

## **PUBLIC-PRIVATE LIMITED DEVELOPMENT AGREEMENT**

**AGREEMENT** made as of the \_\_\_\_ day of \_\_\_\_\_, 2008 by and among **THE TOWN OF FALMOUTH**, a political subdivision of the State of Maine with an office at 271 Falmouth Road, Falmouth, Maine 04105, (hereinafter, the “Town”), **FALMOUTH PLAZA, LLC**, a limited liability company formed and existing under the laws of the State of Maine with an address of P.O. Box 100, York Harbor, Maine 03911, (hereinafter, “Falmouth Plaza”), **FAMILY ICE**, a not-for-profit corporation formed and existing under the laws of the State of Maine with an address of 20 Hat Trick Drive, Falmouth, Maine 04105, and **WAL-MART REAL ESTATE BUSINESS TRUST**, a Delaware business trust, with an address of 702 SW 8<sup>th</sup> Street, Bentonville, Arkansas 72716 (hereinafter, “Wal-Mart”).

### **RECITALS**

**WHEREAS**, Hat Trick Drive is a private road located on the westerly side of U.S. Route 1 within the Town that connects Depot Road and Clearwater Drive and also provides access to, among other things, certain public amenities including an ice skating facility operated by Family Ice on property leased from the Town and known as the Family Ice Center;

**WHEREAS**, it has been proposed to reconfigure the location of Hat Trick Drive, and make other changes and improvements to the general vicinity, including parking and landscaping, in general accordance with certain plans prepared by Sain Associates, as conditionally approved by the Town of Falmouth Planning Board on \_\_\_\_\_, 2009;

**WHEREAS**, the proposed reconfiguration would benefit Family Ice by providing Family Ice with an area to store plowed snow, and ease the flow of traffic to and from Family Ice generally;

**WHEREAS**, the proposed reconfiguration of Hat Trick Drive would be consistent with and would further the purposes of the Town’s so-called Village Master Plan by, among other things, reducing traffic pressure on US Route 1 by providing an improved thoroughfare between Depot Road and Clearwater Drive, enhancing aesthetics by placing utilities underground and providing for additional landscaping, and providing additional parking;

**WHEREAS**, Falmouth Plaza is the owner of a certain parcel of real property known as the Falmouth Plaza which has been improved for use as a shopping center and which includes significant portions of Hat Trick Drive;

**WHEREAS**, the proposed reconfiguration would benefit Falmouth Plaza by, among other things, creating a better-defined secondary artery for traffic access to the Falmouth Plaza shopping center and by adding parking spaces along the Hat Trick Drive side of the shopping center;

**WHEREAS**, Wal-Mart is a lessee of a portion of the Falmouth Plaza shopping center property pursuant to a lease dated June 18, 1997, which lease has been amended from time to time (the “Lease”);

**WHEREAS**, the proposed reconfiguration would benefit Wal-Mart by allowing it to redefine vehicular and pedestrian traffic patterns for the greater convenience and safety of its patrons, and provide for additional parking spaces ;

**WHEREAS**, the parties have worked cooperatively to develop plans and specifications for completion of the desired improvements and have put them out for bid;

**WHEREAS**, bids for the work have been received and the parties have agreed upon the successful bidder; and

**WHEREAS**, in recognition of the aforementioned and other benefits the parties now desire to confirm their desire to work cooperatively for the purpose of reconfiguring the existing Hat Trick Drive, and to perform such other work as more particularly described herein, including the removal and relocation of those utilities, drainage and other elements affected by such a reconfiguration and to memorialize the terms upon which such work shall be conducted.

**NOW, THEREFORE**, the parties mutually agree as follows:

**1. Recitals.** The above Recitals form a material part of this Agreement.

**2. Hat Trick Drive Plan.** Each of the parties agrees to the reconfiguration of Hat Trick Drive, and the removal and relocation of all appurtenant utilities, drainage facilities and other elements, specifically including the removal of existing parking spaces and the creation of new parking spaces, and all of those other changes and improvements, in accordance with certain plans prepared by Sain Associates, titled Access Drive Relocation Plans for Hat Trick Drive Easement Area (attached hereto as Exhibit A and referred to as the “Relocation Plans”), which plans have received required Town and State approvals, as may only be amended further by agreement of all of the parties hereto (and subject to appropriate municipal and other governmental approvals), which shall set forth all elements of the work (hereinafter referred to as the “Work”).

**3. Cost Sharing.** The Town, Wal-Mart and Falmouth Plaza each severally agrees to equally share in the demolition, reconfiguration and construction costs and other expenses as stated in the Bid submitted by \_\_\_\_\_, dated \_\_\_\_\_ (the “Work Cost”) of the Work on a one-third (1/3) basis. The basis for this mutual commitment is expressly premised upon the Work Cost. No party has agreed to assume any cost in excess of its agreed share of the estimated Work Cost. The Town, Wal-Mart and Falmouth Plaza acknowledge and agree that their respective contributions set forth above exclude the costs of all plan preparation, permitting, licensing and other administrative and oversight costs associated with the Work as specified in Section 5 of this Agreement, to be performed by Sain Associates, Inc and the Town, which costs have been or will be absorbed by Wal-Mart and the Town, respectively. Upon the designation of a successful bid for the Work, the Town, Wal-Mart and Falmouth Plaza shall

each contribute their share of the Work Cost and expenses set forth herein into an interest-bearing bank account established specifically for the Work, and such funds shall be disbursed as set forth in this Agreement. The Town shall have full signature authority on the account so established. No funds shall be withdrawn from such account except in full compliance with the provisions of this Agreement. The Town shall provide monthly statements to the parties hereto, setting forth expenditures to date and detailing the progress of the Work. Any remaining funds after completion of the Work will be returned to the Town, Falmouth Plaza and Wal-Mart, together with any interest, in accordance with their pro-rata contribution. The parties will each be responsible for appropriate tax treatment of any interest earned on said funds, or any other aspect of the project. It is expressly understood that none of the Town, Falmouth Plaza or Wal-Mart shall be under any obligation to advance any additional funds for the Work, except as set forth above.

## **5. Easements, Permitting.**

a. The parties each agree to grant, accept, and assist in or support the procurement of, as may be applicable, such easements, subordinations, licenses and other approvals as may be reasonably necessary for the completion of the Work, the permanent location of all elements of Hat Trick Drive, maintenance of the same, and the substitution of new, and/or amendment of certain existing, easement rights among the parties, some of them, and to obtain such consents and subordinations as may be necessary from other entities or individuals not party to this Agreement. The parties will use all reasonable efforts in performing their respective obligations under this Agreement so as to allow the Work to be performed without delay. It is understood that nothing required in or contemplated by this Agreement will result in any fee transfer of any right, title or interest in real property. Each party further agrees that it will support such action that may be required in order to bring the Work into compliance with all local, state and/or federal permitting requirements not identified on the Relocation Plans. In no event shall the Town, Falmouth Plaza or Wal-Mart be required to contribute more than the amounts set forth above.

b. Wal-Mart, Family Ice, and Falmouth Plaza hereby grant to the Town, its agents and assigns, a license to enter onto their respective properties or leaseholds only to the extent reasonably necessary to conduct the Work (the "License"). The Work shall be executed so as to reduce interference with Wal-Mart's access and loading and unloading activities to the maximum extent possible. The License shall terminate upon the earlier of the following: (i) the completion date of the Work; and (ii) the second anniversary of the date of this Agreement. The contract entered into with the general contractor selected to perform the Work shall require the general contractor to procure and maintain a policy for casualty and indemnity insurance in an amount to be determined by the Parties as customary for a project of this scope, and naming the Town, Family Ice, Wal-Mart and Falmouth Plaza as additional named insureds under such policy.

## **6. Permitting & Construction.**

The Town, Wal-Mart and Falmouth Plaza agree that the Town, or its agent, shall be responsible for all phases and/or portions of permitting and construction of the Work in the name of the parties hereto, including, but not limited to: (i) pursuing and coordinating compliance with all local, state and/or federal permitting requirements as required under the conditions set forth in the Relocation Plans; (ii) supervising on-site construction activities performed by the general contractor; (iii) ensuring that all construction work is performed in substantial accordance with the Relocation Plans, based upon visual observations of surface features and in accordance with all other applicable federal, state and local laws, regulations, rules and ordinances in effect as of the date of this Agreement; and (iv) administering construction and payment of the contractor selected by the Town to perform the Work. The Town shall use reasonable efforts to keep the parties hereto apprised as to its efforts to complete the Work, including, but not limited to the selection of a contractor, a work schedule and work progress updates. The Parties shall mutually agree upon the final bid selection and shall authorize Sain Associates or the Town, as they may decide, to award the bid in the name of the parties hereto. The Parties shall not be bound to necessarily choose the least expensive bid, but may exercise its discretion in selecting a contractor while taking into account all project considerations for the Work. The contract with the successful bidder shall include a guaranty of the Work for one (1) year from the date of completion, which guaranty shall run to the benefit of all of the parties hereto. The Parties understand and agree that the Town may prepare a bid package for, and review and accept bids upon, both the Work and also the improvements and alterations to be made in the general vicinity of the so-called seasonal/outdoor sales area. It being understood that in such case, the bids will be solicited and presented in a manner that provides separate treatment for the bid items. The Town will advise each of the parties upon receipt of a request for payment by the general contractor and each party shall be given the opportunity to verify that the work for which the payment is requested has been done in accordance with the Relocation Plans. Each request for payment shall be accompanied by a certification by the Town (the "Town Certification") that, based upon a visual inspection of the surface features and that work actually witnessed, the work covered by such request has been completed in accordance with the Relocation Plans and otherwise in accordance with this Agreement. Each party agrees to either provide its approval for the disbursement, as requested, or to provide notice of any objection, setting forth the basis for any objection in writing, no later than 3 business days after receipt of the request for approval of the payment and Town Certification. If any party should not respond within the specified period, that party will be deemed to have approved the work performed and the disbursement. The Town shall procure interim and final lien releases from all contractors, subcontractors and materialmen as a condition of payment for the Work.

**7. Force Majeure.** The Town shall not be liable or responsible to any party by reason of the failure or inability to take any action it is required to take or to comply with the requirements imposed hereby (or any injury to any party or by those claiming through any party) which failure, inability or injury is caused directly or indirectly by force majeure as hereinafter set forth. The term "force majeure" as employed herein shall mean acts of god, strikes, lock-outs or other industrial disturbances, acts of public enemies, war blockages, riots, acts of armed forces, militia, or public authority, epidemics, landslides, earthquakes, fires, storms, floods, freezes or washouts, acts of terrorism, civil or military disturbances and/or explosions or any other event or instrumentality beyond The Town's reasonable control.

**8. No Liability.** The contract with the contractor selected to perform the Work shall establish privity of contract between such contractor and the Town, Wal-Mart and Falmouth Plaza; provided, however, that such contract shall expressly provide that in no event shall the Town, Falmouth Plaza or Wal-Mart be required to contribute more than the amounts set forth above under such Contract.

**9. Term.** This Agreement shall be deemed terminated and all obligations hereunder satisfied upon the completion of the Work, except for such provisions, if any, that survive termination hereof.

**10. Recordation.** The parties agree that this Agreement shall not be recorded.

**11. Incorporation of Laws, Rules, and Regulations.** This Agreement shall be read in conjunction with and be subject to all existing and future federal, state, and local laws, rules and regulations applicable to the Work in any manner or form.

**12. Disclaimers; Limitation of Liability.** Except as specifically stated herein, this Agreement does not create any other obligation or relationship such as a partnership, joint venture or other similar legal relationship under the laws of any state or the federal government. Any correspondence, documents or other reference to “partners”, “joint venturers” or other similar terms will not be deemed to alter, amend or change the relationship between the parties hereto unless there is a formal written agreement specifically detailing the rights, liabilities and obligations of the parties as to a new, specifically defined legal relationship.

**13. Notices.** All notices and other communications required or permitted to be given hereunder shall be in writing and shall be mailed by certified or registered mail, postage prepaid, or by Federal Express, Airborne Express, or similar overnight delivery service, addressed as follows:

If to Town:

Mr. Nathan Poore, Town Manager  
Town of Falmouth  
271 Falmouth Road,  
Falmouth, Maine 04105

With a copy to:

William L. Plouffe, Esq.  
Drummond, Woodsum & MacMahon  
245 Commercial Street  
Portland, ME 04104-5081

If to Falmouth Plaza:

Falmouth Plaza, LLC  
c/o Mr. George Rogers  
P.O. Box 100,  
York Harbor, Maine 03911

With a copy to:  
Dennis C. Keeler, Esq.  
Pierce Atwood  
One Monument Square  
Portland, ME 04101

If to Family Ice:

Mr. Peter Wellin  
Family Ice  
P.O. Box 6127  
20 Hat Trick Drive  
Falmouth, ME 04105

With a copy to:  
Jonathan T. Harris, Esq.  
Lambert Coffin  
P.O. Box 15215  
477 Congress Street, 14<sup>th</sup> Floor  
Portland, ME 04112-5215

If to Wal-Mart:

Wal-Mart Real Estate Business Trust  
ATTN: Mr. Timothy Carr  
2001 S.E. 10<sup>th</sup> Street  
Bentonville, AR 72712-6489

With a copy to:  
Adrian P. Kendall, Esq.  
Norman, Hanson & DeTroy, LLC  
415 Congress Street  
Portland, ME 04112-4600

Notice shall be deemed to have been given upon receipt. Refusal of delivery or undeliverable for any reason shall be deemed receipt.

**14. Default.** Each of the parties hereto shall give the other party written notice of any alleged default hereunder and shall allow the defaulting party fifteen (15) days from the date of its receipt of such notice within which to cure any such default. Failure to cure any such default within the aforementioned period shall constitute a breach of this Agreement.

**15. Severability.** If any part of this Agreement is found invalid or unenforceable by any court, such invalidity or unenforceability shall not affect the other parts of this Agreement if the rights and obligations of the parties contained therein are not materially prejudiced, and if the intentions of the parties can continue to be effected. To that end, this Agreement is declared severable.

**16. Authority to Execute Agreement.** The signature by any person to this Agreement shall be deemed a personal warranty by that person that he has the full power and authority to bind any corporation, partnership, or any other business entity for which he purports to act hereunder.

**17. Time is of the Essence.** Time is hereby declared of the essence to the lawful performance of the duties and obligations contained in this Agreement.

**18. Entire Agreement.** This Agreement contains the entire agreement of the parties, and all prior communications, oral or written, are without any force and effect as it is the specific intent of the parties that this Agreement alone set forth the terms on which the parties have mutually agreed. Each party specifically agrees that it enters into this Agreement based on its own understanding of the terms hereof and does not rely, in whole or in part, on any interpretations or representations of the other party. Each party agrees that this Agreement is the result of good faith arms length negotiations.

**19. Modifications/Amendments.** No modification of this Agreement shall be valid or binding unless such modification is in writing, duly dated and signed by all parties.

**20. Construction.** The parties hereto have read and fully understand the terms of this Agreement, and each has had the opportunity to have this Agreement reviewed by its own counsel.

**21. Governing Law.** This Agreement and the provisions contained herein shall be construed, controlled, and interpreted according to the laws of the State of Maine.

**22. Binding Effect.** The parties agree that this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns, and no right or cause of action shall accrue upon or by reason hereof, to or for the benefit of any third party not a party to this Agreement or an authorized successor or assignee thereof.

**REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK**

**IN WITNESS WHEREOF**, the parties have executed or have caused this Agreement, with the named Exhibits attached, to be duly executed in several counterparts, each of which counterpart shall be considered an original executed copy of this Agreement the day and year first above written.

WITNESS:

**TOWN OF FALMOUTH**

\_\_\_\_\_

By: \_\_\_\_\_  
Nathan Poore  
Its Town Manager

STATE OF MAINE

COUNTY OF CUMBERLAND, ss.

\_\_\_\_\_, 2008

Then personally appeared the above-named Nathan Poore, Town Manager of said Town of Falmouth, and acknowledged the forgoing to be his free act and deed in his said capacity and the free act and deed of said Town of Falmouth.

Before me,

\_\_\_\_\_  
Notary Public  
Attorney at Law

\_\_\_\_\_  
Print name

**FALMOUTH PLAZA, LLC**

By: G. L. Rogers & Co., Inc.,  
Its Manager

By: \_\_\_\_\_  
George L. Rogers  
Its President

\_\_\_\_\_  
Witness:

STATE OF MAINE

COUNTY OF \_\_\_\_\_, ss.

\_\_\_\_\_, 2008

Then personally appeared the above-named George L. Rogers, President of G. L. Rogers & Co., Inc., Manager of Falmouth Plaza LLC, and acknowledged the foregoing instrument to be his free act and deed in his said capacity and the free act and deed of said G. L. Rogers & Co., Inc. in its capacity as Manager of said Falmouth Plaza LLC, and the free act and deed of said Falmouth Plaza LLC.

Before me,

\_\_\_\_\_  
Notary Public  
Attorney at Law

\_\_\_\_\_  
Print name

**FAMILY ICE**

\_\_\_\_\_  
Witness:

Signed: \_\_\_\_\_  
Name: Peter J. Wellin  
Title: Board President

STATE OF MAINE  
COUNTY OF CUMBERLAND, ss. \_\_\_\_\_, 2008

Then personally appeared the above-named Peter J. Wellin, Board President of said Family Ice, and acknowledged the forgoing to be his free act and deed in his said capacity and the free act and deed of said Family Ice.

Before me,

\_\_\_\_\_  
Notary Public  
Attorney at Law

\_\_\_\_\_  
Print name

**WAL-MART REAL ESTATE BUSINESS TRUST**

\_\_\_\_\_  
Witness:

Signed: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

STATE OF ARKANSAS  
COUNTY OF BENTON

The foregoing was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2008 by \_\_\_\_\_ as Trustee of **WAL-MART REAL ESTATE BUSINESS TRUST**, a Delaware business trust, on behalf of the said trust. He/she is personally known to me or has produced \_\_\_\_\_ (type of identification, with ID number and expiration date) as identification.

Signed: \_\_\_\_\_

Print Name: \_\_\_\_\_

Notary Public, State of Arkansas

My Commission Number: \_\_\_\_\_

Commission Expires: \_\_\_\_\_

