

Order 113-14/15

Passage 8-1 (Suslovic) on 12/15/2014

MICHAEL F. BRENNAN (MAYOR)
KEVIN J. DONOGHUE (1)
DAVID A. MARSHALL (2)
EDWARD J. SUSLOVIC (3)
JUSTIN COSTA (4)

**CITY OF PORTLAND
IN THE CITY COUNCIL**

Effective 12/25/2014

DAVID H. BRENERMAN (5)
JILL C. DUSON (A/L)
JON HINCK (A/L)
NICHOLAS M. MAVODONES, JR (A/L)

**ORDER APPROVING AND AUTHORIZING THE ACTING CITY MANAGER
TO SIGN THE SECOND AMENDMENT OF
THE CORPORATE GUARANTY AGREEMENT
RE: THE FEDERATED COMPANIES LLC**

ORDERED, that the Second Amendment of the Corporate Guaranty Agreement with The Federated Companies LLC is hereby approved in substantially the forms attached hereto as Attachment 1; and

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

SECOND AMENDMENT OF CORPORATE GUARANTY AGREEMENT

THIS AGREEMENT dated _____, 2014 is made by and between **THE CITY OF PORTLAND, MAINE**, a body politic and corporate with a place of business at 389 Congress Street, Portland, Maine 04101 (the “City” or “Seller”), **LEGACY PARK APARTMENTS, LLC**, a Florida limited liability company with a place of business at 3301 NE 1st Avenue, Suite M-302, Miami, Florida 33137 (“Legacy” or “Buyer”), **THE FEDERATED COMPANIES LLC**, a Florida limited liability company with a principal place of business at 3301 NE 1st Avenue, Suite M-302, Miami, Florida 33137 (“Federated”), and **FEDEQ DV001, LLC**, a Maine limited liability company with a mailing address of PO BOX 370008 , Miami, Florida 33137 (“FEDEQ”).

RECITALS

WHEREAS, The City and Federated entered into a certain June 3, 2011 Purchase and Sale Agreement, as amended by a First Amendment to Purchase and Sale Agreement dated October 15, 2012 (the “P&S”) and a Second Amendment Of Purchase And Sale Agreement And Amendment of Guaranty And Parking Garage Contribution And Funding Agreement dated October 14, 2014 (the “Second Amendment”) (the P&S, as amended, is referred to herein as the “P&S”), and

WHEREAS, Federated has assigned its rights as buyer under the P&S to Legacy pursuant to a certain Assignment and Assumption Agreement dated June 27, 2011 (the “Assignment”), and Legacy has assigned its right to purchase the Property to a Maine limited liability company known as FEDEQ DV001, LLC by a certain Assignment and Assumption Agreement dated October 14, 2014 (the “FEDEQ Assignment”); and

WHEREAS, the City, Legacy, Federated, and FEDEQ are parties to a certain October 15, 2012 Corporate Guaranty Agreement dated October 15, 2012, as amended by the Second Amendment (the Corporate Guaranty Agreement, as amended, is referred to herein as the “Guaranty Agreement”); and

WHEREAS, the City, Legacy, and FEDEQ are parties to a certain Parking Garage Contribution and Funding Agreement dated October 15, 2012, as amended by the Second Amendment (the Parking Garage Contribution and Funding Agreement, as amended, is referred to herein as the “Parking Garage Agreement”); and

WHEREAS, as a result of a pending lawsuit filed by certain Portland residents against the City, Federated, and Legacy, Federated has submitted to the City’s Planning Department a site plan application and amended subdivision plan with a redesigned plan for the development of its Midtown Project on the Property. The redesigned Midtown Project is described in a certain “Midtown Project Description” by CBT Architects, a copy of which is attached hereto as Exhibit A and made a part hereof; and

WHEREAS, the City, Legacy, Federated and FEDEQ now wish to amend certain provisions of the Guaranty Agreement and the Second Amendment as set forth herein.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Guaranty Agreement and the Second Amendment are hereby amended as follows:

1. Section 1 of the Guaranty Agreement and sections 3(a) & (b) of the Second Amendment are hereby deleted and the following is added to the Guaranty Agreement as section 1:

Subject to Planning Board approval, FEDEQ shall construct the Midtown Project in a single phase in substantially the form described in the Midtown Project Description. The parties agree that the Midtown Project shall consist of four buildings and will include not less than four hundred (400) residential apartments, not less than 85,000 square feet of retail space, and a parking garage containing not less than 800 spaces. Notwithstanding anything to the contrary in the Midtown Project Description, the parties agree that the specifications shown on a plan as may be approved by the Planning Board shall be deemed to satisfy the design guidelines and specifications required by the terms of the Guaranty, provided that the Midtown Project, as approved, is in substantially the form described in the Midtown Project Description. The Midtown Project shall be substantially complete within three years after the date on which the Buyer shall have requisitioned a total of one million dollars (\$1,000,000.00) in City Grant Funds, exclusive of funds requisitioned by the City or by the Buyer for environmental remediation costs (the "Guaranty Deadline"). The annual penalty for not meeting the Guaranty Deadline shall be limited to Guarantor paying to City, on an annual basis for a maximum term of seventeen (17) years, the annual difference between the actual tax revenue realized from the Midtown Project, as constructed, and the Midtown Project's tax revenue the City would have received had the Midtown Project been substantially completed (the "Midtown Project Value") by the Guaranty Deadline. The Midtown Project Value shall be the City of Portland Assessor's estimated assessed value of the Midtown Project property (real and personal) made on the April 1 following the Guaranty Deadline, and based on the Midtown Project as it may be approved by the Planning Board. Notwithstanding anything in the forgoing, this Guaranty is contingent on the full \$9,007,000.00 in City Grant Funds being contributed to Guarantor for the construction of the Garage. Guarantor's aggregate, maximum penalty liability under this Guaranty shall not exceed \$9,007,000.00. Finally, regardless of when substantial completion of the Midtown Project is achieved, this Guaranty shall automatically terminate, Guarantor shall have zero financial liability under this Guaranty and City shall provide Guarantor with a release from any financial liability under this Guaranty effective as of the earlier of the date that the City of Portland Assessor's estimated assessed value of the Midtown Project reaches \$45,000,000.00 or as of the date of the timely and valid exercise of the City's right of repurchase under Section 9 of the Parking Garage Agreement, as amended. For purposes of this Guaranty, "substantial completion" is deemed to mean all structures having received a Certificate of Occupancy from the City of Portland, and the complete 'fit-out' of all commercial portions of the Midtown Project.

The rights and obligations under the P&S and under the Parking Garage Agreement are cumulative and in addition to the rights described herein.

2. The parties recognize that the definition of the Land subject to the P&S, as set forth in section 2(a) of the Second Amendment, is likely to change following review by the Planning Board of the new site plan application and amended subdivision plan. The parties hereby agree to execute a further amendment to the P&S and any other documents that may be required to document such a change.
3. All terms capitalized but not defined herein shall have the meanings defined in the P&S, the Guaranty and the Parking Garage Agreement.
4. Except as amended hereby, the P&S, the Guaranty, the Parking Garage Agreement and the Job Creation Agreement shall remain in full force an effect and are hereby ratified. In the event of any conflict between the terms of this Agreement and the terms of the P&S, the Guaranty and the Parking Garage Agreement, the terms of this Agreement shall govern and control.
5. This Agreement may be signed in counterparts, which shall be construed together as one document.

IN WITNESS WHEREOF, the parties have caused this Agreement to be signed and sealed by their respective duly authorized undersigned officers as of the date first mentioned above.

CITY OF PORTLAND

By: _____
Name: Sheila Hill-Christian
Its: Acting City Manager

Approved: Acting Finance Director

Approved to Form: Corp. Counsel

LEGACY PARK APARTMENTS LLC

By: _____

Jonathan Cox
Its: Manager

THE FEDERATED COMPANIES LLC

By: _____

Jonathan Cox
Its: Manager

FEDEQ DV001, LLC

By: _____

Jonathan Cox
Its: Manager

EXHIBIT A
MIDTOWN PROJECT DESCRIPTION

ATTACHMENT A

MIDTOWN PROJECT DESCRIPTION

The proposed project is a mixed-use residential/retail development in the Bayside area of Portland. It consists of four buildings designated “midtownOne”, “midtownTwo”, “midtownThree”, and midtownFour” further described below. The project will contribute about 87,200 square feet of direct street access retail space at the ground level, about 440 new apartments ranging from 400 square foot studios to 1,050 square foot two-bedroom units, and structured off street parking for about 800 vehicles.

