

AGREEMENT TO STAY LITIGATION

WHEREAS, the City of Portsmouth, a municipal corporation with a principal place of business of 1 Junkins Avenue, Portsmouth, New Hampshire (the “City”) and SoBow Square, LLC, a Delaware limited liability company (“Developer”) (collectively, the “Parties”), intend to settle the litigation pending between them in the Hillsborough County Superior Court, Northern District, Docket Number 218-2023-CV-00468 (the “City’s Lawsuit”) (*consolidated with* 218-2023-CV-00470 (the “Developer’s Lawsuit”)) (collectively the “Consolidated Actions”).

WHEREAS, there is a housing crisis in Portsmouth, New Hampshire, as there is throughout the State of New Hampshire, and the creation of additional housing units addresses a critical need for ongoing successful Citywide and Statewide economic development and continued vitality.

WHEREAS, the creation of additional housing in the City is a crucial part of the City’s current Master Plan.

WHEREAS, the City has enacted a zoning ordinance pursuant to RSA 674:16 (the “Zoning Ordinance”).

WHEREAS, the Portsmouth City Council’s first City Council Goal of 2024-2025, as adopted by public vote at its meeting on February 5, 2024, and reaffirmed by adoption of the Fiscal Year 2025 Budget by vote on June 3, 2024, was to “enhance the supply of housing choices, especially the supply of below-market rate housing options”.

WHEREAS, in furtherance of that goal, on January 16, 2024, the City Council voted to establish a Housing Blue Ribbon Committee charged with addressing housing

challenges within the City, including through examining its Zoning Ordinance and zoning districts to increase housing opportunities in the City.

WHEREAS, at its regularly scheduled meeting on June 13, 2024, the Housing Blue Ribbon Committee discussed the possibility of rezoning properties in the vicinity of Commerce Way, a public right-of-way in the City, from an Office Research (OR) Zone to a Gateway Zone to permit additional mixed and residential uses.

WHEREAS, the City's existing legislative process for the amendment of its Zoning Ordinance is defined by Section 4.5 of the City Charter, Rules 29 and 30 of the Revised Rules and Orders of the Portsmouth City Council, Zoning Ordinance Section 10.150, and RSA 675:2, RSA 675:6, and RSA 675:7, and it includes, but is not limited to, three readings before the City Council including a public hearing at second reading, and consideration by and public hearing before the Planning Board, and may include a report back by relevant City committees and commissions upon vote by either the City Council or the Planning Board (collectively the "Existing Legislative Process").

WHEREAS, affiliates of the Developer own or have a legal interest in a significant amount of property in the Commerce Way area, specifically the parcels identified on the City Assessor's Tax Maps as Map/Lot numbers: 217/0002/1975; 217/0002/1819; 216/0001/0005; 216/0001/0004; 216/0001/0001; 216/0001/0002; 216/0001/0011; 216/0001/0008; 0216/0001/008A; 0213/0001; and 0213/0012 (collectively the "Developer Properties") and are interested in developing the Developer Properties with a mix of uses, including without limitation, a substantial number of housing units, community space, public realm improvements and providing the City with

land to create additional housing units and public infrastructure, including but not limited to below market rate housing.

WHEREAS, Developer is amenable to dismissing the Developer's Lawsuit on the terms set forth herein if (1) certain zoning provisions are amended to enable the development of a substantial number of housing units at certain properties located in the Commerce Way area of the City; (2) the Developer receives the \$500,000 currently held in escrow pursuant to the Court's Order in the Consolidated Action; and (3) the City contributes a sum of \$250,000 to a City trust fund dedicated to support below market rate housing in Portsmouth.

WHEREAS, the City is amenable to dismissing the City's Lawsuit on the terms set forth herein upon Developer's agreement to (1) provide the City with a parcel of land that would support at least 80 affordable housing units as more particularly described in Exhibit A; and (2) contribute \$250,000 to a City trust fund dedicated to support below market rate housing in Portsmouth.

WHEREAS, the City intends to bring forward for consideration through its Existing Legislative Process a proposed zoning ordinance amendment to create a Pilot zoning district called a Gateway Neighborhood Overlay District ("GNOD") to enable the development of a substantial number of new housing units in the Commerce Way area of the City (the "Ordinance"). The initial draft of the GNOD, as agreed to by the Parties, is attached as Exhibit B (the "Proposed GNOD"). The new zone will be in the form of an overlay district and shall encompass the geographic scope of the GNOD depicted in Exhibit C (the "Proposed District Boundaries").

WHEREAS, the proposed GNOD is uniquely situated within the City to accommodate a development of substantial density, it is the City's intention to limit any expansion of the material provisions of the Proposed GNOD for a period of two years while it assesses its ability to absorb the demands of the possible development on the City's infrastructure, police, fire and schools.

WHEREAS, in order to enact or amend any zoning ordinance the City must act consistent and in harmony with the intent and purpose of its Master Plan, to promote and enhance the development of the community as a whole, to meet a public necessity, and to act in accordance with accepted methods of zoning, in conformance with the developed legislative process for zoning legislation, including proper notice and public hearings. See *Schadlick v. City of Concord*, 108 N.H. 319, 322-23 (1967).

WHEREAS, the City, as a municipal corporation, cannot enter contracts that control the performance of their legislative powers and duties. See *PMC Realty Trust v. Town of Derry*, 125 N.H. 126, 131 (1984).

NOW THEREFORE, the parties agree as follows:

I. Stay Pending Legislative Proceedings

1. Stay of the Consolidated Actions. Within two (2) business days of the execution of this Agreement, the parties shall file the Joint Motion to Stay the Litigation and for Entry of Collection and Preservation Order in the form attached as Exhibit D (the "Joint Motion"). The Joint Motion shall request a stay for such time as it takes the City to consider the Ordinance through the Existing Legislative Process. While it is anticipated that this process will require at least 3 months' time, the parties agree and acknowledge that the process may require additional time for the Ordinance to be considered by the

Housing Blue Ribbon Committee, the Planning Board, and by the City Council. Delays in the process beyond either party's reasonable control shall not be cause for any party moving to vacate the stay contemplated in this paragraph or to repudiate this Agreement, except to the extent contemplated pursuant to Section 8 below. The Joint Motion shall also request Court entry of a Collection and Preservation Order pertaining to the Devices and Accounts as defined and set forth in the proposed order attached as Exhibit 1 to the Joint Motion.

2. Submission of GNOD through Existing Legislative Process. At the regularly scheduled City Council meeting on August 19, 2024, the City Manager shall bring forward a request for first reading of the Proposed GNOD as shown in Exhibit B with the Proposed District Boundaries depicted in Exhibit C. The City Manager's public description of the purpose and attributes of the Proposed GNOD and its relationship to the settlement contemplated herein shall be substantially consistent with the points previously agreed upon by the parties.

3. Conditional Agreement for Settlement of the Consolidated Actions. The Parties shall settle the Consolidated Action if the City Council passes an Ordinance through its Existing Legislative Process consistent with the following criteria (collectively the "Successful Ordinance"):

(i). The Ordinance rezones the properties contained within the Proposed District Boundaries (but does not include additional properties); and,

(ii) The Ordinance is consistent with the substantive provisions of the Proposed GNOD. The Parties agree and accept that, through the Existing Legislative Process alterations may be made to the wording, format, or organization of the

Ordinance (“Non-Substantive Revisions”). For clarity and without limitation, not included within Non-Substantive Revisions, and therefore not consistent with the substantive provisions of the Proposed GNOD, are any revisions which materially impact the development rights or development potential of the Developer Properties (including without limitation the provisions addressing dimensional requirements, density, parking, uses and Density Bonus Incentives), any revisions which impose any additional regulatory review upon the Developer Properties not contemplated by the Proposed GNOD (e.g., requiring conditional use permits where not contemplated in the Proposed GNOD), or any revisions which impose additional impact fees or other offsite mitigation requirement not contemplated in the Proposed GNOD. Nothing in this section shall be construed to apply to the City’s Site Plan Review Regulations, Subdivision Regulations, or the application thereof by the Technical Advisory Committee of the Planning Board to any future proposed project in the GNOD. The Developer agrees to notify the City, within seven (7) business days of any request by the City that identifies any proposed revisions, whether the Developer believes any such proposed revisions would constitute Non-Substantive Revisions.

4. Appeals of the Proposed GNOD. If, within thirty-five (35) days of the final enactment of the Successful Ordinance any appeal is filed in a court of competent jurisdiction challenging the Successful Ordinance (“Appeal”), the Parties agree they will not vacate the stay contemplated by this Agreement until the Appeal is resolved and no further appellate rights with respect to the Appeal exist. Within two (2) business days of receipt of notice by the City of any Appeal, the City agrees to notify the Developer of the Appeal, and to release to the Developer the Escrow Funds as defined in paragraph 5

(C). If the Appeal results in the affirmance of a Successful Ordinance, then the Parties agree to proceed to settle the Consolidated Actions in accordance with the terms contained in Section II of this Agreement. If the Appeal results in the invalidity of a Successful Ordinance, or results in the enactment of or modification to an ordinance which as a result does not meet the criteria of a Successful Ordinance, then the Developer may move to vacate the stay in accordance with paragraph 9. In any event, if any Appeal is still pending, or any further appellate rights with respect to the Appeal exist after July 31, 2026, either Party shall have the right to move to vacate this stay agreement in accordance with paragraph 9. The enactment of a Successful Ordinance, either following Appeal or without an Appeal, shall be defined as “Successful Zoning Ordinance Enactment”. The City shall diligently and in good faith defend any Appeal.

