

**AGREEMENT**

**By and Between the**

**TOWN OF NEWMARKET, NEW HAMPSHIRE,**

**and the**

**MOODY POINT COMMUNITY ASSOCIATION**

**for the**

**EXTENSION OF WATER MAIN AND PROVISION OF TOWN WATER**

THIS AGREEMENT is entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 2019 (this "**Agreement**"), by and between the **TOWN OF NEWMARKET, NEW HAMPSHIRE** (the "**Town**"), acting through its Town Council, and the **MOODY POINT COMMUNITY ASSOCIATION** ("**MPCA**"). This Agreement shall be effective as of the date first written above (the "**Effective Date**").

WHEREAS, the Town, acting through its Water Department, is engaged in the business of supplying water services to residents of the Town through a system of water mains and related facilities (the "**Town Water Supply**");

WHEREAS, MPCA's members (the "**MPCA Members**" or the "**Members**") are the owners of 101 lots within a development in the Town located on the shores of Great Bay and known colloquially as Moody Point ("**Moody Point**");

WHEREAS, 95 of the lots in Moody Point have been improved with homes as of the Effective Date, and an additional six lots may have homes in the future, but one lot owner receives water from a private well and has agreed with MPCA that, at this time, it will not receive public water and will not be included in any betterment;

WHEREAS, MPCA represents its Members in matters pertaining to Moody Point's infrastructure, including the provision of water and wastewater management, and presently obtains its water supply through a privately-owned well system in need of upgrades to address saltwater intrusion and related water quality issues;

WHEREAS, rather than upgrade its privately-owned water supply, MPCA, acting through a unanimous vote of its Members present at a meeting held on April 6, 2019, ratifying a resolution adopted by its Board of Directors on March 20, 2019, authorized the Board of Directors' designees and legal counsel to negotiate, in the best interests of MPCA, an agreement with the Town to fund and construct a water line extension connecting Moody Point to the Town Water Supply (the "**Moody Point Connection**");

WHEREAS, the Moody Point Connection requires the Town to extend the water main located within the layout of Bay Road (the "**Water Main**") by approximately 530 feet, then

southeasterly beneath Cushing Road by approximately 4,600 feet, then potentially beneath land owned in common by the Members (the “**Moody Point Common Land**”) by approximately 130 feet to a Pressure Reduction Valve (the “**PRV**”), with all water metering appurtenances associated with backflow presentation, metering and pressure control to be installed by the Town within MPCA’s well house located off Eagle Drive (the “**Well House**”), subject to changes due to the final engineering design, which work is referred to herein as the “**Cushing Road Water Main Extension Project**,” or the “**Project**”;

WHEREAS, at the annual town meeting on March 12, 2019, residents of the Town voted in favor of Article 11 of the Town Meeting Warrant, thereby authorizing the Town to raise funds, via loans and grants from state and federal agencies, and to spend these funds on several projects to upgrade existing water mains, bring a new well online, improve the water treatment facility, and undertake the Cushing Road Water Main Extension Project (the “**Water System Upgrades**”);

WHEREAS, the Town has been awarded a loan and grant by the United States Department of Agriculture (the “**USDA**”) under the Rural Development Program (collectively, the “**USDA Funds**”), which will be used to fund some of the Water System Upgrades, including the Cushing Road Water Main Extension Project;

WHEREAS, MPCA acknowledges that use of these USDA Funds for the Cushing Road Water Main Extension Project comes with financial and technical conditions and stipulations that the Town shall abide by as set forth by the USDA;

WHEREAS, the Town will retain ownership of and responsibility for the Water Main extending beneath Bay Road and Cushing Road up to a valve installed at the Moody Point Common Land property line, but, upon substantial completion of the Project, shall transfer to the MPCA ownership of and responsibility for the water main and all water metering appurtenances associated with backflow prevention, metering and pressure control installed on the Moody Point Common Land as part of the Cushing Road Water Main Extension Project;

WHEREAS, MPCA will retain ownership of and responsibility for the Well House and the network of pipes running to the individual homes within Moody Point (the “**MPCA Water Distribution System**,” or the “**Distribution System**”); and

WHEREAS, the homeowners and lot owners within Moody Point who will be served by the Town Water Supply through the MPCA Water Distribution System (collectively, the “**Owners**,” and each an “**Owner**”) currently include 100 of the 101 MPCA Members;

