

AGENDA
SCARBOROUGH TOWN COUNCIL
THURSDAY – MARCH 14, 2019
WORKSHOP RE: PINE POINT CO-OP 6:00 P.M.

Item 1. Call to Order.

Item 2. Those Present.

Item 3. Discussion on the potential Sale of the Pine Point Co-Op.

Item 4. Adjournment.

ASSIGNMENT, ASSUMPTION & AMENDMENT
of PARKING LEASE AGREEMENT

This Assignment, Assumption & Amendment of Parking Lease Agreement (the “Agreement”) is dated as of _____, 2019 by and between the **Pine Point Fisherman’s Co-operative**, a Maine co-operative corporation with an address of 96 King Street Extension, Scarborough, Maine 04074 (“Assignor”), **The Town of Scarborough, Maine**, a body corporate and politic with an address of PO Box 360 Scarborough, ME 04074 (“Town”), and **96 King, LLC**, a Maine limited liability company with an address of _____ (“Assignee”).

WHEREAS, Assignor (as Tenant) and the Town (as Landlord) entered into a certain Parking Lease Agreement dated September 16, 2010 (the “Lease”) concerning the lease of 25 parking spaces near the Pine Point municipal pier; and

WHEREAS, contemporaneously with this Agreement, Assignor is selling substantially all of its assets to Assignee and Assignor and Assignee have jointly requested the Town’s written consent to assignment of the Lease pursuant to Section 5 thereof; and

WHEREAS, the Town consents to the assignment of the Lease subject to the terms and conditions hereof;

NOW THEREFORE, in consideration of the assignment of the Lease, the performance by the parties thereunder, and the mutual promises and covenants herein contained, the receipt and sufficiency of which is acknowledged and agreed, the parties hereto agree as follows:

1. Assignment. Assignor hereby sells, assigns, transfers and conveys to Assignee, all of its right, title and interest as Tenant in and to the Lease, together with all of its right, title and interest in and to any and all other fixtures, improvements and infrastructure located on the Premises under the Lease. Assignor represents and warrants to Assignee that: (i) there are currently no pending or actual defaults by Landlord or Tenant under the Lease and (ii) that Assignor has the right and power to convey its interest under the Lease to Assignee. Assignor hereby agrees to indemnify and save Assignee harmless from and against any and all verifiable losses, damages and liabilities of any nature whatsoever, including, without limitation, reasonable attorneys’ fees and expenses actually incurred by Assignee by reason of Assignor’s failure to perform any of Tenant’s obligations under the Lease prior to the date hereof, or due to the breach of any of the above representations and warranties of Assignor to Assignee.

2. Acceptance. Assignee hereby accepts the foregoing sale, assignment and transfer and assumes, promises and agrees to be bound by, and to faithfully perform all covenants, stipulations, agreements and obligations of the Tenant under the Lease occurring on or after this date and continuing thereafter, in accordance with the terms of the Lease. Assignee hereby agrees to indemnify and save Assignor harmless from any and all verifiable losses, damages and liabilities of every nature whatsoever, including, without limitation, reasonable attorneys’ fees

and expenses actually incurred by Assignor by reason of Assignee's failure to perform any of Tenant's obligations under the Lease on or after the date hereof.

3. **Binding Agreement.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors and assigns. The parties shall execute and deliver such further additional instruments, agreements and other documents as may be necessary to evidence or carry out the provisions of this Agreement, and/or to ensure compliance with any applicable law or regulation concerning the transfer of the Lease.

4. **Town Consent.** The Town, as Landlord under the Lease (as defined above) hereby consents to the transfer of Tenant's interest therein as described above, and shall look solely to Assignee herein for the performance of any and all of Tenant's responsibilities thereunder as of the date hereof, including those obligations and conditions set forth below.

5. **Additional Tenant Obligations.** The following provisions shall be added to the Lease in place of the existing Section 3 (Rent) which is hereby repealed and replaced with the following:

3. RENT. Subject to any credit in Section 3-C below, Tenant covenants and agrees to pay rent at the rate of Seventy-Five Thousand Dollars (\$75,000.00)¹ ("Rent") per year for the Initial Term, said Rent shall be payable on or before the fifteenth (15th) day of January ("Due Date"), or such other fixed date as to which both parties agree in writing. Rent may not be withheld by Tenant pending the negotiation of an alternate Due Date. If no written agreement can be reached between the parties within thirty (30) days, the actual Due Date for Rent shall remain the 15th of January. Rent for each Renewal Term shall be subject to negotiation between the parties.

