

## **RESOLUTION NO. 1670**

### **A RESOLUTION APPROVING A PURCHASE AND SALE AGREEMENT FOR THE BURLINGAME PROPERTY**

#### **THE TROUTDALE CITY COUNCIL FINDS AS FOLLOWS:**


1. Approximately 7.5 acres of vacant property in the City of Troutdale is being subdivided into fifty-one (51) residential lots (the "Property").
2. The Property is located near Reynolds High School, existing commercial development and existing residential development.
3. The City anticipated acquiring and developing a park near the Property.
4. The eastern boundary of the Property is comprised of four lots and Tract A. The four lots and Tract A have large trees and a trail on them. Residents and patrons in the community are accustomed to using them.
5. It is in the City's best interest to preserve the trees, trails and customary use of the four lots and Tract A for park use by existing and future patrons and residents.
6. When the subdivision was approved the City asked the owners if they would dedicate the four lots and Tract A to the City for park use, or voluntarily agree not to build houses on the four lots and to allow them to be used by residents and patrons. The owners were willing to dedicate Tract A to the City but were unwilling to dedicate the four lots, or to forego developing them.
7. To further the City's interest, the City must purchase the four lots for park use.

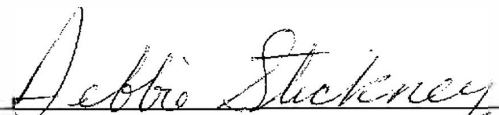
#### **NOW THEREFORE BE IT RESOLVED BY THE COUNCIL OF THE CITY OF TROUTDALE**

Section 1. A purchase and sale agreement, with terms that are substantially similar to those set forth in the Earnest Money Agreement for Purchase of Land, attached hereto as Exhibit A, is hereby approved. The City, acting through the City Administrator, shall acquire the four tracts identified on the proposed final plat as lots 48 through 51 in accordance with terms that are substantially similar to those in the attached Agreement.

Section 2. This resolution is effective immediately upon adoption.

**YEAS: 5**  
**NAYS: 1** Councilor Gorsek  
**ABSTAINED: 0**

  
Paul Thalhofer, Mayor  
Dated: 9-10-03

  
Debbie Stickney, City Recorder  
Adopted: September 9, 2003

**EARNEST MONEY AGREEMENT  
FOR PURCHASE OF LAND**

Multnomah County, Oregon  
August 14, 2003

**Seller:** Burlingame East LLC  
16 NE Hogan Drive, Suite 212  
Gresham, OR 97030

**Buyer:** City of Troutdale, an Oregon Municipal Corporation  
104 SE Kibling Avenue  
Troutdale OR 97060-2099

**AGREEMENTS**

1. **Purchase and Sale.** Seller agrees to sell to Buyer and Buyer agrees to purchase from Seller the real property in Multnomah County, Oregon, that will be developed into lots 48 through 51 in the Burlingame East Subdivision, shown in Exhibit A attached hereto and by this reference incorporated herein (the "Property"). All references to "Property" shall include all right, title and interest of Seller in and to: all streets, alleys, easements and rights-of-way in, on, across, in front of, abutting or adjoining the Property; all development rights, air rights, water rights and mineral rights; all licenses, permits, certificates of occupancy, approvals and entitlements issued, approved or granted by any governmental authority; any soils and environmental reports; and any other reports, studies, certificates, contracts or documents relating to the Property. The Property shall also include the public improvements that are required for all four lots, prior to the issuance of building permits, as described in paragraph 5(b). Seller and Buyer will attach an adequate legal description prior to Closing.

2. **Purchase Price and Payment.** The total purchase price for the Property shall be TWO HUNDRED AND FIFTY TWO THOUSAND DOLLARS (\$252,000), which shall be paid as follows:

(a) An initial payment of FOUR THOUSAND (\$4,000) dollars is being provided as earnest money with delivery of this Earnest Money Agreement for Purchase of Land ("Agreement").

(b) The balance of the purchase price TWO HUNDRED FORTY EIGHT THOUSAND DOLLARS (\$248,000) shall be paid in cash at Closing.

3. **Earnest Money Deposit.** Accompanying this Agreement is an earnest money deposit in the form of a check, made payable to the Seller. Seller shall establish an escrow at First

American Title (the "Escrow Agent") and deposit this check with the Escrow Agent. The earnest money shall be nonrefundable except as otherwise provided herein, but shall be applied to the purchase price. Buyer shall have the right to cause the Escrow Agent to deposit the cash earnest money in a federally insured interest bearing account, with the interest to accrue for the benefit of Buyer.

4. **Title Report.** Within ten (10) days of the date that Multnomah County accepts the final subdivision plat for the Burlingame East Subdivision, Seller shall order and cause to be delivered to Buyer a preliminary title report (the "Preliminary Commitment") from Escrow Agent. Buyer shall have not later than thirty (30) days after receipt of the Preliminary Commitment, together with legible copies of all documents shown therein as exceptions to title, within which to give notice in writing to Seller of any objection to such title or to any liens, encumbrances or conditions affecting the Property. In the event Buyer fails to raise any such objection within such thirty (30) day period, all conditions and exceptions to title set forth in such Preliminary Commitment shall be "Permitted Exceptions." In the event Buyer objects to an exception to title, or a condition on the property, Seller shall be obligated to notify Buyer within ten (10) days after notice of such objection whether Seller is able to remove such exception or condition. If Seller is able to remove such exception or condition, Seller shall do so at or prior to closing. If Seller is not able to remove the objected-to exception or condition, Buyer may, by written notice to Seller within ten (10) days after notice of Seller's inability to remove such exception, terminate this Agreement, or Buyer may elect to acquire the Property subject to such exception or condition. All exceptions and conditions described in the Preliminary Commitment and not removed or to be removed pursuant to this paragraph 4 shall be "Permitted Exceptions."

5. **Contingencies.** Buyer's obligation to close the sale and purchase shall be subject to the satisfaction or waiver by Buyer of all of the following conditions:

(a) Seller's conveyance of the Burlingame East Subdivision, absent the lots the Seller anticipates will be developed into lots 48 through 51, to Palace Construction Corp. in accordance with the Purchase and Sale Agreement and Receipt for Earnest Money between Seller and Palace Construction Corp. dated July 29, 2003.

(b) Completion of the public improvements for the Burlingame East Subdivision that are required prior to the issuance of building permits for construction on individual lots, including but not limited to the first layer of asphalt on the streets, corner sidewalks, curbs, gutters, street trees and water, sewer and storm infrastructure. The improvements shall be made to and for the benefit of the Property, to the Buyer's reasonable satisfaction and at the Seller's expense.

(c) Buyer's approval of title as set forth in paragraph 4 of this Agreement and approval of the condition of the Property following the inspections that are authorized under paragraphs 8 and 9, within the time period specified in paragraph 4.

If condition 5(c) is timely satisfied or waived, Buyer shall give Seller written notice

thereof. Seller shall give Buyer timely notice that conditions 5(a) and (b) have been satisfied. If Buyer shall fail to give written notice to Seller of the timely satisfaction or waiver of condition 5(c), or Seller shall fail to give Buyer timely notice that conditions 5(a) and (b) have been satisfied, this Agreement shall terminate and Buyer's earnest money with interest shall be returned to it. As set forth below, the sale is to close within ten (10) days following satisfaction of all the conditions in this paragraph and written notice from the Seller.

6. **Representations and Warranties.** Seller represents and warrants to Buyer that:

(a) To Seller's knowledge, the Property complies with all applicable building codes, environmental, flood zone, planning, fire, health, traffic, and similar laws, zoning and land use laws, and other applicable local, state and federal laws, codes, rules, ordinances, regulations and requirements and is not in violation of any agreements, covenants, conditions or restrictions affecting the Property.

(b) Seller has received no notice from any governmental agency having jurisdiction in the matter of any violation of any statute, law, ordinance, deed restriction or rules or regulations with respect to the existence, construction, maintenance or operation of the Property.

(c) Risk of loss or damage to the Property shall be Seller's until Closing and Buyer's at and after Closing.

(d) Except for Seller's representations set forth in this Agreement, Buyer shall acquire the property "AS IS" with all faults and Buyer shall rely on the results of its own inspection of the Property.

(e) It shall be a condition of Buyers obligation to close, and of Sellers right to retain the Earnest Money as of Closing, that all of the Sellers representations and warranties and investigation in Buyers acquisition stated in this Agreement are materially true and correct on the closing date.

(f) Seller has the legal power, right and authority to enter into this Agreement and to consummate the transactions contemplated hereby. The individual executing this instrument on behalf of Seller has the legal power, right and actual authority to bind Seller to the terms and conditions of this Agreement. All requisite action (corporate or limited liability company) of such party has been taken in connection with entering into this Agreement and the documents referenced herein, and the consummation of the transaction contemplated hereby.

(g) Seller's representations and warranties stated in this Agreement shall survive Closing for one (1) year.

7. **Right of Entry.** Buyer, its authorized agents, employees and independent contractors are hereby granted the right to enter upon the Property at reasonable times, for the

purpose of making or conducting any inspection, investigation, test or survey reasonably related to the purchase of the Property or the satisfaction of Buyer's contingencies hereunder, subject to the following:

(a) Any damage to the Property shall be promptly repaired and the Property restored to the same state as existed prior to such entry.

(b) Buyer shall keep the Property free from liens in connection with any such entry.

(c) Buyer shall indemnify, defend and hold Seller harmless of and from any and all claims, demands, actions and liabilities that may arise or result from Buyer's activities on the Property in connection with any such entry.

8. **Environmental.** Within the period set forth in paragraph 5(c) in which Buyer is to satisfy itself as to the condition of the Property, Buyer, at its expense, may obtain a Level I environmental assessment or such environmental assessment, audit, inspection or testing as Buyer deems appropriate.

9. **Condemnation.** If prior to the closing date condemnation proceedings are commenced against the Property or any part thereof, then at Buyer's option, (i) this Agreement shall terminate, and the earnest money shall be returned to Buyer and neither party shall have any further rights or obligations hereunder, or (ii) the Closing shall proceed as provided pursuant to this Agreement and Buyer shall receive any condemnation proceeds attributable to condemnation, which proceeds shall not be credited against Buyer's obligation to pay the purchase price.

10. **Closing, Escrow, Prorates.** Closing shall occur within ten (10) days after the conditions in paragraphs 5(a) (b) and (c) have been satisfied and the Seller provides the Buyer written notice that the conditions have been satisfied. If the conditions in paragraph 5 are not timely satisfied or waived by March 1, 2003, Buyer may terminate this agreement. If Buyer terminates this agreement because the conditions have not been satisfied or waived by March 1, 2003, Seller shall return the earnest money deposit with interest. The purchase of the Property shall be closed in escrow by the Escrow Agent. Prior to Closing, each party will deposit with the Escrow Agent the funds, documents and instructions necessary for Closing. The cost of the escrow shall be shared equally by Seller and Buyer. Current real property taxes on the Property and deferred taxes will be paid by Seller prior to recording the final subdivision plat.

11. **Warranty Deed, Title Insurance.** Upon closing, the Property shall be conveyed to Buyer by statutory warranty deed, free of encumbrances except for the Permitted Exceptions and an existing encroachment on proposed lot 48. At closing, Seller, at Seller's expense, shall deliver to Buyer a standard title insurance policy in the amount of the total purchase price insuring title to be vested in Buyer subject only to the standard printed exceptions and the exceptions authorized to be

included in the statutory warranty deed. Buyer may obtain an extended coverage ALTA owner's policy of title insurance at Buyer's expense.

12. **Broker.** The parties represent and warrant to one another that there are no real estate brokers or salespersons involved in this transaction on behalf of the Buyer and that Donna Burlingame, Bret Burlingame and Bridget Burlingame, are licensed real estate brokers and are affiliated with the Seller.

13. **Other Closing Matters.** Buyer's obligation to close is subject to performance by Seller of all of its obligations pursuant to this Agreement, as well as performance of all of Seller's obligations pursuant to the Palace Construction Corp. Purchase and Sale Agreement, and the accuracy of Seller's representations and warranties at the closing date. Buyer shall be entitled to possession of the Property on the closing date.

14. **Default by Seller.** In the event this purchase and sale does not close by reason of any default of Seller, Buyer shall be entitled to the return of the earnest money together with any interest accrued thereon, notwithstanding the provisions of this Agreement stating the same to be nonrefundable, and Buyer shall have the right to pursue any other remedy available to it at law or in equity for such default, including the specific performance of this Agreement.

15. **Default by Buyer.** IN THE EVENT THIS PURCHASE AND SALE DOES NOT CLOSE BY REASON OF ANY DEFAULT OF BUYER, BUYER AND SELLER AGREE THAT IT WOULD BE IMPRACTICAL AND EXTREMELY DIFFICULT TO ESTIMATE THE DAMAGES WHICH SELLER MAY SUFFER. THEREFORE, BUYER AND SELLER DO HEREBY AGREE THAT A REASONABLE ESTIMATE OF THE TOTAL NET DETRIMENT THAT SELLER WOULD SUFFER IN THAT EVENT THAT BUYER DEFAULTS AND FAILS TO COMPLETE THE PURCHASE OF THE PROPERTY IS AND SHALL BE AS SELLER'S SOLE AND EXCLUSIVE REMEDY (WHETHER AT LAW OR IN EQUITY), AN AMOUNT EQUAL TO THE EARNEST MONEY DEPOSIT HELD BY THE ESCROW AGENT. SAID AMOUNT SHALL BE THE FULL, AGREED AND LIQUIDATED DAMAGES FOR THE BREACH OF THIS AGREEMENT BY BUYER, ALL OTHER CLAIMS TO DAMAGES OR OTHER REMEDIES BEING HEREIN EXPRESSLY WAIVED BY SELLER. UPON DEFAULT BY BUYER, THIS AGREEMENT SHALL BE TERMINATED AND NEITHER PARTY SHALL HAVE ANY FURTHER RIGHTS OR OBLIGATIONS HEREUNDER, EACH TO THE OTHER, EXCEPT FOR THE RIGHT OF SELLER TO COLLECT SUCH LIQUIDATED DAMAGES FROM BUYER AND THE ESCROW AGENT.

16. **General and Miscellaneous Provisions.**

(a) **Prior Agreements.** This instrument is the entire, final and complete agreement of the parties pertaining to the sale and purchase of the Property, and supersedes and replaces all written and oral agreements heretofore made or existing by and between the parties or their representatives insofar as the Property is concerned. Neither party shall be bound by any

promises, representations or agreements except as are herein expressly set forth.

(b) **Time is of the Essence.** Time is expressly made of the essence of each provision of this Agreement.

(c) **Notices.** Any notice required or permitted under this Agreement shall be in writing and shall be given when actually delivered in person or forty-eight (48) hours after having been deposited in the United States mail as certified or registered mail addressed to the addresses set forth below the names of the parties on the first page hereof, or to such other address as one party may indicate by written notice to the other party.

(d) **Attorney Fees and Costs.** In the event legal action is commenced in connection with this Agreement, the prevailing party in such action shall be entitled to recover its reasonable attorney fees and costs incurred therein.

(e) **Nonwaiver.** Failure by either party at any time to require performance by the other party of any of the provisions hereof shall in no way affect the party's rights hereunder to enforce the same, nor shall any waiver by the party of the breach hereof be held to be a waiver of any succeeding breach or a waiver of this nonwaiver clause.

(f) **No Merger.** The obligations set forth in this Agreement shall not merge with the transfer or conveyance of title to any party of the Property but shall remain in effect until fulfilled.

(g) **Amendments.** This Agreement may be amended, modified or extended without new consideration but only by written instrument executed by both parties.

(h) **Governing Law.** This Agreement shall be construed in accordance with and governed by the laws of the state of Oregon.

(i) **Severability.** If any portion of this Agreement shall be invalid or unenforceable to any extent, the validity of the remaining provisions shall not be affected thereby.

(j) **Counting of Days.** Whenever a time period is set forth in days in this Agreement, the first day from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday or legal holiday, including Sunday, in which event the period runs until the end of the next day which is not a Saturday or legal holiday.

(k) **Number, Gender and Captions.** In construing this Agreement, it is understood that if the context so requires the singular pronoun shall be taken to mean and include the plural, the masculine, the feminine and the neuter, and that generally all grammatical changes shall be made, assumed and implied to individuals and/or corporations and partnerships. All

captions and paragraph headings used herein are intended solely for convenience of reference and shall in no way limit any of the provisions of this Agreement.

(l) **Recording.** Upon request of either party, the parties shall execute in a form sufficient for recording a memorandum of this Agreement, which may be recorded at the expense of the party requesting the same.

(m) **Binding Effect.** The covenants, conditions and terms of this Agreement shall extend to and be binding upon and inure to the benefit of the heirs, personal representatives, successors and assigns of the parties hereto.

(n) **Execution in Counterparts.** This Agreement may be executed in any number of counterparts and by different parties hereto on separate counterparts, each of which counterparts, when so executed and delivered, shall be deemed to be an original and all of which counterparts, taken together, shall constitute but one and the same Agreement.

17. **Zoning and 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, WHICH, IN FARM OR FOREST ZONES, MAY NOT AUTHORIZE CONSTRUCTION OR SITING OF A RESIDENCE AND WHICH LIMIT LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930 IN ALL ZONES. 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 APPROVED USES AND EXISTENCE OF FIRE PROTECTION FOR STRUCTURES.

18. **Date of Execution.** The date of execution of this Agreement shall be deemed to be the last date of execution set forth below the name of the respective parties. If this Agreement has not been executed by both parties by 5:00 p.m. on Monday, August 25, 2003, and fully executed copies delivered to each party by that date and time, then this offer shall terminate.

BURLINGAME EAST LLC

THE CITY OF TROUTDALE

By: \_\_\_\_\_  
Donna Burlingame

By: \_\_\_\_\_  
Erik Kvarsten

Its: \_\_\_\_\_  
Manager

Its: \_\_\_\_\_  
City Administrator

Dated: \_\_\_\_\_, 2003

Dated: \_\_\_\_\_, 2003

**SELLER**

**BUYER**