Order 186-08/09
Given first reading on 3/16/09
Public hearing and Passage: 4/6/09 8-0 (Anton out)

JILL C. DUSON (MAYOR)
KEVIN J. DONOGHUE (1)
DAVID A. MARSHALL (2)
DANIEL S. SKOLNIK (3)
CHERYL A. LEEMAN (4)

CITY OF PORTLAND

IN THE CITY COUNCIL

JOHN R. COYNE (5)
JOHN M. ANTON (A/L)
DORY RICHARDS WAXMAN (A/L)
NICHOLAS M. MAVODONES (A/L)

AMENDMENT TO CITY CODE
SEC. 14-49 (ZONING TEXT AND MAP AMENDMENT)
RE: CONDITIONAL REZONING FOR PROPERTY
IN THE VICINITY OF CONGRESS STREET AND WHITNEY AVENUE

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.

CONDITIONAL ZONE AGREEMENT

WESTBROOK DEVELOPMENT CORPORATION

AGREEMENT made this ____ day of _____, 2009 by Westbrook Development Corporation, a Maine corporation with a place of business in Westbrook, Maine ("Developer"), and its successors and assigns.

W I T N E S S E T H

WHEREAS, the Developer has acquired land and buildings located at 1251 Congress Street in Portland, consisting of parcels shown on City of Portland Tax Map 186, Block A, Lots 2, 3 and 5, and more particularly described in a deed from the Roman Catholic Bishop of Portland dated October 29, 2008 and recorded in the Cumberland County Registry of Deeds in Book _____, Page _____ (the "Property"); and

WHEREAS, the existing building located on the Property used to house a grammar school for St. Patrick's Church; and

WHEREAS, the existing building located on the Property is currently vacant; and

WHEREAS, the Developer intends to convert the existing building located on the Property into fifteen (15) condominium units, all of which shall be sold initially as affordable to buyers with household incomes at one hundred and twenty (120) percent or less of the U.S. Department of Housing and Urban Development moderate-income figure for metropolitan Cumberland County Maine and five (5) of said units will remain affordable so long as the Property remains a residential condominium; and

WHEREAS, the Developer intends to house all of the condominium units in the existing building located on the Property; and

WHEREAS, the Developer intends to maintain the character of the Property and complement the adjacent residential neighborhood; and

WHEREAS, the existing zoning is R-5 which requires 2500 square feet of land area per unit (if affordable housing is included), and which results in a limitation on the number of condominium units in the building upon the Property to eleven (11); and

WHEREAS, the Developer has requested a rezoning of the Property in order to permit the proposed redevelopment and reuse of the building from a vacant school to a fifteen (15) unit residential condominium; and

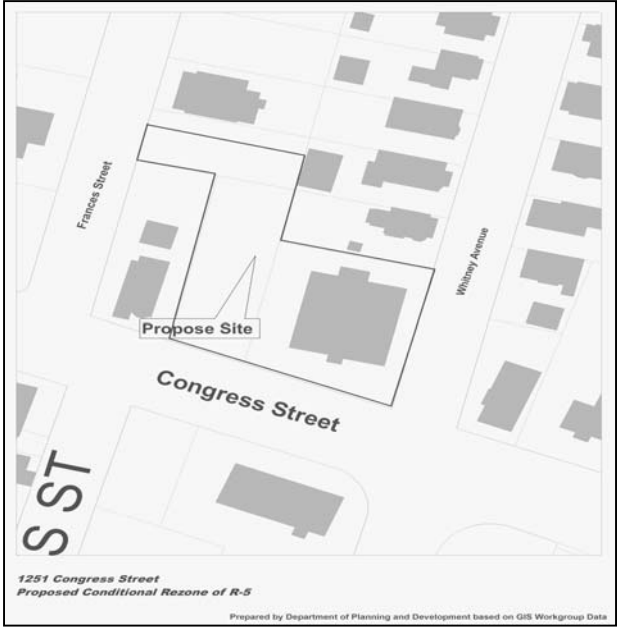
WHEREAS, the Planning Board, after notice and hearing and due deliberation thereon, recommended the rezoning of the Property as aforesaid, subject, however, to certain conditions contained in this Agreement; and

WHEREAS, the Portland City Council, pursuant to 30-A M.R.S.A. § 4352(8) and Portland City Land Use Code (the "Code") §§ 14-60 to 14-62, after notice, hearing and due deliberation thereon, has determined that because of the unusual nature and unique location of the proposed development, and its minimal impact on and compatibility with the surrounding community, it is necessary and appropriate to recommend the rezoning of the Property as aforesaid, with the following conditions and restrictions set forth in this Agreement; and

WHEREAS, the Portland City Council has on _____, 2009 approved this Agreement in its entirety, by City Council Order No. _____, a true copy of which is attached hereto as Attachment 1 (the "Order");

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

1. Pursuant to the Order, the City shall amend the Zoning Map of the City of Portland, dated September, 2000 (as amended from time to time and on file in the Department of Planning and Urban Development, and incorporated by reference into the Zoning Ordinance by § 14-49 of the Code) by adopting the map change amendment shown below to zone the property R-5, subject to the conditions contained below.



If this Agreement is not recorded within sixty (60) days after the date of the approval of the Order, then the conditional rezoning shall become null and void and the zoning of the Property shall revert to the pre-existing R-5 zone.

2. The use of the Property shall be for a maximum of fifteen (15) residential condominium units. No additional condominium units shall be developed and the fifteen (15) condominium units shall be developed substantially as delineated and depicted on the Site Plan, elevations and floor plans, attached hereto as Attachment 2, submitted by _____ dated _____, 2009.

3. As a condition of this rezoning, the Planning Board shall be substituted for the Zoning Board of Appeals for purposes of evaluating and approving the conditional use of an alteration of an existing non-residential structure to a residential structure in the R-5 zone.

4. The underlying dimensional requirements of the R-5 zone shall apply and are modified as follows:

a.	Square Feet of land area per Unit:	1975
b.	Units per Building:	15

5. The Developer agrees to maintain the following affordability controls on the proposed development on the Property:

a. Ten (10) of the fifteen (15) condominium units shall be initially developed, marketed and sold to individuals with household incomes at 120% or less of the U.S. Department of Housing and Urban Development moderate-income income figure for metropolitan Cumberland County Maine, as calculated for the year in which the sale takes place (a "Qualified Purchaser"), and shall be priced to be affordable to a Qualified Purchaser. Each of the Qualified Purchasers of these ten (10) condominium units shall occupy the units as their principal residences, except that a Qualified Purchaser may rent a unit

for a period not to exceed twelve (12) months in any thirty-six (36) month period, to enable the Qualified Purchaser to address matters such as divorce, transfer of employment, economic hardship and the like. Transient rentals shall not be permitted. No affordability restrictions or controls shall apply beyond the initial sales of these ten (10) units, except that the Developer may subject these ten (10) units to additional affordability restrictions or controls as the Developer deems appropriate. Any such additional affordability restrictions or controls shall be reviewed and approved by the City of Portland corporation counsel's office. In the event that the purchase price for any one of these ten (10) units is subsidized as a result of public funds made available to make the purchase of such unit more affordable, a junior mortgage shall be placed upon such condominium unit, representing the amount of the subsidy received. Unless the Qualified Purchaser sells the condominium to another Qualified Purchaser upon resale of the condominium unit, the amount of the junior mortgage, being the amount of the subsidy received, shall be paid from the proceeds of sale by the Qualified Purchaser to the holder of the affordability covenants upon the condominium units, as set forth in the Declaration of Affordability Covenants to which the condominium units shall be subject, to be used for the purpose of providing additional affordable housing opportunities in the City of Portland, which may include the continued subsidy of subsequent Qualified Purchasers of any of these ten (10) condominium units. In the event that an initial Qualified Purchaser sells one of these ten (10) condominium units to another Qualified Purchaser, the junior mortgage shall not be repaid, but shall be assumed by the subsequent Qualified Purchaser, who shall own and hold these condominium units subject to a junior mortgage in the same manner as an initial Qualified Purchaser. Notwithstanding the foregoing, in the event that the terms of the subsidy program require a different treatment of the subsidy upon resale, the terms of the subsidy program shall control and shall govern the treatment of the subsidy upon resale.

b. Five (5) of the fifteen (15) condominium units shall be developed, marketed and sold, and resold, as long as the Property remains a residential condominium, to Qualified Purchasers. Each of the Qualified Purchasers of these five (5) condominium units shall occupy the units as their principal residences, except that a Qualified Purchaser may rent a unit for a period not to exceed twelve (12) months in any thirty-six (36) month period, to enable the Qualified Purchaser to address matters such as divorce, transfer of employment, economic hardship and the like. Transient rentals shall not be permitted. A junior mortgage may be placed upon such condominium unit, to further secure the continued affordability covenants contained in the Declaration of Affordability Covenants.

c. All of these affordability restrictions shall be stated in and secured by a Declaration of Affordable Housing Covenants and Restrictions, other deed restriction(s) and/or condition(s) in any deed(s) conveyed out by the Developer, shall be stated in the condominium documents, shall be identified on the approved Site Plan for the Property, and shall be reviewed and approved by the City of Portland corporation counsel's office. The affordability covenants contained in the Declaration of Affordable Housing Covenants and Restrictions shall be enforceable by the City of Portland, or its designee.

