



## MEMORANDUM

TO: South Portland City Council  
James H. Gailey, City Manager

FROM: Sally J. Daggett, Esq.

RE: Moratorium Ordinance Requirements and Procedures

DATE: November 6, 2013

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### Statutory Authority and Requirements

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 (copy attached), subject to certain requirements set forth in the statute. The statutory requirements are express limitations on municipal home rule authority. Therefore, any moratorium ordinance must comply with the statutory requirements; the City has no other legal alternative for temporarily halting development for which it may be unprepared.

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. Either of these rationales will suffice, though the City may cite both as justification for a moratorium ordinance if there is a factual basis for doing so. In order to create a record for a reviewing court in the event the ordinance is challenged, every moratorium ordinance should include a preamble that recites the facts that demonstrate the necessity for the moratorium. While factual justification is critical, courts will not second-guess the City's determination of necessity; a moratorium ordinance, like any other municipal ordinance, is presumed valid, and the challenger must establish "the complete absence" of any facts supporting the need for a moratorium. The moratorium ordinance must be adopted by the City Council. (Note that because the moratorium ordinance constitutes an amendment of the Zoning Ordinance, at least 5 affirmative votes are required for the City Council to adopt the moratorium ordinance. *See* Sec. 27-115 of the Zoning Ordinance.) If the

moratorium involves a temporary ban on land use activity, the Planning Board must conduct a public hearing on the proposed moratorium ordinance.

#### Duration of Moratorium

State statute limits the duration of a moratorium ordinance to a definite term of not more than 180 days. A moratorium may, after notice and hearing, be extended by the City Council for additional 180-day periods if the City finds that (1) the problem necessitating the moratorium still exists, and (2) reasonable progress is being made to alleviate the problem. Both findings are important, but the second clearly implies an affirmative duty on the City's part to address the underlying circumstances and to do so in a responsible, timely fashion.

## 30-A §4356. MORATORIA

### 30-A §4356. MORATORIA

Any moratorium adopted by a municipality on the processing or issuance of development permits or licenses must meet the following requirements. [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

**1. Necessity.** The moratorium must be needed:

A. To prevent a shortage or an overburden of public facilities that would otherwise occur during the effective period of the moratorium or that is reasonably foreseeable as a result of any proposed or anticipated development; or [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

B. Because the application of existing comprehensive plans, land use ordinances or regulations or other applicable laws, if any, is inadequate to prevent serious public harm from residential, commercial or industrial development in the affected geographic area. [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

[ 1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW) .]

**2. Definite term.** The moratorium must be of a definite term of not more than 180 days. The moratorium may be extended for additional 180-day periods if the municipality adopting the moratorium finds that:

A. The problem giving rise to the need for the moratorium still exists; and [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

B. Reasonable progress is being made to alleviate the problem giving rise to the need for the moratorium. [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

[ 1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW) .]

**3. Extension by selectmen.** In municipalities where the municipal legislative body is the town meeting, the selectmen may extend the moratorium in compliance with subsection 2 after notice and hearing.

[ 1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW) .]

#### SECTION HISTORY

1989, c. 104, §§A45,C10 (NEW).

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Note: Additions are shown as underlined; deletions are shown as ~~strikethrough~~.

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:

## CHAPTER 27

### ZONING

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#### **ARTICLE XVI. MORATORIUM ON DEVELOPMENT PROPOSALS INVOLVING THE LOADING OF UNREFINED OIL SANDS ONTO MARINE TANK VESSELS DOCKING IN SOUTH PORTLAND**

##### **Sec. 27-1601. Moratorium declared.**

**WHEREAS**, the City of South Portland intends to protect the natural resources on which the City depends, including, but not limited to: its land resources; source of drinking water at Sebago Lake; and its marine and aquatic resources, including Portland Harbor, Casco Bay, and the rivers and tributaries passing through and adjacent to South Portland; and

**WHEREAS**, oil sands are the combination of clay, sand, water and bitumen; and

**WHEREAS**, according to the March 17, 2013 study entitled “Transporting Alberta’s Oil Sands Products: Defining the Issues and Assessing the Risks” prepared by Shanese Crosby, Robin Fay, Colin Groark, Ali Kani, Jeffrey R. Smith and Terry Sullivan of the University of Washington, oil sands and tar sands mean the same thing, but the term “oil sands” is more scientifically correct; and

**WHEREAS**, bitumen is a semi-solid or solid petroleum deposit that is thick like molasses and, unlike most conventional crude oils, must be heated or diluted with lighter hydrocarbons to flow through a pipeline; and

**WHEREAS**, diluent is any lighter viscosity petroleum product that is used to dilute bitumen for transportation in pipelines; and

**WHEREAS**, diluents themselves are toxic volatile chemicals, such as the known carcinogen benzene; and

WHEREAS, diluted bitumen (a/k/a dilbit) is bitumen combined with any diluent for transport; and

WHEREAS, the term “marine tank vessel” is used in this Article to mean a ship that is constructed or adapted to carry oil in bulk as cargo or cargo residue and the term does not include a vessel carrying oil in drums, barrels or other packages, or a vessel carrying oil as fuel or stores for that vessel, or an oil spill response barge or vessel; and

WHEREAS, oil sands are mined and processed to extract the oil-rich bitumen, which is then refined into an extra heavy crude oil; and

WHEREAS, nationwide, in the last three-and-one-half years, there have been two major pipeline ruptures and an unspecified number of minor ruptures of pipelines carrying unrefined oil sands; and

WHEREAS, the July 25, 2010 pipeline rupture in Marshall, Michigan spilled an estimated 843,444 gallons (20,082 barrels (bbl)) of dilbit and contaminated 35 miles of the Kalamazoo River and Morrow Lake, which spill has not yet been fully cleaned-up; and

WHEREAS, the total Marshall, Michigan spill clean-up cost reached \$809 million in 2012 and is increasing, more than any non-ocean spill on record; and

WHEREAS, the March 29, 2013 pipeline rupture in Mayflower, Arkansas spilled more than an estimated 157,500 gallons (3,750 barrels (bbl)) of dilbit and the clean-up is still underway, which spill resulted in the evacuation of approximately 22 homes and the clean-up of approximately 28,000 barrels of oily water; and

WHEREAS, the two above-referenced spills occurred on pipelines that had carried non-oil sands crude oil for years and that had not been specifically designed to carry oil sands; and

WHEREAS, unrefined oil sands alone weigh more than water, but it is diluted with diluent to decrease the viscosity in order to allow it to flow through a pipeline while also decreasing its weight compared to water; and

WHEREAS, while the parent bitumen can be denser than water (meaning it would sink), after diluent addition, the density decreases to less than water (meaning that it would float); and

WHEREAS, the environmental conditions present during a spill such as turbidity, water salinity, and mixing with sediments can all affect the potential for the unrefined oil sands to float or sink; and

WHEREAS, responders to the dilbit spill into the Kalamazoo River reported the presence of floating oil, submerged oil and sunken oil, making damage greater and clean-up more expensive than it would have been with other lighter crude oils; and

WHEREAS, responders to the Kalamazoo River and Mayflower, Arkansas spills reported air toxics at levels of concern to public health officials and there is a concern that this same issue may be present in South Portland in the event of a spill in South Portland; and

WHEREAS, techniques for cleaning-up unrefined oil sands in marine and aquatic environments are still not fully developed and are experimental or difficult; and

WHEREAS, federal and state guidelines for tracking the chemical composition of pipeline transported fuels so that local governments, citizens, and first responders can better understand, and plan for, the risks associated with the specific type of fuel flowing through or to their communities, do not currently exist; and

WHEREAS, the Portland-Montreal pipeline crosses the Sebago Lake watershed (South Portland's source of drinking water) and terminates at Portland Harbor and Casco Bay, important resources to the economic and recreational well-being of the City, its residents and property owners; and

WHEREAS, in 2009, Portland Pipe Line Corporation (PPLC) sought and obtained site plan approval from the City's Planning Board to reverse the flow of the existing 18-inch Portland-Montreal pipeline to bring crude oil south from Montreal for loading onto marine tank vessels and to install a vapor control system to convey vapors displaced by marine tank vessel loading operations to vapor combustion units, which site plan approval has since lapsed; and

WHEREAS, in 2009, PPLC sought and obtained an air emission license from the Maine Department of Environmental Protection (DEP) to reverse the flow of the existing 18-inch Portland-Montreal pipeline to bring crude oil south from Montreal for loading onto marine tank vessels and to install a vapor control system to convey vapors displaced by marine tank vessel loading operations to vapor combustion units, which air emission license has since been surrendered by PPLC; and

WHEREAS, the Portland-Montreal pipeline could, in the future, be considered for transporting unrefined oil sands to Portland Harbor; and

WHEREAS, the transportation of and loading of unrefined oil sands onto marine tank vessels docking in South Portland poses risks to South Portland's natural resources and citizens, specifically Casco Bay and Sebago Lake upon which the City depends; and

WHEREAS, the possible effect of the loading of unrefined oil sands onto marine tank vessels docking in South Portland has implications for the health, safety and welfare of the City and its citizens; and

WHEREAS, the South Portland Comprehensive Plan may not adequately address the concerns listed above; and

WHEREAS, the South Portland Code of Ordinances does not adequately address the concerns listed above; and

WHEREAS, the City needs time to study its own ordinances to determine the implications of future development proposals involving the loading of unrefined oil sands onto marine tank vessels docking in South Portland and to develop reasonable ordinances to address the concerns cited above; and

WHEREAS, the City needs time to study oil sands so it can best plan for potential incident responses if an accident involving unrefined oil sands occurs in South Portland; and

WHEREAS, the City needs time to review and study the natural resources at risk in general and in the case of a worst-case spill, the potential behavior and fate of unrefined oil sands when spilled in marine or freshwater environments and response options for a spill, including the equipment, expertise and technology needed to respond to a spill that has an impact on groundwater and/or marine or freshwater environments; and

WHEREAS, the City needs time to review and study the potential effects on the City in the case of a spill, including a worst-case spill, and the best response options; and

WHEREAS, the City needs time to review federal studies, including any reports by the National Academy of Sciences, scientific studies on spills of unrefined oil sands in Mayflower, Arkansas and Marshall, Michigan and any reviews related to the Keystone XL pipeline, as well as any Maine DEP studies on oil sands; and

WHEREAS, the City needs time to review and study the potential effects on the City of the vapor discharges in the case of a spill as well as in the loading of unrefined oil sands onto marine tank vessels docking in South Portland;

WHEREAS, the City, under its home rule authority, its police power generally and as otherwise provided by law, has the authority to impose reasonable restrictions,

conditions, and limitations on development proposals involving the loading of unrefined oil sands onto marine tank vessels docking in South Portland; 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 the loading of unrefined oil sands onto marine tank vessels docking in South Portland 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 the loading of unrefined oil sands onto marine tank vessels docking in South Portland; 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 the loading of unrefined oil sands onto marine tank vessels docking in South Portland; 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 the loading of unrefined oil sands onto marine tank vessels docking in South Portland;

**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 the loading of unrefined oil sands onto marine tank vessels docking in South Portland. This Article shall take effect in accordance with the provisions of the City Charter, but shall be applicable as of November 6, 2013, 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 an unrefined oil sands discharge and air emissions related to both an unrefined oil sands discharge and the loading of unrefined oil sands onto marine tank vessels if not properly regulated; and

**BE IT FURTHER ORDAINED**, that this Article shall apply to any new development proposals involving the loading of unrefined oil sands onto marine tank vessels docking in South Portland after the November 6, 2013 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 the loading of unrefined oil sands onto marine tank vessels docking in South Portland for which an application for a license, building permit, certificate of occupancy, special exception review, site plan review and/or any other required approval has not been submitted and acted on by the Code Enforcement Officer, Planning Board or other City official or administrative board or agency prior to November 6, 2013, the applicability date of this Article; and

**BE IT FURTHER ORDAINED**, that no person or organization shall start or engage in the loading of unrefined oil sands onto marine tank vessels docking in South Portland on or after the November 6, 2013 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 the loading of unrefined oil sands onto marine tank vessels docking in South Portland; and

**BE IT FURTHER ORDAINED**, that those provisions 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 loading of unrefined oil sands onto marine tank vessels docking in South Portland 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 November 6, 2013, the date it first appeared on a City Council agenda.

DRAFT

**MORATORIUM SCHEDULE  
(INCLUDING SCHEDULE OF MEETING NOTICES)**

Nov. 6, 2013 Wednesday	City Council workshop
Nov. 7, 2013 Thursday	Notify PPH re Planning Board Public Hearing Notice to be published on Nov. 14, 2013 and Nov. 19, 2013
Nov. 13, 2013 Wednesday	Post Notice of Planning Board Public Hearing at City Hall – at least 13 days before public hearing; send individual notices to oil terminal property owners with copy of proposed moratorium ordinance
Nov. 14, 2013 Thursday	1st Newspaper Notice of Planning Board Public Hearing – at least 12 days before public hearing
Nov. 18, 2013 Monday	City Council first reading
Nov. 19, 2013 Tuesday	2nd Newspaper Notice of Planning Board Public Hearing – at least 7 days before public hearing
Nov. 22, 2013 Friday	Post ordinance at City Hall (City Clerk) (Charter Sec. 222)
Nov. 26, 2013 Tuesday <i>or</i> Dec. 3, 2013 Tuesday	Planning Board Public Hearing
Dec. 16, 2013 Monday	City Council second reading and public hearing