

Order 44-15/16

Passage: 9-0 on 8/3/2015

Effective 8/13/2015

MICHAEL F. BRENNAN (MAYOR)
KEVIN J. DONOGHUE (1)
DAVID A. MARSHALL (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
PH WARREN AVE, LLC FOR 42.5 ACRES OF LAND ON FARNHAM AND IFFLEY
STREETS TO PROTECT THE CAPISIC BROOK WATERSHED**

ORDERED, that the Purchase and Sale Agreement with PH Warren Ave, LLC for 42.5 acres of land on Farnham and Iffley Streets in Portland, Maine, to protect the Capisic Brook Watershed 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 and whatever other documents are necessary to effect the intent and purpose of the Agreement.

PURCHASE AND SALE AGREEMENT

THIS AGREEMENT for the purchase and sale of real estate made this _____ day of _____, 2015 (the "Effective Date") by and between the **CITY OF PORTLAND**, a body politic and corporate located in Cumberland County, Maine (hereinafter referred to as "Buyer"), and **PH WARREN AVE, LLC**, a Maine limited liability company with a mailing address of 401 Warren Avenue, Portland, Maine 04103 (hereinafter referred to as "Seller").

WITNESSETH:

WHEREAS, Seller owns an approximately 42.5 acre parcel of land located on Farnham Street and Iffley Street, City of Portland, County of Cumberland, State of Maine, being a portion of the land described in a deed to Seller recorded in the Cumberland County Registry of Deeds, Book 30781, Page 74, which portion is more particularly described in Exhibit A attached hereto and incorporated herein by reference (the "Property") and generally depicted on the sketch plan attached hereto as Exhibit B; and

WHEREAS, Seller intends to sell and Buyer desires to acquire the Property.

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.

Seller agrees to sell the Property, and Buyer agrees to purchase the Property in accordance with the provisions hereof. It is hereby agreed and acknowledged that the actual description of the Property shall be determined based on the title and related due diligence work to be completed by Buyer pursuant to this Agreement and that such description shall be subject to Buyer's final review and approval before including the same in the Deed (as that term is defined below) to be delivered by Seller to Buyer as set forth and described below.

2. CONSIDERATION.

The consideration for the property shall be Eight Hundred Thousand and no/100 Dollars (\$800,000.00) (the "Purchase Price") payable as follows:

- (a) A deposit of Twenty Thousand Dollars (\$20,000.00) to be paid by Buyer within two (2) business days of the Effective Date and held in escrow by _____ until closing and applied to the Purchase Price (or, if applicable, until returned to Buyer pursuant to this Agreement) (the "Deposit"); and
- (b) The Purchase Price, less the Deposit, to be paid by Buyer to Seller at closing by Buyer's check, subject to any adjustments provided for in this Agreement.

This is a cash purchase and no financing is required.

3. TITLE.

Title to the property shall be conveyed by good and marketable title acceptable to the Buyer evidenced by Quitclaim Deed with Covenant (the "Deed"), and shall be free of liens or other encumbrances and leases or other rights of occupancy, except for utility easements and other encumbrances that do not impair the value of the property. In the event Seller is unable to convey title as aforesaid, Seller shall be given a reasonable period of time, not to exceed sixty (60) days after receipt of written notice, in which to remedy any title defects at Seller's sole expense. In the event that any defects cannot be corrected or remedied within said period to Buyer's satisfaction, then Buyer may, at its option, receive back the Deposit, and Buyer and Seller shall be under no further obligation to one another hereunder. Buyer may elect to close this transaction notwithstanding said defects.

4. POSSESSION.

Full possession of the Property will be delivered to Buyer at the transfer of title free and clear of all tenancies or occupancies by any person or entity.

5. ADJUSTMENTS, PRORATIONS, CLOSING COSTS.

- (a) Real estate taxes and any other assessments that may be due on the Property shall be prorated as of the date of the closing.
- (b) The Maine real estate transfer tax shall be paid by Seller and Buyer in accordance with 36 M.R.S.A., §4641-A.
- (c) The recording fee for the deed of conveyance shall be paid for by Buyer.
- (d) A portion of the purchase price shall be withheld at the closing by Buyer if required by 36 M.R.S.A. § 5250-A.

6. RISK OF LOSS.

Until transfer of title hereunder, the risk of loss or damage to the Property by fire or otherwise is assumed by the Seller. The Property is to be delivered in substantially the same condition as of the date of this Agreement unless otherwise stated. In the event Seller is not able to deliver the Property as stated, Buyer may terminate this Agreement and receive a refund of the Deposit.

7. INSPECTIONS; CONTINGENCIES.

Buyer may enter into any part of the Property at all reasonable times prior to the closing in order to inspect the Property, conduct surveys, test borings, engineering and environmental studies, and to do such other things as are reasonably necessary with respect to the acquisition and development of the Property (collectively, the "Inspections"). In the event that any of the Inspections reveals defects or conditions that are unacceptable to Buyer, as determined by Buyer in its sole and absolute discretion, Buyer shall have the option of terminating this Agreement and receiving back the Deposit

Seller shall have no obligation to close on this transaction until Seller has received all City of Portland approvals for and building permit to construct a 28,000 square foot commercial building on Warren Avenue, Portland, Maine which is adjacent to this Property. Seller has received to date site plan approval from the City of Portland Planning Board (Portland Planning Board Project ID 2014-016) for said project. In the event that Seller has not received said approvals and building permit prior to the Closing Date and elects not to close, Buyer shall be entitled to the return of its deposit and reimbursement of its costs and expenses as set forth in section 10(a) below.

8. REPRESENTATIONS AND WARRANTIES OF SELLER.

Seller represents and warrants to Buyer that to its knowledge, the following are true as of the date of this Agreement and will be true as of the closing:

- (a) There are no outstanding pending or threatened liens, claims, rights of first refusal, licenses or encumbrances against or affecting the Property.
- (b) All outstanding bills and/or accounts payable concerning the Property are either paid or will be paid prior to or at the time of closing.
- (c) There are no outstanding claims, losses or demands against Seller by any person respecting Seller's ownership, use or occupancy of the Property.
- (d) The Property has not been used for any dumping of waste materials or landfilling and is free of special wastes, underground storage tanks, radon, asbestos, lead substances, and any hazardous, biomedical, radioactive or toxic, substances, materials or wastes. The terms used in the foregoing sentence shall include, without limitation, all substances, materials, etc., designated by such terms under any laws, ordinances or regulations, whether federal, state or local.
- (e) Seller has no knowledge of any boundary disputes or encroachments affecting the Property.
- (f) There are rights of ingress and egress in perpetuity from the Property to Warren Avenue from Newcastle Street and Saville Street and to Verrill Street, Iffley Street, and Sarsfield Street for vehicular and pedestrian traffic and utilities.

9. CLOSING.

The closing of this transaction shall take place on or before that date which is sixty (60) days after the Effective Date (the "Closing Date"), at a time agreeable to the parties, at the offices of the Corporation Counsel, Room 211, City Hall, 389 Congress Street, Portland, Maine. Time is of the essence in the performance of this Agreement.

Seller further agrees to execute and deliver to Buyer at the closing such affidavits and certificates as are reasonably necessary for Buyer's acquisition of the Premises including without limitation a certificate of non-foreign status (as required by Internal Revenue Service regulations),

an affidavit regarding underground storage tanks (as required by Maine Law) and a standard title insurance "Seller's Affidavit" regarding mechanics liens and persons in possession and, if Seller is a corporation, partnership or other legal entity, satisfactory evidence of authority to convey and good standing.

10. DEFAULT AND REMEDIES.

- (a) In the event Seller defaults under this Agreement, and if Buyer is not then in default hereunder, Buyer shall have the right to pursue specific performance, but at all times may elect in substitution therefor, as its sole remedy, the right to a return of its deposit, together with reimbursement, in an amount not to exceed Fifteen Thousand Dollars (\$15,000.00) of reasonable, documented, out-of-pocket costs or expenses incurred by Buyer in connection with its purchase of the Premises, including fees of inspectors, engineers, attorneys, or other professionals engaged by Buyer in connection with its purchase of the Premises.
- (b) In the event Buyer defaults under this Agreement, for a reason other than the default of Seller, Seller's sole remedy shall be the right to retain the Deposit and any interest accrued thereon as liquidated damages for the breach and not as a penalty therefor and this contract shall be deemed terminated.

11. CONDITIONS PRECEDENT.

Buyer's obligation to close hereunder is subject to Buyer's full and complete satisfaction with all of the following:

- (a) There shall have been no material adverse change in the condition of the Property occurring after the conclusion of Buyer's inspections under Section 7 above, and the Property shall be substantially in the same condition as they were at the time of the inspections;
- (b) Title to the Property shall be good and marketable; and
- (c) As of the date hereof, and as of the Closing Date, all of Seller's representations and warranties shall be true and correct in all material respects.
- (d) If the conditions described in subsections (a) through (c) above are not satisfied as of the dates specified, or if no date is specified, by the Closing Date, then Buyer shall have the option of terminating this Agreement in writing and receiving back the Deposit, excepting that issues related to title shall be addressed as provided in Section 3 above.

12. 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.

13. 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 Seller and Buyer.

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. 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.

16. NOTICE.

Any notice required or permitted under this Agreement shall be deemed sufficient if mailed with first class postage affixed or delivered in person to:

FOR THE BUYER: City of Portland
 Attention: City Manager
 389 Congress Street
 Portland, ME 04101

With a copy to: City of Portland
 Attention: Office of The
 Corporation Counsel
 389 Congress Street
 Portland, ME 04101

FOR THE SELLER: PH Warren Ave, LLC
 401 Warren Avenue
 Portland, ME 04103
 Attn: Peter Holmes

With a copy to: Richard H. Spencer, Jr., Esq.
 Jensen Baird Gardner Henry
 10 Free Street
 P.O. Box 4510
 Portland, ME 04112-4510

Any notice so mailed shall be deemed delivered and received 3 days after mailing. Either party

may change its address for purposes of this paragraph by giving the other party notice of the new address in the manner described herein.

17. 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. A signature in a faxed, pdf or other reproduced or electronic document shall be considered the equivalent of an original signature.

18. BROKERS.

Seller and Buyer each represents and warrants that neither has dealt with a real estate broker in connection with this transaction, other than Garrett Adams and Daren Hebold of LUX Realty Group (“LUX”) and Joseph Malone, whose commission will be paid by Seller pursuant to the terms of a separate agreement between Seller, Malone and LUX. Seller agrees to indemnify, defend, and hold Buyer harmless from any claims made by any broker should Seller'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 above written.

CITY OF PORTLAND

WITNESS

By: _____
Jon P. Jennings
Its City Manager

PH WARREN AVE, LLC

WITNESS

By: _____
Peter Holmes
Its: _____ Manager

Exhibit A

Exhibit B

P:\RHS\Spencer\Holmes, Peter\ACQUISITION OF 40 ACRES WARREN AVE 2013\SALE ON INTERIOR PORTION\CITY CONTRACT\REVISED FEB 9\Purchase and Sale Agr - RHS - RL - 03-20-15.docx