

Order 4 – 06/07

Passage: 7/17/06 8-0 (Duson absent)

JAMES I. COHEN (MAYOR)(5)

WILLIAM R. GORHAM (1)

KAREN A. GERAGHTY (2)

DONNA J. CARR (3)

CHERYL A. LEEMAN (4)

CITY OF PORTLAND

IN THE CITY COUNCIL

JAMES F. CLOUTIER (A/L)

JILL C. DUSON (A/L)

NICHOLAS M. MAVODONES (A/L)

EDWARD J. SUSLOVIC (A/L)

ORDER AUTHORIZING PUMP STATION COST SHARING AGREEMENT WITH STATE OF MAINE AND BRICK HILL SUBDIVISION SUBLESSEES RE: AIRPORT PROPERTY

ORDERED, that the City Manager is authorized to execute a cost sharing agreement for the state owned pump station, substantially as provided in Attachment 5.

EASEMENT AND COST SHARING AGREEMENT

THIS AGREEMENT, dated as of the ___ day of July, 2006, among the STATE OF MAINE, acting through its Department of Administrative and Financial Services, with a place of business in Augusta, Maine, and mailing address of 77 State House Station, Augusta, Maine 04333 (the "State"), THE CITY OF PORTLAND, a Maine body corporate and politic with a place of business and mailing address of 389 Congress Street, Portland, Maine 04101 (the "City"), CASTLEBROOK, LLC, a Maine limited liability company with a place of business and mailing address in care of Berman Associates, One India Street, Portland, Maine 04101 ("Castlebrook"); YOUTH ALTERNATIVES, INC., a Maine nonprofit corporation with a place of business in Portland, Maine and mailing address of P.O. Box 596, Portland, Maine 04112 ("YA") and BRICKHILL OFFICE LLC, a Maine limited liability company with a place of business and mailing address in care of Berman Associates, One India Street, Portland, Maine 04101 ("Brickhill Office;" Castlebrook, YA and Brickhill Office are referred to collectively as the "Sublessees")

WITNESSETH:

WHEREAS, the City owns a certain lot or parcel of land in South Portland, Cumberland County, Maine, more particularly described in a deed from the State dated December 20, 2001 and recorded in Book 17126, Page 328 of the Cumberland County Registry of Deeds (the "Property") on which there is located certain infrastructure owned by the State consisting of a waste water disposal system, including the pump station, gravity sewers, force mains, and electrical feeds and related equipment, and a right of way accessing same; and, for purposes of this Agreement, the infrastructure shall also include backup electric generation, but shall exclude the private sewer lines of each party entering the system (collectively the "System"); and

WHEREAS, in the deed to the City referred to above, the State reserved unto itself, its successors and assigns, for the benefit of its adjacent parcels, a right of way and easement across the Property for the purpose of ingress and egress, by foot or vehicle, for access to and maintenance, repair and upkeep of the System; and

WHEREAS, pursuant to a Ground Lease dated February 13, 2004 with the State, a memorandum of which is recorded in said Registry of Deeds in Book 20891, Page 331 (the "Ground Lease"), Long Creek Redevelopment LLC, a Maine limited liability company ("Long Creek") has developed an approximately 56 acre parcel of land, now known as (and referred to in this Agreement as) the "Brickhill Subdivision," as shown on a plan recorded in Plan Book 205, Page 62 (as such plan may be amended, modified, superseded or replaced from time to time, the "Plan"); and

WHEREAS, Long Creek and Castlebrook, with the State's consent, entered into a Sublease with respect to Lot 3, a memorandum of which is recorded in said Registry of Deeds in Book 22721, Page 200; Long Creek and YA, with the State's consent, entered into a Sublease with respect to Lot 5, a memorandum of which is recorded in said Registry of Deeds in Book

23586, Page 41; and Long Creek and Brickhill Office have entered into a sublease with respect to Lot 4 which is before the State for the State's consent (such subleases, as they may be amended, modified, superseded or replaced from time to time, are referred to collectively in this Agreement as the "Subleases"); and

WHEREAS, the Ground Lease and the Subleases include a grant to Long Creek and its sublessees of all rights and easements appurtenant to the Brickhill Subdivision; and Long Creek and the Sublessees are "successors and assigns" within the meaning of the reservation language in the deed to the City of the Property; and

WHEREAS, by separate instrument of even date, to be recorded herewith in the Cumberland County Registry of Deeds, the State has granted to the City a sanitary sewer line easement for the purpose of connecting to and using the System; and

WHEREAS, the parties hereto wish to confirm the grant of rights and easements in and to the System and set forth their agreement regarding the sharing of costs for the regular inspection, maintenance, repair and upkeep of the System.

