

~~DRAFT Restrictive Covenant~~ — “Tax Certainty Agreement”

~~DRAFT~~ — March 6, 2019

IN RE: the several parcels known as 8-10 Waldo Street (Parcel I.D. No. 045-02-01); 16 John Street (Parcel I.D. 045-11-00) and 10-18 Pleasant Street (Parcel I.D. No. 045-01-00)

BROOKLINE, MASSACHUSETTS

————— TAX CERTAINTY AGREEMENT

This Agreement between _ CHR Pleasant, LLC and Waldo Street, LLC, Massachusetts limited liability companies, with a principal place of business at Chestnut Hill Realty Corp., 300 Independence Drive, Chestnut Hill, MA 02467, and CM-WS Corp., Trustee of the 16 John Street ~~Realty~~ Trust u/d/t, and their successors and assigns (“CHR”) and the Town of Brookline, a municipal corporation (“Town”), located in Norfolk County, Massachusetts and acting by and through its Select Board (the “Board”), is made and entered into this ___ day of _____, _____, upon the mutual promises and obligations hereinafter set forth and additional consideration which the parties acknowledge is adequate and appropriate, upon the following terms and conditions:

PREAMBLE

WHEREAS, the Town through its comprehensive plan seeks to encourage the redevelopment of underutilized, vacant and/or abandoned buildings and land in the Coolidge Corner area and to be assured that such redevelopment results in the improvements remaining as taxable properties within the Town to help protect the Town’s existing property tax revenue; and

WHEREAS, CHR owns the several parcels of real property known as and numbered as 8-10 Waldo Street (Parcel I.D. No. 045-02-01); 16 John Street (Parcel I.D. 045-11-00) and 10-18 Pleasant Street (Parcel I.D. No. 045-01-00) (collectively hereinafter the “Premises”), the legal descriptions of which are attached hereto as Exhibit A1, which currently consists of a garage, vacant lot and commercial building; and

WHEREAS, CHR has proposed a mixed use development on the Premises including a modern Select-Service hotel and luxury residential building with underground parking (the “Project”); and

WHEREAS, the Town requires a public area easement of approximately 1,000 +/- square feet of land in order to connect the site from John Street through the Premises to Pleasant Street in the area which is more particularly shown on a sketch plan provided by the Town and attached hereto as Exhibit B2 (hereinafter the “the Public Easement”); and

WHEREAS, CHR requires a zoning amendment to construct the Project; and

WHEREAS, CHR acknowledges the value of the Public -Easement to the Project; and

WHEREAS, CHR has stated to the Town that the Project is not likely to result in a loss of the Town's taxable property, and in order to assure that the Premises will pay taxes or the equivalent thereof in the future it has offered to enter into this Agreement; and

WHEREAS, the Town intends to file a Warrant Article for consideration by Town Meeting to accept the Pedestrian Easement and authorize the Board of Selectmen to execute and record the Pedestrian Easement from CHR on certain terms and conditions and upon the assurance that CHR would enter into an agreement binding upon its successors and assigns with respect to the future payment of taxes or the equivalent thereof; and

WHEREAS, the Town and CHR seek to confirm their shared commitment to keeping the Premises upon which the Project may be constructed as a taxable parcel notwithstanding that by virtue of its potential use, it may be exempt from the payment of real estate taxes as nontaxable real property under Massachusetts General Laws, Chapter 59, §5, Clause Third or other applicable exemption; and

WHEREAS, for the reasons stated above and pursuant to the terms of this Agreement, the Town and CHR have agreed that CHR and its successors and assigns in title to the Premises will make, during the term of this Agreement, as that term is explicitly defined below, voluntary payments to the Town in lieu of real estate and hotel room excise taxes in circumstances in which CHR or its successors and assigns in title would not otherwise be obligated to pay on the Premises to the Town under applicable law. Voluntary in-lieu of tax payments are in addition to other economic enhancements provided by CHR in developing the Premises as may be mutually agreed between the Town, acting through its Select Board, and CHR;

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the parties, CHR and the Town agree as follows:

