STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

In the Matter of the Complaint by Gateway Development Group Inc. against Consolidated Edison Company of New York	Case 555968

APPEAL OF INFORMAL HEARING DECISION

On behalf of

Gateway Development Group, Inc.

January 23, 2016

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I. Introduction and Background

The Informal Hearing Decision ("IHD") concluded that "complainant [Gateway] is not entitled to compensation for incurred expenses for undergrounding overhead electric facilities on Kensington Road." IHD at page 1. Gateway Development Group, Inc. ("Gateway") respectfully disagrees.

The IHD contains mistakes with respect to the facts that were presented and with respect to the laws and regulations that govern this matter. In addition, the IHD did not consider evidence presented at the hearing that, if considered, would have changed the decision.

This case is about whether the Consolidated Edison Company of New York ("CECONY") or the Gateway should bear the costs of

undergrounding an existing aerial electric service to several other CECONY customers across the street from the project site. That project, VillaBVX, is a mixed public – private enterprise that will increase the amount of public parking in the Village of Bronxville ("Village") and provide 54 empty-nester apartments in an architecturally beautiful setting with direct public access to the Metro-North train station.

Gateway argues that this is classic interference work[1], the cost of which should be borne by CECONY. CECONY argues that the undergrounding of its facilities is the developer's responsibility. The IHD sided with CECONY.

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[1] Q. Please explain "municipal interference," and why Con Edison incurs costs related to municipal interference.
A. "Municipal Interference" is when a municipality performs work which requires a company to relocate or protect its facilities. Con Edison incurs costs to support and protect its facilities when New York City (NYC or the City), or any other municipality, performs certain work on its infrastructure, such as the installation and repair of water mains, sewers and drainage facilities, and the reconstruction of roadways, curbs, sidewalks, and highway bridges. (emphasis added).

Prepared Testimony of:
Staff Shared Services and Municipal Infrastructure Support Panel
Liliya A. Randt, Utility Engineer 3
Humayun Kabir, Power System Operation Specialist 4
Brian D. Fisher, Utility Engineer 2
Laurie Gibbs, Utility Analyst 1
Office of Electric, Gas and Water

CECONY Rate Cases 16-E-0060 and 16-G-0061 (May 2016)

The actual cost of the work that has been completed is $610,409 as correctly stated in the IHD.

THE SITE PLAN APPROVAL REQUIRED UNDERGROUNDING OF UTILITIES FOR THE PROJECT, VILLA BVX, NOT THE EXISTING CECONY FACILITIES

The approved site plan resolution, see Exhibit A attached hereto, required all utilities to be buried underground. "The Project will also have open space areas with significant new landscaping and utilities will be buried underground".[2]

The approved site plan did not address the existing aerial facilities in the Village right-of-way that served customers on the other side of Kensington Road. Site plan approval is just that – approval for the development of that site. There was no reference in the site plan approval with respect to the existing facilities that provided electric, telephone and cable service to customers across Kensington Road.

IF THE VILLAGE DID THE BROWNFIELD REMEDIATION OR CONSTRUCTED THE PARKING GARAGE, CECONY WOULD BE RESPONSIBLE FOR RELOCATING THE EXISTING FACILITIES

As Gateway representatives, Kevin McManus and Neil J. DeLuca, explained -- the five CECONY utility poles had to be relocated for either the remediation of the brownfield site and/or the construction of the underground garage. There is no

[2] Exhibit A, page 6, last WHEREAS clause.

question about this uncontroverted fact.

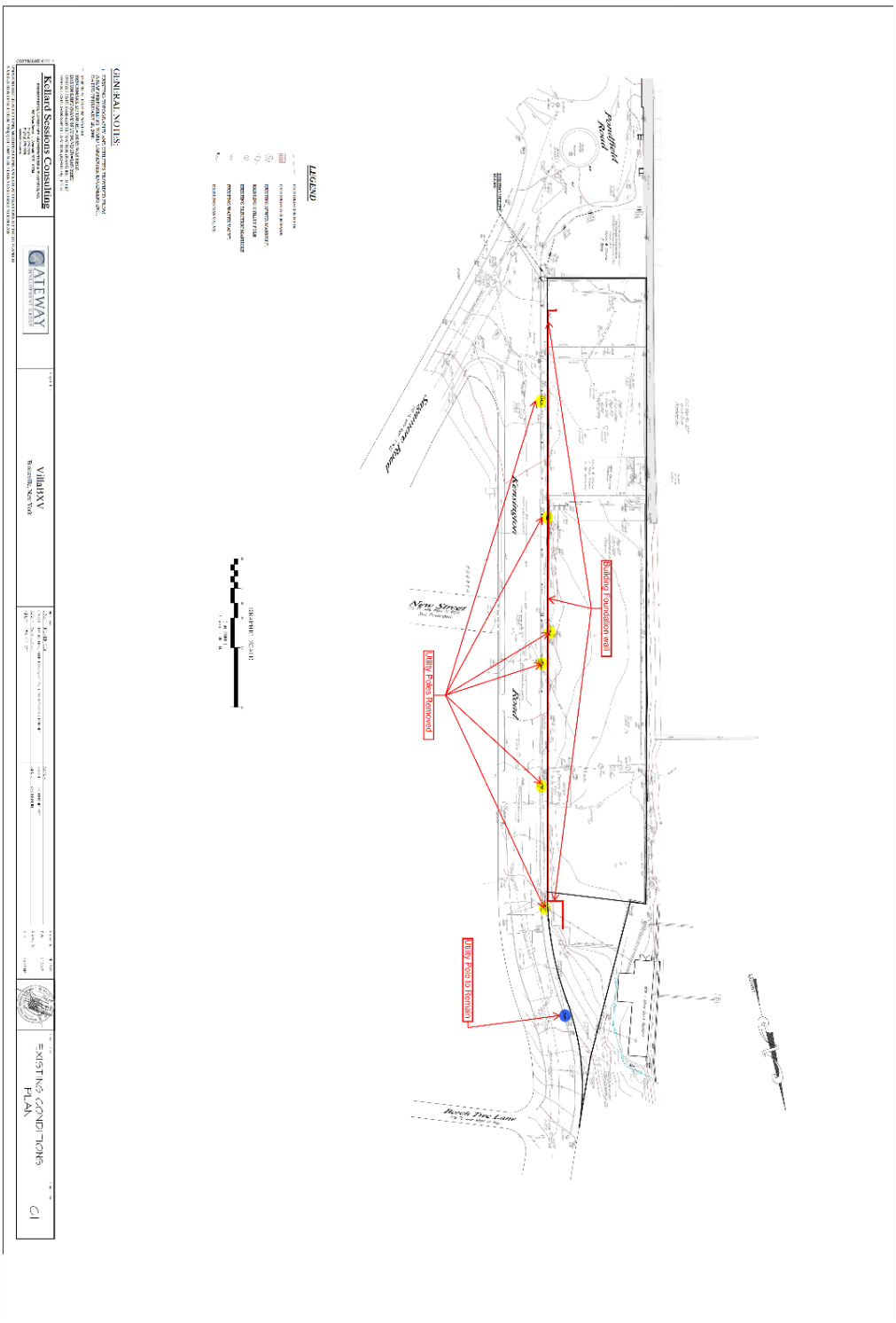
This preconstruction photograph shows the telephone poles along Kensington Road.

One need not be a professional engineer to see how site remediation[3] and/or foundation work for the below grade two-story

[3] According to the DEC Fact Sheet: "Approximately 31,000 tons of soil that exceeded the unrestricted soil cleanup objectives

garage would require excavation up to the site property line and, accordingly, the utility poles would have to be relocated at Con Edison's expense because they were interfering with the required municipal work.

(SCOs) were excavated and disposed of off-site." http://www.dec.ny.gov/data/der/factsheet/c360081cucomp.pdf



on

As can be seen from the foregoing plan, the utility poles providing service to CECONY customers across the street from the

VillaBVX were located inches off the property line in the Village Right of Way.

If the Village undertook the remediation by hiring a qualified brownfield remediation contractor, CECONY would have had to move the poles at its expense. If the Village had undertaken to build the needed public parking garage by hiring a contractor, CECONY would have had to relocate the poles at its expense. If the Village decided to completely reconstruct the sidewalk, repave the street and make parking spaces, CECONY would have had to relocate the utility poles at its expense.

Here the Village entered into a partnership to have its property remediated (as part of the sale) and obtain the extra parking needed by the Village. This was a wise decision on behalf of the Mayor and Village Trustees. The fact that the private developer also obtains benefits should not undercut the essential public benefits that drove the project in the first place from the Village's perspective – more public parking in the Village, coupled with a brownfield remediation.

There are at least 6 aspects of the project that constitute municipal public benefit work:

1. Public parking garage, with dedicated merchant, commuter, resident and visitor spaces – <u>all public spaces (203) are controlled by the Village of Bronxville</u>.

2. Brownfield remediation.

3. New sidewalks, new parallel parking and street paving.

4. Enhanced safety and reliability.

5. Beautified streetscape.[4]

6. Synergistic economic development.

What is interesting and what also takes this project out of the "normal" project development scenario is that the Village insisted on a $10 million bond that was personally guaranteed by John Ferari, the owner. In essence, the Village was insuring that its public works, the parking garage, would be built. The parking garage is accessible by the public as well as the residents, local merchants and visitors. The parking garage also provides direct access to the adjacent Metro-North train station. It is the Village that will control the public parking which is separated from the parking for the residences.

If this was a "normal" development project, the Village would only be asking for bonding on the associated street improvement requirements and professional fees for project review, not the entire parking garage. That bond for the parking

[4] "The manager of LTS presently has a substantial workload of daily activities [*306] that continues to expand with increased municipal and state activity associated with road widening projects, beautification projects and other interference work." (emphasis added) CECONY 2013 Rate Case 13-E-0030.

garage, the prior ownership of the site, along with the control over the public parking spaces, makes this a public project sponsored by the Village. Accordingly, the construction of that two-story underground parking garage required the removal of the 5 existing telephone poles, as explained by Kevin McManus.

The public works aspect of this project is evident in New York Tel. Co. v. Binghamton, 18 N.Y.2d 152, 219 N.E.2d 184, 272 N.Y.S.2d 359, 1966 N.Y. LEXIS 1180 (N.Y. 1966). In that case, the City of Binghamton undertook an urban renewal project. In the process New York Telephone had to re-locate its facilities in the blighted area. New York Telephone sued the City seeking compensation on the theory that this was a "proprietary function" and not a "governmental function" because the City, after exercising its eminent domain power, conveyed the property to a private, for profit company, that would build middle class housing. The Court held as follows:

> Rather, the present submission [****18] requires us to determine whether or not this particular enforced removal of the telephone company's property from this particular street was or [***362] was not subject to the unquestioned common-law rule against compensation for such expenses. HN1 The common-law rule, based on public considerations of a high order, has never been doubted or questioned and any exceptions thereto should be carved out with reluctance and from compelling considerations [*160] of constitutional right. The common-law doctrine was most recently restated by this court in New Rochelle Water Co. v. State of New York (10 N Y 2d 287) where we reminded ourselves that "The obligation of the State to pay the cost of relocation or the value of retired facilities did not exist at common law" (p. 291). In the New Rochelle opinion we quoted with approval Judge Crane's statement in

> Transit Comm. v. Long Is. R. R. Co. (253 N. Y. 345, 351, 353) as follows: "'The "fundamental common law right applicable to franchises in streets" is that a utility company must relocate its facilities in the public streets when changes are required by public necessity * * *. "Although authorized to lay its pipes [****19] in the public streets, the company takes the risk of their [**187] location and is bound to make such changes as the public convenience and security require, at its own cost and charge."'" Reasonable regulation and control by the municipality of its streets means, said the Transit Comm. opinion (p. 351), that the public service corporations "are bound to relocate their structures at their own expense whenever the public health, safety or convenience requires the change to be made."

The analogy to the present case is striking. The only difference in this scenario is that the Village did not have to use the power of eminent domain – it already owned the parcel of real estate that it contributed by its sale to the public – private partnership. The IHD did not adequately address this binding case law.

Indeed, this project is so closely linked to the Village that it appears on its home page. The latest update is as follows:

> **Kensington Road Project**
> December 15, 2016
> Gateway Construction will continue to work through the winter months. All concrete work is now complete and work on the exterior and interior buildout of the north and south buildings will continue. Installation of the granite curbing down Kensington Road is underway and construction of the sidewalk will commence in January (weather permitting). Concurrently, work on the interior of the parking garage is continuing as well. We are still anticipating that access to the garage will be made available in the spring (2017) and we should have better idea on when it will become available by March 1st.

The Law is Clear, Interference Work is Borne by the Utility

The IHD lost its way by focusing on the fact that Hi-Lite, a contractor, filed the request with CECONY to bury the overhead electric lines. It does not make any difference who requested the work. It only matters that this was a mixed public – private project that could not be built with the existing utility poles in place. The remediation (excavation) of the brownfield site could not occur with the 5 utility poles in place.

There is no question regarding CECONY's obligation to relocate facilities that interfere with a municipal project.

> Utility companies have a longstanding common-law obligation to move their facilities when they interfere with municipal work projects. In Transit Comm. v [***295] [**278] Long Is. R.R. Co. (253 N.Y. 345, 351, 289 A.D.2d 412 [1930]), this Court explained that a utility's privilege to maintain its facilities came at the cost of "mak[ing] such changes as the public convenience and security require, at its own cost and charge." There is, then, absolutely no question that a utility must relocate its facilities and pay for the task, hire its own contractor, or do the work itself, but it may not leave interfering facilities in place and delay projects until it finds the best price for the work (see also City of New York v Consolidated Edison Co., 114 A.D.2d 217, 220, 498 N.Y.S.2d 369 [1st Dept 1986]).

City of New York v. Verizon, 4 N.Y.3d 255; 827 N.E.2d 276; 794 N.Y.S.2d 293; 2005 N.Y. LEXIS 450(footnotes omitted). See also Consolidated Edison Co. v. Lindsay, 24 N.Y.2d 309, 248 N.E.2d 150, 300 N.Y.S.2d 321, 1969 N.Y. LEXIS 1388 (N.Y. 1969).

> Under common law, public utility companies have an obligation to pay all costs associated with protecting

> their facilities during street repair projects (see, Matter of Diamond Asphalt Corp. v Sander, 92 NY2d 244, 249). Underlying the common-law rule "is the concept of franchise, a special privilege which authorizes use of the public streets thereby creating a right where none existed before and which commensurately requires [*192] that the one to whom the privilege is granted assume the risk of relocation" (Tennessee Gas Transmission Co. v State of New York, 32 AD2d 71, 75 [emphasis in original], affd 27 NY2d 608).

City of New York v. Consolidated Edison Co. of N.Y., Inc., 274 A.D.2d 189, 713 N.Y.S.2d 40, 2000 N.Y. App. Div. LEXIS 9161 (N.Y. App. Div. 1st Dep't 2000).

Interference Work is Not Dependent on the Source of Funds

CECONY states that interference work only comes into play when the municipality spends taxpayer money on a capital project. None of the cases cited by CECONY to date states that interference work is dependent on the source of funds for a public works project. The IHD did not address this assertion by CECONY.

The undersigned, after a diligent search of the Commission's website and LexisNexis, could not find a single case that even remotely intimates a municipal project must be funded by the taxpayers. In any event, the taxpayers of the Village of Bronxville did contribute to this public - private partnership since the Village sold the land with a very rigid set of restrictions to achieve its primary public benefit goal of increasing the public parking in the Village. And to guarantee performance, the Village required a $10 million bond

along with retaining control over the 203 public parking spaces. The Village was acting in its governmental capacity and astutely achieved two goals: more parking and brownfield remediation.

Gateway was also held responsible to install new sidewalks, curbs and repave the street. It was CECONY that installed its facilities in the Village's ROW a few inches from the previously Village-owned parking lot. As was made clear at the informal hearing, brownfield remediation could not take place with the poles in their existing location, nor could the two-story foundation that also serves as the parking garage be constructed. Accordingly, CECONY's facilities interfered with or were "in the way" of this municipal - private project.

CECONY's Annual Interference Work Budget Exceeds $170 Million

CECONY does not dispute this long-standing legal principle that the utility must pay for the relocation and protection of its facilities. In fact, in the current CECONY rate Case 16-E-0060, there is an entire panel, the Municipal Infrastructure Support Panel ("Municipal Panel"), of three experts discussing CECONY's O&M and Capital Budgets for this routine work consisting annually of hundreds of jobs.

In the current rate case, CECONY has an interference O&M budget of $90.8 million and a interference capital budget of $82.4 million for the rate year (first year new rates are in effect). See MISP Testimony at DMM 3 (filed January 29, 2016)

at pages 42 to 45.

> On advice of counsel, courts have held that Con Edison's right to lay and maintain its facilities pursuant to a franchise granted by a municipality is subject to the municipality's right to require Con Edison to remove or relocate its facilities at the Company's expense whenever public health, safety, or convenience requires. If the Company fails to comply with such a request by the municipality, the Company may be liable for damages caused by its failure.

Id. at 13. The Municipal Panel also provided a definition of interference:

> When a municipality plans to perform work, either underground or overhead, and is unable to complete the proposed plan absent our relocating or supporting Company facilities that are "in the way," the term "interference" is used.

Id. at 7. So there is no disagreement over the legal principle between Gateway and CECONY.

The Village also required Gateway to install new sidewalks, parallel parking and re-pave the street, so the existing electric facilities had to come down to make way for these additional public improvements – any one of which is sufficient to place this into the interference work category.

Indeed, this is classic municipal interference as the following testimony from the Municipal Panel in CECONY's 2013 rate case reveals:

> Q. What types of municipal construction activities typically result in interference with Company facilities?
>
> A. The typical municipal activities that affect Company

> facilities are the installation of water, sewer and drainage facilities, reconstruction of roads, highway bridges, curbs and sidewalks, and, as mentioned above, the repaving of roadways. (emphasis added).

Id. at 10.

After the CECONY poles came down Verizon installed a telephone pole to serve Gramattan Court, a private cooperative apartment building. The Village told Verizon to take the pole down and Gateway dug the trench across the street as a courtesy to the Village.

Verizon did not send a bill to Gateway. Suez Water Westchester had to cut and cap a water main that was interfering with the project. It did not send a bill to Gateway. These two utilities know interference work when they see it.

CECONY Overcharged Gateway

At the hearing CECONY representatives stated that the "much less expensive" approach would have been to remover the poles and install them across the street on a temporary basis and then return them when construction was completed to their original locations. That much less expensive option was not presented to Gateway. CECONY overcharged Gateway by requiring the undergrounding and, if it is determined that this relocation is Gateway's responsibility, then Gateway should only pay for the "much less expensive" option.

