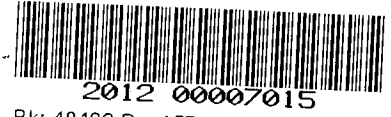


# TOWN OF BERLIN

Office of the Town Clerk  
23 Linden St., #8  
Berlin MA 01503-1066

(978) 838-2931 Phone  
(978) 838-0014 Fax  
[townclerk@townofberlin.com](mailto:townclerk@townofberlin.com)

WORCESTER REGISTRY OF DEEDS  
90 FRONT STREET – C201  
WORCESTER MA 01608



Bk: 48432 Pg: 157  
Page: 1 of 18 01/20/2012 03:38 PM WD

January 19, 2012

## CERTIFICATE OF NO APPEAL – SOLOMON POND MALL DEVELOPMENT AGREEMENT

I, Eloise E. Salls, Town Clerk of Berlin, hereby certify that no legal proceedings have been filed concerning the SOLOMON POND MALL DEVELOPMENT AGREEMENT on Donald Lynch Boulevard, in the City of Marlborough and the Town of Berlin. The Town Meeting voted date was March 26, 1994. Decision filed with the Town Clerk on March 26, 1994.

OWNER: Paramount Development Associates, Inc.  
Marlborough Business Center Limited Partnership

APPLICANT: Berlin Properties Limited Partnership, c/o New England Development:

Location: on Donald Lynch Boulevard, in the City of Marlborough and the Town of Berlin, (off) River Road, Berlin

Property Recorded: Worcester County Registry of Deeds Book 16796. Page 309

The Development Agreement was granted with the following conditions:

1. Traffic Mitigation, Public Safety, Stormwater Management, Open Space Mitigation, Project Maintenance, Landscaping and Screening will be completed prior to issuance of certificate of occupancy with ongoing responsibilities.

**The twenty day (20) appeal period ended on April 18, 1994, and no appeal filed.**

A true copy.

Attest: Eloise E. Salls  
Town Clerk of Berlin

PAW  
18

## DEVELOPMENT AGREEMENT

This Agreement is entered into as of this 26th day of March, 1994, by and between Berlin Properties Limited Partnership, a Delaware limited partnership, acting by and through Berlin Properties Corporation, a Delaware corporation ("the Developer") and the Town of Berlin, acting by and through its Board of Selectmen (the "Town") for good and valuable consideration the receipt and sufficiency of which are hereby acknowledged. It represents the understanding between the parties with respect to the contributions and commitments of the Developer with respect to mitigating traffic, environmental, public safety, growth management and other impacts arising from the development of a Regional Shopping Center ("the Project") on Donald Lynch Boulevard in the City of Marlborough and the Town of Berlin ("the Project Site").

### 1. GENERAL

1. The Developer shall comply with applicable rules, regulations and by-laws of the Town of Berlin, City of Marlborough, Commonwealth of Massachusetts and Federal Agencies as they apply to the construction, maintenance and operation of the Project, including, without limitation, compliance with Wetlands Protection Act final orders, the Massachusetts Environmental Policy Act ("MEPA"), General Laws Chapter 30A, Section 61 and the State building code.
2. The Developer shall comply with applicable regulations issued by the Commonwealth of Massachusetts relative to the existence of hazardous waste located on the Site, including compliance of the provisions of M.G.L., Chapter 21E and other applicable government codes.
3. The Developer shall file an Environmental Notification Form under MEPA covering the entire Project before beginning any construction on the Project Site.
4. The terms of this Agreement shall be incorporated into the conditions of any Site Plan Approval issued by the Planning Board for any portion of the Project, and shall be binding upon the Developer and any successor in interest to the Project, as provided in Sections 15.4 and 15.10 of this Agreement.

### 2. CONSTRUCTION PHASE RESPONSIBILITIES

1. Construction of all structures on the Site is to be in accordance with all applicable zoning regulations in effect in the applicable local or state jurisdiction and with the State Building Code.

