

**OPTION TO GROUND LEASE
35 SHERBURNE ROAD, PORTSMOUTH, NH
FOR THE DEVELOPMENT OF BELOW MARKET RATE HOUSING**

This Option to Ground Lease 35 Sherburne Road, Portsmouth NH for the Development of Below Market Rate Housing at ("Agreement") is made this 4th day of ~~March~~, 2025, by and among the following parties:

April

City of Portsmouth, New Hampshire, a municipal corporation having its principal place of business at One Junkins Avenue, Portsmouth, NH 03801 (the "City");

Portsmouth Housing Authority, a New Hampshire public housing authority, with a principal place of business at 245 Middle Street, Portsmouth, NH 03833 ("PHA"); and

PHA Housing Development LTD, PHA's affiliated New Hampshire non-profit corporation, with a principal place of business at 245 Middle Street, Portsmouth, NH 03833 ("PHAD" and together with PHA, "Portsmouth Housing" and collectively with the City, the "Parties").

RECITALS

A. Enhancing the supply of housing choices, especially the supply of below market rate housing options, tops the list of the Portsmouth City Council's goals for 2024-2025 ("City's Goal").

B. In furtherance of the City's Goal and in accordance with its Master Plan (Portsmouth Master Plan 2005), the City's Housing Blue Ribbon Committee recommended that the City Council support the creation of below market rate housing at municipally owned property having an address of 35 Sherburne Road, a site comprised of an approximately 5.3-acre parcel known as City of Portsmouth Tax Assessor Map 259 Lot 10 that is serviced by public water and sewer, and includes, among other attributes, an existing structure, the vacant Sherburne School (the "Property").

C. The City Council voted unanimously to commence the exploration of the creation of below market rate housing at the Property at their April 15, 2024, meeting.

D. The City initiated a process beginning with seeking Letters of Interest and Statements of Qualifications on May 15, 2024, and subsequently, a Request for Proposal (RFP) from pre-qualified housing development teams for the development of the Property on October 9, 2024.

E. The City Council and the Housing Blue Ribbon Committee submitted written questions to the City Manager, and City staff provided the written questions to the two top-ranked firms, including PHA, and the two top-ranked firms submitted written responses which, in addition to the City Council's and the Housing Blue Ribbon Committee's questions, were

subsumed and made part of the City Council agenda packet for the December 2, 2024, City Council meeting.

F. After hearing from the two top-ranked firms and from the public, and after consideration of all written materials submitted during the process, the City Council voted at a December 9, 2024, Special City Council meeting 8-1 in favor of having the City Manager enter a contract with PHA for the creation of below market rate housing at 35 Sherburne Road (the “Purpose”).

G. Portsmouth Housing has demonstrated the management and financial capacity to develop, own and operate high quality below market rate housing, and has agreed to invest its internal staff and its financial resources to fulfil the Purpose (the “Project”).

H. The Parties desire to fulfil the Purpose in good faith and in a manner substantially consistent with plans outlined in PHA’s response to the City’s RFP (“PHA’s Proposal”) as contemplated and understood by the City Council when it cast its December 9, 2024 vote and as further clarified and detailed in PHA’s presentations at the January 30, 2025, “charette” and repeated at the February 1, 2025, “charette,” and the shared results of those “charettes” presented on February 6, 2025, (collectively “the Charette Presentations”).

I. The City Council voted on February 18, 2025, to waive all permit fees for Portsmouth Housing’s development of the Property and voted to establish a certain Land Use Approval Process, as defined herein.

J. The Parties recognize and agree that, so as not to frustrate the Purpose, there are certain conditions precedent to the signing of a long-term ground lease.

K. The Parties recognize the need for flexibility in the scope and timing of the Project, as may be impacted by the Financing (defined below), while concurrently committing to pursue the Purpose at the Property with due diligence, appropriate attention, and deliberate speed in adherence to the conditions precedent as outlined below.

NOW, THEREFORE, in reliance on the above recitals and in consideration of the mutual promises set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Option

- 1.1 Grant of Option. Subject to the terms, covenants and conditions in this Agreement, the City hereby grants to Portsmouth Housing (or either PHA or PHAD) the exclusive option to enter a long-term ground lease for the Property for the Purpose of developing the Project (the “Option”). During the Option Term (below defined), the City will not grant any third party a present or future interest in the Property unless otherwise mutually agreed to by the Parties.

- 1.2 Term of the Ground Lease and Consideration. The term of the ground lease will be at least sixty-five (65) years, and the consideration for the conveyance is the development and operation of the Project for the Purpose.
- 1.3 Exercise. Unless this Agreement is earlier terminated, Portsmouth Housing may exercise this Option by written notice to City, but in no event sooner than the completion of an environmental review pursuant to 24 C.F.R. 58 and any other applicable federal or state agency environmental review regulations (collectively, "Environmental Review"), receipt of a Finding of No Significant Impact (FONSI) and having satisfied the additional conditions precedent described in this Agreement. Portsmouth Housing also may not exercise this Option prior to receipt of Land Use Approvals granted pursuant to the Land Use Approval Process, as defined herein, and not prior to their submission of an application to the New Hampshire Housing Finance Authority for Low Income Housing Tax Credits.
- 1.4 Option Period. Unless sooner terminated or extended pursuant to the terms of this Agreement, and except as provided in paragraph 1.5, the Option shall expire no later than on December 31, 2027("Option Period").
- 1.5 Extension of Option Period. The Option Period may be extended for an additional one-year period for good cause shown to the City Manager by Portsmouth Housing. The City Manager, on behalf of the City, shall not unreasonably withhold agreement to a one-year extension to the Option Period.

2. Responsibilities of Portsmouth Housing during Option Period

- 2.1 Due Diligence. Portsmouth Housing shall conduct such due diligence as it deems necessary to determine whether to exercise the Option.
- 2.2 Physical Inspection. Portsmouth Housing shall complete any and all assessments, studies, surveys, and research at its sole cost and expense as it deems necessary or appropriate, (including, but not limited to environmental site assessments, including soil and groundwater testing and subsurface explorations), real estate title reviews, boundary surveys, building and property inspections, flood zone reviews and certifications, reviews of all applicable governmental regulations and ordinances, geotechnical studies, parking and traffic studies, noise overlay studies, as well as reviews to determine the adequacy of public and private utilities serving the Property. If Portsmouth Housing shall discover or determine prior to the expiration of the Option Period that it is not satisfied in any way with the status of the Property or the results of any of its due diligence or inspections, Portsmouth Housing shall have right to terminate this Agreement by written notice delivered to the City, and the Parties shall thereafter be released from any further obligations hereunder. In the event that Portsmouth Housing's due diligence reveals any condition that in its judgment requires disclosure to any governmental agency or authority, it shall immediately notify the City and may

disclose matters concerning the Property to a governmental authority if, in the opinion of its legal counsel, it is required by law to make such disclosure.

- 2.3 **Title.** During the Option Period, Portsmouth Housing shall perform a title examination of the Property at its sole cost and expense and may conduct a survey, to satisfy itself that title to the Property is good, marketable and insurable, and not otherwise subject to any liens, encumbrances, covenants or other restrictions which would prevent Portsmouth Housing from using the Property for the Project. In the event that the title to the Property is not good, marketable and insurable, or is otherwise subject to any other condition that would impair the Project ("Title Defects"), it shall notify the City, and the City shall be provided a reasonable period of time, no less than ninety (90) days following written notice from Portsmouth Housing ("Title Objections"), within which to resolve such title defects. Any Title Objections shall be delivered to the City on or prior to the expiration of the Option Period. In the event that the City is unable or otherwise unwilling to provide good, marketable and insurable title, or to remove the Title Defects within the ninety (90) day period, Portsmouth Housing, at its sole option, may proceed with any of the following options: (i) afford the City additional time to cure said title defects; (ii) terminate this Option; (iii) negotiate a mutually agreeable solution; or (iv) proceed with the Project, notwithstanding the Title Objections.
- 2.4 **Timetable for Financing Submissions.** Within sixty (60) days of the date of this Agreement, Portsmouth Housing shall deliver to the City Manager for review and acceptance a timetable containing milestones for submission of applications for public and private capital to enable development of the Project ("Financing"). Such timetable shall include milestones for the submission of both preliminary and final application for Low Income Housing Tax Credits by the deadline imposed by New Hampshire Housing Finance Authority for 2025 applications. The Parties acknowledge and agree that the proposed timetable may be affected by the requirements and conditions of third parties, beyond the control of Portsmouth Housing. Portsmouth Housing agrees to keep the City Manager updated on any such modifications to the timetable.
- 2.5 **Reports to the City.** PHA shall provide monthly progress reports to the City Manager or her representative for the duration of this Agreement.

