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Gale A. Brewer, Borough President

November 1, 2018

Zachary Carter
Corporation Counsel for the City of New York
100 Church Street
New York, NY 10007

Dear Mr. Carter:

We write to urge you to consider allowing the recent First Department Appellate Division decision in *Matter of Peyton v. New York City Board of Standards and Appeals* decided on October 16, 2018 to stand. While there may be ancillary legal reasons to appeal (such as the correct application of the collateral estoppel doctrine or the amount of deference to accord the BSA), we believe that 1) the policy objectives of ensuring adequate open space and, 2) access to that open space by the greatest number of residents are served by the decision and that the decision comports with the plain language of the City's Zoning Resolution relating to open space in residential districts. Moreover, the plaintiffs in the case represent a substantial number of city residents, who are expressing their commitment to maintaining open space in Park West Village. As you know, the Jewish Home Lifecare System (JHL) has proposed a development to be constructed on a portion of a zoning lot on which the buildings comprising the Park West Village complex are located. The general controversy is whether this development will result in the failure of the zoning lot as a whole to meet the Zoning Resolution's requirements for open space accessible to all residents of the zoning lot. At issue is the calculation of the remaining amount of open space on the zoning lot after completion of the proposed JHL development; and specifically whether open space on the roof of a building built in 2009 on the same zoning lot can be counted as open space that meets the requirement of the Zoning Resolution, even though the rooftop space is accessible only to residents of that building.

Justice Oing noted in his opinion that the City's Zoning Resolution declares in its "general purposes" provisions for residential districts that the goals of residential districts include "protecting residential areas against congestion, requiring opens space in residential areas, opening up residential areas to light and air, providing open areas for rest and recreation, and breaking "the monotony of continuous building bulk…." (Decision at 3 citing New York City Zoning Resolution (ZR) §21-00(d)).

The decision then holds that the definition of "open space" in ZR §12-10 is unambiguous, especially in light of amendments made to other provisions of the zoning resolution concerning the calculation of required open space in residential districts in 2011. This definition states that "open space" is "that part of a #zoning lot#, including #courts# or #yards#, which is open and unobstructed from its lowest level to the sky and is accessible and usable by all persons occupying a #dwelling unit# or a #rooming unit# on

the #zoning lot#." (Decision at 3 citing ZR §12-10). He goes on to explain that while the 2011 amendments do not change the definition of "open space," their replacement of the term "building" with the term "zoning lot" for purposes of open space calculations constitute "an unmistakable rejection" of the "building by building" approach to calculating open space – an approach that must be employed in order to count roof space not accessible to all residents of a zoning lot as open space. (Decision at 10). All of the other justices except one concurred in this decision.

We believe that given the strong opposition of the community to this project, and the sound public policy of requiring the maximum amount of open space on a lot to be accessible to the maximum number of residents, that you should strongly consider refraining from an appeal of the decision.

Thank you for your consideration.

Yours,

Gale A. Brewer,
Manhattan Borough President

Mark Levine,
Member of the New York City Council