

Order 282-16/17

Passage: 9-0 on 6/19/2017

ETHAN K. STRIMLING (MAYOR)
BELINDA S. RAY (1)
SPENCER R. THIBODEAU (2)
BRIAN E. BATSON (3)
JUSTIN COSTA (4)

**CITY OF PORTLAND
IN THE CITY COUNCIL**

Effective 6/29/2017

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

**ORDER APPROVING PURCHASE AND SALE AGREEMENT WITH
THE NEWHEIGHT GROUP, LLC FOR SALE OF
CITY PROPERTY ON FRANKLIN STREET**

ORDERED, that the Purchase and Sale Agreement with The NewHeight Group, LLC for 1,800 square-feet of city-owned land on Franklin Street, identified by the Portland Tax Assessor as Map 28, Block C, Lot 18, 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 _____, 2017 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 THE NEWHEIGHT GROUP, LLC, or assigns, a Maine limited liability company having a mailing address of 118 Congress Street, #401, Portland, ME 04101 (hereinafter referred to as “Buyer” or “NewHeight”).

RECITALS

WHEREAS, the CITY is the owner of an approximately 12-foot wide way with a chart block and lot number designated by the Portland Assessor as 28-X-1 off of Federal Street, Portland, Maine (the “Premises”), which is generally depicted on the orientation plan that is attached hereto as Exhibit A and incorporated herein (the “Plan”); and

WHEREAS, the City issued a “Request for Bids” for sale of the Premises, Bid #EDD04-17, a copy of which is attached hereto as Exhibit B and incorporated herein; and

WHEREAS, NewHeight timely submitted a bid for the Premises dated May 11, 2017, a copy of which is attached hereto as Exhibit C and made a part hereof (the “Proposal”) and intends to develop the Premises and abutting property in accordance with the Proposal; and,

WHEREAS, NewHeight desires to purchase the Premises, and the City desires to convey the Premises to NewHeight pursuant to the terms of this Agreement.

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 NewHeight, and NewHeight 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 Twelve Thousand Dollars (\$12,000) (the “Purchase Price”), subject to the following cost adjustments and conditions:
 - a. The City acknowledges receipt of NewHeight’s deposit in the amount of One Thousand Dollars (\$1,000.00) (the “Deposit”) that the parties agree will be held in escrow as of the date of this Agreement; and
 - b. NewHeight shall pay the balance of the Purchase Price to the City by wire transfer at closing.

3. TITLE AND DUE DILIGENCE.

- a. Due Diligence Period. NewHeight will have from the date of this Agreement until 4:00 PM Eastern Daylight Savings Time on the day that is one month after the date of this Agreement (the “Due Diligence Period”) to complete any survey, environmental review and title examinations. City shall provide whatever information it, or its agents, have in this regard to NewHeight within 10 days of the effective date of this Agreement.
- b. Title and Survey Objections. NewHeight 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 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 end of the Due Diligence Period 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 NewHeight 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 NewHeight’s reasonable satisfaction, NewHeight will have the option to (1) terminate 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).

City shall convey the Premises to NewHeight 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) any easements of record, including, without limitation, the access easement described in a deed from the City to Ernest B. Woodard dated October 2, 1972 and recorded in the Cumberland County Registry of Deeds, Book 3554, Page 57; (ii) any easements for utilities on the property, (ii) zoning ordinances, and (iii) real estate taxes not yet due and payable.

4. INSPECTIONS.

- a. During the Due Diligence Period, NewHeight and its employees, consultants, contractors and agents shall have the right, at NewHeight’s expense, to enter on the Premises at reasonable times in order to (i) inspect the same, (ii) conduct engineering studies, survey work, percolation tests, geotechnical exams, environmental assessments, and other such studies, tests, exams, and assessments, and (iii) do such other things as NewHeight determines, it is sole

discretion, to be required to determine the suitability of the Premises for NewHeight's intended use (collectively, the "Inspections").

- b. NewHeight agrees to defend, indemnify and hold harmless the City against any mechanics liens that may arise from the activities of NewHeight and its employees, consultants, contractors and agents on the Premises.
- c. NewHeight shall exercise the access and inspection rights granted hereunder at its sole risk and expense, and NewHeight 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 NewHeight of its rights hereunder, except to the extent that such Damages result from the act or omission of the City.
- d. NewHeight shall cause any contractors, consultants or any other party conducting the Inspections to procure automobile insurance, if applicable, 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, listing the City as an additional insured thereon, and also Workers' Compensation Insurance coverage to the extent required by law.
- e. In the event that NewHeight does not purchase the Premises, NewHeight 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 NewHeight 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 NewHeight's obligations under this Agreement that the results of the Inspections be acceptable to NewHeight in its sole discretion. If the results of such due diligence are not acceptable to NewHeight in its sole discretion, and if NewHeight exercises its right to terminate this Agreement, 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.** NewHeight 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 NewHeight 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 NewHeight's financing or closing shall be paid for by NewHeight.

6. **DEFAULT AND REMEDIES.** In the event that NewHeight defaults hereunder for a reason other than the default of the City, City shall retain the deposit and shall have the right to pursue all other legal or equitable remedies available to City. In the event City defaults under this Agreement, and if NewHeight is not then in default hereunder, NewHeight 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.
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, NewHeight may terminate this Agreement, and obtain a refund of the Deposit and neither party shall have any further obligations or liabilities under this Agreement.
8. **PROPERTY SOLD "AS IS, WHERE IS."** NewHeight acknowledges that NewHeight 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 NewHeight 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.** NewHeight 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 NewHeight 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 NewHeight'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 NewHeight's counsel at a time agreeable to the parties on or before the day that is two months after the date of this Agreement (the "Closing Date"). At the Closing:
- a. the City shall execute, acknowledge and deliver to NewHeight a municipal quitclaim deed conveying to NewHeight good and marketable title to the Premises, free and clear of all encumbrances except as otherwise set forth herein.
 - b. The property description contained in the deed will be a survey description based on a survey prepared by NewHeight at its sole expense that will more specifically describe the property shown on the Plan. NewHeight will provide the survey description to the City prior to the expiration of the Due Diligence Period, and the parties will agree on the property description for the Premises prior to the closing.
 - c. NewHeight shall deliver the Purchase Price to the City by wire transfer.
 - 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.
- 11. 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 NewHeight.
- 12. 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.
- 13. 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.
- 14. 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.
- 15. TIME.** The City and NewHeight each confirm and agree that each of the time periods set forth herein are essential provisions of the terms of this Agreement.
- 16. 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.

- 17. 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 NewHeight: The NewHeight Group, LLC
118 Congress St., #401
Portland, ME 04101

With a copy to: Thomas B. Federle, Esq.
254 Commercial Street
Portland, Maine 04101

- 18. 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.

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

- 20. 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 hereunto set their hands and seals on the day and year first written above.

CITY OF PORTLAND

WITNESS

Jon P. Jennings
Its City Manager

THE NEWHEIGHT GROUP, LLC

WITNESS

Printed Name: _____
Its _____

Approved as to Form:

Corporation Counsel's Office