CECONY Pays for Non-Municipal Interference Work

Exhibit 768 in CECONY's 2013 rate Cases 13-E-0030, 13-G-0031 and 13-D-0032 (DMM Filing #338) shows, a response to a Staff interrogatory, that

> Non-City funded projects included in the City's Capital Commitment Plan may impact the Company's facilities, consequently resulting in interference expenditures in the same way as City funded projects.

Non-City funded projects include projects by: Empire State Development Corporation, New York City Economic Development Corporation, United States Department of Housing and Urban Development, NYS Department of Transportation. So there is significant precedent (millions of dollars) that undercuts CECONY's argument that interference work involves only municipal taxpayer funded projects.

The extensive research of the Commission's website and LexisNexis revealed no cases limiting interference work to those projects funded by municipal taxpayers, as CECONY asserts. The vast majority of cases at the Commission level address the ratemaking impact of interference work and whether the CECONY forecast is reasonable for ratemaking purposes, along with reconciliation proposals. The court cases discuss the common law requirement that utilities bear the cost of interference work in the first instance.

Finally, two appellate division cases recognize that the utility bears the cost of relocating utility poles when required

for the benefit of the public. See, Orange & Rockland Utils. V. Washomatic, 187 A.D.2d 855, 589 N.Y.S.2d 719, 1992 N.Y.App.Div LEXIS 12874 and Orange & Rockland Utils. V. Schulson, 199 A.D.2d 952, 605 N.y.S.2d 571, 1993 App.Div. LEXIS 12394. Both cases found that the relocation was primarily for the benefit of the developer and required payment for the relocation to the utility. Both cases, however, make clear that when the benefit is for the public, as is the case here, then the utility must incur the cost.

There is no question that the construction of a parking garage that increases the number of public parking spaces in the Village by 25% was for a public benefit. There is no question that the remediation of a brownfield site adjacent to the Metro-North Train Station in the heart of the Village was a public benefit. Neither could occur with the utility poles in the existing location. They had to be moved at CECONY expense, since these poles were standing in the way of the remediation excavation and construction of the two-story underground parking garage.

ALTERNATIVE RESOLUTION

As an alternative resolution that could be considered akin to a pragmatic settlement is to apportion the cost of burying the overhead facilities between CECONY and Gateway on the basis of the public/private benefit as allocated by the number of

parking spaces. The Village will control 203 public parking spaces, VillaBVX will control 103. According, as a settlement position, CECONY should bear 203/306 or 66.34% of the $610,409 or $404,945 and Gateway the balance of $205,464.

CONCLUSION

The removal of the CECONY overhead facilities that served other CECONY customers is classic interference work that was necessitated by the construction of the municipal garage. The fact that a private developer did the work including the brownfield remediation does not change this fact. The Village was responsible for brownfield remediation in its governmental capacity and would have had to hire a qualified contractor for the remediation. The Village controls all of the 203 public parking spaces in its governmental capacity. CECONY should reimburse Gateway for the $610,409 with interest and then recover that sum from its substantial interference budget. This is the proper result according to the common law and is fair to all parties.

In the alternative, akin to a settlement position, the cost should be allocated based on the number of public to total parking spaces.

Respectfully submitted,

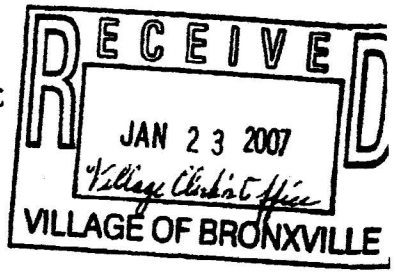
Daniel P. Duthie

Daniel P. Duthie
Counsel to Gateway

January 23, 2017

EXHIBIT A – SITE PLAN RESOLUTION

RESOLUTION OF THE PLANNING BOARD OF THE VILLAGE OF BRONXVILLE GRANTING FINAL SITE PLAN APPROVAL FOR THE KENSINGTON PROJECT



WHEREAS, the Bronxville Planning Board and the Bronxville Board of Trustees have received applications for site plan approval, special permit approval, zone text amendments and a proposal to enter into a real estate transaction from Spectrum Kensington LLC (the "Applicant") for a project referred to as The Kensington (the "Project"); and

WHEREAS, the Applicant proposes to construct a +/- 110,000 s.f., 54 unit condominium development on a parcel of real property located on Kensington Road, shown as Section 11, Block 5, Lots 1, 6 and 16 on the Village of Bronxville Tax Assessment Map (the "Property"); and

WHEREAS, pursuant to the Applicant's contract with the Village, the Project is required to include a parking garage, containing a total of at least 300 parking spaces, at least 200 of which are to be provided to the Village of Bronxville as public parking pursuant to the terms of a permanent easement in favor of the Village; and

WHEREAS, the Applicant proposes to acquire the property from the Village of Bronxville pursuant to the terms of that certain Purchase, Sale & Development Agreement between the Village and the Applicant, dated June 21, 2004; and

WHEREAS, the applications were accompanied by a full Environmental Assessment Form ("EAF"); and

WHEREAS, on June 16, 2004, the Planning Board adopted a resolution authorizing circulation of a Lead Agency Determination Notice and a copy of the

application materials including a copy of the EAF to all involved agencies for the Project; and

WHEREAS, the Board of Trustees by resolution approved on July 12, 2004, consented to the Planning Board acting as Lead Agency and requested the Planning Board to review and make a recommendation to the Board of Trustees regarding the proposed zone text amendments; and

WHEREAS, on September 8, 2004, the Planning Board resolved to (i) assume the role of Lead Agency in connection with the SEQRA review of the Project, (ii) find the Project to be an Unlisted Action, and (iii) issue a Positive Declaration requiring the preparation of an Environmental Impact Statement for the Project; and

WHEREAS, the Applicant submitted a Draft Scope of the Draft Environmental Impact Statement ("DEIS") for the Project; and

WHEREAS, a public scoping session was held on October 13, 2004; and

WHEREAS, on October 13, 2004, the Planning Board adopted a Final Scope for the DEIS; and

WHEREAS, the Applicant prepared the Preliminary DEIS based on the filed Scope, including consideration of alternatives, and submitted same to the Planning Board on April 20, 2005; and

WHEREAS, written comments on the completeness of the Preliminary DEIS were received as follows: Memorandum dated May 5, 2005 submitted by F.P. Clark Associates; Memorandum dated June 5, 2005 from Maryann Palermo; Memorandum dated June 8, 2005 from F.P. Clark Associates; Memorandum dated June 13, 2005 from Jeff Faville; and Memorandum dated June 28, 2005 from F.P. Clark Associates; and

WHEREAS, in addition to its professional consultants, the Planning Board members carefully reviewed the Preliminary DEIS and provided specific comments with respect to the completeness thereof to the Applicant at Planning Board meetings held on May 11, 2005 and June 8, 2005; and

WHEREAS, the Applicant revised the Preliminary DEIS to address substantially all of the comments received from the Planning Board members and the Planning Board's professional consultants; and

WHEREAS, a revised Preliminary DEIS was submitted by the Applicant on June 29, 2005; and

WHEREAS, the Planning Board and its professional consultants reviewed the revised Preliminary DEIS; and

WHEREAS, on July 13, 2005 the Planning Board of the Village of Bronxville, as Lead Agency, accepted the Preliminary DEIS submitted on June 29, 2005 as adequate with respect to its scope and content for the purpose of commencing public review; and

WHEREAS, the Planning Board adopted a Notice of Completion with respect to the DEIS; and

WHEREAS, the Planning Board scheduled a public hearing with respect to the DEIS and the application for site plan approval to be held on September 14, 2005; and

WHEREAS, the duly noticed public hearing was commenced on September 14, 2005, continued on September 28, 2005 and closed with respect to the DEIS only on October 12, 2005, at which times all those wishing to be heard were given the opportunity to be heard; and

WHEREAS, following the closing of the written comment period on October 30, 2005, the Applicant prepared a preliminary Final Environmental Impact Statement ("FEIS") to address all of the comments received with respect to the DEIS, both at the public hearing and in writing thereafter; and

WHEREAS, a preliminary FEIS was submitted to the Planning Board on January 20, 2006, and subsequently reviewed by the Planning Board, with the assistance of its professional consultants, at Planning Board meetings held on February 8, 2006, March 1, 2006, March 8, 2006 and April 12, 2006. All of the aforesaid comments were addressed and revised preliminary FEIS sections were submitted on February 23, 2006, March 15, 2006, and April 10, 2006; and

WHEREAS, by resolution dated April 12, 2006, the Planning Board unanimously resolved to file the completed FEIS; and

WHEREAS, on May 10, 2006, the Planning Board made a positive recommendation to the Board of Trustees with respect to the proposed zone text amendments; and

WHEREAS, at its meeting on June 12, 2006, the Board of Trustees received the positive recommendation from the Planning Board and scheduled a public hearing on the proposed zone text amendments for July 10, 2006; and

WHEREAS, on July 10, 2006, the Board of Trustees conducted a public hearing regarding a proposed local law to amend the zoning law of the Village of Bronxville with respect to the proposed Project at which time all those wishing to be heard were given an opportunity to be heard and the public hearing was closed; and

WHEREAS, on August 31, 2006, the Planning Board adopted the Lead Agency Findings Statement with respect to the Project; and

WHEREAS, on September 18, 2006, the Board of Trustees adopted the Lead Agency Findings Statement previously approved by the Planning Board and unanimously adopted the local law, which local law modified provisions of the zoning law relating to the Village's Six Story Multiple Residents D Zoning District to create a new special permit use for age-targeted multiple residence facilities and to set forth required area, dimensional, and parking requirements for such age-targeted multiple residence facilities; and

WHEREAS, on August 31, 2006, the Applicant submitted an application for special permit approval; and

WHEREAS, the application for special permit approval was received by the Planning Board at its meeting on September 13, 2006, at which time, and subject to the subsequent adoption of the local law by the Board of Trustees, the Planning Board scheduled a public hearing on the special permit application for October 11, 2006; and

WHEREAS, the Board of Trustees having adopted the local law on September 18, 2006, the Planning Board opened and conducted the public hearing on the special permit application, concurrent with the public hearing on the site plan application, which site plan public hearing had been continued month to month since it was opened on September 14, 2005; and

WHEREAS, the combined public hearings with respect to site plan approval and special permit approval were conducted on October 11, 2006, November 8, 2006,

December 13, 2006 and January 10, 2007, at which time the public hearings were closed; and

WHEREAS, on the date hereof, the Planning Board has granted special permit approval for the proposed age-targeted multiple residence facility; and

WHEREAS, §310-26 of the Bronxville Code establishes that, pursuant to §7-725-a of Village Law, the construction of the proposed Project requires the approval of a site plan granted by the Planning Board; and

WHEREAS, the plans that were the subject of the public hearing and are the subject of this Approval Resolution are set forth in the list annexed hereto and made a part hereof as Schedule A (the "Plans"); and

WHEREAS, §310-30(A) of the Bronxville Code sets forth various standards to be utilized by the Planning Board and the Design Review Committee in reviewing applications for site plan approval and each of the standards and criteria enumerated therein have been considered; and

WHEREAS, based upon the entire record herein, the Planning Board finds that the proposed Project will not result in the unnecessary destruction or blighting of the Village's landscaped or achieved man-made environment. At present the subject property is the site of at-grade parking lots with essentially no existing landscaping. The Project would replace this existing condition with an architecturally sensitive multiple residence facility over two stories of primarily underground parking. The Project will also have open space areas with significant new landscaping and utilities will be buried underground; and

WHEREAS, based upon the entire record herein, the Planning Board finds that the proposed Project will relate harmoniously to the terrain and landscape of existing buildings that have a visual relationship to the proposed development. The Planning Board has studied in great detail the proposed design and siting of the building on the subject property. Various alternatives have been examined with respect to building size, height, location, and architecture, resulting in the Project now being considered by the Planning Board. The Applicant has provided a massing model which has enabled the Planning Board to view the proposed building in the context of the surrounding areas. In particular, attention has been focused on the relationship of the proposed building to the church across the street; and

WHEREAS, based upon the entire record herein, the Planning Board finds that the proposed Project facilitates safe and appropriate pedestrian access, vehicular traffic movement, and servicing and parking within the Village. In this context, the Planning Board has considered a number of alternatives with respect to access to the parking facility, both for the public and the residents of the Project. Pursuant to the contract between the Applicant and the Village, at least 200 parking spaces are being provided for Village use, and at least 100 additional spaces will be reserved for the residents of the Project. Provision has also been made for visitor parking to service the residential facility. Particular attention has been focused on pedestrian circulation, including the pedestrian experience along Kensington Road as well as safe and convenient access to the Metro-North railroad platform. The Eastchester Fire Department has reviewed the Plans and must be satisfied with provisions for access and movement of fire and emergency vehicles prior to the issuance of a building permit by the Superintendent of

Buildings. The entrance to the parking facility has been located to assure adequate sight lines and separation from intersections. The Plans provide for barriers separating pedestrians from automobiles. Traffic has been analyzed as described in the Environmental Findings Statement; and

WHEREAS, based upon the entire record herein, the Planning Board finds that the proposed Project will, to the maximum extent practicable, protect owners and users and the Village with respect to surface water drainage. The Project provides for no increase in post-construction stormwater runoff. In addition, the building has been designed to minimize noise disturbance and reflection both to and from the subject property. Significant attention has been devoted to the relationship of the proposed building to the neighboring structures with respect to light and air and the proposed Project minimizes those impacts; and

WHEREAS, based upon the entire record herein, the Planning Board finds and requires that the proposed Project be in compliance with all applicable laws and regulations as set forth in §310-30.A(5) of the Bronxville Code; and

WHEREAS, in the review and consideration of Spectrum Kensington LLC's application for site plan approval, the Planning Board and its professional consultants have had an opportunity to review the plans and have made various comments with respect thereto; and

WHEREAS, on the date hereof the Planning Board granted special permit approval for an age-targeted multiple residence facility pursuant to §310-13(A)(3) and §310-42(m) of the Bronxville Code;

NOW, THEREFORE. BE IT RESOLVED that the foregoing "Whereas" clauses and the findings contained in the Lead Agency Environmental Findings Statement are incorporated herein by reference as findings of this Board and fully adopted as part of this approval; and

BE IT FURTHER RESOLVED, that the application for preliminary and final site plan approval be, and it hereby is, granted, subject to the following conditions:

1. Subject to condition 18 below, the Project shall be constructed in accordance with the Plans.

2. Subject to condition 18 below, architectural and landscape details shall be in accordance with the Plans and the samples and descriptions which have been provided to the Board and the Design Review Committee to date. Subject to condition 18, it is understood that additional architectural and landscape detail refinements (including lighting fixtures) will be provided to the Design Review Committee following this Site Plan approval, as the detailed construction drawings progress. The Design Review Committee shall have ongoing jurisdiction, in conjunction with the Village, to review and approve such detail which shall include, among other items, lighting fixtures and poles on the east and west sides of Kensington Road.

3. There will be no gates at the main parking garage entrance unless the Village determines otherwise.

4. The Applicant has proposed, and the Board accepts, that trash and recyclables pickup from the residences and their parking area will be handled by a private carting service to be paid for by the owners of the Property. Trash and recyclable pickup

shall be scheduled for times which will not unreasonably disturb neighbors. Trash will not be placed outside where it would be visible to neighbors or passers-by.

5. Parking to replace parking lost during the construction period shall be provided as determined by the Board of Trustees.

6. Prior to construction commencement, the Applicant shall be required to demonstrate to the reasonable satisfaction of the Superintendent of Buildings that adequate off-site construction worker parking has been secured.

7. The Construction Management Plan previously submitted to this Board shall be updated as required by the Superintendent of Buildings as construction proceeds. The details of the updated Construction Management Plan shall be subject to the reasonable approval of the Superintendent of Buildings.

8. Noise mitigation measures shall be employed as detailed in the FEIS.

9. The residential parking spaces shall be for use by residents of the building and their guests only. Each space (except the dedicated visitor spaces) shall be assigned to a specified residential unit. Each unit shall be assigned at least one space. These spaces shall not be leased, sold or otherwise made available for use by any parties other than the building's residential unit owners and their guests. Tandem parking spaces must both be assigned to the same unit.

10. Engineering details, including but not limited to, those relating to stormwater management, erosion and sediment control, rock removal and soil removal shall continue to be refined as construction drawings progress following this site plan approval. Such details shall be subject to the approval of the Village Engineer. The Applicant acknowledges that the Village will engage the services of an outside consulting

engineer(s) to assist the Village Engineer regarding engineering issues related to the Project. The Applicant shall be required to reimburse the Village or fund an escrow as determined by the Village for the cost of paying such consulting engineer(s). The Applicant shall keep the Village Engineer timely advised of all proceedings and requirements of the New York State DEC, and any other applicable agencies, regarding removal of contaminated materials and environmental remediation measures at the property.

11. The Applicant shall be responsible for any cost incurred by the Village or fund an escrow as determined by the Village for any other third party consulting or testing services required by the Village Engineer in connection with the construction process.

12. At least thirty (30) days prior to commencement of construction, the Applicant shall provide a plan to Christ Church, subject to the Church's reasonable approval, which shall provide for the protection of the Church's stained glass windows and pipe organ from construction damage.

13. Completion and maintenance of any improvements of public facilities shall be ensured in a manner reasonably acceptable to the Village Engineer and Counsel, including the posting of bond(s) or other security, if required.

14. Any damage to public roads or other public property and/or facilities resulting from the construction process shall be repaired by the Applicant at times, and in a manner, reasonably satisfactory to the Village Engineer, at the Applicant's cost.

15. Prior to issuance of a certificate of occupancy, the Applicant shall submit to the Superintendent of Buildings a landscape maintenance/replacement plan for

landscaping visible to the public, which shall be subject to the Superintendent's reasonable approval and to review and approval by the DRC.

16. Prior to issuance of a certificate of occupancy, the Applicant shall provide to the Village Engineer a monitoring and maintenance plan for the Project stormwater management facilities, and such other facilities as he may reasonably require. Such plan(s) shall be subject to the reasonable approval of the Village Engineer.

17. Prior to issuance of a certificate of occupancy, all easement, easement modifications and other agreements necessary to assure access to the railroad platform for the public, and to otherwise implement the Project, shall be secured in form and substance reasonably satisfactory to the Village.

18. The Applicant shall be required to make such improvements to the Kensington Road right of way and to the Kensington/Sagamore/Pondfield Road intersection as the Village may require and approve. The Kensington/Sagamore/Pondfield Road intersection improvements shall be in keeping with the plans which have been submitted to this Board to date. Following the approval by the Village of plans to make such improvements, any revisions to the Plans resulting therefrom, including landscaping plans included therein, shall be subject to approval by the Board, which shall have ongoing jurisdiction to review such revisions.

Dated: January 10, 2007

Adopted by unanimous vote of members present: January 10, 2007

Donald Henderson, Chairman

Spectrum Kensington LLC

By: _____
(Print name)
Robert Pulley