Order 62-08/09
Given first reading: 9/3/08
Public Hearing, Amended & Passage: 9/15/08 8-0 (Cohen absent)

EDWARD J. SUSLOVIC (MAYOR)
KEVIN J. DONOGHUE (1)
DAVID A. MARSHALL (2)
DANIEL S. SKOLNIK (3)
CHERYL A. LEEMAN (4)

CITY OF PORTLAND

IN THE CITY COUNCIL

JAMES I. COHEN (5)
JOHN M. ANTON (A/L)
JILL C. DUSON (A/L)
NICHOLAS M. MAVODONES (A/L)

ORDER APPROVING PURCHASE OF CITY PROPERTY IN BAYSIDEWITH BAYCO, LLC

ORDERED, that the Purchase and Sale Agreement with BAYCO, LLC for the purchase of city-owned property in Bayside is hereby approved in substantially the form attached hereto as Attachment 1 dated 9/15/08; and

BE IT FURTHER ORDERED, that the city Manager is authorized to execute the Purchase and Sale Agreement and any other documents necessary to complete this transaction.

Rev. 09/15/08

PURCHASE AND SALE AGREEMENT

THIS AGREEMENT for the purchase and sale of real estate made as of the ____ day of _____, 2008 by and among the **DOWNTOWN PORTLAND CORPORATION**, a not for profit corporation, with its principal office at 389 Congress Street, Portland, Maine (hereinafter referred to as **"DPC"** or "**SELLER"**), the City of Portland, a body corporate and politic with its principal office at 389 Congress Street, Portland, Maine (hereinafter referred to as **"CITY"**), and **BAYCO LLC,** a Maine limited liability company with a mailing address of 465 Congress Street, Portland, Maine 04101 (hereinafter referred to as **"BUYER"**).

W I T N E S S E T H:

WHEREAS, **DPC** is the owner of real estate located on Somerset Street in Portland, Maine, which is further shown as lots A-1, A-2, A-3 and A-4 (collectively referred to hereinafter as the **"**Property**"**) on the plan attached hereto as Exhibit A and is a portion of the Property described in a deed recorded in the Cumberland County Registry of Deeds in Book 23759, Page 305; and

WHEREAS, **BUYER** desires to acquire the Property for development of a parking garage (the "Garage") and office building (the "Office Building") with provision for partial first floor retail space in the Garage and first floor conference space in the Office Building as provided hereinafter (collectively "the Project") on Lots-A–3 and A–4 and the development of additional structures on Lots A-1 and A-2 for such commercial or other purposes as may be allowed under any applicable zoning and private restrictions; and

WHEREAS, **DPC** agreed by vote of its Board on _____, 2008 to sell the Property to **BUYER** and the City of Portland consented to said sale by vote of the Portland City Council on _____, 2008;

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable consideration, the receipt of which is hereby acknowledged, **DPC, CITY** and **BUYER** agree to be legally bound as follows:

1. SALE.

DPC agrees to sell the Property to **BUYER**, and **BUYER** agrees to purchase the Property in accordance with the provisions hereof.

2. CONDITION.

BUYER agrees to accept the Property as is, where is, with no warranties as to its condition by **DPC** whatsoever, provided, however (a) **SELLER** agrees to remove, to the extent not already removed, from the Property by October 15, 2008 any debris, trash or contaminants (the "Snow Banking Debris") resulting from the snow banking at the Property during the winter of 2007-2008 ; (b) **SELLER** agrees to not place on or release at the Property after the date hereof any substances or materials including without limitation any future Snow Banking Debris; and (c) SELLER agrees to convey the Property (subject to the removal of the Snow Banking Debris) in substantially the same condition at Closing as it is in as of the Effective Date..

3. CONSIDERATION.

The purchase price for the Property shall be $1,724,400.

4. DEPOSIT.

BUYER has paid to **DPC** the sum of One Hundred Thousand Dollars ($100,000.00) as a deposit (the "Deposit") on the Property. The Deposit shall be credited toward the Purchase Price for Lots A-3 and A-4. In the event that **BUYER** defaults in its obligations hereunder and fails to close, the Deposit shall be retained by the DPC as full and complete liquidated damages for **BUYER'S** breach of this Agreement.

