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September 14, 2012

Hon. Peter Koffler, Chairman
and Members of the Zoning Board of Appeals
Village of Sleepy Hollow
28 Beekman Avenue Municipal Building
Sleepy Hollow, New York 10591

*Re: Open Door Family Medical Center
Application for Parking Variance(s) and an Appeal
from the Determination of the Building Inspector
300 North Broadway, Sleepy Hollow, New York
Tax Identification No.: Section 115.11, Block 4, Lot 27*

Dear Chairman Koffler and Members of the Board:

We represent Open Door Family Medical Centers, Inc. ("Open Door") in its efforts to obtain the requisite approvals to employ the building it owns at 300 North Broadway, at the intersection of North Broadway and New Broadway in the Village of Sleepy Hollow (the "Property"), as a non-profit family medical clinic. Currently pending before the Village of Sleepy Hollow Planning Board is an application for site plan approval. The proposed site plan, a copy of which is annexed hereto as Exhibit 1, will require at least one area variance from your Board to allow deviation from the applicable off-street parking requirements of the Village of Sleepy Hollow Zoning Ordinance (the "Zoning Ordinance"). Submitted herewith as Exhibit 2 is a copy of Open Door's application seeking: (1) an area variance to allow the proposed use to operate with 10 off-street parking spaces where 40 are required by Section 450-41E of the Zoning Ordinance;¹ and (2) an interpretation that no variance is needed from the requirements of Zoning Ordinance Sections 450-41B(1 and 4) and 450-53A and B, which, if applicable, would require that pedestrian access to any off-site parking area must be located within 250 feet of the entrance to the use it serves and be in the same ownership as or leased to the

¹While the traffic and parking study prepared on behalf of Open Door by Adler Consulting, dated June 28, 2012 (the "Adler Study"), states that 42 spaces are required, the correct number is 40. Adler included a stairway of approximately 400 square feet in the floor area calculation upon which the number of parking spaces was based, but under Section 450-4 of the Zoning Ordinance the area of stairways is not included in floor area. A copy of the Adler Study is annexed hereto as Exhibit 3.

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owner of the property on which the use is located, or, in the alternative, a variance from such provisions.

As described in this letter and established by the evidence submitted in support of Open Door's application, granting the variance (or variances) will benefit not only Open Door, but the community as a whole, and have no appreciable negative impacts in light of, among other things: (1) the existing experience of over two decades with an Open Door facility in the Village of Sleepy Hollow (the "Village"), which serves a clientele overwhelmingly comprised of patients and visitors who walk to the clinic; (2) the extensive Adler Study of vehicular and pedestrian traffic and parking and associated safety concerns, which demonstrates that there will be no significant detriment to the community or neighborhood with respect to any of the studied parameters; (3) the beneficial nature of Open Door's operations and planned family residency program; (4) the characteristics of the existing improvements on and possible uses of the Property; (5) the nature of the surrounding land uses; and (6) the operational safeguards and procedures being built into the project (including mandatory off-site parking for all employees and a shuttle bus to convey them to and from the Property) to eliminate any potential impacts on traffic, parking, and pedestrian safety. As such, the requested variance(s) should be granted under Village Law §7-712-b3(b) and Section 450-80C(2)(b) of the Zoning Ordinance.

Salient Factual Background About Open Door and Its Current Clinic

Open Door is a not-for-profit, federally-qualified health center with sites located in four of Westchester County's densely-populated villages – Ossining, Sleepy Hollow, Port Chester and Mount Kisco. It receives grant funding from the federal government to operate medical and dental practices in communities where private practice physicians cannot or will not serve. Its patients are predominantly uninsured or covered by government-subsidized insurance.

Open Door has operated a clinic on Beekman Avenue in the Village since 1986, the current site of which is 80 Beekman Avenue (the "Beekman Avenue Facility").² Open Door is the *only* provider in the Village and surrounding communities to offer a sliding fee scale for low-income patients. In addition to medical care, the Beekman Avenue Facility operates a WIC program providing nutritional counseling and financial support for food to pregnant women and children up to five years of age. On the Property, Open Door will continue its existing activities on an enlarged scale, and will supplement them with a new program. It will be joining forces with Phelps Memorial Hospital ("Phelps") and New York Medical College to create a new residency training program for family practice physicians. This program will not only serve the needs of Open Door's patients, but is designed to recruit and

² The Property is located within one quarter mile of the Beekman Avenue Facility. The new facility will consequently continue to serve its existing patients. Prior to opening the 80 Beekman Avenue office, Open Door maintained a medical office at 46 Beekman Avenue.

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retain the services of top young physicians in the country at Phelps³ and within, and for the benefit of, the community.

As soon as next year, the current Beekman Avenue Facility will not be suitable for Open Door's practice, which will include the joint family residency program. Although nominally 10,000 square feet in area, the Beekman Avenue Facility (the old "Strand Theatre"), has an unimproved second floor that was unusable for the medical practice. The second story is not accessible by an elevator; nor was it structurally sound for or economically adaptable to Open Door's use. Continued use of the Beekman Avenue Facility simply will not fulfill the present or future needs or objectives of Open Door. In fact, the body which accredits residency programs, the American Council on Graduate Medical Education ("ACGME"), found the Beekman Avenue facility to be inadequate.

Notably, the Beekman Avenue Facility includes no off-street parking. Nonetheless, it has functioned well without significant traffic or parking problems. Presumably, this is largely attributable to the fact that approximately 70 percent of the patients and visitors to the Beekman Avenue Facility walk to it, while just over one-quarter drive to the medical clinic, as confirmed by surveys referenced in the Adler Study.

The Property, Its Acquisition and Proposed Use

To address the deficiencies in the Beekman Avenue Facility, continue its important public health function for low-income patients, and accommodate the family residency program, Open Door sought new space in the Village to accomplish its mission. After consulting with the Village of Sleepy Hollow Downtown Revitalization Committee and considering four other potential locations in the Village with the assistance of a knowledgeable local realtor, Open Door chose to acquire the recently-renovated, though vacant, building on the Property. The Property is located in the C-1 Zoning District in which the proposed medical office/clinic is a permitted use. The Property, of course, fronts on Route 9 (North Broadway), a major commercial thoroughfare, and the development along Route 9 in proximity to the Property is commercial. The building had historically been utilized as an automobile dealership. After the dealership closed, the building deteriorated and remained vacant for two decades. In 2008, the Planning Board approved renovation and use of the former car dealership as a multi-tenanted office building. In fact, although the approved renovations of the building were substantially completed, the building is unoccupied.

³ There is fierce competition among hospitals and a growing need for a limited pool of primary care physicians nationally, and the physicians at Phelps are aging. Accordingly, the planned collaboration with respect to the residency program is a methodology to help insure future viability of the hospital. A copy of a letter from Keith F. Safian, President and CEO of Phelps, addressing this issue, is annexed hereto as Exhibit 4.

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The clinic would utilize both levels of the two-story building, occupying 11,989 feet of floor area. It would have numerous exam rooms, as well as various other facilities including procedure rooms, offices, counseling rooms, lab rooms, a nutrition office and a patient advocate office. Copies of the proposed floor plans are annexed hereto as Exhibit 5. The pattern and volume of usage of the building by Open Door would be less intense than would a similar use of the space by a regular medical practice, where profit is the primary motivation due, in part, to the non-profit mission of Open Door and the rendition of services by residents who routinely take more time with patients than experienced physicians in private practice. The facility will be open Monday through Friday (from 8:30 a.m. to 7:00 p.m. Monday through Thursday, and 8:00 a.m. to 5:00 p.m. on Friday) and likely for a portion of the day on Saturday (8:30 a.m. to 2:30 p.m.). Vehicular access to the Building would be from North Broadway, with the driveway and parking lot fronting on and having access to and from that street. The location of the pedestrian entrance on the northwest corner of the building and Open Door's operational plan are designed to eliminate access (ingress or egress) to the facility from the Property's New Broadway frontage except for emergency egress under a panic-door type arrangement to satisfy building code egress requirements. Open Door proposes to convert to windows those doors on New Broadway that are not required for emergency egress.

As the proposed variance(s) seek relief from on-site parking requirements, the primary potential impacts thereof (as raised by opponents to the pending site plan application) would be with respect to parking, traffic, and pedestrian traffic and safety. In order to mitigate any such possible impacts, Open Door's program is designed so that all employees and staff will be required to park at Phelps, where there is an overabundance of parking capacity, pursuant to an agreement between Phelps and Open Door.⁴ Employees and staff will be transported to and from the Property by shuttle bus. As discussed in the letters of Lyons McGovern, LLP, dated July 10, 2012, and Adler Consulting, dated July 9, 2012, copies of which are annexed hereto as Exhibits 6 and 7, respectively, ample on-street parking exists to handle the rare instances when the capacity of the parking lot on the Property would be insufficient to handle the entire peak patient load. Even then, the on-site shortfall is projected not to exceed one or two spaces at certain limited peak appointment times.

Open Door's operations will not produce enough vehicular traffic to impact levels of service of area intersections. According to the Adler Study, at the weekday peak hour time projected for the opening of Open Door's proposed facility, the level of service at each salient intersection would be the same whether or not the clinic is in operation.

A study of the area's sidewalks, and other pedestrian facilities and equipment (including physical condition and crossing signal duration) established that they are adequate to handle the pedestrian traffic projected to be generated by the proposed medical office. Further, the accident

⁴The driving distance between Phelps and the Property is approximately 1.6 miles.

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reports for the studied intersections over a five-year period (January 1, 2007 - December 31, 2011) included no accidents involving pedestrians, even though hundreds of pedestrians pass through them at the peak traffic hours. Nonetheless, as part of the proposed use, Open Door has committed to reimburse the Village for the employment of a crossing guard for the crosswalk that traverses North Broadway.

The Adler Study concludes as follows:

the operation of the proposed Open Door Clinic in the Village of Sleepy Hollow will not have a significant impact on area wide traffic operating conditions. Because of the low volume of cars expected to be generated by the Open Door Clinic, it is anticipated that the relocation of the existing Open Door Clinic to 300 North Broadway will not have a significant impact on the accident rate for the intersections and roadway segments that were studied.

Based on the analysis of the on-street parking, there would be sufficient number of spaces available to accommodate the anticipated needs of the Open Door facility for patients. Analyses also indicate that there would be sufficient parking spaces available at the Phelps Memorial Hospital garage for use by the Open Door staff. Therefore, it is [the] considered professional opinion of Adler Consulting that there are sufficient parking spaces available to accommodate the anticipated needs of the Open Door Clinic. Further a safe pedestrian crossing of North Broadway is provided directly opposite the new facility. (See pages 4-5)

In short, the expert information prepared on behalf of Open Door, in particular, the Adler Study and letter of July 9, 2012, expressly demonstrates that the potential impacts that could be associated with the operation of the facility – parking, traffic, and pedestrian flow and safety – will not be significant issues. Viewed in the context of the relevant statutory criteria, it should be clear to the Board that the requested variance(s) should be granted.

**No Variance is Needed from Sections 450-41B(1 and 4)
and 450-53A and B of the Zoning Ordinance**

As discussed, Open Door is seeking a variance from the required number of parking spaces under Section 451-41E of the Zoning Ordinance, to allow the clinic to operate with ten spaces, where 40 are required. It is a straightforward application, which if granted, would mean that the applicable parking requirements are satisfied by the construction on the Property of the ten spaces shown on the

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site plan being reviewed by the Planning Board. Nonetheless, because Open Door has proposed that all employees park at Phelps (solely as a proposed means of mitigating any impacts caused by the variance), the Village Architect has taken the position that a variance is also needed from Sections 450-41B (1 and 4) and 450-53A and B to permit the proposed mitigation. In combination, Sections 450-41B (1 and 4) and 450-53A and B require that the pedestrian access to any off-site parking area which is constructed or used to fulfill the number of applicable parking spaces must be located within 250 feet of the entrance to the proposed use, on land owned or leased by the owner of the property on which the proposed use is located (collectively such parameters will be referred to as the “Separation Distance Requirements”).⁵ It is respectfully submitted that such a construction of the Zoning Ordinance is wrong and, accordingly, Open Door seeks an interpretation from this Board pursuant to its authority under Village Law §7-712-b(1) and Section 450-80A of the Zoning Ordinance, that, in fact, no variance is required from the Separation Distance Requirements.

By granting a variance allowing a deviation in the number of spaces required by Section 450-41E the Board will have determined that the requested deviation is acceptable under local and state standards for issuance of an area variance, in light of the unique operational characteristics and quasi-public nature of the clinic and with the mitigation that is proposed, including mandatory employee parking at Phelps with the associated shuttle service and the provision of a crossing guard. No further relief is required because the off-site parking arrangement is not proposed to meet the minimum number of required parking spaces under the Zoning Ordinance – that is, to allow the requisite 40 spaces to be located somewhere off the Property – but rather as a mitigation measure devoted solely to employee parking. As such, there is no legal or logical basis why the Phelps parking spaces should be treated as needing a separate variance in addition to that which will allow the clinic to proceed with ten on-site spaces.

Viewed alternatively, if a variance were granted from the Separation Distance Requirements to allow 40 spaces at Phelps to fulfil the parking requirements for the clinic, then no other variance (including from the number of required parking spaces) would be required. In order to obtain approval for the site plan, Open Door needs to obtain a variance from the minimum number of required parking spaces under Section 450-41E *or* the Separation Distance Requirements of Sections 450-41B(1 and 4)

⁵ Section 450-41B(4) imbues this Board with authority to allow an applicant in a commercial district to satisfy its off-street parking space requirement by constructing the required spaces in an off-site parking area (as opposed to on-site where the use is located) if the Board finds that “there are practical difficulties in the way of the location of parking space or if the public safety or public convenience or both would be better served by the location of such parking space other than on the same lot with the use to which it is appurtenant” subject to the requirements of Section 450-53. In turn, Section 450-53A reads as follows: “An off-site parking area, as described in §450-41B(4), shall be located on land in the same ownership or leasehold as that of the land on which is located the use to which it is appurtenant.” Section 450-53B states: “An off-site parking area shall be so located that its pedestrian access shall be within 250 feet from the effective entrance to the use which it serves.”