A TRUE COPY,  
Attest: *Elaine E. Salls*  
Town Clerk of Berlin

2. The Developer will work with the Town and with the City of Marlborough to coordinate an integrated approach to permitting and inspections.
3. In addition to the normal fees payable to the Town of Berlin for building permits and other permits, the Developer shall assume reasonable expenses of ongoing inspection and review of the construction process and compliance with all applicable conditions and requirements of the Zoning By-Laws, the Development Plan and site plan approval. Upon the issuance of a building permit, the Town shall provide to the Developer an initial estimate of the cost of inspection and review services and the Developer shall deposit said amount in an interest bearing escrow account, such an initial amount not to exceed \$100,000. The Town shall draw from the escrow account as necessary to pay for inspection and review services, and shall provide additional estimates to the Developer when the balance of the escrow account is reduced to a point below the anticipated requirements for the next month. To the extent that the Developer agrees, the Developer shall then deposit such further amounts subject to the terms of this Section. At the completion of construction under the building permit, any funds remaining in the escrow account shall be returned to the Developer. The Town and the Developer shall work together to coordinate inspections with the City of Marlborough. The Town agrees to use moneys deposited under this Section for the purpose of retaining qualified inspectors to review the Project.
4. During construction of the Project, the Developer shall impose on each of its contractors a requirement that all heavy equipment accessing the Site shall use the interstate highway system (Route 495/290 to Solomon Pond Road). This clause shall not apply to any trip originating or ending at a place of business within the Town of Berlin.
5. During the construction phase, Developer will limit the removal of trees and vegetation in the Management Area to that reasonably required for construction of stormwater runoff system and provision of access to such construction. Prior to issuance of Certificate of Occupancy, the Developer shall replace any mature trees removed in access cuts for construction access or pipe installation using coniferous trees of not less than 10-15 feet in height. This obligation is in addition to any obligation to maintain the buffer zone under Section 10.2.1.

### 3. TRAFFIC MITIGATION

#### 3.1 To be completed prior to issuance of certificate of occupancy

##### 1. Mitigation Projects to be Completed by the Developer.

Prior to the issuance of the final Occupancy Permit for the Project, the Developer shall undertake (subject to and provided that it obtains the necessary local and state permits or approvals, and the Town of Berlin acknowledges that the time for performance of those conditions shall be extended pending receipt of all necessary permits and approvals to effectuate the improvements set forth below), the following traffic improvements:

- a. Route 62 (Central Street)/Linden Street and Linden Street/South Street: Traffic signal at Route 62/Linden Street; establish two lanes (left turn, right turn) on northbound Linden Street at Route 62; rebuild island on South Street to be a median island; install "Stop" sign at Linden Street for northbound South Street traffic, install granite curbing as needed;

- b. Route 62 (Central Street)/Pleasant Street:

Widen Pleasant Street on the east side to create two northbound approach lanes from Pleasant into Central Street; resurface intersection; paint double yellow center lines on all approaches;

- c. West Street/Boylston Road/Barnes Hill Road/Derby Road:

Widen Route 62 (West Street) on northeast and southeast corners if possible; build two traffic islands on easterly approach of West Street; install "Yield" sign for West Street right turn to the north; install "Stop" sign for westbound straight through/left turn West Street; resurface intersection, paint appropriate pavement markings and remove guard rail in center of intersection; change flashing beacon to flashing red in their direction (facing westbound Route 62).

- d. Any other improvements required by MEPA and not listed specifically in Section 3.1.2.

