

MEMORANDUM OF AGREEMENT
BY AND BETWEEN
THE TOWN OF BROOKLINE AND WELLTOWER INC. AND WELLTOWER TRS HOLDCO LLC

This Memorandum of Agreement (this “Agreement”) between WELLTOWER INC., a Delaware corporation and WELLTOWER TRS HOLDCO LLC, a Delaware limited liability company, each having an office at 4500 Dorr Street, Toledo, Ohio 43615 (together with their successors and assigns hereinafter collectively referred to as “Developer”) and the Town of Brookline, a municipal corporation (“Town”), located in Norfolk County, Massachusetts and acting by and through its Select Board (the “Board”), (Developer and the Town being collectively referred to as the “Parties”) is made and entered into this ___ day of _____, 2020, upon the mutual promises and obligations hereinafter set forth and additional consideration which the parties acknowledge is adequate and appropriate, upon the following terms and conditions:

WHEREAS, by Quitclaim Deed dated September 5, 2019 recorded with the Norfolk Registry of Deeds (the “Registry”) in Book 37136, Page 283, Welltower Inc. acquired property in Brookline, Massachusetts commonly known as 117 Fisher Avenue and 124 Holland Avenue (said properties being sometimes referred to herein as the “East Parcel”, a legal description of which is attached hereto as Exhibit A-1);

WHEREAS, by Quitclaim Deed dated September 5, 2019 recorded with the Registry in Book 37136, Page 286, Welltower TRS Holdco LLC acquired property commonly known as (i) 110 Fisher Avenue, 150 Fisher Avenue, 146 Hyslop Road (a/k/a 129 Fisher Avenue) and 124 Fisher Avenue (said properties being collectively referred to as the “West Parcel”, a legal description of which is attached hereto as Exhibit A-2), and (ii) 125 Holland Road (“125 Holland”), a legal description of which is attached hereto as Exhibit A-3;

WHEREAS, Developer seeks to construct a senior living facility consisting of 160 units of independent living, assisted living and memory care units and related facilities and parking spaces for a total of 98 vehicles (hereinafter collectively referred to as the “Project”, which term does not include the 125 Holland Project as such term is defined below), and a summary of the proposed Project and associated concept site plan, and concept building massing are attached hereto as Exhibit B;

WHEREAS, the proposed location for the Project is the East Parcel all as more particularly described in the legal description contained in Exhibit A-1 (collectively referred to as the “Property” or the “Site” unless otherwise indicated);

WHEREAS, the Parties have elected to develop multiple options for the Project to address the requirements it engenders related to affordable housing, and intend to memorialize the parameters by which the Developer will either: (1) provide eighteen

(18) affordable condominium units at 125 Holland; or (2) provide a cash payment of Six Million Five Hundred Twenty Five Thousand Dollars (\$6,525,000) made payable to the Brookline Affordable Housing Trust Fund;

WHEREAS, the Parties agree that the Project will benefit the Town in many ways including, but not limited to: (1) the opportunity for the Town to acquire the West Parcel at an agreed-upon price or, if the Town elects not to acquire the West Parcel, share in certain proceeds of the sale of the West Parcel, as set forth below; (2) substantial fiscal benefits associated with the redevelopment of the East Parcel for a taxable use; (3) a 95-year Tax Certainty Agreement for the East Parcel (the “Tax Certainty Agreement”); (4) improvements to the public realm including a public area easement along the Fisher Avenue frontage of the East Parcel which will include the obligation of Developer to maintain the existing trees in the easement area (the “Public Area Easement”), (5) commitment to sustainable development in general conformance to the standards embodied in the Town’s “Prohibition on New Fossil Fuel Infrastructure in Major Construction”; (6) providing access in the Project for neighborhood meetings and for events held by the Town’s Council on Aging; and (7) maintenance for adaptive reuse of the Mitton House and addition on the East Parcel, subject to the terms hereof;

WHEREAS, the Newbury College Zoning Study Committee (“the Committee”) intends to submit a zoning by-law amendment (the “Proposed Zoning Amendment”) for consideration at the Town Meeting commencing in June 2020 that, if approved, would allow the Project to proceed through a special permit process informed by design guidelines developed specifically for the Project;

WHEREAS, the provisions of this Agreement are available for consideration by the Planning Board and the Board of Appeals in reviewing any application for a special permit(s) for the Project;

WHEREAS, the Parties wish to enter into this Agreement to memorialize their mutual understandings and obligations with respect to (1) the Project and certain permits and approvals required for the Project, as well as any other agreements between the Developer and the Town pertaining to the Project, including a 95-year Tax Certainty Agreement and the Public Area Easement, (2) the manner in which the Developer will comply with the requirements of Section 4.08 of the Town’s Zoning Bylaw with respect to affordable housing requirements; (3) agreements of the Parties with respect to the disposition of the West Parcel; and (4) other matters set forth herein, all on the terms and conditions hereinafter set forth;

WHEREAS, the Parties contemplate entering into such further binding agreements as reasonably appropriate and approved by both Parties to proceed with the Project and to satisfy the mutual obligations contained herein;

NOW THEREFORE, in consideration of the promises and mutual obligations of the Parties hereto and upon good and valuable consideration the receipt and sufficiency of which the Parties acknowledge, each of them does hereby covenant and agree as follows:

