AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between CP III RINCON TOWERS, LLC, Claimant, v. CITY AND COUNTY OF SAN FRANCISCO, Respondent.	AAA No. 01-22-0001-5714 **Record of Hearing** **And** **Final Decision**

This is an arbitration proceeding before the Commercial Arbitration Tribunal of the American Arbitration Association. During this Arbitration, Claimant CP III Rincon Towers, LLC, was represented by Lubin, Olson & Niewiadomski LLP, by Charles R. Olson, Ellen A. Cirangle, and Ian E. Browning. Respondent the City and County of San Francisco was represented by David Chiu, City Attorney, by Peter Keith, Heidi J. Gewertz, and Wade Chow.

Record of Hearing

1. The evidentiary Hearing in this Arbitration was held before the Arbitrator on April 18 and 19, 2023.

2. By stipulation of the parties, a verbatim stenographic report of all sessions of the Hearing was waived.

3. The parties filed Pre-Hearing Briefs.

4. Witnesses were called and sworn, and testified at the Hearing.

5. Various Deposition Testimony was admitted at the Hearing.

6. Various Exhibits were admitted into evidence at the Hearing.

7. At the conclusion of the Hearing, each party stated that the party had no further evidence to present.

8. At the direction of the Arbitrator, the parties filed their respective proposed Final Decisions/Awards.

9. On July 26, 2023, the Arbitrator issued a "Record of Hearing And [Tentative] Final Decision." That "[Tentative] Final Decision" provided in part, in Section IV.A., as follows:

> "This [Tentative] Final Decision is submitted to the parties for limited comment before any Final Decision is filed.
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> Each party shall have until the close of business on August 14, 2023, or such other, later time as the parties may agree upon or the Arbitrator may set on request, to provide the Arbitrator with the party's written comments pointing out with respect to this [Tentative] Final Decision what the party may view as an error in the statement of an evidentiary fact or an error in the statement of a term or provision of a contract or other document cited in this [Tentative] Final Decision.
>
> This is not an invitation to the parties to amend any claims or defenses raised in the pleadings, or to submit any new evidence, or to raise any new argument or issue, or to reargue any point made in the briefs or post-Hearing proposals, or to cite to any new authorities not previously cited in a brief or in a post-Hearing proposal.
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> After receipt of the parties' submissions under this Section IV.A., and the absence of a request by the Arbitrator for additional comment, no party shall submit any opposition or reply to a submission under this authorization."

The parties timely submitted their respective comments. The Arbitrator did not request any additional comments from either party. To the extent the Arbitrator has found it appropriate, the parties' respective comments are addressed at various locations in the below Final Decision.

10. The below Final Decision constitutes the Arbitrator's findings of fact, conclusions of law, and reasons supporting this Final Decision. Even though the Final Decision may not refer to every item of oral or documentary evidence presented during the Hearing, or to every authority cited by any Party during the course of this Arbitration, or to every argument advanced by any Party during the course of this Arbitration, the Arbitrator has considered each such item of evidence, authority, and argument. To the extent any fact or conclusion differs from a party's position, it is the result of the Arbitrator's determinations as to credibility, the applicable law, relevance, the weight of the oral and written evidence and the inferences to be drawn from them, and the burden of proof.

Final Decision

I.

A.

This case involves the interpretation of an Owner Participation Agreement ("OPA")

(Ex.25)[1] that relates to the development of property under The Rincon Point – South Beach Redevelopment Plan ("Plan").

The Plan was a product of the Community Redevelopment Law ("CRL"), codified in the California Constitution (Article XVI, Section 16) and in the Health and Safety Code (Section 33000, et seq.). During its existence, the goal of the CRL was to assist local governments in the elimination of identified blight through development, reconstruction, and rehabilitation of certain residential, commercial, industrial, and retail districts. The CRL gave cities and counties the authority to establish redevelopment agencies to carry out the law. In 1948, under this authority, Respondent The City and County of San Francisco ("City") created the former Redevelopment Agency of San Francisco ("Agency").

The CRL required municipal agencies to adopt a formal "redevelopment plan" with respect to property sought to be rehabilitated pursuant to the CRL. (Cal. Health & Safety Code § 33330.) A redevelopment plan is a comprehensive document that establishes the purposes, objectives, and requirements for all redevelopment projects within a particular geographic area. The plan is legislation – it must be passed into law by the governing body of the municipality and it binds the corresponding designating redevelopment agency. (*Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal. App. 4th 511, 529.)

The Plan was adopted and approved by the San Francisco Board of Supervisors on January 5, 1981. (Exs. 6, 7). The Plan had an expiration date of January 5, 2011. The City amended the Plan several times, including on January 23, 1984. (Ex. 8).[2] The Plan allowed private landowners and developers to participate in redevelopment projects pursuant to contracts with the Agency known as "owner participation agreement[s]," under which "the property retained or acquired will be developed . . . for use in conformity with the Plan, the Declaration of Restrictions, and the Owner Participation Rules promulgated by the Agency." (Ex. 8 at p.12). The Plan states that the owner participation agreements with the Agency will be created through the "formulation" by the Agency of "rules and regulations for owner participation." (Ex. 8 at p.5.)

The "Owner Participation Rules" adopted by the Agency set out detailed "owner participation procedures." (Ex. 5.) Under these procedures, "[a] final Owner Participation

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[1] All exhibit references are to the numbers of the Joint Exhibits admitted during the Hearing.

[2] The 1984 version of the Plan was in effect when the OPA was entered into by the Agency and RCA.

Agreement will then be prepared by the Agency" and the "owner will be required to enter into such Owner Participation Agreement." (*Id.*)

B.

In 1985, the United States Postal Service ("USPS") owned the underlying real property that ultimately became subject to the Plan as the "Rincon Center." The USPS was seeking a private party willing to redevelop the property, under a long term lease with the USPS, for commercial and residential uses. Because the site was a part of the Plan redevelopment area, the USPS discussed various proposals with the Agency. (See, e.g., Ex. 14 at p. 1.) The Agency rejected a USPS proposal for the lack of an affordable housing component. (*Ibid.*) Ultimately, the Agency and the USPS came to an agreement that the private developer selected by the USPS would be required to provide 46,000 square feet of low- and moderate-income housing or, alternatively, $5,000,000 in contributions toward such housing. (*Id.* at p. 2.)[3]

The Prospectus to potential developers circulated by the USPS included the requirement that the development of the Center must include an affordable housing component, with restrictions on the resale of "subsidized dwelling units." (Ex. 17 at p. 6.)

