

**MEMORANDUM OF UNDERSTANDING  
BY AND AMONG  
FELLSWAY DEVELOPMENT, LLC, LANGWOOD COMMONS, LLC  
AND  
DEPARTMENT OF CONSERVATION AND RECREATION**

This Memorandum of Understanding (this “MOU”) is entered into as of this \_\_\_\_ day of \_\_\_\_\_, 2009 by and among the Department of Conservation and Recreation (the “DCR”), a body public, corporate, and politic, organized and existing pursuant to the laws of the Commonwealth of Massachusetts (the “DCR”) with offices at 251 Causeway Street, Boston, Massachusetts 02114; Fellsway Development, LLC (“Fellsway”) with an address c/o The Gutierrez Company at One Wall Street, Burlington, Massachusetts 01803; and Langwood Commons, LLC with an address c/o Simpson Housing LLLP at 33 Broad Street, Boston, Massachusetts 02109 (“Langwood”, Fellsway and Langwood are hereinafter at times collectively referred to as the “Developer”).

**RECITALS**

The following sets forth the background of this Memorandum of Understanding:

1. The Commonwealth of Massachusetts, acting through the DCR, is the owner of the Middlesex Fells Reservation (the “Reservation”) in the Town of Stoneham, as successor to the Metropolitan District Commission (the “MDC”) pursuant to G.L. c. 92 and St. 2003, Chapters 26 and 41.
2. The Developer is the owner of an approximately 36 acre parcel of land located east of Spot Pond on Woodland Road in Stoneham, Massachusetts (the “Site”), which is bounded to the north and east by the Reservation. The Developer proposes to redevelop the Site into a mixed use development consisting of the redevelopment of the existing 374,000 square foot hospital facility to approximately 225,000 square feet of office space, continued use of 14,000 square feet in accessory buildings, and development of approximately 49 townhouses, 261 apartments and 95 garden-style condominiums, for a total of 405 residential units, and a ancillary convenience store (collectively, the “Third Redevelopment”). The conceptual plan for the Third Redevelopment is attached hereto as Exhibit A.
3. The Site abuts Woodland Road (a four-lane parkway controlled and maintained by DCR) and has two existing driveways that access Woodland Road.
4. Previously, the Developer proposed redeveloping the Site as a 914,000 square foot first-class office, medical, and research and development facility. Fellsway Development, LLC and the MDC entered in a memorandum of understanding dated as of

March 16, 2002 pertaining to such prior redevelopment proposal (“2002 MOU”). The parties formally confirm that the 2002 MOU is of no further force and effect and terminated.

5. In November, 2005, the Developer filed a Notice of Project Change pursuant to the Massachusetts Environmental Policy Act , M.G.L. c. 30, §§61 et seq. and regulations thereunder (“MEPA”) with the Secretary of Environmental Affairs (now the Secretary of Energy and Environmental Affairs; the “Secretary”).

6. On January 6, 2006, in response to comments from DCR and the Massachusetts Historical Commission (“MHC”), the Secretary issued a Certificate (the “2006 Certificate”) requiring the Developer, among other things, to engage in consultations with DCR and MHC, followed by the negotiation of a draft Memorandum of Agreement (MOA) with DCR and public review and comment on such MOA, with respect to any changes proposed to be made by the Developer to DCR parkways.

7. The Developer consulted with DCR and the community on a “Vision Plan” for the Middlesex Fells parkways. The Vision Plan’s focus was on Woodland Road, as “the central spine of the Fells Reservation.” In a far-reaching, public exercise led by DCR and its design consultant Glatting Jackson, with assistance from DCR’s traffic and engineering staff and DCR’s traffic and engineering consultant, Rizzo Associates, existing traffic and safety concerns were identified, at the Developer’s cost, resulting in a published Vision Plan that the parties then hoped that the Developer could implement. Specifically, the Vision Plan recommended numerous “traffic calming” measures for Woodland Road. Among those measures was the construction of “roundabouts” at each of the existing entrances to the Site. These measures were intended to remedy existing deficiencies on Woodland Road and nearby roads, whether related to or independent of redevelopment of the Site (collectively, the “Vision Plan”).

