



2018-ORD-000

RESIDENTIAL LEASING ORDINANCE

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The Mashpee Wampanoag Tribal Council does ordain as follows:

Section 1. FINDINGS

The Mashpee Wampanoag Tribal Council finds as follows:

- (a) The Mashpee Wampanoag Tribe (“Tribe”) is a federally-recognized Indian Tribe with a duly-enacted Constitution and the governing body of the Tribe is the Mashpee Wampanoag Tribal Council (the “Tribal Council”) pursuant thereto.

- (b) Article VI, § 2.A of the Constitution provides that the Tribal Council is empowered to promote and protect the health, peace, morals, education, political integrity, economic security and general welfare of the Tribe and its members.
- (c) Article VI, § 2.B of the Constitution provides that the Tribal Council is authorized to establish a basic departmental structure for the executive branch of the Tribal government with a delegation of appropriate powers to such subdivisions and agencies.
- (d) Article VI, § 2.G of the Constitution provides that the Tribal Council is authorized to manage and operate land and other assets of the Tribe.
- (e) Article VI, § 2.L of the Constitution provides that the Tribal Council is authorized to establish and enforce all ordinances governing tribal members.
- (f) The Tribal Council is aware of the Helping Expedite and Advance Responsible Tribal Homeownership Act (“HEARTH Act”), 25 U.S.C. § 415, Public Law 112-151, July 30, 2012, authorizes Indian tribes to develop regulations are consistent with all Secretary regulations and provide an environment process in accordance with the HEARTH Act.
- (g) The Tribal Council deems it in the best interest of the Tribe and its Tribal members to develop and enact Tribal leasing regulations regarding residential leases on Mashpee Wampanoag Tribal Lands.

Section 2. AUTHORITY AND PURPOSE

- (a) **Authority.** The authority for this Ordinance is Article VI, §§ 2.A, 2.B, 2.G and 2.L of the Constitution of the Mashpee Wampanoag Tribe.
- (b) **Purpose.** This Ordinance shall be liberally interpreted and construed to implement the HEARTH Act by establishing a process under which the Lease of a Housing Unit or Tribal Land by the Tribe will not require the approval of the Secretary of the Interior if the Lease is executed under Tribal Law approved by the Secretary of the Interior. Nothing in this Ordinance is intended to expand the authority or responsibility of the Secretary of the Interior beyond that provided for under applicable federal statutes or regulations.

Section 3. DEFINITIONS

- (a) “Assignment” means an agreement between a Lessee and an assignee, whereby the assignee acquires all or some of Lessee's rights, and assumes all or some of Lessee's obligations under a Lease.
- (b) “Constitution” means the Constitution of the Mashpee Wampanoag Tribe.
- (c) “Designated Assignee” means any lender to which a Mortgagee has or may transfer or assign its interest in a Lease or Leasehold Mortgage.

- (d) “District Court” means the Mashpee Wampanoag District Court as established by the 2008-ORD-002, Mashpee Wampanoag Tribal Judiciary Ordinance, as amended.
- (e) “Housing Department” means the Mashpee Wampanoag Tribal Housing Department.
- (f) “Housing Director” means the Director of the Housing Department.
- (g) “Housing Ordinance” means the Tribe’s Ordinance establishing the Mashpee Wampanoag Tribal Housing Department.
- (h) “Housing Unit” means all or any portion of any house, home, building or other structure used as a residence by any person, which is located on Tribal Land subject to a Lease, to which this Ordinance applies. Each Housing Unit is a type of “Single-family residence” as defined in 25 C.F.R. Section 162.003.
- (i) “Interested Party” means an Indian or non-Indian individual or corporation, or tribal or non-tribal government whose interests could be adversely affected by a decision of the Tribe to Lease a Housing Unit or Tribal Land.
- (j) “Lease” means a written contract between the Tribe and a Lessee, whereby the Lessee is granted a right to possess a Housing Unit or Tribal Land for residential use for a specified purpose and duration.
- (k) “Lessee” means a person who has acquired a legal right to possess Tribal Land by executing a Lease of a Housing Unit or Tribal Land.
- (l) “Leasehold Estate” means the possessory interest in Tribal Land established pursuant to a Lease between a Lessor and a Lessee.
- (m) “Leasehold Mortgage” means a Mortgage, or other instrument that pledges the Leasehold Estate of Lessee as security for a debt or other obligation owed by the Lessee to a lender or other Mortgagee.
- (n) “Lessor” means the legal, beneficial, or equitable owner of a Housing Unit or Tribal Land subject to a Lease, including the Tribe, and any heir, successor, executor, administrator, or assign of the Lessor.
- (o) “Mortgage” means a lien on a Leasehold Estate given to secure advances on a loan to purchase, construct, refinance or renovate a Housing Unit or improvement, and may refer both to a security instrument creating a lien, whether called a mortgage, deed of trust, security deed, or other term, as well as the credit instrument, or note, secured there by.

