

South Portland City Council
Position Paper of the City Manager

Subject:

ORDINANCE #6-15/16. Amending Chapter 27, “Zoning Ordinance,” regarding moratorium on development proposals involving liquefied petroleum gas (LPG) storage and distribution facilities. Failed first reading on 12/9/15, reconsidered and passed first reading on 12/21/15. ROLL CALL VOTE. Passage requires five (5) affirmative votes.

Position:

At City Council workshop meetings on October 14, 2015 and November 9, 2015, the topic of a potential moratorium on new liquefied petroleum gas (LPG) storage and distribution facilities was discussed. At the conclusion of the November 9, 2015 workshop meeting, there was a request to bring forward a proposed moratorium ordinance that would catch the pending Planning Board site plan application of NGL Supply Terminal Company, LLC so that any future changes of law would apply to its project. The site plan review and approval process is set forth in the City’s Zoning Ordinance, Chapter 27 of the Code of Ordinances, and that is why a moratorium under Chapter 27 of the Code of Ordinances is proposed.

A moratorium is a temporary ban on land use activity or development to give City officials time and the opportunity to plan for accommodating or managing development. Development moratoria are specifically authorized by State statute, 30-A M.R.S.A. § 4356, subject to certain requirements set forth in the statute. The principal statutory requirement for a moratorium ordinance is that it be necessary either (1) to prevent a shortage or overburdening of public facilities (e.g., sewer, water, roads, schools, public safety), or (2) because existing plans, ordinances or regulations, if any, are inadequate to prevent serious public harm.

Because the proposed moratorium ordinance constitutes an amendment of the Zoning Ordinance (Chapter 27), at least 5 affirmative votes are required for the City Council to adopt the moratorium ordinance after second reading. See Sec. 27-115 of the Zoning Ordinance. (Passage of first reading only requires four affirmative votes.) Because the proposed moratorium ordinance involves a temporary ban on land use activity and is an amendment of the Zoning Ordinance, the Planning Board must conduct a public hearing on the ordinance.

This moratorium ordinance is brought forward to impose a moratorium that, if enacted, would provide the City Council with time to study liquefied petroleum gas (LPG) storage and distribution facilities and to develop any appropriate ordinance amendments to address development proposals involving the same. The moratorium would be applicable retroactive to October 14, 2015 (date as amended on December 21, 2015) so that even if it took a couple of months for the Planning Board public hearing and City Council process to run its course, it would still apply to any pending or new applications filed between now and the effective date of the moratorium ordinance. The moratorium would be effective for 180 days from October 14, 2015 (*i.e.*, until April 11, 2016), but could be terminated early if appropriate (or extended if necessary).

This ordinance failed first reading on December 9, 2015, was reconsidered, amended and passed first reading on December 21, 2015. The Planning Board held its public hearing on January 12, 2016 and by a vote of 6-1 (Phillips) sends a negative recommendation to the City Council for passage of the moratorium. Attached is a copy of the Planning Board Report.

Requested Action:

This item is in order for City Council action.


City Manager

CITY OF SOUTH PORTLAND



DEPARTMENT OF
PLANNING & DEVELOPMENT

496 Ocean Street
P.O. Box 9422
South Portland, Maine
04116-9422
Telephone (207) 767-7603 x2
pdoucette@southportland.org

PATRICIA DOUCETTE
Code Enforcement Director
Deputy Director of
Planning & Development

January 8, 2016

Stephen R. Bushey, P.E.
Fay, Spofford & Thorndike
778 Main Street, Suite 8
South Portland, ME 04106

Re: NGL Supply Terminal Company, LLC / NGL Terminal Relocation Project /
20 Rigby Yard, South Portland

Dear Steve:

I am writing to follow up Planning Director Tex Haeuser's December 21, 2015 letter to you regarding NGL Supply Terminal Company, LLC's (NGL) pending site plan application and related Zoning Ordinance interpretation issues.

A number of residents have inquired of the Planning Department whether the rail cars themselves constitute "storage" and, if so, whether the amount of LPG product that NGL proposes to have on site (the leased premises) at any one time complies with the limitations on gas storage set forth in Sec. 27-964(14) of the Zoning Ordinance. The Planning Director and the City Manager have asked me to make a formal use determination pursuant to Sec. 27-131 of the Zoning Ordinance regarding this issue.

While I addressed the above ground storage tank storage limitations set forth in the Zoning Ordinance in my September 11, 2015 letter to you, I did not address the rail car storage issue in that letter. (Note that I do not consider rail cars to be above ground storage tanks within the meaning of Sec. 27-1517 of the Zoning Ordinance.) The term "storage or permanent storage" is defined in Sec. 27-201 of the Zoning Ordinance as "retention on site for any period longer than twenty-four (24) consecutive hours."

I have carefully reviewed NGL's September 18, 2015 site plan application and NGL's supplemental application materials dated November 20, 2015. As I understand the specifics of NGL's proposed rail car off-loading, storage and truck loading operations from start to finish, the maximum number of rail cars that will be present on the leased premises at any one time is 16 full rail cars and 8 empty rail cars. This will be in addition to the single above ground storage tank capable of storing 24,000 gallons of LPG product. As I understand the nature of propane, it is one of a group of liquefied petroleum gases (LP gases). It exists as a liquid and a gas. It is normally a gas, but

compressible to a transportable liquid. It is considered a petroleum product, and it is either a gas or a liquid when contained in a pressurized container. Any space in a pressurized container, such as a rail car, that is not filled with liquid propane is filled with propane gas. Ten thousand cubic feet of gas is equivalent to approximately 75,000 gallons of empty liquid storage vessel capacity (1 cu. ft. gas = 7.48052 liquid gallons).

Section 27-962 of the Zoning Ordinance lists the allowed uses in the INR zoning district, which includes a storage and distribution facility as an allowed use. Sec. 27-964 of the Zoning Ordinance lists the prohibited uses in the INR zoning district, and Sec. 27-964(14) of the Zoning Ordinance provides, in part, that gas (fuel or illuminating) storage in excess of 10,000 cubic feet of gas is prohibited in the INR zoning district, with some exceptions to the prohibition included therein. It is my interpretation of the Zoning Ordinance that none of the exceptions to the Sec. 27-964(14) prohibition apply to NGL's proposed project.

Given the nature of propane as either a liquid or a gas when contained in a pressurized container, I interpret the definition of "storage" in the Zoning Ordinance in conjunction with Sec. 27-964(14) of the Zoning Ordinance's prohibition on the storage of more than 10,000 cubic feet of gas in the INR zoning district to mean that NGL is allowed to store 74,805 gallons of LPG product on site for no more than 24 hours at a time (7.48052 gallons x 10,000 cu. ft. = 74,805 gallons). Thus, if NGL has its one proposed above ground storage tank filled with 24,000 gallons of LPG product, that leaves 50,805 gallons of LPG product storage capacity in the rail cars available to NGL without it exceeding the gas storage limitation set forth in Sec. 27-964(14) of the Zoning Ordinance. Because NGL proposes to have as much as 504,000 gallons of LPG product (24,000 gallons [1 above ground storage tank] + 480,000 gallons [16 full rail cars x 30,000 gallons of LPG product per rail car = 480,000 gallons] = 504,000 gallons grand total) retained on site for more than 24 hours, I hereby determine that NGL's proposed use as set forth in its September 18, 2015 site plan application does not comply with Sec. 27-964(14) of the Zoning Ordinance's 10,000 cubic feet gas storage limitation for the INR zoning district. NGL will need to amend its site plan application to comply with Sec. 27-964(14)'s storage limitation if it wants the Planning Board review process to proceed further.

To the extent that this formal use determination differs from my prior memos on NGL's proposed use from March and April of last year, this determination supersedes those two prior memos. A new site plan application was filed by NGL with the Planning Board on September 23, 2015 containing a revised proposal; additional information was submitted by NGL to the Planning Department in November of 2015; and the Planning Department has received more information on the specifics of NGL's proposed use, the technical aspects of LPG and its storage/transfer/distribution, and the regulatory scheme governing LPG on the federal, state and local level since I wrote those two memos last spring. In other words, a lot of new information has been provided to the Planning Department and me over the last 7-8 months that I had not considered last spring. This is a very complex proposed project and it has taken everyone involved a significant amount of time to understand the project and the applicable regulatory

scheme. Thank you for your patience and cooperation with Planning Department staff to date.

If NGL wishes to dispute this determination, an appeal may be filed within 30 days with the Board of Appeals pursuant to Section 27-152 of the Zoning Ordinance.

If you have any questions, please do not hesitate to contact me. Thank you.

Sincerely,



Patricia Doucette
Director of Code Enforcement

cc: Kevin Fitzgerald, NGL Manager of Terminal Operations
Charles (Tex) Haeuser, Planning Director
Steve Puleo, Community Planner

MEMORANDUM

To: City Council

From: Planning Board

Date: January 14, 2016

Subject: Zoning Text Amendment – Amendment to Chapter 27 Zoning Ordinance Enacting a Moratorium on Development Proposals Involving Liquefied Petroleum Gas (LPG) Storage and Distribution Facilities - City of South Portland – - Meeting of January 12, 2016

INTRODUCTION

The South Portland City Council had requested that the Planning Board provide a land use recommendation regarding a proposed amendment to the Zoning Ordinance enacting a moratorium on development proposals involving liquefied natural gas (LPG) storage and distribution facilities in South Portland.

