

Order 91-16/17

Amended to add a new Section 11, Conditions of Sale, to P&S: 9-0 on 11/21/2016

Passage as amended: 9-0 on 11/21/2016

Effective 12/1/2016

ETHAN K. STRIMLING (MAYOR)  
BELINDA S. RAY (1)  
SPENCER R. THIBODEAU (2)  
EDWARD J. SUSLOVIC (3)  
JUSTIN COSTA (4)

**CITY OF PORTLAND**  
IN THE CITY COUNCIL

DAVID H. BRENERMAN (5)  
JILL C. DUSON (A/L)  
JON HINCK (A/L)  
NICHOLAS M. MAVODONES, JR (A/L)

**ORDER APPROVING PURCHASE AND SALE AGREEMENT WITH  
CPB2 LLC FOR SALE OF CITY PROPERTY**

**ORDERED,** that the Purchase and Sale Agreement with CPB2 LLC, for City-owned land adjacent to 58 Fore Street, is hereby approved in substantially the form attached hereto; and

**BE IT FURTHER ORDERED,** that the City Manager is hereby authorized to execute the Purchase and Sale Agreement and whatever other documents are necessary to effect the intent and purpose of the Purchase & Sale Agreement.

## PURCHASE AND SALE AGREEMENT

THIS AGREEMENT for the purchase and sale of real estate made this \_\_\_\_\_ day of December, 2016 by and between the CITY OF PORTLAND, a body politic and corporate located in Cumberland County, Maine, (hereinafter referred to as "City"), and CPB2 LLC, a Delaware limited liability company, having a mailing address of c/o CPB2 Management LLC, P.O. Box 7987, Portland, Maine 04112 (hereinafter referred to as "CPB2").

### RECITALS

WHEREAS, CPB2 is the owner of that certain real property known as 58 Fore Street in the City of Portland, County of Cumberland and State of Maine, which is more particularly described in deeds dated July 19, 2013 and April 1, 2014 and recorded in the Cumberland County Registry of Deeds in Book 30879, Page 75 and Book 31425, Page 267 respectively ("CPB2's Property"); and

WHEREAS, as contemplated by the City's Eastern Waterfront Master Plan ("EWMP"), the City is planning to extend Thames Street in an easterly direction to a point ("Thames Street Extension") and then in a northerly direction to connect to Fore Street ("Fore Street Connector"), as shown on the plan attached hereto as Exhibit A (the "Thames Street Plan"); and

WHEREAS, subject to its receipt of all necessary permits, regulatory approvals, rights of way and funding, the City plans to construct the Thames Street Extension and the Fore Street Connector; and

WHEREAS, the creation of the Thames Street Extension and Fore Street Connector results in an isolated triangular shaped residual parcel of City-owned land lying between the eastern boundary of the Fore Street Connector and the western boundary of CPB2'S Property, which parcel consists of approximately 12,116 square feet as generally depicted on the Thames Street Plan (said parcel of land being hereinafter referred to as the "Premises"); and

WHEREAS, the primary access to CPB2's Property (the "Access Road") is planned to be located over the Premises, the exact location of which will be determined through a master planning process or site plan process with the Portland Planning Board; and

WHEREAS, CPB2 desires to purchase the Premises, and the City desires to convey the Premises to CPB2, in order to provide CPB2 additional property for future development and pedestrian and vehicular access to CPB2's Property from the Thames Street Extension.

NOW THEREFORE, in consideration of the foregoing and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties, intending to be legally bound, hereby agree as follows:

1. **SALE.** City agrees to sell the Premises to CPB2, and CPB2 agrees to purchase the Premises, in accordance with the terms and conditions set forth in this Agreement. This Agreement is for the sale of land only.
2. **CONSIDERATION.**

- a. The purchase price for the Premises shall be Four Hundred Thousand Dollars (\$ 400,000.00), subject to the adjustment in subsection b, which shall be made upon the parties' approval of the survey described in Section 3 below.
- b. The purchase price will be increased or decreased based on the actual square footage of the Premises, which CPB2 shall purchase for Thirty-Three Dollars (\$33.00) per square foot.
- c. The City acknowledges receipt of CPB2's deposit in the amount of Five Thousand Dollars (\$5,000.00) (the "Deposit") paid to it as of the date of this Agreement.
- d. CPB2 shall pay the remainder of the Purchase Price to the City by wire transfer at closing.

### **3. TITLE.**

- a. Due Diligence Period. CPB2 will have from the date of this Agreement until 4:00 PM Eastern Daylight Savings Time on the day that is ninety (90) days after the date of this Agreement (the "Due Diligence Period") to complete its title examinations.
- b. Survey. During the Due Diligence Period, CPB2 shall cause a survey to be prepared that will more specifically describe the Premises. CPB2 will provide such survey to City during the Due Diligence Period and the parties will agree on a metes and bounds description to be included in the deed prior to closing.
- c. Title and Survey Objections. CPB2 will have until the end of the Due Diligence Period to deliver to City any written objections to title or survey matters (other than the permitted exceptions identified herein) that affect marketability or use. Objections not made prior to the end of the Due Diligence Period will be deemed waived; provided, however, that objections pertaining to matters of record first appearing after the date of this Agreement may be made at any time prior to the closing.
- d. Option to Cure. In the event of a title or survey objection, City will have the option, but not the obligation, to cure the objection and will notify CPB2 of its election within ten (10) business days after receipt of the objection. In the event that the City elects to cure the objection, it will have sixty (60) days from the date of the notice of election, or such other reasonable time as the parties may agree, to cure the objection. In the event that the City does not elect to cure the objection, or, having elected to cure the objection fails to timely do so to CPB2's reasonable satisfaction, CPB2 will have the option to (1) terminate this Agreement and obtain a refund of the Deposit (after which neither party will have any further obligation or liability to the other under this Agreement), (2) waive the objection and close, or (3) undertake the cure of such objection at its own expense (in which case it shall have 60 days to do

so). In the event CPB2 elects to cure such objection, but CPB2 is unable to cure such objection to CPB2's reasonable satisfaction within said 60-day period, then CPB2 will have the option to (1) terminate this Agreement and obtain a refund of the Deposit (after which neither party will have any further obligation or liability to the other under this Agreement), (2) waive the objection and close.

- e. City shall convey the Premises to CPB2 at the closing in fee simple by a municipal quitclaim deed without covenant. Title shall be good, marketable and insurable title, free and clear of all encumbrances except (i) easements for utilities servicing the property, (ii) zoning ordinances, and (iii) real estate taxes not yet due and payable. CPB2 acknowledges that the deed shall contain a restriction stating that in the event that the Premises or any portion thereof shall be exempt from real and personal property taxes, by transfer, conversion, or otherwise, then the then-owner of the exempt portion shall make annual payments to the City in lieu of taxes in the amount equal to the amount of property taxes that would have been assessed on the exempt portion of the real and personal property situated on the Premises had such property remained taxable. Such restriction shall also confirm that CPB2 and its successors and assigns shall possess and be vested with all rights and privileges as to abatement and appeal of valuations, rates, and the like as are accorded owners of real and personal property in Maine.

#### **4. INSPECTIONS.**

- a. During the Due Diligence Period, CPB2 and its employees, consultants, contractors and agents shall have the right, at CPB2's expense, to enter on the Premises at reasonable times in order to (i) inspect the same, (ii) conduct engineering studies, percolation tests, geotechnical exams, environmental assessments, and other such studies, tests, exams, and assessments, and (iii) do such other things as CPB2 determines, in its sole discretion, to be required to determine the suitability of the Premises for CPB2's intended use (collectively, the "Inspections"). The City acknowledges that such Inspections may include the digging of test pits, which the City hereby approves.
- b. CPB2 agrees to defend, indemnify and hold harmless the City against any mechanics' liens that may arise from the activities of CPB2 and its employees, consultants, contractors and agents on the Premises.
- c. CPB2 shall exercise the access and inspection rights granted hereunder at its sole risk and expense, and CPB2 hereby releases the City from, and agrees to indemnify, defend, and hold the City harmless against, any and all losses, costs, claims, expenses and liabilities (including without limitation reasonable attorney fees and costs) (collectively, "Damages") suffered by the City on account of any injury to person or damage to property arising out of the exercise by CPB2 of its rights hereunder, except to the extent that such Damages result from the act or omission of the City.

- d. CPB2 shall cause any contractors, consultants or any other party conducting the Inspections to procure automobile insurance and general public liability insurance coverage in amounts of not less than Four Hundred Thousand Dollars (\$400,000.00) per occurrence for bodily injury, death and property damage and also Workers' Compensation Insurance coverage to the extent required by law.
  - e. In the event that CPB2 does not purchase the Premises, CPB2 agrees to either return the Premises as nearly as possible to its original condition after conducting the Inspections, or, at the City's option, reimburse the City for any physical damage caused to the Premises in connection with the Inspections; provided, however, the City hereby acknowledges and agrees that the term "physical damage" does not include any disturbance of any pre-existing environmental contamination on the Premises caused by such inspections, studies, tests, exams, and assessments, and that CPB2 shall have no obligation to clean-up, remove or take any other action with respect to any pre-existing environmental contamination disturbed thereby.
  - f. The parties hereto acknowledge and agree that it is a condition to CPB2's obligations under this Agreement that the results of the Inspections be acceptable to CPB2 in its sole discretion. If the results of such due diligence are not acceptable to CPB2 in its sole discretion, and if CPB2 exercises its right to terminate this Agreement, then the City shall refund to CPB2 the Deposit, if previously paid, without interest, within thirty (30) days after receipt of CPB2's termination notice, and neither party shall have any further obligations or liabilities under this Agreement except as expressly set forth in this Agreement.
5. **REAL ESTATE TAXES, PRORATIONS AND TRANSFER TAX.** CPB2 shall be liable for all real estate taxes beginning as of the start of fiscal year following the closing and continuing thereafter. Because the Property is currently owned by the City of Portland, which is exempt from real estate taxes, no taxes were assessed or will be due for any portion of the current fiscal year, and no taxes will be prorated at the closing. Any utilities for the Property shall be prorated as of the closing. The Maine real estate transfer tax shall be paid for by CPB2 in accordance with 36 M.R.S.A. § 4641-A. City is exempt from paying the transfer tax pursuant to 36 M.R.S.A. § 4641-C. The recording fee for the deed of conveyance and any expenses relating to CPB2's financing or closing shall be paid for by CPB2.
6. **DEFAULT AND REMEDIES.** In the event that CPB2 defaults hereunder for a reason other than the default of the City, City shall retain the deposit, it being understood, however, the City's acceptance thereof shall not constitute a waiver of any other legal or equitable remedy available to City. In the event City defaults under this Agreement, and if CPB2 is not then in default hereunder, CPB2 shall have the right to pursue specific performance, but at all times may elect in substitution therefor, as its sole remedy, the right to terminate this Agreement and obtain a refund

of the Deposit (after which neither party will have any further obligation or liability to the other under this Agreement).

7. **RISK OF LOSS.** The risk of loss or damage to the Premises by fire, eminent domain, condemnation, or otherwise, until transfer of title hereunder, is assumed by the City. The Premises is to be delivered in substantially the same condition as of the date of this Agreement unless otherwise stated. In the event City is not able to deliver the Premises as stated, CPB2 may terminate this Agreement and receive a refund of the Deposit without interest, and neither party shall have any further obligations or liabilities under this Agreement except as expressly set forth in this Agreement.
8. **PROPERTY SOLD “AS IS, WHERE IS.”** CPB2 acknowledges that CPB2 has had an opportunity to inspect the Premises, and to hire professionals to do so, and that Premises will be sold “as is, where is” and “with all faults.” City, and its agents, make no representations or warranties with respect to the accuracy of any statement as to boundaries or acreage, or as to any other matters contained in any description of the Premises, or as to the fitness of the Premises for a particular purpose, or as to development rights, merchantability, habitability, or as to any other matter, including without limitation, land use, zoning and subdivision issues or the environmental, mechanical, or structural condition of the Premises. Acceptance by CPB2 of the Deed at closing and payment of the purchase price shall be deemed to be full performance and discharge by the City of every agreement and obligation contained herein.
9. **CLOSING.** Time is of the essence in the performance of this agreement. The closing shall be held at the offices of CPB2’s counsel at a time agreeable to the parties on or before the earlier of that date that is 30 days after the date that the City receives the last of the Thames Street Extension Approvals, as that term is defined below, or January 31, 2018. Provided, however, that if the City has not received the last of the Thames Street Extension Approvals by January 1, 2018, the closing date, may, upon the mutual agreement of the parties, be extended to a later date agreed to by the parties. At the closing:
  - a. the City shall execute, acknowledge and deliver to CPB2 a municipal quitclaim deed conveying to CPB2 good and marketable title to the Premises, free and clear of all encumbrances other than those approved by CPB2 in its sole discretion;
  - b. the City shall execute, acknowledge and deliver such affidavits and indemnifications, in form and substance reasonably satisfactory to the City and CPB2, regarding mechanics’ liens, materialmens’ liens and parties in possession sufficient to eliminate any title insurance exceptions for these matters;
  - c. CPB2 shall deliver the balance of the Purchase Price to the City by wire transfer or otherwise provide documentation satisfactory to the City regarding any alternative consideration negotiated by the Parties; and

- d. Each party shall deliver to the other such other documents, certificates and the like as may be required herein or as may be necessary to carry out the obligations under this Agreement.

**10. CITY CONDITIONAL COMMITMENT TO CONSTRUCT THAMES STREET EXTENSION.**

- a. The City anticipates including the costs of construction of the Thames Street Extension in the 2017 Capital Improvements Program (CIP) to be presented to the Portland City Council for in the Spring of 2017.
- b. Subject to the City's receipt of all necessary permits and regulatory approvals, and provided that the Portland City Council appropriates the funds necessary to do so (the "Thames Street Extension Approvals"), the City will, at its sole cost and expense, construct the Thames Street Extension and related utilities. The City currently anticipates constructing the Thames Street Extension during 2017 and 2018.
- c. The City shall endeavor to coordinate construction of the Thames Street Extension with CPB2 in an effort to ensure that the construction is performed in a timely manner and does not unreasonably delay or interfere with the construction of the Access Road by CPB2 or the construction of the buildings and other improvements on CPB2's Property.
- d. In the event that the City does not construct the Thames Street Extension prior to CPB2's commencement of construction on CPB2's Property, and provided that CPB2 is unable to access CPB2's Property from Fore Street, the City shall enter into a revocable license agreement with CPB2, in a form satisfactory to the City, in order to provide CPB2, its contractors, tenants, and invitees with access to CPB2's Property across City property. Such license agreement shall only be available to CPB2 from the time CPB2 loses access to its property from Fore Street until the City completes construction on the Thames Street Extension.
- e. The provisions of this Section 10 shall survive the closing.

**11. CONDITIONS OF SALE.** The sale is conditioned upon the agreement that the developer, its successors and assigns will allow public access over the proposed private Access Road as a condition of site plan approval should the Planning Board require it.

**12. ENVIRONMENTAL INDEMNIFICATION.** CPB2 covenants and agrees to indemnify, defend, and hold the City harmless from and against any and all claims, damages, losses, liabilities, obligations, settlement payments, penalties, assessments, citations, directives, claims, litigation, demands, defenses, judgments, costs, or expenses of any kind, including, without limitation, reasonable attorneys', consultants', and experts' fees incurred in investigating, defending, settling, or prosecuting any claim, litigation or proceeding, that may at any time be imposed upon, incurred by or asserted or awarded against CPB2 or the City and relating

directly or indirectly to the violation of or compliance with any federal, state, or local environmental laws, rules, or regulations governing the release, handling or storage of hazardous wastes or hazardous materials and affecting all or any portion of the Premises. This duty to indemnify, defend, and hold harmless shall be included in a covenant in the deed and shall run with the land conveyed and be binding upon CPB2's successors, assigns, and transferees.

