

Order 86-12/13

Postponed on 10/15/12

Passage: 9-0 11/5/12

MICHAEL F. BRENNAN (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 (5)
JOHN M. ANTON (A/L)
JILL C. DUSON (A/L)
NICHOLAS M. MAVODONES (A/L)

**ORDER CONVEYING CONSERVATION EASEMENT
TO PORTLAND TRAILS RE: CANCO WOODS**

BE IT ORDERED, the Finance Director is authorized to convey to Portland Trails a conservation easement over Canco Woods at the closing of the purchase of the property by the City of Portland from the Trust for Public Lands, said conservation easement to be substantially in the form attached.

CONSERVATION EASEMENT

In consideration of the payment of one dollar, **CITY OF PORTLAND**, a Maine municipal corporation, with a mailing address of 389 Congress Street, Portland, Maine 04101 (“Grantor”) hereby releases to **PORTLAND TRAILS**, a Maine not-for-profit corporation with a place of business at 305 Commercial Street, Portland, Maine 04101 (“Grantee”), a conservation easement encumbering the land described in Schedule B hereto, on the terms and conditions and with the restrictions detailed and delineated in Schedule A hereto.

To have and to hold the said easement and all rights granted hereunder to the said Grantee and their successors and assigns forever.

IN WITNESS WHEREOF, Grantor has caused this easement to be executed by Ellen Sanborn, its duly authorized Finance Director, on this ____ day of November, 2012.

WITNESS:

CITY OF PORTLAND

By:

Ellen Sanborn, Its Finance Director

State of Maine
County of Cumberland, ss.

November ____, 2012

Personally appeared the above-named Ellen Sanborn, Finance Director of the City of Portland as aforesaid, who acknowledged the foregoing instrument to be her free act and deed in her said capacity and the free act and deed of said City of Portland.

Before me,

Print Name:

Notary Public/Attorney-

at-Law

SCHEDULE A

Conservation Easement

(A) PURPOSES.

The purposes of this Conservation Easement are:

- (1) to protect the property described in Schedule A hereto (hereinafter called the “Protected Property”), in perpetuity, in a predominately undeveloped, open space, natural, scenic, and forested condition, for the scenic enjoyment of the general public;
- (2) to protect, conserve and promote the conservation of forests, wetlands, and wildlife thereon, and perpetuate the plant and animal eco-systems on the Protected Property;
- (3) to allow the **City of Portland**, its successors and assigns, (“Grantor”) or **Portland Trails**, its successors or assigns (“Grantee” or “Easement Holder”), to construct pedestrian trails through the Protected Property, and otherwise generally provide for low-impact, non-commercial outdoor recreational use by the general public of the Protected Property; and
- (4) to prevent uses that would significantly impair or interfere with the conservation values of the Protected Property; and confine, in perpetuity, the uses of the Protected Property to activities which are compatible with these purposes and the protection of wildlife habitat and preservation of these scenic, open space and natural values.

(B) GRANTOR’S RESERVED RIGHTS.

- (1) The Grantor and the Grantee, shall both have the right and easement to maintain and operate unpaved pedestrian trails through the Protected Property for public access for daytime use for low-impact, non-motorized recreational activities, including walking, hiking, biking, nature observation, cross-country skiing, snowshoeing, and picnicking, subject to all applicable laws and regulations concerning such activities and the limitations set forth herein. The trails shall be constructed and maintained in an environmentally sound manner, including the following: constructing water bars, bridges for stream crossings, bog bridges, stone steps, erosion control measures, and trail markings such as tree blazes or other like markings.