1. CHR Commitment to Voluntary Annual Payment to the Town. This Agreement shall become effective on the date of its recording with the Norfolk Registry of Deeds and the Norfolk Registry District of the Land Court as may be required ("the Effective Date"). Subsequently, commencing with the first fiscal tax year next following the first assessment date on which the Project has been constructed by CHR on the Premises and has received a final Certificate of Occupancy from the Town, in the fiscal years thereafter during which the Premises is being used for an Exempt Use or Uses, as hereinafter defined, and expiring ninety-five years from the Effective Date of this Agreement (the "Term"), CHR shall make a direct financial contribution to the Town (the "Annual Payment"), and the Town shall accept the Annual Payment in full satisfaction of CHR's obligations to make payments to the Town under this Agreement and/or applicable law (whether now in effect or, subject to ~~Sections 2 and 3~~Section 4, hereafter amended or adopted) on account of the Premises being used for an Exempt Use or Uses. During the Term, the Annual Payment shall be paid by CHR to the Town pursuant to this Agreement, consisting of the "Voluntary Real Estate Tax Payment" more particularly described in Section 2 below and the "Voluntary Hotel Room Tax Payment" more particularly described in Section 3 below. The assessment date shall mean January 1st or

another date on which the Town Assessors by statute determine the value of real property for the next following fiscal year.

2. Voluntary Payment in Lieu of Real Estate Tax to the Town. The "Voluntary Real Estate Tax Payment" shall be paid to the Town by CHR and its successors-in-title pursuant to this Agreement in quarterly installments on the date real property taxes are due and payable in the Town in each applicable fiscal tax year during the Term. The total Voluntary Payment shall be equal to the amount of real property taxes that would otherwise have been levied by and owed to the Town for all or any portion of the Premises were it not used for an Exempt Use or Uses and thus not exempt from real property taxes under applicable law in the relevant fiscal tax year. CHR shall have the right to contest the amount of the Voluntary Payment on the basis of over valuation or disproportionate valuation in comparison to similar properties, provided CHR shall before commencing legal action first use good faith efforts to mediate the issue of valuation with the Assessors. An Exempt Use or Uses shall mean those uses of real property that render such property eligible for exemption from real property taxation pursuant to Massachusetts General Laws Chapter 59, Section 5, Clause Third or other similar law, whether currently in existence or adopted during the Term of this Agreement. The Town shall provide CHR with a written statement of the amount due not less than thirty (30) days prior to the due date.

3. Voluntary Payment in Lieu of Excise Taxes to the Town. Currently, the Town of Brookline imposes an occupancy excise tax charged against hotel revenues in accordance with Massachusetts General Laws, Chapter 64G, Sections 3 and 3A. CHR agrees that in the event the Project no longer includes the hotel use subject to occupancy excise taxes, then pursuant to this Agreement, it and its successors-in-title, shall make a voluntary payment in lieu of excise taxes ("Voluntary Hotel Room Tax Payment") in quarterly installments on the date real property taxes are due and payable in the Town in each applicable fiscal tax year during the Term. If the hotel use is paying an occupancy excise tax for all hotel rooms in the Project at the time of the final Certificate of Occupancy ("Project Hotel Rooms") in accordance with Massachusetts General Laws, Chapter 64G, Sections 3 and 3A, then there will be no Voluntary Room Tax Payment owed to the Town. If, however, the hotel use is no longer subject to Massachusetts General Laws, Chapter 64G, Sections 3 and 3A, or if the hotel use changes to any other use not subject to local occupancy excise tax, CHR shall be obligated to make the Voluntary Room Tax Payment based upon the following formula:

a. (Audited Total Room Revenue of Premises) x (Local Option Hotel tax), or if hotel operations cease:

b. (REVPAR) x (Project Hotel Rooms) x (Local Option Hotel tax), where REVPAR, or Revenue Per Available Room, is the annual Boston Average for Limited Service Hotels, as reported by STR Analytics (formerly Smith Travel Research) or similar industry leader in reporting hotel performance metrics, and, if needed, updated by the Town's annual assessment date for the following fiscal year.

