

**RESOLUTION NO. 1005**

**A RESOLUTION AUTHORIZING THE CANBY URBAN RENEWAL AGENCY BOARD TO ENTER INTO A CONTRACT TO PURCHASE REAL PROPERTY LOCATED AT 316, 325, AND 326 NE 2ND AVENUE, CANBY, OREGON**

**WHEREAS**, the Canby City Council established an Urban Renewal Agency to function within the City pursuant to Ordinance 1032 passed October 6, 1999; and

**WHEREAS**, pursuant to the CMC 2.68.030 the City Council shall exercise all powers, duties and rights granted to the Urban Renewal Agency, unless specifically granted by the City Council to the Agency to perform; and

**WHEREAS**, City Council finds that it is in the City's best interest to complete the proposed redevelopment project by purchasing this property.

**NOW THEREFORE, IT IS HEREBY RESOLVED** by the City Council of the City of Canby, as follows:


1. The City of Canby Urban Renewal Agency Board is hereby authorized to enter into a contract to purchase real property located at 316, 325, and 326 NE 2<sup>nd</sup> Avenue in Canby, Oregon and to enter into the Purchase and Sale Agreement, attached hereto as Exhibit "A" and by this reference incorporated hereto, in order to effectuate said purchase; and
2. The City Administrator of the City of Canby is further authorized and directed to sign the attached Exhibit "A" on behalf of the Urban Renewal Agency Board and carry out all necessary actions to execute the Option and enter into the Purchase and Sale Agreement.

This Resolution shall take effect on October 15, 2008.

ADOPTED this 15<sup>th</sup> day of October, 2008, by the Canby City Council.

  
\_\_\_\_\_  
Melody Thompson, Mayor

ATTEST:

  
\_\_\_\_\_  
Kimberly Scheafer, CMC  
City Recorder, Pro-Tem

**EXHIBIT A TO COUNCIL RESOLUTION 1005**

**DRAFT**

**FRANK CUTSFORTH/CANBY 2<sup>ND</sup> STREET PROPERTIES, LLC  
and  
CITY OF CANBY  
SALE AGREEMENT, RECEIPT FOR EARNEST MONEY  
AND PRELIMINARY ESCROW INSTRUCTIONS**

This SALE AGREEMENT, RECEIPT FOR EARNEST MONEY AND PRELIMINARY ESCROW INSTRUCTIONS (“**Sale Agreement**”), dated \_\_\_\_\_, 2008 (“**Effective Date**”), is by and between the CITY OF CANBY acting by and through its Urban Renewal Agency (“**Buyer**”), and FRANK CUTSFORTH, an individual, and CANBY 2<sup>ND</sup> STREET PROPERTIES, LLC (collectively “**Seller**”).

**RECITAL**

Buyer, Seller (and Seller’s company Canby 2<sup>nd</sup> Street Properties, LLC), Charles F. Nakvasil and Cinemagic Theatres, LLC (collectively for purposes herein, “**Developer**”) entered into a Memorandum of Agreement, dated September 3, 2008 (the “**MOA**”) whereby Seller agreed to sell the property described below to Buyer for development of a parking lot and to sell certain other property to Developer for the development of a Theatre Project, as more particularly described in the MOA.

**AGREEMENT**

**1. SALE AND PURCHASE**

**1.1 MOA and Description of Property**

The MOA is incorporated by reference herein. In connection with and subject to the MOA and the agreements and responsibilities contained therein, Buyer hereby agrees to purchase from Seller and Seller hereby agrees to sell to Buyer, on the terms and conditions set forth in this Sale Agreement, four (4) tax lots consisting of approximately thirty-nine thousand nineteen (39,019) total square feet of land located along NE 2nd Avenue, in the City of Canby, Clackamas County, Oregon, situated in the area commonly known as downtown Canby, as legally described on the attached **Exhibit A** and shown on the drawing attached hereto as **Exhibit B** (the “**Property**”).

