

Order 13-06/07

Amended & Passed: 7/17/06 7-0 (Geraghty, Duson absent)

JAMES I. COHEN (MAYOR)(5)

WILLIAM R. GORHAM (1)

KAREN A. GERAGHTY (2)

DONNA J. CARR (3)

CHERYL A. LEEMAN (4)

CITY OF PORTLAND

IN THE CITY COUNCIL

JAMES F. CLOUTIER (A/L)

JILL C. DUSON (A/L)

NICHOLAS M. MAVODONES (A/L)

EDWARD J. SUSLOVIC (A/L)

ORDER APPROVING LEASE WITH METRO AT ELM STREET GARAGE RE: DOWNTOWN TRANSPORTATION CENTER

ORDERED, that a lease for space at the Elm Street Garage with METRO for a Downtown Transportation Center is hereby approved substantially in the form attached subject to review and approval by the Office of Corporation Counsel.

LEASE

This lease, made in duplicate original as of the ___ of _____, 2006, by and between METRO, a regional transportation district pursuant to Maine law, having its principal place of business at Portland, Maine (hereinafter referred to as "Tenant"), and CITY OF PORTLAND, a Maine Municipal Corporation having its principal place of business at Portland, Maine (hereinafter sometimes referred to as "Landlord" and sometimes as "City").

WHEREAS, Tenant currently occupies office space in the Elm Street Parking Garage (hereinafter the "Garage") on a month to month basis;

WHEREAS, Tenant wishes to expand said office space at its sole cost and expense; and

WHEREAS, Landlord has agreed to lease to Tenant additional space in the Elm Garage to Tenant upon certain terms and conditions (hereinafter "Premises"); and

WHEREAS, Landlord has sufficient right, title and interest in and to the real property, together with the facilities, easements, rights, licenses, and privileges hereinafter granted, and has full power and authority to enter into this Agreement in respect thereof;

NOW THEREFORE, in consideration of the mutual covenants and considerations herein contained,

WITNESSETH:

THAT Landlord does hereby lease, demise and let unto Tenant the Premises described as the office space on the first floor of said Garage subject to the conditions and covenants hereinafter provided. For the purposes of this Lease, said Premises shall be deemed to contain approximately _____(_____) square feet attached to the first floor of the Garage for use as office space by Tenant. For the purposes of this Lease, the term "Premises" shall include the said office space as may be expanded by Tenant, and the Improvements thereon, along with ingress and egress thereto. The parties shall determine the final square feet of the Premises upon completion of Tenant's Improvements as provided herein. The Premises are as identified on Exhibit A, attached hereto and incorporated herein.

1. Term.

- a. The term of this Lease shall be for a period of twenty (20) years, commencing on the date a certificate of occupancy is granted, and ending twenty (20) years thereafter (the "Initial Term"). This lease will automatically renew on a year to year basis thereafter, subject to either parties' right to terminate upon no less than six months prior written notice to the other as provided in Section ___ below.
- b. Any holding over by Tenant at the termination of this Lease and any renewals thereof shall not constitute a renewal of the Lease, but at Landlord's election such holding over shall result in a tenancy-at-will from month to month on the same terms in effect at the expiration of the Lease, other than term.

2. Rent.

- a. For each year of the term, the Tenant shall pay to the Landlord as Rent hereunder the annual sum of One Dollar (\$1.00).
- b. This annual rent shall be payable in advance on the first day of each year of term, or at Tenant's option may be paid in full in advance for the Initial Term.
- c. It is the intent of the parties that this lease is on a triple net basis, and Tenant shall be solely responsible for the cost of all maintenance, repair, cleaning, utilities, applicable taxes, insurance, construction, and alteration of the Premises except to the extent otherwise provided herein.

3. Improvements by Tenant.

- a. Tenant takes the Premises "as is". It is the intent of the parties that Tenant shall, solely at its own cost and expense, expand the size of the current office space which it occupies; create a waiting area and public rest rooms and make such other improvements to the Premises as approved by Landlord (hereinafter the "Improvements"). In addition to the Improvements to the Premises, Tenant shall reconstruct the plaza area between Elm Street and Portland High School (the "Plaza"), as shown on Exhibit A, as part of its Improvements.
- b. **Prior Approval.** All plans and specifications for the design, rehabilitation and construction of the Premises and reconstruction of the Plaza shall be subject to the prior written approval of the Parking Manager of the City of Portland. All construction and rehabilitation of the Premises and the Plaza shall be done in a safe, efficient and workmanlike manner, and in compliance with all applicable Codes and with any required City, State or federal permits or approvals, including but not limited any required site plan approval, and in accordance with the plans and specifications approved by the Parking Manager and Landlord's site plan approval.
- c. **Commencement and Completion Dates.** Tenant shall submit its plans and specifications for the Improvements to the Premises to the Landlord's Parking Manager for approval no later than _____. The Parking Manager shall either approve or reject such plans within twenty (20) calendar days of submission. Tenant shall commence actual repair and rehabilitation within sixty (60) calendar days of the Parking Manager's final written approval or such later date when Tenant has obtained all necessary governmental approvals, and Tenant shall diligently proceed to obtain such approvals and complete the Improvements to the Premises. Tenant's construction of the Improvements shall not interfere with the normal, daily operations of the Garage, or its use and the use of its common areas, and in the event Tenant needs to undertake any activity which might so interfere, for example shutting off electrical power, Tenant shall notify the Parking Manager at least 24 hours in advance and shall schedule such