##### 2. Developer Contribution toward Additional Traffic Mitigation.

In addition, the Developer, at the time of the issuance of the final Occupancy Permit, shall deposit with the Town the sum of Two Hundred Thousand (\$200,000) Dollars in an interest-bearing, escrow account (the "Traffic Mitigation

Account") for the specific purpose of funding mitigation which may be determined to be necessary as a direct result of the Project operations. These mitigation measures may include, but not be limited to the following:

- a. Pleasant Street/Sawyer Hill Road: Implement safety improvements at the intersection of Pleasant Street and Sawyer Hill Road.
- b. South Street/Pleasant Street/Crosby Street: Implement safety improvements at the intersections of Pleasant, South and Crosby Streets, possibly including channelization of the northbound South Street approach at Pleasant Street, widening of South Street at the Post Office, and/or restriction of movements from northbound Pleasant Street at South Street.
- c. River Road Rotary: Paint double yellow center lines on all four approaches; extend center lines as edge lines around delta median traffic islands; paint white edge lines on approaches and around rotary; install and repair curb as needed.
- d. River Road West/Bridge Street: Paint pavement markings (double yellow enter line, edge lines, line); install curve warning signs; improve guard rail as needed and install chevrons on guard rail.
- e. West Street/Randall Road: Build median traffic island on Randall Road; relocate utility pole; construct curbing around parking lot where possible.
- f. School zone safety improvements on Linden Street.

Any portion of the funds that have not been used for traffic mitigation purposes within four (4) years of the issuance of the Certificate of Occupancy shall be returned, with accumulated interest, to the Developer. If any of the improvements listed in this Section 3.1.2 are required to be carried out as a condition of the MEPA approval for the Project, the Town will implement such improvements using the above escrowed funds. If the Town fails to implement such improvements and the Developer implements such improvements as cure, the Town shall reimburse the Developer its reasonable expenses attendant to such cure, but only to the extent of any funds escrowed for this purpose. Further, in the event under the terms of the MEPA approval some portion of the above enumerated items needs to be completed prior to occupancy, the Developer shall have the right, after completing the same, to deduct the cost thereof from the funds to be deposited with the Town under this section.

3. Location Outside the Town or Berlin:

The Developer shall work with the City of Marlborough and the Town of Berlin to assure that any signalization of the intersection of Donald Lynch Boulevard and River Road (Solomon Pond Road) and the intersections of Solomon Pond Road with the two sets of access ramps to Interstate 290 shall include some degree of progression or coordination, in order to provide benefit to through traffic along Solomon Pond Road (River Road).

4. Donald Lynch Boulevard:

The Developer will (i) extend the proposed median in front of the Project, in a westerly direction from the Project to a point approximately 1,000 feet east of Solomon Pond Road; and (ii) with respect to any opening in said portion of the median, Berlin shall be given notice and the opportunity to comment.

5. Access to Project:

Left turns will be prohibited from all driveway exits from the Project and "No Left Turn" signs, will be provided at each exit to prevent left turns.

6. Public Transportation: The Developer shall provide a semi-enclosed shelter at the Project for the drop-off of passengers from the local bus service.

7. Traffic Consulting During the MEPA Process: The Developer will provide the Town of Berlin with the sum identified in the Schedule of Payments for the specific purpose of funding independent consultant review of traffic impacts and proposed mitigation during the MEPA process. The funds will be deposited in an interest bearing escrow account, and any funds not used for their intended purpose at the time that the Secretary of Environmental Affairs issues a Certificate for the Final Environmental Impact Report shall be promptly returned to the Developer, with accumulated interest.

8. Traffic Impact Studies: The Developer will deposit the sum identified in the Schedule of Payments in an interest bearing escrow account (the "Traffic Study Account") to fund traffic studies on behalf of the Town of Berlin by an independent traffic consultant to determine if additional traffic mitigation is required. Any funds in the Traffic Study Account not used for their intended purposes within three (3) years of the issuance of the final Occupancy Permit for the Regional Shopping Center shall be promptly returned to the Developer, with accumulated interest.

9. The Developer shall provide to the Town of Berlin copies of traffic impact studies or other traffic reports produced for Marlborough under the terms of or in connection with the special permit issued by Marlborough for the Project. Developer agrees that such studies shall include intersections in Berlin that were within the scope of initial studies associated with the Project.

