

Order 75-18/19

Passage: 9-0 on 10/1/2018

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

**CITY OF PORTLAND
IN THE CITY COUNCIL**

Effective 10/11/2018

KIMBERLY COOK (5)
JILL C. DUSON (A/L)
PIOUS ALI (A/L)
NICHOLAS M. MAVODONES, JR (A/L)

**ORDER APPROVING A REAL ESTATE OPTION AGREEMENT
WITH CAPRICORN PRODUCTS, LLC FOR THE SALE OF LOT 1
AT PORTLAND TECHNOLOGY PARK**

ORDERED, that a Real Estate Option Agreement with Capricorn Products, LLC for the sale of Lot 1 in Portland Technology Park for \$420,000 is hereby approved substantially in the form attached hereto; and

BE IT FURTHER ORDERED, that the City Manager is hereby authorized to execute whatever documents are necessary to effect the intent and purpose of the Agreement.

OPTION AGREEMENT FOR PURCHASE OF PURCHASE REAL ESTATE

KNOW ALL PERSONS BY THESE PRESENTS that, the CITY OF PORTLAND, a body politic and corporate with a mailing address of 389 Congress Street, Portland, Maine 04101 (the “City” or “Seller”), for and in consideration of the sum of Five Thousand Dollars (\$5,000.00), the receipt of which is hereby acknowledged, hereby grants to CAPRICORN PRODUCTS LLC, a Maine limited liability company with a mailing address of _____ (“Buyer”), its successors and assigns, the exclusive option and right to purchase certain premises owned by the City and described in the attached Exhibit 1, located in Portland, Cumberland County, Maine (the “Premises”), subject to the following terms and conditions:

1. Purchase Price. The purchase price for the Premises shall be Four Hundred Twenty Thousand Dollars (\$420,000.00).
2. Consideration for Option. Consideration for the option set forth herein shall be Five Thousand Dollars (\$5,000.00) (the “Option Consideration”), which Buyer shall pay to the City upon execution of this Option. The Option Consideration shall be nonrefundable but shall be credited to the Buyer against the Purchase Price at the closing of the sale of the Premises.
3. Term of Option. Buyer may exercise this Option at any time on or before the date that is twelve (12) months after the Effective Date set forth below. Such 12-month period is referred to herein as the “Option Period.”

Prior to the expiration of the Option Period, Buyer, at its sole option, may terminate this Option at any time and for any reason by delivering a written notice of termination to the City.

4. Exercise of Option. To exercise this Option, Buyer must give written notice to the City of its intent to do so (the “Option Notice”) by Certified U.S. Mail, return receipt requested, or hand delivery, to the address set forth below. Such notice must be received by the City by the end of the Option Period.
5. Purchase and Sale Terms and Conditions. Upon exercise of the Option, the parties shall be bound by the Terms and Conditions for the Purchase and Sale of Condominium Unit at Portland Technology Park Condominium, which is attached hereto as Exhibit 1 and made a part hereof (the “Terms and Conditions of Sale”).
6. Inspections.
 - a. During the Option Period, Buyer and its employees, consultants, contractors and agents shall have the right, at Buyer’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 Buyer determines, in its sole discretion, to be required to determine the suitability of the

Premises for Buyer'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. Buyer agrees to defend, indemnify and hold harmless the City against any mechanics liens that may arise from the activities of Buyer and its employees, consultants, contractors and agents on the Premises.
- c. Buyer shall exercise the access and inspection rights granted hereunder at its sole risk and expense, and Buyer hereby releases the City from, and agrees to indemnify, defend, and hold the City and the Portland Technology Park Condominium Association 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 or the Portland Technology Park Condominium Association on account of any injury to person or damage to property arising out of the exercise by Buyer of its rights hereunder, except to the extent that such Damages result from the act or omission of the City.
- d. Buyer 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 and Portland Technology Park Condominium Association as an additional insured thereon, and also Workers' Compensation Insurance coverage to the extent required by law; the forms of all such insurance to be subject to City's Corporation Counsel's reasonable satisfaction.
- e. In the event that Buyer does not exercise this Option, Buyer 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.

