ORDINANCE NO. 1002

An Ordinance to create a new Chapter to the Mandan Code of Ordinances which creates an Environmental Institutional Control Zoning District within the central business district and provides for definitions, institutional controls applicable to the zoning district, regulatory status of owners in the zoning district, financial assurance as required by NDCC Section 23-20.3-03.1, Coordination, Recording, Penalties, Enforcement, Amendments Legislative Authority.

BE IT ORDAINED by the Board of City Commissioners of the City of Mandan, North Dakota, as follows:

SECTION 1. There is hereby created a new Chapter 21-10 to the Mandan Code of Ordinances, consisting of 12 Sections which reads as follows:

"Chapter 21-10

Environmental Institutional Control Ordinance

Sections:

21-10-01 Legislative Intent

21-10-02 Definitions

21-10-03 Environmental Institutional Control Zoning District

21-10-04 Institutional Controls Applicable to Zoning District

21-10-05 Regulatory Status of Owners In Zoning District

21-10-06 Financial Assurance Required By Section 23-20.3-03.1 NDCC

21-10-07 Coordination

21-10-08 Recording

21-10-09 Violations - Penalty
21-10-10 Enforcement
21-10-11 Amendment
21-10-12 Legislative Authority

21-10-01. Legislative Intent.

The Board of City Commissioners of the City of Mandan, North Dakota declares that it is in the public interest to ensure that environmental remediation of the Petroleum Hydrocarbon Contamination of the soil and groundwater in a 30-acre area of the City of Mandan be carried out and completed, in accordance with the remedial action plan approved by the North Dakota Department of Health, so as to protect human health and the environment to the extent practicable. The Board finds that when environmental remediation is completed, to the extent practicable, there may necessarily be residual contamination. The Board finds that in such cases, it is necessary to provide an effective and enforceable means of ensuring the conduct of any maintenance, monitoring or operation of remediation systems, of restricting certain uses of land, including placing restrictions on drilling for or pumping groundwater, and of providing certain limitations on the development or improvement of properties as long as any residual contamination remains, as required by the remedial action plan approved by the North Dakota Department of Health. The Board, therefore, declares that it is in the public interest to create the Environmental Institutional Control Zoning District to define the area of downtown Mandan impacted by the contamination and to establish the institutional controls set forth in this Chapter for the protection of human health and the environment.

21-10-02. Definitions.

For the purposes of the provisions of this Chapter, unless the context or subject matter otherwise requires:

"Approved remedial action plan" or "approved plan" means the remediation and/or monitoring plan approved and required by the North Dakota Department of Health.

“Approved remediation system” means the treatment infrastructure within the District consisting of the wells, piping, treatment facilities as shown on the approved plan.

“Corporate counsel or city attorney” means the city attorney of the city of Mandan, North Dakota.

“Department or NDDH” means the North Dakota Department of Health, an administrative agency of the State of North Dakota.

“District” means the 30-acre area of the City of Mandan comprising the environmental institutional control district defined in Section 21-10-03 below and shown on Appendix A and including the properties listed and legally described on Appendix B.

“Financial assurance” means the insurance coverage or other financial assurance required by the Department for any environmental monitoring or remediation that may become necessary on properties within the District notwithstanding the institutional controls established by this ordinance and/or responsibility exemptions established by the Department.

“Health and safety plan” means the site-specific health and safety plan approved by the Department for the protection of public health during the construction and implementation of the approved remedial action plan at the Site.

“On-site health and safety officer” means the person responsible, under the health and safety plan, for enforcing its provisions, communicating hazards, providing access to safety equipment, air monitoring, and directing emergency situations.

“Institutional controls” are restrictions on the use and management of real property within the District including use and management of buildings or fixtures, that contain or prevent migration of petroleum contamination, or protect receptors from exposure or the threat of

exposure to petroleum contamination. Institutional controls may apply during environmental remediation activities or may apply to residual petroleum contamination or their byproducts that may remain on property within the District after active environmental remediation activities are concluded or while natural attenuation of petroleum contamination is occurring.

"Trustees" means and includes the Trustees of the Mandan Remediation Trust created under the laws of the State of North Dakota by Declaration dated July 30th, 2004, registered with the District Court of Morton County, North Dakota pursuant to N.D.C.C. Chapter 30.1-32 on August 19, 2004 and the Trustees of the Mandan Supplemental Environmental Projects Trust created under the laws of the State of North Dakota by Declaration dated July 30th, 2004, registered with the District Court of Morton County, North Dakota pursuant to N.D.C.C. Chapter 30.1-32 on August 23, 2004 to remediate the petroleum contamination; protect the environment and public health through the implementation of remediation technology and institutional controls and to alleviate the environmental, economic and other impacts of the Petroleum Contamination.

"Petroleum contamination" means the soil and groundwater contamination in the District resulting from releases of petroleum hydrocarbons at and from railroad storage, fueling and operating activities as defined in Appendix C to this ordinance entitled "Description of Soil and Groundwater Contamination."

