

Order 202-04/05

Given first reading: 3/21/05

Amended in Order 201 & Emerg. Passage: 4/4/05 9-0

JILL C. DUSON (MAYOR)(A/L)
PETER O'DONNELL (A/L)
JAMES F. CLOUTIER(A/L)
NICHOLAS M. MAVODONES (A/L)

CITY OF PORTLAND
IN THE CITY COUNCIL

WILLIAM R. GORHAM (1)
KAREN A. GERAGHTY (2)
DONNA J. CARR (3)
CHERYL A. LEEMAN (4)
JAMES I. COHEN (5)

**AMENDMENT TO CITY CODE
SEC. 14-49 (ZONING MAP AMENDMENT)
RE: CONDITIONAL REZONING FOR PROPERTY
IN THE VICINITY OF
CONGRESS AND SEWALL STREETS**

ORDERED, that the Zoning Map 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.

**CONDITIONAL ZONE AGREEMENT
OLYMPIA EQUITY INVESTORS II, LLC
50 Sewall Street, Portland, Maine**

This contract made this ____ day of _____, 2005 by **OLYMPIA EQUITY INVESTORS II, LLC**, a Maine Limited Liability Company with a mailing address at 280 Fore Street, Suite 202, Portland, ME 04101.

WHEREAS, Olympia Equity Investors I, LP (“OEI I”) is the owner of property at ____ Congress Street, Portland, Maine, Chart ____, Block A, Lot ____; and

WHEREAS, OLYMPIA EQUITY INVESTORS II, LLC (“OEI II”) is the owner of property at 50 Sewall Street, Portland, Maine, Chart 189, Block A, Lot 31 (hereinafter the **“PROPERTY”**), as shown on Attachment 1; and

WHEREAS, Olympia Equity Investors III, LLC (“OEI III”) is the owner of property at 1198 Congress Street, Portland, Maine, Chart ____, Block A, Lot __; and

WHEREAS, Olympia Equity Investors XIII (“OEI XIII”) holds a purchase and sale agreement for the purchase of property from the Maine Department of

Transportation (the “MDOT lot”) at ___ Congress Street, Portland, Maine, Chart ____,
Block A, Lot __; and

WHEREAS, the City of Portland (“**CITY**”) and **OEI II** are parties to a contract zone agreement dated October 22, 1997 (hereinafter the “**1997 AGREEMENT**”), which established the C-19 contract zone on the **PROPERTY**; and

WHEREAS, for purposes of this Agreement the term “Site” shall refer to the combined properties of **OEI I**, **OEI II**, **OEI III**, and **OEI XIII** (the latter being the subject of a purchase and sale agreement in **OEI XIII**’s favor), as shown on Attachment 2; and

WHEREAS, **OEI II** requests a rezoning of the **PROPERTY** to permit an office building; and

WHEREAS, the **PROPERTY** consists of a long, narrow lot which is not conducive to development of the type proposed by **OEI II** absent conditional rezoning; and

WHEREAS, **OEI II** has entered into private agreements with **OEI I** and **OEI XIII** to facilitate the development of the **PROPERTY** (including the location of market-driven parking demands, as well as a central access point to the **PROPERTY** from Congress Street);

WHEREAS, in addition to providing off-site parking amenities, **OEI II** also seeks to modify certain requirements of the C-19 zone and its underlying R-5 zone, as made applicable to the **PROPERTY** by the **1997 AGREEMENT**, such that the C-19 zoning designation shall terminate, the underlying **PROPERTY** shall be rezoned from R-

5 to B-2, and modifications to the said B-2 zone shall be governed by this Conditional Rezoning Agreement; and

WHEREAS, the Portland Planning Board, pursuant to 30-A M.R.S.A. § 4352(8), and after notice and hearing and due deliberations, recommended the rezoning of the **PROPERTY**, subject to certain terms and conditions; and

WHEREAS, the **CITY**, by and through its City Council, has determined that the rezoning, with conditions and restrictions, would be pursuant to and consistent with the **CITY**'s Comprehensive Plan and would not unreasonably interfere with, and would be consistent with, the existing and permitted uses within the underlying B-2 zone; and

WHEREAS, **OEI II** has agreed to enter into this Agreement, with its concomitant terms and conditions, which shall hereinafter bind **OEI II**; and

NOW, THEREFORE, in consideration of the rezoning of the **PROPERTY**, **OEI II** contracts to be bound by the following terms and conditions:

1. The following exhibits are incorporated into and made a part of this Agreement:

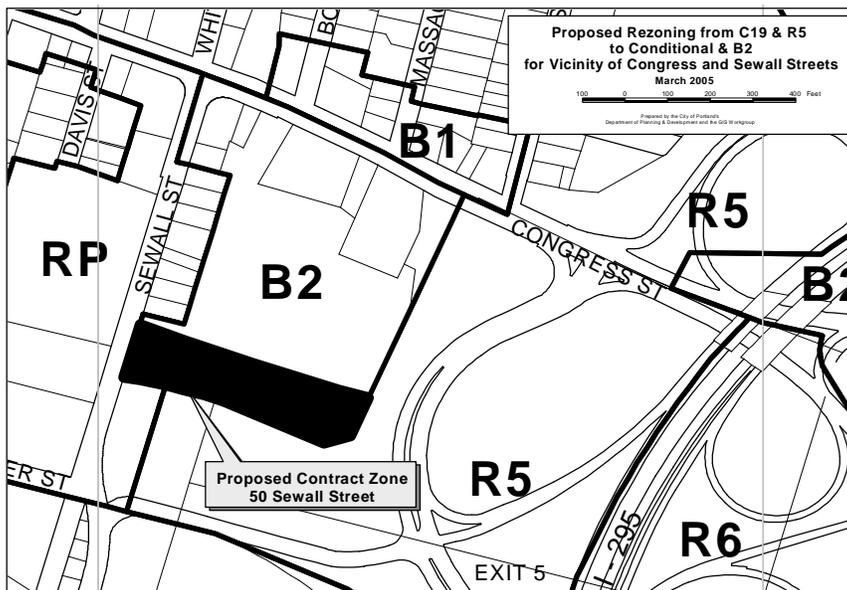
Attachment 1
Attachment 2

PROPERTY depiction
Site Plan (for the four properties comprising the Site, Chart __ Block __ Lot __ ; Chart __ Block __ Lot __ ; Chart __ Block __ Lot __ ; Chart __ Block __ Lot __)

The Site Plan consists of the Site Plan, prepared by DeLuca-Hoffman Associates, Inc., dated December 2004 "Sheet C-4"; the Grading and Drainage Plan, prepared by DeLuca-Hoffman Associates, Inc., dated November 2004 "Sheet c-5"; the Utility Plan, prepared by DeLuca-Hoffman Associates, Inc., dated November 2004 "Sheet C-6"; the Landscaping Plan, prepared by SMRT, dated 02-22-05 "LP101"; the Enlarged Landscape Plan and Details, prepared by SMRT, dated 02-22-05 "LP102"; the Parking Plan, prepared by SMRT, dated 02-22-05; the Landscaping Plan, prepared by SMRT, dated 02-22-05 "LP101"; the Zoning Identification Plan, prepared by SMRT, dated 02-22-05; and the Building

Elevations, prepared by PDT Architects, dated December 17, 2004, revised February 2, 2005 "Sheets A4.1-A4.3".

2. Effective on _____, 2005 (if passed as emergency) **OR** _____, 2005 (if effective thirty (30) days after the date of Portland City Council approval), the **CITY** amends the Zoning Map of the City of Portland, dated December 2000 (as amended from time to time and on file in the Department of Planning and Urban Development, and incorporated by reference into the Zoning Ordinance by § 14-49 of the Code) by adopting the text change and map shown below. **OEI II** shall record this Agreement at the Cumberland County Registry of Deeds within sixty (60) days of Council action. If this Agreement is not recorded by said date, then this Agreement and the conditional rezoning shall be null and void, and the zoning of the **PROPERTY** shall revert to the underlying Business-2 zone.



3. *Permitted Uses.* **OEI II** shall be authorized to establish and maintain the following uses on the **PROPERTY**:
- a. General, business, and professional offices, as defined in section 14-47.
 - b. Retail establishments.
 - c. Restaurants, except that restaurants shall close for all purposes including the service of alcohol no later than 11:00 p.m.
 - d. Health clubs.

- e. Accessory uses, including, but not limited to, parking facilities and structures, utility services, stormwater management systems, and site amenities.
4. *Zoning deviations.* The following zoning deviations from the underlying B-2 zone shall be permitted on the **PROPERTY**.
 - a. The building height for the **PROPERTY** shall not exceed sixty (60) feet, and no corollary increase in side yard setback shall be required.
 - b. Parking in the front yard between the street line and the building shall be permitted. The front yard setback may exceed the average depth of the front yards of the closest developed lots on either side of the **PROPERTY**. The project need not comply with the requirements of the **CITY's** Technical and Design Standards and Guidelines with respect to building placement and street orientation.
 5. The **PROPERTY** will be developed substantially in accordance with the Site Plan, including the building elevations and architectural renderings, all as shown on Attachment 2, provided that nothing herein is intended to substitute for the full site plan review and approval by the Portland Planning Board pursuant to the standards contained within the Portland Land Use Code and any other applicable regulations.
 6. The curb cut presently located at the northwesterly edge of Chart __ Block __ Map __ shall be closed as a condition of this Agreement and the area along Congress Street to a depth of at least ten (10) feet shall be bermed and landscaped in accordance with Attachment 2 (or as otherwise recommended by the City arborist during Site Plan Review) prior to the issuance of a Certificate of Occupancy for the **PROPERTY**.
 7. The berms along Congress Street and the State Connector Road on Chart __, Block A, Lot __, which berms shall be installed and landscaped to a depth of at least ten (10) feet (or as otherwise recommended by the City arborist during Site Plan Review) shall be required to be built prior to the issuance of a Certificate of Occupancy for the **PROPERTY**.
 8. The area identified as “potential future parking” in the northwesterly corner of the Site (and identified on Attachment 2 as “ ”) need not be built prior to the issuance of a Certificate of Occupancy for the **PROPERTY**.
 9. **OEI II** bears the responsibility for ensuring that **OEI I**, **OEI III**, and **OEI XIII** join in applying simultaneously for the site plan changes depicted on Attachment 2. **OEI II** represents that each of the aforementioned entities acknowledge that it is not possible to anticipate the future development or use of the Site or any individual

parcel comprising the Site. As a result, the Site Plan may need to be amended from time to time to give **OEI I**, **OEI II**, **OEI III**, or **OEI XIII** reasonable flexibility in the development and/or use of their respective lots. Therefore, the parties agree to work cooperatively with each other and to negotiate, in good faith, any amendments to the site plans governing the Site and, in particular, to acknowledge that the traffic access, parking, lighting, landscaping, and drainage are all in common and interdependent site plan features that must continue to be planned and engineered in a comprehensive manner. Further, **OEI II** agrees that as mortgage terms for **OEI I** and **OEI III** roll over, this provision shall be incorporated in such mortgages to the extent necessary to adhere to the terms of this provision. Such rollover dates are as follows: **OEI I**, June 30, 2008, and **OEI III**, April 30, 2010. **OEI XIII** shall be obligated hereunder upon its acquisition of the MDOT lot.

10. Should the properties designated as Chart __ Block __ Lot __ and Chart __ Block __ Lot __ (the "Dugas Property") be redeveloped in the future and subject to site plan approval from the **CITY**, then **OEI II** by virtue of this Agreement, shall be required to review with **CITY** Planning Staff whether modifications or amendments to the Site Plan are appropriate in order to better address the entrance servicing the **PROPERTY** from Congress Street and the traffic and pedestrian circulation within the **PROPERTY** and the Site. If the City Traffic Engineer determines that such modifications or amendments are reasonable, **OEI II** shall be required to undertake any such modifications on the Site if the owner of the Dugas Property is required to perform complementary work on the Dugas Property as part of the future site plan approval for the Dugas Property redevelopment, but **OEI II** shall not be required to spend more than \$50,000 on such modifications.
11. **OEI II** shall be required to obtain all applicable federal, state, and local permits for construction of the office building project.
12. The landscaping plan as shown on Attachment 2 shall be the least amount of landscaping required during site plan review and nothing herein precludes the Planning Board from requiring increased landscaping in accordance with the site plan standards of the Land Use Code.
13. **OEI II** shall secure a maintenance agreement giving **OEI II** the right to perpetually maintain the landscaped buffer at the entrance to the Site and such agreement shall be provided to the City at the time of Site Plan approval.
14. **OEI II** shall contribute \$~~360,000.00~~ toward public improvements in the area, for the purpose of pedestrian access from the site to the Hadlock Baseball Field. ~~installation of a sidewalk along Sewall Street and/or improvements on the southern side of Congress Street between Sewall Street and I-295.~~
15. All building signs shall receive the approval of the City of Portland.

16. In the event the development described herein is not commenced within two (2) years from the date of this conditional rezoning this Agreement shall become null and void and the Property shall revert to the underlying B-2 zone.

The above stated restrictions, provisions, and conditions are an essential part of the rezoning, shall run with the **PROPERTY**, shall bind and benefit **OEI II**, any of its successors and assigns, and any party in possession or occupancy of said **PROPERTY** or any part thereof, and shall inure to the benefit of and be enforceable by the **CITY**, by and through its duly authorized representatives. **OEI II** 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 **PROPERTY**.

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.

Except as expressly modified herein, the development, use, and occupancy of the subject premises 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.

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 **PROPERTY** 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, and in addition to any penalties authorized by law and imposed 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 Conditional Rezoning be modified or the **PROPERTY** rezoned.

WITNESS:

**OLYMPIA EQUITY INVESTORS II,
LLC, by its managing member Erin
Management Group II**

By _____
James H. Brady

STATE OF MAINE
CUMBERLAND, ss.

Date: _____, 2005

Personally appeared before me the above-named James H. Brady, in his said capacity, and acknowledged the foregoing instrument to be his free act and deed in his said capacity and the free act and deed of Olympia Equity Investors II, LLC.

Before me,

Notary Public/Attorney at Law