3. Responsibilities of the City During Option Period

- 3.1 **Existing Information.** The City shall make available to Portsmouth Housing, to the extent not already provided, any existing building plans, inspection records, environmental or soil reports or data, or other information relative to the Property and its uses in its possession or reasonably accessible to it.

- 3.2 Right of Entry. The City shall continue to cooperate with Portsmouth Housing to provide access to the site and building in accordance with the Executed Right of Entry between PHA and the City, dated February 4, 2025, **Attachment A.**
- 3.3 Public Meetings. The City shall work with Portsmouth Housing to facilitate any public meetings necessary to the Project and the Land Use Approval Process.
- 3.4 Designation of a Representative and Cooperation. The City shall provide Portsmouth Housing with a single point of contact who shall be responsible for coordinating assistance including: (i) providing access to the Property; (ii) providing Project-related documentation, and any other information reasonably requested; (iii) assisting with public meetings; and (iv) ensuring timely City review and comment on any Project-related deliverables, as may be reasonably requested by Portsmouth Housing, in connection with the Land Use Approval Process or otherwise.
- 3.5 Land Use Board Recommendations. The City will provide guidance and non-monetary assistance to Portsmouth Housing regarding the submission of its site plan application.
- 3.6 Maintenance of Insurance. The City shall bear the risk of any loss to the Property prior to the execution and consummation of the Ground Lease. The City shall maintain casualty and liability insurance upon the Property as currently insured and provide Portsmouth Housing with evidence of same within ten (10) business days of the Effective Date.

4. Progress Milestones

4.1 Milestones for Obtaining Land Use Recommendations. Portsmouth Housing shall follow the Land Use Approval process established by vote of the City Council on February 18, 2025, and as further defined in that certain Land Use Compliance Agreement by and between the Parties of near or even date herewith (the “Land Use Approval Process”).

5. Approvals

- 5.1 City Manager Approval. The City Manager’s approval of the Project plans which will be incorporated into the Ground Lease shall be a condition precedent to the exercise of the Option (the “Approval”). Provided that the Project plans are substantially consistent with those submitted and recommended pursuant to the Land Use Approval Process, the Approval shall not be unreasonably withheld, conditioned, or delayed. Portsmouth Housing will promptly notify the City Manager of any material change to any Project plans previously approved, whether necessitated by Financing or other conditions.

- 5.2 Other Approvals. The exercise of the Option is expressly conditioned upon Portsmouth Housing receiving, together with the expiration of any appeals period(s), any and all federal, state or local approvals, licenses, permits, zoning changes, variances, special exceptions, site plans, subdivisions, agreements or consents necessary from any state, federal or local official, regulatory authority, or other agency having jurisdiction over the Property in any manner or configuration, and with any required off-site improvements and impact fee requirements acceptable to Portsmouth Housing as well as any other applicable legal or regulatory requirements (collectively, the "Approvals") relative to the Project.

6. Breach and Opportunity to Cure

- 6.1 **Breach of Agreement:** If any Party (the "Breaching Party") fails to perform or observe any material term or condition, including without limitation the achievement of any milestone, of this Agreement, the other party (the "Non-Breaching Party") may provide written notice to the Breaching Party specifying the nature of the breach.
- 6.2 **Opportunity to Cure:** Upon receipt of such notice, the Breaching Party shall have thirty (30) days or such other mutually agreed time to cure the breach to the reasonable satisfaction of the Non-Breaching Party.
- 6.3 **Failure to Cure:** If the Breaching Party fails to cure the breach within the specified thirty (30) day period, or such other reasonable time as agreed by the Parties, the Non-Breaching Party may terminate this Agreement immediately upon written notice to the Breaching Party.
- 6.4 **Effect of Termination:** Upon termination of this Agreement, all rights and obligations of the Parties shall cease, except for those rights and obligations that expressly survive termination as set forth in this Agreement.

