

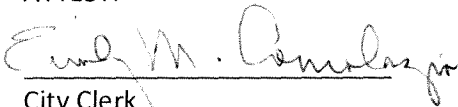
RESOLUTION R-73-07

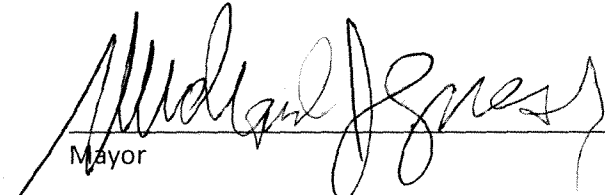
A RESOLUTION AUTHORIZING THE CITY MANAGER TO SIGN AND  
DIRECTING THE CITY CLERK TO ATTEST TO THAT CERTAIN LICENSE  
AGREEMENT BETWEEN THE CITY OF WHEATON AND  
AVALON BAY COMMUNITIES, INCORPORATED

WHEREAS, the Corporate Authorities for the City of Wheaton deem it necessary and appropriate to enter into a License Agreement with Avalon Bay Communities.

NOW, THEREFORE, Be It Resolved by the Mayor and City Council of the City of Wheaton, DuPage County, Illinois, that the City Manager is hereby directed to sign and the City Clerk is hereby directed to attest that certain License Agreement between the City of Wheaton and the Avalon Bay Communities, Inc., attached hereto and incorporated herein as it is fully set forth as Group Exhibit A.

ATTEST:

  
\_\_\_\_\_  
City Clerk

  
\_\_\_\_\_  
Mayor

Ayes:

Roll Call Vote:

Councilman Mouhelis  
Councilman Prendiville  
Councilman Suess  
Councilwoman Corry  
Councilman Johnson  
Councilman Levine  
Mayor Gresk

Nays:

None

Absent:

None

Motion Carried Unanimously

**GRANT OF LICENSE PERTAINING TO A MAINTENANCE SHED**

RECITALS

WHEREAS, the City of Wheaton, an Illinois Home Rule Municipality (hereinafter "City") is holder of an actual and/or prescriptive public utilities easement for a water and or storm water sewer line located along the east property line of the property depicted in the plat of survey attached hereto and incorporated herein as **Exhibit "A"** and hereinafter referred to as the "easement area" in Wheaton, DuPage County, Illinois; and

WHEREAS, Avalon Bay Communities, Inc. is the Owner (hereinafter "Avalon or Owner") of the Briar Cliff Lakeside Apartments located on the property containing the easement area; and

WHEREAS, Avalon has constructed a maintenance shed over the easement area; and

WHEREAS, the construction of the maintenance shed over the easement area may interfere on some future date with the City's access to a 12" water main and/or 66" storm sewer (hereinafter "utilities"); and

WHEREAS, the City does not ordinarily allow structures to be constructed over municipal water mains or sewer lines; and

WHEREAS, the City does not deem the removal of the shed necessary or essential for the immediate protection of the public health safety and welfare; and

WHEREAS, the City has determined that in the case of an emergency, or the Owner's failure to timely respond to a request from the City to remove the shed to provide access to the utilities, the City must retain all rights and privileges of the City with regard to the easement area; and

WHEREAS, the City is willing to grant this license to the Owner to maintain the maintenance shed upon and over the easement subject to the terms and conditions of this License Agreement; and

NOW THEREFORE, based upon the foregoing recitals and other good and valuable consideration, Wheaton and the Owner hereby covenant and agree as follows:

1. Wheaton hereby grants a license to the Owner to keep, use, maintain replace, repair and remove the shed and its appurtenances (hereinafter "shed") at the location depicted on **Exhibit A** in strict conformance with the following conditions and covenants.