activity during times approved by the Parking Manager. Tenant shall include a clause to this effect in any contract which it enters into for construction of the Improvements.

- d. Alterations. In addition to the required Improvements, Tenant may, at its own expense, place office and trade fixtures, equipment, and the like in the Premises and make non-structural alterations, improvements, or additions ("Alterations") to the Premises, provided such work shall be performed in a good and workmanlike manner, in compliance with laws, rules, orders, and regulations of governmental entities having authority over the Premises, and provided such Alterations shall not interfere with the use and function of the Garage and its common use areas. The Parking Manager's prior approval shall be required for any such Alterations.
- e. Permits and Approvals. Tenant agrees to bear the sole responsibility and entire cost of obtaining required permits and approvals prior to commencement of the Improvements or Alterations. If, after the exercise of due diligence, the Tenant has been unable to secure all the permits necessary for the Improvements to go forward by _____, then, upon notice to the Landlord in writing of its intention to do so, the Tenant may re-negotiate the terms of this Lease as to the Premises included.
- f. Landlord reserves the right to approve any contractors hired by Tenant to do the Improvements or Alterations, which approval shall not be unreasonably withheld. At all times during construction of Improvements or Alterations, Tenant shall require any contractor to defend, indemnify and hold the Tenant and the Landlord harmless from any personal injury or property damage arising out of or resulting from the contractor's act or omission at or on the Premises, and each contractor shall provide and maintain no less than \$1,000,000 in commercial general liability insurance, and \$2,000,000 in Builders Risk insurance, naming both Tenant and Landlord as additional insureds thereon, and workers compensation insurance in the statutory amount. Tenant shall require lien waivers prior to payment to contractor(s) and contractor shall be required to obtain a performance and payment bond as required by Maine law, and naming the City of Portland as an additional obligee.
- g. Tenant shall not cause or permit any lien against the Landlord's property or any improvements thereto to arise out of or accrue from any action or use thereof by Tenant and shall hold the Landlord harmless therefrom; provided, however, that Tenant may in good faith contest the validity of any alleged lien. Upon request of the Landlord, Tenant shall post a bond warranting payment of any such lien in the event Tenant contests such lien.
- h. Upon completion of all approved Improvements hereunder, the parties agree to amend the lease in writing as to the area of the Premises as necessary.

4. Obligations of Landlord.

The Landlord shall provide, at Landlord's expense, the following services:

- a. Maintenance and repair of the Garage (excluding the Premises) of which the leased Premises are a part, reasonable wear and tear, damage by fire and other casualty of the kind covered by standard fire insurance policies with extended coverage only excepted, unless such maintenance or repair is made necessary by fault or neglect of the Tenant or the employees, contractors, agents or invitees of Tenant, in which case such maintenance or repair shall be at the expense of the Tenant and Tenant shall pay all costs therefore. Notwithstanding the foregoing, if an area of the Garage other than the Premises is damaged as a result of a problem in or on the Premises (for example, a leak in the Premises' roof which damages the Garage roof as well as the Premises), Tenant shall be responsible for the cost of all required repairs to the Garage regardless of whether it is the fault or neglect of Tenant or its employees, contractors, agents or invitees.
- b. Upon final completion of the Plaza repairs and notwithstanding anything herein to the contrary, Landlord shall assume the repair and maintenance of the Plaza and Tenant shall have no further responsibility for repair or maintenance of the reconstructed Plaza area. Upon such final completion, Tenant shall assign all warranties or guarantees in regard to such reconstruction to Landlord to the extent possible, and/or shall cooperate with Landlord in enforcing any such warranties or guarantees.