NOW THEREFORE, pursuant to the authority granted by the Town’s Charter and every other legal authority, for good and valuable consideration, the receipt of which is hereby acknowledged, the Town and MPCA (each a “**Party**,” and collectively, the “**Parties**”) hereby agree as follows:

**A. The Cushing Road Water Main Extension Project Construction**

**1. Process for Awarding the Cushing Road Water Main Extension Project.**

Subject to the provisions of this Agreement, the Town shall, in accordance with its usual and customary practice, plan, design, layout, install, and construct the Project as shown on engineering plans to be provided by the Town (the "**Engineering Plans**"). In taking the steps necessary to award, construct, and complete the Project, the Town shall involve MPCA as follows:

a. The Town shall provide MPCA with a set of the Engineering Plans and the Request for Proposals (the "**RFP**") before it is published.

b. The Town shall provide the engineer's recommendation for the selected contractor to the MPCA at the same time this information is provided to USDA and to the Newmarket Town Council. MPCA understands that use of the USDA Funds for the Project limits the flexibility of contractor selection to the lowest responsive and responsible bidder.

**2. Review and Approval of Engineering Plans.** Prior to the start of construction, the Town shall provide MPCA, for review and comment, a copy of the Engineering Plans that the Town sends to USDA and the New Hampshire Department of Environmental Services ("**NHDES**"). MPCA's review will be completed in conjunction with the necessary USDA and NHDES reviews. MPCA shall not unreasonably withhold, delay or condition such review and comment. Upon approval by USDA and NHDES, the Engineering Plans shall be deemed **Exhibit A** hereto, whether or not so attached, and shall be incorporated by reference as if fully set forth herein.

**3. Specifications for the Engineering Plans.** As set forth in the Engineering Plans, the Cushing Road Water Main Extension Project shall adhere to the following specifications:

a. **Fire Hydrants.** Along Cushing Road from its intersection with Bay Road to its intersection with Eagle Drive, fire hydrants shall be placed no less than 600 feet apart, unless the Town's Fire Chief, in consultation with the Environmental Services Director, determines that a greater separation is warranted given the sparse population in this area. The Environmental Services Director and Project Manager shall seek the Fire Chief's recommendation when preparing the Engineering Plans. To facilitate flushing, one fire hydrant shall be placed in a location deemed appropriate by the Project Engineer in the vicinity of the southernmost end of Cushing Road and/or the northernmost end of Eagle Drive.

b. **Water Main Diameter.** The diameter of the Water Main that will run beneath Cushing Road to the MPCA Water Distribution System shall be no less than eight inches. Whether the diameter should be greater than eight inches will be determined in accordance with best engineering practices for maintaining the quality of the water based on the expected water flow and usage within Moody Point under existing conditions, including the approximately three-inch diameter piping that comprises the

Distribution System. The Town may require the installation of a Water Main beneath Cushing Road with a diameter larger than required by best engineering practices as determined above, provided that this diameter does not lessen the quality of water provided to Moody Point.

4. **Permits and Approvals.** The Town shall be solely responsible for the procurement of all approvals, authorizations, certificates, licenses, and permits from local, state, and federal authorities required for the construction of the Cushing Road Water Main Extension Project (the “**Permitting**”). MPCA agrees to cooperate and participate reasonably as necessary to aid in the Permitting and shall in good faith provide assistance as the Town may from time to time reasonably request in a manner that will not delay the construction of the Project.

5. **Construction Schedule and Responsibilities**

- a. **Work Progress.** MPCA recognizes that improvements to the Water Main outside of the Cushing Road Water Main Extension Project limits are needed to adequately supply MPCA and other Town Water Supply projects and will move forward in tandem with the Project. The Town intends to complete the Cushing Road Water Main Extension Project as soon as possible, and to complete all other projects associated with the USDA Funds by 2024.
- b. **Progress Meetings.** The Town shall meet with the designated representative of MPCA identified in Section G.5 (the “**MPCA Representative**”) in accordance with the following schedule, unless both Parties agree to a different schedule in writing:
  - 1. **Prior to Construction.** During the period beginning on the date on which the Town enters into an obligation agreement with USDA for the USDA Funds and ending on the date on which construction on the Cushing Road Water Main Extension Project begins, meetings shall be held no less than once a quarter.
  - 2. **During Construction.** Beginning with the commencement of construction and lasting through the completion of construction of the Cushing Road Water Main Extension Project, meetings with the MPCA Representative shall be held once a month, either in person or by telephone as the Environmental Services Director’s schedule permits, provided that the Water Department shall inform MPCA of any change orders, changes in the Project budget, or changes in the design of the Project as soon as is practicable upon obtaining knowledge of the change, and the Environmental Services Director or Project Manager shall meet either in person or by telephone to discuss the change if requested by the MPCA Representative. The Environmental Services Director and the Project Manager shall each provide the MPCA Representative with a phone number and an email address where they can be contacted

expediently and shall notify the MPCA Representative of any changes in this contact information.

- c. Document Inspections. The Town shall afford MPCA the opportunity to inspect records and documents pertaining to the Cushing Road Water Main Extension Project, including but not limited to plans and change-work orders, as the work is being performed.
- d. Diligent Pursuit. The Town shall cause the selected contractor to proceed diligently with the Cushing Road Water Main Extension Project so as to complete the Project as promptly as is practicable. MPCA understands the need for other Water Main-related improvements in addition to the Project to effectively serve MPCA. The Town is working to coordinate these projects to be completed as promptly as practicable.

**6. Standard of Care for Construction Work; Notification; Sewer Force Main**

The Town shall ensure that all construction is performed in a safe and workman like manner in accordance with best construction management practices and best engineering practices and in accordance with all applicable local, state and federal laws. The Parties acknowledge that the Cushing Road Water Main Extension Project will entail work within the same area as the existing sewer force main that serves Moody Point (the “Sewer Force Main”). In the event that the Sewer Force Main is damaged, the Town shall notify the MPCA Representative as soon as possible after learning of the damage and shall ensure that the contractor repairs the damage as soon as possible in a good and workmanlike manner and in accordance with all applicable local, state and federal laws. In the event that any repairs will interrupt the use of the Sewer Force Main, representatives of the Town and the Project engineering team and the MPCA Representative shall meet and shall agree upon the measures necessary to limit interruption of use of the Sewer Force Main to the maximum extent possible, to ensure that all Owners are notified of any unavoidable interruption of use of the Sewer Force Main, and to address the needs of the Owners during an unavoidable interruption.

The Parties also acknowledge that the Cushing Road Water Main Extension Project may require the relocation of portions of the Sewer Force Main. Prior to any relocation work that would interrupt use of the Sewer Force Main by Moody Point, representatives of the Town and the Project engineering team and the MPCA Representative shall meet and shall agree upon the relocation and the measures necessary to avoid any interruption of use of the Sewer Force Main to the maximum extent possible, to ensure that all Owners are notified in advance of any unavoidable interruption of use of the Sewer Force Main, and to address the needs of the Owners during any unavoidable interruption.

Any costs attributable to the reconstruction, relocation, and interruption of the Sewer Force Main shall be included in the Project Cost (as that term is defined hereafter) and shall be assessed in accordance with Section E of this Agreement.

Costs necessary to repair damage caused by the Town or its agents or representatives, or to repair damage caused by the contractor or subcontractors or the Project engineering team,

shall be Project Costs and shall not be separately chargeable to MPCA. To the extent that the Town is able to recover monies from the party causing such damage and cost, the recovery of such damage monies shall be applied by the Town as an offset to the inclusion of such damage cost as a Project Cost.

**B. Easements**

If necessary based on the final Engineering Plans, MPCA shall grant the Town an easement for the construction, maintenance, repair, and use of the Water Main beneath the Moody Point Common Land and for access to and use of the Well House, in a customary and mutually agreeable form.

**C. Supply of Water; Water Rates**

Commencing on the date on which the Cushing Road Water Main Extension Project has been completed and accepted by the Town, and continuing thereafter, the Town shall provide MPCA with all of the MPCA's water supply. This water shall be potable water that is suitable and safe for public consumption and use by current and future residents of Moody Point and shall comply with all applicable local, state, and federal laws, including water quality standards. Water user rates payable to the Town as a result of the Project shall be the same for the Owners as for other residents served by the Town Water Supply. It is understood that these rates are subject to change from time to time in accordance with customary practice.

**D. Ownership, Responsibility, Operation and Maintenance**

**1. Town Ownership and Responsibility.** The Town will own and be solely responsible for the operation, maintenance, repair, and replacement of the Water Main under Bay Road and Cushing Road up to the Moody Point Common Land property line, and shall maintain the Water Main in accordance with good water utility operating practice and state and federal drinking water regulations. MPCA and the Owners shall have no responsibility, financial or otherwise, for the foregoing other than pursuant to assessments, fees, taxes, charges and rates as are customary and imposed on the public in general, it being the intent of this provision that, despite MPCA's contribution to the cost of the Cushing Road Water Main Extension Project under Section E below, upon completion of the construction, the Town will treat the Water Main for which the Town is responsible under this section no differently from any other parts of the Town Water Supply (except for the connection fees, which are addressed in Section E.3 below).

**2. MPCA Ownership and Responsibility.** MPCA shall own and be responsible for the operation, maintenance, repair, and replacement of the Well House and the MPCA Water Distribution System beginning at the Moody Point Common Land property line, but nothing in this section shall prohibit the Town and MPCA from entering into a separate agreement on terms suitable to both Parties whereby the Town assumes responsibility, on either a general or project-specific basis, for operating, maintaining, repairing or replacing any part or all of the Well House or MPCA Water Distribution System. As part of its ownership and responsibility for the Distribution System, MPCA shall flush out the Distribution System at least once a year in conjunction with the Town's scheduled flushing program and may, in appropriate circumstances, flush out the Distribution System more than once in some years. Prior to flushing out the

system, MPCA shall notify the Town no less than three business days in advance. MPCA shall be responsible for ensuring that the water shutoff valves are fully operational. In the event that the Town intends to shut off water supply to an Owner who has not paid its water usage fee or its Betterment Fee (as defined below), the Town shall provide written notice to the Owner no less than 30 days prior to the date on which it intends to shut off the water supply and shall send a copy of this notice simultaneously to MPCA. MPCA shall ensure that the shutoff valve works by the end of the 30-day notice period. MPCA shall notify the Town in writing on the day on which any necessary repairs are complete. If the shutoff valve is not functioning by end of the 30-day notice period, the Town may impose and collect from MPCA a fine of \$100.00 day for each day that the valve remains unrepaired, except to the extent that MPCA was prevented from repairing the shutoff valve by extreme weather conditions (including frozen ground) or force majeure, in which case MPCA shall not be fined for a period equal to the duration of the weather conditions or force majeure.

**3. Water Loss.** The Town acknowledges that MPCA actively monitors the MPCA Water Distribution System for water loss. Neither MPCA nor the Owners shall pay for or otherwise be responsible for water loss due to leaks in the Town's Water Main or other infrastructure not included within the Distribution System. The Town requires the installation of a master meter in a location that allows the Town to measure the total volume entering the Distribution System so that it can calculate the difference between the water usage by the Owners as a whole, through the master meter, and the sum of individual water meters servicing lots within Moody Point (the "**Water Use Differential**"). The Town shall not charge the Owners for the Water Use Differential, and shall only charge MPCA for the Water Use Differential if the Water Use Differential exceeds 2%, measured over four consecutive quarters. In the event that MPCA disagrees with the data used by the Town to determine that the Water Use Differential exceed 2% over four consecutive quarters, the Town and MPCA shall meet and discuss their differences and attempt in good faith to resolve the disagreement. In the event that the disagreement is not resolved, each Party shall be entitled to whatever remedies are available at law.

**E. Repayment and Financial Matters.**

**1. Project Cost.** The total costs of design, engineering, and construction for the Cushing Road Water Main Extension Project are referred to here as the "**Project Cost.**" Excluded from the Project Cost are interim financing interest, USDA project management, costs attributable to the application for the USDA Funds, and the costs of bond counsel, all of which are being borne by the Town in connection with the larger Water System Upgrades project. The total Project Cost shall be determined upon completion of construction. The share of the Project Cost to be assessed against and collected from the Owners is 95% of the Project Cost, which reflects both (a) a 5% reduction arising from a portion of the sum received by the Town from a USDA grant.

**2. Deductions from Project Cost.** In the event that the Town, in its discretion, opts to install a Water Main with a diameter greater than what is required by best engineering practices determined in accordance with Section A.3.b above, the Project Cost shall be reduced by an amount equal to the difference between (a) the Project Cost with a Water Main with the

diameter determined in accordance with Section A.3.b above; and (b) the Project Cost with a Water Main with the larger diameter selected by the Town.

3. **Connection Fee.** The Owners shall pay a connection fee of \$1,000.00 for each Owner for a total of \$100,000.00 (the “**Connection Fee**”), which will be paid as part of the Moody Point Share (defined below) in accordance with Sections E.5 through E.7.

4. **Allowed MPCA Expenses.** To the fullest extent allowed under USDA rules and regulations governing the USDA Funds, MPCA shall be allowed to include in the Moody Point Share (defined below) its out-of-pocket expenses, including engineering and legal costs, incurred in connection with the Project as of October 13, 2018, or such other date as is approved by the USDA (the “**Allowed Expenses**”). The total Allowed Expenses shall be determined upon completion of construction. In the event that the USDA has not approved the allowed MPCA expense by the time that the Town plans to issue its first quarterly bill for the known Project Cost, the bill may be issued, with USDA approved allowed expenses to be added when they become available. Set forth on **Exhibit B** are MPCA’s expenses as of the Effective Date for consideration as Allowed Expenses. Upon completion of construction, MPCA shall supplement **Exhibit B** to include USDA approved allowed expenses incurred after the Effective Date.

5. **Calculation and Payment of the Betterment Fee.** Each owner shall be responsible for a betterment fee (the “**Betterment Fee**”), which will be assessed in equal quarterly installments over a period of 30 years (the “**Repayment Period**”). The formula for calculating the Betterment Fee is set forth in **Exhibit C**. All 100 Owners shall be assessed the Betterment Fee, irrespective of whether they secure water from the Town Water Supply.

6. **Payment Commencement Date.** The Repayment Period shall commence within the first quarter following the date on which the Owners are first served by the Town Water Supply.

7. **Equitable Reductions in the Moody Point Share.** If, as a result of completion of the Cushing Road Water Main Extension Project, one or more lots on Cushing Road is not served by the MPCA Water Distribution System connect to the Town Water Supply during the first ten years of the Repayment Period (such lot(s) being referred to as the “**Participating Lot(s)**”), then, as of the first quarter within which the Participating Lot(s) start receiving water from the Town Water Supply and for the remainder of the Repayment Period, the Betterment Fee assessed against each Owner shall be adjusted as set forth in **Exhibit C**.

## **F. Insurance, Indemnification, and Liability.**

1. **Insurance.** The Town shall insure that any and all contractors and subcontractors carry insurance policies meeting the requirements of USDA. Attached hereto as **Exhibit D** are the USDA insurance requirements. During the construction of the Project on the Moody Point Common Land, the Town shall ensure that each contractor and subcontractor policy name MPCA as an additional insured with coverage up to the full policy limits, except where precluded by law. As evidence of compliance with this requirement, the Town shall produce, and shall cause the contractor and each subcontractor to produce, Certificates of Insurance evidencing MPCA as an additional insured, together with any relevant provisions of the



insurance policy concerning the coverage afforded additional insureds. Coverage shall apply on a primary, non-contributory basis on all insurance policies other than workers' compensation and employer's liability insurance. All insurance policies shall be written on an "occurrence" basis and shall include a waiver of subrogation provision in favor of MPCA. To the extent the Town requires the contractor or subcontractors or both to carry additional insurance beyond what is set forth above, the Town shall require the contractor and the subcontractors to name MPCA as an additional insured up to the full limits of this additional insurance.

**2. Indemnification.** The Town shall defend, indemnify and hold harmless MPCA and its officers, board members, representatives, and agents, and the Members and the Owners, from and against any and all claims, actions, proceedings, losses, damages, liabilities, obligations, costs, and expenses, including reasonable attorneys', investigators' and consulting fees, court costs, and litigation expenses (collectively "**Claims**", and each individually, a "**Claim**"), suffered or incurred in connection with the Cushing Road Water Main Extension Project, except for Claims caused by the gross negligence or intentional misconduct of MPCA or its officers, board members, representatives, or agents, or the Members or Owners.

**3. No Waiver of Immunity or Individual Liability.** The Town does not waive statutory immunity, if any, from individual or personal liability that inures to the benefit of its employees, officials, or representatives. Similarly, in no event shall any MPCA board member, director, officer or other individual acting on behalf of MPCA be personally or individually liable for any action taken in connection with this Agreement.

**4. Limitation on Damages and Liability.** Neither Party shall be entitled to, and each of Party hereby waives, any and all rights to recover special, indirect, consequential, incidental, and punitive or exemplary damages, however arising, whether in contract, in tort, or otherwise, under or with respect to any action taken in connection with this Agreement. Each Owner shall be solely and separately liable for its quarterly payment of the Moody Point Share, and the Town's remedies in the event of nonpayment shall be limited to the same remedies it has with respect to any other landowner served by the Town Water Supply for nonpayment of betterments, assessments, and other fees for use of the Town Water Supply. There shall be no joint and several liability for and among the MPCA, the MPCA Members, and the Owners for nonpayment of an Owner's Betterment Fee or other betterments, assessments, or fees for the use of the Town Water Supply. No property, other than an individual lot served by the MPCA Water Distribution System, shall be subject to levy, execution or other enforcement procedure as a result of this Agreement. Each Owner shall be liable for its Betterment Fee, regardless of whether its lot is occupied or improved, and the Town shall have no remedies against MPCA or its Members or the Owners (other than the Owner not paying its Betterment Fee) for nonpayment by the Owner of a vacant or abandoned lot, but rather shall have solely those remedies it ordinarily possesses with respect to nonpayment for vacant or abandoned lots.

## **G. Miscellaneous.**

**1. Time of the Essence.** Time is of the essence in the performance of this Agreement.

2. **No Third Party Rights.** This Agreement is solely intended to provide rights and benefits to the Parties and is not intended to provide third party benefits or rights to any other party, without the express written consent of the Parties, except for those provisions that concern the rights and obligations of the individual Owners and MPCA Members.

3. **Integration.** This Agreement is the entire agreement of the Parties with respect to the matters contained herein, and there is no other agreement or document pertaining to these matters that is not superseded and comprised within this Agreement.

4. **Amendments.** This Agreement may not be amended except by a written instrument validly entered into and executed by each Party.

5. **Notification and Notices.**

a. **Notification:** Wherever this Agreement requires notification of the MPCA Representative (*see* Sections A.5.b and A.6), such notification shall be by telephone and email to the following:

Name: JB Parrett  
Phone: 603-341-2310  
Email: [jbparrett@me.com](mailto:jbparrett@me.com)

MPCA may designate a different MPCA Representative via a notice sent, by email or facsimile, to the Town Administrator and the Environmental Services Director.

b. **Notices.** Except where this Agreement solely requires notification of the MPCA Representative (*see* Sections A.5.b and A.6), any notice, consent or approval under this Agreement shall be in writing and shall be given by either Party (i) by delivery in hand or by courier service, or (ii) by registered or certified mail. All notices, requests or communications shall be sent to the addressees set forth below. Notices shall be deemed given when received or when delivery is refused.

If to the Town:

Steven Fournier, Town Administrator  
Town of Newmarket  
186 Main Street,  
Newmarket, NH 03857

With a copy to:

John J. Ratigan, Esq.  
Donahue, Tucker & Ciandella, PLLC  
16 Acadia Lane  
Exeter, NH 03833

If to MPCA:

Moody Point Community Association  
c/o True North Property Management  
135 Lafayette Rd. #10  
Hampton, NH 03862  
ATTN: President of the Board of Directors

With a copy to:

Gareth I. Orsmond, Esq.  
Pierce Atwood LLP  
Pease International Tradeport  
One New Hampshire Avenue, 3<sup>rd</sup> Floor  
Portsmouth, NH 03801

Or at such other address as the Party to be notified may have designated hereafter by notice in writing to the other Party.

**6. No Waiver.** No delay or omission by a Party hereto in exercising its rights occurring upon any default or noncompliance by any other Party under this Agreement shall impair those rights or be construed to be a waiver of those rights. Any waiver of any of the terms, covenants, conditions or agreements of this Agreement shall be in writing, shall be express and contain the word “waiver,” and shall not be construed to be a waiver of any succeeding breach thereof or of any other term, covenant, condition or agreement herein contained. No consent given by any person in any one instance shall be deemed to be consent in any other instance or circumstance.

**7. Successors and Assigns.** Except as otherwise provided in this Agreement, this Agreement and every provision herein contained shall run with the land and shall be binding upon and inure to the benefit of the Parties hereto and their respective heirs, successors, and assigns, legal representatives. Upon either Party’s request, this Agreement or a mutually agreeable notice of this Agreement shall be recorded with the appropriate registry of deeds to ensure that the Agreement runs with the land.

**8. Actions by the Parties; Deemed Approvals.** Except as specifically provided otherwise in this Agreement, when the assent, consent or approval of either Party is required to be obtained pursuant to this Agreement, this consent shall be in writing, the Party shall be obligated to act reasonably, and approval may not be unreasonably withheld, delayed, or conditioned.

**9. Certification of Final Project Cost; Audits.**

a. The Town shall provide a written certification to MPCA attesting to the true and accurate final Project Cost and the true and accurate Moody Point Share, and shall provide written updates of this certification whenever a change in circumstances changes the facts on which the certification was based, such as whenever a home or lot not served by the

MPCA Water Distribution System receives water as a result of the Cushing Road Water Main Extension Project.

b. MPCA shall have the right, at its own expense and upon seven days' advance written notice, to audit the Town's records as necessary to ensure the accuracy of the Town's certification and any updates thereof, and to ensure that repayment of the USDA loan is progressing as planned. This shall be an ongoing right, exercisable by notice, so as to provide MPCA with timely and accurate information throughout the duration of the Repayment Period.

c. The Town shall notify MPCA in writing of any audits conducted by or on behalf of the USDA with respect to the USDA Funds; shall diligently keep MPCA informed about any audits as they progress; and shall provide MPCA with the findings of any audit as soon as practicable after these findings are made.

**10. Participation in Drafting.** Each Party has cooperated in the drafting and preparation of this Agreement. Accordingly, in any action to construe this Agreement, a Party's participation in this drafting shall not cause any language to be construed against it.

**11. Dispute Resolution; Jurisdiction; Applicable Law.** Any and all disputes arising under or in connection with this Agreement or the subject matter hereof shall be resolved first by good faith negotiation and discussion between the Parties and thereafter in the courts of the State of New Hampshire. This Agreement shall be governed by and construed in accordance with the laws of the State of New Hampshire, regardless of any choice of law principles to the contrary.

**12. Severability and Enforceability.** If and to the extent that any term or provision of this Agreement is found to be void or unenforceable by a court of competent jurisdiction, then it is the intent of the Parties that the Agreement be reformed, if possible, to carry out its purposes and that any other provisions remain in full force and effect as severed from the void or unenforceable provisions hereof. This Agreement shall be interpreted and construed so as to achieve its purposes.

**13. Authorization.** Each of the signatories to this Agreement represents and warrants that he or she has the authority to execute this Agreement on behalf of the Party for which he or she is signing.

**14. Counterparts.** This Agreement may be executed in multiple counterpart originals, each of which shall constitute one and the same instrument.

**(Execution Page Follows)**

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives pursuant to due legal authorization and authority as of the day and year first above written.

**TOWN OF NEWMARKET**

By its Town Council,

\_\_\_\_\_  
Toni Weinstein, Chair

\_\_\_\_\_  
Amy Burns, Vice Chair

\_\_\_\_\_  
Casey Finch, Councilor

\_\_\_\_\_  
Gretchen Kast, Councilor

\_\_\_\_\_  
Zachary Dumont, Councilor

\_\_\_\_\_  
Helen Sanders, Councilor

\_\_\_\_\_  
Jon Kiper, Councilor

**MOODY POINT COMMUNITY ASSOCIATION**

By: \_\_\_\_\_  
Michael Watson, President, Board of Directors

**EXHIBIT A**

**ENGINEERING PLANS**

**[To Be Provided at a Later Date]**

**EXHIBIT B**

**MPCA Expenses through the Effective Date for Consideration as Allowed Expenses**

**[To Be Provided]**

## EXHIBIT C

### Calculation and Payment of the Betterment Fee

#### I. Calculation and Payment of the Betterment Fee under Section E.5 of the Agreement

- A. **Calculation of the Betterment Fee.** Each owner shall be responsible for a betterment fee (the “**Betterment Fee**”). The Betterment Fee shall be comprised of: (a) a 95% share of the Project Cost, (b) the Allowed Expenses, (c) the Connection Fee, and (d) the Interest (defined below):

$$\text{Betterment Fee} = [(\textit{The Project Cost} \times 0.95) + \text{the Allowed Expenses} + \text{the Connection Fee}] + \text{the Interest}$$

As used above, the “**Interest**” is the total interest owed on  $[(\textit{The Project Cost} \times 0.95) + \text{the Allowed Expenses} + \text{the Connection Fee}]$  over a 30-year period, calculated at the same interest rate that the Town pays on the loan portion of the USDA Funds, not to exceed 2.75%.

- B. **Quarterly Payment of the Betterment Fee.** The Betterment Fee shall be paid by each owner in equal quarterly installments over the 30-year Repayment Period. For each Owner, the quarterly installment shall be calculated as follows:

$$(\text{Betterment Fee} \div 100) \div 120 \text{ quarters}$$

By way of explanation, 100 equals the number of lots owned by the Owners, and 120 equals the number of quarterly payments over the 30-year Repayment Period.