**1.2 Purchase Price and Survey**

The total purchase price (“**Purchase Price**”) for the Property is FIVE HUNDRED SIXTY THOUSAND TWO HUNDRED EIGHTY-FIVE DOLLARS (\$560,285). An appraisal of the Property was conducted at the request of Buyer by RSP & Associates LLC, dated February 28, 2008. Based on this appraisal, it was determined that the Purchase Price is below fair market value. Seller has agreed to sell the Property to Buyer below the appraised value and may elect to claim the difference as a tax deductible contribution. Buyer will reasonably support Seller’s efforts to obtain such a tax deduction but does not represent and cannot guarantee that

any such tax deduction will be granted. In no event, however, will the Purchase Price be increased from the amount stated herein.

## **2. EARNEST MONEY**

Within seven (7) days after the execution of this Sale Agreement by Buyer and Seller, Buyer agrees to deposit with Chicago Title Insurance Company of Oregon, whose address is 888 SW Fifth Avenue, Suite 930, Portland, Oregon 97204 ("**Escrow Agent**"), cash earnest money in the amount of TWENTY-FIVE THOUSAND DOLLARS (\$25,000) ("**Earnest Money**"). The Earnest Money will be deposited in an interest-bearing account which provides no penalties for early or immediate withdrawal. The interest accruing on the Earnest Money shall be credited to the Purchase Price at Closing (defined in **Section 4**). In the event Closing does not occur, the Earnest Money and all of the accumulated interest shall be disbursed in accordance with the provisions of **Sections 7.3** and **16** of this Sale Agreement. Buyer shall also deliver to the Escrow Agent articles of incorporation and a resolution from Buyer's corporation authorizing the appropriate officers' execution of all required documents, including this Sale Agreement, subject only to the Contingencies described in **Section 7** of this Sale Agreement.

## **3. PAYMENT OF PURCHASE PRICE**

At Closing, Buyer shall pay by immediately available funds the remaining Purchase Price due, after credit for Earnest Money and interest earned thereon is given. In addition to the Purchase Price, Buyer agrees to pay Buyer's share of Closing costs, pursuant to **Section 4** of this Sale Agreement.

## **4. CLOSING**

For purposes of this Sale Agreement, "**Close**," "**Closing**," or "**Closed**" shall mean the date on which all of the necessary documents have been deposited with the Escrow Agent and the Escrow Agent has: (a) disbursed the full amount of the Purchase Price to Seller; (b) recorded, on behalf of Buyer, the Deed for the Property; (c) issued or authorized the issuance of the title insurance policy referred to in **Section 13**; and (d) complied with all other escrow instructions of Seller and Buyer imposed as a condition of Closing. The Closing Date shall occur on or about December 1, 2008. Any extension beyond December 30, 2008 shall be by mutual agreement by the parties. This Sale Agreement shall be Closed in the offices of the Escrow Agent. Each party will pay one-half (1/2) of the escrow fee. Buyer shall also pay any recording fees and other Closing costs normally attributable to a buyer. Buyer and Seller shall deliver a fully-executed copy of this Sale Agreement to the Escrow Agent. Buyer and Seller hereby authorize their respective attorneys to execute and deliver to the Escrow Agent any additional or supplemental escrow instructions as may be necessary or convenient to implement the terms of this Sale Agreement and to Close this transaction. In the event of any conflict between such additional or supplemental escrow instructions and the express terms of this Sale Agreement, the terms of this Sale Agreement shall control.

## **5. PRELIMINARY TITLE REPORT**

Seller shall cause the Escrow Agent to issue a preliminary title report within seven (7) days of the Effective Date ("**Preliminary Title Report**"). Buyer shall review the Preliminary Title Report and to provide Seller with a list of permitted exceptions that may remain on title (the

“**Permitted Encumbrances**”) and all other exceptions must be removed by Seller prior to Closing. Within ten (10) days of receipt of the Permitted Encumbrances, Seller will advise Buyer as to whether Seller will remove the other unpermitted exceptions, and if Seller does not agree to remove those unpermitted exceptions, Buyer may terminate this Sale Agreement. If Seller does not notify Buyer of any of the unpermitted exceptions that Seller will not remove within the ten (10) day period, then Seller shall be deemed to have agreed to remove all exceptions to title except the Permitted Encumbrances.

