

Order 146-15/16

Motion to postpone until 2/17/2016: 9-0 on 1/20/2016

Amendment to change easement option for public access: Failed 2-7(Duson, Mavodones, Brenerman, Costa, Ray, Suslovic, Strimling)

Passage: 8-1 (Thibodeau) on 2/17/2016

Effective 2/27/2016

ETHAN K. STRIMLING (MAYOR)  
BELINDA S. RAY (1)  
SPENCER R. THIBODEAU (2)  
EDWARD J. SUSLOVIC (3)  
JUSTIN COSTA (4)

**CITY OF PORTLAND  
IN THE CITY COUNCIL**

DAVID H. BRENERMAN (5)  
JILL C. DUSON (A/L)  
JON HINCK (A/L)  
NICHOLAS M. MAVODONES, JR (A/L)

**ORDER ACCEPTING AN EASEMENT OPTION  
FOR PUBLIC ACCESS  
AT THE PORTLAND COMPANY HISTORIC DISTRICT**

**ORDERED**, that a Public Access Easement Option from CPB2 LLC to allow public access at the Portland Company Historic District is hereby accepted in substantially the form attached hereto; and

**BE IT FURTHER ORDERED**, that the City Manager or his or her designee is authorized to exercise the Easement Option as set forth in paragraph 4 of the Easement Option upon Corporation Counsel's approval of the public access easement.

## PUBLIC ACCESS EASEMENT OPTION

This PUBLIC ACCESS EASEMENT OPTION is dated as of \_\_\_\_\_, 2016 (the "Effective Date"), by and between **CPB2 LLC**, a Delaware limited liability company having a mailing address of c/o CPB2 Management LLC, P.O. Box 7987, Portland, Maine 04112 ("Grantor"), and the **CITY OF PORTLAND**, a body politic and corporate having a mailing address of 389 Congress Street, Portland, Maine 04101 ("Grantee" or "City").

WHEREAS, Grantor is the owner of that certain real property known as 58 Fore Street in the City of Portland, County of Cumberland and State of Maine, which is more particularly described in deeds dated July 19, 2013 and April 1, 2014 and recorded in the Cumberland County Registry of Deeds in Book 30879, Page 75 and Book 31425, Page 267 respectively ("Grantor's Property"); and

WHEREAS, the existing improvements on Grantor's Property include, among other things, buildings associated with the former Portland Company; and

WHEREAS, the City has designated a portion of Grantor's Property as the Portland Company Historic District and has designated certain, existing buildings within the Historic District as contributing and non-contributing; and

WHEREAS, Section 14-610(d) of the City's Land Use Code requires the City Council to consider the effect of historic district designation on other aspects of the City's comprehensive plan; and

WHEREAS, the Statement of Principles in the Eastern Waterfront Master Plan lists several principles and objectives which are to be treated with equal value and applied uniformly; and

WHEREAS, the objectives of the Eastern Waterfront Master Plan include, but are not limited to the following: "encourage historic preservation and the adaptive reuse of historic structures;" "increase public use of the water, waterfront and shore through public access and green space development;" and "encourage public physical and visual access to the water where appropriate;" and

WHEREAS, in recognition of and consistent with the objectives of the Eastern Waterfront Master Plan, the Grantor has agreed to provide the City with a fifty-foot wide public access easement across Grantor's Property from Fore Street to the southerly boundary of the Grantor's Property in the location set forth below in order to provide physical and visual public access to the water for pedestrians; and

WHEREAS, the existence of physical and visual public access across the Property in the location set forth below informed the City's conclusion that its delineation of the District boundaries and its determination as to contributing and non-contributing structures are consistent with the City's Eastern Waterfront Master Plan;

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Grantor and Grantee, intending to be legally bound hereby, do hereby agree as follows:

1. GRANT OF OPTION. Subject to the terms and conditions contained herein, Grantor hereby grants, bargains, sells, conveys and delivers unto Grantee a binding, exclusive and irrevocable option (the "Option") to acquire an easement on a portion of Grantor's Property for the purpose of providing physical and visual public access to the water for pedestrians (the "Public Access Easement").

