



**EXHIBIT 5 –**  
**WATERFIELD LOT LDA/GROUND**  
**LEASE SUMMARY**

# ANDERSON KREIGER

To: Beth Rudolph, Acting Town Manager  
Rich Mucci, Select Board Chair  
Town of Winchester

From: Mina S. Makarious & Stephanie Dubanowitz  
Anderson & Kreiger LLP

Re: Waterfield Lot Transactional Documents

Date: May 17, 2022

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Enclosed for your review are the proposed Amended and Restated Land Development Agreement (“LDA”) and the form of Ground Lease (the “Lease”) proposed as Exhibit C thereto between the Town of Winchester and Winchester Waterfield MM LLC (a.k.a. “Civico”) for development of the Waterfield project (the “Project”) on the Waterfield Lot (the “Premises”).

This memorandum describes the key provisions of the current draft of the LDA and the incorporated Lease.

## I. Authorization and Execution of the LDA and Lease

The LDA, along with the incorporated Lease, will be presented to Special Town Meeting this June. If Town Meeting authorizes the Select Board to enter into the LDA and Lease, the following timeline would commence<sup>1</sup>:

1. Within **six business days** of the close of the Special Town Meeting, Civico would be required to submit a **\$50,000 deposit** with the Town’s escrow agent (the “Initial Deposit”). LDA, § 1(a). The Town and Civico would also sign the LDA at this time, which will include the form of Lease as an exhibit, but the Lease would not yet be signed.
2. Civico is required to complete review of title to the Premises within **six months** of the Town Meeting approval. LDA, § 5(a). Note that Civico would be agreeing to lease the Premises subject to a number of existing encumbrances identified on Exhibit E to the LDA and described in further detail below.
3. Within **48 months** of the Town Meeting approval (the “Lease Execution Deadline”), Civico and the Town would be expected to enter into a ground lease in substantially the same form as the Lease, as authorized by Town Meeting. LDA, § 2(b).

The Select Board may not alter the material terms of the Lease after Town Meeting’s authorization, but may make minor adjustments to reflect updated dates, surveyed square footage of the leased premises, or details resulting from Civico’s obtaining financing for

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<sup>1</sup> If Town Meeting does not approve the LDA and Lease, or if Town Meeting’s approval is overturned on a referendum, the LDA and Lease become null and void. LDA, § 13(a).

the Project. Civico's lenders are required to review the Lease during this two month window to avoid the need for further revisions thereafter. LDA, § 1(b). The Lease will be held in escrow until the Lease term commences (see # 8 below).

4. Civico is required to complete its due diligence on the Project and the Premises within **six months** of the Town Meeting approval. LDA, § 3(a). Civico may inspect the Premises, conduct environmental, engineering, and architectural assessments, and review the condition of the Chamber of Commerce Building to prepare for its demolition. The LDA outlines a process for Civico to seek permissions from the Town to conduct inspections and to raise and resolve issues regarding the Premises with the Town. LDA, §§ 3, 4. Civico's due diligence must be conducted entirely at Civico's expense.
5. At the conclusion of Civico's due diligence (i.e., no later than **six months** after Town Meeting approval), Civico is required to make another **\$50,000** deposit to the Town's Escrow agent (the "Second Deposit"). This deposit will be credited against Civico's \$1,000,000 payment to the Town upon the Lease commencement.
6. Civico may, during the first **18 months** after Town Meeting approval, terminate the LDA if it cannot receive the necessary permits or approvals. The 18 month deadline may be extended due to delays in the MBTA's Winchester Center project or other *force majeure* events which delay permitting. A failure to meet applicable permitting requirements is not considered a *force majeure* event which may delay permitting.
7. Civico may terminate the LDA within **36 months** if, despite its efforts, it has not obtained a financing commitment from MassHousing or other financing entities. LDA, § 7.
8. Although the Lease will be executed within two months after Town Meeting approval, the 99 year Lease term will only commence (and the \$1,000,000 payment will be paid to the Town) once Civico has received all of the necessary approvals and financing for the Project and the MBTA has completed the Winchester Center construction, which will then allow Civico to proceed. LDA, §§ 2(d), 4(d).

