

OPTION TO LEASE AGREEMENT

THIS AGREEMENT made this ___ day of _____, 2019.

BETWEEN:

THE CITY OF SAINT JOHN, a body corporate maintaining its City Hall on the 8th Floor, City Hall Building, 15 Market Square, P.O. Box 1971, Saint John, NB, E2L 4L1,
(hereinafter referred to as the “**Owner**”)

-and-

FUNDY QUAY DEVELOPMENTS INC., a body corporate maintaining its registered office at [address],
(hereinafter referred to as the “**Developer**”)

WHEREAS:

- A. The Owner is the owner of the lands and premises known as “Fundy Quay” located off of Water Street in the City of Saint John, New Brunswick and more particularly identified in Schedule “A” attached hereto (the “Site”);
- B. The Owner envisions that the Site will be developed to accommodate a mix of uses such as retail and commercial space and services, specialty shops and boutiques, residential condominiums and apartments, hospitality, entertainment, cultural and educational uses, green spaces, cafes, and transportation systems that will make the Site a vibrant catalyst for future waterfront activity;
- C. The Developer carries on the business of residential and commercial real estate development, and related activities;
- D. Following a Request for Expressions of Interest dated April 12, 2019 issued by Develop Saint John Inc. on behalf of the Owner, the Developer was selected as the developer for the Site to whom a long-term ground lease could be granted;
- E. Prior to entering into the ground lease, the Owner wishes to further explore the Developer’s vision and development plans for the Site, and has agreed to grant to the Developer an option to lease the Site in the interim, subject to the terms and conditions herein.

NOW THEREFORE in consideration of the Option Fee paid by the Developer to the Owner, and the mutual covenants and agreements herein contained, the Parties agree as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

The following expressions where used in this Agreement, shall have the following meanings:

- (a) **“Agreement”** means this option to lease agreement;
- (b) **“Development”** means the Developer’s planned development on the Site with a view to the redevelopment of Fundy Quay as contemplated in Recital B hereof;
- (c) **“Effective Date”** means the effective date of this Agreement, being _____;
- (d) **“Extension Notice”** means written notice served by the Developer on the Owner within the Initial Option Period which submits the Developer's request to extend the length of time that it may exercise the option granted herein to lease the Site;
- (e) **“Extension Period”** means an additional period of one year at the discretion of the Owner from the end of the Initial Option Period pursuant to Section 2.4 herein;
- (f) **“Initial Option Period”** means the period starting on the Effective Date and ending on December 31, 2021;
- (g) **“Lease”** means the ground lease in generally the same form and having the same basic business and financial terms and conditions as the draft ground lease annexed hereto as Schedule “B”;
- (h) **“Option”** has the meaning given to it at Section 2.1;
- (i) **“Option Fee”** has the meaning given to it at Sections 2.3 and 2.5;
- (j) **“Option Notice”** means written notice, in the form annexed hereto as Schedule “C”, served by the Developer on the Owner within the Option Period and which exercises the Developer's option to lease the Site; and
- (k) **“Option Period”** means the combined Initial Option Period and the Extension Period.
- (l) **“Parties”** means the Parties to this Option Agreement.
- (m) **“Site”** has the meaning given to it in the recitals hereto;

1.2 Interpretation

The captions and headings in this Agreement are for the convenience of reference only and do not affect the scope, intent or interpretation of any provision. This Agreement is governed by the laws of the Province of New Brunswick.

2. OPTION TO LEASE

2.1 Grant of Option

- a) In consideration of the Option Fee and subject to Section 2.2, the Owner hereby grants the Developer an option to lease the Site (the “Option”) on terms generally in accordance with the draft form of Lease set out in Schedule “B” attached hereto.

- b) This Option may be exercised by the Developer at any time during the Option Period by serving the Option Notice on the Owner provided both of the following conditions have been met:
 - I. The Developer has fulfilled its obligations set out at Sections 3.1 and 3.2,
 - II. The Developer has acquired the fee simple interest or a leasehold interest for a minimum term of 50 years to the lands currently owned by the Province of New Brunswick bearing Service New Brunswick parcel identifier number 55235105 and located adjacent to the Site.

2.2 Finalization of Form of Lease

- (a) The Developer acknowledges that the draft form of ground lease attached hereto as Schedule "B" contains the basic business and financial terms and conditions upon which the Owner is prepared to lease the Site to the Developer and that supplementary terms and conditions and revisions to the terms and conditions contained in the draft form of ground lease at Schedule "B" may be contained in the final version of the Lease.
 - (i) The Parties agree that in the event the Owner does not obtain the funding referenced at s. 4.2 and therefore by operation of section 4.2 the Owner does not carry out the infrastructure work contemplated at s. 4.1 (b) and (c), then only in such an event, the rent and purchase price provisions of the Ground Lease will be revised proportionately, pursuant to paragraph (b), to reflect the rent and purchase price of a non-development-ready site.
 - (ii) The Parties also agree that in the event that the Owner receives the funding referenced at s. 4.2 and undertakes the work contemplated at s. 4.1 (b) and (c) but does not complete it before the expiry of the Option Period, then in such an event, the rent provisions of the Lease will be revised to reflect a temporary reduction to the Rent for each month the said work is not substantially complete.
- (b) Following the execution of this Option by both Parties, the Owner will prepare the final version of the Lease and the Parties will endeavor to settle the final form of Lease, acting reasonably, within (3) months of their execution of this Agreement. Subject to Subsections 2.2(a)(i) and 2.2(a)(ii), the Owner will consider reasonable requests of the Developer for modifications to portions of the Lease, but no modifications will alter the business or financial basis of the terms set out in the draft form of ground lease attached hereto as Schedule "B".
- (c) In the event that the Developer exercises the Option, it shall be understood and agreed by the Parties that insofar as there may be blanks or bullets in the settled form of the Lease, or schedules or affidavits may be missing thereto, or amendments necessary or desirable to deal in a commercially reasonable manner with any changes in law at the time the Option is exercised, such blanks, bullets, affidavits, schedules or amendments shall be completed by the Parties

herein acting reasonably in accordance with the purpose and intent of this Option and the Lease. Both Parties agree to complete, execute and deliver the Lease, in substantially the same form as settled in accordance with Section 2.2(a), within thirty (30) days of the Owner's receipt of the Option Notice.

2.3 Fee for Initial Option Period

In consideration of the Option and other rights granted hereunder, the Developer shall pay the Owner a fee as follows:

- (a) the fee for the period commencing on the Effective Date and ending on December 14, 2020, is ONE DOLLAR (\$1.00) plus HST, payable upon the execution and delivery of this Agreement by the Owner; and
- (b) the fee for the period commencing on December 15, 2020 and ending on December 31, 2021 is TWO HUNDRED AND FIFTY THOUSAND DOLLARS (\$250,000.00) plus HST, payable on or before December 15, 2020.

2.4 Extension Period

- a) The Developer may request that the Owner extend the Initial Option Period by one year (the "Extension Period") by service of the Extension Notice on the Owner.
- b) Subject to subsection c), the granting of the Extension Period shall be at the sole discretion of the Owner.
- c) In the event that the Owner does not complete the public infrastructure construction contemplated at s. 4.1 before the expiry of the Initial Option Period, upon service of the Extension Notice, the Owner shall grant the Extension Period.

2.5 Fee for Extension Period

- a) Subject to subsection b), the Option Fee for the Extension Period granted by the Owner shall be TWO HUNDRED AND FIFTY THOUSAND DOLLARS (\$250,000.00) plus HST annually, payable on or before the first day of the Extension Period.
- b) In the event that the Extension Period is granted pursuant to s. 2.4 c), and only in such event, the Option Fee for the Extension Period shall be one dollar (\$1).

