

MEMORANDUM OF AGREEMENT

This Memorandum of Agreement (“**MOA**” or “**Agreement**”) is entered into and effective as of MARCH 4, 2024 (the “**Effective Date**”) by Palm Cove Owners Association, Inc. (“**Palm Cove**”) and the Town of Sunset Beach, North Carolina (the “**Town**”) (collectively referred to as the “**Parties**”).

RECITALS

WHEREAS, the Parties have each determined to pursue the construction of a navigation and shoreline nourishment project at the Eastern Channel of Jinks Creek located within the Town’s boundaries as they are authorized to do under North Carolina law (the “**Project**”);

WHEREAS, the Project would provide several benefits to the Parties, including realignment of the channel to restore water vessel navigation and restore the beach along the Town’s eastern sound-side shoreline;

WHEREAS, the Parties have determined that they can achieve significant cost savings by applying to the State of North Carolina’s Shallow Draft Navigation Channel Dredging and Aquatic Weed Fund (the “**Shallow Draft Fund**”);

WHEREAS, only local governments, such as the Town, are eligible to apply to the Shallow Draft Fund;

WHEREAS, based on the terms contained in this Agreement, the Town has agreed to Palm Cove’s request that the Town apply to the Shallow Draft Fund only upon Palm Cove’s agreement to fully reimburse the Town for all fees and costs associated with the Project that are not covered by the Shallow Draft Fund (if the Town’s application and Shallow Draft Funds are granted by the State) as well as in the event the State does not award the Town the Shallow Draft Fund. In other words, irrespective of whether the Town’s Shallow Draft Fund application is granted or not, Palm Cove has agreed to fully reimburse the Town for all of its fees and costs associated with said application and efforts in connection therewith;

WHEREAS, according to N.C. Gen. Stat. § 143-215.73F, *et seq.*, revenue in the Shallow Draft Fund may only be used to provide the State’s cost share of the costs associated with any dredging project designed to keep shallow draft navigation channels located in State waters or waters of the State located within lakes navigable and safe;

WHEREAS, any project funded by revenue from the Shallow Draft Fund must be cost-shared with non-State dollars as follows: the cost-share for dredging projects located, in whole or part, in a development tier one area, such as the Project that is the subject of this Agreement and as defined in N.C. Gen. Stat. § 143B-437.08, shall be at least one non-State dollar for every three dollars from the Shallow Draft Fund (Tier 1 match: 75% paid by the State and 25% paid by the Local entity, in this case, the Town);

WHEREAS, Palm Cove has agreed to be financially responsible for all of the Town’s Local share and all other fees and costs associated with the Project not covered by the Shallow Draft

Fund, including in the event that the Town’s application for Shallow Draft Funds is unsuccessful; and,

WHEREAS, the Parties desire to set forth their agreement herein.

NOW THEREFORE, the Parties hereto agree as follows:

All of the foregoing recitals are fully incorporated herein and made a binding part of this Agreement.

ARTICLE I Statement of Purpose

The Parties are entering into this MOA to cooperate in the pursuit of the Project by having the Town apply to the State’s Shallow Draft Fund, which, if granted by the State, will achieve overall savings on the construction costs associated with the Project. Palm Cove shall, in advance, deposit funds into an agreed-upon escrow account, to be used by the Town to pay all State-approved invoices associated with the Shallow Draft Fund and for all fees and costs associated with applying for and receiving the Shallow Draft Fund grant. The Town will seek reimbursement from the Shallow Draft Fund and, upon receipt of the proceeds from the Shallow Draft Fund, the Town will reimburse Palm Cove for those amounts previously advanced by Palm Cove to the escrow account. Palm Cove will be financially responsible for all costs associated with the Project and will be entitled to the Town’s reimbursements from the Shallow Draft Fund. Palm Cove shall be financially responsible for all costs incurred by the Town and associated with the Town’s pursuit of the Shallow Draft Fund application even if the Town is ultimately unsuccessful in receiving approval or the granting of the Shallow Draft Fund for the Project. This MOA sets forth the terms under which the Town will enter into the Design and Permitting Contract, the Pre-Construction Services Contract, the Dredge and Construction Contract, the Project Management Contract, and any other contract(s) necessary to implement the Project (collectively, the “**Contracts**”) and the Parties understanding as to the administration of the Project’s construction process, financing, and liabilities associated with the construction of the Project.

ARTICLE II Construction and Administration of Project

Section 2.1. Soliciting Bids and Selecting Contractors. The Town shall comply with all statutory and regulatory requirements for bidding for architectural, engineering, surveying, and construction services associated with the Project.

Section 2.2. Application to Shall Draft Fund. Palm Cove, at its own cost and expense, shall prepare for and on behalf of the Town the application to and for the Shallow Draft Fund. At its 4 March 2024 Town Council meeting, the Town shall pass a resolution agreeing to the terms of this MOA and to pursue the Shallow Draft Fund grant for the Project. Within (10) days of the Town receiving a complete application, the Town shall submit the application to the Shallow Draft Fund for the Project. If the North Carolina Department of Environmental Quality (“**DEQ**”) determines that the Project does not qualify for the Shallow Draft Fund, this Agreement shall

immediately terminate; provided, however, upon receipt by Palm Cove of the Town's bill of costs and fees, Palm Cove shall fully reimburse the Town for all costs and fees incurred by the Town consistent with this MOA and in pursuit of the Shallow Draft Fund.

Section 2.3. Administration of Project. The Town shall negotiate all terms and conditions of the Contracts for the Project. Prior to entering into any Contract, the Town shall: (a) provide fourteen (14) days written notice to Palm Cove, including a draft of the Contract; and (b) consider, in the Town's sole and unfettered discretion, any comments or proposed revisions provided in writing by Palm Cove. In no event shall the Town be required to accept or agree to any comments or proposed revisions provided by Palm Cove.

The Design and Permitting Contract will focus on initial project design analysis and the development of required permit applications and supporting environmental documentation. The Pre-Construction Services Contract will include the development of project plans and specifications and provide bidding assistance to the Town. Assuming favorable bids are obtained for the Project, the Dredge and Construction Contract will be executed between the Town and the dredge contractor.

The Town will be responsible for the administration of the Project. The Project Manager shall be selected by the Town and the Project Manager will manage the Project on a day-to-day basis on behalf of the Town. Prior to selecting a Project Manager, the Town shall provide ten (10) days written notice to Palm Cove, including a draft of the Contract. The Project Manager will provide periodic updates to the Town on the Project as required by the Project Management Contract. Upon receipt of any periodic updates from the Project Manager, the Town will provide copies of said updates to Palm Cove.

Section 2.4. Project Modifications. Prior to making any modification to the design, scope, construction, and other aspects of the Project (collectively, the "**Project Modifications**"), the Town shall provide fourteen (14) days written notice to Palm Cove, including a description and costs of the Project Modification. Subject to the 14-day notice requirements, the Town shall have the right, power, and authority to enact a Project Modification that increases the cost of the Project. Any Project Modifications shall be memorialized in writing and a copy of same shall be submitted to the Town at least ten (10) days before the effective date of the Project Modification. In no event shall a Project Modification materially impact the Project without the 14-day notice to Palm Cove and the Town's prior written consent. The Town agrees to sign any change order to the Contracts submitted in accordance with the terms of this Section 2.4.

Section 2.5. Funding and Payment of Invoices. Prior to the Town entering into any Contract, Palm Cove shall either deposit 125% of the funds required to implement each Contract into an escrow account designated by the Town or provide financial assurance acceptable to the Town to fully secure Palm Cove's monetary obligations to the Town under this MOA and the Project.

All invoices submitted pursuant to the Contracts for the Project will be reviewed by the Project Manager and submitted to the Town for approval. The Town shall pay each approved invoice in accordance with the instructions on the invoice. The Town will make all reasonable efforts to effect the payment of the invoices in accordance with the Contracts.

Palm Cove shall be fully responsible for all of the Town's Local share of the Shallow Draft Fund and any costs and expenses not reimbursed by the Shallow Draft Fund. Palm Cove shall also be responsible for all reasonable and necessary administrative fees incurred by the Town, including the Town's legal fees for the review of the Contracts. The Town shall provide detailed information, including the date incurred, amount of time, and a detailed description to Palm Cove documenting such fees and costs. Palm Cove shall pay the Town for such fees within ten (10) days of receiving such documentation. Other than paying the approved invoices with funds provided by Palm Cove, the Town shall not be responsible for any costs or expenses related to the Project.

Within five (5) days of paying each approved invoice, the Town shall request the State's 75% reimbursement from the Shallow Draft Fund. Within ten (10) days of receiving reimbursed funds from the Shallow Draft Fund, the Town shall transfer such reimbursed funds to Palm Cove or to the Parties' escrow account, whichever is applicable, so as to maintain the 125% threshold set forth above.

ARTICLE III Disputes and Mediation

Section 3.1. Agreement to Cooperate to Settle Disputes. This Agreement shall be liberally construed to promote a harmonious relationship between the Parties with regard to the completion of the Project. If a problem or dispute arises that this Agreement does not directly or indirectly address, the Town and Palm Cove shall meet to discuss and work with one another in good faith to determine a mutually satisfactory solution.

Section 3.2. Agreement to Mediate. The Town and Palm Cove will attempt to settle any dispute, claim, or controversy arising out of this Agreement through consultation and negotiation in good faith and in a spirit of mutual cooperation as set forth in Section 3.1. If those attempts fail, then the claim or dispute shall be mediated by a mutually-acceptable mediator before any party resorts to court action. The mediation procedure shall be that which is contained in the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions adopted pursuant to N.C. Gen. Stat. § 7A-38.1 as same may be amended from time to time.

ARTICLE IV Liabilities and Indemnification

Section 4.1. Palm Cove Assumption of Liability. Palm Cove recognizes that the Town is entering into this Agreement for the purpose of assisting Palm Cove in the execution and administration of the Contracts in order to achieve savings in the costs of the Project. Unless assumed by the Town or arising from the intentional or gross negligent acts or omissions of the Town, Palm Cove assumes full liability for any claims, suits, actions, orders, administrative proceedings, judgments, damages, injunctions, whether foreseeable or unforeseeable, strict liabilities, penalties, fines, costs, expenses, debts, taxes, assessments, obligations, liabilities (including without limitation, sums paid in settlement of claims), interest of losses, including reasonable attorneys' fees and expenses, consultant fees and expert fees, together with all other reasonable costs and expenses of any kind or nature, whether known or unknown, past, present or future, contingent or direct, but excluding consequential and/or special damages (collectively,

“**Liabilities**”) arising from, connected with, or resulting, directly or indirectly from the Project or any Project Modifications pursuant to Section 2.3 (collectively, “**Palm Cove Assumed Liabilities**”).

Section 4.2. Palm Cove Indemnification. Subject to the limitations in this Agreement, Palm Cove shall protect, indemnify, save, hold harmless, and defend (with counsel of the Town’s choice) the Town and any member of the governing body, officer, agent or employee thereof, acting in such capacity, from and against any and all Liabilities to the extent arising out of (i) Palm Cove’s breach of this Agreement, and/or (ii) the Palm Cove Assumed Liabilities.

Section 4.3. The Town Assumption of Liability. Unless assumed by Palm Cove or arising from the intentional or gross negligent acts or omissions of Palm Cove, the Town assumes any Liabilities arising from, connected with, or resulting, directly or indirectly from (i) the failure of the Town to enter into the Contracts in accordance with the terms of this Agreement, (ii) to pay the invoices under the Contracts in accordance with the terms of Section 2.4, or (iii) to request reimbursement from the Shallow Draft Fund in accordance with the terms of Section 2.4 (collectively, the “**Town Assumed Liabilities**”).

Section 4.4. Town Indemnification. Subject to the limitations in this Agreement, the Town shall protect, indemnify, save, hold harmless, and defend Palm Cove and any member of the governing body, officer, agent or employee thereof, acting in such capacity, from and against any and all Liabilities to the extent directly arising out of (i) the Town’s breach of this Agreement, and/or (ii) the Town Assumed Liabilities.

ARTICLE V

Performance of Government Functions

Nothing contained in this Agreement shall be deemed or construed so as to in any way estop, limit, or impair the Town from exercising or performing any regulatory, policing, legislative, governmental, or other powers or functions pursuant to applicable law.

ARTICLE VI

Default and Remedies

Section 6.1. The Town or Palm Cove will be in default under this Agreement if it fails to materially comply with the terms of this Agreement.

Section 6.2. If an event of default occurs as set forth in the preceding paragraph, and after following the procedures and requirements of Article III herein, each party hereto will have all remedies available at law or in equity to enforce any of the terms and provisions hereof, including, but not limited to, actions at law for damages and equitable actions seeking rescission of this Agreement and/or injunctive relief (mandatory or prohibitory) to prevent the breach or threatened breach of any term or provision thereof or to enforce the performance of all terms and conditions of this Agreement. All remedies are cumulative; the exercise of any one or more of them will not in any way alter or diminish the rights of the exercising party to any other remedy provided herein or at law or in equity. Action under this Agreement will not be taken, however, until the non-

defaulting party or parties gives the defaulting party or parties written notice of the event of default and a reasonable opportunity to cure the event of default.

ARTICLE VII
Notice

Except as otherwise provided in this Agreement, all notices, certificates, requests, requisitions, or other communications given pursuant to this Agreement must be in writing and will be sufficiently given and will be deemed given when delivered by hand, mailed by certified mail, postage prepaid or by electronic mail with confirmation of receipt. The mailing and current email addresses are as follows:

Town: Town of Sunset Beach
 c/o: Office of the Town Administrator
 700 Sunset Boulevard North
 Sunset Beach, NC 28468
 Facsimile No. (910) 579-1840
 Email: The address available on the Town's website for the Town
Administrator <mailto:>

With copy: G. Grady Richardson, Jr., Town Attorney
 LAW OFFICES OF G. GRADY RICHARDSON, JR., P.C.
 1908 Eastwood Road, Suite 224
 LUMINA STATION
 Wilmington, North Carolina 28403
 Facsimile No. (910) 509.7167
 Email: grady@ggrlawoffice.com

Palm Cove: Karen Triplett, President
 2808 Chelsea Circle
 Durham, NC 27707
 Email: karenwtriplett@yahoo.com

With copy: Todd Roessler
 Kilpatrick Townsend & Stockton LLP
 4208 Six Forks Road, Suite 1400
 Raleigh, NC 27609
 Facsimile No. (919) 510-6121
 Email: TRoessler@KilpatrickTownsend.com

ARTICLE VIII
Miscellaneous

Section 8.1. Amendment. This Agreement may only be amended through a supplement approved in writing and signed by both the Town and Palm Cove.

Section 8.2. Severability. If any section of this Agreement is deemed to be illegal or otherwise unenforceable, it is the intent of the Parties that all other provisions of this Agreement shall remain in full force and effect.

Section 8.3. Governing Law. This Agreement is to be governed by and interpreted in accordance with the laws of the State of North Carolina.

Section 8.4. This section intentionally deleted by the Parties.

Section 8.5. Execution in Multiple Counterparts. This Agreement may be executed in any number of counterparts, by manual, facsimile, digital, electronic or .pdf file signatures, each of which will be deemed an original, but all of which taken together will constitute one and the same instrument. An executed copy of this Agreement delivered by facsimile, email, or other electronic means will be deemed to have the same legal effect as delivery of a manual signed copy of this Agreement. This Agreement and related documents may be sent and stored by electronic means.

Section 8.6. Termination. This Agreement shall terminate under either of the following three (3) circumstances: (1) DEQ and/or any other State agency, department, or governing body however denominated with the authority to do so determines that the Project is not eligible for the Shallow Draft Fund; or, (2) when all of the following events have occurred: (a) the completion of all of the Project as evidenced by certificates of completion issued to the Town by the Project Manager, (b) the balance of any funds to be paid by Palm Cove to the Town is zero, (c) the balance of any funds to be reimbursed to Palm Cove is zero, and (d) all duties and responsibilities of the Town and Palm Cove set forth in this Agreement have been completed or waived in writing by the Parties; or (3) the date on which Palm Cove provides notification in writing to the Town to terminate this Agreement and Palm Cove has fully reimbursed to the Town all of the Town's fees and costs incurred consistent with this Agreement.

[SIGNATURES BEGIN ON THE FOLLOWING PAGE]

IN WITNESS WHEREOF, Palm Cove and the Town have executed this Agreement as of the Effective Date.

PALM COVE OWNERS ASSOCIATION, INC.

By: Karen Triplett

Name: Karen Triplett

Title: President
Palm Cove Owners Association, Inc.

TOWN OF SUNSET BEACH, NORTH CAROLINA

By: Shannon Phillips

Name: Shannon Phillips

Title: Mayor