

STIPULATION OF SETTLEMENT WITH CITY OF LONG BEACH

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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SINCLAIR HABERMAN and BELAIR BUILDING, LLC,

Index No.
001138-04

Petitioners-Plaintiffs,

Justice Marber

- against-

ZONING BOARD OF APPEALS OF THE CITY OF LONG BEACH, ROCCO MORELLI, LENNY TORRES, MARCEL WEBER, MICHAEL FINA, STUART BANSCHICK, LORRAINE DIVONE, MICHAEL LEONETTI, THE CITY OF LONG BEACH, SCOTT A. KEMINS, as Commissioner of the Department of Buildings of the City of Long Beach, and XANDER CORP.,

**Stipulation of
Settlement**

Respondents-Defendants.
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Petitioners-Plaintiffs, Sinclair Haberman and Belair Building, LLC, ("the petitioners") and Respondents-Defendants the Zoning Board of Appeals of the City of Long Beach ("the ZBA"), Rocco Morelli, Lenny Torres, Marcel Weber, Michael Fina, Stuart Banschick, Lorraine Divone, Michael Leonetti, the City of Long Beach ("the City"), and Scott A. Kemins, as Commissioner of the Department of Buildings of the City of Long Beach ("the City Respondents"), (all collectively "the parties"), except the Defendant-Respondent Xander Corp., enter into this Stipulation of Settlement as of the 27th day of November 2013 ("this Stipulation").

BACKGROUND

Initial History –the 1985 Variance

1. Petitioners are the owners of certain parcels of property located on Shore Road, between Monroe and Lincoln Boulevards in the City ("the subject property"), described as follows:

A. Site "A" Section 59, Block 146, Lot Nos. 8 to 19, Lot Nos. 21 to 35, Lot Nos. 41 and 46 as shown on the Nassau County Land and Tax Map;

B. Site "B" Section 59, Block 145, Lot Nos. 174 through 177 as shown on the Nassau County Land and Tax Map;

C. Site "C" Section 59, Block 145, Lot Nos. 30 and 129 as shown on the Nassau County Land and Tax Map.

Site "A" is located on the south side of Shore Road and Sites "B" and "C" are adjacent to each other on the north side of Shore Road.

2. In 1985 an application by the petitioners to the ZBA, under Case No. 459, was approved for variances to permit the construction of a 432-unit, four-tower, cooperative or condominium project on the subject property, three of which towers were to be located on Site "A" and one on Sites "B" and "C". Each of the towers was to be ten stories in height and a variance, as requested, was granted by the ZBA, upon certain conditions, which, to the extent relevant herein, provided, in substance and in part:

A. That a completed application for a building permit to construct the first tower of the project ("the Construction Permit") was to be filed with the Building Commissioner within 3 months after the date of the filing of the ZBA's resolution granting the variance.

B. That within 12 months after the issuance of the Construction Permit, the petitioners were to submit completed applications for any and all permits required for the demolition of the garden apartments located on the western-most part of "Site A" ("The Belair") and that said apartments were to be demolished within 15 months of the issuance of the Construction Permit.

C. That within 18 months after the Construction Permit was issued, a completed application for a permit to construct the second tower ("the Second Construction Permit") was to be filed with the Building Department.

D. That within fifteen months after issuance of the Second Construction Permit, the petitioners were to submit completed applications for any and all permits required for the demolition of any and all structures existing on Sites "B" and "C" ("the Demolition Permit") and that demolition was to be completed within eighteen months after the issuance of the Second Construction Permit.

E. That within 18 months after the issuance of the Second Construction Permit, a completed application for a permit to construct the third tower was to be filed with the Building Department.

F. That within 18 months after the issuance of the Demolition Permit, a completed application for a permit to construct the fourth tower was to be filed with the Building Department.

G. That as part of the construction for the first tower, the petitioners were to construct a pool.

3. A building permit was issued for the construction of the first tower comprising 126 units on Site "A", and construction of the first tower (now known as the "Xander Cooperative Building", located at 360 Shore Road) was commenced.

4. At the time of the approval of the variance application, there were various improvements on the Sites. Site "A" was improved with an income producing garden apartment complex, a bar and lounge, and two swimming pools which had been filled with soil. Site "B" was improved with a multiple dwelling and Site "C" was improved with a 3-family dwelling.

5. Pursuant to a condition of the approval of their application by the ZBA, the petitioners in good faith reliance on that approval demolished the improvements on Site "A".

6. Only weeks after the petitioners demolished those substantial income-producing improvements, the City began the process of upzoning the petitioners' property, the effect of which would have been to deprive them of their right to complete the project as it had been approved by the ZBA.

7. The petitioners thereafter filed applications with and paid all of the required building permit fees to the City for the permits to construct the second, third, and fourth towers. At the time, the City contended that said applications were not complete.

1987 – The City's Amendment to its Zoning and the ensuing Litigation

8. The City then adopted amendments to its zoning ordinance whereunder the permissible height of the second, third, and fourth towers was reduced from ten to seven stories, and the parking requirements for those towers was increased beyond the amount approved under the earlier variance.

9. The petitioners commenced a hybrid action/proceeding in the Supreme Court, Nassau County, under Index No. 13391-87 to, *inter alia*, enjoin the City from enforcing the new zoning requirements on the ground that petitioners had a vested right to complete the development as approved in their variance application based upon expenditures made in reliance on the variances they had been granted, the demolition of the apartment complex and bar and lounge on Site "A", improvements already completed pursuant to building permits for the first tower, and the additional improvements for the benefit of the entire project.

10. In addition to the foregoing, the petitioners alleged that as of 1987 they had incurred and/or expended:

- A. \$18,540,000 in acquisition costs for the property;
- B. \$1,831,000 in State of New York Gains Tax incurred;
- C. \$199,000 in architectural fees incurred;

- D. \$75,788.00 for building permit fees the first tower;
- E. \$36,264.00 for building permit fees the second, third and fourth towers; and
- F. \$310,000 for the demolition and removal of a 58-unit income producing garden apartment complex, with two swimming pools, and the bar and lounge on Site "A".

11. The City filed an answer generally denying the allegations in the complaint/petition and alleged that, under any circumstance, the petitioners did not have a vested right complete the project.

The 1989 Stipulation of Settlement

12. Following the service of the City's answer, the parties entered into an agreement to settle the action/proceeding, subject to the consent of the court (the "1989 Stipulation"), which, to the extent relevant herein, provided, in substance and in part:

- A. In lieu of the 10-story fourth tower to be erected on Sites "B" and "C", petitioners were permitted to construct a building on Sites "B" and "C" comprising 72 units, which was not to exceed 7 stories, and the lower two stories of which were to be used for parking. The three 10-story towers on Site "A" were permitted to be constructed and completed as originally approved.
- B. Upon completion of all of the buildings, petitioners were to provide and maintain off-street parking for a minimum number of cars equal to 150% of the total number of units erected in the four buildings.
- C. The petitioners were required to provide the parking, at their discretion, within the buildings and/or by double-tier deck on Sites "B" and "C", or ground parking on any portion of Sites "A", "B", and "C", or at any other location within the same blocks wherein Sites "A", "B", and "C" were located, or on property within the proximity of the buildings as permitted by the ordinances of the City. Open parking and decks used for parking were permitted to extend up to property lines and include provision for compact cars and turning radii as approved under the variance previously granted to the petitioners.
- D. The required parking could include tandem parking, if the tandem spaces were owned by the same unit owners and approved by the ZBA.
- E. The petitioners were also required to add the following described parcel of land, which was then owned by petitioners but not included in their original application, to be used exclusively as parking for the complex; to wit:

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying, and being in the City of

Long Beach, County of Nassau and State of New York, known and designed as and by the lots numbered 11, 12, 13, 14 and 15 in Block 145 on a certain Map entitled, "Estates of Long Beach, Long Beach, Long Island, William H. Reynolds, President, Map No. 1, Charles W. Leavitt, Jr., Landscape Engineer, 220 Broadway, New York City, March 1907", and filed in the Office of the Clerk of the County of Nassau on April 20, 1911, as Map Number 31, Case Number 231.

F. For the purpose of the 1989 Stipulation, the four towers to be erected were referred to as follows:

Building "1" – The easterly building on Site "A";

Building "2" – the center building on Site "A";

Building "3" – the westerly building on Site "A";

Building "4" – The building on Sites "B" and "C".

G. The petitioners were required to apply to the ZBA for the necessary variances to permit the construction of the buildings in accordance with the terms of the 1989 Stipulation, which set forth certain conditions, which it was agreed could be imposed by the ZBA in an amended decision adopted pursuant to the 1989 Stipulation. Those additional conditions, to the extent relevant herein, provided, in substance and in part:

- i. Within 60 months of the date of the approval of the required variances, a completed application for a permit to construct Building "2" was to be filed by the petitioners with the Building Department.
- ii. Within 78 months of the approval of the required variances, a completed application for a permit to construct Building "3" was to be filed by the petitioners with the Building Department.
- iii. Within 84 months of the approval of the required variances, a completed application for a permit to construct Building "4" was to be filed by the petitioners with the Building Department.
- iv. The petitioners had the right to construct the various approved buildings either simultaneously or separately.
- v. It was the stated intention of the parties that during the period of construction, the petitioners would maintain, to the extent practicable, parking for the previously-erected units equal to 175% of the total number of units that had been completed.
- vi. Promptly following the approval of the required variances, the petitioners were to clear and temporarily pave the sites on which Buildings "2" and "3" were to be constructed to provide for interim parking spaces thereon. Upon the commencement of construction of Building "2", the

site of Building "3" was to remain clear and temporarily paved to provide for interim parking spaces thereon to maintain a parking area, to the extent practicable, for a minimum number of cars equal to 175% of the total number of units erected in the Building "1".

- vii. No certificate of occupancy was to be issued for Building "2" until the garden apartments then existing on Site "B" were demolished, and said site was cleared and temporarily paved to provide for interim parking spaces thereon and to maintain, to the extent practicable, for a minimum number of cars equal to 175% of the total number of units erected in Buildings "1" and "2". If required to provide 175% parking for the number of units in Buildings "1" and "2", the 3-family house on Site "C" was to be demolished.
- viii. In the event that the petitioners desired to change the order of construction of the buildings to be erected, petitioners had the right to do so, provided that provisions for interim parking were established, to the extent practicable, as provided above. Prior to proceeding with a change in the order of construction, the petitioners were first to secure approval of the City Building Commissioner, which approval was not to be unreasonably withheld.
- ix. The foregoing time limitations were to be tolled for the period of any moratorium which might thereafter be imposed prohibiting or restricting the construction of the approved units.
- x. In the event the petitioners failed to submit the building permit applications and/or commence and complete construction in accordance with those conditions, or if the petitioners failed to comply with any of those conditions, the variances were to be deemed null and void.
- xi. The premises were to be used only for residential condominium or cooperative units as proposed, along with the indicated amenities.
- xii. Additionally, upon the approval of the required variances to complete the project, the petitioners agreed to pay the sum of \$200,000 to the City to be dedicated and used by the City for public improvements on Shore Road between Lincoln and Monroe Boulevards for the benefit of the petitioners' project. Said sum was to be applied first to the cost of installation of underground utilities in lieu of above-ground utilities; then to road improvements in the immediate vicinity of the subject premises, and, thereafter, the balance for the general benefit of the surrounding area as might be determined by the City. The City agreed to commence the construction of the improvements to be completed in accordance with the stipulated terms within a reasonable time after receipt of the \$200,000, but in any event not later than two years after receipt thereof.