## 6. **PROPERTY CONDITION**

Seller warrants that the Property is in good clean condition and to the best of Seller’s knowledge free of any Hazardous Substances (as defined in **Section 27**) and that the Property does not contain any aboveground or underground fuel or oil storage tanks. Buyer will have until November 15, 2008 to inspect the Property and perform any required environmental due diligence thereon that Buyer deems appropriate, as more particularly provided in **Section 7.1**.

## 7. **CONTINGENCIES OF CLOSING**

The following contingencies of sale (each a “**Contingency**,” or collectively “**Contingencies**”) must be satisfied or waived not later than the date indicated below, unless such date is extended by mutual agreement of the parties.

### 7.1 **Buyer’s Due Diligence Contingency**

For a period of time commencing with the Effective Date of this Sale Agreement, and continuing through November 15, 2008 (the “**Due Diligence Period**”), Buyer and its consultants shall have access to the Property, at Buyer’s sole expense and risk, for the purpose of determining the condition of the Property and conducting all tests, studies, inspections, surveys, audits, environmental assessments, geotechnical assessment, soil condition reports; and evaluations of the Property as Buyer deems necessary to enable Buyer to approve all aspects of the Property, including, without limitation, zoning; land use restrictions; environmental condition; soil and ground water conditions in and about the Property; the types, location, size, capacity, adequacy and other specifications for existing utilities; the Standards; and the ability and suitability of the Property for Buyer to develop and use the Property as may be desired by Buyer (“**Due Diligence**”). Seller hereby grants Buyer’s consultants the right to enter upon the Property, at Buyer’s sole expense and risk, to conduct studies which require Buyer’s entry onto the Property. Prior to entry upon the Property for such studies, Buyer shall notify Seller as to the date or dates of the entry. If, during the Due Diligence Period, Buyer is dissatisfied with any aspect of the Property, or any item related to the Property, then Buyer shall be entitled to terminate this Sale Agreement by delivering written notice of such termination to Seller on or before the end of the Due Diligence Period, whereupon this Sale Agreement shall be terminated and of no further force or effect. If Buyer does not reject the Property by giving written notice of termination to Seller within the Due Diligence Period, then Buyer shall be deemed to have waived this Contingency and right to terminate.

### 7.2 **Lot Line Adjustment**

In addition to the foregoing, during the same period, Seller and Buyer will work together to complete the necessary lot line adjustments or other land use approvals required in order to create legal lots that can be transferred to Buyer. Buyer has agreed to provide the assistance of

City staff with respect to preparing the paperwork needed for the lot line adjustments and Seller hereby agrees to make such application. If the lot line adjustments are not completed within the Due Diligence Period, the parties will either agree to reasonably extend the Due Diligence Period to allow for such completion or this Sale Agreement will terminate and Buyer will be entitled to a full refund of its Earnest Money without the need for any further authorization for its release from Seller.

### **7.3 Waiver/Satisfaction of Contingencies**

The Contingencies set forth above in **Sections 7.1 and 7.2** may be waived only by Buyer. Unless the Contingencies are satisfied or deemed waived by expiration of the time limit as set forth above, this Sale Agreement shall terminate without liability to either party. In the event this Sale Agreement is timely terminated on the basis of the failure of the Contingencies as stated above, and Buyer is not in default under this Sale Agreement, the Earnest Money (together with the interest thereon) shall be immediately returned to Buyer without the need for further release or authorization from Seller, and neither party shall have any further liability under this Sale Agreement, except any liabilities which are specifically stated to survive termination.