4. Termination of Agreement. The Town or CHR shall have the right to terminate this Agreement by, and effective upon, written notice of such termination delivered to the other in accordance with Section ~~8~~9(a), in the event that, at any time after the Effective Date the federal or state laws, regulations, ordinances and/or other government requirements applicable to the payment by CHR of taxes, similar assessments or payments in lieu of such taxes on the Premises used for an Exempt Use or Uses and/or any judicial or administrative interpretation of any of them (other than by the Town), change in any manner, the direct or indirect effect of which is to change the terms, conditions, and/or benefits of this Agreement in any way that is materially adverse to the Town or CHR, with the exception of a change that would have the effect of expanding the uses covered by the term Exempt Uses in this Agreement. This Agreement shall not in any manner whatsoever restrict the Town's exercise of its police power. Upon transfer of title of the Premises CHR's obligations under the Agreement shall automatically terminate and the successor owner of the Premises shall be bound by the terms of this Agreement in accordance with the Successor Affirmation set forth in ~~Section~~Sections 8 and 9 of this Agreement.

5. Period of Restrictions. It is the intent of the parties that the restrictions set forth herein be imposed for a term of ninety-five (95) years from the Effective Date hereof, and CHR hereby agrees and acknowledges that the restrictions shall not be deemed to be "unlimited as to time" within the meaning of Massachusetts General Laws, Chapter 184, Section 23, and that prior to the expiration of the initial thirty (30) years and prior to the expiration of any subsequent renewal period, such restrictions may be renewed from time to time thereafter for additional periods not in excess of twenty (20) years each, in accordance with the provisions of Massachusetts General Laws, Chapter 184, Section 27 or any successor statute.

6. Representations as to Authority. *The Town's Authority.* The Town represents that it is duly organized, validly existing and in good standing under the laws of Massachusetts and has all requisite municipal power and authority under the Town's Bylaws and under the laws of Massachusetts to execute, deliver, perform and be bound by this Agreement. The Town represents that (i) the individuals executing and delivering this Agreement on the Town's behalf are the incumbents of the offices stated under their names, and such offices have been duly authorized to do so by all necessary municipal action taken by and on the part of the Town, (ii) the Agreement has been duly and validly authorized, executed and delivered by the Town, and (iii) subject to any future decision of a court or arbitrator of competent jurisdiction (which the Town will not instigate and has no reason to believe will be forthcoming), the Agreement constitutes the valid and binding obligation of the Town, enforceable against the Town in accordance with its provisions. If a third party challenges the validity and enforceability of this Agreement against the Town, the Town agrees to use best reasonable efforts to defend the validity and enforceability of this Agreement.

CHR's Authority. CHR represents that it is duly organized, validly existing and in good standing under the laws of Massachusetts and has all requisite power and authority to execute, deliver, perform and be bound by this Agreement. CHR represents that (i) the individual

executing and delivering this Agreement on CHR's behalf is the incumbent of the office stated under his name, and such offices has been authorized to do so by all necessary corporate action taken by and on the part of CHR, (ii) the Agreement has been duly and validly authorized, executed and delivered by CHR, and (iii) subject to any future decision of a court or arbitrator of competent jurisdiction (which CHR will not instigate and has no reason to believe will be forthcoming), the Agreement constitutes the valid and binding obligation of CHR, enforceable against CHR in accordance with its provisions. If a third party challenges the validity and enforceability of this Agreement against CHR, CHR agrees to use best reasonable efforts to defend the validity and enforceability of this Agreement.

7. Lien/Collection Remedies. Upon the failure to make any Voluntary Payment to the Town, the Town may take whatever action it deems feasible to collect said payment whether in law or equity. The parties agree that the Voluntary Payment may constitute a fee for collection proceedings and may constitute a lien on the property for collection purposes. Upon written request from time to time to the Town Tax Collector, the Tax Collector shall provide the record owner of the Premises with a written statement certifying compliance with this Agreement as of said date and otherwise stating any amounts due and payable and the amount of the Voluntary Payment.

