

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

***Subject:***

**ORDER #153-13/14 – Authorizing the City Manager to execute a license and indemnification agreement between Long Creek Watershed Management District and the City to allow LCWMD to install and maintain stormwater best management practice improvements in the Maine Mall Road and Gorham Road rights-of-way. Passage requires majority vote.**

***Position:***

This item is brought forward to enter into a License and Indemnification Agreement between the Long Creek Watershed Management District (the “District”) and the City of South Portland that would allow the District to maintain portions of the Long Creek stormwater management system within the Maine Mall Road and Gorham Road rights-of-way. In return, the District would agree to defend and indemnify the City for any damages resulting from its installation and maintenance of the stormwater management system located in the City’s rights-of-way.

Maine Mall Road and Gorham Road are state and state-aid highways, respectively, and the City must maintain Maine Mall Road and Gorham Road in good repair at the City’s expense. The two roads are located within the Long Creek Watershed, and Long Creek has been designated an “urban impaired stream” by the Maine Department of Environmental Protection because it fails to meet certain State of Maine water quality standards pursuant to the federal Clean Water Act. The municipalities of South Portland, Portland, Westbrook and Scarborough, along with other entities, have jointly developed the Long Creek Watershed Management Plan for the purpose of complying with State and federal Law and restoring the water quality of Long Creek.

The City and the District are parties to a Participating Landowner Agreement pursuant to which the District has agreed to oversee and assist in the implementation of the State and federal remediation and improvement requirements in and along Long Creek and within the Long Creek Watershed.

The District needs permission from the City in order to be able to install and maintain the stormwater improvements within both rights-of-way; through this agreement, the City provides the District a license over, through, and under the subject property to construct,

reconstruct, install, operate, modify, alter, use, maintain, repair, replace, remove, inspect and monitor stormwater management structures as defined by the State of Maine, Department of Environmental Protection, BMPs Technical Design Manual. The District is in the process of obtaining similar permission from the Maine Department of Transportation to install and maintain the stormwater improvements within both rights-of-way, and the terms of the City's license and indemnification agreement are consistent with the terms upon which MaineDOT is granting the same permission to the District as relates to Maine Mall Road and Gorham Road.

***Requested Action:***

Council passage of ORDER #153-13/14.

  
City Manager



CITY OF SOUTH PORTLAND

GERARD A. JALBERT  
Mayor

JAMES H. GAILEY  
City Manager

SUSAN M. MOONEY  
City Clerk

SALLY J. DAGGETT  
Jensen Baird Gardner & Henry

District One  
MICHAEL R. POCK

\_\_\_\_\_

District Two  
PATRICIA A. SMITH

\_\_\_\_\_

District Three  
MELISSA E. LINSKOTT

\_\_\_\_\_

District Four  
LINDA C. COHEN

\_\_\_\_\_

District Five  
GERARD A. JALBERT

\_\_\_\_\_

At Large  
MAXINE R. BEECHER

\_\_\_\_\_

At Large  
THOMAS E. BLAKE

**IN CITY COUNCIL**

**ORDER # 153-13/14**

**ORDERED**, that the City hereby approve the license and indemnification agreement between the Long Creek Watershed Management District ("LCWMD") and the City in substantially the same form as shown on the attached to allow LCWMD to install and maintain stormwater best management practice improvements in the Maine Mall Road and Gorham Road rights-of-way and authorize the City Manager to execute the agreement on behalf of the City.

Fiscal Note: Less than \$1,000

Dated: May 19, 2014

## LICENSE AND INDEMNIFICATION AGREEMENT

This License and Indemnification Agreement (the “Agreement”), made this \_\_\_\_\_ day of \_\_\_\_\_, 2014, is by and between the CITY OF SOUTH PORTLAND, a municipal corporation existing under the laws of the State of Maine and located in South Portland, County of Cumberland, and State of Maine (the “City”), and LONG CREEK WATERSHED MANAGEMENT DISTRICT, a quasi-municipal, special purpose district established as a separate legal entity and instrumentality and as a body corporate and politic under the laws of the State of Maine, whose mailing address is Long Creek Watershed Management District c/o Cumberland County Soil & Water Conservation District, 35 Main Street, Suite 3, Windham, Maine 04062 (the “District”). The City and the District are hereinafter referred to collectively as the “Parties.”

