



## SPECIAL CITY COUNCIL MEETING

*Members of the public also have the option to join the meeting over Zoom, a unique meeting ID and password will be provided once you register. To register, click on the link below or copy and paste this into your web browser:*  
[https://us06web.zoom.us/webinar/register/WN\\_DEWxD5J5Rwao9Yb2MDXr\\_Q](https://us06web.zoom.us/webinar/register/WN_DEWxD5J5Rwao9Yb2MDXr_Q)

### AGENDA

**DATE:** WEDNESDAY, APRIL 6, 2022  
**TIME:** 5:30PM  
**LOCATION:** EILEEN DONDERO FOLEY COUNCIL CHAMBERS  
**SUBJECT:** McINTYRE

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- I. CALL TO ORDER - Mayor McEachern
- II. ROLL CALL
- III. PUBLIC COMMENT SESSION
- IV. McINTYRE FEDERAL BUILDING DISPOSITION (SOBOW Square LLC, versus City of Portsmouth) *(See Attachment)*
- V. ADJOURNMENT

KELLI L. BARNABY, MMC/CNHMC  
CITY CLERK

**SETTLEMENT AGREEMENT**

This Settlement Agreement (this "Agreement") is made as of the \_\_\_ day of April, 2022, by and between the City of Portsmouth, a New Hampshire municipal corporation (the "City"), and SoBow Square, LLC, a Delaware limited liability company ("Developer") (together, the "Parties").

**Agreement**

For valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Parties, the Parties hereby agree as follows.

1. Settlement Contingent on Approval by General Services Administration ("GSA").

This settlement is subject to the GSA granting the City a minimum of six-month extension of time to file an application under the Historic Surplus Property Program (the "Application") to the National Park Service (the "NPS") for the McIntyre property (the "Property"). If the GSA does not grant such extension, this Agreement shall be null and void and the status quo immediately prior to execution of this Agreement shall be restored.

2. Dismissal of Lawsuit. Following the execution of this Agreement and upon the GSA's grant to the City of a minimum six month extension per paragraph 1, the City and Developer shall jointly file with the Rockingham County Superior Court a stipulation of dismissal of their Lawsuit with prejudice in the form attached as Exhibit 1.

3. Advancement of the Community Plan. The City and Developer shall work together cooperatively, each acting reasonably and in good faith, to advance the development of the Project consistent with the Community Plan, attached hereto as Exhibit 2. The City and Developer shall act reasonably in addressing further development and any changes to the Community Plan necessary to address engineering, design, and marketability concerns. The City's urban design, development, and planning firm Principle Group and the Developer's architect shall collaborate on further development and any necessary design/plan changes. The City administration and Developer shall cooperate in seeking to obtain NPS and local board approvals. The Parties acknowledge the timing concerns occasioned primarily due to the desire of the GSA to be relieved of its obligations with regard to the Property as soon as possible and agree to use their reasonable and best efforts cooperatively to address these timing concerns.

4. Expenses. The City shall reimburse Developer \$2 million for prior Project-related expenses that have been rendered unusable due to the changeover to the Community Plan. The reimbursed expenses do not include expenses that Developer incurred prior to its selection as Project developer by a prior City Council on January 16, 2018. The reimbursement shall be made by the City in three payments consisting of \$500,000 on or before May 15, 2022, \$1 million on or before

July 15, 2022, and \$500,000 on or before July 15, 2023. Until NPS and local board approvals are obtained beyond appeal, the City shall reimburse Developer's one half of the third-party costs incurred to advance the Project that are approved by the City in advance of when they are incurred, such approval not to be unreasonably withheld, conditioned or delayed. If after NPS and local board approvals are obtained, the transaction fails to close for any reason other than (a) Developer default, (b) Developer's inability to obtain financing, or (c) a reason within Developer's reasonable control, the City shall reimburse seventy-five (75) percent of all further third-party costs incurred by Developer that are reasonable and customary for a development of this nature. The City's obligation to reimburse Developer for expenses shall not extend to expenses incurred after the execution of the Ground Lease (as revised pursuant to paragraph 5 below).

5. City Contributions to the Costs of Project Development and Construction. The Parties acknowledge that public financial support from the City will be necessary to develop and construct the Community Plan. The Parties shall agree upon an updated financial pro forma for the construction of the revised project, each acting reasonably and in good faith. The updated pro forma will project a Rate of Return on Developer's invested capital of an unlevered return on Developer invested capital of 7.4% (the "Rate of Return"). The Developer's invested capital on which the

return shall be calculated shall not include expenses reimbursed pursuant to paragraph 3 above. The City and Developer will keep each other informed of and collaborate on updated to the pro forma during the planning of the Project. Upon the determination of the updated development and construction costs following completion of design and construction pricing prior to closing, the pro format shall be adjusted to reflect actual costs. The City shall enter such further agreements as necessary to (a) make financial contributions to the cost of development and construction of the Project (through infrastructure commitments and/or monetary payments the nature and timing of which shall be negotiated in good faith by the Parties) in amounts necessary to project the Rate of Return or (b) agree to changes to the Community Plan to reduce the Project's development and construction cost or to increase the Project's projected net income as necessary to project the Rate of Return. The City shall have no obligation to subsidize or contribute to costs of operating the Project incurred after completion thereof.

6. Amendments to Development Agreement; Approval of Ground Lease. Promptly following execution of this Agreement, the City and Developer shall, each acting reasonably and in good faith, negotiate and implement amendments to the Development Agreement necessary or appropriate to reflect the changes contemplated by this Agreement, including the construction of the

“Community Plan”. Furthermore, the City acknowledges that the draft form of Ground Lease previously negotiated by Developer and the City (having draft date December 7, 2019) is a substantially acceptable starting point for further negotiation thereof, subject to revisions necessary or appropriate to reflect the changes contemplated by this Agreement, such revisions to be negotiated reasonably and in good faith by the Parties.

7. Representations and Warranties of the City. The City hereby represents and warrants to the best of its knowledge and belief that:

A. The execution and delivery of this Agreement and the performance of the City's obligations hereunder have been duly authorized by such municipal action as necessary, and this Agreement constitutes the legal, valid and binding agreement of the City, enforceable against the City in accordance with its terms subject only to the conditions set out in this Agreement.

B. Subject to the conditions set out in this Agreement, neither the execution or delivery by the City of this Agreement, the performance by the City of its obligations in connection with the transactions contemplated hereby, nor the fulfillment by the City of the terms or conditions hereof conflicts with, violates or

results in a breach of any constitution, law or governmental regulation applicable to the City, or conflicts with, violates or results in a breach of any term or condition of any judgment or decree, or any agreement or instrument, to which the City is a party or by which the City or any of its properties or assets are bound, or constitutes a default thereunder.

- C. There is no action, suit or proceeding, at law or in equity, or official investigation before or by any court or Governmental Authority, pending or threatened against the City, or to the City's knowledge with respect to the Property, wherein an unfavorable decision, ruling or finding would materially adversely affect the performance by the City of its obligations hereunder or the performance by the City of its obligations under the transactions contemplated hereby, or which, in any way, questions or may adversely materially affect the validity or enforceability of this Agreement, or any other agreement or instrument entered into by the City in connection with the transactions contemplated hereby.

8. Representations and Warranties of Developer. Developer hereby represents and warrants to the best of its knowledge and belief that:

- A. Developer has the power and authority to execute, deliver and carry out the terms and provisions of this Agreement and all necessary action has been taken to authorize the execution, delivery and performance by it of this Agreement. This Agreement will, upon execution and delivery thereof by Developer, constitute valid, legal and binding obligations of Developer enforceable against Developer in accordance with the respective terms thereof.
- B. Neither the execution or delivery by Developer of this Agreement, the performance by Developer of its obligations in connection with the transactions contemplated hereby, nor the fulfillment by Developer of the terms or conditions hereof conflicts with, violates or results in a breach of any constitution, law or governmental regulation applicable to Developer, or conflicts with, violates or results in a breach of any term or condition of any judgment or decree, or any agreement or instrument, to which Developer is a party or by which Developer or any of its properties or assets are bound, or constitutes a default there under.
- C. There is no action, suit or proceeding, at law or in equity, or official investigation before or by any court or Governmental Authority, pending or threatened against



Developer, its principal(s), affiliate(s), or entities controlled by its principal(s), wherein an unfavorable decision, ruling or finding would materially adversely affect the performance by Developer of its obligations hereunder or the performance by Developer of its obligations under the transactions contemplated hereby, or which, in any way, questions or may adversely materially affect the validity or enforceability of this Agreement or any other agreement or instrument entered into by Developer in connection with the transactions contemplated hereby.

9. Cooperation: Developer and the City agree to cooperate with each other, and to act reasonably and in good faith, in order to achieve the purposes of this Agreement and, in connection therewith, to take such further actions and to execute such further documents as may reasonably be requested by the City, Developer, or their representatives, agents, consultants and any prospective or actual lenders, investors or tenants.

10. Entire Agreement; Amendments. This Agreement embodies the entire agreement and understanding between the Parties hereto relating to the subject matter herein and supersedes all prior agreements and understandings between the Parties (including without limitation the RFP and the

McIntyre Project Negotiating Principles). This Agreement may not be changed, modified, waived, discharged or terminated orally, but only by an instrument in writing signed by each of the Parties hereto or by the party against which enforcement is sought. Any change, modification or amendment, which requires the consent or approval of a Governmental Authority, shall be effective only upon receipt of such approval.

11. Binding Effect; Successors and Assignors. The terms and provisions of this Agreement and the respective rights and obligations of the Parties hereunder shall be binding upon, and inure to the benefit of, their respective heirs, successors, assigns, and nominees. The Developer shall not have the right to assign this Agreement without the prior written consent of the City which may be withheld in the City's sole discretion.

12. Headings. The headings to the sections and subsections of this Agreement have been inserted for convenience of reference only and shall not modify, define, limit or expand the express provisions of this Agreement.

13. Exhibits. All exhibits referred to in this Agreement are hereby incorporated by reference and expressly made a part hereof.

14. Governing Law. This Agreement shall in all respects be governed by, and construed and enforced in accordance with, the laws of the State of New Hampshire.

15. Consent to Jurisdiction and Venue. Developer and City submit to the jurisdiction of the courts of the State of New Hampshire and the courts from which an appeal from such trial venue may be taken or other relief may be sought for purposes of any action or proceeding arising out of this Agreement or any related agreement. All legal actions taken by the Parties shall be commenced in Rockingham County New Hampshire Superior Court. Both Parties hereby waive their right to a jury trial.

16. Independent Parties. Developer and City are independent Parties under this Agreement, and nothing in this Agreement shall be deemed or construed for any purpose to establish between any of them or among them a relationship of principal and agent, employment, partnership, joint venture, or any other relationship other than independent Parties.

17. Waivers. Failure on the part of any party to complain of any action or non-action on the part of the other party, no matter how long the same may continue, shall not be deemed to be a waiver of any such party's rights hereunder. No waiver at any time of any provision hereof by any

party shall be construed as a waiver of any other provision hereof or a waiver at any subsequent time of the same provision.

18. No Rights Conferred Upon Others. Except as expressly set out herein, nothing in this Agreement shall be construed as giving any individual, corporation, limited liability company, partnership, joint venture, association, joint stock company, trust, unincorporated organization or government, other than the Parties hereto, their successors and permitted assigns, any right, remedy or claim under or in respect of this Agreement or any provision hereof.

19. Time of the Essence. The Parties agree that time is of the essence in performance of their respective obligations under this Agreement.

20. Good Faith and Fair Dealing. Unless expressly stated otherwise in this Agreement, whenever a party's consent or approval is required under this Agreement, or whenever a party shall have the right to give an instruction or request another party to act or to refrain from acting under this Agreement, or whenever a party must act or perform before another party may act or perform under this Agreement, such consent, approval, or instruction, request, act or performance shall be reasonably made or done, or shall not be unreasonably withheld, delayed, or conditioned, as the case may be.

21. Warranties and Representations. Developer and City each acknowledge that they have not been influenced to enter into this transaction or relied upon any warranties or representations not specifically set forth or incorporated into this Agreement.

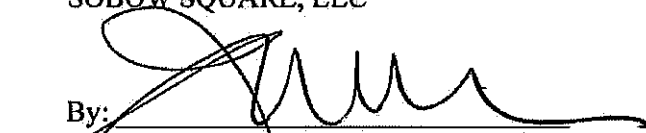
[Remainder of page intentionally blank; signature page follows]


This Agreement has been executed by the City and by Developer as a sealed instrument effective as of the date first set forth above.

CITY OF PORTSMOUTH

By: \_\_\_\_\_  
Karen S. Conard, City Manager  
Duly Authorized by vote of the Portsmouth City  
Council on \_\_\_\_\_, 2022

SOBOW SQUARE, LLC

By:   
Michael Kane  
Duly Authorized

By:   
Ralph Cox  
Duly Authorized

DOCKET #: 218-2020-CV-00352

SOBOW SQUARE, LLC

v.

CITY OF PORTSMOUTH

**AGREEMENT FOR DOCKET MARKINGS**

NOW COME the parties in the above-captioned action and agree that the docket for all claims against and among the parties may be marked as follows:

“NEITHER PARTY. NO COSTS. NO INTEREST. NO ATTORNEY’S FEES. NO FURTHER CLAIMS FOR ANY CAUSE OF ACTION ARISING PRIOR TO APRIL 5, 2022. WITH PREJUDICE.”

Respectfully submitted,

**CITY OF PORTSMOUTH, NH**  
**By its attorneys,**

Dated: April 5, 2022

By: /s/ Michael J. Connolly  
Michael J. Connolly, Esq. (#14371)  
Owen R. Graham, Esq. (#266701)  
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[ograham@hinckleyallen.com](mailto:ograham@hinckleyallen.com)

**SOBOW SQUARE, LLC**  
**By its attorneys,**

**DLA PIPER LLP (US)**

Dated: April 5, 2022

By: /s/ Bruce E. Falby  
Bruce E. Falby, Esq.  
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DOCKET #: 218-2018-CV-01095

**DONAHUE, TUCKER & CIANDELLA, PLLC**

Dated: April 5, 2022

By: /s/ Christopher T. Hilson

Christopher T. Hilson, Esq. (#17116)

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**Reviewed and So Ordered and Approved**

Date: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_, **Presiding Justice**