II. Settlement Terms:

5. Stipulation of Dismissal With Prejudice, General Releases, and Release of Escrow Funds.

If the Successful Zoning Ordinance Enactment occurs, the following shall occur:

- A. Within seven (7) business days, the parties shall file a Stipulation of Dismissal in the form attached as Exhibit E stipulating to the dismissal of the Consolidated Actions, including all claims, counterclaims, and defenses asserted therein, with prejudice, and without costs or attorneys' fees to any party.
- B. Upon filing of the Stipulation of the Dismissal pursuant to subsection A, the following mutual general releases shall go into effect and become fully enforceable by either party:

(i) General Release by the City: Excluding the right to enforce the provisions of this Agreement, the City, on behalf of itself and its employees, representatives, attorneys, directors, officers, heirs, successors, assigns, and subsidiaries, hereby releases and forever discharges Developer, and each of its respective officers, directors, attorneys, insurers, shareholders, members, partners, owners, managers, employees, agents, successors, and assigns, of and from all manner of actions and causes of actions, suits, rights, claims, demands, damages (including incidental, consequential, and claims for attorneys' fees and costs), debts, dues, liabilities, controversies, covenants, agreements, judgments, and suits, known or unknown, which the City ever had, now has or hereafter can, shall or may have arising out of or in any manner related to acts or omissions from the beginning of the world up to the date of this Agreement, and without limiting the generality of the foregoing, including but not limited to claims that were or could have been asserted in the Consolidated Actions. This general release specifically excludes (a) the enforcement of this Agreement by the City, (b) claims with no relationship to the Consolidated Actions against properties owned by Developer's affiliates through another entity, corporation, partnership, or other ownership format.

(ii) General Release by Developer. Excluding the right to enforce the provisions of this Agreement, Developer, on behalf of itself and each of its respective elected officials, volunteers, officers, directors, attorneys,

insurers, shareholders, employees, agents, affiliates, successors, and assigns, hereby releases and forever discharges the City, and its employees, representatives, attorneys, directors, officers, heirs, successors, assigns, and subsidiaries, of and from all manner of actions and causes of actions, suits, rights, claims, demands, damages (including incidental, consequential, and claims for attorneys' fees and costs), debts, dues, liabilities, controversies, covenants, agreements, judgments, and suits, known or unknown, which the Developer ever had, now has or hereafter can, shall or may have arising out of or in any manner related to acts or omissions from the beginning of the world up to the date of this Agreement, and without limiting the generality of the foregoing, including but not limited to claims that were or could have been asserted in the Consolidated Actions. This general release specifically excludes (a) the enforcement of this Agreement by the Developer, and (b) claims with no relationship to the Consolidated Actions.

- C. Within two (2) business days of the filing of the Stipulation of Dismissal, or as otherwise provided by Paragraph 4, the \$500,000 currently being held by the City's escrow agent pursuant to the Court's August 6, 2023, Order in the Consolidated Actions (the "Escrow Funds") shall be released to the Developer to satisfy the City's pre-existing obligation under the parties' prior Settlement Agreement dated April 6, 2022.
- D. Within seven (7) business days of the filing of the Stipulation of Dismissal, the parties shall jointly move the court to direct FTI Consulting to destroy all

Forensic Images, as defined in the Exhibit 1 proposed order to the Exhibit D Joint Motion.

6. Housing Trust Fund

Within thirty (30) business days of the filing of the Stipulation of the Dismissal each Party shall contribute \$250,000 to a City trust fund dedicated to supporting and creating below market rate housing opportunities in the City.

7. Land Transfer

A. Within six (6) months of the Successful Zoning Ordinance Enactment, the Developer shall identify a parcel of land (the "Land Transfer Parcel") that meets or exceeds the minimum requirements set forth in Exhibit A. The Developer shall offer to convey the Land Transfer Parcel to the City pursuant to the Land Transfer Option provisions contemplated in the Proposed GNOD. If the Land Transfer Option provisions contemplated in the Proposed GNOD are not enacted, then Developer shall have no obligation to convey the Land Transfer Parcel or any other property to the City.

B. The Developer's obligation to convey the Land Transfer Parcel to the City is conditioned on the following:

(i) the City accepts the Land Transfer Parcel pursuant to the Land Transfer Option of the GNOD;

(ii) the City recognizes and approves that the Developer Properties will be entitled to the greater height (up to six stories and totaling up to 80 feet in height) and density (up to 120 units per building) and other provisions of the Successful Zoning Ordinance Enactment in exchange for the land transfer, as memorialized

in a Prospective Development Incentive Agreement (the "PDIA") between Developer and the City pursuant to the GNOD; and

(iii) the City issues its final design review approval for the initial proposed development to be constructed by Developer within the GNOD on land subject to the PDIA approved by the City. However, the condition in this clause (iii) shall not apply if the Developer has not submitted a complete application for design review approval of such development on or before the date that is seven (7) months after the Successful Zoning Ordinance Enactment. In such an event, the Developer remains obligated to offer to convey the Land Transfer Parcel to the City in accordance with this Section 7.

B. Following identification of the Land Transfer Parcel, the City shall then have no more than three (3) months to conduct independent due diligence to confirm that the Land Transfer Parcel meets those requirements contained within Exhibit A. The Parties agree to negotiate in good faith to convey a parcel of land which meets those requirements set forth in Exhibit A. If the Developer identifies a Land Transfer Parcel that meets those requirements set forth in Exhibit A and the City elects not to accept the conveyance of such Land Transfer Parcel in accordance with the terms of this Agreement within three (3) months after its due diligence period expires, then the Developer shall have no obligation to convey the Land Transfer Parcel or any other property to the City.

8. Publicity

Within two (2) business days of the filing of the Stipulation of Dismissal, the Parties shall issue a joint press release in substantially the form as previously agreed by

the Parties, and their public statements regarding this matter shall be consistent with the content of this press release.

