

L5091

COMMUNITY PRESERVATION FUNDING AGREEMENT

PARTIES: NEWTON HOUSING AUTHORITY
THE CITY OF NEWTON

PROPERTY: 52-54 WYMAN STREET

This AGREEMENT made as of June 29, 2005 by and between Newton Housing Authority, a public body politic and corporate, created pursuant to Chapter 479 of the Acts of 1982, having a usual place of business at 82 Lincoln Street Newton, Massachusetts 02461 (hereinafter "NHA") and the City of Newton, a corporation organized and existing under the laws of the Commonwealth of Massachusetts, acting by and through its Director of Planning and Development or his designated staff, but without personal liability to him, (hereinafter the "City"), collectively, the "parties."

WITNESSETH THAT:

WHEREAS, on December 9, 2004, NHA acquired a parcel of land improved with an existing ten-unit apartment building, located at 52-54 Wyman Street, in that part of Newton known as Waban (hereinafter "the Property"), which NHA uses as ten (10) affordable rental housing units for income-qualified households; and

WHEREAS, NHA applied to City for Community Preservation funding, which was approved by the Community Preservation Committee and Board of Aldermen, as described in order #32-05 of the Board of Aldermen, dated April 19, 2005 ; and

WHEREAS, the terms of such order (including those terms incorporated from the referenced CPC's Recommendation, as revised, dated April 19, 2005) call for a deferred forgivable loan in the amount of \$1,000,000 for the creation and support of the affordable housing units at the Property; and

WHEREAS, such terms call for NHA to execute an affordable housing restriction (hereinafter the "Covenant") which will permanently require that the Property be used as affordable housing for occupancy by qualifying households, and NHA has agreed to execute such Covenant; and

WHEREAS, NHA will also execute a Note and a Mortgage securing such Note;

NOW THEREFORE, the parties do mutually agree to the following General Provisions:

****GENERAL PROVISIONS****

1. **Subject matter.** This Agreement sets forth the terms and conditions whereby NHA shall receive funding from the City in the amount of one million dollars (\$1,000,000), subject to the terms of the Declaration of Affordable Housing Covenants ("Covenant") of even date, which is attached and incorporated as part of this Funding Agreement (Exhibit C).

2. **Use of funds.** The funds shall be used to reduce the existing outstanding balance of an existing loan from Village Bank, dated December 15, 2005, which is secured by a mortgage recorded at Middlesex South Registry of Deeds at Book 44305 Page 308.
3. **Conditions Prior to Receipt of Funds.** NHA agrees to the following conditions prior to receipt of funds:
 - (a) The Department of Housing and Community Development shall have issued its written approval of the Covenant, in recordable form, pursuant to G.L. c. 184 §32. If DHCD does not approve the Covenant, NHA agrees to execute a form of affordable housing restriction acceptable to DHCD, Grantor, and Grantee which shall satisfy the requirements of G.L. c. 184, §32 and shall be a perpetual restriction the terms of which shall preserve the Property's affordable housing rental units for qualifying households whose annual household income is at or below 50% of area median income, unless the City determines that state or federal rental subsidy programs such as Section 8 vouchers are not available, in which case, the City shall allow occupancy of the units by qualifying households whose annual household income is at or below 80% of area median income.
 - (b) The Grantee shall have executed and delivered to the City a Note evidencing the indebtedness and a Mortgage securing the obligations under this Agreement and the Note. The forms for the Note and the Mortgage are attached (Exhibits D and E, respectively) and incorporated as part of this Agreement.
4. **Closing/Payment of Funds and Reporting.**
 - (a) The parties agree to hold a closing within twenty (20) days of City's receipt of DHCD's written approval of the Covenant.
 - (b) At the closing, upon NHA's execution and delivery of the Note and Mortgage, the City shall issue and deliver a check in the amount of \$1,000,000, payable to the order of Newton Housing Authority AND Village Bank. Within seven (7) days of the City's delivery of the check to NHA, NHA shall deliver to the Planning Director a receipt from Village Bank evidencing receipt of the check and application of such funds to the existing loan.
5. **Recapture of Funds.** If NHA fails to comply with the requirements of this Agreement, the funds shall revert back to the City, and NHA shall be liable to repay the entire amount of the funding to the City. The City may take such steps as necessary, including legal action, to recapture such funds. In the alternative, at the sole option of the City, the City may elect to exercise its right pursuant to the Note executed herewith.
6. **Record Keeping.** NHA agrees to keep such records as are kept in the normal course of rental operations by a Massachusetts housing authority and as may be required by the City. The City shall have full and free access to such records with respect to utilization of the proceeds of this Agreement.

7. **Termination.** In the event NHA fails to fulfill all obligations under the terms of this Agreement, after the lapse of any applicable notice and/or cure period, as described in this Agreement or in any of the other loan documents referenced herein, including refusal to comply with the Covenant, the City shall have the right, in its sole discretion, to terminate this Agreement upon written notice to NHA. Upon such termination, the City shall be free to pursue any rights or remedies available at law or in equity, as well as any rights or remedies provided within the Note, Mortgage, or this Agreement, including without limitation, recapture of funds under paragraph 5.
8. **Compliance with Applicable Laws.** NHA shall comply with all applicable laws, ordinances, or codes of state and/or local governments, in the operation and maintenance of the Property.
9. **Monitoring.** The City shall periodically evaluate the performance of NHA and may make a determination as to whether NHA has conformed with this Agreement and has a continuing capacity to carry out the funded activities in the manner required pursuant to this Agreement. At any time during normal business hours and as often as the City may deem necessary, NHA shall make available all such records and documents as requested by said parties for audit and/or monitoring. The City may examine and make copies of such records and may audit all contracts, procurement records, invoices, materials, payrolls, personnel records, conditions of employment, and all documents relating to all matters covered by this Agreement.
10. **Successors and assigns.** The terms of this Agreement, including, but not limited to the Permanent Reporting Requirements in Paragraph 5, shall be binding on the NHA's successors and assigns. NHA shall promptly provide notice of any change in ownership of the Property to the City.
11. **Free from Encumbrances.** It is agreed and represented that the Property is free from any attachments, tax liens, mechanic liens or any other encumbrances, except as shown on Exhibit B attached hereto
12. **Indemnification.** NHA shall indemnify, hold harmless, and defend the City and its departments, officers, employees, servants, and agents from and against all actions, causes of actions, claims, demands, damages, costs, loss of services, expenses, and compensation, including attorneys' fees and interest arising out of or resulting directly from the services rendered pursuant to this Agreement, provided that any such action, cause of action, claim, demand, damage costs, loss of service, expense, compensation (1) in any way grows out of bodily injury, sickness, disease or death, or to injury to or destruction of tangible property which (2) is caused in whole or in part by any act or omission of the NHA, anyone directly or indirectly employed by NHA or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder.
13. **Notice.** Any notice, demand, request, consent, approval, communication either party is required to give to the other party or any person shall be in writing and either served

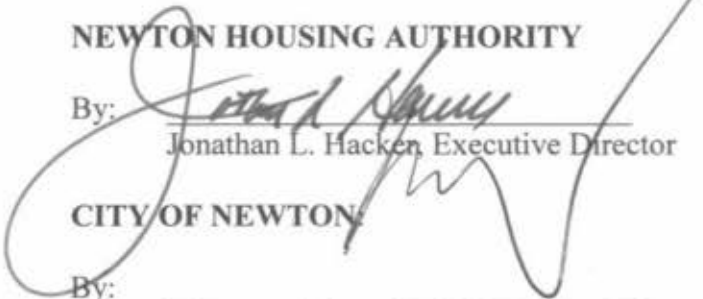
personally or sent by prepaid, first class mail to the respective addresses set forth below. Either party may change its address by notifying the other party of the change of address in writing.

To the City: Associate Director for Housing and Community Development
Planning and Development Department
City Hall
1000 Commonwealth Avenue
Newton Centre, MA 02459

To NHA: Executive Director
Newton Housing Authority
82 Lincoln Street
Newton Highlands, MA 02461

IN WITNESS WHEREOF the parties hereto have executed this Agreement in three sets to be effective when executed by the Mayor of the City of Newton.

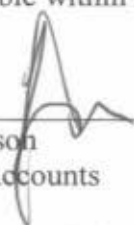
NEWTON HOUSING AUTHORITY

By: 
Jonathan L. Hacken, Executive Director

CITY OF NEWTON

By: _____
Director of Planning & Development


I certify funds are available within Acct. 21C11410-5797 in the amount of \$1,000,000 for this Agreement.

By: 
David C. Wilkinson
Comptroller of Accounts

Approved as to legal form and character

By: 
Assoc. City Solicitor

CONTRACT APPROVED

By: 
David B. Cohen, Mayor

7/27/05
Date

EXHIBIT A

[Newton Housing Authority's vote]

Extract from Newton Housing Authority Board of Commissioners meeting May 13, 2005.

Resolution #1641

On a motion by Commissioner Panaggio and seconded by Commissioner Turner the Board of Commissioners authorized Jonathan Hacker to execute any and all documents relating to CPC/City of Newton Funds for the pay down of our mortgage at 52-54 Wyman Street.

Voted: unanimous

A true copy

Attest:



Jonathan L. Hacker
Executive Director

EXHIBIT B

PERMITTED ENCUMBRANCES

1. Mortgage to Village Bank, dated December 15, 2004, recorded at Book 44305 Page 308.
2. Easements of record as of December 15, 2004.

EXHIBIT C

Declaration of Affordable Housing Covenants

DECLARATION OF AFFORDABLE HOUSING COVENANTS

Newton Housing Authority, a Massachusetts housing authority organized pursuant to chapter Chapter 479 of the Acts of 1982 with an address at 82 Lincoln Street Newton, MA 02461, and owner in fee simple of property now known and numbered as **52-54 Wyman Street**, Newton, Massachusetts, acting by and through its Director (the "Owner") hereby covenants and agrees for itself, its successors, heirs and assigns, that the parcel described in Exhibit A, attached hereto and incorporated herein, (hereinafter the "Property") shall be subject to the following restrictions for the benefit of the **City of Newton**, having a mailing address of Newton City Hall, 1000 Commonwealth Avenue, Newton Centre, Massachusetts, 02459 (the "City"), its successors and assigns.

The consideration for this Declaration of Affordable Housing Covenants is a deferred forgivable loan from Community Preservation funds to support the use of the Property as rental housing for low and moderate income households.

The terms of this Covenant authorized by Massachusetts General Laws, Chapter 184, §§26, 31-33 and otherwise by law, are as follows:

1. **Purpose.** The purpose of this Covenant is to ensure that the Property will be retained as affordable housing for occupancy by low and moderate-income households as defined by the U.S. Department of Housing & Urban Development (HUD). This Covenant is intended to be construed as an affordable housing restriction as defined in Section 31 of Chapter 184 of the Massachusetts General Laws which has the benefit of Section 32 of said Chapter 184.

2. **Covenants.** The Owner intends, declares and covenants on behalf of itself, its successors and assigns that these covenants, agreements, and restrictions are not merely personal covenants of the Owner and shall run with the land and shall bind the Owner, its successors and assigns and inure to the benefit of the City, and its successors and assigns.

3. **Term.** Both Owner and City intend that these covenants, agreements, and restrictions shall be in effect for perpetuity. The Owner acknowledges that the City intends to seek approval of the Commonwealth of Massachusetts, pursuant to General Laws, Chapter 184, Sections 31-33. The City of Newton is a governmental body as defined in G.L. c. 184, sec. 26.

4. **Owner's Warranties and Representations.** During the term of this Covenant as defined in paragraph 3, (hereinafter "affordability period") the Owner shall comply with the following requirements:

A. The Owner shall provide ten two-bedroom units at the Property which shall be rented at affordable rents as defined by the Federal Department of Housing and Urban Development. Each unit will comply with the following income and affordable rent requirements:

(i) Except as provided in subparagraph (iv), the units must be occupied by households with incomes that do not exceed 50% of the area median income for the Boston Metropolitan Statistical Area, adjusted for family size. The actual income limits are determined by HUD and published annually in the Federal Register.

(ii) Rent, including utilities, may not exceed 30% of the income of the renting household, except as may be permitted or required by a subsidy program with which the Owner or tenant participates, such as the Section 8 program.

- (iii) A tenant whose income met the income limits at the time of initial occupancy, but whose income eventually exceeds 50% of the area median income, may remain in the unit, provided that the rent is adjusted so that the "over-income" tenant is paying not less than 30% of their adjusted monthly gross income for rent and utilities. As soon as the "over-income" tenant vacates the Property, the Owner must re-rent the unit to an income-eligible household.
- (iv) In the event that the City determines that state and federal rental subsidy programs, such as Section 8 vouchers, are not available to prospective residents of the Property, the City may authorize occupancy of one or more of the units by households with incomes that do not exceed 80% of the area median income for the Boston Metropolitan Statistical Area, adjusted for family size. Such determinations may be made from time to time, upon request by the Owner. All such determinations on behalf of the City shall be made by the Director of Planning and Development, or such municipal officer or board as the mayor of the City may designate from time to time.

- B. The Owner represents warrants and covenants that the determination of whether a resident meets the income requirements set forth herein shall be made by Owner at the time of the leasing of the unit and thereafter at least annually on the basis of the current income of such resident. The Owner shall maintain as part of its records, copies of all leases governing the rental of the unit as may be executed throughout the affordability period and all initial and annual income certification(s) by the tenant(s) of the unit. At the request of the City, the Owner shall provide copies of records documenting the annual and monthly gross and adjusted income of each resident occupying the unit. For residents who have Section 8 certificates, the City may rely on the housing assistance payment contract from the applicable housing authority in lieu of income verification by the Owner. In addition to the foregoing, Owner shall keep such additional records and prepare and submit to the City such reports as the City may deem necessary to ensure compliance with the requirements of this Covenant, provided however that the required number of years for such record-keeping under this paragraph shall not exceed the number of years required of Owner for record-keeping of the same or similar records, in the course of its operations as a housing authority, by Massachusetts state statutes and/or regulations, and HUD rules and standards, whichever is greater.
- C. Prior to initial occupancy of the unit and annually thereafter, the Owner shall submit to the City a proposed schedule of monthly rent and monthly allowances for utilities and services for the unit.
- D. The Owner shall not mortgage, pledge, hypothecate, or demolish any part of the Property or substantially subtract from any real or personal property of the Property except in conjunction with renovation or rehabilitation of the Property, subject to the prior written consent of the City, which consent shall not be unreasonably withheld. The Owner shall not permit the use of the Property for any purpose other than housing for low and moderate income households.
- E. The Owner represents, warrants and agrees that if the Property, or any part thereof, shall be damaged or destroyed, the Owner will use its best efforts to repair and restore the Property to substantially the same condition as existed prior to the event causing such damage or

destruction, and the Owner represents, warrants and agrees that the Property shall thereafter continue to operate in accordance with the terms of this Covenant.

F. Any use of the Property or activity thereon which is inconsistent with the purpose of this Covenant is expressly prohibited.

5. **Condition of Property.** By its acceptance of this Covenant, the City does not undertake any liability or obligation relating to the condition of the Property.

6. **Instruments to Enforce Covenant.** The City is authorized to record or file any notices or instruments appropriate to ensuring the enforceability of this Covenant; and the Owner on behalf of itself and its successors and assigns appoints the City its attorney-in-fact to execute, acknowledge and deliver any such instruments on its behalf. Without limiting the foregoing, the Owner and its successors and assigns agree to execute any such instruments upon request. The Owner and the City intend that the restrictions arising hereunder take effect upon the date hereof, and to the extent enforceability by any person ever depends upon the approval of governmental officials, such approval when given shall relate back to the date hereof regardless of the date of actual approval or the date of filing or recording of any instrument evidencing such approval.

7. **Covenants to be Referenced in Deed.** These restrictive covenants shall be contained or referenced in any deed of conveyance of the subject Property or any other instruments conveying a non-leasehold interest in the Property or any part thereof and shall be equally binding on any subsequent owner of the title thereto whether acquired by grant, sale or any other means and such subsequent owner shall comply with this restriction for the remaining duration of said restriction.

8. **Notices.** All notices required under this Covenant shall be deemed to have been received if mailed, postage prepaid to the following:

For the City:

Director of Planning & Development
City Hall
1000 Commonwealth Avenue
Newton, MA 02459

For Owner:

Executive Director
Newton Housing Authority
82 Lincoln Street
Newton, MA 02459

9. **Enforcement.**

A. The rights hereby granted shall include the right of the City to enforce this Covenant by appropriate legal proceedings and to obtain injunctive and other equitable relief against any violations, including without limitation relief requiring restoration of the Property to its condition prior to any such violation (it being agreed that the City will have no adequate remedy at law), and such restoration shall be in addition to, and not in limitation of, any other rights and remedies available to the City. The Owner covenants and agrees to reimburse City all reasonable costs and expenses (including without limitation reasonable counsel fees) incurred in enforcing this Covenant or in taking reasonable measures to cure any violation hereof, provided that a violation of this Covenant is acknowledged by Owner or determined by a court of competent jurisdiction to have occurred.

B. Without limitation on any other rights or remedies of the City, its successors and assigns, the City shall be entitled to the following remedies, which shall be cumulative and not mutually exclusive:

- (i) specific performance of the provisions of this Covenant, which shall be the preferred remedy;
- (ii) voiding of any rental arrangement that violates this Covenant;
- (iii) in the case of any rental arrangement where the Owner is found to have violated willfully or in bad faith, then money damages for charges in excess of rents permissible under this Covenant;
- (iv) If any action is brought to enforce this Covenant, the prevailing party shall be entitled to reasonable attorneys' fees and other costs of bringing such action, in addition to any other relief or remedy to which such party may be entitled.

11. **Certificate.** Any party may rely on a certificate signed by the Owner and the City as to any facts relative to this Covenant.

12. **Governing Law.** This Covenant shall be governed by the laws of the Commonwealth of Massachusetts. Any amendments to this Covenant must be in writing and executed by all of the parties hereto. If any provision of this Covenant shall to any extent be held invalid, the remainder shall not be affected.

IN WITNESS WHEREOF the said **Newton Housing Authority**, has caused its corporate seal to be hereto affixed and these present to be signed, acknowledged and delivered in its name and behalf by its duly authorized Executive Director, this ____ day of _____ 2005.

Newton Housing Authority

By: _____ Date _____
Jonathan L. Hacker
Its: Executive Director

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. _____, 2005

On this ____ day of _____, 2005, before me, the undersigned notary public, personally appeared the above-named Jonathan L. Hacker, proved to me through satisfactory evidence of identification, which was _____, to be the person whose name is signed on the preceding document, and acknowledged to me that he signed it voluntarily for its stated purpose, as Director for **Newton Housing Authority**.

Notary Public
My Commission expires: _____

EXHIBIT A
PROPERTY DESCRIPTION

A certain parcel of land with the buildings thereon, as described in a deed from Waban Village LLC, Gerald E. Butterworth, Manager, to Newton Housing Authority, dated December 9, 2004 and recorded with Middlesex, South, Registry of Deeds at Book 44305 Page 302 (also see confirmatory deeds dated March 3, 2005 and March 14, 2005, recorded with said Registry at Book 44749 Page 301 and Book 44791 Page 515, respectively).

EXHIBIT D

Date: July __, 2005
Place: Newton, Massachusetts
Term: Ninety-Nine (99) Years

PROMISSORY NOTE

FOR VALUE RECEIVED, Newton Housing Authority (called the "Borrower"), promises to pay to the order of the City of Newton (called the "City"), the sum of one million dollars (\$1,000,000.00) and to pay simple interest on the unpaid principal amount of this Note (as hereinafter defined) at the rate of zero (0%) percent per annum until paid in full.

Deferral and Cancellation:

(a) Subject to the Declaration of Affordable Housing Covenants (called the "Restriction") attached hereto and made a part hereof, Borrower shall have no obligation to pay the principal, interest, or any other outstanding charges due hereunder for the term of this Note provided that:

- (1) Borrower maintains 10 units of the 10-unit property at 52-54 Wyman Street ("Property") as affordable rental housing as further described in the Restriction; and
- (2) Borrower complies with all terms and requirements as described in the Restriction and a certain Funding Agreement dated June __ 2005.

(b) So long as the Borrower has satisfied the terms of this Note, this Note shall be forgiven and this instrument cancelled at the expiration of the Term.

Security

This Promissory Note is secured by a Mortgage on real property located at 52-54 Wyman Street, Newton which Mortgage shall be recorded at the Middlesex South Registry of Deeds.

Events of Acceleration

Acceleration of this Note shall be triggered if any of the following events occur:

1. A transfer or change in ownership of the Property, without the City's prior written approval; or
2. Failure of Borrower to pay any tax or assessment when due or failure to comply with the requirement of every applicable statute, law, ordinance, regulation or order whether in effect on the date of this Note or hereafter enacted or made by any Federal, State, municipal, or other public body affecting the use or occupation of the Property.
3. Failure of Borrower to make payment on any loan or comply with any provision of a senior loan which is secured by the Property.

Attorney's Fees/Costs

If suit is instituted by the City to recover on this Note, the Borrower agrees to pay all costs of such collection, including reasonable attorneys' fee and court costs.

Notices

Borrower shall promptly notify City of the occurrence of any of the following: a fire or other casualty damage to the Property; receipt of notice of violation from any governmental authority relating to the use, structure or occupancy of the Property; receipt of notice of eminent domain proceedings or condemnation of the Property; any change in the use of the Property; commencement of any litigation affecting the Property, except for termination of tenancies and other litigation where amounts in dispute do not exceed \$25,000; any proposed transfer or change in the ownership of the Property; or receipt of notice of default on any prior lien.

City shall provide written notice to Borrower of any default hereunder and thereafter the Borrower shall have 60 days in which to cure such alleged default before the City shall become entitled to pursue any remedies hereunder. Such 60 day period may be extended upon evidence of Borrower's good faith efforts to take steps to cure such alleged default during such 60 day period.

Waiver

Notice of presentment, demand for payment, protest and notice of demand for payment and protest are hereby waived.

IN WITNESS WHEREOF, this Promissory Note has been duly executed by the undersigned.

Newton Housing Authority

Jonathan L. Hacker, Executive Director

Witness

EXHIBIT E

MORTGAGE

MORTGAGOR: Newton Housing Authority ("Owner")

MORTGAGEE: City of Newton ("City")

THE OBLIGATIONS: (1) To maintain a minimum of 10 units of affordable rental housing at the Property, for occupancy by qualified households that have annual household incomes at or below 50% of area median income, unless City, upon its determination that state and federal rental subsidy programs are not available to prospective residents of the Property, authorizes occupancy by qualified households that have annual household incomes at or below 80% of area median income; (2) to continue to own and operate the Property, or if the Property is to be transferred, to obtain the City's written approval of such transferee prior to the transfer of the Property; and (3) to satisfy all the obligations set forth in the Funding Agreement dated June ___, 2005, and Note of even date.

THE MORTGAGED PREMISES: (also, the "Property") 52-54 Wyman Street, Newton, more specifically described as follows:

A certain parcel of land, consisting of 23,939 square feet, with the buildings thereon, being shown as Lot 1A on "Plan of Land in Newton, Massachusetts at 54 - 54 & 68 - 70 Wyman Street," dated Nov. 12, 2004, by Wade T. Putnam, PLS, which plan is recorded with the Middlesex South Registry of Deeds ("Registry") as Plan # 1487 of 2004.

For title see deed from Waban Village LLC, Gerald E. Butterworth, Manager, to Newton Housing Authority, dated December 9, 2004 and recorded with said Registry of Deeds at Book 44305 Page 302 (also see confirmatory deeds dated March 3, 2005 and March 14, 2005, recorded at Book 44749 Page 301 and Book 44791 Page 515, respectively).

In consideration of the monies advanced by the City to Owner as evidenced by the Note, for benefits to the Owner under the Funding Agreement, and for other valuable consideration paid, the receipt and sufficiency of which is acknowledged, the Owner hereby grants the Mortgaged Premises to the Mortgagee WITH MORTGAGE COVENANTS to secure the Obligations herein.

The Owner hereby covenants and agrees that the CONDITION of this Mortgage is that the Owner, and Owner's successors and assigns now or hereafter owning all or any part of the Mortgaged Premises faithfully perform and observe the Obligations.

For any breach of such CONDITION, the City shall have the STATUTORY POWER OF SALE.

EXECUTED as a sealed instrument under Massachusetts law this _____ day of July 2005.

Newton Housing Authority

Jonathan L. Hacker, Executive Director

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

On this ____ day of July, 2005, before me, the undersigned notary public, personally appeared Jonathan L. Hacker, acting for Newton Housing Authority, proved to me through satisfactory evidence of identification, which was/were [type of evidence:] _____, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily, in such capacity, for its stated purpose.

[NOTARY SEAL]

Notary Public
Name (Print):
My commission expires: