



ARLINGTON COUNTY, VIRGINIA

**County Board Agenda Item
Meeting of May 16, 2009**

DATE: May 12, 2009

SUBJECT: Approval of the Deed Modifying a Restrictive Covenant Running to the Benefit of the County on Real Property Known as 3215 24th Street South, Parcel A, The Shelton (RPC #s 31-022-PEA; 31-022-101; and 31-022-102).

C. M. RECOMMENDATIONS:

1. Approve the attached Deed Modifying a Restrictive Covenant Running to the Benefit of the County on Real Property Known as 3215 24th Street South, Parcel A, The Shelton (RPC #s 31-022-PEA; 31-022-101; and 31-022-102), Which Covenant is Contained in a Deed of Vacation Recorded Among the Land Records of the Circuit Court of Arlington County, Virginia, in Deed Book 4161 at Page 1959; and
2. Authorize the Real Estate Bureau Chief, or his designee, to execute on behalf of the County Board of Arlington County, Virginia, the Deed Modifying a Restrictive Covenant and all related documents, subject to approval as to form by the County Attorney; and

ISSUES: Should the County Board agree to release, under specified circumstances, a restrictive covenant in favor of the County Board requiring affordable housing.

SUMMARY: In order to obtain its permanent financing from the Virginia Housing Development Authority for the affordable housing development known as “The Shelton”, AHC Limited Partnership-14 (“AHC”) has requested the County Board to modify an existing restrictive covenant benefitting the County Board on the real property constituting The Shelton. The existing restrictive covenant requires six (6) of the ninety-four (94) total units to remain affordable for not less than sixty (60) years. The modification proposed by County staff would release this covenant in the limited event of a foreclosure of the Virginia Housing Development Authority’s deed of trust and subsequent sale of the subject real property.

BACKGROUND: On January 21, 2006, the County Board approved Use Permit U-3130-05-1 (the “Use Permit”) for an affordable housing development known as The Shelton, located at

County Manager: _____

County Attorney: _____

Staff: David Cristeal – DCPHD, Housing Division
Hank Leavitt – DCPHD, Office of the Director
Michael Halewski – DES, Real Estate Bureau

2300, 2310, and 2312 Shirlington Road, Arlington, Virginia (RPC # 31-022-003; 31-022-004; 31-022-005; 31-022-006; and 31-022-099). Condition 24 of the Use Permit indicated that the approved development included density from the adjacent County right-of-way for a portion of 23rd Street South between Shirlington Road and South Kenmore Street, and required AHC to obtain an ordinance of vacating such portion of County right-of-way..

On March 20, 2007, pursuant to an application by AHC, the County Board enacted an ordinance, entitled, “An Ordinance to Vacate a Portion of the Right-of-Way of 23rd Street South, or Variable Width, Located between South Shirlington Road and South Kenmore Street, Adjacent to Parcels Known as: The Ada S. Thompson Estate at Nauck (RPC # 31-022-004); Part of Lots 13 and 14, Subdivision of Mary Norris (RPC # 31-022-099); Lot 15, Subdivision of Mary Norris (RPC # 31-022-005); Lot 1, Block 1, Nauck Subdivision (RPC # 31-023-001); and Lot 24, Block 1, Nauck Subdivision (RPC # 31-023-002); With Conditions,” (the “Ordinance of Vacation”) to vacate a portion of the County’s right-of-way constituting a portion of 23rd Street South (the “Vacated Right-of-Way”). Condition Five (5) of the Ordinance of Vacation required the Deed of Vacation to include the following covenant running with the land, in favor of the County Board of Arlington County, Virginia, obligating the Owner, its successors in interest and title, heirs and assigns, as indicated below (the “Restrictive Covenant”):

Owner covenants and agrees to maintain a total of six (6) dwelling units on the parcels of real property, currently identified as Arlington County Real Property Code (“RPC”) number 31-022-099, 31-022-003, 31-022-004, 31-022-005, and 31-022-006, as affordable dwelling units (the term “affordable dwelling units” being defined as units rented to households at or below sixty percent (60%) of the Area Median Income for the Washington, D.C. Metropolitan Area, and Area Median Income being determined and periodically published by the United States Department of Housing and Urban Development) for a continuous period of not less than sixty (60) years from the date of this Deed of Vacation.

Pursuant to Condition 24 of the Use Permit, and various provisions of the Nauck Village Center Action Plan, adopted by the County Board on July 10, 2004, the vacation was granted for nominal consideration because the additional density from the vacated right-of-way was to be used solely for the provision of additional affordable housing units. Because the Use Permit does not contain a condition requiring the six units to remain affordable housing, the Restrictive Covenant was included as a condition of the Ordinance of Vacation to ensure that the additional affordable housing units available in the project from the density of the vacated right-of-way remain affordable housing units for at least sixty (60) years.

AHC met all of the conditions of the Ordinance of Vacation, including having a Deed of Vacation, containing the Restrictive Covenant, fully executed and accepted on behalf of the County Board of Arlington County, Virginia, on January 9, 2008, and recorded on January 17, 2008 in Deed Book 4161 at Page 1959 among the Land Records. The Deed of Vacation conveyed fee simple title to the Vacated Right-of-Way to AHC.

AHC subsequently obtained County approval of a resubdivision of The Shelton parcels (i.e. RPC numbers 31-022-003, 31-022-004, 31-022-005, 31-022-006, 31-022-099, and 31022100). This

resubdivision is contained in a Deed of Resubdivision, Vacation and Rededication, recorded among the Land Records in Deed Book 4231 at Page 708. The resulting consolidated parcel (the "Subject Property") is identified as RPC #s 31-022-PEA; 31-022-101; and 31-022-102, and is more particularly shown on the Vicinity Map attached hereto as Attachment 2.

DISCUSSION: AHC has constructed an affordable housing development, known as "The Shelton", pursuant to Use Permit # U-3130-05-1, and has arranged permanent financing from the Virginia Housing Development Authority ("VHDA") for The Shelton. However, VHDA has conditioned its permanent financing on the County modifying the Restrictive Covenant such that the Restrictive Covenant would not apply to the VHDA's lien of its deed of trust securing the permanent financing in the event VHDA's deed of trust is foreclosed on all or a portion of the real property securing the VHDA loan. Therefore, AHC has requested the County Board to partially release the Restrictive Covenant as to VHDA.

The attached Deed Modifying a Restrictive Covenant (Attachment 1) would modify the Restrictive Covenant by inserting the following language:

Notwithstanding the foregoing, in the event of foreclosure of Virginia Housing Development Authority's deed of trust and subsequent trustee's sale, this covenant shall be null and void with respect to any portion of the aforementioned real property conveyed by a deed from a trustee or substitute trustee pursuant to the terms of a deed of trust benefitting Virginia Housing Development Authority.

The impact of this additional language is to release the Restrictive Covenant in the event of a completed foreclosure of VHDA's deed or deeds of trust securing the Subject Property as collateral for its loan to AHC, a subsequent public sale of the Subject Property, and recordation of a deed conveying such property to the purchaser at such public sale. The Deed of Vacation and the Restrictive Covenant shall remain otherwise unchanged.

FISCAL IMPACT: None.

**RECORDING REQUESTED BY,
AND WHEN RECORDED RETURN TO:**

Real Estate Bureau Chief
Engineering & Capital Projects Division
Department of Environmental Services
Arlington County Government
2100 Clarendon Boulevard, Suite 900
Arlington, Virginia 22201

**RPC Nos. 31022PEA;
31022101 &
31022102**

This document is exempt from Recordation Tax per Virginia Code § 58.1-811.A.3

DEED MODIFYING A RESTRICTIVE COVENANT

THIS DEED MODIFYING A RESTRICTIVE COVENANT (this "Deed"), dated this ____ day of _____, 20__, made by and between **THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA**, a body corporate and politic, Grantor and Grantee for indexing purposes (the "County"), and **AHC LIMITED PARTNERSHIP-14**, a Virginia limited partnership, Grantor and Grantee for indexing purposes (the "Owner"). The County and the Owner are sometimes jointly hereinafter referred to collectively as the "Parties".

RECITALS

R-1. WHEREAS, on March 20, 2007, the County Board of Arlington County, Virginia enacted an ordinance, entitled, "An Ordinance to Vacate a Portion of the Right-of-Way of 23rd Street South, of Variable Width, Located between South Shirlington Road and South Kenmore Street, Adjacent to Parcels Known as: The Ada S. Thompson Estate at Nauck (RPC # 31-022-004); Part of Lots 13 and 14, Subdivision of Mary Norris (RPC # 31-022-099); Lot 15, Subdivision of Mary Norris (RPC # 31-022-005); Lot 1, Block 1, Nauck Subdivision (RPC # 31-023-001); and Lot 24, Block 1, Nauck Subdivision (RPC # 31-023-002); With Conditions," (the "Ordinance of Vacation") to vacate a portion of the County's right-of-way constituting a portion of 23rd Street South (the "Vacated Right-of-Way");

R-2. WHEREAS, Owner is the owner of a certain parcel of real property located and situated in Arlington County, Virginia, adjacent to and abutting the Vacated Right-of-Way, presently known as 3215 24th Street South, The Shelton, RPC #s 31-022-PEA; 31-022-101; and 31-022-102 (the "Property"), title thereto having been acquired by

and conveyed to the Owner by those deeds recorded in Deed Book 4036 at Page 2355, Deed Book 4036 at Page 2359, and Deed Book 4161 at Page 1959 among the Land Records of the Arlington County Circuit Court (the "Land Records");

R-3. WHEREAS, pursuant to a Deed of Resubdivision, Vacation and Rededication dated October 30, 2008, and recorded in Deed Book 4231 at Page 708 among the Land Records, the Owner vacated and resubdivided RPC # 31-022-004, RPC # 31-022-005, RPC # 31-022-099, RPC # 31-022-003, RPC # 31-022-006, and RPC # 31-022-100, consolidating these parcels into the Property;

R-4. WHEREAS, Condition Five (5) of the Ordinance of Vacation required the Deed of Vacation to include the following covenant running with the land, in favor of the County Board of Arlington County, Virginia, and burdening the Property and the Owner, its successors in interest and title, heirs and assigns (the "Restrictive Covenant"):

Owner covenants and agrees to maintain a total of six (6) dwelling units on the parcels of real property, currently identified as Arlington County Real Property Code ("RPC") number 31-022-099, 31-022-003, 31-022-004, 31-022-005, and 31-022-006, as affordable dwelling units (the term "affordable dwelling units" being defined as units rented to households at or below sixty percent (60%) of the Area Median Income for the Washington, D.C. Metropolitan Area, and Area Median Income being determined and periodically published by the United States Department of Housing and Urban Development) for a continuous period of not less than sixty (60) years from the date of this Deed of Vacation.

R-5. WHEREAS, a Deed of Vacation (the "Deed of Vacation"), containing the Restrictive Covenant, was fully executed, accepted on behalf of the County Board of Arlington County, Virginia, and recorded in Deed Book 4161 at Page 1959 among the Land Records;

R-6. WHEREAS, the Owner has constructed an affordable housing development, known as "The Shelton", pursuant to Use Permit # U-3130-05-1, and has arranged permanent financing for The Shelton;

R-7. WHEREAS, the Owner's permanent financing lender, the Virginia Housing Development Authority ("VHDA"), has conditioned its permanent financing on the lien of its deed of trust not being subject to the Restrictive Covenant such that the Restrictive Covenant would not apply to property conveyed by a trustee's deed in the event of foreclosure of VHDA's deed of trust and subsequent trustee's sale; and

R-8. WHEREAS, to facilitate the Owner obtaining its permanent financing from VHDA, the Owner and the County desire to modify the Restrictive Covenant as provided hereinafter.

DECLARATION MODIFYING COVENANT

NOW, THEREFORE, for and in consideration of the sum of Ten Dollars (\$10.00), cash in hand paid, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and in further consideration of the mutual benefits to be received by the Parties hereto, the Parties agree for modify the Restrictive Covenant by inserting the following sentence at the end of the existing Restrictive Covenant:

Notwithstanding the foregoing, in the event of foreclosure of Virginia Housing Development Authority's deed of trust and subsequent trustee's sale, this covenant shall be null and void with respect to any portion of the aforementioned real property conveyed by a deed from a trustee or substitute trustee pursuant to the terms of a deed of trust benefitting Virginia Housing Development Authority.

The Deed of Vacation and the Restrictive Covenant shall remain otherwise unchanged.

The Recitals set out above are incorporated into this Deed.

No representations or statements have been made which would modify, add to, or change the terms of this Deed.

This Deed shall be construed, interpreted, and applied according to the laws of the Commonwealth of Virginia.

[SIGNATURES APPEAR ON THE FOLLOWING PAGES]

WITNESS the following signatures and seals:

AHC LIMITED PARTNERSHIP-14, a Virginia limited partnership

By: SHELTON DEVELOPMENT CORPORATION, a Virginia corporation, its general partner

By: _____

Name: _____

Its: _____

COMMONWEALTH OF VIRGINIA :
COUNTY OF _____ : to-wit

The foregoing instrument was acknowledged before me this ____ day of _____, 20____, by _____, the _____ of Shelton Development Corporation, a Virginia corporation, the general partner of AHC Limited Partnership-14, a Virginia limited partnership.

NOTARY PUBLIC

NOTARY ID #

COMMISSION EXPIRATION DATE

**THE COUNTY BOARD OF ARLINGTON COUNTY,
VIRGINIA**, a body corporate and politic

By: _____

Name: URI ARKIN

Title: REAL ESTATE BUREAU CHIEF

COMMONWEALTH OF VIRGINIA :
COUNTY OF _____ : to-wit

The foregoing instrument was acknowledged before me this ____ day of _____, 20____, by _____, the _____ of the County Board of Arlington County, Virginia, a body corporate and politic, on behalf of said County Board, pursuant to a resolution, motion, or action of the said County Board duly adopted on the ____ day of _____, 20____.

NOTARY PUBLIC

NOTARY ID #

COMMISSION EXPIRATION DATE

APPROVED AS TO FORM:

COUNTY ATTORNEY

