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March 5, 2015

Nathan Poore, Town Manager  
Town of Falmouth  
271 Falmouth Road  
Falmouth, ME 04105

Re: Proposed Amendments to the Tidewater Master Development Plan and the  
Tidewater Village Design Guidelines

Dear Nathan:

As you know, I have been retained by the Town of Falmouth to assist the Town Council in their review of proposed amendments to the Tidewater Village Area 4 (TV-4) portion of the Tidewater Master Development Plan (the “Development Plan”) and the Tidewater Village Design Guidelines (the “Guidelines”).<sup>1</sup> Specifically, I have been asked whether the Council has the authority to amend the Development Plan and the effect that the Town’s 2013 Comprehensive Plan has on the proposed amendments.

## A. BACKGROUND

### 1. The Ordinance and Development Plan

Land development in the Tidewater area of Falmouth is regulated through the Zoning and Site Plan Review Ordinance, which additionally requires the development to be consistent with the Development Plan and the Tidewater Village Design Guidelines.

The Town adopted the Tidewater Master Planned Development District (the “TMPDD”) as a district within the Ordinance to allow for the development of the Tidewater area into a “mixed use commercial-residential neighborhood.” *Ordinance* at Section 3.18. As with other zoning districts in Falmouth, the TMPDD lists the structures and uses that are permitted in the TMPDD as a whole, as well as certain general dimensional standards and other requirements.

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<sup>1</sup> The Applicant also originally proposed to amend the language in the Tidewater Planned Development District provisions in the Zoning and Site Plan Review Ordinance related to parking distances, but has withdrawn that request.

The TMPDD also requires the adoption of a Development Plan, which is “conceptual in nature” that further identifies the proposed location, size and use type of all buildings, parking, roads and buffer areas that guides the site review process. *Ordinance* at Sections 3.17, 3.18.8. The currently approved Development Plan divides Tidewater area into three portions – Tidewater Village, Tidewater Farm, and a residential area. Tidewater Village is further divided into four areas, while Tidewater Farm is divided into three areas.

The Development Plan then provides development parameters through a graphic plan of development as well as by listing the permitted uses and dimensional requirements for each of the areas.

Finally, all development in the District must also be consistent with the Tidewater Village Design Guidelines, which are approved as part of the Development Plan. *Ordinance* at Section 3.18.5. The Guidelines provide a general design vocabulary, outline the development review process, and include parcel-specific development requirements.

## **2. The Proposed Amendments**

The applicant, Doten Properties LLC, has proposed amendments to the Development Plan and the Guidelines for the TV-4 portion of the Tidewater Village area to:

- Permit Restaurant and Outdoor Dining Areas uses;
- Exclude basements from the 8,000 square foot maximum square foot gross floor area limitation for buildings; and
- Reconfigure the proposed building to face Hat Trick Drive instead of Farm Gate Road.

The TMPDD does not contain any limitations on the gross floor area for buildings, and permits both restaurant and outdoor dining areas in the District. The Development Plan, however, only permits commercial office use and limits the size of a building to 8,000 square feet in the TV-4. The term “maximum square foot gross floor area” is not defined in the Ordinance nor in the Development Plan.

## **B. THE TOWN COUNCIL’S QUESTIONS**

### **1. Does the Town Council have the Authority to Amend the Development Plan?**

The short answer is yes, if the proposed amendments are consistent with the TMPDD and the Town’s adopted comprehensive plan.

Amendments to TMPDD are expressly permitted by both Maine law and the Ordinance itself. Pursuant to 30-A M.R.S. § 4352, municipalities have the authority to adopt zoning ordinances (and subsequent amendments) that are “pursuant to and consistent with a comprehensive plan.” Section 10.10 of the Ordinance provides that “The Town Council may amend this Ordinance, or any provision thereof, including changes of district boundaries and classifications in accordance with the provisions of the Charter of the Town of Falmouth.”

Additionally, the Ordinance specifically contemplates that the Development Plan may be amended by including procedural requirements for amendments in Section 3.18.13. Any such amendment to the Development Plan must be consistent with both the purpose of the Tidewater Master Planned Development District, and, as with state law, the Town’s adopted comprehensive plan. *Ordinance* at Section 3.18.10.

Regarding consistency with the TMPDD, among the purposes of the District is to develop a “mixed use commercial-residential neighborhood.” The list of permitted uses in the TMPDD as a whole include both restaurants and outdoor eating areas. Unlike the Development Plan, the TMPDD does not divide the District into sub-areas, and does not assign permitted use categories for individual areas or parcels. Likewise, the TMPDD does not contain a limitation on the square foot area for buildings. See below for a discussion on consistency with the comprehensive plan.

I would finally note that the Town Council has previously amended the Development Plan in 2008 to increase the allowed building footprint and add garage units in TV-2.

**2. What effect does the 2013 Comprehensive Plan have on the proposed amendments?**

**a. Legal Standards**

Under both Maine law and Falmouth’s Ordinance, to be valid a proposed amendment must be consistent with the Town’s adopted comprehensive plan. The currently adopted comprehensive plan was adopted in 2013, so it is that plan that should be reviewed as part of the proposed amendments to the Development Plan.

The test for consistency is whether, based on the evidence before the Town Council, the amendment is “in basic harmony with the comprehensive plan.” *Rommel*, 2014 ME 114, ¶ 13, 102 A.3d 1168. The zoning amendment does not need to perfectly fulfill the goals nor be consistent with all aspects of the plan. Instead, an amendment may be in basic harmony as long as it strikes a reasonable balance between the town’s various zoning goals or overlaps considerably with the plan. *Id.* ¶ 14. Finally, the Law Court has held that plan should be considered as a whole; *i.e.* an amendment may be in harmony with some portions of the plan even if it appears to be inconsistent with others. *Id.*

It is important to note that although a comprehensive plan and a land use ordinance are complementary, their purposes are different. *Nestle Waters N. Am., Inc. v. Town of Fryeburg*, 2009 ME 30, ¶ 24, 967 A.2d 702, 709-10. The two are not meant to be interchangeable. *Id.* A plan does not have regulatory standing on its own; instead the land use ordinance provides “regulatory teeth” that implements the purposes and general policies of the plan to control the allowable uses of land and set the standards by which those uses are permitted. *Id.* ¶¶ 19, 22. In other words, the plan provides general guidelines and goals, while the ordinance (and in this case the Development Plan) provide specific land use standards.

#### **b. The Town’s Comprehensive Plan**

The Town’s 2013 Comprehensive Plan (the “Plan”) designates the TV-4 site as located within the Designated Commercial District Growth Area, an area identified for commercial and mixed-use growth. The Plan at 23, 24. The southern portion of the Route One Commercial District Growth Area (the “District”), where the TV-4 site is located, is further described as a retail and services center. *Id.* at 24.

The District is a “key commercial hub providing employment, shopping, and service opportunities for the community.” *Id.* at 34. The Plan notes that a variety of retail, office, and service uses are permitted throughout the District, and describes the Tidewater development as a “mixed-use development, “combining residential use with office and medical development, as well as some historical farming use.” *Id.* The TMPDD is described as allowing the Tidewater area to be developed “into a high quality, mixed use commercial/residential neighborhood...”. *Id.* at 36. The Plan further notes that the “future uses are similar to the existing uses” in the Route One Commercial District, which include a wide variety of retail, commercial and professional uses. *Id.* at 34-35.

The Holtwijk, the Director of the Long Range Planning/Economic Development Department, submitted a comprehensive plan compliance review to assist the Town Council in their consistency analysis for the proposed amendments to the TV-4 area of the Development Plan. In addition to outlining provisions related to the District as outlined above, Mr. Holtwijk also cites the Local Economy section of the Issues, Policies and Goals chapter of the Plan, which notes that the “Route 1 corridor remains the economic engine of Falmouth” and that a proposed policy is to “attract and retain desirable businesses to increase the town tax base and available employment.” Mr. Holtwijk concluded that the proposed amendments to allow restaurant use in the TV-4 “are in keeping with” the Plan.

Before making any determination, however, the Council should carefully review the Plan, all documentation related to the proposal, and any public comments made during

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the Council and MRA hearings, all of which will be part of the record of the Council's decision.

Although ultimately a legislative decision for the Town Council, it is my opinion after reviewing the Plan that the proposed amendments to the TV-4 portion of the Development Plan appear to be consistent and in basic harmony with the Plan as a whole and strike a reasonable balance among the Plan's competing goals. As noted above, the TV-4 area is located as a designated commercial growth area that described in the Plan as a retail and services center and key commercial hub that permits a variety of retail, office, service uses and mixed use development.

Although one can never predict with certainty how a court would decide any challenge to a rezoning, my opinion is also informed by the Law Court's determination in *Rommel* that "zoning is a legislative act" and that courts give deference to the decisions of the legislative body. 2014 ME 114, ¶ 12, 102 A.3d 1168.

I hope this letter is helpful. Please let me know if you would like any additional information.

Sincerely,



Philip R. Saucier

PRS/rl

cc: Amanda Stearns, Community Development Director