

CITY OF NEWTON  
IN BOARD OF ALDERMEN  
JOINT MEETING  
FINANCE AND  
ZONING & PLANNING COMMITTEES  
AGENDA

MONDAY, JANUARY 25, 2010

**7:00 PM PLEASE NOTE EARLY START  
ALDERMANIC CHAMBER**

***A PUBLIC HEARING WILL BE HELD JOINTLY WITH FINANCE AND ZONING &  
PLANNING COMMITTEES ON THE FOLLOWING ITEM:***

**REFERRED TO ZONING & PLANNING AND FINANCE COMMITTEES**

#412-09      HIS HONOR THE MAYOR requesting approval of an amended 121A Tax Agreement between the City of Newton and the New Falls Associates Limited Partnership ('the owner'), dated November 13, 2009, whereby the City will receive \$2,537,500 in deferred taxes upon the completion of refinancing by the owner and 41 affordable housing units will be extended for an additional 22 years, until 2040.

Leonard J. Gentile, Chair, Finance Committee  
Marcia T. Johnson, Chair, Zoning & Planning Committee



David B. Cohen  
Mayor

City of Newton, Massachusetts  
Office of the Mayor

Telephone  
(617) 796-1100  
Telefax  
(617) 796-1113  
TDD  
(617) 796-1089  
E-mail  
dcohen@newtonma.gov

December 15, 2009

Honorable Board of Aldermen  
Newton City Hall  
1000 Commonwealth Avenue  
Newton, MA 02459

Ladies and Gentlemen:

I write to request that your Honorable Board docket for consideration a request to approve the agreement reached between the City of Newton and the New Falls Associates Limited Partnership dated November 13, 2009. By this agreement, the City will receive \$2,537,500 in deferred taxes upon the completion of refinancing by the owner. In addition, the affordability of 41 housing units will be extended for an additional 22 years, until 2040.

I believe this is an equitable agreement for both parties. In approving this agreement, the city will obtain a sizable and much needed infusion of cash, preserve the affordability of 41 units for a considerable length of time and lift a burdensome tax liability, enabling the owner to make much needed improvements to the property that will improve the quality of life for the individuals and families living in these affordable units.

Thank you for your consideration of this matter.

Very truly yours,

David B. Cohen  
Mayor

09 DEC 15 PM 4: 04  
CITY CLERK  
NEWTON, MA, 02159

DBC:srb



#412-09

Telephone

(617) 796-1100

Telefax

(617) 796-1113

E-mail

David.B.Cohen@newtonma.gov

NEWTON, MA 02159

CITY CLERK

09 NOV 16 PM 5:24

09 NOV 16 PM 11:54

NEWTON, MA 02159



David B. Cohen  
Mayor

City of Newton, Massachusetts  
Office of the Mayor

November 16, 2009

Honorable Members of the Board,

I am pleased to inform you that I will be docketing for your approval an agreement the City of Newton reached last week with the New Falls Associates Limited Partnership. The Agreement will preserve a significant number of affordable housing units, provide an immediate payment of more than \$2.5 million to the city, and will provide relief from a tax liability that will enable the property owner to renovate all affordable and market rate units.

New Falls, located on Washington Street in Newton <sup>Lower</sup> Upper Falls, has 41 affordable units among its 60 total units. Under the previous agreement of 1977, the owner would have had the option of returning the units to market rate in 2018. The new agreement will keep these units affordable for 20 additional years, until 2038.

In addition, the city will collect \$2,537,500 in due taxes. The remaining funds that are due will be subject to a 3% compounded annual interest rate, over 30 years. This is an adjustment from the old agreement terms of 14% simple annual interest, a heavy tax liability that precluded the owner from making needed repairs.

I believe this agreement is an equitable one for both parties. In signing this agreement, the city has (1) obtained a sizable and much needed infusion of cash, (2) preserved 41 units of affordable housing well into the future, and (3) lifted a tax liability that enables the property owner to make needed upgrades that will improve the quality of living for the individuals and families who will live in these affordable housing units.

I will soon be docketing an item to provide you with further details in the hopes that the agreement will meet with your approval.

Very Truly Yours,

David B. Cohen

1000 Commonwealth Avenue Newton, Massachusetts 02459

www.ci.newton.ma.us

09 DEC -1 PM 4: 57

CITY CLERK  
NEWTON, MA. 02159

**Amended and Restated  
Agreement Under Section 6A of  
Chapter 121A of the General Laws**

This Amended and Restated Agreement Under Section 6A of Chapter 121A of the General Laws of Massachusetts is made this 13<sup>th</sup> day of November, 2009 ( the "Restated Agreement") by and between **NEW FALLS ASSOCIATES LIMITED PARTNERSHIP**, a limited partnership organized pursuant to the provisions of Chapter 109 of the General Laws of the Commonwealth of Massachusetts (the "Owner") having an address c/o The Barkan Companies 24 Farnsworth Street, Boston, Massachusetts 02210, and the **CITY OF NEWTON**, a municipal corporation of the Commonwealth of Massachusetts (the "City") having an address at 1000 Commonwealth Avenue, Newton, Massachusetts 02459.

**WHEREAS**, the Owner is the owner of real property at 2251-2311 Washington Street Newton Lower Falls comprising 60 units of multi-family housing (the "Property"); and

**WHEREAS**, pursuant to approvals granted by the City of Newton Board of Aldermen as of November 21, 1977, the Mayor of the City of Newton as of November 23, 1977 and the Massachusetts Department of Community Affairs dated as of April 7, 1978 the Property is exempt from real estate taxation for a period of forty (40) years pursuant to the provisions of G.L. c. 121A §10 but the Owner is obligated in lieu of taxes to pay the excise established in G.L. c. 121A §10; and

**WHEREAS**, the Owner and the City have entered into an Agreement dated November 14, 1978 pursuant to G.L. c. 121A §6A (the "6A Agreement") requiring certain additional annual payments and accruals of other amounts from the Owner to the City; and

**WHEREAS**, the amounts accrued as owed by the Owner to the City under the 6A Agreement now create a substantial impediment to operation, refinancing and capital improvements of the Property; and

**WHEREAS**, the operation of the 6A Agreement over a thirty year period has had an unanticipated effect of requiring the Project to incur obligations in lieu of real estate

taxes which are substantially higher than the *ad valorem* real estate taxes which would be incurred in the absence of the Chapter 121A tax exemption; and

**WHEREAS** the tax exemption of the Property, the obligations of the Owner under G.L. c. 121A and the term of the 6A Agreement will expire in 2018; and

**WHEREAS** the City is desirous of extending the term of affordability of the currently affordable housing units within the Property; and

**WHEREAS** the City and the Owner believe that in furtherance of the terms of this Restated Agreement the Owner may be able to obtain additional mortgage financing which will assist the Owner in:

- (i) achieving increased Section 8 “mark-up-to-market” rentals at the Property;
- (ii) providing funds to undertake deferred maintenance at the Property; and
- (iii) making a substantial payment towards amounts accrued and owing under the 6A Agreement; and
- (iv) providing for future payment of the balance of the amount accrued and owing by the Owner to the City under the 6A Agreement.

**NOW THEREFORE** the Owner and the City adopt and affirm the recitals herein stated and agree that effective as of the Effective Date (hereinafter defined) the 6A Agreement is amended and restated in full as follows:

1. Maintenance of Property in accordance with Regulations. For the duration of the Property’s tax exemption provided by G.L. c. 121A §10 which the parties agree and acknowledge to be December 31, 2018 the Owner agrees to maintain the Property in accordance with the provisions of G.L. c. 121A and the rules and regulations setting minimum standards for the maintenance and management of the Project as set forth or referred to in the approval of the Department of Housing and Community Development (“DHCD”), formerly known as the Department of Community Affairs (“DCA”).
2. Refinancing: Upon execution of this Restated Agreement the Owner will seek replacement financing for the Property with an intention of seeking a

“mark-up-to-market” increase in Section 8 rentals to the highest levels allowed by the U.S. Department of Housing and Urban Development (“HUD”) and gross loan proceeds of approximately \$6,000,000.00 (the “Refinancing”).

3. Effective Date: For purposes of this Restated Agreement the “Effective Date” shall be the date upon which the mortgage documents creating the Refinancing are recorded, but in no event later than June 30, 2010. Upon occurrence of the Effective Date, the Owner will deliver to the City (i) the payment provided for in Paragraph 7(iii) and the Deferred City Balance Note referred to in Paragraph 11. Notwithstanding anything to the contrary herein, the Effective Date shall also be the date upon which all provisions of this Restated Agreement take effect, including the mechanism for additional payments to the City under Paragraph 9. At such time, the Owner and the City agree to execute an Effective Date Acknowledgement Agreement in the form of Exhibit A attached hereto. If the Effective Date shall not have occurred by June 30, 2010, then the last date for occurrence shall be extended by the parties for good cause shown.
4. Anticipated Effective Date; Right of Termination: The Owner will use good faith efforts and due diligence to seek the Refinancing and associated Section 8 mark-up-to-market rental increases. The Owner shall use commercially reasonable efforts to complete the Refinancing by June 30, 2010. In the event the Effective Date shall not have occurred by June 30, 2010 and shall not have been extended under Paragraph 3, then, at any time after July 1, 2010 and continuing until the Effective Date shall have occurred, either the Owner or the City may terminate this Restated Agreement, and the 6A Agreement shall remain in full force and effect without amendment.
5. Extension of Affordability: Contemporaneously with and conditioned upon the Refinancing, as of the Effective Date the Owner will date, execute and record an Affordability Agreement in the form of Exhibit C extending the

availability of at least 41 units for affordable housing as and to the extent provided in Exhibit B until thirty (30) years from the Effective Date.

6. Accrued City Balance: The Owner and the City agree that the amount of accrued and unpaid payments under the 6A Agreement outstanding as of December 31, 2009 will be \$4,992,438.47, of which \$1,871,174.39 represents deferred principal (the “Deferred Principal”), and is exclusive of any payment due with respect to calendar year 2009, which has not yet been calculated in accordance with the 6A Agreement. The Deferred Principal, together with any payment deferred from calendar 2009 (“2009 Deferred Payment”), shall continue to accrue interest in the manner provided in the 6A Agreement until the occurrence of the Effective Date. The sum of the Deferred Principal and 2009 Deferred Payment, together with any interest accrued thereon in the manner provided in the 6A Agreement, shall be referred to as the Accrued City Balance (the “Accrued City Balance”). Upon the occurrence of the Effective Date, any interest accrued from January 1, 2010 through the Effective Date in the manner provided in the 6A Agreement shall be deducted from the Accrued City Balance and recalculated at the rate of three (3%) percent per annum on the remaining Accrued City Balance.
7. Proceeds of Refinancing: Upon closing of the Refinancing the proceeds of the Refinancing shall be applied in the following order of priorities:
  - i. First: To the payment of all the Owner’s costs, consulting and other fees and expenses in reaching this Restated Agreement and of the Refinancing;
  - ii. Second: To the repayment of all of the Owner’s debt under the Owner’s existing mortgage financing which as of December 31, 2008 was approximately \$1,619,192.00;
  - iii. Third: \$ 2,537,500.00 to the City as payment toward and on account of the Accrued City Balance;

- iv. Fourth: \$1,500,000.00 to an account held and controlled by the Owner designated for the payment of costs of capital maintenance and improvements to the Property;
- v. Fifth: \$50,000.00 as a distribution to the Owner;
- vi. Sixth: Any balance remaining of the proceeds of the Refinancing shall be distributed:
  - (a) 40% to the City as an additional payment toward and on account of the Accrued City Balance;
  - (b) 40% as an additional payment to the account held and controlled by the Owner designated for the payment of costs of capital maintenance and improvements to the Property; and
  - (c) 20% as a distribution to the Owner.

The unpaid balance of the Accrued City Balance remaining after the payments from the Refinancing under this Paragraph is referred to herein as the Deferred City Balance. The Effective Date Acknowledgement Agreement will also fix and determine the Deferred City Balance.

- 8. Payment of Statutory Excise Tax: With respect to each year until calendar year 2018 the Owner agrees to pay to the Commonwealth of Massachusetts any excise tax payable under G.L. c. 121A §10. In connection therewith the Assessors of the City, for purposes of the 8<sup>th</sup> paragraph of G.L. c. 121A §10 affirm their determination under the 6A Contract that the fair cash value of the Property for purposes of computing the excise tax payable under G.L. c. 121A §10 remains \$1,722,353.00.
- 9. Additional Payments Through 2018; Procedures: In addition to payments to the Commonwealth of Massachusetts of such excise tax the Owner shall pay to the City with respect to each calendar year commencing with calendar year 2009 through calendar year 2018 payments equal in the aggregate to the amount by which *ad valorem* real estate taxes if applicable



to the Property would exceed the amount of the statutory excise tax payable to the Commonwealth of Massachusetts under G.L. c. 121A §10. In implementation of this Paragraph:

- i. Prior to April 15 of each year the Owner shall provide to the City through its Board of Assessors a statement of income and expenses of the Property for the prior calendar year and the book value of the same for the prior calendar year in the same form as is provided to the principal lender providing mortgage financing for the Property and also a copy of any statement of income and expenses and chapter 121A excise tax returns and attachments thereto filed with the Department of Revenue or provided to DHCD in connection with payment of the statutory excise tax under G.L. c. 121A. When available, the Owner shall provide to the City through its Board of Assessors an audited report by a certified public accountant consisting of a statement of profit and loss, a balance sheet, a statement of receipts and disposition of funds for the preceding calendar year and a certified copy of the Urban Redevelopment Excise Tax Return as submitted to the Department of Revenue. If gross rents collected as stated in the audited report results in an increased payment due under this Paragraph 9, Owner shall pay such difference within thirty (30) days of notice thereof. In addition, if there is a discrepancy of five (5%) percent or greater in gross rents collected between the statement of income and expenses and the audited report, then Owner shall pay interest from the original due date at the rate set forth in G.L. c. 59 §57 on the additional amount due hereunder owing to such discrepancy. The Owner and the City anticipate that the first such statements will be provided to the City prior to April 15, 2010 with respect to calendar year 2009.
- ii. Prior to the first May 30 after the Effective Date and each May 30 thereafter and based upon the statements of income and

expenses provided by the Owner plus such other information as the Assessors would be entitled to request under G.L. c. 59 §38D the City acting through its Board of Assessors shall determine a fair cash value for the Property as of January 1 of the immediately prior year in the same manner as fair cash value would be established were the Property subject to assessment and taxation under G.L. c. 59, and the City shall notify the Owner of such determination by June 1 of each year. For purposes of transition and calculations of matters prior to the Effective Date the Owner and the City agree that the fair cash value of the Property as of January 1, 2008, January 1, 2009 and January 1, 2010 is \$8,066,000.00.

- iii. The determination of fair cash value made by the City through its Board of Assessors shall not be final, but may be appealable to the Appellate Tax Board under G.L. c. 121A §10. Any appeal under this section must be made by the Owner within thirty (30) days after receipt of notice from the City through its Board of Assessors. The Owner and the City agree that jurisdiction of the Owner's appeal will lie in the Appellate Tax Board under G.L. c. 121A §10 notwithstanding that pursuant to this Restated Agreement the valuation for purposes of §10 has been established as provided in Paragraph 8 of this Restated Agreement. In the event jurisdiction of such appeal does not lie in the Appellate Tax Board then the Owner shall have recourse to arbitration as provided in this Restated Agreement.
- iv. Upon determination of the fair cash value by the City, the City shall determine the *ad valorem* taxes under G.L. c. 59 which would have applied to the Property during the preceding calendar year based upon (i) the fair cash value established as of January 1 of the prior year, (ii) as to the period from January 1 to June 30 of the prior year the *ad valorem* tax rate applicable to that period,

and (iii) as to the period from July 1 to December 31 of the prior year the ad valorem tax rate applicable to that period. The City shall give notice of the amount of *ad valorem* taxes which would have been payable with respect to the prior year had the Property been subject to G.L. c. 59 to the Owner on or before June 30 or each year.

- v. Within thirty (30) days after the City gives the notice provided for in subparagraph (iv) the Owner shall pay to the City an amount equal to (x) the amount calculated under subparagraph (iv.) above less (y) any amount paid to the Commonwealth of Massachusetts with respect to the prior calendar year as the excise tax payable under G.L. c. 121A §10. Late payments shall be subject to interest at the rate set forth in G.L. c. 59, §57.

10. Ad Valorem Taxes After 2018: The Owner and the City agree that effective as of January 1, 2019 the Property will no longer be exempt from real estate taxation under G.L. c. 121A. The City and the Owner agree that effective as of January 1, 2019 for FY 2019 the Property will be assessed for one half of FY 2019 *ad valorem* real estate taxes based upon a valuation date of January 1, 2018, and that any assessment made for the period of January 1, 2019 through June 30, 2019 shall be appealable by the Owner under G.L. c. 59 §65. For each fiscal year commencing on or after July 1, 2019 the Property will be assessed *ad valorem* real estate taxes in accordance with G.L. c. 59.
11. Deferred City Balance: The Deferred City Balance resulting after the distribution of proceeds of the Refinancing under Paragraph 7 shall be evidenced by a Promissory Note in the form of Exhibit B (the "Deferred City Balance Note") bearing interest at the rate of 3% per annum compounded annually. Principal and interest payments of the Deferred City Balance shall be payable from available cash flow and the proceeds of future additional financings or refinancings in accordance with the terms of

the Deferred City Balance Note, and any outstanding balance shall be due and payable on the maturity date of the Deferred City Balance Note thirty (30) years from the Effective Date.

12. Lien for Deferred City Balance: The City shall have a lien under, or in the manner of G.L. c. 60 §37 as to any amount of principal or interest due under the Deferred City Balance Note, except that the lien shall not terminate or expire, provisions of G.L. c. 60 notwithstanding. The City shall make no tax title taking under G.L. c. 60 §37 until after the maturity date of the Deferred City Balance Note.
13. Subordination of Lien: In connection with the Refinancing the City agrees to subordinate its lien under G.L. c. 60 §57 with respect to the Accrued City Balance and to execute in favor of Owner's lender or lenders an instrument of subordination to any mortgage or mortgages and ancillary loan and security documents required of Owner for the Refinancing in form satisfactory to City and Owner's lender or lenders. The City's subordination agreement shall be delivered at the time of the closing of the Refinancing, but delivery and recording shall be conditioned upon the payments required by this Restated Agreement and execution and delivery of:
  - i. Effective Date Acknowledgement Agreement;
  - ii. Deferred City Balance Note; and
  - iii. A recorded copy of the Affordability Agreement.
14. Further Subordination: The City agrees that it will from time to time further subordinate the lien under G.L. c. 60 §57 securing the Deferred City Balance outstanding from time to time in connection with and for the facilitation of future financings whether additional financings or replacement or modifications of financings of the Property, provided, however that:
  - i. At the time of such subsequent financing or refinancing the aggregate loan to value ratio of all loans secured by the

Property including without limitation the Deferred City Balance shall not exceed 90% unless a higher amount is approved by the City; and

- ii. the time for repayment of any monies borrowed in any such subsequent financing or refinancing shall not extend beyond the Maturity Date of the Deferred City Balance Note.
- iii. In connection with such subsequent financing or refinancing the Owner will pay to the City at the time of such financing or refinancing:

(a) with respect to a refinancing the lesser of (x) 50% of the proceeds of such subsequent refinancing after repayment of Owner's then existing mortgage, transaction costs and contributions to required reserves; provided, however that for purposes of this clause the total of such transaction costs and contributions to required reserves shall not exceed five (5%) percent of the total loan proceeds or (y) 100% of the proceeds of such subsequent refinancing after repayment of Owner's then existing mortgage, and all of the Owner's transaction costs and contributions to required reserves; or

(b) with respect to subsequent financing the lesser of (x) 50% of the proceeds of any subsequent financing after payment of transaction costs and contributions to required reserves; provided, however, that for purposes of this clause the total of such transaction costs and contributions to required reserves shall not exceed five (5%) percent of the total loan proceeds or (y) 100% of the proceeds of such subsequent refinancing after payment of all of the Owner's transaction costs and contributions to required reserves .

Payments received by the City under Paragraph 14.iii.a. or b. above will be applied against any then outstanding principal balance of the Deferred City Balance.

15. Arbitration: Except for those disputes over which the Appellate Tax Board has jurisdiction, all other disputes between the Owner and the City as to matters or amounts of payments due or accrued arising under this Restated Agreement including without limitation any dispute as to the amounts of payments due under Paragraph 9 or under the Deferred City Balance Note from available cash flow or distributions from the proceeds of additional financings or refinancings in accordance with Paragraph 14 or upon maturity of the Deferred City Balance Note shall be subject to arbitration at the choice of either party. Such arbitrations shall be subject to the provisions of G.L. c. 251, and shall be in accordance with the provisions, then in effect, of the Standard form of Arbitration Procedure of the American Arbitration Association except that the arbitration shall, upon request of either party not be under the auspices of the American Arbitration Association. If a party wishes to have any dispute arbitrated, and either party requests that the arbitration not be under the auspices of the American Arbitration Association the party seeking arbitration shall appoint one arbitrator being a person experienced in real estate in Greater Boston, and the party against whom arbitration is sought shall likewise name a second arbitrator with a comparable experience. The two arbitrators so named shall pick a third, and the three arbitrators so named shall constitute a panel for the arbitration. This agreement to arbitrate shall be specifically enforceable in any court of competent jurisdiction within the Commonwealth of Massachusetts and judgment upon the award rendered may be entered in such court. The costs of any arbitration undertaken pursuant to this Restated Agreement shall be borne equally by the Owner and the City.
16. Representations: The City represents:

- i. The City has been authorized by all necessary action of its charter and ordinances to execute and fulfill the City's obligations under this Restated Agreement;
- ii. The persons executing this Restated Agreement as the Mayor and a majority of the Board of Assessors are duly appointed and authorized by the City's charter and ordinances to execute and fulfill the obligations of the City under this Restated Agreement.

The Owner represents:

- i. The Owner is a duly organized and validly existing Massachusetts limited partnership with power and authority to enter into this Restated Agreement;
- ii. The person executing this Restated Agreement as general partner of the Owner is duly authorized by the Owner's organizing documents to execute this Restated Agreement and cause the Owner to be bound by the terms hereof.

17. Parties Bound; Successors and Assigns: The provisions of this Restated Agreement shall be binding upon and inure to the benefit of the City and the Owner and the successors and assigns of the Owner, provided that the obligation to pay the Deferred City Balance Note shall in any case be subordinated and shall not apply to (i) the lender holding the first mortgage arising from the Refinancing or (ii) any future first mortgagee providing replacement financing for the Refinancing, and upon any foreclosure of such first mortgage or replacement mortgage the foreclosing mortgagee shall not be obligated to pay the balance of the Deferred City Balance Note. The Owner shall require as a condition of any subsequent sale of the Property that any purchaser of the Property assume all of the obligations of the Owner outstanding as of the time of such sale, including the obligations of this Restated Agreement, the Affordability Agreement, and the obligation to pay the Deferred City Balance Note. No officer or employee of the City and no general or limited partner of the Owner shall be personally obligated

or have any personal liability under the terms of this Restated Agreement and recourse of the Owner shall be solely against the City of Newton and recourse of the City shall be solely against the assets of the Owner.

18. Severability. If any provision of this Restated Agreement shall for any reason be held invalid or unenforceable, such invalidity or unenforceability shall not affect any other provision hereof, but this Restated Agreement shall be construed as if such invalid or unenforceable provision had never been contained herein.
19. No Waiver: Rights Cumulative. No failure or delay on the part of either party in exercising any right, remedy, power or privilege hereunder shall operate as a waiver thereof or of any other right, remedy, power or privilege hereunder nor shall any single or partial exercise of any such right, remedy, power or privilege preclude any other or further exercise thereof or of any other right, remedy, power or privilege. No modification or waiver of any provisions of this Restated Agreement shall be effective unless the same shall be in writing and executed by both the City and the Owner.
20. Governing Law. This Restated Agreement shall be deemed to be a contract under the laws of and shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts.
21. Notices. Any notice, request, demand or other communication hereunder shall be given in writing by delivering the same in person to the intended addressee, by overnight courier service with guaranteed next day delivery or by certified United States Mail, postage prepaid sent to the intended addressee at the applicable address set forth on Page 1 hereof or to such different address as either party shall have designated by written notice to the other sent in accordance herewith. Copies of all notices to the City shall be sent to City Solicitor, City of Newton 1000 Commonwealth Avenue, Newton, MA 02459, and to Owner shall also be sent to Alan J. Schlesinger Schlesinger and Buchbinder, LLP 1200 Walnut Street Newton, MA 02461 however, that the inadvertent failure of either party to provide copies of



notices to designated counsel shall not render ineffective notices otherwise given validly. Such notices shall be deemed given when received or, in the case of delivery by courier service with guaranteed next day delivery, the next day or the day designated for delivery, or in the case of delivery by certified United States mail, two days after deposit therein.

*[signatures on following page]*

Executed as of the date first set forth above.

**NEW FALLS ASSOCIATES  
LIMITED PARTNERSHIP**

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

*AS General Partner A.U.P*

*NOT INDIVIDUALLY*

**CITY OF NEWTON**

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

David B. Cohen  
Mayor

ASSENTED TO:  
A MAJORITY OF THE BOARD OF  
ASSESSORS:

*Elizabeth Dromey*  
\_\_\_\_\_  
Assessor

*Michael Flynn*  
\_\_\_\_\_  
Assessor

\_\_\_\_\_  
Assessor

**EXHIBITS**

- Exhibit A     Effective Date Acknowledgement  
                         Agreement
- Exhibit B     Deferred City Balance Note
- Exhibit C     Affordability Agreement

Exhibit A

**Effective Date Acknowledgement Agreement**

The undersigned are the parties to a certain Amended and Restated Agreement Under Section 6A of Chapter 121A of the General Laws dated \_\_\_\_\_, 20 (the "Restated Agreement") to an Agreement Under Section 6A of Chapter 121A of the General Laws originally made as of November 14, 1978.

In accordance with the provisions of the Restated Agreement the Owner and the City agree:

1. The Effective Date of the Restated Agreement is \_\_\_\_\_, 20 .
2. The Deferred City Balance as of the Effective Date is \$ \_\_\_\_\_.

Executed as of the \_\_\_\_\_ day of \_\_\_\_\_, 20

**NEW FALLS ASSOCIATES  
LIMITED PARTNERSHIP**

**CITY OF NEWTON**

By: \_\_\_\_\_  
General Partner

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

ASSENTED TO:  
A MAJORITY OF THE BOARD OF  
ASSESSORS:

\_\_\_\_\_  
Assessor

\_\_\_\_\_  
Assessor

\_\_\_\_\_  
Assessor

Exhibit B

**PROMISSORY NOTE  
DEFERRED CITY BALANCE NOTE**

\$ (Deferred City Balance Amount) Dated: , 20

**FOR VALUE RECEIVED**, and as contemplated and provided for in a certain Amended and Restated Agreement Under Section 6A of Chapter 121A of the General Laws dated , 2009 (the "Restated Agreement") amending and restating an Agreement Under Section 6A of Chapter 121A of the General Laws dated November 13, 1978, **NEW FALLS ASSOCIATES LIMITED PARTNERSHIP**, a limited partnership organized pursuant to the provisions of Chapter 109 of the General Laws of the Commonwealth of Massachusetts having an address c/o The Barkan Companies 24 Farnsworth Street, Boston, Massachusetts 02210 (the "Maker") promises to pay to **CITY OF NEWTON**, a municipal corporation of the Commonwealth of Massachusetts having an address at 1000 Commonwealth Avenue, Newton, Massachusetts 02459 (the "Holder") or order, the principal sum of (Deferred City Balance Amount) Dollars in or within thirty (30) years from the date hereof (the "Maturity Date") together with interest at the rate of three (3.00%) percent per annum compounded annually.

The entire balance of principal and interest hereunder shall be due and payable on the Maturity Date. Maker shall have the right of prepayment of any part or all of its obligations at any time hereunder without premium or penalty, and in the event of such prepayment interest charges shall be applied only to the outstanding balance hereunder.

The Maker shall make payments of principal under this note as follows:

- (i) Surplus Cash Payments: In or with respect to any year in which (i) the Maker has "surplus cash" as such term may be defined by the U.S. Department of Housing and Urban Development from time to time and as shown on financial statements provided to the Holder pursuant to Section 9 of the Restated Contract whether referred to as "surplus cash" or "net cash flow" or "cash flow after debt service" (however so shown or labeled referred to herein as "surplus cash"), and
- (ii) the Maker is entitled to distribute the surplus cash to the Maker's general and limited partners as a cash distribution of income under the regulations governing the Maker's first mortgage financing, the Maker shall pay to the Holder as a

payment on account of and in reduction of the principal balance hereunder 33 % of the surplus cash otherwise distributable to the Maker.

(ii) Proceeds of Refinancing. In the event that the Maker shall obtain any replacement or additional financing under conditions permitted by the Restated Contract, the Maker shall pay to the Holder, as a payment against the principal hereunder

(a) for any replacement financing, the lesser of (x) 50% of the loan proceeds of such replacement refinancing after repayment of Owner's then existing mortgage, transaction costs and contributions to required reserves, provided however, that for purposes of this clause the total of such transaction costs and contributions to required reserves being no greater than five (5%) percent of the total loan proceeds; or (y) 100% of the proceeds of such subsequent refinancing after repayment of Owner's then existing mortgage, and all of the Owner's transaction costs and contributions to required reserves;

(b) for any additional financing, the lesser of (x) 50% of the loan proceeds of such additional financing, transaction costs and contributions to required reserves, provided however that for purposes of this clause the total of such transaction costs and contributions to required reserves being no greater than five (5%) percent of the total loan proceeds; or (y) 100% of the proceeds of such subsequent refinancing after payment of all of the Owner's transaction costs and contributions to required reserves.

Payments to the Holder of proceeds of refinancing shall be a condition to the Holder's obligation to subordinate its lien under the Restated Contract.

Payments hereunder shall be made to the Holder at its address first above written or to such other addresses as the Holder from time to time may designate in writing.

The Maker represents:

- (i) it is a duly organized validly existing Massachusetts limited partnership with power, authority and legal right to execute this Promissory Note;
- (iii) the person executing this Note on behalf of the Maker has been duly authorized and has authority under the Maker's organizational documents to execute this Promissory Note.

Any of the following events shall constitute defaults hereunder:

- (i) The Maker shall fail to make any payment due hereunder within thirty (30) days of the date when due;
- (ii) The Maker shall have a receiver appointed for it which receivership shall not be terminated within thirty (30) days or shall enter into an agreement assigning assets for the benefit of creditors;
- (iii) Any representation made hereunder shall have been false when made or shall no longer be true while any balance of this Promissory Note is outstanding

No delay or omission on the part of the Holder in exercising any right hereunder shall operate as a waiver of such right or of any other right hereunder, nor shall any delay, omission or waiver on any one occasion be deemed a bar to or a waiver of any other right on any future occasion.

This Promissory Note shall be binding on the successors and assigns of the Maker. No general or limited partner of the Maker shall have any personal liability hereunder, but the Holder shall retain all of its rights against the assets of the Maker under this Promissory Note and the Restated Contract.

This Note shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts (without giving effect to the conflict of laws principles thereof). Any legal action or proceeding with respect to this Promissory Note shall be brought in the courts of the Commonwealth of Massachusetts or of the United States of America for the District of Massachusetts, and, by execution and delivery of this Promissory Note, the Maker hereby accepts for itself, and in respect of its property, generally and unconditionally, the jurisdiction of the aforesaid courts.

No provision hereof shall be modified, altered or limited except by a written instrument expressly referring to this Promissory Note and to such provision, and executed by the Maker and the Holder.

Executed as a sealed instrument as of the date first set forth above.

**NEW FALLS ASSOCIATES  
LIMITED PARTNERSHIP**

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

General Partner

\_\_\_\_\_  
Witness



Exhibit C

**AFFORDABILITY AGREEMENT**

This Affordability Agreement made this \_\_\_ day of \_\_\_\_\_ 2010 by and between **NEW FALLS ASSOCIATES LIMITED PARTNERSHIP**, a limited partnership organized pursuant to Chapter 109 of the General Laws of the Commonwealth of Massachusetts (the "Owner"), and the **CITY OF NEWTON**, a municipal corporation of the Commonwealth of Massachusetts (the "City").

**WHEREAS**, by deed from Newton Community Development Authority dated March 13, 1979 recorded with the Middlesex South Registry of Deeds at Book 13655 Page 272 and filed with the Land Court Registry District of Middlesex County with Certificate No.157480 in Land Registration Book 917 Page 130. Owner is the owner of a 60 unit mixed income development known as New Falls located at 2251 – 2311 Washington Street in Newton, Massachusetts 02462 ( the "Property");

**WHEREAS**, the Owner has entered into an Amended and Restated Agreement Under Section 6A of Chapter 121A of the General Laws dated \_\_\_\_\_, 20 (the "Restated Agreement") amending and restating an Agreement Under Section 6A of Chapter 121A of the General Laws dated November 13, 1978 (the "6A Agreement") between Owner and City in order to finance *inter alia*, major capital repairs at the Property and to pay a portion of the Owner's accrued obligations to the City;

**NOW, THEREFORE**, in consideration of \$1.00 and execution of the Restated Agreement, the receipt and sufficiency of which is acknowledged by the parties, the parties agree as follows:

1. Affordability. Owner covenants and agrees that for so long as project based or other funds for at least 41 units are available to the Property pursuant to Section 8 of the National Housing Act of 1937 ("Section 8"), or the Massachusetts Rental Voucher Program (MRVP) or a renewal of contract under the U.S. Department of Housing & Urban Development Mark-Up-To-Market procedures, or a successor state or federal program providing a comparable level of project based or other rental subsidy to the Owner to the subsidy programs in effect as of the last date on which a Section 8 or

comparable program shall have been available including provisions for reasonable rent increases over time (herein collectively referred to as an "Affordable Housing Program"), the Owner shall rent 41 apartments at the Property to families that meet the eligibility requirements established by such Affordable Housing Program. In the event that Owner receives notice that Owner's contract under Section 8 or other Affordable Housing Program has not been renewed, Owner shall continue to request and diligently seek continued Section 8 funding for such affordable dwelling units and accept project based or other assistance payments, or payments from a comparable successor project based or other Federal program or a comparable State program or other Affordable Housing Program, with respect to at least 41 units within the Property. Owner further agrees to notify City of any such non-renewal, update the City in a timely manner as to Owner's attempts at renewal or substitution of another Affordable Housing Program, and seek the City's support in obtaining such a renewal or substitution of another Affordable Housing Program, such that during the term of this Agreement at least 41 units within the Property are continuously rented to households meeting the eligibility standards of the available Affordable Housing Program. If at any time the maximum number of such comparable subsidies available to the Owner for units at the Property is less than 41, then the requirements of this paragraph shall apply to the number of units for which comparable subsidies are then available, subject to the provisions of this paragraph. Owner covenants and agrees that for any unit for which subsidy funding is discontinued, Owner shall be obligated to accept "traveling" vouchers or otherwise seek to obtain and/or qualify for comparable assistance under an Affordable Housing Program. If, however, Owner is unable at any time to obtain comparable funding from an Affordable Housing Program (including acceptance of "traveling vouchers") Owner may lease units for which there is no comparable funding from an Affordable Housing Program at market rates from time to time, and if the total number of affordable units at the Property is less than 41, Owner covenants and agrees to rent the next available market rate unit to a household for which subsidy is then available that meets the eligibility requirements established by the applicable Affordable Housing Program or otherwise by acceptance of traveling vouchers, until there are 41 affordable units at the Property; provided, however, that a discontinued unit for elderly tenants need only be replaced by a subsequently vacant unit

for elderly tenants, and a discontinued unit for family tenants need only be replaced by a subsequently vacant unit for family tenants..

3. Term. The term of this Affordability Agreement shall expire on December 31, 2038.

4. Binding Effect; Remedies. This Affordability Agreement shall run with the Property for the duration hereof. Owner agrees to incorporate by reference the terms of this Affordability Agreement in any deed or other legal instrument by which the Owner divests itself of any interest in all or a portion of the Property, including a leasehold interest. In light of the unique nature of the rights conveyed hereby, the City may enforce any violation of this Affordability Agreement by commencing an action in the Massachusetts Trial Court Superior Court Department and seeking specific performance of its terms and injunctive relief.

**IN WITNESS WHEREOF**, the parties have executed this document as an instrument under seal as of the day and year first set forth above.

**NEW FALLS ASSOCIATES  
LIMITED PARTNERSHIP**

**CITY OF NEWTON**

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

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

General Partner

Mayor  
As to legal form:

\_\_\_\_\_  
City Solicitor

**COMMONWEALTH OF MASSACHUSETTS**

SS

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me, the undersigned notary public, personally appeared \_\_\_\_\_ general partner of New Falls Associates Limited Partnership, proved to me through satisfactory evidence of identification which were \_\_\_\_\_, to be the person whose name is signed on the preceding or attached document and acknowledged to me that he/she signed it voluntarily for its stated purpose for and on behalf of New Falls Associates Limited Partnership

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

**COMMONWEALTH OF MASSACHUSETTS**

SS

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me, the undersigned notary public, personally appeared \_\_\_\_\_, Mayor of the City of Newton proved to me through satisfactory evidence of identification which were \_\_\_\_\_, to be the person whose name is signed on the preceding or attached document and acknowledged to me that he/she signed it voluntarily for its stated purpose for and on behalf of the City of Newton

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



Setti D. Warren  
Mayor

## ASSESSMENT ADMINISTRATION

Elizabeth Dromey, Director

**#412-09** Telephone  
(617) 796-1160  
Telefax  
(617) 796-1179  
tdd-tty  
(617) 796-1089  
Email  
assessing@newtonma.gov  
dromey@newtonma.gov

January 15, 2010

Leonard J. Gentile, Chair, Finance Committee  
Marcia T. Johnson, Chair, Zoning and Planning Committee  
Tabetha McCartney, Chair, Planning and Development Board  
1000 Commonwealth Avenue  
Newton, MA 02459

Re: New Falls Associates Limited Partnership (New Falls Associates)  
Agreement with City of Newton November 13, 2009 / Property location  
2251-2311 Washington Street, Newton Lower Falls / 42-32-18

Dear Finance Chair Gentile, Zoning and Planning Chair Johnson and Planning  
and Development Board Chair McCartney:

In 2007, representatives of New Falls Associates first approached the City of Newton to ask to renegotiate the Chapter 121A Section 6A agreement entered into by the City of Newton and New Falls Associates in 1978. That 1978 agreement, which was approved by the Board of Aldermen and the Planning Board pursuant to Chapter 121A Section 6A of the Massachusetts General Laws, exempted New Falls from real estate taxes because 41 of the 60 units at the property were to be maintained as affordable housing for 40 years, until 2018. Instead, New Falls would pay a state excise amount set forth in Chapter 121A that is returned to the City of Newton each year. The agreement also required an additional payment in lieu of tax ("PILOT") to be paid directly to the City, part of which could be deferred each year at 14% simple interest. At the time of the 1978 agreement, this special tax treatment was favorable to New Falls. By 1982, after Proposition 2 ½ was implemented, the payment in lieu of tax provisions of the agreement worked so that New Falls actually was required to pay and/or defer more than it would have paid if it had been taxed in the typical manner that other apartment buildings in the City were taxed. The amount deferred by New Falls and interest accrued through December 31, 2009 is almost \$5,000,000.

Representatives of New Falls informed the City that they were unable to refinance the property to perform deferred maintenance and capital improvements to the property because of the close to \$5,000,000 lien the City has on the property. They stated lenders were not willing to loan when there was that much debt on the property.



Leonard J. Gentile  
Marcia T. Johnson  
Tabetha McCartney  
January 15, 2010

After lengthy negotiations, an agreement was signed on November 13, 2009. Chapter 121A requires that this amendment to the original agreement be approved by both the Board of Aldermen and the Planning Board.

The agreement provides that the City will subordinate its lien behind a new mortgage so that New Falls can pay off its existing mortgage. With part of the proceeds of the new financing, New Falls (i) will pay more than half of the existing deferred taxes and accrued interest and (ii) agrees to perform capital improvements and maintenance to the property. In exchange for the subordination of the City's lien, the City, with language approved by the Planning Department, would receive extended affordability of 41 units at New Falls.

Members of the Assessing Department were involved in the payment in lieu of tax discussions. These discussions resulted in the agreement between the Mayor, the Newton Assessors and the owner of New Falls, the chief provisions of which will, on the Effective Date, which is the date on which refinancing closes:

- 1) require New Falls to pay down \$2,537,500 of the approximately \$5,000,000 deferred taxes and interest;
  
  - 2) extend the affordability of at least 41 units for thirty (30) years from the Effective Date. If the refinancing occurs as anticipated on or before June 30, 2010, this will extend the affordability provisions for an additional 22 years from 2018 (the end of the current affordability term) until 2040. Former Planning Director Michael Kruse approved the Affordability Agreement language (see Exhibit C).
- (Members of the Planning Department were involved in discussions involving extending the affordability of 41 of the 60 units at New Falls. In a separate communication, the Interim Planning Director will summarize the provisions of the Affordability Agreement.)
- 3) calculate the PILOT payments for the property the same way as taxes for other apartment buildings in the City are calculated. This will achieve equitable tax treatment for the property. See attached spreadsheet. In addition, PILOT payments will no longer be able to be deferred.



Leonard J. Gentile  
Marcia T. Johnson  
Tabetha McCartney  
January 15, 2010

- 4) roll the remaining deferred balance into a note bearing 3% compound interest per annum payable in thirty (30) years. At the end of the 30 year term, the Assessors have calculated that New Falls will owe approximately \$6,000,000.
- 5) require New Falls to devote \$1,500,000 of the refinancing proceeds to pay for capital improvements and maintenance to the property.
- 6) distribute \$50,000 of the refinancing proceeds to the owner of New Falls.
- 7) distribute any balance of the proceeds of the refinancing in the following proportions:
  - a. 40% to the City as an additional payment toward and on account of the Accrued City balance.
  - b. 40% to the owner designated for costs of capital maintenance and improvements to the property; and
  - c. 20% as a distribution to the owner.
- 8) provide a mechanism for subordination of the City's lien to future financing and refinancing if the following requirements are met:
  - a. the aggregate loan to value ratio of all loans secured by the property including the deferred City balance shall not exceed 90% unless a higher amount is approved by the City; and
  - b. the time for repayment of any monies borrowed in any such subsequent financing or refinancing shall not extend beyond the maturity date of the deferred City balance note;
  - c. at the time of such subsequent financing or refinancing the owner will pay the City the lesser of (x) 50% of the proceeds of such subsequent refinancing after repayment of owner's then existing mortgage, transaction costs and contributions to required reserves which shall not exceed 5% of the total loan



Leonard J. Gentile  
Marcia T. Johnson  
Tabetha McCartney  
January 15, 2010

proceeds or (y) 100% of the proceeds of such subsequent financing or refinancing after payment of all of the owner's transaction costs and contributions to required reserves. Payments received by the City from proceeds from a subsequent financing or refinancing shall be applied against any then outstanding principal balance of the deferred City balance.

The public hearing on this matter is scheduled for January 25, 2010. If you have questions on the payment in lieu of tax piece of this agreement, please let me know.

Sincerely,



Elizabeth Dromey

Director of Assessment Administration

cc: Mayor Setti D. Warren  
Robert R. Rooney, Chief Operating Officer  
Members of the Finance Committee  
Members of the Zoning and Planning Committee  
Members of the Planning Board  
Eileen McGettigan, Esq.  
Candace Havens, Interim Planning Director  
Trisha Kenyon Guditz, Housing Program Manager



COMPARISON OF NEW FALLS TAXES AND CPA SURCHARGE UNDER EXISTING CHAPTER 121A AGREEMENT WITH TAXES AND CPA SURCHARGE OF OTHER APARTMENTS IN NEWTON AND COMPARISON WITH AD VALOREM TAXES UNDER NEW AGREEMENT

APARTMENT BUILDINGS ASSESSED AD VALOREM	UNITS	FY2010 ASSESSMENT	FY2010 RE TAXES + 1% CPA SURCHARGE	TAXES AND 1% CPA PER UNIT	MEDIAN TAXES & 1% CPA PER UNIT
129 North Street	88	\$9,968,900	\$104,814.01	\$1,191.07	
151 Concord Street	30	\$3,775,800	\$39,699.14	\$1,323.30	
264 Grove Street	126	\$15,948,900	\$167,688.33	\$1,330.86	
181 Lexington Street	30	\$3,842,600	\$40,401.48	\$1,346.72	
2340 Commonwealth Ave	59	\$7,598,800	\$79,894.54	\$1,354.14	
128 North Street	44	\$5,672,200	\$59,638.08	\$1,355.41	
77 Beaconwood Road	21	\$2,708,000	\$28,472.18	\$1,355.82	
483 Centre Street	35	\$4,852,000	\$51,014.41	\$1,457.55	<b>MEDIAN \$1,457.55</b>
155 Lexington Street	52	\$7,252,200	\$76,250.36	\$1,466.35	
2300 Commonwealth Ave	54	\$8,065,400	\$84,800.42	\$1,570.38	
230 Walnut Street	46	\$7,208,400	\$75,789.84	\$1,647.61	
109 Needham Street	294	\$49,120,700	\$516,459.95	\$1,756.67	
457 Centre Street	22	\$3,700,900	\$38,911.63	\$1,768.71	
1938 Washington Street	180	\$37,551,000	\$394,814.97	\$2,193.42	
160 Boylston Street	204	\$43,327,800	\$455,552.82	\$2,233.10	

EXISTING 121A METHOD	UNITS	GROSS AMOUNT DUE	EXCISE DUE TO STATE THAT COMES TO NEWTON	AMOUNT DUE TO NEWTON (GROSS - EXCISE)	AMOUNT PAID DIRECTLY TO NEWTON (10.5% - EXCISE) FERRED
New Falls	60				
2251-2311 Washington Street					
20.5% OF NET RENTAL REVENUE		\$191,998.29	\$42,420.00	\$149,578.29	\$55,920.59
PAYMENTS MADE EXCISE & DIRECT		\$98,340.59			
		<b>TAX PAID &amp; 1% CPA PER UNIT</b>		<b>WITH DEFERRED AMOUNT INCLUDED TAXES &amp; 1% CPA / UNIT</b>	
					<b>\$3,199.97</b>

AD VALOREM TAXES UNDER NEW AGREEMENT	UNITS	ASSESSMENT	TAXES + 1% CPA	TAXES+CPA/UNIT
New Falls	60	\$8,066,000	\$84,806.73	<b>\$1,413.45</b>





CITY OF NEWTON, MASSACHUSETTS

Department of Planning and Development

Setti D. Warren  
Mayor

Telephone  
(617)-796-1120

TDD/TTY  
(617) 796-1089

Telefax  
(617) 796-1142

TO JAN 21 PM 3:05  
CITY CLERK  
NEWTON, MA. 02159

January 21, 2010

Leonard J. Gentile, Chairman, Finance Committee  
Marcia T. Johnson, Chairman, Zoning and Planning Committee  
Tabetha McCartney, Chairman, Planning Board  
1000 Commonwealth Avenue  
Newton, MA 02459

Re: Affordability Agreement for New Falls Apartments under the Amended and Restated Agreement under Section 6A of Chapter 121A of the General Laws

Dear Finance Chairman Gentile, Zoning and Planning Chairman Johnson and Planning Board Chairman McCartney:

The genesis of the New Falls development located at 2251-2311 Washington Street is the Newton Redevelopment Authority's 1969 *Urban Renewal Plan for the Lower Falls Urban Renewal Project*. One of the objectives identified in the plan was the development of 60 apartments of which at least 20 would be reserved for rental housing for low-income elderly. In 1977, the Newton Board of Aldermen authorized the Newton Redevelopment Authority and New Falls Associates to set-aside no more than 41 units, including 20 for the elderly, for households receiving Section 8 rental subsidies. The Board Order specified that 19 of the 60 total units would be market rate.

The terms of the Affordability Agreement extends the term of affordability for 41 units (20 one-bedroom units for the elderly and persons with disabilities and 21 two-four bedroom units for families) an additional 22 years from 2018 to 2040 if rental subsidies remain available through the Section 8 Housing Choice Voucher Program or a comparable successor rental subsidy program approved by the City. Under the Section 8 Housing Choice Voucher Program, eligible tenants' annual gross household income cannot exceed 50 percent of area median income. In Newton, this is \$31,550 for a one-person household and \$45,100 for a four-person household. The Amended and Restated Agreement will also enable the owners to refinance the property so that they can capitalize the improvements needed to ensure a suitable quality of life for New Falls residents.

The Planning Department supports the provisions of the proposed Affordability Agreement which, when authorized, will secure 41 units of housing for low-income households including the most economically vulnerable in the community—the elderly and persons with disabilities.

Sincerely,  
  
Candace Havens  
Interim Planning Director

#412-09



SETTI D. WARREN  
MAYOR

City of Newton, Massachusetts  
Office of the Mayor

Telephone  
(617) 796-1100

Facsimile  
(617) 796-1113

TDD/TTY  
(617) 796-1089

E-mail  
swar@newtonma.gov

10 JAN 22 AM 9:24  
CITY CLERK  
NEWTON, MA. 02159

January 22, 2010

Honorable Members of the Board of Aldermen and Planning Board:

I write to express my full support of the Amended and Restated Agreement under Section 6A of Chapter 121A of the General Laws between New Falls Associates Limited Partnership ("New Falls") and the City of Newton. The Amended Agreement extends the period of affordability for 41 elderly and family rental units, collects over \$2.5 million in deferred taxes, and allows New Falls to refinance its existing debt in order to undertake needed renovations to the units. It is my understanding that the parties involved have been negotiating this agreement for over two years.

Under the original agreement, New Falls would have been able to rent the 41 affordable units at market rate rents in 2018. The Amended Agreement provides an additional 22 years of affordability for these elderly and family units, through 2040. Newton has a critical need for affordable housing. New Falls' request to renegotiate its original 121A agreement presented an excellent opportunity to preserve these existing units, while insuring that they are maintained in good condition by allowing New Falls to make necessary capital improvements.

In addition, the City will receive a lump sum payment of \$2,537,500, over half of New Falls' deferred tax liability. The Amended Agreement also puts an end to tax deferrals, so that New Falls will be taxed going forward on a par with other rental developments in the City.

I ask that you give careful consideration to the materials submitted by the Assessing and Planning Departments and join me in supporting the Amended Agreement.

Very truly yours,

  
Setti D. Warren

1000 Commonwealth Avenue Newton, Massachusetts 02459

www.newtonma.gov



DEDICATED TO COMMUNITY EXCELLENCE

SCHLESINGER AND BUCHBINDER, LLP  
ATTORNEYS AT LAW  
1200 WALNUT STREET  
NEWTON, MASSACHUSETTS 02461-1267

STEPHEN J. BUCHBINDER  
ALAN J. SCHLESINGER  
LEONARD M. DAVIDSON  
LORI YARVIS  
KRISTINE H.P. HUNG  
FRANKLIN J. SCHWARZER

TELEPHONE (617) 965-3500  
FACSIMILE (617) 965-6824

OF COUNSEL  
HEATHER G. MERRILL

January 15, 2010

Leonard J. Gentile, Chairman Finance Committee  
Marcia T. Johnson, Chairman, Zoning and Planning Committee  
Tabetha McCartney, Chairman, Planning and Development Board  
City of Newton  
Board of Aldermen  
1000 Commonwealth Avenue  
Newton, MA 02459

10 JAN 15 AM 10:01  
CITY CLERK  
NEWTON, MA 02159

Re: New Falls Associates Limited Partnership (New Falls Associates) Agreement with City of Newton November 13, 2009

Dear Alderman Gentile, Alderman Johnson and Chairman McCartney:

In anticipation of the January 25, 2010 joint hearing of the Finance Committee, the Zoning and Planning Committee and the Planning Board this letter is intended to summarize the background of the real estate tax status of the New Falls Apartments in Newton Lower Falls as well as the Amended and Restated Agreement entered into between New Falls Associates Limited Partnership and the City of Newton on November 13, 2009. Under G.L. c. 121A Section 6A the Amended and Restated Agreement is subject to approval of the Planning Board and of the Board of Aldermen.

Background

New Falls was approved in 1978 at a time of rapidly increasing tax rates. Affordable housing finance agencies (HUD and MHFA) required all new projects to have both a G.L. c. 121A exemption from *ad valorem* real estate taxes and an agreement for payments in lieu of taxes. New Falls Associates entered into the required agreement with the City of Newton in 1978. That original agreement called for payments of (i) the statutory Chapter 121A excise tax to the State (which is passed back to the City on the "cherry sheet") and (ii) an additional annual payment in lieu of taxes to the City. The agreement further provided that New Falls Associates was permitted to defer that portion of the City payment in excess of 10.5% of gross collected rental if HUD did not provide

SCHLESINGER AND BUCHBINDER, LLP

Leonard F. Gentile  
Marcia T. Johnson  
Tabetha McCartney  
January 15, 2010

funding for it -- and HUD has never provided funding for that excess. The deferral was specifically structured to continue until 2020 and bears interest at 14% per annum.

Status

In each year since initial occupancy in 1980 New Falls Associates has paid the excise tax to the State plus an additional amount to the City and the remainder was deferred. For every year since about 1982 the total of the payments to the City have exceeded what would have been the *ad valorem* rate. Although fully occupied and prudently operated the project has not in 30 years generated any cash flow for the partners. The deferred amount and the accruals on it have been calculated to be \$4,992,438.47 as of December 31, 2009, and by 2020 the amount deferred with interest accrued is estimated to exceed \$10,000,000.00. In the meantime, through Proposition 2 1/2 and property classification laws the *ad valorem* taxes which would have applied to the project in the absence of Chapter 121A would actually have been *lower* than the actual payments and accruals to the City. New Falls Associates' payments under Chapter 121A, originally intended to aid and promote affordable housing have become significantly higher than *ad valorem* taxes, creating a fundamental unfairness to this affordable housing project. For nearly thirty years New Falls Associates has been making annual tax payments in excess of *ad valorem* taxes while also accruing deferred taxes of nearly \$5,000,000.00.

The deferred tax amount is a continuing lien against the property which prevents the owner from refinancing the property. In addition the operating budget, constrained by the tax payments has forced the deferral of many capital repairs, so that the property has significant unfunded capital requirements which are growing.

New Falls Associates has forecast that by 2020 the projected tax accruals will likely exceed the value of the property and that the regulatory agreement ensuring affordability of 41 units will expire at that time.

Negotiations and Proposal

Beginning in 2007 New Falls Associates and the City have been seeking a solution which would (i) provide for repayment of the deferred and accrued debt in full, (ii) allow the project to obtain financing for necessary capital improvements and repairs, (iii) place the project to be on a sound financial footing going forward, and (iv) extend the period of affordability for the residents. The Agreement of November 13, 2009 achieves those goals.

Summary of Proposal

We will be pleased to discuss with the Committees or with individual Aldermen the specific provisions of the Amended and Restated Agreement. To summarize its major concepts:

SCHLESINGER AND BUCHBINDER, LLP

Leonard F. Gentile  
Marcia T. Johnson  
Tabetha McCartney  
January 15, 2010

1. If the Agreement receives timely approval by the Aldermen, New Falls Associates will immediately seek to refinance the project based upon a "mark-up to market" Section 8 contract which will support a larger mortgage than the current mortgage, while keeping rents affordable to the tenants. New Falls Associates hopes to complete that financing by June 30, 2010. After payoff of the current mortgage and transaction costs we expect net proceeds of approximately \$4,000,000.00 from the refinancing.

2. \$2,537,500.00 of the net proceeds will be paid to the City to reduce the deferred balance now owed which will leave a balance due to the City of approximately \$2,500,000.00. \$1,500,000.00 of the net proceeds of refinancing are designated for costs of capital maintenance and necessary improvements to the Property.

3. The balance of the accrual due to the City will accrue future interest at the rate of 3% per annum and be paid by a sharing of future cash flow with any unpaid balance due at the end of 30 year affordability period.

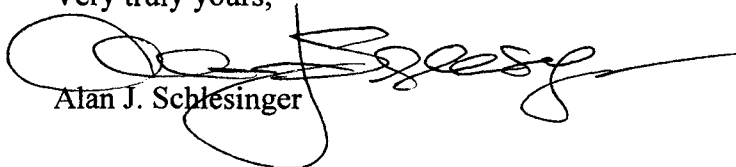
4. Tax payments to the City going forward from the date of the refinancing will be calculated in the same manner as *ad valorem* taxes although technically still paid under Chapter 121A until the 121A expires in 2018.

5. The period of affordability will be extended for 30 years from the refinancing date.

The Amended and Restated Agreement contains other provisions including those for the sharing of excess refinancing proceeds, the possibility of additional or replacement financings and appeals of tax valuations which we can review with the Committees in whatever detail you may wish.

I understand you will be receiving supplementary materials from the Assessing and Planning Departments. We look forward to seeing you on January 25.

Very truly yours,

  
Alan J. Schlesinger

AJS/kcb

cc: Members of the Finance Committee  
Members of the Zoning and Planning Committee  
Members of the Planning and Development Board

10 JAN 15 AM 10:02  
CITY OF NEW FALLS  
MICHIGAN