

Order 104-15/16

Passage: 9-0 on 11/16/2015

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**

Effective 11/26/2015

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

**ORDER APPROVING AND AUTHORIZING THE  
AMENDED AND RESTATED LAND SWAP  
WITH J.B. BROWN & SONS AND FORE RIVER WAREHOUSING &  
STORAGE CO. AND THE CITY OF PORTLAND  
RE: CANCO ROAD SITE FOR  
DEPARTMENT OF PUBLIC SERVICES FACILITY**

**ORDERED**, that the Amended and Restated Land Exchange Agreement between J.B. Brown & Sons and Fore River Warehousing & Storage Co. and the City of Portland 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 said documents; and

**BE IT FURTHER ORDERED**, that the Finance Director or his or her designee is authorized to execute a release deed to J.B. Brown & Sons and/or Fore River Warehousing & Storage Co. and to accept a release deed from J.B. Brown & Sons and/or Fore River Warehousing & Storage Co. following the land exchange authorized herein.

## LAND EXCHANGE AGREEMENT

This Land Exchange Agreement (this "Agreement") is made as of the \_\_\_ day of ~~July~~November, 2015, by and between the J.B. BROWN & SONS ("JBB") and FORE RIVER WAREHOUSING & STORAGE CO., INC. ("FRW&S"), each a Maine corporation with offices in Portland, Maine, and their respective successors and permitted assigns (JBB and FRW&S shall be collectively referred to herein as "JBBrown"), and CITY OF PORTLAND, a Maine municipal corporation with a place of business in Portland, Maine and mailing address of 389 Congress Street, Portland, Maine 04101 ("City").

### Section 1. Introduction.

Each of the parties owns real property in Portland, Maine. The parties have agreed to exchange certain property, and to provide for certain appurtenant easements in connection with the exchange, all on the terms and conditions set forth in this Agreement. Exhibit A is an aerial photograph that generally depicts the properties that are the subject of the exchange.

### Section 2. Property to be Exchanged.

In the exchange:

(i) City will convey to JBBrown the parcel of land acquired from Norman S. Reef and Raymond H. Reef as Trustees of the R.F. Investment Trust, located at or near Cornell Street and Morrill Street (Tax Map 151A-A-013) and depicted on Exhibit A as "Parcel 1," ~~except that the City shall retain the portion of said parcel that is cross-hatched on Exhibit A. The City shall be solely responsible for the prompt remediation of all hazardous materials on Parcel 1 as described in a certain July 20, 2015 Phase I Environmental Site Assessment by Sebago Technics;~~

(ii) City will convey to JBB and FRW&S an access easement deed for vehicle and pedestrian ingress and egress (including an area for the specific purpose of a safe and reasonable "turn around" for large commercial trucks, i.e., eighteen wheel tractor trailers), from and to Canco Road across the City's property located at or near 250 Canco Road (Tax Map 154-B-001) to JBB's and FRW&S' respective properties located on Quarry Road, which easement area shall be constructed and maintained by the City and is depicted on Exhibit A as "Parcel 2";

(iii) JBBrown will convey to City the parcel of land depicted on Exhibit A as Parcel 3 and identified as Tax Map 148-A-002 ("Parcel 3");

(iv) JBBrown will convey to City a portion of the parcel of land depicted on Exhibit A as Parcel 4A and identified as Tax Map 151A-A-014 and a portion of land identified as Tax Map 151A-A-23 ("Parcel 4A");

(v) JBBrown will convey a five-year easement to the City over a portion of the parcel of

land depicted on Exhibit A as Parcel 4B and identified as Tax Map 151A-A-023 (“Parcel 4B”). The purpose of this easement shall be to grant the City vehicle and pedestrian access to the easement area, and to allow the City, without limitation, to construct, install, operate, maintain, replace, and repair salt sheds and other structures and equipment, and any appurtenances and fixtures thereto, that the City deems necessary to conduct its winter salt and sand operations, and any other rights the City deems reasonably necessary to effectuate the purpose of this easement.

~~(v)~~(vi) JBBrown will convey to City the parcel of land depicted on Exhibit A as Parcel 5 and identified as Tax Map 154-B-045 (“Parcel 5”); and

~~(vi)~~(vii) JBBrown will convey to City the parcel of land depicted on Exhibit A as Parcel 6 and identified as Tax Map 151A-A-021, except that JBBrown shall retain the portion of said parcel that is cross-hatched on Exhibit A (“Parcel 6”);

All of these conveyances will be on the terms and conditions set forth in this Agreement.

