

EXCHANGE AGREEMENT

THIS EXCHANGE AGREEMENT (this "Agreement") made this 21st day of June, 2017 by and between the CITY OF PORTLAND, a body politic and corporate located in Cumberland County, Maine (hereinafter referred to as "CITY"), CPB2 LLC, a Delaware limited liability company, having a mailing address of c/o CPB2 Management LLC, P.O. Box 7987, Portland, Maine 04112 (hereinafter referred to as "CPB2"), and STATE OF MAINE DEPARTMENT OF TRANSPORTATION, an agency of the State of Maine, having a mailing address of 16 State House Station, Augusta, Maine 04333-0016 (hereinafter referred to as "DOT"). For the purposes of this Agreement, the CITY, CPB2 and DOT are sometimes hereinafter collectively referred to as the "Parties" and individually as a "Party."

RECITALS

WHEREAS, CITY is the owner of that certain real property located along the eastern waterfront that is designated on the official tax map for the City of Portland as Block 448, Lot A-1 (the "CITY Property"); and

WHEREAS, CPB2 is the owner of that certain real property known as 58 Fore Street in the City of Portland, County of Cumberland and State of Maine, which is more particularly described in deeds dated July 19, 2013 and April 1, 2014 and recorded in the Cumberland County Registry of Deeds in Book 30879, Page 75 and Book 31425, Page 267 respectively (the "CPB2 Property"); and

WHEREAS, DOT is the owner of that certain right of way along the eastern waterfront that is designated on the official tax map for the City of Portland as Block 18, Lot A-13 (the "DOT Right of Way"); and

WHEREAS, in connection with the construction of the Thames Street extension and the development of the CPB2 Property, CITY and CPB2 have proposed the relocation of a portion of the DOT Right of Way in the manner shown on the Land Transfer Plan prepared by Woodard & Curran dated December 1, 2016 and revised January 10, 2017, a copy of which is attached hereto as Exhibit A (the "Plan"); and

WHEREAS, DOT has approved the relocation of the DOT Right of Way, as shown on the Plan; and

WHEREAS, in order to accomplish such relocation, the parties have agreed to certain property transfers, as identified herein; and

WHEREAS, the parties hereto desire to memorialize their agreements;

NOW THEREFORE, in consideration of the foregoing and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties, intending to be legally bound, hereby agree as follows:

1. **EXCHANGE.** In accordance with the terms and conditions set forth in this Agreement, (i) CITY agrees to transfer to DOT the property designated on the Plan as “City to MDOT” (the “CITY/DOT Exchange Property”) by municipal quitclaim deed, (ii) DOT agrees to transfer to CITY the property designated on the Plan as “DOT to City” (the “DOT/CITY Exchange Property”) by deed of vacation, (iii) DOT agrees to transfer to CPB2 the property designated on the Plan as “DOT to CPB2” (the “DOT/CPB2 Exchange Property”) by deed, of vacation (iv) CPB2 agrees to transfer to DOT the property designated on the Plan as “CPB2 to DOT” (the “CPB2/DOT Exchange Property”) by quitclaim deed, and (v) CPB2 agrees to transfer to CITY the property designated on the Plan as “CPB2 to City” (the “CPB2/CITY Exchange Property”) by quitclaim deed, together with an easement in a form satisfactory to the CITY and CPB2 allowing public access over the entire five foot strip of land separating the CPB2/CITY Exchange Property from the water(said properties being hereinafter collectively referred to as the “Exchange Properties” and individually referred to as an “Exchange Property”).
2. **CONSIDERATION.** The parties agree that the properties being conveyed are of a comparable size and value and that there is no additional consideration being paid or received by any party in connection with the exchanges.
3. **SURVEY.** CPB2 shall, at its sole expense, cause an ALTA survey to be prepared that will more specifically describe, by metes and bounds, the Exchange Properties. CPB2 shall provide such survey and associated property descriptions to the CITY and to DOT on or before the expiration of the Due Diligence Period (as defined in Paragraph 4.a) for their review and approval.
4. **TITLE.**
 - a. **Due Diligence Period.** Each Party will have from the date of this Agreement until 4:00 PM Eastern Daylight Savings Time on the day that is one hundred eighty (180) days after the date of this Agreement (the “Due Diligence Period”) to complete its title and survey examinations.
 - b. **Title and Survey Objections.** Each Party will have thirty (30) days from the expiration of the Due Diligence Period (the “Due Diligence Response Period”) to deliver to the other Parties any written objections to title or survey matters (other than the permitted exceptions identified herein), including, but not limited to, those affecting marketability or use. Objections not made prior to the end of the Due Diligence Response Period will be deemed waived; provided, however, that objections pertaining to matters of record first appearing after the date of this Agreement may be made at any time prior to the closing.
 - c. **Option to Cure.** In the event of (i) an objection to the title or the survey pursuant to Paragraph 4.b or (ii) an objection to the results of the Inspection (as defined in Paragraph 5.a) pursuant to Paragraph 5.f, the Party who owns the property to which such objection relates (the “Notice Recipient”) will have the option, but not the obligation, to cure the objection and will notify the

