

AGREEMENT

This AGREEMENT is made this 24th day of August, 2009 by and between the TOWN OF FALMOUTH, a Maine municipal corporation with an address of 271 Falmouth Road, Falmouth, Maine 04105 (hereinafter "Town") and FALMOUTH ON THE GREEN HOMEOWNERS ASSOCIATION, a Maine non-profit corporation with an address of c/o Dirigo Management Company, One City Center, Portland, Maine 04101 (hereinafter "FOG").

WHEREAS, FOG's membership is composed of lot owners within the Falmouth-on-the-Green residential subdivision located off Winn Road in the Towns of Falmouth and Cumberland (the "Subdivision");

WHEREAS, Falmouth-on-the-Green abuts the Falmouth Country Club ("FCC") clubhouse lot and the golf course located on land leased by the Falmouth Country Club from the original developer, Dictar Associates II ("Developer"), which land is now owned by FOG;

WHEREAS, the Subdivision was approved by the Falmouth Planning Board and the Cumberland Planning Board on November 12, 1986 and November 18, 1986, respectively, and has received amended approvals since that time;

WHEREAS, the wastewater disposal system proposed by the Developer and approved by both Planning Boards consisted of individual septic tanks located on the residential lots and the clubhouse lot, a sewerage collection system, including pump stations, manholes, and gravity and low pressure force mains that run under the private roads within the Subdivision, and a common leach field located near the intersection of Winn Road and Inverness Road which accepted and treated wastewater from the sewerage collection system;

WHEREAS, 121 lots within the Subdivision, of which 88 are located in Falmouth and 33 in Cumberland, were served by the central wastewater leach field disposal system operated by FOG ;

WHEREAS, the common leach field serving the Subdivision began to fail in the late 1990's and required significant expenditures by FOG for repairs and maintenance;

WHEREAS, in the early 2000's it became evident to FOG that continued use of the leach field was not practicable and threatened public health;

WHEREAS, FOG approached the Town in 2002 with a request to extend the public sewer at the expense of FOG so that it could serve the Subdivision and FCC;

WHEREAS, the Falmouth Town Council voted on August 25, 2003 to allow FOG to construct an extension of the public sewer by a force main located under the Winn Road right-of-way to the Subdivision pursuant to the provisions of section 18-231 of the Falmouth Code of Ordinances;

WHEREAS, in 2005 FOG completed the sewer extension project and upgraded parts of its existing collection system and pumping stations and financed the same through special assessments on its members and bank loans being repaid through common charges, and connected to the public sewer;

WHEREAS, it was the expectation of both the Town and FOG that, subject to a satisfactory inspection, the Town would accept ownership of and operate the sewer extension and the sewerage collection system within the Subdivision, excepting the abandoned leach field;

WHEREAS, before completion of the extension project, the Town became aware that certain pump stations within Falmouth-on-the-Green were receiving peaking water volumes during heavy rain events at rates exceeding their capacity and were overflowing, which situation persisted after completion of the sewer extension and the connection of the FOG system to the public sewer;

WHEREAS, FOG made substantial expenditures to abate water infiltration into manholes, to "TV" sewer lines and paid for engineering and other services in an attempt to ascertain the cause of the excessive flow and to correct the same but was ultimately unsuccessful in identifying the source of the infiltration or in significantly reducing the flow;

WHEREAS, in 2007 the Town notified FOG that the Town had accepted the sewer extension along Winn Road but not the sewerage collection system within the Subdivision and FOG responded by demanding that the Town rescind its acceptance of the extension and the Town complied but allowed lots within the Subdivision to continue to discharge into the public sewer and the Town continued to charge sewer user fees to those lot owners;

WHEREAS, in 2008 the Town engaged the engineering services of the Wright-Pierce firm of Topsham, Maine and took other measures, such as acceptance of data from pump stations through telemetry, in an attempt to ascertain the cause of the excessive flow;

WHEREAS, Wright-Pierce undertook extensive testing of the sewer collection system and reviewed work that had been performed on behalf of FOG and issued a report of its findings in a Technical Memorandum dated June 10, 2008;

WHEREAS, it is the professional judgment of Wright-Pierce, as expressed in its Technical memorandum dated September 23, 2008, that the excessive flows are mostly due to inflow into the septic tanks located on individual lots in the Subdivision during heavy rain events that eventually discharges into the collection system, and that by-passing the septic tanks is required in order to eliminate the suspected inflow;

WHEREAS, by-passing the septic tanks will also result in more solids entering the collection system than were anticipated in the original design of the system;

WHEREAS, it is the further professional judgment of Wright-Pierce, as expressed in its Technical Memorandum dated September 23, 2008, that the addition of solids to the system in the anticipated quantities will necessitate new piping and pump station changes in order to avoid

the build-up of solids and, further, that back-up generators are needed at some of the pump stations;

WHEREAS, the estimated cost of the piping and pump station upgrades is \$312,000;

WHEREAS, the estimated cost of by-passing the approximately 102 remaining septic tanks located on individual Subdivision lots (approximately 20 homeowners have already by-passed their septic tanks) is approximately \$300,000, with the cost for individual lot owners varying widely because of the need for pumps, depth of tanks and difficulties of access, plus the unknown costs of removing and re-establishing landscaping on each lot which will vary widely;

WHEREAS, FOG contends: That the Town committed to accept the sewerage collection system within the Subdivision when it agreed to allow FOG to extend the public sewer; that FOG has completed the sewer extension and upgrades at great expense; that the Town has been accepting the sewage flows since 2004; that the Town and neighboring land owners will benefit from the acceptance of the Winn Road portion of the sewer system; and, in any event, that the problems with the system noted by the Town are sporadic and not unusual for sewer systems and should not be a basis for refusing to accept the system;

WHEREAS, the Town contends: That the sewerage collection system within the Subdivision in its current condition does not meet current professionally recognized performance standards for peaking flow or the Falmouth Code of Ordinances; that it will continue to require excessive treatment plant capacity by carrying storm water and groundwater to the plant; that it will strain components of the public sewer system that are downstream of the Subdivision ; that overflow at certain pump stations within the Subdivision presents an environmental and public health hazard; and that it was always the Town's intention not to accept the sewerage collection system until it was inspected by Town and found to meet standards for acceptance; and

WHEREAS, the parties wish to avoid litigation and to reach a fair agreement that serves the interests of the owners at FOG, other users of the Falmouth sewer system and Falmouth tax payers and that protects the environment and public health.

NOW THEREFORE, the Town and FOG agree as follows:

1. To the extent not already in the possession of the Town, FOG will furnish the Town with plans, prepared by an appropriate professional, showing the location of all pump stations and appurtenances such as generators and telemetry equipment, gravity and force mains, manholes and other elements of the sewerage collection system proposed for acceptance by the Town. The plans will also identify each lot served by the sewerage collection system within the Subdivision. (The individual lots added to the Subdivision by Sawdust Investments in 2002 are served by their own individual subsurface wastewater disposal systems which include, at least, lots on Olympic Drive, Bethpage Drive, Canterbury Lane and Shinnecook Lane.) FOG will procure plans showing the location of irrigation facilities, if any, located within pump station easement areas.

2. Within 90 days of acceptance of the sewerage collection system by the Town, FOG will cause pins to be set at the corners of each of the pump station easement areas.

3. FOG will furnish the Town with a written opinion from FOG's attorney in a form reasonably satisfactory to the Town that the FOG President is authorized to sign this Agreement pursuant to vote of the FOG membership at the meeting duly noticed and held on September 22, 2003 and recorded in the Cumberland County Registry of Deeds in Book 20364, Page 224.

4. FOG will actively cooperate with the Town and its employees in communicating the septic tank bypass requirement to Subdivision lot owners and will, at a minimum, do a mailing to each of its members informing them that an agreement has been reached with the Town under which the Town will accept the sewerage collection system within the Subdivision and the Winn Road extension and under which each lot owner will be required to by-pass their septic tank within two years. FOG will request via a return response envelope that members advise as to when they will do the by-pass work and will follow-up with those who do not respond. It shall be a pre-condition to acceptance of the Subdivision sewer system by the Town that respondents representing not less than 106 of the 122 Subdivision lots state that they will bypass or have already bypassed their septic tanks within two years. FOG will cooperate with the Town in inducing compliance by lot owners, and shall monitor the compliance of lot owners and shall periodically report to the Town the status of compliance. Each Subdivision lot owner shall by-pass his/her septic tank by straight-piping through the tank and will decommission the tank by filling with sand/gravel or by such other method as may be acceptable to the Town Sewer Superintendent within two years of the date of acceptance of the sewer collection system by the Town. Subdivision lot owners who have already by-passed their septic tank shall so certify in writing and provide proof of the work done.

5. The Town will amend its Code of Ordinances to prohibit connection of septic tanks to the public sewer and to require that persons connected to the public sewer by-pass their septic tanks within two years of the effective date of the ordinance amendment, and to establish a per diem fine and liability for attorneys fees and costs, which shall constitute a lien on the lots of those owners who fail to comply.

6. The cost and expense of the by-pass of the septic tanks within the Subdivision shall be borne by the lot owners in accordance with section 18-125 of the Falmouth Code of Ordinances. The obligation to connect to the sewer main after acceptance by the Town shall be pursuant to this Agreement and sections 18-120 and 18-121 of the Code of Ordinances, as amended, provided that the ninety (90) day time period to complete connection contained in said sections and the non-connection option contained in section 18-121(b) shall not pertain. Each lot owner shall be responsible for payment of the sewer service charges under section 18-160 of the Code of Ordinances, but no sewer connection charges shall be assessed to Subdivision lot owners who are currently connected to the FOG system. The Town shall be entitled to inspect the by-pass construction pursuant to section 18-130 of the Code of Ordinances.

7. The Town and FOG will share equally the actual, direct cost of the sewer collection system upgrades identified in the September 23, 2008 Wright-Pierce report, including, without limitation, installation of new gravity and force mains, pump station improvements and generators, which upgrades shall be initiated by the Town within 60 days of the Town's acceptance of the FOG sewer system and carried out by the Town with due diligence. In no event, however, shall FOG be obligated to pay more than One Hundred Fifty-Six Thousand Dollars (\$156,000), i.e., one-half of the estimated total cost for upgrades.

8. FOG may, at its option, pay its share of the cost of upgrades in equal annual installments over a ten (10) year period without interest. The first payment shall be due and payable to the Town upon the Town's acceptance of the FOG sewer system, including both the Winn Road extension and the collection system within the Subdivision. Subsequent payments shall be due annually on the anniversary date of the first payment.

9. FOG will convey to the Town easements for the gravity and force mains and manholes within the Subdivision and for access to the pump stations shown on the plans referred to in paragraph 1 hereof. Such easements shall be in a form that is mutually acceptable to the parties, which acceptance shall not be unreasonably withheld and shall be submitted to the Town Council at the time of requested acceptance of the sewer collection system. The easements shall include, *inter alia*, the right of the Town to inspect, maintain, repair and replace the elements of the sewerage collection system, the right to add equipment deemed necessary for proper operation of the system, including, but limited to, back-up generators, and the access necessary to exercise the easement rights. The easement shall obligate FOG to plow the pump station access ways so long as the roads within the Subdivision remain private and shall acknowledge that maintenance of landscaping around the pump stations is the responsibility of FOG and not the Town. A bill of sale for the pump stations and other personal property that is part of the sewer collection system being accepted by the Town will also be presented along with the transfer of any applicable warranties on the personal property.

10. FOG will take all actions necessary to complete the acceptance of the sewer extension within Winn Road by the Town, including the delivery of a bill of sale.

11. Promptly after receipt of the plans referred to in paragraph 1, the opinion of counsel referred to in paragraph 3, the survey results referred to in paragraph 4 and the easements and bill of sale referred to in paragraph 9, the Town Council will vote to accept the sewer extension along Winn Road (and to reaffirm any prior acceptance) and to accept the sewerage collection system and pump stations within the Subdivision as part of the public sewer.

12. The parties acknowledge that here are thirty-three (33) house lots in the Subdivision which are located in the Town of Cumberland and which are served by the sewerage collection system. Reference is made to a certain Agreement by and between the Town of Falmouth, the Town of Cumberland and the Portland Water District dated April 20, 2004, a copy of which is attached hereto as Exhibit A, which provides for the collection of fees and assessments by the Town of Cumberland in the event of failure to pay the same by

Cumberland lot owners. The parties acknowledge that said Agreement will continue to govern collection of fees due from lot owners in Cumberland.

13. In the event that the Town brings an enforcement action against any Subdivision lot owner who fails to by-pass his/her septic tank within the required two year period and the Town prevails in such action, either by order of the Court or by settlement with the lot owner, FOG agrees to reimburse the Town for 50% of its Court costs and reasonable attorneys fees to the extent that the Town is not awarded such costs and fees by the Court, does not receive such costs and fees as part of a settlement or is unable to collect such costs and fees that have been awarded or agreed to after reasonable efforts to do so. The Town agrees to consult with FOG before bringing any such enforcement action and to accept any reasonable alternative to bringing such action that may be proposed by FOG provided that the by-pass is accomplished, and agrees to consult with FOG before entering into a settlement of an enforcement action.

(a) If the Town brings an enforcement action involving a Subdivision lot located in the Town of Cumberland and a Court determines that the Town is without authority to enforce the Ordinance or other means requiring by-pass of septic tanks in the Town of Cumberland, FOG agrees that it will use all reasonable means at its disposal to compel the by-pass, but without making any representation in this Agreement as to FOG's ability to independently compel the by-pass. The Town agrees to reimburse FOG for costs and reasonable attorneys incurred by FOG in such an action to the extent that FOG is unable to collect such costs and fees through Court Order or settlement terms, provided that FOG agrees to consult with the Town before entering into a settlement of an enforcement action.

FALMOUTH ON THE GREEN
HOMEOWNERS ASSOCIATION

By: 

Joseph Bousquet, its President

TOWN OF FALMOUTH

By: 

Nathan Poore its Town Manager