

Prepared by:
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After recording return to:
Office of the City Attorney
22 Lincoln Street
Hampton, Va. 23669
(bnb)

LRSN: 13004215

PROFFER AGREEMENT

THIS PROFFER AGREEMENT (“Agreement”) made this 16th day July, 2021, by and between **HAMPTON BAY ASSOCIATES, L.L.C.**, a Virginia limited liability company (“Hampton Bay”) (index as “Grantor”); **MARLYN DEVELOPMENT CORPORATION**, a Virginia corporation (“Marlyn”) (index as Grantor); and **THE CITY OF HAMPTON**, a municipal corporation of the Commonwealth of Virginia (the “Grantee”), with an address of 22 Lincoln Street, Hampton City Hall, Hampton, Va. 23669.

RECITALS

- A. Hampton Bay is the owner of a certain parcel of property located in the City of Hampton, herein known as LRSN Number(s) 13004215, and more fully described on “Exhibit A” (the “Property”).
- B. Marlyn and Hampton Bay (collectively, “Grantor”) intend to conclude a transfer of ownership of the Property to Marlyn in order to facilitate Marlyn’s development of the Property in accordance with the terms of this Agreement.
- C. Grantor has initiated a conditional amendment to the zoning map of the City of Hampton, Virginia, by petition addressed to the Grantee so as to change the zoning classification of the Property from General Commercial District C-3 to Multifamily Residential District MD-3.
- D. Grantor has requested approval of this Agreement.
- E. Grantee’s policy is to provide for the orderly development of land for various purposes, including commercial purposes, through zoning and other land development legislation.
- F. Grantor desires to offer the City of Hampton certain conditions for the enhancement of the community and to provide for the highest quality and

orderly development of the Property.

- G. The conditions outlined in this Agreement have been proffered by Grantor and allowed and accepted by Grantee as a part of the amendment of the City Zoning Ordinance and the Zoning Map. These conditions shall continue in full force and effect until a subsequent amendment changes the zoning of the Property; provided, however, that such conditions shall continue if the subsequent amendment is part of the comprehensive implementation of a new or substantially revised zoning ordinance of Grantee.

NOW, THEREFORE, for and in consideration of the approval and acceptance by the City of Hampton, (the “City”) of this Agreement, Grantor agrees that it will meet and comply with all of the following conditions in developing the Property. In the event the requested change of zoning classification is not granted by the City, these Proffers shall thereupon become null and void. Grantor, its heirs, successors, assigns, grantees and other successors in title or interest to the Property, voluntarily and without any requirement by or exaction from Grantee or its governing body and without any element or compulsion or quid pro quo for zoning, rezoning, site plan, building permit or subdivision approval, makes the foregoing declaration of conditions and restrictions governing the use and physical development and operation of the Property, and covenants and agrees that this declaration and the further terms of this Agreement shall constitute covenants running with the Property, which shall be binding upon the Property, and upon all persons and entities claiming under or through the Grantor, its heirs successors and assigns, grantees and other successors in interest or title to the Property; namely:

CONDITIONS

- A) The only permitted use of the Property shall be as multifamily residences, together with all accessory uses.
- B) The Property shall be developed in substantial conformance with the conceptual site plan entitled “CONCEPTUAL LAYOUT THE ARBORS AT WEST PEMBROKE”, dated April 14, 2021, last revised June 4, 2021 and prepared by AES Consulting Engineers (the “Master Plan”), a copy of which is on file with the Community Development Department and has been exhibited to the Hampton City Council for illustrative purposes and to provide justification for this rezoning action. Significant changes in the Master Plan may be made to accommodate environmental, engineering, architectural, topographic or other development conditions, or site/subdivision plan approval requirements as required by applicable law and/or regulations and subject to approval of the Director of Community Development or his designee for consistency with the terms of this proffer. A copy of the final approved Master Plan shall be placed in the file with the Planning Division of the Department of Community Development and shall supersede any previous Master Plan.
- C) There shall be a maximum of 150 residential dwelling units (each, a “Residential Unit” and collectively, the “Residential Units”) constructed on the Property.

- D) The building to be constructed on the Property shall be in substantial conformance with the elevations entitled “NEW AGE-RESTRICTED MULTI-FAMILY DEVELOPMENT, THE ARBORS AT WEST PEMBROKE”, dated April 22, 2021, last revised May 18, 2021 and prepared by Cox, Kliever & Company, P.C., (the “Elevations”), copies of which are on file with the Community Development Department which Elevations have been exhibited to the Hampton City Council for illustrative purposes and to provide justification for this rezoning action. Minor changes in the Elevations may be made to accommodate environmental, engineering, architectural, topographic or other development conditions, building code, or site/subdivision plan approval requirements as required by applicable law and/or regulations and subject to approval of the Director of Community Development or his designee for consistency with the terms of this proffer. A copy of the final approved Elevations shall be placed in the file with the Planning Division of the Department of Community Development and shall supersede any previous Elevations.
- E) Occupancy of the Residential Units developed upon the Property shall be age restricted to either persons fifty-five (55) or sixty-two (62) years of age or older (the “Qualifying Age”) in accordance with the following parameters:
1. It is the intent of the Grantor that Residential Units shall be occupied by persons of the Qualifying Age or older and that no Residential Unit shall be occupied by a person under the age of eighteen (18). In some instances, persons under the Qualifying Age but age eighteen (18) or older shall be entitled to occupy Residential Units, subject, at all times, to the laws and regulations governing Qualifying Age restricted housing as more particularly set forth and described in subparagraph 2 below.
 2. Each Residential Unit shall be constructed and operated in compliance with applicable federal and state laws and regulations regarding housing intended for occupancy by persons of Qualify Age or older, including but not limited to: the Fair Housing Act, 42 U.S.C. §3601 *et seq.* and the exemption therefrom provided by 42 U.S.C. §3607(b)(2)(C) regarding discrimination based on familial status; the Housing for Older Persons Act of 1995, 46 U.S.C. §3601 *et seq.*; the Virginia Fair Housing Law Va. Code §36-96.1 *et seq.*; any regulations adopted pursuant to the foregoing; any judicial decisions arising thereunder; any exemptions and/or qualifications thereunder; and any amendments to the foregoing as now or may hereafter exist.
 3. Upon request of the Zoning Administrator, the Grantor shall provide such data or information as may be necessary to verify compliance with this condition (E).
- F) The construction of the building shall be as follows:

1. The exterior of the building will be constructed of full face brick veneer, Fiber cement panel siding, and premium vinyl lap siding, with panel thickness of .044" and meeting the requirements for Exposure Zone B.
2. Roofing materials shall be architectural shingles.

G) There shall be a twenty foot (20') wide landscape buffer that consists of a mixture of evergreen and deciduous trees, shrubs, and groundcover, as further described below, along the southerly, easterly, and westerly boundaries of the site adjacent to any residential zoned properties.

1. The Landscape Buffer shall provide an opaque screen of trees and shrubs from the ground to a minimum height of six feet (6') in substantial conformance with the illustration attached hereto as Exhibit "B" and made part of the Agreement. Before installation or removal of any material in the Landscape Buffer, a landscape plan meeting the requirements of the City of Hampton Landscape Guidelines shall be reviewed and approved by the Director of Community Development or his designee. Further, the Landscape Buffer shall consist of the following:

- i. Vegetation: All existing trees within the Landscape Buffer shall be preserved, with the exception that all dead, diseased or damaged vegetation and invasive species, which shall be removed only to the extent necessary. All trees installed in the Landscape Buffer shall be dispersed throughout the required planting areas and shall be planted with a combination of single trees and groups of trees in a staggered, clustered or other pattern. Trees shall not be installed in a continuous single row except where necessary and appropriate to meet screening buffer requirements. Shrubs shall be installed in groupings and integrated with trees.
- ii. Plant Specifications: All new trees installed shall be a combination of the following tree types: deciduous trees, evergreen trees, and understory trees. No more than fifty percent (50%) of the required trees shall be of any one type, nor shall more than twenty-five percent (25%) of the required trees be of any single species (e.g., maple, pine, oak, dogwood, holly, etc.).

All new trees and shrubs shall meet the following size requirements:

Plant Type	Installed Size	Mature Height Capability
Shade Tree	2" caliper	>50'
Evergreen Tree	10' height	>40'
Understory Tree	10' height	>20'
Evergreen Shrub	30" height	>6'

The Landscape Buffer shall be left in an undisturbed natural vegetative state with the exception of providing supplemental plantings, fencing and maintenance of the buffer as described in this Agreement. Pruning and trimming shall be limited to selective thinning of vegetation under two inch (2") caliper.

- H) Existing plant material along the westerly boundaries of the site, as shown on the Master Plan, shall be preserved and left in an undisturbed natural vegetative state to the greatest extent possible with the exception of providing supplemental plantings, fencing, and maintenance. All existing trees along the westerly boundaries shall be preserved, with the exception that all dead, diseased or damaged vegetation and invasive species, which shall be removed only to the extent necessary. Pruning and trimming shall be limited to selective thinning of vegetation under two inch (2”) caliper. In the event that this area is required to be, or is inadvertently cleared during through land disturbance, then the area shall be restored per the landscape requirements specified in condition “G” above.
- I) The dumpster enclosure, shown on the Master Plan, shall be fully screened from public view with an enclosure of durable materials consistent with the primary structure to complement the building architecture and supplemented with landscaping.
- J) Fencing visible from the right-of-way shall be limited to a decorative aluminum picket fence. Materials for fencing not visible from the right-of-way shall be limited to vinyl coated chain link, PVC, wood composite, and/or aluminum. Other suitable fencing materials complementary to the building architecture may be approved by the Director of Community Development or his designee.
- K) All exterior lighting, both site and building, shall comply with the “City of Hampton Outdoor Lighting Policy and Procedures”, and shall consist of full cut-off fixtures that are directed downward and inward to the site.
- L) The community amenity shall include, but is not limited to, a grilling area, community garden, and dog park as shown on the Master Plan. Other similar amenities intended to provide a communal focal point may be provided in place of those previously listed with the approval of the Director of Community Development or his designee.
- M) It is understood that all phases of the proposed project shall comply with all ordinances of the City of Hampton.
- N) Further lawful conditions or restrictions against the Property may be required by Grantee during the detailed Site Plan review and administration of applicable codes and regulations of Grantee by all appropriate agencies and departments of Grantee, which shall be observed or performed by Grantor. Grantor acknowledges that additional further lawful conditions or restrictions may be imposed by Grantee as a condition of approvals, including but not limited to final site plan approval. All references hereinabove to zoning districts and to regulations applicable thereto, refer to the City Zoning Ordinance of the City of Hampton, in force as of the date the conditional rezoning amendment is approved by the Grantee.

- O) The Grantor covenants and agrees that (1) the Zoning Administrator of the City of Hampton, Virginia, shall be vested with all necessary authority on behalf of the governing body of the City of Hampton, Virginia, to administer and enforce the foregoing conditions and restrictions specified in this Agreement, including (i) the ordering in writing of the remedying of any noncompliance with such conditions, and (ii) the bringing of legal action or suit to ensure compliance with such conditions, including mandatory or prohibitory injunction, abatement, damages or other appropriate action, suit or proceedings; (2) the failure to meet all conditions shall constitute cause to deny the issuance of any of the required building or occupancy permits as may be appropriate; and (3) the Zoning Map shall show by an appropriate symbol on the Map the existence of conditions attaching to the zoning of the subject Property on the Map and that the ordinance and conditions may be made readily available and accessible for public inspection in the office of the Zoning Administrator and in the Department of Community Development and that this Agreement shall be recorded in the Clerk's Office of the Circuit Court of the City of Hampton, Virginia and indexed in the name of the Grantor and Grantee.

WITNESS the following signatures:

[Signatures located on the following pages]

[Signature Page to Proffer Agreement]

Grantor:

HAMPTON BAY ASSOCIATES, L.L.C.

By: William T. Wharton III

Name: William T. Wharton III

Its: Managing Partner

STATE OF VIRGINIA
City of Hampton, to-wit:

I, Wendy M Belliar, the undersigned, a Notary Public in and for the City and State aforesaid, do hereby certify that WILLIAM T. WHARTON III, whose name is signed to the foregoing instrument as (title) of HAMPTON BAY ASSOCIATES, L.L.C., a Virginia limited liability company, has sworn to, subscribed, and acknowledged the same before me in the City and State aforesaid, this 29 day of July, 2021 on behalf of said LLC. He/she is personally known to me or has produced VA DL T60387646 as identification.

Wendy M Belliar
Notary Public

My commission expires: Jan. 31 2021
Registration No. 359995



[Signature Page to Proffer Agreement]

Grantor:

MARLYN DEVELOPMENT CORPORATION

By: M. David Jester

Name: M. DAVID JESTER

Its: PRESIDENT

STATE OF VIRGINIA
City of Hampton, to-wit:

I, Michelle Helms, the undersigned, a Notary Public in and for the City and State aforesaid, do hereby certify that M. David Jester, whose name is signed to the foregoing instrument as President of Marlyn Development Corporation, a Virginia corporation, has sworn to, subscribed, and acknowledged the same before me in the City and State aforesaid, this 29th day of July, 2021 on behalf of said S Corporation. He/she is personally known to me or has produced _____ as identification.

Michelle R. Helms
Notary Public

My commission expires: 4/30/2023
Registration No. 7829070



Exhibit A
Legal Description

Parcel 1

All those certain lots, pieces or parcels of land, situate, lying and being in the City of Hampton, Virginia, known and designated as follows: GAINSVILLE. BLOCK 1, LOTS 20-29 & PART OF LOTS 15-19; BLOCK 3, LOTS 1-15; BLOCK 4, LOTS 1-41; BLOCK 5, LOTS 3-20; BLOCK 7,

LOTS 1-8 & 22, 23; BLOCK 8, LOTS 3-14 & 21-30; and BLOCK 9, LOTS 1, 2, 3, 6, 7, 8, 9, 10 & 14, as shown on that certain plat entitled, "PLAT OF THE PROPERTY OF JAMES A. BICKFORD", which plat is dated February 22, 2000, made by Becouvarakis and Associates, Land Surveying, which said plat is attached to instrument recorded on November 18, 2004 as Instrument No. 040031150.

Together with any right, title and interest in the streets platted as Hanna Street, Ashland Street, Day Street and Portland Street, as shown on the attached plat.

Less and Except Gainsville Block 7, Lots 22 and 23 as conveyed by deed dated March 20, 2006 from Hampton Bay Associates, LLC to Melva N. Woods-Merrell, recorded March 21, 2006 in the Circuit Court of the City of Hampton, Virginia, as Instrument No. 060007332.

It Being a portion of the same property conveyed by deed dated November 3, 2004 from William R. Burnette, Trustee, Old Point Trust and Financial Services, N.A., Trustee as Successor to Virginia National Bank of Norfolk, James V. Bickford, III, Paul R. Bickfold, Jr., Carolyn B. McCulloch and Betsy B. Burnette, to Hampton Bay Associates, LLC, a Virginia limited liability company, recorded November 18, 2004 in the Clerk's Office of the Circuit Court of the City of Hampton, Virginia, as Instrument No. 040031150.

Ordinance adopted May 14, 2014 vacating a portion of Subdivision Plat entitled "Plat of Gainsville", recorded in Deed Book 26 at Pages 112-114 and located at the corner of West Pembroke Avenue and G. Street with the Vacation Area comprising 50, 204 +/- S.F. or 1.1525 acres if unimproved right-of-way, vacating a portion of Ashland Street, Portland Street, Hannah Street and Day Street, recorded March 12, 2015 in the Clerk's Office of the Circuit Court of the City of Hampton, Virginia, as Instrument No. 150002796.

Parcel 2

All those certain lots, pieces or parcels of land situate, lying and being in the City of Hampton (formerly Elizabeth City County), Virginia, known and designated as: that portion of lots 15, 16, 17, 18 & 19 in Block 1, that are located on the south-east side of Route 351 - West Pembroke Avenue, outside of the existing street right of way as shown on the attached plat title "PLAT SHOWING A PORTION OF PROPERTY STANDING IN THE NAME OF VIRGINIA DEPARTMENT OF TRANSPORTATION EAST RIGHT OF WAY LINE ROUTE 351 WEST PEMBROKE AVENUE" prepared by Robert O. Harmon for Edward C. Can, II dated

January 10, 2006 duly recorded in the Clerk's Office of the Circuit Court for the City of Hampton, Virginia, in Misc. Plat Book 2, at Page 135; all of lots 20, 21, 24, 25 & 26 in Block I; that portion of lots 22, 23 & 24 in Block 2, that are located on the south-east side of Route 351 - West Pembroke Avenue, outside of the existing street right of way as shown on said plat; all of lot 25 in Block 2; all of Lot 5 in Block 5; all as shown on the aforesaid plat.

It Being the same property conveyed by deed dated September 21, 2006 from the Commonwealth of Virginia, acting by and through the Commonwealth Transportation Commissioner, and William

R. Burnette, Trustee, Old Point Trust and Financial Services, N.A., Trustee as Successor to Virginia National Bank of Norfolk, James V. Bickford, III, Paul R. Bickford, Jr., Carolyn B. McCulloch and Betsy B. Burnette, to Hampton Bay Associates, LLC, recorded March 7, 2007 in the Clerk's Office of the Circuit Court of the City of Hampton, Virginia, as Instrument No. 070005915.

Parcel 3

All that certain lots, pieces or parcels of land situated, lying and being in the City of Hampton (formerly Elizabeth City County), Virginia, known and designated as: Block 5, all of lots 1 and 2, and portions of Lots 22 and 23, Block 1, that are located on the southeast side of Route 351 - West Pembroke Avenue, outside of the existing street right of way as shown on the attached plat titled "PLAT SHOWING A PORTION OF PROPERTY STANDING IN THE NAME OF VIRGINIA DEPARTMENT OF TRANSPORTATION EAST RIGHT OF WAY LINE ROUTE 351 WEST PEMBROKE AVENUE prepared by Robert O. Harmon for R. Dean Minnix dated November 28, 2007; and being the same property conveyed to the Commonwealth of Virginia by Agreement dated March 7, 1946 and recorded in Deed Book 132 Page 314 in the aforesaid Clerk's Office of the County of Elizabeth City.

It Being the same property conveyed by deed dated December 28, 2007 from the Commonwealth of Virginia, acting by and through the Commonwealth Transportation Commissioner, to Hampton Bay Associates, LLC, recorded March 7, 2007 in the Clerk's Office of the Circuit Court of the City of Hampton, Virginia, as Instrument No. 080013041.

Parcel 4

All that certain lot, piece or parcel of land, lying, situate and being in the City of Hampton, Virginia being known, designated and described as Lots Numbered 1 and 2 in Block Numbered 8, as shown on that certain plat entitled "Map of Gainesville in the County of Elizabeth City, Va" made by E. A. Semple, Civil Engineer, a copy of which said plat is recorded in the Clerk's Office of the Circuit Court for the City of Hampton in Deed Book 26, page 112.

It Being the same property conveyed by deed dated November 14, 2013 from Ronald Warren Clyburn, Sr. to Hampton Bay Associates, LLC, recorded December 19, 2013 in the Clerk's Office of the Circuit Court of the City of Hampton, Virginia, as Instrument No. 130019284.

Parcel 5

All that certain lot, piece or parcel of land situate, lying and being in the City of Hampton, Virginia, known and designated as Parcel A-1 10,672 S.F., as shown on that certain plat entitled, "SUBDIVISION OF THE PROPERTY OF HAMPTON ROADS INDEPENDENT BAPTIST CHURCH, CITY OF HAMPTON, VIRGINIA", made by T. J. Savage, Jr., Surveyor and Land Planner, Hampton, Virginia, dated June 18, 2012, and recorded in the Clerk's Office of the Circuit Court for the City of Hampton, Virginia, in Miscellaneous Plat. Book 4, at Page 9, to which plat reference is here made.

It Being the same property conveyed by deed dated February 20, 2014 from Douglas C. Butler, Sr., Milton Gatling, Kevin R. Wilson, Sr. and Ned H. Kelley, Jr., Trustees of the Hampton Roads Independent Baptist Church, to Hampton Bay Associates, LLC, recorded February 21, 2014 in the Clerk's Office of the Circuit Court of the City of Hampton, Virginia, as Instrument No. 140002106.

Exhibit B
Landscape Buffer Exhibit