7. Ground Lease and Closing

- 7.1 Closing Documents. Upon the exercise by Portsmouth Housing of the Option, to the extent applicable and if requested to do, the City shall work with Portsmouth Housing to prepare and deliver customary Ground Lease documents including a long-term ground lease, consistent with the terms herein and mutually acceptable to the Parties, and any and all other transfer documents, and affidavits (in customary form) as may be required by Portsmouth Housing's title insurance company, and Financing parties. Counsel for the City shall have the opportunity to review and comment on the affidavits and such other documents. Any taxes applicable to the Ground Lease will be prorated between the Parties as is customary in the State of New Hampshire.

- 7.2 Form of Ground Lease. The Ground Lease shall be in a form mutually agreeable to the Parties. However, the Ground Lease shall provide for rent of \$1.00 and include a right of reentry in favor of the City in the event Portsmouth Housing does not obtain a building permit for the Project by December 31, 2027, unless the Parties mutually agree to an extension.
- 7.3 Timing. The Parties agree to make reasonable efforts to complete the closing on the Ground Lease within ninety (90) days of the Exercise of the Option.
- 7.4 City Council. The form of the Ground Lease is subject to approval by the Portsmouth City Council.

8. Casualty and Condemnation.

- 8.1 Entire Property. In the event that the entire Property is damaged by fire, flood or other casualty, or is subject to an eminent domain proceeding prior to the consummation of the Ground Lease, Portsmouth Housing at any time after the occurrence of such damage or casualty may elect to terminate this Agreement by written notice, in which event to compensate Portsmouth Housing for out of pocket expenses borne in connection with its work under this Agreement, the City will pay over to Portsmouth Housing a portion of the insurance proceeds received on account of casualty or any settlement amounts received through any eminent domain proceeding up to the amount of its out-of-pocket expenses plus 10%. Any remaining proceeds remain with the City. Thereafter, all other obligations of the Parties hereunder shall cease, and this Agreement shall thereupon be void and of no further force or effect.
- 8.2 Partial Property. In the event of a partial eminent domain or casualty (leaving suitable residual property for the Project) prior to consummation of the Ground Lease, Portsmouth Housing may choose to (i) proceed with the Ground Lease pertaining to the residual property and redesign its intended use of the Property to accommodate the Project; or (ii) terminate this Agreement by written notice, in which event, to compensate Portsmouth Housing for out of pocket expenses borne for its work on the Project, the City will pay over to Portsmouth Housing a portion of the insurance proceeds received on account of casualty or any settlement amounts received through any eminent domain proceeding up to the amount of its out-of-pocket expenses plus 10%. Thereafter, all other obligations of the Parties hereunder shall cease, and this Agreement shall thereupon be void and of no further force or effect.

9. Representations of the Parties

- 9.1 City Representations. The City represents that: the Property's use for the described Purpose is permissible under the current applicable zoning ordinance;

the City is not aware of any clouds or defects in title; and the City Manager has authority pursuant to vote of the City Council on December 9, 2024, to enter into this Agreement and to extend the term of the Option as herein provided.

- 9.2 Portsmouth Housing Representations. Portsmouth Housing represents that: it will dedicate a development team, including an architect, civil engineer and other disciplines as may be required, to develop site plans to advance the Project; it will diligently pursue Financing for the Project; and has authority to pursue this Project by vote of its governing body.

10. Fees and Costs

- 10.1 Waiver of Permit Fees. The City agrees to waive local land use, building and inspection permit fees related to the Portsmouth Housing's obligations under this Agreement and for the Project should the Option be exercised.
- 10.2 Costs. Each Party shall bear its own costs for any consultants engaged or other costs incurred to fulfill any part of this Agreement unless otherwise agreed in writing.

11. Cooperation

- 11.1 The Parties shall cooperate with each other to perform this Agreement and to consummate the Ground Lease. Toward such end, the Parties shall take such further actions and execute such further documents as may reasonably be requested by either Party, or their representatives, agents, and consultants.
- 11.2 The City shall review all submissions timely, and any required approval shall not be unreasonably withheld.

12. Miscellaneous

12.1 Ownership and Use of Materials. All materials produced by Portsmouth Housing, including, without limitation, plans, specifications, reports, manuals, pamphlets and articles, shall be the property of Portsmouth Housing, and shall appropriately designate Portsmouth Housing as the owner. Portsmouth Housing shall make copies of these materials available to the City.

12.2 Right to Assign. Portsmouth Housing shall have the right to assign the Option to a separate legal entity formed, controlled or sponsored by Portsmouth Housing for the purpose of the Financing.

12.3 Project Scope and Structure. Unless the Parties otherwise agree through the Project Approval Process, the Parties acknowledge and agree that Portsmouth Housing or its authorized assignee shall be in sole possession and control of the Property upon the consummation of the Ground Lease, and subject to applicable Approvals, shall be authorized to

structure the Project in any manner necessary to optimize Financing and the achievement of the Purpose.

12.4 Compliance with Laws. In connection with this Agreement, each of the Parties shall, and shall require all of their employees, contractors, and agents to, comply with all federal, state, and local laws, regulations, rules, ordinances and orders of any kind which are applicable to any performance under this Agreement.

12.5 Portsmouth Housing Liability. In no event shall Portsmouth Housing be held liable with respect to: (i) any contract between a third party and the City, whether relating to the subject matter of this Agreement or otherwise; (ii) any recommendations, proposals, suggestions, comments, or actions taken or omitted in connection with this Agreement; or (iii) any work performed by the City or by any contractor or consultant of the City.

12.6 Nature of Relationship. The Parties acknowledge that nothing herein shall create an agency relationship, partnership, joint venture, or other ownership relationship between Portsmouth Housing, any third-party contractor, or the City. Portsmouth Housing's participation in this Agreement in no way obligates any further action or financial assistance by Portsmouth Housing beyond the terms hereof. Furthermore, the Parties understand and agree that the ultimate feasibility of the Project is not guaranteed by Portsmouth Housing.

12.7 Notices. All notices shall be in writing and shall be deemed given when delivered by hand or when delivered via certified or registered first class mail, return receipt requested, or via overnight delivery with confirmation of process and shall be addressed as follows:

To Portsmouth Housing:

Portsmouth Housing Authority
345 Middle Street
Portsmouth, NH 03833

To City of Portsmouth:

City of Portsmouth, City Manager
1 Junkins Avenue
Portsmouth, NH 03801

12.8 Binding Effect; Successors and Assigns. 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.

12.9 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.

12.10 Enforceability. Any provision of this Agreement that is determined to be illegal or unenforceable by a court of competent jurisdiction, shall be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof; and the Parties agree to negotiate in good faith to amend this Agreement to provide for each party to this Agreement the same relative rights and obligations existing prior to such determination of illegality or unenforceability.

12.11 Consent to Jurisdiction and Venue. The Parties 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. Both Parties hereby waive their right to a jury trial.

12.12 No Waiver. 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.

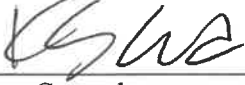
12.13 No Rights Conferred Upon Others. Except as expressly set out herein, nothing in this Agreement shall be construed as giving any individual, corporation, limited liability company, partnership, joint venture, association, joint stock company, trust, unincorporated organization or government, other 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.

12.14 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 MOUs, agreements and understandings between the Parties. 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.

[Signature Pages follow]

The Parties have executed this Agreement on the Effective Date set forth above.

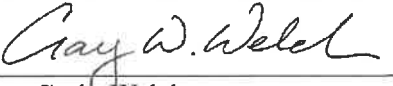
CITY OF PORTSMOUTH

By: 
Name: Karen Conard
Title: City Manager

PHA HOUSING DEVELOPMENT LTD.

By: 
Name: Craig Welch
Title: Executive Director

PORTSMOUTH HOUSING AUTHORITY

By: 
Name: Craig Welch
Title: Executive Director

**ATTACHMENT A
RIGHT OF ENTRY AGREEMENT**