AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between:

Re: 13 115 Y 01348 12
Board of Managers of the Shorehaven Condominium ("Claimant")
and
Beechwood RB Shorehaven, LLC ("Respondent")

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration provision contained in the settlement agreements dated June 27, 2002 and July 15, 2004, as well as Order of John A. Barone, JSC dated April 30, 2012 (all further defined below), having been duly sworn, having duly heard and been provided with the proof and allegations of each of the parties at hearings conducted in New York, New York on January 9, 10, 14, 31, April 3, 9, 11 and June 4 and 6, and upon the receipt of the parties' post-hearing submissions, FIND, as follows:

Background of Case

This case involves a dispute between the Board of Managers of the Shorehaven Condominium ("SH" or the "Condominium"), Claimant, and Beechwood RB Shorehaven, LLC ("Beechwood"), Respondent, the current sponsor of the Shorehaven Condominium, over the amount that should be placed in escrow pursuant to settlement agreements entered into in 2002, 2004 and 2006, as well as the authority of the Independent Engineer as provided for in those agreements.

By way of background, Claimant is the original condominium of several phases of a condominium community located in Bronx, NY (the "Project"). The first 172 units of SH were built by the original sponsor, a Zeckendorf entity, and after a "friendly foreclosure" in the mid-1990's, the remaining 84 units (the so-called "84 New Units") were built by a successor sponsor, Shorehaven Property, Inc. ("SPI"), for a total of 256 units in the first phase.

The original sponsor, in what is known as Phase I, constructed the sewer system, which included the Main Sewer Line that connected to the New York City sewer main along Sunset Boulevard, a road running through the middle of the Project. The system as a whole included branch lines to various sections of the Project, as well as sanitary sewer house connections in which individual residential units connected to the sanitary system.

Respondent Beechwood has a business relationship with SPI and is now the new sponsor for the remaining phases of the Shorehaven Complex, having become involved after the completion of the Phase I 256 units, including the 84 New Units, and the construction of the utilities necessary to service same.

Sometime prior to 2002 the residents in the complex encountered various problems associated with the original construction of both the homes as well as the sewer system and water supply lines. Considerable acrimony ensued between the residents, represented by the Board of Managers, Claimant herein, and the new sponsor, Beechwood, Respondent herein. Respondent believed that Claimant was seeking to block Respondent's completion of the Project, while Claimant felt that it was Respondent's responsibility, as successor sponsor, to correct deficiencies that may have been caused by prior sponsors.

Eventually, the parties engaged the assistance of the New York Attorney General's Office (the "AG's Office") to effectuate a resolution, which was facilitated by then Assistant Attorney General Oliver Rosengart. At the conclusion of an all night negotiation session on June 27, 2002, the parties entered into

a settlement agreement (the "2002 Agreement") in which Respondent agreed, among other things, to "repair the main sewer line in the entire Complex and branch lines which service the 84 new units to the satisfaction of the Kupper engineering firm". Kupper Engineering was hired by Respondent, with the parties splitting the fees, to inspect the Complex and issue a report outlining the sewer defects in Phase I, which initial report was issued on November 22, 2003.

The 2002 Agreement also provided for the parties to execute a "more formal" agreement in supplementation, which more formal agreement was ultimately executed on July 15, 2004 (the "2004 Agreement"), over two years later. The two year lag time between the two settlement agreements is suggestive of the contentious nature of the relations between the parties.

Paragraph 14 of the 2002 Agreement contains a provision for arbitration by "Oliver A. Rosengart or another Assistant Attorney General if he is not available", and encompasses disputes arising under both that agreement and the "more formal agreement", i.e. the 2004 Agreement. As noted below, eventually the AG's Office was no longer involved, and in 2012 the New York Supreme Court, County of Bronx determined that this dispute should be heard under the auspices of the American Arbitration Association (the "AAA").

The 2004 Agreement amplifies Paragraph 3 of the 2002 Agreement (relating to sewers) and provides that the parties jointly retain an engineering firm (the "Independent Engineer", ultimately, Rand Engineering & Architecture, PC ("Rand")) which is to determine the scope of work to be completed by Respondent as well as what is necessary to satisfactorily repair, *inter alia*, the roofs. It also provides that a surety bond of 125% of the estimated cost of completing the work on the roofs (and sewers and water main branch lines) was to be placed with the Attorney General.

The 2004 Agreement also provided that:

> "In the event that Beechwood fails to complete the work to the reasonable satisfaction of the Independent Engineer, or fails to complete the Work within eight (8) months, unless the Board in either event prevents Beechwood from performing the Work, the bond shall be forfeited to the Board. Notwithstanding the foregoing, the work required in connection with the repair of the sewers shall be completed within eight (8) months after a recommendation is received from the Kupper Engineering firm or another engineering firm acceptable to the parties." (2004 Agreement, p. 4)

Respondent did not perform the work within the requisite time frame, and so Claimant made a claim under the surety bond.

In lieu of pursuing the claim against the bond, the parties entered into an escrow agreement on May 31, 2006 (the "2006 Escrow Agreement"), with Respondent placing certain sums into escrow as security for the performance of the work. Paragraph 8 of the 2006 Escrow Agreement provides that in the event of a dispute regarding the entitlement to any sum held in escrow, the Escrow Agent (who happens to be Claimant's counsel in this arbitration) is to go into Bronx Supreme Court to obtain a judicial determination as to the party entitled to receive the funds.

For reasons outlined below, the Independent Engineer, Rand, has now requested that the escrow account, which already contains approximately $884,390.04, be supplemented by an additional $667,630.78, to cover increased costs associated with both sewer and roof repairs. Respondent has refused to make this payment, and so Claimant initiated this action.

Procedural History of Instant Claim

As mentioned above, at some point this dispute was taken to Bronx Supreme Court, and on April 30, 2012, Justice John A. Barone issued a Court Order directing that this matter proceed to arbitration and that the AAA shall conduct this arbitration in full accordance with both New York State law and its own internal rules and regulations.

Accordingly, Claimant filed a claim with the AAA on June 7, 2012 alleging Breach of Stipulation of Settlement that provided the Respondent sponsor would fund sewer and roof repairs at Claimant condominium as determined by jointly retained independent engineer in an original amount of $686,104.94, amended on June 28, 2012 to $735,949.94, and further amended in post hearing submission dated June 26, 2013 to $667, 630.78. Claimant also requested a reasoned award.

After a number of postponements due to witness and counsel availability, evidentiary hearings commenced on January 9, 2013 at the offices of Claimant's counsel, Ron Francis, Esq., 350 Fifth Avenue, New York, NY, continuing at the same location on January 10, 2013, and further continuing at the offices of Respondent's counsel, Daniel Katz, Esq., located at 915 Broadway, New York, NY on January 14 and 31, April 3, 9, 11 and June 4 and 6, 2013. Post hearing briefs were submitted on June 26, 2013, which was the date the hearings were declared closed by the arbitrator.

Testifying at various times during the hearing on behalf of Claimant were: Peter Edwin Varsalona, P.E., principal of Rand, Avraham (Avi) Slansky, Senior Vice President of Wavecrest Management, which managed the Condominium, Lucindo Suarez, former member of Board of the Condominium, and Robert L. Wheeler III, former member of the board of the Condominium; and on behalf of Respondent were: Leslie A. Lerner, former employee, current consultant (and minority owner) of Beechwood, John W. Pusz, P.E., president of JWP Engineers (Respondent's sewer consultant), Richard Rosenberg, Esq., general counsel to Respondent, Ronald Bielinski, P.E., of Erwin & Bielinski, forensic architects and engineers (Respondent's roofing consultant), William Varney, AIA, of Rand, and Gerard Romski, Esq., representative of Respondent.

During the pendency of the hearing, on February 1, 2013, at the request of Claimant, a telephone conference was held with the parties and their various consultants regarding release of escrow funds for the purpose of roof probes.

On February 2, 2013 I issued an interim order under Rule R-34(a) of the AAA Rules to direct the escrow agent to release certain funds held in escrow for the purpose of performing limited probing, possible infrared scans and analysis to assess any damage resulting from work performed or not performed by JR Builders, the roofer at the Project.

Specifically, I found and ordered as follows (after describing my authority in the procedural history):

> "...I find that this investigatory work is indeed necessary for the proper resolution of the dispute regarding the roof. Moreover, undertaking this work at this time will expedite final resolution of the claim as well as to move forward the protection and conservation of the buildings.
>
> I therefore order the Escrow Agent to disburse amounts needed for the investigation to proceed as determined by Rand, but in no event more than $26,000. Sums should be disbursed for the purpose of limited probing, infrared scans if necessary, and analysis to be performed by Rand in order to determine the extent of damage, if any, resulting from the manner in which JR Builders left the site and the failure of temporary protective coverings at the parapets, the extent of any remedial work necessary, and the cost of any such remedial work. The current roofing contractor, Accura, will be asked to provide unit price costs for potential remedial work, at the direction of Rand once it is determined what type of remedial work, if any, may be necessary.

As the evidentiary hearing is ongoing over the next few months, I will continue to hear evidence on whose responsibility it is to pay for any such remedial work regarding the roofs. At the conclusion of the evidence, in my final award I may re-allocate or confirm the responsibility for amounts expended pursuant to this order to the appropriate party. Any payments hereunder are made without prejudice to either party."

The Sewer Claim and Events Leading up to It

Claimant contends that it was always the intent of the settlement agreements to repair the main sewer lines in the entire complex.

Respondent points out that it was under no prior legal obligation to make any repairs to the sewer lines, which had been constructed by prior developers, but agreed to do so in 2002 because Claimant was concerned the main sewer line would be unable to handle increased volume at such time as additional phases of the Project should be built. Indeed, Mr. Rosenberg testified that the further homes built by Respondent barely increased the sewer volume at all because only a small portion of the new units hooked up through it.

In the 2004 Agreement, supplementing Paragraph 3 (which related to repairs to the sewer lines) the parties agreed – in an effort to avoid future litigation - that they would jointly retain an Independent Engineer, who was to determine the scope of work to be completed by Respondent as well as what is necessary to satisfactorily repair/extend the water main branch lines servicing the 84 New Units, the repairs to the roofs and the repair to the sewer lines (collectively, the "Work"). The Independent Engineer was to also supervise the Work and determine whether and when the Work had been completed satisfactorily. The Independent Engineer was to be the "sole arbiter of all issues concerning the Work and its decision shall be final". Costs of the Independent Engineer were to be split equally between Claimant and Respondent.

The 2004 Agreement went on to delineate Respondent's responsibilities, including entering into direct contracts with appropriate construction companies to repair the roofs on all four clusters (which was not to include a rip off of existing roof but rather a new roof being placed on top of existing), to repair the sewers by a licensed sewer contractor to correct flaws set forth in the Kupper report, and to repair and extend branch supply lines servicing water to the 84 new units.

Respondent was to provide and deliver to the AG's Office a bond of 125% of what it believed the work to be worth, but the Independent Engineer had the right to require an increase or decrease of the bond amount if it decided that the amounts were not sufficient to cover 125% of the Work.

The Work was to be performed within eight months of the (July 15) 2004 Agreement, after which the bond was to be forfeited to Claimant.

The work was not performed within the allotted time frame and so Claimant submitted a claim to the bonding company, after which the parties entered into the Escrow Agreement dated May 31, 2006, described above.

Meanwhile, on January 3, 2005 the parties jointly engaged Rand to serve as the Independent Engineer.

Rand's contract provided, among other things, that Rand would (1) develop, specify, outline and verify the scope of work to be performed by Respondent as indicated in the 2002 and 2004 Agreements; (2) develop and confirm cost projections of the scope of work; prepare plans and technical specifications for use by the contractors; (3) observe the performance of the work, and sign off the respective projects upon completion; and (4) issue change orders as required.

Even though the scope of sewer work under the 2005 Rand contract remained unchanged up until 2008, Claimant argues that it did not focus on the sewer issues until the beginning of 2008, after addressing issues related to the roofs. At this time, Claimant's representatives compared the Kupper report and the later Pengat videotapes to the scope of work in the Rand Contract and noticed what they believed were deficiencies in Rand's scope of work to correct the problems outlined in the settlement agreements.

On July 15, 2008 Claimant requested that Rand modify the scope of the sewer work to include sewer deficiencies in the **entire** Project, which it claims it only at this time noticed was missing from Rand's scope. Respondent's in house counsel, Richard Rosenberg, who testified at the hearing, objected to this increase in scope, disagreeing with the interpretation of the 2002 and 2004 Agreements.

The current dispute now involves what the parties intended by the words "main sewer line" in Paragraph 3 of the 2002 Agreement[1]. Respondent contends that this term referred only to the trunk line along Sunset Boulevard, and does not include any individual house connections that had been separately requested by Mr. Slansky for Kupper to perform. Claimant contends that all the sewer repairs to correct the flaws as set forth in the report of Kupper were appropriately in Rand's updated escrow request and were entirely in keeping with Rand's right to determine the scope of work for which Respondent was responsible.

Respondent contends that Rand's scope/budget report dated July 11, 2005 covers the intent of the original settlement agreements, but that 3-4 years later Rand abruptly changed its view and expanded the scope to require Respondent to be responsible for sewer repairs to the entire complex. Respondent contends that it was only in December of 2008 that Mr. Varsalona first opined in writing that the 2002 Settlement Agreement called for repairs to be undertaken at the "sewer main line in the entire complex".

In early February 2009 the parties had a meeting with Rand to discuss the scope of the sewer work. At this meeting Respondent reluctantly agreed to withdraw its objection to the increased scope of the sewer work depending on the results of Rand's analysis and budget. Whether or not Respondent reserved its rights – or waived them - at this time or later with regard to the increase in scope is a matter of contention between the parties.

By February 2009 Rand prepared Scope Revision One to its contract in which it increased its scope to review videos of "sewer mains" for the remaining clusters outside the 84 New units. Both Claimant and Respondent consented to this change order (executed by Respondent on March 10, 2009), although they reserved their rights under the 2002 and 2004 Settlement Agreements, as follows:

> "It is understood that both parties retain their rights pursuant to the June 27, 2002 and July 15, 2004 Settlement Agreements. Nevertheless, it is understood that Sponsor *may agree* [emphasis added] to withdraw its December 2, 2008 objection to the increased scope depending on the results of RAND's analysis of the required scope and budget pertaining to sewer piping repairs outside of Clusters 10, 11, 12 and 13."

On April 27, 2009 Rand issued an updated Scope/Budget Report, which now included work beyond the main sewer line, although it did not include any individual house connections.

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[1] "3. Beechwood agrees to repair the main sewer line in the entire complex and the branch lines which service the 84 new units to the satisfaction of the Kupper Engineering firm." 2002 Agreement, second page.

By May 17, 2010 Rand increased the scope of the sewer work to be performed, updated the budget, and increased the funds Respondent would have to deposit into the escrow to require an additional $470,136.80, which amount Respondent did place into the escrow on June 11, 2010. Respondent agreed to do this even though it did not agree it was legally obligated to do so, primarily as a business decision, to keep the project moving. However, Respondent never agreed to the house connections outside the 84 New Units.

Claimant contends that Respondent waived its rights regarding this extra work by agreeing to the additional escrow deposit. Respondent contends it never waived its objections, and it never agreed to pay for house connections outside the 84 New Units.

On August 13, 2010, Claimant entered into a contract with Bedford Construction Corp. ("Bedford") for the performance of the sewer work as determined by Rand.

On December 8, 2010, Rand issued Change Order No. 1 in the amount of $81,318.99 to Bedford and Claimant for additional work to clean out and video all sanitary house connections in the entire complex. Because it was still within budget, even though it included work outside the 84 New Units, Respondent did not object to this change order.

On January 25, 2011 Rand issued the first Change Order No. 2 to Bedford and Claimant adding additional work in the proposed amount of $349,177.51. Respondent never agreed to this change order.

On January 28, 2011, Rand increased the amount of funds Respondent should deposit into the escrow, including the 125%, to cover Change Orders 1, 2 and 3 (it is unclear if this is the same as proposed change order No. 3 dated a couple of weeks later) to $686,104.94. This demand was rejected by Respondent, ultimately resulting in this arbitration.

On February 15, 2011 Rand issued Preliminary Proposed Change Order No. 3 which included eight items of proposed work: $132,000.00 for additional manhole to manhole lining of sanitary mains, $50,000.00 for selective manhole reconstruction, $169,000.00 for spot repairs including reinstatement of HC openings and removal of loose concrete in pipes, $20,500.00 for 10 additional cutting of protruding pipes, $22,860 for repair and excavation of an additional 3 spurs, $2,921.00 for additional grouting, $3,000.00 for plugging abandoned sewers, $3,000.00 for root cutting, for a total of $403,281.00. Respondent vigorously objected to approving this preliminary proposed change order.

In an effort to reach some kind of resolution to the change order dispute, Rand issued a revised Change Order No. 2, Proposed Change Order No. 2 (Rev. 1) on February 22, 2011. This new, revised Change Order 2 included certain credits in the amount of $334,976.80, and additions in the amount of $337,947.51, for a net change of $ 2,970.71.

Authority of the Independent Engineer

The parties dispute whether Rand exceeded its authority by increasing the scope of work to be performed with respect to the underground piping.

Under the plain language of the Settlement Agreements Rand was engaged as Independent Engineer to determine the scope of work to be completed by Respondent as well as what is necessary to satisfactorily repair/extend the water main branch lines servicing the 84 New Units, repairs to the roofs and the repair to the sewer line.

As stated above, the 2004 Agreement, in relevant part, reads as follows:

> "Supplementing paragraph 3, the parties agree to jointly retain an engineering firm (the "Independent Engineer"). The Independent Engineer will determine the scope of work to be completed by Beechwood as well as what is necessary to satisfactorily repair/extend the water main branch lines servicing the 84 "new" units, the repairs to the roofs and the repair to the sewer lines (collectively, the "Work"). The Independent Engineer shall also supervise the Work and determine whether and when the Work has been completed satisfactorily. The Independent Engineer shall be the sole arbiter of all issues concerning the Work and its decision shall be final. The cost of the Independent Engineer shall be split equally between Beechwood and the Board." 2004 Agreement, p. 2.

The 2004 Agreement goes on to list the construction contracts that Respondent agreed to enter into directly, which were for the roof replacement, sewer repair and branch supply lines servicing water to the 84 New Units, provides for a bond of 125% of the estimated cost of completing the work, and, among other things, provides for Respondent to have access to the premises.

The 2004 Agreement continues:

> "In the event the Independent Engineer decides that the bond amount does not represent 125% of the cost of the Work, Beechwood shall increase or decrease the amount of the bond as per the Independent Engineer. Beechwood's failure or refusal to increase the amount of the bond as per the Independent Engineer, shall constitute a breach of this Stipulation and the arbiter of the Agreement may issue an award to the Board in an amount sufficient to cover the costs of the Work not covered by the bond. Upon completion of an item and approval by the Independent Engineer, the bond will be reduced accordingly but shall remain at all times to equal 125% at [sic] the cost of the work not yet completed." 2004 Agreement, pp. 3-4.

Arguments and Findings Regarding Rand's Authority

Respondent argues that Rand, as Independent Engineer, was empowered to make binding decisions as to factual disputes that fall within its particular technical expertise, but not to interpret matters of law or contract interpretation, citing *Thomas Crimmins Contracting Co., Inc. v. The City of New York*, 74 N.Y. 2d 166, 544 N.Y.S. 2d 580 (1989), and distinguishing *Westinghouse Electric Corp. v. New York City Transit Authority*, 82 N.Y.2d 47, 51, 623 N.Y.S.2d 531, 532 (1993).

Indeed, the original Settlement Agreements contemplated that Oliver Rosengart, the Assistant Attorney General who was present and involved in the negotiations of those documents, would act as the arbitrator of disputes as to contract interpretation. In Mr. Rosengart's absence, Justice John A. Barone of New York Supreme Court, County of Bronx in April of 2012 directed that the AAA conduct this arbitration to resolve the dispute over the scope of the work, indicating that this particular issue was possibly outside Rand's authority to determine.

Although in general both sides acted with integrity, in this situation, neither party was completely devoid of fault. The 2004 Settlement Agreement required Respondent to enter into contracts directly with construction companies to perform the roof and sewer repair within certain time frames. It failed to do this, engendering a claim against the bond, resulting in the 2006 Escrow Agreement, which provided that except as modified by the escrow arrangement, the Settlement Agreements – and the scope of work outlined therein - were to remain unchanged and in full force and effect (Para. 11 of the May 31, 2006 Escrow Agreement).

On the other hand, there may have been a tendency on the part of Claimant towards advocating some "scope creep" to get additional work done that might benefit the residents and have Respondent foot the bill for this. Even though Rand, as Independent Engineer, acted in good faith in attempting to maintain its independence, it may have unintentionally exceeded its authority in expanding the scope of the sewer work based on a reconsidered interpretation of what was intended by the Settlement Agreements.

After reviewing the testimony of the various witnesses and documentary evidence presented by both sides, I find that the parties did not have had a full meeting of the minds in understanding what was intended by the language "repair the main sewer line in the entire complex and the branch lines which service the 84 new units..." in the 2002 Agreement.

Claimant's witnesses testified that they understood the words "entire complex" in the 2002 Agreement to mean the entire complex and not just the 84 New Units, and that sewer repairs were discussed in general terms without any specific exclusion of house connections. Claimant argues that house connections are part of the "sewer system" and that "sewer main" and "main sewer" are the same thing and used interchangeably.

There was no evidence presented that a professional sewer engineer was involved contemporaneous with the Settlement Agreements to fully define for both sides at the time the meaning of the now disputed language so as to make sure everyone understood exactly, from a technical perspective, what was intended.

There was inconsistent testimony regarding what Respondent understood it was agreeing to, including the meaning of "branch lines which service the 84 new units" and whether this meant domestic water service lines as opposed to sewer lines to the 84 units. However, whether or not it ever fully agreed with this, in the end Respondent agreed to provide the connections to the 84 units, but not beyond that.

The 2004 Agreement, in the section referring to supplementing paragraph 3 of the 2002 Agreement, refers to "(b) repairing the sewers by a licensed sewer contractor to correct the flaws set forth in the report of Kupper" as well as "(c) repairing and extending the branch supply lines servicing water to the 84 new units".

Claimant argues that the Kupper Report was supplemented by 10 VHS Pengat videotapes of the sewers, which videos were not limited to the 84 newer units and include ***all*** house connections at the project. These were included in Rand's increase of scope dated February 12, 2009 in which Rand increased the scope of work to include "sewer mains beyond the area encompassed by Clusters 10, 11, 12 and 13", i.e., beyond the original 84 New Units. Claimant contends that because of this, everything should be included in the scope of work for which Respondent is responsible. However, even the Kupper Report dated November 22, 2003 states that at the request of management (i.e., Claimant, but not Respondent) it was asked to investigate additional house connections (beyond those relating to Buildings 10, 11, 12 and 13). (Kupper Report, Ex. 11, p. 3)

It is noted that the Rand 2009 Scope Revision also included language that both parties retained their rights pursuant to the 2002 and 2004 Agreements (suggesting an appreciation that Respondent was objecting to this), but that Respondent ***might*** agree to withdraw its previous objection depending on the results of Rand's analysis of the new scope and budget. Contrary to Claimant's assertion that Respondent had always agreed that the Kupper (and subsequent Pengat) investigations would govern, the evidence presented at the hearing was that Respondent never did agree to the increase in scope and only agreed to proceed in order to keep the project moving ahead.

I therefore find that Respondent never agreed to the increase in scope to include house connections in the entire Project outside the 84 New Units. Even if the Kupper and Pengat reports include areas of sewer beyond that which Respondent understood itself to have agreed to, and there was language in the Settlement Agreements relating to work done by Kupper, this does not alter my finding since it is entirely

plausible and in fact made sense for the parties to have these consultants investigate all areas of the complex while it was undertaking to do the sewer investigation. As mentioned above, the original Kupper report makes reference to additional house connections at the request of "management".

Claimant argues that the 2004 Agreement refers to "sewer lines" in the plural, as evidence that the scope of the sewer work was not limited to a single "line". However, Respondent contends that it understood "main sewer line" –or lines – to mean the main, or trunk, sewer line that ran along Sunset Boulevard, which does not include a house connection or a "branch line".

I find that the reference in the plural to "sewer lines" in the 2004 Agreement and "main sewer line in the entire complex" in the 2002 Agreement should be interpreted to mean the various sewer lines, including branch, or main lines, but not individual house connections outside the 84 New Units. The term "entire complex", used in the 2002 Agreement, certainly suggests that the parties intended the main sewers beyond that which ran down Sunset Boulevard were to be included, and this is buttressed by the pluralization in the 2004 Agreement.

Regardless, Respondent did remit to the escrow on June 11, 2010 an additional $470,136.80 to cover the revised scope/budget to repair the sewers, including the house connections to all 256 units, not just the 84 New Units. Claimant argues that this payment was made without any reservation of rights and constitutes an acceptance of the revised scope and budget, which included repairs to the entire condominium including all the house connections.

The evidence presented at the hearing was that this payment was made very reluctantly by Respondent and done in order to keep the project moving forward, plus it was within an amount that Respondent was willing to pay. However, having made this payment, I find that at this point in time Respondent has in fact waived its right to contest responsibility for at least this $470,136.80 that it has contributed to the escrow for sewer repair for the entire project, including the house connections outside the 84 New Units.

Given the uncertainty that the parties actually had a meeting of the minds that Respondent should be responsible for the sewer system in the entire complex, I find that Respondent agreed to be responsible for the main sewer line and other branch or main sewer lines that went through the complexes outlined in the 2003 Kupper report, but not including the house connections to units other than the 84 New Units. Except to the extent already agreed to in the monies already deposited into the escrow, $470,136.80, as well as its agreement to Bedford Change Order No. 1 in the amount of $81,318.99 (see below), both of which Respondent agreed to assume on a business basis, Respondent is not responsible to fund additional repair of any additional house connections beyond the 84 New Units.

Findings Regarding the Change Orders and the Dispute

On December 8, 2010 Rand issued Change Order #1 ($81,318.99) to Bedford and Claimant which added work to clean out and video all sanitary house connections in the entire complex, determined to be necessary by Rand. Respondent did not object to this change order, even though it included some work related to house connections outside the 84 New Units. Given Respondent's assent to this change order, I find that Respondent waived any right to contest responsibility for the work contained in this change order, despite my finding elsewhere in this award that Respondent is not responsible for any additional monies going forward to fund house connections outside the 84 New Units.

The situation involving Change Orders No. 2, 2 revised and 3 is more difficult to parse and the testimony was complicated as to how these change orders interrelate.

On January 25, 2011, Rand issued proposed Change Order No. 2 to Bedford and Claimant adding additional sewer and related work, increasing the cost by $349,177.51. During that time frame, Respondent strongly objected to the scope of work as exceeding the responsibilities it had agreed to under the Settlement Agreements.

By February 15, 2011 Rand also issued a proposed Change Order 3, which provided for additions to the Bedford sewer contract of $403,281.00, containing some "overlap" with unsigned Change Order 2, comprised of components outlined elsewhere in this award.

Because Respondent objected to both proposed Change Orders 2 and 3, in order to get the project moving and to keep Bedford from walking off the job (which in fact it did do eventually, terminating its contract due to suspension of project on July 8, 2011), Mr. Varsalona testified that Rand issued a new Change Order 2 – Revised, containing both additions as well as credits. The additions totaled $337,947.51 and the credits totaled $337,947.51, for a net add of $2,970.71.

Indeed, Bedford had already performed some of the work contained in Change Order 2, which they needed to get paid for. In order to keep the project within the existing escrow holdings, Rand revised this Change Order to take out (providing credits, or deducts) work that Rand felt was never going to be needed based on what they found in the field (Varsalona tr. 492).

None of the proposed Change Orders: 2, 2 revised, or 3 were ever fully executed or agreed to.

Regarding Proposed Change Order No. 2, Revised, Respondent disputes that it is obligated to pay $44,960.00 for temporary parking along Surf Drive (CO2-1) as it claims this was not necessary to perform the agreed upon work. I find that to the extent that residents from the 84 New Units were displaced from parking in their usual spots due to the sewer work connecting to their homes, Respondent should be obligated to pay this as directed by Rand as this would have been within the scope of the original Settlement Agreements.

It is unclear from the evidence whether the temporary parking only relates to Clusters 10, 11, 12 and 13 or others as well, and so in the absence of clarity, it seems fair to have the parties split the cost of the temporary parking. I therefore find that Respondent is obligated to fund one half of this cost, or $22,480.00.

Respondent does not dispute item CO2-2, $10,091.52 for video probes, nor does it dispute CO2-3, $2,850.00 related to tracing domestic water mains, so I find that Respondent is obligated to fund these items.

CO2-4, relating to house connections, which may also be included in proposed Change Order No. 3, is somewhat confusing. It appears that Respondent has conceded that of a total of $288,925.00 (in both Change Orders CO2-4 and proposed CO3) requested for house connections, $200,000 of this is Respondent's responsibility to fund as that is the figure allocable to the 84 New Units.

Because the evidence was not perfectly clear on this issue and I have decided that Respondent is not responsible to fund house connections beyond the original 84 New Units (except to the extent waived in its escrow submission of $470,136.80, remitted on June 11, 2010 and its approval of Bedford Change Order No. 1 dated December 10, 2010 in the amount of $81,318.99) and because Respondent has conceded responsibility for $200,000 of this, I will allow a total of $200,000 additional to be required of Respondent to pay into the escrow for the house connections. I therefore find that Respondent is obligated to fund $200,000.00 additional into the escrow for this.

Respondent also concedes that it is responsible for $7,620.00 to repair one defective building house sewer spur connection (CO2-5), $20,500.00 to repair an additional 40 linear feet of collapsed and or heavily damaged section of underground concrete sanitary piping (CO2-6) and $132,000.00 to reline manhole-to-manhole (or manhole-to-catch basin) all cracked sections of underground sanitary or storm water piping mains in various locations (CO2-7).

Regarding proposed Change Order No.3, which was never formally issued by Rand, Respondent vigorously objects to the item of $132,000.00 for manhole-to-manhole cracked sections of concrete sanitary piping's as being duplicative of the same item it concedes in Revised Change Order No. 2 (CO2-7).

When he testified in January 2013, Mr. Varsalona was very clear that there was some overlap between Change Order 2 revised and Change Order 3 (Varsalona tr. 494 et seq.). Certainly there was overlap insofar as the house connections were concerned.

However, when he returned to testify in June 2013 Mr. Varsalona very clearly indicated that the figure of $132,000.00 on proposed Change Order No. 3 was based on results from the second of two scans. In other words, the $132,000.00 on Change Order No. 2 Revised involved work pertaining to the original scope of work, while the same figure on Change Order No. 3 was for additional lining work "needed on the sanitary house connections pertaining to change order 3, and that all happened to be 132,000." (Varsalona tr. 1337).

It is difficult for me to determine whether the $132,000.00 reflected on Proposed Change Order 3 relates to the scope of work that I have found to be included in the 2002 and 2004 Agreements. To the extent that this purportedly additional relining work (beyond that allowed for under CO2-7) might involve individual house connections outside the 84 New Units, then Respondent should not be held responsible for it. For present purposes, I will require that Respondent place this additional sum into the escrow, to be disbursed at the direction of Rand as Independent Engineer, upon Rand's confirmation that this work is not duplicative of the work referred to in CO2-7 and also does not relate to individual house connections outside the 84 New Units.

Similarly, while Respondent concedes responsibility for Item CO2-6 ($20,500.00)to repair an additional 40 linear feet of collapsed and or heavily damaged section of underground concrete sanitary piping, it disputes responsibility for the item on Proposed Change Order 3 in the exact same amount, $20,500.00, for "10 additional cutting or protruding pipes". Regarding this item, in his June testimony Mr. Varsalona stated that these were entirely different items of work and the fact that the amounts are the same was just a coincidence (Varsalona tr. 1342).

I therefore find that Respondent should be responsible to place an additional $20,500.00 for the 10 additional cutting of protruding pipes (from Proposed Change Order 3) into the escrow, subject to the following qualification: Only if Rand as Independent Engineer determines that the cutting of protruding pipes for this amount in Proposed Change Order 3 does not relate to house connections outside the 84 New Units and/or also is not duplicative of the work covered in CO2-6, only in that event is the Escrow Agent authorized to disburse these funds as directed by Rand. In the event that Rand determines that these funds (or some portion of them) do relate to house connections outside the 84 New Units and/or are duplicative ofCO2-6, then the Escrow Agent but shall return such funds to Respondent.

Respondent accepts its responsibility for selected manhole reconstruction in the amount of $50,000 as delineated in proposed Change Order No. 3.

Respondent concedes responsibility for the last four items of Change Order No. 3, relating to three additional spurs excavation and repair ($22,860.00), five additional grouting ($2,921.00), plugging abandoned sewers ($3,000.00), and root cutting ($3,000.00) for a total of $31,781.00.

To recapitulate,

Respondent is responsible to pay into the escrow as follows:

CO2-1 Temporary parking	$22,480.00
CO2-2 Video Probe:	$10,091.52
CO2-3 Trace Water mains	$2,850.00
CO2-4 (and CO3) house connections	$200,000.00
CO2-5 Building House sewer/spur	$7,620.00
CO2-6 Repair collapsed concrete sanitary piping	$20,500.00
CO2-7 Reline manhole to manhole cracked sections of concrete sanitary piping	$132,000.00
CO3 Costs for additional manhole to manhole lining of sanitary mains[2]	$132,000.00
CO3 10 additional cutting of protruding pipes[3]	$20,500.00
CO3 Costs for selective manhole reconstruction	$50,000.00
CO3 3 additional excavate and repair deficient spurs	$22,860.00
CO3 5 additional grouting	$2,921.00
CO3 Plugging abandoned sewers	$3,000.00
CO3 Root cutting	$3,000.00

TOTAL: Respondent shall pay into the escrow the following additional amounts for underground piping related work: $629,822.52 LESS credits from Change Order No. 2 Revised: $334,976.80 = $294,845.72.

The Roof Work, Claim and Findings

In addition to work related to underground piping for sewer and water main lines, the 2004 Agreement also provides that the parties engage the Independent Engineer to determine the scope of work to be completed by Respondent regarding repair to roofs in the four clusters (10, 11, 12 and 13). Specifically, Respondent was to enter into contracts with an "appropriate construction" company to "(a) repair the roofs on the four (4) clusters which shall not include a rip off of the existing roof but rather a new roof being placed on top of the existing roof" (this was eventually changed in scope by agreement of both parties to a rip off of the existing roof and construction of a new roof).

Although originally it was Respondent's obligation to enter into a direct construction contract to perform this work within eight months, that never happened. As mentioned above, Claimant thus made a claim under the surety bond, which eventually was settled by the 2006 Escrow Agreement.

Under the 2006 Escrow Agreement, Claimant[4] was now to perform the work, but payment for it was to be made by Respondent, and all the work and payments were to be administered by Rand as Independent Engineer. If there should be any excess in funds in the escrow after the work was performed to the satisfaction of Rand, then that excess was to be remitted to Respondent. In addition, if the work were not to be completed within the amount in the escrow, the Agreement provided that Respondent directly pay the contractors performing the work, and/or reimburse Claimant any sums incurred in performing the work or additional sums necessary to complete the work "to the satisfaction of the Independent Engineer".

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[2] Prior to disbursing these funds, Rand, as Independent Engineer, is to reconfirm that this work does not relate to house connections outside the 84 New Units and is not duplicative of CO2-7.

[3] Prior to disbursing these funds, Rand, as Independent Engineer, is to reconfirm that this work does not relate to house connections outside the 84 New Units and is not duplicative of CO2-6.

[4] As opposed to Respondent, which was initially contemplated in 2004.

Therefore, in accordance with the 2006 Escrow Agreement, and after a competitive bidding process, on August 7, 2007 Claimant entered into a contract with JR Builders to perform the roofing work, overseen by Rand as Independent Engineer.

The evidence presented at the hearing indicated that Rand and Claimant did everything they reasonably could to assure that JR Builders perform the work satisfactorily. Nonetheless, although JR Builders initially performed adequately, towards the end of the project, about three quarters of the way through, their prosecution of the work became seriously deficient and its personnel were non-responsive (possibly as a result of financial difficulties), despite many diligent attempts by both Rand and personnel of Claimant to get them to perform.

Eventually, Rand determined that JR Builders had defaulted and it would be necessary to terminate its contract, which was done on February 12, 2012. This action was undertaken very reluctantly due to the disruption and possible additional expense that could be incurred by having to find a new roofing contractor to come in and complete the work.

Respondent argues that it had nothing to do with the roofing contract, which was signed only by JR Builders and Claimant, even though it listed Respondent as a contracting party on the first page. Respondent argues that Rand's representatives observed the shoddy work and issues with the temporary protection and discussed all this with Claimant, but kept Respondent "out of the loop of these discussions". Respondent contends that steps should have been taken "well prior to 2012", including retaining a completion contractor, withholding payments, assessing liquidated damages, or commencing an arbitration against J&R, but Claimant and Rand negligently failed to do any of this.

Respondent argues that because Claimant chose the subcontractor, Respondent is not responsible for "their failure to act".

As a result of JR Builder's default, some temporary protection may have blown off, resulting in further damage to the roofs. On May 31, 2012, Rand recommended that additional temporary work be performed to prevent further damage to the roofs due to JR Builders' temporary protection having deteriorated and/or blown off. Claimant argues that because Respondent objected to the use of escrow funds to pay for this temporary work, it was never performed, possibly resulting in further damage.

Regardless of the cause of any of the damage, having heard the testimony of Ron Bielinski, P.E., Respondent's roofing consultant, representatives of Rand and representatives of both Claimant and Respondent and having reviewed the documentation submitted at the hearing, I find that neither Claimant nor Rand was negligent in the prosecution of the roof work. Therefore, under the 2006 Escrow Agreement, as well as the 2004 Agreement, Respondent is responsible to pay for the work necessary to complete the repairs.

This work was originally to have been performed directly by Respondent, which it failed to do, and it is clear from the 2006 Escrow Agreement that Respondent agreed to leave it up to Claimant and the Independent Engineer to prosecute the work, but that Respondent agreed to pay for it, whatever it might cost as dictated by the Independent Engineer. Unless for some reason the Independent Engineer was negligent in overseeing the work, which I find that it was not, Respondent is obligated to pay for this, either by increasing the escrow or by paying the new roofing contractor directly, at the direction of Rand, the Independent Engineer.

Unlike the sewer situation, which involved a disagreement as to the scope of the Independent Engineer's authority, the roof issue is relatively straightforward. Rand, as Independent Engineer, is authorized under the various settlement agreements to determine the scope and cost of the roof repair, and Respondent is to pay for same. This is so even if in the normal course of performing the repair the first contractor defaulted and it became necessary to bring in another contractor to complete the work, and even if there is now

corrective work to be performed due to JR Builders' inadequate temporary protection (which in any event Respondent refused to allow escrow funds to be used to mitigate).

After JR Builders' termination, Rand solicited bids for the completion of the work left unfinished by JR Builders, but not any corrective work. Eventually Accura, the low bidder, was retained to complete the roof work.

During the pendency of this arbitration, additional investigatory work was performed on the roofs to evaluate and assess damage associated with the JR Builders' default, and on May 23, 2013 Rand issued a thorough report, with recommended corrective scope work, totaling $89,300.00, with no contingency allowance.

On May 30, 2013, Rand, as Independent Engineer, issued an updated Escrow Account Funding Requirements letter. In this it outlined the various payments both under the JR Builders contract as well as the Accura contract, totaling a net requirement of $201,990.00 remaining on the Accura contract to both complete the work ($103,790.00) and perform the corrective work ($89,300.00 plus Change Order No. 1 relating to the investigatory work, $8,900.00). Adding the 125% as outlined in the Settlement and Escrow Agreements, Rand is now requesting that $252,487.50 be in the escrow for the roof issues.

Respondent contends that Rand's recommendations are overstated by $29,700 because it calls for $32,400 in work related to Unit 106, possibly engendered by someone who may have "sliced" the roof after the fact, and a much lesser amount should be sufficient to address the problem at this location. Because I have found that Rand has the authority to make the determination as to roof work that needs to be done, I will not intercede in second guessing any such decisions.

Finally, Respondent disputes Change Order No. 1 of the Accura contract ($8,900.00), relating to roof access stair tower, roof probes, water tests, which I had ordered performed during the pendency of the arbitration in order to get a more accurate assessment of the damage and costs to correct and to provide some more defined numbers for resolution in this arbitration. I find that Respondent is responsible to pay for this investigatory work, as it became necessary to do in the ordinary course of prosecuting the job given that the first roofing contractor performed inadequately and there was no negligence on the part of Claimant or Rand (despite Respondent's contentions to the contrary).

Because I have found that Rand has authority to finally determine amounts necessary to perform the roof repairs and corrective work and also that Respondent is required to submit amounts deemed necessary by Rand to fund this, I find that Respondent shall be responsible for the escrow to contain $252,487.50 to be used for the roof work. I also confirm amounts expended in accordance with my February 2, 2013 order relating to investigatory work as the responsibility of Respondent.

Recapitulation of Findings

I FIND that Respondent agreed to be responsible for the main sewer line and other lines that went through the complex outlined in the 2003 Kupper report, but not including the house connections to units other than the 84 New Units. Except to the extent already agreed to as to funds already deposited into the escrow, $470,136.80, and as agreed to in Bedford Change Order No. 1, $81,318.99, both of which sums Respondent waived having agreed to assume on a business basis, Respondent is not responsible to fund additional repair of any additional house connections beyond the 84 New Units.

Regarding Change Orders 2 Revised and 3, relating to underground piping issues, Respondent is responsible for the escrow to contain an additional $294,845.72, to be disbursed as indicated herein, subject to final confirmation by the Independent Engineer, with respect to the items of $132,000.00 and $20,500.00 in Change Order 3, that those items of work do not relate to house connections outside the 84 New Units and are not duplicative of CO2-6 and CO2-7.

There remains in the escrow under Bedford's contract $633,374.95, derived from its original contract sum of $656,820.00, plus bond cost of $16,420.50 plus Change Order No. 1, $81,318.99, less payments under Payment Application #1 of $121,184.54. Added to this $633,374.95 should be a total of $294,845.72 to cover the work related to Change Orders 2 Revised and 3, outlined above, in accordance with this award.

Therefore, the amount that should be in the escrow for underground piping is a base sum of $928,220.67 ($633,374.95 plus $294,845.72), 125% of which is $1,160,275.80. It is understood that the actual amounts expended from the escrow may change depending on final bidding regarding the unfinished portion of the underground piping program.

Regarding the roof replacement program, the escrow should contain $252,487.50, as outlined above.

Therefore, the amount that should now be in the escrow account is: $252,487.50 (roof) plus $1,160,275.80 (underground piping) = $1,412,763.30.

Because the escrow currently (as of May 30, 2013) contains $884,390.04, Respondent shall now supplement the escrow by an additional $528,373.30 ($1,412,763.30 minus $884,390.04).

Respondent also objects to the application of the 25% contingency because it claims that is not necessary as to the roofs since there is a firm contract in hand for this and it is not applicable to the underground piping because even though this work has not yet been bid out "prices in the construction industry have been depressed for many years". Not only do the 2004 Agreement and the 2006 Escrow Agreement make reference to funds or bonds in an amount of 125% of the estimated cost of the work, but this is also wise practice considering the possibility of further unforeseen events occurring. I therefore confirm the requirement for the Independent Engineer to include 125% of the estimated cost of the work in its projections regarding any future escrow supplementation.

Accordingly, I AWARD as follows:

Respondent shall submit Five Hundred Twenty Eight Thousand Three Hundred Seventy Three Dollars and Thirty Cents ($528,373.30) additional into the escrow account set up under the 2006 Escrow Agreement for the purpose of completing roof and underground piping repair.

Henceforth, as a new underground piping contractor is retained and work proceeds with the roofs, I reconfirm the Independent Engineer's authority pursuant to the various Settlement Agreements (including the 2006 Escrow Agreement) as the entity to determine the scope of work as defined in and in accordance with this award, to supervise the work, to request further monies be placed by Respondent into the escrow account if necessary based on future bidding results or change orders within the scope of this award and to determine whether and when the work has been completed satisfactorily. Within the framework defined in this award, the Independent Engineer is to be the sole arbiter and final decision maker of all issues concerning the work.

The administrative fees of the American Arbitration Association totaling $8,700.00 and the compensation of the arbitrator totaling $30,900.00 shall be borne as incurred.

This Award is in full settlement of all claims, counterclaims and set-offs submitted to this Arbitration, which includes any and all potential claims or counterclaims relating to the settlement agreements dated June 27, 2002 and July 15, 2004, and the Escrow Agreement dated May 31, 2006, as well as Order of John A. Barone, JSC dated April 30, 2012. All claims not expressly granted herein are hereby, denied.

7/22/13
Date

Amy K. Eckman

I, Amy K. Eckman, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

7/22/13
Date

Amy K. Eckman