

## **DEVELOPMENT AGREEMENT**

This DEVELOPMENT AGREEMENT ("**Agreement**"), made as of this \_\_\_ day of \_\_\_\_\_, 2024, by and between the TOWN OF WINDHAM, a municipal corporation organized under the laws of the State of Maine and situated in Cumberland County (the "Town"), and WINDHAM VILLAGE APARTMENTS, LLC, a Maine limited liability company ("WVA").

### **RECITALS**

WHEREAS, WVA intends to purchase real property located at 770 Roosevelt Trail in Windham, County of Cumberland and State of Maine (the "**Property**") more particularly described in Exhibit A attached hereto; and

WHEREAS, WVA is seeking approval from the Town to develop 156 two-bedroom apartment units and 16 one-bedroom apartment units within 14 buildings to be constructed on the Property (the "**Project**") as depicted on Exhibit B attached hereto; and

WHEREAS, approval and development of the Project will require certain easements, property transfers, fees, permits, and sewer connections to be completed by WVA and the Town; and

WHEREAS, WVA and the Town have agreed upon the shared responsibility for the actions necessary to enable the Project.

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

### **ARTICLE I WVA OBLIGATIONS**

#### **Section 1.01 Easements.**

(a) WVA agrees to grant an easement of approximately forty-five (45) feet in width to the Portland Water District in the location as shown on the plan titled First Amended Shaw's Commercial Subdivision, attached hereto as Exhibit\_\_\_\_\_, to be more particularly defined by the parties and the Portland Water District at a later date, for the District's access to and maintenance of the existing watermain and sewer lines therein. The easement shall set forth the parties rights and obligations thereunder, including, but not limited to, the restoration of the easement area following construction or maintenance activities.

(b) The Town hereby agrees to grant an easement of approximately 325 square feet to B33 WINDHAM II LLC at the southwest corner of the Property, adjacent to the intersection of Roosevelt Trail and Manchester Drive as shown on the plan titled \_\_\_\_\_, attached hereto as Exhibit\_\_\_\_\_, to be more particularly defined by the parties at a later date, for the maintenance of an existing sign for the adjacent Shaw's

retail store. Any additional easements necessary for B33 WINDHAM II LLC to connect to the Town's sewer system across WVA's property shall be negotiated by and between WVA and B33 WINDHAM II LLC.

**Section 1.02 Pump Station.** WVA hereby agrees to convey to the Town by warranty deed a portion of the Property at the southwest corner of the Property, at the intersection of Roosevelt Trail and Manchester Drive as shown on the plan titled \_\_\_\_\_, attached hereto as Exhibit\_\_\_\_, to be more particularly defined by the parties at a later date, for the purpose of enabling the Town to construct a new sewer pump station at said location in accordance with the plans attached hereto as Exhibit\_\_\_\_, plus access from Manchester Drive and area for one parking spot (the "Pump Station Lot"). The Pump Station Lot shall be identified on the subdivision plan submitted by WVA for Town approval and included for purposes of the site plan only to the extent the Pump Station Lot has not been conveyed to the Town prior to such site plan approval. WVA further agrees to convey the Pump Station Lot to the Town as soon as reasonably practical, but no later than \_\_\_\_\_, to ensure that the Town is able to commence construction on the pump station and the connections necessary to serve the Property and the Project by \_\_\_\_\_. Upon WVA's purchase of the Property, WVA agrees to grant a temporary construction easement to the Town, if necessary, for the purpose of allowing the Town to begin site preparation and construction activities related to the pump station prior to WVA's conveyance of the Pump Station Lot.

**Section 1.03 Sewer Connection.** Pursuant to Chapter 181 of the Town Code, WVA hereby agrees to pay an assessment of \$500,000 for the connection to the Town's sewer system, which represents WVA's share of the Town's expense to increase capacity of the sewer system and expand the treatment facility to enable development of the Property and the Project. This assessment shall be required to be paid by WVA to the Town prior to the Town's issuance of a certificate of occupancy for each building and may be paid in installments of \$35,714 per the first 13 buildings, and the final installment in the amount of \$35,718 for the 14<sup>th</sup> building. In addition to the sewer connection fee set forth above, WVA shall also be responsible for the payment of all other fees required in connection with the development of the Property and the Project unless expressly stated otherwise herein.

## **ARTICLE II TOWN OBLIGATIONS**

**Section 2.01 Easements.** The Town will work with the Portland Water District to ensure that all construction activities necessary within the easement area granted by WVA to the Portland Water District under Section 2.01(a) shall be completed in a timely fashion to provide for connection to the Project no sooner than January 2026.

**Section 2.02 Pump Station.** The Town will ensure that the construction of a new pump station, including all piping and other connection infrastructure necessary to serve the pump station will be completed in a timely fashion to provide for connection to the Project no sooner than January 2026, provided that WVA conveys the Pump Station Lot to the Town as set forth in Section 1.02 above. In the event the Pump Station Lot is not conveyed to the Town by \_\_\_\_\_ to enable connection to the Property and the Project, the Town shall not be held in default of this Agreement and WVA shall have no remedy against the Town therefor. The Pump

Station Lot shall be conveyed to the Town prior to subdivision approval. The Town will engage the Portland Water District to design and complete the construction of the pump station, and the Town reserves full discretion regarding the design and sizing of the pump station, provided that it shall, at a minimum, meet the requirements to serve the Project. The Town and the Portland Water District will work with the consultants for WVA to finalize the construction plans and determine the construction timeline for the pump station, which will provide for connection to the Project no sooner than January 2026.

**Section 2.03 Sewer Connection.** The Town shall be responsible to notify the owners of adjacent property located at B33 WINDHAM II LLC that the 14 buildings within the Project will be connected to the Town's sewer system on or after January 2026, and that they may be eligible to connect to the Town's sewer system at that time. The Town hereby acknowledges that WVA intends to construct two buildings and associated parking areas on an existing septic field that serves the adjacent property owned by B33 WINDHAM II LLC, and that connection to the Town's sewer system by B33 WINDHAM II LLC will be necessary prior to construction of these two buildings as may be required by the Town's Planning Board. The Town hereby agrees to ensure that there is no interruption of service to B33 WINDHAM II LLC, other than any temporary delays in service related to the transfer of the connection to the Town's sewer system, provided that B33 WINDHAM II LLC has secured all rights necessary to connect its property to the Town's sewer system.

**Section 2.04 Growth Ordinance.** The Town hereby agrees to allocate 14 growth permits to the Project. The growth permits shall first be issued, if available, subject to the annual allocation set forth in Section 101-7(C) of the Growth Management Ordinance of the Town of Windham. In the event such growth permits are not available subject to the annual allocation when requested, the Town hereby agrees to allocate the remaining growth permits from the reserve pool pursuant to Section 101-7(G) of the Growth Management Ordinance. WVA shall be responsible for submitting applications for growth permits when necessary as set forth in Section 101-7(D) of the Growth Management Ordinance. All other provisions, including, but not limited to, issuance, extensions and transfer of growth permits, shall be subject to the terms of the Growth Management Ordinance.

### **ARTICLE III TERM**

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

### **ARTICLE IV INDEMNIFICATION**

**Section 4.01 Indemnity by WVA.** To the full extent permitted by law, WVA shall indemnify, defend, and hold harmless the Town, and each of the Town's employees, officials, officers, agents, consultants, attorneys, and assigns, from and against any and all liabilities, losses, claims, costs, damages, and expenses (including, without limitation, attorneys' fees, costs, and

expenses, but specifically excluding any consequential, special, or punitive damages) arising from, relating to, or in connection with: (a) the gross negligence, fraud, or willful misconduct of WVA; (b) any materially false or misleading representation or warranty made by WVA in this Agreement or (c) acts by WVA outside the scope of authority granted under this Agreement.

**Section 4.02 Limitation on Indemnities.** Before enforcing its rights under Section 5.01 or Section 5.02 (as applicable), the Town shall first seek defense and indemnity from any insurer that provides coverage for that claim, and/or any subcontractor that provides indemnity and defense for the claim, regardless of the cause of the claim, and the defense and indemnity obligations of each party will apply only to the extent that defense and indemnity is not timely provided by any applicable insurer or subcontractors.

**Section 4.03 Survival.** The provisions of this Article VII will survive the expiration or earlier termination of this Agreement.

## **ARTICLE V DEFAULT**

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

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

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

(c) **Bankruptcy.** WVA experiences any of the following: (i) the filing of a voluntary petition under any federal or state law for the relief of debtors; (ii) the filing of an involuntary proceeding under any such law; (iii) the making of a general assignment for the benefit of the assignor's creditors; (iv) the appointment of a receiver or trustee for a substantial portion of a person's assets; or (v) the seizure by a sheriff, receiver, or trustee of a substantial portion of a person's assets; provided, however, that no bankruptcy shall be

deemed to have occurred in the case of an event described in clause (ii), (iv), or (v) above, until the proceeding, appointment, or seizure has been pending for sixty (60) days.

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

### **Section 5.03 Force Majeure.**

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

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

## **ARTICLE VI REPRESENTATIONS AND WARRANTIES**

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

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

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

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

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

(e) There are no pending legal proceedings or administrative actions of any kind or character materially and adversely affecting the Property or WVA's interest therein.

## **ARTICLE VII MISCELLANEOUS**

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

To Town:

Barry Tibbetts  
Town Manager  
Town of Windham  
8 School Road  
Windham, ME 04062  
Email: batibbetts@windhammaine.us

with a copy to:

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

To WVA:

Loni Graiver

with a copy to:

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

**Section 7.03 Assignment; Successors and Assigns.** Neither party may not assign any of its rights or delegate any of its obligations hereunder without the written approval of the other party, which may be withheld in its sole and absolute discretion. Any purported assignment or delegation in violation of this Section shall be null and void. No assignment or delegation shall relieve a party of any of its obligations hereunder. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective permitted successors and permitted assigns.

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

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

**Section 7.06 Attorneys' Fees.** If any action is brought by either party against the other in connection with, relating to, or arising out of this Agreement or any of the documents and instruments delivered in connection herewith or in connection with the transactions contemplated hereby, the prevailing party shall be entitled to recover from the other party its reasonable out-of-pocket costs and expenses, including, without limitation, reasonable attorneys' fees, incurred in connection with the prosecution or defense of such action.

**Section 7.07 Submission to Jurisdiction.** The parties hereby agree that any suit, action, or proceeding seeking to enforce any provision of, or based on any matter arising out of, relating to, or in connection with, this Agreement or the transactions contemplated hereby, whether in contract, tort, or otherwise, shall be brought in the federal or state courts of the State of Maine, so long as such courts shall have subject-matter jurisdiction over such suit, action, or proceeding, and

that any cause of action arising out of this Agreement shall be deemed to have arisen from a transaction of business in the State of Maine. Each of the parties hereby irrevocably consents to the jurisdiction of such courts (and of the appropriate appellate courts therefrom) in any such suit, action, or proceeding and irrevocably waives, to the fullest extent permitted by law, any objection that it may now or hereafter have to the laying of the venue of any such suit, action, or proceeding in any such court or that any such suit, action, or proceeding that is brought in any such court has been brought in an inconvenient forum. Service of process, summons, notice, or other document delivered by registered mail to the address set out in Section 7.01 shall be effective service of process for any suit, action, or other proceeding brought in any such court.

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

**Section 7.09 Interpretation and Construction.**

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

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

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

**Section 7.11 Entire Agreement.** This Agreement, together with all related exhibits and schedules, constitutes the sole and entire agreement of the parties to this Agreement regarding the subject matter contained herein and therein, and supersedes all prior and contemporaneous understandings, agreements, representations, and warranties, both written and oral, regarding such subject matter.

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

**Section 7.13 Waiver.** No waiver by any party of any of the provisions hereof shall be effective unless explicitly set out in writing and signed by the party so waiving. No waiver by any party shall operate or be construed as a waiver in respect of any failure, breach, or default not



expressly identified by such written waiver, whether of a similar or different character, and whether occurring before or after that waiver. No failure to exercise, or delay in exercising, any right, remedy, power, or privilege arising from this Agreement shall operate or be construed as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power, or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power, or privilege.

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

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

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

**TOWN OF WINDHAM:**

By: \_\_\_\_\_

Name: Barry A. Tibbetts

Title: Town Manager

**WINDHAM VILLAGE APARTMENTS,  
LLC:**

By: \_\_\_\_\_

Name: Loni Graiver

Title: