

Order 212-16/17
Passage: 9-0 on 4/24/2017

Effective 5/4/2017

ETHAN K. STRIMLING (MAYOR)
BELINDA S. RAY (1)
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CITY OF PORTLAND
IN THE CITY COUNCIL

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
AIM RIVERSIDE, LLC FOR SALE OF
CITY PROPERTY AT 636 RIVERSIDE STREET**

ORDERED, that the Purchase and Sale Agreement with AIM Riverside, LLC for 6.72 acres of city-owned land at 636 Riverside Street, 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 AIM Riverside II, LLC, or assigns, a Maine limited liability company having a mailing address of c/o Thomas Jewell, 477 Congress Street, Portland, ME 04101 (hereinafter referred to as “Buyer” or “AIM Riverside”).

RECITALS

WHEREAS, the CITY is the owner of approximately 7.02 acres of land at 650 Riverside Street, Portland, Maine as generally depicted on the plan attached hereto as Exhibit A (the “Site Plan”) and incorporated herein, and more particularly described in Exhibit B attached hereto and incorporated herein (the “Premises”); and

WHEREAS, AIM Riverside desires to purchase the Premises, and the City desires to convey the Premises to AIM Riverside, subject to an easement benefitting the CITY, its tenants and licensees, for access to, utilities for, and maintenance of a City-owned communications tower (the “Tower”) on the Premises (the “Tower Easement”); a public access easement to the City or Portland Trails to access adjacent City-owned property (the “Access Easement”) that is subject to a March 26, 2010 Conservation Easement to Portland Trails, recorded in the Cumberland County Registry of Deeds, Book 27677, page 125 (the “Conservation Easement”); and a declaration of environmental covenants to be recorded (the “Declaration of Environmental Covenants”) in accordance with an August 30, 2010 Commissioner’s Certification of Completion Of Remedial Actions Under A Voluntary Response Action Plan recorded in the Cumberland County Registry of Deeds, book 28269, page 281 (the “Certificate of Completion”).

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 AIM Riverside, and AIM Riverside 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 Six Hundred Five Thousand Seven Hundred Dollars (\$604,800) (the “Purchase Price”), subject to the following cost adjustments and conditions:
 - a. Buyer shall be responsible for all labor, materials and costs associated with the relocation of any and all utilities serving the Tower if Buyer determines that such utilities need to be relocated. In connection therewith, the City will reimburse the Buyer up to \$6,500 for documented costs for such relocation.
 - b. In addition to the Purchase Price, Buyer shall pay at closing two percent (2%) of the Purchase Price to NAI The Dunham Group, Inc.

- c. The City acknowledges receipt of AIM Riverside's deposit in the amount of Twenty Thousand Dollars (\$20,000.00) (the "Deposit") that the parties agree will be held in escrow as of the date of this Agreement; and
- d. The AIM Riverside shall pay the remainder of the Purchase Price to the City by wire transfer at closing.

3. TITLE AND DUE DILIGENCE.

- a. Due Diligence Period. AIM Riverside will have from the date of this Agreement until 4:00 PM Eastern Daylight Savings Time on the day that is three months 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 AIM Riverside within 10 days of the effective date of this Agreement.
- b. Title and Survey Objections. AIM Riverside 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 AIM Riverside 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 AIM Riverside's reasonable satisfaction, AIM Riverside will have the option to (1) terminate this Agreement and obtain a refund of the Deposit (after which neither party will have any further obligation or liability to the other under 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).
- e. City shall convey the Premises to AIM Riverside 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) the Tower Easement, Access Easement, and Declaration of Environmental Covenants, which shall be in form and substance satisfactory to the City; (ii) easements for utilities servicing the property, (ii) zoning ordinances, and (iii) real estate taxes not yet due and payable. Further, AIM Riverside 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 City 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 AIM Riverside 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.

4. INSPECTIONS.

- a. During the Due Diligence Period, AIM Riverside and its employees, consultants, contractors and agents shall have the right, at AIM Riverside's expense, to enter on the Premises at reasonable times in order to (i) inspect the same, (ii) conduct engineering studies, percolation tests, geotechnical exams, environmental assessments, and other such studies, tests, exams, and assessments, and (iii) do such other things as AIM Riverside determines, in its sole discretion, to be required to determine the suitability of the Premises for AIM Riverside's intended use (collectively, the "Inspections"). The City acknowledges that such Inspections may include the digging of test pits, which the City hereby approves.
- b. AIM Riverside agrees to defend, indemnify and hold harmless the City against any mechanics liens that may arise from the activities of AIM Riverside and its employees, consultants, contractors and agents on the Premises.
- c. AIM Riverside shall exercise the access and inspection rights granted hereunder at its sole risk and expense, and AIM Riverside 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 AIM Riverside of its rights hereunder, except to the extent that such Damages result from the act or omission of the City.
- d. AIM Riverside 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 AIM Riverside does not purchase the Premises, AIM Riverside 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 AIM Riverside 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 AIM Riverside's obligations under this Agreement that the results of the Inspections be acceptable to AIM Riverside in its sole discretion. If the results of such due diligence are not acceptable to AIM Riverside in its sole discretion, and if AIM Riverside exercises its right to terminate this Agreement, then the City shall refund to AIM Riverside the Deposit, if previously paid, without interest, within thirty (30) days after receipt of AIM Riverside's termination notice, and 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.** AIM Riverside 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 AIM Riverside 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 AIM Riverside's financing or closing shall be paid for by AIM Riverside.
6. **DEFAULT AND REMEDIES.** In the event that AIM Riverside defaults hereunder for a reason other than the default of the City, City shall retain the deposit as its sole remedy. In the event City defaults under this Agreement, and if AIM Riverside is not then in default hereunder, AIM Riverside 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, AIM Riverside may terminate this Agreement and receive a refund of the Deposit without interest, and neither party shall have any further obligations or liabilities under this Agreement except as expressly set forth in this Agreement.
8. **PROPERTY SOLD "AS IS, WHERE IS."** AIM Riverside acknowledges that AIM Riverside 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 AIM Riverside 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.** AIM Riverside 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 AIM Riverside 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, except to the extent that such a claim results directly from the City’s release, handling or storage of hazardous wastes or hazardous materials on 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 AIM Riverside’s successors, assigns, and transferees.
- 10. CONDITIONS PRECEDENT TO CLOSING.** The City shall pursue an amendment to the Riverside Subdivision approved by the City of Portland Planning Board on September 21, 2010, recorded in the Cumberland County Registry of Deeds, Plan Book 210, Page 352, in order to obtain approval for the creation of the parcel which constitutes the Premises, including that the driveway access to the Premises will be from Riverside Street. If it is required, AIM Riverside shall be responsible for all costs of removing the existing curb cut and driveway which is encroaching on the property subject to the Conservation Easement. AIM Riverside shall diligently pursue site plan approval from the city of Portland Planning Board, and the issuance of a Building Permit. In the event the City or AIM Riverside are unable to obtain such approvals prior to the Closing Date, as defined below, then the City shall refund the Deposit, if previously paid, without interest, and this Agreement shall be terminated and neither party shall have any further obligations or liabilities under this Agreement. Buyer acknowledges and agrees that the City is acting as Seller, and not in its regulatory capacity, in connection with this Agreement.
- 11. CLOSING.** Time is of the essence in the performance of this agreement. The closing shall be held at the offices of AIM Riverside’s counsel at a time agreeable to the parties on or before the day that is eight months after the date of this Agreement (the “Closing Date”). At the Closing:

- a. the City shall execute, acknowledge and deliver to AIM Riverside a municipal quitclaim deed conveying to AIM Riverside good and marketable title to the Premises, free and clear of all encumbrances except as otherwise set forth herein.
- b. AIM Riverside shall deliver the balance of the Purchase Price to the City by wire transfer; and
- c. 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.

12. BUYER'S POST CLOSING OBLIGATIONS; RIGHTS OF CITY TO REPURCHASE PROPERTY. AIM Riverside agrees to commence construction of the project generally depicted on the attached Plan (the "Project") within twelve (12) months after closing. If AIM Riverside, its successors, assigns, or transferees fails to commence construction of the Project on the Property within 12 months after the closing, and construct 40,000 square feet of building within seven (7) years after closing, the City shall have the right, but not the obligation, to repurchase the Premises at the lesser of (1) the Purchase Price plus all construction and approval expenses incurred by AIM Riverside, or successors, to that juncture, or (2) the fair market value of the Premises determined by an appraiser agreed upon by the parties. The provisions of this paragraph will survive closing, and the City's deed to AIM Riverside shall include a reference to the City's option to repurchase the Premises.

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 City and AIM Riverside.

14. 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.

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 City and AIM Riverside 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 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 AIM Riverside: AIM Riverside II, LLC
c/o AIM Properties
531 E. Chapman Avenue
Orange, CA 92866

With a copy to: Thomas Jewell, Esq.
477 Congress Street
Portland, ME 04101

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.

21. BROKERS. City and AIM Riverside shall each pay NAI The Dunham Group at closing a brokerage commission equal to two percent (2%) of the Purchase Price at closing, for a total commission of four percent (4%) of the Purchase Price. The CITY and AIM Riverside each represent and warrant that they have not dealt with a real estate broker in connection with this transaction other than NAI The Dunham Group. AIM Riverside agrees to indemnify and hold harmless City from any claims made by any broker should AIM Riverside'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 AIM Riverside 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.

22. **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

AIM RIVERSIDE II, LLC

WITNESS

Printed Name: _____
Its _____

Approved as to Form:

Corporation Counsel's Office

