

Order 282-10/11

Given first reading 6/20/11

Public Hearing, Amended and Passage 7/18/11 (8-0) (Leeman absent)

NICHOLAS M. MAVODONES (MAYOR)  
KEVIN J. DONOGHUE (1)  
DAVID A. MARSHALL (2)  
EDWARD J. SUSLOVIC (3)  
CHERYL A. LEEMAN (4)

**CITY OF PORTLAND**  
IN THE CITY COUNCIL

JOHN R. COYNE (S)  
JOHN M. ANTON (A/L)  
DORY RICHARDS WAXMAN (A/L)  
JILL C. DUSON (A/L)

**AMENDMENT TO CITY CODE**  
**SEC. 14-49 (ZONING TEXT AND MAP AMENDMENT)**  
**RE: Second Amendment to Conditional Zoning Agreement**  
**The Village At Ocean Gate (aka Bayhouse)**

**ORDERED**, that the zoning map and text 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.

**SECOND AMENDED CONDITIONAL ZONE AGREEMENT**

This amendment and agreement is made as of the \_\_ day of \_\_\_\_\_ 2011, by **THE VILLAGE AT OCEAN GATE, LLC**, a Maine Limited Liability Corporation having a principal place of business at Boston, Massachusetts (hereinafter **“DEVELOPER”**).

**WHEREAS, DEVELOPER, as owner of land located at 112-113 Newbury Street, Portland, Maine, consisting of the property shown on the Portland Assessor’s Map as parcels 20-E-9 and a part of parcel 20-E-21 and described in a deed dated November 15, 2007 and recorded in the Cumberland County Registry of Deeds at Book 25625, Page 275, and in a deed from Pearl Properties, LLC dated April 2, 2010 and recorded in the Cumberland County Registry of Deeds at Book 27688 Page 258(hereinafter the “SITE”);**  
and

**WHEREAS, this Second Amendment is intended to supersede the Conditional Zoning Agreement for the Site as amended by the First Amendment signed June 18<sup>th</sup>, 2008 and recorded in the Cumberland County Registry of Deeds at Book 26146, Page 291, and also removes the area covered by Phase II referenced in the First Amendment; and**

**WHEREAS, the SITE is currently in the B-2b zoning district and is adjacent to a B-5b district to the southeast; and**

**WHEREAS, Developer has filed a Zone Change Application with the City of Portland (hereinafter “CITY”) to rezone the SITE to the B-5b zoning district subject to certain modifications and conditions set forth in this Agreement in order to accommodate a mixed-use development consisting of up to 110 residential units; space for a 150- to 200-**

**Deleted:** as assignee of the rights of the purchaser under a purchase and sale agreement with the Village Café, Inc., has the right to purchase the property located at 112113 Newbury Street and 40 Hancock Street, Portland, Maine, consisting of the property shown on the Portland Assessor’s Map as parcels 20-E-9, 20-D-13-15 and 20-D-32 and described in the Cumberland County Registry of Deeds at Book 17317, Page 167, Book 3161, Page 504, Book 4357, Page 291, Book 3217, Page 83, Book 3004, Page 226, Book 3091, Page 703, Book 3752, Page 140, Book 3112, Page 131, Book 3024, Page 132, Book 3291, Page 260, Book 2996, Pages 235 and 237, Book 4357, Page 289, Book 4094, Page 222 and Book 9520, Page 73

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seat restaurant; and sidewalk-level commercial space in a complex of buildings of varying sizes and heights (hereinafter the “project”); and

**WHEREAS**, the Portland Planning Board has determined that the rezoning would provide needed housing, would create a vibrant new neighborhood and would assist in revitalizing adjacent areas; and

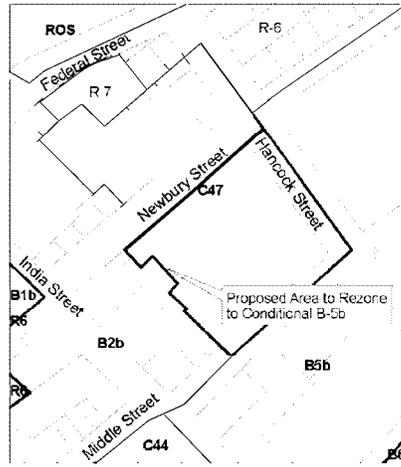
**WHEREAS**, the Portland Planning Board, pursuant to 30-A M.R.S.A. § 4352(8), and after notice and hearing and due deliberation, recommended rezoning the **SITE**; and

**WHEREAS**, the **CITY**, by and through its City Council, has determined that the rezoning is appropriate due to the unusual nature and unique location of the development proposed, that the uses proposed are consistent with the existing and permitted uses within the B-5b zone and that the rezoning would be pursuant to and consistent with the **CITY**’s Comprehensive Plan; and

**WHEREAS**, **DEVELOPER** has agreed to enter into this Agreement and the Amendment thereto, with its concomitant terms and conditions, which shall hereinafter bind **DEVELOPER**, its successors and assigns;

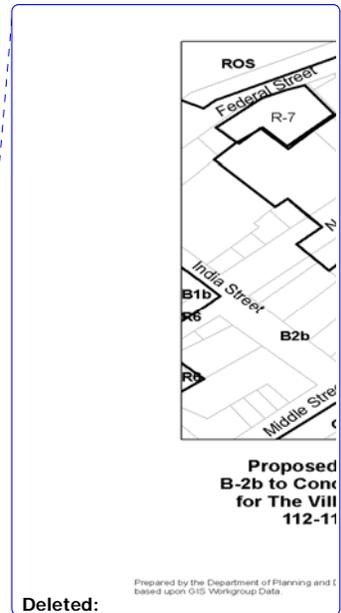
**NOW, THEREFORE**, in consideration of the rezoning of the **SITE**, **DEVELOPER** agrees to be bound by the following terms and conditions:

1. Map. The **CITY** shall and does hereby amend the Zoning Map of the City of Portland, dated December 2000, as amended and on file in the Department of Planning and Development, and incorporated by reference into the Zoning Ordinance by §14-49 of the Portland City Code, by adopting the following map change. The underlying zone is changed from B-2b to B-5b.



Proposed Area to Rezone from B-2b to Conditional Rezoning to B-5b for The Village at OceanGate, LLC 112-113 Newbury Street April 2008. July 2011

Prepared by the Department of Planning and Development based upon GIS Workgroup Data



Proposed B-2b to Conditional B-5b for The Village at OceanGate, LLC 112-113 Newbury Street

Prepared by the Department of Planning and Development based upon GIS Workgroup Data

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2. Subdivision and Overall Site Plan. Except as otherwise provided in this paragraph 2, the **SITE** will be developed substantially in accordance with the Subdivision and Overall Site Plan, Attachment 1 submitted by Sebago Technics, Inc., dated August 3, 2005 as revised April 22, 2008 and September, 2009, and with the lot line adjustment approved by the Portland Planning Board on May 24, 2011. The project shall consist of two buildings along Middle, Hancock and Newbury Streets. The final building elevations shall be or have been approved by the Planning Board during the required subdivision and site plan amendment process. The previously approved building elevations for the SITE, submitted by David M. White, Architect, dated June 26, 2007 as revised and modified September, 2009, Attachment 2 (collectively, “the Plans for the SITE”), may be modified or altered by the Planning Board in accordance with the Design Standards for the Eastern Waterfront in connection with the site plan and subdivision amendments.

The Planning Board shall review or shall have reviewed the SITE proposal, and apply the site plan and subdivision standards of the Portland Land Use Code and the applicable standards of the Eastern Waterfront Design Standards to each.

After the initial approval of the Plans, the Planning Board may, upon application of **DEVELOPER** and without the necessity of amending this Conditional Rezoning Agreement, approve subsequent changes to the Plans, which decrease building dimensions or reduce the density of development, provided that any such

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Deleted: Phase II of the project, consisting of one or more buildings along Newbury and Hancock Streets shall meet the following requirements:  
 <#>a maximum of sixty six (66) residential units shall be provided; and  
 <#>a minimum setback of twenty five (25) feet from the most westerly rear property line (abutting CBL 20-D-11) shall be provided and as illustrated below ; and ¶ ... [1]

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decrease or reduction shall nonetheless be determined to substantially conform to the Plans.

The project shall incorporate light fixtures in “Downtown Black,” specifications to be provided by the Planning Authority during subdivision review. In addition, all other streetscape improvements will be consistent with the Hancock Street Extension Plans, which improvements are currently represented on the Plans.

2. Permitted uses: Those uses allowed in the B-5b zoning district. The project shall include not less than 5,700 square feet of commercial/retail space on the ground level along Middle Street and at the corner of Hancock and Middle Streets as depicted on the Plans unless during site plan review the Planning Board approves a minimum amount of 5,200 square feet of commercial/retail space.

3. The SITE shall consist of, at minimum Buildings 1 and 2,

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4. Modifications to B-5b Regulations. The **SITE** shall be governed by the regulations applicable to the B-5b zoning district, except as follows:

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a. The maximum residential density on the **SITE** shall be 110 dwelling units.

b. The maximum front yard setback shall be ten (10) feet, except that a front yard setback of no greater than sixteen (16) feet shall be allowed for the parking garage entrance and associated façade as depicted on the Plans for the SITE.

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c. The maximum height for the structures shall be:

Buildings 1 and 2: The maximum height of each building shall not exceed 74 feet from average grade, as measured and approved by the Zoning Administrator.

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d. The cornices of buildings, and storefront awnings along Middle and Hancock Streets, will extend over the street rights of way in various locations as shown on the Plans. The CITY hereby grants license for such overhangs and authorizes the City Manager to execute said license in such form and with such terms and conditions as he deems appropriate.

Deleted: Building(s) in Phase II: The maximum height in Phase II shall not exceed sixty-five (65) feet measured from the existing Newbury Street grade. ¶

e. An underground electrical vault will be installed within the right of way of Newbury Street, the final location of such vault to be approved by the Planning Authority. The **CITY** hereby grants license for such installation and authorizes the City Manager to execute said license in such form and with such terms and conditions as he deems appropriate.

5. Community Contribution. The community contribution under this Agreement shall be \$200,000.00, to be dedicated to extending Hancock Street between Middle Street and the Commercial Street extension or to reimburse the City for expenses it incurs in such extension; \$5,000.00 dedicated to the India/Middle

Street traffic improvements to be commissioned by the City; and \$5,000.00 to be dedicated to the Eastern Waterfront Post-Development Traffic Impact Study to be commissioned by the City. The community contribution under this Agreement is independent of any conditions which the Planning Board may lawfully require under site plan review or subdivision review. The community contribution shall be made prior to the issuance of a building permit for the SITE.

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The restaurant and/or retail/commercial uses on site shall participate in a Park and Shop Program (or similar program) with the “Riverwalk Parking Garage located at Middle Street, Portland, with documentation of such participation provided to the City Planning Authority at minimum every two years.

6. Performance Guarantee. Prior to recording this Second Amendment to the Conditional Zoning Agreement at the Cumberland County Registry of Deeds the **DEVELOPER** shall post a performance guarantee in the amount of ~~\$25,000~~, or such amount as approved by the Planning Authority and reviewed by the Public Services Department on the basis of a detailed cost estimate showing quantities and unit costs as required for such performance guarantees in order to cover the cost of the following:

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- a. Close off two curb cuts on Newbury Street with granite curb;
  - b. Close off two curb cuts on Hancock Street with granite curb;
  - c. Close off one curb cut on Middle Street and maintain (as is) the one curb cut in active use on Middle Street;
  - d. All sidewalks where curb cuts are closed shall be constructed to City standards with bituminous paving material as a temporary situation;
  - e. Install granite curb around the corner of Hancock and Middle intersection and include one handicap ramp meeting the City standards to line up the existing ramp across Middle Street; and
  - f. Install guardrail or fencing along the perimeter of the **SITE** as approved by the Planning Authority.
8. **DEVELOPER** shall immediately undertake the following actions:
1. Stabilize the **SITE**, including the following:
    - a. Clean-up demolition debris;
    - b. Maintain a clean **SITE**;
    - c. Install erosion control measures meeting best management practices and maintain the erosion controls;

- d. Grade and mulch disturbed areas from erosion control measures;
  - e. Clean catch basin sump near the corner of Hancock and Middle Streets; and
  - f. Remove debris and maintain filter material that has clogged the catch basin.
2. Sidewalk Maintenance and Repair, including the following:
- a. Hold a pre-construction meeting to ensure compliance with **CITY** regulations for sidewalk repair;
  - b. Stabilize and repair edge condition of Newbury Street sidewalk;
  - c. Remove debris that has washed across the Middle Street sidewalk; and
  - d. Install a sidewalk patch along Middle Street, where erosion has caused the sidewalk to deteriorate.
9. **DEVELOPER** shall be responsible for regular maintenance of the **SITE** on a bi-weekly or at least monthly basis. This maintenance shall include, but not be limited to, mowing the grass and weeds, picking up and removing trash and any material dumped on the **SITE** within four (4) working days of said dumping, and plowing the public sidewalks abutting the **SITE**. Prior to the recording of this Second Amendment to the Conditional Zoning Agreement at the Cumberland County Registry of Deeds, the **DEVELOPER** must present evidence to the satisfaction of Corporation Counsel and the Planning Authority of a snowplowing contract for the public sidewalks around the **SITE** in order to comply with **CITY** ordinances to maintain sidewalks for safe pedestrian access.
10. This conditional rezoning shall become null and void and the **SITE** shall revert to the existing B-2b zoning district in the event that **DEVELOPER** fails to commence construction of the SITE by September 22, 2012. If any required approval, including the approval of the conditional rezoning, has been appealed, and if DEVELOPER fails to commence construction within one (1) year from the final disposition of such appeal, this conditional rezoning shall become null and void and shall revert.
11. The site plan approval for the **SITE** dated September 22, 2009, shall be extended until September 22, 2012.
12. 13. Parking shall be provided for the SITE at no less than a) a 1:1 ratio (1 parking space per dwelling unit), and b) 6 spaces for retail employee parking and c) active participation in a valid Park and Shop ticket validation program – all to be provided as follows: 80 parking spaces on-site for residential use and 16 parking spaces in the parking garage being built at the corner of India Street and Middle Street. A post development occupancy parking analysis shall be conducted by the **DEVELOPER**

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**Deleted:** Phase II of the project must be commenced within two (2) years following the issuance of a certificate of occupancy for Phase I.

