

Order 70-14/15

Passage: 9-0 on 10/6/2014

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

Effective on 10/16/2014

**CITY OF PORTLAND
IN THE CITY COUNCIL**

JOHN R. COYNE (5)
JILL C. DUSON (A/L)
JON HINCK (A/L)
NICHOLAS M. MAVODONES, JR (A/L)

**ORDER APPROVING LEASE AGREEMENT FOR BARGE LANDING BY AND
BETWEEN CITY OF PORTLAND AND
DIAMOND COVE HOMEOWNERS ASSOCIATION**

ORDERED, that the Lease Agreement for a Barge Landing by and between City of Portland and Diamond Cove Homeowners Association is hereby approved in substantially the form attached hereto as Attachment 1; and

BE IT FURTHER ORDERED, that the Acting City Manager is authorized to execute the Lease Agreement and any other related documents necessary or convenient to carry out the intent of said Agreement.

**LEASE AGREEMENT
FOR BARGE LANDING
BY AND BETWEEN
CITY OF PORTLAND AND
DIAMOND COVE HOMEOWNERS ASSOCIATION**

THIS LEASE AGREEMENT (hereinafter this “**Agreement**”) is made as of this _____ day of August 2014, by and between the **CITY OF PORTLAND**, a municipal corporation located in Cumberland County, State of Maine (hereinafter the “**CITY**”) and **DIAMOND COVE HOMEOWNERS ASSOCIATION**, a Maine not-for-profit corporation doing business on Great Diamond Island, Maine (hereinafter “**LESSOR**”).

W I T N E S S E T H:

That **LESSOR**, for and in consideration of the rent hereinafter to be paid by **CITY**, and other consideration, and the covenants and agreements hereinafter contained, to be kept and performed by **CITY**, does hereby demise, lease and let unto **CITY**, the property located at or near the existing barge landing on Great Diamond Island in Portland, Maine and more particularly described in Exhibit A (hereinafter the “**PREMISES**”), being a portion of the “Open Space Recreation Area” parcel owned by **LESSOR** and shown as Map 083E, Block/Lot A040 on the **CITY**’s Assessor’s maps (the “**Open Space Parcel**”), subject to the reserved rights of **LESSOR** set forth in Section 15 and elsewhere below, and to have and to hold unto said **CITY** on the following terms and conditions:

1. Term and Renewal; Commencement Date

A. The initial term of this Agreement shall begin on the Commencement Date (as hereinafter defined), and shall continue until midnight on the last day of the calendar month containing the ninety-ninth (99th) anniversary of the Commencement Date, unless sooner terminated by either party as provided herein. However, if the **CITY** fails to substantially complete the construction of a barge landing facility on the **PREMISES** in accordance with the

Final Site Plan and the Final Construction Plans, each as hereinafter defined, by September 1, 2015, this Agreement shall then be automatically and immediately terminated as of that date.

B. As used herein, the “**Commencement Date**” shall mean the date on which the last of the following events shall have occurred: (i) the date on which **CITY** shall obtain site plan approval by the Portland Planning Board of the Final Site Plan (the “**Planning Board Approval**”); (ii) the date on which **CITY** shall obtain from the Maine Department of Environmental Protection (“**DEP**”) a modification to the existing Site Location Orders for Diamond Cove,¹ expressly permitting the improvements and uses contemplated by this Agreement (the “**DEP Modification Order**”); and (iii) the date on which **CITY** shall obtain a submerged lands lease or easement from the State of Maine Bureau of Parks and Lands, if required for the improvements and uses contemplated by this Agreement (a “**Submerged Lands Lease**”). In the event the Commencement Date shall not occur by June 1, 2015, this Agreement shall then be automatically and immediately terminated as of that date.

2. Rent

From and after the Commencement Date, **CITY** agrees to pay to **LESSOR** as rent for such use and occupancy of the **PREMISES** the sum of One Dollar (\$1.00) per year, payable in advance. This is a ‘net lease’, that is, the costs of constructing, operating, maintaining, repairing and replacing the barge landing facility shall be borne solely by **CITY**. **CITY** will pay any fees related to the improvements which are the barge landing facility, including but not limited to permit fees. **CITY** will not pay any real estate taxes on the **PREMISES**, but shall be responsible for any taxes or assessments on the barge landing facility as improved and maintained by **CITY** at the **PREMISES**.

3. Purposes

(A) **CITY** shall use the **PREMISES** solely for the development, construction, operation, maintenance, repair and replacement of a barge landing facility to provide for the landing of barges, transporting vehicles and the like. **CITY** will not be permitted to build any improvements on the **PREMISES** other than those shown on the Final Site Plan and Final Construction Plans for this barge landing facility.

(B) There shall be no parking on the **PREMISES**. There shall be no standing/waiting vehicles on the **PREMISES** unless related or incident to the transporting of vehicles, and then only very short term and in strict accordance with the Rules attached hereto as Exhibit C.

(C) Subject to (i) the construction of the barge landing facility in accordance with the Final Site Plan and the Final Construction Plans and the conduct of the operation of said barge landing facility in accordance with this Agreement, and (ii) **CITY**’s obtaining of the DEP Modification Order, **LESSOR** represents to **CITY** that such purposes are permitted under the private regulation of the **PREMISES** set forth in the Amended and Restated General Declaration of Covenants and Restrictions dated December 17, 1993 and recorded at the Cumberland County

¹ DEP Site Location Order for Phase I (#L-013160-87/03-A-N, dated Dec. 10, 1986), and DEP Site Location Order for Phase II (#L-013160-L3-G-N, dated June 25, 1991).

Registry of Deeds in Book 11277, Page 322; as modified and amended (hereinafter the “**DCHA Declaration**”).

4. Access to Lower Gate, and Temporary Access to Open Space Parcel

Appurtenant to the **CITY**'s leasehold of the **PREMISES**, **CITY** shall have a nonexclusive right to access the **PREMISES** from the “Lower Gate”, over that portion of the existing roadway known as West Shore Drive located between the **PREMISES** and the Lower Gate (said portion of roadway hereinafter referred to as the “**Access Road**”), subject to the Rules attached hereto as Exhibit C. **CITY** will repair any damage it causes to the Access Road; and in addition, will provide limited annual general maintenance to the Access Road, such by as spreading several loads of gravel, reclaim, or other appropriate material on said Access Road, annually.

Also appurtenant to the **CITY**'s leasehold of the **PREMISES**, **CITY** shall have a nonexclusive right to temporarily use portions of the Open Space Parcel adjacent to the Premises (a) as is reasonably necessary for the construction, repair or replacement of the barge landing facility on the **PREMISES**, and (b) to install landscaping as shown on the Preliminary Site Plan (as hereinafter described). In connection with any such use, **CITY** shall use reasonable efforts to minimize the area used, and shall restore the areas used to substantially the same condition existing prior to such work, and repair any damage caused by such work. **CITY** will not be permitted to build any improvements on the Open Space Parcel.

The appurtenant nonexclusive rights described above are subject to existing easement rights of others identified in the DCHA Declaration and on plans recorded at the Cumberland County Registry of Deeds.

5. Site Plan and Barge Landing Facility Operation

CITY covenants and agrees:

A. that a preliminary, not-yet approved by the Portland Planning Board or Planning Board staff, site plan of the barge landing facility at the **PREMISES** is attached to this Agreement as Exhibit B (hereinafter collectively, the “**Preliminary Site Plan**”);

B. that the barge landing facility will be constructed in a good and workmanlike manner in accord with the Final Site Plan and the Final Construction Plans;

