

MEMORANDUM OF UNDERSTANDING

This **MEMORANDUM OF UNDERSTANDING** (this "MOU") is made as of this 20th day of ~~January~~^{February}, 2008 by and between **THE INCORPORATED VILLAGE OF GARDEN CITY** ("Village"), and **AVALON BAY COMMUNITIES, INC.** (the "Developer").

PRELIMINARY STATEMENT

The Village is the owner of the St. Paul's Development Site, constituting a 125,000 square-foot school building (the "Main Building"), a 16,000 square-foot annex building ("Ellis Hall") and approximately 7 acres of underlying land (the "Land") located in the Village of Garden City (the Main Building, Ellis Hall and the Land are hereinafter collectively referred to as the "Development Site"). The Main Building has been a cherished architectural feature in the Village of Garden City for over 125 years. The Village is seeking to return the Main Building to productive use, restore its historic exterior and other distinguished features to the extent possible, and provide for its long-term maintenance at minimal or no direct cost to Village of Garden City taxpayers.

Accordingly, on July 19, 2006, the Village issued a request for proposals (as the same may have been amended and/or supplemented, the "RFP") seeking proposals for the redevelopment of the Development Site in accordance with the foregoing guidelines (the "Project"). Developer submitted a proposal in response to the RFP (as hereinafter more fully described, the "Proposal") and has been conditionally designated as the preferred party to redevelop the Development Site. The Developer has proposed (a) a long term net lease of the Development Site by the Village, as landlord, to Developer, as tenant (the "Developer Lease"), and (b) a sublease of certain space within the Development Site (the "Community Space") by Developer to the Village (the "Community Space Lease"). Execution of the Developer Lease and the Community Space Lease and satisfaction of the conditions necessary to enter into such instruments, and such other instruments and agreements that the Village or Developer determine may be necessary, is hereinafter referred to as the "Transaction".

The Village and the Developer acknowledge that in order to obtain certain real estate and sales tax exemptions it may be advantageous to enter into agreements with either the Nassau County Industrial Development Agency or the Hempstead Industrial Development Agency (each such agency is referred to hereinafter as the "IDA") (such agreements are hereinafter referred to as the "IDA Agreements"). However, the terms of any IDA involvement in the Project, including any payments in lieu of real estate taxes ("PILOTS"), have not yet been established.

The Village and Developer are entering into this MOU to establish a framework (a) for informing Village residents about details of the proposed project and receiving resident feedback, (b) for negotiating the Developer Lease and other instruments required to consummate the Transaction (the "Transaction Documents"), (c) to allow for the performance of any environmental, structural and other investigations that may be required, and (d) for undertaking various planning, design, engineering and other related activities.

NOW, THEREFORE, the Village and Developer hereby agree as follows:

ARTICLE I

DEVELOPER'S PROPOSAL

Developer's Proposal is set forth in the following documents:

- (a) RFP Response, dated October 5, 2006;
- (b) RFP Clarifications, dated November 3, 2006;
- (c) Letter from Developer to the Village, dated December 7, 2006;
- (d) Letter from Developer to K. Backus & Associates, Inc., dated February 2, 2007;
- (e) Letter from Developer to K. Backus & Associates, Inc., dated May 22, 2007; and
- (f) Letter from Developer to K. Backus & Associates, Inc., dated September 5, 2007.

Developer acknowledges that the Proposal has not been formally accepted by the Village Board of Trustees, and that it remains subject to further discussion and negotiation. It is the parties' intention to (i) negotiate and reach understandings on the primary business issues contained in the Proposal on or before February 29, 2008, and (ii) memorialize such understandings in an addendum to this MOU. Developer acknowledges that the paramount objective for the Village in any redevelopment is to restore the Main Building's historic exterior and other distinguished features to the extent possible, and provide for its long-term maintenance at minimal or no direct cost to Village taxpayers. Any private redevelopment or use of the Main Building that does not achieve these minimal objectives is unacceptable. The Village acknowledges that the Developer has advised it that while Developer is prepared to discuss and negotiate the terms of the Proposal, Developer has certain minimum economic thresholds it must meet and, accordingly, it may be limited in making changes to its development Proposal. In any event, as set forth in Section 4.1 hereof, either party may terminate this MOU at any time.

ARTICLE II

ACTIONS OF THE PARTIES DURING THE TERM OF THIS MOU

2.1 **Transaction Documents**. This MOU shall become effective upon the date hereof and shall remain in effect until the earlier of the consummation of the Transaction (the "Closing") or the termination of this MOU pursuant to Section 4.1 hereof (the "Effective Period"). During the Effective Period of this MOU, the Village and Developer will, among other things, seek to reach agreement with respect to the terms of the Transaction Documents and the Plans (hereinafter defined), both of which shall be in form and substance satisfactory to (a) the Village, in the exercise of its sole discretion, and (b) Developer, in the exercise of its sole discretion.

2.2 **Community Outreach**. The Village and Developer acknowledge that it is important to communicate the goals and material elements of the Project, and the background and experience of the Developer, to the residents of the Village of Garden City, and to solicit

public feedback and input. Accordingly, Developer has agreed, at a minimum, to engage in the following methods of communicating such information to such resident and of obtaining feedback and input, at Developer's expense:

- (a) Preparation of artist's renderings and other detailed depictions of the proposed redevelopment;
- (b) Establishing and maintaining a "web site" on the Internet;
- (c) Preparation and direct mailing of informational materials;
- (d) Conducting an outreach to Village groups and opinion leaders.
- (e) Conducting public forums and presentations; and
- (f) Conducting, or supporting the conduct by the Village, of one or more polls or other activities by a professional entity to measure the opinions and views of the residents of the Village regarding the Project (such polls and activities being collectively referred to as "Measures")..

Developer agrees that the issuance or release by it, or on its behalf of any press release, advertisement, literature or material of any kind (including the items referred to above) that refers to the St. Paul's Development Site, the Village of Garden City, or to the development contemplated in connection with this MOU shall require the mutual written approval of Developer and the Village, which approval may be withheld by either party for any reason. Notwithstanding the foregoing, except to the extent prohibited by the provisions of Section 4.9, the written approval of neither the Village nor the Developer shall be required (x) for issuance or release of any communication or material by the Village, or (y) for the issuance by Developer of individual, limited and directed correspondence. Developer agrees to keep the Village fully apprised of any strategies or plans for communicating with, and any actual communications with, the residents of the Village, and with any groups, departments, boards, agencies, commissions or other organizations or individuals, whether governmental or private, in connection with this MOU or the development contemplated herein and hereunder. Developer agrees that it shall retain, at its sole cost and expense, the services of one or more consultants to assist in this process. All such consultants shall be subject to the approval of both parties. Notwithstanding the foregoing provisions, the parties agree that (x) the Developer shall not conduct any Measures without the consent of the Village, (y) the Village may conduct Measures with consultants of its choosing, without the consent of the Developer, and (z) the Village shall pay for such Measures as it may conduct, unless the parties otherwise agree.

Plans. The Proposal contains preliminary drawings (the "Preliminary Drawings") outlining the design for Developer's proposed redevelopment of the Development Site. The parties intend to discuss and negotiate the Preliminary Drawings. Based on such discussions and negotiations, Developer, at its own cost, shall develop the Preliminary Drawings into schematic drawings showing in sufficient detail to enable the Village to evaluate and make decisions regarding the design and construction of:

(i) the exterior portions of the Main Building and all improvements to be constructed on the Development Site;

(ii) those interior portions and elements of such Main Building and other improvements (I) that comprise any Community Space or will otherwise be available for use by the public, and/or affect such interior portions and elements, and (II) which are necessary to determine Developer's compliance with the any final agreement that may be reached concerning the Project (for example, the number of residential units that may be built); and

(iii) the layouts of apartment units in the Main Building and other improvements. (the foregoing plans described in (i). (ii) and (iii) above being referred to as the "Plans").

To assure that the Plans are timely completed and submitted for approval by all parties to the extent required, the parties will develop and adopt specific design procedures and schedules, which will provide, among other things, (a) that the Village's representatives are afforded opportunities to meet with Developer's design team, (b) that all design discussions will be embodied in meeting minutes that will be provided to all parties, and (c) that progress milestones will be established to assure the timely completion of the Plans. Additionally, the Village may request of Developer that Developer prepare such other plans and drawings as the Village determines may be required to allow it to evaluate the proposed redevelopment of the Development Site.

2.3 **IDA**. As noted above, the participation of the IDA in the Project may be required. If, and to the extent, the parties agree to involve the IDA in the Project, the Village shall lead the IDA negotiations, with the active support of the Developer. Without limiting the generality of the foregoing, each of the Village and Developer will: (a) keep the other party fully apprised as to the status of all discussions and negotiations with or pertaining to the IDA (and, when the Village deems it appropriate, the Village will afford the Developer with the opportunity to participate in such discussions and negotiations), (b) provide the other party with copies of any correspondence with or pertaining to the IDA, (c) afford the other party the opportunity to review and comment on any proposed IDA Agreements, and (d) agree not to execute any IDA Document unless both parties have given their written approval thereto in each instance.

2.4 **Parkland Alienation and Home Rule Legislation**. The Development Site is currently subject to "public trust" and "parkland" designations, which must be removed to enable any private redevelopment and reuse of the Main Building. Removal of the parkland designation is accomplished through a process known as alienation (the "Parkland Alienation"). Action by the New York State Legislature, with the cooperation and approval of the New York State Office of Parks, Recreation and Historic Preservation (the "Parks Office"), is required (such action is referred to as the "Home Rule Legislation") to eliminate the public trust and parkland restrictions and provide the other critical approval required for a redevelopment to proceed. The parties acknowledge that a key element in obtaining the Home Rule Legislation is a demonstration of public support from Village residents and the support of local elected officials for the Project. The Village shall lead the effort to obtain the Parkland Alienation and the Home Rule Legislation, with the active support of the Developer. Without limiting the generality of the foregoing, each of the Village and Developer will: (a) keep the other party apprised as to the status of discussions and negotiations with third parties pertaining to the Parkland Alienation and

Home Rule Legislation (and, when the Village deems it appropriate, the Village will afford the Developer with the opportunity to participate in such discussions and negotiations), (b) provide the other party with copies of material correspondence with third parties pertaining to the Parkland Alienation and Home Rule Legislation, and (c) afford the other party the opportunity to review and comment on any proposed legislation or similar document in connection with the Home Rule Legislation.

2.5 Updates.

(a) Developer shall provide updates to the Village through bi-weekly conference calls and monthly in-person meetings, or at other time(s) upon the mutual concurrence of both parties, with respect to the status of Developer's progress in connection with the Project, including, without limitation, budgets for all work, marketing, leasing, financing and the status of agreements with third parties. The Village shall prepare and deliver to the Developer agendas for, and minutes of, such scheduled conference calls and meetings as it [reasonably] determines shall be required. The parties shall confer from time to time as to the progress of any items agreed upon in such conference calls and meetings that require further action.

(b) Developer shall cause a reasonable number of copies of all plans, reports, studies, surveys, designs, drawings and plans and specifications prepared by third parties for or on behalf of Developer) with respect to the Project (collectively, the "Project Materials") to be delivered to the Village as they are received by Developer. However, the Village agrees that Project Materials shall not include early drafts of such plans, reports, etc, that the Developer reasonably determines will materially differ from the anticipated final version of such item; provided, however, that the Developer shall upon the Village's request provide a list of such preliminary plans, reports, etc and will, upon the Village's request provide copies of any of same.

(c) The main contact person for the Village with respect to the updates provided for under Section 2.5 is Karen Backus, or such other person as the Village may designate from time to time.

(d) The main contact persons for Developer with respect to the updates provided for under Section 2.5 are Matthew Whalen and Christopher Capece, or such other person as Developer may designate from time to time.

2.6 Access. From and after the date hereof, Developer shall have the right to access the Development Site to perform inspections and for other reasonable purposes consistent with the development planning, subject to and in accordance with the conditions hereinafter set forth.

(a) Developer shall have the right to conduct inspections (both invasive and non-invasive), examinations, surveys, tests and studies of the Development Site (collectively, the "Investigative Activities") from time to time, after the date hereof upon the written permission of the Village to perform the same, which permission shall not be unreasonably withheld. Requests by Developer for permission to perform Investigative Activities and the Village's response thereto may be made by email transmissions between Matthew Whalen (at the following email address: mwhalen@avalonbay.com) and Robert Schoelle, Village Administrator (at the following email address: rschoelle@gardencityny.net).

Developer shall conduct all such on-site Investigative Activities of the Development Site during normal business hours, or at other times mutually acceptable to Developer and the Village.

(b) Prior to commencement of any Investigative Activities, Developer shall furnish to the Village a copy of Developer's commercial general liability insurance policy, or a certificate evidencing that Developer has such insurance, covering any and all liability of Developer and Developer's representatives with respect to or arising out of any Investigative Activities. Developer's commercial general liability insurance policy shall be an occurrence policy and shall have liability limits of not less than Two Million (\$2,000,000.00) Dollars combined single limit per occurrence for bodily injury, personal injury and property damage liability. Such liability insurance policy shall name the Village as an additional insured and shall be in form and substance and issued by an insurance company reasonably satisfactory to the Village.

(c) Developer shall protect, indemnify, defend and hold the Village (and the Village's mayor, trustees, members, representatives, officers, directors, participants, employees, invitees, agents and contractors (collectively, the "Indemnitees")) free and harmless from and against any and all claims, damages, liens, stop notices, liabilities, losses, costs and expenses, including all interest, penalties, reasonable attorneys' fees and all disbursements and court costs (collectively "Damages"), resulting from Developer's Investigative Activities, and shall be responsible for repairing any and all damage to any portion of the Development Site, arising out of or related (directly or indirectly) to Developer's conducting such Investigative Activities. Such indemnification shall not extend to, nor shall Developer (or any officer, director or shareholder thereof) be liable to the Village for (x) any environmental conditions disclosed or confirmed by permitted Investigative Activities, (y) any preexisting environmental conditions that are released as a result of any permitted Investigative Activities, or (z) the consequences of any disclosure of environmental conditions disclosed by reason of any permitted Investigative Activities to any governmental entity, to the extent such disclosure is required by law. Notwithstanding the foregoing provision, Developer shall indemnify the Village and shall be liable for any Damages to the extent arising by reason of the Investigative Activities being performed in a negligent or improper manner. Developer shall provide the Village with true and complete copies of all reports rendered with respect to the Investigative Activities. Developer shall keep the Development Site free and clear of any mechanics' liens or materialmen's liens related to Developer's conduct of Investigative Activities. The Developer's indemnification obligations set forth in this Section 2.6(c) shall survive the Closing or the termination of this MOU prior to the Closing.

ARTICLE III

CONDITIONS AND PROCEDURES REQUIRED TO CONSUMMATE THE TRANSACTION

3.1 Closing Conditions. Should the parties agree on the form and substance of the Transaction Documents, the Closing will occur on a date when all of the following conditions, and such other conditions as the parties determine may be necessary (collectively, the "Closing Conditions"), have been satisfied:

(a) The Transaction shall have received the approval of the Village's Board of Trustees and the Transaction Documents shall have been fully-executed by the parties thereto, and all conditions to the effectiveness of the Transaction Documents set forth therein shall have been satisfied or waived in writing by the party(ies) for whose benefit such conditions have been imposed;

(b) The requirements of the State Environmental Quality Review Act have been satisfied;

(c) The zoning of the Land necessary to permit the Project shall be in full force;

(d) The parties shall have approved a final legal description of the land that will comprise a portion of the premises to be demised under the Developer Lease and such land shall have been constituted as a separate tax lot; provided, however, that if constituting such land as a separate tax lot would unduly delay the Closing of the Transaction and failing to do so would not materially and adversely affect either party, then such condition shall be deemed waived;

(e) The Parkland Alienation shall have been achieved through the passage of the Home Rule Legislation, and any other state approvals with respect to the Development Site and required for the development to go forward shall have been completed; and

(f) The Plans shall have been approved by the Village (including any site plan approval and architectural review required pursuant to New York State Law and the Code of the Village of Garden City).

ARTICLE IV

MISCELLANEOUS

4.1 **Rights to Terminate.** During the Effective Period of this MOU the Village agrees to negotiate exclusively with Developer with respect to the Project. Moreover, during the Effective Period the Village shall not market the Development Site for redevelopment as a residential luxury rental project or respond in a substantive manner to unsolicited proposals received for such a redevelopment or engage in any substantive negotiations with other parties regarding such a redevelopment. At any time prior to the Closing, either the Village or Developer shall have the sole and absolute right to terminate this MOU by written notice to the other. Upon any termination of this MOU, neither party shall have any further liability or obligation to the other hereunder; provided, however, that the obligations of the parties set forth in this Section and in Sections 2.6(c), 4.8 and 4.9 shall survive such termination and shall remain in full force and effect.

4.2 **Developer's Representations.** (a) Developer hereby represents and warrants to the Village as follows: (i) all information furnished pursuant to the Proposal was and remains

true and correct in all material respects, and (ii) the Preliminary Drawings accurately represent Developer's current intentions with respect to the Project; and

(b) Developer acknowledges that the Village has made no representation or warranty with respect to any aspect of the Project.

4.3 **Village's Representations.** It is the present understanding of the Village that, upon the satisfaction of the conditions set forth in Section 3.1, the Village shall have the authority under applicable law to enter into the Transaction Documents.

4.4 **Non-Liability.** In no event shall the Village or any other Indemnitee have any liability in connection with, or related to, this MOU. In no event shall the Developer have any liability in connection with, or related to, this MOU, except in connection with: (a) the obligation on the part of the Developer to cause the Project Materials to be delivered to the Village under Section 2.6 hereof, and (b) any breach on the part of Developer of the provisions of Section 4.2 hereof or of any representation or warranty made herein.

4.5 **Counterparts.** This MOU may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute but one and the same instrument.

4.6 **Notices.** Notices permitted or required to be given under this MOU shall be in writing and shall be delivered by hand, by certified mail, or by reputable overnight courier. Notices shall be deemed given upon receipt or the failure to accept delivery. Notices sent to the Village shall be sent to The Incorporated Village of Garden City, 352 Stewart Avenue, Garden City, New York 11530-9695, Attention: Robert L. Schoelle, Jr., Village Administrator, with copies to K. Backus & Associates, Inc., 230 West 41st Street, Suite 1102, New York, New York 10036, Attention: Lori Matsukuma. Notices sent to Developer shall be sent to Avalon Bay Communities, Inc., 135 Pinelawn Road, Suite 130 South, Melville, New York 11747, Attention: Matthew Whalen, Vice President, Development, with copies to Latham & Watkins LLP, 885 Third Avenue, New York, NY 10022-4834, Attention: Joshua Stein, Esq.

4.7 **Assignment.** Developer may not, directly or indirectly, assign this MOU or its interest herein, in whole or in part, without in each case the prior written consent of the Village, which consent may be withheld in the Village's sole discretion.

4.8 **Brokers.** Neither party has had any conversations or dealings with any broker, finder or other similar party in connection with the conditional designation of the Developer or the transactions contemplated hereby. The Village and Developer shall indemnify, defend and hold the other party harmless from and against any and all claims, liabilities, losses, damages, costs or expenses (including reasonable attorneys' fees and expenses) arising out of a claim of a breach of the representation and warranty made by such indemnifying party pursuant to the immediately preceding sentence.

4.9 **Confidentiality.**

(a) Developer agrees to keep this MOU and all other documents, negotiations and discussions relating to the Project strictly confidential; provided, however, that

this provision may be waived by the Village, in whole or in part, with respect to (a) the community outreach set forth in Section 2.2 hereof, (b) the discussions and negotiations among the Village, Developer and the IDA, (c) the discussions and negotiations among the Village, Developer and the Parks Office, or (d) for other purposes as determined by the Village in its sole and absolute discretion.

(b) If requested by the Developer, the Village agrees to keep confidential any financial analysis identified by Developer which it furnishes to the Village and which contains, in any material respect, proprietary methodologies of Developer.

(c) Notwithstanding the foregoing, if either party (the “Disclosing Party”) furnishes confidential materials to the other party (the “Recipient”) and Recipient is requested or required (by oral questions, interrogatories, requests for information (including freedom of information requests) or documents, subpoena, civil investigative demand or other process) to disclose such materials, Recipient shall give immediate notice to Disclosing Party of such request so that Disclosing Party may seek an appropriate protective order. If, absent a protective order, Recipient is nonetheless legally compelled to disclose such confidential material, Recipient may disclose such information to the extent compelled to do so in such proceedings, without liability under this MOU. Recipient shall, however, give Disclosing Party written notice of the information to be disclosed as far in advance of its disclosure as is practicable. Recipient shall use commercially reasonable efforts to obtain assurances that such information will be accorded confidential treatment.

4.10 **Costs.** To the extent not otherwise provided for herein, the parties will discuss and reach agreement as to their respective responsibility for the costs associated with effecting the terms of this MOU.

4.11 **Defined Terms.** Capitalized terms used herein shall have the meanings set forth in the sections referenced below:

Closing	Section 2.1
Closing Conditions	Section 3.1
Community Space	Preliminary Statement
Community Space Lease	Preliminary Statement
Developer	Opening Paragraph
Developer Lease	Preliminary Statement
Development Site	Preliminary Statement
Disclosing Party	Section 4.9
Effective Period	Section 2.1
Ellis Hall	Preliminary Statement
Home Rule Legislation	Section 2.5
IDA	Preliminary Statement
IDA Agreements	Preliminary Statement
Indemnitees	Section 2.7(c)
Investigative Activities	Section 2.7(a)
Land	Preliminary Statement

Main Building	Preliminary Statement
MOU	Opening Paragraph
Parkland Alienation	Section 2.5
Parks Office	Section 2.5
PILOTS	Preliminary Statement
Plans	Section 2.3
Preliminary Drawings	Section 2.3
Project	Preliminary Statement
Project Materials	Section 2.6
Proposal	Preliminary Statement
Recipient	Section 4.9
RFP	Preliminary Statement
Transaction	Preliminary Statement
Transaction Documents	Preliminary Statement
Village	Opening Paragraph

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IN WITNESS WHEREOF, the parties hereto have entered into this MOU as of the date hereof.

**THE INCORPORATED VILLAGE OF
GARDEN CITY**

By: 

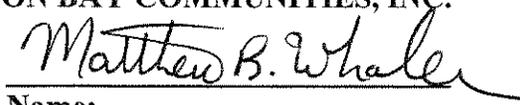
Name:

PETER A. BEE

Title:

MAYOR

AVALON BAY COMMUNITIES, INC.

By: 

Name:

Matthew B. Whalen

Title:

Vice President, Development
AvalonBay Communities, Inc.

**Matthew B. Whalen
Vice President, Development
AvalonBay Communities, Inc.**