### Section 3. Equivalent Value.

The parties agree that (i) the value of the property including the easement that JBBrown is conveying to the City and the easement that City is conveying to JBBrown in this exchange is equivalent to the value of the properties that JBBrown is conveying to City in this exchange, and (ii) each party’s conveyance is in full consideration of the other party’s conveyance. Except as provided in Section 10 below (regarding closing adjustments), neither party is seeking any monetary payment to the other party in connection with the exchange.

### Section 4. Property Being Exchanged “As-Is”.

(a) Parcel 1. Except as described in Section 2(i) above and as hereinafter set forth, JBBrown acknowledges that it is acquiring Parcel 1 “as is” and that City has made no representations or warranties of any kind whatsoever with respect to the condition of Parcel 1 or the compliance of Parcel 1 with any laws, rules, regulations, or ordinances, including (without limitation) any relating to zoning, the environment, or hazardous materials. Notwithstanding the foregoing, it shall be a condition of JBBrown’s obligations to close that (i) Parcel 1 is no longer subject to a Contract Zone Agreement and reverts to the I-L Industrial Zone, and (ii) JBBrown is satisfied with the title and environmental condition (including as to any hazardous materials as described in an environmental report to be provided to JBBrown by the City).

(b) Parcel 2. City will construct and maintain the easement for JBBrown (Parcel 2) described in Section 2(ii). ~~The City will~~JBBrown shall have the right to install a directional signage at a location chosen by the City on Parcel 2 or Parcel 5 near~~at~~ the Canco Road entrance way to ~~the easement across~~ Parcel 2 that will ~~indicate the easement roadway is an entrance~~direct traffic to JBBrown properties, provided that such a signage is consistent with section 14-371(f) of the City’s Land Use Ordinance, has all necessary permits, and otherwise complies with all

applicable legal requirements. ~~All such signage~~ Upon approval by the City, the sign shall be installed by the City at JBBrown's sole cost and expense. JBBrown shall also be responsible for all costs associated with ~~and~~ maintaining, repairing, or replacing the sign. JBBrown's obligations under this paragraph shall survive the closing of the Agreement. ~~ed by JBBrown at JBBrown's sole cost and expense.~~

(c) Parcels 3, 4A&B, 5 and 56. City acknowledges that it is acquiring Parcels 3, 4A&B, 5 and 56 "as is" and that JBBrown has made no representations or warranties of any kind whatsoever with respect to the condition of Parcels 3, 4A&B, 5 and 56 or the compliance of Parcels 3, 4A&B, 5 and 56 with any laws, rules, regulations or ordinances, including (without limitation) any relating to zoning, the environment, or hazardous materials. Notwithstanding the foregoing, it shall be a condition of City's obligations to close that City is satisfied with the title and environmental condition of Parcels 3, 4A&B, 5 and 56. Further, upon the expiration of the easement for Parcel 4B, the City shall ensure, prior to said expiration of the easement, that the City shall remedy any hazardous material contamination existing as a result of the City's use of Parcel 4B.

#### Section 5. Title.

(a) Title Examinations; Objections. The parties will have from the date of this Agreement until 4:00 PM Eastern Daylight Savings Time on the sixtieth (60<sup>th</sup>) day after the date of this Agreement (the "Due Diligence Period") to complete their respective title examinations. Title shall be good, marketable and insurable title, free and clear of all encumbrances except (i) as set forth in Exhibit B, (ii) easements for utilities servicing the property, (iii) zoning ordinances, and (iv) real estate taxes not yet due and payable. Each party will have until the end of the Due Diligence Period to deliver to the other party any written objections to 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 date of this Agreement may be made at any time prior to the closing.

(b) Option to Cure. In the event of a title objection, the party owning the property that is the subject of the title objection will have the option, but not the obligation, to cure the objection and will notify the other party of its election within ten (10) business days after receipt of the title objection. In the event that the party owning the property that is the subject of the objection elects to cure the title objection, that party thereupon will have thirty (30) 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 party owning the property that is the subject of the objection does not elect to cure the objection, or having elected to cure the objection fails to timely do so, the other party will have the option either to terminate this Agreement (after which neither party will have any further obligation or liability to the other under this Agreement) or to waive the objection and close.

#### Section 6. Conditions Precedent to Closing.

(a) Parcel 1 is subject to JBBrown's satisfactory review of an Environmental Report

(Phase I) described in Section 2(i) above.

(b) The City shall cause the termination or provide satisfactory evidence to JBBrown that a certain Contract Zone affecting Parcel 1 has terminated, and that upon termination the Parcel 1 property shall be located in the City's I-L Industrial Zone.

(c) (i) JBBrown is satisfied in its sole discretion in the condition or plans for the construction of the easement as described above over Parcel 2, and (ii) the sign described in Section 4(b) above is authorized by the City to be installed.

(d) Parcels 3, 4 A&B, 5 and 56 are subject to City's satisfactory review of environmental issues.

(e) The City is satisfied in its sole discretion that Parcel 6 conforms with applicable land use ordinances.

#### Section 7. Closing.

The closing will be on or before the thirtieth (30<sup>th</sup>) day after the later to occur of: (i) the expiration of the Due Diligent Period, and (ii) the date on which the Conditions to Closing described in Section 6 above are completed to the satisfaction of each party to this Agreement, to be held at Verrill Dana, LLP, One Portland Square, Portland, Maine, or on such other date or at such other place as the parties may agree.

#### Section 8. Deeds.

(a) Deed to City. At the closing, JBBrown will deliver to City a fully-executed Quitclaim Deed conveying Parcels 3, 4 A&B, 5 and 56.

(b) Deed to JBBrown. At the closing, City will deliver to JBBrown a fully-executed Municipal Quitclaim Deed conveying Parcel 1; and City will deliver to JBB and FRW&S a fully-executed Easement Deed as to Parcel 2.

(c) Property Descriptions. The property descriptions contained in each deed will be survey descriptions based on a survey plan (the "Plan") that will more specifically describe the properties shown on Exhibit A hereto. The Plan will be distributed to the parties hereto prior to the expiration of the Due Diligence Period and the parties will agree on property descriptions prior to the closing.

(d) Abutter Status. Each deed will recite that the grantee is an abutter to the grantor.

#### Section 9. Closing Deliverables.

(a) City Deliverables. At the closing, and as a condition to closing, City will deliver in

connection with its conveyance to JBBrown:

- (i) the executed contract zone termination described in Section 6(b) above;
- (ii) the executed deed described in Section 8(b) above;
- (iii) an executed State of Maine Real Estate Transfer Tax Declaration;

(iv) an executed notice pursuant to 38 M.R.S.A. § 563(6) stating that, to the best of City's knowledge, no underground storage facility for the storage of oil or petroleum exists on the property being conveyed to JBBrown;

(v) documentation acceptable to JBBrown indicating that this transaction has been duly authorized and that the person executing documents on behalf of City and City's general partner is duly authorized to do so;

(vi) an executed owner's affidavit indicating no tenants or other occupants presently in possession and indicating no debts due for labor or services performed or materials used that could give rise to mechanic's liens.

(b) JBBrown Deliverables. At the closing, and as a condition to closing, JBBrown will deliver in connection with its conveyance to City:

- (i) the executed deed described in Section 8(a) above;
- (ii) an executed State of Maine Real Estate Transfer Tax Declaration;

(iii) an executed notice pursuant to 38 M.R.S.A. § 563(6) stating that, to the best of JBBrown's knowledge, no underground storage facility for the storage of oil or petroleum exists on the property being conveyed to City;

(iv) documentation acceptable to City indicating that this transaction has been duly authorized and that the person executing documents on behalf of JBBrown is duly authorized to do so;

(v) an executed certificate of non-foreign and Maine Residency status; and

(vi) an executed owner's affidavit indicating no tenants or other occupants presently in possession and indicating no debts due for labor or services performed or materials used that could give rise to mechanic's liens.

#### Section 10. Closing Costs and Apportionments.

(a) Real Estate Taxes and Assessments. The parties acknowledge that the City is exempt from taxes or assessments on its property and that Parcels 1 and 2 are exempt from real estate taxes

for fiscal year 2016. As to Parcels 3, 4 A and B, 5 and 56, JBBrown shall be liable for all real estate taxes and assessments for fiscal year 2016. JBBrown shall pay all such taxes on or before the closing date.

(b) Real Estate Transfer Tax. Each real estate transfer tax declaration will state that the value of the properties that is the subject of the declaration is the assessed value, and JBBrown will pay its share of real estate transfer taxes. The parties acknowledge that, pursuant to 36 M.R.S.A. § 4641-C(1), City is exempt from real estate transfer taxes.

(c) Recording Fees. City will pay the recording fees for the termination of contract zone, if necessary, and for the deed from JBBrown on Parcels 3, 4 A and B, 5 and 56. JBBrown will pay the recording fee for the deeds from City on Parcels 1 and 2.

(d) Legal Fees and Expenses. The parties each will bear the cost of their respective legal fees and expenses.

Section 11. Representations and Warranties.

(a) City. City represents and warrants that:

(i) It has full power and authority to enter into this Agreement and to carry out its obligations under this Agreement.

(ii) This Agreement has been duly authorized, executed, and delivered by City and is a legal, valid, and binding agreement of City, enforceable in accordance with its terms. The execution, delivery, and performance of this Agreement by City will not violate any judgment or order applicable to City or City's instruments of organization, governance or operation, and will not result in any material breach of, or constitute a material default under, or result in the creation of any material lien, charge, security interest, or other encumbrance upon Parcel 1 or any note, bond, indenture, mortgage, deed of trust, bank loan, or credit agreement to which City is a party or by which Parcel 1 is bound.

(iii) City has not received any written notice of any pending condemnation, violation of law, or other legal action of any kind materially and adversely affecting Parcel 1.

(iv) City has no knowledge of any pending or threatened litigation, administrative action, or governmental investigation or examination (including, but not limited to, environmental investigations, examinations, claims, and demands) concerning Parcel 1.

(v) No third party has any right to acquire all or any part of Parcel 1.

(b) JBBrown. JBBrown represents and warrants that:

(i) JBBrown has full power and authority to enter into this Agreement and to carry out its obligations under this Agreement.

(ii) This Agreement has been duly authorized, executed, and delivered by JBBrown and is a legal, valid, and binding agreement of JBBrown, enforceable in accordance with its terms. The execution, delivery, and performance of this Agreement by JBBrown will not violate any judgment or order applicable to JBBrown or result in any material breach of or constitute a material default under any agreements to which JBBrown is a party.

(iii) JBBrown has not received any written notice of any pending condemnation, violation of law, or other legal action of any kind materially and adversely affecting Parcels 3, 4 A and B, 5 and 56.

(iv) JBBrown has no knowledge of any pending or threatened litigation, administrative action, or governmental investigation or examination (including, but not limited to, environmental investigations, examinations, claims, and demands) concerning Parcels 3, 4 A and B, 5 and 65.

(v) No third party has any right to acquire all or any part of Parcels 3, 4 A&B, 5 or 65.

(c) Survival. All representations and warranties contained herein are intended to remain true and correct as of the closing, are deemed to be restated at the closing, and will survive the closing.

## Section 12. General Provisions.

(a) Assignment. Neither this Agreement nor any of the rights or obligations of any party pursuant to this Agreement may be assigned without the prior written consent of the other party.

(b) Brokers. Each party will indemnify and hold harmless the other from and against any claims for brokerage commissions arising out of any brokerage agreements entered into by the indemnifying party.

(c) Governing Law. This Agreement is governed by, and is to be construed and enforced in accordance with, the laws of the State of Maine (without regard to conflicts-of-laws principles that would require the application of any other law).

(d) Entire Agreement. This Agreement constitutes the entire agreement between the parties relating to the exchange of the property that is the subject of this Agreement, supersedes all prior oral or written offers, negotiations, agreements, understandings, and courses of dealing between the parties relating thereto, and is subject to no understandings, conditions or

representations other than those expressly stated herein. This Agreement may be modified or amended only by means of a writing signed by the parties.

(e) Notices. Notices in connection with this Agreement must be in writing, delivered by certified mail or by Federal Express or a similar overnight delivery carrier to the addresses set forth below:

To JBBrown:

Vincent P. Veroneau  
J.B. Brown & Sons  
36 Danforth Street  
P.O. Box 207  
Portland, Maine 04112-0207

with a copy to:

David L. Galgay, Jr., Esq.  
Verrill Dana

Mailing address: P.O. Box 586  
Portland, Maine 04112-0586

Street address: One Portland Square  
Portland, Maine 04101

To City:

Gregory A. Mitchell  
Director of Economic Development  
City of Portland  
389 Congress Street  
Portland, Maine 04101 with

a copy to:

Danielle West-Chuhta, Esq.  
Corporate Counsel  
City of Portland  
389 Congress Street  
Portland, Maine 04101

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, effective as of the day and year first above written.

J.B. Brown & Sons

By: \_\_\_\_\_  
Vincent P. Veroneau  
Its President

Fore River Warehousing & Storage Co., Inc.

By: \_\_\_\_\_  
Vincent P. Veroneau  
Its President

City of Portland

By: \_\_\_\_\_  
Jon P. Jennings  
Its City Manager

Approved as to Form: \_\_\_\_\_  
Corporation Counsel

Approved as to Funds: \_\_\_\_\_  
Finance Dept.

Parcel 6 – Approximate Area  
– J.B. Brown to City,  
excepting hatched area

Parcel 1 – City Tax-Acquired  
Property to J.B. Brown,  
excepting hatched area

Parcel 5 – J.B. Brown to City



Parcel 4 – Approximate Area  
– J.B. Brown to City

Parcel 2 – Approximate  
Easement Area to J.B. Brown



Parcel 3 – J.B. Brown to City