

Order 168-20/21
Passage: 9-0 on 2/22/2021

Effective 3/1/2021

KATE SNYDER (MAYOR)
BELINDA S. RAY (1)
SPENCER R. THIBODEAU (2)
TAE Y. CHONG (3)
ANDREW ZARRO (4)

**CITY OF PORTLAND
IN THE CITY COUNCIL**

MARK DION (5)
APRIL D. FOURNIER(A/L)
PIOUS ALI (A/L)
NICHOLAS M. MAVODONES, JR (A/L)

**ORDER GRANTING A PARK ENCROACHMENT LICENSE AT
46 WESTERN PROMENADE**

ORDERED, that a park encroachment license at 46 Western Promenade is hereby granted in substantially the form attached hereto; and

BE IT FURTHER ORDERED, that the City Council hereby authorizes the City Manager to execute said document and any other related documents necessary or convenient to carry out the intent of said document.

**CITY OF PORTLAND, MAINE
ENCROACHMENT LICENSE**

THIS LICENSE AGREEMENT (“License”) is made this ____ day of _____, 202_, by and between the **CITY OF PORTLAND**, a body politic and corporate located in the County of Cumberland, State of Maine (hereinafter referred to as the “City”), and **Thomas A. Zack** and **Carol S. Zack**, owners of real property located at _____, Portland, Maine (the “Property”) with a mailing address of 84 Eastern Promenade, Portland, Maine 04101 (hereinafter referred to together as the “Licensee”).

RECITALS

WHEREAS, Licensee is the owner of the Property, which is more particularly described in the legal description attached as Exhibit A, hereto; and

WHEREAS, Licensee maintains certain improvements consisting of a paved parking area, flower bed, and retaining wall (the “Encroachment”) which encroaches into/over real property owned by the City, as depicted on the plan attached hereto as Exhibit B and incorporated herein by reference (the “Plan”); and

WHEREAS, the area occupied by said Encroachment is referred to herein as the “Licensed Area”; and

WHEREAS, the City will, in consideration of the payment of \$20,000, the receipt whereof the City acknowledges, allow the Encroachment to encroach into the Licensed Area under the terms and conditions set forth in this License unless sooner terminated as outlined herein.

NOW, THEREFORE, the City and Licensee do mutually agree as follows:

1. Licensee is hereby permitted to maintain, repair and replace the Encroachment within the Licensed Area and to use areas adjacent thereto for workers, materials and machinery necessary to maintain the Encroachment over the Licensed Area as shown on the Plan.
3. Term: The term of this License is twenty (20) years, beginning as of January 1, 2021 and continuing through December 31, 2041, unless sooner terminated as provided herein. Upon the expiration of the Term, this License shall no longer be of any force or effect and Licensee, its successors or assigns, shall cease any use or occupancy of the licensed area except as otherwise authorized by the City.
4. Fees: The fee for this License is Twenty Thousand Dollars (\$20,000.00), which shall be payable in full upon execution hereof.
5. Maintenance: Licensee shall be responsible for the proper maintenance of the Encroachment. In the event of damage to the Encroachment and/or the Licensed Area, Licensee shall promptly repair/restore the same. Prior to such repair/restoration, Licensee shall obtain all necessary permits and approvals and notify the City (in writing and by

telephone) at least forty-eight hours before it plans to conduct such repair or restoration. Licensee shall coordinate with City staff on the closure, if needed, of any City streets in the vicinity of the property in order to conduct such repair/restoration.

6. Street Access: Street access to the Premises is limited to the existing curb cut on Western Promenade and Licensee's abutting property.
7. Compliance with laws: Licensee agrees to comply with all applicable laws and regulations in its operations hereunder, including but not limited to all applicable federal, state and local environmental law and regulations, including without limitation all laws and regulations governing hazardous substances. Licensee further understands and agrees that it must obtain at its own cost any permits and licenses required for its use of the Premises.

Licensee further agrees to provide to the City, immediately upon receipt, copies of any correspondence, Notice, Pleading, Citation, Indictment, Complaint, Order, Decree or other document from any source asserting or alleging a circumstance or condition which requires, or may require, a clean-up, removal, remedial action, or other response by or on the part of Licensee under environmental laws, or which seek civil, criminal or punitive penalties from Licensee for an alleged violation of environmental laws.

8. Removal of Unauthorized Encroachments: Removal of Encroachments: As a condition of this License, Licensee agrees to remove, within 3 months after this License is fully executed, all their personal property located on the real property of the City which is not covered by this License, including, but not limited to, Licensee's shed.
9. Indemnification. To the fullest extent permitted by law, Licensee shall defend, indemnify and hold City, its officers, agents and employees, harmless at all times from any claims, liability, losses, costs, expenses (including, without limitation, reasonable attorney's fees) fines, damages or judgments, just or unjust, that arise out of or result from the activities hereunder (collectively, "Claims"), said Claims to include, without limitation, claims for personal injury, death, or property damage, including injury or damage to City employees or property, whether caused by the acts or omissions of the Licensee, the Licensee's guests, City, its agents, officers or employees, and including claims based upon violation of any environmental law or regulation governing hazardous substances. Licensee's obligations under this paragraph shall survive the termination of this License.
10. Release. Licensee hereby releases City and its officers, agents and personnel (collectively, the "Releasees") from any and all claims, liabilities, damages, losses, costs, fees and expenses arising out of or resulting, directly or indirectly, from Licensee's use of the Licensed Area, including, without limitation, injuries, losses and damages for bodily injury (including disability or death) and property damage, regardless of cause, including any and all claims, damages and liabilities that arise out of or result from any actions or omissions, including negligence, on the part of any of the Releasees. Licensee promises not to sue any of the Releasees with respect to any such claims or liabilities. This waiver and release is intended to be as broad as the law allows and shall survive termination of this agreement.
11. Insurance. Prior to the execution of this Agreement, Licensee will procure and maintain occurrence-based Automobile Liability Insurance and Commercial General Liability

Insurance coverage in amounts of not less than Four Hundred Thousand Dollars (\$400,000.00) per occurrence for bodily injury, death and property damage, naming City as additional insured thereon, and also Workers' Compensation Insurance coverage to the extent required by law. With respect to the Automobile and Commercial General Liability Insurance, the Licensee shall name City as an additional insured for coverage only in those areas where government immunity has been expressly waived by 14 M.R.S. A. § 8104-A, as limited by § 8104-B, and § 8111. This provision shall not be deemed a waiver of any defenses, immunities or limitations of liability or damages available to City under the Maine Tort Claims Act, other Maine statutory law, judicial precedent, common law, or any other defenses, immunities or limitations of liability available to the City. Prior to execution of this Agreement, the Licensee shall furnish and City and thereafter maintain certificates evidencing all such coverages, which certificates shall guarantee thirty (30) days; notice to City of termination of insurance from the insurance provider or agent. Licensee shall also provide a copy of any endorsement naming City as additional insured. A certificate that merely has a box checked under "Addl Insr,"; or the like, or that merely states that and City of Portland is named as an Additional Insured, will not be acceptable. The Workers' Compensation insurance shall include an endorsement waiving all rights of subrogation against the City of Portland, its officers or employees. Upon City's request, Licensee shall provide City with a complete copy of any of the above-referenced policies. Licensee shall be responsible for any and all deductibles and/or self-insured retentions. Licensee shall also require its contractors using the Licensed Area to provide City with certificates evidencing the coverages set forth above. City's acceptance or lack of acceptance of Licensee's Certificate of Insurance or other evidence of insurance shall not be construed as a waiver of the Licensee's obligation to obtain and maintain such insurance as required by this agreement.

All insurance policies hereunder shall be primary to any insurance, or self-insurance, maintained by the City. Policies and certificates evidencing such policies shall be delivered to the City. The City shall be provided with no less than thirty (30) days' prior notice of cancellation or non-renewal.

12. Termination: The City of Portland may revoke this license prior to the expiration of the Term, upon an uncured Event of Revocation (as defined below). The City may revoke this License six (6) months after written notice to Licensee that an Event of Revocation has occurred and identifying such Event of Revocation, provided that such Event of Revocation is not cured within six (6) months after Licensee's receipt of such notice, except as set forth in subsection (d) below. "Event of Revocation" shall mean: (a) Licensee's non-compliance with any of the material terms of this Agreement; (b) the Encroachment fails to be maintained substantially in accordance with the Plan or any amendments thereto; (c) the Encroachment as shown on the Plan is destroyed, removed or otherwise thereafter ceases to exist on Licensee's property and construction to rebuild the Encroachment has not begun within twelve (12) months of said destruction or removal, or (d) failure to maintain insurance as required under Section 11 above, and such failure is not remedied within thirty (30) days after written notice thereof from the City to Licensee.
13. License: This instrument is a License and no provision hereof shall be construed as conveying an easement or other estate in land.

14. Assignment: This License may not be transferred or assigned except together with the conveyance of the Licensees' property. Licensee and Licensees' successors and/or assigns shall provide notification to the City at least 30 days prior to any such transfer. Any deed conveying the Licensee's Property shall contain the following language:

“Grantee, by acceptance and recording of this deed acknowledges receipt of the City of Portland Maine License Agreement with Thomas A. Zack and Carol S. Zack dated _____, 2020 and recorded in the Cumberland County Registry of Deeds in Book _____, Page _____ (the “License”) and further acknowledges the City's rights including, but not limited to its rights of termination and obligation of Grantee to remove improvements, all as more fully expressed in the License.”

Any Grantee/Assignee of this License shall submit proof of insurance as required under Paragraph 11 to the City within 30 days of the closing on the transfer of Licensee's Property . Failure to submit proof of insurance as required herein will result in the immediate termination of this License.

15. Amendment: This License shall be amended only in writing executed by the parties.

The parties have hereunto executed this License, in the case of the City, through its duly authorized representative, as of the day and date first above written.

CITY OF PORTLAND, MAINE

By: _____
Jon P. Jennings,
City Manager

STATE OF MAINE

County of Cumberland

_____, 2021

Personally appeared before me the above-named Jon P. Jennings, City Manager of the City of Portland as aforesaid, and acknowledged the foregoing instrument is his free act and deed in his said capacity and the free act and deed of the City of Portland.

Notary Public/Attorney-At-Law

Typed or Printed Name: _____

Commission Expires: _____

Thomas A. Zack

Carol S. Zack

STATE OF MAINE
County of Cumberland

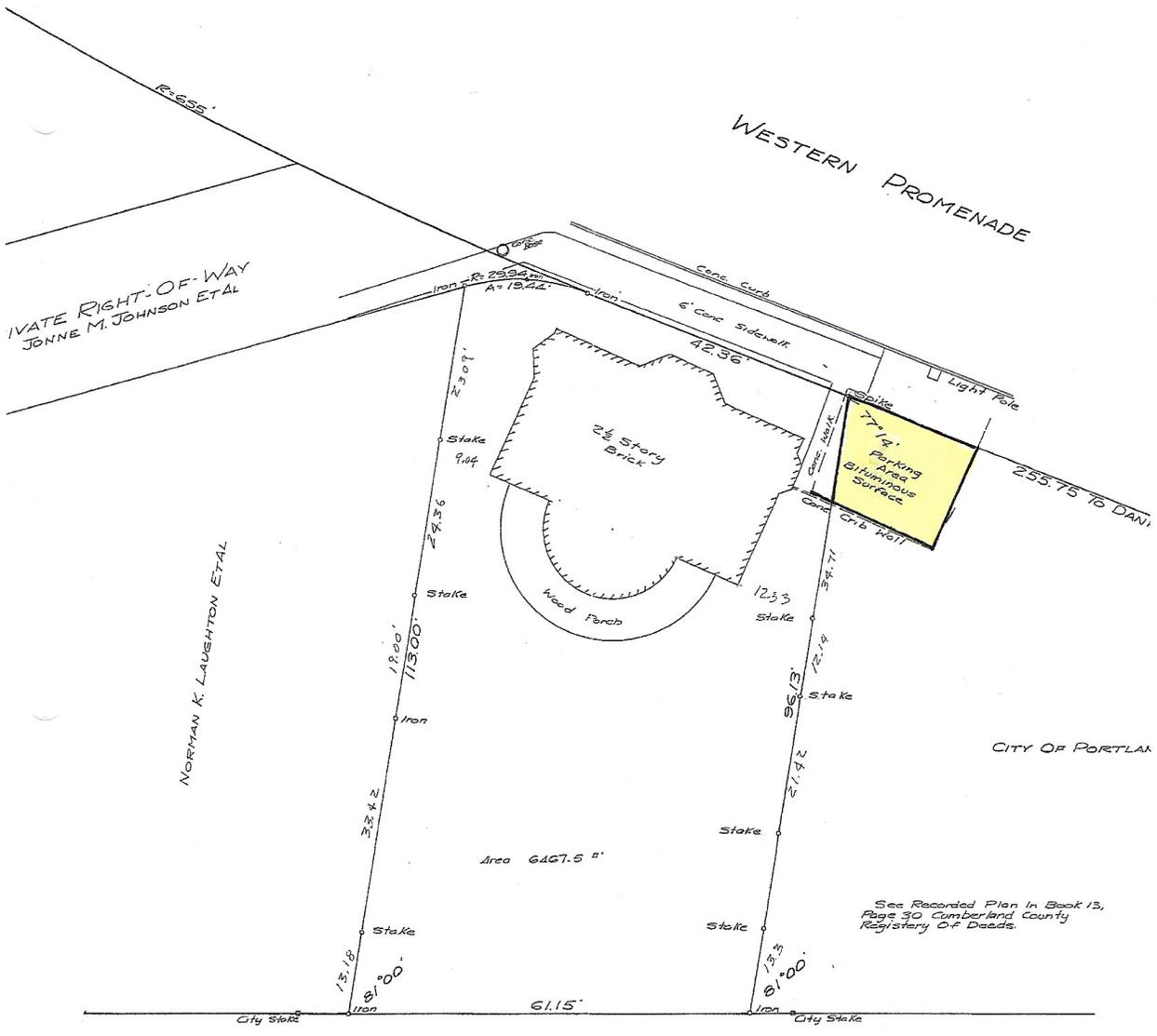
_____, 2021

Personally appeared before me the above-named Thomas A. Zack and Carol S. Zack, and acknowledged the foregoing instrument is their free act and deed.

Notary Public/Attorney-At-Law

Typed or Printed Name: _____

Commission Expires: _____



DANFORTH STREET

EXHIBIT A.

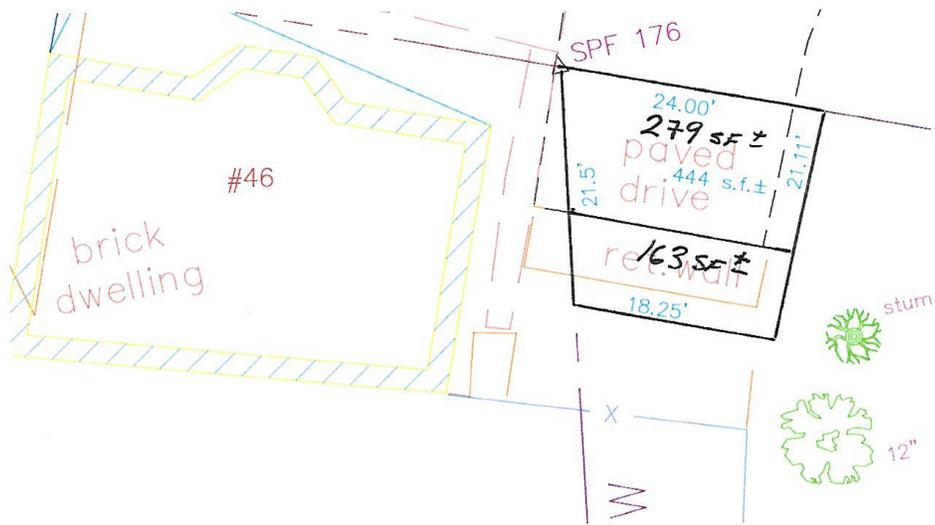


EXHIBIT B