

RECORDING REQUESTED BY AND
WHEN RECORDED RETURN TO:

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

SPACE ABOVE FOR REGISTRY USE ONLY

DECLARATION OF RESTRICTIVE COVENANT

This **DECLARATION OF RESTRICTIVE COVENANT** (this “**Declaration**”) is made as of this __ day of _____, 201_ (the “**Effective Date**”), by **CHILDREN’S BROOKLINE PLACE LLC**, a Massachusetts limited liability company having an address c/o The Children’s Hospital Corporation, 300 Longwood Avenue, Boston, Massachusetts (“**Children 2-4 BP**”), and **CHILDREN’S ONE BROOKLINE PLACE LLC**, a Massachusetts limited liability company having an address c/o The Children’s Hospital Corporation, 300 Longwood Avenue, Boston, Massachusetts (“**Children’s 1 BP**” and, collectively, at times herein with Children’s 2-4 BP, the “**Declarant**”), as the owners of those certain parcels of real property comprised of approximately 3.318 acres, in the aggregate, within the Town of Brookline, together with the improvements located thereon, hereby declares that the Property (as more particularly defined below) shall be subject to and have the benefit of the covenants and restrictions set forth herein.

WITNESSETH:

WHEREAS, Children’s 2-4 BP is the owner of certain property situated at and known as 2-4 Brookline Place in Town of Brookline, Norfolk County, Commonwealth of Massachusetts, containing approximately 57,040 square feet (the “**2-4 BP Property**”), and which is more particularly described on Exhibit A, and Children’s 1 BP is the owner of certain property situated at and known as 1 Brookline Place in said Town of Brookline, containing approximately 87,468 square feet (the “**1 BP Property**”), and which is more particularly described on Exhibit B attached hereto and incorporated herein by reference (collectively, the “**Property**”); and

WHEREAS, the Town is the holder of certain easement rights for pedestrian access purposes on over the Property, pursuant to that certain Easement Agreement dated of even date herewith, and recorded with the Norfolk Registry of Deeds (the “**Registry**”) in Book _____, at Page ____ (the “**Town Easement**”), which Town Easement is immediately adjacent to the Property; and

WHEREAS, the Town, at its Annual Town Meeting held on May 27, 2014, adopted certain amendments to the zoning district containing the Property, in order to permit the redevelopment of the Property (the “**Amended Zoning**”), as more particularly defined in that certain Memorandum of Agreement (“MOA”) entered into by and among the Declarant and the Town, acting by and through its Board of Selectmen, dated as of April 29, 2014 (the “**Development Agreement**”); and

WHEREAS, pursuant to Section 5(b) of the MOA, Declarant covenanted and agreed to execute and deliver this Declaration, in consideration for the adoption and continued effectiveness of the Amended Zoning, and the Town desired to accept the same, which Declaration shall inure to the benefit of the Town Easement, in order to ensure, subject to the terms and provisions of this Declaration, the long-term real estate tax certainty of the Property for a term of up to ninety-five (95) years from the Effective Date.

NOW, THEREFORE, in consideration of the Town’s adoption of the Amended Zoning and the continued effectiveness thereof, the undersigned hereby represents, covenants and agrees with the inhabitants of the Town as follows:

1. Restriction. Except for conveyances to the Town or the Commonwealth of Massachusetts, neither the Property nor any portion thereof shall be sold, conveyed or otherwise transferred to an entity that qualifies for an exemption from property taxation under Massachusetts General Laws Chapter 59, Section 5, unless prior to such sale, conveyance, or other transfer, the exempt entity enters into an agreement with the Town for Payment-In-Lieu-Of-Taxes or such other substantively similar agreement (such an agreement, a “**PILOT**”) with regard to the Property or portion thereof to be sold, conveyed or otherwise transferred, on such terms and conditions as are reasonably acceptable to the Board of Selectmen, that provides, among other things, the following:
 - (a) That the owner of the applicable portion of the Property shall be required to pay to the Town a Voluntary Real Estate Tax Payment in quarterly installments on the date that real property taxes are due and payable in the Town in each applicable fiscal tax year for the then-remaining Term of this Declaration;
 - (b) The total Voluntary Real Estate Tax Payment paid with respect to the 2-4 BP Property shall be equal to the amount of real property taxes that would otherwise have been levied by and owed to the Town for all or any portion of the 2-4 BP Property were it not used for an exempt use or uses and thus not exempt from real property taxes under applicable law in the relevant fiscal tax year;
 - (c) The total Voluntary Real Estate Tax Payment paid with respect to the 1 BP Property shall be equal to the amount of real property taxes that would otherwise have been levied by and owed to the Town for all or any portion of the following components of the Property, were it not used for an exempt use or uses and thus not exempt from real property taxes under applicable law in the relevant fiscal year: (i) the 47,000 +/- square foot

addition constructed on the 1 BP Property pursuant to the Amended Zoning and any subsequently issued special permit; (ii) subject to the limitations of this subparagraph (c), the entire garage situated on the 1 BP Property, if such garage is redeveloped and or a new garage is constructed on the 1 BP Property pursuant to the Amended Zoning and any subsequently issued special permit; (iii) and/or any improvements that have been constructed pursuant to the Amended Zoning and any subsequently issued special permit.

