all of the following criteria are met:

- (i) A situation exists that threatens the public health and safety and/or where invasive species pose a threat to the environment;
- (ii) The applicant has carefully evaluated all alternative methods and materials;
- (iii) The applicant will, to the greatest extent practical, minimize the impact of the application on abutting properties; and
- (iv) The grant of the waiver will not be detrimental to the public health, safety or welfare.

(C) Waiver applications must be filed with the Waiver Committee, with a copy provided to the Sustainability Coordinator. The Waiver Committee shall act upon a waiver application within five business days of receipt of a completed application. Both members of the Waiver Committee must agree that approval of the application is appropriate in order for the application to be approved; otherwise, the application is deemed denied.

(D) In approving any waiver application, the Waiver Committee may prescribe conditions and safeguards as are appropriate to further the purposes of this ordinance. The decision of the Waiver Committee shall be in writing, with copies provided to the applicant, PMAC, Sustainability Coordinator and City Clerk.

(E) A person aggrieved by a decision of the Waiver Committee shall have five business days to appeal the decision of the Waiver Committee to the City Manager. The appeal shall be in writing and shall state the basis for the appeal. The City Manager shall act upon the appeal within three business days of receipt of the appeal. The decision of the City Manager shall be in writing, with copies provided to the appellant, PMAC, Sustainability Coordinator and City Clerk.

Sec. 32-7. Public Notifications and Signage.

If prohibited pesticides are to be used/applied through an exemption pursuant to Sec. 32-5(B)(ii) or through an approved waiver application pursuant to Sec. 32-6, the following posting requirements shall be complied with by the property owner or applicator.

(A) The owner or applicator shall post warning signs in compliance with this ordinance. These signs must be posted before application activities commence

and left in place for at least 48 hours after actual application or until expiration of the restricted entry interval or reentry time indicated by the pesticide label, whichever is longer.

(B) All signs shall be at least five inches high and four inches wide in size. Signs shall be attached to the upper portion of a dowel or other supporting device so that the bottom of the sign is not less than 12" and the top of the sign is not more than 48" above the ground. The signs shall be of rigid, weather resistant material substantial enough to be easily read for at least 48 hours when placed outdoors.

(C) All notification signs must be light colored (white, beige, yellow or pink) with dark, bold letters (black, blue or green). They shall have lettering that is conspicuous and clearly legible.

(D) The sign must include the following:

- (i) The word "CAUTION" in 72 point type;
- (ii) The words "PESTICIDE APPLICATION" in 30 point type or larger;
- (iii) The Maine Board of Pesticides Control designated symbol;
- (iv) Any reentry precautions from the pesticide labeling;
- (v) The name and telephone number of the entity making the pesticide application;
- (vi) The date and time of the application; and
- (vii) A date and/or time to remove the sign.

(E) All notification signs shall state the chemical and trade name of the pesticide, the date to be applied, the length of time to remain off the treated area as indicated by the pesticide label, and a phone number of the responsible party for more information.

These requirements are in addition to any requirements that may also apply to State of Maine licensed applicators subject to the Maine Board of Pesticides Control rules regarding public notification.

Sec. 32-8. Reporting by State of Maine Licensed Applicators.

In addition to complying with the Maine Board of Pesticides Control rules regarding record keeping and reporting requirements outlined in Chapter 50 of the Code of Maine Rules, all State of Maine licensed applicators are required to submit to the City Clerk an annual summary report on or before February 1 relating to the preceding calendar year. The report shall contain the following information for applications performed in the City in the prior calendar year: target site, pesticide brand name, EPA registration number, total undiluted formulation (in pounds or gallons), and total area treated as listed and as amended on the Commercial Applicator Annual Summary Report required by the Maine Board of Pesticides Control.

Sec. 32-9. Outreach and Education.

- (A) The Sustainability Coordinator or his/her designee shall publish notice of this ordinance in a newspaper of general circulation in the City upon adoption of this ordinance and shall provide periodic notice of this ordinance to identified retailers and lawn, garden, and tree-care providers serving South Portland as well as to churches, schools, and other institutions in South Portland.
- (B) The PMAC shall prepare and publish materials designed to educate the community about the role of pesticides in the local environment and the benefits of organic pest management. This outreach shall include: a community-based social marketing campaign targeting City households and businesses; promotion of professional education and training for State of Maine licensed applicators; distribution of information and news about City practices through South Portland internet and web-based resources; SPC-TV public service announcements; news releases and news events; tax bill inserts; posters and brochures made available at City events and applicable locations that serve the public; workshops, trainings, and demonstration projects; targeted outreach to schools; and any additional methods deemed appropriate by the PMAC.
- (C) The PMAC shall also develop a program to work directly with retailers that sell pesticides in South Portland to:
- (i) Provide educational training for all retail store employees who recommend and sell pesticides for use in the home and garden, highlighting the following:
 - (a) federal, state, and local pesticide regulations;
 - (b) principles of organic pest management;
 - (c) pesticide toxicity and health and environmental concerns;
 - (d) proper pesticide display and storage; and
 - (e) the role of personal protective equipment, pesticide poisoning symptoms, and emergency procedures in case of spills.
 - (ii) Implement a toolkit consisting of educational materials and signage (i.e., posters, signs, stickers) that can be customized, printed, and placed in stores to help consumers understand this ordinance and alternatives to prohibited pesticides.

Sec. 32-10. Violations.

Any person violating any of the provisions of this ordinance or failing or neglecting or refusing to obey any order or notice of the Sustainability Coordinator

and/or the PMAC issued hereunder shall be subject to enforcement action as provided herein.

Sec. 32-11. Enforcement.

It shall be the duty of the Code Enforcement Officer to provide investigative assistance and to enforce the provisions of this ordinance in collaboration with the City's Sustainability Coordinator. The Sustainability Coordinator shall work with alleged violators of this ordinance to bring them into compliance by providing the individual(s) with educational materials and advice on the use of less toxic chemicals to achieve their desired results. The Sustainability Coordinator will maintain a listing of complaints of alleged violations of this ordinance and how they were resolved. The listing will include the nature of the complaint, a summary of the situation and a brief description of how each complaint was resolved. This information will be reported on the City's website in aggregate by Assessor's tax map number and not by specific property address or Assessor's lot number.

Sec. 32-12. Severability.

Should any section or provision of this ordinance be declared by the courts to be invalid, such decision shall not invalidate any other section or provision of this ordinance.

Sec. 32-13. Conflicts with Other Ordinances.

Whenever a provision of this ordinance conflicts with or is inconsistent with another provision of this ordinance or of any other ordinance, regulation or statute, the more restrictive provision shall control.

Sec. 32-14. Effective date; Applicability dates.

This ordinance shall become effective pursuant to Section 225 of the City Charter. In order to allow time for residents and businesses to become familiar with the requirements of this ordinance, the prohibitions on the use of certain products and/or applications (and the related public notification, signage and reporting requirements) shall be phased in as follows:

Phase One: Commencing May 1, 2017, the provisions set forth in Sec. 32-5 on the use or application of certain pesticides for turf, landscape and outdoor pest management activities shall apply to City-owned property (but not to any golf course).

Phase Two: Commencing May 1, 2018, the provisions set forth in Sec. 32-5 on the use or application of certain pesticides for turf, landscape and outdoor pest management activities shall apply to private property (but not to any golf course).

Phase Three: Commencing May 1, 2019, the provisions set forth in Sec. 32-5 on the use or application of certain pesticides on certain portions of golf courses for turf, landscape and outdoor pest management activities shall apply to all golf courses.

Fiscal Note: Less than \$1,000

Dated: August 15, 2016