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**STATE OF NEW HAMPSHIRE
DEPARTMENT OF CULTURAL RESOURCES**

Division of Arts, Division of Historical Resources,
Division of Libraries, Film and Television Office
Office of Curatorial Services
*American Canadian French Cultural Exchange Commission,
Administratively Attached*



Van McLeod, Commissioner

May 22, 2013

Her Excellency, Governor Margaret Wood Hassan
and the Honorable Council
State House
Concord, New Hampshire 03301

No Cost

REQUESTED ACTION

Authorize the Department of Cultural Resources, Division of Historic Resources, to accept, upon Governor and Council approval, a Perpetual Historic Preservation Easement consisting of the real property and archaeological sites on approximately 4.237 acres along NH Route 103 in Newbury, NH and no appraised value, from Newbury Elderly Housing, Inc., effective upon Governor and Council Approval.

EXPLANATION

The property contains two Paleoindian era archaeological sites listed in the NH Archaeological Site Inventory as 27MR370 and 27MR124. Newbury Elderly Housing, Inc. is receiving federal funding through the Department of Housing and Urban Development (HUD) to purchase the property and construct approximately 34 units on the site. In the spring and summer of 2010, a Phase 1 A Archaeological Sensitivity Assessment and a Phase 1B Intensive Archaeological Investigation were conducted confirming two archaeological resources within the project area. A preservation easement was recommended to protect both archaeological sites during and after construction.

In order to move forward with the transfer of funds to purchase the property, Housing and Urban Development needs a ready to execute easement to be signed by the grantor (Newbury Elderly Housing, Inc.) and the Grantee (the State of New Hampshire through the New Hampshire Division of Historical Resources.) Housing and Urban Development will not accept an easement signed before the transfer of funds occurs and will not transfer the funds without an easement that is ready to be signed and executed.

The attached easement has been reviewed and accepted by Newbury Elderly Housing, Inc. and the NH Division of Historical Resources. The Attorney General's office has reviewed the document and after consultation, has approved it moving forward without signature with the understanding that the document language is in final form for the property transfer that will occur in May of 2013. The Division of Historical Resources has been working closely with Newbury Elderly Housing, Inc. to insure that their pending plans for construction will move forward quickly and looks forward to continued collaboration and cooperation under the preservation easement.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Van McLeod', written in a cursive style.

Van McLeod
Commissioner

The within conveyance is a transfer to the State of New Hampshire and pursuant to RSA 78-B:2(1) it is exempt from the New Hampshire Real Estate Transfer Tax

HISTORIC PRESERVATION DEED RESTRICTION (EASEMENT)

NEWBURY ELDERLY HOUSING, INC. a New Hampshire non-profit corporation with a principal place of business at 2 Industrial Park Drive, P.O. Box 1016, City of Concord, County of Merrimack and State of New Hampshire 03302 (hereinafter referred to as the "Grantor", which word includes the plural and shall, unless the context clearly indicates otherwise, include the Grantor's successors and assigns),

with **QUITCLAIM COVENANTS**, grants in perpetuity to

the **STATE OF NEW HAMPSHIRE, DEPARTMENT OF CULTURAL RESOURCES**, acting through the **DIVISION OF HISTORICAL RESOURCES**, having its place of business and mailing address at 19 Pillsbury Street, Concord, Merrimack County, New Hampshire 03301-3570, (hereinafter referred to as the "Grantee", which word includes the plural and shall, unless the context clearly indicates otherwise, include the Grantee's successors and assigns),

an **HISTORIC PRESERVATION EASEMENT**, (hereinafter "Easement") hereinafter described with respect to that certain parcel of land (hereinafter "Property") being unimproved land, consisting of approximately 4.237 acres in the Town of Newbury, County of Merrimack, State of New Hampshire, more particularly bounded and described in Appendix "A" attached hereto and made a part hereof, more particularly described on the plan entitled, "Boundary and Proposed Easement Plat prepared for Newbury Elderly Housing" to be recorded, upon the terms and conditions set forth herein.

1. BACKGROUND AND NATURE OF EASEMENT

WHEREAS Grantor and Grantee desire to guarantee the preservation of the historical character and archaeological qualities of the Property and to impose "preservation restrictions" on the Property in accordance with RSA 477:46, and the Property possesses the following historic attributes:

A. The Property contains two archaeological sites listed in the NH Archaeological Site Inventory as 27MR370 and 27MR124.

NOW THEREFORE, it is hereby understood and acknowledged:

2. PURPOSES

This easement is given in consideration of the acquisition of an historic preservation easement by the State of New Hampshire Department of Cultural Resources, Division of Historical Resources, acting through the Governor and Council, exclusively for the following historic preservation purposes ("Purposes"):

A. To ensure that the archaeological, historical, and cultural features of the Property will be retained and maintained in their current or better condition for research and preservation purposes;

B. To provide access to the Property for archaeological research and education; and

C. To prevent any use or change of the Property that will significantly impair or interfere with the historic preservation values of the Property.

All of these Purposes are consistent and in accordance with and pursuant to the provisions of New Hampshire RSA 477:45-47.

3. USE LIMITATIONS

Any activity on or use of the Property inconsistent with the Purposes of this Easement is prohibited. Without limiting the generality of the foregoing, the following use limitations shall apply to the Property except as otherwise specifically provided by the Easement:

A. Grantor covenants and agrees that it shall not undertake any of the following actions without the prior express written approval of the Grantee, which approval may be withheld or conditioned in the sole discretion of the Grantee: construction, placement, or introduction of any structure or improvement, including, but not limited to, a dwelling, any portion of a septic system, educational building, tennis court, athletic field, pavilion, swimming pool, dock, shooting range, aircraft landing strip, pavement, dam, bridge, outdoor lighting, utility pole, conduit, antenna, personal wireless service facility, communications facility tower, unpaved road, levee, water control structure, bridge, culvert or mobile home; dredging, filling, roadwork, and changes in topography. There shall be no ditching, draining, diking, filling, excavating, dredging, quarrying, mining, drilling, or removal of topsoil, subsoil, sand, gravel, rock, water, gas, petroleum, minerals, peat, or other materials, or building of new roads or trails, or alteration of the land surface or subsurface in any manner, unless such activities have been reviewed and approved by the Grantee under the terms of this preservation easement.

4. GENERAL INTENT

In the event the Grantor and/or Grantee have a difference of opinion about the meaning of a specific term or condition recited below, they shall be guided in interpretation by the following statements of General Intent:

- A. The purpose of the preservation restrictions is to preserve the archaeological values of the identified sites known to exist on the Property.
- B. All changes to the Property subject to these preservation restrictions shall be in the spirit of contributing to the public purpose of protecting and preserving the archaeological resources in conformance with the Standards for Review, or as required by local, state, and federal laws and regulations for the public benefit.
- C. The Grantor shall refrain from excavating, operating machinery on, or otherwise impacting the Property to prevent harm to the identified and potential archaeological resources therein unless such activities have been reviewed and approved by the Grantee under the terms of this preservation easement.
- D. The Grantee reserves the discretionary right to perform archaeological study and to allow archaeological investigations on the Property after receiving written approval from the Grantor, and said approval shall not be unreasonably withheld. The Grantee may, in its sole discretion, approve the proposed investigations only if it finds that all of the following conditions are met:
 - 1. The archaeological investigations shall be conducted by qualified individuals, as defined at 36 C.F.R. 61, and according to a specific research proposal;
 - 2. The proposed activities will not harm state or federally recognized rare, endangered, or threatened species; and
 - 3. The proposed activities will not be materially detrimental to the purposes of this Easement.

5. INTERPRETATION

In the event of a disagreement between Grantor and/or Grantee as to the interpretation or application of the provisions of these preservation restrictions, any party may request that the matter be submitted to binding arbitration, or in the event that either party does not wish to submit to binding arbitration, Grantor and/or Grantee may petition to the Merrimack County Superior Court for relief.

6. STANDARDS FOR REVIEW

The Grantee shall apply the following Standards for Review in exercising any authority created by these preservation restrictions to inspect the Property subject to these preservation restrictions, and to review and approve any proposed construction, alteration, rehabilitation, relocation, demolition, change in use, sale, subdivision, or other transfer of property rights. The

Grantor agrees to abide by the Standards for Review in performing any construction, excavation, machinery operation, alteration, rehabilitation, relocation, demolition, change in use, sale, subdivision, land altering activity, or other transfer of property rights affecting the premises subject to these preservation restrictions. The Standards for Review are as follows:

- A. *Secretary of the Interior's Standards and Guidelines for Preservation Planning*, 1983 and as amended. A copy of the standards and guidelines is on file with the Grantee.
- B. *The Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation* as they may be amended from time to time. A copy of the Standards is on file with the Grantee.
- C. Baseline Documentation: *Phase IA Archaeological Sensitivity Assessment and Phase IB Intensive Archaeological Investigation, Newbury Elderly Housing Complex*, 2010, on file at with the Grantee.

7. ENFORCEMENT

The right of enforcement of these restrictions by the Grantee shall be as provided in New Hampshire Revised Statutes Annotated RSA 477:45-47 (Chapter 391, Laws of 1973, and Chapter 301, Laws of 1979), as they may be amended from time to time. This Historic Preservation Deed Restriction (Easement) enumerated in items one (1) through nineteen (19) inclusive, shall be a binding servitude, and run with the land and be binding upon the Grantor, its heirs, successors, transferees, and assigns, in perpetuity. The restrictions, stipulations, and covenants contained herein shall be inserted by the Grantor, its heirs, successors, transferees, and assigns, verbatim or by express reference, in any deed or other legal instrument by which it divests itself of either the fee simple title or any lesser estate in the property, or any part thereof.

8. INSPECTION AND COMPLIANCE

The Grantee shall be permitted to inspect the Property to ascertain whether the Grantor is complying with these restrictions. Said inspection shall be conducted during normal business hours and shall be conducted without undue interference with the operations of the property. In the event that a violation is found, the Grantee shall give written notice of such violation and establish a reasonable time within which such violation shall be corrected.

9. NOTICE; INSPECTION, REMEDIES

9.1 Notices from Grantor or Grantee to each other shall be in writing and shall be delivered to the Grantor at 2 Industrial Park Drive, P.O. Box 1016, City of Concord, County of Merrimack and State of New Hampshire 03302, and to the Grantee at 19 Pillsbury Street, Concord, NH 03301-3570. Such notices shall be either delivered in hand or shall be sent by overnight courier, postage prepaid, by facsimile transmission, or by registered or certified mail with return receipt requested. The party receiving notice shall have two weeks to respond to the

notice before any action is undertaken by the sending party. Each party may change its address set forth herein by a notice to that effect to the other party.

9.2 Grantor shall promptly notify Grantee in writing of any proposed sale of the Property and shall provide the opportunity to the Grantee to explain the terms of this Easement to any potential new owner prior to the closing on such sale.

9.3 Upon request of the Grantor the Grantee shall promptly furnish Grantor with certification that, to the best of Grantee's knowledge, Grantor is in compliance with the obligations of Grantor contained in this Easement or that otherwise certifies the status of this Easement to the extent of Grantee's knowledge thereof.

9.4 Grantee, following reasonable notice to the Grantor, may institute a suit to enjoin any violation of the terms of this Easement and may seek *ex parte*, temporary, preliminary, and/or permanent injunctive relief, which relief may also include prohibitory and/or mandatory injunctive relief, and may further require the restoration of the Property and the Building to the condition and appearance that existed prior to the violation complained of. Grantee shall also have available all legal and other equitable remedies to enforce Grantor's obligations under this Easement. In the event Grantor is found to have violated any of its obligations under this Easement, Grantor shall reimburse Grantee for any costs or expenses incurred in connection with the enforcement of the terms of this Easement, including, but not necessarily limited to, all reasonable Court costs and attorneys, architectural, engineering, and expert witness fees. Grantee's exercise of one remedy hereunder shall not have the effect of waiving or limiting its right to any other remedy and the failure to exercise any remedy shall not have the effect of waiving or limiting the use of that remedy or any other remedy or the use of such remedy at any other time. Grantee shall have a lien upon the Property for any costs or expenses incurred under this Section. Any such lien may be confirmed by a judgment and executed upon in the same manner as a mechanic's lien, except that any lien created pursuant to this Section shall be subordinate to, and shall not jeopardize the priority of, any recorded lien of a mortgage or deed of trust given in connection with a promissory note that is secured by the property, including without limitation a mortgage to the U.S. Department of Housing and Urban Development and the Regulatory Agreement, Use Agreement and UCC-1 Financing Statement recorded or to be recorded in connection therewith.

10. MAINTENANCE AND ADMINISTRATION

The Grantor agrees to assume the total costs of continued maintenance, repair, and administration of the Property, in a manner that complies with the Standards for Review, in order to preserve the archaeological integrity of its sites. The Grantor shall maintain the Property at all times. Nothing herein shall prohibit the Grantor from seeking financial assistance from any sources available to the Grantor.

11. ALTERATIONS

The Grantor and the Grantee agree that no alterations as defined in Section 4C shall be made to the Property and no structures subsequently shall be placed, erected, relocated, or demolished on the Property subject to these preservation restrictions, without the prior written consent of the Grantee, its successors or assigns, except for:

- A. ordinary maintenance on the Property; or
- B. actions required to mitigate a casualty or other emergency promptly reported to the Grantee, its successors or assigns.

12. SUBDIVISION AND CHANGE IN USE

The Grantor agrees that the use of the Property subject to these preservation restrictions shall not be changed, nor shall easements or other property rights be granted, sold, or transferred, nor shall the premises be subdivided, without the prior written consent of the Grantee, its successors or assigns.

13. EXCLUSION

The Grantor agrees that the State of New Hampshire, by and through any of its agencies, in no way assumes any obligation whatsoever for maintaining, repairing, or administering the premises covered by these preservation restrictions.

14. GRANTOR LIABILITY

The Grantor acknowledges it shall be liable for any and all losses suffered by the Grantor, and any and all claims, liabilities, or penalties asserted against the Grantor by or on behalf of any person on account of, based on, resulting from or arising out of (or which may be claimed to have arisen out of) acts or omissions of the Grantor relating to these preservation restrictions. Notwithstanding the foregoing, nothing herein contained shall be construed to be a waiver of the sovereign immunity of the State of New Hampshire.

15. EXERCISE OF RIGHTS AND REMEDIES

Failure of the Grantee to exercise any right or remedy granted under these preservation restrictions shall not have the effect of waiving or limiting the exercise by the Grantee of any other right or remedy or the invocation of such right or remedy at any other time.

16. CONTINUATION

In the event that the parcels are damaged or destroyed through the willful action or negligence of the Grantor, the State of New Hampshire may initiate such administrative or judicial actions as may be legally available and appropriate.

17. SEPARABILITY

Any portion of items of these preservation restrictions found to be contrary to law shall not invalidate any other portions or items or the whole of these preservation restrictions.

18. EXTINGUISHMENT

Grantor and Grantee hereby recognize that circumstances may arise that may make impossible the continued ownership or use of the Property in a manner consistent with the purpose of this Easement and necessitate extinguishment of the Easement. Such circumstances may include, but are not necessarily limited to, partial or total destruction of the archaeological sites on the Property resulting from casualty or by eminent domain. No such extinguishment or termination of this restriction shall be effective until an instrument to that effect is recorded in the Merrimack County Registry of Deeds.

19. OTHER CONDITIONS

NONE.

TO HAVE AND TO HOLD, the said subdivision, with all the privileges and appurtenances thereunto belonging to the said Grantor and its assigns forever.

IN WITNESS WHEREOF, Grantor and Grantee have set their hands under seal on the days and year set forth below.

GRANTOR:

NEWBURY ELDERLY HOUSING. INC.

Witness

Newbury Elderly Housing, Inc.
By: Nancy Dickerman, President
Duly Authorized

State of New Hampshire
County of _____

Personally appeared Nancy Dickerman, the duly authorized President of Newbury Elderly Housing, Inc., this _____ day of _____, 2013 and acknowledged the foregoing to be its voluntary act and deed.

Before me:

Justice of the Peace/Notary Public
My commission expires:

ACCEPTANCE OF EASEMENT:

GRANTEE:

NEW HAMPSHIRE DIVISION OF HISTORICAL RESOURCES

By: Elizabeth H. Muzzey
Elizabeth H. Muzzey, Director and
State Historic Preservation Officer

By: Richard Boisvert
Richard Boisvert, Deputy Director

State of New Hampshire
County of Merrimack

Personally appeared Elizabeth H. Muzzey & Richard Boisvert, the duly authorized Director of the New Hampshire Division of Historical Resources, this 23rd day of May, 2013 and acknowledged the foregoing to be its voluntary act and deed.

Before me:

Peter Michaud
Peter Michaud, Justice of the Peace
My commission expires April 18, 2017

APPROVED AS TO FORM AND EXECUTION:

NEW HAMPSHIRE DEPARTMENT OF JUSTICE

Michael K. Brown
Signature

5/23/13
Date

Michael K. Brown
Name

Sen. Asst. Atty. General
Title

Appendix A

HISTORIC PRESERVATION EASEMENT AREA

Beginning at a point marking the northeasterly corner of land now of William R. Hall Jr. and the northwesterly corner of the within described parcel, thence; N 89°10'18" E a distance of 30.00 feet to a point marking the southeasterly corner of land now of Thomas J. & Anne M. Lally, thence; N 74°29'31" E a distance of 106.79 feet to a point on the westerly property line of land now of Newbury Plaza LLC, thence; Turning S 23°48'48" E along land of said Newbury Plaza LLC a distance of 192.33 feet to a concrete bound marking the southwesterly corner, thence; Turning N 80°26'07" E along land of said Newbury Plaza LLC a distance of 240.42 feet to a point marking the northeasterly corner of the within described parcel, thence; Turning S 27°54'08" E a distance of 12.90 feet to a point, thence; S 17°45'52" E a distance of 31.01 feet to a point, thence; S 29°12'34" E a distance of 23.99 feet to a point, thence; S 39°54'51" E a distance of 34.12 feet to a point, thence; S 75°46'18" E a distance of 15.93 feet to a point on the westerly right of way line for the former Concord & Claremont Railroad, thence; Following a curve to the right along the westerly right of way line of said Concord & Claremont Railroad a distance of 196.54 feet to a point, said curve having a central angle of 02°06'55" a radius length of 5323.84 feet a chord bearing of S 20°43'25" E and a chord distance of 196.53 feet, thence; Turning N 70°15'32" E continuing along the westerly right of way line of said Concord & Claremont Railroad a distance of 24.75 feet to a point, thence; Turning S 19°38'23" E continuing along the westerly right of way line for said Concord & Claremont Railroad a distance of 51.52 feet to a point marking the southeasterly corner of the within described parcel, thence; Turning S 79°05'52" W a distance of 45.53 feet to a point, thence; S 18°45'39" W a distance of 59.43 feet to a point, thence; S 44°31'14" W a distance of 65.45 feet to a point, thence; S 08°19'39" E a distance of 45.56 feet to a point, thence; S 56°52'11" W a distance of 40.62 feet to a point, thence; Turning N 66°15'43" W a distance of 45.35 feet to a point, thence; N 79°37'37" W a distance of 51.63 feet to a point, thence; N 38°24'45" W a distance of 93.53 feet to a point, thence; N 47°01'55" W a distance of 52.39 feet to a point, thence; N 51°54'44" W a distance of 66.59 feet to a point, thence; S 89°12'02" W a distance of 29.05 feet to a point, thence; N 56°02'35" W a distance of 43.84 feet to a point, thence; S 70°36'45" W a distance of 4.49 feet to a point on the easterly property line of land now of Christopher Hallisey, thence; Turning N 27°57'53" W a distance of 88.80 feet to a concrete bound marking the northeasterly corner of said Hallisey, thence; N 27°58'27" W a distance of 200.11 feet to a concrete bound marking the northeasterly corner of land now of Paul J. Jr. & Doris E. Diekmann, thence; N 27°58'27" W a distance of 47.07 feet to a point, thence; N 09°06'02" W a distance of 106.18 feet to the point of beginning.

Containing 184,569 square feet of 4.237 acres

Meaning and intending to convey by historic preservation easement a portion of the premises conveyed to Newbury Elderly Housing by the Clark M Davis 2000 Revocable Trust and the Evelyn C. Davis 2000 Revocable Trust by deed dated _____ and recorded in the Merrimack County Registry of Deeds at Book____, Page____. See also the plan entitled, "Boundary and Proposed Easement Plat prepared for Newbury Elderly Housing" to be recorded.