Notwithstanding the above, in the event that the PILOT is entered into between the Town and the exempt entity before the date that the Leasehold Mortgage, Assignment of Leases and Rents and Security Agreement dated as of August 1, 2008, granted by Children's 1 BP and Children's Five Brookline Place LLC to John Hancock Life Insurance Company (U.S.A.), and recorded with the Norfolk Registry of Deeds in Book 25954, at Page 1, and the Norfolk Registry District of the Land Court as Document No. 1157966, as the same may be amended and restated from time to time (the "Mortgage"), is discharged as a result of Children's 1 BP's pay-off of the underlying indebtedness secured by said Mortgage, the PILOT shall provide that the total Voluntary Real Estate Tax Payment to be paid with respect to the garage, shall be limited to the amount equal to the amount of real property taxes that would otherwise have been levied by and owed to the Town for the addition to the garage situated on the 1 BP Property as of the Effective Date of this Declaration or, in instance of construction of a new garage, the increased value of the 1 BP Property, resulting from the addition of the net new parking spaces on the 1 BP Property pursuant to the Amended Zoning and any subsequently issued special permit (such incremental amount, the "Partial Garage Tax Amount"), in the event that John Hancock Life Insurance Company (U.S.A.) or any of its affiliates, successors and/or assigns holding the Mortgagee's interest in such Mortgage (collectively, "JHUSA") (i) forecloses on the Mortgage or (ii) takes possession of the 1 BP Property. In the event that the PILOT is entered into after the date that the Mortgage is foreclosed on or JHUSA has taken possession of the 1 BP Property pursuant to its rights under the Mortgage, the PILOT shall provide that the total Voluntary Real Estate Tax Payment to be paid by the exempt entity with respect to the garage, shall thereafter be limited to the Partial Garage Tax Amount. The Town hereby agrees that any consent and/or subordination agreement granted by JHUSA with regard to this Declaration, shall not affect JHUSA's or any party claiming by, through or under JHUSA's, rights to enforce the limitations contained in this subparagraph 1(c). The limitations contained in this subparagraph shall not apply after a discharge of the Mortgage resulting from the pay-off of the underlying indebtedness by Children's 1 BP, even if such pay-off is the result of a refinancing of such indebtedness by any lender or lending institution, including, without limitation, John Hancock Life Insurance Company (U.S.A.);

- (d) That the owner shall have the right to contest the amount of the Voluntary Real Estate Tax Payment on the basis of over valuation or disproportionate valuation in comparison to similar properties or by another measure of taxable value used by the Town Assessors for similarly situated uses, provided that such owner and the Town shall, before commencing legal action or commencing collection activity, first use good faith efforts to mediate the issue of valuation with the Assessors;
- (e) For the purposes of the PILOT, the term “Exempt Use” shall mean those uses of real property that render such property eligible from real property taxation pursuant to Massachusetts General Laws c. 59, Section 5, Clause Third or any other subsequent amendment thereto or other law enacted which effects the tax status of the property adopted during the Term of this Declaration;
- (f) The owner shall have the right, at any time following the expiration of the twentieth (20th) fiscal year of such PILOT to terminate the PILOT Agreement with regard to either or both of the 1 BP Property and the 2-4 BP Property, by making a one-time Voluntary Real Estate Tax Payment to the Town equal to the net present value of the Voluntary Real Estate Tax Payments that would be due to the Town for the balance of the term of the PILOT on such Property, the amount of which prepayment shall equal the net present value, as of the date of such prepayment, of all of the remaining payments that are scheduled to be made to the Town under the PILOT, discounted to the date of such prepayment at an annual rate that is equal to the most recent 30-year U.S. Treasury bond, with the remaining payments under the PILOT to be determined by applying to each annual payment an increase based on the average of the increase in taxes, on a percentage basis, for the commercial properties class in the Town of Brookline for the immediately preceding 20-year period.; and
- (g) The PILOT shall require the Town to provide the owner with a written statement of the amount due not less than thirty (30) days prior to the due date; and
- (h) The PILOT shall contain a provision with respect to lien/collection remedies that upon the failure to make any payment due to the Town, the Town may take whatever action it deems feasible to collect said payment whether in law or equity and the parties shall agree that payments due may constitute a fee for collection proceedings and may constitute a lien on the property for collection purposes. Upon written request from time to time to the Town Tax Collector, the Tax Collector shall provide the record owner of the Premises with a written statement in recordable form certifying compliance with this Agreement as of said date and otherwise stating any amounts due and payable and the amount of the payment.

The Town hereby acknowledges that Children's 1 BP may in the future subdivide the 1 BP Property, thereby creating separate lots for each of (a) the office/medical office building, as improved by the above-referenced addition, and (b) the redeveloped parking garage. The parties hereby agree that in the event of such a subdivision, (1) the Voluntary Tax Payment payable pursuant to subparagraph (c) above, by the owner of the parcel containing the office/medical office building shall be limited to the 47,000 square foot addition to such building, and, by the owner of the garage, for the garage (or relevant portion thereof in the event of a foreclosure by JHLICO) if the garage is redeveloped and/or reconstructed; and (2) the owner of each parcel shall each have the rights, with regard to its respective parcels, of Children's 1 BP under this Declaration, including, without limitation, the rights under subparagraph (f) above to prepay the Voluntary Tax Payments allocable to its parcel.

Declarant, for and on behalf of itself and its successors and/or assigns, hereby agrees and covenants that in the event that it or any other owner of any portion of the Property, after the date that it acquires its ownership interest in such portion of the Property, becomes qualified to apply for and receive an exemption from property taxation under applicable law, such entity, prior to applying for an exemption from property taxation, shall enter into a PILOT containing the provisions set forth in this Section 1.

2. Benefit and Burden. The covenants and restrictions contained in Article 1 shall attach to, bind and run with the Property for the term specified in Article 4 of this Declaration and shall inure to the benefit of the Town as the holder of the Town Easement, which Easement, pursuant to its terms, is not assignable by the Town, and shall be enforceable by appropriate injunctive or other equitable relief.
3. Conveyances Voidable. A deed for the Property or any portion thereof in violation of this covenant shall be voidable by the Town.
4. Period of Restrictions.
 - (a) Except as set forth in subparagraph (b) below, the restrictions set forth herein are imposed for a term of ninety-five (95) years from the Effective Date hereof (the "**Term**"), and Declarant hereby agrees and acknowledges that the restrictions shall not be deemed to be "unlimited as to time" within the meaning of Massachusetts General Laws, Chapter 184, Section 23, and that prior to the expiration of the initial thirty (30) years and prior to the expiration of any subsequent renewal period, such restrictions may be renewed from time to time thereafter for additional periods not in excess of twenty (20) years each, in accordance with the provisions of Massachusetts General Laws, Chapter 184, Section 27 or any successor statute.
 - (b) Notwithstanding the above, the Town, by executing and acknowledging this Covenant, hereby agrees that in the event that Declarant fails to obtain

a building permit for the construction of the improvements permitted by the Amended Zoning prior to the date on which the Special Permit, as the same may be extended, lapses, this Declaration shall automatically terminate and be deemed null and void and without any further force or effect in the event that (i) Declarant applies for a special permit and/or any other permits, licenses and/or other approvals necessary, in the Declarant's reasonable discretion, to allow for the construction of improvements under the Amended Zoning (collectively, the "**Required Approvals**") and (ii) the Board of Appeals of the Town of Brookline or any other public board, committee or body having jurisdiction or enforcement powers over the Property or the proposed project fails to grant such Required Approvals in form and condition satisfactory to Declarant, with all appeal periods having passed, no appeals pending, or, if any such Required Approval is appealed (x) in the event the appeal was filed by unrelated third parties, the same having been finally disposed of favorably to the third party or favorably to the Declarant, more than two (2) years from the date of the issuance of the Required Approval which is subject of the appeal; and (ii) in the event that the appeal was filed by the Declarant, the same having been finally disposed of favorably to the Town. Upon such termination, Declarant shall have the right to file with the Registry a notice, executed by the Declarant, stating that this Declaration has terminated, provided that Declarant delivers a copy of said certificate to the Town Clerk of the Town immediately following the recording of said certificate with the Registry.

5. Force Majeure. Whenever performance is required by the Declarant under the terms of this Declaration, the Declarant shall use all due diligence to perform and take all necessary measures in good faith to effect the necessary or required performance; provided, however, that if completion of performance shall be delayed at any time by reason of Acts of God, adverse weather conditions preventing the performance of work as certified by such party's architect or engineer, war, civil commotion, riots, strikes, picketing or other labor disputes, unavailability of labor or materials, government action or inaction (including, without limitation, action or inaction by the Town), damage to work in progress by reason of fire or other casualty, or any other cause beyond the reasonable control of the Declarant or not caused by such party, as applicable ("**Force Majeure**"), then the time for performance as herein specified shall be appropriately extended by the amount of the delay actually so caused; provided that Declarant provides the Town with written notice specifying the nature and anticipated duration of the Force Majeure circumstance. Notwithstanding the foregoing, lack of adequate funds or financial inability to perform shall not be deemed to be a cause beyond the control of the Declarant.

6. Severability. If any term or provision of this Declaration or the application thereof to any person or circumstance shall, to any extent, be declared to be invalid or unenforceable, then the remainder of this Declaration or the application of such term or provision to other persons or circumstances, other than those as to which it would become invalid or unenforceable, shall not be affected thereby, and each term and provision of this Declaration shall be valid and enforceable to the fullest extent permitted by law.

7. Governing Law. This Declaration shall be construed and governed in accordance with the laws of the Commonwealth of Massachusetts.

8. Recording. Wherever this Declaration requires or permits a recording, such recording shall be in the Registry.

9. Limited Undertaking. Nothing in this Declaration shall be construed as an undertaking by the Declarant to commence or complete the construction of the improvements on the Property.

For Declarant's title to the Property, see that certain Deed to Children's 2-4 BP recorded with the Registry in Book _____, at Page ____, and that certain Deed to Children's 1 BP recorded with the Registry in Book _____, at Page ____.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

EXECUTED as a sealed instrument as of _____, 2014.

DECLARANT:

CHILDREN'S BROOKLINE PLACE LLC, a
Massachusetts limited liability company

By: Fenmore Realty Corporation, a Massachusetts non-
profit corporation, its sole manager

By: _____
Name: _____
Title: _____
Hereunto Duly Authorized

CHILDREN'S ONE BROOKLINE PLACE LLC, a
Massachusetts limited liability company

By: Fenmore Realty Corporation, a Massachusetts non-
profit corporation, its sole manager

By: _____
Name: _____
Title: _____
Hereunto Duly Authorized

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss:

On this ___ day of _____, 2014, before me, the undersigned notary public, personally appeared _____, proved to me through satisfactory evidence of identification, which was _____, to be the _____ of Fenmore Realty Corporation, the sole manager of Children’s Brookline Place LLC, and acknowledged to me that he signed it voluntarily for its stated purpose as the _____ of the corporation on behalf of the limited liability company.

Notary Public

Print Name: _____

My Commission Expires: _____

[affix seal]

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss:

On this ___ day of _____, 2014, before me, the undersigned notary public, personally appeared _____, proved to me through satisfactory evidence of identification, which was _____, to be the _____ of Fenmore Realty Corporation, the sole manager of Children’s One Brookline Place LLC, and acknowledged to me that he signed it voluntarily for its stated purpose as the _____ of the corporation on behalf of the limited liability company.

Notary Public

Accepted:

Town of Brookline Board of Selectmen:

EXHIBIT A

Legal Description of 2-4 BP Property

The land in Brookline, Norfolk County, Massachusetts, known as One Brookline Place and shown as Lot A on a plan entitled "Subdivision Plan of Land/Marsh Project - B-2 Parcel/Brookline, MA/Norfolk County" by J.F. Hennessey Co., dated January 15, 1985, recorded with the Norfolk County Registry of Deeds in Plan Book 324, Plan 927 of 1985, bounded and described as follows:

SOUTHEASTERLY
and SOUTHERLY by Washington Street 213.30 feet;

WESTERLY and
NORTHWESTERLY by Pearl Street 400.31 feet;

EASTERLY by Lot B shown on said plan by 3 courses measuring 139.02 feet,
30.95 feet and 156.61 feet.

Together with the benefit of terms and provisions of Easement Agreement dated October 31, 2006 by and among Brookline Village II Limited Partnership, Village Plaza Limited Partnership and Village Waterworks Limited Partnership and recorded in Book 24255, Page 389, and filed as Document No. 1115033.

EXHIBIT B

Legal Description of 1 BP Property

The land in Brookline, Norfolk County, Massachusetts, known as One Brookline Place and shown as Lot B on a plan entitled "Subdivision Plan of Land/Marsh Project - B-2 Parcel/Brookline, MA/Norfolk County" by J.F. Hennessey Co., dated January 15, 1985, recorded with the Norfolk County Registry of Deeds in Plan Book 324, Plan 927 of 1985, bounded and described as follows:

SOUTHEASTERLY by Brookline Avenue and Washington Street by four courses, measuring 99.69 feet, 19.06 feet, 42.73 feet and 175.33 feet, respectively;

WESTERLY by Lot A shown on said plan by three courses measuring 156.61 feet, 30.95 feet and 139.02 feet, respectively;

NORTHWESTERLY
NORTHERLY AND
NORTHEASTERLY by Pearl Street, 393.75 feet; and

SOUTHEASTERLY
EASTERLY AND
SOUTHWESTERLY by Lot C shown on said plan by three courses measuring 65.74 feet, 48.82 feet and 95.09 feet, respectively.