

Order 89-12/13
Given first reading on 10/15/12
Postponed on 11/5/12
Public Hearing & Passage 11/19/12 9-0

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)

AMENDMENT TO CITY CODE
SEC. 14-49 (ZONING TEXT AND MAP AMENDMENT)
RE: FIRST AMENDMENT TO CONDITIONAL REZONING FOR PROPERTY
IN THE VICINITY OF
NORTH DEERING/PRESUMPCOT RIVER

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.

FIRST AMENDMENT TO CONDITIONAL ZONE AGREEMENT
Re: PROPERTY IN VICINITY OF NORTH DEERING/PRESUMPCOT RIVER

This amendment and agreement (hereinafter “**AGREEMENT**”) is made this _____ day of _____, 2012, by Lloyd B. Wolf of Portland, Maine, his heirs, successors, devisees, and assigns (hereinafter “**APPLICANT**”).

W I T N E S S E T H

WHEREAS, APPLICANT, desires to develop a 8.2 acre piece of property, located in Portland at Map 390-A-1; Map 390-A-12, and Map 448-A-1, (referred to herein as the “**PROPERTY**”) (See Exhibit A) which is a portion of the property annexed to the City of Portland by the Maine State Legislature in a Private and Special Law, Chapter 62, S.P.499 and L.D. 1586, April 2, 2002 (See Exhibit B)); and

WHEREAS, APPLICANT and Robert L. Adam entered into an Agreement with the City of Portland, dated September 21, 2001 (hereinafter referred to as the “Development Agreement”), whereby the **CITY** would be willing to allow up to a total of eighty (80) age-restricted housing units (consisting of a minimum of fifty-five (55) clustered units [two or more units with common walls] and a maximum of twenty-five (25) detached single family units) to be developed, as compactly as possible, but in any event on no more than twenty (20) acres of developable land on property adjacent to the Falmouth town line; and

WHEREAS, this **AGREEMENT** shall apply to the development of the detached single family housing units allowed upon the **PROPERTY**, pursuant to the Development Agreement; and

WHEREAS, the conditional zone agreement dated July 11, 2005, permitted the development of single family age restricted housing; and

WHEREAS, APPLICANT has requested this amendment to the original conditional rezoning agreement dated July 11, 2005, in order to remove the age restricted requirement for the 23 lot single family subdivision; and

WHEREAS, the Planning Board of the City of Portland, pursuant to 30-A M.R.S.A. § 4352(8) and Portland City Code §§ 14-60 to 14-62 and 14-264, and after notice and hearing and due deliberation thereon, recommended the original conditional zone agreement and this amendment to the rezoning of the **PROPERTY** as aforesaid, subject, to certain conditions; and