1. CERTAIN DEFINITIONS. All references herein to the following terms shall have the meanings hereinafter set forth:
 - a) All references to the “Proposed Project Zoning Amendment” shall be construed as a reference to the text of a Warrant Article prepared for the Town Meeting commencing June 2020, a copy of which is attached hereto as Exhibit C, as such text may be amended at Town Meeting, provided that such amendments do not impose burdens on the Project that are materially adverse to the financial feasibility of the Project in the reasonable judgement of Developer (which may include construction or operation costs). If Developer determines in its reasonable judgment that any such amendment/s to the text of the Proposed Project Zoning Amendment (Exhibit C) do impose burdens on the Project that are materially adverse to the financial feasibility of the Project, Developer shall use all commercially reasonable efforts to notify the Town as soon as possible prior to any vote to amend the Proposed Project Zoning Amendment. If the Proposed Project Zoning Amendment is nonetheless passed in a form amended in a materially adverse manner, and as a result thereof Developer decides in its sole discretion not to proceed with the Project or if Developer determines in its reasonable judgment that the amendment/s prohibits Developer from proceeding with Project as proposed then, in either case, Developer shall so notify the Town in writing within seven (7) business days after the date Town Meeting votes these articles, and in such case this Agreement shall immediately become null and void and of no force and effect.
 - b) All references to the “Town Meeting Approval Conditions” shall be construed as references to: (i) approval by the 2020 Annual Town Meeting and the Attorney General of the Proposed Project Zoning Amendment; (ii) authorization by Town Meeting of the acceptance of the 95-year Tax Certainty Agreement attached hereto as Exhibit D; (iii) authorization by Town Meeting for the Select Board to execute this Agreement and any other documents or agreements necessary or appropriate for implementation of the proposed Project; and in each case with challenge periods to all such Town Meeting actions having passed (which, in the case of the Proposed Zoning Amendment, shall be the challenge period under G.L. c. 40, Secs. 32 and 32A) with no challenges by unrelated third parties pending or, if any of such actions is/are challenged, the same having been finally disposed of in a manner favorable to the Town Meeting action, not later than January 31, 2021. Notwithstanding anything herein to the contrary, if the Town Meeting

Approval Conditions have not been satisfied by such date, then the Developer shall have the right, at any point prior to the issuance of the Special Permit contemplated by the Proposed Project Zoning Amendment, to abandon its permit application and relinquish its right to pursue the Project. Exercise of said right by the Developer will terminate this Agreement without the need for any further action on the part of either Developer or the Town, and without further recourse to the parties hereto.

- c) All references to the “Special Permit and Other Required Approvals” shall be construed as references to such other special permits, variances, licenses and/or other approvals, including but not limited to the expiration of any demolition delay under the Town’s Demolition Delay By-Law or lift(s) of stay as to such delay, any additional special permits under the existing Zoning By-Law and Proposed Project Zoning Amendment, including building permits and certificates of occupancy, which are necessary, in Developer’s and Town’s reasonable determination, to allow for the construction and operation of the Project such that the Project, with all the appeal periods having passed, with no appeals pending or, if any such permit or approval is appealed, the same having been finally disposed of favorably to Developer not later than two (2) years from the date of issuance of the permit or approval which is the subject of the appeal.

2. AFFORDABLE HOUSING.

- a) 125 Holland Option. In addition to the Town Meeting Approval Conditions, the Committee shall submit a warrant article for consideration at the 2020 Annual Town Meeting (the “Proposed 125 Holland Warrant Article”, a copy of which is attached hereto as Exhibit E) pursuant to which 125 Holland shall be included in an overlay district to allow for the construction thereon of a condominium project containing eighteen (18) units of affordable housing (the “125 Holland Project”). In the event that the 125 Holland Warrant Article fails to achieve the 2/3 Town Meeting vote necessary for approval, the “Cash Option”, as described further below, shall automatically take effect.

A conceptual site plan of the development of 125 Holland Project proposed by the Proposed 125 Holland Warrant Article is attached as Exhibit F. The conceptual site plan is subject to change as 125 Holland Developer advances the 125 Holland Project.

The Town understands and agrees that the Developer does not intend, nor shall it be required to construct the 125 Holland Project. Accordingly, the Developer shall have the right to enter into such contractual arrangements with a third party, which the Developer has determined to have the requisite experience and financial wherewithal to

construct the 125 Holland Project (the “125 Holland Developer”). The Developer shall include within the arrangements it enters into with the 125 Holland Developer a provision stating that any recourse by the 125 Holland Developer to the Zoning Board of Appeals for modification of the affordability requirements pursuant to Section 5.06.4.m.4 (or equivalent section), if such recourse would require raising the applicable Median Income levels, shall be conditioned upon prior recourse to funds available to the 125 Holland Developer by means of all budgeted contingencies (but in no event including the Developer Backstop, as such term is hereinafter defined). The Developer shall send to the Town copies of all contractual arrangements reached with the 125 Holland Road Developer prior to their execution. Pursuant to said contractual arrangements:

- (i) As soon as is reasonably feasible following the later of (i) issuance of a building permit for the Project, and (ii) the 125 Holland Developer’s obtaining a construction loan for the 125 Holland Project (which construction loan is expected to contain or require customary net worth and liquidity covenants of the 125 Holland Developer and its guarantors), the Developer shall cause 125 Holland to be conveyed for nominal consideration to the 125 Holland Developer, subject to an Affordability Deed Restriction (in a form substantially similar to the one attached at Exhibit G) whose terms specify that it will survive any further transfer including foreclosure; and
- (ii) the Developer shall contemporaneously contribute cash in the amount of Three Million One Hundred Twenty Three Thousand Dollars (\$3,123,000) to the 125 Holland Project, to be deposited in a construction disbursement account and made available on a requisition basis to the 125 Holland Developer during the course of construction on customary terms and conditions; and
- (iii) except for the Developer Backstop (as hereinafter defined), the 125 Holland Developer shall be solely responsible for all costs associated with the 125 Holland Project, including, without limitation, the design, financing, construction, completion and marketing of the same. The Developer agrees to reasonably cooperate in the 125 Holland Developer’s attempt to secure all permits and approvals necessary to proceed with the 125 Holland Project, including by executing applications for the same (or authorizing the 125 Holland Developer to do so), but such cooperation shall be at no additional cost or obligation to Developer. Following the conveyance of 125 Holland to the 125 Holland Developer, the 125 Holland Developer shall be

responsible for obtaining all necessary approvals and permitting and the Developer agrees not to appeal or otherwise contest any issuance of any permit necessary to complete or bring online the 125 Holland Project.

It is expressly understood and agreed by the Town that under no circumstance shall the issuance of the Special Permit and Other Required Approvals for the Project (including, without limitation, any building permit or certificate of occupancy) be conditioned on the commencement or completion of the 125 Holland Project.

If the 125 Holland Developer is unable to close on a construction loan for the 125 Holland Project by December 31, 2021, the obligations of the Developer hereunder will automatically revert to making the cash payment described in the Cash Option below without the need for any further agreement or documentation.

Upon closing of the construction loan for the 125 Holland Project, Welltower Inc., will also provide a financial guaranty of up to \$650,000 (the "Developer Backstop") for the benefit of the Town to help ensure completion of the 125 Holland Project should the funds available for completion be deemed insufficient by the construction lender after recourse to the available sources of funding from the 125 Holland Developer and its guarantor(s). Evidence that the construction lender has deemed the funds insufficient shall include: (1) notification by the construction lender to the Developer or the Town that the construction lender has reached such a conclusion; (2) publication of a foreclosure sale of 125 Holland; (3) classification by the lender of the loan as 100 percent impaired with a full write-off; or (4) an arm's length sale of the loan while impaired. To the extent Welltower Inc. elects not to contribute further funds under the Developer Backstop to help ensure completion of the 125 Holland Project under those circumstances, Welltower Inc. will be required to pay into the Town's Affordable Housing Trust any funds not previously advanced by the Developer under its Developer Backstop. If (1) Welltower has not advanced the full amount of the Developer Backstop prior to the later of (i) December 31, 2023 or, (ii) the term of any applicable construction loan as the same may be extended by the construction lender, and (2) the 125 Holland Road Project has not been completed by such date, Welltower Inc. will be required to pay into the Town's Affordable Housing Trust any funds not previously advanced under the Developer Backstop, unless it has already done so.

It is understood that the text of the Proposed 125 Holland Warrant Article may be amended at Town Meeting, provided that such amendment/s in the reasonable judgement of the 125 Holland Developer, do not impose burdens on the 125 Holland Project which are materially adverse to the Developer or the ability of the 125 Holland Developer to complete the 125 Holland Project (which may include increased construction or operation costs or decreased maximum affordable sales prices). If any such amendment/s to the text of the Proposed 125 Holland Warrant Article do impose burdens on the 125 Holland Project as set forth in the preceding sentence, then Developer or the 125 Holland Developer shall so notify the Town in writing within seven (7) business days of the conclusion of Town Meeting, and in such case the provisions of Section 2(b) below shall automatically come into effect.

- b) Cash Option. Upon the occurrence of the Cash Trigger Conditions (as hereinafter defined), in lieu of the 125 Holland Project, the Developer shall fully satisfy all obligations arising under Section 4.08 or other operative provision of the Zoning By-law with respect to affordable housing by making a cash contribution to the Town's Affordable Housing Trust Fund (the "Cash Contribution") equal to Six Million Five Hundred Twenty Five Thousand Dollars (\$6,525,000) in two installments. Per Section 4.08 of the Town's Zoning By-Law, this obligation (minus the initial 25% payment if paid in advance) shall be secured at Developer's discretion via a recorded legal instrument or letter of credit satisfactory to the Community Development Division prior to issuance of a building permit for the Project. Fifty percent (50%) of the Cash Contribution shall be payable thirty days after the later of (i) the issuance of the first non-appealable building permit for the Project, and (ii) the occurrence of a Cash Trigger Condition. The balance of the Cash Contribution shall be due prior to the issuance of the final Certificate of Occupancy for the Project. Early advances on the 50% final payment may be made on a mutually agreed upon basis between the Select Board and Developer with incentives for early payments to be negotiated in good faith. Any unpaid balance 48 months following an appeal-free Special Permit shall accrue interest at an annual rate equal to the monthly 10-year U.S. Treasury rate.

As used herein, the term "Cash Trigger Conditions" shall mean and include either of the following: (1) the Town Meeting beginning in June 2020 fails to approve the Proposed 125 Holland Warrant Article, or it is approved with one or more material adverse text amendments as set forth in Section 2(a) above, or the Attorney General does not approve it

or the rescission thereof; or (2) the 125 Holland Developer fails to close on a construction loan by December 31, 2021.