WHEREAS, Maine Mall Road and Gorham Road are state and state-aid highways, respectively, located within the compact areas of an urban compact municipality as defined by 23 M.R.S.A. § 754 (collectively, the “Property”); and

WHEREAS, the City must maintain Maine Mall Road and Gorham Road in good repair at the City’s expense; and

WHEREAS, the Property is located within the Long Creek Watershed; and

WHEREAS, Long Creek has been designated an “urban impaired stream” by the Maine Department of Environmental Protection (“DEP”) because it fails to meet certain State of Maine water quality standards (38 M.R.S.A. § 465(4) as amended from time-to-time, the “Water Quality Standards”) due to the effects of stormwater runoff from developed land, and therefore has been listed on Maine’s Section 303(d) list pursuant to Section 305(b) of the federal Clean Water Act (“CWA”); and

WHEREAS, the U.S. Environmental Protection Agency (“EPA”), under its Residual Designation Authority under the CWA, is requiring certain owners of parcels located within the Long Creek Watershed to address stormwater runoff into Long Creek; and

WHEREAS, EPA has delegated to DEP permitting authority under the CWA’s National Pollutant Discharge Elimination System permit system, and DEP has issued a “General Permit - Post Construction Discharge of Stormwater in the Long Creek Watershed” dated November 6, 2009, which may be renewed, reissued, replaced and/or modified from time-to-time (“General Permit”) regarding stormwater discharge in the Long Creek Watershed; and

WHEREAS, the General Permit requires the owners of Parcels from which there is a Designated Discharge (a post-construction stormwater direct discharge from a Parcel in the Long Creek Watershed on which there are Impervious Surfaces or Impervious Areas equal to or greater than one (1) acre) on or after the effective date of the General Permit to file a Notice of Intent to enter into the General Permit or to obtain individual permits, and requires that certain remediation work be done and improvements constructed, installed and/or implemented in and along Long Creek and within the Long Creek Watershed which are intended to cause Long Creek to comply with Water Quality Standards; and

WHEREAS, the municipalities of South Portland, Portland, Westbrook and Scarborough, along with other entities, have jointly developed the Long Creek Watershed Management Plan dated July, 2009 and approved by the DEP (the "Plan") for the purpose of complying with the General Permit and restoring the water quality of Long Creek; and

WHEREAS, The City and the District are parties to a Participating Landowner Agreement dated May 17, 2010 (the "Participating Landowner Agreement"), pursuant to which the District has agreed to oversee and assist in the implementation of the state and federal remediation and improvement requirements to which the Property is subject; and

WHEREAS, the District has agreed to oversee and assist in the implementation of the state and federal remediation and improvement requirements in and along Long Creek and within the Long Creek Watershed; and

WHEREAS, the City desires to grant to the District, and the District desires to accept, a license to enable the District to perform such remediation and improvements on the Property; and

WHEREAS, the City has agreed to provide and the District has determined to accept, a license over, through, and under the Property to construct, reconstruct, install, operate, modify, alter, use, maintain, repair, replace, remove, inspect and monitor stormwater management structures as defined by the State of Maine, Department of Environmental Protection, "Stormwater Management For Maine, Volume III, BMPs Technical Design Manual," January 2006 ("Structures") on the Property subject to the provisions below; and

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. License. The City hereby grants to the District through this Agreement

the following rights through, under, across, over, and upon the Licensed Premises, as defined in Section 2 below, exclusively for the construction, reconstruction, installation, operation, modification, alteration, use, maintenance, repair, replacement, removal, inspection and monitoring of the Specified BMP Structures that are depicted in **Exhibit B** hereto (the “Specified BMP Structures”), in accordance with the terms of the General Permit, subject to the terms and conditions hereof and for the purposes stated below:

- (a) to construct, reconstruct, install, operate, modify, alter, use, maintain, repair, replace, remove, inspect and monitor Specified BMP Structures on the Property;
- (b) to collect and control the flow of storm water with the purpose of remediation of existing contamination and prevention of additional contamination of the Long Creek due to storm water runoff;
- (c) to trim, cut down, and/or remove bushes, trees, grass, crops or any other vegetation to the extent deemed necessary by the District in its reasonable discretion to effectuate the purposes of this Agreement; and
- (d) for ingress and egress, with people and machines, over the Property to and from the Licensed Premises and over the Licensed Premises.

The District’s use and exercise of the above rights granted by this Agreement are limited to matters relating to the Specified BMP Structures on the Property. Rights to the Licensed Premises are granted solely on an “as is, where is” basis. This Agreement shall be subject to all existing permits, covenants, restrictions and encumbrances of record. To the extent this Agreement is inconsistent with the obligations of the City under any current agreements as to any portions of the Property affected hereby, this Agreement shall be implemented and interpreted by the District so that the City’s existing obligations shall be paramount and shall control its obligations hereunder and the District agrees that it shall not impair, restrict, or otherwise affect any commitments or obligations of the City under any existing agreement or permit, including, but not limited to, existing access, drainage, or other agreements between the City and any third party (whether or not such third party is subject to regulation by the District).

2. Licensed Premises. The Licensed Premises consist of the portions of the Property more particularly described as “Permit #1” and “Permit #2” on **Exhibit A** attached hereto and made a part hereof (the “Licensed Premises”).

3. City Obligations. The City, at its sole expense, will restore any damage to the Specified BMP Structures caused by the exercise of its obligations for state and state

aid highways as an urban compact municipality under 23 M.R.S.A. § 754, so that any Specified BMP Structures constructed or installed in the Licensed Premises will function as designed and intended; provided, however, that nothing in this Agreement shall obligate the City to restore damage to the Specified BMP Structures caused by the State of Maine, acting by and through its Department of Transportation (“MaineDOT”), in the exercise of its obligations for state and state aid highways under 23 M.R.S.A. § 701 *et seq.*

4. District Obligations. The District covenants and agrees by execution of this Agreement:

- (a) to comply with any and all applicable laws, ordinances, and regulations in connection with the exercise of its rights hereunder;
- (b) to obtain, prior to commencing any of the activities allowed by this Agreement, a street opening permit in compliance with the City of South Portland’s street opening ordinance and regulations;
- (c) to, except in the event of emergency, provide the City with reasonable notice prior to entering the Property and Licensed Premises for the purpose of construction, reconstruction, installation, operation, modification, alteration, use, maintenance, repair, replacement, removal, inspection and monitoring of BMPs, provided, however, that in connection with such entry for the purpose of construction, reconstruction, installation, replacement or removal of BMPs, the District will provide the City with at least ten (10) business days’ notice prior to entering the Property and Licensed Premises, which notice shall include copies of any plans, specifications and other descriptions of the work to be performed;
- (d) to promptly restore, at its sole expense, any damage to the Property and Licensed Premises caused by its exercise of its rights under this Agreement and to restore the Licensed Premises to their original condition to the extent reasonably possible while allowing any Specified BMP Structures constructed or installed in the Licensed Premises to function as designed and intended; and
- (e) to minimize the disruption to the free flow of traffic along Maine Mall Road and Gorham Road, the District shall be responsible for working with the City to develop a traffic control plan.

5. District Liability/Indemnification. The District agrees to defend, indemnify

and hold harmless the City, its officers, agents and employees, for and against any and all claims, loss, cost, damage, or expense, including reasonable attorney's fees that may arise from a breach of the District's covenants herein or from the exercise by the District of its rights under this Agreement, provided, however, that the District does not herein waive the immunities, defenses and limitations on liability for itself and its officers, directors and employees provided to it and to them under Maine law, including but not limited to the Maine Tort Claims Act, 14 M.R.S.A. § 8101 *et seq.* Under all circumstances, the defense and indemnification obligations shall survive any termination of this Agreement. Further, the District shall contractually require any third-party contractor, except for a governmental entity as defined by 14 M.R.S.A. § 8102(2), with whom the District may contract to carry out the purposes of this Agreement to: (a) to the fullest extent allowed by law, defend, indemnify and hold the City and the District and their respective directors, officers, managers, members, agents and employees harmless from any claim(s), cause(s) of action, liability or expense, including, without limitation, costs and reasonable attorney's fees, for personal injury (including death) and/or property damage caused by, related to, arising out of or resulting from the error, act or omission of the Contractor's performance of work and/or services under that contract and/or the Contractor's and its Subcontractors' and each of their agents' and employees' presence on the Property; and (b) procure and maintain during the term of such contract commercial general liability and automobile liability insurance coverage, each in an amount of not less than \$2,000,000.00 (Two Million Dollars), combined single limit, with deductibles in amounts typically carried by prudent contractors engaged in the performance of similar work and/or services, to insure this obligation, and the City and the District and their respective directors, officers, managers, members, agents and employees shall be additional named insureds under that coverage, and workers' compensation insurance coverage as required by State law. The foregoing indemnity expressly extends to claims of injury, death, or damage to employees of the Contractor or a Subcontractor. In claims against any person or entity indemnified under this Section by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts. The Contractor expressly waives immunity under workers' compensation laws for the purposes of this indemnity provision.

