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Village of Nyack
Office of the Village Attorney
North Broadway
Nyack, New York 10960

Attention: Dennis D. Michaels, Esq.
Village Attorney

Re: Planning Board Meeting Follow-up on
Montefiore Nyack Campus Project

Dear Village Attorney:

As you know this Office represents Montefiore Nyack Hospital (the "Hospital") with regard to the Project above-captioned currently pending before the Village Planning Board. I was asked at the most recent Meeting to address Village Code provisions at Chapter 360 referenced by you after the Village Planning Board (the "Board") returned from Executive Session at the most recent Board Meeting. This Letter is in response to the same and related Village Code Provisions and applicable Law.

**THE VILLAGE CODE AT CHAPTER 360 ONLY CONCERNS
AND APPLIES TO "DEVELOPMENT" ACTIVITIES**

To properly address the potentially applicable Village Code Chapter 360 provisions raised, I believe it is important to refer to general and then specific Village Code provisions that were raised at the most recent Village Board Meeting that involve water related issues in any way. The Village Code provisions at Chapter 360 referenced at the recent Board Meeting are entitled "**Article IV Development Standards**". Thus all of those provisions referenced at Chapter 360 refer by definition only to "Development Standards". Thus, provisions under Chapter 360 only apply to land use development activities and not any non-development activities arising outside of the scope of the Hospital's "development" plan. For example, the stormwater runoff from the Oak Hill Cemetery has nothing to do with the proposed Hospital Development Project before this Board and has everything to do with activities of the Oak Hill Cemetery from years ago that allows stormwater runoff on the NYSDOT Route 9W Property.

Accordingly, as the case law I previously provided to you (and I believe you confirmed is controlling), no Village Code provision could be made applicable to stormwater runoff issues that arise from conduct originating outside of the Hospital Property and not caused by the Hospital's requested development improvements in the Hospital's Project before the Board. Otherwise stated, the Hospital cannot be compelled to remedy flow of stormwater runoff issues from the Oak Hill Cemetery as legal authorities already noted to you confirm. (See, (*Sepco Ventures, Ltd. v. Planning Board*, 230 A.D.2d 913, 915 (2nd Dept. 1996); (*In re Sandord v.*

Whearty, 216 A.D.2d 399, 400 (2nd Dept. 1995). (See, e.g. *Legacy at Fairways, LLC v. McAdoo*, 20 Misc.3d 1134(A) (2008). Thus, under no lawful construction of any Village Code provisions cited at the recent Board Meeting is the Hospital legally responsible for Oak Hill Cemetery stormwater runoff actions that were diverted onto the NYSDOT Route 9W Property

In confirmation of the foregoing limitation of Chapter 360 to only “development activity” and not any non-development activity, it bears emphasis that Chapter 360 makes specific reference to the limitations of its application to stormwater runoff issues. Specifically, Chapter 360-4.12(A) entitled “Stormwater pollution prevention” references the Village Code at “Chapter 295” which Chapter 295 also limits application of Chapter 360 to “Land development activities” as a matter of “Findings of fact” at Section 295-1(A) that “Land development activities and associated increases in site impervious cover often alter the hydrologic response of local watersheds and increase stormwater runoff rates and volumes, flooding, stream channel erosion, or sediment transport and deposition”. Therefore, as a factual finding in the Village Code regarding “land development issues”, the Village Code relates only to “Land development activities and associated **increases in site impervious cover . . .**”. As the Hospital Development Plans confirm, there is no increase in site impervious cover and in fact a decrease in site impervious cover with zero net incremental discharge of runoff from the Hospital’s Development Project.

Thus, the Village Code has a factual finding by the Village with regard to “Land development activities” and stormwater issues associated with any “increase stormwater runoff rates and volumes “concerning only **“increases in site impervious cover”**”. Therefore, by its own terms Chapter 360 only applies to “Land development activities” and the only such land development activity before the Board is the above-captioned Project---not the consequences of Oak Hill Cemetery’s stripping of most vegetation there. And as just noted, the engineering documentation already supplied to the Village confirms with this Hospital Project there is zero net incremental discharge of runoff and a decrease in impervious surfaces. As such Village Code does not apply to the Hospital previously using sandbags and now a mechanical barrier to keep away off-site flooding from “reaching” into Hospital Property.

VILLAGE CODE, CHAPTER 360

Understanding the limited context and content of Chapter 360 as set forth above, appropriate consideration of other Chapter 360 provisions can be undertaken. That specific provision of the Village Code referenced at the Board Meeting is at Chapter 360-4.4 which provides

§ 360-4.4 ***Natural and scenic resource protection standards.*** *The purpose of this section is to protect and enhance the natural and man-made features that contribute significantly to the Village's scenic quality and character, including: varying topography and hillsides, floodplains, wetlands, significant trees*

(3) *Diversion of stormwater.* *In no case shall stormwater be diverted to another property.*

Applying the previously referenced Village Code Chapter 360 context and content, the Code's "Natural and scenic resources protection standard" provides that in no case "shall stormwater be diverted to another property". Thus considering the aforementioned specific Code provision, all involved in this Hospital Application agree that the subject "stormwater" is coming from the Oak Hill Cemetery property and is being diverted onto the property of New York State DOT at North Highland Avenue ("Route 9W"). Accordingly, the Hospital cannot lawfully be determined to have potentially "diverted to another property" any Oak Hill Cemetery stormwater runoff as that diversion has already taken place to Route 9W. At no time do the aforesaid Village Code provision preclude or prevent the Hospital from preventing stormwater runoff from the Oak Hill Cemetery and across Route 9W from entering or "reaching" the Hospital Property.

Courts in New York State have clearly ruled that a Property Owner such as the Hospital cannot be prevented from keeping the flow of water, including stormwater runoff, from "reaching" the Hospital Property as the sand bags have so prevented for the past many years and now a safer and sound removable barrier will accomplish. As the Court in *Hanley v. State*, 193 A.D.3d 1397, (4th Dept. 2021):

In other words, although a landowner cannot "by drains or other artificial means, collect the surface water into channels, and discharge it upon the land of [its] neighbor," **such a landowner is nevertheless permitted to "in good faith, and for the purpose of building upon or improving [its] land, fill or grade it, although thereby the water is prevented from reaching [the land] and is retained upon the lands above"** (*Barkley*, 86 N.Y. at 147-148). Contrary to claimants' contention, we conclude that those principles apply to the circumstances of this case in which, according to the allegations in the claim, **defendant's construction of a curb allegedly prevented water from discharging through defendant's land, causing it to saturate the ground and flood the surface of claimants' property** (see generally, *Barkley*, 86 N.Y. at 144-148; *Robb v. State of New York*, 262 App.Div.37, 28, 28 N.Y.S.2d 107 (4th Dept. 1941). (Emphasis supplied)

What the Hospital is doing in this Hospital Development Project is exactly the same that the Hospital was doing with the sand bags for the past many years. That is the Hospital is preventing the stormwater runoff from the Oak Hill Cemetery that was diverted onto the NYSDOT Property of Route 9W "from reaching" the Hospital Property. Nowhere in the Village Code is such action by the Hospital prohibited and if the Village Code were to be construed that way now, the Village Code was never construed that way for the many years the Hospital used sand bags. The barrier planned by the Hospital is just a safer, more effective and more secure version of the sand bags.

THE VILLAGE CONSTRUCTION OF SECTION 360 OF THE VILLAGE CODE MUST SUPPORT THE HOSPITAL'S CONSTRUCTION OF SECTION 360

As the prior provisions of this Letter confirm, the Hospital has established that Section 360 of the Village Code generally and Section § 360-4.4 cannot be lawfully applied by the Village to prevent the Hospital's plans to keep the stormwater runoff from the Oak Hill Cemetery that was

diverted to Route 9W from “reaching” the Hospital Property. This results from two well-known provisions of New York State Land Law jurisprudence on Village Code interpretation

First, as previously noted, when the Hospital years ago placed sand bags to prevent the Oak Hill Cemetery to Route 9W stormwater runoff from reaching Hospital Property, the Village never claimed any violation of the Village Code generally and Section § 360-4.4 specifically due to such Hospital action. Thus as this Village Code was interpreted back then and applied by the Village itself when the Hospital deployed sandbags to keep Oak Hill Cemetery/NYSDOT Route 9W from “not reaching” the Hospital Property, so too the Village must follow that precedent when the sand bags are just now being replaced by a barrier. New York Law is well settled that how a municipality previously interprets and/or applies its Codes, Laws and Regulation becomes a binding precedent for any future such interpretation on the same facts. *Matter of Tall Trees Constr. Corp. v. Town of Huntington*, 97 N.Y.2d 86 (2001). See also, *Nozzeleman 60 LLC v. Village of Cold Spring*, 34 A.D.3d 682 (2nd Dept. 2006) and *In re Charles A. Field Delivery Service, Inc.*, 66 N.Y.2d 516 (1985). This has been the precedent in New York State for almost 40 years. (*Knight v. Amelkin*, 68 N.Y.2d 975 (1986).

Second and independent of any precedent that the Village must follow in this present Hospital Application on any “diversion” stormwater runoff issue, again New York Law is well settled that any construction of any Village Code provision, including Chapter 360, must be in the favor of the Hospital and against the Village. As you know, the hallmark in reviewing any municipal code is that any ambiguity in the construction of Zoning Code language must be construed in the favor of the property owner and against the municipality. New York State Law is unambiguous on this requirement. See *Allen v. Adami*, 39 N.Y.2d 275, 277, 383 N.Y.S.2d 565, 567, 347 N.E.2d 890, 892 (1976); *DeTroia v. Schweitzer*, 87 N.Y.2d 338, 343, 639 N.Y.S.2d 299, 301, 662 N.E.2d 779, 781 (1996); *Robert E. Havell Revocable Tr. v. Zoning Bd. of Appeals of Vill. of Monroe*, 127 A.D.3d 1095, 1097, 8 N.Y.S.3d 353, 355 (2d Dept. 2015); *Bonded Concrete Inc. v. Zoning Bd. of Appeals of Town of Saugerties*, 268 A.D.2d 771, 774, 702 N.Y.S.2d 184, 186 (3d Dept. 2000). The Village Code being in derogation of common law must be construed in the favor of Hospital. As the Court ruled in *Anthony Sposato v. Zoning Board of Appeals*, 287 A.D.2d 639, 732 N.Y.S.2d 19 (2nd Dept. 2001):

Zoning codes, being in derogation of the common law, must be strictly construed against the enacting municipality (see, *Matter of E&B Realty v. Zoning Bd. Of Appeals of Inc. Vil. Of Roslyn*, 275 A.D.2d 779, *Matter of Tarten Oil Corp. v. Bohrer*, 249 A.D.2d 481). Ambiguities in a zoning ordinance must be resolved in favor of the property owner (see, *Matter of Hogg v. Cianciulli*, 247 A.D.2d 474).

Thus, in viewing the Village Code at Section 360-4.4 regarding any “diversion” interpretation issue, it is clear that the full scope of Chapter 360 applies since no Stormwater pollution prevention plan at Chapter 360-4.12 can allow any such “diversion” and the Hospital Plans do not allow any such diversion since there is no stormwater runoff

from the Hospital's Property to be 'diverted'. This is *a fortiori* so since there is a zero net incremental discharge of runoff from this Hospital Project and a decrease in the impervious Site surface.

Ready reference to the Village Code at Chapter 360 also confirms that the requirement of no stormwater runoff be established in the "Stormwater pollution prevent plan" or "SWPPP". Specifically, the Village Code at Chapter 360-4.12(B)(1)(b) does require that the SWPPP address water runoff the "could be affected by the construction activity". Again, regarding any water or stormwater from this Hospital Project, based upon the Hospital's planned "construction activity" there is a zero net incremental discharge of runoff as documented in the Hospital plans. As plans submitted by the Hospital also confirm, the Hospital's Project on-site improvements will result in less impervious surface. Chapter 360 applies to "stormwater discharges" (360-4.12(B)(1)(b)) and no such stormwater discharge or diversion of stormwater results from the Hospital's planned construction in its Application before this Board. Accordingly, there can be no lawful construction or interpretation of Village Code Chapter 360 generally or § 360-4.4 specifically that would require the Hospital to address Oak Hill Cemetery/Route 9W stormwater runoff as the Hospital's Project is manifestly to keep said external waters from "reaching" the Hospital's Property. (See above Court Decision of *Hanley v. State*, 193 A.D.3d 1397, (4th Dept. 2021)).

CONCLUSION

As plans submitted by the Hospital confirm, the Hospital's Project on-site improvements will result in a zero net increase in storm water runoff. The most recent Hospital Plans submitted confirm that the amount of impervious coverage on Hospital Property will actually be reduced. Accordingly, the Hospital's plans now address any Village concerns that arise from storm water issues within the scope of the Chapter 360. Just as the Hospital cannot be compelled to address and resolve stormwater runoff issues caused by the Oak Hill Cemetery that were diverted onto the NYSDOT Route 9W Property, the Hospital cannot be legally prevented from changing the deployment of sand bags previously with now a safer and sound retractable mechanical barrier preventing that Oak Hill Cemetery/NYSDOT Route 9W Property stormwater runoff from "reaching" into Hospital Property.

Feel free to contact me with any questions. Thank you for your time and review of this communication intended to avoid any Litigation over the issues referenced herein.

Very truly yours,


Dennis E. A. Lynch

Cc: Montefiore Health System