3-A. BAIT STORAGE. Tenant covenants and agrees to provide and allow any commercial fishermen who:

(i) use the Pine Point municipal pier and/or the property of Tenant located adjacent to the Leased Premises (specifically including the real estate transferred on near or even date as this Agreement by Assignor to Assignee) for vessel landing, loading, unloading, provisioning, or non-retail seafood sales, and

(ii) who have entered into a business agreement with Tenant,

to make reasonable use of the bait storage facility existing as of the date hereof, for storage of their own bait, and not the bait of others, without charge, provided however, that Tenant shall have the right to impose and enforce reasonable rules upon use, including without limitation restrictions on nighttime use, so long as any such rules apply equally to all users and so long as Tenant's rules are posted on or near the bait storage facility. The existing bait storage facility is acknowledged to contain approximately 500 square feet of unheated storage space, which allows approximately 75 barrels of storage capacity. Tenant shall reasonably maintain the bait storage facility from time to time in order to maintain a level of repair and function reasonably equivalent to levels as of the

¹ This term is subject to Tenant's lender's approval.

date of this Agreement, which means providing an air conditioning unit in temperatures above 60 degrees Fahrenheit. It shall not constitute a breach of this Lease for Tenant to restrict, limit, or suspend individual privileges to the use of the bait storage facility from time to time where such individual users fail to observe Tenant's reasonable rules, provided however, that prior to any such restriction of an individual's privileges, the user facing restriction shall be given a first verbal or written warning, and a second written warning, setting forth the nature of any alleged violation(s). A copy of the second such written warning shall be simultaneously transmitted by Tenant to the Scarborough Town Manager's attention. Notwithstanding the foregoing, the parties agree that if in the Tenant's reasonable judgment the first or second violation is so egregious as to warrant immediate suspension of privileges, Tenant may do so, in which case Tenant shall promptly provide written notice thereof to the Scarborough Town Manager's attention stating the basis for such immediate suspension.

3-B. SEAFOOD PURCHASING. In the event that Tenant shall use Tenant's property adjacent to the Leased Premises (specifically including the real estate transferred on near or even date as this Agreement by Assignor to Assignee) and/or the Pine Point municipal pier for non-retail seafood purchasing and/or operation as a "buying station" for lobster, shellfish, and other seafood products, Tenant shall generally allow such sales, on equal terms and conditions and at fair market value, by any and all commercial fishermen landing product who have entered into a business agreement with Tenant, provided however, that Tenant shall not be or become obligated to purchase product from any particular individual(s) nor to purchase on any particular terms by virtue of this Agreement. Tenant may set reasonable rules for the use of its buying station so long as Tenant's rules apply equally to all sellers and are posted on or near the buying station. Prior to any action being taken by Tenant against an individual seller as a result of an alleged rule violation, such seller shall be given a first verbal or written warning and a second written warning, setting forth the nature of any alleged violation(s). A copy of the second such written warning shall be simultaneously transmitted by Tenant to the Scarborough Town Manager's attention. Notwithstanding the foregoing, the parties agree that if in the Tenant's reasonable judgment the first or second violation is so egregious as to warrant immediate suspension of privileges, Tenant may do so, in which case Tenant shall promptly provide written notice thereof to the Scarborough Town Manager's attention stating the basis for such immediate suspension. During the winter months the buying station may be located at Tenant's property at 5 Avenue 6, Scarborough. Tenant's compliance with this Section 3-B shall be the subject of periodic (no more than once yearly and only upon request) reporting to Landlord concerning the volume of purchases and the number of sellers to Tenant.

3-C. WORKING WATERFRONT INCENTIVE. In the event that Tenant shall reasonably comply with Sections 3-A and 3-B above as reasonably determined by Landlord, then Tenant shall be deemed in compliance with the Lease (as modified by this Agreement) and Tenant shall receive a (non-refundable) credit towards Rent in the

amount of Sixty-Five Thousand Dollars (\$65,000.00)². In the event that Tenant shall not substantially and materially comply with Sections 3-A and 3-B above, then following any two (2) written notices from Landlord to Tenant setting forth its findings of substantial and material events of non-compliance within a single calendar year, then, in addition to any other remedies hereunder, Tenant's un-adjusted Rent (*i.e.*, without any credit hereunder) shall be and become immediately due payable in arrears for any lease year(s) in which Tenant's non-compliance shall have been determined. In the event of a major event impacting the seafood industry, including without limitation regional closures, Landlord shall reasonably consider Tenant's request for an exception to the requirements of Sections 3-A and 3-B.

6. Additional Landlord Obligations. The following shall be added to the existing Section 4 of the Lease:

So long as Tenant is in compliance with Sections 3-A and 3-B above, Landlord shall not permit the use of the Landlord-owned parking lots adjacent to the Leased Premises as competing bait coolers (mobile or otherwise) and/or competing buying stations (mobile or otherwise). In the event that Tenant shall not substantially and materially comply with Sections 3-A and 3-B above, then Landlord may permit the use of the Landlord-owned parking lots adjacent to the Leased Premises as competing bait coolers (mobile or otherwise) and competing buying stations.

In all other respects the Lease shall be unmodified and remains in full force and effect.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed under seal by their duly authorized agents as of the day and year first above written.

WITNESS:

Assignor:

PINE POINT FISHERMAN'S CO-OPERATIVE

By: _____

Printed Name: _____

Its: _____

Assignee:

96 KING, LLC

By: _____

Printed Name: _____

Its: _____

² This term is subject to Tenant's lender's approval.

DRAFT

TOWN OF SCARBOROUGH, MAINE

By: Thomas J. Hall, Town Manager

DRAFT

RIGHT OF FIRST REFUSAL AGREEMENT

THIS RIGHT OF FIRST REFUSAL AGREEMENT (the “Agreement”) is executed as of the ____ day of _____ 2019, by and between **The Town of Scarborough, Maine**, a body corporate and politic with an address of PO Box 360 Scarborough, ME 04074 (“Town”), and **96 King Street, LLC**, a Maine limited liability company with an address of _____ (“Owner”).

WHEREAS, as of near or even date herewith, Owner shall have acquired title to certain land and buildings located along King Street Extension at Pine Point in the Town of Scarborough, Maine (the “Property”), by virtue of a deed from the Pine Point Fisherman’s Co-Operative to be recorded herewith, to which reference is hereby made for a more complete description of the Property that is the subject of this agreement; and

WHEREAS, Owner is willing to grant the Town a Right of First Refusal to match any incoming market offer to purchase the Property which Owner may wish to accept;

NOW THEREFORE, in consideration of the performance by the parties of their respective obligations hereunder, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

1) From and after the date hereof, in the event that Owner shall receive a bona fide offer to purchase all or any portion of the Property that Owner wishes to accept, Owner shall provide written notice to the Town of such offer, and include with such notice a copy of the bona fide offer, and the Town shall have forty-five (45) calendar days from its receipt of such notice to enter into a purchase and sale agreement with Owner on the same terms and conditions as offered by the third party (or the cash equivalent if the consideration in the bona fide offer is partially or wholly property or services) (the “Right of First Refusal”). In the event that the Town fails to enter into such purchase and sale agreement within said 30 calendar day period or fails to close pursuant to said agreement for reason other than default of Owner, the Town agrees to execute all such documents as Owner shall reasonably require to evidence the Town’s election not to purchase the Property (or portion thereof) and confirming that, in the event said third party purchases the Property (or portion thereof) pursuant to the terms and conditions of its offer, the Property (or applicable portion thereof) shall not be subject to this Right of First Refusal. This Right of First Refusal shall encumber the Property (or such portion of the Property as then remains) until the entirety of the Property has been sold pursuant to the terms and conditions set forth above. The Town’s Right of First Refusal may

also be exercised upon the Property in the event of any sale or transfer of a controlling interest in the stock or ownership interests of Owner to any party, provided that in such case, the Town shall (at its cost) engage an independent Maine-licensed commercial real estate appraiser with substantial experience appraising commercial real estate similar to the Property in southern Maine to determine a fair market value of the Property and the Town's rights hereunder shall apply to such fair market value as if it had been an acceptable bona fide offer to purchase the Property in its entirety, EXCEPT THAT notwithstanding the foregoing, in the event that the fair market value appraisal shall determine a value for the Property below the level of bona fide mortgage debt on the Property at the time of the proposed transfer, then the Town's rights hereunder shall be deemed to apply in such manner that the Town may only purchase the Property for the amount of such bona fide mortgage debt. The Town's rights hereunder shall not apply, however, to any proposed transfers or sales: (i) to a company, corporation, or trust owned or controlled by the individual members of the originally-named Owner entity and their immediate family members; provided, however, that Property so sold or transferred to persons or entities described above, shall remain subject to this Agreement.

2) During the term of this Agreement and/or so long as the Town shall hold a right of first refusal on the Property, Owner shall not lease, encumber, or otherwise transfer the Property (or any part thereof), in whole or in part, to any other person or entity, other than an affiliate of Owner, without the prior written consent of the Town, which consent will not be unreasonably withheld, conditioned, or delayed. The Town shall under no circumstances be obligated to subordinate its rights hereunder to the lien of any mortgage granted by Owner unless such mortgagee shall extend a recognition and non-disturbance agreement to the Town on such reasonable terms and conditions as the Town may then approve.

Owner

96 King Street, LLC

By:

TOWN OF SCARBOROUGH, MAINE

By: Thomas J. Hall, Town Manager

STATE OF MAINE

COUNTY OF _____, ss. _____, 2019

Personally appeared the above-named _____ in his capacity as _____ of 96 King Street, LLC and acknowledged the foregoing instrument to be his/her free act and deed and the free act and deed of 96 King Street, LLC.

Before me,

Name:

Notary Public/Attorney-at-Law

STATE OF MAINE

COUNTY OF _____, ss. _____, 2019

Personally appeared the above-named Thomas J. Hall in his capacity as the duly authorized Town Manager of the Town of Scarborough, Maine and acknowledged the foregoing instrument to be his free act and deed and the free act and deed of the Town of Scarborough, Maine.

Before me,

Name:
Notary Public/Attorney-at-Law

PARKING LEASE AGREEMENT

This Parking Lease Agreement ("Lease") is made as of the 16th day of September 2010 by and between the **TOWN OF SCARBOROUGH**, a body corporate and politic, located in Cumberland County and having a mailing address of P.O. Box 360, Scarborough, ME 04070 ("Landlord"), and **PINE POINT FISHERMEN'S CO-OPERATIVE**, a corporation organized under the laws of the State of Maine, with a place of business at 96 King Street Extension, Scarborough, Maine 04074 ("Tenant").

WITNESSETH:

1. **PREMISES LEASED:** Landlord does hereby lease to Tenant, and Tenant does hereby lease from Landlord, twenty-five (25) parking spaces (the "Leased Premises") on certain real property identified on Scarborough Tax Map U021 as Lot 21 (the "Property"). The Property and Leased Premises are further described as being located on King Street Extension, near the Pine Point municipal pier, at the outlet of the Scarborough River, in the Town of Scarborough and State of Maine.
2. **TERM:** The initial term of this Lease shall be ten (10) years ("Initial Term"). Tenant shall have the option to renew this Lease for five (5) immediately consecutive, additional terms of five (5) years each ("Renewal Term"). In order to exercise Tenant's option to renew, Tenant shall notify Landlord in writing by certified mail, return receipt requested, of its intention to exercise its option on or before thirty (30) days prior to the end of then-current Term, said renewal to be upon the same terms and conditions of this Lease.
3. **RENT:** Tenant covenants and agrees to pay rent at the rate of Five Thousand Dollars (\$5,000.00) ("Rent") per year for the Initial Term, said Rent shall be payable on or before the fifteenth (15th) day of January ("Due Date"), or such other fixed date as to which both parties agree in writing. Rent may not be withheld by Tenant pending the negotiation of an alternate Due Date. If no written agreement can be reached between the parties within thirty (30) days, the actual Due Date for Rent shall remain the 15th of January. Rent for each Renewal Term shall increase annually based on the percentage increase (or decrease) in the Moody's/REAL Commercial Properties Price Index.
4. **MAINTENANCE AND MANAGEMENT:** Landlord shall manage the parking area, including appropriate signage, parking arrangement and control of unauthorized parking. Landlord shall provide maintenance, snow removal, and sanding of icy conditions of the parking area as needed. It shall be within the sole discretion of Landlord to determine the appropriate extent and timing of maintenance and management.
5. **ASSIGNMENT & SUBLETTING:** Tenant shall not assign this Lease or sublet the Leased Premises or any part thereof without the prior written consent of Landlord, which consent shall be entirely within Landlord's discretion.
6. **INSURANCE:** Tenant shall purchase and maintain a standard general liability insurance policy covering its use of the Leased Premises, in a reasonable coverage amount, which amount is to be determined by and satisfactory to the Landlord. The insurance policy shall name the Landlord as an additional insured at no cost to Landlord. Tenant shall provide a

copy of the insurance policy to the Landlord within thirty (30) days of the execution of this Lease. Tenant shall also, at Landlord's request, provide proof that the insurance policy is in effect and the fees associated therewith paid to date.