8. On June 29, 2007, the MHC issued a letter in which it concluded that implementation of the Vision Plan would cause an “adverse effect” on a historical resource, namely, the existing design of Woodland Road. MHC called for in an entirely new consultation process for any work on Woodland Road.

9. Thus, in January 2008, the Developer put forth a third redevelopment proposal (i.e. the Third Redevelopment), which proposed no alterations to any roads or facilities outside of the Site, including Woodland Road, and a further, 10% reduction of the mixed-use project to 225,000 square feet of office space redevelopment of the existing hospital facility, 405 residential units, continued use of existing accessory buildings and structure, and the ancillary convenience store. The Developer proposed to use the Site’s existing Woodland Road driveways “as is,” and without construction of the two roundabouts recommended in the Vision Plan, but rejected by MHC. The Developer notified the Secretary that the Developer believed that the Third Redevelopment did not call for the issuance of state permits, and therefore it did not require review under MEPA. In February 2008, the director of the Secretary’s MEPA office responded to the Developer’s January 2008 notice and stated that, if the Third Redevelopment was not the

subject of any “agency action,” there would be no basis for MEPA jurisdiction or MEPA review.

## AGREEMENTS

NOW, THEREFORE, in consideration of the mutual covenants set forth in this MOU and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

### I. BASIC AGREEMENTS; DESCRIPTION OF THE WORK: DCR TO UNDERTAKE WORK; FUNDING FOR THE WORK

10. The parties agree that the Third Redevelopment will not involve any change of use of the Reservation or conveyance by the DCR to the Developer of interests in the Reservation.

11. DCR hereby agrees that in consideration of the actions undertaken by the Developer in Paragraphs 5 - 9 and 12, and compliance with its funding obligations pursuant to Paragraph 13 below, the Third Redevelopment does not require a DCR permit or financial assistance from DCR, and that this MOU and the undertakings of the Developer hereunder mitigate all traffic and safety issues identified by DCR in its letter to the Secretary dated June 16, 2008. DCR further represents that the Developer has satisfied all DCR regulations, policies and guidance regarding access to DCR parkways that apply to the Third Redevelopment and that the traffic improvements funded by the Developer ensure safe and efficient traffic operations on DCR roadways, regardless of when the Developer proceeds to build particular elements of the Third Redevelopment.

12. The Developer has caused to be prepared and submitted to DCR, and DCR has reviewed and hereby agrees to, the Transportation Safety Improvements Plan (“TSI Plan”), attached hereto and incorporated herein as Exhibit B. The Developer has caused to be prepared and submitted to DCR and DCR has reviewed and hereby agrees to that certain Traffic Impact Summary and a Level of Service/Capacity Analysis completed by Developer’s consultant, VHB (the “2009 VHB Study”), attached hereto and incorporated herein as Exhibit C.

13. In consideration of the foregoing and the terms and provisions of this MOU, the Developer has agreed to fund One Million Eight Hundred Thousand Dollars (\$1,800,000.00) into an escrow account to be used for (i) the detailed design, permitting, reviews, consulting / project management services and construction of the improvements shown on and described as Options 2, 3, 6, 7 and 9 in the TSI Plan, including associated area clean-up or landscaping work, and construction period traffic details, on those portions of Woodland Road, Pond Street and Ravine Road immediately abutting or in the vicinity of the Site (and as it may be reasonably modified or varied hereafter by DCR provided such modifications or variations are not materially inconsistent with the TSI Plan, the “Work”), and (ii) the potential interim traffic mitigation described below.

Without limiting the generality of the foregoing, the term “Work” as used herein shall include any applicable design, review and permitting processes and consulting and project management services, including interim traffic safety measures. DCR may in its sole discretion determine not to implement portions of the Work other than Options 2, 3 and 6, which must be implemented if any Work is implemented.

14. Within thirty (30) days after the execution of this MOU by all parties, the Developer shall deposit the sum of Three Hundred Thousand (\$300,000.00) Dollars with First American Title Insurance Company (the “Escrow Agent”) to be held and disbursed in accordance with the terms and provisions of this MOU (the “Initial Deposit”).

15. Within thirty (30) days of the earlier to occur of either (i) the Developer obtaining a final, unconditional Certificate of Occupancy for at least half of the buildout of the Third Redevelopment, or (ii) DCR obtaining all final, non-appealable permits and review certifications for the construction of the Work and DCR giving written notice to Developer that DCR shall commence construction of the Work promptly thereafter (provided that DCR timely commences the Work in accordance with such notice), the Developer shall deposit the remaining balance, being the sum of One Million Five Hundred Thousand (\$1,500,000.00) Dollars, with the Escrow Agent to be held and disbursed in accordance with this MOU (the “Second Deposit”; the Initial Deposit and the Second Deposit, together with all interest and earnings thereon, shall herein be collectively referred to as the “Escrowed Funds”).

16. The Escrowed Funds may be used by DCR for the detailed design, permitting, review processes, consulting / project management services and construction of the Work. In no event shall DCR propose, agree to or undertake any modification or variation of the Work or propose, agree to and take any other action using the Escrowed Funds, which would have the effect of reducing or eliminating pedestrian and vehicular access to the Site for the construction, use and occupancy of the Third Redevelopment. The amount of Escrowed Funds payable to DCR for consulting / project management services and any other non-construction related costs, including without limitation, landscaping and clean-up, shall be capped at \$300,000 in the aggregate.

17. DCR agrees that if it chooses, in its sole and absolute discretion, to pursue the Work and traffic mitigation, it shall pursue and complete the same and shall cause to pursue all required review processes (e.g. MHC, MEPA) and obtain any and all necessary permits and approvals required in connection therewith. In no event shall any term or provision in this MOU (i) require DCR to perform any of the Work, or (ii) require the Developer to apply or file for, or to obtain any permit or approval for, or to lead or participate in any review processes, or to construct the Work or any portion thereof, or in any way subject the Developer to any liability in connection therewith.

18. In the event that DCR elects to permit or construct the Work, DCR shall submit a requisition to the Escrow Agent, with a copy to Developer, to fully fund the Work completed, which such Work may include pre-construction costs for design and permitting, review processes (e.g., MHC, MEPA), and consulting / project management services and traffic mitigation. Such requisition shall include a written certification from

DCR's Chief Engineer, certifying DCR's intent to proceed with the improvements, or portions thereof, more particularly described in Paragraph 13, which certification shall be supported by reasonable back-up documentation supporting the means and methods proposed by DCR to make such improvements. Upon receipt of the certification and reasonable backup documentation, the Developer and the Chief Engineer shall have seven business days to consult, and thereafter, the Escrow Agent shall transfer the remaining balance to a separate account identified by DCR to be held for the purposes of funding the Work. At least ten days prior to issuing any contract documents or other applicable documents concerning the Work, DCR shall provide Developer with a copy of said contract documents (which shall include, without limitation, applicable sureties and bonds) to insure that said contract documents further the improvements identified in Paragraph 13.

19. DCR does not object that construction and occupancy of the Third Redevelopment may proceed immediately upon execution of this MOU.

20. In the event that the total cost of completing the Work is less than the Escrowed Funds, then after all requisitions or invoices relating thereto have been submitted to and paid by the Escrow Agent, then the Escrow Agent shall, after written notice to both the Developer and DCR, distribute the balance of the Escrowed Funds to DCR to be used for improvements within or nearby to Woodland Road..

21. In the event that construction of the Work by DCR (or such portion thereof as DCR has determined to construct consistent with this MOU) has not commenced on or before the earlier of (a) June 30, 2013, or (b) such date which is the third (3<sup>rd</sup>) anniversary of Developer's receipt of a final, unconditional Certificate of Occupancy for at least half of the Third Redevelopment, but in no event later than June 30, 2013 (the "Outside Date"), then the Escrow Agent shall distribute the then balance of the Escrowed Funds to the Developer. For purposes hereof, the term "commencement" shall require DCR to have a current contract in hand and actual construction to have commenced in accordance with usual and customary construction practices.

22. In the event that the total cost of constructing the Work is more than the total cost of the Escrowed Funds, together with all interest earned thereon, the parties agree that Developer shall have no obligation to deposit funds in excess of the Escrowed Funds described herein. DCR shall have no obligation to expend any public funds on the Work, unless appropriated by the Legislature for that purpose.

## II. INTERIM TRAFFIC DETAILS

23. The Developer and DCR agree that if the Developer commences construction of the Third Redevelopment, or any part thereof, prior to the commencement of construction by DCR of the Work, or any part thereof, then, the Developer shall implement, at its sole cost and expense, but reimbursable out of the Escrowed Funds as hereinafter provided, or shall request that DCR implement, out of the Escrowed Funds (or out of such funds held in a separate DCR account pursuant to Paragraph 18 above), a traffic detail, reasonably acceptable to DCR, at either the North Site Drive/Woodland

Road intersection or the South Site Drive/Woodland Road intersection during “peak hours” (as defined by standard ITE definitions), if, as and when either party notifies the other in writing that, in accordance with applicable ITE standards, a traffic detail is warranted.

24. The Developer shall have the right to obtain reimbursement for such police details out of the Escrowed Funds by sending an invoice(s) to the Escrow Agent, with a copy to DCR, together with any reasonable back up documentation evidencing such costs reasonably incurred by the Developer in providing such detail, whereupon the Escrow Agent shall pay the Developer from the Escrowed Funds, an amount equal to each of Developer’s said invoice(s).

25. The Developer shall have no obligation to provide or fund any traffic detail if and to the extent remaining Escrowed Funds are not sufficient to pay the cost thereof, or after the Work is completed.

### III. EASEMENT

26. Upon written request by DCR to Developer, which such request shall be made by DCR no later than the Outside Date, and provided that DCR has then obtained all permits and approvals beyond appeal required for the Work, the Developer agrees to grant to DCR at no cost to DCR or Developer, a temporary non-exclusive easement on such portion of the Site, as described and shown on Exhibit D attached hereto, for the construction at no cost to the Developer (other than out of Escrowed Funds), of a single-lane roundabout as contemplated by the TSI Plan, and thereafter a perpetual exclusive easement for use and access of such roundabout as a public way by DCR, the general public and others legally entitled thereto, including access by DCR to perform any required maintenance, repairs and/or replacement thereof, subject, however, to all pre-existing rights and easements including those granted to adjacent lot owners pursuant to that certain Amended and Restated Declaration of Easements and Maintenance Agreement dated as of December 20, 2007 and recorded with the Middlesex South Registry of Deeds in Book 50503, Page 109 and that certain Declaration of Non-Exclusive Access and Utility Easements dated October 13, 1995 and recorded with said Deeds in Book 25733, Page 265, as amended by First Amendment to Declaration of Non-Exclusive Access and Utility Easements dated July 14, 2008 and recorded with said Deeds in Book 51473, Page 194. Developer and DCR shall agree on a mutually agreeable easement agreement incorporating the foregoing terms promptly upon receipt of DCR’s written notice to the Developers as aforesaid. The initial draft of the agreement and easement plan shall be prepared by DCR..

### IV. ESCROW PROVISIONS

27. The Escrow Agent shall hold the Escrowed Funds in an interest bearing account, and interest earned on the Escrowed Funds shall be paid to the DCR or Developer on a pro rata basis based on the portion of the principal amount of the Escrowed Funds paid to such parties, as applicable.

28. In the event of any disagreement between the Developer and DCR with respect to the Work (or the cost thereof) or any other matter arising hereunder in connection with the Escrowed Funds, the parties agree to work together, each acting reasonably and in good faith, to resolve the same. If the parties resolve their dispute, they shall issue joint written instruction to the Escrow Agent, to the extent such dispute pertains to the escrowed funds or otherwise affects the service of the Escrow Agent hereunder. If the Developer and DCR fail to reach an agreement within thirty (30) days of notice of such disagreement, then any party or the Escrow Agent is hereby authorized and directed to file an interpleader action with a court of competent jurisdiction

29. Developer agrees to indemnify the Escrow Agent and to hold the Escrow Agent harmless from and against any and all claims, damages, losses, liabilities, judgments and expenses (including, without limitation, all reasonable fees and expenses of counsel and all expenses of litigation or preparation therefor) that the Escrow Agent may incur or that may be asserted against the Escrow Agent in connection with the performance of the Escrow Agent's duties hereunder or arising out of any investigation, litigation or proceeding involving this MOU (including compliance with or contesting of any subpoenas or other process issued against the Escrow Agent), whether or not the Escrow Agent is a party thereto, other than claims, damages, losses, liabilities or judgments with respect to any matter as to which the Escrow Agent shall have been adjudicated not to have acted in good faith. Promptly upon receipt by the Escrow Agent of notice of the commencement of any action, the Escrow Agent shall, if a claim in respect thereof is to be made against any other party hereto hereunder, notify such party in writing of the commencement thereof.

## V. MISCELLANEOUS

30. Developer agrees, subject to a reservation of its claims in the pending Land Court action and a reservation of all other rights, promptly upon receipt of a letter signed by the Commissioner of DCR and stating that DCR is prepared to enter into this MOU in a form mutually agreeable to DCR and Developer, which form shall be attached to such letter, to cause to be submitted to the Secretary a request for an advisory opinion under MEPA that such MOU and the TSI Plan and 2009 VHB Study constitute new information not available to the Secretary when the Secretary issued his Certificate on July 3, 2008, and determining that no further review of the Third Redevelopment is required under MEPA. If the Secretary issues such an advisory opinion without qualification or limitation, and such advisory opinion is not directly, indirectly or collaterally challenged, appealed or attempted to be circumvented in any way by any person within three months after such advisory opinion is formally issued and effective, then DCR and the Developer shall within a further 15 days thereafter execute and deliver this MOU among them. DCR and Developer acknowledge that Developer intends to request that the Secretary submit the request for such advisory opinion to public review and comment prior to acting thereon.

31. Notwithstanding any language to the contrary set forth in this MOU, in the event that (a) DCR, MEPA or other state agency, body or authority, asserts jurisdiction over the Third Redevelopment despite this MOU, or (b) a court declares that DCR,

MEPA or other state agency, body or authority has jurisdiction over the Third Redevelopment despite this MOU, then the Developer (and DCR only in the case of (b) above) shall have the right, exercisable by giving notice to the other party, to terminate this MOU and Developer shall immediately receive back all of the unexpended Escrowed Funds (including any such funds held in a separate DCR account pursuant to Paragraph 18 above), with any interest earned thereon, whereupon this MOU (except Paragraphs 10, 33, 37 and 40 hereof, which shall survive) shall become null and void without further force and effect.

32. The Developer shall have no liability or obligation in connection with the performance and/or completion of the Work undertaken or constructed by DCR and shall have not have any responsibility for any violations of laws or other liability caused by DCR in connection therewith. The provisions of this paragraph shall survive the termination of this MOU and the escrow hereunder.

33. The Developer and DCR agree that this MOU, or any documents related hereto, will not be recorded in the Registry of Deeds or registered in the Land Court, as this MOU does not grant, transfer or dispose to the Developer of any right, title or interest in or to the Reservation, Woodland Road or any other DCR property.

34. Developer and DCR agree that DCR retains, subject to this MOU, all customary and applicable police power, regulatory authority or other discretion as a state agency with regard to the Reservation, Woodland Road and other DCR property; and nothing in this MOU grants or confers upon Developer or any other person any special standing, status, privilege or right in or upon the Reservation, Woodland Road or other DCR property that is separate, distinct or in addition to that of the general public or afforded an abutter under state law.

35. All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given if delivered (a) by certified mail, return receipt requested, or (b) if deposited with an overnight delivery service, properly addressed and postage prepaid. All notices shall be effective upon the earlier receipt of (i) actual receipt or (ii) by 5:00 PM on the third business day following deposit in the U.S. Mail as certified, return receipt requested mail. Notices shall be addressed as follows:

If to the DCR, to:

Department of Conservation and Recreation  
Attention: Richard Sullivan  
251 Causeway Street  
Boston, MA 02114



with a copy in like manner to:

Department of Conservation and Recreation  
Attention: Gary Davis, General Counsel  
251 Causeway Street  
Boston, MA 02114

If to the Developer, to:

Fellsway Development, LLC  
c/o The Gutierrez Company  
Attention: John A. Cataldo, Vice Chairman and Secretary  
One Wall Street  
Burlington, MA 01803

with a copy in like manner to:

Fellsway Development, LLC  
c/o The Gutierrez Company  
Attention: Gloria M. Gutierrez,  
Executive Vice President and Corporate Counsel  
One Wall Street  
Burlington, MA 01803

And:

Spencer Welton  
Simpson Housing LLP  
33 Broad Street, Suite 1002  
Boston, MA 02109

with a copy in like manner to:

Greg Peterson  
DLA Piper  
33 Arch Street, 26<sup>th</sup> Floor  
Boston, MA 02110-1447

If to the Escrow Agent, to:

First American Title Insurance Company  
101 Huntington Avenue  
Boston, MA 02199-7610  
Attn: \_\_\_\_\_

or at any other address as may be given by any party to the other party by notice in writing pursuant to the provisions of this Section 40.

36. Whenever the consent or approval of either party is required, such consent or approval shall not be unreasonably withheld, conditioned or delayed.

37. Except as otherwise expressly provided herein, the provisions of this MOU shall inure to the benefit of and be binding upon the parties and their successors and assigns to or of the Property and the Reservation, expressly excluding any mortgagee of record, but including subsequent purchasers at a foreclosure sale or otherwise, and upon taking title to the property referred to herein by foreclosure deed or deed in lieu of foreclosure, such parties shall thereafter have the rights previously conferred upon, and become subject to the obligations of the prior owner, and Developer as applicable for the Property, of such property.

38. This MOU shall not be modified, amended or terminated except in writing executed by all parties hereto.

39. This MOU may be executed in any number of counterparts, each of which when executed and delivered is an original, but all of which together shall constitute one instrument.

40. The 2002 MOU in its entirety is terminated and of no further force and effect.

41. This MOU shall take effect as of the date first written above.

42. This Agreement shall be construed and enforced in accordance with the laws of The Commonwealth of Massachusetts.

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*Signature Page to Follow*

IN WITNESS WHEREOF the parties hereto have executed this MOU under seal as of the date set forth above.

DEPARTMENT OF CONSERVATION  
AND RECREATION  
Division of Urban Parks and Recreation

Approved as to form:

By: \_\_\_\_\_  
Gary Davis  
General Counsel

By: \_\_\_\_\_  
Richard Sullivan  
Commissioner

FELLSWAY DEVELOPMENT, LLC

By: The Gutierrez Company,  
Managing Member

By: \_\_\_\_\_  
Arthur J. Gutierrez, Jr.  
President

LANGWOOD COMMONS LLC

By: Simpson Housing L.L.L.P.

By: Columba LLC, a Delaware limited  
liability company, its General  
Partner

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

ESCROW AGENT

FIRST AMERICAN TITLE INSURANCE  
COMPANY

By:

Name: \_\_\_\_\_

Title:

EXHIBIT A

CONCEPTUAL SITE PLAN OF THE THIRD REDEVELOPMENT

EXHIBIT B

COPY OF THE TRANSPORTATION SAFETY IMPROVEMENTS PLAN AND  
DESCRIPTION OF THE IMPROVEMENTS UNDER SUCH PLAN

EXHIBIT C  
2009 VHB STUDY

EXHIBIT D

LOCATION AND DETAILS OF THE CONTINGENT EASEMENT