Legal advertisements regarding this request appeared in the Portland Press Herald on December 30, 2015, and January 4, 2016, and a public notice was posted at City Hall and Public libraries on December 30, 2015.

This submission is being reviewed under Chapter 27 Article II. Zoning Ordinance, Section 27-7 Conformity, and the Comprehensive Plan.

ZONING RECOMMENDATION FROM THE PLANNING BOARD

By a vote of 6-1 (Phillips), the Planning Board recommends that the City Council not approve the proposed zoning text amendments to Chapter 27 Zoning for a Moratorium on Development Proposals Involving Liquefied Petroleum Gas (LPG) Storage and Distribution Facilities in South Portland.

Planning Board Meeting Minutes of January 12, 2016—Agenda Item #3

The South Portland City Council is requesting a Planning Board land use recommendation regarding a proposed amendment to the Zoning Ordinance enacting a moratorium on development proposals involving liquefied natural gas (LPG) storage and distribution facilities in South Portland. Pursuant to Ordinance Section 27-115(g), the Planning Board will, after the close of the public hearing, make a recommendation to the City Council regarding the proposed amendment. The City Council will then act on the proposed amendment.

S. Daggett gave a brief overview of the item. She stated that a moratorium would be a temporary ban on land use activity that gives city officials time to study the issue and develop plans to accommodate and/or manage development of LPG storage and distribution. Moratoriums are authorized under state statute and specific criteria that has to be met. The Planning Board's role is to look at the issue of if the moratorium is consistent with the City's Comprehensive Plan and what the implications are. The Comprehensive Plan may not specifically address moratorium ordinances and this may be neither consistent nor inconsistent with it. If the Board recommends changes and the City Council wants to

adopt any of the changes, this requires a new first reading and may change the timetable. Additionally, the City Council may move forward in any case.

T. Haeuser stated that the purpose is to have a discussion about the moratorium, not NGL's application. Legal advertisements regarding this request appeared in the Portland Press Herald on December 30, 2015, and January 4, 2016, and public notices were posted at City Hall and the public libraries on December 30, 2015.

He gave two main reasons for a moratorium. First, language in some zoning ordinances dealing with propane and propane facilities is convoluted, leading to differences in interpretation. He showed a list of uses prohibited in the Non-Residential Industrial zone (INR) on the projector, stating that 14th on the list is a limit on gas manufacture. He also discussed whether gas storage is in its gaseous or liquid state. The second issue is the two parts of Section 27-1517 A and B, Standards for Above Ground Storage Tanks. He showed this language on the projector and read them, stating that Part B says, "for any purpose."

He gave a timeline of the item. NGL's application was first submitted on January 20th, 2015, and a Planning Board workshop was held on February 24th, 2015. After that, there were concerns from the residents wondering what limits on gas meant and feelings that the ordinance wasn't interpreted properly. The City hired Woodard & Curran Engineers for an independent assessment. Their first memo, on June 4th, 2015, focused on gaseous propane and stated that it would be hard for the applicant to meet the storage limit with the proposed six tanks.

There was not much attention to 27-1517 because the applicant was looking at tanks as pressure vessels and not above ground storage tanks, which have slightly different definitions in some contexts. By summer, the City had communicated with the applicant that this was an issue and on September 11th, 2015, in a response from questions from the applicant, Patricia Doucette, the City's Code Enforcement Director, sent a letter to the applicant stating that their thinking of revising their application to a single 24,000 above ground storage tank would be okay. The applicant wanted to request a waiver for the second tank, and Ms. Doucette said that wouldn't work because it wouldn't be an accessory use. The applicant submitted a revised submission on September 21st, 2015, that took care of 27-1517. However, there were several tracks within the leased area and the applicant indicated proposing a maximum of 16 loaded propane tank cars and eight empty cars within the site. The question was now if tank cars count toward the storage limit.

With information from a concerned citizen and further discussion with legal counsel, Mr. Haeuser, Mr. Puleo, Ms. Doucette, and Ms. Daggett decided that the loaded railway cars would count if left onsite for longer than 24 hours. This marked a switch, and they accepted that propane by its nature is a liquid or gas—they were not just focused on gas anymore. The INR limit of 10,000 cubic feet pertained to propane product as liquid. Ms. Doucette sent that letter on January 8th, 2016, and yesterday they received communication from the applicant that their intention is to revise their application again to meet the City's interpretation to not have more than 10,000 cubic feet (slightly less than 75,000 gallons) of liquid product within the leased area for more than 24 hours.