- C. **Example.** An example of the calculation and payment of the Betterment Fee is as follows:

1. **Assumptions:**

- Total Project Cost = \$1,500,000.00; no deductions under Section E.2
- USDA Allowed Expenses = \$30,000.00
- Connection Fees = \$100,000.00
- Interest Rate = 2.75%

2. **Calculation of the Betterment Fee:**

$$(\$1,500,000 \times 0.95) + \$30,000 + \$100,000 + \$748,783.24^1 = \$2,303,783.24$$

3. **Quarterly Payment for Each Owner:**

$$(\$2,303,783.24 \div 100) \div 120 \text{ quarters} = \$191.98/\text{quarter}$$

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<sup>1</sup> \$748,783.24 is the interest on \$1,555,000, which is the sum of  $(\$1,500,000 \times 0.95) + \$30,000 + \$100,000$ .



**II. Calculation and Payment of the Betterment Fee with Equitable Reduction under Section E.7 of the Agreement**

- A. Calculation of Quarterly Payment of the Betterment Fee. In this case, the equation in Section I.B. above shall be adjusted by adding the Participating Lot(s) to 100. For the remainder of the Repayment Period, each Owner's quarterly installment will be calculated as follows:

Quarterly payment times the number of homes currently paying divided by total number of homes with the new homes included.

- B. Example. An example of the calculation of the Betterment Fee with an Equitable Reduction is as follows:

1. Assumptions:

- Total Project Cost = \$1,500,000.00; no deductions under Section E.2
- Allowed Expenses = \$30,000.00
- Interest Rate = 2.75%
- Participating Lots: 2

2. Betterment Fee: Same as in Section I.A above:

$$(\$1,500,000 \times 0.95) + \$30,000 + \$100,000 + \$748,783.24 = \$2,303,783.24$$

3. Quarterly Payment for Each Owner:

$$[(\$2,303,783.24 \div 102) \div 120 \text{ quarters}] = \$188.22/\text{quarter}$$

**EXHIBIT D**

**USDA Insurance Requirements**

**SC-6.03 CONTRACTOR'S LIABILITY INSURANCE**

K. The limits of liability for the insurance required by Paragraph 6.03 of the General Conditions shall provide coverage for not less than the following amounts or greater where required by Laws and Regulations:

1. Workers' Compensation, and related coverages under Paragraphs 6.03.A.1 and A.2 of the General Conditions:

State:	<u>Statutory</u>
Federal, if applicable (e.g., Longshoreman's):	<u>Statutory</u>
Jones Act coverage, if applicable:	
Bodily injury by accident, each accident	\$ <u>                    </u>
Bodily injury by disease, aggregate	\$ <u>                    </u>

Employer's Liability:

Bodily injury, each accident	\$ <u>500,000</u>
Bodily injury by disease, each employee	\$ <u>                    </u>
Bodily injury/disease aggregate	\$ <u>                    </u>

For work performed in monopolistic states, stop-gap liability coverage shall be endorsed to either the worker's compensation or commercial general liability policy with a minimum limit of:

\$                     

Foreign voluntary worker compensation	<u>Statutory</u>
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2. Contractor's Commercial General Liability under Paragraphs 6.03.B and 6.03.C of the General Conditions:

General Aggregate	\$ <u>2,000,000</u>
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Products - Completed Operations Aggregate	\$ <u>2,000,000</u>
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Personal and Advertising Injury	\$ <u>1,000,000</u>
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Each Occurrence (Bodily Injury and Property Damage)	\$ <u>1,000,000</u>
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3. Automobile Liability under Paragraph 6.03.D. of the General Conditions:

Bodily Injury:

Each person	\$ <u>1,000,000</u>
Each accident	\$ <u>1,000,000</u>

Property Damage:

Each accident	\$ <u>1,000,000</u>
[or]	
Combined Single Limit of	\$ _____

4. Excess or Umbrella Liability:

Per Occurrence	\$ <u>5,000,000</u>
General Aggregate	\$ <u>5,000,000</u>

5. Contractor's Pollution Liability:

Each Occurrence	\$ <u>1,000,000</u>
General Aggregate	\$ <u>1,000,000</u>

7. Contractor's Professional Liability:

Each Claim	\$ <u>2,000,000</u>
Annual Aggregate	\$ <u>2,000,000</u>