### **3.2 Ongoing Responsibilities**

1. The Developer shall impose on each of its tenants, tenants' employees, and department store owners and itself, a requirement that delivery vehicles serving such tenants, department store owners and the Developer, will utilize the interstate highway system (Route 495/290) to Solomon Pond Road to access the Project. This requirement shall not apply to trips originating or ending at a business located in Berlin nor to deliveries of small cargoes made by common carriers such as UPS or Federal Express as part of a route delivery that in its ordinary course includes residences and business located within the Town of Berlin.
2. The Developer shall cooperate with appropriate officials of the Town and the City of Marlborough in developing traffic contingency plans for peak traffic periods or special events associated with the Project.

## **4. PUBLIC SAFETY**

### **4.1 To be completed prior to issuance of certificate of occupancy**

1. The Developer, at the time of the issuance of the final Occupancy Permit, shall delineate and maintain the Town-City line of Berlin and Marlborough within the Project structure and in the parking areas. Such delineation is to be designed so as not to impact the aesthetic quality of the project.
2. The Developer shall make the payments indicated in Sections 1, 2 and 3 of the Public Safety Section of the Schedule of Payments. With respect to the payment not to exceed \$250,000 in respect of a new fire truck, the Town, acting through its Finance Committee and representatives of the Fire Department, agrees to make best efforts to investigate the purchase of a refurbished engine and/or a lease purchase arrangement. Any amount of savings less than the \$250,000 will be returned to the Developer.

#### **4.2 Ongoing responsibilities**

1. The Developer will cooperate with the Town of Berlin and City of Marlborough to develop legally enforceable rules and regulations for the operation of motor vehicles at the Project. Appropriate signage and markings shall be installed and maintained by the Developer after such rules and regulations have been developed.
2. The Developer will coordinate with the Town of Berlin and its Police Department to (i) develop an appropriate mutual aid agreement with the City of Marlborough to effect concurrent police jurisdiction in the Regional Shopping Center Overlay District and such adjoining areas as the Town of Berlin and City of Marlborough may deem appropriate and to establish that the City of Marlborough shall have primary responsibilities for police coverage of the Regional Shopping Center, and (ii) develop compatible and consistent rules and regulations and ordinances for the administration of public safety in the Project.
3. The Developer will cooperate with the Town of Berlin and its Fire Department to (i) develop an appropriate mutual aid agreement with the City of Marlborough, and (ii) develop compatible and consistent rules and regulations and ordinances for the administration of public safety in the Project.

#### **5. STORMWATER MANAGEMENT**

1. The on-site detention basins shall be inspected not less than annually with respect to sedimentation accumulation with copies of annual reports given to the Conservation Commission. To the extent such reports indicate the need for sediment removal, the same shall be removed.
2. All catch basins shall be installed with sumps and inverted outlets as more fully shown on the Site Plan. The catch basins shall be monitored on a semi-annual basis with reports given to the Town of Berlin. The catch basins are to be cleaned annually, and as necessary, at more frequent intervals.
3. Snow storage is to be provided on-site, primarily on impervious surfaces, except (i) during peak periods (November 1 - January 1) or (ii) exceptional storms, in which event the Developer may or may not elect to utilize off-site storage. Snow-melt runoff is to be directed towards catch basins. The Developer agrees to use calcium chloride or such other substitute for sodium chloride as may be acceptable to the Town and the Developer for purposes of snow removal treatment.



**6. LIGHTING**

The Developer will comply with the lighting requirements set forth in Section X.J.3. of the Zoning By-Laws as such By-law is approved by Town Meeting on March 26, 1994.

**7. NOISE**

1. The Developer will comply with the noise generation standards set forth in Section X.J.2. of the Zoning By-Laws as such By-law is approved by Town Meeting on March 26, 1994.
2. In order to verify compliance with the performance standards regarding noise impacts from the Project, at the Town's reasonable request the Developer shall engage a competent engineering firm, which may be the engineering firm normally employed by the Developer, to make measurements and analyze noise levels in reference to such performance standards.

