

Order 140-20/21
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CITY OF PORTLAND
IN THE CITY COUNCIL

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**ORDER APPROVING PURCHASE AND SALE AGREEMENT WITH
MAINE COOPERATIVE DEVELOPMENT PARTNERS FOR 165 LAMBERT STREET**

ORDERED, that the Purchase and Sale Agreement with Maine Cooperative Development Partners for city-owned land at 165 Lambert 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 PURCHASE AND SALE AGREEMENT IS made this _____ day of _____, 2020 by and between the City OF PORTLAND, a body politic and corporate located in Cumberland County, Maine, (hereinafter referred to as “Seller” or “City”), and _____, a Maine _____, having a mailing address of _____ (hereinafter referred to as “Buyer”).

RECITALS

WHEREAS, the CITY is the owner of approximately 13.3874 acres of land at or near 165 Lambert Street, Portland, Maine (the “Premises”) and did advertise RFP #2020-3 dated April 10, 2020, entitled Request for Proposals for Disposition of City-Owned Property Located at 165 Lambert Street, a copy of which is attached hereto as Exhibit A and incorporated herein (the “Request for Proposals”) (the Premises is identified in the City’s tax records as CBL 385 A001 and 386 C001 and is generally depicted on Attachment C to the Request for Proposals); and

WHEREAS, Buyer submitted a proposal dated June 16, 2020 in response to the Request for Proposals, a copy of which is attached hereto as Exhibit B and incorporated herein (the “Proposal”); and

WHEREAS, Buyer desires to purchase and develop the Premises, and the City desires to convey the Premises to Buyer, subject to the terms and conditions set forth herein.

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 Buyer, and Buyer 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.** The purchase price for the Premises shall be One Dollar (\$1.00) (the “Purchase Price”).
3. **TITLE AND DUE DILIGENCE.**
 - a. **Due Diligence Period.** Buyer will have from the date of this Agreement until 4:00 PM Eastern Daylight Savings Time on the day that is thirteen (13) months after the date of this Agreement (the “Due Diligence Period”) to complete any surveys, environmental review, inspections, and title examinations, and to obtain any zone change, site plan approval, and any other permits and regulatory approvals required for the Project.
 - b. **Property Description.** The legal description of the Premises contained in the deed will be a survey description based upon a survey plan that will more specifically describe the Premises. The survey and description of the

Premises will be prepared by the Buyer at its sole expense and provided to the City for review two months prior to the expiration of the Due Diligence Period. City shall notify Buyer of any objections to the survey and description prior to the expiration of the Due Diligence Period.

- c. Rezoning Contingency. Buyer proposes to obtain the Portland City Council's approval to rezone the Premises (the "Rezoning Approval") to maximize residential density for its development of the Premises as described in the Proposal (the "Project"). The Buyer will be responsible for obtaining, at its sole expense, the Rezoning Approval and any other regulatory approvals required for the Project prior to Closing.
- d. Financing Contingency. The Buyer's obligation to close is contingent on obtaining construction and permanent financing for the Project that the Buyer, in its discretion, determines is sufficient to put the Project on a sound financial footing. That financing is anticipated to include, but not be limited to, the following: (i) permanent financing for the Coop in the form of a HUD Section 213 loan; and (ii) affordable housing tax increment financing from the City.
- e. Title and Survey Objections. Buyer will have until the end of the Due Diligence Period to deliver to City any written objections to title, environmental, or survey matters (other than the permitted exceptions identified herein) that materially affect insurability 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 end of the Due Diligence Period may be made at any time prior to the closing.
- f. 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 Buyer 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 Buyer's reasonable satisfaction, Buyer will have the option to (1) terminate this Agreement (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).
- g. Deed. City shall convey the Premises to Buyer at the closing in fee simple by a municipal quitclaim deed without covenant. Title shall be good and insurable title, free and clear of all encumbrances except (i) easements of record and easements described herein; (ii) easements for utilities servicing the property, (iii) zoning ordinances, and (iv) real estate taxes not yet due

and payable. Further, Buyer 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 Buyer 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.