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and 450-53A and B, but not from both. As Open Door has elected to seek the former, it requests that the Board render a determination that the latter is not required.⁶

**Application of the Controlling Statutory Criteria –
The Benefit to Open Door Outweighs Any
Detriment to the Neighborhood or Community**

As your Board is aware, under Section 7-712-b(3)(b) of the Village Law, in deciding whether to grant an area variance a zoning board of appeals is to weigh the benefit to the applicant if the variance is granted against the detriment to the health, safety and welfare of the neighborhood or community flowing from the grant of the variance. To aid zoning boards in performing the requisite balancing, the following five subsidiary factors are to be considered:

(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created; which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

Village Law §7-712-b(3)(b). Section 450-80C(2)(b) of the Zoning Ordinance establishes standards for the issuance of area variances which are essentially identical to those in the Village Law.⁷

⁶ Even if there were ambiguity as to whether only one or two variances are required, the issue would need to be resolved in Open Door's favor. One of the most fundamental rules of zoning is that: "Since zoning regulations are in derogation of the common law, they must be strictly construed against the municipality which has enacted and seeks to enforce them. ... *Any ambiguity in the language used in such regulations must be resolved in favor of the property owner.* ..." *Allen v. Adami*, 39 N.Y.2d 275, 277, 383 N.Y.S.2d 565, 567 (1976)(emphasis added; citations omitted). Here, a finding that Open Door requires variances from all three zoning code sections, as opposed to just Section 450-41E, would be turning the presumption on its head and interpreting the Zoning Ordinance in the manner that is the most unfavorable to Open Door.

⁷ Subparagraph 3 of Section 450-80C(2)(b) of the version of the Zoning Ordinance which is posted on line requires consideration of "[w]hether the requested area variance is essential," whereas analogous state law clause asks "whether the requested area variance is substantial." It would appear that the substitution of the word "essential" for the word "substantial" is a typographical error. To the extent that this were not the case, the standards of Village Law Section 7-712-b(3)(b) control. *Cohen v. Village of Saddle Rock*, 100 N.Y.2d 395, 764 N.Y.S.2d 64 (2003)(holding that Village

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*The Benefit to Both the Applicant and Community Outweighs Any
Detriment To the Health, Safety and Welfare of the Community*

Initially, for the purposes of simplifying the analysis of Open Door's proposal in the context of the law applicable to area variances, the following discussion will assume, without conceding, that variances are needed from both the required minimum number of parking spaces (Section 450-41E) the Separation Distance Requirements (Sections 450-41B(1 and 4) and 450-53A and B).

The benefits of granting the requested variances will not only flow to Open Door but to the community as a whole. As discussed above, Open Door needs to expand the square footage of its operations in order both to improve the services it provides the community and participate in the joint family residency program. It requires a downtown location that is accessible to its low-income clientele, which resides predominately within the central portion of the Village and most often needs to be able to reach the clinic without use of a private automobile. The Property provides an ideal location which meets Open Door's goals and needs.

More importantly, this is not the typical circumstance of an application by a private for-profit business or a homeowner simply seeking to advance its or his personal or financial needs. Rather it is an application by an entity which serves a vital quasi-public function by providing medical, dental and related services to those who cannot afford to pay market rate and/or lack insurance. There is a substantial population of individuals, including families and children, who depend on the services which will be provided at the Property. Additionally, the new family residency program will help provide more comprehensive services to those in need of medical care and, importantly, constitute a future source of family practitioners in the area and help insure the continued viability of Phelps. In short, the benefit to be weighed by your Board under the equation provided by the Village Law cannot be restricted to Open Door's direct benefit, but should take into account the value to the community as a whole of the services rendered and activities occurring at the proposed facility.

Law §7-712-b(3) evinced an intent by the State Legislature to preempt the field of variance review); *Stone Landing Corp. v. Board of Appeals of Village of Amityville*, 5 A.D.3d 496, 497, 773 N.Y.S.2d 103, 105 (2d Dep't 2004)(holding that "Village Law §7-712-b(3)(b) preempts any inconsistent local zoning ordinance ..."); see *Caspian Realty, Inc. v. Zoning Board of Appeals of Town of Greenburgh*, 68 A.D.3d 62, 70, 886 N.Y.S.2d 442, 449 (2d Dep't 2009), *lv. denied*, 13 N.Y.3d 716, 895 N.Y.S.2d 316 (2010)("the standards set forth in Town Law §267-b(3) [the Town Law counterpart to Village Law §7-712-b(3)] are exclusive, thereby precluding zoning boards of appeals from considering any factors not recited in the statute.")

The standards in the Village Law are identical to those applicable in Towns (Town Law §267-b(3)(b)) and Cities (General City Law §81-b(4)(b)). Accordingly, those court decisions which were issued in the context of review of area variance determinations by city or town zoning boards of appeals are binding with respect to area variance decisions in villages as well.

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In contrast, as should become apparent both from the discussion above and review below of the potential impacts of the variances on physical and environmental conditions and with respect to neighborhood and community character in the context of the individual criteria of Section 7-712-B(3)(b), there is simply no significant detriment that will flow from a grant of the requested variances.⁸

The Variance(s) Will Not Have an Adverse Effect on Physical or Environmental Conditions

Traffic, parking and pedestrian traffic and associated safety considerations are the only possible issues of potential environmental concern. In each such category Open Door's proposed operations will generate no tangible environmental impacts.⁹

First, the Adler Study shows that based on the projection of the amount of traffic to be generated by the clinic there will be no impact on existing levels of service at any studied intersection. The low numbers for trip generation are amply supported by surveys showing that less than 30 percent of the patients will travel to and from the clinic by automobile and the fact that all staff will be forced

⁸It should be noted that the Board's recent unanimous grant of a parking variance to Marcelo Poguio - La Esquina Latina for conversion of a building to a grocery store at 95 College Avenue serves as strong precedent supporting the grant of the variances to Open Door. On that application, this Board relaxed the off-street parking requirement which would have mandated 20 spaces and granted an area variance to allow for only four. Some of the factors cited in support of the variance are present with respect to Open Door's application, although they are even more compelling in Open Door's case. In the Poguio application, as here, the applicant relied on the facts that a significant portion of its customers lived near to the proposed store and was likely to walk to the enterprise and that the study prepared on its behalf showed there was significant available on-street parking to serve those customers who would be unable to park on the site. Of course in this case, unlike the for-profit nature of the grocery store use, the charitable mission of Open Door means that not only Open Door but the community as a whole will benefit from the granting of the variances.

⁹Assertions to the contrary before the Planning Board by opponents of the medical office, which we anticipate will be raised again in this proceeding, are not borne out by credible, empirical evidence such as that presented by Open Door. Generalized community opposition simply does not provide for denial of a variance in the face of empirical evidence to support it. *See Marro v. Libert*, 40 A.D.3d 1100, 836 N.Y.S.2d 691 (2d Dep't 2007)(annulling denial of a variance which was based solely on generalized community opposition; *see generally Kinderhook Development, LLC v. City of Gloversville Planning Board*, 88 A.D.3d 1207, 1209, 931 N.Y.S.2d 447, 449 (3d Dep't 2011), *lv. denied*, 18 N.Y.3d 805, 940 N.Y.S.2d 214 (2012)("inasmuch as [the planning board] relied upon 'generalized community objections' rather than the unchallenged empirical evidence in denying petitioner's application, we agree with Supreme Court that the determination was not supported by substantial evidence"). *Framike Realty Corp. v. Hinck*, 220 A.D.2d 501, 502, 632 N.Y.S.2d 177, 178 (2d Dep't 1996), *lv denied*, 88 N.Y.2d 803, 645 N.Y.S.2d 446 (1996)("[i]t was impermissible to deny a special exception or permit solely on the basis of generalized objections and concerns of the neighboring or adjoining communities expressed by members thereof, which in effect amount to 'community pressure' ... [f]urther, generalized complaints about traffic from local residents describing existing conditions are insufficient to counter an expert opinion based on empirical studies that the existing street system could handle the projected increase in traffic (citation omitted)").

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to park at Phelps and travel to and from the Property by shuttle.¹⁰ Moreover, as the only vehicular access to the Property is from the driveway on North Broadway, signage will clearly indicate that this is the sole access and the pedestrian entrance to the building itself on New Broadway is going to be limited to emergency egress only, it is not anticipated that significant traffic associated with the use will travel on New Broadway or in the Webber Park Neighborhood. Open Door is taking further steps to reinforce what will be this natural pattern of usage by educating both the local taxi companies and its patients that the entrance to the building is only from North Broadway.

Second, the ten spaces on the Property should be sufficient to handle the demand generated by Open Door's use. As indicated, approximately 70 percent of the patients and visitors will not travel to and from the Property by private automobile. All of the staff will be parking at the Phelps facility, which has available capacity of several hundred spaces. The patient projections prepared by Open Door establish that on weekdays, other than during the busiest time period which occurs on Monday between noon and 4:00 p.m., all patient parking needs will be met on the Property. During that Monday peak time period, which represents the worst case weekday scenario, the demand for on-street parking generated by the facility would amount to one or two spaces per hour. The July 9, 2012 letter from Adler Consulting establishes that during the week within one-quarter mile of the Property an average of 103 on-street parking spaces are available between 8:00 a.m. and noon; an average of 98 are unoccupied from noon to 4:00 p.m. (the time period during which the one- or two-space overflow could need to be accommodated); and an average of 70 are vacant between 4:00 p.m. and 7:00 p.m. Clearly, the numbers show that the proposed use will not impact on-street parking.

