

11/27/06 - 13

REGULATORY AGREEMENT AND AFFORDABLE HOUSING COVENANT

This Regulatory Agreement and Affordable Housing Covenant (the "Agreement") made this 27th day of November, 2006 by **Avalon Acton, Inc**, a Maryland corporation, having an office address of 2900 Eisenhower Avenue, Third Floor, Alexandria, Virginia 22314 (the "Developer") and **The Town of Acton**, a municipal corporation duly organized under the laws of the Commonwealth of Massachusetts, acting by and through its Board of Selectmen with its offices at 472 Main Street, Acton, Massachusetts 01720 (the "Town").

BACKGROUND:

A. Developer proposes to construct a 296-unit rental development with related amenities and improvements (the "Development") on an approximately 35-acre site more particularly described on Exhibit A attached hereto (the "Property"). The Development is also proposed to include 84 units in the Town of Westford. The Westford component of the Development is not governed or affected by this Agreement, and except where otherwise explicitly specified, the word "Development" as used herein shall mean only those buildings and other improvements that are located within the Town of Acton.

B. Developer received a comprehensive permit (the "Comprehensive Permit") from the Zoning Board of Appeals for the Town pursuant to M.G.L. Chapter 40B, §§20-23, authorizing the Development. The Comprehensive Permit was filed with the Acton Town Clerk on December 20, 2005 and was recorded with the Middlesex (S.D.) Registry of Deeds (the "Registry of Deeds") in Book 47074, Page 265.

C. The Comprehensive Permit requires that "low or moderate income housing" be included as part of the Development in perpetuity, and includes provisions concerning the inclusion of low or moderate income housing in the Development (the "Affordability Requirements").

D. Construction and/or permanent financing for the Development will be obtained from the Massachusetts Development Finance Agency or another qualified subsidizing agency (the "Subsidizing Agency"). As a component of such financing, Developer will be entering into a separate Regulatory Agreement and other agreements with respect to the Development which, inter alia, will set forth certain restrictions as to low or moderate income housing to be provided as part of the Development as the same may be hereafter extended or amended (the "Subsidizing Agency Agreements").

E. The terms of the Subsidizing Agency Agreements are not in perpetuity, and do not contain certain other provision governing the inclusion of low or moderate income housing in the Development, and therefore the Town and the Developer desire to enter into a supplemental regulatory agreement to govern those issues for which the Subsidizing Agency Agreement are silent, and to govern the Affordability Requirements if and when the Subsidizing Agency Agreements terminate or expire.

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, Developer and the Town hereby agree and covenant as follows:

1. Regulatory Agreements. It is the intention of the Comprehensive Permit and the parties hereto that the Development would, in perpetuity and without interruption, be subject to a suitable regulatory agreement consistent with the Comprehensive Permit governing the low or moderate income housing (the "Affordable Units") in the Development. For so long as the Subsidizing Agency Agreements are in force and effect (hereinafter, the "Subsidy Period"), the Subsidizing Agency Agreements shall satisfy in full the requirements of Condition R.4 for a regulatory agreement. From and after the expiration or termination of the Subsidizing Agency Agreements, this Agreement shall immediately take effect as the Regulatory Agreement specified in Condition R.7 of the Comprehensive Permit. The provisions of the preceding sentence shall be self-operative, but Developer agrees to give notice to the Town within ten days after the termination of the Subsidizing Agency Agreements should the same terminate prior to the end of the Qualified Project Period (as defined in the Subsidizing Agency Agreements). Developer shall also provide the Town with copies of:

- (a) any notices of default under the Subsidizing Agency Agreements immediately following Developer's receipt of any such notices (e.g., the notices contemplated under Section 10(a) and (g) of the MassDevelopment Regulatory Agreement); and
- (b) any notices or correspondence from the Subsidizing Agency or its agent or assignees to Developer, notifying Developer of the Agency's intention to terminate the Subsidizing Agency Agreements prior to the expiration of the Qualified Project Period (e.g., any notice served under Section 9 of the MassDevelopment Regulatory Agreement).

2. Affordability Requirements. Pursuant to the terms of Condition R.1 of the Comprehensive Permit, the Developer has elected to restrict twenty percent (20%) of the units in the Development (the "Affordable Units") to households earning not more than fifty percent (50%) of the median income for the applicable area, charging rents (the "Maximum Rents") that are permitted by the Subsidizing Agency Agreements, all in accordance with the applicable rules, regulations and guidelines of the Subsidizing Agency. Without derogating from the provisions of Section 6 below relative to the exclusive jurisdiction of the Subsidizing Agency to monitor and enforce the affordability requirements during the Subsidy Period, the Developer shall provide a copy to the Board of Selectmen, of any statements, reports, notices, or certifications made by the Developer to the Subsidizing Agency (or its monitoring agent) relative to the Developer's compliance with the affordability requirements in the Subsidizing Agency Agreements contemporaneous with the Developer's delivery of such documents to the Subsidizing Agency.

From and after the Subsidy Period, the Development shall continue to be restricted so that 20% of the rental units therein will be occupied by households earning not more than fifty (50%) of the applicable area median income, and the rents charged to the Affordable Units are affordable to households earning 50% of said area median income (the "General Affordability

Requirement”), all in accordance with the applicable rules, regulations and guidelines of the Subsidizing Agency (or its successor agency) that existed just prior to the expiration or termination of the Subsidizing Agency Agreements. To the extent that the Subsidizing Agency (or its successor agency) has ceased to promulgate such applicable rules, regulations and policies, then the General Affordability Requirement shall be carried out in accordance with substitute regulations of a federal or state governmental agency providing subsidies for low or moderate income housing as shall be reasonably determined by the Developer and the Town, in order to ensure the continued availability of the Affordable Units for the purposes set forth herein and in the Comprehensive Permit for the entire term of the Agreement. Further, if M.G.L. c. 40B (or its successor statute) still provides a mandate for municipalities to provide low or moderate income housing, then the Developer agrees to operate and manage the Development as would permit the Development to be credited towards the Town’s Subsidized Housing Inventory for purposes of Chapter 40B. The provisions of the foregoing sentence shall not require the Developer to take any steps or impose any additional restrictions on itself or the Development after the Subsidy Period, in addition to the General Affordability Requirement.

The Board of Selectmen shall establish reasonable rules and protocols to govern the monitoring of the affordability requirements, including any reporting and notice obligations, and may designate an entity to serve as its monitoring agent to monitor the Developer’s compliance with the affordability requirements. The selection of tenants in the event of unit vacancies shall be governed by the applicable rules of the Subsidizing Agency just prior to the expiration or termination of the Subsidizing Agency Agreements, and in the absence of such rules, by the rules of another subsidizing agency that are reasonably acceptable to the Town and the Developer.

3. Phasing-in of Affordable Rental Units. Consistent with the requirements of the Subsidizing Agency, the Affordable Units shall be constructed and rented contemporaneously with the market-rate units in the Development.

4. Reporting on Limited Dividend; Cooperation. Without derogating from the provisions of Section 6 below relative to the exclusive jurisdiction of the Subsidizing Agency to monitor and enforce the provisions of the Subsidizing Agency Agreements relative to limited dividends from the Development during the Subsidy Period, the Developer shall provide a copy to the Board of Selectmen of any and all certifications, statements, reports, appraisals, and notices, including but not limited to requests by the Developer to the Subsidizing Agency to revalue the Developer’s equity in the Development, made by the Developer to the Subsidizing Agency (or its monitoring agent) relative to the Developer’s compliance with the limited dividend provisions in the Subsidizing Agency Agreements (e.g., all statements required to be submitted under Section 19 of the MassDevelopment Regulatory Agreement), contemporaneous with the Developer’s delivery of such documents to the Subsidizing Agency (or its monitoring agent). If, at any time during the Subsidy Period, the Subsidizing Agency determines that there is project income or funds that, in accordance with the Subsidizing Agency’s limited dividend policies are (a) not eligible to be distributed to, or retained by, the Developer, or (b) not retained by the Developer or the Subsidizing Agency for the benefit of the Development, (“Excess Profits”) then the Developer shall cooperate in good faith with any effort by the Town to have the Subsidizing Agency direct the Excess Profits to the Town’s affordable housing trust fund.

5. Local Preference. In accordance with the terms of the Comprehensive Permit, to the maximum extent permitted by law, households having an Acton Connection (as such term is defined in the Comprehensive Permit) shall have first preference for the rental of 70% of the Affordable Units, all in accordance with the terms of Condition R.4(b) of the Comprehensive Permit.

6. Monitoring and Enforcement. During the Subsidy Period, the Subsidizing Agency shall have exclusive authority and jurisdiction for all monitoring, oversight and enforcement functions with respect to the Affordable Units, including without limitation, provision of the Affordable Units, monitoring eligibility for tenancy, calculation of affordable rentals and all matters related to limited dividend restrictions. Notwithstanding the foregoing, throughout the term of this Agreement (including, without limitation, during the Subsidy Period), the Town shall have the right to monitor the Developer's compliance with Sections 3 and 5 of this Agreement, and the Developer shall reasonably cooperate with the Town in its tenant selection processes to ensure that the local preference set forth herein is complied with, to the maximum extent permitted by law and the requirements of the Subsidizing Agency.

7. Subordination and Compliance. In the event of any conflict or inconsistency between the terms hereof and the terms of the Subsidizing Agency Agreements, and provided that such conflict is not inconsistent with the basic intent of this Agreement to preserve the Affordable Units as "low or moderate income housing" for the entire term hereof, the terms of the Subsidizing Agency Agreements shall control during the Subsidy Period. The execution and recording of this Agreement and the Subsidizing Agency Agreements shall satisfy in full:

- (a) the requirements of Sections R.4 of the Comprehensive Permit to execute and record a Regulatory Agreement; and
- (b) the requirements of Section R.7 of the Comprehensive Permit.

8. Governing Law. 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.

9. Notices. 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, to the parties hereto at the addressee set forth below, or to such other place as a party may from time to time designate by written notice:

To Developer:

Avalon Acton, Inc.
c/o AvalonBay Communities, Inc.
1000 Bridgeport Avenue
Suite 258
Shelton, Connecticut 06484
Attention: Joanne Lockridge, Senior Vice President -- Finance

With copies to:

AvalonBay Communities
2900 Eisenhower Avenue, Third Floor
Alexandria, Virginia 22314
Attention: General Counsel

and

Goulston & Storrs, P.C.
400 Atlantic Avenue
Boston, Massachusetts 02110
Attention: Steven Schwartz, Esq.

To Town:

Town of Acton
Town Hall
472 Main Street
Acton, Massachusetts 01720
Attn: Board of Selectmen

With a copy to:

Stephen D. Anderson, Esq.
Anderson & Kreiger, LLP
43 Thorndike Street
Cambridge, Massachusetts 02141

10. 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 G.L. c. 184, § 31 and as that term is used in G.L. c.184, § 26, 31, 32 and 33. This Agreement is made for the benefit of the Town, and the Town shall be deemed to be the holder of the affordable housing restriction created by this Agreement. The Town has determined that the acquiring of such affordable housing restriction is in the public interest. The term of this Agreement, the

rental restrictions, and other requirements provided herein shall remain for so long as the Development exists on the Property.

11. Developer 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, which shall run concurrently with the term of the "Affordability Requirements" in the Comprehensive Permit, and are binding upon Developer's successors in title, (ii) are not merely personal covenants of Developer, and (iii) shall bind Developer, 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. Developer 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 privileges of estate are also deemed to be satisfied in full. Developer shall cause this Agreement to be recorded in the Registry of Deeds (or, if the Property consists of registered land, to be filed in the Middlesex (S.D.) Registry District of the Land Court). Developer shall pay all fees and charges incurred in connection with such recording or filing.

12. The Developer hereby represents, covenants and warrants as follows:

- (a) The Developer (i) is a corporation duly organized under the laws of the State of Maryland, and is qualified to transact business under the laws of the Commonwealth of Massachusetts, (ii) has the power and authority to own its properties and assets and to carry on its business as now being conducted, and (iii) has the full legal right, power and authority to execute and deliver this Agreement.
- (b) The execution and performance of this Agreement by the Developer (i) will not violate or, as applicable, has not violated any provision of law, rule or regulation, or any order of any court or other agency or governmental body, and (ii) will not violate or, as applicable, has not violated any provision of any indenture, agreement, mortgage, mortgage note, or other instrument to which the Developer is a party or by which it or the Development is bound, and (iii) will not result in the creation or imposition of any prohibited encumbrance of any nature.
- (c) The Developer will, at the time of recording of this Agreement, have good and marketable title to the premises constituting the Development free and clear of any lien or encumbrance (subject to encumbrances created pursuant to this Agreement).

13. 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.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as a sealed instrument as of the date first above written.

DEVELOPER:

AVALON ACTON, INC.

By: _____
Its
Hereunto duly authorized

COMMONWEALTH OF MASSACHUSETTS

County of _____, ss

On this _____ day of _____, 2006 before me, the undersigned notary public, personally appeared _____, proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding document, as _____ of _____, a _____ corporation, and acknowledged to me that s/he signed it voluntarily for its stated purpose.

Notary Public

My commission expires:

TOWN:

By its Board of Selectmen,

Walter M. Foster, Chairman

F. Dore' Hunter

Lauren S. Rosenzweig

Peter K. Ashton

Andrew D. Magee

COMMONWEALTH OF MASSACHUSETTS

COUNTY OF MIDDLESEX ,ss.

On this _____ day of _____, 2006 before me, the undersigned notary public, personally appeared _____, proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding document, as Chairman of the Board of Selectmen for the Town of Acton, and acknowledged to me that he signed it voluntarily for its stated purpose.

Notary Public
Print Name:
My Commission Expires

EXHIBIT A

Property Description

Those certain parcels of land in Acton, Middlesex County, Massachusetts, being shown as Lots 1 and 2 and the fee in Avalon Drive as shown on the plan entitled "The Woodlands at Laurel Hill, Comprehensive Permit, Acton and Westford, Massachusetts (Middlesex County), Record Plan, For: Woodlands at Laurel Hill, LLC," Scale 1"=40", dated October 19, 2005, and revised June 2, 2006, recorded with Middlesex South Registry of Deeds as Plan No. ____ of 2006, and recorded with Middlesex North Registry of Deeds as Plan No. ____ of 2006.