



Town of Winchester

Town Manager's Office
71 Mt. Vernon Street
Winchester, MA 01890
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townmanager@winchester.us

Board of Selectmen Meeting
Monday, August 8, 2016

BUSINESS

Docket Item G - 5: Winning Farm Development Agreement

Supporting Documents:

G - 5: Copy of Development Agreement

Action Required: VOTE to approve and sign agreement (RED BOOK).

DEVELOPMENT AGREEMENT

This Development Agreement ("Agreement") dated June ____, 2016, is entered into by and between the Town of Winchester, acting by and through its Board of Selectmen ("Town" or "Winchester"), and BEK Winchester Winning Farm LLC ("Developer"), with a principal place of business located at 82 Meadowbrook Road, Mashpee, Massachusetts 02649.

RECITALS

The Developer has asked the Town to amend the Winchester Zoning Bylaw ("Zoning Bylaw"): to apply the Attached Residential Cluster Development Overlay District ("ARCDOD"), which is Section 8.7 of the Zoning Bylaw, to a parcel of land owned by Winning Farm, LLC consisting of approximately 12.5 +/- acres, more or less, (the "Property") as is more particularly described in **Exhibit A**. The adoption of the Zoning Amendment would enable the Developer to apply to the Winchester Planning Board for Comprehensive Plan Approval (the "Plan Approval") and to the Winchester Zoning Board of Appeals ("SPGA") for a special permit (the "Special Permit") as required under the ARCDOD for development of an Attached Residential Cluster Development on the Property. The Plan Approval and Special Permit, together with all other local, state and federal approvals collectively, are referred to as the "Permits." The structures, infrastructure and other development improvements described in the Permits are sometimes herein referred to collectively as the ("Improvements" or the "Project").

AGREEMENT

Now, therefore, for mutual consideration, the receipt and sufficiency of which are hereby acknowledged, the Town and the Developer agree that if, and only if, (i) the Zoning Amendment is adopted at the Town Meeting substantially in the form attached hereto as Exhibit B without modifications that materially adversely affect the Developer's rights as set forth herein; and (ii) the Zoning Amendments are subsequently approved by the Commonwealth's Office of the Attorney General; and (iii) the Developer obtains the Permits as set forth in this Agreement and purchases the Property from Winning Farm, LLC, then the Developer shall promptly proceed with the development of the Property pursuant to the Permits and the provisions of this Agreement, and the Town and the Developer shall each perform the actions as set forth herein.

From and after substantial completion of the Improvements, the Developer, for itself and its successors and assigns, covenants, promises and agrees to continuously and without interruption, except in the ordinary course of operation and maintenance thereof, devote the Property exclusively to the combination of uses described herein and as described in the Permits, as they may be amended from time to time or in other applicable zoning in effect from time to time, except as hereinafter provided. Other than the Improvements, no other structures or facilities of any kind shall be constructed on the Property, unless permitted by an amendment to the Permits or to the ARCDOD.

A. MUNICIPAL WATER SUPPLY

1. Required Improvements. The Developer shall construct and / or modify, at its sole expense, the municipal water supply improvements necessary to increase the existing water pipe connection and

to provide adequate fire protection pressure for all phases of the Project. The design and permitting of these improvements shall be in accordance with the Town's "Special Provisions for Construction of Roadways including the Installation of Water, Sewer and Drains in the Town of Winchester" and any other standard engineering practices as may be reasonably required by the Town. The final design and the installation of the required municipal water supply improvements shall be approved by the Winchester Department of Public Works, Engineering Department and Fire Department. Fees associated with the water connection will be assessed to the Developer in accordance with the Town's Sewer Demand Fee and Water Demand Fee as established by the Town of Winchester Sewer and Water Commissioners on January 15, 1998, as revised by the Winchester Board of Selectmen on June 25, 2007.

2. Looped Service. The Developer, at its sole cost and expense, shall provide a water main to service the Project. The design as approved by the Town Engineer, shall be in accordance with the requirements of the Department of Public Works. The connection to the existing water main shall be as per the instructions of the Department of Public Works, Engineering Department and Fire Department.

3. MWRA Permits. The Developer shall obtain, at its sole cost and expense all necessary system permits from the Massachusetts Water Resources Authority ("MWRA") for the water supply improvements.

B. MUNICIPAL SEWER FACILITIES

1. Town Connection. The Developer shall, at its sole cost and expense, prepare all plans and permit applications necessary to apply for and receive permits to create new connections and/or to modify the existing connections to the Town's sewer system in order to provide adequate sewer services for all phases of the Project. The final design and the installation of required municipal sewer improvements shall be approved by the Public Works Department and the Engineering Department. The design, permitting and construction of all sewer facilities shall be in accordance with the Town's "Special Provisions for Construction of Roadways including the Installation of Water, Sewer and Drains in the Town of Winchester" and any other standard engineering practices as may be reasonably required by the Town. Fees associated with the sewer improvements shall be assessed to the Developer in accordance with the Town's Sewer Demand Fee and Water Demand Fee as established by the Town of Winchester Sewer and Water Commissioners on January 15, 1998, as revised by the Winchester Board of Selectmen on June 25, 2007.

2. Infrastructure Improvements

- a.** Prior to the issuance of any certificate of occupancy the Developer shall fund certain pump station improvements at the Thornberry Road pump station and fund certain downstream sewer improvements on Johnson Road and Wildwood Street consistent with the plans and specifications prepared by Weston & Sampson and set forth in Exhibit C.
- b.** At closing, the Developer will provide the Town with a bond or other security acceptable to the Board of Selectmen in the amount of Five-hundred Thousand USD (\$500,000) to secure payment of the infrastructure improvements as defined in a above and as referenced in section G-3.
- c.** The Developer shall be responsible for all water, sewer and drains located on the site

C. TRAFFIC IMPROVEMENTS

1. Roads and Parking Areas. The Developer shall construct the streets and parking areas within the Project. All such streets and parking areas shall remain privately owned and, until completion of the Project, shall be maintained, repaired, replaced and rebuilt by the Developer, its heirs, successors and assigns, at its/their sole cost and expense. The Developer or its successor in interest shall be responsible for maintenance of the roads and parking areas until such time that the Homeowners Association assumes responsibility for same. The Developer shall notify the Board of Selectmen ninety (90) days prior to the assumption of responsibility by the Homeowners Association.

2. Board of Selectmen Approval. Prior to the commencement of any work within the Town's right-of-way to make any local traffic improvements that may be required by the SPGA, the Developer shall obtain approval for the proposed traffic mitigation measures from the Board of Selectmen in their capacity as Traffic Commissioners.

3. Repaving and Repair. After installation of the required water, sewer and drainage improvements, the Developer shall repave/repair the affected streets and sidewalks in accordance with the technical requirements established in Section 2.0 of the "Rules and Regulations Governing Street Opening Permits and Grants of Location in the Town of Winchester, Massachusetts" adopted April 30, 2007, and the "Special Provisions for the Construction of Roadways Including the Installation of Water, Sewer and Drains in the Town of Winchester, Massachusetts," and any other conditions as may be reasonably required by the Engineering Department and the Department of Public Works.

D. PROJECT LIMITS, DESIGN AND SECURITY

1. Aggregate Limits. The Developer's application for a Special Permit pursuant to the ARCDOD shall

a. The Project shall be limited to twenty-nine (29) total dwelling units of which two (2) dwelling units shall be affordable pursuant to the provisions of Paragraph G(1).

b. All of the dwellings shall be located in townhouses or stand-alone units, but in no case shall there be stacked "flat" units (units on top of other units).

2. Age-Restriction. The Project shall be subject to an age-restriction (55 and over) consistent with the Fair Housing Act, 42 USC Section 3607(b), as amended, and the Housing for Older Persons Act (HOPA) and the regulations promulgated thereunder. The Developer's application for a special permit under the ARCDOD shall propose such age-restriction, and the Developer shall not appeal the imposition of such condition in the grant of any special permit.

3. Plan Consistency. The application for Comprehensive Plan Approval under ARCDOD Section 8.7.4 of the Zoning Bylaw shall be limited to no more than twenty-nine (29) total dwelling units of which two (2) dwelling units shall be affordable.

