

DEVELOPMENT AGREEMENT

This DEVELOPMENT AGREEMENT ("**Agreement**"), made as of this ___ day of _____, 2024, by and between the TOWN OF FALMOUTH, a municipal corporation organized under the laws of the State of Maine and situated in Cumberland County (the "**Town**"), and Scittery Woods Partners, a Maine Limited Liability Company ("**Developer**"). Town and Developer are sometimes each individually referred to herein as a "**Party**," and collectively as the "**Parties**".

RECITALS

WHEREAS, the Town owns property located at 2 Marshall Drive (off Woods Road), Falmouth, Maine, an approximately 25 acre parcel of land referred to as Tax Map R01, Lot 1, as shown on Exhibit A hereto (the "**Property**"); and

WHEREAS, a portion of the Property consisting of approximately 5 acres currently includes the Falmouth Police Department headquarters, and a portion of the Property consisting of approximately 20 acres is vacant land (the "**Development Area**"), as depicted on Exhibit B hereto; and

WHEREAS, the Town issued a Request for Qualifications on March 20, 2023 seeking interest in developing the Development Area for workforce housing, attached hereto as Exhibit C, and a Request for Proposals on February 13, 2024 seeking parties interested in purchasing a portion of the Development Area from the Town for the purpose of developing housing targeted at households with specified income levels, attached hereto as Exhibit D, (the "**RFP**"); and

WHEREAS, the Developer submitted a proposal dated March 14, 2024 (the "**Proposal**") to develop forty-nine (49), two bedroom, 1.5 bathroom townhomes to be sold at a price of \$425,000, as further described in Exhibit E attached (the "**Project**"); and

WHEREAS, the Town Council expressed interest in the Project and requested that this Agreement be developed for the purpose of establishing certain terms and conditions upon which the Town and the Developer will engage in further negotiation regarding the terms of the sale of a portion of the Development Area and the conditions of development on a portion of the Development Area; and

NOW, THEREFORE, in consideration of the foregoing, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

ARTICLE I TOWN OBLIGATIONS

Section 1.01 Sale of Development Area.

(a) The Town has offered to sell and the Developer has agreed to the Development Area for the price of \$500,000, subject to any and all conditions the Parties

may hereafter agree upon. Following approval of this Development Agreement, the Parties shall negotiate and enter into a Purchase and Sale Agreement, Option Agreement, or some other form of real estate contract to be drafted by the Town related to the sale of the Development Area, which shall provide the Developer with a mutually agreeable time period to conduct all necessary due diligence with regard to the Development Area prior to closing on the sale of the Development Area. The Parties shall further negotiate and agree upon their respective obligations to ensure that a formal survey of the full Development Area and any other studies that the Town or the Developer may require are completed prior to closing. The closing on the sale of the Development Area shall be contingent upon the Developer receiving all necessary approvals to develop the Project.

(b) The Town shall provide the Developer with an easement and any other rights necessary to access the Development Area for purposes of planning, design, survey, testing, and other due diligence necessary to purchase the Project Area and complete the Project. The details of such access shall be negotiated and set forth in the real estate contract related to the sale of the Project Area as set forth above.

Section 1.02 Land Sale Proceeds.

(a) The Town Council shall be solely responsible to determine the use of the proceeds of the sale of the Project Area to the Developer.

(b) The Developer has not requested financial assistance from the Town in connection with the development of the Project; however, the Town Council reserves the right to establish a TIF District to include the Development Area and use the tax revenue from such TIF District on any eligible project cost as may be authorized by the Town Council and Maine law.

Section 1.03 Town Manager Authority.

(a) The Town Council, by and through its approval of this Agreement, hereby authorizes the Town Manager and/or his designee(s) to act on its behalf for purposes of negotiating terms and conditions related to the sale of the Project Area to the Developer and the requirements for the Project related to access, trail development, affordability, sustainability, and/or any other elements of the Project identified in this Agreement to be further negotiated between the Parties.

ARTICLE II DEVELOPER OBLIGATIONS

Section 2.01 Due Diligence.

(a) The Developer shall be responsible for conducting all due diligence necessary to purchase the Project Area pursuant to the agreement to be negotiated by the Parties under Section 1.01, including, but not limited to surveys, wetland delineation, zoning analysis, and title research. The Developer shall bear the full cost of any such due

diligence conducted in connection with the purchase of the Project Area, unless otherwise agreed upon by the Parties in said agreement.

Section 2.02 Project Design and Approvals.

(a) The Developer's Proposal included a concept plan for the Project. The Developer has not requested any changes to zoning or other Town ordinances, or waivers of any applicable standards. The Developer shall be responsible for preparing a final development plan and receiving all necessary Town and State, if any, approvals.

(b) The final design of the Project shall include a dedicated open space area to the west of Scitterygusset Creek on the Development Area, the ownership of which shall be retained by the Developer, but which shall be open to the public and accessible by a pedestrian bridge to be constructed by the Developer as part of the Project. The Developer shall be responsible to construct trails within this open space area to the satisfaction of the Town. In no event shall the Developer be permitted to include additional housing or other development on the Development Area to the west of Scitterygusset Creek, and the Parties shall further negotiate the method of restricting the development of this area in perpetuity.

Section 2.03 Housing Types and Affordability.

(a) The Project as proposed includes forty-nine (49), three-story townhomes to be constructed within fourteen (14) buildings to the east of Scitterygusset Creek on the Project Area, subject to all necessary Town and State, if any, approvals. However, the Parties recognize that the Project is subject to change, including the number of buildings, the number of units (no fewer than 40 and no more than 55), the number of stories, and any other element of design of the Project or the site.

(b) The Developer shall covenant in a form of agreement to be approved by the Town that the units within the Project will be sold to the initial purchaser(s) for a price not to exceed \$425,000, inclusive of down payment. The Developer shall further covenant and certify in a form to be approved by the Town that all purchasers of units within the Project, including initial purchasers, have a household income that does not exceed 120% of the Area Median Income for a period of five (5) years following the first sale to the initial purchaser. For purposes of determining affordability of the units to purchasers, the Developer shall also take into consideration the costs of mortgage principal and interest, property taxes, mortgage insurance, homeowners insurance, and fees of a Homeowners' Association, if any. To the extent the Town establishes a buyer assistance program available to purchasers of units within the Project or purchasers of units within the Project receive down-payment assistance through a program established by another entity, the Developer agrees that such units shall be sold to purchasers with a household income not to exceed 120% of the Area Median Income for a period of ten (10) years following the first sale to the initial purchaser(s).

(c) The Developer shall covenant in a mutually acceptable form of agreement that the townhomes will be owner-occupied and the primary residence of the owner.

Rental of the units shall be prohibited during the period of required affordability covenant set forth in Section 2.03(b) above by a mechanism to be determined by the Town and the Developer. The Parties may agree on unique circumstances under which an exception may be granted for rent of the units within the first ten years; provided, however, that rentals for investment and income purposes shall be strictly prohibited. Furthermore, short-term rentals shall never be allowed.

Section 2.04 Access.

(a) The Developer shall be solely responsible for designing, constructing and ensuring the maintenance of a new road to serve the Project from Woods Road. The Town reserves sole discretion to accept the road, subject to its applicable ordinance provisions, and does not currently intend to accept the road as a public road. The Developer agrees to grant the Town a public easement over the road for the purpose of allowing the public to access the open space to the west of Scitterygusset Creek. The Town agrees to provide winter maintenance of the road serving the Project during the five-year period following the occupancy of the first unit within the Project. The Town reserves the right to extend the period of winter maintenance in the event that units within the Project remain affordable as set forth in Section 2.03(b) beyond the five-year period following initial occupancy of the units.

Section 2.05 Utilities.

(a) The Developer shall be responsible for connecting all units within the Project to public water and sewer utilities at its sole expense.

Section 2.06 Financing.

(a) The Developer shall be responsible for securing all financing necessary to complete the Project. The Developer has provided a conceptual budget within the Proposal, attached hereto as Exhibit E, and agrees to provide the Town Council with a detailed cash flow model for the Project in a form acceptable to the Town to be negotiated and executed by and between the Parties as a condition of closing on the Development Area pursuant to Section 1.01(a). The Developer further agrees that the cash flow model shall be a public record.

(b) The Developer agrees to seek and apply for any available funding or financing for which the Project may qualify from Maine State Housing Authority, and to assist initial homebuyers in seeking available funding or financing from Maine State Housing Authority. For the sake of clarity, the Developer shall not be obligated to accept any such funding.

Section 2.07 Efficiency and Sustainability.

(a) The Developer agrees to design and construct the Project to meet the LEED Silver certification through the use of materials including, for example, highly rated insulation, heat pumps, and other sustainable building materials.

(b) The Developer agrees to install within each unit's garage a junction box with a connection wired to a 60 amp 220V breaker in the main electrical panel that will accommodate the mounting of one Level 2 electric vehicle charging station for use by occupants and owners of the units within the Project and the electrical infrastructure necessary for the future installation of solar panels on units within the Project.

ARTICLE III TERM & TERMINATION

Section 3.01 Term. Unless sooner terminated, the term of this Agreement shall commence on the date hereof and continue until all obligations of Developer and the Town have been met.

Section 3.02 Termination by Developer.

(a) The Developer shall be permitted to terminate this Agreement and not pursue the Project upon 30 days' notice to the Town. In the event the Developer elects to terminate the Agreement and not move forward with the Project, the Developer shall be solely responsible for all costs associated with evaluation, design, planning, site preparation, and construction of the Project incurred prior to and up to the effective date of termination. In no event shall the Town be responsible for costs incurred by the Developer in connection with the Project if the Developer elects to terminate this Agreement.

Section 3.03 Termination by Town.

(a) The Town shall be permitted to terminate this Agreement in the event of default per Article V.

ARTICLE IV INDEMNIFICATION

Section 4.01 Indemnity by Developer. To the fullest extent permitted by law, Developer shall indemnify, defend, and hold harmless the Town, and each of the Town's employees, officials, officers, agents, consultants, attorneys, and assigns, from and against any and all liabilities, losses, claims, costs, damages, and expenses (including, without limitation, attorneys' fees, costs, and expenses, but specifically excluding any consequential, special, or punitive damages) arising from, relating to, or in connection with: (a) the gross negligence, fraud, or willful misconduct of Developer in performance of its obligations under this Agreement; (b) any materially false or misleading representation or warranty made by Developer in this Agreement; or (c) acts by Developer outside the scope of authority granted under this Agreement.

Section 4.02 Indemnity by Town. To the fullest extent permitted by law, the Town shall indemnify and hold harmless the Developer, and each of the Developer's employees, officials, officers, agents, consultants, attorneys, and assigns, from and against any and all liabilities, losses, claims, costs, damages, and expenses (including, without limitation, attorneys' fees, costs, and

expenses, but specifically excluding any consequential, special, or punitive damages) arising from, relating to, or in connection with the gross negligence, fraud, or willful misconduct of the Town in performance of its obligations under this Agreement. Under no circumstances shall the foregoing indemnification by the Town be construed to waive or otherwise limit any of the defenses, immunities, or limitations of liability available to the Town under the Maine Tort Claims Act, 14 M.R.S. § 8101, *et seq.*, or other applicable law.

Section 4.03 Limitation on Indemnities. Before enforcing its rights under Section 4.01 or Section 4.02 (as applicable), the Town and the Developer shall first seek defense and indemnity from any insurer that provides coverage for that claim, and/or any subcontractor that provides indemnity and defense for the claim, regardless of the cause of the claim, and the defense and indemnity obligations of each party will apply only to the extent that defense and indemnity is not timely provided by any applicable insurer or subcontractors.

Section 4.04 Survival. The provisions of this Article IV will survive the expiration or earlier termination of this Agreement.

ARTICLE V DEFAULT

Section 5.01 Default. The occurrence and continuance of any one or more of the following events, beyond the expiration of any applicable grace and/or cure period provided for herein, is an "Event of Default". In the event of an Event of Default, the non-defaulting party may deliver to the defaulting party a written notice of termination of this Development Agreement ("Termination Notice"), and in the event the defaulting party does not cure such Event of Default within thirty (30) days from the date of the Termination Notice, this Development Agreement shall terminate and neither party shall have any obligation to the other except as expressly survives this Agreement.

(a) **Monetary Default.** Any breach or default by either Developer or Town involving the payment of money under this Agreement; provided, however, that before such breach or default is deemed an Event of Default, the defaulting party shall have: (i) received notice from the Town of such breach or default; and (ii) failed to cure or remedy such breach or default within thirty (30) days following such notice.

(b) **Non-Monetary Default.** Any breach or default by either Developer or Town of any non-monetary covenant, duty, obligation, representation, or warranty under this Agreement; provided, however, that before such breach or default is deemed an Event of Default, the defaulting party shall have: (i) received notice from the non-defaulting party of such breach or default; and (ii) failed to cure or remedy such breach or default within thirty (30) days following the date of such notice.

(c) **Bankruptcy.** Developer experiences any of the following: (i) the filing of a voluntary petition under any federal or state law for the relief of debtors; (ii) the filing of an involuntary proceeding under any such law; (iii) the making of a general assignment for

the benefit of the assignor's creditors; (iv) the appointment of a receiver or trustee for a substantial portion of a person's assets; or (v) the seizure by a sheriff, receiver, or trustee of a substantial portion of a person's assets; provided, however, that no bankruptcy shall be deemed to have occurred in the case of an event described in clause (ii), (iv), or (v) above, until the proceeding, appointment, or seizure has been pending for sixty (60) days.

Section 5.02 Remedies Not Exclusive. Except as may otherwise be expressly provided in this Agreement: (a) the exercise of one or more of the rights and remedies under this Agreement shall not preclude the exercise of any other right or remedy under this Agreement, at law, or in equity; and (b) damages at law may not be an adequate remedy for a breach or threatened breach of this Agreement and in the event of a breach or threatened breach of any provision hereunder, the respective rights and obligations hereunder shall be enforceable by specific performance, injunction, or other equitable remedy.

Section 5.03 Force Majeure.

(a) Neither party shall be liable or responsible to the other party, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement (except for any obligations to make payments to the other party hereunder), when and to the extent such failure or delay is caused by a Force Majeure Event. The failure or inability of either party to perform its obligations in this Agreement due to a Force Majeure Event shall be excused for the duration of the Force Majeure Event and extended for a period equivalent to the period of such delay. Nothing contained in this Section shall excuse either party from paying in a timely fashion any payments due under the terms of this Agreement. For purposes of this Agreement, **Force Majeure Event** means any of the following events: (i) acts of God; (ii) floods, fires, earthquakes, explosions, or other natural disasters; (iii) war, invasions, hostilities (whether war is declared or not), terrorist threats or acts, riots or other civil unrest; (iv) moratorium on the issuance of governmental approvals; (v) governmental authority, proclamations, orders, laws, actions, or requests; (vi) embargoes or blockades in effect on or after the date of this Agreement; (vii) epidemics, pandemics, or other national or regional public health emergencies; (viii) strikes, labor stoppages or slowdowns, or other industrial disturbances; and (ix) shortages of supplies, adequate power, or transportation facilities. For the avoidance of doubt, a citizen petition initiated pursuant to the Town Charter or an appeal of any governmental action or approval is not considered a Force Majeure Event for purposes of this Agreement. To the extent any such action occurs, the Parties agree to meet and negotiate the impact of such action on the sale of the Development Area and/or the Project and the ability of the Parties to meet their respective obligations under this Agreement.

(b) Either party (the "**Noticing Party**") shall give the other party notice within five (5) days of the commencement of the Force Majeure Event, explaining the nature or cause of the delay and stating the period of time the delay is expected to continue. The Noticing Party shall use diligent efforts to minimize the effects of such Force Majeure Event. The Noticing Party shall resume the performance of its obligations as soon as reasonably practicable after the removal of the cause.