3. WEST PARCEL

- a) Possible Acquisition of West Parcel by the Town. The Town agrees to take such actions as are required to cause there to be a vote of all the Town's electorate by no later than November 3, 2020 to approve a so-called debt exclusion enabling the Town's acquisition of the West Parcel for a purchase price (the "West Purchase Price") equal to Fourteen Million Eight Hundred Thousand Dollars (\$14,800,000). In anticipation of that vote, and regardless of when the vote on the debt exclusion occurs, the Town shall propose for the 2020 Annual Town Meeting (and, if necessary, a subsequent Town Meeting) the following warrant article (the "Proposed West Parcel Warrant Article"): a warrant article authorizing the Town to acquire the West Parcel for the West Purchase Price and authorizing the Town's chosen method for financing the acquisition, in the form of Exhibit H annexed hereto. Subsequent to the June 2020 Annual Town Meeting and assuming a positive result of the Proposed Project Zoning Amendment, the Developer and the Town shall negotiate in good faith to enter into a purchase and sale agreement for the conveyance of the West Parcel to the Town (the "West Parcel PSA") for the West Purchase Price with a closing to take place no later than the date (the "Outside Closing Date") that shall be the later of: (i) thirty (30) days after the satisfaction of the Town Meeting Approval Conditions and (ii) sixty-five (65) days after the vote approving the necessary debt exclusion; and on terms otherwise reasonably acceptable to the Parties. Developer shall carry commercially reasonable property insurance until closing to cover any potential property loss. Without limiting the generality of the foregoing, it is understood that the West Parcel shall be conveyed to the Town on an "as-is, where-is" basis without any representation or warranty as to the condition of the West Parcel or any improvements thereon or its potential development.
- b) Possible Profit Sharing Upon Sale of West Parcel. Upon the occurrence of any Profit Sharing Trigger Conditions (as hereinafter defined), the Developer shall commence and thereafter use commercially reasonable efforts to market the West Parcel for sale to a third party. Such commercially reasonable efforts may include, at Developer's discretion, retaining a qualified real estate brokerage firm to assist with the marketing of the property in order to achieve the best possible price on terms and conditions that are acceptable to the Developer in its discretion. Developer shall send to the Town or its consultant for informational purposes only Welltower's marketing and disposition plan

for the West Parcel. It is understood and agreed that whether or not to sell the West Parcel, the identity of any purchaser, the timing of such sale, and all other terms and conditions of any such potential sale shall all be in the Developer's sole discretion. If the purchase price Developer is willing to accept for the West Parcel in an arms-length transaction exceeds the West Purchase Price then Developer shall pay to the Town an amount (the "Town's Share") equal to the total of the "Incremental Town Proceeds, as shown on the Chart entitled "Profit Sharing Structure – Newbury College West Side" and annexed hereto as Exhibit I, less the Developer's out of pocket transaction costs incurred by the Developer in connection with the sale. The Town's Share shall be paid by the Developer to the Town not later than seven (7) business days after the closing of such sale, and shall be deposited with the Town Treasurer and held in a separate account until a purpose is authorized. As used herein, Developer's transaction costs shall include reasonable and customary costs and charges incurred by a seller of commercial property in the Commonwealth of Massachusetts and the Town of Brookline, including, without limitation, broker's fees and commissions, all marketing costs, transfer taxes, costs to clear any title matters, attorneys' and other consultants' fees and expenses related to the sale.

The term Profit Sharing Trigger Conditions shall include any of the following: (i) the Town's voters failing to approve the debt exclusion by November 3, 2020; (ii) the June 2020 Town Meeting (or, if appropriate, a subsequent Town Meeting) failing to approve the Proposed West Parcel Warrant Article, or the Attorney General failing to approve the same or the rescission thereof; (iii) the Parties, despite the exercise of good faith efforts, failing to agree upon the terms and enter into the West Parcel PSA by thirty (30) days after the approval by the voters of the debt exclusion question intended to support the purchase of the West Parcel; or (iv) the closing of the Town's acquisition of the West Parcel not taking place by the Outside Closing Date. It is understood and agreed that if the Parties enter into the West Parcel PSA and the Town subsequently defaults on its obligation to acquire the West Parcel, the same shall not be considered a Profit Sharing Trigger Condition. Rather, upon such a default, the Developer shall immediately be relieved of its obligations under this Section 3 to convey the West Parcel to the Town and any requirement to pay the Town's Share (or any other amount) to the Town upon a sale or other disposition of the West Parcel, without the need for any further documentation to that effect.

Further, should the Developer elect to convey the West Parcel to an entity not subject to taxation by the Town, the Developer shall supply such tax-exempt purchaser with a copy of the Town's Payment In Lieu of

Taxes (PILOT) Policy (a copy of which is attached hereto as Exhibit J and require, as a condition of the Purchase and Sale Agreement with said tax-exempt purchaser, that the purchaser meet with the Town Administrator to discuss PILOT Payments prior to closing.

4. FURTHER PERMITTING. The Developer agrees to use all commercially reasonable efforts to diligently apply for and pursue all permits and approvals necessary to proceed with the Project subject to financing and economic conditions. It is understood that the Developer will be subject to the timeframes applied to the Project by the Proposed Project Zoning Amendment, including all sunset provisions. Further, it is of great importance to the Developer that it be able to commence construction of the Project as soon as possible. Accordingly, to the maximum extent permitted by law, the Town agrees to take such actions as may be reasonably necessary or appropriate to expedite review and approval of the Project so that Developer (or any affiliate thereof) can receive a building permit for the Project as soon as possible. Such actions shall include the formation by the Town of a Design Advisory Team (“DAT”) for the Project as a so-called “Major Impact Project” under the Town’s Zoning By-law within fifteen (15) days after Town Meeting approval of the Proposed Project Warrant Article, and the Town will use best efforts to cause the DAT to begin its review of the Project by no later than July 31, 2020. It is further understood and agreed that the Design Guidelines to be used by the DAT in its review of the Project shall be substantially in accordance with the document attached as Exhibit K hereto. Representatives of the Town Planning Department and Town Counsel’s office will use best efforts to attend all meetings of the Developer and Town Preservation Commission at which the Project is discussed, including without limitation, Developer’s efforts to expedite the lifting of the stay of demolition of affected buildings on the East Parcel under the Town’s Demolition Delay By-law.

5. RECORDING OF AGREEMENT AND EXECUTION OF TAX CERTAINTY AGREEMENT. Upon satisfaction of the Town Meeting Approval Conditions Developer shall immediately record this Agreement with the Registry at its own expense and shall provide evidence of such recording to Town Counsel; and ii) Developer and the Town shall execute the Tax Certainty Agreement and Developer shall deliver the same to a mutually agreed upon escrow agent to be held in escrow pursuant to mutually agreed upon conditions under the provisions of this Agreement (the “Escrow Agent”). In the event the Town Meeting Approval Conditions are not satisfied by January 31, 2021, and the Developer elects to abandon its permit application and relinquish its right to pursue the Project prior to the issuance of a Special Permit contemplated by the Proposed Project Zoning Amendment, this Agreement and the obligations set forth in the Tax Certainty Agreement shall become null and void and of no force and effect.

6. RECORDING OF TAX CERTAINTY AGREEMENT. In the event that the Special Permit and Other Required Approvals are satisfied, Developer shall deliver notice thereof to the Escrow Agent, who shall promptly thereafter record with the Registry the Tax Certainty Agreement. In the event that the Special Permit and Other Required Approvals are not satisfied, or Developer does not proceed with the Project, either party may deliver notice to the Escrow Agent (with a copy to the other party hereto), and the Escrow Agent shall thereafter immediately return the original copy of the Tax Certainty Agreement to Developer. In such case where the Tax Agreement is returned to the Developer, all further obligations set forth in this Agreement shall become null and void and of no force and effect.

7. TAXABLE PERSONAL PROPERTY. The Developer agrees to have the personal property associated with the Project held in an entity taxable to the Town, and taxed at the applicable commercial rate. In the event of a conveyance of the Project to a third party in a bona fide transaction, the Developer shall take steps to ensure this standard remains in place, absent any changes to the applicable laws or regulations.

8. SUSTAINABLE DESIGN. Upon execution of this Agreement, the Town and the Developer agree to work in a voluntary partnership such that the development process of the Project will explore, pilot and innovate sustainable practices from conceptual design through full occupancy (“Voluntary Sustainability Partnership”). The purpose of this Voluntary Sustainability Partnership is to create replicable best practices that will be shared by the Town and the Developer, to the benefit of the Town, the Developer, and the larger community. Without limiting the generality of the foregoing, the Developer will undertake the following in connection with the construction and operation of the Project (referred to herein as the “Sustainability Undertakings”)
 - a. The Project will be constructed in a manner so as to be LEED-NCv4 Gold Certifiable.
 - b. The Project will not use natural gas or fuel oil except as necessary for the commercial kitchens, emergency generator, indoor swimming pool and domestic hot water.
 - c. Developer will implement certain sustainable design principals as follows
 - (i) Consider the use of permeable pavements such as permeable asphalt for driveways and parking areas, and permeable concrete pavers for the vehicular entry plaza, Holland Rd. Overlook, and other site features where feasible.
 - (ii) Stormwater control measures will optimize on-site filtration using rain gardens and bioswales.

- (iii) Installation of native and drought tolerant plants and bird-friendly and pollinator plants.
- (iv) Use of Electric vehicles for on-site fleet of passenger vehicles for transporting Project residents, including providing electric vehicle charging stations in excess of current Town requirements for Project residents and guests. On-site fleet will be registered in Massachusetts and garaged at the property in a manner that allows the application of Town vehicle excise tax.
- (v) Providing bicycle parking on site to accommodate residents, staff, and visitors with shower and dressing room access to be provided to employees who may choose to bike to work.
- (vi) Use of full cut-off exterior light fixtures with LED lighting and pole mounted fixtures limited to surface parking areas.
- (vii) Provide visual and physical access to vegetation.
- (viii) General design spaces designed to support social connection.
- d. To the extent feasible as reasonably determined by the Developer, it will implement so-called Passive House strategies to reduce energy use.
- e. Developer will optimize energy efficiency of building systems, including
 - (i) Providing water-efficient plumbing fixtures,
 - (ii) Performing Building Commissioning, and
 - (iii) Training for Operations and Maintenance
- f. To the extent feasible as reasonably determined by the Developer, Developer will implement WELL strategies to provide users with a healthy building, including
 - (i) Optimizing daylighting and views,
 - (ii) Specification of healthy building materials, and
 - (iii) Providing healthy indoor air quality measures
- g. Developer will optimize the building for solar renewable energy measures and will consider photovoltaic and solar thermal where feasible.