- h. Buyer's Right to Terminate. The Buyer may terminate this Agreement at any time during the due diligence period if, in the exercise of its sole discretion, it decides to not proceed with the Project by giving written notice of termination to the City in which case neither party shall have any further obligations to the other.

4. INSPECTIONS.

- a. During the Due Diligence Period, Buyer and its employees, consultants, contractors and agents shall have the right, at Buyer'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 Buyer determines, it is sole discretion, to be required to determine the suitability of the Premises for Buyer'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. Buyer agrees to defend, indemnify and hold harmless the City against any mechanics liens that may arise from the activities of Buyer and its employees, consultants, contractors and agents on the Premises.
- c. Buyer shall exercise the access and inspection rights granted hereunder at its sole risk and expense, and Buyer 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 Buyer of its rights hereunder, except to the extent that such Damages result from the act or omission of the City.
- d. Buyer shall cause any contractors, consultants or any other party conducting the Inspections to procure automobile insurance, if applicable, and commercial general 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, listing the City as an additional insured thereon, and also Workers' Compensation Insurance coverage to the extent required by law; the forms of all such insurance to be subject to City's Corporation Counsel's reasonable satisfaction.

- e. In the event that Buyer does not purchase the Premises, Buyer agrees to either return the Premises as nearly as possible to its original condition after conducting the Inspections; provided, however, the City hereby acknowledges and agrees Buyer shall have no obligation to clean-up, remove or take any other action with respect to any disturbance of any pre-existing environmental contamination on the Premises caused by such inspections, studies, tests, exams, and assessments, and that Buyer 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 Buyer's obligations under this Agreement that the results of the Inspections be acceptable to Buyer in its sole discretion. If the results of such due diligence are not acceptable to Buyer in its sole discretion, and if Buyer exercises its right to terminate this Agreement, 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.** Buyer 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 Buyer 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 Buyer's financing or closing shall be paid for by Buyer.

6. **DEFAULT AND REMEDIES.** In the event that Buyer defaults hereunder for a reason other than the default of the City, City may terminate this Agreement, and neither party shall have any further obligation to the other. In the event City defaults under this Agreement, and if Buyer is not then in default hereunder, Buyer shall have the right to pursue specific performance or terminate this Agreement, in which case neither party shall have any further obligation to the other.

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, Buyer may terminate this Agreement, 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.”** Buyer acknowledges that Buyer 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 Buyer 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. ENVIRONMENTAL INDEMNIFICATION.** Buyer 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 Buyer 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, except to the extent that such a claim results directly from the City’s release, handling or storage of hazardous wastes or hazardous materials on 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 Buyer’s successors, assigns, and transferees.
- 10. CLOSING.** Time is of the essence in the performance of this agreement. The closing shall be held at the offices of Buyer’s counsel at a time agreeable to the parties on or before the day that is fifteen (15) months after the date of this Agreement (the “Closing Date”). At the Closing:
- a. the City shall execute, acknowledge and deliver to Buyer a municipal quitclaim deed conveying to Buyer good and insurable title to the Premises, free and clear of all encumbrances except as otherwise set forth herein.
 - b. Buyer shall deliver the Purchase Price to the City.
 - c. 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.
 - d. Buyer shall deliver evidence, reasonably satisfactory to City’s Corporation Counsel, that the entity receiving title to the Premises is in good standing

under Maine law, and that the individuals acting at Closing and executing documents on behalf of Buyer are authorized to do so.