7. **LIABILITY & INDEMNIFICATION:** Tenant shall defend, indemnify and hold harmless Landlord and Landlord's agents and employees in their public and individual capacities, from and against all claims, damages, losses and expenses, including attorneys' fees, arising out of or resulting from use of the Leased Premises by Tenant and Tenant's customers, guests, employees, agents and the like and Landlord assumes no liability or responsibility for damage or loss to vehicles or the contents of the vehicles parked in the Leased Premises and Tenant hereby waives all such claims against Landlord. Nothing in this Lease shall constitute a waiver of any immunities or defenses available to Landlord under the Maine Tort Claims Act or other applicable law.
8. **DEFAULT:** Tenant shall be in default of this Lease if Tenant regularly allows customers, guests, employees, agents and the like to use parking spaces in a quantity greater than the twenty-five (25) spaces provided for herein. If any such overuse of public parking spaces is noted by the Harbor Master or the Town of Scarborough Police, Tenant shall receive a written warning, including appropriate supporting documentation, notifying Tenant of same. Prior to issuance of the first written warning, Landlord shall contact Tenant and the parties shall meet at a mutually agreeable time to discuss Tenant's overuse of public parking spaces. The meeting shall be held no later than ten (10) days after Landlord contacts Tenant regarding same, unless both parties agree to a longer period of time. At said meeting, Landlord and Tenant shall make best efforts to resolve any problems related to the use of the public parking spaces in a fair and expedient manner. If Tenant receives more than three (3) written warnings in any one calendar year, then Tenant and Landlord shall be required to enter into arbitration to resolve disagreements regarding the use of the Leased Premises. Arbitration shall be conducted in accordance with the Maine Uniform Arbitration Act, and judgment upon the decision rendered by the arbitrator may be enforced in any court of competent jurisdiction. The parties shall agree on one arbitrator, who shall be an attorney licensed to practice law in Maine who has experience in commercial transactions such as this Agreement and is an experienced arbitrator. The arbitrator shall be bound by and follow the substantive law of Maine. The arbitrator shall render a decision within thirty (30) days of the arbitration hearing. Arbitration shall be conducted in Portland, Maine, unless another location is agreed to by the parties. Landlord acknowledges that Tenant's customers and guests may park in the public parking area for reasons that include, but are not limited to, patronizing Tenant's business. The Harbor Master and the Scarborough Police shall make best efforts to distinguish between members of the public who use parking spaces for multiple purposes from members of the public who use parking spaces for the exclusive purpose of patronizing Tenant's business.
9. **TERMINATION:** This Lease may be terminated by either party at any time during the Lease, by meeting the conditions set forth in Section 9a, 9b, and 9c below:
 - a. Providing written notice of intent to terminate to the other party. In the event that Landlord wishes to initiate termination, the Town shall proceed as follows: Prior to issuing a notice of termination, the Scarborough Town Council shall hold a public hearing and determine, by majority vote, that the use of the Property of which these

Leased Premises are a part will be more valuable to the public if used for a purpose other than public parking. Landlord shall provide Tenant with written notice of the date and time of said public hearing, with such hearing not to occur any sooner than thirty (30) days from the date of Landlord's notice to Tenant of said meeting.

- b. Providing one hundred and eighty (180) days in said notice of termination.
- c. Sending said notice of termination by certified mail, return receipt requested.

In the event the Lease is terminated upon initiation of Landlord, Landlord shall refund to Tenant any portion of rent paid to Landlord for the then-current Lease year, and shall further pay Tenant the full amount of the rent owed for the remaining term of the then-current Lease term.

10. **SUCCESSORS AND ASSIGNS**: The provisions of this Lease shall be binding upon and inure to the benefit of the respective successors and assigns of Landlord and Tenant.

IN WITNESS WHEREOF, Landlord and Tenant have executed this Lease as of the date first above written.

WITNESS

Gloria Justice

PINE POINT FISHERMEN'S CO-OPERATIVE

By: Gary Johnson

Its: President

WITNESS

Gloria Justice

By: Timothy Staples

Its: President

WITNESS

Gloria Justice

TOWN OF SCARBOROUGH

Thomas J. Hall

By: Thomas J. Hall

Its: Town Manager, duly authorized