9. Vacation of Stay. Should the Existing Legislative Process extend past December 31, 2024 or if the Successful Zoning Ordinance Enactment does not occur by January 31, 2025, or as otherwise provided in Paragraph 4, either Party has the right to file a Motion to Vacate Stay with the Court, which the other Party agrees not to oppose, and, either by agreement or upon motion by either party, a new structuring order and trial date will be set.

III. Failure to Pass Ordinance

10. Failure to Pass Ordinance. If the Successful Ordinance fails to pass, if the City no longer pursues the Successful Ordinance, or if the City Council takes definitive action which makes it not possible for a Successful Ordinance to be enacted by December 31, 2024, the Parties agree that the stay in the Consolidated Actions will be lifted upon motion by either party, and, either by agreement or upon motion by either party, a new structuring order and trial date will be set.

IV. Miscellaneous:

11. No Representation or Warranty. Nothing in this Agreement is a representation that any zoning amendment will be adopted by the City, nor that any development proposed by Developer within the GNOD will be approved by the City. Any proposed development will be subject to all applicable land-use regulations, approval processes, and State law. The parties further agree and acknowledge that neither has been influenced to enter into this Agreement or has relied upon any

warranties or representations not specifically set forth within the terms of this Agreement.

12. 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 them. 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.

13. Binding Effect; Successors and Assigns. The terms and provisions of this Agreement and the respective rights and obligations of the parties hereto shall be binding upon, and inure to the benefit of, their respective heirs, successors, assigns, and nominees.

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

15. 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.

16. Consent to Jurisdiction; Exclusive Venue. Developer and City submit to the jurisdiction of the courts of the State of New Hampshire for the purposes of any action or proceeding arising out of this Agreement. Any action or proceeding arising out of this Agreement shall be exclusively pursued within the Consolidated Actions.

17. Independent Parties. The parties hereto are independent under this Agreement, and nothing herein 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.

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 entity, 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.

SoBow Square, LLC.

Dated: August 19, 2024

By: 
Michael Kane

CITY OF PORTSMOUTH

Dated: August 20, 2024

By: 
Karen S. Conard
City Manager

Exhibit A

Requirements for Land Transfer Parcel

- The parcel shall be in the GNOD district.
- The parcel shall be conveyed with marketable title.
- The parcel shall be free of any environmental hazards that may limit or add material cost to residential development as demonstrated by a Phase I environmental site assessment.
- The parcel shall be a minimum of 1.5 acres of land.
- The parcel shall be of adequate dimensional size and topographical configuration to accommodate at least 80 dwelling units and to accommodate the City's construction and installation of associated necessary site improvements without unique or excessive engineering or construction means and methods.
- The parcel shall have at least 100 feet of frontage on a public or private right of way.

Exhibit B

[Agreed to Draft of Proposed GNOD]

SECTION 10.680 – GATEWAY NEIGHBORHOOD OVERLAY DISTRICT

10.681 Purpose

This overlay district is created for the purpose of creating housing opportunities in suburban neighborhoods. This overlay shall allow for higher density housing in order to create neighborhoods where residents can live and work.

10.682 Applicability

10.682.10

The provisions of this ordinance shall apply to all land within the **Gateway Neighborhood Overlay District** (GNOD) as defined in Section 10.613.70.

10.682.20

The requirements of the underlying zoning district shall apply with respect to any non-residential use within the overlay district. The requirements of this section shall apply to any residential use or mixed use which includes residential uses within the overlay district.

10.683 Standards

10.683.10

All residential or mixed-use developments including a residential use shall comply with the provisions of Article 5B of this Ordinance, with the following exceptions:

- (1) No more than 80 **dwelling units per building** shall be allowed without a conditional use permit as provided in Sections 10.686.20 or 10.686.30.
- (2) Maximum **building height** for any **apartment building** or **mixed-use building** shall not exceed 5 stories or 68 feet without a conditional use permit as provided for in Section 10.686.20 or 10.686.30.
- (3) Front, side, and rear **building setback** from **lot line** shall be a minimum of 10 feet.
- (4) Maximum **building coverage** shall not exceed 75%.
- (5) Minimum **open space coverage** shall be 10%.
- (6) The requirements of Sections 10.5B22.20, .30 and .40, 10.5B25, 10.5B33, and 10.5B71 shall not apply to land within the GNOD. Additionally, for a development site within the GNOD, no conditional use permit shall be required pursuant to Section 10.5B41.10.

10.683.20 Relationship to Other Provisions of this Zoning Ordinance

The provisions of this Article shall take precedence over all other provisions of the Zoning Ordinance that conflict with this Article.

10.684 Allowed Uses

In addition to the uses permitted in the underlying district, the following uses shall be permitted within the GNOD:

1. Single Family Dwelling
2. Two-Family Dwelling
3. Multifamily Dwelling
4. Assisted Living Facility
5. **Retail Sales** conducted within a **building**
6. **Restaurant**, place of public assembly or function room
7. **Personal Services**
8. Consumer services such as copy shop, bicycle repair, and pet grooming.
9. Health club, yoga studio, martial arts school or similar **use**.

