

Order 301-21/22

Passage: 6-3 (Fournier, Ali, Zarro) on 7/19/2021

Effective 7/29/2021

KATE SNYDER (MAYOR)
BELINDA S. RAY (1)
SPENCER R. THIBODEAU (2)
TAE Y. CHONG (3)
ANDREW ZARRO (4)

CITY OF PORTLAND
IN THE CITY COUNCIL

MARK DION (5)
APRIL D. FOURNIER(A/L)
PIOUS ALI (A/L)
NICHOLAS M. MAVODONES, JR (A/L)

**ORDER APPROVING THE SECOND LETTER AGREEMENT WITH
DEVELOPERS COLLABORATIVE FOR THE HOMELESS SERVICES
CENTER ON RIVERSIDE STREET**

ORDERED, that the Second Letter Agreement between Developers Collaborative and the City of Portland for the Homeless Services Center on Riverside Street is hereby approved and accepted in substantially the form attached hereto; and

BE IT FURTHER ORDERED, that the City Council hereby authorizes the City Manager or his or her designee to execute said document and any other related documents necessary or convenient to carry out the intent of the above order.



SECOND LETTER AGREEMENT

Homeless Service Center, 654 Riverside Street, Portland, Maine (the “Project”)

July 29, 2021

City of Portland
City Hall
389 Congress Street
Portland, Maine 04101
Attn.: Jon Jennings
City Manager

This is the “Second Letter Agreement” referred to in the First Letter Agreement (the “First Letter”) between the City of Portland (“City”) and Developers Collaborative Predevelopment LLC (“Developer”) dated May 27, 2021, concerning predevelopment activities with respect to the Project. The terms of the First Letter are incorporated herein by reference, but if there are any conflicts between the terms of the First Letter and this Second Letter Agreement (referred to herein as the “Agreement”), the terms of this Agreement shall be controlling.

For valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Developer and the City agree as follows:

Section 1. Duties of the Developer.

A. Obligations of Developer. Subject to the provisions of this Section, Developer shall design, seek financing and land use approvals, which shall include all regulatory approvals typically obtained except for those obtained immediately prior to construction, such as but not limited to a building permit and state fire marshal approvals (collectively, the “Approvals”) for the Project, including such design as may be necessary to receive the Approvals. Developer shall keep City apprised of significant milestones in the development process with respect to the Project. City shall actively participate in the design and development process, and Developer shall accept such participation in designing and developing the Project in order to receive the Approvals.

B. Design Process; Meetings; Milestones. Developer shall arrange for and shall supervise the entire permitting and design process as to the Project, including architectural, engineering, land survey and other consultant services; review of all plans, drawings, specifications, submissions. Prior to Developer entering into any contract or agreeing to any amount of work to be performed on the Project, such contract and/or work shall be approved in

writing by the City Manager. The City Manager shall have five (5) business days from receipt of any contract to approve or deny the same. If City Manager does not take any action within five (5) business days from receipt of such contract, such contract shall be deemed rejected. The City will participate in the design process for the Project and Developer shall address, to City's reasonable satisfaction, City's suggestions and concerns when raised. Developer hereby commits to an "open book" transparent process whereby City will have all access to any information affecting the Project Construction Budget.

1. City and Developer agree to mutually cooperate with the goal of moving the Project forward as expeditiously as possible.

2. The parties agree to hold regular status meetings and/or teleconferences, to be attended by representatives of the parties. Developer shall publish in advance of each meeting an agenda and desired outcomes and action steps for each meeting.

3. The parties acknowledge that achieving the goal set forth in subsection (1) above requires performance by both parties of their respective obligations under this Agreement, and in connection therewith, time is of the essence in the performance of the parties' respective duties and obligations under this Agreement.

C. Project Construction Budget. The Developer shall prepare a development budget for the entire Project (the "Project Construction Budget"), which shall be complete and shall cover the planning, design, permitting, construction and delivery of the Project in accordance with applicable requirements of law and the approved Project plans. The Project Construction Budget target shall be that conceptual budget proposed by the Developer in its response to City RFP #21041 (the "RFP"). The Project Construction Budget shall be revised as appropriate, and as mutually agreed to by Developer and City, throughout the Approvals process. Developer and City acknowledge that while the Project Construction Budget is a target, many conditions may affect the final Project Construction Budget, such as, but not limited to: availability of labor and materials, City-requested changes in the design of the Project, lawsuits or appellate actions, or concealed conditions affecting the Project site not reasonably discoverable in the exercise in due diligence.

D. Paying Predevelopment Costs. Developer shall pay for all actual third party soft costs reasonably necessary to move the Project forward and secure the Approvals (the "Predevelopment Costs"). City and Developer acknowledge that, while some soft costs such as, but not limited to, complete architectural drawings are not necessary to obtain the Approvals, City and Developer may choose by mutual written agreement to accelerate the Project Schedule by continuing, by way of example, the architectural design work past that stage strictly required by the Approvals. If such written agreement is signed, such soft costs shall become part of the Predevelopment Costs.

E. Compliance with Law. Developer shall comply with all applicable requirements of law and municipal regulations relative to the development of the Project.

F. Authority of Developer to Engage Independent Contractors. In the performance of its duties hereunder, and, except as hereinafter provided, Developer shall have full and complete authority to engage such independent contractors as may be necessary for the timely design and permitting of the Project, and to discharge any such independent contractors so engaged. The fees paid to such independent contractors shall be included in the Project Construction Budget.

G. Disclaimer Of Warranty. Developer will exercise due diligence and commercially reasonable efforts to fulfill its obligations under this Agreement; however, Developer provides no warranty or assurance regarding:

1. The completeness, accuracy or quality of the work performed by the vendors and consultants associated with the Project, including architects, engineers, legal counsel, designers, planners, general contractors, construction managers and sub-contractors; or

2. The accuracy, completeness or sufficiency of engineering reports, soil studies, site reviews by third parties, environmental and other third party studies and reports for the Project.

J. Further Assurances as to Title to the Property. City shall cooperate with and assist Developer in clearing title to the Property, if necessary, so that such title shall be good and marketable and not subject to exceptions that are objectionable to either Developer or to the lender of Project Debt. Any expenses associated with clearing of title, and all transfer taxes and recording fees incurred in connection with the Leases (as defined below) and Project Debt, shall be included in the Project Construction Budget.

2. Duties of the City

A. Information Concerning the Project Site. City shall furnish to the Developer all information in City's possession that is in any way relevant to the Project site or to the development of the Project.

B. Use of Project When Completed. The parties acknowledge and agree that Developer's willingness to acquire a leasehold interest in the Project site and develop the Project is conditioned upon City's expressed need for a homeless services center. Developer would not enter into this Agreement and undertake the Project without assurance from City that City will fully utilize and operate the Project as a homeless service center when complete.

C. City Participation in Development Process. City shall actively participate in the development process for the Project and shall assign a project manager to interact with Developer's staff throughout the process. Time being of the essence in development projects generally, City shall not unreasonably delay action on any request by Developer, and shall not unreasonably withhold, delay or condition its consent except where any provision of this Agreement expressly states that City may act or choose not to act in its sole discretion.

3. Compensation and Reimbursement of Developer; Next Steps.

A. For its services pursuant to the Project, Developer shall be earn a development fee of \$250,000 (the "Development Fee"), which City acknowledges is significantly below market for projects of the scope of the Project. The Development Fee shall be paid at the time the Leases are executed and the Project closes on its construction financing (collectively "Construction Closing").

B. If for any reason the Project does not move forward and Construction Closing does not occur, or City decides not to pursue the Project, or either party terminates this Agreement for any reason, excluding a termination by Developer for purposes of convenience only within sixty (60) days after the date of this Agreement (together, "Terminating Events") the City shall pay to Developer a breakup fee totaling 16.67% of the Development Fee per 30 day period following the date of this Agreement, up to a maximum of 90 days or 50% of the total Developer Fee, upon the occurrence of said Terminating Event.

C. In addition to any payment of the Development Fee, upon the occurrence of a Terminating Event, all actual Predevelopment Costs incurred and paid by Developer up to the date of such Terminating Event shall be reimbursed by City to Developer in full, based on written invoices supplied by the Developer to the City. Upon payment in full, Developer will assign all of its rights in the work products created to the City.

D. City and Developer contemplate, but do not commit to, entering into a ground lease and master lease structure whereby City would lease the 654 Riverside site (the "Property") to Developer and Developer would lease the Property and the Project back to City, on a long term and coterminous basis. City and Developer agree to negotiate in good faith the essential terms of a master lease and ground lease (together, the "Leases") within 30 days of receipt of the Approvals. City and Developer do further agree to negotiate in good faith mutually agreeable Leases within 60 days of agreeing on the essential terms of the Leases. Upon signing the Leases, the Leases shall be the controlling documents for the relationship between the parties, superseding this Agreement. Developer will target a lease rate equal to 7.6% of the Project Construction Budget, as detailed in Developer's response to the RFP. The Parties contemplate that, after the expiration of the master lease term, the Project will become the Property of the City.

4. Term.

The term of this Agreement shall commence on the date hereof and shall end on the earlier to occur of Construction Closing or December 31, 2021, unless extended in writing by mutual agreement of the parties. If the Approvals have not been obtained by December 31, 2021 and the parties have not agreed in writing to extend the term hereof, this Agreement shall end and be of no

further force or effect. Either Party may terminate this Agreement (a) for convenience no earlier than thirty (30) days after the date of this Agreement, or (b) for cause upon five (5) business days' notice.

5. Default; Termination.

If either party defaults in its obligations under this Agreement, the nondefaulting party may terminate this Agreement in writing pursuant to Section 4 above. The breakup fee and reimbursement of actual Predevelopment Costs described in Sections 3 B. and 3 C. above shall be paid to Developer notwithstanding any default by Developer under this Agreement.

6. Miscellaneous.

A. Relationship of Parties; No Partnership Created. The parties do not intend to be partners or co-venturers in any respect, and this Agreement shall not be deemed to create a partnership or joint venture.

B. Invalidity. In case one or more of the provisions contained in this Agreement (or any portion of such provision) shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision of this Agreement (or any portion of any such provision) but this Agreement shall be construed as if such invalid, illegal or unenforceable provision (or portion thereof) had never been contained herein.

C. Third Parties. There are no third-party beneficiaries to this Agreement, and no terms or provisions created by this Agreement may be enforced by or for the benefit of any person or party not a signatory to this Agreement.

D. Modifications; Waivers. No change or modification of this Agreement shall be valid or binding upon the parties hereto, nor shall any waiver of any term or condition in the future, unless such change or modification or waiver shall be in writing and signed by the parties hereto.

E. Construction. This Agreement shall be governed by and construed in accordance with the laws of the State of Maine without reference to the choice of law or conflicts of laws provisions thereof. The titles of the sections and paragraphs herein have been inserted as a matter of convenience of reference only and shall not control or affect the meaning or construction of any of the terms or provisions herein.

F. Notices. All notices, demands, requests and other communications required or permitted hereunder shall be in writing and shall be deemed to be properly delivered or made if (i) personally served, (ii) sent by nationally-recognized overnight express delivery service, (iii) sent by United States certified mail, return receipt requested, postage prepaid, or (iv) sent by electronic transfer, with prompt telephone confirmation, addressed to the other party at

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its address set forth below, or at such other address as either party may from time to time designate by notice to the other. All such notices, demands, requests and other communication hereunder shall be deemed effective upon actual receipt thereof.

If to City
City of Portland
City Hall
389 Congress Street
Portland, Maine
Attn: City Manager

With a copy to:
Nicholas J. Morrill, Esq.
Jensen Baird Gardner & Henry
10 Free Street
Portland, Maine 04101

If to Developer
Developers Collaborative Predevelopment LLC
100 Commercial Street, Suite 414
Portland, Maine 04101
Attn: Kevin R. Bunker

With a copy to:
Maurice A. Selinger, III, Esq.
Curtis Thaxter
One Canal Plaza, P.O. Box 7320
Portland, Maine 04112

Any party hereto may, at any time, by ten (10) days' written notice given to the other party hereto, designate any other address in substitution of the foregoing address to which such notice or communication shall be given.

IN WITNESS WHEREOF, the parties have caused this Second Letter Agreement to be executed by their duly authorized representatives as of the day and year first written above.

CITY OF PORTLAND

DEVELOPERS COLLABORATIVE
PREDEVELOPMENT LLC, Developer

By: _____

By: _____

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Jon P. Jennings, City Manager

Kevin R. Bunker, its Manager