

Sample 1-12-11
ANYWHERE AFFORDABLE HOUSING RESTRICTIVE COVENANT—Durham, NH

This Affordable Housing Restrictive Covenant (the “**Covenant**”) dated this _____ day of _____, 201____, is entered into between the Town of Durham (“**Town**”), a municipal corporation, having its principal office at Newmarket Road (NH Route 108), Durham, NH 03824 and _____ and _____, (the “**Owner**”) of the property known as _____, _____, _____. This Covenant applies to the real property and the building constructed on the property (the “**Home**”), described on **Exhibit A** attached hereto.

WHEREAS, _____ (the “**Developer**”), will be constructing or has constructed homes in a new subdivision named _____, according to the final subdivision plan dated _____ and recorded in the _____ Registry of Deeds as Plan No. _____ (the “**Development**”);

WHEREAS, as a condition of the Town of Durham approving the Development under its workforce housing provisions of the Conservation Subdivision Regulations adopted in accordance with RSA 674:58-61, the Town has required that ____ (number of affordable housing units) housing units within the Development be maintained as affordable housing;

WHEREAS, this Covenant is designed to satisfy the conditions of the Town by requiring that the Home be maintained for a term of at least thirty years as affordable housing;

WHEREAS, this Covenant shall restrict the sale, resale, rental, mortgaging and use of the Home and shall apply to and be enforceable against all current owners and all future owners of the Home for a term of thirty years, up to and including the current owner of the Home on the thirtieth anniversary of this covenant;

WHEREAS the Owner recognizes the special nature of the terms and conditions of this Covenant and, with the independent and informed advice of legal counsel, freely accepts the terms and conditions of this Covenant, including, without limitation, the terms and conditions that affect the marketability and the resale price of the Home; and

WHEREAS, the Town shall have responsibility for monitoring and enforcing this Covenant in compliance with the Town’s requirements for long term affordability.

THEREFORE, in consideration of the foregoing recitals and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1 DEFINITIONS

The following terms shall have the following meanings for purposes of this Covenant:

1.1 “**Administrative Agent**” means a third party private entity or non-profit agency selected by the developer acceptable to the Town to oversee and administer sale transactions for workforce housing including certification of income of prospective Eligible Buyer of workforce housing at initial sale and subsequent resale as required by this Covenant.

1.2 “**Area Median Income**” or “**AMI**” means the current Area Median Income for single persons and households of various sizes established by the United States Department of Housing and Urban Development (HUD) or by any successor United States Government department, agency, or instrumentality, for the Fair Rental Market Area which includes the Durham, New Hampshire.

1.3 “**Compliance Certificate**” means the certificate issued by Town verifying the facts in accordance with **Section 2.1A**.

1.4 “**Covenant**” has the meaning set forth in the above recitals.

1.6 “**Developer**” has the meaning set forth in the above recitals.

1.7 “**Development**” has the meaning set forth in the above recitals.

1.8 “**Eligible Buyer**” means a natural person, who is certified for the Town by an Administrative Agent or an Income Verification Agent to be qualified to buy a Home in accordance with the qualifications, standards, and procedures established through this Restrictive Covenant; provided, however, that for purposes of determining who is an Eligible Buyer for purposes of this Covenant Eligible Buyers shall include only those individuals whose income is at or below one hundred (100%) percent of Area Median Income for a family of four (4) at the time of purchasing the Home.

1.9 “**First Mortgage**” means a recorded mortgage which is senior to any other mortgages or liens against the Home (other than the lien for real estate taxes and homeowner association assessments, if any), and which is used to secure a loan from an Institutional Lender to an Eligible Buyer to purchase a Home.

1.10 “**Home**” has the same meaning set forth in the above recitals.

1.11 “**Income Verification Agent**” means an agency or other entity that has received training in determining income eligibility for HUD Section 8 or other HUD affordable housing programs and is found to be acceptable to the Town to perform such income verification functions as required by this Covenant.

1.12 “**Intent to Sell Notice**” means Owner’s written notice to the Town and/or Developer’s Administrative Agent of the Owner’s intent to sell the Home and shall include those items listed in **Section 2.2**.

1.13 “**Institutional Lender**” means any bank, savings and loan association, or any other lender that is licensed to engage in the business of providing purchase money or mortgage financing on residential real property.

1.13 “**Maximum Sales Price**” means the purchase price of the affordable home that results in monthly housing costs (principal, interest, taxes, insurance and condominium fees, if any) that do not exceed thirty percent (30%) of the gross income of an Eligible Buyer.

1.14 “**Owner**” has the same meaning set forth in the above recitals and also means the record title owner of a Home.

1.15 “**Primary Residence**” means the residence a person occupies for a minimum of eight (8) full months out of any twelve (12) month period.

1.16 “**Purchase Price**” means any and all consideration paid for the purchase of a Home, either at or outside of closing, but not including prorated amounts such as taxes and utilities, costs and expenses of obtaining financing, the fair market value of furnishings or personal property, lender’s fees, title insurance fees, closing costs, inspection fees, or other normal and customary financing and closing costs.

1.17 “**Town**” has the meaning set forth in the above recitals.

1.18 “**Transfer**” means any sale, assignment or transfer, voluntary or involuntary, by operation of law (whether by deed, contract of sale, gift, devise, bequest, trustee’s sale, deed in lieu of foreclosure, or otherwise) of any ownership or possessory interest in a Home, including but not limited to, a fee simple interest, a joint tenancy interest, a tenancy in common, a life estate, or leasehold interest, or mortgage or lien.

2. SALE AND TRANSFER RESTRICTIONS

2.1 Maximum Sales Price/Eligible Buyer. Except as set forth in **Section 2.4**, a Home shall not be Transferred, and no attempted Transfer will be valid unless:

A. The Town, or its designee, issues a Compliance Certificate after receipt, review and acceptance of the maximum sales price and eligible buyer determination from an Administrative Agent, stating that the Purchase Price is equal to or less than the Maximum Sales Price, the buyer is an Eligible Buyer, the proposed terms of the Transfer are in compliance with this Covenant, and the Compliance Certificate will be recorded at the Strafford County Registry of Deeds.

B. Any good faith buyer of a Home, an Institutional Lender or any other third party may rely upon a Compliance Certificate as conclusive evidence of the matters stated in the Certificates and may record the Certificates in connection with the Transfer of the Home.

C. Within ten (10) days of the Closing, the new Owner shall deliver to the Town a certified copy of the recorded deed of the Home.

D. Affordability Recapture: The owner of the Home at the time of expiration of this thirty year Restrictive Covenant shall not be bound by the Maximum Sales Price or Eligible Buyer restrictions of this covenant however when said owner does sell the Home after the thirty year term of this covenant, the Maximum Sales Price shall be calculated and the owner shall pay to the Town an amount equal to the actual sales price minus the calculated Maximum Sales Price. The Town shall place these funds in a Town managed Housing Trust Fund to be used to enhance the affordability of other housing projects in the Town and to administer and enforce the workforce housing program in Town.

2.2 Administrative Fee. At the time of initial sale of workforce housing, the Developer shall pay a reasonable administrative fee to the Administrative Agent who shall be responsible for determining the eligibility of the Eligible Buyer based on the most current AMI and Maximum Sales Price. For subsequent sales the Owner shall pay a reasonable administrative fee to the Administrative Agent who shall be responsible for determining the eligibility of the Eligible Buyer based on the most current AMI and Maximum Sales Price. The Administrative Agent shall prepare a Compliance Certificate for review by the Town and execution if it is deemed acceptable.

2.3 No Guarantee. Nothing in this covenant shall be construed or give rise to any implied representation, warranty or guarantee and Town and the Developer expressly disclaim that an Owner will be able to resell a home for the Maximum Resale Price or receive Owner's initial purchase price.

2.4 Exempt Transfers. The following Transfers shall be exempt from the resale provisions of this Covenant:

A. Any Transfer resulting from the death of an Owner by operation of law or pursuant to any will or trusts to a spouse, child, parent, grandparent or grandchild of any Owner. For purposes of this Covenant, the term child includes adopted children or stepchildren.

B. Any Transfer resulting from a decree of dissolution of the marriage or legal separation or from a property settlement agreement incidental to such a decree, by which a spouse who is an Owner and becomes the sole Owner of the Home.

C. Any Transfer by an Institutional Lender in connection with any foreclosure proceeding or any Transfer to an Institutional Lender in lieu of a foreclosure.

Following any Exempt Transfer set forth above, the Home shall remain subject to the covenants, conditions and restrictions set forth in this Covenant. Any transfer by or to an Institutional Lender as set forth in **Section 2.4(C)** above shall be subject to the terms and provision of **Section 4** of this Covenant.

3. RESTRICTONS ON USE, RENTAL AND JUNIOR ENCUMBRANCES

3.1 Occupancy. The Owner shall maintain the Home as his or her Primary Residence, occupying that Home for a minimum of eight (8) full months out of any twelve (12) month period, unless otherwise agreed in writing by the Town. Occupancy by children or other immediate family members or dependents of the Owner, who have been occupying the Home for a period of at least nine (9) consecutive months before the start of the Owner's absence, shall be deemed occupancy by the Owner. Upon written request of the Town, the Owner shall provide the Town with such information as the Town may reasonably request to satisfy itself that the Home is being used as the Owner's Primary Residence.

3.2 Residential Use. The Owner shall use, and shall cause all occupants thereof to use, the Home only for residential purposes and such incidental activities related to residential use as are currently permitted by then existing zoning codes, Town ordinances, and restrictive covenants governing the Development. The Owner shall not use or occupy, nor permit any use or occupancy of the Home in violation of this Covenant.

3.3 Maintenance/Improvements. The Owner shall maintain the Home in a good, safe, and habitable condition in all respects, except for normal wear and tear, and in full compliance with all applicable laws, ordinances, homeowner covenants, and rules and regulations set forth by any master association for the Development or by any governmental authority with jurisdiction over matters concerning the condition and use of the Home. The Owner may make any improvements to the home, however the Owner recognizes that the maximum sales price calculations may limit the amount of equity that the owner is able to recover at the time of sale of the home.

3.4 Restrictions Against Leasing and Junior Encumbrances. The Owner shall not lease, refinance, encumber (voluntarily or otherwise) or grant a mortgage on the Home without the prior written consent of the Town, provided, however, that this provision shall not apply to a First Mortgage granted to acquire the Home. Any rents, profits, or proceeds from any prohibited lease or encumbrance shall be paid to and be the property of the Town. In the event that the Town in the exercise of its absolute discretion consents to a lease, refinancing, encumbrance or mortgage, it shall be a condition to such consent that all rents, profits or proceeds from such transaction which exceed the carrying costs of the Home as determined by the Town, in its sole discretion, be paid to and be the property of the Town's Housing Trust Fund. No encumbrance shall be in excess of the amount of the Maximum Sales Price.

4 MORTGAGE PROTECTIONS

4.1 Covenant Subordinate to First Mortgage. This Covenant shall be subordinate to a First Mortgage.

4.2 Notice of Foreclosure. *[An Institutional Lender shall give the Town sixty (60) days notice of its intent to foreclose upon its First Mortgage or to accept a conveyance of the Home in lieu of foreclosure.] or [An Institutional Lender shall give the Town, its successors or assigns, the same notice provided to "any person having a lien of record" in accordance with RSA 479:25,II.]* During the [_____] (___) day period, the Town, its successors or assigns, shall have the right, but not the obligation, to purchase the mortgage for the amount due thereunder (including applicable expenses), and in such event the Institutional Lender shall deliver to the purchaser such assignments and other evidentiary documents as the purchaser shall reasonably request.

4.3 Termination of Covenant. If an Institutional Lender acquires the Home by foreclosure or by deed in lieu of foreclosure under its First Mortgage, after giving the Town the required [____ (___)] days notice, the rights and restrictions contained in this Covenant shall terminate, and the Home shall become free from the rights and restrictions in this Covenant. Notwithstanding the foregoing, nothing shall prevent an Institutional Lender from selling a Home subject to this Covenant to an Eligible Buyer in any foreclosure proceeding or after acquisition of title to the Home. The Town shall, upon request, provide a determination as to a purchasers qualifications as an Eligible Buyer. In such case, the deed shall indicate that the Home is being sold subject to this Covenant. In addition, if the Town, or its successors or assigns, purchases a Home at a foreclosure sale or from an Institutional Lender, the Town, or its successors or assigns may resubject the Home to this Covenant by recording a supplemental covenant.

4.4 Excess Proceeds. If an Institutional Lender conducts a foreclosure or other proceeding enforcing its rights under its mortgage and the Home is sold for a price in excess of the greater of: (i) the outstanding principal balance of the note secured by such mortgage plus all future advances, accrued interest and all reasonable costs and expenses which the Institution is entitled to recover pursuant to the terms of its mortgage, or (ii) the Maximum Sales Price applicable on the date of the sale, the excess after repayment to the Owner of the Owner's equity investment in the Home shall be paid to the Town in consideration of the loss of the value and benefit of the rights and restrictions contained in this Covenant held by the Town and released by the Town pursuant to this section. If the excess is paid, the Town shall agree to indemnify the Institutional Lender against loss or damage it may suffer as a result, provided the Institutional Lender gives the Town prompt notice of any claim and shall not object to intervention by the Town in any proceeding relating to the claim. In order to determine the Maximum Sales Price of the Home at the time of foreclosure or other proceeding, the Town may, at its own expense, calculate the Maximum Sales Price or obtain that calculation from an Administrative Agent. If the Institutional Lender disagrees with the Maximum Sales Price calculated by the Town, the Institutional Lender may obtain a second Maximum Sales Price calculation from an independent Administrative Agent at its expense and the final Maximum Sales Price used shall be equal to the average of the two Maximum Sales Price calculated amounts. To the extent the Owner possesses any interest in any amount which would otherwise be payable to the Town under this section, to the fullest extent permissible by law, the Owner hereby assigns its interest in such amount to the Institutional Lender as holder for payment to the Town.

5 COVENANT TO RUN WITH THE HOME

5.1 Right of First Refusal. The Developer and the Owner, for good and valuable consideration, the receipt and sufficiency of which is acknowledged, grant and assign to the Town and the Town's successors and assigns, the Right of First Refusal to purchase the Home and the right to designate an Eligible Buyer of the Home.

5.2 Duration. It is intended and agreed that all of the rights, restrictions, covenants and agreements in this Covenant shall be deemed to be covenants running with the Home and shall be binding upon and enforceable against the Owner, the Owner's successors and assigns and any party holding title to the Home, for the benefit of and enforceable by the Town and the Town's successors and assigns for a period thirty (30) years from the creation of this Covenant. This covenant shall also be binding on the owner of the Home who purchases the Home prior to the thirty year term of this covenant and sells it after the expiration of the thirty year term.

5.3 Condition of Development Approval. This Covenant and all the rights and restrictions contained in this Covenant shall be deemed to be a condition of the approval for this development granted by the Durham Planning Board under the Workforce Housing regulations embodied in the Durham Open Space Development Regulations adopted in accordance with RSA 674:58-61.

5.4 Covenant to Run with the Home. The Owner intends, declares and covenants on behalf of itself and its successors and assigns (i) that this Covenant and the rights and restrictions contained in the Covenant shall be covenants running with the land, encumbering the Home for the term of this Covenant, and are binding upon the Owner's successors in title, (ii) are not merely personal covenants of the Owner, and (iii)

shall bind the Owner, its successors and assigns and enure to the benefit of the Town and the Town's successors and assigns for the term of this Covenant. Grantee hereby agrees that any and all requirements of the laws of the State of New Hampshire to be satisfied in order for the provisions of this Covenant to constitute restrictions and covenants running with the land shall be deemed to be satisfied in full and that any requirements of privity of estate or privity of contract are also deemed to be satisfied in full.

5.5 Enforcement. The Developer and the Owner, for good and valuable consideration, the receipt and sufficiency of which is acknowledged, grant and assign to the Town and the Town's successors and assigns the right to take all actions with respect to the Home which the Town may determine to be necessary or appropriate, with or without court order, to prevent, remedy or abate any violation of the rights, restrictions, covenants and agreements in this Covenant. The rights granted to the Town shall be in addition to and not in limitation of any rights and remedies available to the Town for enforcement of the restrictions, covenants and agreements set forth in this Covenant. Without limitation on any other rights or remedies of the Town or the Town's successors or assigns, any sale or other transfer or conveyance of the Home in violation of the provisions of this Covenant shall, to the maximum extent permitted by law, be voidable by the town or the Town's successors or assigns. The Owner shall be liable for all court costs and reasonable attorneys' fees incurred by the Town in connection with any enforcement action brought by the Town.

6 MISCELLANEOUS

6.1 Notices. Whenever this Covenant requires either party to give notice to the other, the notice shall be given in writing and delivered in person or mailed, by certified or registered mail, return receipt requested, to the party at the address set forth below, or such other address designated by like written notice:

If to The Town of Durham:

Town of Durham
15 Newmarket Road
Durham, NH 03824
Attn: Planning Administrator

If to Owner or Administrative Agent:

All notices, demands and requests shall be effective upon being deposited in the United States Mail or, in the case of personal delivery, upon actual receipt.

6.2 Homestead Waiver. This Covenant is prior and superior to the Owner's right to a homestead exemption under RSA 480:1, or any successor statutes. Each Owner waives his or her homestead rights to the fullest extent that they conflict with or impair the Town's rights and remedies under this Covenant.

6.3 Severability. If any provision of this Covenant shall be held by a court of proper jurisdiction to be invalid or unenforceable; the remaining provisions shall survive and their validity, legality and enforceability shall not in any way be affected or impaired thereby; and the court may, but shall not be required to, fashion a substitute for the provision held to be invalid or unenforceable.

6.4 Headings. The headings of the sections in this Covenant are for convenience only and shall not be used to interpret the meaning of any provision hereof.

Executed as of the date first written above.

OWNER:

Witness

Witness

**The Town of Durham,
a municipal corporation**

Witness

Town Administrator

State of New Hampshire

County of _____

Personally appeared the above named _____ and _____, this ____ day of _____, 20__ and acknowledged the foregoing to be her free and voluntary act and deed, before me.

Justice of the Peace/Notary Public
My commission expires:_____

State of New Hampshire

County of _____

Personally appeared the above named _____ and _____, this ____ day of _____, 20__ and acknowledged the foregoing to be her free and voluntary act and deed, before me.

Justice of the Peace/Notary Public
My commission expires:_____

EXHIBIT A
LEGAL DESCRIPTION OF THE HOME