



City of Foley, AL

407 E. Laurel Avenue
Foley, AL 36535

Signature Copy

Resolution: 19-1014-RES

File Number: 19-0024

Enactment Number: 19-1014-RES

A resolution to approve the sale of the Cactus Cafe/Historic Foley Bakery Building to Katapult Properties

WHEREAS, The City has received five offers for the purchase of the Cactus Cafe/Historic Foley Bakery Building from Azalea Fund, Mark White (owner of Moe's BBQ), Katapult Properties, Dyas, LLC and Michael Gunnels, and
WHEREAS, the City awarded the sale to Azalea Fund, and
WHEREAS, Azalea Fund was unable to follow through with the purchase, and
WHEREAS, the City has received another offer from Katapult Properties to purchase the Cactus Cafe/Historic Foley Bakery Building in the amount of \$100,000.00.

NOW THEREFORE BE IT RESOLVED that the City Council of the City of Foley, Alabama, as follows:

SECTION 1: Approves the sale of the Cactus Cafe/Historic Foley Bakery Building to Katapult Properties in the amount of \$100,000.00, contingent upon a 180 day due diligence and receipt of a non-refundable deposit.

SECTION 2: If the contingency is met, authorizes staff to negotiate details relevant to a mutually acceptable purchase agreement and closing documents to present to the Mayor for signature.

SECTION 3: This Resolution shall become effective immediately upon its adoption as required by law.

PASSED, APPROVED AND ADOPTED this 7th day of January 2019.



President's Signature

Date

1-9-19

Attest by City Clerk

Date

1-9-19

Mayor's Signature

Date

1/14/19

STATE OF ALABAMA
COUNTY OF BALDWIN

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PURCHASE AND SALE AGREEMENT

THIS AGREEMENT OF PURCHASE AND SALE (this "Agreement") is entered into this ____ day of _____ 2018, by and between **CITY OF FOLEY** ("Seller"), and **RETAIL MARKETS GROUP, LLC AND/OR ASSIGNS** ("Buyer").

1. **SALE AND PURCHASE.** Subject to the terms and conditions of this Agreement, Seller hereby agrees to sell and convey to Buyer, and Buyer hereby agrees to purchase from Seller fee simple interest in 118 W Laurel Ave including all improvements, personal property and equipment, located in Foley, AL, which is more particularly described on Exhibit A, which is attached hereto and incorporated herein by this reference. ("Property")

2. **PURCHASE PRICE.** The purchase price to be paid by Buyer to Seller for the Property shall be One Hundred Thousand Dollars (\$100,000.00) (the "Purchase Price"), which shall be due and payable and paid by Buyer to Seller as follows:

(a) **Earnest Money Deposit.** Within three (3) days of the Effective Date, One Thousand and no/100 Dollars (\$1,000.00) (the "Earnest Money Deposit") shall be deposited with Fairhope Title Services (the "Escrow Agent"). This Agreement shall constitute a binding contract upon receipt of the Earnest Money Deposit by the Escrow Agent and this agreement is signed by both Buyer and Seller.

(b) **Balance of the Purchase Price.** Buyer shall pay by certified funds or federal wire transfer to an account designated by the Escrow agent, an amount (the "Cash to Close") equal to the Purchase Price less the Earnest Money Deposit, subject to the closing costs and adjustments as set forth in paragraph 10.

3. **EVALUATION PERIOD.** Buyer shall have a period commencing on the date of a fully executed Agreement (the "Effective Date") and ending One Hundred Eighty (180) days thereafter to inspect the Property including but not limited to the Due Diligence items described on Exhibit "B" in the Seller's possession (the "Evaluation Period"), to make and conduct any and all investigations, tests, engineering evaluations, economic feasibility evaluations, design evaluations, review of county real estate taxes, building code and zoning records pertaining to the Property, and any other tests, studies, or evaluations which Buyer may, in its sole discretion, deem necessary or desirable in order to evaluate the Property. Buyer or Buyer's agent and contractors shall have the right of access to the Property at any reasonable time during business hours for such studies to be conducted. All studies and tests made or conducted by or for Buyer shall be at Buyer's sole cost and expense. Buyer agrees to indemnify and hold Seller harmless from and against any and all liability, claims, damages, causes of action, costs and expenses that Seller may incur or suffer arising from or directly related to Buyer's inspection and testing of the Property hereunder, which indemnity agreement will survive the Closing or termination of this Agreement, as appropriate. If Buyer determines, in Buyer's sole discretion, that the Property is suitable for its anticipated use,

written notification of such acceptance may be given (the "Notice to Proceed") and the Earnest Money Deposit shall then be non-refundable and credited against the Purchase Price at Closing. If no such Notice to Proceed is given within such Evaluation Period, the Buyer shall be deemed to have elected to proceed and the Earnest Money Deposit shall then be non-refundable and credited against the Purchase Price at Closing. If Buyer determines, in Buyer's sole discretion, that the Property is not acceptable, then Buyer shall give written notification of such to Seller prior to the expiration of the Evaluation Period and the Earnest Money Deposit shall then be refunded to the Buyer ("Notice Not To Proceed").

4. CONVEYANCE OF SUBJECT PROPERTY. Provided that Seller has received the Purchase Price and all other sums due and owing from Buyer to Seller under this Agreement and provided further that Buyer has satisfactorily completed all of Buyer's obligations under this Agreement, at the time of the Closing hereunder, Seller shall convey title to the Property to Buyer by Warranty Deed, free of all encumbrances except as permitted in this Agreement (the "Permitted Exceptions"). As used herein, the term "Permitted Exceptions" shall mean any (i) Title Defect (as defined herein) shown or revealed by any title commitment procured by seller in accordance with paragraph 5 herein, (ii) matter of public record, or (iii) matter which would be revealed by an accurate survey, to which no timely objection is taken by Buyer prior to the expiration of the Evaluation Period. In addition, Permitted Exceptions shall include any other matters which Buyer waives, or is deemed to have waived hereunder, or which are permitted by the terms of this Agreement, or to which Buyer otherwise consents. Any Permitted Exceptions shall not be deemed to be Title Defects within the meaning of this Agreement. As used herein, "Title Defect" shall mean any exception other than a Permitted Exception which would render title unmarketable or otherwise adversely affect the Property, in Buyer's reasonable discretion.

If any title commitment or survey shall reveal a Title Defect to which Buyer makes objection prior to the expiration of the Evaluation Period, then Seller shall have the right (at Seller's sole option but Seller shall have no obligation) to take such action as may be necessary, at Seller's expense, to correct any Title Defect. If all such Title Defects timely objected to in writing by Buyer are corrected and remedied by Seller within five (5) business days after receipt of such timely written objection thereto from Buyer ("Cure Period") or agreed by Seller to be corrected or remedied on or prior to Closing, then this Agreement shall continue in full force and effect in the same manner and for all intents and purposes as if such Title Defect had never existed.

If any title commitment or survey shall reveal a Title Defect to which Buyer makes timely written objection prior to the expiration of the Evaluation Period, and Seller shall fail to remedy or agree to remedy such Title Defect within the Cure Period, then Buyer, at its election, shall either (the following rights shall be Buyer's sole and exclusive rights if Seller shall elect not to remedy or shall fail to remedy such Title Defects): (i) waive such uncured Title Defects, and accept such title as Seller is able to deliver subject to all uncured Title Defects, in which event the parties shall proceed with Closing under this Agreement in accordance with and subject to the terms and provisions hereof, without reduction in the Purchase Price, or (ii) terminate this Agreement, in which event the Earnest money deposit shall be refunded to Buyer, and thereupon this Agreement shall be and become null and void and all parties hereto shall be released from all further liability hereunder. Notwithstanding the foregoing, in the event that Closing occurs, Seller shall cure all objections that are monetary liens against the Property and all encumbrances that are placed on the Property by Seller after the date of this Agreement. Any such liens of record may be cleared and paid from Seller's closing proceeds.

5. **TITLE INSURANCE.** Buyer shall order within fifteen (15) business days of effective date, a commitment for standard form owner's title insurance policy, the cost of which to be borne by buyer, in the amount of the Purchase Price, insuring Buyer against loss on account of any defect or encumbrance in the title, subject to the Permitted Exceptions.

6. **SURVEY AND SUBDIVISION.** Seller shall provide within three (3) days of the effective date to Buyer a copy of its existing survey of the Property, if any.

7. **REPRESENTATIONS OF SELLER.** Seller represents and warrants to Buyer, as of the date hereof that the following are true and correct and each of the said representations shall be reaffirmed at Closing provided same are true and correct as of the date of Closing:

(a) Seller has and will convey good and indefeasible fee simple title to the Property, free and clear of any liens or encumbrances except for the Permitted Exceptions and has authority to contract and consummate the sale contemplated hereby without the joinder of any other person.

(b) To the best of Seller's knowledge, but without verification, no portion of the Property is affected by any special assessments.

(c) Seller has not received notice of any default, (nor is there any default), under any note or deed of trust or contract for deed related to the Property, and Seller covenants not to default thereunder nor to grant any liens, leases, easements, options, rights of refusal or contracts with respect to the Property during the term of this Agreement.

(d) Seller, to the best of Seller's knowledge, but without verification, has complied with all applicable laws, ordinances, and restrictions pertaining to or affecting the Property.

(e) Except as expressly mentioned in this Agreement or as may be imposed by the Permitted Exceptions, there are no agreements to which Seller is a party affecting the Property, and Seller will enter into no agreements affecting the Property without the prior written approval of Buyer so long as this Agreement shall remain in force and effect.

(f) There is no delinquent property tax, levy or assessment against the Property.

(g) Seller has received no written notice of any alleged violation of any fire, zoning, applicable comprehensive plans, building, health or environmental laws, regulations or rulings, whether federal, state or local, or of any other alleged violations of law which affect the Property.

8. **AGREEMENTS OF SELLER AND BUYER.** From the Effective Date of this Agreement until the Closing, the Seller shall:

(a) Not permit, within its knowledge, any hazardous or environmentally sensitive material to be handled, stored, treated, or disposed of on the Property.

(b) Permit the Buyer and any of Buyer's representatives to enter upon the Property to investigate the condition of the Property, including without limitation in order to conduct

inspections, make analysis, take core drillings and/or other intrusive samples, to conduct any environmental site assessment, and to perform such activities as the Buyer may deem appropriate.

(c) Promptly notify the Buyer of any material change in respect of the Property and its condition or any information furnished to the Buyer in respect of the Property, including without limitation, any change that would affect this Agreement.

(d) Not sell, assign, or convey any right, title or interest to the Property or allow any real estate procedural modifications affecting the Property or any part thereof, without the Buyer's prior written consent, so long as this Agreement shall remain in force and effect.

10. CLOSING. The Closing ("Closing") to take place at Fairhope Title Services 455 Magnolia Ave Suite C-1 Fairhope, AL 36532 No later than thirty (30) days after expiration of Evaluation Period, or Buyer's Notice to Proceed.

(i) Seller's Obligations at Closing. At Closing, Seller shall deliver to Buyer the following documents:

(a) Deed. Warranty Deed shall be executed by Seller conveying the Property to Buyer, subject to no exceptions other than the Permitted Exceptions of this Agreement.

(b) Foreign Persons. An affidavit of Seller certifying that Seller is not a "foreign person," as defined in the federal Foreign Investment in Real Property Tax Act of 1980, and the 1984 Tax Reform Act, as amended, if required by Title company.

(f) Seller's Affidavit used in executed by the Seller stating that Seller has caused no repairs or improvements to be made to the Property within the appropriate statutory period prior to Closing which remain unpaid at the time of Closing, except for work for which lien waivers have been obtained; that to Seller's knowledge there are no judgments, bankruptcies, liens, leases or other claims arising from Seller against the Property or against Seller that would create an encumbrance on upon the Property, except as otherwise specified herein, including the Permitted Exceptions. The affidavit called for herein shall, in any event, be sufficient to induce the title company to issue its owner's policy without exception for mechanic's and materialmen's liens, at its standard rates.

(g) Other Documents. All other documents that both the Seller's and Buyer's attorneys and the Title Company may reasonably require to properly consummate this sale.

(ii) Buyer's Obligation at Closing. At Closing, Buyer shall deliver to Seller the following:

(a) Purchase Price. The Purchase Price by certified funds or wire transfer of immediately available funds, less the Earnest Money held by the Escrow Agent.

(c) Other Documents. All other documents that the Seller's and Buyer's attorneys or the Title Company may reasonably require to properly consummate this sale.

(iii) **Closing Costs.** Buyer shall pay all closing settlement (escrow) costs, owner's title insurance policy, deed preparation, transfer fees and the deed recordation fee. Each party shall be responsible for the payment of its own attorneys' fees.

11. REAL ESTATE COMMISSIONS AND DISCLOSURE. Buyer and seller warrants and represents that no agent, broker, or finder has acted for the Buyer or seller in connection with this Agreement or is entitled to compensation on account of the transactions contemplated hereby. One or more members of the Buying entity are licensed Alabama Real Estate agents.

12. DEFAULTS AND REMEDIES.

(a) If Seller has performed its covenants and obligations and is not otherwise in default hereunder, but Buyer has breached its covenants, warranties, representations, agreements, undertakings, or obligations or is otherwise in default hereunder and, as a result, is unable to consummate the purchase and sale contemplated herein at closing, then the remedies of Seller shall be to: (i) terminate this Agreement by giving Buyer written notice of termination, in which event the Earnest Money Deposit shall be forthwith paid to Seller by the Escrow Agent, and the parties hereto shall have no further rights or obligations to each other under this Agreement, either at law or in equity or otherwise (except as specifically stated herein to the contrary), or (ii) bring an action against Buyer for specific performance of its obligations hereunder purchase the Property from Seller, provided, however that Seller must file suit for specific performance within ninety (90) days after any alleged default, or else, the remedy of specific performance is waived and not available.

(b) If Buyer has performed its covenants and obligations and is not otherwise in default hereunder, but Seller has breached its covenants, warranties, representations, agreements, undertakings, or obligations or is otherwise in default hereunder and, as a result, is unable to consummate the purchase and sale contemplated herein at closing and if Seller fails to cure such breach or default within ten (10) days after notice thereof from Buyer, then the remedies of Buyer shall be to: (i) terminate this Agreement by giving Seller written notice of termination, in which event the Earnest Money Deposit shall be forthwith returned to Buyer, and the parties hereto shall have no further rights or obligations to each other under this Agreement, either at law or in equity or otherwise (except as specifically stated herein to the contrary), or (ii) bring an action against Seller for specific performance of its obligations hereunder to sell and convey the Property to Buyer, provided, however that Buyer must file suit for specific performance within ninety (90) days after any alleged default, or else, the remedy of specific performance is waived and not available. .

13. NOTICES. All notices shall be in writing and shall be deemed effective when personally delivered to the address of the party to receive such notice set forth below if effected by telecopy, hand delivery or by Federal Express or similar courier service, or, whether actually received or not, when deposited in any post office or mail receptacle regularly maintained by the United States Government, certified or registered mail, return receipt requested, postage prepaid, addressed as follows:

If to Seller: City of Foley
Attn:

Foley, AL 36535
Tel:
E-mail:

If to Buyer: Retail Markets Group, LLC
Attn: Jeremy Friedman
19940 State Hwy 181
Fairhope, AL 36532
Tel: 251-929-9295
jeremy@katapultproperties.com

14. **ASSIGNMENT.** Buyer shall have the right to assign this Agreement without Seller's consent.

15. **EXCHANGE COOPERATION.** In the event Buyer is acquiring the Property as replacement property in connection with a deferred exchange or reverse exchange, Seller shall cooperate with Buyer in effecting such like kind exchange by Buyer pursuant to and in accordance with the provisions of Section 1031 of the Internal Revenue Code of 1986, as amended, and the Treasury regulations promulgated thereunder at no cost to Seller. Buyer acknowledges and agrees that Seller makes no and disclaims any representations concerning the suitability, qualification, or legal sufficiency of the Property for use in connection with any like kind exchange contemplated or consummated by Buyer. Seller's obligation to cooperate hereunder shall not preclude or otherwise prevent Seller from exercising or enforcing any rights which Seller has under this Agreement. This Agreement shall be freely assignable by Buyer so that the Buyer may meet all requirements of law with respect to "tax free exchanges." Buyer shall indemnify and hold Seller harmless from any liability or expense as a result of Buyer completing a tax free exchange. In no event shall Buyer's desire to accomplish a tax free exchange delay the Closing, and Seller shall not be required to take title to any 3rd party property.

Seller may desire to complete a tax free exchange under Section 1031 of the Internal Revenue Code in connection with the sale or purchase of the Property, in which event the Closing shall be coordinate with a qualified delayed exchange intermediary or a qualified exchange escrow agent as the exchange facilitator with full powers to complete the exchange or a qualified exchange escrow agent. The exchange facilitator will instruct the Seller or Buyer as to the manner in which title shall be conveyed to the Buyer. There will be no additional expenses to the Buyer as the result of Seller completing a tax free exchange. Buyer agrees to cooperate with Seller and its exchange facilitator to allow the completion of the exchange. Seller shall indemnify and hold Buyer harmless from any liability or expense as a result of Seller completing a tax free exchange. In no event shall Seller's desire to accomplish a tax free exchange delay the Closing, and Buyer shall not be required to take title to any 3rd party property.

