

SUBSTITUTE ORDINANCE NO. _____
A SUBSTITUTE ORDINANCE TO AMEND THE CITY OF MEMPHIS CODE OF ORDINANCES CHAPTER 16 “HEALTH AND SANITATION”, TO PROTECT PUBLIC HEALTH AND THE ENVIRONMENT, PRESERVE THE MEMPHIS SAND AQUIFER, AND PROMOTE ENVIRONMENTAL JUSTICE

WHEREAS, the City of Memphis relies on the groundwater of the Memphis Sand Aquifer for its drinking water supply and, according to the United States Geological Survey (“USGS”), Memphis and Shelby County (population more than 950,000) comprise one of the largest metropolitan areas in the world that relies exclusively on groundwater for its municipal water supply; however, despite the importance of ensuring that Memphis’ drinking water resources remain plentiful and uncontaminated, the existing system of federal, state, and local review for many development projects does not adequately consider risks to groundwater in many situations.

WHEREAS, the potential risks to groundwater resulting from improper siting and routing of underground hazardous liquids transportation infrastructure do not receive sufficient scrutiny at any level of government in Tennessee.

WHEREAS, recognizing the important and traditional role of city government in protecting the quality of the drinking water of its citizens, the Memphis City Council has determined a need to ensure increased oversight of structures that may impact the City’s drinking water supply, and particularly the Memphis Sand Aquifer or Wellhead Protection Areas.

WHEREAS, acknowledging that patterns of racial, ethnic, and economic inequality in the United States have resulted in the inequitable geographic concentration of potential environmental hazards, the Memphis City Council has determined that this increased level of oversight must also ensure that new development in the City does not cause adverse impacts on the minority populations, low-income populations, and neighborhoods historically burdened by environmental pollution.

WHEREAS, experience has shown that companies handling hazardous liquids are not always able to fully remediate environmental damage caused by accidents, leaving local governments responsible for expending resources to complete the remediation, such that it is in the fiscal stewardship interest of Memphis to regulate the transport of hazardous liquids.

WHEREAS, because the long-term success of the City of Memphis depends on thoughtful and deliberate planning, the City must carefully consider where underground infrastructure is sited to ensure that future growth and development is not unduly constrained.

WHEREAS, the Federal Safe Drinking Water Act, 42 U.S.C. §§ 300f *et seq.*, requires states to protect public water supplies, and pursuant to the Act the United States Environmental Protection Agency has authorized the Tennessee Department of Environment and Conservation (“TDEC”) to enforce the Act.

WHEREAS, TDEC, pursuant to the Tennessee Safe Drinking Water Act of 1983, T.C.A. §§ 68-221-701 *et seq.*, promulgated regulations, including Tenn. Comp. R. & Regs. 0400-45-01-.34, and those state regulations identify the important role of local governments in protecting public drinking water, including through the enactment of ordinances to implement or support the Wellhead Protection Plans developed by public water system operators.

WHEREAS, TDEC has stated that Tennessee does not have an Executive Order or specific language within a rule or statute that requires or provides TDEC the explicit authority to consider environmental justice within its environmental regulatory program actions.

WHEREAS, the locating of new underground hazardous liquids transportation infrastructure in minority, low-income neighborhood would adversely affect property values disproportionately in these neighborhoods.

WHEREAS, various infrastructure has been located above the Memphis Sand Aquifer and already poses a significant threat to the viability of the City’s drinking water supply and wherein the routing and siting of further underground infrastructure that poses significant additional risks should be avoided.

WHEREAS, USGS determined that there is broad agreement in the scientific community that a continuing concern exists for a major destructive earthquake in the New Madrid seismic zone, that structures in Memphis are vulnerable and at risk from severe ground shaking, and that Memphis would be severely impacted by such earthquakes.

WHEREAS, the City deems it necessary for all the reasons above to assess the associated risks inherent in the locating and routing of new underground hazardous liquids transportation infrastructure in Memphis.

WHEREAS, Memphis City Charter, Section 409, grants the City power to pass all laws to preserve the health of the City.

WHEREAS, Memphis City Charter, Section 405, grants the City power to regulate the keeping and storage of combustible articles.

WHEREAS, Memphis City Charter, Section 369, grants the City power over all affairs in the City in which the general welfare of the inhabitants is interested.