The liabilities and immunities of a governmental entity as defined by 14 M.R.S.A. § 8102(2) with whom the District may contract to carry out the purposes of this Agreement shall be subject to the monetary limits, limitations, defenses, immunities, and liabilities established by the Maine Tort Claims Act, 14 M.R.S.A. § 8101 *et seq.*, and such governmental entity contractor shall procure and maintain during the term of such contract insurance coverage in the minimum amount of Four Hundred Thousand Dollars (\$400,000) or such other amount as may be required under that Act for those areas in



which it is liable under that Act, or in such greater amount as the District may determine.

6. Permits. The District shall obtain and comply with all permits necessary in connection with each Specified BMP.

7. Default. The District will be in default under this Agreement if the District fails to comply with any terms of this Agreement within thirty (30) days after the City has given written notice of noncompliance or, in the case of a failure which is not by its nature capable of being cured within thirty (30) days, if the District fails to take action to cure the breach within said thirty (30) days and fails to prosecute the curing of the same diligently to completion. If the District is in default, the City may terminate this Agreement at any time by giving the District written notice at least ten (10) days in advance.

8. Assignment. This Agreement shall not be assigned; provided, however, this Agreement may be assignable by the District to another governmental entity for the purpose of implementing the Plan with the prior written consent of the City, which consent shall not be unreasonably withheld, conditioned or delayed.

9. Term of Agreement. The duration of this Agreement is for a term coterminous with the duration of coverage under the initial "General Permit - Post Construction Discharge of Stormwater in the Long Creek Watershed" issued by DEP and dated November 6, 2009 and its renewal, reissuance or replacement from time-to-time.

10. Miscellaneous.

- (a) This Agreement, together with the Participating Landowner Agreement, constitute the entire agreement between the Parties and may not be modified, amended, or terminated except by an instrument in writing signed by both Parties.
- (b) Capitalized terms used in this Agreement shall have the meaning given them in the Participating Landowner Agreement unless otherwise defined in this Agreement.
- (c) This Agreement shall be governed by and construed in accordance with the laws of the State of Maine but without regard to its principles of conflict of laws.
- (d) Invalidation of any one of these terms or provisions by any court shall in no way affect any other terms or provisions, which shall remain in full

force and effect.

- (e) Execution of this Agreement by the District evidences the District's acceptance of this Agreement.

**IN WITNESS WHEREOF**, the City and the District have executed this Agreement by their respective duly authorized representatives on the date first set forth above.

WITNESS:

**CITY OF SOUTH PORTLAND**

\_\_\_\_\_

\_\_\_\_\_

By: James H. Gailey  
Its: City Manager, duly authorized

WITNESS:

**LONG CREEK WATERSHED  
MANAGEMENT DISTRICT**

\_\_\_\_\_

\_\_\_\_\_

By: \_\_\_\_\_  
Its: \_\_\_\_\_, duly authorized

## **EXHIBIT A**

### **Description of Licensed Premises:**

#### **Permit #1**

The right-of-way of Maine Mall Road between stations 50+00 and 82+00 as shown on the right-of-way plans of Maine Mall Road in Map Book 197, Pages 253 through 258 of the public records as recorded in the Registry of Deeds of Cumberland County, Maine, including additional rights-of-way of record acquired.

#### **Permit #2**

The right-of-way of Gorham Road between stations 50+00 and 97+00 as shown on the construction plans for Gorham Road, MDOT Project No. M-0785 (1). Being the right-of way of Gorham Road as shown on the right-of-way plan of Maine Mall Road in Map Book 207, Page 693 of the public records as recorded in the Registry of Deeds of Cumberland County, Maine, currently in use and continuing to the intersection with Foden Road (sta. 65+75.07) as shown on the right-of-way map of Gorham Road in Map Book 189, Page 69 of the public records as recorded in the Registry of Deeds of Cumberland County, Maine. In addition, being the right-of-way of Gorham Road as shown on the right-of-way plans of Gorham Road in Map Book 189, Pages 69 & 70 and Map Book 190, Pages 1 through 3 of the public records as recorded in the Registry of Deeds of Cumberland County, Maine, including additional rights-of-way of record acquired.

## **EXHIBIT B**

### **Specified BMP Structures:**

The Specified BMP Structures are shown on drawings on file with Long Creek Water Management District consisting of a cover drawing and drawings numbered 1 through 17 inclusive, with each sheet bearing the following general title: Long Creek Watershed Management District Gorham Road Landscape and Drainage Improvements, South Portland, Maine prepared by Sebago Technics, Inc. and dated March 2014 along with drawings consisting of a cover drawing and drawings numbered 1 through 13 inclusive, with each sheet bearing the following general title: Long Creek Watershed Management District Maine Mall Road Drainage Improvements, South Portland, Maine prepared by Sebago Technics, Inc. and dated March 2014.