This fall, City Council came forward with two initiatives: a moratorium and amendments to Fire Safety, Chapter 8, in the Code of Ordinances. There were workshops in December and last night on the amendments; they would require a certain setback for commercial propane facilities from critical infrastructure (e.g. fire stations, hospitals, schools). The Council put this on a fast track, asking staff to work on a draft for the February 1st Council hearing. It would pertain to any commercial propane distribution facility after November 9th, 2015.

There are policies and recommendations in the Comprehensive Plan. This would be citywide but in the immediate instance, INR is in an area that the Comprehensive Plan deems as a “growth area.” For such areas there should be development allowed with necessary protections but without extra concern. The Comprehensive Plan has policies to support economic development and job creation, but puts a big premium on enabling citizens to enjoy their neighborhoods and to be safe. In the Memo to the Planning Board, the current proposal has the aspect of being as close to neighborhoods as you can get in Rigby Yard. They also have a proposal for Chapter 8 amendments. The fact that they don’t allow more the 25,000 gallons is fairly restrictive and there are some performance standards in place already. There is also the element that, in amending the zoning ordinance, they have heard through Council Workshops that there is danger of having the City’s efforts challenged legally.

It should be taken into consideration that the Chapter 8 amendments are going forward and pertain back to November. Also, there are changes needed to Chapter 27: the language is convoluted, needs clearing up, and better definitions are needed. They need to look at zones at which propane facilities are allowed and they need to be careful how they’re done. They may or may not need a moratorium to do them. There are parts of Comprehensive Plan that would suggest “better safe than sorry.” These are all things for the Board to keep in mind.

W. Laidley read ground rules into the record and asked if anyone on the Board has any bias on this issue; no one did. **S. Puleo** read time limitations, stating that everyone has five minutes to speak and will be warned when they have one minute remaining.

PUBLIC HEARING OPEN

Russ Lunt, 133 Brigham St., doesn’t believe a moratorium is needed and thinks this should be in the City and staff’s hands. He thinks tactics have been nasty and disagrees with how it’s been done. He stated that Pan Am Railways could build this tomorrow. He said a propane dealer from Gorham said that by pushing this out, the supply of propane could be compromised.

Devin Deane, 87 Thirlmere Ave., appreciates Mr. Haeuser’s background info. He stated that sometimes there are old laws and new technology; a moratorium allows us to press pause and revisit an issue. The first issue is the above ground storage tank limitation and the second is the regulation of no storage of gas in excess of 10,000 cubic feet. He doesn’t believe there can be a new massive gas tank storage in South Portland and that the laws have a hook—the definition of storage. If it’s onsite for 24 hours, regulations apply. It encourages, as written, an unsafe method of propane storage. With the shift of pushing everything to railcars, you encourage the new technology of transloading; it is the least safe method. With old laws encouraging transloading, he believes the City needs to press pause and figure out what storage means and how to interpret and apply it. With the scale of this operation, there would be over 500,000 gallons of LPG next to his house, coming from replacing an 180,000 gallon facility in Portland.

Bob Whyte, 7 Orchard St., stated that there are a number of points. Urgency: if Pan Am decided, they could make facility tomorrow. He believes the applicant has made this the City’s problem when it is theirs to figure out. He said staff is good at doing their job, but the staff’s job isn’t to make value judgements. They can craft techniques and rules. Danger: there are zoning rules that are in conflict, interacting jurisdictional issues, and language that’s dense. This will take time, but is coupled with the urgency issue. He is in favor of the moratorium.

Eben Rose, 57 Buchanan St., stated that he is not speaking as City Councilor but as a resident because he's been involved from the beginning. He thanked Mr. Haeuser for the narrative and said that the lesson that can be drawn is that there was a lot of confusion on what codes meant. He wants to suggest that we do homework and look at these issues ourselves. If codes are too complicated to understand, be cautious when looking through someone else's filter. It's important to have readable and understandable codes; it helps empower citizens. Staff is skilled in certain areas more so than others. The City is faced with a situation where there's a firm that wants to set up shop, and was firstly doing it in violation of two ordinances. It is contingent upon them to also read the code. We are dealing with industries that are changing; technology is changing and they are not prepared for technological workarounds. As citizens, Councilors, Board members, staff, take the time to figure out different possible ways to safeguard citizens.