Party who gave the objection notice (the "Notice Sender") of its election within ten (10) business days after receipt of the objection. In the event that the Notice Recipient elects to cure the objection, it will have sixty (60) days from the date of the notice of election, or such other reasonable time as the Parties may agree, to cure the objection to the satisfaction of the Notice Sender. In the event that the Notice Recipient does not elect to cure the objection, or, having elected to cure the objection fails to timely do so to the satisfaction of the Notice Sender, then the Notice Sender will have the option to (1) terminate this Agreement (after which the Parties will not have any further obligation or liability to the other Parties under this Agreement), (2) waive the objection and close, or (3) undertake the cure of such objection at its own expense (in which case it shall have 60 days to do so). In the event the Notice Sender elects to cure such objection, but the Notice Sender is unable to cure such objection to its reasonable satisfaction within said 60-day period, then the Notice Sender will have the option to (1) terminate this Agreement (after which the Parties will not have any further obligation or liability to the other under this Agreement), or (2) waive the objection and close.

- d. CPB2 shall convey its property at the closing in fee simple by a quitclaim deed. The City shall convey its property at the closing in fee simple by municipal quitclaim deed. Title shall be free and clear of all encumbrances, except (i) easements for utilities servicing the property, (ii) zoning ordinances, and (iii) real estate taxes not yet due and payable.
- e. DOT shall convey its property at the closing as a full release of whatever property interest(s) DOT holds by a deed of vacation. Title shall be free and clear of all encumbrances, except (i) easements for utilities servicing the property, and (ii) zoning ordinances.

5. INSPECTIONS.

- a. During the Due Diligence Period and the Due Diligence Response Period, each Party and their respective employees, consultants, contractors and agents shall have the right, at such Party's expense (except as otherwise set forth herein), to enter on the Exchange Property being conveyed to them, 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 such Party determines, in its sole discretion, to be required to determine the suitability of such Exchange Property for such Party's intended use (collectively, the "Inspections"). The Parties acknowledge that such Inspections may include the digging of test pits, which each Party hereby approves.
- b. To the extent permitted by law, the Party performing the Inspections agrees to defend, indemnify and hold harmless the Party on whose property the Inspections are being performed against any mechanics' liens that may

arise from the activities of said Party and its employees, consultants, contractors and agents on the property.

- c. Each Party shall exercise the access and inspection rights granted hereunder at its sole risk and expense, and the Party performing the Inspections hereby releases the Party on whose property the Inspections are being performed from, and agrees to indemnify, defend, and hold said Party harmless, to the extent permitted by law, against, any and all losses, costs, claims, expenses and liabilities (including without limitation reasonable attorney fees and costs) (collectively, "Damages") suffered by said Party on account of any injury to person or damage to property arising out of the exercise by the other Party of its rights hereunder, except to the extent that such Damages result from the act or omission of the Party on whose property the Inspections are being performed. Nothing in this Agreement shall waive any defense, immunity or limitation of liability that may be available to CITY and/or DOT under the Maine Tort Claims Act (14 M.R.S. § 8101 et seq.) or any other privileges or immunities provided by law. Any other provision of this Agreement to the contrary notwithstanding, this provision shall survive any termination or expiration of this Agreement.
- d. The Party (other than DOT and the CITY) performing the Inspections shall cause any contractors, consultants or any other party conducting the Inspections to procure automobile insurance and general commercial or 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 and also Workers' Compensation Insurance coverage to the extent required by law. DOT and the City are self-insured.
- e. In the event that the Party performing the Inspections does not acquire the property in question for any reason or for no reason, said Party agrees to either return the property in question as nearly as possible to its original condition after conducting the Inspections, or, at the option of the Party who owns the property in question, reimburse the Party owning the property for any physical damage caused to the property in question in connection with the Inspections; provided, however, the Parties hereby acknowledge and agree that the term "physical damage" does not include any disturbance of any pre-existing environmental contamination on the property caused by such inspections, studies, tests, exams, and assessments, and that the Party performing such Inspections shall have no obligation to clean-up, remove or take any other action with respect to any pre-existing environmental contamination disturbed thereby.
- f. The parties hereto acknowledge and agree that it is a condition to each Party's obligations under this Agreement that the results of the Inspections be acceptable to the Party performing such Inspections in its sole discretion. If the results of such due diligence are not acceptable to the Party performing such Inspections in its sole discretion, then such Party

shall notify the Party who owns the property to which such results relate, and the provisions of Paragraph 4.c shall apply. If such Party ultimately exercises its right to terminate this Agreement, then the Parties shall not have any further obligations or liabilities under this Agreement to each other except as expressly set forth in this Agreement.

6. TAXES, PRORATIONS AND RECORDING FEES.

- a. CPB2 shall be liable for all real estate taxes attributable to the CPB2/DOT Exchange Property and the CPB2/CITY Exchange Property through the end of the fiscal year in which the closing occurs. CPB2 shall be liable for all real estate taxes attributable to the DOT/CPB2 Exchange Property beginning as of the start of the fiscal year following the closing and continuing thereafter. Because the DOT/CPB2 Exchange Property, the DOT/CITY Exchange Property, and the CITY/DOT Exchange Property are currently owned by entities that are exempt from real estate taxes, no taxes have been assessed or will be due for any portion of the current fiscal year, and no taxes will be prorated for those properties at the closing.
- b. The DOT/CPB2 Exchange Property and the CPB2/CITY Exchange Property are the only Exchange Properties subject to Maine real estate transfer tax at closing, and any transfer tax due shall be paid for by CPB2 in accordance with 36 M.R.S. § 4641-A. CITY and DOT are exempt from paying the transfer tax pursuant to 36 M.R.S. § 4641-C, and the transfer of the CPB2/DOT Exchange Property is exempt because it is a conveyance to DOT for transportation purposes..
- c. The recording fees for the various deeds shall be paid for by CPB2.

7. **DEFAULT AND REMEDIES.** In the event that any Party defaults under this Agreement, any of the non-defaulting Parties shall have the right (i) to the extent permitted by law, to pursue specific performance or (ii) in lieu of specific performance, as its sole remedy to terminate this Agreement (after which the Parties will not have any further obligation or liability to the other under this Agreement).
8. **RISK OF LOSS.** The risk of loss or damage to any of the Exchange Properties by fire, eminent domain, condemnation, or otherwise, until transfer of title hereunder, is assumed by the owner of the Exchange Property in question. The Exchange Properties are to be delivered in substantially the same condition as of the date of this Agreement unless otherwise stated. In the event any Party is not able to deliver their Exchange Property as stated, any of the other Parties may terminate this Agreement, and the Parties shall not have any further obligations or liabilities under this Agreement except as expressly set forth in this Agreement.
9. **PROPERTY SOLD "AS IS, WHERE IS."** Except as otherwise set forth in this Agreement, each Party acknowledges (i) that, by the end of the Due Diligence Response Period, it will have had an opportunity to inspect the Exchange Property it is receiving, or to hire professionals to do so; (ii) that such Exchange Property will be

sold “as is, where is” and “with all faults;” and (iii) that the current owner of such Exchange Property, and its agents, shall not be deemed to have made any representations or warranties with respect to such Exchange Property, including, without limitation, the accuracy of any statement relating to boundaries or acreage, or relating to any other matters contained in any description of such Exchange Property, or relating to the fitness of such Exchange Property for a particular purpose, or relating to development rights, merchantability, habitability, or as to any other matter, including without limitation, land use, zoning and subdivision issues or the environmental, mechanical, or structural condition of such Exchange Property. Acceptance by a Party of the deed at closing to the Exchange Property it is receiving shall be deemed to be full performance and discharge by the Party conveying such Exchange Property of every agreement and obligation contained herein.

10. CLOSING. Time is of the essence in the performance of this Agreement. The closing shall be held at the offices of CPB2’s counsel at a time agreeable to the Parties on or before the earlier of that date that is 30 days after the date that the CITY receives the last of the Thames Street Extension Approvals, as that term is defined below, or January 31, 2018, so long as the Due Diligence Response Period has expired. Provided, however, that if the CITY has not received the last of the Thames Street Extension Approvals by January 1, 2018, the closing date, may, upon the mutual agreement of the Parties, be extended to a later date agreed to by the Parties. At the closing:

- a. each Party shall execute, acknowledge and deliver the deed required under this Agreement to convey title to the Exchange Property in question, free and clear of all encumbrances other than those approved by the recipient of such Exchange Property in its sole discretion;
- b. each Party shall execute, acknowledge and deliver such affidavits and indemnifications, to the extent permitted by law, in form and substance reasonably satisfactory to the applicable Parties, regarding mechanics’ liens, materialmen’s’ liens and parties in possession sufficient to eliminate any title insurance exceptions for these matters;
- c. each Party shall deliver to the others 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; and
- d. DOT will grant to CPB2 an easement in accordance with the provisions of Paragraph 1(b) of an associated MOU, as such MOU is defined in Paragraph 11 below.

For the purposes of this Agreement, the term “Thames Street Extension Approvals” shall mean CITY’S receipt of all necessary permits and regulatory approvals to construct the Thames Street extension and related utilities and the appropriation by the Portland City Council of the funds necessary to do so.

11. CONTINGENCIES. DOT and CPB2 entered into a certain Memorandum of Understanding dated March 31, 2015 relating to the portion DOT Right of Way that bisects the CPB2 Property, which memorandum contemplated the exchange of property between the parties thereto (the "MOU"). DOT and CPB2 acknowledge and agree that DOT's obligations under this Agreement are contingent upon (i) the submission to DOT of the geological tests of the soils required by Paragraph 3 of the MOU and, if applicable, the performance of the work described in Paragraph 3.b of the MOU, (ii) the consent of the CITY to the relocation of the Trail Corridor (as defined in the MOU), as contemplated by Paragraph 7 of the MOU, and (iii) if applicable, CPB2 obtaining the consent of the Trust for the Preservation of Maine Industrial History and Technology (the "Narrow Gauge") to the relocation of the narrow gauge railroad track or to the terms of a lease agreement between the Narrow Gauge and CPB2 to replace the terms of the Narrow Gauge's existing lease with DOT, as contemplated by Paragraphs 4 and 7 of the MOU.

12. ENVIRONMENTAL ASSESSMENT.

As outlined in the MOU, if it is determined by CPB2 that a Phase I Environmental Site Assessment of the existing Rail Corridor, as such is defined in the MOU, is required in connection with the exchange contemplated herein, CPB2 agrees to obtain, at its sole cost and expense, such Phase I Assessment and to submit the resulting report to DOT for review.

- a. If, as a result of the findings of the Phase I Assessment, it is determined that a Phase II Environmental Site Assessment is required, CPB2 agrees to obtain, at its sole cost and expense, such Phase II Assessment and to submit the resulting report and all data and associated documentation to DOT for review.
- b. If it is determined that environmental remediation is required in connection with the existing Rail Corridor, the Parties acknowledge that DOT shall not be required to perform such remediation unless CPB2 agrees to pay for all associated costs or DOT is otherwise reimbursed for such costs.

13. RELATED WORK.

- a. If CPB2 elects to relocate the narrow gauge railroad track, as contemplated by Paragraph 4.a of the MOU, and if the Narrow Gauge has consented to such relocation, then CPB2 agrees to relocate the same at no expense to DOT or to the Narrow Gauge. DOT acknowledges that such work will be done in connection with the redevelopment of the portion of the DOT/CPB2 Exchange Property on which the narrow gauge railroad tracks currently exist and will likely occur after the closing.
- b. CPB2 agrees further to relocate the Trail Corridor (as defined in the MOU) at no expense to DOT or to CITY. DOT and CITY acknowledge that such work will be done in connection with the redevelopment of the marina or the redevelopment of the portion of the CPB2 Property that runs along the shoreline, and will likely occur after the closing. If the new location of the Trail Corridor, as shown on an

approved site plan, is partly on the CPB2 Property, then CPB2 agrees to grant to CITY an easement over such portion on substantially the same terms and conditions as set forth in the easement granted by DOT to CITY.

- c. In connection with the relocation of the narrow gauge railroad tracks and/or the relocation of the Trail Corridor, DOT agrees to grant to CPB2 a temporary, construction right over the relocated DOT Right of Way to the extent reasonably required to relocate the narrow gauge railroad tracks and/or the Trail Corridor. If requested by CPB2, CITY also agrees to grant to CPB2 a temporary, construction right in form and substance reasonably satisfactory to the CITY, over the relocated Trail Corridor to the extent reasonably required to relocate the narrow gauge railroad tracks and/or the Trail Corridor.
- d. DOT acknowledges that the relocation of the narrow gauge railroad tracks and/or the Trail Corridor may require site plan approval or other governmental approval, and DOT agrees to reasonably cooperate with CPB2 in connection with such approvals and to execute and deliver any documents reasonably requested by CPB2 or any governmental entity, department or agency in connection therewith, provided such documents are in form and substance reasonably satisfactory to DOT and do not require DOT to undertake any construction work in connection with such relocation or relocations.
- e. The provisions of this Paragraph 13 shall survive the closing.

14. 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 Exchange Properties hereunder. This Agreement cannot be amended except by written instrument executed by the CITY, CPB2 and DOT.

15. NON-WAIVER. No waiver of any breach of any one or more of the conditions of this Agreement by a Party shall be deemed to imply or constitute a waiver of any succeeding or other breach hereunder.

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. BINDING EFFECT. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective heirs, administrators, successors and assigns.

18. TIME IS OF THE ESSENCE. The CITY, CPB2 and DOT each confirm and agree that each of the time periods set forth herein are essential provisions of the terms of this Agreement.

19. GOVERNING LAW. This Agreement shall be construed in all respects in accordance with, and governed by, the laws of the State of Maine. The 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. If any provision of this Agreement is determined to be invalid or unenforceable, it shall not affect the validity or enforcement of the remaining provisions hereof.

20. NOTICE. All notices, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given on the date of service if served personally on the party to whom notice is to be given, or on the first business day after mailing if mailed to the party to whom notice is to be given by first class mail, postage prepaid, certified, return receipt requested, addressed to the recipient at the addresses set forth below. Either party may change addresses for purposes of this paragraph by giving the other party notice of the new address in the manner described herein.

FOR THE CITY: City of Portland
ATTN: CITY MANAGER
389 Congress Street
Portland, ME 04101

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

FOR CPB2: CPB2 LLC
c/o CPB2 Management LLC
P.O. Box 7987
Portland, Maine 04112

With a copy to: Bernstein, Shur, Sawyer & Nelson, P.A.
Attention: Mary E. Costigan, Esq.
100 Middle Street, West Tower
Portland, Maine 04101

FOR DOT: STATE OF MAINE DEPARTMENT OF
TRANSPORTATION
Attention: Toni Kemmerle, Esq.
16 State House Station
Augusta, Maine 04333-0016

21. SIGNATURES; MULTIPLE COUNTERPARTS. This Agreement may be executed in any number of counterparts and by different parties in separate counterparts. Each counterpart when so executed shall be deemed to be an original and all of which together shall constitute one and the same agreement.

22. BROKERS. The CITY, CPB2 and DOT each represent and warrant that they have not dealt with a real estate broker in connection with this transaction. CPB2 agrees to indemnify and hold harmless the CITY and DOT from any claims made by any broker

should CPB2's representation in this paragraph be false. To the extent permitted by law, the CITY and DOT agree to indemnify and hold harmless CPB2 from any claims made by any broker should the representation by the CITY or DOT 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 the closing.

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

CITY OF PORTLAND

Judith Rosen
WITNESS

By: Jon P. Jennings
Jon P. Jennings
Its: City Manager

CPB2 LLC

By: CPB2 Management LLC, Manager

Richard D. Prentice
WITNESS

By: Casey Prentice
Name: CASEY PRENTICE
Its: MANAGER

**MAINE DEPARTMENT OF
TRANSPORTATION**

Delubah Puskad
WITNESS

By: David Bernhardt
David Bernhardt
Its Commissioner

Approved as to Form:

MH
Corporation Counsel's Office

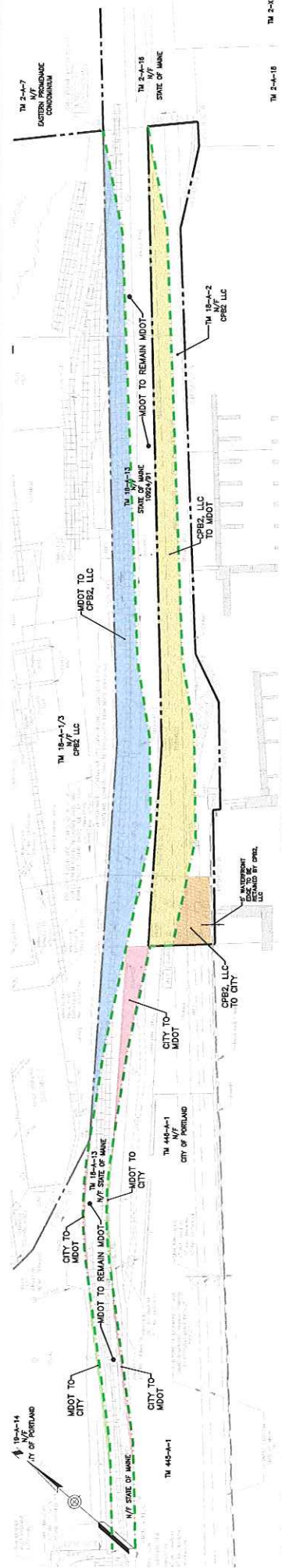
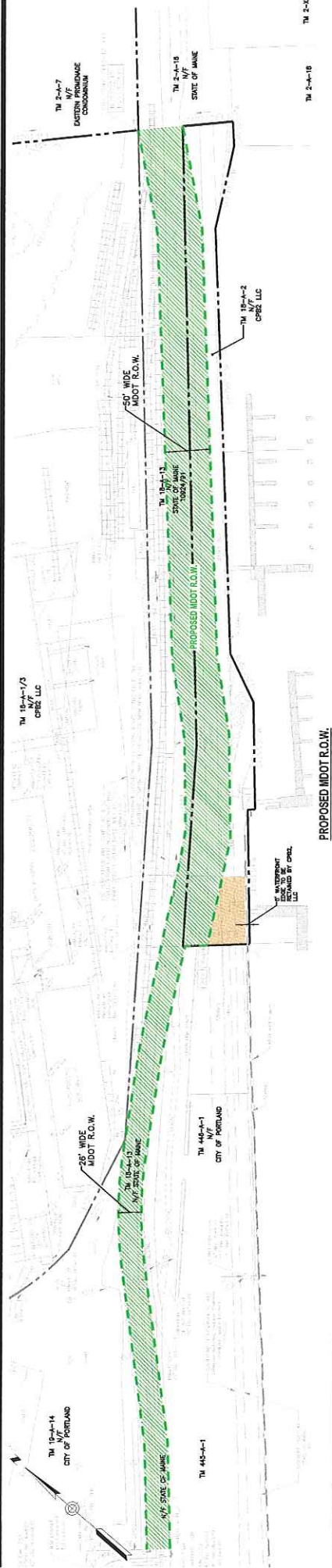
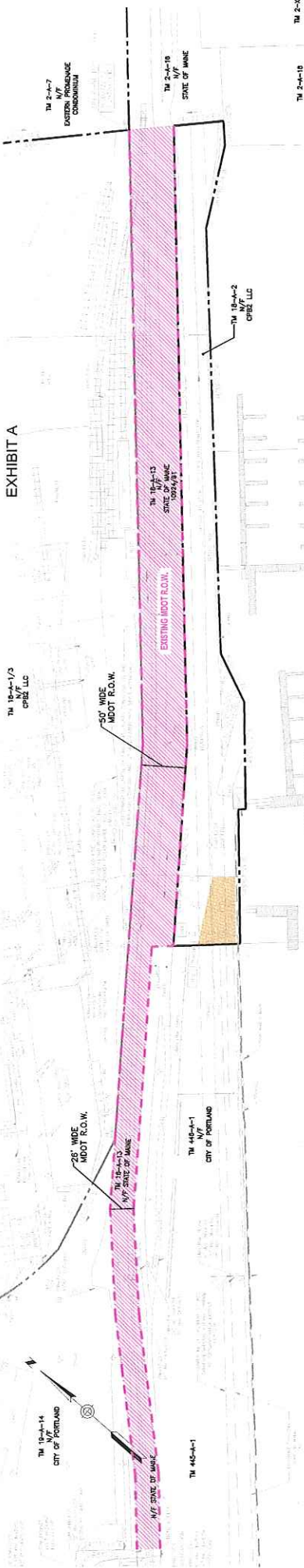