7. Recording of Option. The parties agree that this Option Agreement will not be recorded, but that Buyer may record a memorandum of this Option in a form satisfactory to the parties.
8. Release of Option. If Buyer does not exercise this Option within the Option Period, or if the parties fail to timely close on the purchase and sale of the Premises in accordance with the attached Terms and Conditions of Sale, Buyer shall, on request of the City, execute and deliver to the City a written release or other instrument in the form reasonably satisfactory to the City, evidencing Buyer's non-exercise and release of the option and all other rights hereunder. The instrument shall be signed and acknowledged in recordable form by Buyer. In the event Buyer refuses or fails to deliver such instrument to the City, Buyer acknowledges and agrees that the City may execute and record an affidavit stating that Buyer failed to timely exercise its option to purchase the Premises and that this Agreement

is terminated and all of Buyer's rights under this Agreement are therefore terminated and released.

9. Notices. Any notice under this Option Agreement shall be delivered or sent by certified, postage prepaid, return receipt requested, and addressed as follows:

If to Buyer, to: Dwight G. Havey
 Capricorn Products LLC
 12 Rice Street
 Portland, Maine 04103

With a copy to: Charles Katz-Leavy, Esq.
 Jensen Baird Gardner & Henry
 10 Free Street
 P.O. Box 4510
 Portland, Maine 04112-4510

If to City, to: Jon P. Jennings, City Manager
 City of Portland
 389 Congress Street
 Portland, ME 04101

With a copy to: Office of the Corporation Counsel (at the same address).

10. Miscellaneous Provisions.

- a. This Agreement shall be binding upon and shall inure to the benefit of the successors, administrators and assigns of the parties hereto, except that Buyer will not assign its interest in this Agreement to anyone other than a related entity without the written consent of the City, in its reasonable discretion. As used in this Agreement, the term "Related Entity" shall mean any entity other than Buyer (i) which owns beneficially, directly or indirectly, a majority of the shares of stock or partnership interests in Buyer, or (ii) which controls or is under common control with Buyer. The term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through ownership of voting securities, by contract or otherwise.
- b. 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 Premises hereunder. This Agreement cannot be amended except by written instrument executed by Seller and Buyer.

- c. This Agreement may be simultaneously executed in any number of counterparts, each of which when so executed and delivered shall be deemed an original, but all of which together shall constitute one and the same instrument.
- d. 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.
- e. If any provision of this Agreement is found to be invalid or unenforceable, such finding shall not affect the validity or enforceability of any other provision hereof.
- f. No waiver of any breach of any one or more of the conditions of this Agreement or its attachments by either party shall be deemed to imply or constitute a waiver of any succeeding or other breach hereunder.
- g. The City and Buyer each confirm and agree that each of the time periods set forth herein are essential provisions of the terms of this Agreement.

Signature pages follow.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals as of the _____ day of _____, 2018 (the "Effective Date").

CITY OF PORTLAND

WITNESS

By: _____
Jon P. Jennings
Its City Manager

STATE OF MAINE
COUNTY OF CUMBERLAND

_____, 2018

Personally appeared the above-named Jon P. Jennings, City Manager of the City of Portland, as aforesaid, and acknowledged the foregoing to be his free act and deed in his said capacity, and the free act and deed of said City of Portland.

Before me,

Attorney-at-Law/Notary Public
Commission Expires:
Print Name:

Approved as to form:

City Corporation Counsel

Approved as to funds:

City Finance Director

CAPRICORN PRODUCTS LLC

WITNESS

By: _____
Print Name: _____
Its _____

STATE OF MAINE
COUNTY OF CUMBERLAND

_____, 2018

Personally appeared the above-named _____, _____ of Capricorn Products LLC, as aforesaid, and acknowledged the foregoing to be his/her free act and deed in his/her said capacity, and the free act and deed of said Capricorn Products LLC.

Before me,

Attorney-at-Law/Notary Public
Commission Expires:
Print Name:

EXHIBIT 1

TERMS AND CONDITIONS
FOR THE PURCHASE AND SALE
OF CONDOMINIUM UNIT AT
PORTLAND TECHNOLOGY PARK CONDOMINIUM

1. Premises to be Sold. Seller agrees to sell and Buyer agrees to buy Unit 1 at the Portland Technology Park Condominium located on Rand Road, Portland, Maine, together with said Unit's percentage allocated interest in the Common Elements and Limited Common Elements, all as more particularly described in the Declaration of Condominium, Portland Technology Park (the "Declaration") dated March 10, 2016, and recorded in the Cumberland County Registry of Deeds in Book 32969, Page 97, and as shown on the Condominium Plat pertaining thereto; said Plat being recorded in the Cumberland County Registry of Deeds in Plan Book 216, Pages 62-63; and subject to such state of facts and conditions as shown on a First Amended Subdivision Plat of Portland Technology Park Condominium prepared by SGC Engineering, LLC dated September 29, 2011 and revised through May 1, 2015, as recorded in the Cumberland County Registry of Deeds in Plan Book 215, Page 250. The Premises to be conveyed is hereinafter called the "Unit." Title reference is made to a Deed from Simon A. Snyder et alia to the City of Portland dated December 7, 1999 and recorded in the Cumberland County Registry of Deeds, Book 15211, Page 31. The Premises are more particularly described in Schedule A attached hereto and made a part hereof.

2. Purchase Price. Subject to any adjustment and prorations hereinafter described, Buyer agrees to pay for the Unit the sum of Four Hundred Twenty Thousand Dollars (\$420,000.00), payable to the City at closing by wire transfer.

3. Title. City shall convey the Unit to Buyer at the closing in fee simple with good and marketable or insurable title that is acceptable to Buyer, subject to: (a) easements, privileges, restrictions, conditions, development rights, special declarant rights, and agreements created by or referred to in the Declaration, as well as the matters showed or disclosed on the plats or plans mentioned above; (b) provisions of (i) the Maine Condominium Act, and all amendments thereto; (ii) the Declaration, the By-Laws and the Plats for The Portland Technology Park Condominium Association and all amendments or modifications thereto; (iii) building, zoning and land use ordinances; (c) all restrictions required because the Premises were improved, in part, with funding from the United States Economic Development Administration (EDA), United States Department of Commerce, a draft of which restrictions is attached hereto as Schedule B; and (d) such taxes and assessments, including Common Expenses allocable to the Unit, if any, as are not due and payable on the date of delivery of the deed, and (e) a deed 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 Buyer 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. At the closing, Seller shall execute and deliver to Buyer, against payment of the balance of the

purchase price, a Municipal Quitclaim Deed without Covenant (the "Deed"). In the event that Seller is unable to convey title as aforesaid, Seller shall be given a reasonable period of time in which to remedy any title defects. In the event that said defects cannot be corrected or remedied or in the event that Seller elects not to remedy same, then this Agreement, and Seller's and Buyer's obligations hereunder, will terminate. Buyer may, at Buyer's option elect to close notwithstanding such defects as may exist. Seller and Buyer understand and agree that any mortgages and liens on the Premises shall not be considered title defects provided that the same shall be discharged at or prior to closing at Seller's expense. Seller may use purchase money proceeds for this purpose. The Unit shall be sold and conveyed strictly on an "as is, where is, and with all defects" basis, without representation, warranty or covenant, express, implied or statutory, of any kind whatsoever, including, without limitation, representation, warranty or covenant as to condition, past or present use, tax ramifications or consequences, compliance with law, merchantability or fitness or suitability for any purpose, all of which are hereby expressly disclaimed. Acceptance by Buyer 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.

4. Closing. This transaction shall be closed on or before the day that is 30 days after Seller receives Buyer's Option Notice at a time mutually agreeable to the parties (the "Closing Date") at the offices of Buyer's counsel, or if the Seller and Buyer shall mutually agree in advance at another time and place. At the closing:

- (a) Seller shall deliver to Buyer an executed Quitclaim Deed without Covenant to the Premises and such other customary instruments, documents and affidavits as may be associated with said closing in form satisfactory to Seller;
- (b) Buyer shall deliver to Seller the Purchase Price, less the \$5,000.00 Option Consideration, by wire transfer;
- (c) Buyer shall deliver to Seller 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.
- (d) Buyer shall deliver evidence, reasonably satisfactory to City's Corporation Counsel, that the entity receiving title to the Premises is in good standing under Maine law, and that the individuals acting and executing documents on behalf of Buyer are authorized to do so, and 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.

5. Risk of Loss, Damage, Destruction and Insurance. Before closing, Seller shall bear the risk of any loss to the Premises by fire or otherwise.

6. Possession. Seller shall deliver the Premises to Buyer at closing free and clear of all leases, tenancies and occupancies by any person.

7. Adjustments, Proration and Closing Costs.

- (a) Real estate taxes, assessments, and utilities shall be prorated as of the closing.
- (b) The Condominium Association assessments for the Unit's Allocated Interest, as defined in the Declaration, shall be prorated as of the closing.
- (c) The Maine real estate transfer tax shall be paid by Buyer in accordance with 36 M.R.S.A., §4641-A. Seller is exempt from Maine real estate transfer tax.
- (d) The recording fee for the deed of conveyance and any expenses relating to any Buyer's financing or closing shall be paid for by Buyer.

8. Default and Remedies. In the event that Buyer fails to close hereunder for a reason other than the default of the Seller, Seller shall have available to it all remedies at law and in equity. In the event Seller defaults under this Agreement, other than the default of Buyer, Buyer shall have available to it all remedies at law and in equity, including, without limitation, the remedy of specific performance.

9. Brokers. Seller and Buyer each represents and warrants that neither has dealt with a real estate broker in connection with this transaction. Buyer agrees to indemnify and hold harmless Seller from any claims made by any broker should Buyer's representation in this paragraph be false. Subject to the immunities, defenses, and limitation available to Seller pursuant to the Maine Tort Claims Act, Seller agrees to indemnify and hold harmless Buyer from any claims made by any broker should Seller'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.

SCHEDULE A
(Legal Description of Premises)

The Unit designated as Unit 1 (the "Unit") of Portland Technology Park Condominium, located in the City of Portland, County of Cumberland and State of Maine ("Condominium") created pursuant to the provisions of the Maine Condominium Act (the "Act") by the Declaration of Condominium, dated March 10, 2016 and recorded in the Cumberland County Registry of Deeds in Book 32969, Page 97, as the same may be amended from time to time (hereinafter called the "Declaration") and by the Condominium Plat of Portland Technology Park Condominium prepared by SGC Engineering, LLC dated March 17, 2014, as revised March 9, 2016, incorporated into the Declaration and recorded in the Cumberland County Registry of Deeds, Plan Book 216, Page 62. The Unit is subject to and has the benefit of the Declaration, the Plats, Plans and the Act which is incorporated herein by reference, to which reference is hereby made for a more particular specification of the definition, location and description of the real property hereby conveyed and of the rights, obligations, easements, common elements, limited common elements, development rights, special declarant rights, restrictions, covenants and conditions pertaining thereto. The Unit is conveyed subject to such taxes and assessments, including Common Expenses, allocable to the Unit, if any, as are not due and payable on the date of delivery of this deed and subject to all terms, easements, covenants, obligations, conditions, restrictions, reservations and encumbrances contained in or referred to in the Declaration. Said Unit is conveyed together with an undivided interest in the Common Areas of the Condominium and the interest in the Limited Common Areas allocated thereto.

SCHEDULE B

COMPLIANCE WITH EDA RESTRICTIVE COVENANTS

The Seller and Buyer acknowledge that the premises were improved, in part, with funding from the United States Economic Development Administration (EDA), United States Department of Commerce, EDA Project Number 01-01-08630 and are subject to the terms and conditions of the EDA financial assistance award. Consequently, all recipients or owners and/or their successors and assigns, agree as follows:

Real Property or tangible Personal Property acquired or improved with EDA Investment Assistance must be used in a manner that is consistent with the authorized general and specific purposes of the Award, in this case, industrial purposes and EDA policies concerning adequate consideration and environmental compliance; and any applicable provisions of 13 CFR §314. It may not be used in violation of the nondiscrimination requirements set forth in 13 C.F.R. §302.20 or for inherently religious activities prohibited by applicable federal law.

Buyer agrees to provide Seller and/or EDA with any document, evidence or report required to assure compliance with federal and state law, including, but not limited to, applicable federal and state environmental laws.

Any deeds or instruments of conveyance shall contain a covenant which shall prohibit the use of the subject property for any purpose other than the authorized purpose of the EDA grant, which in this case, are commercial uses. This covenant shall remain in effect for a period of twenty (20) years.