4. Performance Guaranty. To the extent that, for any reason, substantial water, sewer or drainage improvements, or other such substantial improvements are not completed prior to the Developer's

application for the 20th certificate of occupancy for a dwelling unit (provided, however, that no certificate of occupancy shall be issued without a determination from the Building Commissioner, after consultation with the Engineering Department and the DPW, that the dwelling unit is adequately served with utilities in accordance with applicable health and safety standards), the Developer agrees that the SPGA may require, as a condition for the issuance of any such certificate of occupancy, security for such incomplete work in the manner provided for securing construction of ways and the installation of municipal services set forth in G.L. c. 41, §81U, paragraphs (1), (2) and (4) and as determined by the SPGA. The amount of such security shall be determined by the SPGA after consultation with the Developer and the Town Engineer and shall be sufficient to cover the design and construction of any such incomplete work whether required under the Special Permit or by any other municipal permitting entity.

5. Chapter 40B. The Developer hereby agrees and covenants for and on behalf of itself, its successors and assigns that the Property shall not be, now or ever, proposed as the site for dwelling units or developed for dwelling units pursuant to G.L. Chapter 40B, ss. 20-23, the Comprehensive Permit Law. This restriction may be enforced by a restraining order, injunction or any other available remedy.

E. SITE SERVICES AND UTILITIES

1. Private Services. Until completion of the Improvements, the Developer, or its successors or assigns, shall be solely responsible for the maintenance and operation of all Project-related services, including but not limited to refuse and trash removal, snow removal, road and sidewalk maintenance, lighting, landscape maintenance and other similar activities related to the operation of the Project to be built on the Property. The Developer or its successor in interest shall be responsible for maintenance of the water, sewer and drainage lines servicing the development from their connection with the Town-owned mains, until such time that the Homeowners Association assumes responsibility for same. The Developer shall notify the Board of Selectmen ninety (90) days prior to the assumption of responsibility by the Homeowners Association.

2. Board of Health. Solid waste disposal shall be handled in accordance with the rules and regulations of the Board of Health.

3. Underground Utilities. The Developer shall install all utilities serving the Project underground, including, but not limited to, water, sewer, drain lines, gas, electric, telephone/teledata and cable.

F. PUBLIC SAFETY

1. Fire Suppression Plans. The Developer shall prepare and submit detailed fire suppression and detection plans for the approval by the Town's Fire Department.

2. Construction Phase. The Developer shall be responsible for site security during Construction. The Developer shall pay for public safety details during the construction period when the Town determines that deliveries of equipment and material to the Project site may adversely affect the safe movement of vehicles, bicycles and pedestrians on public and private roadways adjacent to the Project.

G. FINANCIAL CONSIDERATION

1. Affordable Housing. Developer agrees that two (2) units of the Project shall be permanently reserved for households meeting the eligibility requirements for affordable housing as set forth in the Local Initiative Program of the Massachusetts Department of Housing and Community Development (DHCD), 760 CMR 45.00. In order to accomplish this, the Developer shall prepare and execute a marketing plan and other documents as required by DHCD. Certificates of occupancy shall be obtained for the affordable units prior to the conveyance of the 20th market-rate unit.

2. Linkage Payment. At the closing on the purchase of the Property, the Developer shall provide the sum of One Million (\$1,000,000) USD (the "Linkage Payment") to the Town.

3. Infrastructure Improvement Payment. The Town will invoice the Developer for the cost of making the required infrastructure improvements. The Developer shall make payment of the invoice within thirty (30) days of receipt thereof. The total of invoices for the required infrastructure improvements shall not exceed Five-hundred Thousand (\$500,000) USD.

H. OPEN SPACE

1. Open Space. Developer shall comply with the Open Space and Preservation Area requirements as set forth in ARCDOD Section 8.7.7 of the Winchester Zoning Bylaw.

2. Public Access to Conservation Area. The Comprehensive Plan approved by the Planning Board, pursuant to ARCDOD Section 8.7.4 of the Winchester Zoning Bylaw shall show trails as may be required in the Conservation Commission Order of Conditions. The Town shall be granted easements through the Project for access to and use of such trails. The Developer shall provide a public parking area onsite or on adjacent Town-owned property as required by the SPGA and Conservation Commission, that provides access to Town-owned land and Project open space.

I. SUBMISSION OF PLANS

The Developer shall comply with ARCDOD Section 8.7 of the Winchester Zoning Bylaw and obtain an Order of Conditions from the Conservation Commission.

J. TIME FOR COMMENCEMENT AND COMPLETION OF CONSTRUCTION

1. Commencement of Construction. The Developer shall begin the construction of the Improvements not later than nine (9) months after the date of the closing between Winning Farm, LLC and the Developer (the "Commencement Date").

2. Completion of Construction. The Developer shall diligently prosecute to completion the construction of the Improvements in phases and shall substantially complete all such construction within three (3) years of the Commencement Date (the "Completion Date"). In the event that the townhouses are not substantially completed by the Completion Date or the remainder of the Improvements have not been substantially completed by the Completion Date, such dates may be extended for an additional two (2) years (the "Extended Completion Period") at the Board's discretion, such extension shall not be unreasonably withheld. In the event that all of the Improvements have not been constructed and certificates of occupancy issued therefore by the

expiration of the Extended Completion Period, the Town may exercise its rights under Paragraph O (2) herein without any further recourse by the Developer, except as provided herein.

3. Report. A quarterly construction report, in a form satisfactory to the Board of Selectmen, shall be provided to the Town by the Developer for each year of construction.

4. Obligations Excused. The obligations of the Developer hereunder to commence, diligently pursue and complete construction of the Improvements shall be excused during the pendency of any appeals of Permits and/or if a court of competent jurisdiction shall prohibit construction of the Improvements but in such case, only with respect to those portions of the Improvements to which such court decision relates.

5. Covenants Running with the Land. It is intended and agreed that the agreements and covenants contained in this Section with respect to the beginning and completion of the Improvements shall be covenants running with the land. This subsection shall not, however, apply against a mortgagee.

K. PROVISIONS RELATING TO DAMAGE

Whenever any of the Improvements or any part thereof shall have been damaged or destroyed, any reconstruction or repair undertaken by the Developer shall in all material respects be in accordance with and conform to the provisions of this Agreement and the Permits.

L. PROVISIONS RELATING TO RIGHTS, REMEDIES AND PROCEDURES IN THE EVENT OF A DEFAULT.

1. Default by the Developer. If the Developer shall default in the performance of any material term, covenant or condition of this Agreement, which default shall continue for more than thirty (30) days after written notice to the Developer specifying the alleged default (the "First Cure Period") or, if such default (other than a payment default) shall be reasonably expected to take more than thirty (30) days to cure, the Town and the Developer shall agree upon a longer period of time within which such cure shall be completed (the "Extended Cure Period"), and such default is continuing at the expiration of such First Cure Period or the Extended Cure Period, as applicable, the Town shall have the right to (i) terminate this Agreement; (ii) withhold any approvals to be issued by any municipal agency or official of the Town; or (iii) exercise any other remedy available at law or in equity, including commencing an action for specific performance. The Town agrees that if, within ten (10) days after the Developer's receipt of a notice of a claim of default, the Developer shall give notice to the Town that the Developer contests the same, then the Town shall not have the right to exercise any of the foregoing rights in respect thereto until a court has issued an enforceable order on such claim. The Developer agrees to diligently prosecute any such contest. If the Developer has not commenced such action within thirty (30) days of such written notice to the Town, the Developer shall be deemed to have abandoned the right to contest such default and the Town may exercise any of its remedies hereinbefore described without any further delay. If such matter is determined adversely to the Developer, the Developer shall have thirty (30) days (or, such longer period of time as agreed to between the Town and the Developer) to effect such cure (the "Second Cure Period"). If, after such adjudication in favor of the Town, the default is not cured within the Second Cure Period, the Town shall have the rights hereinbefore described, but there shall be no further right of appeal by the Developer.

2. Default by the Town. If the Town shall default in the performance of any material term, covenant or condition of this Agreement, which default shall continue for more than thirty (30) days after written notice to the Town specifying the alleged default (or if such default shall be reasonably expected to take more than thirty (30) days to cure, said longer period of time), the Developer shall have the right to (i) terminate this Agreement; or (ii) exercise any other remedy available at law or in equity, including commencing an action for specific performance.

M. NOTICES OF BREACHES TO MORTGAGEES OR TO THE TOWN

If the Town gives written notice to the Developer of a default under this Agreement and the Developer fails to remedy such default as required herein, the Town shall forthwith, after such failure, furnish a copy of the notice of default and a statement that such default has not been cured to each of the mortgagees of record of the Property who have provided construction financing for the Improvements. To facilitate the operation of this Section, the Developer shall at all times keep the Town provided with an up-to-date list of names and addresses of mortgagees from whom the Developer has obtained loans as permitted under this Agreement. Any such mortgagee or holder may notify the Town of its address and request that the provisions of Section T(6) hereof as they relate to notices apply to it. The Town agrees to comply with any such request.

The Developer shall use its best efforts to have the mortgagees provide to the Town a copy of any default notice provided by them to the Developer.

N. MORTGAGEE MAY CURE BREACH OF DEVELOPER

If the Developer has received notice from the Town of a default under this Agreement and such breach is not cured by the Developer before the expiration of the period provided therefor, the holders of record of construction mortgages on the Property may cure any breach upon giving written notice of their intention to do so to the Town within ninety (90) days after such holder receives such notice of breach as set forth in Section M, and shall thereupon proceed with due diligence to cure such breach. In the event any mortgagee elects to complete the Improvements as herein provided, a reasonable extension of time for performance will be granted by the Town to enable the mortgagee to complete construction of the Improvements.

O. REMEDIES FOR OTHER BREACHES

1. It is understood by the parties hereto that in the event any party shall fail to comply with or violate any of the provisions of this Agreement, then the other party hereto may institute such actions and proceedings to compel specific performance and payment of all damages, expenses, and costs. Neither these remedies nor that class of remedies more particularly described in this Agreement shall be exclusive unless specifically so described.

2. If the Developer shall fail or refuse to commence construction as hereinbefore described or, after commencing construction, to construct the Improvements as required hereby or by the Permits, the Town shall in writing notify the Developer of such failure or violation. The Developer shall thereupon have one hundred eighty (180) days from the receipt by it of such written notice to commence to cure such failure or violation, and shall thereafter diligently pursue such cure. The Town may enforce the provisions of this section by an action in a court of appropriate jurisdiction to

exercise fully its rights against the infrastructure bond or security instrument referenced herein unless the Developer can reasonably demonstrate to the Town that such failure or violation is due to the unavailability of financing to complete the Project upon terms and conditions then prevailing in the Greater Boston area or to such other economic circumstances that would make the completion of the Project impracticable or economically infeasible.

P. MODIFICATIONS

In the event that any permit granting authority having jurisdiction over the Project imposes any condition or requirement that is inconsistent with any provision herein, the Town shall grant an amendment hereto, upon the request of the Developer, in form and substance reasonably acceptable to the Town for the purpose of bringing the requirement of this Agreement into conformity with the conditions required by the permit granting authority. Any such amendment by the Town shall be made in an expeditious manner consistent with the amendment provisions of Section T (5).

This agreement shall not be modified without written approval of the Board of Selectmen. If necessary to respond to unanticipated field conditions, or other changed circumstances, the Board of Selectmen may approve modifications of this Agreement as necessary to allow the Project to be completed in a reasonable manner, provided the Board determines that the interests of the Town as set forth in this Agreement are adequately protected.

Q. AMENDMENTS

No amendment hereto shall be effective until recorded in the Middlesex South District Registry of Deeds.

R. ACCESS TO TOWN-OWNED LAND

The Developer shall provide the Town with an easement permitting the Town access to Town-owned land shown as Lot 2 and Lot 3 on Plan Recorded at Middlesex South Registry of Deeds BK 30552 page 601 for the purposes of maintenance and emergency access satisfactory to the Police and Fire Departments, Conservation Commission, the Planning Board and the Zoning Board of Appeal.

S. MARKETING PLAN

The Developer shall adopt a marketing plan, acceptable to the Board of Selectmen (said approval not to be unreasonably withheld or delayed) that gives sales preference to current Winchester Residents, for a minimum of three (3) months prior to commencement of regional marketing, subject to all applicable laws and regulations.

T. MISCELLANEOUS PROVISIONS

1. Invalidity. The Town and the Developer agree that if the Town's adoption of the proposed Zoning Amendment is determined to be invalid, illegal or unconstitutional by a court of competent jurisdiction and, as a consequence thereof, the Developer is not able to develop the Property in the

manner contemplated by this Agreement, then the provisions of this Agreement and each of the agreements and documents referenced herein shall be null and void.

2. Transfer. The initial ownership of the Project shall be vested in a single purpose limited liability company (the "LLC"), the managers of which shall be Ronald S. Bonvie, W. Albert Ellis and Eric A. Katz. Management of the Project shall not be leased, alienated or transferred without the express written permission of the Board of Selectmen, such permission not to be unreasonably withheld or delayed.

3. Compliance. During the Comprehensive Plan Approval process, the Developer shall submit all necessary evidence, to the satisfaction of the Planning Board, to show compliance with the terms of this Agreement.

4. Intent to Bind Successors and Assigns. The foregoing obligations shall run with the Property and shall be binding upon and inure to the benefit and burden of the Developer, its successors and assigns, and to the extent legally permissible, the Town. This agreement shall be recorded with the Registry of Deeds together with the deed to the Property upon approval by the Attorney General of the Zoning Amendments.

5. Effect; Amendment. This Agreement shall not take effect until voted and executed by the Board of Selectmen of the Town of Winchester. Upon such vote, this Agreement shall not be amended in any material respect except by a further majority vote of the Board of Selectmen.

6. Required Notice. Unless otherwise specified in this Agreement, any notice to be given under this Agreement shall be in writing and signed by the party (or the party's attorney) and shall be deemed to have been given (a) when delivered, if delivered by hand, or (b) two business days after the date mailed, if mailed by registered or certified mail, all charges prepaid, in either event addressed as follows:

In the case of the **Town** to:

Richard C. Howard, Town Manager
Winchester Town Hall
71 Mount Vernon Street
Winchester, MA 01890

In the case of the **Developer**, to:

BEK Winchester Winning Farm LLC
Ronald S. Bonvie
82 Meadowbrook Road
Mashpee, MA 02649

With a copy to:

Mark Vaughan, Esq.
Riemer & Braunstein LLP
700 District Avenue

11th Floor
Burlington, Massachusetts 01803

By such notice, either party (or such party's attorney) may specify a new address, which thereafter shall be used for subsequent notices.

7. Effective Date of Agreement. This Agreement shall be effective as of the date it shall be executed by both the Developer and the Town.

8. Dispute Resolution. Prior to the initiation of any court proceeding involving the terms of this Agreement or either party's performance thereunder, the Town and the Developer agree that such disputes shall be first subject to nonbinding arbitration or mediation, for a period not longer than ninety (90) days.

9. Applicable Law; Construction.

a. This Agreement has been executed within the Commonwealth of Massachusetts. The rights and obligations of the parties hereto shall be construed and enforced in accordance with, and governed by, the laws of the Commonwealth of Massachusetts.

b. This Agreement is the entire agreement among the parties with respect to the subject matter hereof and supersedes all prior and contemporaneous oral and written agreements and discussions.

Executed under seal as of the date first above written.

TOWN OF WINCHESTER

By: _____
Selectman Lance R. Grenzeback, Chairman

By: _____
Selectman E. James Whitehead, Vice Chairman

By: _____
Selectman Stephen L. Powers

By: _____
Selectman Michael Bettencourt

By: _____
Selectman David P. Errico

BEK WINCHESTER WINNING FARM LLC

By: _____
Its duly authorized _____
Ronald S. Bonvie, Manager

By: _____
Its duly authorized _____
W. Albert Ellis, Manager

By: _____
Its duly authorized _____
Eric A. Katz, Manager

SCHEDULE OF EXHIBITS

Exhibit A: Property Description

Exhibit B: Zoning Amendment Adding the property to the ARCDOD

Exhibit C: Sewer Study/ Other Improvements

2013469.1