5. Obligations of Tenant.

The Tenant, at the Tenant's expense shall:

- a. Maintain and repair the entire portion of the Premises, including windows, and keep them in such repair as on the commencement of this Lease. Casualty damage to windows shall be responsibility of the Tenant;
- b. Be responsible for all installation, maintenance and repairs within the Premises, including but not limited to the air conditioning/heating system, plumbing, electrical and communication lines;
- c. Pay all expenses relating to its use of utilities, including but not limited to telephone and communications service (including installation costs), electricity, heat, cooling, gas, water and sewer, all of which shall be separately metered by Tenant;
- d. Properly bag and remove all trash and garbage pursuant to City policy;
- e. Provide and be responsible for all cleaning and janitorial services for the Premises, including but not limited to maintenance and cleaning of the public rest rooms, any related exterior space, and the cleaning of exterior windows of the Premises. Tenant shall maintain the Premises in a neat and clean condition at all times;
- f. Do any sidewalk snow or ice removal needed in addition to that provided through the Portland Downtown District;

- g. Replace rugs or other flooring and repaint the Premises when it chooses, such repainting and floor replacement to be done at Tenant's expense; and
- h. Be solely responsible for security of the Premises and comply, at its own expense, with any state or federal security requirements which may be applicable.

6. Use of Premises.

The Premises shall be used by Tenant and its successors in interest for office/retail purposes only during the original and any extended terms of the Lease, and for no other purposes. Tenant will at all times comply with all applicable governmental laws, ordinances, codes, regulations and other requirements in its use of the Premises. Tenant shall have the use of one parking space in the Garage to accompany its use of the Premises.

After occupancy, should Tenant abandon use of the Premises for sixty (60) consecutive days for reasons unrelated to Casualty Damage, then Landlord reserves the right to terminate this Lease for default as provided herein.

7. No Assignment/Subletting.

The lease is not assignable and shall not be sublet or transferred, in whole or in part, without the Landlord's prior written approval.

8. Casualty Damage.

- a. If the Garage or any part thereof shall be destroyed or damaged by fire or other peril of the type generally covered by standard fire insurance policies with extended coverage, so that the same shall be thereby rendered unfit for use, then, and in such case, the Landlord shall put the Garage (excluding the Premises) in proper condition to permit restoration of the Premises by Tenant; provided, however, in the event that Landlord does not begin such Garage restoration within 180 days after the date of the casualty and proceed diligently to complete such restoration, then either party shall have the right to terminate this Lease by giving the other party written notice of such termination within the 180 day period after the date of the casualty, and upon the giving of such notice, the term of this Lease shall cease and come to an end as of the date of such notice and any unearned rent shall be returned to Tenant.
- b. In the event Landlord restores the Garage, Tenant shall undertake restoration of the Premises and proceed diligently to restore the Premises to the same or better condition as prior to the casualty. Alternatively, at its option, Tenant may restore the Premises to the same or better condition as prior to the execution of this Lease, and thereafter may terminate this Lease upon no less than thirty (30) days notice after issuance of a certificate of occupancy for the Premises. The parties agree to coordinate all restoration efforts to the extent reasonably feasible and the contractor(s) of each party shall agree to defend, indemnify and hold harmless and

name the other party as an additional insured on its commercial general liability insurance.

- c. In the event of a casualty affecting only the Premises, Tenant shall undertake restoration of its Premises within ninety (90) days of such casualty and proceed diligently to complete such restoration of the Premises to the same or better condition as prior to the casualty. Alternatively, at its option, Tenant may restore the Premises to the same or better condition as prior to the execution of this Lease, and thereafter may terminate this Lease upon no less than thirty (30) days notice after issuance of a certificate of occupancy for the Premises.
- d. Anything in this Lease to the contrary notwithstanding, Landlord and Tenant each hereby releases the other and its officers, directors, shareholders, agents and employees from any and all liability or responsibility (to the other or anyone claiming through or under them by way of subrogation or otherwise) for any loss or damage to the releasor's property caused by fire or other peril of the type generally covered by standard fire insurance policies with extended coverage, whether or not the releasor actually carries such insurance coverage and even if such fire or other peril shall have been caused by the fault or negligence of the other party, or anyone for whom such party may be responsible.

9. Return of Premises; Trade Fixtures.

Tenant at the expiration of the Lease term shall peaceably yield up to Landlord the Premises, including any renovations or leasehold improvements installed by Tenant during the term hereof, in good repair in all respects, reasonable use and wear and damage by fire and all other unavoidable casualties excepted. Tenant shall have the right to remove all trade fixtures, equipment and other personal property installed or placed by it at its expense in, on or about the Premises; provided, however, all damage caused by or as a result of such removal shall be repaired by Tenant.

10. Signage.

Tenant shall have the right to erect a sign on the Premises. Final design of exterior signs shall be subject to Landlord's written approval, which approval shall not be unreasonably delayed or withheld, and shall be in accordance with all local and state governmental codes.

11. Insurance.

Throughout the term of this Lease, the Tenant shall maintain in full force and effect a policy of comprehensive general liability insurance covering the Premises in an amount not less than Four Hundred Thousand Dollars (\$400,000.00) combined single limit or the minimum amount required by the Maine Tort Claims Act, whichever is greater, naming Landlord as an additional insured thereon; workers compensation insurance waiving subrogation against Landlord if such waiver is reasonably available; and fire legal liability insurance with extended coverage in the minimum amount of \$500,000 or

replacement value of the Premises, whichever is less. Such insurance shall be carried through responsible companies qualified to do business in the State of Maine.

The Tenant shall furnish the Landlord with certificates of insurance indicating compliance with this section. The certificates shall provide that the coverage may not be cancelled without thirty (30) days advance notice of cancellation to the Landlord, and the Landlord shall be named as an additional insured in all such policies. Any insurance provided by the Tenant shall be primary to any coverage which the Landlord may provide.

12. Indemnity.

Tenant, its successors and assigns, agrees to defend, indemnify and hold harmless Landlord, its successors and assigns, from any claim, costs, liability and expense (including reasonable attorneys' fees) arising from personal injury or property damage to the extent attributable to any negligent acts or omissions or willful misconduct by Tenant, its officers, agents, employees or invitees. This agreement includes a contractual obligation by the Tenant to indemnify, defend and hold harmless Landlord and the assumption of certain obligations by the Tenant, and Tenant agrees that the terms of this agreement may be enforced against it in a court of competent jurisdiction or through administrative or agency proceedings notwithstanding any immunity, limitation on damages or right to notice which the Tenant may have, or had, under the Maine Tort Claims Act (14 M.R.S.A. § 8101 et seq.) (as it may be amended from time to time) or under any other law, the Tenant hereby waiving for purposes of this indemnity as between Tenant and Landlord (but not as between the Tenant and any third party asserting a claim for personal injury or property damage) any right to notice under the Maine Tort Claims Act. Landlord shall give the Tenant prompt notice of any matter as to which it seeks indemnity hereunder, and shall not settle any such matter without Tenant's consent.

This provision shall survive termination or expiration of this Lease.

13. Covenants of Landlord.

Landlord covenants that it is the owner in fee of the Premises and can and will provide quiet enjoyment of the Premises during the original and any extended terms of the Lease, and that the Lease is signed by a duly authorized individual.

14. Default.

Either party shall be determined to be in default hereunder if it shall fail to perform any obligations stated herein within fifteen (15) days after receipt of notice of such failure from the other party or (if the default is of such nature that it cannot be cured within such period) if it shall fail to commence to cure the default within such period and thereafter diligently prosecute the cure to completion within a reasonable time. Upon such default and failure to cure, the other party shall have the right, at its option, and in addition to any other remedies, to terminate this Lease by giving the party in default written notice

thereof and upon the giving of such notice, this Lease and the term hereof shall cease. Upon any termination of this Lease, Tenant shall quit and surrender to Landlord the Premises in accordance with the provisions of Article 8 hereof. If this lease is terminated for default, neither party shall be liable for any consequential or special damages for such default.

15. Notices.

Any notice required to be given under this Lease shall be in writing and shall be hand-delivered or sent by U.S. certified mail, return receipt requested, postage prepaid, addressed to the parties as stated below or such other address as either party may designate in writing to which its future notices shall be sent.

To Tenant:

Portland, ME 04101

To Landlord: Anita Lachance

Assistant City Manager

389 Congress Street

Portland, Maine 04101

cc: Parking Manager

16. Amendment.

Both parties hereto acknowledge and agree that they have not relied upon any statements, representations, agreements or warranties except such as are expressed herein. The terms of this Lease may be modified or amended by the mutual assent of the parties hereto; provided, however, that no such modification or amendment to this Lease shall be binding until in writing and signed by both parties.

17. Successors Bound.

The terms, covenants and agreements herein contained shall be for the benefit of and be obligatory upon the successors and assigns of the respective parties hereto.

18. Governing Law.

This Lease shall be governed by and construed in accordance with the laws of the State of Maine

19. Termination by Tenant or Landlord.

After the Initial Term, either party may terminate this Lease on a one hundred eighty (180) day written notice, with no further obligations hereunder.

20. Force Majeure.

Neither Tenant nor Landlord shall be deemed in violation of this Lease if it is prevented from performing any of its obligations hereunder by reason of strikes, boycotts, labor disputes, acts of God, war, acts of superior governmental authority or other reason over

which it has no control; provided, however, that the suspension of performance shall be no longer than that required by the force majeure and the party prevented from performance has given written notice thereof to the other party.

21. Non-Waiver.

No waiver of any breach of any one or more of the conditions of this Lease by the Landlord or Tenant shall be deemed to imply or constitute a waiver of any succeeding or other breach hereunder.

IN WITNESS WHEREOF, the parties hereto have caused this Lease to be duly executed as of the day and year first above written.

WITNESS:

METRO

By: _____

Name: _____

Its: _____

CITY OF PORTLAND

By: _____

Joseph E. Gray, Jr.
Its City Manager