CITY OF PORTSMOUTH

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MaryAnn Dempsey
Director
New Hampshire Division of Charitable Trusts

Heather Shank
Chair
Council on Resources and Development

VIA EMAIL ONLY

Re: Request for Determination Regarding Proposed Acquisition of Limited Interests Affecting Properties Subject to Municipally Held Conservation Easement Acquired with LCIP-Funds
Peverly Hill Road Complete Streets Project

Dear Chair Shank and Director Dempsey:

This letter responds to CORD's August 8, 2026 letter, which asks the City, as holder of the Conservation Easement, to analyze whether the Peverly Hill Road Complete Streets Project (the "Project") is an allowable use of the encumbered property, and to detail the Project's scope on that property and the limited interests the City proposes to acquire. The City provides that analysis below.

The Project is an allowable use under the Conservation Easement because the multi-use path is a recreational improvement that the Easement's terms permit. It will advance the public education, scenic enjoyment, and public access purposes described in the Easement. Because the Project is a use consistent with those purposes, the City will not need to sell, transfer, convey, or release any portion of the Conservation Easement for the Project to proceed. The only interests the City must acquire to construct the path are from the fee owners. The City therefore proposes to acquire those limited interests from the fee owners by negotiation or, if necessary, by eminent domain, without further involvement by CORD and without an act of the General Court.

I. Nature, Size, and Uses of the Project on the Conserved Property

As the June 9 letter describes, the Project contemplates construction of a multi-use path for pedestrians and bicyclists along the Peverly Hill Road corridor. This letter addresses only the portion of that work on the conserved property.

A portion of the multi-use path will run along the frontage of the Hett Farm Properties (described in the Conservation Easement as the westerly side of Peverly Hill Road). On the Reis Property, the path and related grading, slope, drainage, and sight distance work as proposed will permanently affect approximately 1,527 square feet, with an additional 4,922 square feet within a temporary construction easement for the duration of the Project. On the Hett Property, the path and associated infrastructure will permanently affect approximately 987 square feet, with an additional 1,854 square feet within a corresponding temporary construction easement.

This footprint is de minimis when measured against the approximately 70.39 total acres of conservation land. The scenic open space remains intact across the overwhelming remainder of the Hett Farm Properties, and the public gains the ability to walk, bike, and otherwise recreate alongside this preserved space.

II. The Project Is an Allowable Use Under the Conservation Easement and under RSA 162-C

The governing standard is articulated in RSA 162-C:6, I–III. The LCIP's purposes include preserving the natural beauty, landscape, rural character, and natural resources of such lands, maintaining "public access . . . where appropriate" and acquiring "recreation lands" and "interests in lands of statewide, regional, and local conservation and recreation importance." A public pedestrian and bicycle path along the frontage of the conserved property is consistent with and advances those purposes.

Conservation Easement's use limitations confirm that the path is permitted on the Proeprty. Use Limitation 1.C.(1) restricts the construction of certain structures and improvements, but permits any structure or improvement "necessary for the agricultural, forestry, conservation, or recreational uses of the Property and provided that such structure or improvement is not detrimental to the purposes of this Restriction." (emphasis added). A multi-use path for pedestrians and bicyclists is a recreational improvement within that exception. Constructing it is consistent with the Easement's own terms and does not breach the restriction.

The Conservation Easement is not a purely restrictive instrument; its stated purposes contemplate public access and use. Purpose 2 preserves the land "for the education of the general public, through the auspices of the Grantee". Purpose 3 preserves the open space "for the scenic enjoyment of the general public," expressly invoking RSA 79-A and RSA 221-A, and reciting the latter's declaration that it is the State's intent to "preserve the natural beauty, landscape, rural character and natural resources, and high quality of life in New Hampshire by acquiring lands and interests in lands of statewide, regional, and local conservation and recreation importance." A public path that allows residents to reach and enjoy the conserved frontage on foot and by bicycle serves these public education and scenic enjoyment purposes.

