

SUBSTITUTE ORDINANCE NO. 5782
SUBSTITUTE ORDINANCE 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 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 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 to enforce the Act.

WHEREAS, the Tennessee Department of Environment and Conservation, 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, the Tennessee Department of Environment and Conservation (“TDEC”) acknowledges that Tennessee does not have an Executive Order or specific language within a rule or statute that requires and/or provides TDEC the explicit authority to consider environmental justice within its environmental regulatory program actions.

WHEREAS, the locating of new pipelines 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 inground infrastructure that pose significant additional risks should be avoided.

WHEREAS, the United States Geological Survey (“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, structures in Memphis are vulnerable and at risk from severe ground shaking, and Memphis would be severely impacted.

WHEREAS, the City deems it necessary to assess the associated risks inherent in the locating and routing of new underground pipelines 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.

NOW THEREFORE, the Memphis City Council hereby adopts the following requirements designed to protect the Memphis Sand Aquifer, Wellhead Protection Areas, and the health and well-being of the people of Memphis.

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, liquified petroleum gases, 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 of crude oil and 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 of crude oil and 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 regulated toxic or hazardous liquids, 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 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. Underground Infrastructure Review Board

1. There is created an Underground Infrastructure Review Board (“Board”), whose purpose is to review particular development projects within the City of Memphis, as described in this Ordinance.
2. The Board shall consist of one representative from the Memphis Division of Engineering, one representative from the Memphis Division of Public Works, one representative from the Memphis and Shelby County Division of Planning and Development (as appointed by the Director of that Division), one representative from Memphis Light, Gas and Water, one representative from the Memphis City Council, two representatives of the Greater Memphis Chamber of Commerce, one representative of the University of Memphis, and one citizen representative with a proven track record of working to promote environmental justice in the Memphis community.
3. The members of the Board shall be selected as follows:
 - a. the Mayor of the City of Memphis will appoint the representative of the Memphis Division of Engineering and the representative of the Memphis Division of Public Works;
 - b. the Director of the Memphis and Shelby County Division of Planning and Development will appoint the representative of that division;
 - c. the President of Memphis Light, Gas and Water will appoint the representative of that entity;
 - d. the chairperson of the Memphis City Council will appoint the representative of that body;
 - e. the Mayor of the City of Memphis will appoint two representatives of the Greater Memphis Chamber of Commerce, which representatives shall be confirmed by the Memphis City Council;
 - f. the Mayor of the City of Memphis will appoint a representative of the University of Memphis, which representative shall be confirmed by the Memphis City Council; and
 - g. the Mayor of the City of Memphis will appoint a citizen member with a proven track record of working to promote environmental justice in the Memphis community, which representative shall be confirmed by the Memphis City Council

4. The Board shall meet as needed in order to review applications for Underground Infrastructure Permits, as described in Sections III and IV below.

III. Underground Infrastructure Development Prohibited

New development (including construction or installation of new structures or expansion of existing 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 Board. This prohibition will not apply private or public waste water, septage, or sewerage tanks or infrastructure.

IV. Underground Infrastructure Permit Applications

1. Any person(s) seeking Board 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. a site plan that shows:
 - i. the area of the development that is in the City of Memphis;
 - ii. the location of the boundaries of the Wellhead Protection Area and all existing public water supply wells in relation to the project, within 1,000 feet of the project boundary; and
 - iii. the location of all known existing private water supply wells within 1,000 feet of the project boundary;
 - d. 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;
 - e. an analysis of any potential adverse environmental, groundwater and drinking water impacts resulting from the development;
 - f. an analysis of the estimated short-term and long-term remediation costs associated with any such adverse impacts, and the long-term fiscal viability of the applicant(s) to pay such remediation costs, including the extent to which the applicant(s) has/have cash reserves or insurance available to pay for such remediation costs;
 - g. a copy of all certificates of insurance for all insurance policies that may provide coverage for remediation costs and/or liability claims arising from any leak, spill or discharge of hazardous liquids;

- h. a detailed description of the abandonment or closure plan for the 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(s) to pay such costs; and
 - i. any other additional information as may be requested by the Board regarding the proposed development, its potential impacts on groundwater or the public interest, hydrogeologic information, and monitoring and mitigation measures.
- 2. After receiving any such application, the Board shall ensure that the application is complete, and request further information from the applicant(s) is required. The Board shall also seek comments on the application from the following:
 - a. Memphis Light, Gas and Water;
 - b. Memphis and Shelby County Land Use and Development Services; and
 - c. The Shelby County Groundwater Quality Control Board.
- 3. The Board shall solicit and collect public comments regarding the application. The Board shall:
 - a. give public notice of the application, which must include access to the application materials and a means for the public to submit comments to the Board; and
 - b. accept public comments for at least 30 days from the public notice of the application.
- 4. The Board shall hold a public hearing on the application, allowing a presentation by the applicant(s) and comments from members of the public. At least 30 days prior to holding the public hearing, the Board must give notice to the applicant(s) and members of the public regarding the time and date of the hearing, as well as providing access to the application materials.
- 5. Following the public hearing, the Board may request such additional information from the applicant and/or others as the Board deems appropriate otherwise no new information shall be submitted to the Board by the public or the applicant. If the Board deems it appropriate, the Board may hold a subsequent public hearing based upon the nature of the information submitted to the Board after a public hearing. The Board shall only approve the application if it determines, after full consideration of all application materials and all comments received, and any additional information that the Board may, in its discretion, request from the applicant(s), that approving the

application would be in the public interest, which shall include a determination that:

- a. the development will not go through any Wellhead Protection Area, as delineated in the most recent Wellhead Protection Plan finalized by Memphis Light, Gas and Water;
 - b. Memphis Light, Gas and Water has no objections to the development;
 - c. the project poses no unacceptable risk of adverse environmental or groundwater impacts resulting from the proposed development, or any future land uses associated with the development;
 - d. the application presents no significant risk that the City will be responsible for expending resources on environmental remediation should an unanticipated accident or event cause such adverse impacts, or should the infrastructure be abandoned; and
 - e. there will be no disproportionate impacts on minority populations, low-income populations, or neighborhoods historically burdened by environmental pollution.
6. Within 14 days of approving or rejecting the application, the Board shall send notice of the decision to the applicant(s), and provide notice of the decision to the public.
7. The applicant(s), or any person who submitted comments to the Board or attended the public hearing, may petition the Memphis City Council for review of the Board's decision within 30 days of the Board providing public notice of the decision. The Council shall review the application to determine whether the project is in the public interest, according to the criteria described in this section.

V. 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 is adopted, may continue operation without applying for an exemption.
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. The owner or operator does not need to apply for a permit for:
 - a. 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.

VI. Compliance with Other Authority

All activities and development being considered by the Board under this ordinance shall comply with these and all other relevant local ordinances and regulations, as well as all relevant state and federal laws and regulations. Any approval of an application for an Underground Infrastructure Permit by the Board shall not be taken as a finding of public purpose or use in the context of any eminent domain proceedings, and conveys no additional rights or privileges to applicant. To the extent that the development regulated by this ordinance is also regulated by any other local, state, or federal regulation, the more restrictive of the regulations 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.