

COMMONWEALTH OF MASSACHUSETTS  
HOUSING APPEALS COMMITTEE

HD/MW RANDOLPH AVENUE, LLC,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 2015-03
	)	
MILTON BOARD OF APPEALS,	)	
	)	
Appellee.	)	
	)	

**DECISION ON REMAND APPROVING  
REVISED CONDITIONS 18 AND 19  
AND MODIFYING COMMITTEE DECISION**

In the Judgment issued by the Land Court on July 30, 2021 in *Town of Milton Zoning Bd. of Appeals v. The Massachusetts Housing Appeals Committee, et al.*, No. 19 MISC 000037 (RBF), the court ordered that “HAC’s decision striking Conditions 18 and 19 imposed by the Board is REVERSED and REMANDED to HAC for further proceedings consistent with the Memorandum and Order [Allowing in Part and Denying in Part Motions for Judgment on the Pleadings].” Specifically, the court ordered the Committee to conduct further proceedings “to reconsider said Conditions, particularly on whether the local concerns of the Board outweigh the regional need for low and moderate income housing consistent with this Memorandum and Order.”

At the September 2, 2021 initial conference on remand, the developer, HD/MW Randolph, LLC, and the Milton Board of Appeals (the Parties on remand)<sup>1</sup> stated they believed they would be able to reach an agreement regarding the foregoing conditions.

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<sup>1</sup> The interveners did not participate in the remand proceeding.

During the next several months, the Parties engaged in discussions with each other and consulted with both MassHousing and the Department of Housing and Community Development with regard to the conditions and the proposed springing regulatory agreement. The Parties have now filed a Joint Motion for Approval of Revised Conditions, stating they “have conferred and agreed on the following revised Conditions 18 and 19:

Condition 18: The Applicant and the Town shall execute a Local Regulatory and Use Agreement in the form attached hereto as **Exhibit A** (the “Springing Regulatory Agreement”). The Springing Regulatory Agreement shall be recorded with the Norfolk County Registry of Deeds prior to the issuance of a building permit for the Project.

Condition 19: At such time as the Springing Regulatory Agreement takes effect and the Town becomes responsible for monitoring the affordability requirements for the Project, the Applicant shall provide the Town with a reasonable monitoring fee in accordance with the terms of the Springing Regulatory Agreement.

The Parties jointly request that the Committee modify Conditions 18 and 19 of the comprehensive permit to reflect the agreed language set forth above.

I have reviewed the Parties’ Motion and agreed conditions, as well as the Springing Regulatory Agreement attached thereto. I find them satisfactory, and I approve the above revised Conditions 18 and 19. I hereby incorporate by reference the Parties’ Motion and Agreement, as well as the Springing Regulatory Agreement, as part of this Decision on Remand and attach them hereto.

I further order that the Committee’s decision in *HD/MW Randolph, LLC v. Milton Board of Appeals*, No. 2015-03 (Mass. Housing Appeals Comm. Dec. 20, 2018) (2018 Decision) be modified to require the Board to replace Conditions 18 and 19 in the comprehensive permit decision the Board issued with the foregoing Conditions 18 and 19 and the referenced Springing Regulatory Agreement. This Decision on Remand is incorporated by reference in the 2018 Decision and it constitutes a final decision in this remand proceeding. *See* 760 CMR 56.06(7)(e)2.d.

The Parties shall take any and all steps necessary to report the resolution of this matter to the Land Court.

HOUSING APPEALS COMMITTEE



February 24, 2022

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Shelagh A. Ellman-Pearl, Chair  
Presiding Officer

COMMONWEALTH OF MASSACHUSETTS  
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**JOINT MOTION FOR APPROVAL OF REVISED CONDITIONS**

Now come Appellant HD/MW Randolph Avenue, LLC and Appellee Milton Board of Appeals (together, the “Parties”) and jointly move the Housing Appeals Committee (the “Committee”) to modify certain conditions of the July 30, 2015 Comprehensive Permit issued by Appellee for Appellant’s project located at 693-711 Randolph Avenue in Milton (the “Comprehensive Permit”). As grounds therefor, the Parties state as follows:

1. On August 18, 2015 Appellant filed an appeal with the Committee, entered as HAC proceeding No. 2015-03, *HD/MW Randolph Avenue, LLC v. Milton Board of Appeals*, arguing that certain conditions imposed by the Appellee in the Comprehensive Permit rendered the Project uneconomic. Additionally, HD/MW objected to Conditions 18 and 19 as impermissible conditions subsequent, exceeding the Board’s legal authority, and superfluous. Conditions 18 and 19, required that, prior to the issuance of a building permit that the Appellant enter into a “Town Regulatory Agreement” “in form and substance reasonably acceptable to the Board and Town Counsel” that agrees to maintain low and moderate income housing in the event that the agreement with the subsidizing agency is terminated, expires, or is otherwise no longer in effect and not replaced and that the Appellant pay the Town reasonable monitoring fees in connection with such replacement agreement that was not enumerated.

2. On December 20, 2018, the Committee issued a decision striking or modifying several of the challenged conditions, including striking Conditions 18 and 19.
3. The Board appealed the Committee’s decision to the Land Court, which by Judgment issued on July 30, 2021 in *Town of Milton Zoning Bd. Of Appeals v. The Massachusetts Housing Appeals Committee, et al.*, No. 19 MISC 000037 (RBF), ordered that “HAC’s decision striking Conditions 18 and 19 imposed by the Board is REVERSED and REMANDED to HAC for further proceedings consistent with the Memorandum and Order [Allowing in Part and Denying in Part Motions for Judgment on the Pleadings].” The Land Court remanded Conditions 18 and 19 back to the HAC to make the “necessary subsidiary findings” after permitting the parties to submit additional evidence and briefing.
4. Consistent with the Land Court’s Judgment and to avoid the time and expense of re-litigating the limited issue of Conditions 18 and 19, the Parties have agreed upon a form of springing regulatory agreement in the event that the agreement with the subsidizing agency is terminated, expires, or is otherwise no longer in effect and not replaced and further defines what constitutes a “reasonable monitoring fee”, a copy of which is attached hereto as **Exhibit A**. Such form of agreement has been reviewed and approved by both the Department of Housing and Community Development and MassHousing.
5. The Parties have conferred and agreed on the following revised Conditions 18 and 19:

Condition 18: The Applicant and the Town shall execute a Local Regulatory and Use Agreement in the form attached hereto as **Exhibit A** (the “Springing Regulatory Agreement”). The Springing Regulatory Agreement shall be recorded with the Norfolk County Registry of Deeds prior to the issuance of a building permit for the Project.

Condition 19: At such time as the Springing Regulatory Agreement takes effect and the Town becomes responsible for monitoring the affordability requirements for the Project, the Applicant shall provide the Town with a reasonable monitoring fee in accordance with the terms of the Springing Regulatory Agreement.

WHEREFORE, the Parties jointly respectfully request that the Committee modify Conditions 18 and 19 of the Comprehensive Permit to reflect the agreed language set forth in paragraph 5, above.

Dated: January 28, 2022

RESPECTFULLY SUBMITTED,

TOWN OF MILTON ZONING BOARD OF APPEALS

By its attorneys,

/s/ Johanna W. Schneider

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HD/MW RANDOLPH AVENUE, LLC

By its attorney,

/s/ Andrew E. Goloboy (by JWS with permission)

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# **Exhibit A**

(the “Springing Regulatory Agreement”)

## LOCAL REGULATORY AND USE AGREEMENT

This Local Regulatory and Use Agreement (this “Agreement”) is made this \_\_\_ day of \_\_\_\_\_, 202\_, by and between the Town of Milton (the “Municipality”), having a mailing address of 525 Canton Avenue, Milton, Massachusetts, and HD/MW Randolph Avenue, LLC, a Massachusetts limited liability company, having a mailing address of 519 Albany Street, Boston, Massachusetts 02118 and its successors and assigns (“Owner”) to be effective upon the Effective Date (as defined below).

### RECITALS

WHEREAS, Owner owns and will operate a housing development known as “H&W Apartments” located off 693-711 Randolph Avenue, Milton, Massachusetts, more particularly described in the deed set forth as Exhibit A attached hereto, which was recorded in the Norfolk County Registry of Deeds (the “Registry”) in Book \*\*\*\*\* Page \*\*\*\*\* (the “Property”), which is hereby made a part hereof; and

WHEREAS, the Massachusetts Housing Finance Agency (“**MassHousing**”) acts as Project Administrator for the Federal Home Loan Bank of Boston’s New England Fund Program for the Property pursuant to 760 CMR 56.00 (as may be amended from time to time, the “Regulations”) relating to the issuance of comprehensive permits under Chapter 40B, Sections 20-23, of the Massachusetts General Laws (as may be amended from time to time, the “Act”); and

WHEREAS, HD/MW obtained a comprehensive permit for the Property by decision \*\*\*\*\* (the “Comprehensive Permit”); and

WHEREAS, MassHousing and the Owner entered into a Regulatory and Use Agreement, dated \*\*\* (the “Regulatory and Use Agreement”) which is recorded in the Registry herewith in Book \*\*\*, Page \*\*\*\*\*, which shall govern the affordability components of said Comprehensive Permit until its expiration in \*\*\*; and

WHEREAS, pursuant to the Comprehensive Permit, the Property consists of a total of 90 rental units, of which 23 units (the “Affordable Units”) are to be rented to Low or Moderate Income Persons and Families (as defined herein) at rentals specified in this Agreement and will be subject to this Agreement; and

WHEREAS, the parties recognize that the Municipality has an interest in preserving affordability of the Affordable Units and may offer valuable services in administration, monitoring and enforcement.

NOW, THEREFORE, in consideration of the agreements hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Municipality and the Owner hereby agree as follows:



## DEFINITIONS

1. In addition to terms defined elsewhere in this Agreement, the following terms as used in this Agreement shall have the meanings set forth below:

Act shall have the meaning given such term in the Recitals hereof.

Affordable Units shall have the meaning set forth in the Recitals above.

Annual Income shall be determined in the manner set forth in the U.S. Department of Housing and Urban Development (“HUD”) income limits for the Boston-Cambridge-Quincy MSA (or any successor regulations).

Area shall mean the Boston-Cambridge-Quincy MSA or HMFA, as designated by the Department of Housing and Urban Development (“HUD”).

Area Median Income (“AMI”) shall mean the median gross income for the Area, as determined from time to time by HUD. For purposes of determining whether Adjusted Family Income qualifies a tenant for treatment as a Low or Moderate Income Tenant, the Area Median Income shall be adjusted for family size.

Comprehensive Permit shall have the meaning given such term in the Recitals hereof.

Effective Date shall have the meaning given such term in the Section 2 hereof.

Event of Default shall mean a default in the observance of any covenant under this Agreement existing after the expiration of any applicable notice and cure periods.

Family shall have the same meaning as set forth in 24 C.F.R. §5.403 (or any successor regulations).

Housing Subsidy Program shall mean any other state or federal housing subsidy program providing rental or other subsidy to the Property.

HUD shall mean the United States Department of Housing and Urban Development.

Lender shall mean the Permanent Lender.

Low or Moderate Income Persons or Families shall mean persons or Families whose Annual Incomes do not exceed eighty percent (80%) of the AMI , and shall also mean persons or Families meeting such lower income requirements as may be required under the Comprehensive Permit.

Low or Moderate Income Tenants shall mean Low or Moderate Income Persons or Families who occupy the Affordable Units.

Mortgage shall mean the Permanent Mortgage, if any.

Owner Party shall mean any partner, manager, member or any other Related Person of the Owner.

Permanent Lender shall mean the lender(s) making the Permanent Loan to the Owner, and its successors and assigns, if any.

Permanent Loan shall mean the Permanent Loan made or committed to be made by the Permanent Lender to the Owner, if any.

Permanent Mortgage shall mean the mortgage from the Owner to the Permanent Lender securing the Permanent Loan, if any.

Plans and Specifications shall have the meaning set forth in Section 3(b) hereof.

Property shall have the meaning given such term in the Recitals hereof.

Regulations shall have the meaning given such term in the Recitals hereof.

Related Person: shall mean a person whose relationship to such other person is such that (i) the relationship between such persons would result in a disallowance of losses under Section 267 or 707(b) of the Code, or (ii) such persons are members of the same controlled group of corporations (as defined in Section 1563(a) of the Code, except that “more than 50 percent” shall be substituted for “at least 80 percent” each place it appears therein).

Term shall have the meaning set forth in Section 17 hereof.

#### EFFECTIVE DATE

2. Pursuant to the terms of the Regulatory and Use Agreement, the parties agree that this Agreement shall serve as a “Use Restriction” as defined in and required by Section 56.05(13) of the Regulations automatically becoming effective immediately upon the expiration or earlier termination of the Regulatory and Use Agreement (the “Effective Date”).

#### UNIT OBLIGATIONS

3. (a) All Affordable Units included as part of the Property must be similar in exterior appearance to other units in the Property and shall be dispersed throughout the Property. In addition, all Affordable Units must contain complete living facilities including but not limited to a stove, kitchen cabinets, plumbing fixtures, and sanitary facilities, as more fully shown in the Plans and Specifications (as defined below). The Property must fully comply with the State Building Code and with all applicable state and federal building, environmental, health, safety and other laws, rules, and regulations, including without limitation all applicable federal and state laws, rules and regulations relating to the operation of the Property, including without limitation requirements to the extent they may be applicable) of adaptable and accessible housing for the handicapped. Except to the extent that the Property is exempted from such compliance by the Comprehensive Permit, the Property must also comply with all applicable local codes, ordinances and by-laws.

(b) The Owner shall provide to the Municipality evidence that the final plans and specifications for the location of the Affordable Units within the Property comply with the requirements of the subsidizing agency (“Plans and Specifications”).

(c) Unless the same shall be modified by a change to the Comprehensive Permit approved by the Board of Appeals for the Municipality, the bedroom mix and minimum areas for the Affordable Units shall be consistent with the bedroom mix and minimum areas maintained pursuant to the terms of the Regulatory and Use Agreement upon its expiration.

#### USE RESTRICTION/RENTALS AND RENTS

4. (a) The Owner shall rent the Affordable Units during the Term hereof to Low or Moderate Income Persons or Families upon the terms and conditions set forth in the Comprehensive Permit, the Regulatory and Use Agreement, and this Agreement. In fulfilling the foregoing requirement, Owner will accept referrals of tenants from the Public Housing Authority in the Municipality, and will not unreasonably refuse occupancy to any prospective tenants so referred who otherwise meet the requirements of the Tenant Selection Plan (as defined in the Regulatory and Use Agreement). The foregoing provisions shall not relieve Owner of any obligations it may have under the provisions of other documents and instruments it has entered with respect to any applicable Housing Subsidy Program.

(b) The annual rental expense for each Affordable Unit (equal to the gross rent plus allowances for all tenant-paid utilities, including tenant-paid heat, hot water and electricity) shall not exceed thirty percent (30%) of eighty percent (80%) of AMI, adjusted for household size, assuming that household size shall be equal to the number of bedrooms in the Affordable Unit plus one. If rentals of the Affordable Units are subsidized under any Housing Subsidy Program, then the rent applicable to the Affordable Units may be limited to that permitted by such Housing Subsidy Program, provided that the tenant’s share of rent does not exceed the maximum annual rental expense as provided in this Agreement.

(c) If, after initial occupancy, the income of a tenant of an Affordable Unit increases and, as a result of such increase, exceeds the maximum income permitted hereunder for such a tenant, the Owner shall not be in default hereunder so long as either (i) the tenant income does not exceed one hundred forty percent (140%) of the maximum income permitted or (ii) the Owner rents the next available unit at the Property as an Affordable Unit in conformance with Section 4(a) of this Agreement, or otherwise demonstrates compliance with Section 4(a) of this Agreement.

(d) If, after initial occupancy, the income of a tenant in an Affordable Unit increases, and as a result of such increase, exceeds one hundred forty percent (140%) of the maximum income permitted hereunder for such a tenant, at the expiration of the applicable lease term, the rent restrictions shall no longer apply to such tenant.

(e) Rentals for the Affordable Units shall be initially consistent with the Rental Schedule under the Regulatory and Use Agreement upon its expiration, subject to change from time to time (if necessary to reflect any changes in AMI) in accordance with the terms and provisions of this Agreement and any applicable Housing Subsidy Program. Thereafter, the Owner

shall annually submit to the Municipality a proposed schedule of monthly rents and utility allowances for all Affordable Units in the Property. It is understood that such review rights shall be with respect to the maximum rents for all the Affordable Units, and not with respect to the rents that may be paid by individual tenants in any given unit. Rents for the Affordable Units shall not be increased above such maximum monthly rents without the Municipality's prior approval of either (i) a specific request by the Owner for a rent increase; or (ii) the next annual schedule of rents and allowances as set forth in the preceding sentence; however, Owner shall be automatically entitled to annual rent increases for Affordable Units based on the HUD formula, the 30% of 80% of AMI. Notwithstanding the foregoing, rent increases shall be subject to the provisions of outstanding leases and shall not be implemented without at least 30 days' prior written notice by the Owner to all affected tenants. If the Municipality fails to respond to a submission of the proposed schedule of rents for the Affordable Units as set forth above within thirty (30) days of the Municipality's receipt thereof, the Municipality shall be deemed to have approved the submission.

(f) Owner shall obtain income certifications satisfactory in form and manner to the Municipality at least annually for all Low or Moderate-Income Tenants. Said income certifications shall be kept by the management agent for the Property and made available to the Municipality upon request.

(g) This Agreement shall not restrict or limit the dividend or profit of the Owner in any respect and no limitation on dividends or profits is imposed hereunder.

(h) The restrictions contained herein are intended to be construed as an affordable housing restriction as defined in Section 31 of Chapter 184 of Massachusetts General Laws which has the benefit of Section 32 of said Chapter 184, such that the restrictions contained herein shall not be limited in duration by any rule or operation of law but rather shall run for the Term hereof. In addition, this Agreement is intended to be superior to the lien of any mortgage on the Property and survive any foreclosure or exercise of any remedies thereunder and the Owner agrees to obtain any prior lienholder consent with respect thereto as the Municipality shall require.

#### TENANT SELECTION AND OCCUPANCY

5. Owner shall use its good faith efforts during the Term of this Agreement to maintain all the Affordable Units within the Property at full occupancy as set forth in Section 3 hereof. In marketing renting the Affordable Units, the Owner shall comply with the Tenant Selection Plan and Affirmative Fair Housing Marketing Plan as defined in the Regulatory and Use Agreement, which are incorporated herein by reference with the same force and effect as if set out in this Agreement, and any changes thereto shall be in accordance with DHCD's Affirmative Fair Housing Marketing and Resident Selection Plan guidelines, or any successor guidelines .

6. Occupancy agreements for Affordable Units shall meet the requirements of the Comprehensive Permit and this Agreement. The Owner shall enter into a lease with each tenant for a minimum term of one year. The lease shall contain clauses, among others, wherein each resident of such Affordable Unit:

(a) certifies the accuracy of the statements made in the application and income survey;

(b) agrees that the family income, family composition and other eligibility requirements, shall be deemed substantial and material obligations of his or her occupancy; that he or she will comply promptly with all requests for information with respect thereto from Owner, the Municipality, or MassHousing; and that his or her failure or refusal to comply with a request for information with respect thereto shall be deemed a violation of a substantial obligation of his or her occupancy; and

(c) agrees that at such time as Owner and the Municipality may direct, but at least annually, he or she will furnish to Owner certification of then current family income, with such documentation as the Municipality or MassHousing shall reasonably require

#### MANAGEMENT OF THE PROPERTY

7. Owner shall maintain the Property in good physical condition in accordance with MassHousing's requirements and standards for Chapter 40B housing and the requirements and standards of the Lender ordinary wear and tear and casualty excepted. Owner shall provide for the management of the Property in a manner that is consistent with accepted practices and industry standards for the management of multi-family market rate rental housing.

#### CHANGE IN COMPOSITION OF OWNER ENTITY; RESTRICTIONS ON TRANSFERS

8. The Owner shall provide the Municipality with notice of the following within fourteen (14) days after its occurrence:

- (a) the conveyance, assignment, transfer of all or a portion of the Property; or
- (b) any change, substitution or withdrawal of any general partner, manager, or agent of Owner; or
- (c) the conveyance, assignment, transfer, or relinquishment of a majority of the Beneficial Interests (herein defined) in Owner (except for such a conveyance, assignment, transfer or relinquishment among holders of Beneficial Interests as of the date of this Agreement or a conveyance of Beneficial Interests to an Owner Party).

For purposes hereof, the term "Beneficial Interest" shall mean: (i) with respect to a partnership, any limited partnership interests or other rights to receive income, losses, or a return on equity contributions made to such partnership; (ii) with respect to a limited liability company, any interests as a member of such company or other rights to receive income, losses, or a return on equity contributions made to such company; or (iii) with respect to a company or corporation, any interests as an officer, board member or stockholder of such company or corporation to receive income, losses, or a return on equity contributions made to such company or corporation.

#### BOOKS AND RECORDS

9. All records, accounts, books, tenant lists, applications, waiting lists, documents, and contracts relating to the Owner's compliance with the requirements of this Agreement shall at all times be kept separate and identifiable from any other business of Owner which is unrelated to the

Property, and shall be maintained, as required by applicable regulations and/or guidelines issued by the Municipality from time to time, in a reasonable condition for proper audit and subject to examination during business hours by representatives of the Municipality. Failure to keep such books and accounts and/or make them available to the Municipality will be an Event of Default hereunder if such failure is not cured to the satisfaction of the Municipality within sixty (60) days after the giving of notice to the Owner.

#### NO CHANGE OF PROPERTY'S USE

12. Except to the extent permitted in connection with a change to the Comprehensive Permit approved in accordance with the Regulations or as set forth in Section 22 below, Owner shall not, without prior written approval of the Municipality and an amendment to the Agreement, change the type or number of Affordable Units. Owner shall not permit the use of the dwelling accommodations of the Property for any purpose except residences and any other use permitted by the Comprehensive Permit.

#### NO DISCRIMINATION

13. (a) There shall be no discrimination upon the basis of race, color, creed, religious creed, national origin, disability, familial status, sex, sexual orientation, gender identity, age, ancestry, genetic information, children, marital status, veteran/military status, receipt of public assistance/housing subsidy, or any other basis prohibited by law in the lease, use, or occupancy of the Property (provided that if the Property qualifies as elderly housing under applicable state and federal law, occupancy may be restricted to the elderly in accordance with said laws) or in connection with the employment or application for employment of persons for the operation and management of the Property.

(b) There shall be full compliance with the provisions of all state or local laws prohibiting discrimination in housing on the basis of race, creed, color, religion, disability, sex, sexual orientation, gender identity, national origin, age, familial status, marital status, children, ancestry, genetic information, veteran/military status, receipt of public assistance/housing subsidy, or any other basis prohibited by law and providing for nondiscrimination and equal opportunity in housing. Failure or refusal to comply with any such provisions shall be a proper basis for the Municipality to take any corrective action it may deem necessary.

#### DEFAULTS; REMEDIES

14. (a) If any default, violation, or breach of any provision of this Agreement by the Owner is not cured to the satisfaction of the Municipality within thirty (30) days after the giving of notice to the Owner as provided herein, then at the Municipality's option, and without further notice, the Municipality may either terminate this Agreement, or the Municipality may apply to any state or federal court for specific performance of this Agreement, or the Municipality may exercise any other remedy at law or in equity or take any other action as may be necessary or desirable to correct noncompliance with this Agreement. The thirty (30) day cure periods set forth in this paragraph shall be extended for such period of time as may be necessary to cure such a default so long as the Owner is diligently prosecuting such a cure.

(b) If the Municipality elects to terminate this Agreement as the result of an uncured breach, violation, or default hereof, then whether the Affordable Units continue to be included in the Subsidized Housing Inventory (as defined in the Act) maintained by DHCD for purposes of the Act shall from the date of such termination be determined solely by DHCD according to the rules and regulations then in effect.

(c) In the event the Municipality brings an action to enforce this Agreement and prevails in any such action, the Municipality shall be entitled to recover from the Owner all of the Municipality's out of pocket reasonable costs of an action for such enforcement of this Agreement, including reasonable attorneys' fees.

(d) The Owner hereby grants to the Municipality or its designee the right as may be reasonably necessary enter upon the Property for the purpose of enforcing the terms of this Agreement or to prevent, remedy or abate any violation of this Agreement, subject to two (2) days written notice to Owner.

#### MONITORING AGENT; FEES; SUCCESSOR SUBSIDIZING AGENCY

15. The Municipality intends to monitor the Owner's compliance with the requirements of this Agreement. The Owner hereby agrees to pay reasonable fees for monitoring services hereunder provided by the Municipality.

16. The Municipality shall have the right to engage a third party (the "Monitoring Agent") to monitor compliance with all or a portion of the ongoing requirements of this Agreement on behalf the Municipality. In carrying out its obligations as a Monitoring Agent, the third party shall apply and adhere to the standards and policies of MassHousing related to the administrative responsibilities of Subsidizing Agencies. The Municipality shall notify the Owner in the event the Municipality engages a Monitoring Agent. In no event shall multiple Monitoring Agents be engaged to monitor compliance with the ongoing requirements of this Agreement. In the event that the Municipality engages a Monitoring Agent, (i) as compensation for providing these services, the Owner hereby agrees to pay to the Monitoring Agent an annual monitoring fee in an amount reasonably determined by the Municipality and consistent with fees customarily charged by the Monitoring Agent, payable within thirty (30) days of the end of each fiscal year of the Owner during the Term of this Agreement and any fees payable under Section 16 hereof shall be net of such fees payable to a Monitoring Agent; and (ii) the Owner hereby agrees that the Monitoring Agent shall have the same rights, and be owed the same duties, as the Municipality under this Agreement, and shall act on behalf of the Municipality hereunder, to the extent that the Municipality delegates its rights and duties by written agreement with the Monitoring Agent. Notwithstanding anything in this Agreement to the contrary, in no event shall Owner be responsible for the payment of aggregate servicing and monitoring fees to the Municipality to the extent such servicing or fees are unreasonable.

#### TERM

17. This Agreement shall bind, and the benefits shall inure to, respectively, Owner and its successors and assigns, and the Municipality and its successors and assigns, in perpetuity (the "Term"). For purposes herein, the term "perpetuity" shall mean for so long as the improvements

at the Property are being used for multi-family housing pursuant to the terms of the Comprehensive Permit.

18. The covenants set forth in this Agreement shall run with the land and shall bind, and the benefits shall inure to, respectively, Owner and its successors and assigns and the Municipality and its successors and assigns.

#### INDEMNIFICATION/LIMITATION ON LIABILITY

19. The Owner, for itself and its successors and assigns, agrees to indemnify and hold harmless the Municipality against all damages, costs and liabilities, including reasonable attorney's fees, asserted against the Municipality by reason of its relationship to the Property under this Agreement to the extent the same is attributable to the acts or omissions of the Owner and does not involve the negligent acts or omissions of the Municipality. Owner shall, at all material times during the Term, carry and maintain adequate limits of fire, casualty or personal injury liability insurance specifically naming the Town of Milton as an additional insured under said policies of insurance and further providing that the Municipality will be indemnified and held harmless from any and damages, costs or liabilities including reasonable attorney's fees under said policies of insurance.

20. The Municipality shall not be held liable for any action taken or omitted under this Agreement so long as they shall have acted in good faith and without gross negligence.

#### CASUALTY

21. Subject to the rights of the Lender, Owner agrees that if the Property, or any part thereof, shall be damaged or destroyed or shall be condemned or acquired for public use, the Owner shall have the right, but not the obligation, to repair and restore the Property to substantially the same condition as existed prior to the event causing such damage or destruction, and thereafter to operate the Property in accordance with the terms of this Agreement. Notwithstanding the foregoing, in the event of a casualty in which some but not all of the buildings in the Property are destroyed, if such destroyed buildings are not restored by Owner, Owner shall be required to maintain 25% of the units in the remaining building as Affordable Units.

#### OWNER'S REPRESENTATIONS AND WARRANTIES

22. The Owner hereby represents and warrants as follows:

(a) The Owner (i) is a Massachusetts limited liability company, qualified to transact business under, the laws of the Commonwealth of Massachusetts, (ii) has the power and authority to own its properties and assets and to carry on its business as now being conducted, and (iii) has the full legal right, power and authority to execute and deliver this Agreement.

(b) To Owner's knowledge, the execution and performance of this Agreement by the Owner (i) will not violate or, as applicable, has not violated any provision of law, rule or regulation, or any order of any court or other agency or governmental body, and (ii) will not violate or, as applicable, has not violated any provision of any indenture, agreement, mortgage, mortgage note, or other instrument to which the Owner is a party or by which it or the Property is bound, and (iii) will not result in the creation or imposition of any prohibited encumbrance of any nature.



(c) The Owner will, at the time of execution and delivery of this Agreement, have good and marketable title to the premises constituting the Property free and clear of any lien or encumbrance (subject to encumbrances created pursuant to this Agreement, and any other documents executed in connection with the Permanent Loan, or other encumbrances permitted by the Municipality, or other encumbrances generally associated with the operation of multi-family market rate rental housing).

(d) Owner has not received written notice of, and to Owner's knowledge, there is no action, suit or proceeding at law or in equity or by or before any governmental instrumentality or other agency now pending, or, to the knowledge of the Owner, threatened against or affecting it, or any of its properties or rights, which, if adversely determined, would materially impair its right to carry on business substantially as now conducted (and as now contemplated by this Agreement) or would materially adversely affect its financial condition.

#### MISCELLANEOUS CONTRACT PROVISIONS

23. This Agreement may not be modified or amended except with the written consent of the Municipality or its successor and assigns, and Owner or its successors and assigns.

24. Owner warrants that it has not, and will not, execute any other agreement with provisions contradictory to, or in opposition to, the provisions hereof, and that, in any event, the requirements of this Agreement are paramount and controlling as to the rights and obligations set forth and supersede any other requirements in conflict therewith including, but not limited to, the terms of the Comprehensive Permit.

25. The invalidity of any clause, part or provision of this Agreement shall not affect the validity of the remaining portions thereof.

26. Any titles or captions contained in this Agreement are for reference only and shall not be deemed a part of this Agreement or play any role in the construction or interpretation hereof.

27. Words of the masculine gender shall be deemed and construed to include correlative words of the feminine and neuter genders. Unless the context shall otherwise indicate, words importing the singular number shall include the plural number and vice versa, and words importing persons shall include corporations and associations, including public bodies, as well as natural persons.

28. The terms and conditions of this Agreement have been freely accepted by the parties. The provisions and restrictions contained herein exist to further the mutual purposes and goals of the Municipality and the Owner set forth herein to create and preserve access to land and to decent and affordable rental housing opportunities for eligible families who are often denied such opportunities for lack of financial resources. The Municipality hereby agrees that the Owner's obligations under this Agreement shall be conditioned on payment by the Municipality of the Settlement Compensation (as defined in the Settlement Agreement) in accordance with the terms of the Settlement Agreement.

## NOTICES

29. Any notice or other communication in connection with this Agreement shall be in writing and (i) deposited in the United States mail, postage prepaid, by registered or certified mail, or (ii) hand delivered by any commercially recognized courier service or overnight delivery service, such as Federal Express, or (iii) sent by facsimile transmission if a fax number is designated below, addressed as follows:

If to the Owner:

HD/MW Randolph Ave., LLC  
519 Albany Street  
Boston, MA 02118,  
Attention: Paul Holland

If to the Municipality:

Town of Milton  
525 Canton Avenue  
Milton, MA 02186  
Attention: Town Administrator

Any such addressee may change its address for such notices to any other address in the United States as such addressee shall have specified by written notice given as set forth above.

A notice shall be deemed to have been given, delivered and received upon the earliest of: (i) if sent by certified or registered mail, on the date of actual receipt (or tender of delivery and refusal thereof) as evidenced by the return receipt; or (ii) if hand delivered by such courier or overnight delivery service, when so delivered or tendered for delivery during customary business hours on a business day at the specified address; or (iii) if facsimile transmission is a permitted means of giving notice, upon receipt as evidenced by confirmation. Notice shall not be deemed to be defective with respect to the recipient thereof for failure of receipt by any other party.

## RECORDING

30. Upon execution, the Owner shall immediately cause this Agreement and any amendments hereto to be recorded or filed with the Registry, and the Owner shall pay all fees and charges incurred in connection therewith. Upon recording or filing, as applicable, the Owner shall immediately transmit to the Municipality evidence of such recording or filing including the date and instrument, book and page or registration number of the Agreement.

## GOVERNING LAW

31. This Agreement shall be governed by the laws of the Commonwealth of Massachusetts. Any amendments to this Agreement must be in writing and executed by all of the parties hereto. The invalidity of any clause, part, or provision of this Agreement shall not affect the validity of the remaining portions hereof.

[Remainder of page intentionally left blank.]

IN WITNESS WHEREOF, the parties have caused these presents to be signed and sealed by their respective, duly authorized representatives, as of the day and year first written above.

OWNER:

HD/MW Randolph Avenue, , LLC

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

MUNICIPALITY:

TOWN OF MILTON

By: \_\_\_\_\_

Town Administrator

Attachments:

Exhibit A – Deeds for Properties Comprising 693-711 Randolph Avenue

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

On this \_\_\_\_\_ day of \_\_\_\_\_, 2021, before me, the undersigned notary public, personally appeared \_\_\_\_\_, proved to me through satisfactory evidence of identification, which were \_\_\_\_\_, to be the person whose name is signed on the preceding document, as HD/MW Randolph Avenue, LLC, and acknowledged to me that he/she signed it voluntarily for its stated purpose.

\_\_\_\_\_  
Notary Public  
Print Name:  
My Commission Expires:

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

On this \_\_\_\_\_ day of \_\_\_\_\_, 2021, before me, the undersigned notary public, personally appeared Michael Dennehy, proved to me through satisfactory evidence of identification, which were \_\_\_\_\_, to be the person whose name is signed on the preceding document, as the Town Administrator for the Town of Milton and acknowledged to me that he signed it voluntarily for its stated purpose.

\_\_\_\_\_  
Notary Public  
Print Name:  
My Commission Expires:

EXHIBIT A

DEED OF HD/MW RANDLOPH AVENUE, LLC