**Deleted:** Phasing: **DEVELOPER** may construct the project in two phases as shown on the Plans. Phase I is designed to stand alone in the event Phase II is not built. Performance guarantees shall be posted separately for each phase. For purposes of the time periods set forth in this paragraph 8 and in section 14-525(f) of the Portland City Code, commencement of construction on Phase I shall be deemed to constitute commencement of construction on Phase II, provided that actual construction on Phase II is commenced no later than 3 years after the commencement of construction on Phase I

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**Deleted:** A separate performance guarantee for the cost of installing the sidewalks and curbing and any other public improvements for Phase II must be posted with the City prior to the release of the recording Plat for Phase II

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six (6) months following the issuance of a certificate of occupancy for the SITE. If the parking analysis demonstrates the inadequacy of a 1:1 /unit: parking space ratio, then the **DEVELOPER** must submit a parking mitigation plan, which plan shall be reviewed and approved by the City and thereafter implemented by the **DEVELOPER**.

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Deleted: Parking for Phase II of the project shall be determined by the Planning Board during subdivision and site plan review provided that a condition of such approval shall include the requirement for a post development occupancy parking analysis, with the same mitigation requirements as Phase I.

Thirty-eight bicycle parking shall be provided on site in accordance with §14-526 of the Portland City Code.

- 14. The rezoning shall run with the **SITE**, shall bind and benefit **DEVELOPER** and any of its successors and assigns, and shall inure to the benefit of and be enforceable by the **CITY**, by and through its duly authorized representatives. Within thirty (30) days of the City Council’s passing of the Conditional Zone, **DEVELOPER** 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 **SITE**. **DEVELOPER** shall provide to the **CITY** the Book and Page number of said recording.
- 15. 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.
- 16. Except as expressly modified herein, the development, use, and occupancy of the **SITE** 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.
- 17. 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 **SITE** 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, 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 Contract Rezoning be modified or the **SITE** rezoned.

**WITNESS:**

**THE VILLAGE AT OCEAN GATE, LLC**

\_\_\_\_\_

\_\_\_\_\_

Its Managing Member

STATE OF MAINE  
CUMBERLAND, ss.

Date:

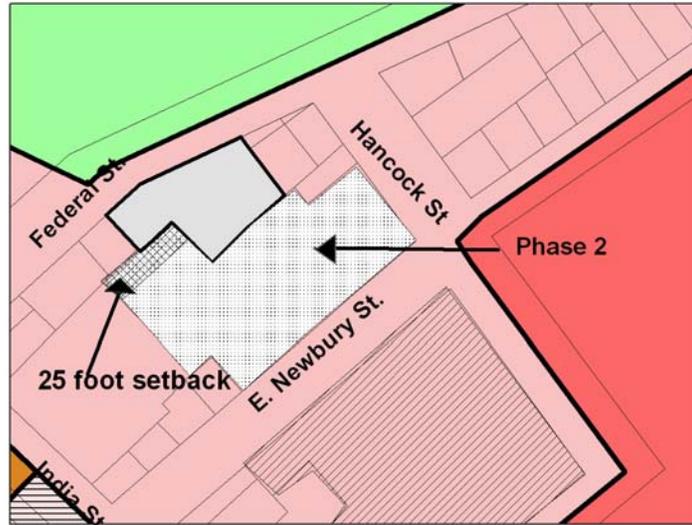
Personally appeared the above-named \_\_\_\_\_, Managing Member of The Village At Ocean Gate, LLC, and acknowledged the foregoing Agreement to be his free act and deed in his said capacity and the free act and deed of The Village At Ocean Gate, LLC.

\_\_\_\_\_  
Notary Public

Phase II of the project, consisting of one or more buildings along Newbury and Hancock Streets shall meet the following requirements:

a maximum of sixty six (66) residential units shall be provided; and

a minimum setback of twenty five (25) feet from the most westerly rear property line (abutting CBL 20-D-11) shall be provided and as illustrated below ; and



Required Minimum Setback of 25 feet in Phase II  
Depiction - Not to Scale

Prepared by the Department of Planning and Development  
based upon GIS Workgroup Data.

