

IN THE MATTER OF

TWO PENGUIN PROPERTIES, LLC
14 HILL WAY (Tax Map 022, Lot 74-3)
CAPE ELIZABETH, ME 04107

CONSENT AGREEMENT

This CONSENT AGREEMENT is entered into this ____ day of _____, 2021 by and between Two Penguin Properties, LLC (the “Landowner”), a Maine limited liability corporation having its principal place of business in Cape Elizabeth, Maine, and the Town of Cape Elizabeth, a municipal corporation existing under the laws of the State of Maine with offices at 320 Ocean House Road in Cape Elizabeth, Maine (the “Town”) (collectively, the “Parties”).

RECITALS

WHEREAS, the Landowner owns a vacant lot at 14 Hill Way in Cape Elizabeth, Maine, which is designated on the Town’s assessing maps as Tax Map 022, Lot 74-3, and is shown as Lot #3 on the Tarbox Triangle Subdivision Plan recorded in the Cumberland County Registry of Deeds in Plan Book 216 (the “Subject Lot”);

WHEREAS, the Subject Lot is located in the Town Center District (“TC District”);

WHEREAS, under Section 19-6-4(B)(3)(m) of the Town’s Zoning Ordinance, “short term rental” is identified as a nonresidential use permitted in the TC District;

WHEREAS, on or about July 21, 2020, the Landowner filed with the Town a site plan review application, seeking approval from the Town’s Planning Board to construct a mixed-use building on the Subject Lot containing a short term rental use on the first floor and a residential unit on the second and third floors;

WHEREAS, on October 20, 2020, after holding a public hearing on the application, the Planning Board voted to approve the site plan review application;

WHEREAS, in its written decision, the Planning Board found that, on or about April 13, 2020, the Town Council had adopted a moratorium on new short term rental permits and further found that the Landowner “may not be able to obtain a certificate of occupancy if Short Term Rental regulations in effect when the moratorium ends do not allow issuance of a Short Term Rental Permit for 14 Hill Way” and that the Planning Board’s “approval will not create vested rights to create a Short Term Rental on the first floor”;

WHEREAS, based on these findings, the Planning Board conditioned its approval by stating that “any use occupying the first floor of the building located at 14 Hill Way must be a use included in Sec. 19-6-4(B)(3) nonresidential uses” (hereafter, this condition of approval is referred to as “COA #5”);

WHEREAS, although the Town Council has not adopted any amendments to the Town’s Zoning Ordinance regulating short term rental uses within the Town to date, the Planning Board prepared draft Zoning Ordinance amendments, dated October 10, 2020, that propose to treat short term rentals as an accessory residential use by removing “short term rental” from the list of permitted nonresidential uses in the TC District and adding “short term rental” to the list of permitted accessory residential uses in the TC District;

WHEREAS, the Landowner is concerned that if the Town Council amends the Town’s Zoning Ordinance so as to re-characterize short term rentals in the TC District from permitted nonresidential uses to accessory residential uses, then the Planning Board’s October 20, 2020 decision, including specifically COA #5, could be interpreted by the Town to deny the Landowner a certificate of occupancy and/or a short term rental license or permit for the use of the first floor of the building to be constructed on the Subject Lot, notwithstanding the Planning Board’s site plan approval;

WHEREAS, a dispute exists between the Town and the Landowner as to (1) whether the Town Council properly enacted a moratorium ordinance on April 13, 2020 banning the issuance of short term rental permits within the Town; (2) whether the Planning Board’s moratorium-related written findings of fact,

conclusions of law, and conditions of approval, including COA #5, are legally valid and enforceable; and (3) whether the Town may lawfully deny the Landowner the use of the first floor of the building on the Subject Lot for short term rental use by virtue of said findings, conclusions, or conditions, including COA #5;

WHEREAS, on November 19, 2020, the Landowner brought an action against the Town pursuant to M.R. Civ. P. 80B, seeking an order to strike all moratorium-related findings, conclusions, and conditions, including COA #5, from the Planning Board's October 20, 2020 decision and to specify with clarity that the Landowner is authorized to use the first floor of the building on the Subject Lot for short term rental use, regardless of whether or not the Town's ordinances, rules, or regulations are amended with respect to short term rental uses (the "Litigation"); and

WHEREAS, this Agreement is intended to reflect the settlement of the Litigation and the establishment of the Landowner's rights to the short term rental use of the first floor of the building approved to be constructed on the Subject Lot, and the Town and the Landowner are willing to forebear from pursuing the Litigation so long as the terms and conditions of this Agreement are met.

AGREEMENT

NOW, THEREFORE, the Town and the Landowner agree as follows:

1. The Town agrees to not interpret or enforce against the Landowner the Planning Board's October 20, 2020 decision (the "**Decision**") granting the Landowner site plan approval (including the Planning Board's moratorium-related findings, conclusions, and conditions of approval, and specifically COA #5) so as to deny the Landowner the right to use the first floor of the building on the Subject Lot for short term rental use, including without limitation by denying the Landowner a certificate of occupancy or a short term rental license or permit, on the basis of the Decision. However, Landowner shall have to meet any and all other conditions necessary for a certificate of occupancy or short term rental license or permit.
2. In the event that the Town's ordinances, rules, or regulations are amended so as to prohibit short term rental uses, re-characterize short term rental use as a land use other than a permitted nonresidential use in the TC District or any successor zoning district designation, establish new or amended land use ordinances affecting short term rental uses, or otherwise prohibit the use of the first floor of the building on the Subject Lot for short term rental, the Town agrees to treat the short term rental use on the Subject Lot as a legally existing, nonconforming use as of the date of the Decision, in accordance with Section 19-4-3.C.1 ("Nonconforming Uses; Continuation") of the Zoning Ordinance of the Town of Cape Elizabeth, Maine.
3. The Landowner agrees, for purposes of implementing a settlement of the Litigation, to stipulate to the dismissal of all claims by the Landowner against the Town related to the Litigation with prejudice and without costs.
4. The Landowner shall record this Agreement in the Cumberland County Registry of Deeds once entered by the Court.
5. In the event any dispute arises under this Agreement, the Parties shall enter into non-binding mediation, with the Parties bearing their own costs and attorneys' fees but sharing equally in the cost of the mediation. If a matter in dispute is not resolved at mediation, the sole venue for judicial enforcement of any claim by either Party of a breach of this Agreement, including any determination that a claim is related to or arising out of matters released in this Agreement, shall be brought in a court of competent jurisdiction in Cumberland County, Maine. In any such dispute, the Parties agree that the prevailing Party shall be entitled to recover from the other Party its attorneys' fees and all other fees, costs, and expenses actually incurred and reasonably necessary in connection therewith.
6. This Agreement shall be binding upon and inure to the benefit of the Town and the Landowner, and their heirs, successors, and assigns.