5. OPTION PAYMENTS.

BUYER shall make to the **DPC** an Option Payment of Ten Thousand Dollars ($10,000.00) sixty (60) days following the Effective Date and additional Ten Thousand Dollar ($10,000.00) payments on the same day of each month following said first payment until Closing. Said Option Payments shall be non-refundable but shall be applicable to the Purchase Price of Lots 3 and 4 at Closing

6. TITLE.

SELLER shall convey the Property to **BUYER** or **BUYER'S** nominee (or both) with good and marketable title, free and clear of liens and encumbrances, except for easements and restrictions of record which will not have a material adverse effect on **BUYER'S** intended development of the Property. **BUYER** shall have forty-five (45) days from the Effective Date within which to notify **SELLER** of any title defects or any encumbrances on the Property which would adversely affect **BUYER'S** intended development of the Property. **SELLER** shall then have sixty (60) days within which to cure any title defects or remove any encumbrances objected to by **BUYER**. In the event that **SELLER** is unwilling or unable to cure any such title defect(s) or remove such encumbrance(s), then **BUYER** shall have the right to either waive its objection and close notwithstanding the same or to terminate this Agreement, in which event the Deposit shall be returned to **BUYER** and neither party will be under any further obligation hereunder. **SELLER** agrees to not further encumber the Property or permit the Property to be further encumbered between the Effective Date and the date of the Closing. Any title defects or encumbrances (other than any liens and mortgages which **SELLER** must discharge at or before the Closing) not objected to by **BUYER** or waived by **BUYER** shall be hereafter referred to as "Permitted Encumbrances." Defects or encumbrances arising after the Effective Date are not Permitted Encumbrances.

7. POSSESSION.

Full possession of the Property free of any tenancies or occupancies will be given at the Closing.

8. INSPECTIONS OF THE PROPERTY.

(a) **BUYER'S** obligations hereunder are contingent upon one or more inspections of the Premises, by **BUYER** or by its employees, agents or contractors revealing the Premises to be in such condition and state as would be suitable in **BUYER'S** opinion for **BUYER'S** intended development of the Property. For purposes of conducting these inspections, **SELLER** agrees that **BUYER**, or its employees, agents or contractors, may enter onto the Property or any portion thereof at all reasonable times prior to the closing in order to perform inspections and to do such things as are reasonably necessary with respect to its intended development of the Property, including but not limited to, conducting environmental assessments, soil tests, borings and surveys. If for any reason the results of **BUYER'S** inspections are unsatisfactory, provided **BUYER** notifies **SELLER** within fifty (50) days of the Effective Date, **BUYER** may terminate this agreement and obtain a return of the Deposit.

(b) The **CITY** agrees to provide to **BUYER** a copy of all existing VRAP, documentation, correspondence and accompanying environmental and geotechnical testing information and reports. Review of such information and any additional environmental or geotechnical testing that **BUYER** seeks to conduct shall be conducted within forty-five (45) days of the Effective Date. The **CITY** hereby authorizes its environmental consultant, John Tewhey Associates, to provide to **BUYER** and its consultants any information it has on the Property and agrees that **BUYER** may, if it so elects, hire at its expense John Tewhey Associates to provide such letters, reports, opinions and other services as may be necessary or

useful for **BUYER'S** financing, acquisition and development of the Property. Test results shall be confidential, except as provided by law; provided, however, that **BUYER** may disclose the test results to its consultants, attorneys, lenders, appraisers, architects and contractors in order to further its development. In the event that the results of any test reviewed or obtained by **BUYER** reveal conditions of the Property that are not acceptable to **BUYER**, **BUYER** shall have the right to terminate this Agreement and obtain the return of the Deposit, so long as that determination is communicated in writing to **DPC** and **CITY** within fifty (50) days of the Effective Date. If **BUYER** terminates the Agreement pursuant to the terms of this provision, it shall provide copies of its test results and reports to **DPC** at no charge to **DPC**, whereupon the Deposit shall be returned to **BUYER** and all obligations of the parties hereunder shall cease and neither party shall have any claim against the other by reason of this Agreement.

9. RISK OF LOSS.

The risk of loss or damage to the Property by fire or otherwise, until transfer of title hereunder, is assumed by **DPC**.

