

South Portland City Council  
***Position Paper of the City Manager***

***Subject:***

**ORDER #13-15/16 – Authorizing the City Manager to sign a Conservation Easement Deed and Indenture for Sawyer Park Open Space. Passage requires majority vote.**

***Position:***

The South Portland Land Trust in collaboration with the Congregation Bet Ha'am, have approached the City Council requesting an opportunity to permanently protect the City-owned parcel located at 25 Westbrook Street. The parcel, Map 63, Lot 164B, is a 2.33 acre site located at the intersection of Westbrook Street and Main Street. The parcel was once the playing fields associated with the former Sawyer Elementary School.

The Land Trust and Congregation have requested the City Council to permanently protect this greenspace through the use of a Conservation Easement. As with any Conservation Easement, a Grantor is established to hold the easement. The proposal brought forward is for the South Portland Land Trust to be the Grantor.

The Conservation Easement recognizes the current use of the parcel as the City's lay-down yard for the sewer/stormwater work in the Thornton Heights neighborhood. The Conservation Easement also recognizes the two existing easements that encumber the property benefitting the Congregation Bet Ha'am.

At a previous workshop, the Congregation Bet Ha'am supported the preservation of the property and committed financially for the development of a park on this piece of property.

This item was discussed at the July 13, 2015 workshop and is in order to authorize the deed to be signed. The legal description will be added to the document prior to signing and recording in the Cumberland County Registry of Deeds.

***Requested Action:***

Council passage of ORDER #13-15/16.

  
City Manager



CITY OF SOUTH PORTLAND

LINDA C. COHEN  
Mayor

JAMES H. GAILEY  
City Manager

SUSAN M. MOONEY  
City Clerk

SALLY J. DAGGETT  
Jensen Baird Gardner & Henry

District One  
CLAUDE V.Z. MORGAN

\_\_\_\_\_

District Two  
PATRICIA SMITH

\_\_\_\_\_

District Three  
MELISSA LINSOTT

\_\_\_\_\_

District Four  
LINDA C. COHEN

\_\_\_\_\_

District Five  
BRAD FOX

\_\_\_\_\_

At Large  
MAXINE BEECHER

\_\_\_\_\_

At Large  
THOMAS E. BLAKE

**IN CITY COUNCIL**

**ORDER #13-15/16**

**ORDERED**, that the City Manager be, and hereby is, authorized to execute and deliver on behalf of the City a Conservation Easement Deed and Indenture, in substantially the same form as shown on the attached, to South Portland Land Trust, Inc., establishing a conservation easement on City-owned vacant land approximately 2.33 acres in size located at the corner of Westbrook and Main Streets (Tax Map 63, Lot 164B), with said property to be called the Sawyer Park Open Space.

Fiscal Note: Less than \$1,000

Date: July 20, 2015

## CONSERVATION EASEMENT DEED AND INDENTURE

for

### SAWYER PARK OPEN SPACE

Westbrook and Main Streets, South Portland, Cumberland County, Maine

THIS CONSERVATION AND EASEMENT DEED AND INDENTURE is made by and between the **CITY OF SOUTH PORTLAND**, a municipal corporation existing under the laws of the State of Maine, having an address of 25 Cottage Road, South Portland, Maine 04106 (hereinafter, with its successors and assigns, referred to as the "**Grantor**"), and the **SOUTH PORTLAND LAND TRUST, INC.**, a not for profit corporation existing under the laws of the State of Maine, with a mailing address of PO Box 2312 South Portland, Maine 04116 (hereinafter, with its successors and assigns, the "**Holder**").

### RECITALS AND PURPOSE

**WHEREAS**, Grantor is the owner of real estate in the City of South Portland, County of Cumberland, and State of Maine, consisting of a 2.3 acre parcel of land located at the corner of Westbrook Street and Main Street, South Portland, Maine, being specifically described in **Exhibit A** (hereinafter referred to as the "**Protected Property**"), which Protected Property may be accessed by way of the right of way or easement described in that certain Easement Deed to Grantor dated November 10, 2005 and recorded in the Cumberland County Registry of Deeds in Book 23378, Page 207 as modified by that certain Easement Deed Modification Agreement dated January 26, 2009 and recorded in said Registry of Deeds in Book 26585, Page 287 (the "Access Easement"), and which Protected Property and Access Easement are depicted on **Exhibit B**, all such Exhibits being attached hereto and made a part hereof; and

**WHEREAS**, Grantor and Holder have the mutual purpose of maintaining the Protected Property for the conservation purposes as set forth herein; and

**WHEREAS**, this Conservation Easement Deed and Indenture is created pursuant to Title 33, Maine Revised Statutes, 1964, Sections 476 through 479-B, inclusive, as amended; and

**WHEREAS**, the Protected Property, which is currently an undeveloped green space serving as public park land, is to remain in a substantially undeveloped, open state, recognizing its scenic, aesthetic value in providing the general public access for quiet recreation and, potentially, community gardens and a playground for young children and other uses not inconsistent with quiet enjoyment of neighboring property owners ("Open Space Values"), and it is the purpose of Grantor and Holder to assure the protection and conservation of the Protected Property while at the same time not precluding its use for recreation in a manner which does not diminish its protection and conservation; and

**WHEREAS**, the Protected Property is of great importance to Grantor and to the citizens

of the City of South Portland; and

**WHEREAS**, the State of Maine has recognized the importance of preserving open space in its Constitution at Article IX, Section 8, and by virtue of other provisions of Maine law; and

**WHEREAS**, Grantor wishes to provide a significant public benefit by protecting and preserving in perpetuity the foregoing Open Space Values of the Protected Property and otherwise, in accordance with a clearly delineated governmental policy, to preserve open space where possible for outdoor recreation; and

**WHEREAS**, Grantor and Holder have the shared purpose of conserving the Protected Property, including access thereto, by the conveyance of a conservation easement on, over and across the Protected Property, which conservation easement shall benefit, protect and conserve the values of the Protected Property as open space and prevent any use or development which would conflict with access to and enjoyment of the Protected Property by the general public;

NOW, THEREFORE, in consideration of the foregoing and the covenants herein contained, GRANTOR HEREBY GRANTS to Holder, its successors and assigns, as an absolute and unconditional gift, forever and in perpetuity, a conservation easement in gross over the Protected Property on the terms and conditions set forth herein (the "Conservation Easement"), its successors and assigns, as an absolute and unconditional gift, forever and in perpetuity, the rights of enforcement hereunder.

## **COVENANTS AND RESTRICTIONS**

### **1. LAND USE; NAME.**

It is the dominant purpose of this Conservation Easement to maintain the Open Space Values, including the scenic and aesthetic characteristics of the Protected Property, and to prevent the use or development of the Protected Property for any purpose or in any manner that would conflict with these features and characteristics. It is a purpose of this Conservation Easement to provide for the maintenance of the Protected Property in its open space condition.

Therefore, no construction of any structures or modification or alteration of the Protected Property is permitted by any party except as expressly set forth hereunder and/or as consented to in writing by Grantor and Holder. Access to and from the Protected Property for and by motorized vehicles of all kinds (but without hereby prohibiting wheelchairs used by and for handicapped or elderly persons), other than (a) temporary access by such vehicles that is directly related to the maintenance and preservation purposes of this Conservation Easement and (b) Temporary City Construction Activity, as defined herein, is prohibited.

The "Temporary City Construction Activity" shall mean use of that portion of the Protected Property located in the Limited Business Zone (as defined by the City of South Portland Code of Ordinances, Chapter 27 (Zoning)), and which is shown on **Exhibit B**, as a temporary lay down area in connection with a stormwater and sewer system separation project

and associated improvements to Main Street being conducted by and on behalf of Grantor, provided that such temporary use shall be for a period ending not later than December 31, 2016.

Other than the Temporary City Construction Activity, no commercial, industrial, residential, quarrying, mining or building development or improvement activities are permitted on the Protected Property. Subject to any more restrictive local, state, and federal laws and regulations, it is forbidden to dispose of or store rubbish, garbage, building debris, unregistered vehicles, abandoned equipment, parts thereof, or waste material on the Protected Property.

## **2. SUBDIVISION.**

No division unrelated to a community gardens use and no subdivision of the Protected Property is permitted, nor may the Protected Property be included as part of the gross tract area of other property not subject to this Conservation Easement for the purposes of determining density, lot coverage, or land area requirements, under applicable federal, state or municipal laws, regulations or ordinances controlling land use and building density. Notwithstanding the foregoing, any portion of the Protected Property may be conveyed to an entity to be retained for conservation ownership, but any such portion shall always be conveyed subject to the terms of this Conservation Easement, which shall be expressly acknowledged in writing by the grantee in any such conveyance.

## **3. STRUCTURES.**

As of the date of this Conservation Easement, there are no structures on the Protected Property. Grantor reserves the right to locate on the Protected Property only minor structures to enhance the opportunity for low-impact pedestrian access for enjoyment of the outdoors, quiet recreation, community gardens, and a playground for young children, specifically, the following: boundary markers, trail markers, small informational signs, improvements such as steps, park benches or similar seating, landscaping features, raised beds and small storage structures dedicated to community gardens, and signs on posts identifying the name of the Protected Property as "Sawyer Park." Except as set forth above, no structures of any kind, temporary or permanent, may be hereafter located on the Protected Property without the prior written consent of Holder.

In furtherance of this specific restriction and the purposes of this Conservation Easement, Grantor hereby grants to Holder all development rights (except as specifically reserved herein) that are now or hereafter allocated to, implied, reserved or inherent in the Protected Property, and the parties agree that such rights may not be used or transferred in whole or in part to any other party or any other property adjacent or otherwise, except as part of a transfer of the interest of Holder in this Conservation Easement.

## **4. SURFACE ALTERATIONS.**

As of the date of this transfer, there are no surface alterations on the Protected Property. Except as may be reasonably required for any permitted structure, community gardens use and for the Temporary Construction Activity, no filling, dumping, excavation or other alteration may

be made to the surface of the Protected Property without the prior written consent of Holder. This restriction shall not limit or prevent the alteration or improvement of the Access Easement, which is not a part of the Protected Property.

## **5. ACCESS.**

Grantor and Holder agree to take no action to prohibit or discourage public access to or use of the Protected Property. Grantor has the right to make reasonable rules and regulations for public use and to control, limit or prohibit, by posting and other means, any of the following uses: camping, loud activities, open fires, use of motor vehicles, snowmobiles, bicycles, or any use that may interfere with or be harmful to other members of the public using the Protected Property, the Open Space Values of the Protected Property, or the quiet use and enjoyment of neighboring property. Grantor and Holder may jointly agree in writing to restrict access to the Protected Property or parts thereof, but only to the extent and for the duration necessary to assure safety, and to permit necessary maintenance.

Grantor and Holder claim all of the rights and immunities against liability for injury to the public to the fullest extent of the law under the "Maine Recreational Use Statute", Title 14 M.R.S.A. Section 159-A, et seq., as amended, and any successor provisions thereof, and under any other applicable provision of law and equity.

## **6. ENFORCEMENT AND REMEDIES**

A. Upon any breach of this Conservation Easement by Grantor, Holder may, exercise any or all of the following remedies:

- (1) Institute suits to enjoin any breach or enforce any term of this Conservation Easement by temporary, and/or permanent injunction either prohibitive or mandatory, including a temporary restraining order; and
- (2) Require that the Protected Property be restored at Grantor's expense promptly to the condition required by this Conservation Easement.

Holder's remedies shall be cumulative and shall be in addition to all appropriate legal proceedings and any other rights and remedies available to Holder at law or equity.

B. No failure on the part of either party to enforce any term hereof shall discharge or invalidate such term or any other term hereof or affect the right of either party to enforce the same in the event of a subsequent breach or default.

C. Holder, and its employees and agents, shall have, in addition to its other rights of access and use described hereunder, the right to enter the Protected Property at reasonable times for the purpose of inspecting the Protected Property to determine compliance with the terms of this Conservation Easement, and Holder shall endeavor to enter at least once each year to determine such compliance.

## **7. PRIOR EASEMENTS AND RIGHTS**

This Conservation Easement is granted subject to the following:

- A. The parking easement, recreational use easement, buffer zone rights and negative covenant described in that certain deed to Congregation Bet Ha'am from the City of South Portland, dated November 10, 2005 and recorded in the Cumberland County Registry of Deeds in Book 23378, Page 202; and
- B. The Right of First Refusal granted to Congregation Bet Ha'am by the City of South Portland in that certain instrument dated November 10, 2005 and recorded in the Cumberland County Registry of Deeds in Book 23378, Page 210.

## **8. MISCELLANEOUS**

- A. Holder may assign, upon prior written notice to Grantor, its rights under this Conservation Easement to any conservation organization; provided that such organization agrees that the purpose of this Conservation Easement will be maintained. No assignment may be made by Holder of its rights under this Conservation Easement unless Holder, as a condition of such assignment, requires the assignee to carry out the conservation purpose of this Conservation Easement. In any event, if the Holder, or its successors and assigns shall abandon this Conservation Easement or the rights and duties of enforcement herein set forth or if such party is dissolved and the terms of the dissolution fail to provide a successor, then Grantor, its successors and assigns, shall institute in a court of competent jurisdiction a proceeding to appoint an appropriate successor as Holder.
- B. In order to provide Holder with notice of a change in ownership or other transfer of an interest in the Protected Property, Grantor agrees for itself, its successors and assigns, to notify Holder in writing of the names and addresses of any party to whom the Protected Property, or any part thereof, is to be transferred at or prior to the time said transfer is consummated.
- C. The Terms of this Conservation Easement are subject to any applicable Maine or Federal statutes.
- D. Grantor and Holder may jointly amend this Conservation Easement; provided that no amendment shall be allowed that will (1) have any adverse effect on the Open Space Values protected by this Conservation Easement and (2) not uphold the intent of the original Grantor and the fiduciary obligation of Holder to protect the Protected Property for the benefit of the public in perpetuity. Holder shall not be required to agree to any amendment. Amendments shall be recorded at the Registry where this Conservation Easement is recorded.

- E. Nothing herein (i) obligates Holder to undertake any work, efforts or to expend any funds related to this Conservation Easement; (ii) creates any duties, express or implied, on the part of Holder, other than as is expressly set forth herein; and (iii) creates any liability or claim for or related to any act or action taken by Holder in the exercise of its obligations hereunder, other than as expressly set forth herein.
- F. The terms of this Conservation Easement do not replace, abrogate or otherwise set aside any local, state or federal laws, requirements or restrictions imposing limitations on the use of the Protected Property.
- G. This instrument sets forth the entire agreement of the parties with respect to the Conservation Easement and supersedes all prior discussions, negotiations, understandings or agreements relating to this Conservation Easement. If any term is found to be invalid, the remainder of the terms of this Conservation Easement, and the application of such term to persons or circumstances other than those as to which it is found to be invalid, shall not be affected thereby.
- H. Holder or Grantor shall record this instrument in a timely fashion at the Cumberland County Registry of Deeds, and may re-record it at any time as may be required to preserve its rights under this Conservation Easement.
- I. Any notices by Grantor to Holder or Holder to Grantor relating to this Conservation Easement shall be sent by registered or certified mail, return receipt requested, addressed to the addressee party at the address set out at the first page of this Conservation Easement, or to such other address as either party may establish in writing on written notification to other.
- J. For purposes of this Conservation Easement, "Grantor" shall mean only, at any given time, the then current fee simple owner of the Protected Property and shall not include the original Grantor herein unless said original Grantor is still the then current fee simple owner of the Protected Property, except that if any Grantor has violated any term of this Conservation Easement, such Grantor shall continue to be liable therefore.

**TO HAVE AND TO HOLD** unto the Holder, and its successors and assigns, forever. The covenants agreed to and the terms, conditions, and restrictions imposed as aforesaid shall be binding upon Grantor, its assigns and all other successors to them in interest, and shall continue as an easement in gross and as such is inheritable and assignable in accordance with the terms of this Conservation Easement, and shall be considered to run with the land as an incorporeal interest and servitude in the Protected Property running in perpetuity; and Grantor covenants that it will execute such further assurances of the same as may be requisite.

**IN WITNESS WHEREOF**, Grantor and Holder have hereunto set their hands and seals on the dates set forth below.

**GRANTOR:**

**Date:** \_\_\_\_\_

**City of South Portland**

By: \_\_\_\_\_  
James H. Gailey  
City Manager

STATE OF MAINE

Cumberland, ss.

\_\_\_\_\_, 2015

Personally appeared before me the above named James H. Gailey, City Manager of the City of South Portland, and acknowledged the foregoing instrument to be his free act and deed in his stated capacity and the free act and deed of the City of South Portland.

\_\_\_\_\_  
Sherry F. Nadeau, Notary Public  
My commission expires

**ACCEPTANCE BY HOLDER**

The above and foregoing Conservation Easement was authorized to be accepted by South Portland Land Trust, and the said Holder hereby accepts the foregoing Conservation Easement, by and through Steve Jocher, its President, hereunto duly authorized.

**Date:** \_\_\_\_\_

**South Portland Land Trust**

By: \_\_\_\_\_  
Steve Jocher  
President

STATE OF MAINE

Cumberland, ss.

\_\_\_\_\_, 2015

Personally appeared before me the above named Steve Jocher, President of the South Portland Land Trust, and acknowledged the foregoing instrument to be his free act and deed in his stated capacity and the free act and deed of the South Portland Land Trust.

\_\_\_\_\_  
Notary Public/Attorney at Law  
Print name:  
My commission expires

Exhibit A

(Legal description of the Protected Property)

# Exhibit B

City of South Portland

July 10, 2015

## 25 Westbrook Street



**Property Information**  
Property ID 063'0000'1648  
Location 25 WESTBROOK ST  
Owner SOUTH PORTLAND



MAP FOR REFERENCE ONLY  
NOT A LEGAL DOCUMENT

The Town makes no claims and no warranties, expressed or implied, concerning the validity or accuracy of the GIS data presented on this map.

Parcels updated April 1, 2014