WHEREAS, Memphis City Charter, Section 834, grants the City power to provide rules and regulations for the use, handling, storage and sale of inflammable liquids and the products thereof.

WHEREAS, the Memphis City Council hereby adopts the following requirements designed to preserve the drinking water supply of the City of Memphis, and particularly the Memphis Sand Aquifer; to ensure that future potentially hazardous development does not further inequitably concentrate environmental pollutants in already burdened communities; and to protect the health and well-being of the people of Memphis.

NOW, THEREFORE BE IT ORDAINED by the Memphis City Council that:

Section 1, Chapter 16, Article XIII shall be added and entitled “Aquifer Pollution Control”, as follows:

I. Definitions

For the purposes of this section:

1. **Development:** Any man-made change defined as the construction of buildings or other structures, mining, dredging, paving, filling, grading or site clearing, and grubbing in amounts greater than ten cubic yards on any lot or excavation.
2. **Groundwater:** Any waters of the State as defined in T.C.A. § 69-3-103 (Tennessee Water Quality Control Act), occurring below the surface of the ground not contained by artificial barriers.
3. **Hazardous liquids:** Any of the following materials, when in liquid form: anhydrous ammonia, crude oil, non-fuel petroleum products (including methanol, ethylene, propylene, butadiene, benzene, toluene, and xylene and any other flammable, toxic, or corrosive products obtained from distilling and processing crude oil or other hydrocarbon compounds), non-petroleum biofuels (such as biodiesel, kerosene, and ethanol), petroleum fuel products (including diesel fuel, gasoline, jet fuel, and any other flammable, toxic, or corrosive products obtained from distilling and processing crude oil or other hydrocarbon compounds), sodium hydroxide (caustic soda solutions), and sulfuric acid (including spent sulfuric acid). Natural gas or mixtures of natural and artificial gas are not hazardous liquids for the purpose of this ordinance, even when in liquid form.

4. **Underground hazardous liquids transportation infrastructure:** Any structure or combination of structures intended to move hazardous liquids from one location to another, and the volume of which (including the volume of underground pipes connected thereto) is 10% or more beneath the surface of the ground. Underground hazardous liquids transportation infrastructure includes the following structures, so long as they are used for or intended for use for the transportation of hazardous liquids: pipes and pipelines (as well as associated valves and appurtenances), pumping units and any associated assemblies, and metering and delivery stations.
5. **Wellhead Protection Area:** The surface and subsurface area surrounding a water well, well field or spring supplying a public water system. The Wellhead Protection Area contains both the Wellhead Protection Zone (Zone 1) and the Wellhead Management Zone (Zone 2), as described in Tenn. Comp. R. & Regs. 0400-45-01-.34.

II. Development of Underground Hazardous Liquids Transportation Infrastructure Prohibited

New development (including construction or installation of new structures) of underground hazardous liquids transportation infrastructure is prohibited throughout the City of Memphis, unless in compliance with an Underground Infrastructure Permit issued by the Council. This prohibition will not apply to private or public waste water, septage, or sewerage infrastructure.

III. Underground Infrastructure Permit Applications

1. Any person seeking Council approval to construct, install, expand, or otherwise develop underground hazardous liquids transportation infrastructure within the City of Memphis shall first submit to the Board an application for an Underground Infrastructure Permit. The application shall include:
 - a. a description of the planned development, including a description of the type and volume of hazardous liquids to be transported;
 - b. documentation of all other required local, state, and federal permits necessary for the development;
 - c. written confirmation from MLGW confirming that the planned development does not pass within 1,000 feet of all Wellhead Protection Areas and all existing public water supply wells as reflected in MLGW's Wellhead Protection Plan;
 - d. a site plan that shows:
 - i. the area of the development that is in the City of Memphis; and

- ii. the location of all known existing private water supply wells within 1,000 feet of the project boundary, to be determined by the applicant after reasonable investigation;
 - e. an analysis of the potential for the development to cause disproportionate adverse impacts on minority populations, low-income populations, and neighborhoods historically burdened by environmental pollution;
 - f. an analysis of any potential adverse environmental, groundwater, and drinking water impacts resulting from the development;
 - g. an analysis of the estimated short-term and long-term remediation costs associated with any such potential adverse impacts, and the long-term fiscal viability of the applicant to pay such remediation costs, including the extent to which the applicant has cash reserves or insurance available to pay such remediation costs;
 - h. a copy of all certificates of insurance for all insurance policies that may provide coverage for remediation costs or liability claims arising from any leak, spill or discharge of hazardous liquids;
 - i. a detailed description of the abandonment or closure plan for the underground hazardous liquids transportation infrastructure, including how any structures would be removed upon abandonment or otherwise safely abandoned, what conditions would constitute such abandonment, how the City would be notified in case of abandonment, an analysis of the estimated costs of removal, and the long-term fiscal viability of the applicant to pay such costs; and
 - j. any other additional information as may be requested by the Board regarding the proposed development, its potential impacts on the environment, drinking water, or the public interest, hydrogeologic information, and monitoring and mitigation measures.
2. The Council will make the application materials publicly available prior to considering a permit request.
3. After receiving any such application, the Board shall ensure that the application is complete, and request further information from the applicant as may be required. The Board shall also seek comments on the application from the following:
 - a. MLGW;
 - b. Memphis and Shelby County Land Use and Development Services; and
 - c. the Shelby County Groundwater Quality Control Board; and
 - d. members of the public.
4. The Council may also by resolution establish an ad hoc advisory committee to send applications to for the purpose of further review and, or to solicit an advisory opinion. The parameters of an ad hoc advisory committee, including

but not limited to member composition and time allotted to complete the committee's work, shall be determined by the council and included in the resolution establishing the ad hoc advisory committee

5. The Council may take up consideration of the application materials, any comments received, and any additional information that the Council may, in its discretion, request, whenever the Council so chooses.
6. Upon taking up consideration, the Council may vote on whether to approve or reject the Underground Infrastructure Permit application, or to hold the vote until a later Regular Meeting of the City Council. The process of approval or rejection of the Permit will be through a Council resolution.
7. Any person who may be aggrieved by the Council's decision regarding the permit application may have the decision reviewed by the courts, according to the general procedures for the common law writ of certiorari specified at Tenn. Code Ann. §§ 27-9-101 *et seq.* Any person seeking such review shall, within sixty (60) days of the Council's decision, file a petition of certiorari in the Circuit Court of Shelby County, the Chancery Court of Shelby County, or any other court with jurisdiction.

IV. Existing Development

1. Development of underground hazardous liquids transportation infrastructure that would be prohibited without an Underground Infrastructure Permit, which has completed construction and is in operation at the time this ordinance becomes effective may continue operation without applying for an Underground Infrastructure Permit.
2. The owner or operator of such existing underground hazardous liquids transportation infrastructure must apply for and receive an Underground Infrastructure Permit prior to initiating any addition to or expansion of such infrastructure, unless covered by one of the exceptions to permit requirements listed in Part VI of this ordinance.

V. Exceptions to Permit Requirements

An Underground Infrastructure Permit is not required for:

1. maintenance, repairs, and replacement of existing underground hazardous liquids transportation infrastructure, so long as in compliance with all other local, state, and federal authority, and so long

as the repairs and replacement do not represent a significant increase in capacity, expansion of footprint, or change in operations;

2. development of underground hazardous liquids transportation infrastructure to be located within the property boundaries of an oil refinery, oil terminal, associated docks or processing facilities, or a retail service station and providing service to that oil refinery, oil terminal, associated docks or processing facilities, or retail service station; or
3. development (including construction, installation, maintenance, repairs, replacement, addition, and/or expansion) of underground hazardous liquids transportation infrastructure that directly provides, or intends to provide, fuel services to airports and other terminals engaged in the transportation of passengers or cargo.

VI. Compliance with Other Authority

1. All activities and development being considered by the Board and the Council under this ordinance shall also comply with all other relevant local ordinances and regulations, as well as all relevant state and federal laws and regulations.
2. Any approval of an application for an Underground Infrastructure Permit by the Council shall not be taken as a finding of public purpose, public benefit, or public use in the context of any other legal or administrative proceedings, including eminent domain proceedings, and conveys no additional rights or privileges to applicant beyond those specifically enumerated in the Underground Infrastructure Permit.
3. To the extent that the development regulated by this ordinance is also regulated by any other local, state, or federal regulation, and simultaneous compliance with both this ordinance and those other regulations is not possible, the more restrictive or protective of the two shall apply.

VII. Savings Clause

Should any section or provision of this ordinance be declared invalid, such decision shall not affect the validity of the ordinance as a whole, or any other part thereof.