10. CLOSING.

Title to the Property shall be conveyed by Quitclaim Deed. The closing (the "Closing") shall be held at Portland City Hall at a time mutually agreeable to the parties on the earlier of (i) within thirty (30) days after the **BUYER'S** and **SELLER'S** conditions precedent outlined in Paragraph 11 have been satisfied or waived by the party having the benefit thereof or (ii) twenty (20) days after notice from **BUYER** to **SELLER** of **BUYER'S** intent to close earlier; but in any event no later than two hundred seventy (270) days after the Effective Date, unless extended by administrative action of the City Manager if, in City Manager's sole discretion the City Manager determines that **BUYER** is diligently pursuing satisfaction of the **BUYER'S** conditions precedent described in Paragraph 12.

11. COVENANTS WHICH WILL SURVIVE CLOSING.

The "Repurchase Price" as that expression is used in this Paragraph 11 means the original purchase price paid to **SELLER** hereunder for the Lot in question.

(a) **BUYER** shall construct the following: the Garage consisting of not less than 700 automobile parking spaces, primarily on the lot shown as Lot A-3 on Exhibit A; and the Office Building of at least 60,000 square feet primarily on the lot shown as lot A-4 on Exhibit A. **BUYER** further agrees that portions of the first floor of the Office Building shall be designated for possible conference center/retail use and the Garage shall be designed and constructed to accommodate 5,000 sq. ft. of retail tenant space along Somerset Street. Depending on the design of the Garage it may be necessary to expand its footprint (to accommodate a 700 space parking garage of reasonable height) to include a portion of Lot A-2 in which event the **CITY** and **BUYER** shall cooperate to modify the Subdivision Plan to accommodate an enlarged Lot A-3 or smaller Lot A-2. The Garage may also extend onto or beneath Lot A-4 and/or Lot A-2 depending on the design. The Office Building may extend onto Lot A-3 depending on the design. **BUYER** and the **CITY** further agree that the Garage shall include a trail corridor (as shown on Exhibits B and C and running from property line to property line) to provide public access from the Bayside Trail to Somerset Street with dimensions of not less than twenty (20) feet wide by twenty (20) feet high. At closing, **BUYER** shall convey to the **CITY** a public trail easement over said trail corridor, which easement shall be for pedestrian and bicycle use; be designed to be compatible and coordinated with the adjacent Bayside Trail; be accessible twenty four hours a day unless otherwise agreed to by the **CITY**; and be free of permanent obstructions or barriers (not including underground utility lines, building structural columns along the sides or footings, or the like) unless otherwise approved by the **CITY**. **BUYER** shall be responsible for the design and installation of lighting and trail enhancements in, on, or over the trail corridor.

(b) The Garage shall be equipped with a "Key" card system (or its equivalent) whereby weekly or monthly or longer term users shall have 24-hour access to the garage 7 days a week, it being understood that certain users may only have access at certain hours based on contractual agreements with

the garage owners. **BUYER** shall also make the garage available for public (hourly access) use during the "Start-up Phase" at such times as may be established by **BUYER** in light of demand for garage use. The expression "Start-up Phase" shall mean that period commencing when the garage receives a certificate of occupancy and ending the date when a building on Lot C-1 is issued a Certificate of Occupancy and that building starts using parking in the garage. After the Start-Up Phase the Garage shall be open during reasonable hours, seven days per week, subject to modification from time to time by **BUYER** based on historical and projected volume of usage. Moreover **BUYER'S** obligations in subparagraphs (d), (e) and (f) below shall be met as soon as economically feasible but at any rate no later than the end of the Start-up Phase subject however to modification from time to time by **BUYER**, (and with the **CITY'**s consent) based on historical and projected volume of usage.

(c) Hourly and monthly rates for the Garage shall be no more than the greater of (a) 110% of the average market rates being charged by the **CITY** at City owned and operated garages or (b) the highest rate charged by any garage within the **CITY**, excluding garages owned by **BUYER** or any of its affiliates.

(d) The Garage shall participate in the **"**Park & Shop**"** program.

(e) The Garage shall be available for City snow ban parking, and the overnight (i.e., 6 pm to 6 am) snow ban parking rate shall not exceed 50% of the then-current daily maximum rate charged by the parking garage.

(f) Upon written request of the **CITY** in each such instance, the Garage shall be available at customary rates for parking for special events held on the Portland Peninsula after 5:30 p.m. on weekdays and if requested, at requested reasonable times on weekends.

(g) The Garage shall be available for overnight residential parking and shall provide such residential parkers reasonable off-hours access to their vehicles.

(h) Parking lease agreements for twenty (20) or more spaces shall be targeted to accommodate Bayside-Area redevelopment as and when it occurs. Notwithstanding the foregoing **BUYER** shall have the right to lease parking spaces to the affiliates or third parties on a long term basis for parking for users not located in the Bayside Area provided each such lease permits the landlord on one hundred eighty (180) days notice to reduce the amount of spaces leased to the affiliate or third party to make room for parking demand for long term lease at fair market rates to accommodate new construction in the Bayside Area. In particular, **BUYER** agrees to make available to the extent not taken for parking needs of the Office Building, and if need be by termination or reducing the number of spaces leased to tenants outside the Bayside Area, automobile parking (to the extent of capacity in the Garage) for new buildings on Lots A-1, A-2, C-1 and C-2 at fair market rates. The "Bayside Area" is that area bordered on the East by Franklin Arterial, the North by Route 295, the West by Forest Avenue and the South by Cumberland Avenue.

(i) **BUYER** shall obtain building permits and commence construction of the Project (i.e., on Lots A-3 and A-4) within two hundred forty (240) days of the Closing, plus the duration of any delays caused by force majeure events. If **BUYER** has not obtained building permits and commenced construction within two hundred forty (240) days of the Closing plus the duration of any force majeure events, then (1) **BUYER** will pay to the **CITY** as liquidated damages Five Hundred Dollars ($500.00) per day for each of Lots A-3 and A-4 until construction is commenced on each Lot provided however that the liquidated damages per Lot will not exceed $75,000.00, and (2) **DPC** may, within eight (8) months thereafter, give notice (the "Repurchase Notice") to **BUYER** that it has elected to repurchase Lot A-3 as depicted on Exhibit A for the Repurchase Price and/or Lot A-4 as depicted on Exhibit A for the Repurchase Price, except and unless **BUYER** has obtained building permits for and commenced construction of improvement on Lot A-3 or Lot A-4 or both prior to **BUYER'S** receipt of a Repurchase Notice, in which event **SELLER** shall not have a right to repurchase any lot on which construction has commenced prior to **BUYER'S** receipt of a Repurchase Notice. In the event that DPC chooses to repurchase Lot A-3 and/or Lot A-4 pursuant to this paragraph, **BUYER'S** obligation to pay liquidated damages will cease when **BUYER** receives a Repurchase Notice. The time for obtaining building permits and commencing

construction under this paragraph may be extended with the consent of the City of Portland by the City Manager, which consent shall not be unreasonably withheld, if additional time is needed due to circumstances beyond the control of the **BUYER**.

(j) The Project shall be substantially completed by **BUYER** within thirty (30) months of Closing, plus the duration of any delays caused by force majeure events. If **BUYER** has obtained a building permit and commenced construction but has not achieved substantial completion of the Garage and Office Building within thirty (30) months of closing, **BUYER** will pay to the **CITY** as liquidated damages Five Hundred Dollars ($500.00) per day until substantial completion is achieved provided however the total damages shall not exceed Seventy Five Thousand Dollars ($75,000.00) per Lot.

(k) **BUYER** shall pursue commercial and/or retail development on the lots described as Lot A-1 and Lot A-2 on Exhibit A. **DPC**, the **CITY** and **BUYER** all agree that **BUYER** may designate a separate entity ("**BUYER'S** Nominee") to take title at the Closing and develop Lots A-1 and A-2. In the event **BUYER** elects to designate **BUYER'S** Nominee to take title to and develop Lots A-1 and A-2, then any reference in this Paragraph (k) or in other places in this Agreement where applicable to Lots A-1 and A-2 to "**BUYER**" shall apply to **BUYER'S** Nominee. The Deposit and any other payments credited to the Purchase Price hereunder shall apply only to the purchase of Lots A-3 and A-4. To enhance potential development options on Lots A-1 and A-2, **BUYER** agrees to cooperate with the **CITY** in its efforts to cause current deed restrictions on said lots prohibiting residential development to be released. In the event that development of Lots A-1 or A-2 is not under construction within sixty (60) months of closing, plus the duration of any delays caused by force majeure events, then (1) **BUYER** will pay to the **CITY** as liquidated damages Two Hundred Fifty Dollars ($250.00) per day for each of Lots A-1 and A-2 until construction is commenced on each Lot provided however that the liquidated damages per Lot will not exceed $25,000.00, and (2) **SELLER** may, at its election within one year thereafter by providing a written notice (the "Repurchase Notice") to **BUYER**, elect to repurchase Lot A-1 and/or Lot A-2 for the Repurchase Price, except and unless **BUYER** has obtained building permits for improvements to Lots A-1 or A-2 or both and has commenced construction thereon, in which event **SELLER** shall not have a right to repurchase any lot on which construction has commenced prior to **BUYER'S** receipt of a Repurchase Notice. In the event that SELLER chooses to repurchase Lot A-1 and/or Lot A-2 pursuant to this paragraph, **BUYER'S** obligation to pay liquidated damages will cease when **BUYER** receives a Repurchase Notice. Provided **BUYER** shall have commenced construction on Lots A-1 or A-2 **BUYER** shall have up to an additional twelve (12) months to achieve substantial completion for either or both of said Lots, but shall pay as liquidated damages to the **CITY** Two Hundred Fifty Dollars ($250.00) per day for each day after said twelve (12) months until substantial completion provided however that the total damages per lot shall not exceed Twenty Five Thousand Dollars ($25,000.00). The times for commencing construction or for achieving substantial completion under this paragraph may be extended with the written consent of the City of Portland by the City Manager, which consent shall not be unreasonably withheld, if additional time is needed due to circumstances beyond the control of the **BUYER**. In the event that Lot A-2 is used for the placement of a portion of the Garage, then the liquidated damages provision in this paragraph and the Repurchase Option shall cease to have any effect with respect to Lot A-2 when a building permit is issued for the Garage.

(l) **BUYER** may lease or use any ground floor spaces (including the "Retail Space" defined below) in the Office Building on Lot A-4 for a conference center. **BUYER** shall make diligent efforts to obtain retail tenants on commercially reasonable terms for 5,000 square feet of space on street level floor of the Garage for Lot A-3 will make similar provision for retail space and for Lot A-2 along the side of the building that faces the Bayside Trail and Elm Street and for Lot a-1 along the side that faces Elm Street (collectively the "Retail Space"). **BUYER** shall not be required to install retail space on the Somerset Street side of Lot A-2. In the event that **BUYER** cannot, after such diligent efforts, secure commercially reasonable retail development for the Retail Space, **BUYER** may lease the Retail Space for non-retail uses, provided, however, **BUYER** shall design and build the "Retail Space" to accommodate future retail development and (with the exception of any space used for conference center purposes) market the spaces for such use as it becomes available from time to time.

(m) **BUYER** shall participate in a Transportation Demand Management consortium.

(n) **BUYER** shall design and submit for Leadership in Energy and Environmental Design (**"**LEED**"**) certification the office building component of the Project.

(o) The **CITY** shall provide to **BUYER** as a grant Nine Million Dollars ($9,000,000) from the Federal Department of Housing and Urban Development's Section 108 and Brownfields Economic Development Initiative programs, for use toward construction of the Garage. Distribution of said funding shall be governed by a separate Construction Disbursement Agreement to be executed by the parties at closing and which will provide for disbursement of funds in tandem with KeyBank's construction loan disbursements to the end that all of said Nine Million Dollars ($9,000,000.00) will have been disbursed upon substantial completion of the Garage. This funding is being provided in part in consideration of **BUYER'S** covenant to pay real estate taxes at the full tax rate for real estate in the City of Portland in order to enable the **CITY** to pay off the HUD loan with tax increment revenues on the Property and in part as an incentive to build the garage which would otherwise not be commercially viable.

(p) In consideration of the $9,000,000.00 grant in the preceding subparagraph, **BUYER** agrees, for itself and its successors, assigns and lessees, that it will not claim tax exempt status for the purpose of calculation of real estate taxes on the Property, and therefore will pay full real estate taxes to the **CITY** on the Property. **BUYER** further agrees that this covenant will run with the land, and that any instrument **BUYER** executes transferring the Property or any portion thereof in the future will provide that the owner or user of the Property shall pay full real estate taxes to the **CITY**, or a payment in lieu of taxes equal to such full real estate taxes, in perpetuity.

(q) **BUYER** shall have no responsibility for improvements to the trail (the "Bayside Trail") to be built adjacent to the Property. The area for the Bayside Trail shall be established by survey prior to closing and shall not be located on the Property. **BUYER** agrees to collaborate with the Trust for Public Land, the **CITY** and other partners to facilitate the integration of the Bayside Trail into the Project and any further development on Lots A-1 and A-2.