The project site is bound on the north by the Bayside Trail, on the East by Pearl Street, on the South by Somerset Street, and on the West by Elm Street, Chestnut Street bisects the site. Immediately neighboring uses consist of Whole Foods to the southeast at Somerset and Franklin, warehousing and open land along Somerset Street opposite the project and low-rise retail and commercial development supported by surface parking extending from the Bayside Trail to Marginal Street to the North. Low and mid-rise residential development extends up the slope from Somerset Street to Portland’s downtown district along Congress Street.

The proponent’s intent is to lead the way in creating a compact walkable mixed-use residential “main street” anchoring the Bayside neighborhood with continuous retail frontage along Somerset Street, while also improving the trail.

Concurrent with the project, both Somerset Street and the Bayside Trail will be raised above flood level from Pearl Street to Elm Street. Future projects may be expected to raise this infrastructure to the East and West of the project site. Pearl Street to the north of Somerset Street has been designed in such a way as to allow its extension to Marginal Street in the future.

midtownOne and Two are located between Pearl and Chestnut Street. They are separated by a mews and courtyard providing public access between Somerset Street and the Bayside Trail. midtownOne will be a six-story building containing 80 dwelling units in a mix of studio, one, and two bedroom apartments with a main entrance on Pearl Street and a secondary entrance on the courtyard. The ground floor retail space is provided with frontage on Somerset Street, the mews, and the courtyard. midtownOne’s façade will be a mix of cement fiberboard and enameled metal panels.

midtownTwo is a seven story-parking garage. The entire ground floor is retail space accessible from Somerset Street, Chestnut Street, and the Trail. Elevator and stair cores are located in the northeast and southwest corners to provide access and egress to the mews/courtyard at one end and the corner of Somerset and Chestnut streets at the other. Garage vehicular entrance and retail service access is located at the eastern end to allow the greatest flexibility in retail leasing. Building B’s facades will consist of architectural precast concrete, painted railings, and “green screen” living plant panels.

The four buildings abut public space on all sides and therefore do not have “fronts” and “backs”. All facades of each building are composed of the same materials.

midtownThree is located between Chestnut Street and the Bayside Trailhead connection at the intersection of Elm and Somerset Streets. It consists of 260 apartments in a mix of one and two bedroom dwelling units in a pair of five story buildings over a continuous one-story retail base. The retail space has frontage on all four sides, although access to/from the trail is prevented by a six-foot high berm

containing contaminated soil abutting the building along most of its trailside facade. Apartments are accessed through a lobby and elevators on Chestnut Street. Service is located at a single point along Somerset Street contiguous with the apartment building cores. The unobstructed retail space west of these core functions allows the greatest possible flexibility to attract the variety and high quality of merchants who will make the project a success and contribute to the pedestrian desirability of Somerset Street.

midtownFour is of similar construction to midtownOne and Three; five stories of residential development over one story of retail space. This building will have 100 studio or loft apartment units with a lobby entry facing Elm Street near the trail. Retail frontage will face Elm Street and the trail. The buildings service entrance will be located to the east adjacent to the building's entrance. Move in/move out, delivery and trash/recycling vehicles will use the pull-off provided on Elm St for convenient access to these entrances. This building's façade will also be composed of a combination of enameled metal panels and cement fire boards constructed as an energy efficient "rain-screen" enclosure.

In total the project will consist of approximately 87,200 square feet of retail space in the four buildings, approximately 440 new apartments in three building to provide housing for 500-600 residents, and about 800 off-street parking spaces, providing one space per dwelling unit and four spaces per thousand square feet of retail space. The development of the midtown buildings will provide essentially continuous active street frontage along Somerset, Chestnut, Pearl, and Elm Streets and along the Bayside Trail. The height of the residential buildings at 72 feet, and of the parking garage at 92 feet, are substantially lower than the 105 and 125 foot heights allowed by the B-7 height overlay for these parcels. The design of the buildings will be in keeping with planning guidelines for the district. This project will bring great enhancement to Somerset Street, provide residential development immediately adjacent and overlooking the Bayside Trail, and will provide the catalyst for a walkable retail district from Whole Foods to Trader Joe's in the spirit of Portland's other great streets.

Prepared by

David Hancock
CBT Architects



midtown
Portland, ME

Site perspective view

A1 16 October 2014 cbt

