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December 20, 2013

Hon. Daniel Kummer, Chair
Brooklyn Community Board 6
250 Baltic Street
Brooklyn, New York 11201

Re: New York Methodist Hospital Center
for Community Health
BSA Calendar No. 289-13-BZ

Dear Mr. Kummer:

We are counsel to New York Methodist Hospital (“NYM”), which is requesting waivers from the New York City Board of Standards and Appeals (the “BSA”) of certain provisions of the New York City Zoning Resolution (ZR) in order to facilitate development of a 498,500 gross square foot (approximately 311,000 square feet of zoning floor area) ambulatory care facility at 505-541 6th Street (502-522 8th Avenue and 512-520 5th Street) in Brooklyn, NY (the “proposed project”). We write in response to the November 20, 2013, letter of Eve C. Gartner, Esq. (the “Gartner Letter”) in opposition to NYM’s application. Ms. Gartner alleges that the proposed project does not meet the standard for a variance under ZR §72-21 and is not entitled to the presumption of a beneficial use for educational institutions established in *Cornell v. Bagnardi*, 68 N.Y.2d 583 (1986), because the proposed project would detract from the public’s health, safety and welfare by significantly impacting traffic and contributing to air pollution. Ms. Gartner alleges in particular that NYM used an incorrect methodology under the New York City Environmental Quality Review (“CEQR”) to assess these potential environmental impacts. For the reasons set forth below, Ms. Gartner’s understanding of both the requirements of CEQR and the analysis performed by NYM is incorrect.

The EAS Appropriately Assessed Potential Environmental Impacts by Comparing the Proposed Development to the Complying Development.

The crux of Ms. Gartner’s argument is that the EAS is “fundamentally flawed because it relies on the wrong baseline for assessing what impacts NYM’s proposal would have on the community and the environment.” Gartner Letter, pp. 3-4. Ms. Gartner alleges that the EAS should have compared the proposed development to “existing conditions,” rather than the

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“complying development,” which represents the as-of-right development that NYM could develop in the future under the current zoning regulations without any discretionary approvals.

The 2012 CEQR Technical Manual (the “Tech. Manual”) states that, when performing an environmental analysis under CEQR, “[t]he existing environmental setting is used as the basis from which future conditions without the proposed project are then predicted. This prediction is made for the year the project would be completed [*i.e.* the build year], using the data about existing conditions together with information about expected future growth and development.” *Tech. Manual*, p. 2-5. The projection of future conditions without the proposed project is referred to as the future “No-Action” condition, and describes the future likely to occur in the absence of the public actions required to implement the proposed project (*i.e.* under existing zoning regulations). Thus, the No-Action condition cannot be a snapshot of “existing conditions.” CEQR requires that future conditions be estimated for the year the proposed project would be operational. The No-Action condition is used as the baseline against which the future with the proposed project, also known as the “With-Action” condition, is compared. The increment between the future No-Action condition and the future With-Action condition represents the measurable effect of a proposed action. *Id.*, pp. 2-5 - 2-6. This comparison determines whether the incremental effects of the proposed action would result in a significant adverse impact in any of the technical areas of environmental concern analyzed under CEQR..

Contrary to Ms. Gartner’s assertion, an applicant may use an “as-of-right” development (*i.e.* one that complies with all applicable zoning regulations and does not require any discretionary action by the City) as the baseline No-Action Condition for an analysis of a proposed project’s environmental impacts. The *CEQR Technical Manual* specifically provides:

Sometimes, private applicants state an intention to develop their property in the future, with or without approval of a proposed project. In these cases, the lead agency should consider the reasonableness of the applicant’s No-Action development scenario by utilizing the relevant factors listed under “Soft Site Criteria.”¹ If the lead agency determines it is reasonable to assume that the applicant’s stated No-Action scenario would occur in the future without the proposed project, the scenario would constitute the No-Action scenario for analysis purposes.

Id. pp. 2-7.

¹ The soft site criteria set forth in the *Tech. Manual* look at, among other things, uses and bulk allowed, size of the development site, recent real estate trends in the area, and issues relating to site control or site assemblage that may affect redevelopment potential. *Tech. Manual*, p. 2-6.