**8. OPEN SPACE MITIGATION**

**8.1 To be completed prior to issuance of certificate of occupancy**

In recognition of Berlin's desire to maintain open space in further recognition of the fact that the Project will remove open space from the Town, and that the Project does not meet the green space requirement of the Zoning By-Laws for the underlying zoning district, the Developer shall pay the Town the sum identified in the Schedule of Payments for open space planning.

**8.2 Ongoing responsibilities**

The Developer shall pay the Town the sum identified in the Schedule of Payments for open space acquisition and preservation, such payments to be made to the Town's Conservation Commission for the Conservation Fund, per G.L. c.40, §8C.

**9. PROJECT MAINTENANCE**

**Ongoing responsibilities**

1. Vacuum sweeping of parking areas shall comply with the provisions of Section X.J.2. of the Zoning By-law as such By-law is approved by Town Meeting on March 26, 1994.
2. As part of its common area maintenance, the Developer will provide a general cleanup of the area within 100 feet outside the regional shopping center boundaries, at least

twice a month subject to written approval of affected landowners.

## **10. LANDSCAPING AND SCREENING**

### **10.1 To be completed prior to issuance of certificate of occupancy**

1. The Developer will provide foundation planting along Project building facades, with a minimum width of nine (9) feet and an average width of between twelve (12) and nineteen (19) feet.
2. In the event that the Planning Board during site plan review should relieve the Developer of any requirement of foundation planting along parking decks or otherwise within the Project, the developer will compensate by providing 125 percent of such landscaped area in the periphery of the Project.

### **10.2 Ongoing responsibilities**

1. Buffer Zone Maintenance and Enhancements.
  - a. The Developer shall prepare a plan and program for the management of the buffer area on the northerly side of the Regional Shopping Center, as designated on the site plan as approved by the Planning Board. The goal of this management program will be to maintain and enhance the existing buffer for its effectiveness primarily as a visual screen. The management plan shall include commercially reasonable provisions for removal of dead or diseased trees, and planting and maintenance of herbaceous cover and understory species where appropriate to provide lower-level screening. The Town and the Developer acknowledge that the purpose of this Section is to maintain the integrity of the visual buffer by reasonable means and undertake to cooperate to assure its application with due concern for balancing the accomplishment of this purpose with reasonable expenditures.
  - b. In the event of loss of significant stands as a result of fire, storm or disease, the Developer shall cause a qualified forester, registered landscape architect or horticulturist to prepare a restoration plan acceptable to the Planning Board and the Developer, which plan may extend over a period of years. The total cost of restoration or any temporary screening shall not entail a cost to the Developer of more than \$5,000 per year. During such restoration period, the Developer and the Planning Board may agree on temporary screening.

measures, such as a fence.

- c. The Developer shall contract for the services of a qualified forester, registered landscape architect or horticulturist acceptable to the Planning Board to review the condition of the buffer zone on an annual basis, who will file a recommendation with the Town of Berlin Planning Board for comment and review. Any work as outlined in the report acceptable to the Town and the Developer will be performed at the expense of the Developer.

## **11. UTILITIES AND SERVICES**

1. The Developer shall contract for solid waste removal at the Developer's expense. In the event that the Town of Berlin is required to provide solid waste removal for the project for any reason, including but not limited to any applicable law or regulation or failure of the Developer or Operator to properly deal with such waste, the Developer agrees to pay the Town for any expenses arising directly from and reasonably attributable to the provision of such services to the Project. In such event the Town and the Developer shall work together to establish a plan to coordinate such services.
2. The Developer shall contract for the provision of public water and sewer services by the City of Marlborough, at the Developer's expense. In the event that the Town of Berlin is required to provide or pay for water or sewer service to the Project for any reason, including but not limited to changes in State laws or regulations or policies of the City of Marlborough, the Developer agrees to hold the Town harmless from any expense, loss, claim or liability arising from the provision of such services to the Project.