In addition, Grantor shall have the right to:

- (2) remove dead or diseased trees, vegetation and forest cover, and to clear and restore forest cover and vegetation that is materially damaged by the forces of nature and to implement appropriate measures with respect to such dead, diseased and damaged forest cover and vegetation;
- (3) prune and clear vegetation and forest cover to remove safety hazards to the uses permitted hereunder and prevent the spread of active fire; to improve wildlife habitat; to prevent or reduce the threat of fire, plant disease or exotic intrusion; provided that all such activities shall be designed, limited, located and conducted in a manner that reasonably minimizes the impact on the conservation values of this easement and consistent with the expressed purposes hereof; In order to protect riparian areas and water quality, there shall be no use of fertilizers, introduction of non-native plants or animals, spraying of biocides, or significant disturbance of soils within the

Property. Notwithstanding the foregoing, the Grantor shall have the right to remove, and consent to the removal of, invasive and exotic species (including the spraying of biocides) within the Property if the removal and the use of removal techniques, including the spraying of biocides, is recommended in writing by a professional forester or other recognized forest conservation professional;

(4) erect signs identifying the public trail and informing the public of rules for proper use of the trails, as well as temporarily closing or rerouting such trails for public safety or maintenance; and

(5) place, use, maintain, repair and replace underground utilities including conduits, utility lines, pipes and related fixtures and underground equipment, and drainage ditches and culverts and other elements of surface drainage systems, , and to utilize existing above ground utility lines. However, this right shall not be construed as an obligation. Without limited the generality of the foregoing, reference is made to the Right of Way or easement cited in the last paragraph of this Schedule A.

(6) place, use, maintain, repair and replace any and all wetland and drainage changes and improvements required by the Trust for Public Lands or by any plans submitted prior to the executed of, or in connection with (even if subsequent to the execution of), this Conservation Easement, for such changes and improvements to regulatory agencies, including but not limited to the Maine Department of Environmental Protection.

(C) RESTRICTIONS ON THE PROTECTED PROPERTY.

The Protected Property will at all times be held, used, and conveyed subject to, and not used in violation of, the following restrictions, which shall run with the Protected Property in perpetuity, subject, however, to the rights reserved by Grantor:

(1) The Protected Property, including without limitation any body of water thereon, shall be continued predominantly in an undeveloped and natural condition, and shall not be used for residential, industrial or commercial use.

(2) No paved driveway, improved road associated with development, aircraft landing strip, billboard or other advertising display, mobile home, utility pole, tower, conduit or line (except for underground conduits and utilities lines), equipment, fixture, trailer, antenna or other temporary or permanent improvement shall be constructed, placed or permitted to remain on the Protected Property. Grantor and Grantee shall have the to use, maintain, repair and replace from time to time any existing utility lines and facilities across said Protected Property, provided the forgoing rights are exercised in a manner to minimize the impact on the conservation values of the Protected Property and consistent with the expressed purposes of this easement.

(3) No structures, temporary or permanent, are permitted on the Protected Property; however, the trail improvements discussed in section (a) above are not restricted by this provision.

(4) No loam, peat, gravel, soil, sand, rock or other mineral resource, or natural deposit shall be excavated, dredged, or removed from the Protected Property, unless related to the uses, activities and purposes expressly permitted herein.

(5) No vegetation may be cut, disturbed, altered or removed from the Property, except under the following restrictions:

- a. vegetation may be altered or removed to install, establish and maintain trails;
- b. work shall be carried out in accordance with all applicable local, state, federal and other governmental laws and regulations; and
- c. work shall be carried out in accordance with then-current, generally accepted best management practices for the sites, soils and terrain of the Property.

(6) No refuse, trash, vehicle bodies or parts, rubbish, debris, junk, waste, radioactive or hazardous waste, or other similar substance or material whatsoever shall be placed, stored, dumped or permitted to remain on the Protected Property.

(7) No use shall be made of the Protected Property, and no activity shall be permitted thereon which is or may be inconsistent with the intent hereof. No activity (including, but not limited to, drainage or flood control activities) shall be carried on which is detrimental to the conservation values of the Protected Property or detrimental to water quality, soil conservation, wildlife conservation, or woodland management practices.

(8) No hunting or trapping shall be permitted on the Protected Property.

(9) No subdivision of the Protected Property shall be permitted. The Grantor further covenants and agrees not to undertake any action that would have the effect of subdividing all or any part of the Property through the allocation of property rights among partners, shareholders or members of any successor entity, the creation of a condominium, leasing or any other means except as specifically allowed herein.

(10) The use of motorized vehicles, including recreational vehicles, all-terrain vehicles, motorcycles, dirt bikes and snowmobiles, of any sort shall not be permitted on the Protected Property except for equipment used for restoration, stewardship or maintenance in accordance with the Stewardship and Management plan. This prohibition against motorized vehicular use on the Protected Property by the general public shall not be construed to prevent use of wheel chairs by members of the public on the Protected Property or prevent authorized agents of Grantor from using motorized vehicles on paths as necessary for maintenance purposes, life safety purposes, and emergency use.

(11) Conveyance of the Property encumbered by this Easement shall require prior written consent by the Easement Holder, which shall not be unreasonably withheld.

(D) GRANTEE'S RIGHTS.

The Grantee shall have these rights:

(1) to enter the Protected Property for inspection and monitoring purposes and for enforcement, at a reasonable time and in a reasonable manner that is consistent with the conservation purposes hereof.

(2) to place signs and/or tags on the Protected Property boundaries and at trail entrances for the purpose of marking boundaries and identifying it as conservation easement land protected by the Grantee.

(E) LIMITATION ON LIABILITY.

This Conservation Easement is reserved pursuant to the Maine Conservation Easement Act at Title 33, Maine Revised Statutes Annotated, Sections 476 through 479-B, and to Title 33 M.R.S.A. Sections 1581 et seq., as amended, and shall be construed in accordance with the laws of the State of Maine. Grantor and Grantee agree that this easement is being granted without charge for the purpose of recreational activities by the general public pursuant to and in accordance with Title 14 M.R.S.A. Section 159-A, and that Grantor and Grantee shall have the benefit of the terms and provisions thereof. Notwithstanding any public use of the Protected Property and any insurance coverage thereof, neither Grantor nor Grantee assume any liability to the general public for accidents, injuries, acts or omissions. This Conservation Easement does not create in the Grantor or Grantee, any duty, not otherwise existing, to keep the Protected Property safe for entry or for use by members of the general public for recreational purposes or to give warning of any hazardous condition, use, structure or activity on such premises to persons entering for recreational purposes, or to extend any assurance that the premises are safe for any such purposes, or to make any person entering upon the Protected Property an invitee or licensee to whom a duty of care is owed, or to assume responsibility for or incur liability for any injury to person or property caused by any act of any person or any other cause. Grantor and Grantee, for themselves and for their successors, assigns, leases and others claiming by or through any of them, claim all of the rights and immunities against liability for injury to the public to the fullest extent of the law under Title 14 M.R.S.A. Section 159-A, et seq. as amended and any successor provision thereto and under any similar or other law, and under any other applicable provision of law and equity. Neither Grantor nor Grantee, for themselves and for their successors, assigns, leases and others claiming by or through any of them, assume any liability to the general public for accidents, injuries, acts or omissions. It is expressly intended that all activities of the Grantor, and the general public entering upon the Protected Property shall be subject to the limited liability provisions of Title 14, Maine Revised Statutes, as amended, Section 159-A, or its successor provisions.

(F) QUALIFICATION.

This Conservation Easement is established exclusively for conservation purposes pursuant to the Internal Revenue Code of 1986 as amended (hereinafter "Code") at Title 26, U.S.C.A., Section 170(h)(1)-(6) and Sections 2055 and 2522, and under Treasury Regulations at Title 26 C.F.R. Section 1.170A-14 et seq., as amended; and

Grantor and Grantee are both qualified to hold conservation easements pursuant to Title 33, Maine Revised Statutes Annotated, 1988, Sections 476 (2)(B), as amended, and is a Qualified Organization under Code Section 170(h)(3)(B), to wit: a governmental body empowered to hold an interest in real property under the laws of this State or the United States, and a publicly supported nonprofit 501(c)(3) preserving and protecting natural, scenic, educational, recreational or open-space values of real property, and with the commitment to preserve the conservation values of the Protected Property, respectively.

(G) ENFORCEMENT.

The rights hereby excepted and reserved shall include the right to enforce this Conservation Easement by appropriate legal proceedings and to obtain injunctive and other equitable relief against any violations, including, without limitation, relief requiring restoration of the Protected Property to its condition prior to the time of the injury complained of (it being agreed that the Grantor may have no adequate remedy at law), and shall be in addition to, and not in limitation of, any other rights and remedies available to the Grantor, after providing Grantee with prior notice and reasonable opportunity to cure any breach, except where emergency circumstances

require more immediate enforcement action. Grantor may not bring an enforcement action against Grantee for injury to or change in the Protected Property resulting from actions by others or natural causes or environmental catastrophe beyond their control or 1“acts of God” so called, such as, but not limited to, fire, flood, storm, industrial accident, and earth movement, or for the acts of vandals or trespassers, or from any prudent action taken by Grantee under emergency conditions to prevent, abate, or mitigate significant injury to the Protected Property resulting from such causes. Grantee specifically acknowledges that events and circumstances of non-compliance constitute immediate and irreparable injury, loss and damage to the Protected Property. The Grantor’s delay or omission in exercising any right or remedy upon any breach by Grantee shall not impair the Grantor’s rights or remedies, or be construed as a waiver.

(H) MISCELLANEOUS.

Grantor does not undertake any liability or obligation relating to the condition of the Protected Property, except as otherwise expressly provided in this Conservation Easement.

If any provisions of this Conservation Easement shall to any extent be held invalid, the remainder shall not be affected.

Any election by the Grantor as to the manner and timing of its right to enforce this Conservation Easement or otherwise exercise its rights herein shall not be deemed or construed to be a waiver of such rights.

Grantee shall be obligated to notify the Grantor in writing thirty (30) days before taking any action, the exercise of which may impair any conservation values associated with the Protected Property. The notice shall describe the nature, scope, design, location, timetable and any other material aspect of the proposed activity in sufficient detail to enable the Grantor to confirm that the proposed activity is permitted under the terms of this Conservation Easement.

The terms and provisions of this Conservation Easement shall run with the Protected Property in perpetuity, and shall be binding upon the Grantor and Grantee holding any interest in the Protected Property, and shall benefit the Grantor. The Grantor is authorized to record or file any notices or instruments appropriate to assure the perpetual enforceability of this Conservation Easement. Without limiting the foregoing, the Grantor agree to execute any such instrument upon the Holder’s reasonable request. The benefits of this Conservation Easement shall be assignable from time to time, subject to the following: (1) As a condition of any assignment, the Grantor shall require that the purposes of this Conservation Easement continue to be enforced, and (2) The assignee, at the time of assignment, must be a qualified conservation agency or conservation organization, and as a condition of transfer, the assignee shall agree to uphold the conservation purposes of this grant. Wherever the term “Grantor” appears in this Conservation Easement, including the foregoing Covenants, it shall also refer, as appropriate, to any transferee, assignee or successor in interest of the Grantor to this Conservation Easement.

Grantor and Grantee recognize that circumstances could arise which warrant modification of certain of the provisions of this Conservation Easement. To this end, subject to more restrictive laws and regulations, if any, Grantor has the right to agree to amendments to this Conservation Easement without prior notice to any other party, provided that in the sole and exclusive judgment of Grantor, such amendment enhances or is not detrimental to the conservation values protected by this Conservation Easement. Amendments will become effective upon recording at the Cumberland County Registry of Deeds. Nothing in this paragraph shall require the Grantor to agree to any amendment or to consult or negotiate regarding any

amendment. Grantor and Grantee recognize that certain activities may warrant the prior discretionary approval of Grantor, and that Grantor has the right to issue such discretionary approvals without prior notice to any other party. Nothing in this paragraph shall require the Grantor to agree to any discretionary approval or to consult or negotiate regarding any discretionary approval.