6. The curb cut presently located along Congress Street shall be permanently closed as a condition of this Agreement.

7. The existing chain-link fence located on the Property shall be removed.

8. The Developer shall screen with plant material and/or fencing the parking lot and service driveways located on the Property in order to appropriately buffer their visibility from the adjacent residential properties and roadways.

9. The Developer shall provide two (2) trees per condominium unit on the Property. If the Developer is unable to provide the required two (2) trees per unit, it shall contribute $200.00 per tree not provided to the City of Portland's Tree Fund. The number and kind of trees, both and existing and proposed, shall be approved by Jeff Tarling, the City Arborist. This contribution is independent of any conditions which the Planning Board may lawfully require under site plan or subdivision review. The Planning Board shall not be authorized, however, to waive this requirement. This contribution shall be made prior to the issuance of a building permit.

10. The Developer shall at its own expense remove the two (2) school speed limit signs with flashing lights, the mast arms and poles and both concrete anchor and/or bolt bases on the Property, the wooden sign post located on Frances Street, and repair the sidewalk as needed.

11. As part of its community contribution, the Developer has already contributed $15,000.00 worth of playground equipment to the City.

12. The Developer shall be responsible for ongoing maintenance of the Property, including snowplowing, salting, sanding, sweeping, lighting, trash pickup (at least weekly), mowing, etc. The dumpster located on the Property shall be enclosed.

13. The provisions of this Agreement are intended to replace and/or supersede the requirements of the underlying R-5 zone. As stated above, to the extent not otherwise altered herein, the zoning requirements for the R-5 zone shall otherwise apply to the Property.

14. In the event of a breach by the Developer or its successors or assigns (including, but not limited to, any homeowners association) of the zoning provisions

contained herein (whether the Zoning Administrator, the Zoning Board of Appeals or a court determines such breach), the Planning Board, after notice and hearing, may recommend to the City Council that the conditional zone and this Agreement be amended, or be rescinded, such rescission to result in the termination of this Agreement and a reversion of the Property to the R-5 zone requirements in place before the execution of this Agreement. Notwithstanding the foregoing, following the issuance of a certificate of occupancy for the fifteen (15) condominium units, and the recording in the Cumberland County Registry of Deeds of a Declaration of Affordability Covenants acceptable to the City of Portland corporation counsel's office and to which the City is a party, the remedies available to the City for a breach of the zoning conditions contained herein shall not include rescission of this Agreement, but shall otherwise include all remedies available under applicable law (including, but not limited to, 30-A M.R.S.A. § 4452 and the Portland City Code) and under the Declaration of Affordability Covenants. The Declaration of Affordability Covenants shall include a provision providing that it may not be amended without the written consent of the City of Portland.

15. The above stated restrictions, provisions, and conditions are an essential part of the rezoning, shall run with the Property, shall bind and benefit the Developer, any entity affiliated with the Developer that takes title to the Property, its successors and assigns (including, but not limited to, any homeowners association), and any party in possession or occupancy of said Property or any part thereof, and shall inure to the benefit of and be enforceable by the City of Portland, by and through its duly authorized representatives. The Developer shall file a counterpart original of this Agreement in the Cumberland County Registry of Deeds.

16. This conditional rezoning agreement shall be enforced pursuant to the land use enforcement provisions of state law including, but not limited to, 30-A MRSA § 4452 and the Portland City Code.

17. 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.

18. Except as expressly modified herein, the development shall be governed by and comply with the provisions of the Portland City Code and any applicable amendments thereto or replacement thereof.

WITNESS: _____

WESTBROOK DEVELOPMENT CORPORATION

_____

BY:

STATE OF MAINE
CUMBERLAND, ss.
_____, 2009

Personally appeared before me the above-named _____, in his/her capacity as _____ of Westbrook Development Corporation, and acknowledged the foregoing instrument to be his/her free act and deed in his/her said capacity and the free act and deed of said corporation.

Before me,

_____
Notary Public/Attorney at Law