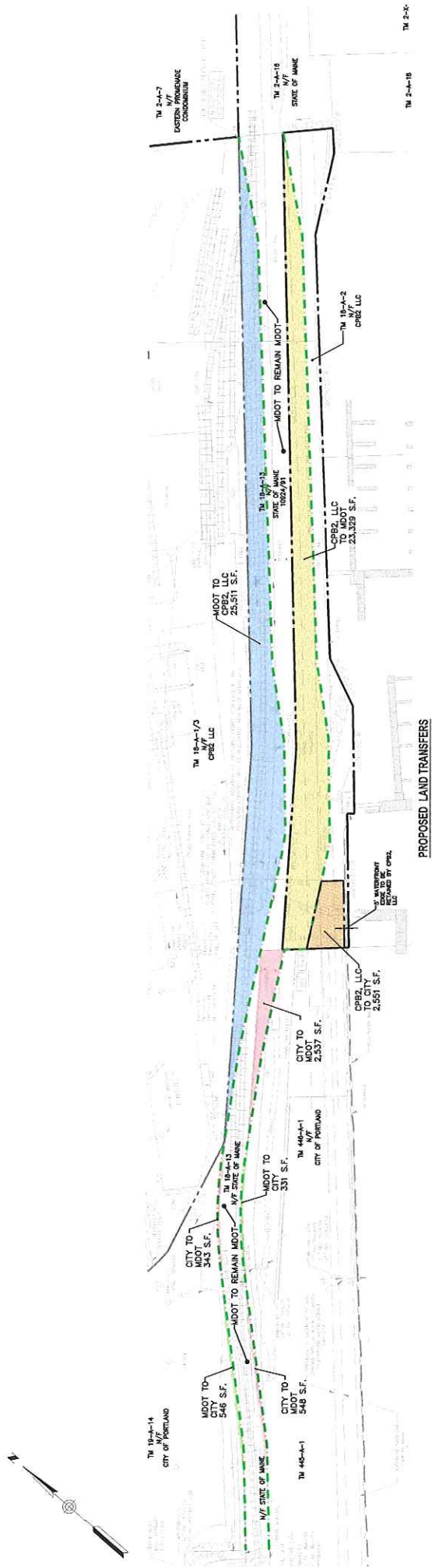
EXHIBIT A

PROPOSED LAND TRANSFERS
58 FORE STREET
 MDOT R.O.W. FIGURE - 1

PLAN REFERENCE
 FOR THE CITY OF PORTLAND, MAINE, PREPARED BY CHEN MARCELLI INC., PORTLAND, ME. SHEET
 HORIZONTAL DATUM: NAD 83; VERTICAL DATUM: MLLW; UNIT: FEET
 CHECK SHEET: 58-FS-01



Scale: 1" = 50'
 12/1/2016
CPB2
 CONSULTING PARTNERSHIP 155 CALVERT STREET, PORTLAND, ME 04108



PROPOSED LAND TRANSFERS

CITY

EXISTING CITY LAND TRANSFERRED TO	NEW CITY LAND TRANSFERRED FROM:	TOTAL S.F.
MDOT	546 S.F.	343 S.F.
	343 S.F.	2,537 S.F.
CPB2	0 S.F.	2,551 S.F.
	TOTAL	3,428 S.F.

MDOT

EXISTING MDOT LAND TRANSFERRED TO:	NEW MDOT LAND TRANSFERRED FROM:	TOTAL
CITY	546 S.F.	26,757 S.F.
	331 S.F.	
CPB2	25,511 S.F.	23,329 S.F.
	TOTAL	26,757 S.F.

CPB2

EXISTING CPB2 LAND TRANSFERRED TO:	NEW CPB2 LAND TRANSFERRED FROM:	TOTAL
CITY	2,551 S.F.	25,511 S.F.
MDOT	23,329 S.F.	25,511 S.F.
	TOTAL	25,511 S.F.

Scale: 1" = 50'
1/10/2017

OPB2ILLO
CIVIL ENGINEERING & ARCHITECTURE



PLAN REFERENCE
FOR THE CITY OF PORTLAND, ME. PREPARED BY OPEN MODEL, INC., PORTLAND, ME. SHEET
HORIZONTAL SCALE: 1" = 100'. VERTICAL SCALE: 1" = 20'. WEST ZONE, US FOOT
VERTICAL DATUM: CITY OF PORTLAND DATUM

58 FORE STREET
MDOT R.O.W. FIGURE - 2