- A. That the shed shall be maintained in good and proper condition in conformance with existing structure codes and ordinances of the City of Wheaton; and
  - B. That the Owner shall not permit any liens that could impair the City's easement rights to be placed against the easement area in consequence of the existence of the shed on the easement area; and
  - C. That the Owner grants to the City of Wheaton the right to examine and inspect the shed as it deems it appropriate in the ordinary course of business at the City of Wheaton.
  - D. That the Owner shall maintain the structural integrity of the shed and its appurtenances so as not to compromise or interfere with the operations of the City's utilities; and
  - E. The Owner shall notify Wheaton in the event if there is any condition or occurrence which may compromise or threaten the municipal utilities located within the easement area so as to impair or threaten the ability of the municipal utilities to function for their design purpose.
2. That the Owner shall not challenge the status of this license or otherwise maintain that this License Agreement constitutes an easement, lease or other interest in real property that is inconsistent with the City's easement rights, it being the intent of the City and the Owner that this agreement constitutes a license only and does not grant or bestow a property interest in the Owner inconsistent with the purpose of the easement.
3. This License Agreement may be terminated by the City in conformance with the following terms and conditions:

A. **Non-Emergency**

If the City determines that the removal or relocation of the shed is reasonably necessary to allow the City to service, repair or maintain any Wheaton-owned utility located under the shed (the "Work") it shall provide the Owner with written notice of the City's intent to perform such repairs to give the Owner the opportunity as the Owner deems appropriate to either (i) relocate, remove or demolish the shed, or (ii) commit to pay the City any additional cost of the Work caused by the presence of the shed, provided that this second option shall apply only if the City determines that the shed can feasibly be left in

place, When Work is required as described in this paragraph the Owner shall have 14 business days from the date of notice to inform the City of Owner's preferred option(e.g., agreeing to pay the additional expense caused by leaving the shed, or agreeing to remove the shed). Any required removal or relocation of the maintenance shed shall be completed no later than thirty (30) days from the date of the written notice. If the shed is not removed or relocated within thirty (30) days of the date of written notice the City shall have the authority under the terms and conditions of this Agreement to remove or demolish the shed from the easement area. The City shall have no obligation in the later circumstance to protect or relocate the shed. All costs associated with the removal, relocation or demolition of the shed whether undertaken by the Owner or the City shall be the Owner's exclusive obligation.

**B. Emergency**

In the case of an emergency requiring repair to one or more of the Utilities the City shall have the right to demolish and/or remove the shed from the easement and the Owner shall pay the City all reasonable out of pocket costs associated with the demolition and removal of the shed. For purposes of this Agreement an "emergency" shall be considered a break in any City-owned utility under the shed and its appurtenances. Whether a situation constitutes an emergency under the terms of this License Agreement shall be determined in the sole and absolute discretion of the City's Director of Public Works or his or her designee.

4. From the effective date of the grant of this License and for all time thereafter, the Owner shall obtain and maintain general liability insurance covering the shed and appurtenances not less than one million dollars per occurrence (combined single limit) including bodily injury and property damage in and amount not less than one million dollars annual per each personal injury. The insurance shall include coverage for collapse. This insurance may be a general liability policy covering the entire property.

All policies of insurance shall be on a per occurrence basis and in accordance with the limits and provisions specific herein. Claims made policies are unacceptable. Owner agrees that all insurance shall not be cancelled or materially altered to reduce the policy limits until the City has received at least thirty (30) days written notice of such cancellation or change. If at anytime such coverage is canceled or materially altered the shed shall be removed from the easement until the insurance coverage is

restored to the satisfaction of the City. After the first five (5) years, and every five (5) years thereafter, the City shall have the right to require Owner to confirm that it continues to maintain such insurance, with such limits, as then may be then customary and reasonably necessary to carry out the intent of this paragraph.

A. The Owner shall file with the City such evidence as the City may from time to time, but not more than once each year, reasonably require to show that Owner carries the insurance required by this Agreement.

Any insurance Wheaton possesses shall be considered excess insurance only and shall not be required to contribute with the Owner's insurance.

B. All insurance carriers providing coverage under this Agreement shall be admitted and authorized to do business in the State of Illinois and shall be rated at least A-X in A.M. best in company's insurance guide. Insurance policies and certificates issued by non-admitted insurance companies are unacceptable.

C. Any deductibles or self insured retention shall be stated on the certificates provided to the City.

5. To the greatest extent permitted under Illinois law, the Owner agrees to indemnify, defend, protect and hold harmless the City, its corporate authorities, officers, agents and employees from and against any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgment immediate actions any kind, and all costs and expenses of any kind, including reasonably attorneys fees, incurred in connection with proximately resulting from the Owner's acts, omissions, and occupations related to the presence of the shed on the easement area. This indemnification and hold harmless shall be the Owner's obligation even where the act or omission creating liability under this section is a result of work performed for the Owner on the shed and/or its appurtenances by the Owner's employees, agents or independent contractors. This indemnity is not limited by the insurance provisions above.

6. Owner hereby waives and releases any and all claims, demands, causes of action and rights it may assert against the City on account of any loss, damage, or injury to the shed or its appurtenances proximately related in any way to the City's exercise of its rights under the terms of this license or the presence of the utilities under the shed.

GENERAL PROVISIONS

7. This Agreement may be enforced by injunctive or declaratory action.
8. This Agreement shall be interpreted in strict accordance with the laws of the State of Illinois. The exclusive and sole jurisdiction for any disputes associated with this Agreement shall be in the 18th Judicial Circuit Court, Wheaton, Illinois.
9. Should any provision of this Agreement be declared null and void by a Court of competent jurisdiction such invalidity shall render this grant of License invalid and the License or any rights or privileges hereunder shall be immediately terminate, and the Owner shall remove the shed from the easement no later than seven (7) days after the License becomes invalid.
10. Should any Court of competent jurisdiction determine this document constitutes anything other than a License this Agreement shall become null void and without effect.
11. All prior negotiations between the parties are incorporated into this Agreement. No prior negotiations, discussions, or subsequent Court of conduct and patterns between the City and the Owner shall in any way modify, amend or otherwise effect the terms, conditions and covenants of this Agreement.
12. Failure of either party to strictly enforce any provision of this Agreement at anytime shall not constitute a release or waiver of that provision or any other provisions of this Agreement by the non-enforcing party which shall retain all rights set forth herein for the duration of the Agreement.
13. All notices, demands, requests or other communications under this Agreement shall be in writing and shall be deemed to have been properly served if delivered by hand to the party whose attention is directed, or if sent, postage, prepaid by regular mail, or if sent by private carrier guaranteeing first or second date delivery, in each case addressed as follows or such other address as either party may designate in writing. If to the Owner: AvalonBay Communities, Inc., 1750 East 22<sup>nd</sup> Street, Wheaton, Illinois, 60187, with a copy to AvalonBay Communities, Inc., 2900 Eisenhower Avenue Suite 300, Alexandria, Virginia 22314, Attn: Legal Department. If to the City, City of Wheaton, 303 Wesley Street, Wheaton, Illinois 60187 Attn: City Manager with a copy to Bollinger, Lock and Associates, Inc., 1010 Jorie Blvd., Oak Brook, Illinois 60523..
14. This Agreement shall not be assigned by the Owner without the written consent of the City except to a party that (i) acquires Owner's interest in the applicable property, and (ii) delivers to the City an express written

undertaking by such party of all Owner's obligations hereunder arising from and after such party's acquisition of Owner's interest in the property. Where the City's consent is required, such consent shall not be unreasonably held.

IN WITNESS WHEREOF, the parties have set their hands and seals this day, and the year first written above.

AVALONBAY COMMUNITIES, INC.

By: \_\_\_\_\_

Name: \_\_\_\_\_

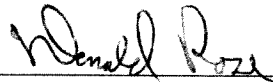
Title: \_\_\_\_\_

Owner

Acknowledged before me this  
\_\_\_\_\_ day of \_\_\_\_\_, 2007.

\_\_\_\_\_  
Notary Public

CITY OF WHEATON



\_\_\_\_\_  
Don Rose, City Manager

ATTEST:



Emily Consolazio, City Clerk  
The City of Wheaton