

Memorandum of Agreement (“MOA”)
between
Symmes Lifecare, Inc. d/b/a Brookhaven at Lexington (“Brookhaven”)
and
The Town of Lexington, Massachusetts (“Town”)
regarding
Planned Development District 1

WHEREAS; Brookhaven has operated in Lexington since 1986;

WHEREAS; Brookhaven’s facility in Lexington was expanded in 2004 to include 309 units;

WHEREAS; Brookhaven filed a Preliminary Site Development and Use Plan (“PSDUP”) dated December 29, 2015, revised March 14, 2016 and April 6, 2017 for a rezoning of land, which PSDUP was placed on the warrant for, and approved by, the Town’s 2017 Annual Town Meeting;

WHEREAS; the property subject to the PSDUP is commonly referred to as “Brookhaven,” and has a street address of 960-1010 Waltham Street and consists of parcels 5-21A, 5-20, 5-19C, 5-18A, and 5-16A of the site, as depicted in the PSDUP (the “Property”);

WHEREAS; Brookhaven proposes certain commitments and actions in the PSDUP and seeks to further expand Brookhaven’s facility on 6.1 additional acres of the Property composed of Map 5 Parcels 19C, 20 and 21A at 960 and 990 Waltham Street (the “Project”) resulting in:

- 49 additional Independent Living residential units, for a total of 289
- 30 additional Assisted Care Units, for a total of 50, and
- 37 fewer nursing units, for a total of 12;

WHEREAS; Brookhaven has made Payments in Lieu of Taxes (“PILOT”) to the Town since 1989;

WHEREAS; the Board of Assessors determined in September of 2016 that Brookhaven was a charitable non-profit healthcare facility exempt from local property taxes for the Fiscal Year 2017, pursuant to G.L. c. 59;

WHEREAS; the PILOT has been an annual amount paid in quarterly installments that currently increases by 3 percent each year;

WHEREAS; the PILOT for fiscal year 2017 is \$497,279;

WHEREAS; should the Massachusetts Attorney General approve Article 44 of the 2017 Annual Town Meeting rezoning the Brookhaven property, this action will permit Brookhaven to apply for site plan review for the Project pursuant to Sections 7.3 and 9.5 of the Town's Zoning Bylaw; and

WHEREAS; the purpose of this Memorandum of Agreement ("MOA") is for Brookhaven and the Town to reach agreement on those provisions having public benefit to the Town as well as benefit to the Property should the Project be so approved;

NOW THEREFORE, Brookhaven and the Town agree that, in consideration for the support of the Town's Board of Selectmen for the PSDUP, the sufficiency of which is hereby acknowledged, Brookhaven shall be bound by the following terms of this MOA in the event that Site Plan Approval for the Project is granted by the Lexington Planning Board and construction of the project proceeds; otherwise, Brookhaven shall continue to be bound by the existing PILOT agreement between the Town and Brookhaven.

1. PAYMENTS IN LIEU OF TAXES (PILOT)

- a. Brookhaven shall increase its PILOT, to be paid quarterly beginning on August 1 of each fiscal year, from the amounts required under the PILOT entered into in 1986 (as amended) by 13.6 percent (based on 351 net units compared to 309 currently - 42 net new

units); 7 percent of this increase to be made in the fiscal year the first Certificate of Occupancy is issued for a living unit in the Project, with the remaining 6.6 percent increase to occur 12 fiscal years later, per the attached Appendix A. The 7 percent increase shall not be pro-rated. Late payments will accrue interest at a rate of 14 percent.

- b. In addition to these increases in the PILOT payments, Brookhaven's PILOT payment will also increase by 2.5 percent annually from the amounts due in the 1986 PILOT, beginning in FY18 and continuing for the 15 fiscal years that begin in the fiscal year the first Certificate of Occupancy is issued for a living unit in the Project and continuing for the subsequent 14 fiscal years.
- c. At the conclusion of the payment schedule provided in Paragraph a. and b. above, and unless otherwise agreed to by the Parties thereafter, Brookhaven's PILOT payment will increase by 3 percent annually. This 3 percent annual increase shall begin in the 16th fiscal year after the initial 7 percent increase is made. At least six months prior to the end of said payment schedule the Parties agree to meet and confer to determine whether this agreement should be amended; provided however, that neither party shall be considered to have hereby agreed to any such future amendment of this MOA.
- d. Brookhaven shall not be required to make a PILOT payment in any year that the Board of Assessors determines that Brookhaven is not exempt from local property taxes pursuant to G.L. c. 59 or other applicable laws, in which case Brookhaven shall be required to pay all applicable property taxes assessed to it instead, subject to all of Brookhaven's rights to appeal any such assessment. The PILOT payment will resume in any subsequent year that the Board of Assessors determines that Brookhaven is exempt from local property taxes pursuant to G.L. c. 59. If Brookhaven is not required to pay a PILOT payment in any year, the PILOT payment in the ensuing fiscal year where a PILOT payment is

required will be calculated as if the PILOT had never ceased (i.e., increasing by 2.5 percent annually).

- e. The provisions of this Section 1 shall supersede any conflicting provisions of the PILOT or any prior amendments thereto.
- f. Nothing herein shall be construed to limit the Board of Assessors, or any other department, committee, board, or official of the Town with the requisite authority, to determine whether Brookhaven, or its use of the Property, is eligible for any exemption from local property taxes.

2. AFFORDABLE HOUSING MITIGATION

- a. It is agreed that in lieu of deed-restricting 10% of the new units within the development as affordable housing units, which is the Town's preference, and in recognition that Brookhaven is a not-for-profit entity, a mitigation payment reflecting the Town's estimated cost to construct affordable housing units at other locations is required.
- b. The Brookhaven development proposal is anticipated to increase the number of year-round housing units by 49. To ensure that this new development remains "40B-neutral" the on-site requirement would be 5 units. However, as these units are not proposed to occur on site, the mitigation payment must factor in these additional units also increasing the 40B denominator. For purposes of this document, it is agreed that Brookhaven is responsible to provide a mitigation equal to the cost of the Town purchasing land and constructing approximately 5.5 affordable housing units.
- c. Brookhaven shall pay the Town an affordable housing mitigation payment of \$2,081,631 over the 15 fiscal years beginning with the year when the first Certificate of Occupancy for a living unit is issued for the Project, and continuing each July 1 thereafter for 14 additional payments, per the schedule included in this document as Appendix A. The

affordable housing mitigation payment is to be paid if the Project proceeds, regardless of whether Brookhaven is or is not exempt from local property taxation. These funds will be given in the memory of David Eagle, former member of LexHab, and held in a special account for affordable housing purposes.

- d. The Assisted Care units to be developed as part of the Project shall not include full kitchens but may include a sink, a microwave, and a dormitory style refrigerator.

3. UTILITIES

Prior to first issuance of Certificate of Occupancy for a living unit in the Project, Brookhaven shall loop the water main proposed for the Project and install and maintain a grinding chamber in the sewer line designed for the Project to specifications to be approved by the Town Engineer.

4. TRANSPORTATION & CONNECTIVITY

- a. Beginning in FY18 and payable each August 1, Brookhaven shall contribute \$1,500 per year to the Town for transportation services, including, without limitation, LexConnect service taxi service. This payment shall increase by 2.5% annually.
- b. Prior to first issuance of Certificate of Occupancy for a living unit in the Project, Brookhaven shall, at its own expense, install, maintain, and keep clean bus seating on Waltham Street at the base of Brookhaven's main drive, installed on the Brookhaven side of the sidewalk, leaving the grass strip and sidewalk in the right-of-way intact for pedestrian passage. Brookhaven shall allow public access for said bus seating at no cost to the Town.
- c. Prior to first issuance of Certificate of Occupancy for a living unit in the Project, Brookhaven shall repair the sidewalk along Waltham Street as specified in the Town's street opening permit, and, if required by the Town Engineer, will replace connecting segments to ensure a continuous sidewalk surface.

- d. The new (north) driveway to the Brookhaven property shall remain open and un-gated for emergency vehicular access.
- e. Any public access walking and bicycle trail proposed to traverse Lots 19C, 20, and 21A of Assessor's Map 5, as shown on Brookhaven's Site Construction Plan, shall be created, preserved, and maintained by Brookhaven for public bicycle and pedestrian access. The trails and sidewalks open to the public and Brookhaven residents, including the Amyas Ames Nature Trail located on the Brookhaven property, which connects to others trails off-site, shall be preserved and maintained by Brookhaven free of brush, re-forestation, barriers, or structures, at Brookhaven's expense.

5. NOISE TESTING AND ABATEMENT

Brookhaven acknowledges that it will comply with the Town's General Noise bylaw. In its Site Plan Review application, Brookhaven and its noise consultant will submit a testing protocol to be used to establish ambient noise levels. These ambient noise levels will be used to determine compliance with the Noise bylaw. This protocol would also be used in the event of future noise complaints to establish compliance with the noise bylaw. The Town will hire, at Brookhaven's expense, a noise consultant to review the testing protocol. Should a change in equipment and/or complaint be received, Brookhaven shall demonstrate compliance to the Noise Bylaw. The Town will hire, at Brookhaven's expense, a noise consultant to review said compliance.

6. MISCELLANEOUS

- a. Incorporation into Site Plan Approval. The terms of this MOA shall be incorporated as conditions of any Site Plan Approval for the Project pursuant to Section 9.5.4.4 of the Town's Zoning Bylaw.
- b. Binding Effect. This MOA shall become binding on Brookhaven and its successors and assigns and on the Town in the event that the PSDUP is approved by Town Meeting and

Site Plan Approval is granted for the Project by the Lexington Planning Board, otherwise Brookhaven shall continue to be bound by the existing PILOT Agreement (as amended). This MOA is for the benefit of Brookhaven and the Town, and it may be enforced by any remedy provided at law or in equity. This MOA and the Lexington Zoning Bylaw shall be construed in such a way as to harmonize any conflicting provisions to the greatest extent reasonably possible, but in the event of any irreconcilable conflict between this MOA and any provision in the Bylaw, the provisions of the Bylaw shall control (subject always to the provisions of General Laws, Chapter 40A, as amended).

- c. Existence and Authority. Brookhaven is a not-for-profit organization duly formed, validly existing, and authorized to do business in Massachusetts. This MOA constitutes a valid and legally binding obligation of Brookhaven, enforceable against Brookhaven in accordance with its terms, and neither the execution, delivery or performance of this MOA nor compliance herewith conflicts with or will conflict with or results or will result in a breach of or constitutes or will constitute a default under (i) the organizational documents of Brookhaven, (ii) any law or any order, writ, injunction or decree of any court of governmental authority, or (iii) any agreement or instrument to which Brookhaven is a party by which it is bound.
- d. Cooperation. Brookhaven hereby agrees to continue to work cooperatively with the Town on an ongoing basis to implement both the specific provisions and the intent and purposes of this MOA.
- e. Time is of the Essence. Time shall be of the essence of this MOA.
- f. Permitting. The execution and delivery of this MOA does not constitute an agreement by the Town that any necessary permit or approval for the Project will in fact be granted.

This MOA shall be incorporated into, and made a condition of, any permit or approval granted by the Town.

- g. Amendment of Agreement. This MOA may not be amended, modified or terminated except by a written instrument executed by Brookhaven and by a majority of the Board of Selectmen.
- h. Enforcement; No Waiver. The failure of the Town to enforce this MOA shall not be deemed a waiver of the Town's right to do so thereafter. If any provision of this MOA or its applicability to any person or circumstances shall be held invalid, the remainder thereof, or the application to other persons shall not be affected.
- i. Severability. The invalidity of any provision of this MOA as determined by a court of competent jurisdiction shall in no way affect the validity of any other provision hereof.
- j. Applicable Law. This MOA shall be governed by and according to the laws of the Commonwealth of Massachusetts, as amended from time to time. Any action brought by the Town hereunder may be brought in the Superior Court in and for the County of Middlesex, and the Brookhaven hereby agrees to the jurisdiction of such court.
- k. Building Permit Contingency. At any time before a building permit is issued for the Project, Brookhaven shall have the right to stop moving forward with the Project, and the PILOT payments shall, in such event, continue pursuant to the existing PILOT agreement.

SIGNED:

Date: _____

Board of Selectmen
Town of Lexington
1625 Massachusetts Avenue
Lexington, MA 02420

Date: _____

James M. Freehling
President/Chief Executive Officer
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