Ultimately, the USPS selected Rincon Center Associates, LP, a California Limited Partnership ("RCA") as the developer of the property. On April 19, 1985, the USPS and RCA entered into a ground lease with a term of 65 years. (Ex. 19 [Lease between USPS and RCA].)

C.

On August 20, 1985, the Agency and RCA executed the OPA in issue, which had been drafted by the Agency.[4]

In general, the OPA granted RCA the right to develop the Rincon Center on one square block of the Plan area, just south of Market Street. (Ex. 25.)

When the OPA was signed by the parties, the Plan included a "duration" provision which read:

> The provisions of this Plan and the provisions of other documents formulated pursuant thereto shall be effective for a period of thirty (30) years from the date of

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[3] This obligation ultimately was increased by another 12,000 square feet in exchange for a Plan amendment permitting development on the roof. (*Ibid.*)

[4] The OPA was amended on May 20, 1986 (Ex. 27) and on June 23, 1988 (Ex. 28)). The Second Amendment to the OPA split the commercial parcels from the residential parcels. The amendments are otherwise not relevant to this Arbitration.

adoption of this Plan by the Board of Supervisors of the City and County of San Francisco except for the nondiscrimination and nonsegregation provisions which shall continue in perpetuity. Any declaration of restrictions formulated pursuant to this Plan may contain provisions for the extension of such Declaration of Restrictions for successive periods. (Ex. 8 at p. 22.)

RCA completed the Rincon Center project; its Certificate of Completion was filed on June 27, 1988. (Ex. 37).

On December 12, 1994, the City amended the "Duration of Plan" section to add an additional ten years to the Plan. (Ex. 10 at p. 23 ["The Plan shall be effective until January 5, 2021 except for the nondiscrimination and nonsegregation provisions which shall continue in perpetuity"].)[5]

In 1999, RCA lost the project in foreclosure. (Ex. 48 at 1.) Thereafter, until 2010, the Rincon Center "suffered from a rapid succession of changed ownerships and shifting marketing strategies." (Ex. 61.). Claimant CP III Rincon Towers, LLC ("Claimant"), is the successor in interest to RCA (Amended Complaint ¶ 2, Answer ¶ 3.) and has owned and operated the residential portion of the Rincon Center since October 12, 2010, having acquired its interest by the foreclosure of an obligation secured by the leasehold interest in the property. (Ex. 63.)

The Agency, as all other California Redevelopment Agencies, was dissolved by the Legislature in 2021. (See Health & Safety C. §34161 et seq.) The City, through the Mayor's Office of Housing and Community Development ("MOHCD"), is the successor-in-interest to the Agency regarding the affordable housing restrictions under the OPA.[6] (Amended Complaint ¶ 3, Answer ¶ 3; Ex. 139 (S.F. Board of Supervisors Res. No. 11-12 (1/24/12).)

D.

1.

The OPA consists of a 17-page main document along with Attachments A through I, all of which "are incorporated [into the OPA] and made a part [t]hereof as if set forth in full." (Ex. 25 at p.14.) The Plan is referenced on the first page of the OPA, and is subsequently also

[5] In 1985, redevelopment plans were generally effective for an initial 30-year term, with a 10-year extension. In 1993, the Legislature capped the length of all redevelopment plans at 40 years. (H. & S. C. §33333.6.)

[6] In 2011, the Legislature approved the dissolution of the state's more than 400 Redevelopment Agencies. The agencies were officially dissolved as of February 1, 2012.

"incorporated herein and made a part hereof as if set forth in full." (*Id.* at pp. 1, 4.)[7] RCA agreed to "develop the Site in accordance with the Plan" and agreed to be "bound by the Plan." (*Id.* at pp. 2-3.)

The OPA required RCA to undertake significant development work on, and improvements to, the Rincon Center property, as well as to make a multitude of public improvements associated with the property, such as utilities, sidewalks, landscaping and street fixtures, all on mandated time schedules. Attachments A-E contained the site plan and description, the schedule of performance through the completion of construction, and the scope of development and relocation requirements. The schedule anticipated RCA completing its development in approximately five years. (Ex. 25 at Attachment C.) Attachment H contained affirmative action requirements and Attachment I established procedures for priority placement for low-income housing of persons displaced from their homes because of the development.

The OPA contained other requirements beyond those related to affordable housing. It provided for the development itself, with a detailed process and schedule for construction. (§3.2 & Att. C.) Other provisions included preferences in commercial leasing for businesses displaced by previous redevelopment activities (§7.06), as well as an affirmative action program (Att. H). RCA agreed to comply with the Redevelopment Plan, as it existed and as it might be amended in the future. (§§1.5 and 2.2.) RCA's committal to the Plan (including its nondiscrimination provisions) was also secured by a requirement that RCA execute and record a separate "Declaration of Restrictions" ("DOR") on the property, in a prescribed form. (§2.7 and Att. F.)

The OPA itself did not contain any "global" termination date, but a variety of dates and schedules are present throughout the OPA with respect to various different obligations. The construction of Rincon Center was governed by a specific schedule that imposed deadlines on the Leasehold Owner and the Agency. (Ex. 25, § 3.2 and Att. C.) In part, Attachment G contained several different obligations with different timetables. For example, if archaeological issues arose at the site, a certain timetable applied. (Att. G, §7.01.) Also, a "fast-track" option, with its own deadline, existed for construction permitting. (§7.04.) A preference program for businesses displaced from the redevelopment area set another distinct timetable. (§7.06.) RCA was further

[7] In addition, Attachment F to the OPA (the Declaration of Restrictions) states that "[e]ach and every term, condition, and provision set forth in" the Plan is incorporated into Exhibit F. (Ex. 25/Attachment F, p. 2.)

required to implement a multi-step affirmative action program, with varying durations and deadlines tied to separate events. (Att. H.)

2.

