

Order 58 -05/06
Given first reading on 9/7/05
Amended & Emergency Passage
9/19/05 7-0 (Carr, Geraghty absent)

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)

**CITY OF PORTLAND
IN THE CITY COUNCIL**

**ORDER AUTHORIZING AMENDMENT OF CITY CODE
RE: CONDITIONAL REZONING AT 38 INDIA STREET**

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 the conditional rezoning as detailed below.

**CONDITIONAL ZONE AGREEMENT
PME I, LIMITED PARTNERSHIP**

This Agreement made this _____ day of _____ 2005 by **PME I, LIMITED PARTNERSHIP**, a Delaware limited partnership with an office in South Portland, Maine (hereinafter "PME").

WITNESSETH:

WHEREAS, **PME** wishes to develop the property commonly referred to 38 India Street, Portland, Maine, consisting of parcels shown on City of Portland Tax Map 29, Block L, Lots 001, 002 and 003 (the "**PROPERTY**"); and

WHEREAS, the **PROPERTY** consists of approximately 1.75 acres, being the site of the former Jordan's Meat plant and is bounded by India Street, Middle Street, Franklin Arterial and Fore Street, occupying nearly an entire City block; and

WHEREAS, the **PROPERTY** is uniquely located in downtown Portland, close to the waterfront, in an area that has received extensive investigation in which mixed-use projects such as the Project (as defined below) are encouraged; and

WHEREAS, the topography of the **PROPERTY** is such that it is almost rectangular, with a narrow "waist", and a significant slope of approximately thirteen (13)

feet, with the higher land being on Middle Street and the lower land fronting on Fore Street; and

WHEREAS, PME proposes to construct a mixed-use project on the **PROPERTY** consisting of a hotel, residential condominium units, restaurants, bars and retail/commercial space, as well as an underground parking garage (the “**PROJECT**”); and

WHEREAS, PME has requested the rezoning of the **PROPERTY** to permit the (i) establishment of an off-street, courtyard entrance way for the proposed hotel and condominium residences; (ii) increase of the building setback at the intersection of Fore Street and Franklin Arterial and at the intersection of Fore Street and India Street to facilitate welcoming entrances to building located on the **PROPERTY**; (iii) decrease in the height requirement for a portion of the building fronting on Fore Street; and (iv) increase in the height allowance to permit additional retail space on the ground level of the Project and mid-block pedestrian access through the semi-public hotel lobby between Middle and Fore Streets, thereby maintaining view corridors and creating attractive variations in roof heights; and

WHEREAS, in connection with the **PROJECT**, PME is proposing certain off-site improvements that include, but are not limited to, (i) striping improvements on Franklin Arterial to enhance the safety of drivers making left hand turns onto Middle Street; (ii) relocation of an existing sewer line that will further the **CITY**’s (as defined below) goal of separating the storm and sanitary sewers; (iii) creating a pedestrian streetscape corridor along Fore Street that does not exist today; (iv) extensive streetscape plantings; and (v) a monetary contribution to the City of Portland (the “**CITY**”) for other off site improvements necessitated by the **PROJECT**; and

WHEREAS, the Portland Planning Board , pursuant to 30-A M.R.S.A. § 4352(8) and Portland City Land Use Code (the “Code”) §§ 14-60 to 14-62, after notice and hearing and due deliberation thereon, recommended the rezoning of the **PROPERTY** as aforesaid, subject, however, to certain conditions; and

WHEREAS, the **CITY**, by and through its City Council, has determined that because of:

- the potential of the **PROJECT** to vitalize commercial activity in the Downtown area,
- the additional commercial/retail space to be included on the ground level of the **PROJECT**,
- the **PROJECT**’s use of space above the ground level commercial/retail space for residential uses,
- the potential of the **PROJECT** to reconnect the **CITY**’s Downtown area on each side of the Franklin Arterial,
- the underground parking garage sufficient to handle all of the **PROJECT**’s parking requirements,

- the **PROJECT**'s compatibility with the **CITY**'s planned development of the Downtown waterfront area, including the Ocean Gateway project,
- the unique location and topography of the **PROPERTY**, and
- the quality of the design and uses of the **PROJECT**

it is necessary and appropriate to have imposed the following conditions and restrictions in order to ensure that the rezoning is consistent with the **CITY**'s Comprehensive Plan; and

WHEREAS, **PME** has agreed to enter into this contract, with its concomitant terms and conditions, which shall hereinafter bind **PME**, its successors and assigns;

WHEREAS, on September 19, 2005, the **CITY** authorized an amendment to its Zoning Map based upon the terms and conditions contained within this Agreement, which terms and conditions become part of the zoning requirements for the **PROPERTY**;

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

1. The **CITY** shall amend 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 Portland City Code §14-49, by adopting the map change amendment below.



2. The site plan, verticals, grading, parking schematic and floor plan schematic (collectively, the “Plans”) are attached as Exhibit 1 and are incorporated into this Agreement.

3. The **PROPERTY** shall be governed by the zoning provisions, as such may be amended from time to time, applicable in the underlying B-3 Zone, except as follows:

(a) Permitted uses. The **PROJECT** proposes, and is authorized to accommodate up to nineteen “hotelominiums,” for purposes of this Agreement defined as privately owned residential condominium units which may, on occasion be rented to the public through private contractual arrangement with the owners of the adjacent hotel, i.e. the Westin or its successor in interest. The “hotelominiums” shall be taxed by the **CITY** as private residential units. Any portion of the **PROJECT** that does not become a “hotelominium” shall be a part of the hotel and shall be taxed in accordance with such use.

(b) Street Wall Build To Line. The dimensional zoning requirements of Section 14-220(c) of the Zoning Ordinance are hereby modified to allow **PME** to

(1) construct a courtyard entranceway (the “Entrance”) for the proposed hotel and condominium residences off of Middle

Street, provided that the Entrance shall not be further back from Middle Street than as shown on the attached Plans, but may become narrower, wider or relocated no more than five (5) feet as may be approved by the Planning Board in its discretion; and

(2) create other entrances to the building as shown on the Plans, provided, however, that the location and/or dimensions of entrances to the building may be further modified as may be approved by the Planning Board in its discretion.

(c) Height Limits.

(1) The minimum structure height (measured according to the definition of “building, height of” in Section 14-47 but not less than 25.72 feet as shown on the Plan) shall be fifteen (15) feet for a portion of the building’s frontage on Fore Street and seventeen (17) feet for a portion of the building frontage on India Street as shown on the Plan.

(2) The maximum structure height (as measured according to the definition of “building, height of” in Section 14-47 but not less than 25.72 feet as shown on the Plan) shall be as follows:

(i) ninety-eight (98) feet for the westerly wing of the building with frontage on Franklin Arterial and Fore Street as shown on the Plan;

(ii) seventy-eight (78) feet for the easterly wing of the building with frontage on Middle Street as shown on the Plan; and

(iii) eighty-eight (88) feet for the easterly wing of the building with frontage on India Street as shown on the Plan.

(d) Parking Requirements: A minimum of three hundred and twenty four (324) on site parking spaces shall be provided to service the needs of the **PROJECT** and the total number of parking spaces required to service the project (including any off-site parking requirements) shall be determined by the Planning Board during site plan and subdivision review.

4. The **PROPERTY** will be developed and operated substantially in accordance with the Plans upon site plan and subdivision approval by Portland Planning Board in compliance with the requirements of Chapter 14 of the **CITY**’s Land Use Ordinance, provided that the uses between residential and hotel room portions of the building (and specifically excluding any retail spaces shown on the Plan) may change without requiring a modification to this Agreement by the City Council.

5. **PME** shall develop the Project to accommodate the **CITY**'s requests as follows:

a. Community Contribution: The community contribution by the **PROJECT** shall be as follows:

1. **PME** shall donate \$ **400,000.00** (broken down as follows: **\$175,000.00** towards public improvements including but not limited to sidewalk improvements within ¼ mile of the site; **\$150,000.00** toward traffic improvements on the peninsula as defined more particularly in the Peninsula Traffic Plan; and **\$75,000.00** to finance activities in the vicinity of the project that support public art and the creative economy as proposed by the Public Arts Committee and approved by the Council) to the **CITY** to address off site impacts of the **PROJECT** determined by the **CITY** in its sole discretion, except that to the extent that the developer is required to implement specific traffic improvements identified in the Peninsula Traffic Plan during the site plan/subdivision/traffic movement permitting process, the **\$200,000.00** for traffic, identified herein, shall be credited toward the cost of such improvements. All such monetary contributions shall be made prior to the issuance of a building permit for the **PROJECT**.

2. the **PROJECT** shall include commercial/retail space on the ground level along India Street and Middle Street; and

3. the **PROJECT** shall provide mid-block pedestrian access through the building by creating an entrance on each of Middle Street and Fore Street.

6. Any change in the fee ownership of the **PROPERTY** shall be brought to the Planning Board for its review and approval, but this requirement shall not apply to (a) the conveyance of the fee interest in the **PROPERTY** from Zemco Industries, Inc. to **PME**; (b) the granting of mortgages by **PME** or any successor in interest, or to the enforcement by mortgagees of their rights under such mortgages, or to the assignment or conveyance of the ownership to an entity in which **PME** and/or any of its general or limited partners holds at least a 20% interest; (c) the conveyance of any condominium units or to the granting of any mortgages upon individual condominium units; or (d) to the leasing or subleasing of any space within the building or on the **PROPERTY**. The restrictions on transfer contained in this paragraph 6 shall expire upon the completion of the **PROJECT** as evidenced by the issuance of certificates of occupancy from the **CITY** for all portions of the **PROJECT**.

7. The above stated restrictions, provisions and conditions are an essential part of the rezoning, shall run with the **PROPERTY**, shall bind and benefit **PME**, its successors and assigns, and any party in possession or occupancy of said **PROPERTY** or

any part thereof, and shall inure to the benefit and be enforceable by the **CITY**, by and through its duly authorized representatives.

8. 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 portions shall be deemed as a separate, distinct and independent provision and such determinations shall not affect the validity of the remaining portions thereof.

9. Except as expressly modified herein, the development, use, and occupancy of the **PROPERTY** 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.

10. In the event of **PME's** breach of any condition(s) set forth in this Agreement which differs from the provisions of Portland Land Use Code that would otherwise be applicable to **PROPERTY** situated in the B-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. In addition, if such an enforcement action should result in a finding that **PME** has breached the Agreement, then 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.

11. **PME** shall file a counterpart original of this Agreement in the Cumberland County Registry of Deeds within sixty (60) days of City Council approval.

WITNESS:

PME I, LIMITED PARTNERSHIP
By PMEGP, LLC, its General Partner

By: _____

Name:

Title:

STATE OF _____

COUNTY OF _____ ss _____, 2005

Then personally appeared before me the above-named _____,
_____ of PMEGP, LLC, a _____, General Partner of PME I, Limited Partnership, a Delaware limited partnership, and acknowledged the forgoing instrument to be his free act in deed in said capacity and the free act and deed of PMEGP, LLC, general partner of PME I, Limited Partnership.

Notary/Attorney at Law

Print name: _____

My commission expires: _____