- (p) “Mortgagee” means any person, entity or governmental agency which lends under a Leasehold Mortgage, and includes any Designated Assignee, or any heir, successor, executor, administrator, or assign thereof.
- (q) “Mortgagor” means the Tribe or any person or entity who has executed a Leasehold Mortgage, including any heir, successor, executor, administrator, or assign thereof.
- (r) “Natural Resources Department” means the Mashpee Wampanoag Tribal Natural Resources Department.
- (s) “Ordinance” means this Residential Lease Ordinance as may be amended from time to time.
- (t) “Permanent Improvements” means buildings, other structures, and associated infrastructure attached to the Premises.
- (u) “Person” means both natural and artificial persons, including, but not limited to, companies, contractors or subcontractors, corporations, partnerships, joint ventures, limited liability companies, sole proprietorships, tribes, associations, unions, trusts, trustees, and agents.
- (v) “Premises” means any portion of a Housing Unit or Tribal Land, as described in any Lease, and any common areas and grounds appurtenant thereto.
- (w) “Significant Effect on the Environment” means a substantial, or potentially substantial, adverse change in the environment.
- (x) “Sublease” means a written agreement by which the Lessee grants a right to possession no greater than that held by the Lessee under the Lease.
- (y) “Tribal Administrator” means the Tribal Administrator of the Mashpee Wampanoag Tribe or other Tribal employee(s) delegated with authority by either the Tribal Council or the Tribal Administrator to act as or to assist the Tribal Administrator in carrying out his or her duties under this Ordinance.
- (z) “Tribal Council” means the governing body of the Mashpee Wampanoag Tribe.
- (aa) “Tribal Member” means a duly enrolled member of the Mashpee Wampanoag Tribe.
- (bb) “Tribe” means the Mashpee Wampanoag Tribe, a federally recognized Indian Tribe.
- (cc) “Tribal Land” means any tract, or interest therein, in which the surface estate is owned by the Tribe in trust or restricted status, and includes such lands reserved for BIA administrative purposes.
- (dd) “Tribal Law” means all ordinances, resolutions or other legislative actions of the Tribe, the Constitution of the Mashpee Wampanoag Tribe, and all rulings of the Mashpee Wampanoag Tribal Court.

Section 4. APPROVAL OF LEASE

- (a) All Leases shall be subject to the approval of the Tribal Council in accordance with Tribal Law.
- (b) All Leases shall be signed on behalf of the Tribe by the Housing Director, or in his or her absence, the Tribal Administrator.
- (c) After the Secretary of the Interior approves this Ordinance, all Leases which are approved and executed under this Section 4, shall be effective without federal approval under 25 U.S. C. 415, unless the Secretary of the Interior rescinds approval of this Ordinance and reassumes responsibility for such approval.
- (d) Any Lease which is approved and executed under this Section 4 shall refer to this Ordinance as authority for its execution on behalf of the Tribe.

Section 5. LEASE REQUIREMENTS

- (a) All Leases shall be in writing, and at a minimum, shall:
 - (1) Describe the tract or parcel of Tribal Land being leased, or on which a Housing Unit being leased is located with reference to a public or private survey plan, if available, in terms sufficient to determine its location;
 - (2) State the purpose of the Lease and authorized uses of the Premises;
 - (3) Identify the parties to the Lease;
 - (4) State the effective date and term of the Lease, which shall not exceed seventy-five (75) years;
 - (5) If a Lease authorizes the Lessee to make Permanent Improvements during the term of the Lease, identify the general type and location of each improvement, and the responsibility for constructing, operating, maintaining, and managing Permanent Improvements during the Lease term, require reasonable notice to Lessor of the construction of any Permanent Improvement not described in the Lease and address the ownership and disposition of each improvement at the expiration or termination of the Lease;
 - (6) Specify all rent and payment requirements, including payment due dates, payee and place of payment, and any interest;
 - (7) For Leases that are not “housing for public purposes” as defined in 25 C.F.R. 162.003, provisions for periodic review and adjustment of the rent by the Housing Department at least every five (5) years, unless the Tribe determines in a

Tribal certification or authorization that no such review is in the best interests of the Tribe;

- (8) State the due diligence, performance bond and insurance requirements that apply, if any;
- (9) State the process for amendment, which shall be only in writing signed by both parties, and with the consent of any Mortgagee;
- (10) State the governing law, which may include Tribal Law and applicable federal statutes and regulations; and
- (11) Include or attach all other provisions required under any applicable federal statutes or regulations, including without limitation, each of the required terms for Residential Leases set forth in 25 C.F.R. Part 162.313.

Section 6. PAYMENTS. For any Lease of Tribal Land requiring payments to be made to the Tribe, the Tribe shall provide the Secretary of the Interior with such documentation of the lease payments as the Secretary of the Interior may request to enable the Secretary of the Interior to discharge the trust responsibility of the United States with respect to the Premises.

Section 7. RECORDING. All Leases and amendments thereto shall be recorded at the Bureau of Indian Affairs Land Titles and Records Office with jurisdiction over the Tribal Land, provided that, to the extent required by a Mortgagee, a Lease shall also be recorded in the appropriate county register of deeds.

Section 8. REQUIREMENTS FOR APPROVAL

- (a) The purpose of Sections 8 - 10 is to establish an environmental review process that satisfies the requirements of 25 U.S.C. 415(h)(3)(B)(ii). Except as may otherwise be provided under federal law, the Tribe is not subject to the National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. 4331 *et. seq.*) or its implementing regulations. Therefore, the Natural Resources Department shall not be bound by NEPA or its implementing regulations in administering Sections 8 - 10.
- (b) Notwithstanding subsection 8(a), pursuant to Section 105 of the Native American Housing Assistance and Self-Determination Act of 1996 (“NAHASDA”) (25 U.S.C. § 4101 *et seq.*) and its implementing regulations (42 C.F.R 1000.18 - 1000.24) , the release of funds to the Tribe under NAHASDA is contingent upon compliance with NEPA and the HUD implementing regulations located at 24 C.F.R parts 50 and 58. Accordingly, although in implementing 25 U.S.C. § 415(h) the Tribe is not subject to NEPA, or applicable regulations, compliance is required as set forth in NAHASDA and applicable regulations. The Housing Department is responsible for ensuring compliance with this Section 8 - 10, NEPA and HUD implementing regulations as applicable.

- (c) The Tribal Council shall not approve a Lease under Section 4 of this Ordinance unless:
- (1) The Natural Resources Department has reviewed the Lease and such other information as may be necessary to identify and evaluate any Significant Effect on the Environment of the intended use of the Premises, and has:
 - (A) Determined that the uses authorized by the Lease are included within a categorical exclusion stated in Section 9 and provided the determination in writing to the Tribal Council; or
 - (B) Issued a final decision after following the procedures set forth in Section 10; or
 - (2) The Natural Resources Department has provided the Tribal Council with notice that the Tribe has carried out a project or activity funded by a federal agency and that it has relied on the environmental review process of the applicable federal agency rather than following the procedures set forth in Section 10.

Section 9. CATEGORICAL EXCLUSIONS

- (a) The Tribal Council hereby finds that the following actions do not individually or cumulatively have a Significant Effect on the Environment; and therefore, except as otherwise provided in subsection 9(b), are categorically excluded from the procedures set forth in Section 10:
- (1) Approval of a Lease for residential use of an existing Housing Unit, including any associated improvements, access roads and utilities; and
 - (2) Approval of a Lease for five (5) acres or less of contiguous Tribal Land for construction and residential use of a single structure of one to four dwelling units and any associated improvements, access roads and utilities.
- (b) Notwithstanding subsection 9(a), the Natural Resources Department shall follow the procedures set forth in Section 10 if it determines that extraordinary circumstances exist under which the residential use of the Premises may, individually or cumulatively, have a Significant Effect on the Environment, including without limitation, as set forth below:
- (1) Substantial controversy on environmental grounds; or
 - (2) Presence of cultural resources or historic properties.

Section 10. ENVIRONMENTAL REVIEW. Unless a categorical exclusion applies, the Natural Resources Department shall cause the effects on the environment of the intended uses authorized by the proposed Lease to be identified and evaluated as follows:

- (a) If the Natural Resources Department determines that the uses authorized by proposed

Lease will not have a Significant Effect on the Environment, then it shall cause the following to occur in the order set forth below:

- (1) A finding of no significant impact shall be issued and posted on the Tribe's Official Website and in the Mashpee Wampanoag Tribe Community and Government Center for a minimum of fifteen (15) calendar days;
 - (2) If there is a substantial interest in holding a meeting, a meeting shall be held to provide an opportunity for Tribal members and residents of Tribal Land to comment (both verbal and written) on the finding of no significant impact. Notice of such meeting shall be posted on the Tribe's Official Website and in the Mashpee Wampanoag Tribe Community and Government Center for at least ten (10) calendar days prior to the meeting;
 - (3) Comments shall be reviewed and analyzed and a report shall be issued responding to relevant and substantive comments, if any, regarding the finding of no significant impact, which report shall be posted on the Tribe's Official Website and in the Mashpee Wampanoag Tribe Community and Government Center for a minimum of fifteen (15) calendar days; and
 - (4) Unless subsection 9(a) applies, a final decision confirming that the uses authorized by the proposed Lease are expected to have no Significant Effect on the Environment shall be issued, forwarded to Tribal Council for approval and posted on the Tribe's Official Website and in the Mashpee Wampanoag Tribe Community and Government Center for a minimum of fifteen (15) calendar days.
- (b) If the Natural Resources Department determines that the uses authorized by proposed Lease will have a Significant Effect on the Environment, then it shall cause the following to occur in the order set forth below:
- (1) A draft environmental review which identifies and evaluates any Significant Effect on the Environment of uses authorized by the proposed Lease shall be issued and posted on the Tribe's Official Website and in the Mashpee Wampanoag Tribe Community and Government Center for a minimum of thirty (30) calendar days;
 - (2) A meeting shall be held on the draft environmental review to provide an opportunity for Tribal members and residents of Tribal Land to comment (both verbal and written) on any Significant Effect on the Environment of the uses authorized by the proposed Lease. Notice of such meeting shall be posted on the Tribe's Official Website and in the Mashpee Wampanoag Tribe Community and Government Center for at least ten (10) calendar days prior to the meeting;
 - (3) Comments shall be reviewed, analyzed, and a report shall be issued responding to relevant and substantive comments, if any, on Significant Effect on the Environment of the uses authorized by the proposed Lease, which report shall be

posted on the Tribe's Official Website and in the Mashpee Wampanoag Tribe Community and Government Center for a minimum of thirty (30) calendar days;

- (4) A final environmental review describing the conclusions of the Natural Resources Department on the issues and evidence gathered under this subsection 10(b) shall be issued and posted on the Tribe's Official Website and in the Mashpee Wampanoag Tribe Community and Government Center for a minimum of thirty (30) calendar days; and
- (5) A final decision assessing the potential for any Significant Effect on the Environment associated with the uses authorized by the Lease shall be issued, forwarded to Tribal Council for approval and posted on the Tribe's Official Website and in the Mashpee Wampanoag Tribe Community and Government Center for a minimum of thirty (30) calendar days.

Section 11. APPROVAL OF SUBLEASE AND ASSIGNMENT

- (a) All Subleases and Assignments, other than to a Mortgagee, or the Designated Assignee shall be subject to the approval of the Tribal Council in a manner consistent with Tribal Law.
- (b) All Subleases and Assignments shall be signed on behalf of the Tribe by the Housing Director, or in his or her absence, the Tribal Administrator.
- (c) After the Secretary of the Interior approves this Ordinance, all Subleases and Assignments which are approved and executed under this Section 11 shall be effective without federal approval under 25 U.S.C. § 415, unless the Secretary of the Interior rescinds approval of this Ordinance and reassumes responsibility for such approval.
- (d) All Subleases and Assignments shall require the prior approval of any Mortgagee or Surety, if required by the Mortgagee or Surety agreement.

Section 12. SUBLEASE AND ASSIGNMENT REQUIREMENTS

- (a) A Lessee may sublease a Housing Unit or Tribal Land in accordance with this Ordinance and applicable Tribal Law.
- (b) A Lessee may assign a Lease in accordance with this Ordinance and applicable Tribal Law.
- (c) No Sublease shall relieve the Lessee or sublessor of any liability under the Lease as provided in 25 C.F.R. 162.353(b)(2).
- (d) In any Assignment, other than to a Mortgagee of the Leasehold Estate, the assignee must agree in writing to assume all of the obligations and conditions of the Lease, and that the Lease is subject to all applicable laws as provided in 25 C.F.R. 162.014.

Section 13. SUBLEASE AND ASSIGNMENT RECORDING. All Subleases and Assignments and amendments thereto shall be recorded at the Bureau of Indian Affairs Land Titles and Records Office with jurisdiction over Tribal Land.

Section 14. APPROVAL OF LEASEHOLD MORTGAGE

- (a) All Leasehold Mortgages under a Lease must be separately authorized by the Tribal Council, unless the Lease authorizes a Leasehold Mortgage and states the law governing foreclosure.
- (b) After the Secretary of the Interior approves this Ordinance, all Leasehold Mortgages which are authorized under this Section 14 shall be effective without federal approval under 25 U.S.C. § 415, unless the Secretary of the Interior rescinds approval of this Ordinance and reassumes responsibility for such approval.

Section 15. REQUIREMENTS OF LEASEHOLD MORTGAGE. A Lessee may grant a Leasehold Mortgage under his/her/its Lease in accordance with this Ordinance and applicable Tribal Law.

Section 16. RECORDING LEASEHOLD MORTGAGES. All Leasehold Mortgages and assignments, amendments and sales relating thereto shall be recorded at the Bureau of Indian Affairs Land Titles and Records Office with jurisdiction over Tribal Land; provided that, to the extent required by a Mortgagee, a Leasehold Mortgage shall also be recorded in the appropriate county register of deeds.

Section 17. COMPLAINTS AND APPEALS. An Interested Party who has reasonable grounds to believe that the Tribe has failed to comply with this Ordinance has the right to file a complaint under this Section 17.

- (a) The complaint shall be in writing, signed by the Interested Party, describe the alleged noncompliance with this Ordinance which is the subject of the complaint, state all relief requested and file with the Tribal Administrator. If the Interested Party agrees, the complaint shall be forwarded to the Tribe's Peacemaking Court to resolve the complaint. All complaints which are resolved through Peacemaking shall be reduced to writing and signed by the Housing Director or Tribal Administrator and the Interested Party.
- (b) If a complaint is not resolved through Peacemaking, the Tribal Administrator shall handle the complaint in a manner consistent with Tribal Law. The decision of the Tribal Administrator shall constitute a final decision of the Tribe.
- (c) In accordance with 25 U.S.C. § 415(h)(8)(A), an Interested Party who has exhausted the Tribe remedies set forth in this Section 17, may submit a petition to the Secretary of the Interior, at such time and in such form as the Secretary of the Interior deems appropriate, to review the Tribe's compliance with this Ordinance.

Section 18. SOVEREIGN IMMUNITY. Nothing contained in this Ordinance is intended or shall be construed to waive the sovereign immunity of the Tribe, including its officers and employees, or its entities, agencies, instrumentalities or create a private right of action in any individual or individuals, partnership, association, corporation, business trust, legal representative, any organized group of individuals or any other person or entity.

Section 19. CONTROLLING LAW.

- (a) To the extent that this Ordinance conflicts with any applicable federal statutes or regulations, the federal statute or regulation shall control.
- (b) To the extent that any Lease to which this Ordinance applies conflicts with this Ordinance, this Ordinance shall control.

Section 20. REPEALER. All ordinances or parts of ordinances inconsistent with this Ordinance are repealed.

Section 21. SEVERABILITY. If any section, subsection, paragraph, sentence, or other portion of this Ordinance is, for any reason, held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed to be a separate, distinct, and independent provision and such holding shall not affect the validity of the remaining portion of this Ordinance.

Section 22. EFFECTIVE DATE. This Ordinance shall take immediate effect and be enforced from and after its passage and publication according to Tribal law.

Passed by the Mashpee Wampanoag Tribal Council on [].

CERTIFICATION

We, the undersigned Chairman and Secretary of the Tribal Council of the Mashpee Wampanoag Tribe hereby certify that the Tribal Council is composed of 13 members, of whom _____ constituting a quorum, were present at a regular meeting thereof, duly and regularly called, noticed, convened and held on the _____ day of _____, 2018, and that the foregoing Ordinance was duly adopted by the affirmative vote of _____ members, with _____ opposing, and with _____ not voting.

DATED THIS _____ day of _____, 2018.

Cedric Cromwell, CHAIRMAN
Mashpee Wampanoag Tribal Council

ATTEST:

Ann Marie Askew, SECRETARY
Mashpee Wampanoag Tribe

CERTIFICATION OF POSTING

This is to certify that the Ordinance titled 2018-ORD-000, Residential Leasing Ordinance, has been posted in accordance with 2009-ORD-003, Regulating Adoption, Amendment or Repeal of Ordinances and Resolutions.

DATED this ____ day of _____, 2018.

Cedric Cromwell, CHAIRMAN
Mashpee Wampanoag Tribal Council

Ann Marie Askew, SECRETARY
Mashpee Wampanoag Tribal Council