8. Deed Reference and Affirmation of Successor In Title. CHR and its successors in title agree that during the Term, that each successive deed to the Premises executed and delivered by the grantor shall contain the following statement:

“Reference is made to an Agreement by and between CHR (add entities as necessary) and the Town of Brookline dated _____, _____, recorded with Norfolk County Registry of Deeds in Book _____, Page _____ (the ‘~~Payment in Lieu of Tax~~ Certainty Agreement’), as well as all amendments duly made and recorded. By acceptance and recording of this deed, the Grantee acknowledges and accepts the ~~Payment in Lieu of Tax~~ Certainty Agreement and all relevant amendments and agrees that the same shall be binding and enforceable against the Grantee in accordance with its terms.”

CHR and such successors in title shall notify the Town in the manner provided in Section 9 hereof of the conveyance of the Premises and shall provide the Town with a copy of the deed evidencing the same conforming to this Section 8. The Town shall not be required to issue the certification provided for in Section 7 hereof absent compliance with Section 8, where applicable.

9. Miscellaneous Provisions.

(a) Notices. All notices, consents, directions, approvals, waivers, submissions, requests and other communications under this Agreement shall be effective only if made in writing with all delivery charges prepaid by a method set forth below, shall be effective at the times specified below, and shall be addressed to:

Chestnut Hill Realty Corp.
300 Independence Drive
Chestnut Hill, MA 02467

With a copy to:

Robert L. Allen Jr., Esq.
Law Office of Robert L. Allen Jr., LLP
300 Washington Street
Brookline, MA 02445

Town of Brookline
Attn: Town Administrator
Brookline Town Hall
333 Washington Street
Brookline, MA 02445

With a copy to:

Town of Brookline
Attn: Town Counsel
333 Washington Street
Brookline, MA 02445

___ By commercially recognized overnight or expedited commercial courier service, effective upon delivery or the refusal of delivery by or on behalf of the addressee as evidenced by the delivery receipt;

___ By hand delivery, effective upon delivery or the refusal of delivery by or on behalf of the addressee as evidenced by the messenger's receipt; or

___ By US certified or registered mail, return receipt requested, effective upon delivery or the refusal of delivery by or on behalf of the addressee as evidenced by the return receipt.

Any party may change or add to the addressees and/or addresses for notice by giving notice of such change or addition to the other party in accordance with this paragraph.

(b) Severability/Captions. The provisions of this Agreement are severable and, if any provision, or any portion thereof, is deemed by a court or arbitrator of competent jurisdiction to be invalid, illegal, or unenforceable for any reason, the remaining

provisions, or remaining portions thereof, shall remain valid and enforceable to the fullest extent permitted by law, provided that (as determined by agreement of the parties or by a court or arbitrator of competent jurisdiction) such continuing validity and enforceability results in neither the loss of any material benefit to, nor the increase of any material burden on, either party or both of them, as such benefits and burdens are originally provided in this Agreement. If this Agreement is terminated or rendered of no effect due to the invalidity, illegality, or unenforceability of any of its provisions, those CHR obligations that otherwise would survive the Term shall end. The captions used in this Agreement are for convenience only and shall not be deemed to have any relevance to the meaning of any of the provisions.

(c) Waivers/Time of Essence. The provisions and any breach of this Agreement shall not be waived, except expressly in writing signed by the waiving party. A waiver on one occasion or of one provision or breach shall not constitute a waiver on another occasion or of another provision or breach. Time is of the essence of this Agreement.

(d) Amendments. This Agreement shall not be amended unless such amendment shall be expressly agreed in writing executed by duly authorized representatives both parties.

(e) Whole Agreement/Survival. This Agreement supersedes any previous negotiations or agreements between the parties to this Agreement, whether oral or in writing, in relation to the matters dealt with herein and represents the entire agreement between the parties in relation thereto. The provisions of this Agreement that, by their specific terms apply after the Term shall, except as provided in Sections ~~54~~ and ~~9-(b)~~, survive the Term for so long as applicable; and all of the provisions of this Section 9 shall also survive the Term in relation to any of this Agreement's other surviving provisions.

(f) Real Property. All references in this Agreement to real property or property owned by or of CHR shall be deemed to mean fee ownership of the Premises, including fixtures and/or improvements thereto and any use and/or occupancy of the Premises, including leases, which would affect the determination of whether the property is exempt or taxable by the Town.

(g) Reservations. The Town and CHR agree that this Agreement provides the Town with protection of its tax base; but nothing in this Agreement in any way restricts the Town's complete discretion in the exercise of its police power or imposes any restrictions on CHR's complete discretion to determine whether and how the Premises shall be developed and improved and the use of the Premises and whether the Premises shall be reserved for, converted to, or acquired for, an Exempt Use or Uses and/or taxable purposes, taking into account economic conditions from time to time, relevant site constraints of development and any and all other considerations it desires. The Town and CHR each reserves all of its respective positions, rights and remedies at law and equity in connection with real estate taxes and exemptions in the event of the termination, expiration or inapplicability of this Agreement. CHR is entering into this Agreement voluntarily; and nothing in this Agreement or CHR's performance of its covenants hereunder shall be construed for any purposes whatsoever

to constitute an acknowledgement by CHR of any regulatory, statutory or contractual obligation to make the Voluntary Payment or any other payment to the Town on account of real property owned by CHR for Exempt Purposes, beyond the explicit contractual commitments voluntarily made by CHR under, and subject to all of the terms and conditions of, this Agreement.

(h) Counterparts. This Agreement may be executed by the parties hereto in multiple separate counterparts, each of which when so executed and delivered shall be an original, but all such counterparts shall together constitute but one and the same instrument of which there may be multiple originals.

(i) Applicable Law. This Agreement shall be governed by, and construed accordance with, the laws of The Commonwealth of Massachusetts for all purposes, without regard to any such laws governing choice of law.

(j) Successor In Title/Recording. This Agreement shall bind CHR and its successors and assigns in title to the Premises and shall be deemed to “run with the land” for the duration of the Term. This Agreement shall be recorded at the Norfolk County Registry of Deeds and Norfolk Registry District of the Land Court as appropriate upon execution of this Agreement and approval of all permitting for the Project.

IN WITNESS whereof the parties have executed this Agreement under seal as of the Effective Date.

~~Chestnut Hill Realty Corp.~~

By: ~~XXXXX~~ CHR Pleasant LLC

By _____
Peter Poras, Treasurer

By _____
~~President~~
Hereunto duly authorized on behalf of

CM-WS Corp. its Manager

Date: _____

Town of Brookline
Select Board:

Hereunto duly authorized
Date: _____

Waldo Street LLC

By _____
Peter Poras, Treasurer
Hereunto duly authorized on behalf of
CM-WS Corp. its Manager
Date: _____

16 John Street Realty Trust,

By _____

Peter Poras, Treasurer
Hereunto duly authorized on behalf of
CM-WS Corp. as Trustee

Date: _____

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss

On this ____ day of _____, 20____, before me, the undersigned notary public, personally appeared _____ of _____ as _____ of _____ through satisfactory evidence of identification to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose..

Notary Public

Personally Known _____

Produced Identification _____

Type of Identification _____

My Commission Expires: _____

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss

On this ____ day of _____, 20____, before me, the undersigned notary public, personally appeared _____ of _____ as _____ of _____ through satisfactory evidence of identification to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose..

Notary Public

Personally Known _____

Produced Identification _____

Type of Identification _____

My Commission Expires: _____

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss

On this _____ day of _____, 20____, before me, the undersigned notary public, personally appeared _____ of _____ as _____ of _____ through satisfactory evidence of identification to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose..

Notary Public

Personally Known _____

Produced Identification _____

Type of Identification _____

My Commission Expires: _____

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss

On this _____ day of _____ 20__, before me, the undersigned notary public, personally appeared _____, _____, _____ Select Board, of the Town of Brookline, proved to me through satisfactory evidence of identification to be the persons whose names are signed on the preceding or attached document, and acknowledged to me that they signed it voluntarily for its stated purpose as the Board of Selectmen of the Town of Brookline.

Notary Public

Personally Known _____
Produced Identification _____
Type of Identification _____

My Commission Expires: _____