

NOV 12 2013

City Attorney

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is entered into on OCTOBER 15, 2013 by and between KENNETH SARACHAN, LAURIE BROWN and the CITY OF BERKELEY (the City).

RECITALS

A. Sarachan is the owner of 2501-03 Haste Street, Berkeley, California (the Property). Laurie Brown is Sarachan's wife and may, or may not, have an ownership interest in the Property.

B. In or about 1994, Sarachan purchased the Property subject to certain liens recorded in favor of the City. On December 11, 1991, the City had recorded against the Property a special assessment lien in the amount of \$179,955.83 and accruing interest at the rate of 7% per annum (Special Assessment Lien). On October 18, 1994, the City recorded a nuisance abatement lien (Nuisance Abatement Lien) in the principal amount of \$41,503.70 and accruing interest at the rate of 7% per annum.

C. On or about March 21, 2003, the City and Sarachan executed an *Agreement Concerning Development of 2501 Haste Street* (2003 Agreement). Pursuant to the 2003 Agreement, the parties agreed to convert the Special Assessment Lien into a promissory note secured by a first deed of trust. The parties agreed that the outstanding amount of \$361,604.09 would accrue interest at the rate of 4% per annum. Pursuant to the 2003 Agreement, Sarachan executed a Promissory Note in favor of the City on October 31, 2005, and executed and delivered to City, as beneficiary, a deed of trust, which was recorded against the Property on November 15, 2005 as Document No. 2005489912 in the Official Records of Alameda County, California (Deed of Trust).

D. In the 2003 Agreement, the City agreed to waive the liens it holds against the Property and to cancel the Promissory Note secured by the Deed of Trust if and when Sarachan met certain terms and conditions set forth in the 2003 Agreement.

E. On or about October 25, 2011, the City sent written notice of default to Sarachan and, pursuant to Section 6 of the 2003 Agreement, gave him 30 days to cure the default of the terms and conditions of the 2003 Agreement.

F. On January 26, 2012, the City of Berkeley filed a Complaint for Reformation of Deed of Trust and Judicial Foreclosure of Deed of Trust and Delinquent Nuisance Abatement Lien against Kenneth Sarachan (Sarachan) and Laurie Brown (Brown) in Alameda County Superior Court, Case No. RG12614265 (the Action). On or about June 25, 2012, Sarachan and Brown filed a Cross-Complaint against the City, and on or about October 2, 2012, they filed a First Amended Cross-Complaint. The Court sustained the City's demurrer to the First Amended Cross-Complaint and dismissed it with prejudice on or about February 5, 2013.

G. The parties now desire to resolve the Action by way of settlement and to enter into a new Agreement. The parties agree that as of October 7, 2013, the amount due on the Promissory Note, including interest, is \$514,290.18 and the amount owing on the Nuisance Abatement Lien, including interest, is ~~\$76,175.67~~, for a total amount due to the City, as of October 7, 2013, of ~~\$590,465.85~~.

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H. Therefore, the parties now agree as follows:

1. 2003 Agreement Superseded

The parties agree that the terms and conditions of the 2003 Agreement are superseded by the terms and conditions of this Agreement. Sarachan agrees to execute a new Promissory Note secured by a Deed of Trust in connection with the obligations set forth in this Agreement no later than November 15, 2013. The City agrees it will cancel and release the October 31, 2005 Promissory Note and Deed of Trust executed by Sarachan in favor of the City, and that it will take whatever steps necessary to do so simultaneously with the recording of the new Promissory Note and new Deed of Trust. Failure to execute a new Promissory Note and Deed of Trust by November 15, 2013 shall constitute material breach of this Agreement, providing that the City provides such instruments to Sarachan by November 1, 2013.

2. Development and Building Requirements

Sarachan agrees to develop a building on the Property, and on 2429-33 Telegraph Avenue and on 2509 Haste ("the Adjacent Properties"), which includes the following features:

- 1.0 Has ground floor retail space with adequate ceiling height for visibility and presentation to retail customers; and
- 2.0 Has a minimum of three floors of housing over the entire ground floor except as may be allowed by use permit; and
- 3.0 Complies with the inclusionary housing requirements of Berkeley Municipal Code section 23C.12.030; and
- 4.0 Contains one additional unit of housing affordable to a household with an income at or below 50% of area median income, in addition to the requirements of BMC section 23C.12.030; and
- 5.0 Includes a public restroom constructed at Sarachan's own expense and either operated by Sarachan or leased to the City for no more than one dollar (\$1.00) per year.

3. Deadlines for Development of the Property and the Adjacent Properties

- 1.0 Within 15 days of the execution of this Agreement by both parties, both parties agree to schedule a preview of Sarachan's use permit application with the Zoning Adjustments Board (ZAB) for a mutually agreeable date not to exceed 45 days from the date of execution of this Agreement.
- 2.0 The City shall set a public hearing before the ZAB on Sarachan's use permit application no less than 60 days, and no greater than 90 days, from the date of the ZAB preview, and Sarachan agrees to complete any items required for such public hearing.

- 3.0 If the ZAB continues the public hearing on Sarachan's application, the City shall set the continued public hearing for the second subsequent ZAB meeting, and Sarachan shall respond to any comments issued by the ZAB on the proposed application in time for the continued ZAB proceedings. The parties agree that Sarachan's application shall remain on the ZAB agenda every other ZAB meeting until the ZAB acts on it.
- 4.0 Sarachan agrees to move the Woolley House to 2506 Dwight Way/2508 Regent Street within ninety (90) days of the City giving written notice to Sarachan that the owner of 2506 Dwight Way/2508 Regent Street has received all necessary regulatory approvals, including approval of the foundation, to receive the Woolley House on the property at 2506 Dwight Way/2508 Regent Street. If PG&E (in its sole discretion) cannot accommodate the move of the Woolley House within the 90-day time frame, then Sarachan's time shall be extended to PG&E's next available date, providing that Sarachan submitted a complete application for the move to PG&E within one week of receiving notice from the City.
- 5.0 In the event the owner of 2506 Dwight Way/2508 Regent Street fails to obtain all necessary regulatory approvals for receipt of the Woolley House on his property within six (6) months of execution of this Settlement Agreement by both parties, Sarachan agrees to move forward with a development that meets all the requirements of Paragraph 2, above, within the timeframes set forth herein, by, if necessary, relocating the Woolley House to another location on the Property or the Adjacent Properties, or to another suitable location, including obtaining all necessary regulatory approvals for such relocation, including any environmental review, consistent with the timeframes and deadlines set forth in subsections 6.0 to 9.0, below.
- 6.0 From the date the use permit becomes final as to the City, Sarachan shall have four (4) months to submit a complete application for a use permit modification. Sarachan agrees to pursue such modification pursuant to the schedule set forth in subsection 3.0, above. If Sarachan does not apply for a use permit modification, Sarachan shall have seven (7) months from the date the use permit becomes final as to the City to submit a complete application for a building permit. Sarachan shall have seven (7) months from the date the modified use permit becomes final as to the City to submit a complete application for a building permit.
- 7.0 The City shall have sixty (60) working days to complete the initial review of the building plans, and Sarachan shall have sixty (60) working days to make all of the requested corrections and/or clarifications and resubmit the plans. If the City takes more than sixty (60) working days to complete the initial review, Sarachan shall have an equal amount of time to make all of the requested corrections and/or clarifications and resubmit the plans. The City shall have twenty one (21) working days to complete review of any subsequent resubmittal of plans, and Sarachan shall have twenty one (21) working days to make all of the requested corrections and/or clarifications and resubmit the plans. If the City takes more than twenty one (21) days to review a resubmittal, Sarachan shall have an equal amount of time to make all of the requested corrections and/or clarifications and resubmit the plans.

8.0 Sarachan shall start construction within six (6) months of the date that the building permit(s) are available for pickup.

9.0 Sarachan shall complete construction and obtain a Certificate of Occupancy (COO) within eighteen (18) months of the date the first building permit is issued. If Sarachan does not obtain a COO within eighteen (18) months, the City shall provide written notice of default and he shall have no more than ninety (90) days to cure such default by completing construction and obtaining a COO.

4. Party Representative

No later than 45 days after execution of this Agreement by both parties, each party shall appoint a single point of contact to discuss issues that may arise in fulfillment of the duties and obligations set forth in this Agreement. A party may modify its appointment of a contact person upon one week written notice to the other party.

5. Arbitration

The parties agree that claims of breach of this Agreement shall be limited to (1) either party failing to meet one or more of the deadlines set forth in Paragraph 1 and Paragraph 3, subsections 2.0, 3.0 and 5.0 to 10.0, above; (2) Sarachan failing to meet any of the requirements of Paragraph 2, above; and (2) nonpayment by Sarachan of any amount owing hereunder, with interest updated to then-present date. Any such controversy or claim shall be resolved by binding arbitration and administered by rules selected by the arbitrator. The arbitrator shall be Retired Judge Richard Snowden, currently of JAMS. Any such arbitration will be held in Alameda County, unless the parties agree otherwise. In the event Retired Judge Snowden is not available, the parties shall mutually agree to a selection method based on an industry-recognized method for selecting an ADR neutral.

6. Cancellation of Amended Promissory Note and Waiver of Nuisance Abatement Lien

If Sarachan complies with all of the terms and conditions of Paragraphs 2 and 3, above, the City agrees to cancel any promissory note secured by a deed of trust recorded against the Property and to record a cancellation or release of that deed of trust, and to waive payment of the Nuisance Abatement Lien described in Recitals F & G, above. The City further agrees that, absent breach of any of the terms and conditions of Paragraphs 1, 2 and 3, above, the City will not enforce any lien it currently holds against the Property, or any promissory note made in relation to development of the Property. If it is determined that Sarachan is in breach of the Agreement, the City may proceed to collect the amounts due under the Promissory Note, executed in conjunction with this Agreement, and the Nuisance Abatement Lien, by whatever process the City, in its sole discretion, chooses, except that the parties agree that the factual and legal findings made by the Arbitrator shall be conclusive for purposes of the City collecting on the amounts owing.