Andy Snyder, 72 Boysenberry Dr., asked the Board to implement the moratorium primarily for health and safety. There has been a lot of talk, but it's not clear that the proposals have the degree of safety he'd like to see so close to residents. Also, there's an impact on infrastructure. They are talking about filling up trucks every hour. On Route 1, add more tanker trucks and there's increased traffic. There's also wear and tear on roads. He believes this conflicts with Comprehensive Plan, which talks about business development. This business isn't going to add anything to South Portland—it will hurt businesses and residences. It does not improve tax income, doesn't create jobs in South Portland; it's just there. There are more compatible uses for the railyard. He feels strongly that a moratorium is important not only for the applicant but to prevent preemption by Pan Am. During a moratorium, he would like to see ambiguity in code made clearer; they also need to update the fire code. Performance standards are in place, but the question is: Are they really understood? Are they enforced?

Stan Jordan, 32 Crestview Dr., urged the Board to support a moratorium. There's a lot of confusion that need to be cleared up. They need to know technical aspects and legal ramifications of this project. He doesn't believe this belongs in any city limit; it should be in rural area and he recommends they relocate between Westbrook and Fryeburg where there's State-owned track already in place. He showed photos of fireballs from propane explosions and stated he has given these to the City Manager, Mr. Haeuser, and Councilor Beecher. City officials need to be fully aware of how dangerous this can be. This moratorium is a desirable; the City needs to take time to get it right. A 1,200 foot limit does not encompass a safe zone.

Nancy Plourde, 106 Grandview Ave., is one of families evacuated during a hazardous leak. With any explosion, there wouldn't be time to get out. She knew when they bought their house that this is a way of life. She read the history of Pan Am from their Wikipedia site. She believes that fire and safety codes need to be brought up to date. She is in favor of moratorium. What would happen to the Cash Corner fire department? Would they be able to get there in time?

Tess Nacelewicz, 25 Robinson St., encouraged the Board to pass the moratorium. She was looking at homes for sale and was surprised at low price of one home, then read it was next to Rigby Yard. She is concerned that if we don't pass the moratorium and take time to address the issues, we are sending a negative message to South Portland as a growing residential community. She doesn't believe this sends a negative message to business in general; they need the right businesses in South Portland. The moratorium is legally afforded time to address admittedly confusing ordinances.

Steve Hasson, 148 Breakwater Dr., supports a moratorium. He has 50 years in fire service. The storage and filling depot the applicant proposes is another disaster waiting to happen. He doesn't question the fire department, but you can't put them into a dangerous situation. He explained what happens to propane under pressure and heat. If a large spill happens in Rigby, you will have to evacuate half a mile. If a fire happens, you have to evacuate one mile in all directions. He told the Board how far a mile is from the site.

William Fowler, Stanford St., agrees with Mr. Lunt and wishes the same thing happened with the tanks on outer Broadway, which are still being used as storage. As for safety, the fire department is going to do their job; gasoline is just as flammable. The new Irving at the Armory will sell propane in tanks, and that is near the police station. He thinks a moratorium gives a bad business name and drives business away. Propane will still go through South Portland. Throwing the moratorium in after it's already been done also sends the wrong message: we don't want it in our backyard. He mentioned the same thing with medical building on Ocean Street and the DMV—everything moves to Scarborough. He thinks it's the wrong message. They should have known this when allowing the three 30,000 gallon tanks on outer Broadway. He doesn't want to see volatile storage tanks near fire or police departments.

Jonathan Perry, 95 Union St., said his house overlooks the location on the Main St. side. He supports the project but also the moratorium. He sees the railyard being used and not being used; it's an indication of the economy in the state—more use of it is good. Safety is important; it seems to him that we pass laws and don't fix what is wrong with them, just keep passing more laws. He urged the Board to take the time to do this right. He trusts fire chief and knows liquefied and natural gas isn't going anywhere. If we lose this company, someone else may come in and do it right.

Fredrick Lancaster, 41 Hillside Ave., sees the Planning Board as being in the position of reflecting the will of the people. The residents overwhelmingly want a moratorium. Private interest have bought and owned decision making in society today. It's clear to himself and his family that the moratorium is the decision the Board is required to make.

George Corey, 44 Franklin Tr., is trained as chemist and lawyer. He asked for the moratorium to be supported. Looking at current propane ordinances, one was written in 1995 and the other in the 1970's, they don't mesh well together. They were both intended to limit the total amount of propane, but they are read in a way to use them together to maximize the amount of propane stored on property. 27-1517 is dangerous; the likelihood of overflow and overfill accidents is very high. Bringing propane onto property, you have to take it off property within time limits; this requires propane to be taken on and off quickly. As for the limitation on storage, to have a certain amount and for longer than 24 hours is in violation of code written in different times and that are in conflict. There is also the issue of health and safety. There are no safety requirements for terrorism. There are a number of things to be factored in that aren't. He would like moratorium to be considered.