10.685 Parking

In the GNOD, the provisions of Section 10.1112.62 shall apply, except that a conditional use permit to allow required **off-street parking** spaces on separate lots, whether in common ownership or separate ownership, shall not be required. The provisions of Section 10.1113 shall not apply to the GNOD.

10.686 Density Bonus Incentives

In order to encourage the development of multifamily housing with incentives including public realm improvements, streamlined parking requirements and increased heights, the following incentives are offered for buildings with residential and mixed use with residential in the GNOD.

10.686.10 Public Realm Improvements

In order to be eligible to construct more than four stories or 24 **dwelling units per building**, **public realm** improvements, as described in Section 10.5B73.20, must be provided. All **public realm** improvements shall be reviewed by the Planning Board as a part of site plan approval, and the Planning Board shall make written comments regarding the proposed public realm improvements to the Director of Planning and Sustainability. To the extent that the Planning Board's comments are not followed or incorporated into the Director of Planning and Sustainability's decision, the Director shall set forth findings relative to the Planning Board's comments.

All public realm improvements shall be subject to administrative approval by the Director of Planning and Sustainability. The Director of Planning and Sustainability shall review all

proposed public realm improvements for compliance with Section 10.5B73.20, ensure that proposed public realm improvements are constructed to City standards, and are in the public interest. Public realm improvements under this section shall be permitted on a different lot than the development, and the remaining requirements of Section 10.5B73.20 (4) shall not apply to **public realm** improvements within the **GNOD**.

10.686.20 Workforce Housing or Payment in Lieu

In addition to compliance with Section 10.686.10, the Planning Board may grant a conditional use permit to construct more than five stories or more than 80 **dwelling units** per building. Such conditional use permit shall be subject to one of, or a combination of, the following:

- (1) Workforce Housing may be provided in accordance with Section 10.5B73.10.
- (2) A full or partial payment in lieu of workforce housing may be provided. The fee shall be established annually by the Fee Committee and the City Council in the fee schedule.

10.686.30 Land Transfer Option

In order to facilitate future development of below-market rate housing, there may be appropriate circumstances where applicants may convey real property to the City in lieu of or in conjunction with meeting the requirements of Section 10.686.20. However, recognizing the unique nature of land, not all property may be suitable or desirable for this purpose. Therefore, any real property offered to the City pursuant to this section shall be subject to acceptance by the City Council, and in accordance with the following.

- (1) In lieu of meeting the requirements of Section 10.686.20, an applicant may offer real property to the City. Any real property offered to the City shall be suitable for developing workforce housing of a size set forth in section 10.686.40 and shall not require a conditional use permit from the Planning Board. Instead, the conveyance shall be subject to approval and acceptance by the City Council. In exchange for transferring land to the City, the developer shall be permitted to construct buildings up to six stories and 80 feet in height, and to construct up to 120 units per building.
- (2) Any applicant must, at their own expense, provide a certificate of title and Phase one environmental report for any property offered to the City Council. All closing costs shall be borne by the applicant. The City Council may request any additional information regarding the offered real property or the proposed transfer, the preparation of which shall be by the applicant.
- (3) Prior to acceptance by the City Council, the Planning Board shall provide written comments to the City Council regarding the offered real property and its compliance with this Article. Any comments offered by the Planning Board shall be advisory in nature only, but the City Council shall, to the extent that the Planning Board's comments are not followed or incorporated into the City Council's decision, set forth findings relative to the Planning Board's comments.

- (4) The City Council shall not accept any real property offered if acceptance would subject the municipality to potential liability as an owner of property under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. section 9601 et seq., the Resource Conservation and Recovery Act, 42 U.S.C. section 6901 et seq., RSA 147-A and 147-B, and any other federal or state environmental statute which imposes strict liability on owners for environmental impairment of the real estate involved.
- (5) In addition to the circumstances described in paragraph 2, the City Council may refuse to accept any offered real property whenever in its judgment acceptance and ownership of the real estate would subject the municipality to undesirable obligations or liability risks, including obligations under real estate covenants or obligations to tenants, or for any other reason would be contrary to the public interest.
- (6) For the first 20 acres of **Developable Upland** under this section as a part of a single project, the Developer shall convey at least 1 acre of **Developable Upland** to the City. For each 10 acres of **Developable Upland** over 20 acres to be developed under this section, the Developer shall convey at least one-half acre of additional **Developable Upland** to the City.
- (7) Any property acquired by the City pursuant to this section shall be primarily utilized for below-market rate housing. The City Council shall designate the appropriate method for procurement, development, form of ownership, disposition and administration of individual parcels of land acquired pursuant to this section.
- (8) Any land conveyed under this section shall be conveyed to the City may be conveyed as a condition subsequent to final Planning Board approval(s) and execution of the site review agreement, but in any event shall be conveyed prior to the issuance of a building permit for any project.
- (9) For purposes of clarity, if land is conveyed under this section, there shall be no further requirement to meet any specific percentage of workforce housing units as provided in Section 10.5B73.10

10.686.40 Transfer of Development Rights Acquired through Land Transfer

- (1) Land may be conveyed in conjunction with, or separately from a proposed development. In the event that a conveyance under this section exceeds the amount required in order to support a proposed development, or when land is conveyed separately from any proposed development, the developer or its assigns will receive future credit for a future project or projects in accordance with the standards set forth below.
- (2) If following any acceptance of real property by the City Council and successful transfer of fee ownership with warranted title, and if there is any excess acreage above what is necessary for an active project, the Director of Planning and Sustainability shall notify

the Planning Board and the transferor of land of the amount of Land Credit the developer shall receive, which shall be memorialized in a Prospective Development Agreement, if appropriate, as defined below.

- (3) Contemporaneous with the conveyance of land, the City and the developer shall enter into a Prospective Development Incentive Agreement (PDIA), which shall specify the amount of land conveyed to the City, the amount if any used for a pending development, and the amount of excess land that may be credited toward a future project in accordance with this Article. Any excess land credit may only be used within the GNOD but may be sold or transferred without limitation. A sale or transfer of excess credits pursuant to this section is only valid upon written notice to the Director of Planning and Sustainability.
- (4) The maximum term of any PDIA shall not exceed fifteen (15) years, following which the rights to any unused incentive shall become null and void.
- (5) By entering into a PDIA under this section shall not be deemed to supersede or waive any of the other provisions of this Article or Article 5B or other applicable provisions of this Ordinance, nor shall any approval be considered to represent the granting of land use approval for any future **development**.
- (6) Future use of the excess land credit to support a future project shall require administrative approval of the Director of Planning and Sustainability, who shall certify to the Planning Board both the amount of land credit used as a part of a development and the remaining land credit pursuant to the PDIA.
- (7) Excess land credits may be used in full or partial replacement of the requirements set forth in section 10.686.20.

Developable Upland

Gross land area of property, less any public rights of way and any wetland or wetland buffer.

10.5B40.80

New number 4:

In the GNOD, the minimum community space coverage shall be equal to 10% of the total site area of the development site.

Effective upon passage.

Exhibit C

[Agreed Zoning Map for GNOD]

Legend

Character Districts
 (Refer to Zoning Map Sheet 2 of 2
 Character Districts' Regulating Plan)

Residential Districts

- R Rural
- SRA Single Residence A
- SRB Single Residence B
- GRA General Residence A
- GRB General Residence B
- GRC General Residence C
- GAMH Garden Apartment/Mobile Home Park

Mixed Residential Districts

- MRO Mixed Residential Office
- MRB Mixed Residential Business
- G1 Gateway Corridor
- G2 Gateway Center

Business Districts

- GB General Business
- B Business
- WB Waterfront Business

Industrial Districts

- OR Office Research
- I Industrial
- WI Waterfront Industrial

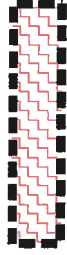
Other Districts

- M Municipal
- NRP Natural Resource Protection
- TC Transportation Corridor

Overlay Districts

- OLOD Osprey Landing Overlay District
- HNOD Highway Noise Overlay District
- DOD Downtown Overlay District (See Inset Map and Zoning Map Sheet 2 of 2 Character Districts' Regulating Plan)
- HD Historic District (See Inset Map)
- FP Flood Plain District (See FEMA Flood Insurance Rate Map)