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7. Settlement as Full Satisfaction

The City of Berkeley, for its part, and Kenneth Sarachan and Laurie Brown, for their part, accept the settlement as full satisfaction of all litigation and/or claims that were made or could have been made against them in the Action.

8. Dismissal; Agreement Not to File Appeal

The City of Berkeley agrees to dismiss the Action with prejudice and Kenneth Sarachan and Laurie Brown agree not to appeal the Court's dismissal of their First Amended Cross-Complaint against the City. However, the City's dismissal of the Action is contingent upon payment by Sarachan of the discovery sanctions ordered by the Court on September 17, 2013 and payment of the court reporter and videographer costs referenced in the Court Order filed on October 8, 2013.

9. Settlement as a Compromise

The parties acknowledge and agree that the settlement provided in this Agreement and the execution of this Agreement are the result of a compromise of disputed claims. This Agreement shall not be deemed an admission of liability concerning any of the matters set forth in the Action. No past or present wrongdoing or liability upon the part of any of those released in this Agreement shall be implied by any of the agreements herein.

10. Force Majeure

Neither party shall be in default or otherwise liable for any delay in or failure of its performance under this Agreement if, and only if, such delay or failure arises by any reason beyond its reasonable control, including any act of God, any acts of the common enemy, the elements, earthquakes, catastrophic floods or fires, epidemics, riots, acts of terrorism, or a bona fide third-party lawsuit related to Sarachan's development of the Property or Adjacent Properties, provided, however, that lack of funds shall not be deemed to be a reason beyond a party's reasonable control. The parties will promptly inform and consult with each other as to any of the above causes which in their judgment may be the cause of a delay in the performance of this Agreement.

11. Attorneys' Fees and Costs

The parties agree that each party shall pay their own attorney's fees and costs in connection with the matters set forth in the Action and the preparation of this Agreement.

12. Waiver of Claims For Unknown Damages

The Parties expressly waive and assume the risk of any and all claims that exist as to these matters as of the date this Agreement is executed by either party, but which it does not know of or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise, and which, if known, might materially affect its decision to enter into this Agreement. The Parties waive all rights under section 1542 of the Civil Code of California, which reads as follows:

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A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

13. Warranty Regarding Capacity to Execute Agreement

The parties expressly represent to each other that they have the sole right and exclusive authority to execute this Agreement.

14. Representations Regarding Comprehension and Preparation of Document

Each party represents that in entering into this Agreement, it has relied upon the legal advice of its attorneys, who are the attorneys of the party's own choice. Each party further represents that the terms of this Agreement have been completely read by the party, and that these terms are fully understood and voluntarily accepted by both their attorneys and themselves.

Each party and counsel for each party has reviewed and revised, or had the opportunity to revise this Agreement, and accordingly the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party is not applicable and therefore shall not be employed in the interpretation of this Agreement or any amendment of it.

15. Entire Agreement

This Agreement contains the entire agreement of the parties with regard to the matters set forth herein and may not be amended except by a writing executed by all the parties hereto.

16. Living Wage Ordinance

The City acknowledges and agrees that to the extent Berkeley Municipal Code (BMC) Chapter 13.27, commonly known as the "Living Wage Ordinance" (LWO), applies to the project contemplated in this Agreement as a result of the waiver of the liens and/or cancellation of the promissory note pursuant to paragraph 6, above, the LWO is waived, except with respect to those employees working directly in conjunction with the development, construction and management of the residential portion of the project. The City Council finds that waiver of the LWO, except as set forth above, is in the best interests of the City, and accordingly waives the requirements of the LWO with respect to a project developed pursuant to, and consistent with, this Agreement, under the authority of BMC Section 13.27.040.


17. Authority

The City agrees that it shall obtain City Council authority to execute this Agreement and that if such authority is given, the City Manager shall have full power and authority to bind the City to waive the lien and cancel the promissory note in accordance with the provisions of

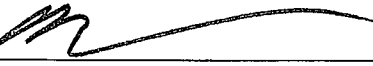
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paragraph 6, above, and to restrict enforcement of the LWO in accordance with the provisions of Paragraph 16, above.

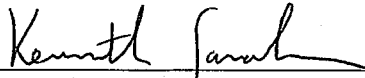
Dated: 11/14/13

By: 
Christine Daniel, City Manager for the City of Berkeley

Dated: 11/18/13

By: 
Zach Cowan, City Attorney for the City of Berkeley

Dated: 10/15/13

By: 
Name: Kenneth Sarachan
Title:

Dated: 10/15/13

By: 
Name: Laurie Brown
Title:

AS THE ATTORNEY FOR SARACHAN and BROWN, I hereby represent and declare that I have fully explained the contents and legal effect of this Settlement and Release to the above signed.

Dated: 10/15/13

By: 
Jeffrey A. Leon, Attorney for Kenneth Sarachan and Laurie Brown

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