Attachment F to the OPA is the DOR. This DOR "provided for the retention of controls and the establishment of restrictions and covenants running with the land sold or leased for private use." (Att. F at p. 1.) The DOR bound RCA's "leasehold interest" in the Rincon Center. (Att. F at p. 2.)

Under Section 2 of the DOR, "[e]ach and every term, condition, and provision set forth in said Redevelopment Plan for the Rincon Point-South Beach Approved Redevelopment Project Area, is hereby incorporated by reference in and made a part of this Declaration of Restrictions, with the same force and effect as though set forth in full herein." (Att. F. at p. 2.)

Section 3 of the DOR prohibited discrimination and segregation in connection with the leasing or sale of any portion of the Rincon Center project. (Att. F at p. 3.) Section 4 of the DOR, titled "Duration of Covenants," provided in part that:

> "These Covenants run with the leasehold interest in the land and shall be binding on all parties and all persons claiming under them for a period of thirty (30) years from the date of adoption of the Redevelopment Plan, after which these said covenants shall be automatically extended for a period of ten (10) years...except that the covenant contained in Section 3 hereof [nondiscrimination and nonsegregation] shall run in perpetuity." (Att. F at p. 3.)

The DOR was attached to the OPA when the OPA was recorded, and was also separately recorded thirty days later. (Ex. 26.) The DOR was the only OPA attachment to be separately recorded.

3.

Attachment G is a set of "Additional Terms and Conditions" to the OPA.

Section 7.07D. of Attachment G authorized RCA to obtain tax-exempt bond financing to fund the construction of the housing portion of the development. During the term of such bonds, RCA's affordable housing obligation would be to rent out a total of 50 percent of its residential units at reduced rents (§7.07D.(3) and (4)), and, after defeasance of the bonds, RCA's affordable housing obligation would revert to a lower "Base Obligation" (§7.07D.(3)). In fact, RCA did obtain the tax-exempt bond financing. Consequently, when the bonds were retired, in 1999, some

fourteen years after inception of the OPA, RCA's housing obligation converted to the Base Obligation.

Section 7.07B. set out the Base Obligation as follows:

> "(1) Amount. The Leasehold Owner shall **rent or sell** 46,000 gross square feet of housing, forty percent (40%) of which shall be priced to be affordable to Low Income Households, and sixty percent (60%) of which shall be priced to be affordable to Moderate Income Households.
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> (2) Length of Obligation – Rental Period. 46,000 gross square feet of housing shall be rented to Low and Moderate Income Households **for as long as the square footage is operated on a rental basis.**
>
> (3) Length of Obligation – Units Which Are Sold. **When any or all of the dwelling units** which are a portion of the 46,000 gross square feet of housing which is priced to be affordable to Low and Moderate Income Households **is sold, such sales shall include provisions, satisfactory to the Agency, which assure that: the price of the unit will be affordable to Low or Moderate Income Households, as appropriate, upon resale; including, but not limited to, an assignment to the Agency of the difference in value between Low and Moderate Income Housing Price and market value, as determined by the Agency, for any Low or Moderate Income Housing Unit, such value to be represented by a lien on the unit.** This lien will be prepared by the Agency and shall be junior only to a first mortgage and the Lease. The Form of Lien will be supplied by the Agency 90 days after notification of the intent to sell pursuant to Section 7.07F.(3)." (§7.07B, emphasis added).)

Section 7.07C. further provided that, if RCA built out another 72,000 square feet of commercial space, the Base Obligation for affordable housing would increase by 12,000 square feet, to 58,000 square feet. RCA did ultimately build the additional commercial space (Ex. 140), and, as a consequence, the Base Obligation became, and has since been to the present, 58,000 square feet. The parties agreed in 2001 that this total of square footage equaled 76 affordable units; the complex has a total of 320 residential units. (Ex. 132 at p. 9.)

Several other provisions in section 7.07 addressed the eventual sale of the affordable units as condominiums. The provision concerning bond financing contemplated "the eventual sale of units which are initially rented." (§7.07D.(3).) The Section also provided for the setting of both a "Low Income Housing Price" and a "Moderate Income Housing Price" applicable to the sale of an affordable unit. (§7.07A.(11) and (16).) The sale price would be calculated according to "Housing Expenses" for "Sale Housing" that include "Mortgage payments (principal and interest)," "Condominium fees," "Property Taxes," and "Mortgage Insurance." (§7.07A.(6).) An expected "Mortgage Ratio" and "Interest Rate Assumption" would be applied "[f]or purposes of

calculating price of units to be sold to Low and Moderate Income Households." (§7.07A.(7) and (17).) The Section further required "a parking space for one vehicle" with "any dwelling unit to be sold to a Low or Moderate Income Household." (§7.07B.(5).)

Other parts of section 7.07 addressed certain additional requirements for the required affordable housing. The affordable units must be reasonably distributed across the complex. (§7.07B.(1) and (4).) The Agency had "the right to rent or purchase…up to fifty percent (50%) of all residential units" for low- and moderate-income households, on a "cost plus" basis. (§7.07F.) RCA had a duty to prepare a Housing Plan that included drawings showing the location of each affordable unit, the procedures to be followed in filling those units, the methods for adjusting rents, the proposed leases and sales agreements, and the proposed means of reporting the occupancy of affordable units. The Housing Plan was subject to approval by the Agency. (§7.07E.)

No provision of the OPA or any of its Attachments, including Attachment G, states that the OPA's provisions regarding affordable housing either live or die with, or extend beyond, the end of the term of the Plan or otherwise end on any other date. Neither the OPA nor any of its Attachments, including Attachment G, includes a "conflict" resolution provision providing in substance that its terms govern in the event of any clash with any other provision of the OPA or the Plan.

E.

Claimant filed its Complaint for Declaratory Relief and Demand for Arbitration on April 14, 2022, and its Amended Complaint for Declaratory Relief and Demand For Arbitration ("Complaint") on August 12, 2022. The amended Complaint substituted the City for the originally-named Respondent, the San Francisco Office of Community Investment and Infrastructure. Claimant seeks "a declaration pursuant to Code of Civil Procedure Section 1060 confirming that the [affordable housing mandates] set forth in Section 7.07 of Attachment G to the OPA expired on or before January 5, 2021," the expiration date of the Plan.

The City filed a Counterclaim for Declaratory Relief; Injunctive Relief, and Damages and Demand for Arbitration ("Counterclaim"). The City has not pursued its claims for damages and for injunctive relief, so the only remaining remedy in issue under the Counterclaim is the request for "a declaration pursuant to Code of Civil Procedure section 1060 that the Affordable Housing Covenants set forth in the OPA, Attachment G, § 7.07, continue to be valid and binding on [Claimant], and that these Affordable Housing Covenants do not expire."

II.

A.

The legal issue is simply stated: did the affordable housing terms of the OPA expire on January 5, 2021, with the end of the Plan, or, instead, did those terms outlast the Plan and remain in force to some determinable future date or event or, as an alternative, indefinitely. Though simply stated, the resolution of the question poses a most stubborn problem of contract interpretation. The parties and people who participated in negotiating and scrivening the mind bending, complex documents that implemented the Rincon Center redevelopment project are unavailable now to explain what was in their collective minds then, nearly 40 years ago. We have only what those "travelers from an antique land"[8] may have left behind, including the words in the documents themselves, as present day clues indicating what the original parties to the OPA may have mutually "intended" about the duration of the housing mandates. This Decision can do no more than measure these clues against the legal principles that govern the interpretation of contracts and attempt to arrive at a result consistent with both.

B.

1.

As is manifested by the many and varied arguments presented by the parties in their post-Hearing proposals, the Plan and the several associated documents relating to the Rincon Center Development are ambiguous about the intended duration of the OPA's housing mandates. The uncertainty springs from the contrast between, on the one hand, the open-ended words of the OPA's "so long as" phrase and the lack of any specific termination date for the mandates in any of the development documents and, on the other, the express termination date in the Plan and the express terms elsewhere in the development documents terminating some but not all of the other contractual obligations of the developer, all of which competing elements are muddied by the multitude of cross-references and incorporations between and among the Plan documents.

Extrinsic evidence was admitted at the Hearing to assist in resolving the ambiguity. (*Dore v. Arnold Worldwide Inc.* (2006) 39 Cal.4th 384, 391.) Such extrinsic evidence is relevant only if it reflects the "objective circumstances" surrounding the creation and terms of the pertinent documents by the parties; it is not relevant if it reflects the unilateral or undisclosed intentions of

[8] Shelley, "Ozymandias" (1818).

only one party. (*Brant v. California Dairies* (1935) 4 Cal.2d 128, 133; *Linton v. County of Contra Costa* (2019) 31 Cal.app.5th 628, 637.)

For the reasons that follow, the OPA, when read in the context of the parties' 1985 negotiations and communications over its terms, expresses the mutual intention of the parties, existing at the time of contracting, that the housing mandates would at minimum survive the expiration of the Plan. (Civ. C. §1636; *Hewlett-Packard Co. v. Oracle Corp.* (2021) 65 Cal.App.5th 506, 530; *Crestview Cemetery Ass'n v. Dieden* (1960) 54 Cal.2d 744, 763; see also Civ. C. §1647 [a contract may be explained by reference to the circumstances under which it was made and the matter to which it relates]..

2.

Section 7.07B.(1), with the heading "Amount," unequivocally requires the Leasehold Owner to "rent or sell" the required square footage of low and moderate income affordable housing. Section 7.07B.(2), with the heading "Length of Obligation—Rental Period," specifies the amount of the required affordable housing and states the term of the requirement to be "for as long as the square footage is operated on a rental basis." Section 7.07B.(3) states that, when an affordable unit is sold, "such sales shall include provisions, satisfactory to the Agency, which assure that: the price of the unit will be affordable to Low or Moderate Income Households…upon resale…."[9] Together, these subsections contemplate that the mandates would exist going forward for some period of time as either low and moderate income rentals or as low and moderate income freeholds.

The period of time contemplated by the Agency and RCA under these subsections is identified in contemporaneous writings made by or exchanged between those parties in connection with the formulation and entry into the OPA and its associated documents. As noted above, the ground lease between the USPS and the Agency left open whether the developer, ultimately RCA, would provide affordable housing "in kind" or would instead provide a $5,000,000 cash subsidy. These two alternatives were in fact the subjects of pre-agreement and post agreement communications between the Agency and RCA. A June 6, 1985, letter from an RCA representative to the Agency expressed the understanding that the affordable housing units in the contemplated Rincon Center, whether provided "in kind" or by "subsidy," would constitute, for a variety of

[9] Consistently, as noted above, the OPA included detailed provisions regarding the establishment of the affordability parameters.

reasons, "a *perpetual* contribution by RCA to the City's stock of low and moderate income housing." (Ex. 22, at p. 2, emphasis added.)[10] The letter also noted that RCA "will retain its right to decide which path to pursue when it converts rental housing units into condominiums."

Ultimately, the final version of the OPA adopted an "in kind" affordable housing feature rather than a cash subsidy. To assist RCA in obtaining the City's approval of this "in kind" option, RCA's attorney presented a letter to a member of the City's Board of Supervisors on September 12, 1985, soliciting the member's and the Board's approval of the then proposed tax-exempt bond financing for the development. This letter expressed, with accents, the proposition that, if the City approved the bond financing, the affordable units would be sold as affordable condominiums after the bond financing term and that the restrictions on the resale price for the anticipated condominiums would make the units permanently affordable to low- and moderate-income households.[11] Specifically, the letter stated:

> Under the terms of the [OPA], 126 (40%) of Rincon Center's 316 units would be reserved for low and moderate income tenants if tax-exempt financing is used.[]...The [OPA] provides that these 126 units, plus 32 affordable income units, will be rented for a period of 10 to 12 years – depending on the length of the bond term.[12] Upon completion of the bond financing term, 22% of the units (70 units) will be made available for sale to low and moderate income buyers.... These units will be reserved in *perpetuity* for low and moderate income buyers on future resale.[13] ... Your approval of the tax-exempt bond issuance will result in the production of below-market-rate rental housing in 50% of Rincon Center's 316 dwelling units, and the further provision that 70 of these units will be reserved for low and moderate income buyers *forever*." (Ex. 30 at p. 4, emphasis in original and *added*)[12]

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[10] The letter was authored by the "Director of Development" of Perini Land & Development (PL&D). PL&D at the time was RCA's Managing General Partner. (Exh. 25 at p. 1.) Claimant says that these references to "perpetuity" and "forever" were "legally incorrect when made because . . . the OPA only binds the ground lease and therefore these statements cannot provide a basis for any speculation regarding the rights and obligations of the parties at the end of the [ground] lease." This Decision, as it explicitly sets out *post.*, does not decide any issue whatsoever with respect to the "rights [or] obligations of the parties at the end of the [ground] lease." Moreover, that the statement might have been inconsistent with the terms and effect of the ground lease does not make it inconsistent with the terms of the OPA itself or the intentions of the parties when the OPA was entered into.

[11] The tax-exempt bond financing was approved by the Board of Supervisors. (Ex. 136 (Regulatory Agreement).)

[12] The statements by RCA's representatives to the Agency and the City provide further support in law for the construction given the mandates under this Decision. (See Civ. C. §1649 [If the terms of a contract are ambiguous, it must be interpreted in the sense in which the promisor believed, at the time, that the promisee understood it]; see also Civ. C. §1864 and Rest.2d, Contracts §201(2).

Footnotes 12 and 13 of the letter in part identified pages 12 and 13 of Attachment G to the OPA, where the "so long as" language is found.[13]

Earlier, on August 22, 1985, after the Agency had adopted a resolution approving the OPA, an internal RCA memo expressed the understanding that, "[w]hen the bonds are retired…71 units of the 316 being built [] will be sold to low and moderate-income buyers, with preference to qualifying occupants." (Ex. 29 at p. 3.) This expectation of rental then sale was also reflected in RCA's 1986 Housing Plan approved by the Agency. (Ex. 34.) The Housing Plan noted that, because "units will not be offered for sale for approximately twelve years, the description [of the methods to be followed] as it applies to sales units will be provided closer to the time of conversion." (*Id.* at p. 5.)

The Agency's understanding of the intended duration of the mandates was the same as RCA's. A February 1986 Agency report described the progress made in meeting the Plan's affordable housing goals under three major area projects, including Rincon Center. (Ex. 33.)[14] In the report, the Agency's Executive Director compared the Rincon Center's strong affordable housing requirements with the affordable housing requirements of the two other 1985 large City redevelopment projects -- SBMA and Bayside Village. The Director explained that "[t]he fact that each development has different housing obligations is due to the use of different incentives and situational factors." (*Id.* at p. 2.) According to the Director, Rincon Center differed from the other two projects because the Agency had exchanged "a plan interpretation permitting a substantial amount of new commercial space to be constructed" for the Postal Service's agreement to impose the affordable housing requirement on the Rincon Center lessee. (*Ibid.*) By contrast, Bayside Village's developer sought only tax-exempt financing, which obligated the provision of affordable housing for only 10 years or until the tax-exempt financing was replaced (*Ibid.*), and SBMA's developer used longer-term tax-exempt bonds so its main affordable housing obligation had, for the most part, a minimum term of 21 1/2 years (*Id.* at p. 5). Significantly, an attachment to the report's narrative reflects that a certain number of affordable units in the Rincon Center

[13] No objection was made on the record at the Hearing that the attorney was not authorized to speak for RCA on the matter with the Agency at the time. (See Ev. C. §1222(b).)

[14] Exhibit 33 was admitted for the limited purpose of showing the Agency's understanding of the Rincon OPA; it is not evidence of the actual terms of the three OPAs that were discussed.

development would be available for "10 years," and, thereafter, a lower number of such units would be available "beyond."

3.

The record writings by or between the original parties to the OPA about the duration of the mandates establishes that the Agency and RCA mutually contemplated, when the relevant agreements between them were entered into, that the designed effect of the mandates would be to preserve a certain amount of affordable housing in the City, which housing would be subject to the ultimate, long term control of the City irrespective of the term of the Plan.

Section 7.07B.(1) required RCA in direct terms to either "rent or sell" the affordable units. In 1985, the Plan had an expiration date of January 5, 2011, twenty-six years ahead. But the Agency and the RCA expected that the bonds would be retired in the next 10 to 12 years and that the units would thereafter be sold, as a result of which the control of the units and their affordability would pass, well before the Plan's express extinction date, from RCA to the City.

Under the record evidence then, the parties to the OPA in 1985 did not link the mandates to the end of the Plan or understand that they would end with the Plan; instead, the Plan's end was entirely irrelevant to the parties' contemporaneous, concurrent understandings and assumptions about the future existence, nature, and control of the affordability mandates, as least as between them.[15] As far as the Agency and RCA were concerned at the time, all of the affordable units covered by the OPA would no longer be covered by the OPA when January 5, 2011, rolled around. This mutual expectation reflects a shared intention that the ultimate effect of the mandates would be to provide a certain stock of low and moderate income affordable housing in the City into the future without regard for the Plan or its stated term. Put another way, when the OPA was prepared and entered into, the end of the Plan was meaningless to the parties' expectations about the future, and the timing of the future life of the mandates.

In these circumstances, the parties' use of the "so long as" phrasing with respect to the duration of the mandates is explainable. The apparent uncertainty about the length of the anticipated bond financing, i.e., "10 to 12 years," probably prompted the selection of words that left the window open for some variable, but planned and expected, finite rental period and also likely resulted in the absence in any of the development documents of any firm end date for the

[15] As made clear later in this Decision, nothing in this Decision addresses any issue with respect to the duration of the mandates given the 2050 termination date of the ground lease between RCA and the USPS.

mandates because it simply was not germane. (*Bradner v. Vasquez* (1951) 102 Cal.App.2d 338, 344 ["Words which fix an ascertainable event, by which the term of a contract's duration can be determined, make the contract definite and certain in that particular]; *Long Beach Drug Co. v. United Drug Co.* (1939) 13 Cal.2d 158, 165 ["It is the general rule that a contract is not fatally defective merely because it does not specify a time presently definite for its termination"]; *Lura v. Multaplex, Inc.* (1982) 129 Cal.App.3d 410, 415 [where "an obligation is conditioned upon an event connected with the subject matter of the contract, the obligation continues until that event occurs"].) For the same reasons, the fact that none of the other development documents include a set termination date for the mandates does not constitute evidence of a mutual intention that the mandates would end with the Plan.

4.

Claimant argues in part that the mandates should be found to have terminated with the expiration of the Plan because the contemplated 12 year lease window has long passed and, as a consequence, the successive leasehold owners over the years since 1997, including Claimant, should not be compelled to continue to bear the costs of the rent subsidies. In the same vein, Claimant maintains that it is "commercially reasonable" to find that the mandates ended, at the latest, with the end of the Plan.

Claimant purchased the Center in 2010 after foreclosing on the mortgage against the property that served as the security for an obligation represented by a promissory note. (Ex. 61 [Mortgage Loan Investment Opportunity report].) The Leasehold Owner at the time, and the debtor on the note, was Rincon EV Realty LLC, the latest in the parade of post-1985 Leasehold Owners. After it purchased the Note, Claimant foreclosed the mortgage, and, on October 12, 2010, became the Leasehold Owner through a Trustee's sale. (Exh. 63 [Trustee's Deed].)

Before it acquired the property, Claimant, as would be expected, performed a comprehensive due diligence assessment of the investment opportunity, including a "a thorough review of all documents and agreements recorded and pertaining to the property." (Ex. 132 at p. 17.)[16] The inventory (Ex. 141 [Due Diligence Inventory]) of reviewed documents included all versions of the Redevelopment Plan as amended between 1981 and 2007, as well as the OPA, the

[16] Claimant's person most knowledgeable ("PMK") testified that the Investment Package was a document prepared by Claimant's staff to present an investment opportunity to Claimant's board. (PMK Depo. 34:21–24; 64:12–65:21.)

2001 Housing Plan, the USPS/RCA CC&Rs, a 2005 Settlement Agreement, the Rincon EV Realty promissory note, the corresponding loan agreement, and the DOR. Claimant also sought and received legal analyses and reviews of the proposed transaction. (Ex. 132 at p. 17; PMK Depo. 69:24-70:24.)[17]

The sale of some or all of the rentals as condominiums, including the affordable units, was among the alternatives covered by Claimant's evaluation of the potential investment. (Ex. 132 at pp. 15–16.) One option noted was a sale of some or all of the units within six months of Claimant's purchase of the property. (PMK Depo. 81:2–10; Ex. 132.) According to the study, a split of the two towers, one for rentals and one for sales, would return a "premium" to Claimant on the condo sales. (Ex. 132.)[18]

Ultimately, Claimant decided not to go forward with any sales of any of the units. Instead, Claimant intended to hold the property, which had been acquired at a deep discount, for five years and then sell it. (PMK Depo. 56:14-25; 101:24 [as corrected].) According to the PMK, a "condo exit" was not a viable strategy because it carried an "additional level of risk." (PMK Dep. 83:4-14.) As he saw it, a "turn" of the entire property would require only one "transaction" while sales of individual rentals as condominiums would require many "individual" transactions. (PMK Depo. 56:14-57:10.)

It is apparent that Claimant, before it decided to acquire the property, was in a position to know, and in fact did know, the contents of the relevant documents, though the record does not show whether Claimant ever directly addressed the legal question, lurking in the documents, about the duration of the mandates. It does not matter. The mandates were in fact irrelevant to Claimant's decision to acquire the property because it was Claimant's intention to "turn" the property within five years of its acquisition (PMK Depo. 101:24 [as corrected]).[19] Claimant got the property at a discount with a clear knowledge of the existence of the mandates and with a plan, obviously ultimately unsuccessful, to avoid those mandates.

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[17] Whether Claimant, before the closing of the trustee's sale, had access to the documents described above in section II.B.2. of this Decision is not shown by the record.

[18] "A scenario has been contemplated by where the residential towers are split into two types of ownership a condominium tower and a rental tower." (Ex. 132 at p. 16 [financial analysis of selling the 38 affordable units and 122 market rate units in East Tower as condominiums].)

[19] Claimant did know that sales of the affordable units would remove them from the coverage of the OPA and shift future control of them to the City. (PMK Depo. 93:12–94:8.)

Given this background, there is no support for the extinguishment of the mandates because of the passage of time beyond the contemplated 12 year lease window or for the imposition of a "commercially reasonable" termination date on or earlier than January 5, 2021. Such a result would be inconsistent with the mutually contemplated, ultimately City controlled, long term existence of the specified affordable housing. The only alternative set out in the OPA to renting the units as affordable units is their sale as affordable condominiums. (Section 7.07B.(1) ["rent or sell"].) Doing neither was not an alternative in the OPA or in the minds of the original parties to the OPA. At any time after the bonds were retired, which occurred in 1999, any of the successive leaseholders was free to sell the units as condominiums and obtain relief from any subsidy obligation. The fact that no unit or units have yet been sold is not inconsistent with the parties' intentions about the original, fundamental purpose of the mandates -- to ultimately give the City a long-term stock of low and moderate housing in the Center. As leaseholds and not freeholds over the ensuing years, the units have continued to serve that original, fundamental purpose.

Whether it was or was not economically feasible to sell rather than rent at any particular moment over the past 40 years is irrelevant. As noted, above, Claimant contemplated selling some or all of the units after it acquired the property, but then determined a five year "turn" was a sounder financial and administrative alternative. There is no reason now to relieve Claimant of an obligation that it could have escaped, and indeed planned on escaping in whole or part, years ago.

The same needs be said with respect to the other, successive Leasehold Owners before Claimant. The record does not show why these owners did not obtain relief from the mandates by selling the affordable units when they each had them, but the information is not of any consequence to the issue here. For some reason sufficient to each of these owners, they did not do so, but that did not absolve any of them from the effect of the obligations they each undertook when they acquired the property, i.e., to "rent or sell" the affordable units.[20]

5.

Claimant points to the fact that the Agency, from 2008 to 2012, and the City, from 2013 to the present, admitted, in their respective A.B. 987 reports about the exact duration of the existing affordability restrictions on the project (see, e.g., H & S C. §33418), that the mandates were to end

[20] In addition, see *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11 [arbitrators "are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [according to what is just and good]].)

with the Plan on January 5, 2021. Claimant also argues that separate reports (Exs. 73, 74, 77, 78) were prepared by the City in 2015 adopting the same position, which was also reported to the press and to the public (Exs. 84, 85, 94, 96). Claimant is correct that all these reports and statements, in one way or another, recite that the mandates would end with the end of the Plan.

Claimant is also correct that a party's "practical interpretation" of a contract may be used against the party (see *DVD Copy Control Assn, Inc. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, 712) and that a written admission of a party before any controversy has arisen about the meaning and effect of a contract may bind the admitting party (*Moore v. Grayson* (1901) 132 Cal. 602, 605).

These admissions are evidence, but they are nothing more than evidence and, as such, are not conclusively binding on the admitting party; instead, the trier of fact may evaluate their respective weights and probative values in the context of all the other evidence and may properly determine that some or all are not material or are rebutted by other, contrary evidence. (1 Witkin, California Evidence (5th ed., 2012), Hearsay, §92.)

The Agency's and the City's many post 2007 statements about the mandates ending with the end of the Plan are inconsistent with the mutual intent of the parties to the OPA when it was concluded in 1985, for the reasons set out above. None of the Agency or City representatives who participated in the investigations or the preparations of the reports or statements were present at or involved in the creation of the Plan, the OPA, or the other development documents. As a consequence, none of these representatives were in any better position to infallibly interpret the hazy relevant documents than anybody else who, commencing around 22 years after the inception of the OPA through to today, may have come to review the documents and make a judgment call about the duration of the mandates as it was intended by the Agency and RCA in 1985.[21]

6.

Claimant asserts that the mandates are not enforceable against it by Respondent because they did not transfer, from the Agency to Respondent, when the Agency was dissolved in 2012.

First, Claimant has admitted that the City is the "successor in interest to [the Agency] under OPA with respect to the BMR requirements at issue in this arbitration." (Amended Demand, §6.) Claimant has also admitted that the City "retain[ed]" the Agency's "rights and obligations under

[21] It is unnecessary to delve into the topic of when and how Claimant came to know of these "admissions." (See PMK Depo. 55:6–20.).

the OPA pertaining to the BMR requirements." (Amended Demand, §11; see also Exhibit 4 to the Amended Demand [April 28, 2022, Stipulation].)

Notwithstanding these admissions, all of the Agency's "rights, powers, duties, obligations," and "housing functions," not just the Agency's "housing assets," were transferred to, and assumed by, the City. (Health & Safety C. §34276(a)(1); see also Ex. 139 [Resolution 11-12 (January 24, 2012)].) By such transfer and adoption, and as the "housing successor" to the Agency, the City also acquired the power to "enforce affordability covenants and perform related activities pursuant to applicable provisions of the Community Redevelopment Law." (Health & Safety C. §34276(c).)[22]

C.

Given the foregoing conclusions, it is unnecessary to discuss in detail the other arguments or points raised by Claimant in its post-Hearing proposal.

The fact that the DOR expressly provided that it would end with the Plan and that the DOR specified that certain of its provisions other than the mandates would outlast the Plan is not inconsistent with a construction of the OPA that extends the mandates beyond the Plan. To the contrary, the language of the OPA itself, when viewed together with the relevant objective circumstances and communications of the parties in 1985, establishes that the mandates were mutually intended to survive the Plan irrespective of anything in the DOR.

The same is so with respect to the arguments that (i) Attachment G "is contained within a broader contract" and incorporates the Plan with its specific end date, (ii) the "OPA is devoid of any language providing that the affordable housing restrictions in Attachment G survive the expiration of the OPA," (iii) there "is nothing in Attachment G, or anywhere else in the OPA, which carves out the affordable housing restrictions from the end of the OPA" or that they "supersede[] the end date for the OPA's provisions," (iv) there is no "conflict clause" stating that in the event of a conflict between Attachment G's language and other provisions in the OPA, Attachment G's language prevails, and (v) there is no statement of any kind that exempts Attachment G from the OPA's January 5, 2021, end date. The facts or lack of facts underlying these contentions are all true, but their effect on the record in this case is to create the ambiguity addressed by this Decision, not to solve it.

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[22] For purposes of Section 34176, a "housing successor" means the entity assuming the housing function of a former redevelopment agency pursuant to" the Section. (Health & Safety C. §34276(a)(3).)

No doubt the fundamental tenets of contract interpretation require that the "whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other" (Civ. C. § 1652), that that "[p]articular clauses of a contract are subordinate to its general intent" (Civ. C. § 1650), and that "[r]epugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract" (Civ. C. § 1641). However, equally fundamental tenets of contract interpretation require that the specific provisions of a contract will control over the general provisions when the two are inconsistent (Code Civ. Proc. §1859), as long as the general purpose of the entire agreement is not undermined (Civ. C. §1652).

As stated repeatedly above, the parties by their objective expressions at the time, including the relevant words in the OPA, intended the effect and purpose of the mandates to persist outside, and therefore beyond, the time frame of the Plan, but their failure to clearly express that intention generated the contract ambiguity in issue and decided now. In absence of any consequence to or impact on the Plan, or any of the other provisions of the OPA, or any of the provisions of any of the other development documents– and there is none -- the enforcement of the intended purpose of the mandates to ultimately provide for a specified inventory of long term affordable housing under the control of the City does not sabotage the general purpose of the Plan, or the Rincon Center development, or any of the provisions of the documents providing for that development.

The testimony by Olson Lee, a former Agency Deputy Director of Housing, that "if you're going to place permanent restrictions on property, that it be clearly delineated in these agreements that were being entered into with developers" are wise words. (Lee Depo. at 111:13-18.)[23] In addition, his testimony that the Agency knew how to draft such language was accurate with respect to the examples he cited from other projects within the Plan. (Lee Depo. at 108:6-109:4) The problem here is simply that the Agency did not do a perfect job of drafting with respect to the intended duration of the OPA mandates for purposes of the Rincon development, resulting in the latent ambiguity that gave rise to this Arbitration.[24] Whatever may have been done by the Agency

[23] Mr. Lee commenced work for the Agency in 1997 (Lee Depo. 12:25-13:2), so he was not a participant in the creation of the OPA or other Rincon Center development documents.

[24] Claimant argues that, because the Agency drafted the OPA, the ambiguity must be interpreted against it. However, the "drafter" principle applies only after application of the "other rules of contract interpretation" fail to resolve the ambiguity. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 798-799; see also Civ. C. §1654.) Here,

with respect to the documents governing other developments in the Plan area, the controversy here involves only the Rincon Center development and the specific documents pertinent to the Rincon Center development. However the OPA or any of the other of the development documents may have come to read as they do, the evidence here establishes that the Agency and RCA intended the mandates, from the inception, to provide low and moderate income housing in the City, subject to ultimate City control, without regard for or reference to the expiration of the Plan. In this light, the omission, in the OPA and in the other Plan documents, of an express expiration date for the mandates is understandable and consistent with the original purpose and intent of those mandates.

D.

There is no dispute that the OPA does not *by its terms* bind the fee interest in the property. (Ex. 19; Ex. 25 at p. 1 and pp. 4-5 §§ 2.2, 2.3 [leaseholder binds only itself and subsequent leaseholders]; Attachment F, p. 2 ["leasehold interest" is "property subject to" Declaration of Restrictions].)[25] There is thus also no dispute that the OPA does not apply *by its terms* to the property beyond April 19, 2050, the end of the USPS lease. (Ex. 19).

This Decision neither addresses nor decides any issue whatsoever about the mandates and the end of the USPS lease. The only question before the Arbitrator in this arbitration is whether the OPA's affordable housing mandates did or did not expire in 2021 with the end of the Plan.[26] Accordingly, nothing in this Decision, or in any other ruling or any Award in this Arbitration, final or interim, decides or purports to decide any such issues, or any aspects of any such issues, or any other question related to any such issues.

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another, primary rule of contract interpretation – extrinsic evidence showing the mutually expressed intention of the parties at the time –resolves the ambiguity. (Civ. C. §1636; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 798-799.)

[25] Additionally, the parties required the USPS, as fee owner, to consent to filing the OPA and DOR. In doing so, the USPS did not agree to bind the fee interest in the property that it had retained. The OPA explicitly states that the holder of the fee interest, the USPS, is "not bound by the Plan." (Ex. 25 at p. 2). The USPS consented solely to the "Leasehold Owner's execution of this Agreement, the Declaration of Restrictions (Attachment F), and such other documents as may be necessary to effectuate this Agreement." (*Id.* at p. 3).

[26] The determination that the mandates did not expire in 2021 with the Plan is not a determination that the mandates "do not expire." It is thus not necessary to address Claimant's arguments that California law disfavors implying perpetual restrictions on land.

III.

A.

1.

The OPA provides as follows for the arbitration of disputes regarding the affordable housing obligations contained in Attachment G, Section 7.07G.:

> Any dispute, controversy or claim regarding this Section 7.07, with the exception of Section 7.07F.(2), which cannot be settled after good faith efforts by the parties, shall be determined by arbitration. Such dispute, controversy or claim shall be submitted to arbitration in the City of San Francisco. Said arbitration shall be conducted in accordance with the Rules of Commercial Arbitration of the American Arbitration Association or its successor, and the provisions of California Code of Civil Procedures [sic], Section 1283.05, or any successor or amended statute or law containing similar provisions. The expenses of arbitration shall be borne equally by the parties, provided that each party shall be responsible for the fees and expenses of its owner experts, evidence and attorneys.

The "dispute, controversy or claim" presented and decided in this Arbitration does not involve or concern in any way Section 7.07F.(2) of the OPA.

2.

All claims, causes of action, and defenses, as well as all undecided motions in limine, if any, raised by a party in this Arbitration that are relevant to the issues decided above by the Arbitrator in this Decision, but that are not expressly discussed in this Decision, are either moot or denied on their respective merits as not having been proved. All claims, causes of action, and defenses identified in this Decision and also generally in this Section III.A. as having been decided by the Arbitrator, including all the claims, causes of action and defenses summarily denied in said subsection as moot or not proved, are found to be arbitrable under Section 7.07G. of the OPA.

B.

Neither this Final Decision nor any other decision, order, or ruling, of whatever nature, on any issue raised in this Arbitration, is, or is intended to constitute, an award, whether partial, final, or otherwise, and no award, whether partial, final, or otherwise, will be entered in this Arbitration unless and until the Arbitrator has fully and finally resolved to his satisfaction all the issues raised in this Arbitration. The Final Award will incorporate whatever provisions are required to implement, to the extent consistent with the relevant pleadings, the findings made in all decisions, orders, and rulings entered in this Arbitration prior to the issuance of such Final Award, and will be expressly labeled as the "Final Award." The Final Award will also incorporate whatever

provisions are required to implement, to the extent consistent with the relevant pleadings, the findings made in all interim decisions, rulings and orders entered in this Arbitration.

IV.

A.

The [Tentative] Final Decision provided in part, in Section IV.A., as follows:

> "In view of the extensive and complex documents involved in the Rincon Center development, the Arbitrator is uncertain whether there are any provisions buried in any of those documents relating to fees and/costs for a "prevailing party," or an indemnitee, or a statutory (i.e., Code of Civil Procedure Section 998) or rule beneficiary, or otherwise on any ground whatsoever. If so, the Arbitrator requests that, not later than August 14, 2023, the parties identify the provision and the document in which the particular provision resides and/or its source in law or rule. The Arbitrator is aware of AAA Commercial Rule R-47.
>
> If neither party intends to claim a right to costs and/or fees notwithstanding any provision of the sort identified in the preceding paragraph, the parties will so notify the Arbitrator."

The parties have not identified any basis for the imposition of fees or costs, of any nature or amount, on any party to this Arbitration. Accordingly, each party shall bear its own fees and costs incurred in this Arbitration, including the fees and costs identified in American Arbitration Association Commercial Rule R-47.

B.

The "Record of Hearing And Final Decision" issued on September 5, 2023, is vacated. This September 15, 2023, "Record of Hearing And Final Decision" simply corrects typographical errors found in the vacated September 5, 2023, version.

Dated: September 15, 2023.

Nickolas J. Dibiaso, Arbitrator