- xiii. Except as modified by the terms of the 1989 Stipulation, the petitioners had the right to complete the construction of the entire project as permitted and in accordance with the terms and conditions set forth in the variances in the previous 1985 decision of ZBA.
- xiv. In the interpretation of the 1989 Stipulation, the parties expressed their intent that the petitioners were obligated to conform with all of the provisions of the zoning regulations of the City as they existed in 1985, at the time of the decision in ZBA Case No. 459, except as otherwise specified under the terms of said decision and as modified by the 1989 Stipulation.
- xv. The petitioners, their transferees, successors, and assigns, were to receive a credit for the building permit fees paid to the City to erect Buildings "2", "3", and "4".
- xvi. The parties further agreed that no further action would be taken by any of them or any other agency of the City to enforce any current zoning or other City regulations or any amendments thereto currently under consideration or thereafter to be enacted which would in any manner be in conflict with or otherwise contravene the terms of the 1989 Stipulation.
- xvii. The binding effect of the 1989 Stipulation was subject to certain conditions precedent, namely, adoption by the ZBA of the necessary variances in accordance with the terms set forth in that Stipulation and its approval by a Supreme Court Justice and the inclusion of the terms of the 1989 Stipulation in a judgment of said court.
- xviii. The parties were to promptly complete all of the procedures required to effectuate the terms of the 1989 Stipulation and to obtain a prompt public hearing by the ZBA to amend the terms and conditions of the variance approved under Case No. 459 to conform to the terms of the 1989 Stipulation.
- xix. Upon the issuance of a decision by the ZBA granting the petitioners' application, unless a proceeding was commenced to review the decision, the action/proceeding was to be discontinued without costs to either party.
- xx. In the event that a proceeding was commenced to review the decision, upon an affirmance of the decision, which was not subject to further appeal, the action/proceeding was to be discontinued without costs to either party.
- xxi. In the event that either the ZBA failed to grant the petitioners' application or upon review or appeal the ZBA decision was not affirmed, the 1989 Stipulation was to be null and void, and the parties were to proceed with their litigation.

The 1989 Variances

13. Pursuant to the terms of the 1989 Stipulation, the petitioners made their application to the ZBA. In its determination, the ZBA found, to the extent relevant herein, in substance and in part:

A. The petitioners were the owners of the subject property which was situated in a Residence "L" District.

B. The petitioners sought permission for an extension of time to build two ten-story condominiums and one seven-story condominium. The Building Department denied the application for failure to comply with the following sections of the Zoning Code of Ordinances:

i. Building "4":

(1) 9-105.13(b) Height – requires the maximum legal height of a building structure shall not exceed 70 feet above grade level; petitioners' proposal indicates an overall height of the building structure to be approximately 71 feet 6 inches above grade level;

(2) 9-105.13(d) Building Area – requires the maximum total building area for a multiple dwelling shall not exceed 20% percent of the total lot area; petitioners' proposal indicates that the building area is 29% of the total lot area;

(3) 9-105.13(e) Front Yards – requires the minimum front yard setback shall be at least 10 feet in depth from the street line; petitioners' proposal indicates a north front yard setback of zero feet;

(4) 9-105.13(e) Front Yards – requires the minimum front yard setback shall be at least 10 feet in depth from the street line; petitioners' proposal indicates a south front yard setback of zero feet;

(5) 9-105.13(f) Side Yard – requires that there shall be a side yard along each side lot line equal to not less than one-half the height of the principal building on the lot nearest to the lot line; petitioners' proposed building is 71 feet 6 inches in height, thus requiring a west side yard of 35 feet 9 inches; petitioners' proposal indicates a west side yard of approximately 20 feet;

(6) 9-105.13(f) Side Yard – requires open yards shall be provided from the front lot line to the rear lot line through not less than 70% of the width of the lot on which the principal buildings are erected; petitioners' proposal indicates an open side yard, which is only 47% of the width of the lot;

(7) 9-105.13(f) (1) Parking – requires that no off-street parking shall be permitted within 15 feet of any side lot line; petitioners' proposal indicates a designation of off-street parking facilities within the 15-foot area;

(8) 9-105.13(g) – Rear Yard – requires a minimum rear yard setback of at least 20 feet in depth, which shall remain open and unobstructed; petitioners' proposal indicates a rear yard located to the north of Shore Road which has a rear yard setback of zero feet;

(9) 9-105.13(i) Density – requires that no multiple dwelling shall be erected to make provisions for more than one dwelling unit per 800 square feet of lot area; petitioners' proposal indicates that each dwelling unit will occupy 597 square feet of lot area;

(10) 9-105.13(j) Recreation Area – requires that no multiple dwelling unit shall be erected without providing for recreation and children's play areas at a ratio of 50 square feet for each dwelling unit, provided, however, that off-street parking areas shall not be included in the computation of the areas required to be furnished for recreational purposes. Under the petitioners' proposal, a minimum recreational area of 3,600 square feet would be required. Petitioners' proposal shows a recreational area of zero square feet;

(11) 9-113.2 (h) Off-Street Parking Design Standards – requires that off-street parking areas shall have a minimum area of 180 square feet with a minimum width of 9 feet and a minimum length of 20 feet; petitioners' proposal indicates 59 parking spaces with a width of nine 9 feet and a length of 17 feet and 97 parking spaces with a width of 9 feet and a length of 18 feet, for a total of 156 non-conforming off-street parking spaces.

ii. Building "2":

(1) 9-105.13 (b) Height – the maximum legal height of a building structure shall not exceed 70 feet above grade level; petitioners' proposal indicates two building structures 100 feet in height above grade level;

(2) 9-105.13 (c) Lot Area – requires that no multiple dwelling shall be erected or altered on a lot having an area of less than 40,000 square feet; petitioners' proposal indicates a lot area of 39,200 square feet;

(3) 9-105.13 (d) Building Area – requires the maximum total building area for a multiple dwelling shall not exceed 20% of the total lot area; petitioners' proposal indicates that the building area is approximately 29% of the total lot area;

(4) 9-105.13 (e) Front Yard— requires a front yard depth of at least 20 feet from the property line where the property fronts on the Ocean Beach Park; petitioners' proposal indicates a front yard setback of zero feet;

(5) 9-105.13 (f) Side Yard – requires open yards shall be provided from the front lot line to the rear lot line through not less than 70% of the width of the lot on which the principal buildings are erected; petitioners' proposal indicates an open side yard, which is only 62.5% of the width of the lot;

(6) 9-105.13 (i) Density – requires that no multiple dwelling shall be erected to make provision for more than one dwelling unit per 800 square feet of lot area. Under such formula, the petitioners would be permitted to have 47 dwelling units; petitioners' proposal indicates provision for 90 units;

(7) 9-105.13 (k) Off-Street Parking – requires the total off-street parking provided be a minimum of 1.75 parking spaces for each dwelling unit; petitioners' proposal indicates one parking space per dwelling unit.

iii. Building “3”:

(1) 9-105.14 (b) Height – requires the maximum legal height of a building structure shall not exceed 70 feet above grade level; petitioners' proposal indicates two building structures 100 feet in height above grade level;

(2) 9-105.13 (c) Lot Area – requires that no multiple dwelling shall be erected or altered on a lot having an area of less than 40,000 square feet; petitioners' proposal indicates a lot area of 37,350 square feet;

(3) 9-105.13 (d) Building Area – requires that maximum total building area for a multiple dwelling shall not exceed 20% of the total lot area; petitioners' proposal indicates that the building area is approximately 28% of the total lot area;

(4) 9-105.13 (e) Front Yard – requires a front yard depth of at least 20 feet from the property line where the property fronts on the Ocean Beach Park; petitioners' proposal indicates a front yard setback of zero feet;

(5) 9-105.13 (f) Side Yard – requires that a minimum of 15 feet immediately adjacent to the property line shall remain open and unobstructed; petitioners' proposal indicates a deck extending from the building to the property line;

(6) 9-105.13 (f) Side Yard – requires open yards shall be provided from the front lot line to the rear lot line through not less than 70% of the width of the lot on which the principal buildings are erected; petitioners' proposal indicates an open side yard, which is only 62.5% of the width of the lot;

(7) 9-105.13 (i) Density – the code would permit 57 dwelling units; petitioners' proposal indicates 108 units;

(8) 9-105.13 (k) Off-Street Parking – requires the total off-street parking provided be a minimum of 1.75 parking spaces for each unit; petitioners' proposal indicates one parking space per unit.

- iv. The members of the Board were familiar with the subject premises and the neighborhood surrounding it. Each member of the Board was also familiar with the contents of the file maintained by the Board on the application, and any member of the Board who was not present at the hearing on the application had read the minutes of the hearing and was familiar with them.
- v. The petitioners demonstrated unnecessary hardship and practical difficulty if the application was denied.
- vi. The subject properties under the application were the topic of a hearing held before the ZBA on September 18, 1985, as Case No. 495. At such time, an application was approved by the ZBA to permit the construction of a 432-unit, four-tower cooperative/condominium project at the premises, wherein three of the towers were to be located on Site "A" and one tower on Sites "B" and "C". Each of the towers were to be ten stories in height and the variance was granted based upon several conditions, which included a variance reducing the amount of off-street parking required from a ratio of 1.25 parking spaces per unit to 1.1 parking spaces per unit.
- vii. Subsequent to the granting of the variance, a building permit was issued for Building "1", which has been completed. During the time period in which to construct Building "2", the City amended its zoning regulations in several respects regarding the subject premises. The major amendments pertained to the reduction of the permitted building height from ten stories to seven stories and an increase in the parking requirements from 1.25 spaces per unit to 1.75 spaces per unit.
- viii. The petitioners thereafter commenced a hybrid action/proceeding to, *inter alia*, enjoin the City from enforcing the new zoning ordinance requirements against their project on the ground that the petitioners had a vested right to complete the project as approved under the variance based upon expenditures made in reliance on the variance, the demolition of the

income producing apartment complex and bar and lounge on Site "A", the improvements already completed pursuant to building permits for Building "1", and the additional improvements for the benefit of the entire project. In addition to their acquisition costs for the property, the petitioners made further expenditures with regard to the State of New York Gains Tax, architectural fees, demolition costs, and building permit fees paid and accepted by the City for the Buildings "1", "2", "3", and "4".

- ix. The City filed an answer generally denying the allegations in the complaint/petition. Additionally, it alleged that, under any circumstance, the petitioners did not have a vested right to complete the project and would have to comply with the zoning ordinances then in effect.
- x. Subsequent to the filing of the answer, the petitioners moved to amend their complaint/petition to include additional causes of action, including a request for a declaration that the zoning ordinances of the City were unconstitutional, that the reduction in height from ten stories to seven stories constituted spot zoning, and for other relief that the court deemed appropriate.
- xi. Prior to the motion being decided, the parties agreed to settle the action/proceeding by a formal Stipulation, entered into by the attorneys for the respective parties on March 8, 1989, conditioned upon the approval of the Stipulation by a Justice of the Supreme Court and the inclusion of the terms of the Stipulation in a judgment of said court, as well as the issuance of an amended variance by the ZBA in accordance with the terms of the Stipulation.
- xii. The application before the ZBA would permit the cooperative/condominium project to proceed, albeit in a reduced form, which would provide for additional parking and reduce the size of Building "4" to seven stories in height, with the remaining two buildings to be erected ten stories in height.
- xiii. Specifically, for the remaining buildings to be erected, numbered "2", "3" and "4", the petitioners stated that a ratio of 1.75 parking spaces per unit would be provided for each building. The additional parking per unit would alleviate the impact of the cooperative/condominium project on a serious parking congestion problem in the immediate vicinity of the subject premises. Originally, the petitioners were granted a variance from the then existing zoning ordinance requiring a ratio of 1.25 parking spaces per unit. Such variance provided a ratio of 1.1 parking spaces per unit. The petitioners, in reducing the total units from the previously approved 432 units to a total of 394 units, would provide 605 parking spaces in lieu of the 482 parking spaces previously provided pursuant to the variance granted in Case No. 459. The petitioners testified that the projected parking for the entire project, including Building "1", would be at a ratio of 1.5 parking spaces per unit. Furthermore, the petitioners agreed to

provide the ratio of 1.5 parking spaces for Building "1" even if petitioners decided not to develop and construct any other building.

xiv. The 605 parking spaces, were to be allocated to each parcel, as follows:

- (1) Building "1" - 126 parking spaces (as then provided);
- (2) Building "2" - 88 parking spaces;
- (3) Building "3" - 108 parking spaces;
- (4) Building "4" - 240 parking spaces.
- (5) On the 10,000 square foot parcel of vacant land designated as lots numbered 11, 12, 13, 14 and 15 in Block 145 - 44 parking spaces.

14. On August 3, 1989, the ZBA granted the petitioners' variance application upon certain conditions, which provided, to the extent relevant herein, in substance and in part, that the terms and conditions of the 1989 Stipulation were approved and made part of the ZBA's variance as though fully set forth therein, with the following relevant modifications and findings:

A. The parking requirements for Buildings "2", "3", and "4", were to provide for and maintain to the extent practicable a minimum number of parking spaces equal to 175% of the total number of units erected in each of the three buildings.

B. Upon construction and completion of all of the buildings, including Building "1", pursuant to the 1989 Stipulation, be it a total of four buildings or less, parking was required to be provided and thereafter maintained for a minimum number of cars equal to 150% of the total number of units erected in the buildings. For example, if the petitioners only completed Buildings "1" and "2", Building "1" containing 126 units and Building "2" containing 90 units, the petitioners would have to provide minimum parking for 324 cars (150% of 216 units). Said off-street parking might be provided within the buildings and by a double tier deck on Sites "B" and "C" or ground parking on any portion of Sites "A", "B", and "C". If upon completion of all four buildings, it became necessary to utilize that certain plot, piece, or parcel of land, with the buildings and improvements thereon erected, situate, lying, and being in the City of Long Beach, County of Nassau and State of New York, known and designated as and by the lots numbered 11, 12, 13, 14, and 15 in Block 145 on a certain map entitled, "Estates of Long Beach, Long Beach, Long Island, William H. Reynolds, President, Map No. 1, Charles W. Leavitt, Jr., Landscape Engineer, 220 Broadway, New York City, March 1907", and filed in the Office of the Clerk of the County of Nassau on April 20, 1911 as Map Number 31, Case Number 231 ("the Estates of Long Beach Map") to meet the necessary parking requirements, such parcel might be used, but only where such parking could not be provided on Sites "A", "B", and "C". Additionally if the petitioners failed to construct any

other building other than the presently existing Building "1", the petitioners were required to provide a ratio of 1.5 parking spaces per unit for Building "1".

C. It was the intention of the parties that during the period of construction, petitioners maintain to the extent practicable a parking for previously erected units equal to 175% percent of the total number of units which had been completed. In consideration thereof, promptly following the approval of the variances therein provided, the petitioners were required to clear and temporarily pave the sites on which Buildings "2" and "3" were to be constructed to provide for interim parking spaces thereon. Upon the commencement of construction of Building "2", the site of Building "3" was to remain clear and temporarily paved to provide for interim parking spaces thereon to maintain a parking area for a minimum number of cars to the extent practicable equal to 175% of the total number of units erected in Building "1".

The \$200,000 Payment to the City

15. The petitioners accepted the modified terms of the variance and, in reliance thereon and in consideration for the granting of the variance, in or about December 1989 paid to the City the \$200,000 that the City was to apply first to the cost of installation of underground utilities in lieu of above-ground utilities, then to road improvements in the immediate vicinity of the subject premises, and the balance for the general benefit of the surrounding area as might be determined by the City.

The 1992 Extension Agreement

16. Notwithstanding the City's obligation to utilize the \$200,000 paid to it by the petitioners in or about December of 1989 to install the underground utilities, *inter alia*, in the immediate vicinity of the subject premises within a reasonable time, but in any event not later than two years after receipt thereof, by January of 1992 two years had passed and the City had still failed do so.

17. In April 1992, approximately two-and-a-half years after receipt of the \$200,000, the City requested that the petitioners agree to extend, without limitation, the time of the City to apply the funds as required by the 1989 Stipulation.

18. The petitioners agreed to the City's request and the extension was memorialized in a letter dated April 7, 1992. In consideration for the petitioners' extension of the City's time to apply the \$200,000 for the installation of underground utilities, *inter alia*, the petitioners' time within which to commence construction was tolled until such time as the City installed the underground utilities. Petitioners nevertheless maintained the right to commence construction, the City's delay in installing underground utilities and such other improvements notwithstanding.

19. In a written Stipulation dated May 1, 1992, and so-ordered by a Justice of the Supreme Court on June 19, 1992, the parties to the Supreme Court action/proceeding, acting by their respective counsel, stipulated and agreed that the 1989 Stipulation and Judgment would be modified in accordance with the Extension Letter, which was annexed to and expressly incorporated in the May 1992 Stipulation.

20. The City never installed the underground utilities as required by the 1989 Stipulation and has not done so as of this date.

The 2003 Building Permit – Xander’s Application to the ZBA

21. In May 2003 the petitioners applied to the City for a building permit to drive piles and install footings for the construction of Building “2.”

22. On August 12, 2003, the Commissioner issued the requested Building Permit.

23. On September 4, 2003, respondent-defendant Xander Corp. (“Xander”) filed with the ZBA a petition to revoke the Building Permit.

24. The Xander Petition asserted that the construction of Building “2” would violate the City’s Code of Ordinances because:

- A. “there is not sufficient area for construction”;
- B. “there is not sufficient parking”;
- C. it would be in “excess of the allowable height for construction”;
- D. it would exceed the “allowable density for construction”; and
- E. “there are not sufficient setbacks for construction”.

25. The Xander Petition:

- A. alleged nothing about the 1989 Stipulation and Judgment, the 1989 Variance, the Extension Order, or requirements under the State Environmental Quality Review Act (SEQRA);
- B. did not allege that petitioners failed in any respect to comply with the 1989 Stipulation and Judgment or the 1989 Variance or that the petitioners had abandoned their rights under the 1989 Variance;
- C. did not allege that the Extension Order was invalid because it had not been approved by the ZBA or for any other reason;
- D. did not allege that construction of Building “2” would obstruct Xander’s tenants’ views from their apartments; and
- E. did not allege that SEQRA had been violated in the issuance of the 1989 Variance.

The ZBA Hearing and Determination

26. On October 23, 2003, the ZBA held a public hearing on the Xander petition. Most of the hearing focused on issues not raised by Xander’s petition, including the alleged abandonment of the 1989 Variance, the alleged invalidity of the extension order, the alleged violation of SEQRA, and the diminished view from the Xander apartments.

27. Because the petitioners had not been notified that those issues would be raised at the public hearing, they alleged that they were deprived of a fair and full opportunity to defend against them.

28. On November 20, 2003, the ZBA granted Xander's application and revoked the petitioners' building permit. The findings allegedly supporting that determination were not promulgated until December 29, 2003. The findings concluded in substance, *inter alia*, that the petitioners' failed to meet the schedule contained in the 1989 Stipulation and that petitioners' extension of time by the 1992 Extension Agreement was not binding upon the ZBA because such a major change to the 1989 Variance required a ratification by the ZBA after a public hearing.

THE PRESENT LITIGATION

29. The petitioners brought this litigation to annul the ZBA's revocation and reinstate their building permit. The original version of the petition/complaint asserted seven causes of action. The first cause of action sought to annul the determination of the ZBA for lack of notice to the petitioners of the hearing before the ZBA and lack of notice of grounds that were not raised by Xander's petition to revoke the permit, but which were raised for the first time at the hearing, thereby depriving them of due process of law. The second cause of action sought to annul the determination of the ZBA on the ground that it was illegal, arbitrary, and capricious, and not supported by substantial evidence in the record. The third cause of action sought a judgment declaring, *inter alia*, that the 1992 Extension Agreement was valid and binding and that the time of the petitioners to file for a building permit under the terms of the Stipulation had not expired. The fourth cause of action sought to recover damages from the City Respondents for breach of contract, namely the 1989 Stipulation as extended by the 1992 Extension Agreement. The fifth cause of action sought an injunction against the City and the ZBA to enjoin them from revoking the building permit. The sixth cause of action sought to recover damages from Samuel Ungar, the City's then Corporation Counsel, for fraudulently inducing the petitioners to enter into the 1992 Extension Agreement that extended the parties' time to comply with the 1989 Stipulation. The seventh cause of action sought to recover damages from the ZBA and its individual members, except Chairman Rocco Morelli, pursuant to 42 USC § 1983, for depriving the petitioners of a protected property interest in the building permit without due process of law.

30. The City Respondents did not answer, but instead moved to dismiss the complaint. By a decision and order dated May 17, 2004, the Supreme Court (Justice Davis) denied their motion to dismiss and, upon considering the petition/complaint, annulled the ZBA's determination revoking the building permit and remitted the matter to the ZBA to consider whether Corporation Counsel Ungar had the authority to bind the ZBA to the 1992 Extension Agreement.

31. The parties separately appealed and cross-appealed from stated portions of the order of Justice Davis. In determining those appeals the Appellate Division held that the 1992 Extension Agreement signed by Ungar in his capacity as Corporation Counsel was ineffective to extend the time of the petitioners to comply with the provisions of the 1989 Stipulation because his action in entering into the 1992 Extension Agreement had not

been ratified by the ZBA. Accordingly, the Appellate Division reversed the order of the Supreme Court insofar as cross-appealed from, denied the petition, dismissed the proceeding on the merits, dismissed the complaint except the fourth cause of action, confirmed the ZBA's determination revoking the building permit, and remitted the matter to the Supreme Court for the entry of a declaratory judgment accordingly. In holding, on the law, that the extension agreement was invalid because it had not been ratified by the ZBA, the Appellate Division explicitly declined to reach the remaining issues, stating that "[t]he parties' remaining contentions are academic in light of our determination" (*Matter of Haberman v Zoning Bd. of Appeals of City of Long Beach*, 35 AD3d 465, 467 [2d Dept. [2006]]).

32. The petitioners then sought and were granted leave to appeal to the Court of Appeals from the order of the Appellate Division. On that appeal, the court unanimously held that the 1992 Extension Agreement was valid and binding upon the City Respondents without the need for ratification by the ZBA and it reversed the order appealed from and remitted the matter to the Appellate Division "for consideration of issues raised but not considered on the appeal to that court" (*Matter of Haberman v Zoning Bd. of Appeals of City of Long Beach*, 9 NY3d 269, 276 [2007]), stating:

The agreement to extend Haberman's time was entered into in writing, after negotiations between counsel, and was approved by the court. It was a benefit given to Haberman in exchange for a benefit received by the City — an extension of the City's time to install underground utility lines. It is admitted that the Corporation Counsel was the ZBA's attorney in the litigation Haberman brought. The ZBA does not claim that, in signing the April 1992 letter agreement and the stipulation adopting it, its lawyer was violating the ZBA's instructions, or concealing his actions from his client—and clearly no such problem, if it existed, was known to Haberman. In other words, the Corporation Counsel had at least apparent, if not actual, authority to act on the ZBA's behalf. It would be unfair to hold, many years after the event, that the lawyer's agreement was a nullity because the parties did not follow a procedure that no statute and no precedent required.

33. On remittal, the Appellate Division considered the issues that it had not reached when the parties' cross-appeals were previously before it, including the contention of the City Respondents that its motion to dismiss should have been granted because certain causes of action asserted in the initial petition/complaint were legally insufficient. In doing so, it modified the order appealed from by (1) deleting the provision that denied the branch of the motion of the City Respondents that was to dismiss the sixth cause of action to recover for fraud against Ungar and substituting therefor a provision granting that branch of the motion, and (2) deleting the provision annulling the determination of the ZBA and substituting therefor a provision permitting the City Respondents to interpose an answer. As so modified the order of the Supreme Court was "affirmed insofar as appealed and cross-appealed from" and the matter was remitted to the Supreme Court "for further proceedings consistent herewith," that is, for the filing of answers by the City

Respondents and Xander (*Matter of Haberman v Zoning Board of Appeals of City of Long Beach*, 53 AD3d 490, 491 [2008]).

34. When the matter was remitted to the Supreme Court, the Petitioners moved for leave to amend their petition/complaint and their motion was granted, leading to the service and filing of the present corrected Third Amended Verified Petition and Complaint ("the Complaint").

35. The Complaint was amended to address both the petitioners' victory at the Court of Appeals, so that the action against Samuel Ungar was now moot, and the petitioners' new information that led them to believe that the Chairman had a substantial undisclosed conflict of interest at the time that he chaired the ZBA hearing on the Xander application to revoke their permit.

36. The Complaint included new allegations, *inter alia*, that the public hearing on the Xander application was not conducted in a fair and impartial manner, that there were undisclosed interests that were required to be disclosed, and that the revocation of the petitioners' permit was merely a bow to political pressure, was illegal, arbitrary, and capricious, and constituted a gross abuse of governmental authority, a deprivation of Haberman's property rights, and a willful and contumacious breach by the ZBA of the "so ordered" 1989 Stipulation, as modified in 1992 by a further order of the Supreme Court.

37. In the Complaint:

A. The former first cause of action to annul the determination of the ZBA for denial of procedural due process remained in place.

B. A new second cause of action alleged that the Chairman participated in the hearing and deliberations on the application of Xander to revoke the building permit while he was under an undisclosed conflict of interest and that by so doing the petitioners were deprived of due process of law requiring that the determination of the ZBA be annulled.

C. The former second cause of action (to annul the determination of the ZBA on the ground that it was illegal, arbitrary, and capricious, and not supported by substantial evidence in the record) was renumbered to be the third.

D. The former third cause of action (for a declaratory judgment) was renumbered to be the fourth.

E. The former fourth cause of action (to recover damages for breach of contract) was renumbered to be the fifth.

F. The former sixth cause of action (to recover for fraud against Ungar) which had been dismissed, was replaced by renumbering the former seventh cause of action (to recover damages under 42 USC § 1983 for depriving the petitioners of a protected property interest in the building permit without due process of law) in its place and amending it to assert it also against the Chairman who had

initially been omitted as a defendant on that cause of action, before his alleged conflict of interest became known to the petitioners, because he had abstained from voting.

38. As relief, the Complaint seeks a judgment:

- A. annulling and vacating the December 2003 Zoning Resolution;
- B. reinstating the August 12, 2003, building permit;
- C. declaring that:
 - i. the extension letter and extension order are binding upon the ZBA, the City, and the Commissioner in all respects;
 - ii. the City has not fulfilled its obligations under the stipulation to install underground utilities as contemplated therein;
 - iii. the petitioners' time under the 1989 Stipulation, as modified by the extension letter and extension order, within which to file an application for a building permit for the construction of Building "2" has been tolled continuously since the execution of the extension letter and the making of the extension order;
 - iv. the petitioners have not abandoned the project or any of their rights under the 1989 Stipulation, the extension letter, or the extension order; and
 - v. the petitioners are entitled to the August 12, 2003 building permit; and
- D. awarding damages in amounts presently undetermined, but believed to exceed \$50,000,000, and costs and disbursements in the action/proceeding.

39. After service of the Complaint, the City Respondents did not answer but again moved to dismiss. The Supreme Court granted the motion to the extent of dismissing the first, second, fifth, and sixth causes of action asserted in the Complaint and all claims against the individual City Respondents.

40. The petitioners appealed from so much of the order as dismissed portions of the Complaint and on that appeal the Appellate Division, Second Department, reversed insofar as appealed from and denied the branches of the motion of the City Respondents pursuant to CPLR 3211(a)(7) and 7804(f) to dismiss the first and second causes of action and pursuant to CPLR 3211(a)(7) to dismiss the fifth and sixth causes of action (*Matter of Haberman v Zoning Bd. of Appeals of City of Long Beach*, 94 AD3d 997 [2d Dept. 2012]). The City Respondents moved for leave to appeal to the Court of Appeals and their motion was denied on June 28, 2012 (*Matter of Haberman v Zoning Bd. of Appeals of City of Long Beach*, 19 NY3d 951 [2012]).

41. The time of the City Respondents to answer the Complaint was extended by CPLR 3211(f) during the pendency of their motion to dismiss and related appeals. When

an answer was not received by the petitioners within some months after the June 28, 2012, order of the Court of Appeals denying leave to appeal, on October 4, 2012, the petitioners served the City Respondents with a copy of the order of the Court of Appeals with notice of its entry together with a letter demanding service of an answer within 10 days. An answer was not timely forthcoming in response to the petitioners' demand and accordingly they moved by notice of motion dated October 18, 2012, for leave to enter a default judgment against the City Respondents for the relief demanded in the Complaint. The return date of that motion was adjourned several times because of the ongoing settlement negotiations that led to this Stipulation. The City Respondents have not yet served papers in response thereto and the motion is still pending and undecided.

THE MEDIATION

42. The petitioners and the City Respondents, each for their own part, independently determined that it was in their respective best interests and those of the residents of the City to attempt to settle this action/proceeding on a mutually agreeable basis, and, in furtherance thereof, agreed to mediate the issues raised in the Complaint utilizing the JAMS Resolution Center, with the Honorable Stephen Crane as mediator.

43. Prior to joining JAMS, Judge Crane served as a Justice of the Supreme Court, New York County from 1984 to 2007, where he was one of the Justices in the Commercial Division handling complex commercial cases from 1995 to 2001. He was appointed to the Appellate Division, Second Department, where he became the Senior Associate Justice. Judge Crane is widely respected as a neutral with a well-deserved reputation for being knowledgeable, thoughtful, and fair.

44. After two days of mediation, lasting more than 8 hours on each day, with the assistance of Judge Crane, and upon his strong recommendation, it was determined by each of the parties, independently and upon the advice of their counsel, that it would be in their best interest to enter into this Stipulation to settle this action/proceeding, and to have this Stipulation "so ordered" by a Justice of the Supreme Court, for the following reasons:

- A. to avoid the uncertainties of litigation;
- B. to avoid the potentially financially crippling contingent liability of the City and the other City Respondents, which, although denied by the City and the City Respondents, is claimed by the petitioners to amount to between \$50,000,000 and \$100,000,000;
- C. to relieve the City from the onerous financial requirement of installing underground utilities on Shore Road between Lincoln and Monroe Boulevards;
- D. to relieve the City from having to account for and return the present value of the \$200,000 paid by the petitioners to the City in 1989, *inter alia*, for the installation of underground utilities on Shore Road between Lincoln and Monroe Boulevards;
- E. to eliminate any residential use of the previously approved Building "4" on Sites "B" and "C", so that it may be used only for parking;

- F. to preserve and not impair the City's bonding ability and to increase its bond rating;
- G. to encourage development and investment in the City after the extreme devastation to and in the City caused by Super Storm Sandy;
- H. to foster the rebuilding of the tax base of the City by substantial new construction;
- I. to attempt to increase the values of waterfront and other properties within the City, which, in turn, will increase the tax base;
- J. to promote the overall health, safety, and welfare of the residents of the City; and
- K. to preserve, but modify, the vested rights acquired by the petitioners:
 - i. as they existed under the City's 1985 zoning, based upon their:
 - (1) demolition of the then existing income producing properties;
 - (2) construction of Building "1" as part of their planned and approved, integrated, four-building complex; and,
 - (3) construction of a swimming pool and other structures to be used as common areas for the four towers in reliance on their 1985 variance;
 - ii. as they presently exist today, based upon both the foregoing and:
 - (1) the hundreds of thousands of dollars that they have paid in soft costs for the project over the last 27 years in professional fees, building permits, and financing; and
 - (2) the extension of time to commence construction until after the City has installed underground utilities on Shore Road between Lincoln and Monroe Boulevards, based upon its stipulation extending the City's obligation to perform such installation; and
- L. to compensate the petitioners in some measure for their alleged damages in excess of \$50,000,000, without the City having to expend any money.

**THE CURRENT ECONOMIC CLIMATE AND ITS IMPACT UPON
THE CITY AND THE PETITIONERS' DEVELOPEMENT PLANS**

45. The extreme devastation caused by Super Storm Sandy to the City has had a significant and adverse impact upon the City and its finances and financing, properties, economy, and residents.

46. Since December of 2003, the petitioners have been delayed in their construction of Buildings "2", "3", and "4" by the ZBA's revocation of their building permit and the ensuing litigation to have that permit reinstated.

47. During that delay there was a national recession that substantially affected not only the country as a whole, but the City in particular. The recession, as it affected the City, resulted, *inter alia*, in difficulty for prospective cooperative and condominium buyers to obtain mortgages, difficulty for developers—such as the petitioners—to arrange for construction financing, and corresponding reductions in the City's land values and tax base. Super Storm Sandy significantly exacerbated those problems, especially as it laid waste to some and substantially damaged other properties along and within close proximity to the City's waterfront:

48. There is presently an urgent need for the City to:

- A. demonstrate the confidence of developers in the City's ability to spur redevelopment, especially along the City's waterfront;
- B. increase the City's tax base that was devastated by Super Storm Sandy;
- C. raise the values of the City's waterfront and other properties;
- D. eliminate all the potentially financially crippling contingent liabilities of the City stemming from the petitioners' damage claims;
- E. eliminate the City's financially onerous obligation to install underground utilities on Shore Road between Lincoln and Monroe Boulevards and make such obligation optional for the City; and
- F. eliminate the City's financially onerous obligation to return to petitioners the present value of the \$200,000 paid by them to the City in 1989, *inter alia*, for installation of underground utilities on Shore Road between Lincoln and Monroe Boulevards.

49. The petitioners require assurance from the City and the other City Respondents that:

- A. The petitioners will be able to complete their project without unreasonable interference from the City or any City agency or official, and that any intervention by them will only be in compliance with applicable law, which, for clarity, includes the rights provided to the petitioners by this Stipulation and by the variances heretofore granted by the ZBA and as hereafter modified by the ZBA pursuant to this Stipulation;
- B. their project will have the potential to provide them with a reasonable return on their investment;
- C. they will be able to commence construction at such time as, in their sole opinion, market conditions make it feasible for them to do so and they will not be required to commence construction before such time; and

D. they will not lose their vested rights under the 1985 and 1989 Variances previously granted to them, as modified by the 1992 Extension Agreement, which, in part, permits them to delay the commencement of future construction pending the City's installation of underground utilities on Shore Road between Lincoln and Monroe Boulevards.

50. If the petitioners are permitted to revise their project by eliminating the residential use at the location of the previously approved Building "4" and are allowed to increase the height of Buildings "2" and "3", so that each may be 19-stories high plus a roof-top penthouse not to exceed 5,000 square feet, with all of the required parking within tax blocks 145 and 146 ("the revised project"); then the completion of the Revised Project, and the required variances therefor, will:

A. spur redevelopment of the City, especially along the City's waterfront devastated by Super Storm Sandy;

B. appreciably raise the values of the City's waterfront and other properties;

C. increase the City's tax base that was devastated by Super Storm Sandy;

D. produce a positive and much needed change to the City and the City's waterfront, which, even with the required variances from the ZBA, clearly outweighs any detriment to the health, safety, and welfare of the nearby properties, the neighborhood, and the community;

E. provide the petitioners with the benefit they seek, enabling them to finally complete their almost 30-year old project in an economically feasible manner acceptable to the City, which cannot otherwise be achieved by them by some method feasible for them to pursue, other than by obtaining the required variances; and

F. will not have a significant adverse effect or impact on the physical or environmental conditions in the neighborhood or district.

51. There is no question but that the required variances, as percentages of the previously approved and presently zoned restrictions, are substantial. However, because of the devastation caused by Super Storm Sandy, the fiscal crises facing the City, and the real estate recession within the City and along its waterfront, the City has urgent current needs to:

A. spur redevelopment of the City, especially along the City's waterfront;

B. raise the values of the City's waterfront and other properties; and

C. increase the City's tax base.

Under these present circumstances, the overall benefit to the health, safety, and welfare of the City, the neighborhood, and the community derived by the granting of the requested variances for the construction of the Revised Project will be so substantially positive, that it will significantly outweigh any negative impacts.

52. The difficulty confronting the petitioners is that the City Respondent's delay of their proposed construction by the ZBA's revocation of their building permit in 2003, has placed them in an extremely disadvantageous economic climate to construct, sell, and/or lease the new units in Buildings "2" and "3" because of the difficulty for prospective cooperative and condominium buyers to obtain mortgages, the difficulty for developers, such as themselves, to arrange for financing, and the significant drop in land value within the City, especially along its waterfront, resulting from a combination of the national recession and the subsequent exacerbation of those problems by Super Storm Sandy, all of which were beyond the petitioners' control and not self-created.

53. The petitioners seek to complete the project as soon as they determine it is financially feasible for them to do so, so they may finally obtain a financial return on what has long been substantially non-productive property.

54. However, the parties recognize that there has been a devastating impact by Super Storm Sandy on the City in general and on the local real estate market in particular; that the national, state, county, and City economies are in or close to crisis; land values in the City, especially along the waterfront, have been significantly diminished; and the financing, development, and sale of new construction high rise condominiums or cooperatives and conventional high rise rental housing currently may not be feasible at this time.

55. Accordingly, knowing it is in the best interests of the petitioners to commence construction as soon as it is financially feasible for them to do so, and (a concern of all parties) to provide sufficient time, without additional litigation, for the petitioners to determine when the real estate market within the City has sufficiently changed to assure that the completion of the project would be feasible, and with the understanding that the construction will probably commence sooner rather than later, the parties have agreed to provide the petitioners with a 20-year period from the granting of the variances, which will be required for the project to continue, to file for the building permits necessary to complete the Revised Project.

THE REVISED PROJECT

56. Based upon all of the foregoing, it is hereby stipulated and agreed by all of the parties that subject to such additional variances as may be required by the petitioners from the ZBA after a public hearing, the petitioners shall be entitled to construct the following ("the Revised Project"):

A. Building "2" on Site "A":

- i. The total height may be 19 stories plus a roof-top penthouse, such penthouse not to exceed 5,000 square feet.
- ii. The 19 stories plus roof-top penthouse may be a total of 200 feet in height, and such 19 stories and 200-foot height shall be measured from the minimum elevation permitted by FEMA and exclusive of such additional height as may reasonably be added and/or required:

- (1) for elevator and mechanical systems on the roof;
 - (2) for ground floor mechanical systems below the first of the 19 stories;
 - (3) by any agency, department, or other entity created by the federal government, the State of New York, or the County of Nassau, with jurisdiction that, in substance, sets a minimum elevation for the first floor of habitable and/or mechanical space within the building; and/or
 - (4) because of the significant additional construction, insurance, or other costs that would be required in setting the first floor of habitable and/or mechanical space within the building below a certain level.
- iii. The building may be used only for residential condominium, cooperative, or rental purposes, or a mix within the building of any of such residential uses, such as, but not limited to, part cooperative and part rental, as the petitioners deem fit, and such parking as the petitioners shall designate.
- iv. The total number of units in the building shall not exceed 181. The petitioners shall have the right to combine units and, thereby, create fewer and larger units.

B. Building "3" on Site "A":

- i. The total height may be 19 stories plus a roof-top penthouse, such penthouse not to exceed 5,000 square feet.
- ii. The 19 stories plus roof-top penthouse may be a total of 200 feet in height, and such 19 stories and 200-foot height shall be measured from the minimum elevation permitted by FEMA and exclusive of such additional height as may reasonably be added and/or required::
 - (1) for elevator and mechanical systems on the roof;
 - (2) for ground floor mechanical systems below the first of the 19 stories;
 - (3) by any agency, department, or other entity created by the federal government, the State of New York, or the County of Nassau, with jurisdiction that, in substance, sets a minimum elevation for the first floor of habitable and/or mechanical space within the building; and/or
 - (4) because of the significant additional construction, insurance, or other costs that would be required in setting the first

floor of habitable and/or mechanical space within the building below a certain level.

- iii. The building may be used only for residential condominium, cooperative, or rental purposes, or a mix within the building of any of such residential uses, such as, but not limited to, part cooperative and part rental, as the petitioners deem fit, and such parking as the petitioners shall designate.
 - iv. The total number of units in the building shall not exceed 217. The petitioners shall have the right to combine units and, thereby, create fewer and larger units.
- C. Building "4" on Sites "B" and "C" shall be used only for parking and not for habitable purposes. The total height may not exceed four stories. The four stories may not exceed 40 feet in height. Such four stories and 40-foot height shall be measured from the minimum elevation permitted by FEMA.
- D. The parking for Buildings "1", "2", and "3" shall be as allocated as follows:
- i. Building "1": 126 spaces - 1 space allocated to each unit (which includes within those 126 spaces the 102 spaces already located under Building "1" on the Xander parcel);
 - ii. Building "2": 1 space allocated to each unit;
 - iii. Building "3": 1 space allocated to each unit;
- E. Additional parking shall be provided for the complex so that:
- i. Until construction commences on either Building "2" or Building "3", the petitioners shall provide not less than 126 parking spaces (which includes within those 126 spaces the 102 spaces already located under Building "1" on the Xander parcel).
 - ii. During construction of Building "2", the petitioners shall provide, to the extent practicable, 221 spaces (126 units multiplied by 1.75).
 - iii. After the completion of the construction of Building "2", the petitioners shall provide the total of 126 parking spaces for Building "1" (which includes within those 126 spaces the 102 spaces already located under Building "1" on the Xander parcel) and 1.5 multiplied by the total number of units in Building "2", allocated 126 parking spaces to Building "1" and the remaining parking spaces to Building "2".
 - iv. During construction of Building "3", the petitioners shall provide, to the extent practicable, a total of 1.75 multiplied by the total number of units in Building "1" and Building "2".

- v. After the completion of the construction of Building “3”, the petitioners shall provide the total of the total of 126 parking spaces for Building “1” (which includes within those 126 spaces the 102 spaces already located under Building “1” on the Xander parcel) and 1.5 multiplied by the total number of units in Buildings “2”, and “3”, allocated 126 parking spaces to Building “1” and the remaining parking spaces allocated between Buildings “2” and “3” as the petitioners deem fit.
- vi. In the event that the project is abandoned and the petitioners determine not to construct Buildings “2” and/or “3”, the petitioners shall provide not less than 126 parking spaces for Building “1” (which includes within those 126 spaces the 102 spaces already located under Building “1” on the Xander parcel).
- vii. Each unit in each of the Buildings shall be entitled to one parking space. All of the remaining parking spaces may be sold by the petitioners, in their discretion, to any owner of any unit of any of the Buildings, and may be leased, or assigned by the petitioners, in their discretion, to anyone, whether or not they own a unit in any of the Buildings.
- viii. Examples:
- (1) In the event that Buildings “2” and “3” are completed and each contains the greatest number of permitted units, 181 and 217, respectively, the total number of required parking spaces would be 126 (which includes within those 126 spaces the 102 spaces already located under Building “1” on the Xander parcel) + 272 $[181 \times 1.5] + 326 [217 \times 1.5] = 724$ parking spaces.
- (i) One each of 524 of those parking spaces would be designated directly to one each of the 524 units.
- (ii) The remaining 200 parking spaces may be sold, leased, or assigned by the petitioners, in their discretion.
- (2) In the event that Building “2” is completed and contains only 170 units, and the petitioners decide not to build Building “3”, the total number of required parking spaces would be 126 (which includes within those 126 spaces the 102 spaces already located under Building “1” on the Xander parcel) + 255 $[170 \times 1.5] = 381$ parking spaces.
- (i) One each of 296 of those parking spaces would be designated directly to one each of the 296 units.
- (ii) The remaining 85 parking spaces may be sold, leased, or assigned by the petitioners, in their discretion.

- ix. All of such required parking shall be provided at such locations as shall be designated by the petitioners within Blocks 145 and 146 of section 59 as shown on the Nassau County Land and Tax Map.
- x. The required parking, in the discretion of the petitioners, may be at or below grade, open or on decks, and/or in multi-tiered structures.
- xi. The required parking, in the discretion of the petitioners, may extend up to property lines and may include provision for compact cars.
- xii. The required parking, in the discretion of the petitioners, may be provided by tandem parking spaces so long as the tandem spaces are owned by or assigned, licensed, or leased to the same unit owners.
- xiii. In the event that the petitioners desire to change the order of construction of the buildings to be erected, they shall have the right to do so and the references to Building "2" and Building "3" in subdivisions "i" through "vi" of this subparagraph "E" shall be reversed accordingly.
- xiv. Nothing in this Stipulation shall be deemed to preclude the petitioners from constructing Buildings "2" and "3" in such order or simultaneously, as they may determine.

57. Construction of all buildings and other structures shall be commenced and completed in accordance with applicable provisions of the New York State Uniform Fire Prevention and Building Code, or such superseding State building code as may be in effect at the time the petitioners submit their building permit applications, and the fee schedule of the City in effect when the Building Permit was issued to the petitioners on August 12, 2003.

58. The existing buildings in the City at 325-45 Shore Road and at 356 East Broadway shall be demolished prior to the issuance of a certificate of occupancy for Building 2 or Building 3.

59. The City Respondents acknowledge receipt of the payments previously made by the petitioners in 1987 for building permits.

60. It is agreed that for any permit for which payment by petitioners previously has been made to the City in full based upon the City's fee schedule at that time, no further payment will be required and that any permit for which payment has not been made, the fees and other costs, if any, for such permit shall not exceed such fees and costs as would have been charged in 2003.

61. As to the payments referred to in paragraph 10(E), the \$32,264 shall be allocated to such permits that have been issued and, if such amount was a partial payment of the fees and costs, if any, required at the time the permits were issued, the petitioners shall pay the balance of the required fees and costs, if any, based upon the fees and costs as would have been charged in 2003.

62. In all other respects, petitioners shall have the right to build and complete the project as permitted and in accordance with the terms and conditions set forth in the Decision of the ZBA in Case No. 459, and in accordance with the zoning in effect in 1985, except as modified and superseded by the terms and conditions of this Stipulation.

TIME PERIOD FOR PETITIONERS TO FILE FOR BUILDING PERMITS

63. At the option of the petitioners, Building "2" and Building "3" (the "Buildings to be built") may be built either concurrently, consecutively, or during an overlapping period.

64. The time for the petitioners to file for a building permit to build either Building "2" or Building "3" (the "first of the Buildings to be built", the other of said Buildings being referred to as the "Remaining Building"), at their option, shall not lapse until 20 years after the last of the following dates to occur:

A. The date of the granting of the variances required to permit the completion of the Revised Project in accordance with the terms of this Stipulation ("the Grant").

B. The date of a Justice of the Supreme Court of the State of New York, with venue in Nassau County, approving and "so ordering" this Stipulation ("the Order").

C. In the event that any proceeding or action is commenced in any tribunal to set aside, annul, vacate, or modify the Grant and/or the Order, in whole or in part:

i. the date that the last nonappealable decision, order, or judgment from such tribunal has been rendered; or

ii. the date that the time to appeal from a decision, order, or judgment from such tribunal has expired with no appeal having been taken.

65. The time for the petitioners to file for a building permit for the Remaining Building shall be the last date for the petitioners to file for a building permit to build the first Building to be built as determined pursuant to paragraph 64 extended by a period of time equal to the time period from the date the building permit was issued for the first Building to be built until the date the final certificate of occupancy is issued for the first Building to be built.

66. The foregoing time limitations shall be tolled for the period of any moratorium, stay, or injunction that may hereafter be imposed by any administrative, legislative, executive, judicial, or other authority prohibiting or restricting the construction of the Revised Project in accordance with the terms of this Stipulation.

CONDITIONS PRECEDENT TO SETTLEMENT

67. The parties shall promptly complete all the procedures required of them to effectuate the terms of this Stipulation and to obtain a prompt public hearing by the ZBA of an application to amend the terms and conditions of the variances previously approved

with regard to the project to conform to the terms and intent of this Stipulation to enable the petitioners to construct the Revised Project.

68. Within three months of this Stipulation being executed and approved by a Justice of the Supreme Court of the State of New York, with venue in Nassau County, the petitioners shall apply to the ZBA for such variances as may be required to permit the completion of the Revised Project in accordance with the terms of this Stipulation (the "Variance Application"). In the event that the ZBA shall determine that the Variance Application is not complete, the ZBA shall promptly notify the petitioners of the additional documentation and/or information required to have the Variance Application deemed complete and the petitioners shall diligently file such additional documentation and/or information. Nothing herein shall be deemed to limit the ZBA's full statutory discretion to take such action as it deems appropriate after the conclusion of a public hearing at which all persons in interest are provided the required notice and the opportunity to be heard.

69. If, within four months after the filing of the complete Variance Application, unless such time is otherwise extended by agreement of the attorneys for the parties, the ZBA has not determined the application, then this Stipulation shall be null and void, and the parties shall proceed with this action/proceeding as if this Stipulation had never been executed.

70. In the event that within the four-month time limit set forth in paragraph 69, including any extension thereof by agreement of the attorneys for the parties:

A. the ZBA denies the petitioners the variances required to permit the construction of the Revised Project in accordance with the terms of this Stipulation, then this Stipulation shall be null and void and the parties shall proceed with this action/proceeding as if this Stipulation had never been executed; or

B. the ZBA approves the required variances subject to conditions not expressly set forth as a part of this Stipulation, then this Stipulation shall be voidable at the election of the petitioners.

71. In the event that within the four-month time limit set forth in paragraph 69, including any extension thereof by agreement of the attorneys for the parties the ZBA grants the required variances unconditionally or upon conditions that the petitioners accept and do not elect to void this Stipulation, but, if either within or subsequent to said four-month time period the determination granting the same is challenged in a CPLR article 78 proceeding that results in its annulment, in whole or in part, modification, or imposition of new or altered conditions, or if an order or judgment in said proceeding is appealed and results in denial of the required variances, in whole or in part, modification, or new or altered conditions, then this Stipulation shall be voidable at the election of the petitioners. For clarity the intent of the foregoing sentence is to include, *inter alia*, the petitioners' ability to elect to void this Stipulation based upon challenges that result in annulments, in whole or in part, modifications, and/or impositions of new or altered

conditions, in orders and judgments whether commenced, occurring, rendered, and/or granted during or after said four-month period.

72. If a right of election to void this Stipulation arises under subparagraph B of paragraph 70 or paragraph 71, the following procedures shall govern its exercise:

A. The City Respondents shall serve upon the attorneys for the petitioners a copy of the decision of the ZBA, the judgment determining the CPLR article 78 proceeding, or the order determining the appeal, together with a written notice requiring the petitioners to exercise their right of election to void this Stipulation under this paragraph or forfeit their right to do so. Said ZBA decision, judgment, or order and the required notice shall be served pursuant to CPLR 2103(b)(1), (2), (3), or (6). The time of the petitioners to exercise their right of election shall not begin to run until service of documents in compliance herewith.

B. Upon service of the documents set forth in subparagraph A hereof the petitioners shall have 45 days, and such additional time as may be provided by General Construction Law § 25, or CPLR 2103(b) depending on the method of service, within which to exercise their right of election to void this Stipulation by letter addressed to the City's Corporation Counsel and served pursuant to CPLR 2103(b)(1), (2), (3), or (6).

C. In the event the petitioners timely exercise their right of election in accordance with subparagraph B hereof, this Stipulation shall be null and void and the parties shall proceed with this action/proceeding as if this Stipulation had never been executed. If the petitioners fail to timely exercise the right of election, such right of election shall terminate.

73. This Stipulation must be approved and "so ordered" by a Justice of the Supreme Court of the State of New York, with venue in Nassau County. If such approval is not obtained, this Stipulation shall be deemed null and void, without force and effect, and the parties shall proceed with this action/proceeding as if this Stipulation was never executed.

SETTLEMENT AGREEMENT

74. In the event that:

A. all the foregoing conditions precedent are satisfied; and,

B. the petitioners have not exercised an election to void the Stipulation under subparagraph B of paragraph 70 or paragraph 71; and,

C. the time to review a determination of the ZBA unconditionally granting the required variances, or granting the same on conditions that the petitioners have elected to accept, lapses without a proceeding seeking such review having been commenced, or such a proceeding having been commenced and such review having not resulted in vacatur or annulment in whole or in part of said approval or in conditioning said approval on conditions that are not acceptable to the

petitioners, and no appeal having been taken or the time for any such appeal having expired,

then this action/proceeding is settled on the following terms:

Obligations of the City Respondents

75. It shall be a violation of this Stipulation if any further action shall be taken by any of the City Respondents or any agency, department, commission, committee, or other body or officer, employee, or agent of the City Respondents to enforce any current zoning or other ordinances or regulations, or any amendments thereto currently under consideration or hereafter to be enacted, which in any manner conflict with or otherwise contravene the terms of this Stipulation and/or the ability of the petitioners to construct the Revised Project in accordance with the terms of this Stipulation and the revised variances granted in furtherance thereof.

76. The City Respondents and every agency, department, commission, committee, and other body and officer, employee, and agent of the City Respondents shall diligently process all applications and perform all inspections and other actions required of them to assure the ability of the petitioners to construct the Revised Project in accordance with the terms of this Stipulation and the revised variances granted in furtherance thereof.

Obligations of the Petitioners

77. The petitioners shall move in the Supreme Court, Nassau County, for an order pursuant to CPLR 603 and 3217(b) severing the causes of action asserted against the City Respondents from those asserted against the defendant-respondent Xander, discontinuing those causes of action against the City Respondents, without costs or disbursements to either the petitioners or the City Respondents, and for entry of a judgment dismissing the discontinued causes of action accordingly.

78. All construction on the subject property shall conform to the Revised Project.

Relief from City's Obligation to Install Underground Facilities

79. The City Respondents are relieved of any further obligation or responsibility to utilize the \$200,000 previously paid and dedicated to the City by the petitioners for public improvements on Shore Road between Lincoln and Monroe Boulevards.

CONDITIONS SUBSEQUENT

80. Because the petitioners were delayed in their construction of the project by the City Respondents' revocation of their permit for a period of more than nine years, from the November 20, 2003, revocation of their permit until the execution of this Stipulation, and it is not clear when the financing, development, and sale of new construction high rise condominiums or cooperatives and conventional high rise rental housing will again be feasible for the reasons stated in paragraphs 45 through 55 hereof, it shall be deemed a violation of this Stipulation by the City Respondents, in the same manner as a breach of their obligations undertaken in paragraphs 75 and 76, if within the time period for

petitioners to file for building permits, as set forth in paragraphs 64, 65, and 66, any administrative, legislative, executive, judicial, or other authority with jurisdiction promulgates, enacts, or otherwise adopts:

- A. any moratorium, court ordered stay, or injunction exceeding one year that prohibits or restricts the construction of the Revised Project in accordance with the terms of this Stipulation;
- B. any requirement that prohibits or restricts the construction of the Revised Project in accordance with the terms of this Stipulation; or
- C. any requirement that makes the cost of the construction of the Revised Project in accordance with the terms of this Stipulation not economically feasible.

**REMEDIES AND DAMAGES FOR BREACH OF OBLIGATIONS
AND/OR CONDITION SUBSEQUENT**

81. If it is judicially determined that either party has breached any of the obligations undertaken by them in paragraphs 75, 76, 77, and 78, or that there has been a breach of the condition subsequent in paragraph 80, in any action or proceeding to enforce this Stipulation and/or for damages for said breach, the successful party shall be entitled, in addition to any damages, costs, and expenses, to the reasonable legal fees it has incurred with regard to the subject matter of this action/proceeding since the November 20, 2003, ZBA grant of the Xander petition revoking the petitioners' building permit.

82. If it is judicially determined that the City Respondents have breached any of the obligations undertaken by them in paragraphs 75 or 76 or there is a breach of the condition subsequent set forth in paragraph 80:

- A. the settlement of this action shall be vacated and the suit as against the City Respondents shall be reinstated;
- B. the petitioners shall be granted the relief that they seek on the first, second, and third causes of action;
- C. the petitioners shall be granted the declaratory relief that they seek on the fourth cause of action;
- D. the petitioners shall be granted summary judgment on the issue of liability on the fifth and sixth causes of action against the City Respondents, both collectively and individually; and
- E. the parties shall proceed to a trial as to the damages to be awarded on the fifth and sixth causes of action, and, thereafter, to the entry of judgment against the City Respondents accordingly.

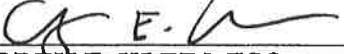
MISCELLANEOUS

83. In any action and/or proceeding challenging this Stipulation and/or the variances that may hereafter be granted pursuant to this Stipulation, the parties agree to act in good faith to work together to defend such action and/or proceeding.
84. This Stipulation has been reviewed and approved by each of the parties and, by signing their names hereto, the attorneys for the parties affirm that their respective clients stipulate to and agree with each of the factual statements made in paragraphs 1 through 55 of this Stipulation.
85. By signing their names hereto, the attorneys for the parties affirm that they have executed this Stipulation pursuant to the authorization of their respective clients and that their respective clients have taken all actions as required by law to provide that authorization.
86. This Stipulation has been reviewed and approved by the attorneys for each of the parties and, in the construction and interpretation thereof, no presumptions shall be made against any of the parties based upon who drafted this Stipulation.
87. As with variances, the benefits of this Stipulation shall run with the land and inure to the benefit of the petitioners, their grantees, successors, and assigns.
88. This Stipulation is entered into by the City Respondents without any admission of liability.
89. The petitioners specifically reserve any and all rights and claims they may have against respondent-defendant Xander Corp. in this or any other action or proceeding.
90. This Stipulation may be signed in counterparts which, when taken together, shall be deemed to be one and the same document. This Stipulation may be executed and delivered via facsimile, or via e-mail attachment in .pdf format, and such facsimile or .pdf format copies of signatures to this document shall have the same force and effect as original ink signatures.
91. Upon five days' notice, any party may submit this Stipulation for approval to a Justice of the Supreme Court of the State of New York, with venue in Nassau County.
92. During the period required to satisfy the conditions precedent to settlement set forth above, all proceedings in this action/proceeding shall be stayed and the pending motion for leave to enter a judgment against the City Respondents upon their default in answering shall be held in abeyance. In the event of a failure to satisfy any of the conditions precedent, either the petitioners or the City Respondents may, by a notice to the court and the other party or parties of not less than 30 days, specifying the particulars of the failure of the condition or conditions precedent in question, require that prosecution of the action/proceeding be resumed. In such event the court shall be asked to fix a prompt new return date for the pending motion for leave to enter a default judgment against the City Respondents.

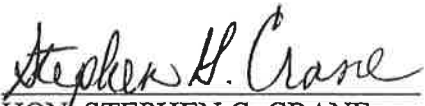
93. A stipulation of discontinuance, in the form attached hereto, discontinuing the action/proceeding solely against the City Respondents, shall be executed by the parties and held in escrow by the petitioners' attorneys until all of the Conditions Precedent have been satisfied and, within thirty days after the last of the Conditions Precedent is satisfied, said stipulation shall be filed in this action/proceeding in Supreme Court, Nassau County, under Index No. 001138-04.

94. This Stipulation of Settlement has been negotiated with the able assistance of the Hon. Stephen G. Crane, a mediator with JAMS. Judge Crane (Ret.) previously served as a Justice of the Appellate Division (Second Department) and as a Justice in the Commercial Division of the NYS Supreme Court (New York County), as well as the Administrative Judge, Civil Branch, of the Supreme Court, New York County. Judge Crane conducted extensive in person mediation sessions with all parties hereto. His extensive efforts and valuable insight enabled the parties to reach this compromise and settlement.

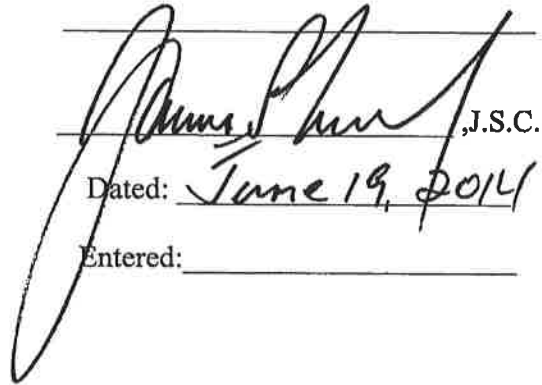
Dated: New York, New York
Dec. 27, 2013


COREY E. KLEIN, ESQ.
Corporation Counsel
The City of Long Beach
Attorney for Respondents- Defendants
Zoning Board of Appeals of The City
of Long Beach, Rocco Morelli, Lenny
Torres, Marcel Weber, Michael Fina,
Stuart Banschick, Lorraine Divone,
Michael Leonetti, The City of Long Beach,
and Scott A. Kemins, as Commissioner
of the Department of Buildings of the
City of Long Beach,
Office and Post Office
City Hall
One West Chester Street
Long Beach, NY 11561
(516) 431-1000


SCOTT MOLLEN, ESQ.
Herrick, Feinstein LLP
Attorney for Petitioners-Plaintiffs
2 Park Avenue, 21st Floor
New York, NY 10016
(212) 592-1505


HON. STEPHEN G. CRANE
(This signature is only to confirm ¶94)

SO ORDERED:


_____, J.S.C.
Dated: June 19, 2014
Entered: _____

<i>Index No. 001138-04</i>
<i>Supreme Court of the State of New York County of Nassau</i>
SINCLAIR HABERMAN and BELAIR BUILDING, LLC,, Petitioners-Plaintiffs, -against-
ZONING BOARD OF APPEALS OF CITY OF LONG BEACH, et al., Respondents-Defendants.
<i>STIPULATION OF SETTLEMENT</i>
Herrick, Feinstein LLP Attorneys for Petitioners-Plaintiffs Two Park Avenue New York, N.Y. 10016-9301 (212) 592-1400

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
SINCLAIR HABERMAN and BELAIR
BUILDING, LLC,

Petitioners-Plaintiffs,

- against -

ZONING BOARD OF APPEALS OF THE CITY
OF LONG BEACH, ROCCO MORELLI, LENNY
TORRES, MARCEL WEBER, MICHAEL FINA,
STUART BANSCHICK, LORRAINE DIVONE,
MICHAEL LEONETTI, THE CITY OF LONG
BEACH, SCOTT A. KEMINS, as Commissioner of:
the Department of Buildings of the City of Long
Beach, and XANDER CORP.,

Respondents-Defendants.
-----X

:
: Index No.
: 001138-04

:
: Justice Marber

:
: **STIPULATION AMENDING**
: **STIPULATION OF SETTLEMENT**

WHEREAS Petitioners-Plaintiffs Sinclair Haberman and Belair Building, LLC ("the petitioners") and Respondents-Defendants the Zoning Board of Appeals of the City of Long Beach ("the ZBA"), Rocco Morelli, Lenny Torres, Marcel Weber, Michael Fina, Stuart Banschick, Lorraine Divone, Michael Leonetti, the City of Long Beach ("the City"), and Scott A. Kemins, as Commissioner of the Department of Buildings of the City of Long Beach ("the City Respondents"), (all collectively "the parties"), except the Defendant-Respondent Xander Corp., entered into a Stipulation of Settlement as of the 27th day of December, 2013 ("Stipulation") and .

WHEREAS the parties wish to amend the Stipulation to clarify or modify certain provisions thereof,

NOW THEREFORE, the parties agree as follows:

1. Paragraphs 67 through and including 93 of the Stipulation are deleted in their entirety and are replaced by new paragraphs 67 through 93 set forth below:

CONDITIONS PRECEDENT TO SETTLEMENT

67. The parties shall promptly complete all the procedures required of them to effectuate the terms of this Stipulation and to obtain a prompt public hearing by the ZBA of an application to amend the terms and conditions of the variances previously approved with regard to the project to conform to the terms and intent of this Stipulation to enable the petitioners to construct the Revised Project.

68. Within three months of this Stipulation being executed and approved by a Justice of the Supreme Court of the State of New York, with venue in Nassau County, the petitioners shall apply to the ZBA for such variances as may be required to permit the completion of the Revised Project in accordance with the terms of this Stipulation (the "Variance Application"). In the event that the ZBA shall determine that the Variance Application is not complete, the ZBA shall promptly notify the petitioners of the additional documentation and/or information required to have the Variance Application deemed complete and the petitioners shall diligently file such additional documentation and/or information. Nothing herein shall be deemed to limit the ZBA's full statutory discretion to take such action as it deems appropriate after the conclusion of a public hearing at which all persons in interest are provided the required notice and the opportunity to be heard.

69. If, within four months after the filing of the complete Variance Application, unless such time is otherwise extended by agreement of the attorneys for the parties, the ZBA has not determined the application, then this Stipulation shall be null and void, and the parties shall proceed with this action/proceeding as if this Stipulation had never been executed.

70. In the event that within the four-month time limit set forth in paragraph 69, including any extension thereof by agreement of the attorneys for the parties:

A. the ZBA denies the petitioners the variances required to permit the construction of the Revised Project in accordance with the terms of this Stipulation, then this Stipulation shall be null and void and the parties shall proceed with this action/proceeding as if this Stipulation had never been executed, or

B. the ZBA approves the required variances subject to conditions not expressly set forth as a part of this Stipulation, then this Stipulation shall be voidable at the election of the petitioners.

71. This Stipulation must be approved and "so ordered" by a Justice of the Supreme Court of the State of New York, with venue in Nassau County. If such approval is not obtained, this Stipulation shall be deemed null and void, without force and effect, and the parties shall proceed with this action/proceeding as if this Stipulation was never executed.

SETTLEMENT AGREEMENT

72. In the event that:

- A. all the foregoing conditions precedent are satisfied, and,
- B. the ZBA unconditionally grants the required variances, or grants the same on conditions that the petitioners have elected to accept,

then this action/proceeding is settled on the following terms:

OBLIGATIONS OF THE CITY RESPONDENTS

73. It shall be a violation of this Stipulation if any further action shall be taken by any of the City Respondents or any agency, department, commission, committee, or other body or officer, employee, or agent of the City Respondents to enforce any current zoning or other ordinances or regulations, or any amendments thereto currently under consideration or hereafter to be enacted, which in any manner conflict with or otherwise contravene the terms of this Stipulation and/or the ability of the petitioners to construct the Revised Project in accordance with the terms of this Stipulation and the revised variances granted in furtherance thereof.

74. The City Respondents and every agency, department, commission, committee, and other body and officer, employee, and agent of the City Respondents shall diligently process all applications and perform all inspections and other actions required of them to assure the ability of the petitioners to construct the Revised Project in accordance with the terms of this Stipulation and the revised variances granted in furtherance thereof.

OBLIGATIONS OF THE PETITIONERS

75. Upon satisfaction of the conditions precedent to settlement set forth in paragraphs 67 through 71 hereof, the petitioners shall promptly move in the Supreme Court, Nassau County, for an order pursuant to CPLR 603 and 3217(b) severing the causes of action asserted against the City Respondents from those asserted against the defendant-respondent Xander, discontinuing those causes of action against the City Respondents, without costs or disbursements to either the petitioners or the City Respondents, and for entry of a judgment dismissing the discontinued causes of action accordingly.

76. All construction on the subject property shall conform to the Revised Project.

RELIEF FROM CITY'S OBLIGATION TO INSTALL UNDERGROUND FACILITIES

77. The City Respondents are relieved of any further obligation or responsibility to utilize the \$200,000 previously paid and dedicated to the City by the petitioners for public improvements on Shore Road between Lincoln and Monroe Boulevards.

CONDITIONS SUBSEQUENT

78. Because the petitioners were delayed in their construction of the project by the City Respondents' revocation of their permit for a period of more than ten years, from the November 20, 2003, revocation of their permit until the execution of this Stipulation, and it is not clear

when the financing, development, and sale of new construction high rise condominiums or cooperatives and conventional high rise rental housing will again be feasible for the reasons stated in paragraphs 45 through 55 hereof, it shall be deemed a violation of this Stipulation by the City Respondents, in the same manner as a breach of their obligations undertaken in paragraphs 73 and 74, if within the time period for petitioners to file for building permits, as set forth in paragraphs 64, 65, and 66, any administrative, legislative, executive, judicial, or other authority with jurisdiction promulgates, enacts, or otherwise adopts:

A. any moratorium, court ordered stay, or injunction exceeding one year that prohibits or restricts the construction of the Revised Project in accordance with the terms of this Stipulation;

B. any requirement that prohibits or restricts the construction of the Revised Project in accordance with the terms of this Stipulation, or

C. any requirement that makes the cost of the construction of the Revised Project in accordance with the terms of this Stipulation not economically feasible.

79. In the event that within the four-month time limit set forth in paragraph 69, including any extension thereof by agreement of the attorneys for the parties the ZBA grants the required variances unconditionally or upon conditions that the petitioners accept and do not elect to void this Stipulation, but, if either within or subsequent to said four-month time period the determination granting the same is challenged in a CPLR article 78 proceeding that results in its annulment, in whole or in part, modification, or imposition of new or altered conditions, or if an order or judgment in said proceeding is appealed and results in denial of the required variances, in whole or in part, modification, or new or altered conditions, then this Stipulation shall be voidable at the election of the petitioners. For clarity the intent of the foregoing sentence is to include, *inter alia*, the petitioners' ability to elect to void this Stipulation based upon challenges that result in annulments, in whole or in part, modifications, and/or impositions of new or altered conditions, in orders and/or judgments whether commenced, occurring, rendered, and/or granted during or after said four-month period.

REMEDIES UPON EXERCISE OF PETITIONERS' RIGHT TO ELECT TO VOID AGREEMENT

80. If a right of election to void this Stipulation arises under subparagraph B of paragraph 70 or paragraph 79, the following procedures shall govern its exercise:

A. The City Respondents shall serve upon the attorneys for the petitioners a copy of the decision of the ZBA, the judgment determining the CPLR article 78 proceeding, or the order determining the appeal, together with a written notice requiring the petitioners to exercise their right of election to void this Stipulation under this paragraph or forfeit their right to do so. Said ZBA decision, judgment, or order and the required notice shall be served pursuant to CPLR 2103(b)(1), (2), (3), or (6). The time of the petitioners to exercise their right of election shall not begin to run until service of documents in compliance herewith.

- B. Upon service of the documents set forth in subparagraph A hereof the petitioners shall have 45 days, and such additional time as may be provided by General Construction Law § 25, or CPLR 2103(b) depending on the method of service, within which to exercise their right of election to void this Stipulation by letter addressed to the City's Corporation Counsel and served pursuant to CPLR 2103(b)(1), (2), (3), or (6).
- C. In the event the petitioners timely exercise their right of election in accordance with subparagraph B hereof, this Stipulation shall be null and void. If the right of election is exercised under subparagraph B of paragraph 70, the settlement of this action shall be vacated and the action as against the City Respondents shall proceed as if this Stipulation had never been executed. If the right of election is exercised under paragraph 79, the settlement of this action and the judgment dismissing the petitioners' causes of action against the City Respondents entered pursuant to paragraph 75 hereof shall be vacated, the petitioners' causes of action against the City Respondents shall be reinstated, and the action as against them shall proceed as if this Stipulation had never been executed. If the petitioners fail to timely exercise the right of election, such right of election shall terminate.

REMEDIES AND DAMAGES FOR BREACH OF OBLIGATIONS AND/OR CONDITION SUBSEQUENT

81. If it is judicially determined in any action or proceeding to enforce this Stipulation and/or for damages for a breach thereof that either party has breached any of the obligations undertaken by them in paragraphs 73, 74, 75, and 76, or that there has been a breach of the condition subsequent in paragraph 78, the successful party shall be entitled, in addition to any damages, costs, and expenses, to the reasonable legal fees it has incurred with regard to the subject matter of this action/proceeding since the November 20, 2003, ZBA grant of the Xander petition revoking the petitioners' building permit.

82. If it is judicially determined that the City Respondents have breached any of the obligations undertaken by them in paragraphs 73 or 74:

A. the settlement of this action and the judgment dismissing the petitioners' causes of action against the City Respondents entered pursuant to paragraph 75 hereof shall be vacated, and the petitioners' causes of action against the City Respondents shall be reinstated;

B. the petitioners shall be granted the relief that they seek on the first, second, and third causes of action,

C. the petitioners shall be granted the declaratory relief that they seek on the fourth cause of action,

D. the petitioners shall be granted summary judgment on the issue of liability on the fifth and sixth causes of action against the City Respondents, both collectively and individually; and

E. the parties shall proceed to a trial as to the damages to be awarded on the fifth and sixth causes of action, and, thereafter, to the entry of judgment against the City Respondents accordingly.

MISCELLANEOUS

83. In any action and/or proceeding challenging this Stipulation and/or the variances that may hereafter be granted pursuant to this Stipulation, the parties agree to act in good faith to work together to defend such action and/or proceeding.
84. This Stipulation has been reviewed and approved by each of the parties and, by signing their names hereto, the attorneys for the parties affirm that their respective clients stipulate to and agree with each of the factual statements made in paragraphs 1 through 55 of this Stipulation.
85. By signing their names hereto, the attorneys for the parties affirm that they have executed this Stipulation pursuant to the authorization of their respective clients and that their respective clients have taken all actions as required by law to provide that authorization.
86. This Stipulation has been reviewed and approved by the attorneys for each of the parties and, in the construction and interpretation thereof, no presumptions shall be made against any of the parties based upon who drafted this Stipulation.
87. As with variances, the benefits of this Stipulation shall run with the land and inure to the benefit of the petitioners, their grantees, successors, and assigns.
88. This Stipulation is entered into by the City Respondents without any admission of liability.
89. The petitioners specifically reserve any and all rights and claims they may have against respondent-defendant Xander Corp. in this or any other action or proceeding.
90. This Stipulation may be signed in counterparts which, when taken together, shall be deemed to be one and the same document. This Stipulation may be executed and delivered via facsimile, or via e-mail attachment in .pdf format, and such facsimile or .pdf format copies of signatures to this document shall have the same force and effect as original ink signatures.
91. Either the petitioners or the City Respondents may submit this Stipulation for approval to a Justice of the Supreme Court of the State of New York, with venue in Nassau County.
92. During the period required to satisfy the conditions precedent to settlement set forth above, all proceedings in this action/proceeding shall be stayed. In the event of a failure to satisfy any of the conditions precedent, either the petitioners or the City Respondents may, by a notice to the court and the other party or parties of not less than 30 days, specifying the particulars of the failure of the condition or conditions precedent in question, require that prosecution of the action/proceeding be resumed.
93. Upon the approval of this Stipulation by a Justice of the Supreme Court in accordance with paragraph 71 hereof, the petitioners' presently pending motion for leave to enter a judgment

against the City Respondents upon their default in answering shall be withdrawn, without prejudice to re-noticing that motion in the event that the prosecution of the action/proceeding is resumed pursuant to subparagraph C of paragraph 80 or paragraph 92 hereof. The parties agree that for purposes of computing compliance with the one-year period of limitation set forth in CPLR 3215(c) the date upon which any such re-noticed motion is made shall be deemed to be October 19, 2012, the date upon which the original motion was made, and that during the period from the date of the approval of this Stipulation to the date, if any, that the prosecution of the action/proceeding is resumed the said one-year period of limitation shall be tolled.

94. This Stipulation of Settlement has been negotiated with the able assistance of the Hon. Stephen G. Crane, a mediator with JAMS. Judge Crane (Ret) previously served as a Justice of the Appellate Division (Second Department) and as a Justice in the Commercial Division of the NYS Supreme Court (New York County), as well as the Administrative Judge, Civil Branch, of the Supreme Court, New York County. Judge Crane conducted extensive in person mediation sessions with all parties hereto. His extensive efforts and valuable insight enabled the parties to reach this compromise and settlement.

2. Except as set forth herein, the Stipulation shall remain in full force and effect.

Dated: New York, New York
March __, 2014



Scott E. Mollen
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New York, NY 10016
(212) 592-1400

COREY E. KLEIN, ESQ.
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The City of Long Beach
Attorney for Respondents-Defendants
Zoning Board of Appeals of The City
of Long Beach, Rocco Morelli,
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(516) 431-1000

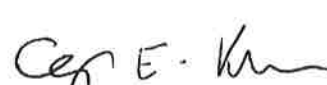
against the City Respondents upon their default in answering shall be withdrawn, without prejudice to re-noticing that motion in the event that the prosecution of the action/proceeding is resumed pursuant to subparagraph C of paragraph 80 or paragraph 92 hereof. The parties agree that for purposes of computing compliance with the one-year period of limitation set forth in CPLR 3215(c) the date upon which any such re-noticed motion is made shall be deemed to be October 19, 2012, the date upon which the original motion was made, and that during the period from the date of the approval of this Stipulation to the date, if any, that the prosecution of the action/proceeding is resumed the said one-year period of limitation shall be tolled.

94. This Stipulation of Settlement has been negotiated with the able assistance of the Hon. Stephen G. Crane, a mediator with JAMS. Judge Crane (Ret) previously served as a Justice of the Appellate Division (Second Department) and as a Justice in the Commercial Division of the NYS Supreme Court (New York County), as well as the Administrative Judge, Civil Branch, of the Supreme Court, New York County. Judge Crane conducted extensive in person mediation sessions with all parties hereto. His extensive efforts and valuable insight enabled the parties to reach this compromise and settlement.

2. Except as set forth herein, the Stipulation shall remain in full force and effect.

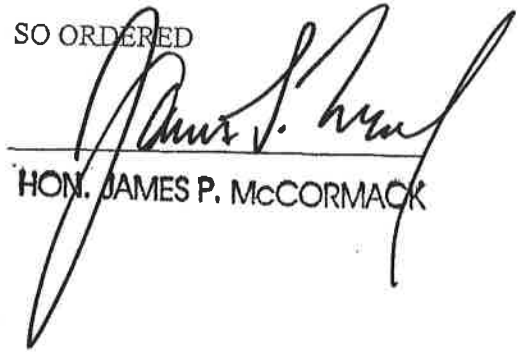
Dated: New York, New York
March 24, 2014



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Zoning Board of Appeals of The City
of Long Beach, Rocco Morelli,
Lenny Torres, Marcel Weber, Michael Fina,
Stuart Banschick, Lorraine Divone,
Michael Leonetti, the City of Long Beach,
and Scott A. Kemins, as Commissioner
of the Department of Buildings of the
City of Long Beach
Office and Post Office
City Hall
One West Chester Street
Long Beach, NY 11561
(516) 431-1000

SO ORDERED

A handwritten signature in black ink, appearing to read "James P. McCormack", is written over a horizontal line.

HON. JAMES P. MCCORMACK

<i>Index No. 001138-04</i>
<i>Supreme Court of the State of New York County of Nassau</i>
SINCLAIR HABERMAN and BELAIR BUILDING, LLC,, Petitioners-Plaintiffs, -against-
ZONING BOARD OF APPEALS OF CITY OF LONG BEACH, et al., Respondents-Defendants.
<i>STIPULATION AMENDING STIPULATION OF SETTLEMENT</i>
Herrick, Feinstein LLP Attorneys for Petitioners-Plaintiffs Two Park Avenue New York, N.Y. 10016-9301 (212) 592-1400