## II. Key Provisions of the LDA

The Purpose of the LDA is to govern the relationship between Civico and the Town while Civico performs its diligence, finalizes plans for construction of the Project, seeks permits and approvals, and confirms financing for the Project. Like the LDA presented to the 2021 Spring Annual Town Meeting, the LDA contemplates the parties then entering into the Lease. In the 2021 LDA, the basic terms of the Lease were included as Exhibit C, but not the full form of the Lease. In the 2022 LDA, Town Meeting will now be presented a complete form of Lease.

Key terms of the LDA include:

- **Description of the Project:**
  - The Project is described in the introductory clauses to the LDA (at p. 2), including

the fact that it will consist of 60 mixed-income residential units, 48 private parking spaces, and 71 public parking space (a total of 119 parking spaces).

- Exhibits F and G to the LDA, which are incorporated into the LDA by reference (see § 6(a)) provide further elaborations on the Project. Exhibit F includes the Concept Plans for the Project, and Exhibit G is a table showing the number of residential units for the Project broken down by affordability levels.
- Within **90 days** of the close of the due diligence period, Civico must provide the Town with the final “permitting set” of documents for the Project. The Town then has **30 days** to review and approve the permitting set (the process may be repeated until the Town is satisfied with the permitting set).
- Section 6(a) provides that once the permitting set of plans has been approved by the Town, it cannot be materially modified without the Select Board’s approval.
- To ensure compliance with the project as proposed, all applications for permits must be submitted in draft form to the Town before submittal. LDA, § 6(a).

- **Due Diligence and Permitting**

- During the due diligence period, Civico may inspect the property, including undertaking subsurface investigations. LDA, § 3(a). Civico must seek advanced permission for access from the Town to conduct any inspection. *Id.*, § 4(a).
- During due diligence, Civico may not interfere with the use and operation of the Property, and must comply with legal requirements for its access. LDA, § 4(c).
- Civico must notify the Town if discovers any issues with the Premises during due diligence that would affect the Project. The Town and Civico then have **30 days** to resolve the issue. LDA, § 3(d). If the parties cannot resolve the issue, Civico has the option to terminate the LDA at which point the Initial Deposit would be returned to Civico. *Id.* Civico would be required to provide the Town with plans and reports resulting from Civico’s due diligence upon termination. *Id.*, § 3(e).
- Civico is responsible for applying for an obtaining all permits and approvals at its sole cost and expense, including paying for the Town’s consulting advisors pursuant to G.L. c. 44, § 53G. LDA, § 6(b).
- Civico is responsible for paying all fees associated with a permit, including the Town’s infiltration and inflow fees (aka “I&I Fees”). LDA, § 6(b).
- The LDA expressly states that it does not supersede any Town Board or Committee’s permitting authority. LDA, § 13(b).

- **Interaction with MBTA Construction of the Winchester Center Station**

- The lease commencement date will not begin until (i) the Town delivers the

property in its required condition and free of any tenants, licensees or occupants, including without limitation, the MBTA and (ii) Civico has obtained all of its approvals and financing. LDA, § 2(d).

- Civico's rights to access the Premises are subordinate to MBTA's rights under its easements with the Town to pursue and complete the Winchester Center project. LDA, § 4(d).
- The Town agrees to continue to pursue fee title of the "orphaned" parcel currently owned by PanAM railways. LDA, § 12(j). This parcel is currently used for access to the Premises in accordance with an easement held by the Town and would continue to be used for access by Civico and other users of the Premises.

- **Insurance and Indemnity**

- Civico must maintain insurance at all times that it is on the Premises, including during the due diligence period. LDA, § 8.
- Civico must indemnify the Town for all claims arising out of Civico's access to the Premises, including any injuries or damage caused during due diligence, environmental or natural resource damage. LDA, § 9. This responsibility survives the termination of the LDA, meaning that whether or not Civico ultimately enters into a ground lease, it will retain this liability.

- **Default and Remedies**

- Section 10 of the LDA identifies events of Civico default, including failure to make deposits, meet any of its deadlines under the LDA (subject to a 30 day cure period), or become insolvent.
- If Civico defaults under the LDA, the Town may:
  - Take over Civico's obligation and perform it itself at Civico's expense (plus a 10% administrative fee);
  - Terminate the agreement and keep the Deposit; and
  - Charge Civico an additional \$40,000 in liquidated damages.
- If the Town defaults on any of its obligations, Civico's primary remedy is to seek to hold the Town to its promises, or terminate the LDA. LDA, § 10(c).

### **III. Key Provisions of the Lease**

As noted above, the Lease would be executed at the conclusion of Civico's due diligence. However, the Term would not commence until the MBTA's work on Winchester Center is substantially complete and Civico has obtained all necessary permits and approvals. LDA, § 2(c). The Term would then run for 99 years. Lease, § 2.1.

The purpose of the Lease is to govern the relationship between the Town and Civico (or any successor entity) during this Term. Civico is referred to as the “Tenant” throughout the Lease.

Key provisions of the Lease include:

- **Project Construction**

- The Lease provides that the Tenant will be responsible for all costs of building the Project, including:
  - the demolition of the Chamber of Commerce Building (§ 3.1(a));
  - construction of a four story building (§ 3.1(b));
  - construction of 119 parking space (48 private/71 public)(§ 3.1(b));
  - construction of all utilities (§ 3.1(c));
  - construction of any improvements required by the MBTA (§ 3.1(d));
  - construction of off-site improvement (§ 3.1(e));
  - performance of all mitigation measures (including off-site) required by permits or approvals (§ 3.1(f))
- All construction must comply with the final approved plans (§ 3.1). Changes to plans must be approved in advance by the Town, acting through the Select Board (§ 3.8).
- Construction must proceed in accordance with a Development Schedule which will be included as Exhibit C to the final Lease (§ 3.2). The Lease provides for a 24 month construction schedule, subject to one, three month extension (if the Tenant is diligently prosecuting the Project. The Lease also explicitly states that the Tenant’s compliance with the schedule is a material term, meaning that if the Tenant fails to comply with the schedule, the Town may use its default remedies under the Lease (see below).
- Section 3.4 of the Lease provides the standard of quality for the Project’s construction. It also affirms that the Tenant must pay all costs associated with construction. *See also* Section 6.4 for alterations after the Project is built.
- Section 3.5 will describe the sustainability measures to be incorporated into the Project.
- The Town will be permitted to use the Tenant’s final plans and specifications should it need to take over the Project (§ 3.9).
- The Tenant must provide payment and performance bonds for the Project, for

both on-site and off-site improvements (§ 3.10).

- The Tenant may undertake alterations to the Project after its completion, but must provide at least 30 days' notice before making such alterations (§ 6.4).

- **Operation and Maintenance of the Project**

- All improvements to the Premises will be owned by the Tenant during the Term of the Lease. When the Lease ends, or if it is terminated, title to the Improvements will vest in the Town (§ 3.3).
- The Tenant, at its costs and extent, must maintain the Premises, including any improvements, throughout the Term. The Tenant's obligations include maintaining the new structure, the parking areas, and all other parts of the Projects (§§ 6.1, 8.3).
- The Tenant is responsible for compliance with all applicable laws, including health and safety laws, as well as insurance requirements (§§ 6.3, 8.4, 8.5).
- The Tenant must restore any area of the Premises that is damaged, subject to certain limitations that allow the parties to choose to demolish certain improvements based on the value of the damage (§§ 9.1, 9.3).
- The Tenant must hire a property management company to manage the residential portion of the Premises. The Town must approve any changes to the property management company (§ 8.6).
- The Tenant may only use the Premises for the use identified in its proposal (§ 8.1).
- The Town may terminate the Lease for non-use if Premises is vacant for a consecutive period of 6 months (§ 8.2).

- **Financial Terms**

- As noted above, the Town will receive \$1,000,000 upon commencement of the Lease.
- Beginning on the lease commencement date, the Tenant will begin paying an annual "base rent" in the amount of up to 8% of \$500,000 (the "Payoff Rent"). The exact amount of rent will depend on Tenant's cash flow from the project (§ 4.1(a)).
- Beginning after the first fiscal year following completion of the Project, the Tenant will pay 15% of its net operating revenue to the Town. Net operating revenue means the Project's gross revenues minus identified costs and expenses and an 8% return on equity for Tenant (§ 4.1(a)).

- The Town will receive an annual report of operating revenues and expenses and has the right to audit Tenant's books to ensure rent is being properly calculated and paid (§§ 4.4, 4.5).
- The Tenant will pay any fines, penalties, taxes, and other costs associated with the Project during the Term, including the costs of installing and using utilities. These are referred to as additional rent (§§ 4.2, 5.1, 5.2, 5.3).
- **Assignment and Transfer**
  - The Town must approve of any assignment of interest by the Tenant prior to final completion of the Project. The Town has absolute discretion as to whether to permit such transfer. (§ 12.1).
  - The Tenant may assign its interest in the Project after completion either with the Town's approval (which may not be unreasonably withheld, conditioned or delayed) or to an affiliate or a Permitted Leasehold Mortgagee as defined in the Lease (§§ 12.1, 12.3).
  - In order to be able to assign its interest, the Tenant (or a later tenant) must not be in default under the Lease, must pay a transfer fee of up to \$3,500 (subject to inflation), and must make explicit that the assignee will be bound by all of the terms and conditions of the Lease (§ 12.2(b)).
  - If an assignment of the Lease or a sublet of the Premises, a refinancing, or other transfer or change of control results in profits to the transferring entity (i.e., a "Capital Event"), the Town will be paid 25% of that profit (§ 12.5)
  - The Tenant may enter into a leasehold mortgage of its leasehold interest in the Premises (§ 13.1) which must be consistent with the terms and conditions of the Lease and does not supersede the Lease.
- **Parking:** The Town will have the right to review and approve the rules governing the public parking (§ 3.11).
- **Insurance and Indemnification**
  - The Tenant must maintain property, builders' risk, business interruption, and general liability insurance, all in amounts to be reviewed by the Town's risk manager (§§ 7.1-7.4). Contractors must also carry insurance during construction (§ 7.5).
  - The liability and contractors' insurance must name the Town as additional insured (§§ 7.3, 7.5).
  - The Town reserves the right to increase insurance amounts every five years throughout the Term (§ 7.6).

- The Tenant agrees to defend, indemnify and hold harmless the Town from any claims associated with the Premises resulting from work on the Premises, use of the Premises, negligence or willful misconduct, accidents (except where the Town was grossly negligent or committed a wrongful act) (§ 7.13).

- **Environmental**

- The Tenant must comply with all environmental laws, and is responsible for hazardous waste remediation required during the Term, including during construction of the Project (§ 11.2).
- The Tenant must give the Town notice of any release of hazardous materials it discovers or received in connection with the Property (§ 11.5).
- The Tenant will indemnify the Town for all costs associated with the release of hazardous materials during the Term, (§ 11.6).

- **Default and Remedies**

- Failure to pay rent, maintain insurance, or perform any duty under the Lease after notice and a thirty day period to cure, or appointment of an involuntary receiver due to bankruptcy are events of default (§14.1).
- Failure to pay the contemplated \$500,000 loan from the Affordable Housing Trust, in accordance with its terms, is also a default under the Lease (§ 16.3) (and, of course, will be a default under the loan from the Trust as well, which will have its own remedies for default).
- In the event of default, the Town may (§ 14.2):
  - Terminate and take possession;
  - Recover its damages, including attorneys' fees;
  - Recover unpaid rent for the remainder of the term, plus interest and an additional 3%;
  - Seek injunctive relief; or
  - Utilize any other legally available remedy.
- The Town, as an additional remedy, may perform any of the Tenant's obligations that the Tenant has failed to perform and recover that expense from the Tenant (§ 18.21).