11. BUYER'S POST CLOSING OBLIGATIONS; RIGHTS OF CITY TO REPURCHASE PROPERTY.

- a. Within twelve (12) months after the Closing Date, Buyer shall commence construction of the Project, as the Project is generally described in the Proposal. The Buyer, in its discretion, may develop the Project in two phases. The first phase of the Project shall include the greater of 20 three-bedroom dwelling units or the maximum number of dwelling units feasible under the current zoning.
- b. Upon the issuance of a certificate of occupancy for all or a portion of the first phase of the Project or at such earlier time as the Buyer, in its discretion, may determine, the Buyer shall convey the Project to a Cooperative Affordable Housing Corporation (the "Coop") organized in accordance with the Maine Cooperative Affordable Housing Ownership Act, 13 M.R.S.A. §1741-1762, as may be amended (the "Act"). Notwithstanding anything to the contrary in the foregoing, the Buyer may retain the right to develop additional units on the Premises as a second phase of the Project which shall be conveyed to the Coop.
- c. Rent Restrictions. For a period of 99 years after the Project has been transferred to the Coop, all units and cooperative interests in the Project shall be affordable to low- and moderate-income households earning less than or equal to 100% of the area median income (AMI), adjusted for family size, in accordance with federal standards generally accepted at the time of incorporation under the Act. For purposes of this Agreement, "affordable" means that the percentage of income a household is charged in connection with its cooperative interest and other housing expenses, including utilities, shall not exceed 30% of the household's gross monthly income. Minimum household size allowed per unit and the formula for calculating maximum allowable monthly rent is detailed on Exhibit C, which is attached hereto and made a part hereof.
- d. Income Restrictions. In order to purchase a cooperative membership interest in, and reside in a unit owned by the limited equity cooperative, a household must not earn more than 100% of the AMI, adjusted for family size, as published by the U.S. Department of Housing and Urban Development ("HUD"). Household income is defined as adjusted gross income used by the IRS. This income test will be used only at the time of the household's purchase, and excludes transfers to family members or an estate beneficiary. At the time of initial sale of cooperative membership interests in the Coop, up to 20% of the cooperative membership interests may be sold to households earning up to 120% of AMI. All other sales and all subsequent sales of cooperative membership interests must be to households earning no more than 100% of AMI.
- e. Option to Repurchase. Unless the Project has been transferred to the Coop as set forth above, if Buyer, its successors, assigns, or transferees fails to commence construction of the Project on the Premises within 12 months after the closing, and construct the buildings which are part of the first

phase of the Project within thirty (30) months after closing, the City shall have the right, but not the obligation, to repurchase the Premises and the Project at the Purchase Price plus all documented, design, development, construction, and approval expenses incurred by Buyer, or successors, to that juncture. If the City exercises this right to repurchase, Buyer shall convey the Premises to the City and assign to the City all contracts, plans, and other documents related to the design, construction, and regulatory approvals for the Project. This right to repurchase shall be assignable by the City.

- f. The articles of organization for the Coop shall provide that in the event the Coop shall be dissolved, its assets will be distributed in accordance with § 1754(6) of the Act to the City or, at the City's option, to another organization permitted under § 1754(6) of the Act reasonably acceptable to the City.
- g. The provisions of this Section 11 will survive closing and will be included in greater detail in the City's deed to Buyer or in a Declaration of Covenants, Conditions and Restrictions executed before or at the time of Closing, which shall be recorded in the Cumberland County Registry of Deeds.

12. 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 Buyer.

13. 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.

14. 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.

15. 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.

16. TIME. The City and Buyer each confirm and agree that each of the time periods set forth herein are essential provisions of the terms of this Agreement.

17. 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.

18. 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 the notice is delivered to an overnight delivery service with delivery confirmation, addressed to the recipients 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 Buyer: TBD

With a copy to: David C. Pierson, Esq.
Eaton Peabody
P.O. Box 15235
Portland, ME 04112-5235

19. 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.

20. BROKERS. The CITY and Buyer each represent and warrant that they have not dealt with a real estate broker in connection with this transaction. Buyer agrees to indemnify and hold harmless City from any claims made by any broker should Buyer'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 Buyer 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.

21. RECITALS INCORPORATED BY REFERENCE. The recitals set forth above are incorporated herein by reference and made a part of this Agreement.

IN WITNESS WHEREOF, the parties have caused this instrument to be executed on their behalf by their duly authorized offices or representatives, on the day and year first written above.

City OF PORTLAND

WITNESS

Jon P. Jennings
Its City Manager

BUYER

WITNESS

Printed Name: _____
Its _____

Approved as to Form:

Corporation Counsel's Office

DRAFT