C. that in the event the **CITY** proposes to revise the Preliminary Site Plan, the **CITY** will provide **LESSOR** with a preliminary draft of the proposed revision; and in the event the proposed revision is material (as determined by City Corporation Counsel in its reasonable discretion), the **CITY** will incorporate any suggestions received by the **CITY** from **LESSOR** that are determined by **LESSOR** to be necessary for its representation in Section 3.C above and are received by **CITY** within 30 days of mailing such revision to **LESSOR**, provided that in the event such suggested changes cannot be made by the **CITY** reasonably cost effectively, or are in conflict with any requirements for the Planning Board Approval, the DEP Modification Order or other required approvals for the barge landing facility, the parties will work in good faith to

revise the Preliminary Site Plan to meet both of their respective needs; the Preliminary Site Plan (with any modifications not deemed material as determined by City Corporation Counsel in its reasonable discretion) or a revised version of it that is approved by the parties pursuant to this Section shall constitute the “**Final Site Plan**”, and the Final Site Plan is hereby incorporated by reference herein and Exhibit B shall be deemed revised accordingly;

D. that **CITY** will prepare and submit to **LESSOR** proposed construction plans (including a construction schedule) for the barge landing facility and **CITY** will incorporate any suggestions made by **LESSOR** that are determined by **LESSOR** to be necessary for its representation in Section 3.C above and are received by **CITY** within 30 days of mailing of said proposed construction plans to **LESSOR**, provided that in the event such suggested changes cannot be made by **CITY** reasonably cost effectively, or are in conflict with any requirements for the Planning Board Approval, the DEP Modification Order or other required approvals for the barge landing facility, the parties will work in good faith to revise such proposed construction plans to meet both of their respective needs; the proposed construction plans or a revised version of them that are approved by the parties pursuant to this Section shall constitute the “**Final Construction Plans**”; and the Final Construction Plans are hereby incorporated by reference herein.

E. that the barge landing facility will be operated in accord with any operational elements of the Final Site Plan; and

F. that the **CITY** and its employees, contractors and agents will operate and maintain the barge landing facility in accord with the Rules attached hereto as Exhibit C, and also with any conditions required by the DCHA Declaration (including, without limitation, DCHA Declaration Section 4.20), the Planning Board Approval, the DEP Modification Order, the Submerged Lands Lease (if any), and any other required approvals for the barge landing facility.

6. Costs of Development and Maintenance of the Premises

The **CITY** shall provide all grading and construction of the barge landing facility and other development set forth in the Final Site Plan and Final Construction Plans, and otherwise all as deemed necessary by the **CITY** for its proposed use. The **CITY** shall provide all services deemed necessary to maintain the **PREMISES** in a safe condition all as deemed necessary by **CITY**.

7. Compliance and Use

A The barge landing facility and all site improvements and/or changes in the **PREMISES** shall be located or done and maintained by **CITY** in accordance with the laws, rules and regulations of all applicable federal, state and local jurisdictions.

B. Work done on the **PREMISES** will either be conducted by a Contractor or by the **CITY**'s Department of Public Services. If the work is performed by a Contractor, the Contractor shall provide a performance bond for work performed on the **PREMISES**. **LESSOR** shall be named as co-obligee on the bond. The Contractor performing the work for **CITY** shall also

procure general liability insurance in the minimum amounts of \$1,000,000 for each occurrence, and \$2,000,000 in the 'general aggregate' for bodily injury, death and property damage, naming **CITY** and **LESSOR** as additional insureds thereon.

C. So long as **CITY** shall not be in default of its obligations hereunder, the residents of Great Diamond Island and Little Diamond Island and their contractors or agents shall be allowed to have access to the barge landing facility without fees or charges being imposed by either the **LESSOR** or **CITY**, but subject to the Rules in Exhibit C hereto; provided, however, that:

- (i) any such public user shall only be permitted to travel across the Access Road, and shall not have access to any other private property or roadway at Diamond Cove (provided that nothing contained herein shall be deemed to affect any existing easement rights of any third-party user to enter upon other portions of Diamond Cove);
- (ii) **LESSOR** reserves the right to impose rules regarding the use of the Access Road and access through the Lower Gate (including, without limitation, speed limits, use limitations during mud season, and notification requirements for making arrangements to have the Lower Gate opened);
- (iii) **LESSOR** reserves the right to impose a fee upon such public users for arranging to open the Lower Gate in connection with each use of the barge landing;
- (iv) **LESSOR** may require such public users to sign a written release of claims / assumption of risk / indemnification agreement in connection with such use of the barge landing and Access Road; and
- (v) **LESSOR** may terminate the permission to use the Access Road and be let through the Lower Gate hereby granted to any such public user that does not follow the foregoing rules.

8. Maintenance and Repairs, and Surrender Upon Termination

CITY represents that it has inspected and examined the **PREMISES** and accepts them in their present condition, and agrees that **LESSOR** shall not be required to make any improvements or repairs or provide any services whatsoever in or upon the **PREMISES** or any part thereof; **CITY** agrees to generally maintain, repair and (if necessary) replace the barge landing facility in accordance with the Final Site Plan and keep the **PREMISES** safe and in good order and condition at all times during the term hereof, and upon expiration of this Agreement or any sooner termination thereof, the **CITY** will quit and surrender the possession of the **PREMISES** quietly and peaceably and leave it in good order and condition. Upon written request by either party from time to time during the term of this Agreement, the parties agree that a representative for the **CITY** shall meet with a representative for **LESSOR** at the **PREMISES** to inspect the barge landing facility and discuss any necessary maintenance or repairs. The timing of any maintenance, repairs or replacements to the barge landing facility conducted by the **CITY** shall be coordinated in advance with **LESSOR**.

9. Various City Commitments

CITY covenants and agrees to observe the conditions imposed by its proposed settlement in the litigation involving **LESSOR** and the Diamond Cove barge landing facility, including the conditions listed on the attached Exhibit C; in addition, **CITY** covenants and agrees not to park any vehicles overnight on the Diamond Cove ('Fort') one-half of Great Diamond Island, except in emergency circumstances. **CITY** further covenants and agrees to observe any conditions imposed by the DEP with respect to use of the Diamond Cove barge landing facility and adjacent roadways.

10. Liability; Waiver of Claims

The **PREMISES** and appurtenant Access Road are being leased and accepted by **CITY** in their AS IS condition, without representation or warranty by **LESSOR**, and **LESSOR** shall have no obligation to furnish or supply any services or materials to make the **PREMISES** or the Access Road safe or suitable for any particular use. **CITY** agrees to use the **PREMISES** and the Access Road at **CITY**'s own risk. **CITY** hereby agrees, for itself and on behalf of its employees, contractors, agents, and any other person or entity exercising rights through or under **CITY** pursuant to this Agreement, that neither **LESSOR**, nor any director, officer, employee or agent of **LESSOR**, shall be liable to **CITY** for any loss, injury or damage to **CITY** or to any other person, or to its or their property, irrespective of the cause of such injury, damage or loss, unless caused by or resulting from the sole negligent acts of **LESSOR**, without contributory negligence on the part of **CITY** or any of its employees, contractors or agents, or any other person. Without limiting the generality of the foregoing, **LESSOR** shall not be liable to **CITY**, its employees, contractors, agents, or any other person or entity exercising rights through or under the **CITY** pursuant to this Agreement, for any damage, injury, loss, or claim based on, arising out of or resulting from any cause whatsoever, including (without limitation) accident, theft or any other crime or casualty, or the actions of any members of **LESSOR** or any other person, unless due to the sole negligent acts of **LESSOR**, without contributory negligence on the part of **CITY**, any of its employees, contractors or agents, or any other person.

11. Default

In the event that **CITY** shall be in default in the performance of any of the terms, covenants, agreements or conditions herein agreed to be kept and performed by **CITY**, then in that event, **LESSOR** may, at its election, either (a) terminate this Agreement as provided in Section 18 of this Agreement, or (b) if such default shall continue for a period of sixty (60) days after written notice from **LESSOR** to **CITY** (or in case of a default which cannot with due diligence be cured within said sixty (60) day period, **CITY** fails to proceed within said sixty (60) day period to commence to cure the same and thereafter to prosecute the curing of such default with due diligence and within a period of time which under all prevailing circumstances shall be reasonable), then **LESSOR** may bring an action against the **CITY** to enforce the performance of or obtain damages caused by a such default, including injunctive relief, specific performance or other remedy available at law or equity.

