

Order 33-04/05

Given first reading: 8/2/04

Amended and Passed: 8/16/04 6-0 (Geraghty, O'Donnell, Cohen absent)

NATHAN H. SMITH (MAYOR)(3)  
WILLIAM R. GORHAM (1)  
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**CITY OF PORTLAND**  
IN THE CITY COUNCIL

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

**AMENDMENT TO CONDITIONAL ZONE AGREEMENT  
REFERENCED IN ORDER 42-84/85  
RE: CONTRACT FOR REZONING FOR PROPERTY  
IN THE VICINITY OF  
DIAMOND COVE/GREAT DIAMOND ISLAND**

**WHEREAS**, on July 15, 1985, the Portland City Council approved a Conditional Rezoning of property located on Great Diamond Island, formerly known as Fort McKinley (hereinafter sometimes referred to as the "Site");

**WHEREAS**, on May 18, 2004, the Diamond Cove Homeowner's Association filed an application to amend the Conditional Rezoning to allow electric golf carts to be operate exclusively within the Site;

**WHEREAS**, on July 20, 2004, the Portland Planning Board recommended the approval of the amendment to the Conditional Rezoning conditioned on some further limitations with regard to number of allowed golf carts and further provisions regarding enforcement; and

**WHEREAS**, the City Council hereby finds and declares that the said amendments to the Contract Rezoning would be pursuant to and consistent with the City's Comprehensive Plan;

**NOW THEREFORE, BE IT ORDAINED** by the City Council of the City of Portland, Maine, in the Council assembled, as follows:

Section 9 and Section 13 of the Contract Zone Agreement in Order 42-84/85 is hereby amended as follows:

Section 9: Restrictions on motor vehicles. Except for vehicles used primarily for construction, maintenance, service and the common transportation of goods and passengers and fire protection, public safety and emergency vehicles, no motor vehicles, as defined in 29-A M.R.S.A. Section 101(42), but including snowmobiles and all-terrain vehicles, shall be operated or stored, temporarily or otherwise, on the Premises; provided that nothing contained herein shall be deemed to restrict electrically powered golf carts, neighborhood electrical vehicles, electric personal assistive mobility devices (a/k/a human transporters), low-speed vehicles as currently defined in 29-A M.R.S.A. Section 101, or any similar vehicles.

Each unit is entitled to one vehicle (i.e. electrically powered golf cart, neighborhood electrical vehicle, electric personal assistive mobility device [a/k/a human transporter], low-speed vehicle as currently defined in 29-A M.R.S.A. Section 101, or any similar vehicle) but in any event, the total number of such vehicles on the Site shall not exceed eighty-two (82).

Within sixty (60) days of approval of this amendment by the Portland City Council, Diamond Cove Homeowners Association shall file a transportation management plan with the City's Planning Authority that includes but is not limited to a description of the process for allocating vehicle permits; a description of the means and methods of providing transportation for the disabled on the island; a restriction that confines permitted vehicles to established roadways that are presently within the Association property; a description of available common transportation service vehicles and how they will be managed for the needs of residents and visitors; and a description of how construction, supply-delivery and service vehicles from outside the island including barge ingress and egress routes to the island are managed.

This paragraph is otherwise governed by the terms and conditions contained within the attached document entitled "Conditions Restricting Use of Diamond Cove Motor Vehicles Outside of Diamond Cove" which document is incorporated by reference.

13. Breach. In the event DCHA or any successor should fail to utilize the **PROPERTY** in accordance with this Agreement, or in the event of DCHA's breach of any condition(s) set forth in this Agreement which differs from the provisions of Portland's Land Use Code which would otherwise be applicable to property situated in the IR-3 zone, the **CITY** may prosecute such violations in accordance with 30-A M.R.S.A. § 4452, M.R.Civ.P. 80K, or in any other manner available by law and seek the remedies authorized by that law.

In addition, if such enforcement action should result in a finding that DCHA has breached the Agreement, then either the Portland Planning Board, or at the request of the Planning Authority, or the City Council on its own initiative, may act either to modify the Agreement or to rezone the **PROPERTY**.

**PROPOSED CONDITIONS  
RESTRICTING USE OF DIAMOND COVE MOTOR VEHICLES  
OUTSIDE OF DIAMOND COVE  
IF PLANNING BOARD APPROVES PROPOSED AMENDMENT  
TO ALLOW GOLF CARTS IN IR-3 ZONE ON GREAT DIAMOND ISLAND**

1. No vehicle shall pass from Diamond Cove to the southerly part of Great Diamond Island, except as permitted herein. **DCHA** will take the following steps to enforce the existing restrictions on motor vehicle traffic entering or exiting the southerly boundary of the Diamond Cove property:
  - (a) **DCHA** will immediately close and lock the so-called “lower gate” at the Diamond Cove property line on West Shore Drive, to prohibit vehicular traffic from entering or exiting through this gate. **DCHA** will place a means to open this gate with first responders on the island, selected fire company officers, and the fire truck and ambulance to ensure that the gate can be opened quickly in an emergency. Said means will be subject to the approval of the Portland Fire Chief or his designee. **DCHA** will also provide the City’s Department of Public Works with a means to open this gate for the purpose of accessing any facility within the Diamond Cove property used by DPW pursuant to an agreement with **DCHA**.
  - (b) **DCHA** will secure the so-called “upper gate” on Diamond Avenue in the same manner as the lower gate. Only a pedestrian access gate shall remain permanently open.
  - (c) Only vehicles used primarily for construction, maintenance, service and the common transportation of goods and passengers, and fire protection, public safety and emergency vehicles, (hereinafter sometimes referred to as “Exempted Vehicles”) will be provided by **DCHA** with the means to open the lower gate and/or the upper gate and only these vehicles may pass to the southerly part of Great Diamond Island. **DCHA** will arrange to open the lower gate for these vehicles in order to use the barge landing on **DCHA** property from which these vehicles may pass to and from the southerly part of Great Diamond Island or remain within the Cove pursuant to Cove regulations.
  - (d) **DCHA** will institute a registration and approval process for Exempted Vehicles that are permitted to open the lower gate and/or the upper gate and exit the southerly boundary of the Diamond Cove property. Vehicles approved by **DCHA** must also be approved by the City Office of Code

Enforcement. If **DCHA** determines that an application meets the definition of Exempted Vehicles set forth in Section 1(c) above, then **DCHA** may provide the operator with a key and a prominent exemption decal provided by the City shall be placed on the vehicle. Any such operator will be required to sign a statement (a) agreeing that the key would be used only with the specified vehicle and only for the specified exempted purpose, and (b) acknowledging the right of **DCHA** and the City to impose fines and to revoke gate privileges for violations of the foregoing use restrictions. **DCHA** will identify any such approved operator/vehicle on a list of exemptions to be kept on file at the office of the Diamond Cove site manager (currently Dirigo Management Company, One City Center, 4<sup>th</sup> Floor, Portland, Maine), which list and any amendments thereto shall also be provided to the City's Office of Code Enforcement.

- (e) Notwithstanding any other state or local law, any non-exempted vehicle must be annually registered with the City and must display in a clearly visible manner a license plate provided by the City with a clearly visible number in the same manner and location required by State law for license plates on motor vehicles. **DCHA** shall provide the City with a list containing the names and addresses of the registered owner of each such vehicle and the license plate number of the vehicle within thirty (30) days of the date upon which the Council approves the amendment to allow golf carts in the IR-3 zone and within ten (10) days for any subsequently registered vehicles.
- (f) **DCHA** will levy fines for violations of the foregoing restrictions, consistent with the Diamond Cove Declaration, in cases when an operator of a motorized vehicle of any kind (including golf carts and electric personal assistive mobility devices, aka human transportors) is found to pass south of the southerly boundary of the Diamond Cove property for any purpose other than those set forth for Exempted Vehicles. In the event of apparent violations, the site manager will be directed to send a letter identifying the date and time in question to the holder of the key and notify the City. The holder of the key will have the opportunity to respond to explain the circumstances of the boundary crossing. Non-conforming crossing of the gate would result in a penalty, imposed by the **DCHA** Board on the holder of the key. Initially, penalties would be as follows: First offense – \$50 fine; second offense – \$100 fine; third offense – \$200 fine and revocation of crossing privileges. Nothing in this paragraph shall be construed or applied to prevent the City from bringing separate enforcement actions for violations.
- (g) Any other language in this contract zone agreement notwithstanding such violations may, in the City's discretion, be prosecuted as Land Use violations pursuant to 30-A M.R.S.A. § 4452 and Rule 80K of the Maine

Rules of Civil Procedure. In all cases the registered owner of a non-exempted vehicle shall be liable for any violations and sanctions unless the registered owner provides clear and convincing evidence showing that the use at the time of the violation was unauthorized by him or her.

- (h) **DCHA** will immediately provide notice to all of its members of the foregoing policies and procedures.
2. Nothing contained herein shall be deemed to grant any third party rights. Without limiting the generality of the foregoing, nothing contained herein shall be deemed to entitle any third party with the means of opening either the upper gate or the lower gate without **DCHA** approval.