2.6 Option Fee Non-Refundable

- (a) The Option Fee shall be deemed to be fully earned by the Owner: (i) in the case of the \$1.00 + HST fee, upon execution of this Agreement by the Owner; (ii) in

the case of the \$250,000.00 + HST fee, on December 15, 2020; and (iii) in the case of any fee required for the Extension Period, upon the granting of any such Extension Period by the Owner, and the Developer shall not be entitled to a refund of any part of the Option Fee under any circumstances, regardless of the date of expiration or termination of this Agreement.

- (b) In the event the Developer exercises the Option on or before the expiry of the Initial Option Period, the Owner will credit the fee for the Initial Option Period defined at section 2.3.(b) on account of the first year's rent payment due under the Lease

2.7 Exclusivity

The Owner agrees that during the Option Period, it shall not negotiate or enter into any agreements with any other parties with respect to the lease or sale of the Site.

3. OBLIGATIONS OF THE DEVELOPER

3.1 Qualifications of the Developer, Development Plans and Financing

Prior to December 15, 2020, the Developer shall provide to the Owner the following:

- (a) details of the Developer's project team;
- (b) documentation to demonstrate the Developer's project team's engineering and project management experience with similar waterfront development projects; and
- (c) concept plans for the Development, including a completed business and project plan demonstrating project viability and phasing;
- (d) a letter from a regulated financial institution in Canada of the Developer's ability to finance the entirety of the Development as described in the concept plans, including the completed business and project plans, referenced at paragraph (c). For clarity, no formal commitment letter from such financial institutions is required at this stage.

3.2 Public Consultation

Prior to December 15, 2020, the Developer will hold a publicly advertised public consultation event together with Develop Saint John Inc. and the Owner, in an effort to generate public support for the Development including associated public space .

4. OBLIGATIONS OF THE OWNER

4.1 Public Infrastructure Construction

Subject to Section 4.2, the Owner will use commercially reasonable efforts to carry out the following public infrastructure work before the expiry of the Option Period in order to deliver to the Developer a viable development Site:

- (a) repair and vertically extend the seawall running along the perimeter of the Site;
- (b) remediate contaminated soil at the Site in accordance with applicable environmental legislation and guidelines of the New Brunswick Department of Environment and Local Government or its equivalent; and
- (c) regrade and elevate the Site up to 1.5 m to accommodate for possible future rises in sea level.

4.2 Federal and Provincial Infrastructure Funding

- (a) The Owner's obligation to carry out the public infrastructure work referred to in Subsections 4.1 (b) and (c) shall be subject to the Owner successfully obtaining the full amount of the federal and provincial government infrastructure funding for the soil remediation of the Site and the Site regrading (Infill/Coastal Flood Protection), for which funding an application was made under the Integrated Bilateral Agreement for the Investing in Canada Infrastructure Program on June 28, 2019 through the New Brunswick Regional Development Corporation
- (b) The Owner and the Developer shall work together in an effort to support the Owner's applications for such government infrastructure funding.

5. USE OF SITE DURING OPTION PERIOD

5.1 Access for Investigations

- (a) The Owner grants to the Developer a non-exclusive right during the Option Period for the Developer and persons authorized by the Developer, at its sole risk and cost, to enter the Site at all reasonable times with or without vehicles and equipment to carry out inspections, testing, surveys and similar activities necessary to continuously assess the environmental and geophysical status of the Site. Prior to any such entry, the Developer shall provide a minimum of 72 hours' written notice to the Owner along with a summary of its intended activities.
- (b) Notwithstanding the Developer's right to access the Site for the purposes set out at Section 5.1(a), the Developer's right of access is without prejudice to the Owner's continuous, uninterrupted use of the Site, including the operation of a parking lot on the Site and the carrying out of public infrastructure or other construction work on the Site.
- (c) The Developer shall exercise its right of access and conduct all operations on the Site in a commercially diligent, careful and workmanlike manner. Unless the Developer elects to exercise the Option, the Developer shall, promptly upon the expiration or termination of this Agreement, and in any event within 15 calendar days following the completion of each of its inspections, tests, surveys or other activities, remove at its expense all equipment from the Site and repair at its expense any damage done to the Site as a result of the Developer exercising its

right of access, or conducting inspections, tests, surveys or other activities on the Site. The Developer shall not be responsible for any pre-existing contamination by hazardous substances on the Site.

- (d) All entry onto the Site by the Developer, and persons authorized by the Developer, shall be at the sole risk and expense of the Developer and the Owner shall have no liability for any loss, injury or damage to persons or property arising therefrom.
- (e) The Developer, its agents, contractors, employees, successors and assigns shall not bring or permit to be brought, any hazardous substances onto the Site except with the prior written consent of the Owner and in accordance with all applicable laws relating to the environment.

5.2 Insurance Requirements of Developer

- (a) The Developer shall, at its sole cost and expense, take out and maintain in full force and effect, at all times throughout the Option Period, commercial general liability and property damage insurance, including personal liability, contractual liability, legal liability, non-owned automobile liability and owners' and contractors' protective insurance coverage with respect to the Site, written on a comprehensive basis with inclusive limits of at least five million dollars (\$5,000,000) for each occurrence, or such higher limit as the Owner, acting reasonably, requires from time to time;
- (b) The said commercial liability insurance shall contain a provision for cross liability or severability of interest as between the Owner and the Developer. All property policies shall contain a waiver of any right of subrogation or recourse by the Developer's insurers against the Owner or its contractors, agents and employees, whether or not any loss is caused by the act, omission or negligence of the Owner, its contractors, agents or employees. The Developer shall obtain from the insurers undertakings to notify the Owner in writing at least thirty (30) days prior to any cancellation thereof; and
- (c) All such insurance policies shall show the Owner as a named insured, and the Developer shall provide to the Owner within ten (10) calendar days of the Effective Date, and yearly thereafter on the anniversary of the Effective Date, and prior to any access to the Site by the Developer or its agents, certificates of all such insurance policies.

6. INDEMNIFICATION

6.1 By the Developer

The Developer shall indemnify and save the Owner harmless against any and all liabilities, claims, damages, interest, penalties, fines, monetary sanctions, losses (including pure economic losses), costs (direct and indirect), and expenses whatsoever (including, without limitation, counsel and solicitor's fees on a substantial indemnity basis, reasonable costs of professional advisors, consultants and experts), except those damages, costs and expenses caused by the Owner's omissions or negligence, arising from injury to property or injury to any person, firm, partnership or corporation, caused

by the use, occupancy or presence of the Developer at, in, on or upon the Site, or the presence of any other person, firm, partnership or corporation at, in, on or upon the Site with the authorization of the Developer, throughout the Option Period. This indemnity shall survive indefinitely the expiration or earlier termination of this Option Agreement notwithstanding anything herein contained to the contrary.

7. EARLY TERMINATION

7.1 By the Developer

The Developer may terminate this Agreement at any time during the Option Period upon giving thirty (30) days' prior written notice to the Owner.

7.2 By the Owner

The Owner may terminate this Agreement on written notice to the Developer if:

- (a) the Developer fails to pay the Option Fee pursuant to this Agreement when due hereunder;
- (b) the Developer becomes bankrupt or insolvent or takes the benefit of any statute for bankrupt or insolvent debtors or makes any proposal, an assignment or arrangement with its creditors, or any steps are taken or proceedings commenced by any person for the dissolution, winding-up or other termination of the Developer's existence or the liquidation of its assets; or
- (c) the Developer is in breach of any of its obligations under this Agreement.

7.3 Notices

Any notice, election, demand or exercise of option to which a party to this Agreement is entitled or is required to give, is deemed to have been given to any other party, if it is in writing and delivered personally or, if mailed in New Brunswick by postage prepaid registered mail, or if sent by facsimile transmission and addressed as follows:

- (a) if to the Owner:

The City of Saint John
8th Floor, City Hall Building
15 Market Square
P.O. Box 1971
Saint John, NB, E2L 4L1
Fax: 506-●
Attention: Common Clerk

-with a copy to-

Develop Saint John
P.O. Box 1971
Saint John, NB E2L 4L1
Attention: CEO

(b) if to the Developer:
Fundy Quay Developments Inc.
37 Rothesay Park Road
Rothesay, NB
E2E 5T7
Attention: Dr. David Elias

Any notice so given is deemed conclusively to have been given and received when personally delivered or sent by prepaid courier service or other electronic communication.

7.4 Time of Essence

Time is of the essence of this Agreement and each of the terms, conditions, covenants and agreements thereof.

7.5 Counterparts

For the convenience of the Parties hereto, this Agreement may be executed and delivered in two or more counterparts, or by facsimile or e-mail transmission of Adobe Acrobat files or either of them, each of which shall be deemed to be an original and all of which together shall constitute one and the same instrument. Any party executing this Agreement by facsimile or PDF file shall, upon the request by any other party, provide an originally signed counterpart of this Agreement.

7.6 Registration

The Developer may register a short-form notice of this Agreement on the title to the Site. The Owner agrees to execute such further instruments as are reasonably necessary to permit the Developer to effect such registration.

7.7 Further Assurances

Each party agrees to execute such further assurances as may be reasonably required from time to time by the other party to more fully effect the true intent of this Agreement.

7.8 No Assignment

The Developer shall not assign this Agreement without first obtaining the written consent of the Owner, which consent shall not be unreasonably withheld. Any transfer or issue by sale, assignment, bequest, inheritance, operation of law or other disposition, or by subscription, of any part or all of the corporate shares of the Developer or any other corporation which would result in any change in the effective direct or indirect control of the Developer, shall be deemed to be an assignment. No permitted assignment shall release the Developer from its obligations and covenants hereunder.

7.9 No Successors and Assigns

Subject to the restriction on assignment, this Agreement shall enure to the benefit of and be binding upon the Parties and their respective successors and permitted assigns.

7.10 No Partnership

Nothing contained herein will be deemed to create any relationship between the Owner and Developer other than the relationship of optionor and optionee.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF this Agreement has been executed by the Parties and their respective corporate seals have been affixed on the date first above written.

Owner: THE CITY OF SAINT JOHN

Per: _____
Name:
Title:

Per: _____
Name:
Title:

Common Council Resolution:

Developer: FUNDY QUAY DEVELOPMENTS INC.

Per: _____
Name:
Title:

Per: _____
Name:
Title:

Schedule "A"

Site

PID 55235113

Place Name: Saint John
Parish/County: City of/Ville de Saint John/Saint John
Designation of Parcel on Plan: Lot 18-2
Title of Plan: City of Saint John Subdivision
Registration County: Saint John
Registration Number of Plan: 38429529
Registration Date of Plan: 2018-09-27

PID 55221881

Place Name: Saint John
Parish/County: City of Saint John/Saint John
Label of Parcel on Plan: portion of South Market Wharf a Public Street/partie de la quai sud Market, une rue Publique
Registration Number of Plan: 33263436
Registration County: Saint John
Registration Date of Plan: October 30, 2013
Title of Plan: Plan of Survey Showing Ward Street, Peters Wharf and South Market Wharf, Montrant Rue Ward, quai Peters, et quai sud Market

Schedule "B"

Draft Form of Lease

Schedule "C"

Option Notice

NOTICE OF EXERCISE OF OPTION

FUNDY QUAY

TO: The City of Saint John
8th Floor, City Hall Building
15 Market Square
P.O. Box 1971
Saint John, NB, E2L 4L1
Fax: 506-●
Attention: Common Clerk

-with a copy to-

Develop Saint John
P.O. Box 1971
Saint John, NB E2L 4L1
Attention: CEO

Pursuant to Section 2.1 of an Option to Lease Agreement dated the ● day of ●, 2019 between The City of Saint John, as Owner, and Fundy Quay Developments Inc., as Developer (the "Option Agreement"), [●] hereby exercises its option to lease the Site (as defined in the Option Agreement) subject to the terms and conditions contained in the Option Agreement.

Dated this ___ day of ●, 20___.

[DEVELOPER]

Per: _____