NOW THEREFORE, in consideration of the covenants contained herein, and for good and valuable consideration, the receipt whereof is hereby acknowledged, the parties hereto agree as follows:

1. Confirmation of Easements. The parties hereby acknowledge and confirm the granting to the City and to the Sublessees (as successors and assigns of the State) of the right of way and easement to the use of the System and the sewer lines leading into and out of the System, subject to the terms and provisions of this Agreement. As to the City, the easement granted herein shall be perpetual, as described by separate instrument of even date and recorded in the Cumberland County Registry of Deeds. As to the Sublessees, the easement granted herein shall terminate upon the termination of the Ground Lease.

2. Certain Duties of the City. The City shall install a new manhole for the System in approximately the location shown on the sketch attached hereto as Exhibit A, for the purpose of controlling the infiltration of stormwater into the System. The City shall initially bear the cost of installing the new manhole, and the State shall credit the City up to \$6,000 toward its share of costs for maintenance, repair, upgrade, improvement or replacement of the System as set forth in Section 4 below. The State shall have the right to approve the design of such manhole for the purpose of assuring itself that stormwater infiltration into the System shall be substantially reduced. The City shall provide the State and the Sublessees with a reasonable accounting of the total cost of installing the new manhole upon completion of such installation.

3. Responsibility of the State. The State shall keep the System in good working order and repair at all times, and shall not suffer any interruption of service of the System at any time; provided, however, the State shall have no liability for interruption of service.

a. The State shall perform all necessary maintenance, repair, upgrade, improvement or replacement of the System and its individual components, and shall conduct such periodic inspections of the System as may be reasonable and prudent in order to avoid unnecessary

maintenance or repair costs. In the event the State fails to maintain the System properly and such failure leads to an interruption of service which the State does not promptly repair, then upon two business days prior written notice, the City and/or the Sublessees shall have the right to perform such work as may be necessary to restore service to the System, and the party performing the work shall be entitled to bill, and be reimbursed by, the other parties for their pro-rata share of the costs incurred by the repairing party in restoring service to the System.

b. The State shall prevent the filing of liens on the Property and on the Brickhill Subdivision arising from the State's failure to pay any contractor or material supplier servicing the System, and if any lien is filed, the State shall promptly bond off or cause such lien to be discharged. The State shall keep reasonably accurate records of all expenditures in connection with the maintenance, repair, upgrade, improvement or replacement of the System, and the other parties hereto may inspect and copy such records at their own expense from time to time.

c. The System is currently a private system. The State reserves the right to dedicate the System to any municipality or utility if the State in its sole discretion determines that a public system would be in the best interests of the State; provided however, that if the State incurs any costs associated with such dedication as a result of upgrades required by the municipality or utility, the State shall not assess a prorata share of such costs on the City or the Sublessees without their consent, which consent shall not be unreasonably withheld. This agreement shall terminate within 60 days of acceptance as a public system, except to the extent otherwise agreed by each of the parties hereto; provided, however, that all obligations incurred prior to such acceptance shall survive termination.

4. Sharing of Costs. The City has provided to the other parties a report, attached hereto as Exhibit B, projecting the sewage flows of each of the parties hereto. Based on such report, and except as provided in Section 3 above, all costs associated with the maintenance, repair, upgrade, improvement or replacement of the System shall initially be shared by the parties in the following percentages:

State:	50.0%
Castlebrook:	17.8%
YA:	6.1%
Brickhill Office:	18.8%
City:	7.3%

The sharing formula set forth above shall be recalculated at the time a Certificate of Occupancy is issued (i) with respect to the City's development on the Property and (ii) with respect to the development on Lot 4 of the Brickhill Subdivision. Each change to the sharing formula shall be documented in an amendment to this Agreement to be executed by the parties and recorded at the Cumberland County Registry of Deeds. The parties agree to recalculate the formula based upon actual sewage flows, determined using the parties' respective water bills from Portland Water District, whenever such flows for any party over a six (6) month period deviates from the formula then in effect by 10 %, plus or minus, and the parties may recalculate the formula at such other times as the parties may agree. The cost of such recalculation shall be shared equally by the parties. All parties agree to provide their water bills to the other parties for purposes of determining the sharing formula and to authorize each party to obtain water billing information

from Portland Water District. Actual water use shall be separately metered by each party and the cost thereof shall be the responsibility of each party.

The State shall invoice the City and the Sublessees for their respective share of costs under this Agreement on a quarterly basis, with a credit to the City of its share based upon the manhole costs as provided in Section 2 above. Payment is due within thirty (30) days of invoicing. The State may collect interest on any invoice unpaid for longer than thirty days, at an annual rate equal to eighteen percent (18%).