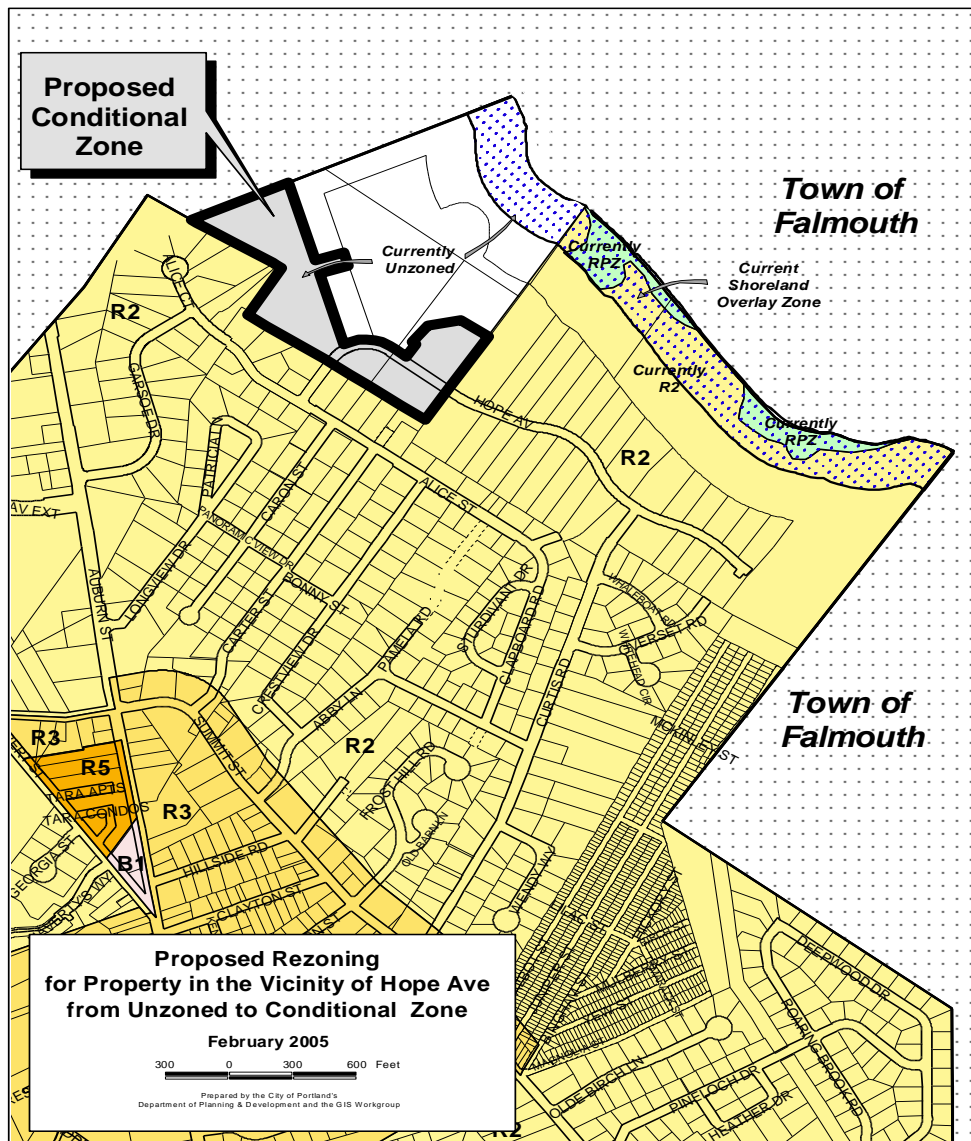
WHEREAS, the **CITY** by and through its City Council has determined that the original conditional zone agreement and this amendment to the rezoning agreement is pursuant to and consistent with the housing component of the **CITY'S** comprehensive land use plan; and

WHEREAS, the **CITY** has determined that the proposed development will be designed and constructed so that it will prevent undue adverse environmental impacts, substantial diminution of the value or utility of neighboring properties, or significant hazards to the health or safety of neighboring residents. These goals shall be achieved through the curtailment of clearing and cutting of vegetation, disturbance or destruction of natural topography and ground cover, soil erosion, filling, noise levels, emissions, traffic, lighting, odors, and any other potential negative impacts of the proposal; and

WHEREAS, the **CITY** authorized the execution of this Agreement on _____, 2012; and

NOW, THEREFORE, in consideration of the rezoning, the **APPLICANT** covenants and agrees as follows:

1. The **CITY** shall 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 Section 14-49 of the Portland City Code, by adopting the following map change amendment:



2. The following plans and documents are attached and incorporated into this Agreement:
- Exhibit A: **PROPERTY:** Detached Single Family Housing with lot designation and building envelopes
 - Exhibit B: Parcel annexed from Falmouth
 - Exhibit C: Parcels to be conveyed by and between Adam and Wolf and the City of Portland
 - Exhibit D: Homeowner's Association Documents
 - Exhibit E: Lot Layout and Grading Plan for Lots 18-23
 - Exhibit F: "Do Not Disturb" Area Plan
 - Exhibit G: Reserved
 - Exhibit H: River Access Parking Plan
 - Exhibit I: Feeno Marker Plan