LEGEND



PROPOSED URBAN NEIGHBORHOOD HOUSING OVERLAY DISTRICT

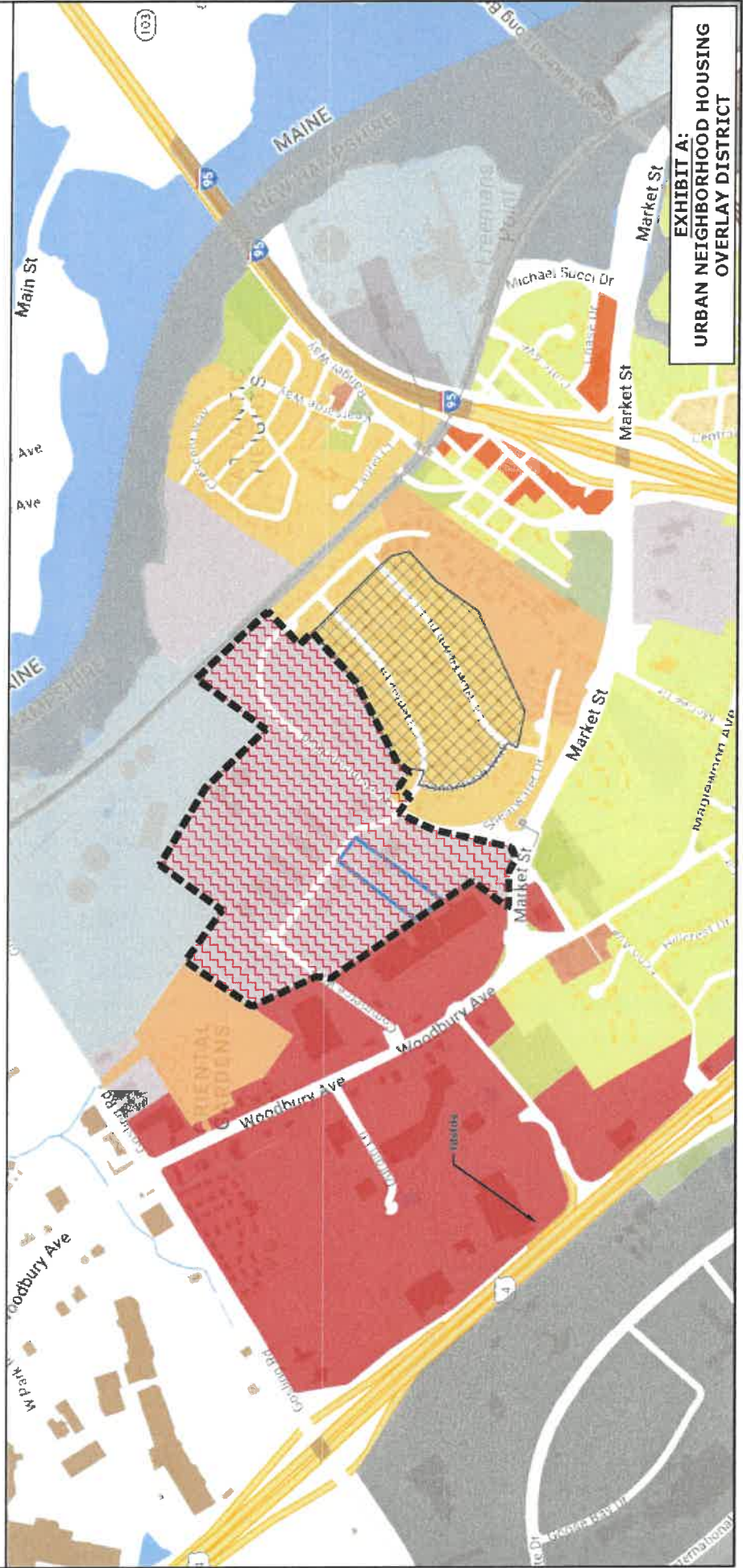


EXHIBIT A:
URBAN NEIGHBORHOOD HOUSING OVERLAY DISTRICT

Exhibit D

[Joint Motion to Stay]

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
Northern District

SUPERIOR COURT
Business and Commercial Dispute Docket

Docket No. 218-2023-CV-00468
(consolidated with 218-2023-CV-00470)

City of Portsmouth
v.
SoBow Square, LLC

JOINT MOTION TO STAY LITIGATION AND FOR ENTRY OF COLLECTION AND PRESERVATION ORDER

City of Portsmouth (the “City”) and SoBow Square, LLC (“SoBow”) (collectively, the “Parties), by and through undersigned counsel, hereby move to stay this litigation as set forth herein and for entry of a collection and preservation order in the form submitted herewith as Exhibit A. In support of this motion, the Parties states as follows:

1. Over the course of the past two months, the Parties have been earnestly engaged in an effort to resolve this matter.
2. The Parties have now entered into an “Agreement to Stay Litigation,” (the “Agreement”) whereby, upon terms set forth therein, the Parties agreed, *inter alia*, to stay this litigation for an indeterminate period while the City pursues a new zoning ordinance through the requisite legislative processes. Pursuant to the Agreement, passage of such ordinance with certain agreed-upon criteria would automatically result in a complete resolution of this matter.
3. Accordingly, the Parties request that the Court enter a stay in this action to be vacated only upon motion by either party or further order of the Court.

4. Should the requested stay be vacated, the Parties will then, by agreement or upon motion by either party, seek a new structuring order and trial date.

5. The Parties also request that the Court enter the Proposed Collection and Preservation Order in the form attached hereto as Exhibit 1. Nonparty consultant FTI Consulting joins in this motion with respect to entry of Exhibit 1 and agrees to be bound by its terms upon entry.

WHEREFORE, the Parties respectfully requests that this Honorable Court:

- A. Issue an Order entering a stay in this action to be vacated only upon motion by either party or further order of the Court;
- B. Enter the Proposed Collection and Preservation Order in the form attached hereto as Exhibit 1, to remain in place until further order of the Court; and
- B. Grant such other and further relief as is deemed just and equitable.

Respectfully submitted,

CITY OF PORTSMOUTH, NH

By its attorneys,

Dated: August 20, 2024

/s/ Kathleen M. Mahan
Michael J. Connolly, Esq. (#14371)
Owen R. Graham, Esq. (#266701)
Kathleen M. Mahan (#17124)
Hinckley, Allen & Snyder LLP
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kmahan@hinckleyallen.com

AND

SOBOW SQUARE, LLC

By its attorneys,

Dated: August 20, 2024

/s/ Christopher T. Hilson
Christopher T. Hilson, Esq. (#17116)
Donahue, Tucker & Ciandella, PLLC
16 Acadia Lane, P.O. Box 630
Exeter, NH 03833-4936
Tel: 603-778-0686
chilson@dtc;awyers.com

With respect to paragraph 5 only, joined by
nonparty consultant:

FTI CONSULTING

By: _____
Its _____

CERTIFICATE OF SERVICE

I hereby certify that on this date I served a true and accurate copy of the foregoing document upon all counsel of record through the Court's electronic filing system.

/s/ Kathleen M. Mahan
Kathleen M. Mahan, Esq.

Exhibit 1 to Joint Motion

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
Northern District

SUPERIOR COURT
Business and Commercial Dispute Docket

Docket No. 218-2023-CV-00468
(consolidated with 218-2023-CV-00470)

City of Portsmouth

v.

SoBow Square, LLC

[PROPOSED] COLLECTION AND PRESERVATION ORDER

Upon joint motion of the City of Portsmouth (the “City”) and SoBow Square, LLC (“SoBow”) (collectively, “the Parties”), joined and agreed to by nonparty consultant FTI Consulting (“FTI”), the Court hereby orders as follows:

1. The City shall promptly collect and provide to FTI (a) Councilor Tabor’s Apple iPhone X, City-issued iPad, and Microsoft Surface (collectively, the “Devices”); (b) Councilor Tabor’s D external hard drive, SanDisk 512 GB thumb drive, SORE N GO thumb drive, Spotlight V-100 drives, Lexar jump drive, and unnamed thumb drive (collectively, the “Drives”) and (c) access to the of following email accounts maintained by Mr. Tabor; johnktabor@gmail.com, johntaborportsmouth@gmail.com, councilor.tabor@cityofportsmouth.com, jtscn@comcast.net” jtscn@comcast.net, and 1g110@hotmail.com (collectively, the “Accounts”). Councilor Tabor represents that these are all of the devices, drives, and accounts containing

electronically stored information within the parameters of the ESI Protocol in this matter in his custody or possession or under his control.

2. At the City's expense, FTI shall forensically image digital evidence on the Devices and Drives, and in the Accounts, using industry standard tools and procedures to create bit-for-bit forensic images of the Devices, Drives, and Accounts ("Forensic Images"). This process will not alter, delete, or in any way change the data on the Devices or Drives, or in the Accounts being imaged. After creating the Forensic Images, FTI shall return the Devices and Drives to the City and make no further access to the Accounts.

3. At the City's expense, FTI shall preserve the Forensic Images and not review them (except as necessary to create them), unless and until further order of the Court. Upon request of the City, FTI shall provide the City at its expense a copy of any or all of the Forensic Images. FTI shall otherwise maintain strict confidentiality of the Forensic Images and not allow access to the Forensic Images to SoBow or any person or entity other than the City, unless and until further order of the Court.

4. In the event one Party or both Parties move the Court for an order that the Forensic Images be used in any way in this litigation or any subsequent litigation, the City and City Councilor John Tabor retain any and all rights to assert claims of attorney-client privilege, attorney work product, and any other available privilege or protection as grounds for the Court to order that particular folders or files included in the Forensic Images not be made available to SoBow, as well as any and all rights to request a Court order applying confidentiality

designations in accordance with any then-applicable protective order or stipulation. SoBow retains any and all rights to challenge and oppose these claims and requests.

5. The City shall issue a preservation notice consistent with this paragraph to each of the persons listed on Schedule A notifying them to preserve and not destroy, delete, or lose or permit the destruction, deletion or loss (whether through cell phone return, failure to suspend automatic deletion programs, or otherwise) of any electronically stored information stored on any of their Devices and or Accounts that concerns the McIntyre Project, SoBow, the subject matters of these consolidated lawsuits, or the lawsuits themselves.

So ordered this ___ day of _____, 2024.

Delker, J.

SCHEDULE A

- John Tabor
- Anne Weidman
- Each of the City of Portsmouth's Communication Custodians as identified in the ESI Protocol
- Each City Councilor for whom the City produced documents or communications

Exhibit E

[Joint Stipulation of Dismissal]

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
Northern District

SUPERIOR COURT
Business and Commercial Dispute Docket

Docket No. 218-2023-CV-00468
(consolidated with 218-2023-CV-00470)

City of Portsmouth

v.

SoBow Square, LLC

STIPULATION OF DISMISSAL

City of Portsmouth (“City”) and SoBow Square, LLC (“SoBow”), by and through undersigned counsel, hereby stipulate to the dismissal of this action, including all claims, counterclaims, and defenses asserted therein, with prejudice, and without costs or attorneys’ fees to any party.

Respectfully submitted,

CITY OF PORTSMOUTH, NH

By its attorneys,

Dated: _____, 2024

/s/ Kathleen M. Mahan
Michael J. Connolly, Esq. (#14371)
Owen R. Graham, Esq. (#266701)
Kathleen M. Mahan (#17124)
Hinckley, Allen & Snyder LLP
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kmahan@hinckleyallen.com

AND

SOBOW SQUARE, LLC

By its attorneys,

Dated: _____, 2024

/s/ Christopher T. Hilson
Christopher T. Hilson, Esq. (#17116)
Donahue, Tucker & Ciandella, PLLC
16 Acadia Lane, P.O. Box 630
Exeter, NH 03833-4936
Tel: 603-778-0686
chilson@dtc;awyers.com

CERTIFICATE OF SERVICE

I hereby certify that on this date I served a true and accurate copy of the foregoing document upon all counsel of record through the Court's electronic filing system.

/s/ Kathleen M. Mahan
Kathleen M. Mahan, Esq.