

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release (hereinafter referred to as the “Agreement”) is made and entered into by and between JOSEPH B. and SHANNON M. ORLANDINI, together as husband and wife, LYLE L. KLNE, individually and as Trustee of the Lyle L. Kline Trust dated September 29, 1993, CARL L. and KATHLEEN GALLO, together as husband and wife, and BDH ENTERPRISES, LTD., an Ohio limited liability company, (hereinafter “Plaintiffs”) joined by FMB Water Front Investment Group, LLC as to 221 Palermo, and the TOWN OF FORT MYERS BEACH, a Florida municipality (hereinafter “Town”) (collectively, Plaintiffs and Town are referred to as the “Parties”).

WHEREAS, the Plaintiffs are owners and/or equitable owners of certain real property located in the Town of Fort Myers Beach, Florida; and

WHEREAS, the Plaintiffs submitted applications for building permits for certain principal and accessory structures with respect to certain real properties on Palermo Circle as described in this Agreement and issued a stop work order for 301 Palermo; and

WHEREAS, with the exception of 301 Palermo which had been previously issued and relied upon by the Plaintiffs, the Town denied the remaining building permit applications for 551, 455, 263, and 221 Palermo Circle consistent with the provisions of Town of Fort Myers Beach Resolution 13-26 and the Fort Myers Beach Land Development Code (hereinafter “LDC”); and

WHEREAS, Plaintiffs subsequently filed an Amended Complaint seeking declaratory relief, writs of mandamus and certiorari, and alleging, among other things, violations of substantive due process and equal protection under the Constitution of the United States, including a claim for attorneys’ fees pursuant to 42 U.S.C. § 1983, et. seq., as a result of the Town’s aforementioned actions, that is currently pending in the Circuit Court of the Twentieth Judicial Circuit in and for the State of Florida, County of Lee Civil Division, Case No. 2014-CA-000148, along with a companion action, seeking a writ of certiorari, in Case No. 2014-CA-000319 before the same court (hereinafter collectively the “Lawsuits”); and

WHEREAS, Plaintiffs have furthermore asserted a claim (hereinafter identified as the “Claim”) that the abovementioned actions by the Town have inordinately burdened the Plaintiffs’ property rights in violation of the Bert J. Harris, Jr. Private Property Rights Protection Act (the “Bert Harris Act”) as codified in Chapter 70 of the Florida Statutes; and

WHEREAS, Town has denied any liability to Plaintiffs; and

WHEREAS, the Parties have, however, reached an agreement as to the their dispute and they desire to fully and finally resolve any and all claims against each other and their respective agents, employees, officers, independent contractors, servants, and representatives concerning, relating to, or in any way arising out of their dispute, and enter into this Agreement to completely settle and dispose of all claims or disputes of whatever kind or nature including, but not limited to, the Lawsuits, the Claim, or any other matter regarding the subject matter of this Agreement whether actually asserted by the Plaintiffs, or as may have been asserted, whether known or unknown, against the Town; and

WHEREAS, the principal structure currently constructed on the property located at 301 Palermo Circle and more fully described herein may not have been permitted and built in strict compliance with all provisions of the LDC, including, but not limited to, height or setbacks; and

WHEREAS, any such variation from the provisions of the LDC is a de minimis or minor construction error and is not, in the opinion of the Town, detrimental to the health, safety or welfare of the Town or its residents; and

WHEREAS, the Town has determined that it is in the best interest of the Town of Fort Myers Beach, its residents, and all parties to the litigation that the Town agree, in the context of settling the litigation, to forego taking any enforcement action against the property located at 301 Palermo Circle for such de minimis or minor construction errors; and

WHEREAS, the Town has the right to exercise its discretion and take whatever action it deems prudent in order to settle the dispute between the Plaintiffs and the Town of Fort Myers Beach; and

WHEREAS, the Town, acting in its executive capacity, has absolute discretion in determining whether to file, prosecute, abate, settle or dismiss a building and zoning enforcement actions.

NOW, THEREFORE, in consideration of the mutual promises contained herein, it is agreed between the Parties as follows:

1. Recitals. The foregoing recitals are true and correct and are incorporated herein as though fully set forth below.
2. Authority. The Parties and all signatories hereto represent and warrant that they have full authorization and legal authority to establish the legally binding rights, obligations, and duties as expressed herein or contemplated hereby.
3. 551 Palermo Circle. The Plaintiffs are entitled to the construction of a single family residence and accessory structures appurtenant thereto consistent with the LDC, provided, however, that no accessory structure may be constructed within 25 feet of the seaward side of the seawall (not including the seawall cap) if the height of such accessory structure above natural predevelopment grade exceeds 42 inches. Additionally, no accessory structure may exceed the height of the principal structure.
4. 455 Palermo Circle. The Plaintiffs are entitled to the construction of a single family residence and accessory structures appurtenant thereto consistent with the LDC, provided, however, that no accessory structure may be constructed within 25 feet of the seaward side of the seawall (not including the seawall cap) if the height of such accessory structure above natural predevelopment grade exceeds 42 inches. Additionally, no accessory structure may exceed the height of the principal structure.
5. 263 Palermo Circle. The Plaintiffs are entitled to the construction of a single family residence and accessory structures appurtenant thereto consistent with the LDC provided, however, that no accessory structure may be constructed within 25 feet of

the seaward side of the seawall (not including the seawall cap) if the height of such accessory structure above natural predevelopment grade exceeds 42 inches. Additionally, no accessory structure may exceed the height of the principal structure.

6. 221 Palermo Circle. The Plaintiffs are entitled to the construction of a single family residence and accessory structures appurtenant thereto consistent with the LDC provided, however, that no accessory structure may be constructed within 25 feet of the seaward side of the seawall (not including the seawall cap) if the height of such accessory structure above natural predevelopment grade exceeds 42 inches. Additionally, no accessory structure may exceed the height of the principal structure.
7. 301 Palermo Circle.
 - a. The Town shall, upon the effective date of this Agreement, remove the Stop Work Order that is in effect for the property and shall allow the completion of the single family residence currently under construction consistent with the Plaintiffs' architectural and site plan depicted in Exhibit "A" and "B" attached hereto and incorporated herein, including any deviations from the LDC depicted in the plans and consistent with any prior variances issued by the Town. Provided, however, that the terms of this Agreement shall only apply to the application of the LDC to said property and shall not affect the Plaintiffs' obligation to comply with all requirements of the Florida Building Code.
 - b. The existing deck, without a pool, not permitted by building permit BLD13-0029 as originally issued shall be removed by Plaintiffs' at their sole expense pursuant to a demolition permit.
 - c. After removal of the existing deck, no accessory structure may constructed within 25 feet of the seaward side of the seawall (not including the seawall cap) if the height of such accessory structure above natural predevelopment grade exceeds 42 inches. Additionally, no accessory structure may exceed the height of the principal structure.
 - d. To the extent of any nonconformity with the provisions of the LDC the nonconforming building regulations of the LDC shall control the structures approved in Exhibits "A" and "B".
8. Settlement Funds. Town agrees to pay to Plaintiffs the sum of TWO HUNDRED AND FIFTY THOUSAND DOLLARS AND 00/100 (\$250,000.00) within five (5) business days of the Plaintiffs' demolition of the currently existing deck described in paragraph seven. The payment described herein shall constitute settlement of and full payment for all of Plaintiffs' damages, attorneys' fees or costs against the Town though the Town specifically denies any such liability to Plaintiffs. Payment shall be made to the trust account of the law firm Roetzel & Andress, P.A.

9. Dismissal with Prejudice. Within five (5) business days of the receipt and acknowledgement and receipt of the settlement funds described in paragraph eight, Plaintiffs shall file a Notice of Dismissal, with Prejudice, of the Lawsuits.
10. Each Party To Bear Own Costs and Fees. To the extent not described in this Agreement, the Parties shall bear their own costs, expert witness fees, attorneys' fees, and other expenses.
11. No Admission of Liability. The Parties agree that neither this Agreement, nor the fact that the Parties have agreed to a settlement, may be used as an admission on the part of either party of any fault, wrongdoing, conduct, interpretation, or liability whatsoever. Each party expressly denies any wrongdoing under any federal, state, or local statute, public policy, tort law, contract law, or common law and expressly denies the truth or validity of any claim made against them.
12. General Release. Subject only to full performance of mutual obligations herein, and except as necessary to enforce this Agreement, the Parties understand and agree that this Agreement constitutes the good faith compromise of the Lawsuits, Claim, and any potential claims for damages, causes of action, or potential liability which could have been ascertained by reasonable diligence, which either Party to this Agreement may have asserted now, or may assert in the future because of any damages, incidents, acts, casualties, or events, described or alluded to in this Agreement. The Plaintiffs further agree, subject to the terms of this Agreement, that they are irrevocably and unconditionally releasing, and discharging the Town, including the Town's divisions, departments, boards, councils, and related entities, their respective past or present employees, including attorneys, board members, council members and other appointed or elected officials, and their respective predecessors, successors and assigns, from and against any and all claims, demands, damages, losses, actions or causes of action of whatsoever kind and character, known or unknown, fixed or contingent, which Plaintiffs may have, or claim based upon any of the events occurring up through and including the date of this Agreement. Such release and discharge includes, but is not limited to, all claims which were asserted or could have been asserted in the Lawsuits or Claim and any causes of action, claims and demands whatsoever, at law, in equity, or before any agency or commission of local, state and federal governments, arising, or alleged to have arisen, or which may arise under any common law theory and/or any law including, but not limited to, the Florida Statutes, federal, state, or municipal laws, that the Plaintiffs ever had, now has, or which their heirs, executors, administrators, or assigns, or any of them, hereafter can, shall or may have, based on any set of facts known or unknown, occurring prior to, and including, the date of the execution of this Agreement. Notwithstanding, the Parties fully realize that they may have sustained unknown or unforeseen losses, costs, expenses, damages, liabilities, claims, business losses and consequences thereof, which at this time may be heretofore or hereafter unknown, unrecognized and not contemplated by them, which resulted or may result from the issues set forth in this Agreement. The Parties intend that all such unrealized or unrecognized losses and claims are also resolved and discharged hereby.

13. Law and Venue. This Agreement shall be construed, enforced and interpreted in accordance with the laws of the State of Florida. In the event that an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by each of the Parties hereto and no presumptions or burdens of proof shall arise favoring any party by virtue of the authorship of any of the provisions of the Agreement. The Parties jointly conclude that should this Agreement be challenged by any of the Parties, that venue for bringing such challenge shall be Lee County, Florida.
14. Sovereign Immunity. It is hereby acknowledged by the Parties that nothing contained in this Agreement is intended to serve as a waiver of sovereign immunity, as set forth and codified in Section 768.28 of the Florida Statutes, by the Town in the recovery of monetary damages in tort for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment.
15. Complete Agreement. The Parties acknowledge that this Agreement constitutes the entire Agreement entered into by the Parties. They further acknowledge that they have read it and understand it; that the terms and conditions of this Agreement were arrived at in arm's-length negotiations between the Parties with all Parties provided the opportunity to seek the advice of legal counsel; that each Party's legal counsel did or could have reviewed this Agreement; and that each Party has given due and full consideration to the legal position of the other in regard to the provisions contained herein. This writing constitutes the final expression of the Parties' Agreement and is a complete and exclusive statement of the terms of that Agreement. The Parties state that, in executing this Agreement, they did not rely on any statement, representation, or warranty, except as expressly set forth in this Agreement. This Agreement supersedes and renders null and void any previous agreements or contracts, whether written or oral, between Plaintiffs and the Town.
16. Amendment. No modification, waiver, amendment, discharge, or change of this Agreement shall be valid unless the same is in writing and signed by the Party against which the enforcement of such modification, waiver, amendment, discharge, or change is sought.
17. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original and all which together shall constitute one and the same instrument representing the Agreement of the Parties. Without limiting the manner in which execution of this Agreement may otherwise be effected, execution by any party may be effected by facsimile or e-mail transmission of a signature page hereof executed by such party.
18. Effective Date. This Agreement shall not become effective until it is signed by authorized representatives of all Parties on the date upon which the last Party hereto sign.

19. Third Party Rights. The Parties expressly acknowledge that it is not their intent to create or confer any rights or obligations in or upon any third person or entity under this Agreement. None of the Parties intend to directly or substantially benefit a third party by this Agreement. The Parties agree that there are no third party beneficiaries to this Agreement and that no third party shall be entitled to assert a claim against any of the parties based upon this Agreement. Nothing herein shall be construed as consent by either Party to be sued by third parties in any manner arising out of this Agreement, or other obligations, whether known or unknown to the Parties.
20. Assignment. The Parties covenant that they have not assigned or caused to be transferred to any person or entity not a party to this Agreement, any claims or rights affected by this Agreement.
21. Non-disparagement. With regard to the matters raised in the lawsuit between the Parties and those addressed in this Agreement, the Parties, their agents, officers, and representatives agree not to make disparaging statements, comments, or remarks about each other to anyone including any businesses, organizations, reporting agencies, or their agents or the media. However, nothing contained herein is intended to affect any party's duty to provide truthful testimony or to respond to any legal process in the future.
22. Breach of Agreement. For breach of any provision of this Agreement, the Parties will have such remedies and rights as are available at law or in equity, except that, in any action or proceeding brought to enforce this Agreement or to recover damages for its breach, the prevailing party will be entitled to recover, should it substantially prevail in the matter, reasonable attorneys' fees and litigation expenses, including expenses incurred in proceedings to determine the amount of attorneys' fees and litigation expenses to be recovered.
23. Waiver. The waiver by any Party of a breach of any provision of this Agreement by any other Party shall not operate or be interpreted as a waiver of any later breach of that provision or any other provision.
24. Binding Effect. This Agreement shall benefit and bind the Town, and any entity created by the Town, for the purpose of regulating development on Fort Myers Beach. This Agreement shall also inure to the benefit and bind the Plaintiffs and signatories as property owners, respectively, of the respective properties referred to in paragraphs 3 thru 7 hereof, their mortgagees, successors and assigns and shall run with the title to said properties.
25. Severability. The Parties agree that if any provision of this Agreement is held to be invalid, illegal or unenforceable, either legislatively or judicially, that provision will be severed from the Agreement, and the remainder of this Agreement shall not be effected thereby and will continue to be valid and enforceable to the fullest extent permitted by law, unless such determination of invalidity shall deprive any party of the substantial benefit of this bargain.

WHEREFORE, on the effective date as set forth herein, the Parties and signatories hereto acknowledge this Agreement and represent and warrant their authority to enter into this Agreement and do so jointly and severally for all purposes specified.

Town of Fort Myers Beach

By: _____
Anita Cereceda, Mayor

Approved as to legal sufficiency:

By: _____
Fowler White Boggs, P.A.
Town Attorney

ATTEST:

By: _____
Michelle Mayher
Town Clerk

By: _____
Joseph B. Orlandini

By: _____
Carl Gallo

By: _____
Shannon M. Orlandini

By: _____
Kathleen Gallo

By: _____
Lyle L. Kline, individually and as
Trustee of the Lyle L. Kline
Trust dated September 29, 1993

BDH Enterprises, Ltd.
By: _____
Title: _____

FMB Water Front Investment Group, LLC

By: _____
Title: _____