GENERAL REQUIREMENTS

3. An executed copy of this amended **AGREEMENT** shall be recorded by the **APPLICANT** at the Cumberland County Registry of Deeds no later than thirty (30) days after the date of Portland City Council approval of this Conditional Rezoning Agreement. If this Agreement is not recorded by said date, then the Conditional Rezoning shall become null and void and the zoning of the **PROPERTY** shall revert to Residential-2 (R-2) zone. , As required by the original conditional zone agreement, the **APPLICANT** shall record and has recorded in the Cumberland County Registry of Deeds an affidavit from land surveyors, Titcomb and Associates, attesting that they have surveyed the parcel boundary line depicted on Exhibit B and that said line is now the boundary between the City of Portland and the Town of Falmouth, along with an accurate metes and bounds description of the parcel of land surveyed and subsequently annexed to the City of Portland by Private and Special Law Chapter 62, S.P.499 and L.D. 1586, April 2, 2002, a copy of which recording shall also be provided to the City of Portland Public Works Department and the Town of Falmouth. Confirmation of such recording and delivery shall be made to Corporation Counsel's Office, Portland City Hall, Portland, Maine. A copy of the Book and Page Number shall be provided to the City upon recording.

4. Executed copies of the exchange of land between the **CITY** and the **APPLICANT** and Adam (as shown on Exhibit C) shall be recorded by the **APPLICANT** before subdivision review by the Portland Planning Board of the development shown on Exhibit A. A copy of the Book and Page Number shall be provided to the City upon recording.

5. This amended Conditional Zone Agreement shall apply to the development of twenty-three (23) detached, single-family house lots on property depicted on Exhibit A. Development of the **PROPERTY** shall be subject to **CITY** Subdivision review and approval as well as review **and** approval under the Site Location of Development Act either by the Maine Department of Environmental Protection (DEP) or the **CITY** under its delegated authority. **APPLICANT** shall obtain all Environmental Protection Agency (EPA) and DEP permits required prior to final action by the Portland Planning Board on any such application for Subdivision or Site Location approval. Within sixty (60) days after this Conditional Rezoning is approved by the Portland City Council, **APPLICANT** will file all required applications with the EPA and DEP or the **CITY** under its delegated authority. **APPLICANT** shall comply with all requirements of the EPA and DEP or the **CITY**, except that, where **CITY** standards are more restrictive, the more restrictive standards shall apply. The "subdivision plans" submitted in conjunction with this Conditional Rezoning do not constitute final approval of the plans. Rather, the in depth review and approval of the Subdivision rests exclusively with the Portland Planning Board.

6. **APPLICANT** may contract for the installation of improvements noted in this amended Conditional Rezoning but shall remain ultimately liable to the **CITY** for the financial obligation for compliance with **CITY** ordinances and approvals. Such financial obligation shall not be transferable without prior authorization of the transfer by the

Planning Board. The foregoing notwithstanding, in the event that **APPLICANT** sells all of its interest in the **PROPERTY**, **APPLICANT** shall be entitled to transfer such financial obligation for compliance with **CITY** ordinances and approvals to said buyer, provided that the **CITY** is reasonably satisfied with the buyer's financial capacity.

7. The provisions of this Agreement are intended to supersede what would otherwise be Residential 2 (R-2) Zone and to the extent not otherwise superceded, the requirements of the R-2 zone shall apply.

CONDITIONS

8. The following conditions shall apply to the development:

A. Permitted Uses. **APPLICANT** shall be authorized to establish and maintain the following uses on the **PROPERTY**:

1. Residential use, consisting of twenty-three (23) single-family house lots.
2. Accessory uses: trail networks, and public access uses.

B. Phasing. **APPLICANT** may develop or sell in three phases:

1. Lot 17 on Hope Avenue;
2. Lots 18-23 on Road B; and
3. Lots 1-16 on Road A.

APPLICANT reserves the right to re-order the phases according to demand and economic conditions.

C. Zoning Requirements:

1. The setbacks listed below notwithstanding, there shall be no building or ground disturbance of any kind within Do Not Disturb Areas noted on Exhibit F. Otherwise, the following minimum dimensional standards shall be required for any development:
 - a. Front yard – Principal or accessory structure: Ten (10') feet
 - b. Side yard – Principal or accessory structure with ground coverage greater than one hundred (100) square feet: Twelve (12') feet.
Accessory detached structures with ground coverage of one hundred (100) square feet or less: Five (5) feet.
 - c. Side yard on side street – twelve (12) feet
 - d. Rear yard setback shall be a minimum twenty (20) feet except that lots 1-7 shall be a minimum twenty-five (25) feet; provided,

however, lot 1 may be a minimum fifteen (15) feet where necessary to accommodate Road A as set forth on Exhibit A; and lots shall be a minimum twenty five (25) feet except that portion of the rear yard abutting I-95 shall be a minimum twenty (20) feet

- e. Minimum lot size - 6,000 s.f.
- f. Minimum floor area, excluding garage – 1,000 s.f.
- g. Maximum structure height – Thirty-five (35’) feet
- h. Minimum no cut/no fill/no disturb rear yard buffer on Lots 21-23 – 15 feet adjacent to City of Portland Pedestrian Easement
- i. Minimum area per dwelling unit: Six thousand (6,000) square feet
- j. Minimum street frontage: Fifty (50) feet
- k. Maximum lot coverage (building first floor area): Forty (40) percent of lot area
- l. Minimum Lot width: Fifty (50) feet

Note that these zoning requirements do not guarantee a buildable lot for any lot depicted on Exhibit A. The buildability of any lot depends upon finished floor elevations, grading plans, soil stability and erosion control, etc. which shall be reviewed by the **CITY** during site plan review.

D. Site Plan Requirements:

1. On lots 18 through 23, the **APPLICANT** will adhere to the following: a) the Lot Layout and Grading plans attached hereto as Exhibit E, which plans contains a clear delineation of the limit of work on these lots and the “Do Not Disturb area” adjacent to these lots. The “Do Not Disturb area” restrictions are more fully set out in paragraph 3 below. The **CITY** shall be permitted to plant additional vegetation within the 15 foot “Do Not Disturb” area on the **PROPERTY** at the rear of lots 21 through 23, at its cost and expense. **APPLICANT** shall convey to the **CITY** the deed for the easement area over this 15 foot strip and shall clearly mark, as set forth in paragraph F. (3), the “Do Not Disturb area” for lots 18 through 23, only, prior to the release of the subdivision plat.
2. The building envelopes for lots 18 through 23, as shown on Exhibit E, represent the maximum area for the construction of principal and accessory structures. Any deviations from, or changes to, the building envelopes from those

depicted on Exhibit E must receive the approval of the Portland Planning Board prior to commencement of construction, and such approval, if granted, will be recorded in the Cumberland County Registry of Deeds with a reference to the Plan Book and Page Number of the originally approved plat. Note that building envelopes shown on Exhibit E do not guarantee a buildable lot for any lot depicted on Exhibit A. The buildability of any lot depends upon finished floor elevations, grading plans, preservation, soil stability and erosion control, etc. which shall be reviewed by the **CITY** during site plan review.

3. The “Do Not Disturb Area(s)” are an integral part of this development and provide an important public benefit of natural and undisturbed open space. To preserve the natural vegetation in the area and to avoid and/or minimize the potential for the effects of windthrow, sunscald, loss of tree vigor on **CITY** property and to preserve the existing vegetation beyond the property boundaries of the individual lots (i.e. those areas labeled “Do Not Disturb area,”) the **APPLICANT** shall adhere to the written and graphic plan for buffer preservation around the perimeter of the **PROPERTY**, which plan includes proper arboricultural practices being implemented on the **PROPERTY**, as shown on Exhibit F. In carrying out these practices the standards contained within the *National Arborist Association, Inc. Standards for Tree Care Operations* shall be followed. However, **APPLICANT** shall not be responsible for performing any work on the **CITY** property. The “Do Not Disturb areas” shall forever remain in their natural state and shall be in the nature of a conservation easement and the enforcement of any violation of the “Do Not Disturb areas” restriction contained herein shall accrue to the Homeowners’ Association, individual lot owners within the subdivision and/or the **CITY**. The remedy for any violation of this paragraph shall include, at minimum, specific performance, monetary penalties and attorneys fees.

E. Subdivision Requirements:

1. No further subdivision of lots shall be permitted without an amendment to this Conditional Zone Agreement by the City Council. No movement of lot lines shall be permitted without further review and approval of the Portland Planning Board.

2. The roadways servicing the **PROPERTY** shall be conveyed to the City of Portland as public roadways. Notwithstanding the street width requirements contained in the site plan and subdivision sections of the Portland City Code, the dedicated rights of way shall be at least fifty (50) feet wide, with the paved travel portion of at least twenty eight (28) feet wide except where a lesser width is necessary to achieve a twenty five (25) foot setback on lot 1, and built to City Standards as contained in the City of Portland Technical and Design Standards and Guidelines, March 2000, as may be amended from time to time. Sidewalks shall be provided on both sides of the street as practicable, designated as Road A, so labeled on Exhibit A, and on one side of the street designated as Road B, so

labeled on Exhibit A. Granite curbing shall be installed on both sides of roads A and B. The roadways will be completed and offered to the **CITY** for acceptance within two (2) years of the posting of each performance guarantee, unless the **CITY** and **APPLICANT** agree in writing to extend the duration for acceptance, and the performance guarantee is extended accordingly.

3. A turn around easement (at the terminus of Road B) for snow plowing and other **CITY** uses shall be provided. It shall not be located within the thirty (30) foot pedestrian easement shown on Exhibit A. The **APPLICANT** shall build and pave said turnaround easement area according to City Standards as contained in the City of Portland Technical and Design Standards and Guidelines, March 2000 as may be amended from time to time. **APPLICANT** shall convey said turn around easement to the **CITY** without consideration and no later than the date upon which the **APPLICANT** conveys Road B to the **CITY**.

4. When either Road A or B has been completed, or both Roads A and B have been completed, to the satisfaction of the **CITY**, the Portland City Council may accept said streets. Unless and until the **CITY** accepts Road A or Road B, said roadways shall be the financial responsibility of the **APPLICANT** for maintaining said roadways (including the cost of street sweeping, snowplowing, sanding, salting and street lighting as well as the cost of curb-side trash pick up). The **CITY** is not, and shall not, become responsible for providing such services until the streets are accepted as **CITY** streets. This provision shall be included, verbatim, in all conveyances of the property or any interest therein by **APPLICANT** or his successors, and shall not merely be referenced to a recorded instrument containing such restrictions.

5. Prior to the release of the subdivision plat the **APPLICANT** shall deed to the **CITY** a 20 foot wide public recreation easement running between Lots 13 and 14 (labeled " 30' Future Access Right-of-Way" on Exhibit A), and a public pedestrian easement that is the width and length of the two adjacent **CITY** owned parcels such that the "gap" between the two parcels is joined, all as delineated on Exhibit A. Such easements shall be in a form satisfactory to the **CITY's** Corporation Counsel's Office. Note that the 30' Future Access Right-of-Way" depicted on Exhibit A is not intended to be a lot and may only be used for pedestrian and vehicle access.

6. Off street parking shall be provided to accommodate two (2) spaces per dwelling unit and shall be permitted on the driveway within the front setback of each dwelling unit. On-street parking shall be permitted on one side of Road A and Road B.

7. **APPLICANT** shall retain a licensed Civil Engineer to design the surface and subsurface improvements of the public right of way, which design shall be subject to the approval of the Portland Planning Board at the time of subdivision review.

8. Public parking for trail access is an integral part of this Conditional Rezoning as it provides an important public benefit. As a result, at the time of subdivision approval, a perpetual public easement shall be conveyed by the **APPLICANT** to the **CITY** for public parking purposes. The perpetual public easement granted to the **CITY** shall specify that the easement holders shall not be entitled to pave the easement area but the **CITY** may take all other reasonable steps to maintain the lot. The public parking lot shall be designed and constructed by **APPLICANT** to accommodate up to six (6) vehicles. The public parking lot shall consist of a graded gravel surface, and bordered by a wooden split-rail fence and **APPLICANT** shall have no obligation to pave or otherwise improve the public parking lot to comply with **CITY** standards for streets. The **APPLICANT** shall construct the public parking lot no later than two (2) years from the subdivision approval. All costs and expenses of constructing the public parking lot shall be shared equally by **APPLICANT** and **CITY**. The easement shall be conveyed from the **APPLICANT** to the **CITY** without a fee. The land area depicted on Exhibit G may constitute the location for such parking lot. The Planning Board, during subdivision review shall determine the feasibility of locating the parking lot in such location. It may require the **APPLICANT** to locate the parking lot in a different location. In any event, a six (6) car parking lot shall be required to be located and constructed on the site in a location approved by the Planning Board as physically feasible and appropriately located to serve this public purpose.

9. **APPLICANT** shall convey a 30' wide easement to the **CITY**, to be located on the southeasterly edge of the development (labeled " 30' Pedestrian Easement" on Exhibit A) within the area indicated on Exhibit A, for use as a pedestrian trail. The 30' wide easement shall include language sufficient to protect area residents and abutters from unreasonable disruption (including, without limitation, reasonable restrictions and rules regarding hours of use, noise, trash, activities, etc.). Conveyance of the additional easement noted in paragraph E(5) also shall be conveyed to the **CITY** prior to the release of the subdivision. The easements shall be conveyed from the **APPLICANT** to the **CITY** without a fee.

10. The **APPLICANT** shall contribute \$17,500.00 to the City of Portland for its use in providing recreational trails through the Presumpscot River Preserve, which trails will serve as the recreational amenity to the development described herein.

11. The **APPLICANT** shall submit to the Planning Board, during subdivision review, a construction vehicle management plan to minimize the impacts of construction vehicles and activities on the surrounding neighborhood.

12. The **APPLICANT** shall consider, during subdivision review, shifting roadway A in a northeasterly direction, to the extent practicable and as necessary to permit a 25 foot setback on Lot 1, at the point road A intersects with Hope Ave.

F. Construction Conditions:

1. During construction of Roadways A and B, so labeled on Exhibit A, **APPLICANT** shall retain either a licensed Civil Engineer or Landscape Architect (“**PROFESSIONAL**”) to conduct site inspections and to report the results of such inspections to the **CITY**, in writing, on a semimonthly basis. At minimum, site inspections shall occur both semimonthly and as follows: 1) prior to site clearing and the commencement of construction; 2) at the completion of clearing and grubbing; 3) at the completion of rough grading; 4) at the completion of final grading; 5) upon completion of surface restoration; and 6) prior to the removal of erosion control measures.

The **PROFESSIONAL** shall submit to the Planning Authority, at least semimonthly, written notes of each inspection visit, summarizing: 1) the construction activity underway; 2) the compliance or non-compliance with the approved site plan and subdivision plan; 3) corrective actions, as appropriate, required to secure such compliance; 4) any changes in field conditions which require modification to the design or the roadway; and 5) the plan for construction activity to take place in the time period following the inspection. In addition, **PROFESSIONAL** shall also provide written certification to the Portland Planning Authority upon completion of construction of the road improvements certifying that the work is in substantial conformance to the approved plans and that all conditions of approval have been satisfied. Such certification shall be based upon the Engineer’s or Landscape Architect’s professional opinion. Any and all improvements which cannot be completed according to the initial approved plans shall obtain **CITY** approval prior to any deviation from the approved plans.