D. The improvement is not detrimental to the conservation purposes. The exception contained in Section 1.C.(1) of the Easement is available when the improvement is "not detrimental to the purposes of this Restriction," and that condition is satisfied. The

Project's footprint on the Hett Farm Properties is confined to the narrow road frontage which is bordered by the traveled way, utility poles, and a mowed shoulder. The impact is de minimis in relation to the conserved land as a whole and it will not impair its open-space, agricultural, or conservation values.

E. The improvement is "necessary" for the recreational use of the Property. The Council and the Charitable Trusts Unit ask how the Project is "necessary" to a recreational use of the conserved property and not detrimental to the purposes of the Restriction. Currently, no recreational use is available for the conserved property. A public pedestrian and bicycle path cannot be provided along this frontage without constructing the path and its appurtenant grading, slope, and drainage on the conserved property. The Project will, for the first time, provide some recreational use of the conserved property. Therefore, those improvements are "necessary for" the recreational use of the Property.

It is worth noting that there are several single-family residences directly across the street from the conserved property. Were the roadway to be shifted towards those residential structures, at least two homes would lose their driveways and would have no realistic opportunity for those driveways to be replaced. Therefore, the sole option for constructing the path along Peverly Hill Road, and thus provide recreational use of the conserved property, is to place the public pedestrian and bicycle path on the conserved property.

The Project also advances the Easement's purposes. At the completion of the Project the City can erect a modest interpretive sign describing the history and significance of the Walford Plantation, providing for the first time on-site educational opportunity for passing cyclists and pedestrians. This will advance Purpose 4 of the Easement, which identifies this "historically important land area" as "one of the first farms established in the City of Portsmouth" and "the last active farm in the City of Portsmouth."

Because the Project is a use consistent with the LCIP's purposes and permitted by the Easement's own terms, the City proposes that the Project may proceed without further action by CORD as there is no detriment or deviation from the terms of the Easement.

III. The Limited Interests the City Seeks Burden Only the Fee Owners' Interests

The limited interests the City must acquire are drawn solely from the fee owners' interests, not from the City's LCIP-funded Conservation Easement. Although the Easement permits the path as an allowable use, it does not itself vest in the City the affirmative right to enter, construct, and open a public way. Accordingly, to construct and open the multi-use path, the City must acquire from the fee owners a permanent easement for the path and appurtenances, together with the temporary construction and permanent grading, slope, drainage, and sight-distance easements described above.

V. The New Boston Letter

The distinction drawn in the June 9 letter between this matter and the September 25, 2013 New Boston Letter remains valid. The 2013 determination involved a municipal impact to LCIP land the State owned in fee, implicating CORD's management authority over State-owned land under RSA 162-C:6, III. The Hett Farm Properties are privately owned and subject

only to a City-held easement; the City neither removes land from State ownership nor invokes the state-owned-land exchange mechanism of RSA 162-C:6, III or the NHDOT process of RSA 162-C:6, IV. The public-trust concern that drove the 2013 determination is not presented here. For the reasons stated above, the proposed use complies with the terms of the easement, and therefore no modification or release is necessary.

VI. Requested Determination. For the foregoing reasons, the City respectfully requests a written determination that:

(1) the Peverly Hill Road Complete Streets Project is an allowable use of the Hett Farm Properties under the Conservation Easement;

(2) the limited interests the City proposes to acquire are drawn solely from the fee owners' interests and do not infringe upon, and require no sale, transfer, conveyance, or release of, the City's LCIP-funded Conservation Easement held in public trust; and

(3) the City may accordingly proceed to acquire those limited interests from the fee owners, by negotiation or, if necessary, by eminent domain, without further involvement by CORD and without an act of the General Court.

The City would be pleased to provide any supplemental materials that would assist CORD and the Division in completing their review.

Sincerely,

Trevor P. McCourt
Deputy City Attorney

cc: Karen S. Conard, City Manager
Peter Rice, Director of Public Works
Suzanne Woodland, Regulatory Counsel
Eric Eby, Traffic Engineer