(r) Within twelve (12) months of **BUYER** receiving a certificate of occupancy for the Project, **CITY** will complete trail and open space improvements to the portion of the Bayside Trail that is adjacent to the Property. In the event that the full and final trail improvements are not funded or ready to construct at that time, at a minimum, **CITY** will complete the following elements: **CITY** will loam and seed said portion of the Bayside Trail and construct a surface that is adequate for pedestrian and bicycle use on said portion.

(s) Regulations of the federal Department of Housing and Urban Development require that the City of Portland, as the grantee of Section 108 funds, document all jobs created and/or retained through the use of Section 108 funds. The **BUYER** recognizes that one of the primary goals of the **CITY'S** Section 108 Loan Assistance is the creation or retention of jobs, and the **BUYER** agrees to work toward that goal and to provide the **CITY** with timely and complete documentation of all jobs created or caused to be created as a result of receiving this financial assistance from the **CITY**. The **BUYER** shall provide a report on a form provided by the **CITY** listing the new employees who have filled the targeted positions and indicate the eligibility of these employees to the **CITY** for review on a quarterly basis until the jobs creation requirement has been met. The **CITY** agrees to require that others developing in the vicinity of the Garage and especially those using the Garage provide similar reports.

(t) The **BUYER** agrees to use its best efforts to create or cause to be created, within 1 year of completion of the Garage a sufficient number of jobs such that when combined with jobs created by other development on Lots A-1, A-2, A-4 and C-1, C-2 and C-3 there will have been created, a minimum of twenty (20) new, permanent, full time or full time equivalent jobs as a result of receiving Section 108 Loan assistance from the **CITY**. Only those jobs generated as a result of the specific projects financed under this Agreement (which shall also include any other developments in the vicinity of the Property which will require as a pre-condition for approvals leases for new parking created in the Garage) can be counted toward the jobs creation requirement. Jobs filled by persons transferring in from another of a company's facilities are not to be counted toward the total projected jobs to be created.

(u) **BUYER** agrees to lease to the **CITY**, for One Dollar ($1.00) per year, a space of between 300 and 400 square feet, located in the northeasterly corner of the garage, (adjacent to the trail corridor easement) and on the trail level floor, to be used by the City at its discretion.. **BUYER** shall stub utilities (i.e., water, sewer and electric) to the space and install an exterior storefront façade, but the space will be otherwise unfinished.

(v) **BUYER** agrees to convey to **CITY,** at closing, a public access/ trail easement on and over a portion of Lot A-2 and Lot A-1 and identified as "1st and 2nd Floor Easement +/- 1820 s.f." on Lot A-2 and "1st and 2nd Floor Easement +/- 810 s.f." on Lot A-1, as depicted on Exhibit C, which easements shall include 26 feet of air space above the footprint of the easements, for public access and pedestrian and bicycle travel (collectively the "Trail Easements"). The Trail Easements shall be in common with **BUYER** and allow for building columns and underground utilities and foundations as well as such trail enhancement, temporary uses and other amenities as may be acceptable to the **CITY** from time to time.

(w) The **CITY** agrees that no later than the date that a Certificate of Occupancy is issued for the Garage it will place two-hour parking meters along Somerset Street from Pearl Street to Elm Street at any location where on-street parking is permitted.

(x) The **CITY** and/or **DPC** as applicable agree to convey to **BUYER** at closing a suitable easement for placement of geo-thermal wells and associated piping on the trail side of the Garage (which will be subsurface except for ground level manhole covers), an easement approximately 20 feet in width along the trail side of the Garage for an earth berm and for subsurface water retention reservoir pipes beneath the trail, an easement for building "pile caps," an easement for snow dumping and removal on the Somerset Street side of the Garage at the southwest corner of the Garage, and an easement for a water line from Chestnut Street under the trail to the Office Building. A temporary construction license for staging, crane placement and crossing the adjacent trail to Lots A-3 and A-4 from Lot A-1 to be on the terms to be negotiated in the Staging Plan referenced in Paragraph 11(a)(x) below.

The expression "force majeure events" as used in this Agreement shall mean any event or occurrence beyond the control of **BUYER**, including without limitation strikes, acts of God (including fires, earthquakes and floods), acts of war, terrorist acts, third party lawsuits, building moratoriums, labor or material shortages and casualty losses.

Notwithstanding any other provision in this Agreement to the contrary, in the event that **BUYER** has diligently pursued but not obtained all of its approvals for the Project (the "Approvals") by December 22, 2008, and **BUYER** elects to close in any case before December 31, 2008, then all of the timeframes set forth in subparagraphs (i), (j) and (k) of this Paragraph 11 within which **BUYER** is required to accomplish certain objectives shall not begin to run until the earlier of the date when **BUYER** obtains Approvals for the Project or June 1, 2009.

12. **CONDITIONS PRECEDENT TO CLOSING.**

(a) **BUYER'S** CONDITIONS PRECEDENT: The obligation of **BUYER** to close is subject to the following conditions precedent:

(i) **BUYER** obtaining all necessary federal, State and **CITY** approvals and permits for the Project.

(ii) The **DPC** shall have obtained subdivision approval for division of the Property into parcels as depicted in Exhibit A from the Portland Planning Board prior to Closing. **BUYER** shall cooperate in the preparation of subdivision plans and other documentation as they relate to **BUYER'S** development plans.

(iii) The **CITY** shall have removed the Snow Banking Debris on or before 10/1/08 and otherwise the Property shall be in substantially the same condition as it was in as of the Effective Date.

(iv) **BUYER** shall have received acquisition financing, a 24-month construction loan and a permanent five (5) year loan all with New Market Tax-Credit enhanced financing from KeyBank as well as supplemental construction loans and a permanent loan to fully fund the Project.

(v) The **CITY** will confirm at Closing that it has HUD approval for the Nine Million Dollars ($9,000,000.00) in HUD funding that is to be disbursed to the Project in tandem with the KeyBank construction loan pursuant to the Disbursement Agreement (which shall have been executed by **BUYER** and the **CITY** at or before the Closing) and that the funds have been "obligated" and are available for requisition by the **CITY**. The Disbursement Agreement shall have a provision permitting it to be collaterally assigned to KeyBank at the Closing.

(vi) **SELLER'S** tender to **BUYER** of a Deed of the Property conveying such title as is required hereunder and subject only to Permitted Encumbrances.

(vii) **BUYER**, **SELLER** and the **CITY** reaching agreement in writing within forty (40) days of the Effective Date on a Grading Plan for the handling of so-called "Group II Soils" from Lots A-1, A-2, A-3 and A-4. It is agreed that the Grading Plan will provide that **BUYER** will be responsible for handling the Group II soils on Lots A-3 and A-4 by temporary excavation and placement on the trail and reburial on Lots A-3 and A-4 or partly in a berm area adjacent to the trail side of the Garage and that the **CITY** will upon receipt of DEP approval handle at its expense the relocation of the Group II soils, up to a maximum of 3500 cubic yards, from Lots A-1 and A-2 by regrading onto the trail area. The expression "Group II soils" refers to Group II soils identified in the DEP VRAP.

(viii) **BUYER'S** members: MaineHealth and United Way obtaining final Board ratifications of the execution of this agreement within twenty (20) days after City Council approval if not sooner obtained.

(ix) **BUYER'S** final determination on or before November 21, 2008 that the project is economically feasible based on updated construction estimates and permitting cost estimates.

(x) **BUYER, SELLER** and the **CITY** agreeing on a Staging Plan for coordinating use of portions of the trail area and possibly Somerset Street in connection with the construction of the Office Building, the Garage and the trail, within thirty (30) days of the Effective Date.

(b) **SELLER'S** CONDITIONS PRECEDENT: The obligation of **SELLER** to close is subject to the following conditions precedent:

(i) **DPC'S** receipt of Subdivision approval for Lots A-1, A-2, A-3 and A-4 from the City of Portland Planning Board.

(ii) The **CITY** will confirm at Closing that it has HUD approval for the Nine Million Dollars ($9,000,000.00) in HUD funding that is to be disbursed to the Project in tandem with the KeyBank construction loan pursuant to the Disbursement Agreement and that the funds have been "obligated" and are available for requisition by the **CITY**.

(iii) Tender of the balance of the Purchase Price by **BUYER** or **BUYER'S** nominee or both.

(iv) **Buyer's** grant of trail easements to the **CITY** for the trail corridor on and over Lot A-3 and A-2 as depicted on Exhibit A and described in paragraph 11(v) above.

In the event that any one or more of the foregoing **BUYER** conditions precedent is not satisfied or is not waived by **BUYER**, then **BUYER** shall have the option of terminating this Purchase and Sale Agreement by written notice to **SELLER** and the **CITY** and in that event the Deposit shall be returned to

BUYER and no party shall have any further obligation to the other hereunder so long as the failure of **BUYER** conditions precedent is not due to default of **SELLER** or the **CITY**.

In the event that any one or more of the foregoing **SELLER** conditions precedent is not satisfied or is not waived by **SELLER**, then **SELLER** shall have the option of terminating this Purchase and Sale Agreement by written notice to **BUYER** and in that event so long as the termination is not for **BUYER'S** default in tendering the Purchase Price, the Deposit shall be returned to **BUYER** and no party shall have any further obligation to the other hereunder.

13. EFFECTIVE DATE.

This Agreement shall take effect (the "Effective Date") as of the date when signed by **BUYER** and **SELLER** and the **CITY** or, if signed at different times, then the Effective Date shall be the date of the last signature obtained.

14. BINDING EFFECT.

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. **BUYER** may assign its rights under this Agreement in whole or in part only to an entity controlled by **BUYER** or one of **BUYER'S** principals with the consent of **DPC**, and such consent shall not be unreasonably withheld.

15. 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.

16. 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.

17. GOVERNING LAW.

This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Maine.

18. NOTICE.

Any notice required or permitted under this Agreement shall be deemed sufficient if mailed with first class postage affixed or delivered in person to:

FOR THE **DPC**: Downtown Portland Corporation
ATTN: CITY MANAGER
389 Congress Street
Portland, ME 04101

FOR THE **City**: Director Planning and Development
City of Portland
389 Congress Street
Portland ME 04101

FOR THE **BUYER**: BAYCO LLC
465 Congress Street
Portland, ME 04101

Attention: William L. Caron, Jr.

WITH COPIES TO:

Meg Baxter, President
United Way of Greater Portland
One Post Office Square
400 Congress Street
PO Box 15200
Portland, ME 04112-5200

Donald E. Quigley, Esq.
MaineHealth
465 Congress Street
Suite 600
Portland, ME 04101-3537

and

Nathan H. Smith, Esq.
Bernstein Shur
100 Middle Street
Portland ME 04101

19. <u>The Maine Department of Transportation ("MDOT") Traffic Movement Permit</u>.

BUYER, SELLER and the **CITY** all acknowledge that **BUYER** will need an MDOT Traffic Movement Permit for the project (the "2008 Permit"). **SELLER** and the **CITY** previously obtained a Traffic Movement Permit (the "2007 Permit") for a seven hundred fifty (750) space parking garage (on so-called Parcel C which lies approximately 500 feet to the east of Lot A-4 along Somerset Street) and for 150,000 square feet of office/retail space in the area. The parties are concerned that the 2007 Permit may not be assignable such that it would apply to the project on Lots A-3 and A-4 (i.e. a 700 space parking garage and 60,000—100,000 square foot office building). However because the 2007 Permit has been issued the parties are concerned that the garage on Parcel C and the 150,000 square feet of building space, despite not being built or in the process of being permitted, are deemed to have been built and in use for purposes of subsequent traffic capacity analyses, and in particular are treated as if built for purposes of determining the traffic capacity of surrounding streets and roads. It is the objective of **BUYER**, **SELLER** and the **CITY** to have any traffic capacity needed by **BUYER** for the Project to be treated as if the 2007 Permit had not been issued and if the Project were (which in fact it is) "first in line" from the perspective of utilization of traffic capacity. To the extent feasible the parties agree to seek approval from MDOT to reallocate the capacity from the 2007 Permit to the Project to the extent needed to accommodate the Project's traffic demand. The objective in this paragraph is to not have **BUYER** be forced to incur the expense of providing additional traffic improvements in the area to increase the capacity to accommodate future possible demand on Parcels B and C which are not at this time under contract, permitting or construction. **BUYER** does agree that it will contribute $85,000 towards the $100,000.00 in traffic improvements contemplated by the 2007 Permit.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the day and year first above written.

CITY OF PORTLAND

_____ By:_____

WITNESS Joseph E. Gray, Jr.
Its City Manager

Orders:\

DOWNTOWN PORTLAND CORPORATION

_____ By:_____

WITNESS

BAYCO LLC

_____ By:_____

WITNESS