5. No Interference with Long Creek Youth Development Center. In no event shall the City's or the Sublessees' usage of the System interrupt, impede, harm or interfere with the operation of the System or the use of the System by the Long Creek Youth Development Center.

6. Certain Activities Requiring Approval. The State shall not (i) enlarge the capacity of the System, (ii) incur an expense relating to the system in excess of \$2,500 in any one instance (except in the case of an emergency in which case the State shall provide notice and reasonable documentation of such expense, including the nature of the emergency, as soon as reasonably practicable) or (iii) allow other parties to connect to the System without following the procedures set forth in this Section. The amount provided in (ii) shall be adjusted at the beginning of every 6th year of this Agreement to reflect the rate of inflation for the prior 5 years, based upon the CPI-U, Northeast Urban, Size B/C or comparable successor index.

In the event the State intends to enlarge the System, incur an expense in excess of \$2,500 (or applicable adjusted amount) or add users to the System, it shall provide prior written notice of such intention to the City and the Sublessees, together with reasonable supporting documentation. The proposed action shall be submitted to a vote of the parties and it shall require the affirmative written vote of at least 67% by usage amount for the proposal to be approved, in which case it shall be binding on all parties hereto. The City and/or the Sublessees may propose an enlargement of the System, an expenditure in excess of \$2,500 (or applicable adjusted amount) or the addition of another user or users, but in such instance the approval of the State shall be required. All decisions made under this Section 6 shall be reduced to writing and a copy provided to all parties.

7. Miscellaneous. Time is of the essence. This Agreement shall be binding on and shall inure to the benefit of the parties hereto and their respective successors and assigns. This Agreement is intended to be a covenant that shall run with the land (except in the case of the Sublessees, as to which this Agreement shall be in effect only during the term of the Subleases). This Agreement shall not be amended except by written, recorded instrument executed by all parties hereto. All notices hereunder shall be in writing and delivered to the recipient by hand delivery or by reputable overnight carrier or certified U.S. mail, postage prepaid, addressed to the recipient at the address set forth at the beginning of this Agreement. Any party may change addresses for notice purposes by giving written notice of the new address in the manner provided herein. If a court of competent jurisdiction shall hold invalid or unenforceable any part or provision of this Agreement, such holding shall not impair, invalidate or otherwise affect the remaining provisions of this Agreement, all of which shall continue in full force and effect. This Agreement constitutes the entire agreement among the parties and there are no other agreements

or understandings except as set forth herein. This Agreement may be executed in counterpart originals, each of which shall constitute one and the same agreement.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives as of the day and year first written above.

WITNESS

STATE OF MAINE

By: Its Department of Administrative and
Financial Services

By: _____
Rebecca M. Wyke, its
Commissioner

CITY OF PORTLAND

By: _____
Joseph E. Gray, Jr., its City
Manager

CASTLEBROOK, LLC

By: _____
Richard Berman, its Manager

BRICKHILL OFFICE LLC

By: _____
Richard Berman, its Member

YOUTH ALTERNATIVES, INC.

By: _____
Michael J. Tarpinian, its President

STATE OF MAINE
CUMBERLAND, ss.

July ____, 2006

Personally appeared before me the above named Rebecca M. Wyke, as Commissioner of Department of Administrative and Financial Services, State of Maine, and not individually, who acknowledged the foregoing instrument to be her free act and deed in her said capacity as Commissioner and the free act and deed of said State of Maine.

Before me,

Notary Public/ Attorney-at-Law
Print Name:

STATE OF MAINE
CUMBERLAND, ss.

July ____, 2006

Personally appeared before me the above named Joseph E. Gray, Jr., City Manager of the City of Portland as aforesaid, who 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
Print Name:

STATE OF MAINE
CUMBERLAND, ss.

July ____, 2006

Personally appeared before me the above named Michael J. Tarpinian, President of Youth Alternatives, Inc., as aforesaid, who acknowledged the foregoing instrument to be his free act and deed in his said capacities and the free act and deed of said nonprofit corporation.

Before me,

Notary Public/ Attorney-at-Law
Print Name:

STATE OF MAINE
CUMBERLAND, ss.

July ____, 2006

Personally appeared before me the above named Richard Berman, Member of Brickhill Office LLC and Manager of Castlebrook, LLC, as aforesaid, who acknowledged the foregoing instrument to be his free act and deed in his said capacities and the free act and deed of said limited liability companies.

Before me,

Notary Public/ Attorney-at-Law
Print Name:

EXHIBIT A

Sketch of Manhole to be Installed by City