The empirical evidence in the Adler Study is bolstered by Open Door's "real world" experience. In light of the not-for-profit nature of facilities operated by Open Door and the travel profile of its patients, normal parking requirements found in zoning ordinances for offices or medical facilities operated on a for-profit basis have little relevance. The clinics Open Door operates in other Westchester municipalities are similarly limited or even more constrained as to the availability of parking. Open Door's 25,000-square-foot Port Chester Office has operated successfully with no on-site parking for the last six years. The same can be said of its Ossining facility of 24,000 square feet for a period of four decades. As noted previously, the Beekman Avenue Facility has generated no traffic or parking issues despite the absence of any off-street parking.

¹⁰For the purpose of traffic analysis, the Adler Study actually overstates the amount that will likely be generated by the proposed use of the Property. Specifically, it employs the traffic generated by the Beekman Avenue Facility to extrapolate the number of vehicle trips based on an increase in the amount of square footage from 5,000 to 12,389. This calculation ignores the fact that at the Beekman Avenue Facility some of the staff travel to and from work by automobile. This will not be the case at the Property because of the parking arrangement with Phelps and the utilization of the shuttle for employees.

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Third, pedestrian traffic and safety should not be a real concern. The Adler Study, which included a detailed inventory of all pedestrian facilities and equipment in the area of the Property and generated numerical counts of actual usage of such facilities, demonstrates both that the facilities are physically adequate and that the time allowed for pedestrians to cross the salient streets is sufficient. In absolute terms, the number of pedestrians projected to be traveling to and from the Property, when quantified over the course of the day, is insufficient to cause any concern. On an hourly basis, the number of pedestrians projected to be generated by Open Door on weekdays is as follows: (1) between 8:00 a.m. and noon, 13 per hour; (2) between noon and 4:00 p.m., 19 per hour; and (3) between 4:00 p.m. and 7:00 p.m., 12 per hour. Even at the peak period, the total amounts to less than one pedestrian every three minutes.¹¹ No greater pedestrian traffic is anticipated on Saturdays. Again, as mentioned, the traffic reports show no accidents involving pedestrians at the studied intersections, even though several of the intersections have a significant level of pedestrian traffic.

Finally, as also mentioned above, Open Door has agreed to pay for a crossing guard to man the crosswalk that traverses North Broadway by the Property. This mitigation measure removes all doubt as to the impacts and safety of pedestrians traveling to and from the Property.

There Will Be No Negative Impact on Neighborhood Character

The neighborhood in which the Property is located is characterized by commercial uses fronting on a busy state road. In the immediate proximity of the Property are two restaurants, a limousine business, an animal hospital, two medical offices, a landscaping business which sells plants, a sign store, and an automobile body shop. The Property itself is zoned for commercial use which would, among other things, allow its utilization for gasoline service stations, motor vehicle repair stores, sales of new or used automobiles, stores, and restaurants. Clearly then, the nature of Open Door's use of the Property is consistent with both the character of the Property's environs and the applicable zoning. The only issues, therefore, are whether the vehicular or pedestrian traffic or parking demand associated with the proposed use are such that they would adversely impact neighborhood character. For the reasons discussed above, they would not.

The proposed clinic also constitutes an appropriate transitional use between the intense commercial development on North Broadway and the houses on New Broadway. The activity associated with the Property is concentrated on North Broadway and will have little effect on the Webber Park neighborhood. Moreover, as was found by the Planning Board in its November 2008 resolution issuing a negative declaration under the State Environmental Quality Review Act and

¹¹ The Adler Study included a so-called sensitivity analysis which added a hypothetical volume of additional pedestrian traffic to the intersections that far exceeds anything that would be associated with Open Door's clinic and found that such pedestrian usage would not adversely affect the level of service at area intersections.

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granting site plan approval for redevelopment of the Property, the height and facade of the building on the New Broadway side of the Property is consistent with the residences on New Broadway. A copy of the elevations of the building on the Property is annexed hereto as Exhibit 8.

No Practical Alternatives

Open Door assiduously evaluated options to utilizing the Property and found them all to be unsuitable to achieve the benefit sought by this application. It first considered remaining in the Beekman Avenue Facility. In order to do so, Open Door needed to renovate the unimproved second floor of the leased property and install an elevator for access thereto. It actually began the process of doing so, but found that structural deficiencies in the building, which existed prior to and at the time Open Door acquired the Property and applied for site plan approval, made any improvements problematic. The requisite improvements would also have been unduly expensive, both because of the structural problems and Open Door's status as a lessee, rather than an owner, of the Beekman Avenue Facility. In addition, the second-story space cannot be used for patient services because of the absence of an elevator. Furthermore, ACGME reviewed the Beekman Avenue Facility and advised Open Door that it was inadequate to meet the physical space requirements of the program. Finally, operating out of a rental property, as opposed to one owned by Open Door, makes securing the requisite governmental funding, which is so central to fulfillment of Open Door's mission, more difficult.¹²