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The use of an as-of-right development as the baseline against which a proposed project is measured has been sustained by the courts. *See Committee to Preserve Brighton Beach & Manhattan Beach, Inc. v. Council of City of N.Y.*, 214 A.D.2d 335, 337 (1st Dep't), *lv. to app. denied*, 87 N.Y.2d 802 (1995) (affirming the "standard of measurement" of an "as-of-right" development as the baseline for assessing the potential impacts of a proposed project). *See also Fisher v. Giuliani*, 280 A.D.2d 13, 17 (1st Dep't 2001) (upholding the City's determination that no significant adverse environmental impacts would result from zoning text amendments creating an as-of-right transfer of development rights where the environmental review compared the reasonable worst case scenario that could result from the text amendments with development that could be anticipated without the amendments); *7-Eleven, Inc. v. Board of Trustees of Inc. Village of Mineola*, 289 A.D.2d 250, 250 (2d Dep't 2001) (annulling the denial of a special use permit based on traffic impacts, because, "[w]here the denial of the special use permit is based on a claim of traffic congestion, there must be evidence that the proposed use would cause greater traffic congestion than an as-of-right use"); *West 54-55 Street Block Assoc. v. City of New York*, Index No. 102524/10, (Sup. Ct. New York Co. September 16, 2010) (holding that using an as-of-right development as a basis of comparison with a proposed project was permissible as "[t]he use of as-of-right scenarios for comparison purposes have been recognized in the courts as consistent with SEQRA and CEQR"); *Croton Watershed Clean Water Coalition, Inc. v. Planning Board of Town of Southeast*, 5 Misc.3d 1010(A), 2004 WL 2480011, at *12-13 (Sup. Ct. Westchester Co. Sept. 14, 2004) (rejecting a claim that "it would be important in comparing the environmental effects of competing alternatives" to consider the alternative of leaving the land at issue undeveloped, and holding that "a private developer is not required to submit a 'no build' alternative," and "the use of the 'as of right' development as the baseline for the 'no-build' scenario instead of existing conditions is sanctioned") (citing *Committee to Preserve Brighton Beach*).

Similarly, various projects that have sought and received BSA variances have used an as-of-right scenario as the No-Action baseline for purposes of CEQR analysis. Examples include: *NYU Langone Medical Center Kimmel Program*, 400-424 East 34th Street (BSA Cal. No. 186-10-BZ); *Weill Cornell Medical College Biomedical Research Building*, 411-431 East 69th Street (BSA Cal. No. 170-08-BZ); *NYU Center for Academic and Spiritual Life*, 58 Washington Square South (BSA Cal. No. 239-09-BZ); *98 Montague Street (Bossert Hotel)* (BSA Cal. No. 189-12-BZ); *MOMA Tower*, 53 West 53rd Street (DCP C090432 ZSM/C090431ZSM); *Columbia University Northwest Science Building*, 3030 Broadway, Manhattan (BSA Cal. No. 113-06-BZ).

Here, NYM's complying development represents a true as-of-right scenario, which conforms to all applicable provisions of the ZR, and which can and would be developed by NYM if the requested waivers are not granted. The complying development would not be the most desirable development for the hospital, as it would not permit the same comprehensive,

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coordinated caregiving, efficient provision of services, or future programming flexibility as the proposed development. However, because NYM already owns the site, which is located across the street from the main hospital pavilion, the complying development is an option that NYM would pursue in the absence of the requested waivers.

Thus, the EAS used the correct CEQR methodology to determine that the impact of the proposed project would not have an adverse impact on traffic, air quality or the other environmental factors. This is the standard the BSA should adhere to in determining whether the application meets the requirements for a variance and whether NYM can avail itself of the presumption of beneficial use under the *Cornell* doctrine.

Even Though Not Required under CEQR, NYM Conducted a Traffic Analysis Comparing the Proposed Project to Existing Traffic Conditions

Even though not required to do so under CEQR, NYM engaged Philip Habib & Associates (“PHA”) to conduct a traffic study that compared the proposed project to existing 2013 conditions in order to alleviate community concerns. Ms. Gartner incorrectly states that this traffic study relies on the “fiction of the complying development baseline instead of a no-build baseline” and, thus, “obscure[s] the true impacts of the proposed development on traffic, parking, and pedestrian safety.” Gartner Letter, p. 6. In fact, PHA’s October 28, 2013 Traffic Technical Memorandum (the “Traffic Study”) examines *existing* transportation conditions (with data collection undertaken on May 16 and May 21, 2013) and compares it to the future (2017) conditions expected to result from the proposed project. A copy of the PHA Traffic Study is annexed hereto at Exhibit “A.” Although the Traffic Study was not prepared to satisfy any CEQR requirements, it does utilize methodologies similar to those set forth in the *Tech. Manual*. See Traffic Study, p. 1. The Traffic Study analyzes a total of five intersections in proximity to NYM where project-generated vehicle trips would be expected to be the most concentrated during the peak AM, Midday and PM periods.

The Traffic Study concludes that in the future with the proposed project all intersections would operate at a level of service (“LOS”) C or better—which, as noted in the Traffic Study, generally represent highly favorable to fair levels of traffic flow—during all three analyzed peak periods. This LOS is similar to existing traffic conditions at these intersections. With respect to pedestrians, the Traffic Study concludes that future pedestrian LOS would actually improve on the north sidewalk of 6th Street with the proposed project even though pedestrian volumes would increase, as a result of the removal of the surface parking lot that currently encroaches into the public sidewalk, and the increase in the effective width of the sidewalk on 6th Street from 2 feet to 7.5 feet. Lastly, the Traffic Study concludes that there would be no parking shortfall as a result of the proposed project. In fact, following the construction of the proposed project, the NYM campus as a whole would have a peak parking demand of approximately 64% of future

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capacity. The Traffic Study notes that this additional capacity would allow NYM to accommodate much of the demand from staff, patients and visitors who currently park on-street, and thereby would improve on-street conditions.

The EAS Adequately Addresses Air Quality Impacts from Vehicular Traffic, Stationary Sources and Construction Vehicles

Ms. Gartner asserts that the EAS does not provide assurance that increased air emissions from NYM's boiler operations will not detract from health and safety. Gartner Letter, p. 8. As noted in the EAS, the proposed project may include either a natural gas-fueled boiler installation to serve process heating and hot water systems or, alternatively, a connection to the existing NYM boiler plant across 6th Street, which would eliminate the need for a separate boiler plant for the proposed development. The existing boiler plant has excess capacity that is believed to be sufficient to provide services to the proposed development; however, further study is required to determine whether connecting the proposed development to the existing NYM boiler plant is feasible. To be conservative and evaluate the worst-case potential future pollutant concentrations from the proposed combustion equipment, the EAS included a stationary source air quality analysis that assumed a stand-alone addition of new boiler equipment.

The air quality analysis focused on emissions of nitrogen oxides (NO_x), which is the primary pollutant of concern for the proposed development. The other pollutants cited in the comments— carbon monoxide (CO) and particulate matter (PM) — are considered to be less critical and were not analyzed. CO is primarily analyzed as a pollutant of concern from transportation rather than stationary sources such as boilers (*see Tech. Manual*, Table 17-2), and, as discussed above, the transportation analysis of the proposed development did not warrant such an analysis. PM was not analyzed since the critical form of PM, PM_{2.5}, is evaluated on an incremental basis for projects subject to CEQR. Since the proposed development is slightly *smaller* in size than the complying development, emissions would be anticipated to be similar to or less than those of a complying alternative, so that no analysis of PM_{2.5} from stationary sources is warranted. *See* EAS, p. H-3.

The analysis determined that, because of the location of the stack on the tallest portion of the development, above other existing buildings in the area, emissions of NO₂ (a component of NO_x) would not result in an exceedance of the NO₂ National Ambient Air Quality Standard. Therefore, no significant adverse air quality impacts from the future operation of the boiler plant would be anticipated, and no public health impacts would occur.

Further, the NYM campus operates under a Title V facility operating permit issued by the New York State Department of Environmental Conservation ("NYSDEC"). Depending on the approach used by NYM to serve the energy needs of the proposed development, the existing

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Title V permit may need to be modified. Such modification would be subject to environmental review and to various regulatory requirements that must be met during the permitting process, which would be reviewed by NYSDEC. Future levels of total emissions from the hospital would need to be estimated to determine what type of modification would be required, and to identify the applicable regulatory approval process and regulations that would apply.

Ms. Gartner also asserts that the “flawed” baseline used in the EAS denies the public a true understanding of the air quality impacts from vehicular traffic that would result from the proposed project. Gartner Letter, p. 9. As detailed above, the EAS correctly used the complying development as the baseline for analyzing the impacts of the proposed action. Using that baseline, the EAS determined that no significant adverse air quality impacts from vehicular traffic would occur with the proposed development. Specifically, the proposed development, as compared to the complying development, would not generate a sufficient number of additional vehicle trips, as discussed in Chapter 17, Sections 210 and 311 of the *CEQR Technical Manual*, to require a mobile source analysis. As presented in the EAS, the maximum hourly incremental traffic from the proposed development would not exceed the *Tech. Manual* carbon monoxide (CO) screening threshold of 170 peak hour trips at nearby intersections in the study area, or the fine particulate matter (PM_{2.5}) emission screening threshold of 12 equivalent heavy duty diesel vehicles. *Id.* Therefore, a quantified assessment of mobile source emissions from project-generated traffic was not warranted and significant adverse air quality impacts due to transportation sources are not expected to occur with the proposed development. *See* EAS, p. H-1.

With respect to construction-related air quality impacts, as described in the EAS, to ensure that construction of the proposed development would result in the lowest practicable diesel particulate matter emissions, NYM would implement an emissions reduction program for all construction activities, where practicable, consisting of the following components: diesel equipment reduction; utilization of ultra-low sulfur diesel (USLD) fuel; utilization of diesel particle filters (DPF); utilization of equipment that meets at least the Tier 3 emission standards; fugitive dust control measures; and idling restrictions. With these measures, the EAS concluded that the proposed development would not result in any significant adverse construction air quality impacts. This conclusion does not rely on a comparison with existing conditions or the complying development, as suggested in the comment, but is based on the range of emission control measures that are proposed. EAS, pp. K-16-K-17.

The Proposed Development Satisfies the Required Findings for a Variance

Ms. Gartner asserts that the discussion in NYM’s application of the *Cornell* doctrine “suggest[s] that the BSA and CB6 should grant the application regardless of whether [NYM] has actually met the legal criteria for variances” Gartner Letter, p. 3. This assertion mischaracterizes NYM’s application. The application analyzes in detail the manner in which the

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proposed development satisfies the findings set forth in ZR Section 72-21. It discusses and incorporates, among other things, the findings of the EAS with respect to the effects of the proposed development on the surrounding neighborhood. As discussed above, the EAS correctly uses the methodology set forth in the *Tech. Manual* to thoroughly consider the effects of the proposed project on a number of environmental conditions, including traffic and air quality. NYM has also conducted a traffic analysis comparing the proposed development to existing conditions. This analysis determined that the proposed development would not create traffic congestion, would improve pedestrian conditions on 6th Street, and would not create a parking shortfall.

NYM's application provides additional detailed information to support the findings under ZR Section 72-21. It describes the unique physical conditions on the zoning lot; how these conditions constrain the ability of a complying development to satisfy NYM's programmatic needs; how the massing and architectural design of the proposed development is compatible with the surrounding neighborhood (with a description of how the design of the proposed development incorporates feedback provided by community members); and how the requested waivers are the minimum necessary to afford NYM relief. The application's discussion of the *Cornell* doctrine supplements this analysis. It does not replace it.

For these reasons and others set forth in detail in the application, the proposed project satisfies the findings set forth in ZR Section 72-21. In addition, the evidence establishes that the project would have no significant adverse impact on traffic, air quality, or other factors relating to the public's welfare. Therefore, NYM's application is entitled to the deferential consideration that the *Cornell* doctrine requires for an institution providing medical education and training. For the foregoing reasons, we request that CB6 recommend approval NYM's application.

Yours very truly,



Elise Wagner

EW

cc: Hon. Brad Lander, City Council
Mr. Craig Hammerman, Community Board 6