## **12. SCHEDULE OF LIQUIDATED DAMAGES**

For violations of the terms of this Agreement, the parties agree to the following amounts as liquidated damages to cover the Town's costs in enforcement action. These damages are not to preclude any remedy in law (including if applicable, specific performance) and do not include regular litigation expenses to the Town in the event that these are necessary for enforcement.

### **12.1 Construction Phase**

For each failure of its contractor to have heavy equipment access the site via interstate highway net: \$100.00

**12.2 Traffic**

For each failure of a delivery vehicle to access the site via the interstate highway net: \$100.00

**12.3 Public Safety**

None

**12.4. Stormwater Management**

For failure to provide reports or maintain catch basins: \$50 per day beginning 10 business days after developer has received written notice of violation.

**12.5 Lighting**

For failure to correct lighting violation: \$25 per day beginning 10 business days after developer has received written notice of violation; provided that such damage shall not accrue for period during which offending lighting is extinguished.

**12.6 Noise**

For any mechanical sweeping not conducted in accordance with Section 9(1) of this Agreement: \$100.00

**12.7 Maintenance**

For each failure to perform cleanup outside the regional shopping center boundaries as required by Section 9(2) of this Agreement, \$100 per day beginning fourteen (14) days after developer has received written notice of the violation.

**12.8 Landscaping and Screening**

For each failure to perform maintenance of the buffer area or to file report with the Planning Board pursuant to Section 10.2: \$100 per day beginning sixty (60) days after written notice of failure to file has been made to the Developer.

**13. OTHER OPERATING REQUIREMENTS**

1. In connection with the sale of tires, batteries, and other automotive accessories, the lubrication of automobiles, including the changing of oil, will be prohibited. The Developer will comply with applicable requirements under law with respect to the disposal of old batteries and used oil that is returned by customers for safe disposal.

2. The Developer agrees, prior to the Grand Opening of the Project, to conduct a "Job Fair", so-called. The Developer will coordinate such Job Fair, to the extent feasible, with local or regional governmental employment agencies so that local residents are provided with adequate notice of employment opportunities. In addition to the implementation of the specific arrangements that the Developer has made, the Developer will also coordinate a like Job Fair for contractors for tenant improvements in the Project and the Developer will encourage its contractors to hire local construction workers for the Project.
3. The Developer shall provide all parking for employees and patrons of the Regional Shopping Center in off-street parking areas, either in designated areas of the Project as approved by the Planning Board or at an approved off-site location. No parking will be permitted on Donald Lynch Boulevard or local streets.
4. In the event that the Developer appeals its real estate tax assessment and such appeal is finally denied, the Developer shall reimburse the Town for its costs of reasonable appraisal, legal and other professional expenses incurred by the Town with respect to such appeals for abatement of real estate taxes up to a maximum of \$20,000 per event.

**14. SCHEDULE OF IMPACT MITIGATION PAYMENTS**

All mitigation payments are to be made at the time of issuance of the final Certificate of Occupancy for the Project, notwithstanding that certificates of occupancy for one or more department stores within the Project may not have been issued, unless other payment arrangements are specifically set forth in this Agreement.

**14.1 Traffic Mitigation**

- |    |  |           |
|----|--|-----------|
| 1. | Traffic capacity and safety improvements (Berlin locations)  | \$200,000 |
| 2. | Traffic consulting during the MEPA process<br>(payable upon filing Environmental<br>Notification Form) | \$ 5,000  |
| 3. | Pre- and post-occupancy traffic impact studies   | \$ 10,000 |

**14.2 Public Safety**

- |    |                           |                              |
|----|---------------------------|------------------------------|
| 1. | Fire Department equipment | \$333,000<br>(not to exceed) |
|----|---------------------------|------------------------------|

"Quint" truck (pumper with junior aerial), refurbished if possible	\$250,000 (not to exceed)
Light rescue truck, new (50% of total cost)	\$ 22,500
Miscellaneous equipment including PASS devices	\$ 18,000
Air compressor and cascade system for breathing apparatus (50% of total cost)	\$ 7,500
Six self-contained breathing apparatus and six extra 4.5 (large) air bottles	\$ 19,500
Three mobile 800 MHz transceivers and five 800 MHz portable radios	\$ 8,000
2. Police Department equipment	\$ 58,000
Radio equipment	
Police base	\$10,750
Fire base	\$10,950
Regional base	\$ 3,505
Console (3 bays)	\$ 4,900
Electronics (inside console)	\$ 7,995
Cruiser	\$20,000
3. Police Department personnel (annual cost)	
First payment shall be made 9 months before grand opening date.	
Year 1 shall be the fiscal year of Town in which such first payment is made.	
Years 1 - 2	\$ 70,000/yr.
Years 3 - 5	\$ 80,000/yr.
Years 6 - 10	\$105,000/yr.

**14.3 Open Space Mitigation**

1. Open Space planning	\$ 65,000
2. Open space acquisition and preservation	\$3,000,000
\$1,500,000 upon issuance of Certificate of Occupancy	
\$50,000/yr. each of the 30 years thereafter	

**14.4 Miscellaneous**

1. Assessors Department personnel (15 hours/week, annual cost)	\$ 5,800/yr.
	for 5 years
Personnel (15 hours/week, annual cost)	\$5,000/yr.
	for 5 years
Educational expenses (annual cost)	\$ 800/yr.
	for 5 years

## **15. MISCELLANEOUS**

### **15.1 Performance Bond**

The Town acknowledges that certain improvements and conditions as may have been required in this Agreement, may not be fully completed or satisfied at the time of the issuance of the final Occupancy Permit (due to weather conditions, local, state or federal approvals or other matters beyond the Developer's control). In addition, certain conditions may be ongoing requirements which are unable to be satisfied prior to the issuance of a final Occupancy Permit. In those instances when conditions requiring construction of an improvement are not so satisfied prior to the issuance of the final Occupancy Permit, due to delay or other matters beyond Developer's control, the Developer shall agree, pursuant to the site plan approval process on the amount and nature of a bond or deliver other adequate security to ensure completion of those conditions not yet satisfied and the Building Inspector, upon notification that such bond or security is satisfactory, shall issue the Occupancy Permit.

### **15.2 Documentary Production**

Concurrent with the presentation of this Agreement, the Developer shall provide the following documentation.

1. Representation from the General Partner or Partners of the Berlin Properties Limited Partnership that it intends to maintain said partnership as a going concern able to discharge its responsibilities hereunder.
2. Opinion of counsel from its counsel that the execution of this Agreement and the representation required are duly authorized and binding upon the party executing such document.

### **15.3 Forbearance from Suit**

Developer shall forego any actions at law or equity attempting to contest the validity or prevent the enforceability of any provisions of this Agreement and shall procure written acknowledgment that such forbearance shall bind any successor or assign. Such forbearance shall not preclude the Developer from bringing any action for breach of contract on the part of the Town or acts of intentional misconduct on the part of the Town with respect to matters contemplated herein.

#### **15.4 Successors and Assigns**

All terms of this Agreement shall bind any successor or assign of this Agreement or any successor or assign of land within the Regional Shopping Center Overlay District, provided, however, that the obligation to make the payments set forth in the Schedule of Impact Mitigation Payments shall not be assigned to nor treated as assumed by any department store or its affiliate who acquires land in the Regional Shopping Center Overlay District for the purpose of constructing a department store thereon, but rather such obligations shall remain the responsibility of the Developer and its successors and assigns which expressly assume the same. The foregoing limitation shall not be applicable to any such acquisition if the effect of such acquisition were to result in the Developer (or the Developer's successor or assign who has assumed the obligations of the Developer under this Agreement) owning land on which less than 250,000 square feet of building is either located or is under construction.

#### **15.5 Acquisition of Land**

The Developer covenants that at such time as it, or a successor or assign that has specifically and in writing acknowledged the terms of this Agreement, shall acquire title to the minimum amount of land required under the Zoning By-Laws to develop a Regional Shopping Center within the Regional Shopping Center Overlay District, the Developer or such successor or assign shall record this document at the time of such acquisition. In the event that the Developer, or its successor or assign, is unable or unwilling to acquire title, the Developer shall immediately notify the Town of its inability or unwillingness to acquire title.

#### **15.6 Notices**

Notices, when required hereunder shall be deemed sufficient if sent registered mail to the parties at the following addresses:

Town:                   Town of Berlin  
                          Town Hall  
                          Berlin, MA 01503  
                          Attn: Town Clerk

Developer:           Berlin Properties Limited Partnership  
                          c/o New England Development  
                          One Wells Avenue  
                          Newton, MA 02159



### **15.7 Governing Law**

This Agreement shall be governed by the laws of the Commonwealth of Massachusetts. The parties hereby consent to non-exclusive jurisdiction of the courts of the Commonwealth of Massachusetts sitting in the county of Worcester or Middlesex.

### **15.8 Amendments to this Agreement**

Amendments to the terms of this Agreement may be agreed to on behalf of the Town by the Board of Selectmen provided that no such amendment shall relieve the Developer of any material obligation without prior approval of Town Meeting.

### **15.9 Interpretation**

For purposes of the operation of this Agreement under Subsection 13 of Section X.J of the Zoning By-Laws, the term "Developer" shall include any proponent of the Regional Shopping Center use, whether or not a successor or assign of any signatory of this Agreement. Capitalized terms not defined herein shall have the meaning assigned under the Zoning By-Laws.

### **15.10 Miscellaneous**

The Developer acknowledges and agrees that this Agreement shall be binding upon the Developer and each of its successors or assigns as to the obligations which arise under this Agreement during their respective periods of ownership of the Project, provided that each predecessor in interest shall be released under this section only if each has procured a written acknowledgment from their immediate successor addressed to the Town of Berlin that such successor is bound by the terms of this Agreement, and that this Agreement shall be enforceable by the Board of Selectmen. As and when requested by the Developer, the Town will promptly advise, in writing, the status of the Developer's obligations under this Agreement for the benefit of existing and prospective mortgagees of all or a portion of the Project and such other persons as the Developer may designate.

Developer also acknowledges and agrees that the Town of Berlin, operating through its officers and employees and upon notice to the Developer, shall have the right to enter the property as reasonably necessary to inspect to confirm compliance with the terms of this Agreement.

EXECUTED under seal as of the date and year first above written, pursuant to the vote under Article One of the March 26,

1994 Special Town Meeting.

BERLIN PROPERTIES LIMITED PARTNERSHIP

By Its General Partner:

BERLIN PROPERTIES CORPORATION

By: *William H. McCabe, Jr.*  
William H. McCabe, Jr.  
Executive Vice President

TOWN OF BERLIN BOARD OF SELECTMEN

*Richard Barnes*  
*Doris Marble*  
*[Signature]*

*M. Kelly, ss*

THE COMMONWEALTH OF MASSACHUSETTS

March 26, 1994

Then personally appeared the above named William H. McCabe, Executive Vice President of Berlin Properties Corporation, General Partner of Berlin Properties Limited Partnership, and acknowledged the foregoing instrument as his free act and deed and the free act and deed of said corporation on behalf of said limited partnership, before me

*[Signature]*  
Notary Public  
My Commission Expires: 1/20/99

THE COMMONWEALTH OF MASSACHUSETTS

Worcester, ss

March 21, <sup>1995</sup>~~1994~~

Then personally appeared Phillip Bartlett, ~~Chairman~~ of the Board of Selectmen, and acknowledged the foregoing instrument as his free act and deed and the free act and deed of the Board of Selectmen on behalf of the Town of Berlin, before me

*[Signature]*  
Notary Public  
My Commission Expires: June 18, 1999