9. VOLUNTARY SPECIAL PERMIT CONDITIONS: The Developer hereby acknowledges that the following conditions of the Special Permits for the Project shall be acceptable to the Developer and shall not be grounds for objection to the Special Permits granted by the Brookline Zoning Board of Appeals (Board of Appeals):

- a) To the fullest extent permitted by law, the Developer shall comply with all terms of this Memorandum of Agreement, as such Agreement may be amended from time to time, in accordance with the provisions herein.
- b) The Project will include a maximum of 160 units of which no more than 120 shall be a combination of independent living units (IL) and assisted

living (AL) units, with the balance to be memory care (MC) units, it being understood that the precise unit mix may change from time to time in accordance with the provisions of this paragraph. The base numbers of 80 IL units and 40 AL units may vary such that there will be between 74 and 86 IL units and between 34 and 46 AL units, subject to the cap of a total of 120 IL and AL units. Further, to the extent there are fewer than 120 IL and AL units, the number of units below 120 may be MC units. Nothing in this paragraph shall preclude Developer from reducing the overall number of units in the Project (such as, by way of example, only combining separate units into a single unit). The following are examples only of permissible unit mixes: (1) 74 IL, 40 AL, 46 MC; (2) 74 IL, 46 AL, 40 MC; (3) 76 IL, 36 AL, 48 MC; (4) 70 IL, 30 AL, 40 MC.

- c) The Project will have bulk and dimensional limits meeting the requirements of the Proposed Project Zoning Amendment, and have parking provided for 98 vehicles, of which only 55 may be surface parking.
- d) In accordance with the Proposed Project Zoning Amendment, if Developer determines that the number of surface parking spaces (55) can be reduced without impacting the neighborhood it may seek a modification to the Special Permit to reduce the surface parking subject to review and approval by the Director of Engineering and Transportation.
- e) All illuminated exterior signage shall be designed and installed with the ability to be automatically dimmed after midnight.
- f) Developer will comply with the Sustainability Conditions.
- g) Unless otherwise agreed to by the Preservation Planners the applicant shall, using available records and to the extent it is feasible to do so, provide historic documentation of the following buildings on the East Parcel, prior to the issuance of a demolition or other building permit with respect to such buildings: _____. Issuance of the demolition permit shall be evidence that this condition has been satisfied.
 - i. This documentation shall include:
 - 1. background information: the historic and common names of the property, documentation of date of construction, complete stylistic and/or architectural description of the resource, description of architectural and/or associative significance using reliable sources, contextual information

that equates the significance of the property, original and current function, and the name and biographical information of architect and/or builder.

2. drawings, maps, and historic images: site plan showing footprint of the subject resource and surrounding buildings; sketch floor plans of existing conditions of all levels of each building, or copies of original plans if available (8 ½ x 11 format or digital format); if available, clear copies of historic photographs; USGS quad/topo map indicating location of property with UTM's;
 3. photographs of: overall site showing context and setting; each exterior elevation of subject property; detail images of significant character-defining features, such as windows, doors, eave details, porches, balconies, etc.; general views of all significant interior spaces; detail images of significant structural details if building is of a rare construction method (i.e. post and beam, balloon framing, mortise and tenon joinery, etc.). All photos must be identified with a list of the photographs indicating property name, address (city, county), date of photograph(s), and view; unmounted.
 - ii. All non-photographic documentation shall be submitted in 8 ½ x 11 format and printed on archivally stable paper (25% cotton bond or better) and provided in digital format (min 300dpi).
 - iii. All photographic documentation shall be provided in 5x7 or 8x10 format using archival quality paper and provided in digital format (min 300 dpi).
- h) Developer shall propose a Transportation Demand Management Plan for approval by the Director of Engineering & Transportation and the Planning and Community Development Director (or designee).
- i) The Project Operator will partner with the Council on Aging and/or Brookline CAN on various cultural, educational and/or musical/artistic events at least quarterly per year with the location and logistics of such events to be agreed to in advance by the Project Operator and the Director of the Council on Aging or Brookline CAN as the case may be. Such events shall be at either the Project Site or the Senior Center or other public place as mutually agreed upon. The Developer has also agreed to make a voluntary contribution of \$2500 per year to the Brookline Multi-Service Senior Center Corporation to support its

programming for so long as the Developer or any affiliate thereof owns and operates the Project.

- j) Developer will provide community space for meetings of local neighborhood associations or other Brookline non-profits a minimum of twelve times per year.
- k) Developer will provide a landscaped buffer to abutters on the South side entry.
- l) Developer will remove the existing curb cut on Holland Road to reduce traffic.
- m) Developer will provide a Public Easement Area to create a green buffer on Fisher Ave and maintain the existing trees on Fisher Ave (with an approximate current value of \$276,000). The Public Easement Area shall be subject to a Tree Protection Plan, which shall be submitted to the Tree Warden for his review and approval. Trees within the Public Easement Area shall be maintained at Developer's cost.
- n) On-site and off-site pedestrian and landscaping improvements equivalent to those shown and diagrammed on Exhibit B;
- o) Additional pedestrian, bicycle, and traffic infrastructure mitigation may be required subject to further study and analysis during the Major Impact Project review process. Such mitigation is anticipated by Developer to include the following:
 - i. Bicycle parking on site to accommodate residents, staff, and visitors with shower and dressing room access to be provided to employees who may choose to bike to work.
 - ii. To the extent feasible, new on-site pedestrian walkways will provide connectivity to/from the existing public sidewalk and crosswalk network around the site to enhance pedestrian mobility for residents and employees.
- p) Developer will maintain the Mitton House and its addition for adaptive reuse in its Project design.
- q) The Project operator will hold a job fair at the Brookline Teen Center or other public venue, and to the extent permitted by law will give qualified Brookline residents preference for jobs at the facility. In order to make Brookline residents aware of job opportunities the Project operator will send a notice at reasonable intervals of such job opportunities to the Town's Director of Diversity and Inclusion and he/she may post and/or

share with other interested parties. The Project operator will also work with the Brookline High School culinary arts and restaurant program to provide, from time to time paid or unpaid internship opportunities for students engaged in the culinary arts program at the High School.

- r) Developer will pay for the relocation and raising of the crosswalk on Fisher Avenue in front of the proposed development.
- s) Balfour Senior Living, or an affiliate thereof shall be the initial manager of the Project.

10. Standard Requirements:

All Parties to this Agreement agree that the Project shall not, by way of this Agreement or the Proposed Project Zoning Amendment, be exempt from any charges, fees, monetary or otherwise, that have been promulgated as of the date hereof pursuant to statute, by-law, regulation or written policy.

11. Undertakings of the Town:

On _____, 2020 the Select Board voted favorable action on the Proposed Project Zoning Amendment, Tax Certainty Agreement, the Proposed West Parcel Warrant Article and a Warrant Article related to the general authorization for this Memorandum of Agreement subject to the terms and conditions of this Agreement and shall convey its votes and favorable report to the Advisory Committee and in the Combined Reports which shall be delivered to all Town Meeting Members. The Select Board shall support and undertake action necessary to obtain the approval of the Attorney General of The Commonwealth of Massachusetts of the Proposed Project Zoning Amendment by Town Meeting. The Select Board shall also, to the extent appropriate, cooperate with the Developer and shall encourage Town staff to cooperate with the Developer in reviewing in a timely and expeditious manner any required permits and approvals for the Project.

11. Miscellaneous:

- a) It is the intent of the Parties that the obligations in this Agreement shall run with the land comprising the Project and be binding upon and inure to the benefit and burden of the Developer and its mortgage lenders and their heirs, successors and assigns during their respective periods of ownership of and/or interests in the Project and its components and shall survive any transfer of the Property or any portion thereof. The Developer agrees to provide a copy of this Agreement to any transferee of the Property or any portion thereof.

- b) Each of the Parties signing below hereby represents and warrants that it is authorized to enter into this Agreement and execute the same on behalf of, and to bind legally, such Party.
- c) All notices or requests required or permitted hereunder shall be in writing and addressed, if to the Town as follows:

Select Board
Town of Brookline
333 Washington Street
Brookline, MA 0 2445

with a copy to:

Town Counsel
Office of Town Counsel
333 Washington Street
Brookline, MA 02445

If to Developer addressed as follows:

Welltower Inc.
4500 Dorr Street
Toledo, OH 43615
Attention: General Counsel

with copies to:

Welltower Inc.
767 5th Avenue, 8th Floor
New York, NY 10153
Attention: Investment Team

Goulston & Storrs
400 Atlantic Avenue
Boston, MA 02110
Attention: Steven Schwartz, Esq.

Jennifer Dopazo Gilbert, Esq.
Law Office of Robert L. Allen, LLP
300 Washington Street
Brookline, MA 02445

Each of the Parties shall have the right by notice to the other to designate additional parties to whom copies of notices must be sent, and to designate changes in address. Any notice shall have been deemed duly given if mailed to such address postage prepaid, registered or certified mail, return receipt requested, on the date the same is received or when delivery is refused, or if delivered to such address by hand or by nationally recognized overnight courier service, fees prepaid, when delivery is received or when delivery is refused, or if transmitted by facsimile or other electronic means with confirmatory original by one of the other methods of delivery herein described, on the date so transmitted by facsimile or other electronic means. If and to the extent that either of the Parties is prevented from performing its obligations hereunder by an event of force majeure, such party shall be excused from performing hereunder and shall not be liable in damages or otherwise, and the Parties instead shall negotiate in good faith with respect to appropriate modifications to the terms hereof to confer the benefits to each respective party as contemplated by this Agreement. For purposes of this Agreement, the term force majeure shall mean any cause beyond the reasonable control of the affected party, including without limitation: acts of God, fire, earthquake, floods, explosion, actions of the elements, war, terrorism, riots, mob violence, inability to procure or a general shortage of labor, equipment, facilities, materials or supplies in the open market; failure of transportation, strikes, lockouts; actions of labor unions; condemnation, laws or orders of governmental or military authorities, requirement of statute or regulation, action of any court, regulatory authority, or public authority having jurisdiction; or any other cause similar to the foregoing, not within the reasonable control of such party obligated to perform such obligation. With respect to any particular obligation of Developer only, the term force majeure shall include the denial or, refusal to grant or appeals of any permit or approval of any public or quasi-public granting authority related to the Town Meeting Approval Conditions and Special Permit and Other Required Approvals, and any litigation brought by a third party relating to any such obligation.

- d) Failure by the Developer to perform any term or provision of this Agreement shall not constitute a default under this Agreement unless and until the Developer fails to commence to cure, correct or remedy such failure within sixty (60) days of the receipt of written notice of such failure from the Town to the Developer and thereafter fails to complete such cure, correction or remedy within ninety (90) days of receipt of such written notice or, with respect to defaults which cannot reasonably be cured, corrected or remedied within such ninety (90) day period, within such additional period of time as is reasonably required to remedy such default, provided the Developer exercises due diligence in the remedying of such default and notifies the Town of the steps being taken to remedy the default.
- e) The Parties agree that time is of the essence with respect to the obligations of the Parties as set forth herein. Subject to market conditions and financing availability, the Developer agrees to use best efforts to diligently apply for the necessary special permits and then expeditiously as possible after the issuance of the Special Permit(s) for the Project to apply for all necessary building permit(s) and to diligently commence work on the Project subject to the terms herein. The Town agrees to request an expedited determination from the Office of the Attorney General with respect to the Proposed Project Zoning Amendment.
- f) The obligations of the Developer do not constitute the personal obligations of the Developer's employees, shareholders, members, directors or officers and the Town shall not seek recourse against any of the foregoing or any of their personal assets for satisfaction of any liability with respect to this Agreement or otherwise. In no event shall the Developer be liable for any incidental, indirect, punitive or special or consequential damages.
- g) Each Party agrees from time to time, upon not less than ten (10) days' prior written request from the other, to execute and deliver a statement in writing certifying that this Agreement is in full force and effect (or if there have been any modifications, setting them forth in reasonable detail), and that there are no uncured defaults of either Party under this Agreement (or, if not, specifying the respects in which the requesting party is not in compliance in reasonable detail), in form reasonably acceptable to and which may be relied upon by any prospective purchaser, tenant, mortgagee or other party having an interest in the Property and any component of the Project.
- h) Upon full performance by the Developer of its obligations hereunder, the Town, at the Developer's request shall issue a statement in a form appropriate for recording with the Registry stating that all of the terms of this Agreement have been satisfied.

- i) Whenever the consent or approval of any party is required for another party to take an action under this Agreement, except where explicitly provided to the contrary, such consent or approval shall not unreasonably be withheld, delayed or conditioned.
- j) This Agreement shall be deemed to have been executed within the Commonwealth of Massachusetts and the rights and obligations of the Parties shall be governed by Massachusetts law. Any action to enforce the terms of this Agreement shall be brought in Norfolk County Superior Court.
- k) If any provision of this Agreement or the application of such provision to any person or circumstances shall be determined to be invalid or unenforceable, the remaining provisions of this Agreement or the application of the provision to persons or circumstances other than those to which it is held invalid or unenforceable shall not be affected and shall be valid and enforceable to the fullest extent.
- l) This Agreement and the accompanying 95-year Tax Certainty Agreement set forth the entire agreement of the Parties with respect to the subject matter thereto. The failure of any party to strictly enforce the provisions hereof shall not be construed as a waiver of any obligation hereunder. This Agreement may be modified only in a written instrument signed by the Select Board and the Developer.
- m) Non-discrimination: Developer agrees to fully comply with the federal, state, and local nondiscrimination laws, including the provisions of Mass. Gen. Laws, Chapter 151B, in its employment practices, its contracting, and its procurement of goods and services. Developer further agrees that it will take commercially reasonable affirmative steps to establish fair access to employment opportunities at the project with the goal of attempting to create a workforce that is an accurate reflection of the demographics of the qualified available workforce in the Boston /Brookline /Newton geographic area or other area from which the type of employees sought are located.
- n) M/WBE contracting/Procurement: Developer commits to work with the Brookline Office of Diversity, Inclusion, and Community Relations (the Diversity Office) (1) to identify minority and women contractors and subcontractors for the development of the project, (2) to identify minority and women vendors to provide goods and services to the project during construction and once it is operational, and (3) to establish goals for the number of contractors and subcontractors it will attempt to use and the amount of procurement from minority and women vendors and service providers it will attempt to purchase. Once a year Developer agrees to report to the Diversity Office the extent to which it succeeds in achieving its goals as stated above.

(The Remainder of this Page is Intentionally Left Blank – Signature Pages follow)

IN WITNESS WHEREOF, the parties have executed this Agreement under seal as of the date first written above.

DEVELOPER

WELLTOWER INC.

By: _____

Its:

Title:

WELLTOWER TRS HOLDCO LLC

By: _____

Its:

Title:

Dated: _____

TOWN OF BROOKLINE SELECT BOARD

Dated: _____

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

I hereby certify that on this _____ day of _____, 2020, personally appeared the above named _____, and provided identification in the form of _____, and who executed the foregoing as his free act and deed as _____ of _____.

Notary Public
My Commission Expires:

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

I hereby certify that on this _____ day of _____, 2020, personally appeared the above named _____, and provided identification in the form of _____, and who executed the foregoing as his free act and deed as _____ of _____.

Notary Public
My Commission Expires:

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

I hereby certify that on this _____ day of _____, 2020, personally appeared the above named _____, _____, _____, and _____, personally known to me and who executed the foregoing as their free act and deed as members of the Select Board of the Town of Brookline acting on behalf of the Town of Brookline.

Witness our hands and seals at Norfolk County, Brookline, Massachusetts, this ____ of _____, 2020.

Notary Public
My Commission Expires: