



IN THE MATTER OF an application submitted by Toll Brooklyn LP pursuant to Sections 197-c and 201 of the New York City Charter for the grant of a special permit pursuant to Section 74-743(a)(2) of the Zoning Resolution to modify the height and setback regulations of Section 123-66 (Height and Setback Regulations), the rear yard regulations of Section 23-47 (Minimum Required Rear Yards), and the inner court regulations of Section 23-852 (Inner court recesses), in connection with a proposed mixed use development on property located at 363-365 Bond Street, (Block 452, Lots 1, 5, 15, 19, and Block 458, Lot 1), in an M1-4/R7-2 (MX-11) district within a General Large-Scale Development, Community District 6, Brooklyn.

This application for a special permit pursuant to Section 74-74 “General Large Scale Development” and to Section 74-743 “Special Provisions for Bulk Modification,” was filed by Toll Brooklyn LP on July 28, 2008, to facilitate the development of a mixed-use project totaling approximately 525,000 square feet along Bond Street between Carroll Street and Second Street on the western edge of the Gowanus Canal in Brooklyn Community District 6.

RELATED ACTIONS

In addition to the proposed zoning special permit (C 090048 ZSK), which is the subject of this report, implementation of the proposed project also requires action by the City Planning Commission on the following applications, which are being considered concurrently with this application:

C 090047 ZMK Amendment to the Zoning Map

N 090049 ZRK Amendment to the Zoning Resolution

BACKGROUND

The applicant, Toll Brooklyn LP, proposes an amendment to the Zoning Map, zoning text amendments and a Special Permit to facilitate a mixed-use development on two blocks comprising approximately three and a half acres adjacent to the western edge of the Gowanus Canal, a 1.5 mile manmade waterway in Brooklyn Community District 6.

The rezoning area encompasses the entirety of Blocks 452 and 458, which contain the applicant's property as well as two City-owned properties. In addition to the lots comprised by the project site, two City-owned lots on Block 452 are proposed to be rezoned, but are not included within the Project Site. One of the lots - 347 Bond Street - is improved with a one-story New York City Fire Department Emergency Medical Service Station. The other lot, 400 Carroll Street contains the Carroll Street Bridge operator's house and the open land that are used for the operation of the landmarked Carroll Street Bridge, which spans the Canal at this location.

The proposed actions would facilitate a development that would contain approximately 525,000 square feet of zoning floor area and consist predominantly of residential buildings providing 447 new residential units, 130 of which are proposed to be affordable under the City's Inclusionary Housing program, which would be mapped at this location. The development would also include approximately 2,000 square feet each for a commercial and a community facility use. In addition, the development would provide over half an acre of publicly accessible open space at the canal's edge and 268 parking spaces.

The Department of City Planning has been engaged in a community planning process for the Gowanus Canal Corridor over the past year and a half, leading to the release of a planning framework in July 2007. The applicant has worked to incorporate the planning parameters of this framework into this proposal. However, the planning of this project predates the City's planning efforts in the area and is independent of any future action that the City may take.

Project Site

The entirety of Blocks 452 and 458 would be rezoned under the action; the project site itself comprises Lots 1 and 15 of Block 452 ("Northern Block") and Lot 1 of Block 458 ("Southern Block"). The project site is bounded by Carroll Street to the north, the Gowanus Canal to the east, Second Street to the south and Bond Street to the west. First Street separates the two blocks from one another. The project site is approximately

145,980 square feet in total lot area: 56,376 square feet on the Northern Block (Block 452) bounded by the canal to the east, Bond Street to the west, Carroll Street to the north and First Street to the south; and 89,604 square feet on the Southern Block (Block 458) bounded by the canal to the east, Bond Street to the west, First Street to the north and Second Street to the south. Carroll, First and Second Streets are all narrow streets mapped to a width of 60 feet. Bond Street is a narrow street mapped to a width of 50 feet. All zoning lots comprising the project site occupy frontage on a mapped street.

The southern block contains a low-rise industrial building that occupies the block's entire Bond Street frontage and a vacant lot used for truck parking and storage adjacent to the canal. The northern block contains one and two-story light industrial buildings. In addition to the project site, the northern block also includes properties that are being rezoned but which are not part of the project site; one lot contains the one-story New York City Fire Department Emergency Medical Service Station, and the other lot, contains the Carroll Street Bridge operator's house and the open land that are used for the operation of the landmarked Carroll Street Bridge, which spans the Canal at this location. Both blocks are currently zoned M2-1, a manufacturing district that allows a maximum 2.0 FAR. Residential use is not permitted in an M2-1 district.

Area Description

Immediately west of the project site across Bond Street is a mix of existing three and four story townhomes and a six story nursing home. To the east and west of the site are the primarily residential neighborhoods of Park Slope and Carroll Gardens, respectively. The commercial corridors of 4th Avenue and Smith Street run are located there. To the south, beyond the southern boundary of Community District 6, are the Hamilton Avenue Bridge and the Gowanus Expressway and heavy industrial areas that flank the Gowanus Creek.

In recent decades, the nature of activity along the canal has changed. Portions of the land along the canal to the south of Third Street are more industrial in character. However,

manufacturing and industrial uses are no longer present in other locations, leaving substantial parcels of vacant and underutilized land. Other areas near the canal contain a mix of uses, including housing and community facilities. Commercial and light industrial activities are scattered through much of the area, with the greatest concentration in the area south of Third Street.

PROPOSED DEVELOPMENT

The applicant is proposing to develop portions of the northern block under the applicant's control and the entirety of the southern block with 447 new residential units (including 130 affordable housing units), 268 accessory parking spaces (198 spaces are required by zoning) local retail and community facility space, and approximately half an acre of publicly accessible open space. The project would contain a total of 525,309 square feet of floor area, representing a total FAR of 3.6 which consists of a base maximum FAR of 2.7 plus an additional .9 FAR generated by the Inclusionary Housing program which would be made applicable on these two blocks as part of the related zoning text amendment (N 090049 ZRK). The northern block would contain 202,744 square feet of floor area, with 322,565 square feet located on the southern block.

The project has been designed to reflect the mixture of building form and scale of existing residential and industrial structures that characterize the canal area. The lowest building heights would be on the western portion of the project site, fronting on Bond Street and closer to the existing low-scale Carroll Gardens neighborhood; the higher building segments would be placed deeper into the project site and wrapped by mid-rise residential building bases. Each block would contain three separate residential buildings that would share enclosed at-grade parking and private interior courtyard open space. The project has been programmed to provide a lively and active streetscape. All parking would be located within the project and wrapped by active uses on all frontages: residences and lobbies, residential amenities and small retail and community facility spaces on the southern block. Parking would be provided on each block with two-way, 24 foot wide curb cuts about halfway into the block providing entrances/exits on both sides

of First Street. The northern block would contain 96 parking spaces, and 172 would be provided on the southern block.

The architectural treatment and massing of the development would be similar on each block: A five-story plus penthouse multifamily building providing the inclusionary housing units on each block would front on Bond Street and rise to its maximum height after a 15 foot setback. In the midblocks fronting on First Street on both blocks and on Second Street on the southern block will be a total of 13 four-story market-rate townhomes, each of which will have an individual stoop-like entrance to the street. To the east of the townhomes will be larger multifamily structures with multiple building heights within each block. On the northern block, the building closest to the townhomes would be approximately 65 feet, rising to varied heights of 75 feet, 115 feet and ultimately 125 feet closest to the canal's edge. On the southern block, the multifamily buildings closest to the eastern side of the townhomes would reach 55 feet, stepping up in height to 65 feet, 85 feet, and a segment reaching 125 feet closest to the canal's edge. A 2,000 square foot retail space would front onto First Street on the northern side of Block 458, and a 2,000 square foot community facility space on the same block would front on Second Street.

As most of the project site is mapped within a FEMA 100-year flood hazard zone, all uses, including parking, would be located at or primarily above base flood elevation in compliance with state and federal flood regulations.

Open Space The development includes private open space for the residents of the project in two central courtyards in the center of each block; the design of this open space has not yet been determined. In addition, the development includes approximately 23,165 square feet (.5 acre) of publicly accessible open space along the Gowanus Canal. The landscaped treatment of the publicly accessible open space would extend across the street ends of both First and Second Streets, providing for a seamless pedestrian experience of almost 500 linear feet. There would be approximately 33,380 square feet (approx. .75 acre) of publicly accessible open space on the applicant's property.

The Zoning Resolution's waterfront zoning regulations do not currently apply to the Gowanus Canal; however, the design of the publicly accessible space attempts to satisfy the waterfront zoning's design requirements. The proposed open space along the canal would be at least 40 feet in depth from the bulkhead at all locations, and would provide three locations at which the pedestrians will be able to access the water's edge. The design of the open space will be informal in nature, with curved paths flanked by planting beds and a variety of wood and metal seating types. Access will be provided at the foot of First Street to a private dock, which is not part of this project. The open space will be constructed, landscaped and maintained by the project owners.

REQUESTED ACTIONS

In order to facilitate the proposed development, the following actions are required:

Zoning Map Amendment (C 090047 ZMK)

The applicant is requesting a rezoning of the entirety of Blocks 452 and 458 from an M2-1 zoning district to an M1-4/R7-2 district and to map an MX-11 Special Mixed Use District on both blocks.

M2-1 districts are intended for mid-intensity industrial uses, and allow a maximum FAR of 2.0 FAR. The M2-1 district permits a range of commercial and manufacturing uses of Use Groups 6 through 14, and Use Groups 16 through 18, with limitations on the types of retail and service establishments permitted. Residential uses are not permitted.

The proposed M1-4/R7-2 district allows residential, commercial, manufacturing and community facility uses. The maximum FAR for permitted commercial and manufacturing uses in an M1-4 district is 2.0. The maximum FAR allowed in an R7-2 district is 3.44 for residential use and 6.5 for community facility use. With the related zoning text amendment (N 090049 ZRK), making the Inclusionary Housing Program applicable to the rezoning area the base residential FAR would be 2.7, with the potential of increasing to 3.6 FAR when including at least 20 percent of the residential floor area

be available as housing affordable to low-income households. The maximum building height of an M1-4/R7-2 district is 135 feet after a setback from the maximum base height of 60 feet.

Special Permit for Bulk Modifications (C 090048 ZSK)

The applicant is requesting a special permit pursuant to Section 74-74 to allow the modification of (a) height and setback regulations, (b) rear yards, and (c) inner court recesses within a general large scale development (GLSD).

(a) Height and Setback: The proposed Special Mixed Use District [M1-4/R7-2 (MX-11)] has a maximum base height of 60 feet and maximum building height of 135 feet. However, the base heights of the proposed buildings of both Block 452 and Block 458 fronting on First Street and on Second Street are proposed to be 65 feet. The applicant is requesting this waiver because of the constraints imposed by the site's location in the flood plain, and to provide an active streetscape with generous floor-to-ceiling heights on the first floor.

(b) Rear Yards: The project does not provide the required rear yards or rear yard equivalents at the eastern portion of the northern block (Block 452) due to the unusual lot configuration of the property.

(c) Inner Court Recesses: The inner court regulations of Section 23-852 require that the minimum width-to-depth ratio of an inner court recess must be 2:1. The recesses proposed within the courtyards of the two multifamily buildings on both blocks of the project are proposed to be five feet in width and depth in order to maximize the area of landscaped passive recreation area within each courtyard to provide a superior residential amenity for the residents of the project.

In order to grant the special permit, the CPC must make findings related to site planning, open space and the relationship of the development to the surrounding area.

Zoning Text Amendment (N 090049 ZRK)

The applicant is proposing a zoning text amendment to; (a) establish a new Special Mixed Use District, MX-11; (b) make the Inclusionary Housing program applicable to the rezoning area, and (c) amend height and setback regulations for developments built pursuant to Inclusionary Housing regulations within Special Mixed Use Districts

Existing regulations require that developments in Special Mixed Use Districts with non-contextual underlying residential zoning districts which participate in the Inclusionary Housing program must comply with the underlying residential district height and setback regulations, which have a lower maximum building height than the Special Mixed Use District regulations. The proposed text amendment would allow developments that use the Inclusionary Housing program to use the underlying MX district height and setback regulations. The proposed text amendment would allow more flexibility for developments using the Inclusionary Housing program in MX districts.

ENVIRONMENTAL REVIEW

This application (C 090048 ZSK), in conjunction with the applications for the related actions (C 090047 ZMK, N 090049 ZRK) were reviewed pursuant to the New York State Environmental Quality Review Act (SEQRA), and the SEQRA regulations set forth in Volume 6 of the New York Code of Rules and Regulations, Section 617.00 et seq. and the New York City Environmental Quality Review (CEQR) Rules of Procedure of 1991 and Executive Order No. 91 of 1977. The lead agency is the City Planning Commission. The designated CEQR number is 08DCP033K.

It was determined that the proposed actions may have a significant effect on the environment. A Positive Declaration was issued on February 4, 2008, and distributed, published and filed. A revised Positive Declaration was issued on August 29, 2008. Together with the Positive Declaration, a Draft Scope of Work for the Draft Environmental Impact Statement (DEIS) was issued on February 4, 2008. A public

scoping meeting was held on the Draft Scope of Work on March 13, 2008. A Final Scope of Work, reflecting the comments made during the scoping, was issued on September 3, 2008.

A Notice of Completion for the DEIS was issued on September 5, 2008, and on January 7, 2009, a public hearing was held on the DEIS pursuant to SEQRA and other relevant statutes. A Final Environmental Impact Statement (FEIS) was completed and a Notice of Completion for the FEIS was issued on February 6, 2009.

The FEIS identified the following significant impacts and proposed the following mitigation measures:

SIGNIFICANT ADVERSE IMPACTS AND PROPOSED MITIGATION

HISTORIC RESOURCES

The proposed project includes the construction of a new steel sheet pile bulkhead along the eastern boundary of the project site either in place of or outside of the existing, archaeologically sensitive bulkhead. As currently proposed, an anchoring system consisting of “deadmen” and steel tie rods would be installed, and would extend up to 40 feet landward of the bulkhead. The tie rods would run from the new sheeting to the deadmen approximately every eight feet for the length of the bulkhead. The installation of the tie rods would require that trenches between the bulkhead and the deadmen be excavated. The installation of the tie rods could require removal of portions of the existing cribwork sufficient to allow the steel tie rods to pass through the area. The proposed bulkhead rehabilitation design described above may require modification based on the requirements of DEC and/or ACOE.

Two new storm water outfalls would also be constructed through the existing bulkhead, one at the end of 1st Street and the other at the end of 2nd Street. The proposed bulkhead work and storm water outfall installation described above would adversely impact portions of the existing bulkhead at the project site.

To mitigate the significant adverse impact on the existing bulkhead under CEQR, an archaeological field investigation would be undertaken in coordination with the LPC that would document the extent and significant characteristics of the portion of the Gowanus Canal bulkhead on the project site. The goals of the investigation would be to determine the length and width of a single crib, document and/or sample fill contained within the timber cribwork, and to evaluate and document the bulkhead’s construction, including the joinery between adjacent cribs. This field investigation would occur either in advance of or in concert with the bulkhead reconstruction and storm water outfall installation. An Archaeological Testing Protocol in compliance with the *LPC’s Guidelines for*

Archaeological Work in New York City (2002) would be prepared and implemented in coordination with LPC.

AIR QUALITY

An analysis was performed to determine if local odor conditions near the project site could impact the proposed project. Based on real-time sampling of odors at the project site, it was determined that at times, the concentration of hydrogen sulfide (H₂S)—an indicator of potential odors—was above the 10 ppb nuisance-based threshold. In accordance with the *CEQR Technical Manual*, these levels would constitute a potential significant odor impact that could occur with respect to both future open space users and residents at the project site.

Given that local waterway and infrastructure is assumed to be the greatest contributor of H₂S, to the ambient condition, this impact could potentially be reduced through the implementation of the City-proposed infrastructure projects for the area by 2013 (described above) which include:

- *Rehabilitation of the Gowanus Canal Flushing Tunnel*—This rehabilitation will increase the capacity for water intake from the East River to the canal from 154 mgd to 215 mgd. This would improve water quality and dissolved oxygen levels, enhance flow through and circulation, and reduce stagnation and organic matter concentrations in the canal waters which is one potential source of H₂S.
- *Reconstruction of the Gowanus Pump Station*—This reconstruction would result in the expansion of the capacity of the Gowanus Pump Station through the installation of four new pumps and the redirection of sewage to a force main that currently runs along the inside of the Flushing Tunnel. Because the current force main is not operational, that flow is diverted to the Bond Street sewer, which could be another source of H₂S through manholes and vents. Moreover, relieving the capacity of the Bond Street combined sewer reduced the potential for CSO discharges into the canal (the reconstruction of the Pump Station and replacement of the force main is projected to reduce the annual volume of CSO discharges to the canal by 34 percent) which in-turn reduces another potential source of H₂S.
- *Dredging*—Dredging the upper 750 feet of the Gowanus Canal will eliminate exposed sediment mounds which has previously been identified as another potential source of H₂S in the area.

As a result of the above-described proposed infrastructure improvements, it is possible that the identified odor impacts could potentially be reduced by 2013 (or upon completion of dredging). Since it is anticipated that these improvements would be implemented after the proposed project's build year, the odor impacts would be considered unmitigated unavoidable adverse impacts until the completion of the improvements. To the extent that none of these measures are implemented or in the event that such measures are ineffective, H₂S levels at the site could remain above 10ppb for an hourly average, thereby constituting an unmitigated unavoidable adverse impact of the proposed project.

TRAFFIC

Two of the intersections in the study area would experience significant adverse traffic impacts as a result of the proposed project: 1) the eastbound approach of Carroll Street at 3rd Avenue during the AM and PM peak hours; and, 2) the eastbound approach of Carroll Street at 4th Avenue during the AM and PM peak hours.

3RD AVENUE AND CARROLL STREET

The impact at the eastbound approach of Carroll Street at 3rd Avenue during the weekday AM peak hour could be mitigated by prohibiting the curbside parking along the south side of the eastbound approach for approximately 150 feet during the AM peak hour. Currently, the curbside parking on the south side of Carroll Street is regulated by alternate side parking (street cleaning) regulations. With the proposed mitigation measure in place, no vehicular parking/standing would be allowed during the weekday AM peak hour (displacing approximately 7 parking spaces at the intersection approach) to provide an additional travel lane. The displaced parking spaces would increase the on-street parking utilization in the study area to approximately 98 percent during the early morning hours.

The impact at the eastbound approach of Carroll Street at 3rd Avenue during the weekday PM peak hour could be mitigated by shifting 3 seconds of green time from the northbound/southbound phase to the eastbound phase.

4TH AVENUE AND CARROLL STREET

The impact at the eastbound approach of Carroll Street at 4th Avenue during the weekday AM peak hour could be mitigated by shifting 4 seconds of green time from the northbound/southbound phase to the eastbound phase.

The impact at the eastbound approach of Carroll Street at 4th Avenue during the weekday PM peak hour could be mitigated by shifting 2 seconds of green time from the northbound/southbound phase to the eastbound phase.

It should be noted that all of the mitigation measures discussed above are subject to review and approval by NYCDOT.

Hazardous Materials

It should also be noted that the owners will implement the Department of Environmental Protection (DEP) approved Remediation Action Plan and Construction Health and Safety Plan (RAP/CHASP) in accordance with a DEP-approved restrictive declaration for the project site, and any necessary remediation will be undertaken in consultation with DEP. The restrictive declaration will ensure that significant adverse impacts with relation to hazardous materials will be avoided.

UNIFORM LAND USE REVIEW

This application, (C 090048 ZSK), in conjunction with the application for a related action

(C 090047 ZMK) was certified as complete by the Department of City Planning on September 8, 2008 and was duly referred to Brooklyn Community Board 6 and the Brooklyn Borough President in accordance with Title 62 of the Rules of the City of New York, Section 2-02(b) along with the application for the related non-ULURP application (N 090049 ZRK) which was referred for information and review.

Community Board Public Hearing

Community Board 6 held a public hearing on this application on September 25, 2008, and on November 12, 2008, by a vote of 23 to 10 with five abstentions, adopted a resolution recommending approval of the application with the following conditions:

- 1) That the restrictive declaration for the subject properties clearly outline and detail the land uses and building designs;
- 2) That the amount of affordable housing for this project be at least 30% of the total residential units constructed;
- 3) That this project be constructed using union labor;
- 4) That the developer be encouraged to reuse storm water captured at the project area on-site as part of a gray water system;
- 5) That the Community Board's approval of this project not be considered a precedent for other projects in the Gowanus area, which should be reviewed on a case-by-case basis and considered individually for their merits.

Borough President Recommendation

This application was considered by the Borough President, who issued a recommendation approving the application on December 17, 2008 with the following conditions:

- 1) That the building height is not to exceed eight stories north of First Street.
- 2) That the achievement of affordable housing be enhanced by sequencing construction so that development on the south side of First Street – containing approximately 2/3 of the proposed affordable housing component – be chosen by Toll to be the beneficiary of up to three application cycles for State funding assistance based on the written commitment dated December 17, 2008, that supplements the December 15 commitment; and, that the affordable housing on both blocks also includes three-bedroom units.
- 3) That retail and commercial gallery/artisans along the canal is provided within the proposed building.

City Planning Commission Public Hearing

On December 17, 2008 (Calendar No. 8) the City Planning Commission scheduled January 7, 2009, for a public hearing on this application (C 090048 ZSK). The hearing

was duly held on January 7, 2009 (Calendar No. 37) in conjunction with the hearings on for the related applications (C 090047 ZMK, N 090049 ZRK). There were 19 speakers in favor of the application and six in opposition.

Speakers in favor of the project included the applicant and his representatives and consultants, the district manager of Community Board 6, a representative for the Councilmember for the 39th District, and local residents.

The applicant outlined the elements of the project that would be provided, including the provision of open space at the Canal's edge, at-grade parking in excess of the zoning requirement, community facility space and infrastructure upgrades to alleviate problems with the combined sewer system. The applicant also discussed the affordable housing proposal for the project site, which would provide 30% of the units as permanently affordable rental units available to families making between 40-60% of Area Median Income.

The second speaker for the applicant, the project architect, described the project's intention of creating a connection from the adjacent Carroll Gardens neighborhood to the proposed park at the Canal's edge. The architect also discussed the proposed building heights, with the low apartment buildings along Bond Street followed by townhomes further down the block which are informed by the rhythm and texture of the Carroll Gardens neighborhood. He also discussed the project's proposed elevated base plane, which would raise the project by one foot over the area floodplain.

A member of the project team described that lowering the height as proposed by the Borough President and local residents would not achieve the project's major architectural design goals including the elimination of the townhouse component, the necessity for longer corridors which could increase the cost of operations and construction, and the reduction of parking spaces

The landscape architect described the design of the canal open space and street ends, which would function as both turnarounds as required by the fire department and a public entrance to the canal open space. He further described the user's experience through the canal esplanade, which would be designed to move through the site's varied landscape and later connect to other canal open spaces as they may develop in the future.

The environmental consultant to the project outlined the impacts and mitigation identified in the Environmental Impact Statement.

The representative of the applicant's attorney detailed the discretionary actions being pursued by the applicant to effectuate the proposed project.

A representative for the Councilmember from the 39th Council district spoke in support of the project and requested that the environmental review consider the combined impact of this project, the Department's proposed Gowanus rezoning, and HPD's proposal for the redevelopment of the Public Place site further south along the Gowanus Canal.

The District Manager from Community Board 6 read the Community Board's recommendation to approve the proposal with modifications.

Other speakers in support included local residents and people working in the neighborhood who testified that there is a demonstrated need in the area for the affordable housing which the applicant is proposing. Speakers in support also praised the project for scaling its height down to match the existing context of the adjacent low-scale Carroll Gardens neighborhood and for including limited portions of higher building components to distribute the bulk throughout the site instead of fitting the same amount of bulk into lower buildings which would not contribute to the community. Several speakers in support noted the applicant's proposal to use responsible contractors during construction as another benefit, and praised the applicant for reaching out to the community for feedback and input during the process. Speakers in support also

applauded the applicant for the proposed clean-up of a portion of land on the Gowanus Canal and for its proposal to provide a public open space amenity at the waterfront

Speakers in opposition included several members of the Gowanus and nearby Carroll Gardens neighborhoods. Some speakers in opposition voiced a concern that the Canal must first be cleaned of pollutants before residential development could occur there. A concern was also raised about the possible increase in flooding on neighborhood blocks as a result of the proposed project. Several speakers shared reservations that allowing the applicant to move ahead with a perceived 'spot zoning' proceeding in advance of an area-wide rezoning study for the larger Gowanus area was premature, and that the developer was taking a lead on how the entire area would be developed.

Two speakers presented an alternative proposal they had developed in which the height on both blocks of the proposed development would be limited to eight stories instead of the 12 stories as proposed. While these speakers stated their support for many of the proposed project's goals, including the provision of waterfront open space and affordable housing, they stated their concern that the applicant's proposed building heights would be detrimental to the quality of life in the adjacent Carroll Gardens neighborhood and would substantially alter the historic views from the nearby three-block Carroll Gardens historic district. They also discussed the implications that the 12 story portions of the buildings would have on reducing direct sunlight to the proposed waterfront open space.

Several speakers voiced their agreement with the alternative proposal of limiting the building heights of the proposed project to eight stories on both blocks, citing concerns about the impacts of 12 story buildings on the predominantly low scale buildings of the adjacent Carroll Gardens neighborhood.

There were no other speakers, and the hearing was closed.

WATERFRONT REVITALIZATION PROGRAM CONSISTENCY

This application was reviewed by the Department of City Planning for consistency with the policies of the New York City Waterfront Revitalization Program (WRP), as amended, approved by the New York City Council on October 13, 1999 and by the New York State Department of State on May 28, 2002, pursuant to the New York State Waterfront Revitalization and Coastal Resources Act of 1981 (New York State Executive Law, Section 910 et. seq.) The designated WRP number is 08-014.

This action was determined to be consistent with the policies of the New York City Waterfront Revitalization Program.

CONSIDERATION

The Commission believes that the grant of this special permit, in conjunction with the related applications for the amendments of the Zoning Map (C 090047 ZMK) and the Zoning Resolution (N 090049 ZRK), is appropriate.

The proposed actions would facilitate the development of an approximately 525,000 square foot mixed use building on two largely underutilized blocks on the western side of the Gowanus Canal. The buildings would include 447 residential units, including 130 affordable units through the Zoning Resolution Inclusionary Housing program, and would also provide 2,000 square feet each of community facility and local retail space. The project would include parking in excess of the Zoning Resolution requirements, and would provide over half an acre of publicly-accessible open space along the edge of the Gowanus Canal in an area currently lacking in open space amenities.

The Commission notes that the Department of City Planning has formulated a planning framework for the Gowanus Canal Corridor, developed in close collaboration with the local community, and that the applicant has worked to incorporate the planning parameters included in the framework into this proposal. At the same time, this project predates the City's planning efforts for the overall area and is independent of any future action that the City may take.

The Commission notes that the applicant has adhered to the design and programmatic goals outlined in the Department's Gowanus Canal Corridor Framework. Furthermore, the Commission believes that the project successfully deals with difficult site constraints while providing a well designed site plan with over half an acre of publicly-accessible open space at the canal's edge, and approximately 130 units as affordable housing.

Special Permit to modify bulk regulations (C 090048 ZSK)

The Commission believes that the requests to waive the height and setback, rear yard and inner court recesses are appropriate.

The Commission believes that the proposal results in a better site plan and relationship among buildings, open space and the surrounding community building design that would not be possible without such modifications. The proposed building heights create an appropriate transition with the adjacent neighborhood to the west. The Commission believes that the plan responds well to the unique conditions of the site including irregularly shaped parcels caused by the bend in the canal south of Carroll Street, the adjacent Carroll Street Bridge on the northern block, and state and federal requirements governing floodproofing for the site. The Commission further notes that the plan includes transparency and active uses at the street level on all sides of the buildings, introducing a lively pedestrian experience to these formerly industrial blocks.

The Commission believes that design of the buildings with 12 story elements which provide setbacks above 85 feet allows the project to provide more interesting and varied building forms at more modest building heights throughout the site, while allowing for transition along Bond Street to the adjacent low-scale neighborhood. The adjacent neighborhood contains other individual structures taller than the immediate townhouse buildings, including St. Mary's Star of the Sea, the Wyckoff and Gowanus Houses, 505 Court Street, and the Smith-9th Street elevated subway station.

The Commission notes that requested waiver of the court regulations maximizes the area of landscaped passive recreation area within each courtyard to provide a superior amenity for the residents of the project. The Commission believes that the requested rear yard waivers facilitate the provision of the publicly-accessible open space as part of the project.

Zoning Text Amendment (N 090049 ZRK)

The proposed zoning text change would allow the proposed development to utilize the Inclusionary Housing provisions of the Zoning Resolution, thereby providing approximately 130 units of on-site affordable housing. The amendments to the height and setback regulations for developments utilizing the Inclusionary Housing regulations would provide for consistency and flexibility in the regulations, thereby facilitating development of affordable units.

Zoning Map Amendment (C 090047 ZMK)

The Commission believes that the requested rezoning, which allows residential development not permitted by the current zoning is appropriate. The Commission notes that the Special Mixed Use District was designed to encourage investments in mixed residential and industrial neighborhoods, create new opportunities for mixed-use communities and recognize and enhance the vitality and character of existing and potential mixed-use neighborhoods. The Commission believes the proposed rezoning would contribute to the vitality of the emerging Gowanus neighborhood, help to enliven the waterfront with a mix of uses, and improve the pedestrian experience in this area.

The Commission believes the proposed M1-4/R7-2 (MX-11) district establishes appropriate densities for the subject blocks. The proposed M1-4/R7-2 would allow a maximum commercial and manufacturing FAR of 2.0 and a base residential and community facility FAR of 2.7, rising to a maximum FAR 3.6 with a bonus for the

provision of affordable units pursuant to the City's Inclusionary Housing program. The Commission further notes that the proposed rezoning is consistent with the planning framework proposed by the Department of City Planning as part of its Gowanus Study.

Although waterfront zoning provisions do not currently apply to the Gowanus Canal because portions of the Canal are less than 100 feet in width, the Commission notes that the project includes over half an acre of waterfront public access at the Canal's edge. The Commission notes that the design of the open space would allow for the future connection of the public space to any future open spaces along the Gowanus Canal.

The Commission notes that a condition of its approval is that the applicant record a restrictive declaration against the property that would, among other things, require any development of the site to be in accordance with the approved plans. This includes the provision and maintenance of the publicly accessible open space. This responds to one of the conditions of Community Board 6.

The Commission also recognizes the condition of Community Board 6, relating to affordable housing. The Commission notes that the applicant's proposal is consistent with the city-wide zoning regulations for Inclusionary Housing and is providing 20% of the project's floor area for on-site affordable housing. The Commission notes that while the conditions of union labor and the reuse of storm water are out of its purview, the applicant has stated its intention to utilize responsible contractors where possible.

Regarding the Borough President recommendation that height not exceed eight stories on the northern block, as well as the testimony at the Commission public hearing to restrict height on both blocks to eight stories, the Commission believes that such a restriction would result in a monotonous building form without any ability to vary the building heights and reflect the adjacent neighborhood scale. Furthermore, the Commission notes that including limited building portions above 85 feet allows for varied building forms at more modest building heights throughout the site.

The Commission notes the Borough President's condition to include commercial space along the Canal but believes that the location as proposed by the applicant is appropriate and provides an important pedestrian element along First and Second Streets. The Commission further notes that the Borough President's condition related to project phasing and funding for affordable housing is outside of the Commission's purview.

FINDINGS

The City Planning Commission hereby makes the following findings pursuant to Section 74-743:

- (1) The distribution of floor area, open space, dwelling units, rooming units and the location of buildings, primary building entrances and show windows will result in a better site plan and a better relationship among buildings and open areas to adjacent streets, surrounding developments, adjacent open areas and shorelines than would be possible without such distribution and will thus benefit both the occupants of the general large-scale development, the neighborhood, and the City as a whole;
- (2) The distribution of floor area and location of buildings will not unduly increase the bulk of the buildings in any one block or unduly obstruct access of light and air to the detriment of the occupants or users of buildings in the block or nearby blocks or of people using the public streets;
- (3) Not applicable;
- (4) Considering the size of the proposed general large-scale development, the streets providing access to such general large-scale development will be adequate to handle traffic resulting therefrom;

- (5) Not applicable;
- (6) Not applicable;
- (7) A declaration with regard to ownership requirements in paragraph (b) of the general large-scale development definition in Section 12-10 (DEFINITIONS) has been filed with the Commission.

RESOLUTION

RESOLVED, that having considered the Final Environmental Impact Statement (FEIS), for which a Notice of Completion was issued on February 6, 2009, with respect to this application (CEQR No. 08DCP033K), the City Planning Commission finds that the requirements of the New York State Environmental Quality Review Act and Regulations, have been met and that:

1. Consistent with social, economic and other essential considerations, from among the reasonable alternatives thereto, the action to be approved is one which minimizes or avoids adverse environmental impacts to the maximum extent practicable; and
2. The adverse environmental impacts disclosed in the FEIS will be minimized or avoided to the maximum extent practicable by incorporating as conditions to the approval, those mitigative measures that were identified as practicable

This report of the City Planning Commission, together with the FEIS, constitutes the written statement of facts, and of social, economic and other factors and standards, that form the basis of the decision, pursuant to Section 617.11(d) of the SEQRA regulations; and be it further

RESOLVED, the City Planning Commission, in its capacity as the City Coastal Commission, has reviewed the waterfront aspects of this application and finds that the proposed action is consistent with WRP policies; and be it further

RESOLVED, by the City Planning Commission, pursuant to Sections 197-c and 201 of the New York City Charter that based on the environmental determination, and the consideration and findings described in this report, the application submitted by Toll Brooklyn LP, pursuant to Sections 197-c and 201 of the New York City Charter, for the grant of a special permit pursuant to Section 74-743(a)(2) of the Zoning Resolution to modify the height and setback regulations of Section 123-66 (Height and Setback Regulations), the rear yard regulations of Section 23-47 (Minimum Required Rear Yards), and the inner court regulations of Section 23-852 (Inner court recesses) in connection with a proposed mixed use development on property located at 363-365 Bond Street, (Block 452, Lots 1, 5, 15, 19, and Block 458, Lot 1), in an M1-4/R7-2 (MX-11) within a General Large-Scale Development, Community District 6, Brooklyn is approved subject to the following terms and conditions:.

1. The property that is the subject of this application (C 090048 ZSK) shall be developed in size and arrangement substantially in accordance with the dimensions, specifications and zoning computations indicated on the following plans, prepared by Greenberg Farrow Architects, and Lee Weintraub Landscape Architecture LLC, filed with this application and incorporated in this resolution:

<u>Drawing</u>	<u>Title</u>	<u>Last Revised</u>
Z-2	Proposed Site Plan	8/25/08
Z-2.1	Public Access Diagram	8/25/08
Z-3	Zoning Map and Analysis	8/25/08
Z-4.1	Base Plane Lot Coverage Yard Compliance	7/15/08
Z-4.2	Proposed Waivers Block 452	7/15/08
Z-4.3	Proposed Waivers Block 458	7/15/08
Z-5	Site Survey	7/15/08

Z-7.1	Building Sections AA-BB	7/15/08
Z-7.2	Building Sections CC-DD	7/15/08
Z-7.3	Building Sections EE-FF	7/15/08
Z-7.4	Building Sections GG-HH	7/15/08
Z-7.5	Building Sections II-JJ	7/15/08
L-1.0	Site Plan with Materials Designated	8/25/08
L-1.1	Dimensioned Plan	8/25/08
L-1.2	Materials and Part Plans	8/25/08
L-2.0	Lighting Plan	8/25/08
L-3.0	Planting Plan	8/25/08
L-3.1	Esplanade Planting Part Plans	8/25/08
L-3.2	Esplanade Planting Notes and Schedule	8/25/08
L-4.0	Site Details	8/25/08
L-4.1	Seating Details	8/25/08
L-4.2	Structure Details	8/25/08

2. Such development shall conform to all applicable provisions of the Zoning Resolution, except for the modifications specifically granted in this resolution and shown on the plans listed above which have been filed with this application. All zoning computations are subject to verification and approval by the New York City Department of Buildings.

3. Such development shall conform to all applicable laws and regulations relating to its construction, operation and maintenance.

4. Development pursuant to this resolution shall be allowed only after the attached Restrictive Declaration marked as Exhibit A hereto, as modified with any necessary administrative and technical changes acceptable to counsel to the Department, is executed by Kingspb LLC; Citybank, N.A. and Joseph Phillips, as Trustees for the Trust Under the Will of David J. Phillips for the Benefit of Joseph Phillips; 363 Bond Street Corp; and Wooden Bridge, LLC; or their respective successors, and such declaration shall have been recorded and filed in the Office of the Register of the City of New York, Kings County

5. The development shall include those mitigative measures listed in the Final

Impact Statement (CEQR No. 08DCP033K) issued on February 6, 2009 and identified as practicable.

6. In the event the property that is the subject of the application is developed as, sold as, or converted to condominium units, a homeowners' association, or cooperative ownership, a copy of this report and resolution and any subsequent modifications shall be provided to the Attorney General of the State of New York at the time of application for any such condominium, homeowners' or cooperative offering plan and, if the Attorney General so directs, shall be incorporated in full in any offering documents relating to the property.

7. All leases, subleases, or other agreements for use or occupancy of space at the subject property shall give actual notice of this special permit to the lessee, sub-lessee or occupant.

8. Upon the failure of any party having any right, title or interest in the property that is the subject of this application, or the failure of any heir, successor, assign, or legal representative of such party, to observe any of the covenants, restrictions, agreements, terms or conditions of this resolution and the restrictive declaration whose provisions shall constitute conditions of the special permit hereby granted, the City Planning Commission may, without the consent of any other party, revoke any portion of or all of said special permit. Such power of revocation shall be in addition to and not limited to any other powers of the City Planning Commission, or of any other agency of government, or any private person or entity. Any such failure as stated above, or any alteration in the development that is the subject of this application that departs from any of the conditions listed above, is grounds for the City Planning Commission or the City Council, as applicable, to disapprove any application for modification, cancellation or amendment of the special permit hereby granted or of the restrictive declaration.

9. Neither the City of New York nor its employees or agents shall have any liability for money damages by reason of the city or such employees or agents failure to act in accordance with the provisions of this special permit.

The above resolution (C 090048 ZSK), duly adopted by the City Planning Commission on February 17, 2009 (Calendar No. 2), is filed with the Office of the Speaker, City Council, and the Borough President, in accordance with the requirements of Section 197-d of the New York City Charter.

AMANDA M. BURDEN, FAICP, Chair
KENNETH J. KNUCKLES, ESQ., Vice Chairman
ANGELA M. BATTAGLIA, IRWIN G. CANTOR, P.E., ANGELA R. CAVALUZZI, A.I.A.,
ALFRED C. CERULLO III, BETTY Y. CHEN, MARIA M. DEL TORO, RICHARD W. EADDY,
SHIRLEY A. MCRAE, JOHN MEROLO, KAREN A. PHILLIPS, Commissioners

RESTRICTIVE DECLARATION

**KINGS COUNTY
BLOCK 452, LOTS 1 AND 15
BLOCK 458, LOT 1**

RECORD AND RETURN TO:

**KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10036
ATTENTION: PAUL D. SELVER**

Exhibit A

RESTRICTIVE DECLARATION

DECLARATION made as of the ___ day of February, 2009 (the “**Declaration**”), by KINGSPB LLC, having an office at c/o Neal T. Dorman, Esq., Hartman & Craven, 488 Madison Avenue, New York, N.Y. 10022; CITIBANK, N.A. AND JOSEPH PHILLIPS, AS TRUSTEES OF THE TRUST UNDER THE WILL OF DAVID J. PHILLIPS FOR THE BENEFIT OF JOSEPH PHILLIPS (the “**Trust**”), having an address at c/o Neal T. Dorman, Esq., Hartman & Craven, 488 Madison Avenue, New York, N.Y. 10022; 363 BOND STREET CORP., a _____ corporation, having an address at 363 Bond Street, Brooklyn, New York 11231; and WOODEN BRIDGE, LLC, a _____ limited liability company having an address at 400 Carroll Street, Brooklyn, New York 11231 (collectively, “**Declarant**”).

RECITALS:

A. Kingspb LLC and the Trust are the owner the owners of certain real property located in the Borough of Brooklyn, Kings County, City and State of New York, which property is designated as Block 458, Lot 1 (“**Block 458**”) on the Tax Map of the City of New York, Kings County (the “**Tax Map**”); 363 Bond Street Corp is the owner of certain real property located in the Borough of Brooklyn, Kings County, City and State of New York, which property is designated as Block 452, Lot 1 on the Tax Map; and Wooden Bridge LLC is the owner of certain real property located in the Borough of Brooklyn, Kings County, City and State of New York, which property is designated as Block 452, Lot 15 (the foregoing Lots 1 and 15 in Block 452, hereinafter, “**Block 452**”) on the Tax Map (all of the foregoing described property, the “**Subject Property**”), as more particularly described in Exhibit A annexed hereto.

B. Declarant or its successor proposes to develop the Subject Property as a “general large-scale development”, as defined in Section 12-10 of the Zoning Resolution (as hereinafter defined), in accordance with the provisions of the Zoning Resolution and to construct multifamily residential buildings and townhouses, with local retail and community facility uses and including an accessory parking garage (the “**Proposed Development**”).

C. In connection with the Proposed Development, the following applications (together, the “**Applications**”) have been submitted to the New York City Planning Commission:

(a) Application No. 090049ZRK for an amendment to the text of the Zoning Resolution,

(b) Application No. 090047ZMK for an amendment of the zoning map to rezone the Subject Property from an M2-1 zoning district to a M1-4/R7-2(MX) zoning district, and

(c) Application No. 090048ZSK for a special permit pursuant to Section 74-743 of the Zoning Resolution (the “**Special Permit**”).

D. The Proposed Development will include waterfront open space, a public easement area for road purposes, and a pedestrian access easement area (all of the foregoing, the “**Development Open Areas**”), all of which will be open and accessible to the public in accordance with the provisions hereof. Although the Subject Property is not a waterfront block as defined in Section 12-10 of the Zoning Resolution and is not subject to the provisions of Article I, Chapter 6 of the Zoning Resolution, Declarant has agreed, at the request of the City of

New York (the “**City**”) to make the Waterfront Open Space (as hereinafter defined) and the Pedestrian Access Easements (as hereinafter defined) conform, to the extent reasonably feasible, with the provisions of Article I, Chapter 6 of the Zoning Resolution.

E. Declarant has agreed, at the request of the City, in connection with the development of the Subject Property, to provide improvements (the “**Street End Improvements**”) to the ends of First Street and Second Street, in Brooklyn, where they abut the Gowanus Canal (the “**Street Ends**”), as part of the Public Open Space. The Street Ends are owned by the City, but the City shall permit access to the Street Ends as necessary to permit Declarant to undertake its obligations under this Declaration with respect to the Street Ends.

F. To ensure that (i) the development of the Subject Property is consistent with the analysis in the FEIS upon which it is anticipated that the New York City Planning Commission will make findings pursuant to the New York Environmental Quality Review, Executive Order No. 91 of 1977, as amended, and the regulations promulgated thereunder at 62 RCNY§5-01 et. seq., and the State Environmental Quality Review Act, New York State Environmental Conservation Law §§ 8-0101 et seq. and the regulations promulgated thereunder at 6 NYCRR Part 617 and incorporates certain requirements for the mitigation of significant adverse environmental impacts, and (ii) the development of the Subject Property includes certain project components related to the environment which were material to the analysis of environmental impacts of the Proposed Development in the FEIS (“**PCREs**”), Declarant has agreed to certain obligations as set forth in this Declaration.

G. The Subject Property is located adjacent to the Gowanus Canal and the City is considering rezoning an area that would include the Subject Property (the “**Areawide**

Rezoning”), and it is contemplated that the Areawide Rezoning would designate a waterfront access plan for the land adjacent to the Gowanus Canal, including the Subject Property (the “**WAP**”).

H. Declarant acknowledges that, on December 15, 2008, the City certified (in accordance with the Uniform Land Use Review Procedure, amendments to Article VI, Chapter 2 of the Zoning Resolution (the “**Waterfront Zoning Amendments**”) that would define the Gowanus Canal as a waterfront area.

I. Declarant acknowledges that the Areawide Rezoning or the Waterfront Zoning Amendments are proposed to include provisions that would allow Declarant to request the City to accept a transfer of all or a portion of the Waterfront Open Space to the City (the “**Transfer Provisions**”), and Declarant desires, in the event that the Transfer Provisions are adopted by the City, to set forth a procedure to enable such a transfer pursuant to the applicable provision of the Transfer Provisions.

J. Declarant intends the restrictions set forth herein to benefit all land, including land owned by the City, lying within a one-half (1/2) mile radius of the Subject Property; and

K. Commonwealth Land Title Insurance Company has certified that as of _____, 2009, a copy of which certification is attached hereto as Exhibit B, there are no parties in interest (“**Parties in Interest**”), as that term is defined in the zoning lot definition in Section 12-10 of the Zoning Resolution, to the Subject Property other than Declarant.

L. All Parties in Interest have executed this Declaration.

NOW, THEREFORE, Declarant does hereby declare and agree that the Subject Property shall be held, improved, operated, maintained, sold, transferred, conveyed and occupied subject to the following restrictions, covenants, obligations and agreements.

ARTICLE I

DEFINITIONS

- 1.1 “Affordable Housing” shall mean lower income housing, as defined in Section 23-93 of the Zoning Resolution.
- 1.2 “Association” shall have the meaning set forth in Section 7.1.1 hereof.
- 1.3 “Circumstances Beyond the Control of Declarant” shall mean: (a) strike, lockout or labor dispute(s); (b) failure of a contractor to deliver labor or materials on schedule or inability to obtain labor or materials or reasonable substitutes therefore unless due to any act or failure to act by Declarant; (c) acts of God; (d) laws (as defined in Section 1.10) that prevent the parties from carrying out their obligations as set forth herein; (e) enemy or hostile government actions; (f) civil commotion, insurrection, terrorism, revolution or sabotage; (g) fire or other casualty; (h) inclement weather of such a nature as to make construction, maintenance, and repair of the Public Open Space or a material portion thereof temporarily impractical or not feasible; (i) unsuitability of any soil conditions that were not in existence, were not known, or could not reasonably have been foreseen at the time of the signing of this agreement making construction, maintenance, or repair of the Public Open Space or any material portions thereof temporarily impractical or not feasible; (j) a taking of the Subject Property, or a portion thereof, by condemnation or eminent domain; (k) failure of a public utility to provide power, heat or light; (l) unusual delay in transportation; (m) unreasonable delay by the City, State of New York or United States government or any agency or instrumentality of any of the foregoing in the

processing or approval of any application or agreements required in order to permit Declarant to carry out its obligations under this Declaration; (n) the pendency of a litigation or similar proceeding relating to the Applications, the M&O Agreement or this Declaration brought by a person or entity not a party hereto; or (o) other conditions not reasonably avoidable by Declarant and which are beyond the reasonable control of Declarant. No event related to the Waterfront Open Space, the Pedestrian Access Easements, or the Improved Street Ends shall constitute a Circumstance Beyond the Control of Declarant unless Declarant complies with the procedures set forth in Sections 2.02.e and f of the M&O Agreement, except as set forth in Section 4 hereof. Circumstances Beyond the Control of Declarant may occur in connection with any obligations of Declarant under this Declaration or of Owner under the M&O Agreement.

1.4 “City” shall mean the City of New York.

1.5 “Commissioner of DPR” or “Commissioner” shall mean the Commissioner of the New York City Department of Parks & Recreation or any successor to the jurisdiction thereof.

1.6 “CPC” shall mean the New York City Planning Commission or any successor to the jurisdiction thereof.

1.7 “CPC Chair” shall mean the Chairperson of the New York City Planning Commission or any successor to the jurisdiction thereof.

1.8 “DCP” shall mean the New York City Department of City Planning or any successor to the jurisdiction thereof.

1.9 “Department of Buildings” shall mean the New York City Department of Buildings or any successor to the jurisdiction thereof.

1.10 “Development Drawings” shall mean the Open Space Drawings and the following drawings prepared by Greenberg Farrow, copies of which are attached hereto as Exhibit D:

<u>DRAWING NUMBER</u>	<u>TITLE</u>	<u>DATE</u>
Z-2	Proposed Site Plan	8/25/08
Z-3	Zoning Analysis	8/25/08
Z-4.1	Base Plane Lot Coverage Yard Compliance	7/15/08
Z-4.2	Proposed Waivers Block 452	7/15/08
Z-4.3	Proposed Waivers Block 458	7/15/08
Z-5	Site Survey	7/15/08
Z-7.1	Buildings Section AA-BB	7/15/08
Z-7.2	Buildings Section CC-DD	7/15/08
Z-7.3	Buildings Section EE-FF	7/15/08
Z-7.4	Buildings Section GG-HH	7/15/08
Z-7.5	Buildings Section II-JJ	7/15/08

1.11 “Development Open Areas” shall have the meaning set forth in Clause D of the Recitals.

1.12 “Development Stage” shall mean either the portion of the Proposed Development on Block 452 or the portion of the Proposed Development on Block 458, but not including in either case the Development Open Areas.

1.13 “DOT” shall mean the New York City Department of Transportation or any successor to the jurisdiction thereof.

1.14 “DPR” shall mean the New York City Department of Parks and Recreation.

1.15 “DPR Subject Open Space” shall mean the Improved Street Ends, the Pedestrian Access Easements, and the Waterfront Open Space.

1.16 “FEIS” shall mean the Final Environmental Impact Statement for the Proposed Development

1.17 “Final Completion” or “Finally Complete,” shall mean, with respect to any Stage, that the Public Open Space has been completed substantially in conformance with the Open

Space Drawings to such an extent that (a) with respect to the DPR Subject Open Space, the Commissioner of Parks certifies that the Stage of the DPR Subject Open Space is finally complete and no further work is required by Declarant except such work as is required by a Completion Certificate issued pursuant to Section 2.02 (f) of the M&O Agreement, and (b) with respect to the Road Easements, the Department of Buildings has determined that the Road Easements have been completed in compliance with the Builders Pavement Plan approved for the Road Easements. Notwithstanding the issuance of any such certification, Declarant shall be liable as provided by Law for any claims related to such construction and shall be responsible for any other obligations of Declarant (including maintenance, repair and indemnification) set forth in the M&O Agreement.

1.18 “Improved Street Ends” shall mean the Street Ends with the Street End Improvements, as shown in Drawing Z-2.1 and labeled as Offsite Publicly Accessible Open Space, and including the intertidal areas.

1.19 “Law” or “Laws” shall mean, but not be limited to, the New York City Charter, the New York City Administrative Code, any law of the State or City of New York, any federal law, and any ordinance, rule government restriction or regulation having the force of law, which is applicable to the Public Open Space or development on the Subject Property.

1.20 “Lot Owners” shall mean (i) Unit Interested Parties, (ii) the fee owner or ground lessee of any portion of the Subject Property, (iii) all mortgagees of any interest in the Subject Property, and (iv) all boards of managers of any condominium corporation and boards of directors of any cooperative corporation on the Subject Property.

1.21 “M&O Agreement” shall mean the maintenance and operations agreement for the DPR Subject Open Space executed by Declarant and DPR, a copy of which is attached hereto as Exhibit C.

1.22 “Mortgagee” shall mean (i) the holder of a mortgage on all or any portion of the Subject Property, other than the holder of a mortgage solely on one or more individual condominium units in the Subject Property, and (ii) the holder of a pledge of the direct or indirect interests in the named Declarant, who has given written notice of its name and address to DCP and DPR.

1.23 “Open Space Drawings” shall mean the drawings identified in Section 4.1.1 hereof and attached hereto as Exhibit C.

1.24 “PCO” shall mean a permanent certificate of occupancy.

1.25 “Pedestrian Access Easements” shall mean those portions of the Subject Property shown on Drawing Z-2.1 and labeled as Pedestrian Access Easement Area.

1.26 “Public Open Space” shall mean the Waterfront Open Space, the Improved Street Ends, the Pedestrian Access Easements and the Road Easements.

1.27 “Road Easements” shall mean those portions of the Subject Property shown on Drawing Z-2 and labeled as Proposed Public Easement.

1.28 “Stage” shall mean the stages of the Public Open Space.

1.29 “Stage 1 Open Space” shall mean the Stage 1 Waterfront and the Road Easement on Block 452.

1.30 “Stage 2 Open Space” shall mean the Stage 2 Waterfront and the Road Easement on Block 458.

1.31 “Stage 1 Waterfront” shall mean the portion of the Waterfront Open Space on Block 452, the Pedestrian Access Easement on Block 452, and the Street End Improvements on 1st Street.

1.32 “Stage 2 Waterfront” shall mean the portion of the Waterfront Open Space on Block 458, the Pedestrian Access Easement on Block 458, and the Street End Improvements on 2nd Street.

1.33 “Substantial Completion” or “Substantially Complete” shall mean, with respect to any Stage, that the Public Open Space in such Stage has been completed substantially in conformance with the Open Space Drawings, and to such an extent that (a) with respect to the DPR Subject Open Space, the Commissioner of Parks certifies that the Public Open Space can be utilized by the public, notwithstanding that minor or inconsequential work is required to be done by Declarant pursuant to the M&O Agreement before a certification of Final Completion can be issued, and except such work as is required by a Completion Certificate issued pursuant to Section 2.02(f) of the M&O Agreement, and (b) with respect to the Road Easements, no further work on the Road Easements in the applicable Stage is required for the Department of Buildings to issue a temporary certificate of occupancy for the portion of the Subject Property for which a Builders Pavement Plan for such Road Easements have been approved, except, in each case, such work as is not completed in connection with Circumstances Beyond the Control of Declarant.

1.34 “TCO” shall mean a temporary certificate of occupancy.

1.35 “Transfer Provisions” shall have the meaning set forth in Clause I of the Recitals.

1.36 “Unit Interested Party” shall mean (i) all owners, lessees and occupants of any individual condominium unit and (ii) all holders of a mortgage or other lien securing each such condominium unit.

1.37 “WAA Maintenance Agreement” shall mean the maintenance and operation agreement for the Improved Street Ends and the Waterfront Open Space to be executed by Declarant and DPR, in form and content reasonably satisfactory to Declarant and DPR.

1.38 “Waterfront Open Space” shall mean that portion of the Subject Property shown on Drawing Z-2.1 and labeled as Publicly Accessible Open Space.

1.39 “Waterfront Zoning Amendments” shall have the meaning set forth in Clause H of the Recitals.

1.40 “Zoning Resolution” shall mean the New York City Zoning Resolution in effect on the date hereof and as subsequently amended.

ARTICLE II

DEVELOPMENT OF SUBJECT PROPERTY

2.1 Development of Subject Property. Declarant agrees that the Subject Property shall be treated as a general large-scale development site and shall be developed and enlarged as a single unit and that (i) the bulk (as defined in the Zoning Resolution) of any buildings on the Subject Property shall not extend beyond the envelope of the buildings in the Proposed Development as shown on Drawing Z-2 (Proposed Site Plan), and (ii) the amount of floor area (as defined in the Zoning Resolution) on the Subject Property shall not exceed the floor area permitted as-of-right in the zoning district in which the Subject Property is located, and any such development shall be deemed to be in substantial conformity with this Declaration and the Special Permit. Any development of the Subject Property that does not comply with the provisions of the preceding sentence, including any development otherwise permitted on an as-

of-right basis under the provisions of the Zoning Resolution within the zoning district in which the Subject Property is located, shall not be permitted unless the Development Drawings have been modified in accordance with the provisions of this Declaration. As applicable, notwithstanding the foregoing provisions of this Section 2.1, in the event that the City approves the Areawide Rezoning and such Areawide Rezoning continues to allow, on an as-of-right basis, the use of the Subject Property for residential use (as defined in the Zoning Resolution), Declarant shall have the right to develop the Subject Property as-of-right in accordance with the provisions of such Areawide Rezoning and Declarant shall not be required to comply with the provisions of the Special Permit, this Declaration except as set forth in Article III, or the Development Drawings, provided that Declarant shall notify DCP that it has not utilized the height, setback, rear yard, and inner court recess waivers of the Special Permit and is developing the Subject Property under the Areawide Rezoning instead of under the Special Permit, and such notification shall be effective upon delivery to DCP.

2.2 Stages. The Waterfront Open Space, the Pedestrian Access Easements, the Road Easements and the Street End Improvements shall be constructed in two stages. The Stage 1 Waterfront shall be undertaken in connection with the Development Stage on Block 452, and the Stage 2 Waterfront shall be undertaken in connection with the Development Stage on Block 458.

2.3 Affordable Housing. Notwithstanding anything to the contrary in this Declaration, Declarant shall have the right to develop the Subject Property with a building or buildings with a floor area ratio (as defined in the Zoning Resolution, "**FAR**") of not more than 2.7 or, if there is an Areawide Rezoning and Declarant elects to develop the Subject Property under the provisions of such Areawide Rezoning, the maximum base FAR permitted under such Areawide Rezoning. Declarant agrees that the total FAR of the Subject Property shall not

exceed 2.7 unless (a) Affordable Housing is provided in accordance with the provisions of Section 23-942 of the Zoning Resolution, or (b) the Areawide Rezoning permits a base maximum FAR of more than 2.7 and Declarant elects to develop the Subject Property under the provisions of such Areawide Rezoning.

ARTICLE III

PROJECT COMPONENTS RELATED TO THE ENVIRONMENT AND MITIGATION MEASURES

3.1 Applicability. Declarant shall undertake the PCREs and mitigations as set forth in this Article III for (a) development undertaken pursuant to the Special Permit, and (b) for development pursuant to the provisions of the Zoning Resolution applicable to the Subject Property without the Special Permit, pursuant to the Development Drawings, as same may be hereafter revised, or pursuant to the Areawide Rezoning, where such development is substantially equivalent in relevant respect to the development analyzed under the FEIS. In the event Declarant determines that a PCRE or mitigation set forth in this Article III should not apply to development pursuant to the provisions of the Zoning Resolution applicable to the Subject Property without the Special Permit, pursuant to the Development Drawings, as same may be hereafter revised, or pursuant the Areawide Rezoning on the basis that such development is not substantially equivalent in a relevant respect to the development analyzed under the FEIS, it shall provide DCP with a Technical Memorandum setting forth the basis for such determination prior to the acceptance of any building permit for such development, and upon the submission of a Technical Memorandum demonstrating same, the requirements of this Declaration with respect to the PCREs and mitigation discussed in such Technical Memorandum (the “Modified Requirements”) shall not be required for the development discussed in the

Technical Memorandum, and Declarant shall have the right to file a minor modification to this Declaration with respect to the Modified Requirements.

3.2 PCREs

3.2.1 Sewer and Stormwater

Declarant shall not accept a TCO or permanent certificate of occupancy (“**PCO**”) for any building on Block 452 unless it shall have constructed a new storm sewer outfall at the end of 1st Street at the Gowanus Canal and an engineer licensed in the state of New York shall have provided to DCP a certification that such outfall is substantially complete and that all government permits and approvals required in connection with the operation of such outfall shall have been obtained, and Declarant shall not accept a TCO or PCO for any building on Block 458 unless it shall have constructed a new storm sewer outfall at the end of 2nd Street at the Gowanus Canal and an engineer licensed in the state of New York shall have provided to DCP a certification that such outfall is substantially complete and that all government permits and approvals required in connection with the operation of such outfall shall have been obtained.

3.2.2 Grade of Subject Property

Declarant shall not accept a TCO or PCO for any building on Block 452 unless it shall have graded Block 452 and the portion of 1st Street adjacent to Block 452 so that the base elevation of Block 452 and 1st Street would be above the level of the 100 year floodplain, as such floodplain level is determined by the Federal Emergency Management Agency (the “**Floodplain Level**”), and Declaration shall not accept a TCO or PCO for any building on Block 458 unless it shall have graded Block 458 so that the base elevation of Block 458 would be above the Floodplain Level.

3.2.3 Noise

Based on actual field monitoring at the Subject Property, Declarant shall provide a minimum of 26 dBA of window wall attenuation, as well as comply with any applicable provisions of the Zoning Resolution with respect to window wall attenuation, in the residential portions of the Proposed Development in order to maintain an interior noise level below 45 dBA for residential use.

3.2.4 Declarant shall consult with SHPO with respect to and prepare and implement an unanticipated discovery plan for human and non-human remains. Declarant shall prepare and implement a construction protection plan in coordination with the SHPO with respect to the avoidance of adverse effects on the Carroll Street Bridge.

3.2.5 Hazardous Materials

Declarant shall not accept a building permit which would allow soil disturbance of any portion of the Subject Property unless it shall have recorded the restrictive declarations required in connection with hazardous materials and executed by Wooden Bridge, LLC, dated February 2, 2009; 363 Bond Street Corp., dated February 13, 2009; and Kingspb LLC and, Citibank N.A. and Joseph Phillips, as Trustees of the Trust under the Will of David J. Phillips for the Benefit of Joseph Phillips, dated February 13, 2009, and received acknowledgement by the New York City Department of Environmental Protection that such declarations have been recorded.

3.3 Mitigation.

3.3.1 Historic Elements. Prior to accepting the first TCO or PCO for any unit in the first building in each Development Stage, Declarant shall arrange for an investigation, evaluation and documentation of the construction of the portion of the bulkhead of the Subject Property on the Gowanus Canal in such Stage, including the joinery between adjacent cribs, to

be undertaken by a professional archaeologist in accordance with the Landmarks Preservation Commission's guidelines for Archaeological Work in New York City 2002, as part of the reconstruction of the bulkhead of the Subject Property along the Gowanus Canal and installation of a storm water outfall for the Proposed Development. This work shall be described in an archaeological report to be submitted to the LPC for review and approval, and no TCO may be issued or accepted for any unit in the first building in each Development Stage until the report has been approved by the LPC. Declarant will consult with the New York State Historic Preservation Office (“SHPO”) in planning the bulkhead reconstruction work and submit specifications and designs for these elements to SHPO for design and comment at preliminary and pre-final design stages.

3.3.2 Traffic. Declarant shall not apply for or accept a TCO for the Proposed Development unless and until Declarant sends written notice to DOT (with a copy to DCP) requesting that DOT implement the following mitigation measures:

(a) At the intersection of 3rd Avenue and Carroll Street: (i) between the hours of 8:15 am and 9:15 am, prohibition of on-street parking on the south side of eastbound Carroll Street approach for approximately 150 feet;

(ii) between the hours of 5:00 pm and 6:00 pm, shift three (3) seconds of green time from the northbound/southbound phase to the eastbound phase

(b) At the intersection of 4th Avenue and Carroll Street:

(i) between the hours of 8:15 am and 9:15 am, shift four (4) seconds of green time from the northbound/southbound phase to the eastbound phase;

(ii) between the hours of 5:00 pm and 6:00 pm, shift two (2) seconds of green time from the northbound/southbound phase to the eastbound phase.

ARTICLE IV

CONSTRUCTION OF PUBLIC OPEN SPACE

4.1 Obligation to Develop the Public Open Space.

4.1.1 In the event that Declarant develops the Subject Property (other than development of the Subject Property pursuant to the Areawide Rezoning), Declarant agrees to develop the Public Open Space in substantial conformity with the following drawings, copies of which are attached hereto as **Exhibit C** (the “Open Space Drawings”):

Drawings prepared by Lee Weintraub/Landscape Architecture LLC:

DRAWING NUMBER	TITLE	DATE
L-1.0	Site Plan with Materials Designated	8/25/08
L-1.1	Dimensioned Plan	8/25/08
L-1.2	Materials and Part Plans	8/25/08
L-2.0	Lighting Plan	8/25/08
L-3.0	Planting Plan	8/25/08
L-3.1	Esplanade Planting Part Plans	8/25/08
L-3.2	Esplanade Planting Notes and Schedule	8/25/08
L-4.0	Site Details	8/25/08
L-4.1	Seating Details	8/25/08
L-4.2	Structure Details	8/25/08

Drawings prepared by Greenberg Farrow:

Z-2.1	Public Access Diagram	8/25/08
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4.2 M&O Agreement. Declarant shall at all times comply with the provisions of the M&O Agreement, including but not limited to securing Declarant’s obligation to construct the Waterfront Open Space pursuant to Section 2.01 of the M&O Agreement. In the event of a conflict between the provisions of this Declaration and the M&O Agreement, the provisions of this Declaration shall apply.

4.3 No Certificate of Occupancy.

4.3.1 The Department of Buildings shall not issue a TCO (a) for all or any portion of the Proposed Development located on Block 452 until (i) a certification of Substantial Completion shall have been issued for the Stage 1 Waterfront, in accordance with the provisions of Section 2.02 of the M&O Agreement, and (ii) the Department of Buildings has determined that the Road Easement in the Stage 1 Open Space has been Substantially Completed; or (b) for all or any portion of the Proposed Development located on Block 458 until (i) a certification of Substantial Completion shall have been issued for the Stage 2 Waterfront in accordance with the provisions of Section 2.02 of the M&O Agreement and (ii) the Department of Buildings has determined that the Road Easement in the Stage 2 Open Space has been Substantially Completed, and in each case, if relevant, a Completion Certificate from the Commissioner of DPR, in accordance with Sections 2.02(e) and (f) of the M&O Agreement.

4.3.2 The Buildings Department shall not issue a PCO (a) for any building on Block 452 until (i) a certification of Final Completion has been issued for the Stage 1 Waterfront, and (ii) until the Department of Buildings has determined that the Road Easement in the Stage 1 Open Space has been Finally Completed or (b) for any building on Block 458 until a certification of Final Completion shall have been issued for the Stage 2 Waterfront and until the Department of Buildings has determined that the Road Easement in the Stage 2 Open Space has been Finally Completed and in each case, if relevant, a Completion Certificate from the Commissioner of DPR, in accordance with Sections 2.02(e) and (f) of the M&O Agreement.

4.4 Circumstances Beyond the Control of Declarant.

4.4.1 Notwithstanding anything in this Declaration to the contrary, in the event that Declarant reasonably believes that the full performance of any of its obligations under this

Declaration (exclusive of the planting of vegetation) related to the DPR Subject Open Space have been delayed or prevented as a result of Circumstances Beyond the Control of the Declarant, the Commissioner of DPR may, pursuant to Sections 2.02(e) and (f) of the M&O Agreement, approve the Substantial or Final Completion of the DPR Subject Open Space and issue a Completion Certificate and allow the Buildings Department to issue a TCO or PCO, as appropriate, for the Proposed Development or the applicable Development Stage, provided that all other requirements for the TCO or the PCO, as the case may be, have been complied with. Where a TCO is issued after a finding by the Commissioner of DPR of Circumstances Beyond the Control of Declarant and the issuance of a Completion Certificate, such TCO may be renewed only upon approval of the Commissioner of DPR, unless the DPR Subject Open Space is Substantially Complete.

4.4.2 The City acknowledges that (a)(i) construction of the Waterfront Open Space and the Street End Improvements will require certain permits and approvals from the State and Federal governments (the “**Federal/State Approvals**”), and (ii) construction of the Street End Improvements will require certain approvals by DOT and other City agencies (the “**Street End Approvals**”), including but not limited to a license or other authorization from the City to enter onto the Street Ends to undertake the Street End Improvements thereto, and that (b) (i) applications for the Federal/State Approvals have been submitted and (ii) provided that the City or an agency thereof executes the required application, applications will be submitted for the Street End Approvals. If Declarant is unable, despite its good faith efforts, to obtain (X) the Federal/State Approvals for any portion of the Waterfront Open Space or the Improved Street Ends or (Y) the Street End Approvals, in each case by the dates by which such approvals are necessary in order for Declarant to obtain a TCO for the Proposed Development or Development

Stage when required in connection with Declarant's construction schedule, Declarant shall so notify DPR. Provided that, exercising its reasonable judgment, DPR concurs that Declarant has exercised good faith in seeking to obtain the permit or other approval and Declarant is unlikely to obtain such permit or other approval by such dates, such failure shall be deemed to be a Circumstance Beyond the Control of Declarant. If Declarant determines that it will be unlikely or unable to obtain the Federal/State Approvals, and, exercising their reasonable judgment, DPR and DCP concur that (x) Declarant has exercised good faith in seeking to obtain the permit or other approval, and (y) Declarant is unlikely to obtain such permit or other approval, Declarant shall modify the Open Space Drawings as may be required. Such determination by DPR and DCP shall also serve as a determination by the Chair of the CPC that he/she is prepared, in the reasonable exercise of his or her discretion, to approve the Open Space Drawings as modified.

4.4.3 In the event that Declarant reasonably believes that full performance of any of its obligations under this Declaration other than those related to the DPR Subject Open Space have been delayed or prevented as a result of Circumstances Beyond the Control of Declarant, Declarant shall notify the CPC Chair in writing. Such notice (the "Delay Notice") shall include a description of the Circumstances Beyond the Control of Declarant, and, if known to Declarant, their cause and probable duration. In the exercise of its reasonable judgment the CPC Chair shall, within twenty (20) days of its receipt of the Delay Notice, (a) certify in writing that the Circumstances Beyond the Control of Declarant have occurred, or (b) notify Declarant that it does not reasonably believe that the Circumstances Beyond the Control of Declarant have occurred. Failure to respond within such twenty (20) day period shall be deemed to be a certification by the CPC Chair that the Circumstances Beyond the Control of Declarant have occurred. Upon a certification or deemed certification that Circumstances Beyond the Control

have occurred, the CPC Chair may grant Declarant appropriate relief. As a condition of granting such relief, the CPC Chair may require that Declarant post a bond, letter of credit or other security in a form reasonably acceptable to the City in order to ensure that the obligation will be completed in accordance with the provisions of this Declaration. Any delay caused as the result of Circumstances Beyond the Control of Declarant shall be deemed to continue only as long as the Circumstances Beyond the Control of Declarant continue. Upon cessation of the Circumstances Beyond the Control of Declarant causing such delay, Declarant shall promptly recommence the work or implement the measure needed to complete the obligation (unless an alternative has been specified and agreed to).

4.5 Insurance. Pursuant to Section 9.01 of the M&O Agreement, Declarant shall carry paid up insurance in the sum of not less than One Million Dollars (\$1,000,000) per occurrence and Three Million Dollars (\$3,000,000) in the aggregate to protect Declarant, the CPC, DPR and the City against all claims for injuries arising on the Public Open Space, as provided in Article IX of the M&O Agreement. Such policy of insurance shall be primary to the City's obligation to indemnify and hold harmless Declarant, its successors or assigns in accordance with Section 62-624 of the Zoning Resolution.

4.6 Indemnification

4.6.1 Subject to the provisions of Section 4.5 above, the City shall indemnify and hold harmless Declarant, its successors and assigns, in accordance with Section 9.06 of the M&O Agreement with respect to the DPR Subject Open Space.

4.6.2 With respect to the Improved Street Ends, the City shall indemnify, defend and hold harmless Declarant, its officers, partners, agents, employees, successors and assigns (all of the foregoing, the "**Indemnified Parties**") from and against any and all claims,

suits, causes of action, losses, damages, costs and expenses (any of the foregoing, a “**Claim**”) arising out of a claim for injury to persons or property as a result of any defect or otherwise dangerous condition in, or on the Street Ends to the extent such judgment or settlement exceeds the amount of three million dollars (\$3,000,000), provided that the City’s obligation to indemnify and hold harmless hereunder shall not arise: (i) if Declarant has not fully complied with the design and maintenance obligations set forth in this Declaration; or (ii) if the injury is determined to have resulted from intentional wrongdoing or recklessness on the part of Declarant or its employees. The City’s obligation to indemnify and hold harmless under this Declaration shall be conditioned upon: (1) Declarant’s maintenance of insurance in accordance with the provisions of the M&O Agreement or other agreement with the City relating to the maintenance of the Improved Street Ends; (2) delivery to the Chief of the Torts Division of the Law Department of the City of New York at 100 Church Street, New York, New York 10007 of a copy of any summons, complaint, process, notice, demand or other pleading initiating an action or proceeding, within ten (10) business days after Declarant’s receipt thereof (or such longer period acceptable to the Chief, Torts Division); (3) the full reasonable cooperation of Declarant in providing the Parks Department with such information as the Parks Department may reasonably require in order to determine whether the Declarant has fully complied with its design and maintenance obligations set forth in this Declaration; and (4) prompt notification to the Chief, Torts Division of the New York City Law Department of any settlement demand. Upon compliance with the above requirements, the City shall assume Declarant’s defense. Thereafter, Declarant shall not make or communicate to the claimant an offer of settlement for an amount in excess of one million dollars nor shall Declarant or his or her counsel admit liability or waive any material right, including the right to appeal, without first obtaining the consent of the City.

4.7 Changes Based on Waterfront Zoning Amendments. Notwithstanding anything to the contrary contained in this Declaration, from and after the effective date of the Waterfront Zoning Amendments, Declarant shall have the right to provide signage, illumination, railings and fencing, bicycle racks, and benches in accordance with the applicable provisions of the Waterfront Zoning Amendments or the applicable WAP instead of in accordance with the Open Space Drawings or the Development Drawings, as applicable, and any such changes in accordance with the Waterfront Zoning Amendments shall be deemed to be in substantial compliance with the Open Space Drawings or the Development Drawings, as applicable.

ARTICLE V

MAINTENANCE AND OPERATION OF OPEN SPACE

5.1 Maintenance and Operation. The Public Open Space shall be maintained and operated in conformance with the provisions of this Article V and, with respect to the Waterfront Open Space, the Pedestrian Access Easements, and the Improved Street Ends, the M&O Agreement.

5.2 General Obligations

5.2.1 The DPR Subject Open Space shall be open and accessible to the public at all times between the hours of dawn and dusk, except as hereinafter provided. The DPR Subject Open Space, or any portion thereof, may be closed to the public to the extent necessary in the event of an emergency or hazardous condition or in order to accomplish the repair and/or renovation of the DPR Subject Open Space. Any closing of the DPR Subject Open Space shall comply with the requirements of Section 5.03 of the M&O Agreement. The Waterfront Open Space and the Pedestrian Access Easements may also be closed to the public for one day in each calendar year pursuant to Section 5.01 (c) of the M&O Agreement to preserve Declarant's

ownership interest in the Waterfront Open Space and the Pedestrian Access Easements. In no event may Declarant allow such areas to be used for a private function during such closing.

5.2.2 The Road Easements shall be open and accessible to the public at all times. The Road Easements may be closed to the public to the extent necessary in the event of an emergency or hazardous condition or in order to accomplish the repair and renovation of the Road Easements.

5.2.3 The Public Open Space shall be maintained in good condition and repair at all times during the existence of the Proposed Development, and, with respect to the DPR Subject Open Space, pursuant to the terms and conditions of the M&O Agreement, including but not limited to the confinement of obstructions to the permitted area designated on the Open Space Drawings, snow removal, litter control, and the care and replacement of vegetation, subject to Circumstances Beyond the Control of Declarant. Notwithstanding the foregoing sentence, Declarant's obligations with respect to the Improved Street Ends are subject to the rights of the City as owner of the Street Ends.

5.2.4 The Public Open Space shall be landscaped substantially in accordance with the Open Space Drawings.

5.2.5 Declarant shall provide and maintain a public space signage system on the Waterfront Open Space.

5.3 Security for Obligations.

5.3.1 To secure Declarant's obligations to maintain the DPR Subject Open Space, upon Substantial Completion of the DPR Subject Open Space and prior to issuance by the Buildings Department of a TCO for the Proposed Development, Declarant shall post security

with DPR in a form reasonably acceptable to DPR in an amount sufficient to cover 125% of the then cost of maintaining the DPR Subject Open Space for the twelve-month period following issuance of the certification of Substantial Completion in accordance with the requirements of Section 4.06 of the M&O Agreement, plus \$10,000 to cover damages in the event that civil penalties are imposed by the Environmental Control Board upon a finding by the Commissioner of DPR that access to the DPR Subject Open Space has been denied pursuant to Section 6.05 of the M & O Agreement (the “**Security**”). The Security shall be replaced every five years with a new Security in such amount as is required pursuant to the provisions of the M&O Agreement. Failure to replace such Security after notice in accordance with the M&O Agreement shall constitute a default under this Declaration, the M&O Agreement and the Security.

5.3.2 In the event that the Street End Approvals have not been obtained by the dates by which such approvals are necessary in order for Declarant to obtain a TCO for the Proposed Development or Development Stage when required in connection with Declarant’s construction schedule and that the Security does not include any sums for maintenance of the Improved Street Ends, Declarant shall, within a reasonable time after receiving the Street End Approvals, consult with the Commissioner of DPR with respect to securing Declarant’s obligation to construct and maintain the Improved Street Ends.

5.4 Planting. Notwithstanding the provisions of Section 4.3 of this Declaration, and pursuant to Section 2.02(c) of the M&O Agreement, Declarant may defer, until the appropriate season, the planting of vegetation (which planting Declarant agrees to complete within the next available and appropriate planting season).

ARTICLE VI

EFFECT AND ENFORCEMENT

6.1 Effective Date.

6.1.1 This Declaration shall become effective upon the New York City Council's approval of the Applications pursuant to the New York City Charter (the "**Effective Date**"). Prior to the approval of the Applications by the City, Declarant shall deliver to DCP duplicate originals of the executed Declaration. Following the Effective Date, Declarant shall promptly file and record this Declaration in the Office of the County Register, Kings County, indexing it against the Subject Property, and shall deliver to DCP a copy of this Declaration as recorded, certified by the Register. If Declarant fails to so record and/or deliver this Declaration, the City of New York may record and/or request certified copies of the recorded Declaration at the sole cost and expense of the Declarant, who shall immediately pay such costs to the City of New York, together with the fee for the purchase of a certified copy of the recorded Declaration. The filing of this Declaration in the Office of the County Register shall be a precondition for the issuance of a building permit.

6.1.2 If, prior to construction of the Proposed Development, the approval or issuance, as the case may be, of any of the Applications is declared invalid or is otherwise voided by final judgment of any court of competent jurisdiction from which no appeal can be taken or for which no appeal has been taken for the statutory period, which judgment has the effect of preventing development of the Subject Property substantially in accordance with the Development Drawings, then, upon entry of judgment or upon the expiration of the applicable statutory period for such appeal, as the case may be, this Declaration shall be automatically cancelled without any further action by Declarant and be of no further force or effect, and the CPC shall, if requested by Declarant, provide Declarant with a letter or instrument in recordable form stating that this Declaration has been cancelled and is of no further force or effect.

6.2 No Other Restrictions of Record. Declarant represents and warrants with respect to the Subject Property that there are no restrictions of record, nor any present or presently existing liens, obligations, estates interests, covenants, easements, limitations or encumbrances of any kind which preclude, presently or potentially, the imposition on the Subject Property of the restrictions, covenants, obligations, liens and agreements set forth in this Declaration.

6.3 Enforcement by City. Declarant acknowledges that the City is an interested party to this Declaration and consents to the enforcement by the City, administratively or at law or at equity, of the covenants, conditions, restrictions and agreements contained herein.

6.4 Notice and Cure.

6.4.1 Before any agency, department, commission or other subdivision of the City institutes any proceeding or proceedings to enforce the terms or conditions of this Declaration or the M&O Agreement, it shall give Declarant thirty (30) business days written notice of such alleged violation, during which period Declarant shall have the opportunity to effect a cure of such alleged violation, except that such right to cure shall not apply to the failure to notify the Law Department of the City under the provisions of Section 4.6.2 hereof. If Declarant commences to effect a cure during such thirty (30) day period and proceeds diligently towards the effectuation of such cure, the aforesaid thirty (30) day period shall be extended for so long as Declarant continues to proceed diligently with the effectuation of such cure. If Declarant or Mortgagee has not commenced and diligently prosecuted efforts to effect such cure pursuant to the terms and conditions of this Declaration and, with respect to the DPR Subject Open Space, Section 6.02 of the M&O Agreement, Declarant (i) consents to the enforcement by the City of such obligation by any means reasonably deemed appropriate by the City, including but not limited to drawing down on the Security and applying such monies to the performance of

such obligation and (ii) agrees that, subject to the provisions of this Section 6.4, the City shall have the right to exercise any and all of its administrative, legal and equitable remedies including, but not limited to, a mandatory injunction compelling the defaulting owner to comply with its obligations under this Declaration. Declarant hereby grants to the City, and the City's agents and employees, a right to enter upon the Development Open Areas for the purpose of enforcing any of the Declarant's obligations under this Declaration following Declarant's failure to commence and diligently prosecute efforts to effect a cure, after notice and opportunity to cure in accordance with the provisions of this Declaration and, where applicable, the M&O Agreement. If the City has drawn down on the Security for the purposes of enforcing any of such obligations, Declarant shall, within fifteen (15) business days of such enforcement by the City, deposit with the DPR or the City, as appropriate, additional Security in an amount equal to the amount expended by the City in enforcing Declarant's obligation. The provisions herein relating to Declarant's opportunity to cure shall not apply to any default constituting a denial of access to DPR Subject Open Space, which shall be governed by Section 6.05 of the M&O Agreement.

6.4.2 Notice to Mortgagee. If Declarant fails to cure a violation within the applicable grace period provided in Section 6.4.1, above, then, prior to the institution by the City, or any agency or department thereof, of any action, proceeding, or proceedings against Declarant in connection with such failure, a Mortgagee shall be given thirty (30) days written notice of such alleged violation, during which period such Mortgagee shall have the opportunity to effect a cure of such alleged violation. If such Mortgagee commences to effect a cure during such thirty (30) day period and proceeds diligently towards the effectuation of such cure, the aforesaid thirty

(30) day period shall be extended for so long as such Mortgagee continues to proceed diligently with the effectuation of such cure.

6.5 Binding Effect. The provisions of this Declaration shall inure to the benefit of and be binding upon the respective heirs, successors, legal representatives and assigns of Declarant, and references to Declarant shall be deemed to include such heirs, successors, legal representatives and assigns as well as the successors to their interests in the Subject Property. Reference in this Declaration to agencies or instrumentalities of the City shall be deemed to include agencies or instrumentalities succeeding to jurisdiction thereof pursuant to the laws of the State of New York and the New York City Charter.

6.6 Limitation of Liability.

6.6.1 The City shall look solely to the fee estate and interest of Declarant and any and all of its successors and assigns in the Subject Property, on an *in rem* basis only, for the collection of any money judgment recovered against Declarant or its successors and assigns with respect to the obligations set forth in this Declaration, and no other property of Declarant or its principals, disclosed or undisclosed, partners, shareholders, directors, members, officers or employees or successors and assigns shall be subject to levy, execution or other enforcement procedure for the satisfaction of the remedies of the City or any other person or entity with respect to this Declaration, and no such party shall have any personal liability under this Declaration. Notwithstanding the foregoing, nothing in this Section 6.6.1 shall be deemed to preclude, qualify, limit or prevent any of the City's governmental rights, powers or remedies, including without limitation, with respect to the satisfaction of the remedies of the City, under any laws, statutes, codes or ordinances.

6.6.2 In the event that any building in the Proposed Development is subject to a declaration of condominium, every condominium unit (other than Affordable Housing) shall be subject to levy or execution for the satisfaction of any monetary remedies of the City solely to the extent of each Unit Interested Party's Individual Assessment Interest. The "**Individual Assessment Interest**" shall mean the Unit Interested Party's percentage interest in the common elements of the condominium in which such condominium unit is located applied to the assessment imposed by the Association on the condominium in which such condominium unit is located. In the event of a default in the obligations of the Association as set forth herein, the City shall have a lien upon the property owned by each Unit Interested Party solely to the extent of each such Unit Interested Party's unpaid Individual Assessment Interest, which lien shall include such Unit Interested Party's obligation for the costs of collection of such Unit Interested Party's unpaid Individual Assessment Interest. Such lien shall be subordinate to the lien of any prior recorded mortgage in respect of such property given to a bank or other institutional lender (including but not limited to a governmental agency), the lien of any real property taxes, and the lien of the board of managers of any such condominium for unpaid common charges of the condominium, and the lien of the Association pursuant to the provisions of Article VII hereof. The City agrees that, prior to enforcing its rights against a Unit Interested Party, the City shall first attempt to enforce its rights under this Declaration against the named Declarant, the Association and the boards of managers of any condominium association. In the event that the Association shall default in its obligations under this Declaration, the City shall have the right to obtain from the Association and/or the boards of managers of any condominium association, the names of the Unit Interested Parties who have not paid their Individual Assessment Interests.

6.6.3 The restrictions, covenants and agreements set forth in this Declaration shall be binding upon the Declarant and any successor-in-interest only for the period during which Declarant and any successor-in-interest is the holder of a fee interest in or is a party-in-interest of the Subject Property and only to the extent of such fee interest or the interest rendering Declarant a party-in-interest. At such time as a Declarant has no further fee interest in the Subject Property and is no longer a party-in-interest of the Subject Property, such Declarant's obligations and liability with respect to this Declaration shall wholly cease and terminate from and after the conveyance of Declarant's interest and Declarant's successors-in-interest in the Subject Property by acceptance of such conveyance automatically shall be deemed to assume Declarant's obligations and liabilities here-under to the extent of such successor-in-interest's interest.

6.6.4 The City shall look solely to the interest of any Party-in-Interest in the Subject Property other than Declarant for the collection of any deficiency not collected from Declarant or any judgment recovered against Declarant or the enforcement of any remedy based upon any breach by Declarant under this Declaration, but only after the City has exhausted all legal and equitable remedies against Declarant. No other property of any such Party-in-Interest or its principals, disclosed or undisclosed, partners, shareholders, directors, officers, members or employees shall be subject to levy, execution or other enforcement procedure for the satisfaction of the remedies of the City under or with respect to this Declaration and any such Party-in-Interest, disclosed or undisclosed, shall have no personal liability under this Declaration.

6.6.5 Notwithstanding anything to the contrary contained herein, the obligation to construct the Public Open Space in accordance with the provisions of this Declaration and the

M&O Agreement shall be binding only upon the Declarant or any successor entity that develops the Subject Property.

ARTICLE VII

PROPERTY OWNERS' ASSOCIATION

7.1 Obligation to Create Property Owners' Association

7.1.1 In order to guarantee Declarant's continuing obligations under this Declaration and under the M&O Agreement, Declarant shall cause to be organized a property owner's association (the "**Association**") if any of the following changes are made in the ownership of the Proposed Development: (i) any portion of the Proposed Development is submitted to a condominium regime under the provisions of Article 9-B of the New York Real Property Law, (ii) a cooperative corporation acquires title to less than all of the Proposed Development, or (iii) the Proposed Development is held in any other form of multiple ownership of fee title and/or leasehold of all or substantially all of the Proposed Development. If an Association is required to be formed as set forth above, the provisions of this Article VII shall be operative.

7.1.2 (a) If an Association is required to be organized pursuant to this Article VII, such Association shall be organized in accordance with the terms of this Declaration and in accordance with the New York State Not-for-Profit Corporation Law. The members of the Association shall be the Board of Managers of any condominium, the Board of Directors of any co-op corporation, any ground lessee(s) of all or any portion of the Subject Property, and the fee owner(s) of any portion of the Subject Property other than owners of individual condominium units.

(b) Declarant shall certify in writing to the CPC Chair and the Commissioner that the certificate of incorporation for the Association has been filed with the Secretary of State

and that the certificate of incorporation and all other governing documents of the Association are in full compliance with the requirements of this Declaration.

7.1.3 Any offering plan or “red herring” issued in connection with the sale of any units in or to a condominium regime formed with respect to any portion of the Proposed Development and any offering plan issued in connection with the ownership of any portion of the Proposed Development by a cooperative cooperation shall include a summary of the terms of this Declaration, and shall clearly identify the rights and obligations of the Association and the unit owners or the owners of shares of stock in the cooperative cooperation, as the case may be, including the provisions of Section 8.4.2 hereof.

7.2 Purposes. The Association shall be established for the purposes of assuming Declarant’s obligations with respect to the maintenance and operation of the Public Open Space as set forth in this Declaration and the M&O Agreement.

7.3 Association as Successor of Declarant. From and after the date the Association is formed, the Association shall be deemed a successor and assign of the Declarant pursuant to this Declaration, and shall be responsible for all costs associated with owning, maintaining, operating, and repairing the Public Open Space as required by this Declaration and the M&O Agreement. In connection with an application to amend, modify or cancel this Declaration, the Association shall be authorized to act on behalf of its members, who shall not be individually required to execute or waive the right to execute the application or the amended, modified, or cancelled Declaration.

7.4 Powers. In connection with its obligations under this Declaration and the M&O Agreement and to the extent permitted by law, Declarant shall cause the Association to be established with the power and authority to:

(a) maintain, repair and operate the Public Open Space to the extent required by this Declaration and the M&O Agreement.

(b) impose fees or assessments against the members of the Association, for the purpose of collecting funds reasonably necessary to satisfy the obligations of the Association pursuant to this Declaration;

(c) collect, receive, administer, protect, invest and dispose of funds;

(d) bring and defend actions and negotiate and settle claims to recover fees or assessments owned to the Association pursuant to this Article VII;

(e) exercise any of its duties or obligations pursuant to this Declaration without seeking the consent of Unit interested Parties; and

(f) exercise any and all of such powers as may be necessary or appropriate for purposes of this Declaration and as may be granted to the Association in furtherance of the Association's purposes pursuant to the New York Not-for-Profit Corporation Law.

7.5 Members. The members of the Association (the "**Association Members**") shall consist of (a) the fee owners of any portion of the Subject Property other than any Unit Interested Party and (b) the Boards of Managers of any portion of the Subject Property which is subject to a declaration of condominium.

7.6 Assessments.

7.6.1 The Association shall assess all real property within the Subject Property, other than property used solely for Affordable Housing, (the "**Assessment Property**") in order to obtain funds for the obligations of the Association pursuant to this Declaration. The Assessment Property shall be assessed on a reasonable prorated basis as determined by Declarant, in

compliance with all applicable laws. For Association Members who are the Boards of Managers of a condominium, a reasonable basis for such proration shall be conclusively established if the Attorney General accepts for filing an offering plan for the sale of interests in such condominium, as applicable, which plan describes such proration. The Boards of Managers of each condominium shall collect such assessments from the owners of individual residential or commercial units (“**Unit Owners**”), other than any Affordable Housing, for delivery to the Association in accordance with the condominium declarations. The Unit Owners shall have no personal liability under this Declaration, and the liability of any Unit Owner is limited to such Unit Owner’s obligation to pay his or her prorated share of the periodic assessment to the Association or to the condominium association.

7.6.2 Each periodic assessment by the Association, together with such interest, costs and reasonable attorney’s fees as may be assessed in accordance with the provisions of this Declaration, shall be the obligation of the Association Members against whom the assessment is charged at the time such assessment falls due and may not be waived by such Association Member. The Association may bring an action to recover any delinquent assessment, including interest, costs and reasonable attorney’s fees of any such action, at law or at equity, against the Association Member obligated to pay the same. In the event an Association Member has not paid its assessment to the Association within ninety (90) days of the date such payment was due, the Association shall take all reasonable measures as may be required in order to collect such unpaid assessment.

7.6.3 The periodic assessments charged to an Association Member shall be a charge on the land and a continuing lien upon the property owned by the Association Member against which each such assessment is made, except that if the Association Member is the Board

of Managers of a condominium, such lien shall be subordinate to the lien of any prior recorded mortgage in respect of such property given to a bank or other institutional lender (including but not limited to a governmental agency), the lien of any real property taxes, and the lien of the Board of Managers of such condominium for unpaid common charges of the condominium. The periodic assessments charged to an Association Member which is the Board of Managers of a condominium shall be included within the common charges of the condominium. The Association may bring an action to foreclose the Association's lien against the property owned by such Association Member, or a Unit Interested Party, as the case may be, to recover such delinquent assessment(s), including interest and costs and reasonable attorneys' fees of any such action. Any Unit Owner may eliminate the Association's lien described above on his or her unit by payment to the Association of such Unit Owner's prorated share of the periodic assessment by the Association to the condominium in which such Unit is located. No Association Member or Unit Owner may waive or otherwise escape liability for the assessments provided for herein by non-use of the Public Open Space or abandonment of the Association's property, or by renunciation of membership in the Association, provided, however, that a Unit Owner's liability with respect to future assessments ends upon the valid sale or transfer of such Unit Owner's interest in the Subject Property. A Unit Owner may give to the Association nevertheless, subject to acceptance thereof by the Association, a deed in lieu of foreclosure.

7.6.4 It is expressly understood that Association Members who may be assessed for the operation and maintenance of the Public Open Space shall not include the holder of a mortgage or other lien encumbering (i) the fee estate in the Subject Property or any portion thereof, or (ii) the lessee's estate in a ground lease of all or substantially all of the Subject Property or all or substantially all of any Parcel or portion thereof, or (iii) any single building to

be built on the Development Property, unless and until any such mortgagee succeeds to either (x) a fee interest in the Subject Property or any portion thereof or (y) the lessee's estate in a ground lease of all or substantially all the Subject Property (the interests described in sub-clauses (x) or (y) immediately preceding being each referred to as a "**Possessory Interest**") by foreclosure of the lien of the mortgage or other lien or acceptance of a deed or other transfer in lieu of foreclosure or exercise of an option to convert an interest as mortgagee into a Possessory Interest in any such fee or ground leasehold estate in the Subject Property or by other means permitted under applicable law from time to time; and no such mortgagee or lien holder shall be liable for any assessment imposed by the Association pursuant to this Article VII until the mortgagee or lien holder succeeds to such Possessory Interest.

ARTICLE VIII

AMENDMENTS, MODIFICATIONS AND CANCELLATIONS

8.1 Amendments of Declaration.

8.1.1 This Declaration may be modified, amended or canceled upon the approval of the CPC after application by Declarant. No other approval or consent by any other public body or private person or entity, including, without limitation, any present or future Parties in interest, shall be required for such modification, amendment or cancellation.

8.1.2 Declarant acknowledges and agrees that if it is in default in the performance of any of its obligations under this Declaration and such default shall not have been corrected after notice of such default prior to an application for amendment or modification of this Declaration, such default shall itself be sufficient grounds for the applicable person or entity as set forth above to disapprove any proposed amendment or modification of this Declaration.

8.2 Minor Modification. Notwithstanding the provisions of Section 8.1 above, the CPC Chair may, by express written consent, administratively approve modifications to this

Declaration (i) that CPC or the CPC Chair has determined to be minor, provided such modifications do not conflict with the M&O Agreement, or (ii) that are deemed to be minor modifications pursuant to the express provisions of the Declaration, and no other approval or consent shall be required from the CPC or any other agency or department of the City, or any private person or entity, including, without limitation, any present or future Parties-in-Interest.

8.3 Modification of M&O Agreement. Notwithstanding anything to the contrary contained in this Declaration, the M&O Agreement may be amended by Declarant and the DPR, which shall consult with the CPC Chair, in accordance with the provisions of the M&O Agreement, and no other approval or consent shall be required from any other public body or private person, including, without limitation, any present or future Parties-in-Interest.

8.4 Required Consents to Modifications or Amendments.

8.4.1 Notwithstanding anything to the contrary contained in this Declaration, for so long as Declarant (other than the Association) shall hold more than a 25% fee interest in the Subject Property (provided that, in the event the Waterfront Open Space shall have been transferred to the City in accordance with the provisions of Article X, said percentage ownership shall be determined based on the area of the Subject Property exclusive of the portion as to which fee title was transferred to the City), (i) all Unit Interested Parties, (ii) all boards of managers of any condominium association, and (iii) the Association, hereby (x) irrevocably consent to any amendment, modification, cancellation, revision or other change in this Declaration by Declarant; (y) waive and subordinate any rights they may have to enter into an amended Declaration or other instrument amending, modifying, canceling, revising or otherwise changing this Declaration, and (z) nominate, constitute and appoint Declarant their true and

lawful attorney-in-fact, coupled with an interest, to execute any documents or instruments that may be required in order to amend, modify, cancel, revise or otherwise change this Declaration.

8.4.2 From and after the date that Declarant (other than the Association) holds less than a 25% fee interest in the Subject Property or any portion thereof (other than one or more individual residential or commercial condominium units, and provided that, in the event the Waterfront Open Space shall have been transferred to the City in accordance with the provisions of Article X, said percentage ownership shall be determined based on the area of the Subject Property exclusive of the portion as to which fee title was transferred to the City)), and provided the Association shall have been organized as provided in this Declaration, the Association shall be deemed to be the sole Declarant and Party-in-Interest under this Declaration. In such event, the Association shall be the sole party with any right to amend, modify, cancel, revise or otherwise change the Declaration, or make any application therefor, and each and every Lot Owner hereby (x) irrevocably consents to any amendment, modification, cancellation, revision or other change in this Declaration by the Association; (y) waives and subordinates any rights it may have to enter into an amended Declaration or other instrument amending, modifying, canceling, revising or otherwise changing this Declaration, and (z) nominates, constitutes and appoints the Association its true and lawful attorney-in-fact, coupled with an interest, to execute any documents or instruments that may be required in order to amend, modify, cancel, revise or otherwise change this Declaration.

ARTICLE IX

MISCELLANEOUS

9.1 Notices. All waivers, elections, demands and notices or other communications relating to this Declaration shall be effective only if in writing and (a) mailed to the party for

which it is intended by certified or registered mail, return receipt requested, postage prepaid, or (b) personally delivered, or (c) by overnight express courier for next day delivery, addressed as follows, or to such other address as the parties hereto may from time to time designate by notice given as aforesaid:

If to the Declarant: Toll Brothers, Inc.
250 Gibraltar Road
Horsham, PA 19044
Attention: General Counsel

With a copy to: Kramer Levin Naftalis & Frankel LLP
1177 6th Avenue
New York, New York 10036
Attention: Paul D. Selver
Telephone: 212- 715-9199

If to the City: New York City Planning Commission
22 Reade St.
New York, NY 10007
Attn: Chairperson

All notices shall be deemed given (i) upon hand delivery, (ii) three (3) days after mailing, if sent by United States mail in the manner described above, or (iii) one (1) day after mailing if sent by overnight express courier for next day delivery.

9.2 Severability. In the event that any provision of this Declaration shall be deemed, decreed, adjudged or determined to be invalid or unlawful by a court of competent jurisdiction after all appeals are exhausted or the time for appeal has expired, such provision shall be severable, and the remainder of this Declaration shall continue to be in full force and effect.

9.3 Declaration to be Included. Declarant shall include a copy of this Declaration as part of any application related to the obligations under this Declaration to any governmental agency or department having jurisdiction over the Subject Property including, without limitation, the Department of Buildings, the New York City Board of Standards and Appeals and the CPC.

9.4 Default and Attorneys' Fees. If Declarant is found by a court of competent jurisdiction to have been in default in the performance of its obligations under this Declaration, and such finding is upheld on final appeal or the time for further review of such finding or appeal by a court or by other proceedings has lapsed, Declarant shall indemnify and hold harmless the City and the CPC from and against all reasonable legal and administrative expenses arising out of or in connection with the enforcement of Declarant's obligations under this Declaration.

9.5 No Third Party Beneficiary. No person or entity other than Declarant (including Mortgagee) or the City shall have any right to enforce the provisions of this Declaration. This Declaration shall not create any enforceable interest or right in any person or entity other than Declarant and the City, who shall be deemed to be the proper entities to enforce the provisions of this Declaration, and nothing contained herein shall be deemed to allow any other person or entity, public or private, any interest or right of enforcement of any provision of this Declaration or any document or instrument executed or delivered in connection with the Applications.

ARTICLE X

PROVISIONS EFFECTIVE UPON ADOPTION OF TRANSFER PROVISIONS

The provisions of this Article X shall be effective solely from and after the adoption of the
Transfer Provisions

10.1 Request for Transfer of Waterfront Open Space to New York City

10.1.1 Within six (6) months after the adoption of the Transfer Provisions by the City, Declarant shall request in writing that the City accept fee title to the Waterfront Open Space in accordance with the Transfer Provisions (the "**Transfer Request**"). Such request shall be accompanied by any and all design and construction drawings of the Waterfront Open Space that have been completed to date by Declarant (collectively, the "**Design Drawings**"). The City shall have one hundred twenty (120) days (the "**Acceptance Period**") to accept such fee title,

provided that during the Acceptance Period it may identify any modifications to the Design Drawings which it determines must be made as a condition to the City's acceptance of the Transfer Request. In the event that the City notifies Declarant during the Acceptance Period that it desires to accept the Transfer Request with modifications to the Design Drawings, Declarant shall notify the City whether such modifications are acceptable and the parties shall meet and confer as necessary to resolve issues. In the event that such modifications are not acceptable to Declarant, in Declarant's sole judgment, Declarant may withdraw its Transfer Request. In the event such modifications are acceptable to Declarant, in Declarant's sole judgment, such modifications shall be deemed incorporated in the Transfer Request. If the City does not notify Declarant within the Acceptance Period that it will accept such fee title, Declarant shall have the right, at its sole option, to withdraw the Transfer Request at any time thereafter, and upon such withdrawal or upon a determination by the City that it does not want to accept the Transfer Request, whichever shall first occur, the provisions of this Article X shall be of no further force or effect. In the event that the City accepts the Transfer Request pursuant to this Section 10.1.1, the provisions of Section 10.2 shall apply.

10.1.2 If the City has notified Declarant that it requests modifications to the Design Drawings or in the event that the City has not provided notice to Declarant within the Acceptance Period that it will accept or reject the Transfer Request and Declarant has not withdrawn the Transfer Request, and as a result of any of the foregoing Declarant determines that it will not obtain a TCO or PCO, as the case may be, for the Proposed Development or Development Stage when required in connection with Declarant's construction schedule, Declarant shall so notify DCP and DPR. Provided that, exercising its reasonable judgment, DPR concurs that Declarant has not exercised bad faith in connection with the Transfer Request and

that Declarant is unlikely to obtain such permit or other approval by such dates, the foregoing shall be deemed to be a Circumstance Beyond the Control of Declarant.

10.2 Amended Declaration

10.2.1 Declarant and the City shall enter into an amendment to this Declaration, in form and substance satisfactory to Declarant and the City, relating to the transfer of the Waterfront Open Space (the “**Amended Declaration**”). In the event that the City and Declarant cannot agree to an Amended Declaration within four (4) months of the date the City shall have notified Declarant that it desires to accept the transfer of fee title, Declarant shall have the right, at its sole option, to withdraw the transfer request, and the City shall have the right, at its sole option, to withdraw its acceptance, and upon the withdrawal of the transfer request or the acceptance, as the case may be, the provisions of this Article X shall be of no further force or effect. The City agrees that the Amended Declaration shall be deemed a minor modification of this Declaration. In connection with such transfer, Declarant and the City shall enter into a WAA Maintenance Agreement and the provisions of the M&O Agreement shall thereafter apply only to the Pedestrian Access Easements.

[Signatures on following page]

IN WITNESS WHEREOF, this Declaration has been duly executed by Declarant
as of the date first written above.

KINGSPB LLC

By: _____

Name:

Title:

CITIBANK, N.A., as Trustee

By: _____

Name:

Title:

JOSEPH PHILLIPS, as Trustee

363 BOND STREET CORP.

By: _____

Name:

Title:

WOODEN BRIDGE, LLC

By: _____

Name:

Title: