

Order 27-12/13

Given first reading on 7/16/12

Passed as Amended 5-3 (Anton, Donoghue, Marshall)

MICHAEL F. BRENNAN (MAYOR)  
KEVIN J. DONOGHUE (1)  
DAVID A. MARSHALL (2)  
EDWARD J. SUSLOVIC (3)  
CHERYL A. LEEMAN (4)

**CITY OF PORTLAND**  
IN THE CITY COUNCIL

JOHN R. COYNE (5)  
JOHN M. ANTON (A/L)  
JILL C. DUSON (A/L)  
NICHOLAS M. MAVODONES (A/L)

**AMENDMENT TO CITY CODE**  
**SEC. 14-49 (ZONING TEXT AND MAP AMENDMENT)**  
**RE: Third Amendment to Conditional Zoning Agreement**  
**The Village At Ocean Gate (aka Bayhouse)**

**ORDERED**, that the zoning map and text of the City of Portland, dated December 2000 as amended and on file in the Department of Planning & Development, and incorporated by reference into the Zoning Ordinance by Sec. 14-49 of the Portland City Code, is hereby amended to reflect a conditional rezoning as detailed below.

**THIRD AMENDED CONDITIONAL ZONE AGREEMENT**

This amendment and agreement is made as of the \_\_\_ day of \_\_\_\_\_ 2012, by **THE VILLAGE AT OCEAN GATE, LLC**, a Maine Limited Liability Corporation having a principal place of business at Boston, Massachusetts (hereinafter "**DEVELOPER**").

**WHEREAS, DEVELOPER**, as owner of land located at 112-113 Newbury Street, Portland, Maine, consisting of the property shown on the Portland Assessor's Map as parcels 20-E-9 and a part of parcel 20-E-21 and described in a deed dated November 15, 2007 and recorded in the Cumberland County Registry of Deeds at Book 25625, Page 275, and in a deed from Pearl Properties, LLC dated April 2, 2010 and recorded in the Cumberland County Registry of Deeds at Book 27688 Page 258(hereinafter the "**SITE**"); and

**WHEREAS**, this Third Amendment is intended to supersede the Conditional Zoning Agreement for the Site as amended by the First Amendment signed June 18<sup>th</sup>, 2008 and recorded in the Cumberland County Registry of Deeds at Book 26146, Page 291, and also removes the area covered by Phase II referenced in the First Amendment; and

**WHEREAS**, the **SITE** is currently in the B-2b zoning district and is adjacent to a B-5b district to the southeast; and

**WHEREAS**, Developer has filed a Zone Change Application with the City of Portland (hereinafter "**CITY**") to rezone the **SITE** to the B-5b zoning district subject to certain modifications and conditions set forth in this Agreement in order to accommodate a mixed-use development consisting of up to 110 residential units; space for a 150- to 200-seat restaurant; and sidewalk-level commercial space in a complex of buildings of varying sizes and heights (hereinafter the "**project**"); and

**WHEREAS**, the Portland Planning Board has determined that the rezoning would provide needed housing, would create a vibrant new neighborhood and would assist in revitalizing adjacent areas; and

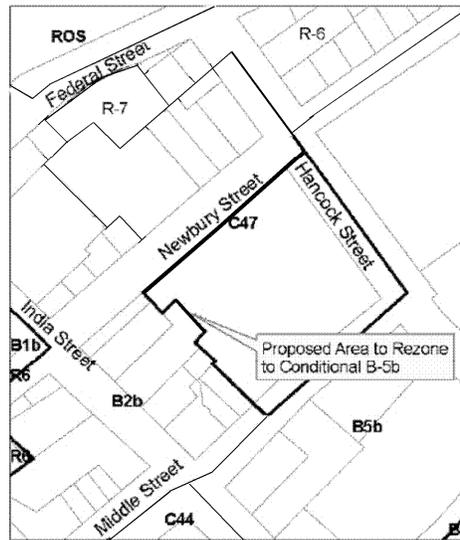
**WHEREAS**, the Portland Planning Board, pursuant to 30-A M.R.S.A. § 4352(8), and after notice and hearing and due deliberation, recommended rezoning the **SITE**; and

**WHEREAS**, the **CITY**, by and through its City Council, has determined that the rezoning is appropriate due to the unusual nature and unique location of the development proposed, that the uses proposed are consistent with the existing and permitted uses within the B-5b zone and that the rezoning would be pursuant to and consistent with the **CITY'S** Comprehensive Plan; and

**WHEREAS**, **DEVELOPER** has agreed to enter into this Agreement and the Amendment thereto, with its concomitant terms and conditions, which shall hereinafter bind **DEVELOPER**, its successors and assigns;

**NOW, THEREFORE**, in consideration of the rezoning of the **SITE**, **DEVELOPER** agrees to be bound by the following terms and conditions:

1. Map. The **CITY** shall and does hereby amend the Zoning Map of the City of Portland, dated December 2000, as amended and on file in the Department of Planning and Development, and incorporated by reference into the Zoning Ordinance by §14-49 of the Portland City Code, by adopting the following map change. The underlying zone is changed from B-2b to B-5b.



**Proposed Area to Rezone from  
B-2b to Conditional Rezoning to B-5b  
for The Village at OceanGate, LLC  
112-113 Newbury Street  
April 2008, July 2011**

Prepared by the Department of Planning and Development  
based upon GIS Workgroup Data.



2. Subdivision and Overall Site Plan. Except as otherwise provided in this paragraph 2, the **SITE** will be developed substantially in accordance with the Subdivision and Overall Site Plan, Attachment 1 submitted by Sebago Technics, Inc., dated August 3, 2005 as revised April 22, 2008 and September, 2009, and with the lot line adjustment approved by the Portland Planning Board on May 24, 2011, and as same may be revised and approved from time to time by the Planning Board. The project shall consist of two buildings along Middle, Hancock and Newbury Streets. The final building elevations shall be or have been approved by the Planning Board during the required subdivision and site plan amendment process. The previously approved building elevations for the **SITE**, submitted by David M. White, Architect, dated June 26, 2007 as revised and modified September, 2009, Attachment 2 (collectively, “the Plans for the **SITE**”), may be modified or altered by the Planning Board in accordance with the Design Standards for the Eastern Waterfront in connection with the site plan and subdivision amendments.

The Planning Board shall review or shall have reviewed the **SITE** proposal and apply the site plan and subdivision standards of the Portland Land Use Code and the applicable standards of the Eastern Waterfront Design Standards to each.

After the initial approval of the Plans the Planning Board may, upon application of **DEVELOPER** and without the necessity of amending this Conditional

Rezoning Agreement, approve subsequent changes to the Plans which decrease building dimensions or reduce the density of development, provided that any such decrease or reduction shall nonetheless be determined to substantially conform to the Plans.

The project shall incorporate light fixtures in “Downtown Black,” specifications to be provided by the Planning Authority during subdivision review. In addition, all other streetscape improvements will be consistent with the Hancock Street Extension Plans, which improvements are currently represented on the Plans.

3. Permitted uses: Those uses allowed in the B-5b zoning district. The project shall include not less than 5,700 square feet of commercial/retail space on the ground level along Middle Street and at the corner of Hancock and Middle Streets as depicted on the Plans unless during site plan review the Planning Board approves a minimum amount of 5,200 square feet of commercial/retail space.
4. The **SITE** shall consist of, at minimum Buildings 1 and 2.
5. Modifications to B-5b Regulations. The **SITE** shall be governed by the regulations applicable to the B-5b zoning district, except as follows:
  - a. The maximum residential density on the **SITE** shall be 110 dwelling units.
  - b. The maximum front yard setback shall be ten (10) feet, except that a front yard setback of no greater than sixteen (16) feet shall be allowed for the parking garage entrance and associated façade as depicted on the Plans for the **SITE**.
  - c. The maximum height for the structures shall be:

Buildings 1 and 2: The maximum height of each building shall not exceed 74 feet from average grade, as measured and approved by the Zoning Administrator.
  - d. The cornices of buildings, and storefront awnings along Middle and Hancock Streets, will extend over the street rights of way in various locations as shown on the Plans. The **CITY** hereby grants license for such overhangs and authorizes the City Manager to execute said license in such form and with such terms and conditions as he deems appropriate.
  - e. An underground electrical vault will be installed within the right of way of Newbury Street, the final location of such vault to be approved by the Planning Authority. The **CITY** hereby grants license for such installation and authorizes the City Manager to execute said license in such form and with such terms and conditions as he deems appropriate.
6. Community Contribution. The community contribution under this Agreement shall be \$10,000.00,; of which \$5,000.00 shall be dedicated to the

India/Middle Street traffic improvements to be commissioned by the City and \$5,000.00 shall be dedicated to the Eastern Waterfront Post-Development Traffic Impact Study to be commissioned by the City. The community contribution under this Agreement is independent of any conditions which the Planning Board may lawfully require under site plan review or subdivision review. The community contribution of \$10,000 shall be made prior to the issuance of a building permit for the **SITE**.

The restaurant and/or retail/commercial uses on site shall participate in a Park and Shop Program (or similar program) with the “Riverwalk” Parking Garage located at Middle Street, Portland, with documentation of such participation provided to the City Planning Authority at minimum every two years.

7. Performance Guarantee. Prior to recording this Second Amendment to the Conditional Zoning Agreement at the Cumberland County Registry of Deeds the **DEVELOPER** shall post a performance guarantee in the amount of \$25,000, or such amount as approved by the Planning Authority and reviewed by the Public Services Department on the basis of a detailed cost estimate showing quantities and unit costs as required for such performance guarantees in order to cover the cost of the following:
  - a. Close off two curb cuts on Newbury Street with granite curb;
  - b. Close off two curb cuts on Hancock Street with granite curb;
  - c. Close off one curb cut on Middle Street and maintain (as is) the one curb cut in active use on Middle Street;
  - d. All sidewalks where curb cuts are closed shall be constructed to City standards with bituminous paving material as a temporary situation;
  - e. Install granite curb around the corner of Hancock and Middle intersection and include one handicap ramp meeting the City standards to line up the existing ramp across Middle Street; and
  - f. Install guardrail or fencing along the perimeter of the **SITE** as approved by the Planning Authority.
8. **DEVELOPER** shall immediately undertake the following actions:
  1. Stabilize the **SITE**, including the following:
    - a. Clean-up demolition debris;
    - b. Maintain a clean **SITE**;
    - c. Install erosion control measures meeting best management practices and maintain the erosion controls;

- d. Grade and mulch disturbed areas from erosion control measures;
  - e. Clean catch basin sump near the corner of Hancock and Middle Streets; and
  - f. Remove debris and maintain filter material that has clogged the catch basin.
2. Sidewalk Maintenance and Repair, including the following:
- a. Hold a pre-construction meeting to ensure compliance with **CITY** regulations for sidewalk repair;
  - b. Stabilize and repair edge condition of Newbury Street sidewalk;
  - c. Remove debris that has washed across the Middle Street sidewalk; and
  - d. Install a sidewalk patch along Middle Street, where erosion has caused the sidewalk to deteriorate.
9. **DEVELOPER** shall be responsible for regular maintenance of the **SITE** on a bi-weekly or at least monthly basis. This maintenance shall include, but not be limited to, mowing the grass and weeds, picking up and removing trash and any material dumped on the **SITE** within four (4) working days of said dumping, and plowing the public sidewalks abutting the **SITE**. Prior to the recording of this Second Amendment to the Conditional Zoning Agreement at the Cumberland County Registry of Deeds, the **DEVELOPER** must present evidence to the satisfaction of Corporation Counsel and the Planning Authority of a snowplowing contract for the public sidewalks around the **SITE** in order to comply with **CITY** ordinances to maintain sidewalks for safe pedestrian access.
10. This conditional rezoning shall become null and void and the **SITE** shall revert to the existing B-2b zoning district in the event that **DEVELOPER** fails to commence construction of the **SITE** by September 22, 2012. If any required approval, including the approval of the conditional rezoning, has been appealed, and if **DEVELOPER** fails to commence construction within one (1) year from the final disposition of such appeal, this conditional rezoning shall become null and void and shall revert.
11. The site plan approval for the **SITE** dated September 22, 2009, shall be extended until September 22, 2012.
12. Parking shall be provided for the **SITE** at no less than one space per dwelling (i.e. 94 spaces) and six (6) spaces for retail employee parking with approximately eighty (80) spaces provided onsite and the balance provided in the Ocean Gateway Garage. A post development occupancy parking analysis shall be conducted by the **DEVELOPER** six (6) months following the issuance of a certificate of occupancy for the **SITE**. If the parking analysis demonstrates the inadequacy of a 1:1 /unit:

parking space ratio, then the **DEVELOPER** must submit a parking mitigation plan, which plan shall be reviewed and approved by the City and thereafter implemented by the **DEVELOPER**.

Thirty-eight bicycle parking shall be provided on site in accordance with §14-526 of the Portland City Code.

13. The rezoning shall run with the **SITE**, shall bind and benefit **DEVELOPER** and any of its successors and assigns, and shall inure to the benefit of and be enforceable by the **CITY**, by and through its duly authorized representatives. Within thirty (30) days of the City Council's passing of the Conditional Zone, **DEVELOPER** shall file a copy of this Agreement in the Cumberland County Registry of Deeds, along with a reference to the Book and Page locations of the deeds for the **SITE**. **DEVELOPER** shall provide to the **CITY** the Book and Page number of said recording.
14. If any of the restrictions, provisions, conditions, or portions thereof set forth herein is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed as a separate, distinct, and independent provision and such determination shall not affect the validity of the remaining portions hereof.
15. Except as expressly modified herein, the development, use, and occupancy of the **SITE** shall be governed by and comply with the provisions of the Land Use Code of the City of Portland and any applicable amendments thereto or replacement thereof.
16. This conditional rezoning agreement shall be enforced pursuant to the land use enforcement provisions of state law (including 30-A M.R.S.A. § 4452) and City Ordinance. No alleged violation of this rezoning Agreement may be prosecuted, however, until the **CITY** has delivered written notice of the alleged violation(s) to the owner or operator of the **SITE** and given the owner or operator an opportunity to cure the violation(s) within thirty (30) days of receipt of the notice. Following any determination of a zoning violation by the Court, either the Portland Planning Board on its own initiative, or at the request of the Planning Authority, may make a recommendation to the City Council that the Contract Rezoning be modified or the **SITE** rezoned.

**WITNESS:**

**THE VILLAGE AT OCEAN GATE, LLC**

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\_\_\_\_\_

Its Managing Member

STATE OF MAINE

CUMBERLAND, ss.

Date:

Personally appeared the above-named \_\_\_\_\_, Managing Member of The Village At Ocean Gate, LLC, and acknowledged the foregoing Agreement to be his free act and deed in his said capacity and the free act and deed of The Village At Ocean Gate, LLC.

\_\_\_\_\_  
Notary Public