12. Hold Over

In the event that **CITY** shall hold over and remain in possession of the **PREMISES** with the consent of **LESSOR**, such holding over shall be deemed to be from month to month only, and upon all the same rents, terms, covenants and conditions as contained herein.

13. Notices

Any notices which are required hereunder, or which either **CITY** or **LESSOR** may desire to serve upon the other shall be in writing and shall be deemed served when delivered personally, or when deposited in the United States mail, postage pre-paid, return receipt requested, addressed to **LESSOR**, Diamond Cove Homeowners Association, c/o Phoenix Management, P.O. Box 759, Saco, ME 04072 and **LESSOR**, Diamond Cove Homeowners Association Board, Great Diamond Island, Portland, ME; or addressed to **CITY**, City Manager, 389 Congress Street, Portland, ME 04101; or to such other address as **LESSOR** or **CITY** may designate to each other from time to time by written notice.

14. Subletting or Assignment

The **CITY** shall not sublet the **PREMISES** or assign its rights hereunder without the express written consent of **LESSOR**.

15. Lessor's Access and Use

LESSOR reserves unlimited rights to access and use the **PREMISES** and the barge landing facility (as improved and maintained by **CITY**) at any and all times during the term of this Agreement. Without limiting the generality of the foregoing, (a) the rights of the members of **LESSOR** to use the barge landing facility shall not be affected by this Agreement, and (b) **LESSOR** reserves the right (but shall have no obligation) to install signs and/or security cameras at the **PREMISES**, to install screening within or along the **PREMISES**, and to maintain or improve the barge landing facility (in addition to, and not in lieu of, what maintenance and improvements **CITY** is obligated to perform pursuant to this Agreement). During the term hereof, **CITY** shall not unreasonably interfere with **LESSOR**'s access and use of the **PREMISES**, and **LESSOR** shall not unreasonably interfere with **CITY**'s rights and obligations set forth in this Agreement.

16. Sale of the Premises

LESSOR agrees that if, during the term of this Agreement and extension, it sells the **PREMISES**, it shall assign its obligations under this Agreement to the buyer of the **PREMISES**.

17. Recordation in Registry of Deeds

The parties agree to execute and record in the Cumberland County Registry of Deeds a Memorandum of Lease outlining the principal terms of this Agreement.

18. Termination

A. **CITY** may terminate this Agreement upon one (1) year written notice to **LESSOR**.

B. **LESSOR** may terminate this Agreement upon a one (1) year written notice for failure of the **CITY** to observe and perform any of its terms, covenants, agreements or conditions hereunder, and such failure shall not have been cured within any time period specified herein or within 90 days of written notice to do so.

19. Waiver

Waiver by either party of any default in performance by the other of any of the terms, covenants, agreements or conditions contained herein, shall not be deemed a continuing waiver of the same or any subsequent default herein.

IN WITNESS WHEREOF, the said **CITY OF PORTLAND** has caused this Lease Agreement to be signed in its corporate name and sealed with its corporate seal by Mark H. Rees, its City Manager, thereunto duly authorized, and **DIAMOND COVE HOMEOWNERS ASSOCIATION** has caused this Lease Agreement to be signed by Matthew Hoffner, its Director and Operations Officer, thereunto duly authorized, as of the day and date first set forth above.

WITNESS:

CITY OF PORTLAND

By: _____

Mark H. Rees
Its City Manager

STATE OF MAINE
CUMBERLAND, ss.

_____, 2014

Personally appeared before me the above-named Mark H. Rees, City Manager of the City of Portland, and acknowledged the foregoing instrument to be his free act and deed in his said capacity, and the free act and deed of the City of Portland.

Before me,

Notary Public/Attorney-at-Law

WITNESS:

**DIAMOND COVE HOMEOWNERS
ASSOCIATION**

By: _____

(Print or type name)

Its: _____

STATE OF MAINE
CUMBERLAND, ss.

_____, 2014

Personally appeared before me the above-named _____, as
_____ for Diamond Cove Homeowners Association, and made oath that
the foregoing is his/her free act and deed and the free act and deed of Diamond Cove
Homeowners Association.

Before me,

Notary Public/Attorney-at-Law

Exhibit A

[Metes and Bounds Description of Leased Premises]

A certain parcel of land situated on northwesterly side of West Shore Drive on Great Diamond Island, Portland, Maine being bounded and described as follows:

Commencing on the northwesterly sideline of West Shore Drive at land now or formerly of Ronald G. Fitch and Sandra E. Fitch as described in a deed dated April 21, 2004 and recorded in Book 21173, Page 28 in the Cumberland County registry of Deeds (CCRD);

Thence northeasterly, by and along the northwesterly sideline of West Shore Drive and along a curve to the right having a radius of 804.95 feet an arc length of 25.00 feet to the Point of Beginning, said curve having a chord which bears N 42° 47' 02" E a distance of 25.00 feet;

Thence N 48° 05' 15" W a distance of 253.09 feet to an angle point;

Thence N 00° 04' 04" W a distance of 39.11 feet to an angle point;

Thence S 50° 17' 43" E a distance of 281.68 feet to the northwesterly sideline of West Shore drive;

Thence southwesterly, by and along the northwesterly sideline of West Shore Drive and along a curve concave to the left having a radius of 804.95 feet an arc distance of 39.99 feet to the Point of beginning, said curve having a chord which bears S 45° 05' 49" W a distance of 39.99 feet.

The parcel contains approximately 9,280 square feet.

Bearings are Grid North.

Reference is made to a plan entitled "Existing Conditions Survey Diamond Cove Boat Landing" dated June 13, 2013 prepared by the City of Portland Public Services Department Engineering Division.

Exhibit B

[Preliminary Site Plan and Illustration of Barge landing Facility]

Exhibit C

SPECIAL RULES REGARDING PARKING AND ANTI-IDLING POLICIES FOR USE OF THE BARGE LANDING OWNED BY DIAMOND COVE HOMEOWNERS ASSOCIATION

Note: Exceptions to the following rules will be made for emergency vehicles and/or emergency situations. These rules do not supersede other DCHA policies pertaining to the barge landing that are now in effect or that may be implemented in the future by the DCHA.

Parking and Loading/Off-loading of Vehicles:

Vehicles may be parked temporarily only in the following permitted parking area prior to and following a scheduled barge delivery:

On the cement pad located to the east of the barge landing on Wood Side Drive, between the hours of **9:00 a.m. to 5:00 p.m. only**.

All vehicle operators shall comply with the vehicle anti-idling policy that is used by the City of Portland for its own vehicles.

Days/Hours of Operation:

- Days of operation for City vehicles will be **Monday through Saturday** only.
- Days of operation for other non-DCHA vehicles (i.e., vehicles servicing the public side of the Island) will be **Monday through Friday** only.
- Hours of operation for City vehicles and other non-DCHA vehicles will be from **7:00 a.m. to 8:00 p.m. Monday-Friday and 7:00 a.m. to 6:00 p.m. on Saturday**.
- DCHA vehicles (i.e., vehicles servicing DCHA property or property of DCHA members) are not subject to these hours and days of operations restrictions.

Reports of Non-Compliance:

Any reports of non-compliance of these rules shall be reported to the City of Portland's Island and Neighborhood Liaison, who shall provide notice of any or all said reports to the DCHA.

The DCHA reserves the right to revoke permission to use the barge landing from non-DCHA vehicles or any operator thereof deemed to be in violation of any of these rules.