## **8. DEED**

At Closing, Seller shall execute and deliver to Buyer a Statutory Warranty Deed ("**Deed**") in substantially the form set forth in **Exhibit D** conveying the Property to Buyer, subject to the Permitted Encumbrances. The Deed contains certain restrictive covenants, including restrictions on use, which should be carefully reviewed before signing this Sale Agreement.

## **9. TAXES**

Current real property taxes will be prorated as of the date of Closing. Any delinquent taxes or special assessments of any kind or nature due with respect to the Property will be paid in full by Seller at Closing so that the Property is sold to Buyer free and clear of any tax lien. Buyer shall have full responsibility for payment of all applicable real property taxes which accrue after Closing, if any.

## **10. POSSESSION**

Buyer shall be entitled to possession of the Property immediately upon Closing.

## **11. SELLER'S DEVELOPMENT OR REPURCHASE COMMITMENT**

Buyer is only acquiring the Property in order to develop a public parking lot that is also intended to satisfy a significant portion of the parking requirements of a multi-plex theater development that is planned to be built on adjoining land also currently owned by Seller ("**Theatre Project**"). But for the Theatre Project, Buyer would not be purchasing the Property or building the parking lot. Therefore, if for any reason construction on the Theatre Project is not completed and the Theatre open for business on or before December 31, 2009, subject to extension due to any Force Majeure Event (defined below), then at any time thereafter Seller will be legally obligated to repurchase the Property for the Purchase Price plus all of Buyer's closing costs, promptly upon demand of repurchase by Buyer. This repurchase right will expire if not exercised and the Theatre Project is subsequently built at a later date but the repurchase right will remain in full

force and effect for any period of time beyond March 1, 2009 for as long as construction has not begun on the Theatre Project.

## **12. UTILITIES AND SANITARY SEWER EXTENSION**

Seller hereby represents that there are or will be prior to closing utility lines currently and readily available to the Property line. Buyer is responsible for extending and connecting all utilities onto the Property, at Buyer's cost, including, without limitation, electric, water, storm, telephone, sanitary sewer and natural gas services. Buyer is responsible for all costs for making such utility connections and extensions, including without limitation design, permitting, construction, and hook up fees and system development charges. Buyer is responsible for: (i) field verifying the location, size, invert elevation, and capacity of all utilities; (ii) determining the suitability of such utilities for Buyer's intended use; and (iii) coordinating all connections, extensions and other utility work with the public and private providers of utility services.

## **13. TITLE INSURANCE**

At Closing, Seller shall authorize the Escrow Agent to issue Buyer a standard owner's policy of title insurance, insuring the vesting of fee title to the Property in Buyer in the amount of the Purchase Price, subject only to the Permitted Encumbrances. Seller will pay the premium for this standard title insurance policy. Buyer shall pay the additional premium charged for extended title insurance coverage and any costs associated with obtaining such coverage, such as completing an ALTA survey or other survey work, if Buyer desires to obtain extended title insurance coverage. Buyer shall also be entitled to obtain any endorsement Buyer deems necessary, at Buyer's cost.

## **14. REPRESENTATIONS AND WARRANTIES OF BUYER**

In addition to any other covenants, representations, or warranties of Buyer contained in this Sale Agreement, the following constitute representations and warranties of Buyer to Seller:

### **14.1 Legal Authority**

Buyer has the legal power, right, and authority to enter into this Sale Agreement and the instruments referred to in this Sale Agreement and to consummate the transaction contemplated in this Sale Agreement.

### **14.2 Corporate Action**

All requisite legal action has been taken by Buyer in connection with entering into this Sale Agreement and the instruments referred to in this Sale Agreement and with the consummation of the transaction contemplated herein. No further consent of any city council, board of commissioners or other governmental authority is required.

### **14.3 Authorized Agent**

The person executing this Sale Agreement and the instruments referred to in this Sale Agreement on behalf of Buyer has the legal power, right, and actual authority to bind Buyer to the terms and conditions of this Sale Agreement. Buyer shall deliver to the Escrow Agent, concurrently with the Earnest Money, a copy of the resolution approved by the Canby City Council confirming this authorization.

#### **14.4 Binding Obligations**

This Sale Agreement and all documents required by it to be executed by Buyer are and shall be valid and legally binding obligations of Buyer and shall be enforceable against Buyer in accordance with their terms.

#### **14.5 No Conflict**

Neither the execution and delivery of this Sale Agreement and documents referred to herein, nor the incurring of the obligations set forth in this Sale Agreement, nor the consummation of the transaction contemplated, nor compliance with the terms of this Sale Agreement and the documents referred to herein conflict with or result in the material breach of any terms, conditions, or provisions of or constitute a default under any bond, note, or other evidence of indebtedness or any contract, indenture, mortgage, deed of trust, loan, partnership agreement, lease, or other agreements or instruments to which Buyer is a party.

### **15. REPRESENTATIONS AND WARRANTIES OF SELLER**

#### **15.1 Legal Authority**

Seller has the legal power, right, and authority to enter into this Sale Agreement and the instruments referred to in this Sale Agreement and to consummate the transaction contemplated in this Sale Agreement. Seller is the sole owner of the Property. Seller is uncertain as to whether the Property is in the name of Frank Cutsforth individually or whether it is in the name of Canby 2<sup>nd</sup> Street Properties, LLC, of which he is the sole member, but in either case, Frank Cutsforth has full legal authority to sell the Property to Buyer as provided in this Sale Agreement.

#### **15.2 Condition of the Property**

The Property is free and clear of all liens or encumbrances, except those special exceptions noted on the Title Report. To the best of Seller's knowledge and belief, the Property is in good clean condition and free of any Hazardous Substances, as defined below, and no aboveground or underground fuel or oil tank has been located on the Property. Seller warrants that Seller has never disposed of any materials on or under the Property that would be construed as a Hazardous Substance under any state or federal environmental laws.

**15.2.1** There are no actions, suits, proceedings, orders or investigations pending or, to the best of Seller's knowledge, threatened against or affecting Seller or the Property which might adversely affect Seller's performance under this Sale Agreement or the consummation of the transaction contemplated hereby;

**15.2.2** All taxes and assessments and other governmental or quasi-governmental levies of any kind which are due for payment prior to the date hereof, the non-payment of which would in any way affect the Property or any part thereof, have been paid, or shall be paid by Seller, prior to or at the Closing Date, together with all interest and penalties thereon;

**15.2.3** There are no unpaid bills, claims, or liens pending or contemplated by mechanics, materialmen, surveyors, or others, recorded or unrecorded, in connection with the Property;



**15.2.4** Neither the Property nor any portion thereof is located in a flood plain or special hazard area as designated by any federal, state or local governmental body or agency;

**15.2.5** Nothing prohibits Seller from entering into this Sale Agreement with Purchaser. No other person or entity has an interest in the Property, except as set forth in the Permitted Encumbrances; and

**15.2.6** The Property information provided by Seller to Purchaser is complete, accurate, true and correct and does not fail to state any fact without which the Property information would be misleading.

### **15.3 Binding Obligations**

This Sale Agreement and all documents required by it to be executed by Seller are and shall be valid and legally binding obligations of Seller and shall be enforceable against Seller in accordance with their terms.

### **15.4 No Conflict**

Neither the execution and delivery of this Sale Agreement and documents referred to herein, nor the incurring of the obligations set forth in this Sale Agreement, nor the consummation of the transaction contemplated, nor compliance with the terms of this Sale Agreement and the documents referred to herein conflict with or result in the material breach of any terms, conditions, or provisions of or constitute a default under any bond, note, or other evidence of indebtedness or any contract, indenture, mortgage, deed of trust, loan, partnership agreement, lease, or other agreements or instruments to which Seller is a party.

## **16. DEFAULT/FAILURE TO CLOSE**

If Closing does not occur as contemplated by this Sale Agreement due to a default by either party, the remedies of the parties shall be as specified below:

### **16.1 Default by Seller**

In the event the sale does not Close by the Closing Date as a result of any default of this Sale Agreement by Seller, Buyer shall be entitled to a return of the Earnest Money and the interest thereon, and Seller shall pay all escrow fees. Such sum will be paid to Buyer by the Escrow Agent. Buyer shall also be entitled to file suit in order to collect any damages suffered as a result of Seller's default. Finally, in the alternative to the foregoing, Buyer shall be entitled to sue Seller for specific performance, but if specific performance is granted and Closing occurs, then Buyer's monetary damages shall be limited to actual damages suffered by Buyer as a result of the delay in Closing. Nothing contained in this **Section 16.1** shall apply post-Closing to any breach of this Sale Agreement by Seller. If this sale does not Close because Developer breaches its obligations to either Buyer or Seller pursuant to the MOA, such breach by Developer shall not be considered a breach of this Sale Agreement by Seller. If this sale closes and Developer later fails to build and open the Theatre on or before December 31, 2009 (unless extended due to a Force Majeure Event as provided herein) as a result of any breach by Seller of the MOA or any other agreement between Developer and Seller, then Buyer shall be entitled to pursue any and all claims for damages it suffers as a result thereof, including the ability to sue Seller for the Out-of-Pocket Costs described in the MOA if Developer does not pay that amount due to Seller's

breach. Nothing contained herein, however, is entitled to limit Developer's obligation to pay Buyer in accordance with the requirements of the MOA and Developer shall not be considered a third party beneficiary of this provision.,

### **16.2 Default by Buyer**

In the event the sale does not Close by the Closing Date by reason of any default of this Sale Agreement by Buyer, Buyer and Seller agree that Seller shall be entitled to retain the Earnest Money as liquidated damages, and the interest thereon, and Buyer shall pay all escrow fees. This sum is agreed upon by both parties as liquidated damages for the failure of Buyer to perform the duties, liabilities, and obligations imposed upon it by the terms and provisions of this Sale Agreement and because of the difficulty, inconvenience, and uncertainty of ascertaining actual damages. In such an event, this Sale Agreement shall terminate and neither party shall have any further rights or obligations under this Sale Agreement. Nothing contained in this **Section 16.2** shall apply post-Closing to any breach of this Sale Agreement by Buyer.

### **16.3 Liquidated Damages**

With respect to the liquidated damages referenced in **Section 16.2**, above, the parties have specifically negotiated the amount of these damages. This amount shall be the full, agreed, and liquidated damages for the pre-Closing breach of this Sale Agreement by Buyer, and all other claims for other money damages are expressly waived by Seller. The payment of this amount as liquidated damages is not intended as a forfeiture or penalty but is intended to constitute liquidated damages to Seller.

### **16.4 Default After Closing**

The above **Sections 16.1, 16.2, and 16.3** apply only to a default which causes the sale contemplated by this Sale Agreement not to Close. Should a default of this Sale Agreement occur after Closing, including but not limited to Seller's failure to repurchase the Property in accordance with **Section 11**, then the non-defaulting party shall have available to it, and shall be entitled to pursue against the defaulting party, all remedies available for breach of contract, both at law and in equity, including, but not limited to, all forms of money damages or equitable relief, such as specific performance, where specific performance is available.

## **17. NO THIRD-PARTY BENEFIT AND NO ASSIGNMENT**

Nothing in this Sale Agreement gives or shall be construed to give or provide any benefit, direct, indirect, or otherwise, to third parties. No assignment by Buyer of its rights under this Sale Agreement shall be allowed without the prior written consent of Seller, in Seller's sole discretion. Any assignment or attempted assignment without Seller's prior written consent shall be void. This provision shall apply to all transfers, including any that may occur by operation of law. Any change in ownership of the controlling interest in Buyer, whether through sale, exchange, merger, consolidation, reorganization, or other transfer, shall be deemed an assignment requiring Seller's consent.

## **18. ATTORNEY FEES**

If a suit, action, or other proceeding of any nature whatsoever (including any proceeding under the U.S. Bankruptcy Code) is instituted in connection with any controversy arising out of this Sale Agreement or to interpret or enforce any rights or obligations hereunder, the prevailing

party shall be entitled to recover attorney fees and all other fees, costs, and expenses actually incurred as reasonably necessary in connection therewith, as determined by the court at trial or on any appeal or review, in addition to all other amounts provided by law. Payment of all such fees and costs shall also apply to any administrative proceeding, trial, and/or any appeal or petition for review.

## **19. NOTICES**

All notices required under this Sale Agreement shall be deemed to be properly served if sent by certified mail, return receipt requested, postage prepaid, or delivered by hand (including by overnight courier) to the last address previously furnished by the parties hereto. Until hereafter changed by the parties by notice in writing, notices shall be sent as follows:

To Seller at:

Frank Cutsforth/Canby 2<sup>nd</sup> Street Properties, LLC  
225 NE 2nd Avenue  
Canby, OR 97013  
Telephone: (503) 266-2016  
E-mail: [thriftway@canby.com](mailto:thriftway@canby.com)

To Buyer at:

City of Canby, Urban Renewal Agency  
Attention: Catherine Comer  
PO Box 930  
170 NW 2nd Avenue  
Canby, OR. 97013  
Telephone: (503) 266-7001  
Facsimile No.: (503) 266-1574  
E-mail: [comerc@ci.canby.or.us](mailto:comerc@ci.canby.or.us)

The date of service of such notice by regular mail is agreed to be three (3) days after the date such notice is deposited in a post office of the United States Postal Service, certified mail, return receipt requested, postage prepaid or, if delivered by hand, then the actual date of hand delivery. Notice may also be given by facsimile. The burden of proof concerning receipt of the facsimile will be on the sender, who may satisfy the burden by presenting a receipt of the transmission showing the date the transmission successfully occurred, the facsimile number to which the transmission was sent, the name of the party to whom the facsimile was sent, and a description of the document sent.

## **20. PERFORMANCE AND NON-WAIVER**

Time is of the essence in the performance of the obligations set forth herein. Failure to enforce any provision of this Sale Agreement shall not constitute a waiver of that provision or the future prompt enforcement of that provision.

## **21. MODIFICATION**

This Sale Agreement may not be modified or amended, except by the mutual written agreement of the parties, signed by both Seller and Buyer.

## **22. SURVIVAL; NO MERGER**

The waivers, covenants, indemnities, representations, obligations, and warranties contained in this Sale Agreement shall all survive the Closing and shall not merge into the Deed and the recordation of it in the official records.

## **23. SEVERABILITY**

If any provision of this Sale Agreement is held to be invalid or unenforceable, the remainder of this Sale Agreement, or the application of such provision to persons or circumstances other than those to which it is held invalid or unenforceable, shall not be affected thereby, and each provision of this Sale Agreement shall be valid and enforceable to the fullest extent permitted by law.

## **24. HEADINGS**

Section headings contained in this Sale Agreement are for convenience in reference and are not intended to define or limit the scope of any provision of this Sale Agreement.

## **25. EXHIBITS INCORPORATED BY REFERENCE**

All Exhibits referenced in this Sale Agreement are incorporated by reference into this Sale Agreement for all purposes.

## **26. DEFINED TERMS**

Capitalized terms shall have the meaning given them in the text of this Sale Agreement.

## **27. HAZARDOUS SUBSTANCES**

“**Hazardous Substances**” means any and all substances, emissions, pollutants, contaminants, materials or products defined or designated as hazardous, toxic, radioactive, dangerous or regulated wastes or materials or any other similar term in or under any applicable Environmental Laws. Hazardous Substances shall also include, but not be limited to, fuels, bio-fuels, petroleum and petroleum-derived products.