Notwithstanding the foregoing, Grantor has no right or power to approve any action or agree to any amendment that would:

(1) materially detract from the conservation values intended for protection, without the prior approval of a court of competent jurisdiction in an action in which the Attorney General has been made a party;

(2) limit the term or result in termination of this Conservation Easement without the prior approval of a court of competent jurisdiction in an action in which the Attorney General has been made a party; or

(3) adversely affect the qualification of this Conservation Easement or the status of the Grantor under applicable laws, including the Maine Conservation Easement Act at Title 33, M.R.S.A. §476 *et seq.*, and Sections 170(h), 501(c)(3), 2522, and 2031(c) of the Internal Revenue Code, successor provisions thereof and regulations issued pursuant thereto.

The interpretation and performance of this Easement shall be governed by the laws of the State of Maine. Any general rule of construction to the contrary notwithstanding, this Easement shall be liberally construed in favor of the grant to effect the conservation purposes of this Easement and the policy and purpose of the Maine Conservation Easement Act at Title 33, Maine Revised Statutes Annotated, Sections 476 through 479-B, inclusive, as amended. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the conservation purposes of this Easement shall govern.

Grantor and Grantee acknowledge that the Protected Property has passing through it existing sewer pipe line, and that it is the intent of the parties hereto that this Conservation Easement not affect or amend or supersede the rights delineated in the Certificate of Taking of Property for Torrey Street Sewer Right of Way by City of Portland, dated May 1960, and Recorded in Book 2611, Page 221; and to the extent that any provision of this conservation is to the contrary, this conservation easement is hereby subordinated to all the rights and interests established in said easement or right of way by said Taking; and the Grantor, City of Portland, hereby reserves to itself all the rights delineated in or established by the said Certificate of Taking.

Schedule B

A certain lot or parcel of land situated in Portland, Cumberland County, Maine. Said lot or parcel of land being more particularly located and described as follows:

Beginning at an iron pin set in the southeasterly sideline of Canco Road, so-called, marking a northeasterly corner of a certain parcel of land conveyed by the City of Portland to Central Maine Power Company by deed dated December 30, 1974 and recorded in the Cumberland County Registry of Deeds in Book 3636, Page 124;

thence S 23° 24' 46" E by land now or formerly of said City of Portland a distance of 36.95 feet to an iron pin;

thence S 38° 34' 46" E by said land of the City of Portland a distance of 17.77 feet to an iron pin marking a southeasterly corner of said land conveyed by the City of Portland;

thence S 38° 41' 08" E by land now or formerly of Black Bear Development Corp. a distance of 128.58 feet to an iron pin;

thence S 37° 12' 38" E by a stone wall and said land of Black Bear Development Corp. a distance of 253.25 feet to an iron pin;

thence S 38° 42' 57" E by said stone wall and said land of Black Bear Development Corp. a distance of 392.61 feet to an iron pin marking a northerly corner of land now or formerly of Patrick O'Donnell et al.;

thence S 44° 52' 39" W by said land of O'Donnell a distance of 420.79 feet to an iron pin marking a northeasterly corner of land now or formerly of Newell D. Tibbals, Jr. et al.;

thence S 64° 56' 26" W by said land of Tibbals a distance of 140.78 feet to an iron pin marking a northwesterly corner of said land of Tibbals;

thence S 25° 09' 44" E by said land of Tibbals a distance of 53.05 feet to an iron pin;

thence S 44° 08' 45" W a distance of 58.79 feet to an iron pin;

thence N 45° 35' 00" W a distance of 832.77 feet to a point in said southeasterly sideline of Canco Road;

thence N 45° 37' 14" E by said sideline of said road a distance of 745.46 feet to the point of beginning. Containing 12.85 acres more or less.

For further reference see plan entitled "Standard Boundary Survey for Union Water Power Company of former Coyne Lot, Canco Road, Cumberland County, Portland, Maine" by E-PRO Engineering & Environmental Consulting, dated July 25, 1997, and recorded in said Registry of Deeds at Plan Book 200, Page 199.---