Susan Henderson, E St., stated that the introduction from Mr. Haeuser supports business and economic growth and safety. This issue has emerged as a dilemma. It's critical that the issue be resolved not as an "either or." The City needs business and safety together. She takes issue with Mr. Lunt observing the Council—people have put heart and soul into this process. Disagreement is because people care; it's not disrespectful to question. There's potential for catastrophic injury—it is worthy of very careful consideration.

Patricia Whyte, Orchard St., said the City has an opportunity to take time. She has sat in on hours of discussions about this and has seen confusion from everybody. She urged the Board to get it right; get ordinances sorted out so that people can understand them. A moratorium is good for business and citizens. She urged the Board to propose the moratorium to City Council.

Daniel Warren, 100 Skillings St., spoke in favor of the moratorium. He asked the Board to take the time to do it right so that it doesn't have to be revisited.

Sandra Warren, 100 Skillings St., agreed; she can see Rigby from her front window. She said the process is scary. Purchasing their home was an investment. If something like this goes through, they will sell their property. It will be devalued. She hopes the Board does the right thing.

PUBLIC HEARING CLOSED

L. Boudreau stated that a member of the public said it's the Board's duty to reflect the will of the people. It's not her understanding that is her role. She understood that she needs to be sure a project is in compliance with ordinances and all applicable laws and asked Ms. Daggett to confirm.

S. Daggett: The Board is not popularly elected; their role is governed by zoning, subdivision ordinances. You review applications, and your role is limited to administering the ordinances of the City.

T. Haeuser gave a historical point of view of the Planning Board. He stated they came about in the 1900's as a reform effort to take some of the politics out of city decision making.

I. Misiuk lives on Pleasant Ave. near the proposed location. He wasn't on the Board when this came to workshop and is displeased with how things have played out. He finds it's very unsettling that we are at this point. LPGs are not new, the way it's transferred is not new. The fact that we have these ordinances that don't fit—why are we not being more proactive? He has seen this on the Planning Board with ADUs. He takes issue with the fact that an organization has come in with an application and revised it, and it is trying to be stopped because we don't like a project. We aren't here on the application, we're here on the moratorium. He came in thinking he had a grasp on how he would vote, and in hearing the testimony and rereading he almost changed in a sense. He hopes to hear more from other members. This is the wrong time to sit and be silent. He thanked everyone for coming.

L. Boudreau sat on Council for 18 years and she appreciates that her job now has been to interpret the ordinances and laws—different than Councilors. It's easy to get tangled up in decision making. She understands passion and desire to prevent certain businesses from locating in the City. Working through her packet, the last section was the Maine Revised Statutes, giving the reasons that she can use to approve a moratorium. There are two options, the first is overburdening in public facilities. She does not believe this project will do that. Route 1 and Broadway are both built to handle heavy traffic. The fire department has said they can handle this operation and the storage of propane in the City. She doesn't believe the first criteria is met. The second is inadequacy to prevent serious public harm, including residential, commercial, industrial developments. She cannot live in a world of fear and doesn't want them to believe that she sees the fears they see. She sees change in the neighborhood but not a lot of change—the railyard currently has all of this material going through it. It's not that it's not there now, and it will probably be there in the future. We have an obligation to let the project go through the

Planning Board and use South Portland, state, and federal laws. She doesn't see that a moratorium is necessary.

K. Carr finds himself conflicted by the parameters of their role. He sees passion in the room—the fact that citizens are deeply concerned about our community and the impacts of any potential project. He agrees with Mr. Misiuk in thinking that he had it figured out but is now bouncing back and forth. He is aware and appreciates the fact that their role is advisory when it comes to a moratorium.

T. Haeuser mentioned that he found that a lot of the testimony was useful and put things into clear perspective.

W. Laidley stated that transloading has been happening for 60 years with no incidents. Tank cars go across the rail bridge every day. He described risk and reward. What does the City get out of this? The City has a lot of tools; the City is in court on one issue and could end up that way with this issue. Throwing tax dollars at legal fees is not ideal as a tax payer. He's not sure a moratorium guarantees anything. As Mr. Haeuser says, governments tend to be reactive not proactive. He cannot support a moratorium; there's enough expertise in the City. The vocal minority does not equal a voting majority. As sincere as some people are, it doesn't mean it's the will of the people.

F. Hagan said listening to Board members shows how complex this issue is. This potential business has been through a lot of hoops, but people may need to live next to it. He asked: will the moratorium help or squash the project? It's tricky. If he lived next to the proposal, he would be nervous. The Board has to deal with facts and not emotions or opinions. It's going to be a tough vote for everyone.