## **28. FORCE MAJEURE**

If the performance by the Buyer or Seller of its respective obligations under this Sale Agreement (excluding monetary obligations) is delayed or prevented by any extraordinary acts of nature (including floods, explosions, and earthquakes), epidemics, war, labor strikes, riots, orders of or restraints by government authorities, or failure of government authorities to provide required funding, major fires or other extraordinary casualty which is not reasonably within the party's control and is not due to the fault or negligence of that party (each of the foregoing a “**Force Majeure Event**”), then that party shall be temporarily excused from performance to the extent that performance is delayed by the Force Majeure Event, without liability under this Sale Agreement until such time as performance can be reasonably accomplished. It shall be a

condition to any extension of the time for a party's performance hereunder that such party notifies the other party within seven (7) days following the occurrence of the Force Majeure Event and diligently pursues the delayed performance with all reasonable dispatch after the Force Majeure Event preventing performance ceases to exist.

## **29. GOVERNING LAW**

This Sale Agreement shall be governed, construed and enforced in accordance with the laws of the State of Oregon. Jurisdiction shall be with Clackamas County Courts.

## **30. BROKERAGE COMMISSION**

Buyer and Seller represent and warrant to each other that no other broker or finder has been engaged by either party in connection with the transaction contemplated by this Sale Agreement, or to each of their knowledge is in any way connected with such transaction, and that Seller shall be solely responsible for the payment of any fees owing to Broker. In the event of any claims for additional brokers' or finders' fees or commissions in connection with the negotiation, execution, or consummation of this Sale Agreement by any broker who claims to have represented Buyer, then the Buyer shall indemnify, hold harmless, and defend Seller from and against such claims. In the event of any claims for additional brokers' or finders' fees or commissions in connection with the negotiation, execution, or consummation of this Sale Agreement by any broker who claims to have represented Seller, then Seller shall indemnify, hold harmless, and defend Buyer from and against such claims.

## **31. ENTIRE AGREEMENT**

This Sale Agreement, including all Exhibits attached hereto and incorporated by reference herein, represents the entire agreement between Seller and Buyer relating to Buyer's purchase of the Property. This Sale Agreement has been thoroughly negotiated between the parties; therefore, in the event of ambiguity, there shall be no presumption that such ambiguity should be construed against the drafter.

## **32. LAND USE**

“THE PROPERTY DESCRIBED IN THIS INSTRUMENT MAY NOT BE WITHIN A FIRE PROTECTION DISTRICT PROTECTING STRUCTURES. THE PROPERTY IS SUBJECT TO LAND USE LAWS AND REGULATIONS THAT, IN FARM OR FOREST ZONES, MAY NOT AUTHORIZE CONSTRUCTION OR SITING OF A RESIDENCE AND THAT LIMIT LAWSUITS AGAINST FARMING OR FOREST PRACTICES, AS DEFINED IN ORS 30.930, IN ALL ZONES. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, UNDER ORS 195.300, 195.301 AND 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY THAT THE UNIT OF LAND BEING TRANSFERRED IS A LAWFULLY ESTABLISHED LOT OR PARCEL, AS DEFINED IN ORS 92.010 OR 215.010, TO VERIFY THE APPROVED USES OF THE LOT OR PARCEL, TO VERIFY THE EXISTENCE OF FIRE PROTECTION FOR STRUCTURES AND TO INQUIRE ABOUT THE RIGHTS OF

NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER ORS 195.300, 195.301 AND 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007.”

IN WITNESS WHEREOF, the parties hereto have subscribed their names.

**BUYER:**

CITY OF CANBY, by and through its  
Urban Renewal Agency

By: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
As Its: \_\_\_\_\_

**SELLER:**

FRANK CUTSFORTH

\_\_\_\_\_  
CANBY 2<sup>ND</sup> STREET PROPERTIES, LLC

By: \_\_\_\_\_  
Printed Name: Frank Cutsforth  
As Its: Sole Member

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## **List of Exhibits**

Exhibit A – Legal Description

Exhibit B – Property Drawing

Exhibit C – Preliminary Title Report

Exhibit D – Statutory Warranty Deed Form

Exhibit E – Memorandum of Agreement