



# 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\\_vmtQbEAaSs-tAS887QkB7A](https://us06web.zoom.us/webinar/register/WN_vmtQbEAaSs-tAS887QkB7A)

## AGENDA

DATE: TUESDAY, NOVEMBER 1, 2022

TIME: 6:00 PM

LOCATION: EILEEN DONDERO FOLEY COUNCIL CHAMBERS

SUBJECT: SUPPLEMENTAL APPROPRIATION - DEER STREET ASSOCIATES AND AFFILIATES

**I. CALL TO ORDER - Mayor McEachern**

**II. ROLL CALL**

**III. PUBLIC HEARING AND ADOPTION OF RESOLUTION:**

A. RESOLUTION AUTHORIZING A SUPPLEMENTAL APPROPRIATION FROM UNASSIGNED FUND BALANCE FOR THE SETTLEMENT AGREEMENT BETWEEN THE CITY OF PORTSMOUTH AND DEER STREET ASSOCIATES AND AFFILIATES - \$500,000.00

- PRESENTATION
- CITY COUNCIL QUESTIONS
- PUBLIC HEARING
- ADDITIONAL COUNCIL QUESTIONS AND DELIBERATIONS

*(Sample motion - move to adopt the Resolution as presented) (A two-thirds vote required for adoption)*

**IV. ADJOURNMENT**

KELLI L. BARNABY, MMC/CNHMC  
CITY CLERK

## LEGAL NOTICE

NOTICE IS HEREBY GIVEN that a Public Hearing will be held by the Portsmouth City Council on Tuesday, November 1, 2022 at 6:00 p.m. at the Portsmouth Municipal Complex in the Eileen Dondero Foley Council Chambers, Portsmouth, NH on a proposed Resolution Authorizing a Supplemental Appropriation from Unassigned Fund Balance for the Settlement Agreement between the City of Portsmouth and Deer Street Associates and Affiliates. The City Council has determined that the sum of Five Hundred Thousand (\$500,000.00) Dollars is to be appropriated from Unassigned Fund Balance to defray the expenditures for the settlement agreement between the City of Portsmouth and Deer Street Associates and Affiliates for Fiscal Year ending in June 30, 2023. The complete Resolution is available for review in the Office of the City Clerk and Portsmouth Public Library, during regular business hours.

KELLI L. BARNABY, MMC/CNHMC  
CITY CLERK

 **Govt Public Notices**

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**KELLI L. BARNABY,  
MMC/CNHMC  
CITY CLERK**

**CITY OF PORTSMOUTH, NEW HAMPSHIRE  
SUPPLEMENTAL APPROPRIATION  
FOR THE FISCAL YEAR ENDING JUNE 30, 2023**

**RESOLUTION # -**

**A RESOLUTION AUTHORIZING A SUPPLEMENTAL APPROPRIATION FROM UNASSIGNED FUND BALANCE FOR THE SETTLEMENT AGREEMENT BETWEEN THE CITY OF PORTSMOUTH AND DEER STREET ASSOCIATES AND AFFILIATES.**

**RESOLVED:**

**BY THE CITY COUNCIL OF THE CITY OF PORTSMOUTH, NEW HAMPSHIRE ASSEMBLED AS FOLLOWS:**

**THAT**, the City Council has determined that the sum of **Five Hundred Thousand (\$500,000) Dollars** is to be appropriated from Unassigned Fund Balance to defray the expenditures for the settlement agreement between the City of Portsmouth and Deer Street Associates and Affiliates for Fiscal Year ending in June 30, 2023.

**THAT**, the settlement amount of **Five Hundred Thousand (\$500,000) Dollars** is to be made on or before November 2, 2022.

**THAT**, to meet this appropriation, the City Manager is authorized to transfer these funds from Unassigned Fund Balance.

**APPROVED BY:**

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**DEAGLAN MCEACHERN, MAYOR**

**ADOPTED BY CITY COUNCIL  
NOVEMBER 1, 2022**

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**KELLI BARNABY, MMC/CNHMC  
CITY CLERK**

**SECTION 7.14-AMENDMENTS TO BUDGET AFTER ADOPTION**

No appropriation shall be made for any purpose not included in the annual budget as adopted unless voted by a two-thirds (2/3) majority of the Council after a public hearing held to discuss said appropriation. The Council shall, by resolution, designate the source of any money so appropriated.

## SETTLEMENT AGREEMENT

**THIS SETTLEMENT AGREEMENT**, dated as of October \_\_\_, 2022 (this “**Agreement**”) is by and among **DEER STREET ASSOCIATES**, a New Hampshire limited partnership (“**DSA**”), **FOUNDRY PLACE, LLC**, a New Hampshire limited liability company (“**Foundry Place**”), **FOUNDRY PLACE HOTEL OWNER LLC**, a Delaware limited liability company (“**Foundry Place Hotel**”), and together with DSA and Foundry Place, the “**DSA Parties**”) and the **CITY OF PORTSMOUTH**, a municipality organized within the State of New Hampshire (the “**City**”).

### PRELIMINARY STATEMENTS

A. On or about September 9, 2016, the City acquired from DSA in an arms-length transaction a certain tract or parcel of land located in Portsmouth, New Hampshire, and depicted as Lot 1 (“**Lot 1**”) on a Consolidation and Subdivision Plan recorded in the Rockingham County Registry of Deeds as Plan D-39699 (the “**Plan**”). A copy of the Plan is attached as Exhibit 1 to the Complaint. The City acquired Lot 1 from DSA for the purpose of constructing a municipal parking garage (the “**Parking Garage**”), now constructed and known as Foundry Place Garage, with public access from Deer Street, an existing public way in the City. DSA retained ownership of Lots 2 through 6, inclusive, shown on the Plan (collectively, the “**DSA Property**”).

B. In connection with the sale of Lot 1 to the City, on or about September 9, 2016, the City and DSA entered into a Post Closing Obligations Agreement (the “**PCOA**”). A copy of the PCOA is attached as Exhibit 2 to the Complaint (hereinafter defined). Pursuant to the PCOA, the City agreed to execute and deliver to DSA an agreement granting DSA the contractual right to access and utilize up to sixty-eight (68) parking spaces in the Parking Garage located on Lot 1 (the “**Parking Agreement**”). Paragraph 10(g) of the PCOA provides that such an agreement “shall be executed and delivered in recordable form” by the City in the form attached to the PCOA as Schedule 10(g), “as shall be amended” to the extent necessary “to cause the same to be sufficient to cause” DSA to utilize the parking spaces to satisfy certain parking requirements of the City’s zoning ordinance.

C. The DSA Parties, as applicable, sought and received City Planning Board approvals for the following three projects on portions of the DSA Property (collectively, the “**Planning Board Approvals**”):

- (a) The first Planning Board Approval was originally granted by the City Planning Board on November 16, 2017, with a Foundation Only Permit #BLDG 20-811 originally issued by the City on November 16, 2020, for the construction of a 4-story mixed use building with parking and commercial space on the ground floor, and 51 residential units on the second, third and fourth floors with a footprint of approximately 16,196 +/- square feet and gross floor area of approximately 73,498 +/- square feet to be constructed on Lot 6 on the Plan (the “**Mixed Use Residential Project**”); and
- (b) The second Planning Board Approval was granted by the City Planning Board on February 15, 2018 for the construction of a 5-story mixed use building (including a hotel, restaurant, and first floor parking garage) and with a Foundation Only Permit #1043 originally issued by the City on April 16, 2020, for the construction of a 5-story mixed use building (including a hotel, restaurant, and first floor parking garage) with a footprint of approximately 21,770 +/- square feet and gross floor

area of approximately 98,100 +/- square feet to be constructed on Lot 3 on the Plan (the “**Mixed Use Hotel Project**”); and

- (c) The third Planning Board Approval was granted by the City Planning Board on September 20, 2018, for the creation of a community space on Lot 2 on the Plan, located adjacent to the Parking Garage with related landscaping, utilities, easements, and improvements, in support of the both the Mixed Use Residential Project and the Mixed Use Hotel Project (the “**Community Space Project**”).

The Planning Board Approvals, together with all other permits and approvals from other government boards and agencies in connection with the Mixed Use Hotel Project and the Mixed Use Residential Project and the Community Space Project, as supplemented or amended through the date hereof, are collectively referred to herein as the “**Approvals**”.

D. The Mixed Use Residential Project and the Mixed Use Hotel Project were designed, and the Approvals were obtained, by the DSA Parties in reliance upon having the Parking Agreement signed and the ability to utilize 68 licensed parking spaces in the Parking Garage, as called for in the Parking Agreement. The Approvals for the Residential Mixed Use Project require thirty-five (35) parking spaces and the Approvals for the Hotel Mixed Use Project require thirty-three (33) parking spaces.

E. The City did not execute the Parking Agreement after the Parking Garage was substantially completed and opened to the public in October 2018.

F. The DSA Parties commenced a lawsuit against the City in New Hampshire Superior Court, Rockingham County, in an action captioned, *Deer Street Associates, et al. v. City of Portsmouth, New Hampshire*, Case No. 218-2021-CV-00352 (the “**Lawsuit**”), with the filing of a Complaint on March 30, 2021 (the “**Complaint**”).

G. In the Lawsuit, the DSA Parties allege that the City's failure to execute the Parking Agreement in accordance with the PCOA constituted a breach of contract (Count I of the Complaint), and violation of the implied covenant of good faith and fair dealing (Count II of the Complaint), as well as a claim for promissory estoppel (Count III) and attorneys' fees and costs (Count IV). In the Lawsuit, the DSA Parties request relief in the form of monetary damages according to proof, and attorneys' fees and costs.

H. The City filed an Answer, dated July 9, 2021, and Revised Answer, Affirmative Defenses, and Demand For Jury Trial, dated December 23, 2021, denying liability on the claims set forth in the Complaint.

I. On February 22, 2022, the City of Portsmouth's City Council approved a parking agreement with DSA that, among other things, grants DSA certain contractual parking rights to access and utilize sixty-eight (68) parking spaces located within any parking garage now or hereafter constructed on the City Property as defined therein (the “**2022 Parking Agreement**”).

J. The 2022 Parking Agreement was accepted by the DSA Parties pursuant to a Reservation of Claims Agreement dated May 12, 2022, and the 2022 Parking Agreement was executed

by DSA and the City and recorded in the Rockingham County Registry of Deeds at Book 6407, Page 1864.

K. For the purpose of avoiding the burden, expense and uncertainty of continued litigation, the parties desire to settle and resolve on mutually agreeable terms the claims and disputes between them, as set forth herein, without further litigation and without admission of any fault or liability by any party.

**NOW THEREFORE**, for and in consideration of the foregoing statements and the mutual covenants and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and subject to the terms and conditions set forth herein, the parties hereby agree as follows:

**1. Settlement Terms/Closing Deliveries.**

(a) Payment. At the Closing (hereinafter defined), the City shall pay Foundry Place, LLC in good and sufficient funds by City check the sum of Five Hundred Thousand Dollars (\$500,000.00)(the “**Settlement Payment**”). As additional consideration, the City agrees and does hereby waive and any all license fees payable to the City for use/encumbrance of City property applicable to construction of the Mixed use Residential Project and/or the Mixed Use Hotel Project.

(b) Mutual Releases. At the Closing, the DSA Parties and the City shall execute and deliver mutual releases in the form attached hereto as Exhibit A (the “**Mutual Release**”).

**2. Community Space Project.** The DSA Parties and the City acknowledge that the Community Space Project Planning Board Approval requires as conditions thereof, among others, that:

- a. Foundry Place, LLC, as the Applicant, provide a financial contribution of \$145,000 (the “**Park Contribution**”), “payable on or before the time the City commences construction of the improvements shown on the Plans (as may be amended), \$10,000 of which shall be placed in escrow by the City and used to pay for art work to be displayed on Lot 2, as mutually agreed to by the City and the Applicant at the time that the City commences construction of the approved park”;
- b. “[p]rior to the issuance of a building permit for either Lot 3 or Lot 6, the applicant [sic] shall provide a surety bond or letter of credit to insure payment from the Applicant” for the Park Contribution (the “**Park Contribution Bond**”); and
- c. “[t]he Planning Board shall approve release of the [Park Contribution Bond] without payment from the Applicant if construction of the improvements on Lot 2 is not developed substantially in accordance with the Plans (as may be amended) by the City within three (3) years of the transfer of Lot 2 to the City.”

The City agrees that it shall not commence construction of the said approved park until the earlier to occur of October 31<sup>st</sup>, 2025, or the issuance of certificates of occupancy for each of Lot 3 and Lot 6 shown on the Plan (the “**Park Construction Commencement Date**”). The DSA Parties agree that no request for Planning Board approval of the release of the Park Contribution Bond shall be made prior

to that date which is the third (3<sup>rd</sup>) anniversary of the Park Construction Commencement Date (the “**Bond Release Date**”). The DSA Parties further agree that: (i) the Declaration of Temporary Construction Easement in favor of Lot 6 shown on the Plan and burdening Lot 2 and recorded at the Rockingham County Registry of Deeds at Book 6445, Page 155, shall expire as of the earlier to occur of the Park Construction Commencement Date or issuance of a certificate of occupancy with respect to the Mixed Use Residential Project; and (ii) the Temporary Construction Easement in favor of Lot 3 shown on the Plan and burdening Lot 2, as described in that certain Declaration of Easements and Restrictive Covenants recorded in the Rockingham County Registry of Deeds at Book 6138, Page 1455, shall expire as of the earlier to occur of the Park Construction Commencement Date or issuance of a certificate of occupancy with respect to Mixed Use Hotel Project; and (iii) the applicable parties will execute and record at the Rockingham County Registry of Deeds amendments to the Temporary Construction Easements in accordance with the provisions of (i) & (ii) above.

**3. Closing.** The consummation of the transactions contemplated herein, including without limitation the payment and the execution and delivery of the Mutual Release referenced in Section 1 above (the “**Closing**”) shall take place within 5 business days of the City Council Vote approving the Appropriation of funds agreed to herein, but in any event no later than on November 2, 2022 at the offices of the City Attorney for the City at 10:00 a.m., or at such other time or location within the City of Portsmouth as the parties shall agree.

**4. Dismissal of Lawsuit.** Within five (5) business days after completion of the Closing, the parties shall take steps to dismiss the Lawsuit, by filing a Stipulation for Docket Markings, which shall recite as follows:

Now come the Parties in the above captioned matter, and by and through their attorneys, and respectfully request that this Honorable Court mark the docket as follows:

Judgment for neither party. No interest. No costs. No fees. No further action for the same cause.

**5. No Interference.** The City of Portsmouth and the DSA Parties, or any other entity developing the Mixed Use Hotel Project or the Mixed Use Residential Project, agree to operate in good faith during the construction of these buildings and related improvements on Lot 6 & Lot 3 in accordance with the applicable Approvals in all material respects, as the same may be extended and confirmed as provided herein, and with applicable law.

**6. Entire Agreement.** This Agreement, and the documents to be delivered at the Closing, set forth the parties’ entire agreement, superseding all prior negotiations and agreements, whether written or oral, concerning its subject matter. There are no collateral or outside agreements of any kind between the parties concerning the subject matter hereof, other than those expressly reflected herein or in such Closing documents.

**7. Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and/or assigns.



**8. Plain Meaning and Headers.** This Agreement shall be interpreted in accordance with the plain meaning of its terms and not for or against the drafter's rights hereunder. The headers describing the contents of the provisions are simply for identification purposes and shall not be construed as a substantive part of the provision.

**9. Product of Negotiation.** This Agreement is the product of negotiation between the parties. In the event of a dispute concerning the interpretation of this Agreement or of any of its terms or provisions, this Agreement shall be deemed to have been drafted jointly by the parties, and shall not be more strictly construed against any party.

**10. Opportunity to Consult with Counsel.** The parties hereby represent and acknowledge that they have been provided with the opportunity to discuss and review the terms of this Agreement with their respective attorneys before signing it and that they are freely and voluntarily signing this document in exchange for the benefits provided herein. The parties further represent and acknowledge that they have been provided a reasonable period of time within which to review the terms of this Agreement.

**11. Voluntary Agreement.** The parties represent and warrant that they have read this Agreement, and sign it freely, without constraint or duress, and on the advice of legal counsel.

**12. Authorization.** Each party represents and warrants that: (i) the individual signing this Agreement on behalf of that party, is duly authorized and empowered to enter into it on its behalf; (ii) the party has full corporate or other power and authority to execute, deliver and perform its obligations under this Agreement and each of the documents, instruments, permits and certificates executed and delivered in connection herewith (collectively with this Agreement, the "**Settlement Documents**"), (iii) the Settlement Documents have been duly authorized by all necessary corporate or other entity action, as applicable, of such party.

**13. Modification or Amendment.** No amendment, change, or modification of this Agreement, nor waiver of any provision of this Agreement, shall be valid unless it is in writing, signed by each of the parties or by his or its respective successors and/or assigns. The parties agree not to make any claim at any time or place that this Agreement has been orally modified in any respect.

**14. Waiver.** No waiver of a breach of any provision of this Agreement shall constitute a waiver of a breach of any other provision of this Agreement or of a prior or subsequent breach of the same provision. No extension of time of performance of an act or obligation under this Agreement shall constitute an extension of time of performance of any other act or obligation hereunder.

**15. Governing Law and Jurisdiction.** This Agreement is made and entered into in the State of New Hampshire and shall in all respects be interpreted, enforced, and governed under the laws of New Hampshire, without giving effect to the conflict of laws principles of New Hampshire law. The parties expressly consent to the exclusive jurisdiction and venue of the Business and Commercial Dispute Docket of the New Hampshire Superior Court with respect to disputes arising under this Agreement or any action to enforce its terms.

**16. Breach.** The parties acknowledge and agree that any party who is found by a Court to have breached this Agreement will be liable to the other party or parties for resulting damage.

**17. Survival.** The representations, warranties, obligations, covenants, agreements and terms set forth in this Agreement shall survive Closing.

**18. Counterparts.** This Agreement may be executed by the parties in separate counterparts, each of which when so executed and delivered shall be an original for all purposes, but all such counterparts shall together constitute but one and the same instrument. Photocopies of the executed signature pages of this Agreement or any amendment hereto sent by facsimile or transmitted electronically shall be treated as originals, fully binding and with full legal force and effect.

**19. Exhibits.** The following Exhibits are attached hereto and incorporated herein by reference:

Exhibit A: Form of Release

*[Balance of page is intentionally blank]*

IN WITNESS WHEREOF, the undersigned have executed this Settlement Agreement under seal as of the date first set forth above.

**DEER STREET ASSOCIATES**

By its general partner,

DSA Rogers LLC

By its manager,


GL Rogers and Company, Inc.

By:   
Name: Kim S. Rogers  
Its: President

**FOUNDRY PLACE LLC**

By its manager

GL Rogers and Company, Inc.

By:   
Name: Kim S. Rogers  
Its: President


**FOUNDRY PLACE HOTEL  
OWNER, LLC**

By its manager,

Foundry Place Olympia LLC,

By its manager,

GL Rogers and Company, Inc.

By:   
Name: Kim S. Rogers  
Its: President

**CITY OF PORTSMOUTH**

By:   
Name: Karen Sawyer Conard  
Its: City Manager