T. Neff agreed. Her thoughts are similar to what's been expressed. She thinks similarly to Ms. Boudreau on the justifications for a moratorium required in State statute. As for the safety concerns, she's not convinced the ordinances are not capable of assessing the risk. The proposal will come in for site plan review. If she was living next door, she would share concerns. For her, the moratorium seems like it's changing the rules midstream. The conversation about businesses to attract in the City is valuable and should continue, but along a different track.

K. Phillips stated that this is directly in her backyard. The affected area is widespread—it could affect schools, the fire department, and the library. She's concerned with issues the retired fire chief brought up. They have the right to protect residents. She will vote for the moratorium, to give it more time and make sure they get things right. They have an obligation to the City for more growth, but we need to make sure we do it right. She supports moratorium.

I. Misiuk said it's been mentioned that the City Council is looking to amend certain ordinances and backdate it. That seems illegal as there is an application in hand, although it's being revised. He asked Ms. Daggett if it is illegal.

S. Daggett said as long as the applicant hasn't obtained constitutional vested rights, it is permissible. It has been done by the City in the past.

L. Boudreau motioned to send a negative recommendation to the City Council to not approve the zoning text amendments to Chapter 27 Zoning; a Moratorium on Development Proposals Involving Liquefied Petroleum Gas (LPG) Storage and Distribution Facilities in South Portland. **T. Neff** seconded; (6-1) (**K. Phillips** opposed).

RECOMMENDATION

The Planning Board voted 6-1 (Phillips) to send a negative recommendation the City Council to not approve the zoning text amendments to Chapter 27 Zoning; a Moratorium on Development Proposals Involving Liquefied Petroleum Gas (LPG) Storage and Distribution Facilities in South Portland.



CITY OF SOUTH PORTLAND

THOMAS E. BLAKE
Mayor

JAMES H. GAILEY
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 #6-15/16

THE COUNCIL of the City of South Portland hereby ordains that Chapter 27, "Zoning," of the "Code of Ordinances of the City of South Portland, Maine" be and hereby is amended by the enactment of a new Article XVI as follows (deletions are ~~struck through~~; additions are underlined):

CHAPTER 27

ZONING

• • •

ARTICLE XVI. MORATORIUM ON DEVELOPMENT PROPOSALS INVOLVING LIQUEFIED PETROLEUM GAS STORAGE AND DISTRIBUTION FACILITIES

Sec. 27-1601. Moratorium declared.

WHEREAS, in early 2015, the City's Planning Department received a site plan application for a liquefied petroleum gas (LPG) storage and distribution facility to be located at the Rigby Rail Yard, which is adjacent to several residential neighborhoods within the City's Main Street/Route 1 Corridor; and

WHEREAS, the City's Zoning Ordinance contains performance standards relating to above ground storage tanks, but it does not contain performance standards specific to LPG storage and distribution facilities or the associated loading and unloading of LPG; and

WHEREAS, residents of the adjacent neighborhoods and property owners have raised concerns about the fire and public safety risks attendant to the various methods for loading, unloading, and/or storage of LPG adjacent to residential neighborhoods; and

WHEREAS, residents of the adjacent neighborhoods and property owners have raised concerns about the environmental impact of LPG storage and distribution facility development proposals as a general matter and in the event of a worst-case spill or explosion; and

WHEREAS, residents of the adjacent neighborhoods and property owners have raised concerns about the impact of LPG storage and distribution facility development proposals and the anticipated increased tractor-trailer traffic of such development proposals on City maintained streets; and

WHEREAS, development proposals involving LPG storage and distribution facilities raise legitimate and substantial questions about the impact of such development on the City, including questions of the compatibility of the development proposals with existing uses and developments in the City; the adequacy of streets to handle additional traffic associated with the development proposals; and the potential adverse health and safety effects of the development proposals on the community if not properly regulated; and

WHEREAS, the possible effect of the development proposals involving LPG storage and distribution facilities has implications for the health, safety and welfare of the City and its citizens; and

WHEREAS, there are at least three sets of federal statutes (and accompanying regulations) that may provide the basis for federal preemption of local regulation of LPG storage and distribution facilities under the Supremacy Clause of the U.S. Constitution: (a) the ICC Termination Act (the "ICCTA"); (b) the Federal Rail Safety Act (the "FRSA"); and (c) the Hazardous Materials Transportation Act (the "HMTA"); and

WHEREAS, the City needs time to study its own ordinances to determine the implications of future development proposals involving LPG storage and distribution facilities and to develop reasonable ordinances for the protection of the health, safety, and welfare of South Portland's residents, property owners and natural resources, and to make recommendations for the City Council's consideration regarding the same; and

WHEREAS, the City needs time to study the experience of other municipalities that regulate LPG storage and distribution facilities and the loading, unloading and/or storage of LPG to develop an understanding of best regulatory practices and to make recommendations for the City Council's consideration regarding the same; and

WHEREAS, the City needs time to review the City's existing regulatory scheme and determine what, if any, additional regulations are appropriate from a public health, safety and welfare prospective; to determine whether the City has authority to

implement any proposed additional regulations in light of the complex regulatory environment already in place surrounding rail carriers and hazardous materials; and to consider appropriate enforcement mechanisms for any proposed additional regulations; and

WHEREAS, the City, under its home rule authority, its police power generally and as otherwise provided by law, may have the authority to impose reasonable restrictions, conditions, and limitations on development proposals involving LPG storage and distribution facilities subject to the complex regulatory environment already in place surrounding rail carriers and hazardous materials; and

WHEREAS, the City Council, with such professional advice and assistance as it deems necessary and appropriate, shall study the Code of Ordinances to determine the land use, environmental and other regulatory implications of future proposed development proposals involving LPG storage and distribution facilities and consider what regulations might be appropriate for such activity; and

WHEREAS, the existing Code of Ordinances and other applicable laws, if any, are not adequate to prevent serious public harm possibly to be caused by future proposed development proposals involving LPG storage and distribution facilities; and

WHEREAS, a moratorium is necessary to prevent an overburdening of public facilities that is reasonably foreseeable as the result of future proposed development proposals involving LPG storage and distribution facilities; and

WHEREAS, it is anticipated that such a study, review, and development of recommended ordinance changes will take at least one hundred and eighty (180) days from the date the City first considers this moratorium on development proposals involving LPG storage and distribution facilities;

NOW, THEREFORE, the City of South Portland, acting through its elected City Council, does hereby ordain that the following Article be, and hereby is, enacted, and, in furtherance thereof, the City does hereby declare a moratorium on development proposals involving LPG storage and distribution facilities. This Article shall take effect in accordance with the provisions of the City Charter, but shall be applicable as of October 14, 2015, as expressly provided below. The moratorium shall remain in effect for one hundred and eighty (180) days from the date of applicability of this Article, unless extended, repealed, or modified by the City Council, for the express purpose of drafting an amendment or amendments to the South Portland Code of Ordinances to protect the public from health and safety risks including, but not limited to, the potential adverse environmental, public health and public safety effects of development proposals involving LPG storage and distribution facilities if not properly regulated; and

BE IT FURTHER ORDAINED, that this Article shall apply to any new development proposals involving LPG storage and distribution facilities after the October 14, 2015 applicability date of this Article; and

BE IT FURTHER ORDAINED, that notwithstanding the provisions of 1 M.R.S.A. § 302 or any other law to the contrary, this Article, when enacted, shall govern any new development proposal involving LPG storage and distribution facilities for which an application for a license, building permit, certificate of occupancy, special exception review, site plan review and/or any other required land use approval has not been submitted and finally acted on by the Building Inspector, Code Enforcement Officer, Planning Board, Board of Appeals or other City official or administrative board or agency prior to October 14, 2015, the applicability date of this Article; and

BE IT FURTHER ORDAINED, that no person or organization shall start or engage in the construction or operation of LPG storage and distribution facility on or after the October 14, 2015 applicability date of this Article without complying with whatever ordinance amendment or amendments the City Council may enact as a result of this Article; and

BE IT FURTHER ORDAINED, that during the time this moratorium is in effect, no officer, official, employee, office, administrative board or agency of the City shall accept, process, approve, deny, or in any other way act upon any application for a license, building permit, certificate of occupancy, special exception review, site plan review and/or any other permits, licenses or approvals related to a LPG storage and distribution facility under Chapter 27 of the Code of Ordinances; and

BE IT FURTHER ORDAINED, that those provisions of Chapter 27 of the Code of Ordinances that are inconsistent or conflicting with the provisions of this Article, are hereby repealed to the extent that they are applicable for the duration of the moratorium hereby ordained, and as it may be extended as permitted by law, but not otherwise; and

BE IT FURTHER ORDAINED, that if the construction or operation of LPG storage and distribution facility is established in violation of this Article, each day of any continuing violation shall constitute a separate violation of this Article, and the City shall be entitled to all rights available to it in law and equity, including, but not limited to, fines and penalties, injunctive relief, and its reasonable attorney's fees and costs in prosecuting any such violations; and

BE IT FURTHER ORDAINED, that should any section or provision of this Article be declared by any court of competent jurisdiction to be invalid, such a declaration shall not invalidate any other section or provision.

Sec. 27-1602. Applicability date.

The applicability date of this Article is October 14, 2015.

Fiscal Note: Less than \$1,000

Dated: December 9, 2015