City of Philadelphia

City Council
Chief Clerk's Office
402 City Hall
Philadelphia, PA 19107

BILL NO. 100776

Introduced November 18, 2010

Councilmember Krajewski

Referred to the
Committee on Parks, Recreation and Cultural Affairs

AN ORDINANCE

Authorizing the Commissioner of Public Property, on behalf of the City, to execute and record a Declaration of Covenants, Conditions, and Restrictions against a portion of Pennypack Park on the Delaware, in favor of the United States, to protect bald eagles and other rare, endangered, or threatened birds, under certain terms and conditions.

THE COUNCIL OF THE CITY OF PHILADELPHIA HEREBY ORDAINS:

SECTION 1. The Commissioner of Public Property is hereby authorized to execute and record, on behalf of the City and in favor of the United States, a Declaration of Covenants, Conditions, and Restrictions against a portion of Pennypack Park on the Delaware, as shown on the map attached hereto as Exhibit "A," to protect bald eagles and other rare, endangered, or threatened birds.

SECTION 2. The Declaration shall be in substantially the form set forth in Exhibit "B," attached hereto, with such changes as the City Solicitor deems necessary or appropriate to protect the interests of the City, and to comply with the requirements of the United States Fish and Wildlife Service.

EXHIBIT "A"

Declaration of Covenants, Conditions, and Restrictions
Philadelphia City, Philadelphia Co.

EXHIBIT "B"

Prepared by/Record and Return to:
Hope Caldwell, Esq.
City of Philadelphia Law Dept.
One Parkway Building
1515 Arch Street, 17th Floor
Philadelphia, PA 19102
215-683-5029

Premises: *Pennypack on the Delaware*
Philadelphia, PA

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

THIS DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS (hereafter "**Declaration**") is made this _____ day of _____, 2010, by **THE CITY OF PHILADELPHIA,** a City of the First Class of the Commonwealth of Pennsylvania (hereafter "**Grantor**");

WITNESSETH:

WHEREAS, Grantor is the fee simple owner of a certain tract of land located in the City and County of Philadelphia, Pennsylvania, known as Pennypack-on-the-Delaware, as more particularly described in ***Exhibit A*** attached hereto and incorporated by reference, hereafter referred to as the "**Property**," which Property is administered for the Grantor by the Philadelphia Department of Parks and Recreation;

WHEREAS, the United States Fish and Wildlife Service within the United States Department of the Interior is authorized by federal law to administer the Bald and Golden Eagle Protection Act and other laws and regulations protecting rare, endangered or threatened bird species, and in particular bald eagles, a Pennsylvania threatened species (collectively, "**Birds**"); and the Pennsylvania Game Commission is the agency of the Commonwealth of Pennsylvania that enforces game laws and provides for the protection of Birds (the United States Fish and Wildlife Service and the Pennsylvania Game Commission collectively referred to as "**Agencies**");

WHEREAS, in conjunction with development of the Southport Marine Terminal in the area of Philadelphia known as the Navy Yard, the Pennsylvania Department of General Services has applied to the Agencies for the issuance of a permit to "take" an abandoned bald eagle's nest in that vicinity, which permit requires mitigation that will provide a net benefit to the local bald eagle population;

WHEREAS, the City of Philadelphia Commerce Department and the Philadelphia City Planning Commission, among other City of Philadelphia agencies and departments, strongly support development of the Southport Marine Terminal;

DRAFT

WHEREAS, that portion of the Property hereafter referred to as the "**Conservation Area**" (which is more particularly described in ***Exhibit B*** attached hereto and incorporated by reference), which contains approximately _____ acres, contains an active bald eagle nest and possesses features, resources, conditions and characteristics that are conducive to, and provide for natural habitat and migration corridors (including, but not limited to, shelter, breeding sites, nest sites, foraging areas and communal nesting sites) for Birds;

WHEREAS, the Agencies and the Grantor have agreed that the Grantor will make the Conservation Area subject to the covenants, conditions and restrictions described in this Declaration as a form of mitigation for the above-referenced take, in order to conserve the wildlife habitat features of the Conservation Area in their natural condition;

WHEREAS, the Property affords the general public open areas and trails to engage in a variety of outdoor opportunities, including wildlife viewing, picnicking, sporting activities, walking, jogging, bicycling, canoeing and kayaking, horse riding, and fishing;

WHEREAS, protection of the Conservation Area in the manner described in this Declaration will not unduly limit use by the general public of the Property;

WHEREAS, until its expiration on May 7, 2010, the Conservation Area was covered by a written cooperative agreement between the Fairmount Park Commission and the Pennsylvania Game Commission that limited entry to the Conservation Area and protected the existing bald eagle nest at the site from human disturbance; and

WHEREAS, the Grantor agrees to the creation of these conservation-based covenants and intends that the Conservation Area shall be preserved and maintained in a natural condition in perpetuity.

NOW, THEREFORE, in consideration of the mutually-held interests in preservation of the wildlife and environment, as well as the terms, conditions, and restrictions contained herein, and pursuant to the laws of the Commonwealth of Pennsylvania, Grantor does agree to the following terms and conditions:

1. PURPOSE

The purpose of this Declaration is to provide protection for the Conservation Area so as to promote, foster, preserve and enhance the features, resources, conditions and characteristics of the Conservation Area as an attractive natural habitat for the protection and productivity of Birds (including, but not limited to, food, shelter, breeding ground, nest sites, foraging area and communal roosting sites), and to minimize any disturbance or adverse impact to the Conservation Area or Birds by human activity (collectively, the "**Conservation Objectives**").

DRAFT

2. RESTRICTIONS

To accomplish the Conservation Objectives, Grantor imposes the following restrictions on the Conservation Area, subject to paragraph 3 herein:

A. The Conservation Area shall be designated and marked off limits to human activity (including, without limitation, all recreational and other activity) from January 1 through August 15 of each year (which period constitutes typical bald eagle breeding season in the Chesapeake Bay Region, which includes eastern Pennsylvania) in order to avoid disruption of foraging and nesting areas and communal roosting sites for bald eagles; provided however that the Grantor, including its representatives, assigns and lessees, shall retain the ability to access the Conservation Area during the abovementioned restricted term in connection with the management of the Property, including without limitation the installation of interpretive signage in the Conservation Area; however, all such access into the Conservation Area shall be reasonably necessary and accomplished by exercising all prudent and appropriate measures to limit the duration and extent of any intrusion or disturbance; and at no time and under no circumstances shall any attempt be made to drive, harass, or disturb nesting bald eagles during such access into the Conservation Area; and

B. Without limiting the foregoing, the following activities and uses are expressly prohibited in the Conservation Area:

i. Construction. The construction of man-made structures on, in, over or above the ground or any water body, including but not limited to the construction or alteration of any buildings, roads, utility lines, billboards or other advertising. This restriction does not include bat boxes; bird nesting boxes; bird feeders; duck blinds; benches, bike racks, or trash receptacles along the existing trails; and the placement of signs for interpretation, safety and or boundary demarcation purposes;

ii. Excavation. The removal, excavation, disturbance, or dredging of soil, sand, peat, gravel or aggregate material of any kind; or any change in the topography of the land, including any discharges of dredged or fill material, ditching, extraction, drilling, driving of piles, or mining;

iii. Dumping. The storage, dumping, depositing, abandoning, discharging, or releasing any gaseous, liquid, solid or hazardous waste substance, materials or debris of whatever nature on, in, over or under ground or into surface or ground water, except for pre-existing or approved project-related stormwater discharges and any maintenance associated with those stormwater discharges;

iv. Removal of Vegetation. The mowing, cutting, pruning, removal, disturbance, destruction, or the collection of any trees, shrubs, or other vegetation, except for pruning, cutting or removal for:

DRAFT

1) safety purposes; or
2) control in accordance with accepted scientific forestry management practices for diseased or dead vegetation; or
3) control of non-native species and noxious weeds; or
4) scientific or nature study; and

v. Other Material Impairment. In addition to the foregoing, the Grantor shall take such reasonable measures as may be necessary or prudent to avoid disturbance of nesting Birds, such as (by way of illustration only and not limitation) creating and maintaining distance buffers between any activity and the Bird's nest and creating and maintaining forested or natural areas (landscape buffers) between any activity and around nest trees.

C. The Grantor agrees that it will not apply to the Agencies for a permit to take an existing or hereafter-established bald eagle nest or disturb bald eagles in the Conservation Area.

3. DURATION

This Declaration shall remain in effect and shall run with the land in perpetuity, and is binding upon all subsequent declarants, their heirs, executors, administrators, successors, representatives, devisees, and assigns, as the case may be; except that if the existing bald eagle nest (or any bald eagle nest established hereafter) should be abandoned (as determined in writing by the Agencies, or either of them) or cease to exist, the Grantor may request written approval from the Agencies to amend this Declaration in a manner that continues to preserve the Conservation Area as property conducive to natural habitat and migration corridors (including, but not limited to, shelter, breeding sites, nest sites, foraging areas and communal nesting sites) for Birds, but allows additional passive recreational uses or facilities. The Agencies may, in their sole discretion, disapprove a proposal pursuant to this Paragraph that may adversely affect the Conservation Objectives of this Declaration.

4. PERMITTED USES

This Declaration does not apply to, and shall not affect the use of, any area of the Property except for the Conservation Area.

5. INSPECTION, ENFORCEMENT AND ACCESS RIGHTS

The Agencies and their authorized representatives shall have the right to enter and go upon the Property, to inspect the Conservation Area and take actions necessary to verify compliance with this Declaration. Such entry shall be upon prior reasonable notice to Grantor. The Grantor grants to the Agencies a discretionary right to enforce this Declaration in a judicial action against any person(s) or other entity(ies) violating or attempting to violate these restrictive covenants; provided, however, that no violation of these restrictive covenants shall result in a forfeiture or reversion of title. In any

DRAFT

enforcement action, an enforcing Agency shall be entitled to a complete restoration for any violation, as well as any other judicial remedy such as civil penalties.

6. RECORDING AND EXECUTION BY PARTIES
The Grantor agrees to record this Declaration in the Department of Records in and for the City of Philadelphia and provide the Agencies with proof of recordation.

7. MODIFICATIONS
There shall be no changes or alterations to the provisions in this Declaration without prior written approval from the appropriate representative(s) from the Agencies.

8. RESERVED RIGHTS

A. The Grantor and any holders of easements or other property rights for the operation and maintenance of pre-existing or project-related structures or infrastructure such as utilities, drainage ditches, or stormwater facilities that are present on, over or under the Conservation Area reserve the right, within the terms and conditions of their permits, their agreements, and the law, to continue with such operation and maintenance. All pre-existing or approved project-related structures or infrastructure shall be shown on the accompanying plat map or approved plan and attached to this instrument.

B. If the authorized project requires any related or unanticipated utility relocation, drainage ditches, or stormwater controls within the identified Conservation Area, said activities must be applied for by the Grantor, project proponent, respective utility, or other appropriate party and may be permitted by the Agencies, such approval not to be unreasonably withheld.

9. SEVERABILITY
If any portion of this Declaration, or the application thereof to any person or circumstance, is found to be invalid, the remainder of the provisions of this instrument, or application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby.

DRAFT

IN WITNESS WHEREOF said GRANTOR has executed this Declaration the day and year first above written.

By: _____
Commissioner of Public Property
City of Philadelphia

COMMONWEALTH OF PENNSYLVANIA :
: SS

COUNTY OF _____ :
:

On _____, before me, a Notary Public for the Commonwealth aforesaid, personally appeared _____, who acknowledged himself/herself to be the City of Philadelphia Commissioner of Public Property, and that s/he, as such Commissioner, being authorized to do so, executed, in my presence, the foregoing instrument for the purposes herein contained

IN WITNESS WHEREOF, I have set my hand and official seal.

_____
Notary Public
My commission expires: _____

[SEAL]

Approved to Form by
Shelly R. Smith, City Solicitor

Per: _____
Deputy City Solicitor

COMMONWEALTH OF PENNSYLVANIA :
: SS
COUNTY OF _____ :
:

Recorded in the Office for Recording of Deeds
in and for aforesaid County, in
Deedbook _____, Vol. _____,
Page _____.

Witness my hand and seal of Office
On _____

_____ _____
RECORDER OF DEEDS GRANTOR

DRAFT