

Order 160-14/15

Passage: 8-1 (Suslovic) on 2/23/2015

Effective 3/5/2015

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 BOPO, LLC
FOR 71 HANOVER STREET**

ORDERED, that the Acting City Manager is hereby authorized to execute the Purchase and Sale Agreement with BOPO, LLC for 71 Hanover Street, in substantially the form attached hereto; and

BE IT FURTHER ORDERED, that the Acting City Manager is hereby authorized to execute whatever 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 February, 2015 by and between the CITY OF PORTLAND, a body politic and corporate located in Cumberland County, Maine, (hereinafter referred to as "SELLER"), and BOPO, LLC, a Maine limited liability company with a mailing address of 58 Alder Street, Portland, Maine, (hereinafter referred to as "BUYER").

RECITALS

WHEREAS, the SELLER is the owner of certain land located 71 Hanover Street in Portland, Maine, as more specifically described in Exhibit A, attached hereto and incorporated herein (the "Premises"), and as generally depicted in the plan attached as Exhibit B and incorporated herein; and

WHEREAS, the SELLER desires to sell the Premises and has published a certain "Request for Proposals For the Sale and Reuse of Property Located at 71 Hanover Street, RFP #5215" (the "RFP"), a copy of which is attached hereto as Exhibit C and incorporated herein, and the provisions of which shall survive closing; and

WHEREAS, the BUYER has submitted a proposal in response to the RFP (the "Proposal"), a copy of which is attached hereto as Exhibit D and incorporated herein; and

WHEREAS, after reviewing all proposals submitted in response to the RFP, the SELLER has selected the BUYER as the successful bidder; and

WHEREAS, BUYER desires to purchase and develop the Premises in accordance with the terms of the Proposal, and the SELLER desires to sell the Premises to the BUYER so that the BUYER may do so.

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. **RECITALS INCORPORATED BY REFERENCE**. The recitals set forth above are hereby incorporated herein by reference and made a part of this agreement. The restatement in this document of any term of the RFP or Proposal shall not be deemed to waive any term not so restated. If any disagreement is found between the RFP or the Proposal and this document, then this document shall govern; and the RFP shall govern over the Proposal, to the extent they disagree; provided, however, that this

document and its attachments shall be construed to be supplemental to one another to the extent possible.

2. **SALE.** SELLER agrees to sell the Premises to BUYER, and BUYER agrees to buy the Premises in accordance with the terms and conditions set forth in this Agreement. This Agreement is for the sale of land only and does not include the structures, concrete block walls, or any other personal property on the Premises (the “Retained Property”), to which the SELLER shall retain title, and which Seller shall fully remove at SELLER’S sole cost, risk and expense as set forth in Section 5 below.
3. **CONSIDERATION.** The consideration for the Premises shall be Three Hundred Forty Thousand Eighteen Dollars (\$340,018.00) (the “Purchase Price”) payable as follows:
 - a. The SELLER acknowledges receipt of BUYER’s deposit in the amount of Thirty-Four Thousand One Dollars and Eighty Cents (\$34,001.80) (the “Deposit”) paid to it as of the date of this Agreement; and
 - b. The BUYER shall pay to the SELLER at closing the remaining Three Hundred Six Thousand Sixteen Dollars and Twenty Cents (\$306,016.20) in immediately available funds.
4. **TITLE.** SELLER shall convey the Premises to BUYER at the closing in fee simple with good and marketable and insurable title by a quitclaim deed without covenant acceptable to BUYER. 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 SELLER 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. If SELLER is unable to convey title to the Premises in accordance with the provisions of this paragraph, then SELLER shall have a reasonable time period, not to exceed 60 days from the time SELLER receives written notice of a defect, unless otherwise agreed to by both parties, during which it shall make a good faith effort to remedy the defect, after which time, if such defect is not corrected so that there is marketable and insurable title, BUYER may within 2 days thereafter, at BUYER’s option, withdraw the Deposit, and neither party shall have any further obligation hereunder. BUYER may, at BUYER's option elect to close notwithstanding any such defects that may exist.
5. **POSSESSION.** Full possession of the Premises will be delivered to Buyer at the transfer of title, free and clear of all tenancies or occupancies by any person or entity. Notwithstanding the previous sentence, in the event that the SELLER is unable to fully remove the Retained Property before the closing date, BUYER and SELLER shall in good faith negotiate and execute a license agreement pursuant to which

SELLER shall be allowed to store the Retained Property on the Premises and continue to operate its sand and salt operations from the Premises until no later than June 15, 2015, provided, however, that SELLER shall endeavor to remove the Retained Property at the earliest date feasible prior to June 15, 2015. Such license agreement shall provide that SELLER shall be entitled to store the Retained Property and continue to operate its sand and salt operations from the Premises until the earlier of June 15, 2015, or the date that it removes the Retained Property from the Premises. Such agreement shall also include the following indemnification provision: "SELLER subject to and limited by the defenses, immunities and limitations of liability available to SELLER under the Maine Tort Claims Act, 14 M.R.S. § 8101 et seq., shall indemnify and hold Buyer harmless from any claims, damages, demands or liabilities resulting from SELLER's exercise of its rights under this license agreement, including without limitation, claims for personal injury, property damage and for the cost of removal including mechanic's lien claims, provided that such claims, damages, demands, or liabilities are caused by any negligent act or omission of the SELLER or its agents, employees or contractors. The license agreement shall also provide that SELLER shall cause its contractors or employees removing the Retained Property to deliver to Buyer, no later than 10 days after the completion of the removal of the Retained Property, a waiver of any and all mechanic's liens associated with the cost of the removal of the Retained Property.

6. **INSPECTIONS.** At reasonable times upon reasonable prior notice prior to Closing, and with SELLER's consent, BUYER, its agents, contractors and any prospective lender or investor of BUYER shall have the right to enter the Premises and perform, at BUYER's expense, any and all inspections, tests, surveys or other due diligence inquiries with respect to the Premises as BUYER deems necessary or appropriate. BUYER agrees to return the Premises as nearly as possible to its original condition after all of such tests and inspections. SELLER shall cooperate with BUYER in such inspections. BUYER shall complete any such inspections within 60 days of the date first set forth above (the "Inspection Period"). In the event that an inspection reveals defects or conditions which are unacceptable to BUYER, BUYER may, prior to the end of the Inspection Period, terminate this Agreement and receive back the Deposit.
7. **REAL ESTATE TAXES, PRORATIONS AND TRANSFER TAX.** BUYER shall be liable for all real estate taxes beginning as of the start of fiscal year 2016 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 fiscal year 2015 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. SELLER 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.
8. **DEFAULT AND REMEDIES.** In the event that BUYER defaults hereunder for a reason other than the default of the SELLER, SELLER shall retain the deposit, it being understood, however, the SELLER's acceptance thereof shall not constitute a waiver of any other legal or equitable remedy available to SELLER. 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, attorneys, or other professionals engaged by BUYER in connection with its purchase of the Premises.

9. **RISK OF LOSS.** The risk of loss or damage to the Premises by fire or otherwise, until transfer of title hereunder, is assumed by the SELLER. The Premises 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 Premises as stated, BUYER may terminate this Agreement and receive a refund of the Deposit.
10. **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." SELLER, 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 SELLER of every agreement and obligation contained herein.
11. **ENVIRONMENTAL INDEMNIFICATION.** BUYER covenants and agrees, at BUYER's sole cost and expense, to indemnify, defend, and hold SELLER 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 SELLER 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, including without limitation the environmental matters identified in the Tewhey Report identified in and attached to the RFP.
12. **RIGHTS OF SELLER TO REPURCHASE PROPERTY.** If development of the Premises in substantially the form set forth in the Proposal, including the securing of a certificate of occupancy, is not complete within 18 months after the closing, the Seller shall have the right, but not the obligation, to repurchase the Premises at the Purchase Price.

- 13. CLOSING.** Time is of the essence in the performance of this agreement. The closing shall be held at City Hall at a time agreeable to the parties on or before seventy-five (75) days after the date first set forth above.
- 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 SELLER and BUYER.
- 15. 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.
- 16. 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.
- 17. TIME.** The SELLER and BUYER each confirm and agree that each of the time periods set forth herein are essential provisions of the terms of this Agreement.
- 18. 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.
- 19. 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 SELLER: 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: BOPO LLC
Attention: Justin Alfond
58 Alder Street
Portland, Maine 04101

With a copy to: Gary D. Vogel, Esq.
Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101-2480

20. 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.

21. BROKERS. Seller and Buyer each represents and warrants that neither has dealt with a real estate broker in connection with this transaction. Buyer agrees to indemnify and hold harmless Seller 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, Seller agrees to indemnify and hold harmless Buyer 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 written above.

CITY OF PORTLAND

WITNESS

Sheila Hill-Christian
Its Acting City Manager

BOPO, LLC

WITNESS

Justin Alfond
Its Manager

Approved as to Form:

Corporation Counsel's Office

EXHIBIT A – DESCRIPTION OF PREMISES

(to be provided)

EXHIBIT B – MAP/PLAN OF PROPERTY
(to be provided)