

# CITY OF MARLBOROUGH MEETING POSTING

Meeting Name: City Council Legislative and Legal Affairs Committee

Date: May 28, 2019

Time: 6:30 PM

Location: City Council Chamber, 2<sup>nd</sup> Floor, City Hall, 140 Main Street

Agenda Items to be addressed:

RECEIVED  
CITY CLERK'S OFFICE  
CITY OF MARLBOROUGH  
2019 MAY 21 P 1:10

1. 05-06-2019 – **Order No. 19-1007671:** Communication from Melynda & JP Gallagher, of Lost Shoe Brewing and Roasting Company, 19 Weed Street, to add outdoor seating to their establishment.  
-Refer to Legislative and Legal Affairs Committee
2. 05-20-2019 – **Order No. 19-1007688:** Communication from City Solicitor, Donald Rider, regarding Proposed Conservation Restriction and Proposed Regulatory Agreement, Avalon Orchards, 91 Boston Post Road East.  
-Refer to Legislative and Legal Affairs Committee

THE LISTING OF TOPICS THAT THE CHAIR REASONABLY ANTICIPATES WILL BE DISCUSSED AT THE MEETING IS NOT INTENDED AS A GUARANTEE OF THE TOPICS THAT WILL HAVE BEEN DISCUSSED. NOT ALL TOPICS LISTED MAY IN FACT BE DISCUSSED, AND OTHER TOPICS NOT LISTED MAY ALSO BE BROUGHT UP FOR DISCUSSION TO THE EXTENT PERMITTED BY LAW.

**The public should take due notice that the Marlborough City Council may have a quorum in attendance due to Standing Committees of the City Council consisting of both voting and non-voting members. However, members attending this duly posted meeting are participating and deliberating only in conjunction with the business of the Standing Committee.**

**Electronic devices, including laptops, cell phones, pagers, and PDAs must be turned off or put in silent mode upon entering the City Council Chamber, and any person violating this rule shall be asked to leave the chamber. Express authorization to utilize such devices may be granted by the President for recordkeeping purposes.**



# IN CITY COUNCIL

Marlborough, Mass., \_\_\_\_\_

MAY 6, 2019

## ORDERED:

That the Communication from Melynda & JP Gallagher, of Lost Shoe Brewing and Roasting Company, 19 Weed Street, to add outdoor seating to their establishment, be and is herewith refer to **LEGISLATIVE & LEGAL AFFAIRS COMMITTEE.**

ADOPTED

ORDER NO. 19-1007671



9

RECEIVED  
CITY CLERK'S OFFICE  
CITY OF MARLBOROUGH

2019 APR 29 P 3:35

April 26, 2019

City Council  
140 Main Street  
Marlborough, MA 01752

L+L

Dear Marlborough City Council,

We are excited to be opening the doors of Lost Shoe Brewing and Roasting Company soon and with the return of warmer weather we would love to include outdoor sidewalk seating in front of our location at 19 Weed Street. Our short term goal is to rope off the area outlined in Figure 1 and use German style picnic tables for seating. Our long term goal is to define the same area shown in Figure 1 with planters and to adorn the area with string lighting for a warm and welcoming ambiance in the evening. We anticipate this area to seat approximately thirty people and be dog friendly as well.

While we will need to amend our state pouring permit we would like to utilize this space for coffee only upon opening and allow consumption of beer in the outdoor seating area once we receive state approval.

We thank you for your consideration and are happy to answer any questions you may have.

Best Regards,

Melynda and JP Gallagher  
Lost Shoe Brewing and Roasting Company  
19 Weed Street  
Marlborough, MA 01752



Proposed sidewalk seating area at 19 Weed Street – dotted line is main entrance – no alcohol beyond this point



Figure 1



## IN CITY COUNCIL

Marlborough, Mass., MAY 20, 2019

### ORDERED:

That the Communication from City Solicitor, Donald Rider, re: Proposed Conservation Restriction and Proposed Regulatory Agreement, Avalon Orchards, 91 Boston Post Road East, as outlined in the attached documents, be and is herewith refer to **LEGISLATIVE AND LEGAL AFFAIRS COMMITTEE.**

ADOPTED

ORDER NO. 19-1007688

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City of Marlborough  
**Legal Department**

RECEIVED  
CITY CLERK'S OFFICE  
CITY OF MARLBOROUGH

2019 MAY 16 A 4:55  
DONALD V. RIDER, JR.  
CITY SOLICITOR

140 MAIN STREET

MARLBOROUGH, MASSACHUSETTS 01752

TEL. (508) 460-3771 FACSIMILE (508) 460-3698 TDD (508) 460-3610

LEGAL@MARLBOROUGH-MA.GOV

L+L

May 16, 2019

Edward J. Clancy  
President  
Marlborough City Council

RE: Avalon Orchards  
91 Boston Post Road East  
Proposed Conservation Restriction and Proposed Regulatory Agreement

Dear President Clancy and Members:

In September 2000, the Marlborough Zoning Board of Appeals granted a comprehensive permit to AvalonBay Orchards, Inc. This letter calls attention to 2 legal matters arising out of that comprehensive permit from nearly 20 years ago.

The first legal matter pertains to a conservation restriction. Specifically, condition no. 10 in the ZBA's comprehensive permit provided that a conservation restriction ("CR") was to be recorded on approximately nine acres of the site located at 91 Boston Post Road, and that the Marlborough Conservation Commission was to hold that CR after having approved its terms. Similarly, condition no. 11 provided that, as part of the CR, a 10-foot wide trail easement allowing public pedestrian access was to be constructed, with a pedestrian 5-foot wide trail within that easement. However, while the trail was constructed some time ago, the CR itself was never drafted let alone recorded. Accordingly, a copy of the proposed CR, already reviewed and approved as to language by the relevant state agency (Division of Conservation Services at the Commonwealth's Executive Office of Energy and Environmental Affairs) is enclosed for your review and approval.

Please note:

- the proposed CR is also on the May 16 agenda for Conservation Commission for its required review and approval; and
- a proposed public pedestrian trail easement, to be granted by AvalonBay to the City, will be submitted on a future Council agenda.

The other legal matter arising out of the ZBA's comprehensive permit pertains to a regulatory agreement ("RA"). One of the main features of the proposed RA deals with affordable housing units at Avalon Orchards. Specifically, condition no. 20 in the 2000 comprehensive permit recites, in part, AvalonBay's agreement not to convert the rental units at Avalon Orchards for a period of 20 years. Since Avalon Orchards is presently a rental community, all 156 units there are currently counted as affordable housing units. However, if Avalon Orchards converted

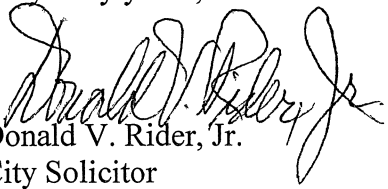
after 20 years to an ownership community by condominiumizing, only 25% of the 156 units – or 39 – would then be counted as affordable housing units. In other words, 117 units would no longer be counted as affordable if Avalon Orchards converted to condos. The proposed RA extends out to the year 2045 what otherwise would be the 20-year period set forth in condition no. 20. A copy of the proposed RA is enclosed for your review and approval.

Note that AvalonBay's counsel and I have already met with the ZBA, as issuing body for the 2000 comprehensive permit, in order to discuss both the proposed CR and the proposed RA.

Further details on the proposed CR and the proposed RA can be discussed in committee.

Thank you for your attention to this matter.

Very truly yours,

  
Donald V. Rider, Jr.  
City Solicitor

Enclosures

cc: Arthur Vigeant, Mayor  
Priscilla Ryder, Conservation Officer  
Paul Momnie, Esquire



**GRANTOR:** AVALONBAY ORCHARDS, INC.  
**GRANTEE:** CITY OF MARLBOROUGH  
**ADDRESS OF PREMISES:** 91 Boston Post Road East,  
Marlborough, MA 01752  
**FOR GRANTOR'S TITLE SEE:** Middlesex County  
(S.D.) Registry of Deeds at Book 32898, Page 152

## **CONSERVATION RESTRICTION**

AVALONBAY ORCHARDS, INC., a Maryland corporation, constituting the owner, for its successors and assigns ("Grantor"), acting pursuant to Sections 31, 32, and 33 of Chapter 184 of the Massachusetts General Laws, grants with QUITCLAIM COVENANTS to the CITY OF MARLBOROUGH, with an address of City Hall, 140 Main Street, Marlborough, Massachusetts 01752, acting by and through its Conservation Commission by authority of Section 8C of Chapter 40 of the Massachusetts General Laws, and its permitted successors and assigns ("Grantee"), for nominal consideration, IN PERPETUITY AND EXCLUSIVELY FOR CONSERVATION PURPOSES, the following Conservation Restriction on an 11.483-acre portion of a 22.869-acre parcel of land located in the City of Marlborough, Massachusetts (the "Premises"), which Premises is shown as "Conservation Restriction Area, Area = 500,187 sq. ft., 11.483 acres" on a plan entitled "Easement Plan, Avalon Orchards, Boston Post Road, Marlborough, Mass.," dated May 22, 2003, prepared by Harry R. Feldman, Inc., Land Surveyors, 112 Shawmut Avenue, Boston, Mass. 02118; Scale: 1"=50' (2 sheets), recorded in the Middlesex County (S.D.) Registry of Deeds as Plan No. \_\_\_\_ of 2019 (the "Plan"), which Premises is more particularly described on Exhibit A and shown on a reduced copy of the Plan in Exhibit B, both of which exhibits are incorporated herein.

### **I. PURPOSES**

This Conservation Restriction is defined in and authorized by Sections 31-33 of Chapter 184 of the General Laws and otherwise by law. The purpose of this Conservation Restriction is to assure that the Premises will be maintained in perpetuity for conservation purposes, in a natural, scenic and undeveloped condition, and to prevent any use or change that would impair or interfere with its conservation and preservation values (the "conservation values").

This Conservation Restriction is required by the following permits:



- (1) Comprehensive Permit dated September 26, 2000 issued to the Grantor pursuant to M.G.L. c. 40B, §§ 20-23 by the City of Marlborough Zoning Board of Appeals for a 156-unit multi-family development with related amenities and improvements on the project known as “Avalon Orchards” (the “Development”), which Comprehensive Permit was recorded with the Middlesex (S.D.) Registry of Deeds (“Deeds”) in Book 32898, Page 157 (the “Comprehensive Permit”).
- (2) Order of Conditions dated December 21, 2000 issued to the Grantor by the City of Marlborough Conservation Commission (the “Conservation Commission”) related to the Development, which Order of Conditions was recorded with Deeds in Book 32898, Page 177 (the “Order of Conditions”).

The Premises contain unique and unusual qualities, the protection of which in their predominantly natural and open state will be of lasting benefit to the public and to the citizens of the City of Marlborough. These include qualities such as the natural, scenic, wooded and open condition of the Premises. The purpose of this Conservation Restriction is to retain the Premises in their natural, scenic and open condition.

**The conservation values include the following:**

- Open Space Protection. The Premises contributes to the protection of the scenic and natural character of the City of Marlborough and the protection of the Premises will enhance the open-space value of these and nearby lands.
- Preservation of Water Quality. The Premises is mapped as Outstanding Resource Waters located within a drainage area to a public water supply, as well as provide the many other public benefits of wetlands protection recognized by the Commonwealth of Massachusetts (Massachusetts General Laws Chapter 131, section 40).
- Public Access. Public access to the Premises will be allowed for passive outdoor recreational activities as defined herein.

The Conservation Values, as well as the current uses of and existing improvements on the Premises, such as, but not limited to, trails, woods roads, structures, meadows or other cleared areas, agricultural areas, and scenic views, are described in a Baseline Documentation Report (“Baseline Report”) prepared by Grantee with the cooperation of the Grantor, consisting of maps, photographs, and other documents and on file with the Grantee and referenced herein. The Baseline Report (i) is acknowledged by Grantor and Grantee to be a complete and accurate representation of the condition and values of the Premises as of the date of this Conservation Restriction, and (ii) is intended to serve as an objective information baseline for subsequent monitoring of compliance with the terms of this Conservation Restriction as described herein. Notwithstanding the foregoing, the parties may utilize any evidence of the condition of the Premises at the time of this grant other than the Baseline Report, should the Baseline Report be unavailable or if it does not adequately address the issues presented.

## **II. PROHIBITED ACTS AND USES, EXCEPTIONS THERETO, AND PERMITTED USES**

### **A. Prohibited Acts and Uses**

Subject to the exceptions set forth herein, the Grantor will not perform or allow others to perform the following acts and uses which are prohibited on, above, and below the Premises:

- (1) Constructing, placing or allowing to remain any temporary or permanent building, tennis court, landing strip, mobile home, swimming pool, asphalt or concrete pavement, sign, fence, billboard or other advertising display, antenna, utility pole, tower, solar panel, solar array, conduit, line or other temporary or permanent structure or facility on, above or under the Premises;
- (2) Mining, excavating, dredging or removing from the Premises of soil, loam, peat, gravel, sand, rock or other mineral resource or natural deposit or otherwise making topographical changes to the area;
- (3) Placing, filling, storing or dumping of soil, refuse, trash, vehicle bodies or parts, rubbish, debris, junk, tree and other vegetation cuttings generated off-site, waste or other substance or material whatsoever or the installation of underground storage tanks;
- (4) Cutting, removing or otherwise destroying trees, grasses or other vegetation;
- (5) Activities detrimental to drainage, flood control, water conservation, water quality, erosion control, soil conservation, wildlife habitat, or archaeological conservation;
- (6) Use, parking or storage of vehicles including motorcycles, mopeds, all-terrain vehicles, trail bikes, or any other motorized vehicles on the Premises except for vehicles necessary for public safety (i.e., fire, police, ambulance, other government officials) in carrying out their official duties or as necessary for the mobility impaired;
- (7) Subdivision or conveyance of a part or portion of the Premises alone, or division or subdivision of the Premises (as compared to conveyance of the Premises in its entirety which shall be permitted), and no portion of the Premises may be used towards building or development requirements on this or any other parcel;
- (8) The use of the Premises for business, residential or industrial use, or for more than *de minimis* commercial recreation;
- (9) Any other use of the Premises or activity which is inconsistent with the purpose of this Conservation Restriction or which would impair its conservation values.

### **B. Reserved Rights and Exceptions**

The Grantor reserves the right to conduct or permit the following activities and uses on the Premises, but only if such uses and activities do not impair the conservation values or purposes of this Conservation Restriction.

- (1) Vegetation Management. The selective minimal removing of brush, pruning and cutting to prevent, control or remove hazards, disease, insect or fire damage, or to preserve the present condition of the Premises, woods, fence lines, and trails and meadows;
- (2) Non-native or nuisance species. The removal of non-native or invasive species, the interplanting of native species, and the control of species in a manner that minimizes damage to surrounding, non-target species and preserves water quality;
- (3) Composting. The stockpiling and composting of stumps, trees, brush, limbs, and similar biodegradable materials originating on the Premises, provided that such stockpiling and composting is in locations where the presence of such activities will not impair the conservation values (including scenic values) of this Conservation Restriction. No such activities will take place closer than one hundred (100) feet from any wetland, waterbody or stream. All exercise of this reserved right shall take into account sensitive areas and avoid harm to nesting species during nesting season;
- (4) Wildlife Habitat Improvement. With the prior written permission of Grantee, measures designed to restore native biotic communities, or to maintain, enhance or restore wildlife, wildlife habitat, or rare or endangered species including selective planting of native trees, shrubs and plant species;
- (5) Archaeological Investigations. The conduct of archaeological activities, including without limitation survey, excavation and artifact retrieval, following submission of an archaeological field investigation plan and its approval in writing by Grantee and the State Archaeologist of the Massachusetts Historical Commission (or appropriate successor official).
- (6) Trails. The marking, clearing and maintenance of existing footpaths, including a trail of approximately 5 feet in width in the location shown as "Trail Easement" on the Plan, and with prior approval of the Grantee, the construction of new trails or the relocation or alteration of existing trails, provided that any construction, relocation, or alteration results in trails that are no wider than 5 feet;
- (7) Signs. The erection, maintenance and replacement of signs with respect to trespass, trail access, identity and address of the occupants, sale of the Premises, the Grantee's interest in the Premises, any gift, grant, or other applicable source of support for the conservation of the Premises, the Reserved Rights, and the protected conservation values;
- (8) Outdoor Passive Recreational Activities. Hiking, horseback riding, cross-country skiing and other non-motorized outdoor recreational activities that do not materially alter the landscape, do not degrade environmental quality, and do not involve more than minimal use for commercial recreational activities;

- (9) Forestry and Cutting. Conducting or permitting others to conduct sound silvicultural uses of the Premises, including the right to commercially harvest forest products (as such term may be defined from time to time in General Laws, Ch. 61, Sec. 1, or successor law) and the establishment of new woods roads in accordance with prudent and sound silvicultural practices that conform at least to the minimum standards set forth in the Massachusetts Forest Cutting Practices Act (General Laws, Ch. 132, or its successor) and carried out pursuant to a Forest Stewardship Plan.

Before any harvest of forest products occurs on the Premises, Grantor shall submit a Forest Stewardship Plan to the Grantee, the Massachusetts Department of Conservation and Recreation (or appropriate successor agency) and to any other required state agencies for their approval. The Stewardship Plan shall be prepared by a forester licensed through the Massachusetts Department of Conservation and Recreation in conformance with the "Directions for the Preparation of the Chapter 61 Forest Management Plans and Forest Stewardship Plans" and such statutes, regulations and directions in effect at the time of the approval of said Stewardship Plan. The Stewardship Plan shall include provisions designed to minimize soil erosion, conserve surface and groundwater quality, scenic views, wildlife habitat, and to protect the conservation values of this Conservation Restriction.

The Stewardship Plan shall be effective for a ten (10) year period and shall be resubmitted once every ten (10) years as necessary if additional timber harvests occur. All cutting plans and designated access routes shall avoid any stone structures or historical and cultural resources and shall be reasonably required to prevent any damage thereto. All cutting operations shall be supervised by a licensed forester;

- (10) Site Restoration. Any work undertaken in conjunction with the Reserved Rights described in this Paragraph B shall seek to minimize disturbance to the Conservation Values and other natural features within the Premises that may be impacted as a result of exercising of any of the Reserved Rights described herein. Upon completion of any site work performed in conjunction with the Reserved Rights described in this Paragraph B, any disturbed areas shall be restored substantially to the conditions with respect to soil material, grade, and vegetated ground cover as documented in the Baseline Report, as applicable, or in conformance with the conditions with respect to soil material, grade, and vegetated ground cover that existed prior to said work, if said work is done in any area not documented in the Baseline Report.
- (11) Permits, Regulations, Laws. The exercise of any right reserved by Grantor under this Paragraph B shall be in compliance with zoning, the Wetlands Protection Act, and all other applicable federal, state and local laws, rules, regulations, and permits. The inclusion of any reserved right requiring a permit from a public agency does not imply that the Grantee or the Commonwealth takes any position whether such permit should be issued.

- (12) Best Management Practices. The exercise of any right reserved by Grantor under this Paragraph B shall follow, when available and if applicable, established, up to date, and regionally-applicable Best Management Practices or similar standards developed by a governmental agency or other entity with known expertise in the area of practice and designed to protect the natural features potentially affected by the action(s).

**C. Notice and Approval.**

Whenever notice to or approval by Grantee is required, Grantor shall notify Grantee, by a method requiring proof of receipt, in writing not less than 60 days prior to the date Grantor intends to undertake the activity in question. The notice shall describe the nature, scope, design, location, timetable and any other material aspect of the proposed activity in sufficient detail to permit the Grantee to make an informed judgment as to its consistency with the purposes of this Conservation Restriction. Where Grantee's approval is required, Grantee shall grant or withhold approval in writing within 60 days of receipt of Grantor's request. Grantee's approval shall not be unreasonably withheld, but shall only be granted upon a showing that the proposed activity shall not impair the purposes of this Conservation Restriction.

Subject to any applicable law or regulation, failure of Grantee to respond in writing within 60 days shall be deemed to constitute approval by Grantee of the request as submitted, so long as the request sets forth the provisions of this section relating to deemed approval after 60 days in the notice, the requested activity is not prohibited herein, and the activity will not impair the conservation values or purposes of this Conservation Restriction.

**III. LEGAL REMEDIES OF THE GRANTEE**

**A. Legal and Injunctive Relief.**

The rights hereby granted shall include the right to enforce this Conservation Restriction by appropriate legal proceedings and to obtain injunctive and other equitable relief against any violations, including, without limitation, relief requiring restoration of the Premises to their condition prior to the time of the injury complained of (it being agreed that the Grantee will have no adequate remedy at law). The rights hereby granted shall be in addition to, and not in limitation of, any other rights and remedies available to the Grantee for the enforcement of this Conservation Restriction. Grantee agrees to cooperate for a reasonable period of time prior to resorting to legal means in resolving issues concerning violations provided Grantor ceases objectionable actions and Grantee determines there is no ongoing diminution of the conservation values of the Conservation Restriction.

Grantor covenants and agrees to reimburse to Grantee all reasonable costs and expenses (including reasonable counsel fees) incurred in enforcing this Conservation Restriction or in taking reasonable measures to remedy, abate or correct any violation thereof, provided that a violation of this Conservation Restriction is acknowledged by Grantor or determined by a court of competent jurisdiction to have occurred. In the event of a dispute over the boundaries of the Conservation Restriction, Grantor shall pay for a survey and to have the boundaries permanently marked.



**B. Non-Waiver.**

Enforcement of the terms of this Conservation Restriction shall be at the discretion of Grantee. Any election by the Grantee as to the manner and timing of its right to enforce this Conservation Restriction or otherwise exercise its rights hereunder shall not be deemed or construed to be a waiver of such rights.

**C. Disclaimer of Liability**

By acceptance of this conservation restriction, the Grantee does not undertake any liability or obligation relating to the condition of the Premises pertaining to compliance with and including, but not limited to, hazardous materials, zoning, environmental laws and regulations, or acts not caused by the Grantee or its agents.

**D. Acts Beyond the Grantor's Control**

Nothing contained in this Conservation Restriction shall be construed to entitle the Grantee to bring any actions against the Grantor for any injury to or change in the Premises resulting from causes beyond the Grantor's control, including but not limited to fire, flood, storm and earth movement, or from any prudent action taken by the Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Premises resulting from such causes. In the event of any such occurrence, the Grantor and Grantee will cooperate in the restoration of the Premises, if desirable and feasible.

**IV. ACCESS**

The Grantor hereby grants to the Grantee, or its duly authorized agents or representatives, the right to enter the Premises upon reasonable notice and at reasonable times, for the purpose of inspecting the Premises to determine compliance with or to enforce this Conservation Restriction. The Grantor also grants to the Grantee, after notice of a violation and failure of the Grantor to cure said violation, the right to enter the Premises for the purpose of taking any and all actions with respect to the Premises as may be necessary or appropriate to remedy or abate any violation hereof, including but not limited to the right to perform a survey of boundary lines.

The Grantor agrees to take no action to prohibit or discourage access to and use of the Premises by the general public, but only for daytime use and only as described in Section II(B)(8) provided that such agreement by Grantor is subject to the Grantor's reserved right to establish reasonable rules, regulations, and restrictions on such permitted recreational use by the general public for the protection of the purposes and conservation values of this Conservation Restriction. Grantor has the right to control, limit, or prohibit by posting and other reasonable means activities or uses of the Premises not authorized in Section II(B)(8). The Grantor's right to grant public access across the Premises is subject to the restrictions described in this Conservation Restriction. Any public use which is permitted by the terms of this Conservation Restriction constitutes permission to use the Premises for purposes described in the Massachusetts General Laws Chapter 21, Section 17C and the Grantor and Grantee hereto

benefit from exculpation from liability to the extent provided in such section. The Grantee may require the Grantor to post the Premises against any use that may result in rutting or erosion or other damage to the natural resources of the Premises.

## V. EXTINGUISHMENT

A. If circumstances arise in the future such as render the purpose of this Conservation Restriction impossible to accomplish, this restriction can only be terminated or extinguished, whether in whole or in part, by a court of competent jurisdiction under applicable law after review and approval by the Massachusetts Secretary of Energy and Environmental Affairs. If any change in conditions ever gives rise to extinguishment or other release of the Conservation Restriction under applicable law, then Grantee, on a subsequent sale, exchange, or involuntary conversion of the Premises, shall be entitled to a portion of the proceeds in accordance with paragraph B below, subject, however, to any applicable law which expressly provides for a different disposition of the proceeds and after complying with the terms of any gift, grant, or funding requirements. Grantee shall use its share of the proceeds in a manner consistent with the conservation purpose set forth herein.

B. Proceeds. Grantor and Grantee agree that the conveyance of this Conservation Restriction gives rise to a real property right, immediately vested in the Grantee, with a fair market value that is at least equal to the proportionate value that this Conservation Restriction, determined at the time of the conveyance, bears to the value of the unrestricted Premises. Such proportionate value of the Grantee's property right shall remain constant. Any proceeds will be distributed only after complying with the terms of any gift, grant, or other funding requirements.

C. Grantor/Grantee Cooperation Regarding Public Action. Whenever all or any part of the Premises or any interest therein is taken by public authority under power of eminent domain or other act of public authority, then the Grantor and the Grantee shall cooperate in recovering the full value of all direct and consequential damages resulting from such action. All related expenses incurred by the Grantor and the Grantee shall first be paid out of any recovered proceeds, and the remaining proceeds shall be distributed between the Grantor and Grantee in accordance with paragraph V. B above, after complying with the terms of any law, gift, grant, or funding requirements. If a less than fee interest is taken, the proceeds shall be equitably allocated according to the nature of the interest taken. The Grantee shall use its share of the proceeds like a continuing trust in a manner consistent with the conservation purposes of this grant.

## VI. DURATION & ASSIGNABILITY

A. Running of the Burden. The burdens of this Conservation Restriction shall run with the Premises in perpetuity, and shall be enforceable against the Grantor and the successors and assigns of the Grantor holding any interest in the Premises.

B. Execution of Instruments. The Grantee is authorized to record or file any notices or instruments appropriate to assuring the perpetual enforceability of this Conservation Restriction; the Grantor, on behalf of itself and its successors and assigns, appoints the Grantee their

attorney-in-fact to execute, acknowledge and deliver any such instruments on its behalf. Without limiting the foregoing, the Grantor and its successors and assigns agree themselves to execute any such instruments upon request.

C. Running of the Benefit. The benefits of this Conservation Restriction shall run to the Grantee, shall be in gross and shall not be assignable by the Grantee, except in the following instances:

As a condition of any assignment, the Grantee shall require that the purpose of this Conservation Restriction continues to be carried out; that the Assignee is not an owner of the fee in the Property, and the Assignee, at the time of the assignment, qualifies under Section 170(h) of the Internal Revenue Code of 1986, as amended, and applicable regulations thereunder, and is a donee eligible to receive this Conservation Restriction under Section 32 of Chapter 184 of the General Laws of Massachusetts. Any assignment will comply with Article 97 of the Amendments to the Constitution of the Commonwealth of Massachusetts, if applicable.

## **VII. SUBSEQUENT TRANSFERS**

The Grantor agrees to incorporate by reference the terms of this Conservation Restriction in any deed or other legal instrument which grants any interest in all or a portion of the Premises, including a leasehold interest, and to notify the Grantee not less than twenty (20) days prior to the execution of such transfer. Failure to do any of the above shall not impair the validity or enforceability of this Conservation Restriction. Any transfer will comply with Article 97 of the Amendments to the Constitution of the Commonwealth of Massachusetts, if applicable.

The Grantor shall not be liable for violations occurring after its ownership. Liability for any acts or omissions occurring prior to any transfer and liability for any transfer in violation of this Conservation Restriction shall survive the transfer. Any new owner shall cooperate in the restoration of the Premises or removal of violations caused by prior owner(s) and may be held responsible for any continuing violations.

## **VIII. ESTOPPEL CERTIFICATES**

Upon request by the Grantor, the Grantee shall, within sixty (60) days execute and deliver to the Grantor any document, including an estoppel certificate, which certifies the Grantor's compliance or non-compliance with any obligation of the Grantor contained in this Conservation Restriction.

## **IX. NON MERGER**

The parties intend that any future acquisition of the Premises shall not result in a merger of the Conservation Restriction into the fee. The Grantor agrees that it will not grant, and the Grantee agrees that it will not take title, to any part of the Premises without having first assigned this Conservation Restriction to a non-fee owner that is qualified under Section 170(h) of the Internal Revenue Code of 1986, as amended, and applicable regulations thereunder and is eligible to receive this Conservation Restriction under Section 32 of Chapter 184 of the General Laws of

Massachusetts in order to ensure that merger does not occur and that this Conservation Restriction continues to be enforceable by a non-fee owner.

## **X. AMENDMENT**

If circumstances arise under which an amendment to or modification of this Conservation Restriction would be appropriate, Grantor and Grantee may jointly amend this Conservation Restriction; provided that no amendment shall be allowed that will affect the qualification of this Conservation Restriction or the status of Grantee under any applicable laws, including Section 170(h) of the Internal Revenue Code of 1986, as amended, or Sections 31-33 of Chapter 184 of the General laws of Massachusetts. Any amendments to this conservation restriction shall occur only in exceptional circumstances. The Grantee will consider amendments only to correct an error or oversight, to clarify an ambiguity, or where there is a net gain in conservation value. All expenses of all parties in considering and/or implementing an amendment shall be borne by the persons or entity seeking the amendment. Any amendment shall be consistent with the purposes of this Conservation Restriction, shall not affect its perpetual duration, shall be approved by the Secretary of Energy and Environmental Affairs and if applicable, shall comply with the provisions of Art. 97 of the Amendments to the Massachusetts Constitution, and any gifts, grants or funding requirements. Any amendment shall be recorded in the Middlesex (S.D.) Registry of Deeds.

## **XI. EFFECTIVE DATE**

This Conservation Restriction shall be effective when the Grantor and the Grantee have executed it, the administrative approvals required by Section 32 of Chapter 184 of the General Laws have been obtained, and it has been recorded in a timely manner in the Middlesex (S.D.) Registry of Deeds.

## **XII. NOTICES**

Any notice, demand, request, consent, approval or communication that either party desires or is required to give to the other shall be in writing and either served personally or sent by first class mail, postage pre-paid, addressed as follows:

To Grantor:

c/o AvalonBay Communities, Inc.  
Attention: Scott Dale, Senior Vice President - Development  
600 Atlantic Avenue, 20<sup>th</sup> Floor  
Boston, Massachusetts 02210  
Email: [sdale@avalonbay.com](mailto:sdale@avalonbay.com)

With copies to:

c/o AvalonBay Communities, Inc.  
Attention: Legal Department / Brian Lerman, Vice President –  
Assistant General Counsel  
Ballston Tower  
671 N. Glebe Road, Suite 800

Arlington, Virginia 22203  
Email: [brian\\_lerman@avalonbay.com](mailto:brian_lerman@avalonbay.com)

And to Goulston & Storrs  
400 Atlantic Avenue  
Boston, Massachusetts 02110  
Attention: Steven Schwartz, Esq.  
Email: [sschwartz@goulstonstorr.com](mailto:sschwartz@goulstonstorr.com)

To Grantee: City of Marlborough  
Conservation Commission  
City Hall  
140 Main Street  
Marlborough, Massachusetts 01752  
e-mail: [pryder@marlborough-ma.gov](mailto:pryder@marlborough-ma.gov)

and

City of Marlborough  
Legal Department  
City Hall, 4<sup>th</sup> Floor  
140 Main Street  
Marlborough, Massachusetts 01752  
e-mail: [legal@marlborough-ma.gov](mailto:legal@marlborough-ma.gov)

or to such other address as any of the above parties shall designate from time to time by written notice to the other or, if notice is returned to sender, to an address that is reasonably ascertainable by the parties.

### **XIII. GENERAL PROVISIONS**

A. Controlling Law. The interpretation and performance of this Conservation Restriction shall be governed by the laws of the Commonwealth of Massachusetts.

B. Liberal Construction. Any general rule of construction to the contrary notwithstanding, this Conservation Restriction shall be liberally construed in favor of the grant to effect the purpose of this Conservation Restriction and the policy and purposes of Chapter 184, Sections 31, 32, and 33 of the Massachusetts General Laws. If any provision in this instrument is found to be ambiguous, any interpretation consistent with the purpose of this Conservation Restriction that would render the provision valid shall be favored over any interpretation that would render it invalid.

C. Severability. If any provision of this Conservation Restriction or the application thereof to any person or circumstance is found to be invalid, the remainder of the provision of this Conservation Restriction shall not be affected thereby.



D. Entire Agreement. This instrument sets forth the entire agreement of the parties with respect to this Conservation Restriction and supersedes all prior discussions, negotiations, understandings or agreements relating to the Conservation Restriction, all of which are merged herein.

**XIV. MISCELLANEOUS**

A. Pre-existing Public Rights. Approval of this Conservation Restriction pursuant to Chapter 184, Section 32 of the Massachusetts General Laws by any municipal officials and by the Secretary of Energy and Environmental Affairs is not to be construed as representing the existence or non-existence of any pre-existing rights of the public, if any, in and to the Premises, and any such pre-existing rights of the public, if any, are not affected by the granting of this Conservation Restriction.

B. Subordination. The Grantor attests that, as of the date hereof, there is no mortgage, promissory note, loan, lien, equity credit line, refinance assignment of mortgage, lease, financing statement or any other agreement which gives rise to a security interest affecting the Premises.

C. Attached hereto and incorporated herein by reference are the following:

Signature pages:

- Grantor
- Grantee Acceptance
- Approval by City Council
- Approval of the Secretary of Energy and Environmental Affairs.

Exhibits:

- Exhibit A: Legal Description of Premises
- Exhibit B: Reduced Copy of Plan of Premises

4819-5520-2422.8

**Executed** under seal this \_\_\_ day of \_\_\_\_\_, 2019.

**BY: AVALONBAY ORCHARDS, INC.**

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

Name:

Title:

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

Name:

Title:

**COMMONWEALTH OF MASSACHUSETTS**

\_\_\_\_\_, SS

On this \_\_\_\_ day of \_\_\_\_\_, 2019, before me, the undersigned notary public, personally appeared \_\_\_\_\_, proved to me through satisfactory evidence of identification to be the person whose name is signed on the preceding document, and acknowledged to me that he signed it voluntarily for its stated purpose as \_\_\_\_\_, for AvalonBay Orchards, Inc., a Maryland corporation.

Notary Public: \_\_\_\_\_  
My commission expires: \_\_\_\_\_

**STATE OF CONNECTICUT**

\_\_\_\_\_, SS

On this \_\_\_\_ day of \_\_\_\_\_, 2019, before me, the undersigned notary public, personally appeared Joanne M. Lockridge, proved to me through satisfactory evidence of identification, to be the person whose name is signed on the preceding document, and acknowledged to me that she signed it voluntarily for its stated purpose as Senior Vice President Finance and Assistant Treasurer, for AvalonBay Orchards, Inc., a Maryland corporation.

Notary Public: \_\_\_\_\_  
My commission expires: \_\_\_\_\_

**ACCEPTANCE OF GRANT BY THE  
CITY OF MARLBOROUGH CONSERVATION COMMISSION**

We, the undersigned, being a majority of the Conservation Commission of the City of Marlborough, Massachusetts, hereby certify that at a public meeting duly held on \_\_\_\_\_, 2019, the Conservation Commission voted to approve the foregoing Conservation Restriction from AvalonBay Orchards, Inc., pursuant to M.G.L. Chapter 184 Section 32 and Chapter 40 Section 8C, and do hereby accept the foregoing Conservation Restriction, subject to approval by the City Council of the City of Marlborough.

MARLBOROUGH CONSERVATION  
COMMISSION

\_\_\_\_\_  
Edward Clancy

\_\_\_\_\_  
Dave Williams

\_\_\_\_\_  
John Skarin

\_\_\_\_\_  
Allan White

\_\_\_\_\_  
Dennis Demers

\_\_\_\_\_  
William Dunbar

\_\_\_\_\_  
Karin Paquin

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, 2019, before me, the undersigned notary public, personally appeared \_\_\_\_\_, and proved to me through satisfactory evidence of identification which was \_\_\_\_\_ to be the person whose names are signed on the proceeding or attached document, and acknowledged to me that they signed it voluntarily for its stated purpose.

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

**APPROVAL BY THE CITY COUNCIL OF THE CITY OF MARLBOROUGH**

We, the undersigned, being a majority of the City Council of the City of Marlborough, hereby certify that at a public meeting duly held on \_\_\_\_\_, 2019, the City Council voted to approve the foregoing Conservation Restriction from AvalonBay Orchards, Inc. to the City of Marlborough acting by and through its Conservation Commission in the public interest pursuant to Section 32 of Chapter 184 of the Massachusetts General Laws.

**MARLBOROUGH CITY COUNCIL**

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

**COMMONWEALTH OF MASSACHUSETTS**

MIDDLESEX, ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, 2019, before me, the undersigned notary public, personally appeared \_\_\_\_\_, and proved to me through satisfactory evidence of identification which was \_\_\_\_\_ to be the persons whose names are signed on the proceeding or attached document, and acknowledged to me that they signed it voluntarily for its stated purpose.

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



**APPROVAL BY THE MAYOR OF THE CITY OF MARLBOROUGH**

I, Arthur Vigeant, the undersigned, the Mayor of the City of Marlborough, hereby approve the foregoing Conservation Restriction from AvalonBay Orchards, Inc. to the City of Marlborough acting by and through its Conservation Commission in the public interest pursuant to Section 32 of Chapter 184 of the Massachusetts General Laws.

MAYOR

\_\_\_\_\_  
Arthur Vigeant

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, 2019, before me, the undersigned notary public, personally appeared \_\_\_\_\_, and proved to me through satisfactory evidence of identification which was \_\_\_\_\_ to be the persons whose names are signed on the proceeding or attached document, and acknowledged to me that they signed it voluntarily for its stated purpose.

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

**APPROVAL BY SECRETARY OF ENERGY AND ENVIRONMENTAL AFFAIRS  
COMMONWEALTH OF MASSACHUSETTS**

The undersigned, Secretary of Executive Office of Energy and Environmental Affairs of the Commonwealth of Massachusetts, hereby certifies that the foregoing Conservation Restriction from AvalonBay Orchards, Inc. to the City of Marlborough acting by and through its Conservation Commission, has been approved in the public interest pursuant to Massachusetts General Laws, Chapter 184, Section 32.

Dated: \_\_\_\_\_, 2019

\_\_\_\_\_  
KATHLEEN A. THEOHARIDES  
Secretary of Energy and Environmental Affairs

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, 2019, before me, the undersigned notary public, personally appeared KATHLEEN A. THEOHARIDES, and proved to me through satisfactory evidence of identification which was \_\_\_\_\_ to be the person whose name is signed on the proceeding or attached document, and acknowledged to me that she signed it voluntarily for its stated purpose.

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

## EXHIBIT A

### Description of the Premises

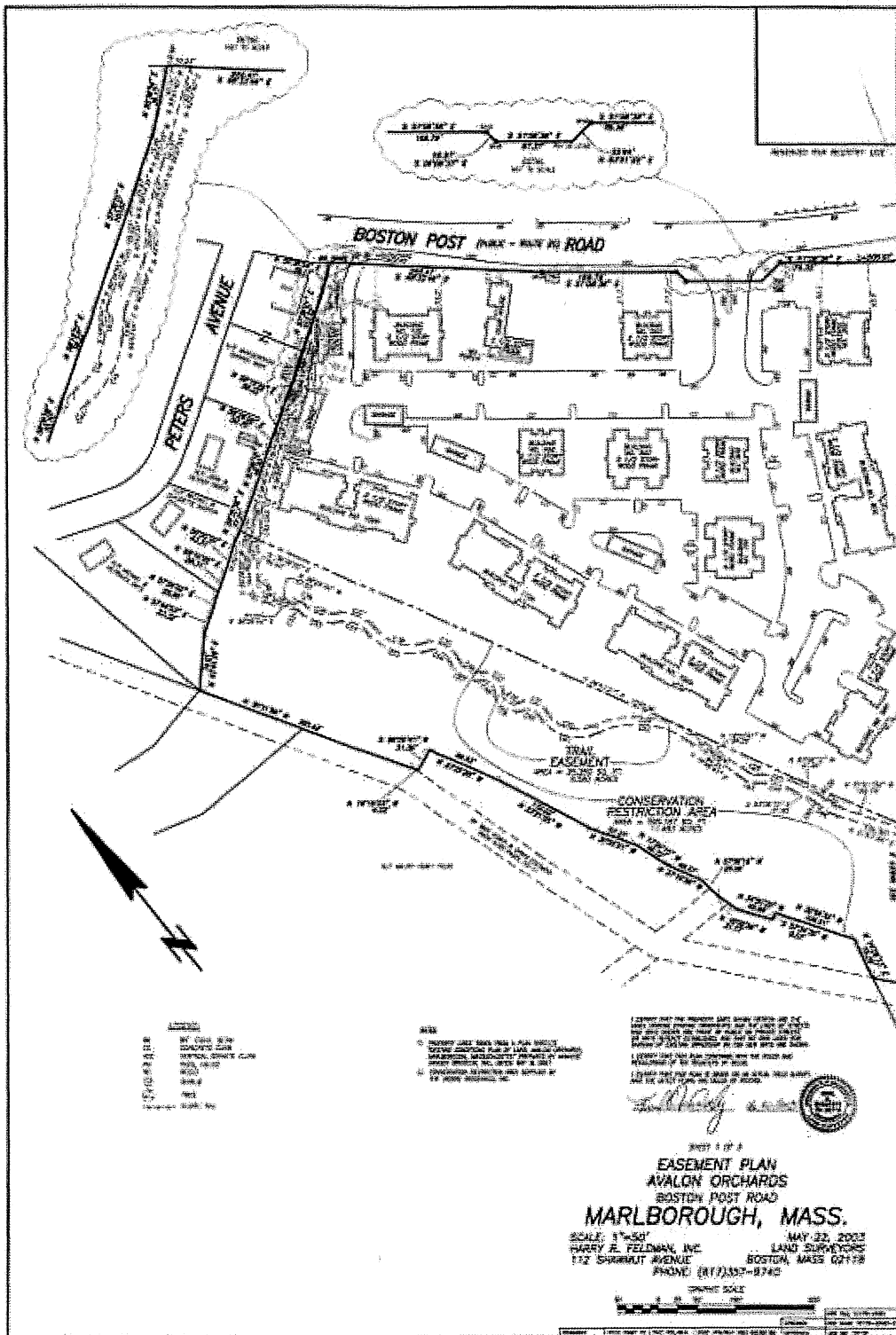
The Premises subject to this Conservation Restriction is the entirety of the 11.483 acre area shown as "Conservation Restriction Area, Area = 500,187 sq. ft., 11.483 acres" on a plan of land entitled "Easement Plan, Avalon Orchards, Boston Post Road, Marlborough, Mass.," dated May 22, 2003, prepared by Harry R. Feldman, Inc., Land Surveyors, 112 Shawmut Avenue, Boston, Mass. 02118, Scale: 1"=50' (2 sheets), said plan recorded at the Middlesex County (South District) Registry of Deeds in Book \_\_\_\_\_, Page \_\_\_\_\_, a reduced copy of which is attached hereto as Exhibit B.

Street Address: 91 Boston Post Road East, Marlborough, MA 01752

**EXHIBIT B - Reduced Copy of Plan of Premises**

*[See attached copy]*

For official full size plan see Middlesex (South) County Registry of Deeds as plan No. \_\_\_\_ of  
2019



BY ORDER OF  
 HARRY E. FELDMAN, INC.  
 LAND SURVEYORS  
 112 SHAWMUT AVENUE  
 BOSTON, MASS. 02118  
 PHONE (617) 552-8740

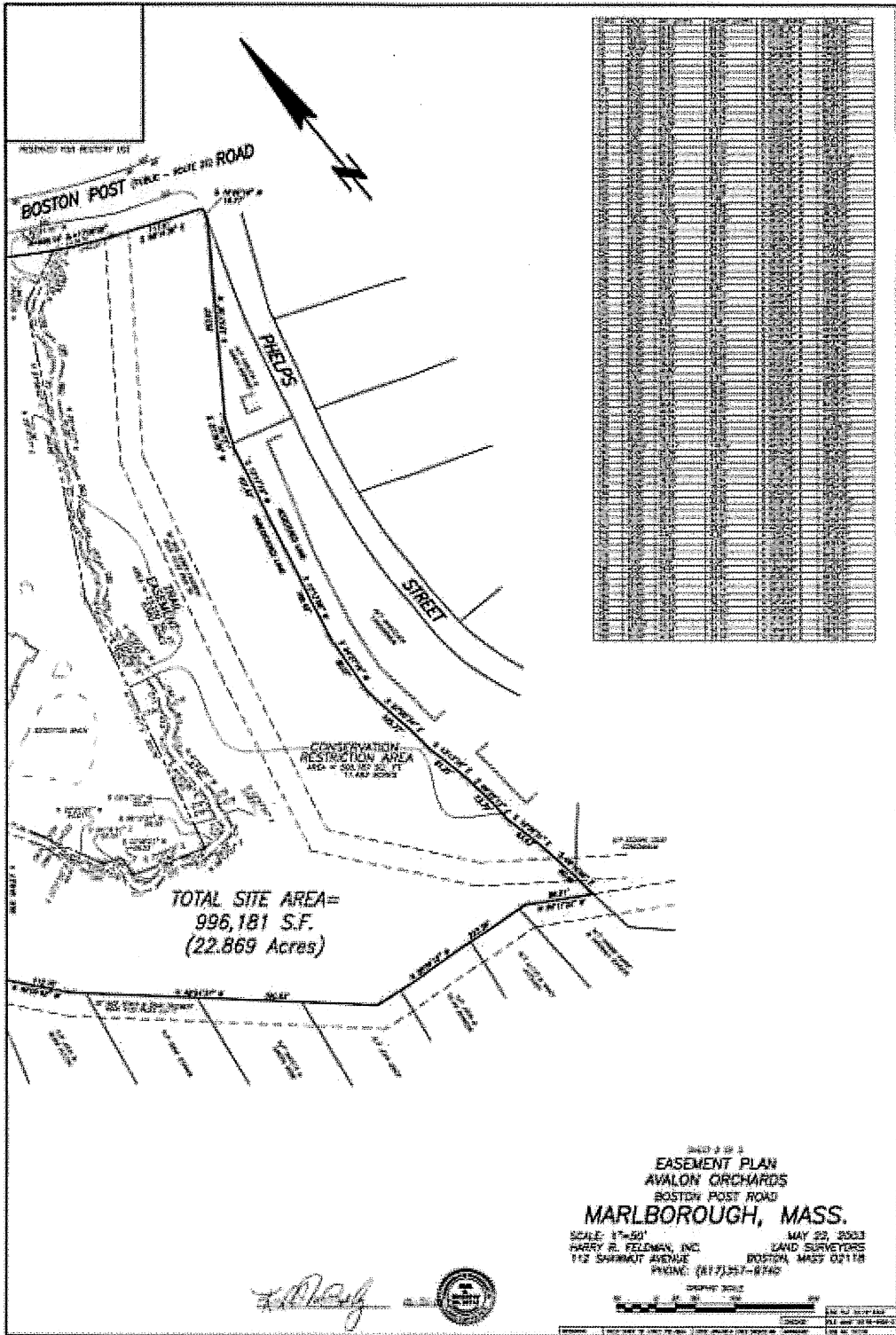
NOTES:  
 1. PROPERTY LINES SHOWN FROM A PLAN SURVEY  
 CONDUCTED IN 1945 AND 1946.  
 2. THE CONSERVATION RESTRICTION AREA IS SHOWN BY  
 A DASHED LINE AND IS SUBJECT TO THE  
 MASS. CONSERVATION COMMISSION'S REGULATIONS.  
 3. THE EASEMENT IS SHOWN BY A SOLID LINE.  
 4. THE EASEMENT IS SUBJECT TO THE  
 MASS. CONSERVATION COMMISSION'S REGULATIONS.

I, HARRY E. FELDMAN, LAND SURVEYOR, DO HEREBY CERTIFY THAT THE INFORMATION CONTAINED ON THIS PLAN IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.  
 HARRY E. FELDMAN, INC.  
 LAND SURVEYORS  
 112 SHAWMUT AVENUE  
 BOSTON, MASS. 02118  
 PHONE (617) 552-8740

SHEET 1 OF 2  
**EASEMENT PLAN**  
**AVALON ORCHARDS**  
**BOSTON POST ROAD**  
**MARLBOROUGH, MASS.**  
 SCALE: 1"=50'  
 HARRY E. FELDMAN, INC. LAND SURVEYORS  
 112 SHAWMUT AVENUE BOSTON, MASS. 02118  
 PHONE (617) 552-8740  
 MAY 22, 2002









## REGULATORY AGREEMENT

This Regulatory Agreement (the "Agreement") is made this \_\_\_\_\_ day of \_\_\_\_\_, 2019 by AVALONBAY ORCHARDS, INC., a Maryland corporation, with an address of 671 N. Glebe Road, Suite 800, Arlington, Virginia 22203, its successors and assigns ("AvalonBay") and the CITY OF MARLBOROUGH, a municipal corporation duly organized under the laws of the Commonwealth of Massachusetts, with an address of 140 Main St, Marlborough, Massachusetts 01752 (the "City").

### BACKGROUND:

A. AvalonBay owns and operates a development consisting of 156 rental units with related amenities and improvements commonly known as "Avalon Orchards" and having an address of 3 Avalon Drive, Marlborough, Massachusetts 01752 (the "Development"). The Development is located on land more particularly described on Exhibit A attached hereto (the "Property").

B. The Development was developed pursuant to a comprehensive permit issued under M.G.L. c. 40B and its implementing regulations (collectively, "Chapter 40B") by the Marlborough Zoning Board of Appeals by decision dated September 26, 2000, recorded with the Middlesex (S.D.) Registry of Deeds (the "Registry") on May 21, 2001 in Book 32898, Page 157 (the "Comprehensive Permit").

C. AvalonBay has repaid in full the loan in the original principal amount of \$20,679,509 (the "Loan") funded by revenue bonds issued by the Massachusetts Housing Finance Agency ("MHFA"), which Loan was secured by, among other things, that certain Mortgage, Security Agreement, and Assignment of Rents and Leases with respect to the Property dated as of June 27, 2003 from AvalonBay to MHFA, which was recorded in the Registry in Book 39713, Page 493 (the "MHFA Mortgage").

D. In connection with the Loan, AvalonBay and MHFA entered into a certain Regulatory Agreement dated as of June 27, 2003, which was recorded with the Registry in Book 39713, Page 528 (the "Regulatory Agreement") and a certain Disposition Agreement dated as of June 27, 2003, which was recorded with the Registry in Book 39713, Page 486 (the "Disposition Agreement"). The Regulatory Agreement, the Disposition Agreement and the MHFA Mortgage are sometimes collectively referred to herein as the "MHFA Agreements."

E. The MHFA Agreements set forth, among other things, certain affordability requirements with respect to low or moderate income housing to be provided as part of the Development.

F. The MHFA Agreements, among other things, were discharged by instrument dated August 6, 2018 which was recorded with the Registry in Book 71510, Page 336 (the "Discharge").

G. In light of the Discharge, the City and AvalonBay wish to memorialize their understanding as to the affordability requirements that will continue to apply to the Development so long as the Development or Property continues to be used as multi-family housing pursuant to

the Comprehensive Permit (which shall be, at a minimum, until the expiration of the Minimum Term, as such term is hereinafter defined).

NOW THEREFORE, in consideration of the agreements and covenants hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, AvalonBay and the City hereby agree and covenant as follows.

1. The term of this Agreement shall commence as of the date the Loan was or is repaid in full and shall continue in perpetuity as may be permitted by law. In entering into this Agreement, the parties intend for the restrictions, rights and obligations herein to be perpetual. To that end, if for any reason this Agreement or any of the restrictions, rights or obligations contained herein shall be deemed subject to sun-setting provisions, invalid, terminated, void or voidable on any grounds, or other principles requiring duration less than perpetual, then AvalonBay and its successors, assigns and transferees shall carry out all necessary measures to extend, adopt and/or renew the terms of this Agreement to renew and extend this Agreement and otherwise to ensure that the City holds in perpetuity the rights and restrictions set forth herein for the benefit of the City in a manner consistent with the terms and intent of this Agreement.

2. During the term of this Agreement, AvalonBay covenants, agrees, and warrants that the Development and each Affordable Unit, as hereinbelow defined, will remain suitable for occupancy and in compliance with all federal, state, and local health, safety, building, sanitary, environmental, and other laws, codes, rules, and regulations, including without limitation laws relating to the operation of adaptable and accessible housing for the disabled.

3. To the maximum extent permitted by law, throughout the term of this Agreement, AvalonBay shall reserve, market and lease, as "low or moderate income housing," as that term is defined in M.G.L. c. 40B, § 20, twenty five percent (25%) of the units in the Development to Low or Moderate Income Persons or Families (the "Affordable Units"). For the purposes hereof, the term Low or Moderate Income Persons and Families shall mean persons or families earning not more than eighty percent (80%) of the applicable area median income ("AMI") adjusted for household size, as determined by the U.S. Department of Housing and Urban Development ("HUD"), the Comprehensive Permit and this Agreement.

4. For so long as this Agreement is in effect, the annual rental expense for each of the Affordable Units shall be equal to the gross rent plus allowances for all tenant-paid utilities (including tenant-paid heat, hot water and electricity) and shall not exceed thirty percent (30%) of 80 percent (80%) of the AMI, adjusted for household size (the "Maximum Rents"). The Maximum Rents shall be determined on an annual basis by AvalonBay in accordance with the rental determination regulations adopted by MHFA (or its successor agency) or Massachusetts Department of Housing and Community Development ("DHCD"), as the same may be amended from time to time, and any policy regulations promulgated thereunder. Annually, AvalonBay shall submit to the City a proposed schedule of monthly rent expenses for all Affordable Units in the Development. 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 AvalonBay to all affected tenants. If the City 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 City's receipt thereof, the City shall be deemed to have approved the submission. If rentals of the Affordable Units are

subsidized under any state or federal housing subsidy program providing rental or other subsidy to the Development (a "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 Rents as provided in this Agreement.

5. AvalonBay will advise the Director of the City's Community Development Authority (the "Director") of any revisions to the designation of any Affordable Units on an annual basis and will provide the Director an annual report with respect to the Development certifying in writing (i) that the Affordable Units have been maintained in a manner consistent with the Comprehensive Permit and this Agreement, and (ii) a listing of each Affordable Unit tenant rent and income. AvalonBay shall deliver the annual report within one hundred twenty (120) days of the end of each calendar year during the term of this Agreement.

6. The Affordable Units will be intermingled with all other dwelling units in the Development and will have access to all common facilities of the Development for use and enjoyment equal to that of other tenants. All Affordable Units constructed and/or to be constructed as part of the Development must be similar in exterior appearance to other units in the Development. Materials used for the interiors of the Affordable Units must be of good quality.

7. If, after initial occupancy, the income of a household occupying an Affordable Unit increases and, as a result of such increase, exceeds the maximum income permitted hereunder for such household, AvalonBay shall not be in default hereunder so long as either (i) the household's income does not exceed one hundred forty percent (140%) of the maximum income permitted (in which case the unit in question shall continue to be counted as an Affordable Unit) or (ii) AvalonBay rents the next available unit at the Development as an Affordable Unit in conformance with Section 3 of this Agreement. If a unit that formerly was an Affordable Unit no longer qualifies as an Affordable Unit due to an increase in the income of the household occupying such unit to an amount in excess of one hundred forty percent (140%) of the maximum income permitted hereunder for such household, AvalonBay may charge a market rental rate for such unit, provided that AvalonBay promptly and continuously markets and leases a different unit or units that are not already Affordable Units as Affordable Units to mitigate the reduction in the number of Affordable Units and to maintain the total number of Affordable Units at the Development as required by Section 3 above.

8. If at any time fewer than the required number of Affordable Units are leased, rented or occupied by Low or Moderate Income Persons or Families, the next available units with at least the same number of bedrooms shall all be leased, rented or otherwise made available to Low or Moderate Income Persons or Families until the required number of units occupied by Low or Moderate Income Persons or Families is again obtained.

9. AvalonBay shall enter into a lease with each tenant for a minimum term of one year. Such leases shall contain clauses, among others, wherein each resident of such Affordable Unit agrees and certifies compliance with the accuracy of information provided.

10. In fulfilling its obligations under this Agreement, AvalonBay will accept referrals of tenants from the public housing authority in the City, and will not unreasonably refuse

occupancy to any prospective tenants so referred who meet the requirements of any applicable tenant selection plan. Notwithstanding the foregoing, in no event shall this Agreement require AvalonBay to take any action which would result in a violation of the federal Fair Housing Act or any other applicable federal, state or local law, rule, ordinance, regulation or requirement or which is inconsistent with any applicable guidelines, rules or regulations. Without limiting the generality of the foregoing, there shall be no discrimination upon the basis of race, creed, color, religion, disability, sex, sexual orientation, national origin, age or familial status in the lease, use or occupancy of the Development.

11. AvalonBay will obtain, at the time of initial rental and on each anniversary of the rental during the term of such rental, and maintain on file certifications of tenant eligibility with respect to the Affordable Units in a form prescribed by MHFA or another qualified agency overseeing affordable housing in the Commonwealth of Massachusetts. Such certifications shall be filed with the Director annually as part of the report required under Section 5 hereof. AvalonBay shall make good faith efforts to verify that the income provided by an applicant in an income certification is accurate.

12. The Director shall represent the interests of the City concerning the enforcement of the terms and conditions of this Agreement. As such, the Director and any person(s) designated by the Director (whether such person(s) are employees of the City or agents acting on behalf of the Director or the City) shall be the person authorized to monitor AvalonBay's compliance with the terms and conditions of this Agreement. AvalonBay will maintain complete and accurate records pertaining to the Affordable Units, and during reasonable business hours and upon reasonable notice, will permit the Director and any person(s) designated by the Director to inspect the books and records of AvalonBay pertaining to the Affordable Units.

13. 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.

14. All notices to be given pursuant to this Agreement shall be in writing and shall be deemed given when delivered by hand or when mailed by certified or registered mail, postage prepaid, return receipt requested, by e-mail, or by reputable overnight courier (such as Federal Express), to the parties hereto at the addresses set forth below, or to such other place as a party may from time to time designate by written notice:

To AvalonBay:

AvalonBay Communities, Inc.  
1499 Post Road, Second Floor  
Fairfield, Connecticut 06824  
e-mail: joannel@avalonbay.com  
Attn: Joanne Lockridge, Senior Vice President -- Finance

With copies to:

AvalonBay Communities, Inc.  
671 N. Glebe Road, Suite 800

Arlington, Virginia 22203  
e-mail: alan\_adamson@avalonbay.com  
Attn: Alan Adamson, Esq., Vice President & Associate General Counsel

and

Goulston & Storrs PC  
400 Atlantic Avenue  
Boston, Massachusetts 02110-3333  
Facsimile: (617) 574-7636  
Attn: Steven Schwartz, Esq  
e-mail: sschwartz@goulstonstorrs.com.

To City:

Marlborough Community Development Authority  
250 Main Street  
Marlborough, Massachusetts 01752  
Attention: Douglas Bushman, Director  
e-mail: dbushman@marlborough-ma.gov

and

City of Marlborough  
Legal Department  
City Hall, 4<sup>th</sup> Floor  
140 Main Street  
Marlborough, Massachusetts 01752  
e-mail: legal@marlborough-ma.gov

15. This Agreement and all of the covenants, agreements and restrictions contained herein shall be deemed to be an affordable housing restriction as that term is defined in M.G.L. c. 184, § 31 and as that term is used in M.G.L. c.184, § 26, 31, 32 and 33, in perpetuity. This Agreement is made for the benefit of the City, which shall be deemed to be the holder of the affordable housing restriction created by this Agreement. In addition, this Agreement is intended to be superior to the lien of any mortgage on the Development and survive any foreclosure or exercise of any remedies thereunder. The City has determined that the acquiring of such affordable housing restriction is in the public interest. For the purposes hereof, the term "perpetuity" shall mean for so long as the Development is being used for multi-family housing pursuant to the terms of the Comprehensive Permit, which shall be, at a minimum, for a term (the "Minimum Term") ending on May 21, 2045. Notwithstanding the foregoing or anything in this Agreement to the contrary but subject to the provisions of the next sentence, the term of this Agreement shall expire, and this Agreement shall be of no further force and effect, at such time as no portion of the Development or Property is used as multi-family housing pursuant to the Comprehensive Permit (but no sooner than the expiration of the Minimum Term). Further, this Agreement shall terminate and be of no further force and effect with respect to all the Affordable Units to the extent that the provisions of M.G.L. Chapter 40B (or any amendment or successor



statute thereto) no longer require that any of the units in the Development be restricted for low and moderate income housing.

16. Nothing in this Agreement shall be deemed to prohibit the conversion of the use of the property on which the Development is built for other uses permitted by the applicable zoning then in effect, so long as no such conversion takes place, at a minimum, until the expiration of the Minimum Term; provided, however, that any conversion of the Property to condominium use may take place after the expiration of the Minimum Term; and provided, further, that in the event of such condominium conversion after such period, the Affordable Units shall remain in perpetuity as "low or moderate income housing," in conformance with Section 3 of this Agreement, in the form either of home ownership units or of rental units as may be agreed to by AvalonBay and the Marlborough Zoning Board of Appeals. In the event of such a condominium conversion, AvalonBay shall execute and record all necessary documents (including but not limited to deed restrictions on the unit deeds for the Affordable Units which will be subject to the affordability restriction approved by DHCD pursuant to M.G.L. c. 184) to ensure that the affordability restriction as to such units will continue in force for the entire term hereof, in accordance with the terms relative to qualifying purchasers and maximum sales prices for initial sales and re-sales in accordance with the regulations promulgated by MHFA (or, if MHFA has ceased to promulgate such regulations, then such terms shall be determined based on substitute regulations and requirements of DHCD, and thereafter of a federal or state governmental agency providing subsidies for low or moderate income home ownership as shall be reasonably determined by AvalonBay). In addition, in the event of such a conversion, AvalonBay shall establish in the condominium master deed a provision for the maintenance of the Development and Property, including, but not limited to, roadway maintenance and repair, snow plowing, trash removal / recycling, and other amenities relating to the Development and Property. Further, in the event of such a conversion, a Deed Rider shall be attached to the deed of each Affordable Unit, and substantially similar restrictions as are in the Deed Rider shall be contained within the condominium master deed; such Deed Rider shall be in a form which is reasonably acceptable to the City, DHCD and any federal or state subsidizing agency providing a subsidy in connection with such conversion to condominium use. In no event shall any conversion of the use of the Property at any time, whether during or subsequent to the expiration of the Minimum Term, impair or interfere with the conservation values protected by the Conservation Restriction granted or to be granted in perpetuity by AvalonBay to the City of Marlborough, acting by and through its Conservation Commission.

17. Subject to the rights of any mortgage lender, AvalonBay agrees that if the Development, or any part thereof, shall be damaged or destroyed or shall be condemned or acquired for public use, AvalonBay shall have the right, but not the obligation, to repair and restore the Development to substantially the same condition as existed prior to the event causing such damage or destruction, or to relieve the condemnation, and thereafter to operate the Development 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 Development are destroyed, if such destroyed buildings are not restored by AvalonBay, AvalonBay shall be required to maintain the same percentage of Affordable Units (namely, 25%, as set forth in Section 3 of this Agreement) to the total number of units then remaining in the Development.

18. AvalonBay intends, declares and covenants on behalf of itself and its successors and assigns, and the parties hereto agree (i) that this Agreement and the covenants, agreements and restrictions contained herein shall be and are covenants running with the land, encumbering the Development for the term of this Agreement accepted by the City by its execution of this Agreement, and are binding upon AvalonBay's successors in title, (ii) are not merely personal covenants of AvalonBay, and (iii) shall bind AvalonBay, its successors and assigns for the term of the Agreement, and shall inure to the benefit of the parties hereto and their respective successors and assigns. AvalonBay hereby agrees that any and all requirements of the laws of the Commonwealth of Massachusetts to be satisfied in order for the provisions of this Agreement to constitute restrictions and covenants running with the land shall be deemed to be satisfied in full and that any requirements of privity of estate are also deemed to be satisfied in full. AvalonBay shall cause this Agreement to be recorded in the Registry. AvalonBay shall pay all fees and charges incurred in connection with such recording or filing.

19. If any default, violation or breach by AvalonBay of the terms of this Agreement is not cured within thirty (30) days after notice to AvalonBay thereof (or such longer period of time as is reasonably necessary to cure such a default so long as AvalonBay is diligently and continuously prosecuting such a cure), then the City may take one or more of the following steps: (a) by mandamus or other suit, action or other proceeding at law or in equity, require AvalonBay to perform its obligations under this Agreement; (b) have access to, and inspect, examine and make copies of all of the books and records of AvalonBay pertaining to the Development; or (c) take such other action at law or in equity as may appear necessary or desirable to enforce the obligations, covenants and agreements of AvalonBay under this Agreement. If the City brings any claim to enforce this Agreement, and the City finally prevails in such claim, AvalonBay shall reimburse the City for its reasonable attorneys' fees and expenses incurred in connection with such claim. No delay or omission on the part of the City in enforcing the covenants, agreements and restrictions contained herein shall operate as a waiver of the City's right to enforce them, nor shall any delay, omission or waiver on any one occasion be deemed to be a bar to or waiver of the same or of any other right on any future occasion.

20. Recognizing that each party may find it necessary to establish to third parties, such as accountants, banks, potential or existing mortgagees, potential purchasers or the like, the then current status of performance hereunder, either party on the request of the other party made from time to time, will promptly furnish to the requesting party a statement of the status of any matter pertaining to this Agreement, including, without limitation, acknowledgments that (or the extent to which) each party is in compliance with its obligations under the terms of this Agreement.

(Signatures on following page)



CITY:

CITY OF MARLBOROUGH

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

Arthur G. Vigeant

Mayor

Hereunto duly authorized by vote  
of the Marlborough City Council

Order No. \_\_\_\_\_

COMMONWEALTH OF MASSACHUSETTS

COUNTY OF MIDDLESEX, ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, 2019 before me, the undersigned notary public,  
personally appeared Arthur G. Vigeant, in his capacity as Mayor of the City of Marlborough,  
proved to me through satisfactory evidence of identification, which were  
\_\_\_\_\_, to be the person whose name is signed on the preceding  
document, and acknowledged to me that he signed it voluntarily for its stated purpose.

\_\_\_\_\_  
Notary Public

My commission expires:

(SEAL)