With the aid of a local real estate agent, Open Door also engaged in a search for properties that were available for purchase and potentially suitable for its objectives. It found only the Property to be compatible with its goals. Open Door explored sites located at 144 Valley Street and 149 Cortlandt Street and the "Frank Chevrolet" property, a lot located on the corner of North Broadway and Beekman Avenue, as well as the Property, and determined them to be unsuitable. For example, Open Door analyzed the location at the corner of North Broadway and Beekman Avenue, which was the site of an apartment building. In order to use the property, Open Door would have had to demolish the building in its entirety – a proposition rendering its use infeasible. It explored the possibility of purchasing the Frank Chevrolet property, but found that parcel unsuitable, both because the price was too high for acquisition by Open Door and the existence of environmental conditions that would have complicated its use to an unacceptable degree. Buildings located at 144 Valley Street and 149 Cortlandt Street were both apartment buildings that would have required substantial, economically unjustifiable renovations. Significantly, such sites have little or no parking and, therefore, suffer from the same zoning issues as the Property.

¹²Open Door was approached in the fall of 2010 by representatives of the Sleepy Hollow Downtown Revitalization Committee about possibly relocating from the Beekman Avenue Facility, based on the Committee's exploration of reclaiming the location and potentially adaptively reusing it as the theater it once was.

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No other properties that remotely would have fulfilled Open Door's needs were available during the salient time period.

The Extent of the Variance(s) Should Not be a Basis for Denial

Case law recognizes that consideration of the substantiality component of the area variance test is primarily dependant on whether the deviation from the zoning standard has substantial impacts. For example, in *Aydelott v. Town of Bedford Zoning Board of Appeals*, 6/25/03 NYLJ p. 21, col. 4 (Sup. Ct. Westchester Co. 2003), the court annulled the denial by the Town of Bedford Zoning Board of Appeals of a variance that would have allowed, among other things, building coverage of 7.1 percent, where only 3 percent was permitted by zoning (a 137 percent variance), and impervious surface coverage of 11.7 percent, where zoning imposed an 8 percent maximum. The court held that the zoning board engaged in improper analysis by focusing on the magnitude of the variance in the abstract. In pertinent part, the decision reads as follows:

A review of the record reveals that the ZBA was, primarily, concerned with the extent of the deviation from the standards established by the zoning code without considering the impact on the surrounding community. ... The ZBA's consideration of this percentage deviation alone, taken in a vacuum, is not an adequate indicator of the substantiality of the Petitioners' Variance Application. Certainly, a small deviation can have a substantial impact or a large deviation can have little or no impact depending on the circumstances of the variance application. Substantiality must not be judged in the abstract. The totality of the relevant circumstances must be evaluated in determining whether the variance sought is, in actuality, a substantial one ... (citations omitted)

See Kleinhaus v. Zoning Board of Appeals of the Town of Cortlandt, 3/26/96, NYLJ p.37, col. 3 (Sup. Ct. Westchester Co. 1996)(annulling a zoning board's denial of a variance to allow an amateur ham radio operator to erect a 120-foot-tall freestanding antenna in his yard, where the zoning height limitation was 35 feet (a 283 percent variance), based on the reasoning that "the deviation only becomes relevant if it relates to the adverse effect in the neighborhood.")¹³ *See generally Friedman v.*

¹³ Notably, case law is full of examples where, when looking strictly at the numbers, variances might seem substantial, but when taken in the context of the application and the existing character of the community, the courts have held them not to be. *See, e.g., Sasso v. Osgood*, 86 N.Y.2d 374, 384, 633 N.Y.S.2d 259, 264 (1995)(upholding the grant of area variances reducing the required 12,000-square-foot minimum lot area to 5,200 square feet and the required lot width from 100 feet to 72 feet at the waterfront and 50 feet at the street line); *Witzl v. Zoning Board of Appeals of Town of Berne*, 256 A.D.2d 775, 777, 681 N.Y.S.2d 634, 635-36 (3d Dep't 1998)(annulling the denial of an area variance to allow construction of a single-

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Board of Appeals of Village of Quogue, 84 A.D.3d 1083, 1085, 923 N.Y.S.2d 651, 653 (2d Dep't 2011)(which in upholding multiple area variances stated: "even if the variances were deemed substantial there was little, if any, evidence presented to demonstrate that granting the variance[s] would have an undesirable effect on the character of the neighborhood, adversely impact the physical environmental conditions or otherwise result in a detriment to the health, safety and welfare of the neighborhood or community ... (citation omitted)"); *Filipowski v. Zoning Board of Appeals of Village of Greenwood Lake*, 38 A.D.3d 545, 547, 832 N.Y.S.2d 578, 581 (2d Dep't 2007)(which, among other things, invalidated denial of a variance to allow a reduced lot size and explained "although the evidence established that the variance sought was substantial, there was little, if any, evidence presented that granting the variance would have an undesirable effect on the character of the neighborhood, adversely impact on physical and environmental conditions, or otherwise result in a detriment to the health, safety, and welfare of the neighborhood or community"). For the reasons already discussed, neither the variance to permit ten parking spaces nor the variance to authorize the Phelps parking would be substantial.

It also is significant that the language of Section 450-53B, imposing the separation limit of 250 feet, shows that it is concerned with maintaining a reasonable distance for *pedestrian* access. Here, no one will be walking from Phelps to the Property, as the parking at Phelps is for employees who will be transported by shuttle. Accordingly, the magnitude of the distance between Phelps and the Property is not detrimental to the community or neighborhood and is essentially irrelevant to the question of effective and safe parking and pedestrian access.

Self-created Hardship Does Not Foreclose the Variance(s)

To the extent the difficulty is self-created, this factor should be afforded little weight. Even Village Law §7-712-b(3)(b)(5) itself provides that the self-created nature of a hardship does not preclude the grant of an area variance. *See Millpond Management, Inc. v. Town of Ulster Zoning Board of Appeals*, 42 A.D.3d 804, 805, 839 N.Y.S.2d 355, 356 (3d Dep't 2007). In emphasizing the non-dispositive nature of this factor in the balancing test, New York's highest court has held that "the fact that the applicant's difficulty was self-created does not necessarily preclude the granting of the area variance." *Sasso*, 86 N.Y.2d at 385, 633 N.Y.S.2d at 265; *see also Easy Home Program v. Trotta*, 276 A.D.2d 553, 553, 714 N.Y.S.2d 509, 510 (2d Dep't 2000)(annulling denial of an area variance because, while the applicant's difficulty was self-created and the magnitude of the variance was

family residence on a 3.5-acre lot in a zone with a minimum lot size of five acres); *Baker v. Brownlie*, 248 A.D.2d 527, 528-529, 670 N.Y.S.2d 216, 218 (2d Dep't 1998)(reversing the denial of a 27.6-foot variance from the required 40-foot rear yard setback); *O'Hara v. Zoning Board of Appeals of Village of Irvington*, 226 A.D.2d 537, 641 N.Y.S.2d 87 (2d Dep't 1996), *lv. denied*, 88 N.Y.2d 810, 649 N.Y.S.2d 377 (1996)(annulling the denial of an area variance to allow construction of a home on an approximately 20,000-square-foot lot which had been rezoned to require a minimum lot size of 40,000 square feet).

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arguably substantial, there was “no evidence that granting the variance would adversely impact on the physical or environmental conditions, or otherwise result in a ‘detriment to the health, safety and welfare of the neighborhood or community’ ... (citations omitted)”).

Here, the self-created nature of the hardship is mitigated by the fact that Open Door has unique requirements both as to location and type of space needed. To be suitable for Open Door’s purposes a building must be readily adaptable to use as a clinic with certain auxiliary counseling and office functions. It must constitute a downtown location close to the residences of its clientele. A rental building poses a significant disadvantage in comparison to one owned by Open Door, as the latter will maximize Open Door’s chances to obtain governmental funding. In this case, ownership of the Property was a factor facilitating Open Door’s success in obtaining a grant to renovate the existing building.

As noted above, other suitable alternatives were not available to Open Door. Furthermore, several of the alternative properties suffered from the same or even greater legal shortfall in parking as the Property. In the Summer of 2010, prior to purchasing the Property, Open Door actually met with Village leaders to discuss the relocation of its clinic to the Property. Village leaders expressed support for Open Door’s proposed use of the Property.

In light of all of these circumstances, while the hardship may technically be self-created, it should not prevent favorable action on the requested variances.

CONCLUSION

For the reasons discussed in this letter, there is no need for a variance from the Separation Distance Requirements of Sections 450-41B(1 and 4) and 450-53A and B of the Zoning Ordinance. In any event, the benefit to Open Door and the community as a whole which would be achieved by the variance(s) would outweigh any possible detriment which would flow therefrom. More particularly, because there is no basis to conclude that the requested area variance(s) will adversely alter the character of the neighborhood or result in a negative impact on the physical and environmental conditions therein or increased traffic, parking or safety problems, the variance(s) should be granted. *Campbell v. Town of Mount Pleasant Zoning Board of Appeals*, 84 A.D.3d 1230, 1231-1232, 923 N.Y.S.2d 699, 701 (2d Dep’t 2011) (invalidating the denial of area variances on a finding that the zoning board’s decision lacked a rational basis); see *Schumacher v. Town of East Hampton, New York Zoning Board of Appeals*, 46 A.D.3d 691, 693, 849 N.Y.S.2d 72, 74-75 (2d Dep’t 2007). Accordingly,

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it is respectfully submitted that your Board should grant the parking variance from Section 450-41E being sought by Open Door and find that no variance is required from Sections 450-41B(1 and 4) and 450-53A and B (or, in the alternative, grant a variance from such provisions).

Respectfully submitted,

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Enclosures

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