"Responsible party" means a person who caused or contributed to the releases of petroleum hydrocarbons at and from railroad storage, fueling and operating activities as described in Appendix C to this Chapter entitled "Description of Soil and Groundwater Contamination."

"Responsibility exemption" means and includes letters of no action, letters of no further action and letters of no further remediation issued by the Department to the owner of a property located within the District and also means and includes letters of regulatory assurance issued to a lender, with respect to a property within the District pursuant to the provisions of Section 23-20.3-03.1 NDCC.

"State" means the State of North Dakota, including the NDDH, the Attorney General, and all other agencies and executive officers.

21-10-03. Delineation of Environmental Institutional Control Zoning District.

The location and boundaries of the District are shown on Appendix A and the properties included within the District are listed and legally described on Appendix B. The city auditor may show the District as an overlay on the official Zoning Map of the City of Mandan, North Dakota pursuant to Section 21-03-02 of the Mandan Code of Ordinances. Except as relates to the institutional controls specifically designated by this Chapter, the applicable provisions of the Chapter 21-03, Districts and Uses, of the Mandan Code of Ordinances establishes the uses, regulations, subdivision, development and administration of land within the District.

21-10-04. Institutional Controls Applicable Within Zoning District.

1. Water Well Restrictions. Except for such uses or methods in existence before the effective date of this ordinance, the use or attempt to use groundwater from within the area of the District by the installation or drilling of wells or by any other method is hereby prohibited.

2. Management of Petroleum Impacted Vapors, Soils and Groundwater. Any person proposing redevelopment, demolition, excavation, grading or construction activities at properties within the District shall submit to the city administrator or their appointee a contingency plan, approved by the NDDH, to evaluate and manage any petroleum contaminated soils or groundwater and any potential petroleum vapor impacts. The contingency plan must be prepared by a Professional Engineer licensed to practice in the State of North Dakota (hereinafter "P.E.") and shall have experience in the environmental field. The contingency plan shall protect the public health and the environment by considering, at a minimum a) historic water/product intrusion; b) historic petroleum vapor/odor issues; c) potential future water/product intrusion; and d) potential future petroleum vapor/intrusion. The contingency plan shall at a minimum also consider the following:

- Excavation and management of petroleum impacted soil at a NDDH approved off-site facility if the concentrations of petroleum in the soils are greater than the concentration deemed by the P.E. to be injurious to human health and/or the utilization of the property;

- Use of petroleum contaminated soils encountered at the property as controlled fill under newly constructed parking and roadway surfaces if the concentrations of petroleum in the soils are less than the concentration deemed by the P.E. to be injurious to human health and/or the utilization of the property;

- Excavation of petroleum contaminated soils in the building footprints/foundations and management of such soil on-site as a part of a project if the concentrations of petroleum in the soils are at or greater than the concentration deemed by the P.E. to be injurious to human health and/or the habitation of the structure; and

- Evaluating and obtaining appropriate permits for the discharge and treatment of petroleum contaminated groundwater resulting from construction activities.

3. Restrictions on Construction of New Structures Within the District. Any person proposing to construct a new structure within the District shall submit a design for that structure that incorporates engineered controls to mitigate the effects of the potential presence of petroleum in the subsurface to the city administrator or their appointee. The design must be prepared by a P.E. and the design must be approved by the NDDH and must meet additional applicable codes and standards relative to the presence of petroleum. The design shall protect the public health and the environment by considering, at a minimum a) historic water/product intrusion; b) historic petroleum vapor/odor issues; c) potential future water/product intrusion; and d) potential future petroleum vapor/intrusion. The design shall incorporate vapor barriers, venting system, groundwater suppression/collection, and specialized HVAC as determined appropriate by a P.E.

In no case shall any structure or any portion of any structure within the District intended for habitation be located below the ground surface.

4. Health and safety. During construction and implementation of the approved plan, the city manager may designate a health and safety officer to implement and enforce the provisions of the health and safety plan approved by the Department for the protection of public health and the environment. A copy of the health and safety plan as approved by the Department and any amendments or modifications made by the Department shall be filed with the office of the city engineer.

5. Non-interference with approved remediation system. The approved plan provides for the treatment and extraction of petroleum contaminated groundwater and soil vapor utilizing multi-phase extraction, area-specific soil vapor extraction and bioventing. The approved plan further provides for the installation and operation of the treatment infrastructure within the District consisting of the wells, piping, treatment facilities as shown on the approved plan on file with the city engineer which is incorporated herein as though fully set forth.

There shall be no interference with or disturbance of the approved treatment system installed in accordance with the approved plan.

6. Access by City or NDDH. The city and the department shall have a right of access to the approved remediation system on properties within the District as necessary and convenient to 1) inspect and operate the approved remediation system, 2) to sample petroleum contaminated soil, groundwater and vapors, 3) to verify compliance with this ordinance, and 4) to enforce this ordinance.

21-10-05. Regulatory Status of Owners Within Zoning District.

The Department and the City have entered into a Joint Agreement, a copy of which is on file in the office of the city administrator , wherein the Department has determined that this

ordinance is an institutional control meeting the requirements of Section 23-20.3-03.1 NDCC, applicable to the properties within the District with respect to the petroleum contamination, approving the remedial action plan and determining that owners of properties within the District, as listed on Appendix B, are not responsible parties and further determining that the Department intends to take no further enforcement action with respect to the petroleum contamination within the District.

21-10-06. Financial Assurance Required By Section 23-20.3-03.1 NDCC.

The Department has determined, as required by Section 23-20.3-03.1 NDCC subsection 7, that the potential costs of monitoring and/or remediation which may become necessary to address the petroleum contamination in the District after this ordinance is established, require a financial assurance in an amount to be determined by the ND Department of Health on a case by case basis. The City and the Department have entered into a joint agreement concerning payment for or funding of such financial assurance.

21-10-07. Coordination.

The provisions of the Mandan Code of Ordinances regulating land use, planning, zoning, development, subdivision, construction, plumbing, electrical work and architecture including the following Chapters:

14-01 Architectural Review;
14-02 Building Code;
14-03 Building Regulations For Manufactured Housing Installations;
14-04 Dwelling Construction Code;
14-05 Electrical Code;
14-06 Plumbing Code;
14-07 Gas, Heating and Mechanical Regulations;
14-08 Housing Code;
14-09 Substandard Structures;
14-10 Moving Building;
14-11 Building Demolition;

21-01 Planning And Zoning Commission;

21-02 General Provisions and Definitions;

21-03 Districts And Uses;

21-04 District Regulations;

21-05 Enforcement;

21-06 Board of Adjustment;

21-07 Amendments;

21-08 Master Plan; and

21-09 Regulations Governing the Subdivision Of Land;

apply to the properties within the District subject only to the provisions of this Chapter providing for the creation of environmental institutional controls, their application, administration and enforcement. Whenever the City receives an application affecting land use or development within the District that may significantly affect an institutional control created by this Chapter, the City shall notify the Department and the Department shall evaluate whether the application is consistent with the institutional control and shall notify the City in a timely fashion, considering the time frame of the City's review under the applicable provisions of the Mandan Code of Ordinances.

21-10-08. Recording.

This ordinance and any amendments thereto shall, upon adoption by the Board of City Commissioners of the City, be recorded in the office of the Morton County Recorder and indexed against the real properties described in Appendix B.

21-10-09. Violations – Penalty.

The use, development or redevelopment of any land and the demolition, construction, reconstruction, alteration, or maintenance of any building or structure within the District in violation of this Chapter of the Mandan Code of Ordinances shall constitute the maintenance of a public nuisance and any appropriate action or proceeding may be instituted by the City,

through any appropriate administrative official, department, board or bureau charged with the enforcement of this Chapter:

1. To prevent such unlawful use, development, construction, reconstruction, alteration or maintenance; or

2. To restrain, correct or abate such violation.

A violation of any provision of this Chapter or a failure to comply with any regulation, order, requirement, decision or determination made under authority conferred by this Chapter shall be punishable as an offense as provided in Chapter 1-04, entitled "Penalties," of the Mandan Code of Ordinances. Each day any such violation or failure or refusal to comply continues shall constitute a separate offense.

21-10-10. Enforcement.

1. No permit, license or approval authorized under the provisions of the Mandan Code of Ordinances regulating land use, planning, zoning, development, subdivision, construction, plumbing, electrical work and architecture including the provisions cited in Section 21-10-07 above, shall be issued for any parcel of land, lot, building or structure before the city engineer, building inspector or other responsible City official certifies that the parcel of land, lot, building or structure is in compliance with any applicable controls or limitations required by this Chapter.

2. It shall be the duty of the city engineer and the city building inspector to enforce this ordinance and to bring to the attention of the city attorney any violations or lack of compliance herewith. In the event of any such notice to the city attorney, notice shall also be given to the Department.

21-10-11. Amendment.

The provisions of this ordinance including the institutional controls described in Section 21-10-04 above, may be amended by the Board of City Commissioners, provided that public hearings, official notice, and publication of such proposed amendments is given according to the provisions of Section 40-47-04 NDCC and also provided that notice is provided to the Department of all proposed amendments and a determination is received from the Department that such proposed amendments are protective of the environment and public health.

21-10-12. Legislative Authority.

This Environmental Institutional Control Zoning Ordinance is adopted and established by the City pursuant to the authority of Section 40-47-01 of the North Dakota Century Code and provides for the establishment of institutional controls that address environmental concerns with the department of health as provided in Section 23-20.3-03.1 NDCC."

SECTION 2. Effective Date. Upon publication of the title and penalty of this ordinance and upon recording of this ordinance with the county recorder, the provisions of the ordinance shall be in full force and effect.

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President, Board of City Commissioners

ATTEST:

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City Administrator

First Reading: February 17, 2006

Second Reading: April 4, 2006

Date of Publication: _____

Date of Recording: _____