ARTICLE VI REPRESENTATIONS AND WARRANTIES

Section 6.01 Developer Representations. Developer hereby represents, warrants, and covenants to the Town as follows:

(a) Developer is a limited liability company, duly formed, validly existing, and in good standing under the laws of the State of Maine.

(b) Developer has all requisite power and authority, has taken all actions required by its organizational documents and applicable law, and has obtained all necessary consents, to: (i) execute and deliver this Agreement; and (ii) consummate the transactions contemplated by this Agreement. This Agreement has been duly authorized and properly executed and delivered and constitutes the valid and binding obligations of Developer, enforceable in accordance with its terms, subject to principles of equity, bankruptcy, insolvency, and other laws generally affecting creditors' rights and the enforcement of debtors' obligations.

(c) Developer shall be responsible for obtaining all necessary licenses, permits, approvals or other certifications necessary for Developer to perform its obligations under this Agreement.

(d) There are no violations of any federal, state or municipal laws, ordinances with regard to any portion of the Project and no written notice of any such violation has been issued by any governmental authority.

(e) There are no pending legal proceedings or administrative actions of any kind or character materially and adversely affecting the Developer's ability to enter into this Agreement or acquire an interest in the Project Area.

ARTICLE VII MISCELLANEOUS

Section 7.01 Notices. Unless specifically stated otherwise in this Agreement, all notices, waivers, and demands required or permitted under this Agreement shall be in writing and delivered to all other parties at the addresses below, by one of the following methods: (a) hand delivery, whereby delivery is deemed to have occurred at the time of delivery; (b) a nationally recognized overnight courier company, whereby delivery is deemed to have occurred the business day following deposit with the courier; (c) registered U.S. Mail, signature required and postage-prepaid, whereby delivery is deemed to have occurred on the third business day following deposit with the United States Postal Service; or (d) electronic transmission (facsimile or email), whereby delivery is deemed to have occurred at the end of the business day on which electronic transmission is completed. Any party may change its address for purposes of this Section 7.01 by giving written notice as provided in this Section 7.01. All notices and demands delivered by a party's attorney on

a party's behalf shall be deemed to have been delivered by said party. Notices shall be valid only if served in the manner provided in this Section 7.01.

To Town:

Nathan Poore
Town Manager
Town of Falmouth
271 Falmouth Road
Falmouth, ME 04105
Email: npoore@falmouthme.org

with a copy to:

Name: Alyssa Tibbetts
Address: 10 Free Street,
PO Box 4510
Portland, Maine 04112
Email: atibbetts@jensenbaird.com

To Developer:
with a copy to:

Section 7.02 Further Assurances. Each party agrees to do such things, perform such acts, and make, execute, acknowledge, and deliver such documents as may be reasonably necessary and customary to carry out the intent and purposes of this Agreement, so long as any of the foregoing do not materially increase any party's obligations hereunder or materially decrease any party's rights hereunder.

Section 7.03 Assignment; Successors and Assigns. The Parties shall not be permitted to assign any rights or delegate any obligations hereunder without the written approval of the Town, which shall not be unreasonably withheld. Any purported assignment or delegation in violation of this Section shall be null and void. No assignment or delegation shall relieve a party of any of its obligations hereunder. This Agreement shall be binding upon and shall inure to the benefit of the Parties hereto and their respective permitted successors and permitted assigns.

Section 7.04 No Third-Party Beneficiaries. This Agreement is for the sole benefit of the Parties hereto and their respective successors and permitted assigns and nothing herein, express or implied, is intended to or shall confer upon any other person or entity any legal or equitable right, benefit, or remedy of any nature whatsoever under or by reason of this Agreement.

Section 7.05 Governing Law. This Agreement shall be governed and construed in accordance with the laws of the State of Maine, without giving effect to any choice or conflict of law provision or rule (whether of the State of Maine or any other jurisdiction) that would cause the application of laws of any jurisdiction other than those of the State of Maine.

Section 7.06 Attorneys' Fees. If any action is brought by either party against the other in connection with, relating to, or arising out of this Agreement or any of the documents and instruments delivered in connection herewith or in connection with the transactions contemplated hereby, the prevailing party shall be entitled to recover from the other party its

reasonable out-of-pocket costs and expenses, including, without limitation, reasonable attorneys' fees, incurred in connection with the prosecution or defense of such action.

Section 7.07 Submission to Jurisdiction. The Parties hereby agree that any suit, action, or proceeding seeking to enforce any provision of, or based on any matter arising out of, relating to, or in connection with, this Agreement or the transactions contemplated hereby, whether in contract, tort, or otherwise, shall be brought in the federal or state courts of the State of Maine, so long as such courts shall have subject-matter jurisdiction over such suit, action, or proceeding, and that any cause of action arising out of this Agreement shall be deemed to have arisen from a transaction of business in the State of Maine. Each of the Parties hereby irrevocably consents to the jurisdiction of such courts (and of the appropriate appellate courts therefrom) in any such suit, action, or proceeding and irrevocably waives, to the fullest extent permitted by law, any objection that it may now or hereafter have to the laying of the venue of any such suit, action, or proceeding in any such court or that any such suit, action, or proceeding that is brought in any such court has been brought in an inconvenient forum. Service of process, summons, notice, or other document delivered by registered mail to the address set out in Section 7.01 shall be effective service of process for any suit, action, or other proceeding brought in any such court.

Section 7.08 Waiver of Jury Trial. EACH PARTY HEREBY EXPRESSLY AND UNCONDITIONALLY WAIVES, IN CONNECTION WITH ANY SUIT, ACTION, OR PROCEEDING BROUGHT BY THE OTHER PARTY HERETO UNDER THIS AGREEMENT OR IN CONNECTION WITH ANY TRANSACTION CONTEMPLATED HEREBY, ANY AND EVERY RIGHT EACH PARTY MAY HAVE TO A TRIAL BY JURY.

Section 7.09 Interpretation and Construction.

(a) **Headings.** Any captions or headings used in this Agreement are for convenience only and do not define or limit the scope of this Agreement.

(b) **Singular or Plural.** The singular of any term, including any defined term, shall include the plural and the plural of any term shall include the singular. The use of any pronoun regarding gender shall include the neutral, masculine, feminine, and plural.

Section 7.10 Severability. If any term or provision of this Agreement is determined to be invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction. Upon such determination that any term or other provision is invalid, illegal, or unenforceable, the Parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.

Section 7.11 Entire Agreement. This Agreement, together with all related exhibits and schedules, constitutes the sole and entire agreement of the Parties to this Agreement regarding the subject matter contained herein and therein, and supersedes all prior and contemporaneous

understandings, agreements, representations, and warranties, both written and oral, regarding such subject matter.

Section 7.12 Amendments. This Agreement may only be amended, modified, or supplemented by an agreement in writing signed by each party hereto.

Section 7.13 Waiver. No waiver by any party of any of the provisions hereof shall be effective unless explicitly set out in writing and signed by the party so waiving. No waiver by any party shall operate or be construed as a waiver in respect of any failure, breach, or default not expressly identified by such written waiver, whether of a similar or different character, and whether occurring before or after that waiver. No failure to exercise, or delay in exercising, any right, remedy, power, or privilege arising from this Agreement shall operate or be construed as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power, or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power, or privilege.

Section 7.14 Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall be deemed to be one and the same agreement. A signed copy of this Agreement delivered by facsimile, email, or other means of electronic transmission shall be deemed to have the same legal effect as delivery of an original signed copy of this Agreement.

*[REMAINDER OF THE PAGE INTENTIONALLY LEFT BLANK; SIGNATURE PAGE
FOLLOWS]*

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the date set forth above.

TOWN OF FALMOUTH:

By: _____
Name: Nathan Poore
Title: Town Manager

SCITTERY WOODS PARTNERS, LLC

By: _____
Name:
Title:

Exhibit A
Depiction of the Property

Exhibit B
Depiction of the Development Area

Exhibit C
Request for Qualifications

Exhibit D
Request for Proposals

Exhibit E
Developer's Proposal

Exhibit F
Project Area