2. **APPLICANT** shall require each Lot Owner to retain a licensed Maine Land Surveyor to lay out and certify the location and elevation of each foundation for each proposed house, on lots 17 – 23 (Exhibit E), in order to ensure that said locations and elevations conform to approved site plan submissions.

APPLICANT shall also require each lot owner of lots 18-23, to retain a licensed civil engineer or landscaped architect to assist in design of the improvements on their lots. The owners of these lots shall also retain that professional to provide construction phase services including, but not limited to, periodic site inspection for adherence to all required erosion and sedimentation control measures and to address any changes in field conditions which require modification to the design of the lot improvements. Site inspection requirements will not apply to lots 1 – 17 unless the Portland Planning authority determines in writing upon submission of a lot site plan that these services are required due to the location of the

improvements on the lot, site conditions, grading and proposed building elevations. At a minimum, the following site inspection must be conducted:

- Subsequent to staking of house and driveway, the installation of silt fence and prior to clearing; and
- Upon completion of clearing and grubbing; and
- Upon completion of rough grading; and
- Upon setting the forms but prior to pouring the foundation; and
- Upon completion of final grading; and
- Upon completion of surface restoration; and
- Prior to removal of erosion control measures.

The professional shall provide a written statement to the Portland Planning Authority upon completion of construction of lot improvements affirming that the work is in substantial conformance to the approved plans and that all conditions of approval have been satisfied. This requirement shall appear as a note in all property deeds except lots 1-17.

3. **APPLICANT** shall install one permanent Feeno-type marker (as described below) (see Exhibit H) at each of the rear yard corners of lots 10, 12, 13, 14 and 16 and at the limit of the “Do Not Disturb Area” at the rear yard of lots 21-23. “Feeno- type” survey markers shall be markers with a granite head and an engraved identity disk with legend reading “City of Portland Presumpscot River Preserve”, or an equivalent survey marker system approved by the Portland Planning Authority. **APPLICANT** otherwise shall install iron pins, with ID caps, at all other corners of lots 10-16, and at all corners of lots 1-9.

4. All backfill material placed within the right of ways for Roads A and B shall meet the MDOT common borrow specification.

5. Prior to the issuance of the first temporary certificate of occupancy, the respective roadway access (Road A or B on Exhibit _A_) shall be completed to, at a minimum, base course pavement.

6. The storage of materials during construction shall be determined by the Planning Board during subdivision.

7. Upon **APPLICANT**'s sale of each lot, the owner of said lot and or the Homeowner's Association shall be responsible for ensuring that construction, development and use of said lot complies with the terms and conditions contained

in this Agreement. **APPLICANT** shall include a covenant in each deed conveying a lot within that provides the **CITY** with the right to enforce restrictions on the lots and includes a requirement for restoration by the owner and payment of the **CITY's** reasonable attorney's fees.

CONCLUSION

9. The above restrictions, provisions and conditions of this Agreement are an essential part of the rezoning, shall run with the **PROPERTY**, shall inure to the benefit of, be enforceable by and bind **APPLICANT**, his successors or assigns, and any party in possession or occupancy of the **PROPERTY** or any part thereof, and said restrictions, provisions and conditions shall inure to the benefit of, be enforceable by and bind the **CITY**, acting by and through its duly authorized representatives.

If any of the restrictions, provisions, conditions, or portions thereof, set forth herein should for any reason be held to be 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.

Except as expressly modified herein, the development, use, and occupancy of the subject premises 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.

This amended Conditional Rezoning agreement may be enforced by the **CITY** pursuant to the land use enforcement provisions of state law (including 30-A M.R.S.A. § 4452) and the City Code. 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 this amended Conditional Rezoning be modified or the **PROPERTY** rezoned.

WITNESS:

APPLICANT:

Lloyd B. Wolf

STATE OF MAINE
CUMBERLAND, ss.

_____, 2012

Personally appeared before me the above-named Lloyd B. Wolf, and acknowledged the foregoing instrument to be his free act and deed.

Notary Public/Attorney at Law