2. EASEMENT AREA and TERMS.

(a) The location of the Public Access Easement described herein shall be determined as follows:

(i) Easement Area A: If Grantor or its successor or assign shall remove Building 1, the Public Access Easement shall be located on and over a fifty (50) foot wide portion of Grantor's Property traversing a portion of the footprint of former Building 1, and extending from Fore Street to the southerly boundary of Grantor's Property ("Easement Area A"), subject to the provisions of Paragraph 2(b).

(ii) Easement Area B: If Grantor or its successor or assign elects not to remove Building 1 for any reason, the Public Access Easement shall be on and over a fifty (50) foot wide portion of Grantor's Property lying westerly of the building commonly known as "Building 2," and extending from Fore Street to the southerly boundary of Grantor's Property ("Easement Area B"), subject to the provisions of Paragraph 2(b).

(b) Grantor and Grantee agree that the above descriptions of Easement Area A and Easement Area B are intended to be general in nature and that the final location and configuration of the Public Access Easement shall be determined by Grantor in Grantor's reasonable discretion, subject to approval by the Portland Planning Board and Corporation Counsel's office.

(c) Before either (i) the submission of a site plan application by Grantor or its successor or assign for the portion of Grantor's Property that includes the Public Access Easement or (ii) the submission of an application by Grantor or its successor or assign for a demolition permit to demolish Building 1, Grantor or its successor or assign shall negotiate the terms of the Public Access Easement with Grantee. The parties agree to include in the Public Access Easement terms that are consistent with the terms contained in the draft easement attached hereto as Exhibit A. Grantor and Grantee agree to negotiate in good faith to finalize the Public Access Easement within sixty (60) calendar days after Grantee's receipt of the first draft of the Public Access Easement.

(d) At any time on or before either (i) the submission of a site plan application by Grantor or its successor or assign for the portion of Grantor's Property that includes the Public Access Easement or (ii) the submission of an application by Grantor or its successor or assign for a demolition permit to

demolish Building 1, Grantor shall submit to the Grantee the negotiated Public Access Easement containing the terms and conditions set forth herein and other customary provisions.

3. OPTION TERM. The term of the Option shall commence when (i) the date when Grantor or its successor or assign has received final site plan approval by the Portland Planning Board for the portion of Grantor's Property that includes the Public Access Easement or (ii) the date when Grantor or its successor or assign has received a demolition permit for Building 1, whichever occurs first, and when all applicable appeal periods have expired without an appeal being filed (or, if an appeal has been timely filed, the appeal has been fully adjudicated). The term of the Option shall expire ninety (90) calendar days thereafter (the "Option Term"). If Grantee does not exercise the Option within the Option Term in the manner set forth in Paragraph 4, then the Option shall automatically expire, but Grantor's right to remove Building 1 shall not be affected by such expiration. In no event shall Grantor remove Building 1 prior to Grantee's exercise of the Option or prior to the expiration of the Option Term, whichever occurs first.

4. OPTION EXERCISE. Grantee shall exercise this Option on or before the expiration of the Option Term by (i) executing and acknowledging, without amendment, the final Public Access Easement previously executed and acknowledged by Grantor or its successor or assign, and (ii) delivering the same to Grantor or its successor or assign for recordation, without any reservation or any condition other than, if applicable, the finalization of the location of the Public Access Easement. Grantor and Grantee shall further sign and deliver, together with the Public Access Easement, such other forms and documents as may be customary or required by state and/or federal law in order to effect the transaction contemplated herein.

5. MISCELLANEOUS.

(a) Execution by Both Parties: This instrument shall not become effective and binding until fully executed by both Grantor and Grantee. This instrument may be executed in any number of counterparts, each of which shall be deemed an original and all of which shall constitute one and the same document.

(b) Notice: Grantee, its successors and assigns, shall at all times keep Grantor advised of the representative of Grantee who will handle inquiries and notifications. All notices and other communications required or permitted to be delivered hereunder shall be in writing and delivered in hand or mailed postage prepaid, by United States mail, or by electronic mail to the parties or their agents, with evidence of receipt by the primary addressee, at the following addresses or to such other address as the person to whom notice is to be given may have previously furnished to the other in writing in the manner set forth above:

IF TO GRANTOR: CPB2LLC  
c/o CPB2 Management LLC  
P.O. Box 7987  
Portland, Maine 04112

WITH COPY TO: Bernstein, Shur, Sawyer & Nelson, P.A.  
Attention: Mary E. Costigan, Esq.  
100 Middle Street, West Tower

Portland, Maine 04101

IF TO GRANTEE:

City of Portland  
Attention: \_\_\_\_\_  
389 Congress Street  
Portland, Maine 04101

WITH COPY TO:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(c) Governing Law: This instrument shall be governed by and construed in accordance with the laws of the State of Maine.

(d) Successors and Assigns: This instrument shall apply to, inure to the benefit of and be binding upon and enforceable against the parties hereto and their respective heirs, successors, and or assigns, to the extent as if specified at length throughout this instrument.

(e) Time: Time is of the essence of this agreement.

(f) Cost of this Agreement: Any cost and/or fees incurred by the Grantor or Grantee in preparing and executing this Agreement shall be borne by the respective party incurring such cost and/or fee, other than as provided herein.

(g) Amendments: This instrument may not be modified or amended unless such amendment is set forth in writing and executed by both Grantor and Grantee.

(h) Severability: In the event that any of the provisions of this instrument are held to be unenforceable or invalid by any court of competent jurisdiction, the validity and enforceability of the remaining provisions shall not be affected thereby

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed by their duly authorized representatives as of \_\_\_\_\_, 2016.

WITNESS:

\_\_\_\_\_

**CPB2LLC**

By: \_\_\_\_\_

Print Name:

Its:

WITNESS:

\_\_\_\_\_

**CITY OF PORTLAND**

By: \_\_\_\_\_

Print Name:

Its:

STATE OF MAINE

COUNTY OF CUMBERLAND, ss.

\_\_\_\_\_, 2016

Personally appeared the above-named \_\_\_\_\_, \_\_\_\_\_  
of the City of Portland, as aforesaid, and 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,

\_\_\_\_\_  
Print Name:

Notary Public/Attorney-at-law

My Commission Expires:

DRAFT PUBLIC ACCESS EASEMENT

KNOW ALL PERSONS BY THESE PRESENTS, that \_\_\_\_\_, a Maine limited liability company with a place of business in Portland, Maine and mailing address of \_\_\_\_\_ Portland, ME, 04101 (the "Grantor"), FOR CONSIDERATION PAID, hereby GRANTS to the CITY OF PORTLAND, a Maine body corporate and politic, with a mailing address of City Hall, 389 Congress Street, Portland, Maine 04101 (the "Grantee" or the "City"), a public access easement for the purpose described below, over portions of Grantor's property at \_\_\_\_\_ in Portland, Maine, more particularly described in Exhibit A attached hereto and as depicted in the drawing attached hereto as Exhibit B and made a part hereof (the "Easement Area").

The purpose of the public access easement granted herein is to provide physical and visual public access to the waterfront for pedestrians within the Easement Area, which access shall include an ADA compliant access way for pedestrians, subject, however, to such rules or ordinances that Grantee may adopt from time to time in the interests of public safety; and provided that wheelchair access to the access way shall be provided on the southern end of the Easement Area. Notwithstanding the foregoing, wheelchairs and emergency vehicles as well as snow removal equipment shall be permitted in accordance with applicable federal and/or state laws regulating accessibility for such devices, vehicles or equipment. Maintenance, repair and snow removal responsibilities within the Easement Area shall belong solely to the Grantor, its heirs and assigns; however, Grantee shall have the right, but not the obligation, to maintain or repair the Easement Area, or to remove snow therefrom, when Grantee, in its sole discretion, deems such maintenance, repair or snow removal necessary to ensure public safety and Grantor has failed to perform the same within a reasonable time after notice from Grantee. Grantor agrees not to use or permit any use, condition or state of disrepair that would be contrary to or otherwise unreasonably interfere with the use of the Easement Area by pedestrians in the manner contemplated herein. This easement is given for recreational use and the Grantor and Grantee claim the rights and protections against liability in accordance with Title 14 MRS §159-A to the maximum extent permitted by law.

TO HAVE AND TO HOLD the aforegranted and bargained public access easement, with all privileges and appurtenances thereof, to the Grantee, its successors and assigns, to its and their use and behoof, forever.

IN WITNESS WHEREOF, \_\_\_\_\_, the Grantor has caused this instrument to be executed by \_\_\_\_\_, its \_\_\_\_\_ thereunto duly authorized, this \_\_\_\_\_ day of January, 2016.