16. **ENTIRE AGREEMENT.** This Agreement constitutes the entire agreement between Buyer and Seller regarding the Property, and supersedes all prior discussions, negotiations and agreements between Buyer and Seller, whether oral or written. Neither Buyer nor Seller shall be

bound by any understanding, agreement, promise, or representation concerning the Property, expressed or implied, not specified herein.

17. **AMENDMENT.** This Agreement may be amended only by a written instrument executed by the party or parties to be bound thereby.

18. **TIME OF ESSENCE.** Time is of the essence of this Agreement. Any time period provided for in this Agreement that expires on a Saturday, Sunday, or legal holiday shall extend to the next full business day.

19. **GOVERNING LAW.** This Contract, and all of the rights and duties of the parties arising from or relating in any way to the subject matter hereof or the transaction contemplated hereby, shall be governed by, construed and enforced in accordance with the laws of the State of Alabama (excluding any conflicts-of-law rule or principle that might refer the construction of this Contract to the laws of another jurisdiction); and all obligations of the parties created hereunder shall be performable in Baldwin County, AL. All parties to this Agreement agree and consent to the exclusive jurisdiction, for any legal proceeding involving anything pertaining to this Agreement, shall be in the Circuit Court of Baldwin County, AL. The prevailing party in a proceeding shall be entitled to an award of a reasonable attorney's fee and costs of court. Seller and Buyer hereby waive any right to trial by jury and any right to punitive damages on any claim, counterclaim, setoff, demand, action or cause of actions (a) arising out of or in any way pertaining or relating to this contract, or (b) in any way connected with or pertaining or related to or incidental to any dealings of the parties hereto with respect to the contract or in connection with the transactions related thereto or contemplated thereby or the exercise of either party's rights and remedies thereunder, in all of the foregoing cases whether now existing or hereafter arising, and whether sounding in contract, tort or otherwise. Seller and Buyer agree that either party may file a copy of this paragraph with any court as written evidence of the knowing, voluntary and bargained agreement of each party irrevocably waiving their right to trial by jury and to punitive damages, and that any dispute or controversy whatsoever between Seller and Buyer shall only be tried by a judge sitting without a jury.

20. **EXPIRATION OF OFFER.** In the event that Purchaser's written acceptance of this offer has not been delivered to Seller by 5:00PM Friday January 11th, 2019 the same shall automatically become null and void and all obligations of the Purchaser hereunder shall be extinguished.

21. **COUNTERPARTS.** Any number of counterparts of this Agreement may be executed, and each such counterpart shall be deemed to be an original instrument, but all such counterparts together shall constitute but one agreement.

IN WITNESS WHEREOF, Seller and Buyer have caused this Agreement to be executed and delivered as of the date first above written.

SELLER:

CITY OF FOLEY

Date of Execution: _____

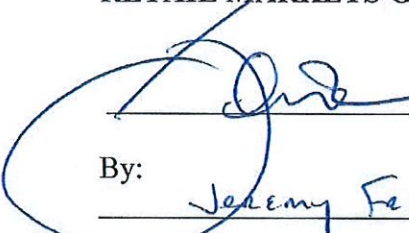
By: _____

Its: _____

BUYER:

RETAIL MARKETS GROUP, LLC

Date of Execution: 12/27/18

By:  _____

Its: _____

Member

EXHIBIT "A"

LEGAL DESCRIPTION

lots 9, 10, 11, and 12 in Block 10 in the City of Foley, according to the plat of record in the office of the Judge of Probate of Baldwin County, Alabama in Map Book 1, page 25. Tax Parcel ID Number 05-54-09-29-1-101-014.000

EXHIBIT "B"

DUE DILIGENCE ITEMS

- 1) Existing Survey of subject property if any
- 2) Any historical data pertaining to the buildings history including photographs in the seller's possession if any.
- 3) Copies of any reports by owner, third-party consultants or governmental entities concerning environmental, soil, civil, structural etc.
- 4) Existing title commitment with all appropriate backup documentation if any.
- 5) All information pertaining to roof replacement including but not limited to invoices and warranty information.