**13. RIGHTS OF CITY TO REPURCHASE PROPERTY.** If CPB2, its successors, assigns, or transferees fails to commence construction of the Access Road to the CPB2 Property within 36 months after the closing, the City shall have the right, but not the obligation, to repurchase the Premises at the Purchase Price. The City's deed to CPB2 shall include a reference to the City's option to repurchase the Premises.

**14. ENTIRE AGREEMENT.** This Agreement represents the entire and complete Agreement and understanding between the parties and supersedes any prior agreement or understanding, written or oral, between the parties with respect to the acquisition or exchange of the Property hereunder. This Agreement cannot be amended except by written instrument executed by City and CPB2.

**15. NON-WAIVER.** No waiver of any breach of any one or more of the conditions of this Agreement by either party shall be deemed to imply or constitute a waiver of any succeeding or other breach hereunder.

**16. HEADINGS AND CAPTIONS.** The headings and captions appearing herein are for the convenience of reference only and shall not in any way affect the substantive provisions hereof.

**17. BINDING EFFECT.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, administrators, successors and assigns.

**18. TIME IS OF THE ESSENCE.** The City and CPB2 each confirm and agree that each of the time periods set forth herein are essential provisions of the terms of this Agreement.

**19. GOVERNING LAW.** This Agreement shall be construed in all respects in accordance with, and governed by, the laws of the State of Maine. All parties hereto hereby consent to the exclusive jurisdiction of the Superior Court for the County of Cumberland in the State of Maine, for all actions, proceedings and litigation arising from or relating directly or indirectly to this Agreement or any of the obligations hereunder, and any dispute not otherwise resolved as provided herein shall be litigated solely in said Court. If any provision of this Agreement is determined to be invalid or unenforceable, it shall not affect the validity or enforcement of the remaining provisions hereof.

**20. NOTICE.** All notices, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given on the date of service if served personally on the party to whom notice is to be given, or on the first business day after mailing if mailed to the party to whom notice is to be given by first class mail,

postage prepaid, certified, return receipt requested, addressed to the recipient at the addresses set forth below. Either party may change addresses for purposes of this paragraph by giving the other party notice of the new address in the manner described herein.

**FOR THE City:** City of Portland  
ATTN: CITY MANAGER  
389 Congress Street  
Portland, ME 04101

With a copy to: The Office of the Corporation Counsel at the same address.

**FOR CPB2:** CPB2 LLC  
c/o CPB2 Management LLC  
P.O. Box 7987  
Portland, Maine 04112

With a copy to: Bernstein, Shur, Sawyer & Nelson, P.A.  
Attention: Mary E. Costigan, Esq.  
100 Middle Street, West Tower  
Portland, Maine 04101

**21. SIGNATURES; MULTIPLE COUNTERPARTS.** This Agreement may be executed in any number of counterparts and by different parties in separate counterparts. Each counterpart when so executed shall be deemed to be an original and all of which together shall constitute one and the same agreement.

**22. BROKERS.** City and CPB2 each represents and warrants that neither has dealt with a real estate broker in connection with this transaction. CPB2 agrees to indemnify and hold harmless City from any claims made by any broker should CPB2's representation in this paragraph be false. Subject to the limitations of liability set forth in the Maine Tort Claims Act, City agrees to indemnify and hold harmless CPB2 from any claims made by any broker should City's representation in this paragraph be false. The foregoing indemnities shall include all legal fees and costs incurred in defense against any such claim, and shall survive closing.

**IN WITNESS WHEREOF**, the parties have hereunto set their hands and seals on the day and year first written above.

**City OF PORTLAND**

\_\_\_\_\_  
WITNESS

\_\_\_\_\_  
Jon P. Jennings  
Its City Manager

**CPB2, LLC**

\_\_\_\_\_  
WITNESS

\_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Its \_\_\_\_\_

Approved as to Form:

\_\_\_\_\_  
Corporation Counsel's Office