CITY PLANNING COMMISSION
CITY OF NEW YORK

OFFICE OF THE CHAIR

June 29, 2009

City Council
City Hall
New York, NY 10007

Re: Application Nos. C 050260 ZSM, C 050269 ZSM and C 050271 ZSM
Related Application Nos. C 090173 ZSM, N 090170 ZRM, N 090171 ZAM and N 0901752 ZAM
Community District 7
Borough of Manhattan

Honorable Members of the Council:

In accordance with Section 197-d(d) of the New York City Charter, the City Planning Commission (the "Commission") has received the attached correspondence, dated June 16, 2009, from the City Council regarding proposed modifications to the above-referenced applications submitted by Fordham University in connection with the facilitation of a proposed master plan expansion of Fordham's Lincoln Center Campus.

The Land Use Committee of the City Council recommended that the approval of the above-referenced applications be expressly conditioned on the following:

1. The maximum height of the residential tower at Amsterdam & 62nd Street (Site 4) would be lowered from 630 feet to 598.

2. Option 1 of the two massing options for the Columbus Avenue buildings (Sites 1 and 2) would be eliminated.

3. Certain modifications to the Restrictive Declaration for applications C 050260 ZSM, C 050269 ZSM, and C 050271 ZSM, execution of which is a condition to development under the Special Permits granted under those applications.

Pursuant to 197-d(d), the Commission offers the following recommendations concerning the proposed Council modifications, as well as proposed amendments to the proposed Council modifications, as follows:

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**C 050271 ZSM (Garage C Special Permit)**

Under the Master Plan, substantial completion of Garage C is not anticipated until 2014, at the end of Phase I, which is after the four year term of the Special Permit. During the ULURP process, Fordham requested that the Department of City Planning consider an extension of the term of the permit in order to conform it to the Master Plan schedule; such extensions may be authorized pursuant to the provisions of ZR 11-42 (c), which provides that:

> Upon a showing that a longer time period for substantial construction is required for a phased construction of a multi-building complex, the Commission may, at the time of granting an authorization or special Permit, extend the period set forth in paragraph (a) of this Section [four years] to a period not to exceed ten years.

An extension was inadvertently omitted from the Special Permit as approved by the City Planning Commission on April 22, 2009. Accordingly, the Commission recommends that the resolution for application C 050271 be amended to add a new condition as follows:

> 11. This Special Permit shall lapse if substantial construction in accordance with the plans and drawings has not been completed within five and one half years following the [effective date] hereof.

The extension of the term of the Special Permit does not affect Fordham's obligation, pursuant to the proposed new Section 2.4 of the Restrictive Declaration, discussed below, to file applications with the City Planning Commission to allow a parking garage in the area allocated to Garage C that is accessed by a curb cut located on West 60th Street.

**Modifications to Restrictive Declaration Provisions Relating to Applications C050260 ZSM and C 050271 ZSM**

**a. Architectural and Aesthetic Design Review of the Site 3 and 4 Buildings**

Under the Council modifications, the Restrictive Declaration associated with the Special Permit granted under Section 82-33 of the Zoning Resolution under Application No. C 050260 ZSM, would be modified to add new provisions (Section 2.2 (m) and (n)) that would: i. Require Fordham to include in any contract for the sale or lease of either of Sites 3 or 4, the right to approve or disapprove the architectural design of those buildings; and ii. Require Fordham to establish a Fordham University Residential Design Review Committee (the "Residential Sites DRC"), having as its purpose the review of the proposed design of the Site 3 and Site 4 Buildings, including such matters as exterior materials, the shape of the envelopes, facades, curtain walls, windows, applied decoration, color and "any other matter affecting the aesthetic character or architectural design of the Residential Buildings." The Borough President and the local

Councilmember, acting jointly, would appoint two voting members of the seven-member Residential Sites DRC.

The Commission notes first that a Restrictive Declaration is a tool utilized by the City to establish administrative controls, conditions and safeguards as necessary to ensure proper implementation of the land use approval and environmental mitigations. The terms of a Restrictive Declaration operate as conditions of the Special Permit and, for that reason, are governed by the same planning and legal standards that govern other aspects of the land use approval.

In that regard, the Commission notes that Special Permits granted under Section 82-33 of the Zoning Resolution do not provide for review and approval of the architectural and aesthetic elements which the proposed modification makes subject to review by the Residential Sites DRC. Rather, Section 82-33 allows for modification of height and setback and other zoning bulk regulations. Among the findings required for such bulk modifications is that they are necessary to "facilitate good design." Thus, while the Special Permit is intended to further "good design", it does so through modification of zoning building massing and the site plan. The Special Permit findings do not relate to such matters as materials, windows, applied decoration and color, and a requirement to establish a post-ULURP process to review such matters is not a condition or safeguard necessary to ensure that the findings will continue to be met.

The Commission recognizes that the architectural and aesthetic review of the building designs would be performed by a body consisting primarily of members chosen by Fordham University, rather than the City, but this does not eliminate the concern because the obligation to form a Residential Sites DRC to approve or disapprove the specified design features would exist solely by virtue of a Restrictive Declaration made a condition of the ULURP approval. The Commission likewise understands that Fordham would execute the Restrictive Declaration and thereby agree to abide by its terms, but this also does not obviate the fact that execution of the Declaration is a governmental requirement for exercise of the Special Permit. The participation of members appointed by the Borough President and the City Councilmember also gives the Residential Sites DRC and its review process a City imprimatur. To the extent that these members may act as representatives of their appointing authorities, further issues would be raised concerning the land use review process.

The Commission is bringing this matter to the Council's attention to highlight the distinction generally followed under the New York City Zoning Resolution between regulation of bulk and architectural design review. With limited exception, the provisions of the Zoning Resolution governing buildings regulate building form, and not architectural detailing such as materials, colors and the like. Section 82-33 follows this pattern. Whether the zoning in New York City should be revised to move in a direction of providing a greater role for architectural and aesthetic review is a complex issue upon which planners, neighborhood residents, and owners/developers are likely to differ. These issues should be discussed further among the Department of City Planning, the

Commission, and the City Council, rather than having architectural design review made a condition of ULURP approval in the absence of a foundation in the Zoning Resolution.

**b. New Land Use Applications for Garage C**

The modifications to the Restrictive Declaration also include a provision associated with Application C 050271 ZSM (new Section 2.4), which would require Fordham to seek a new special permit and authorization pursuant to ZR Secs. 13-561 and 13-553, respectively, to allow for a parking garage in the area allocated to Garage C under Application No. C 050269 ZSM to be accessed by a curb cut located on West 60th Street, west of McMahon Hall. However, Fordham's obligation to pursue these applications would expire ". . . if any litigation challenging the Approvals is commenced by any resident or unit owner of the Alfred Condominium or any constituent member of Fordham Neighbors United, any resident of any of the eight buildings represented by Fordham Neighbors United or any member or affiliate of the foregoing."

The Commission is concerned that compliance with land use conditions not be made subject to whether identified private parties commence litigation. To the extent that the City believes that a condition reflects appropriate land use, it should be made applicable regardless of whether litigation is brought and the benefit to the community provided via the land use condition should not depend upon the conduct of third parties.

In this case, the Commission understands that Fordham's commitment under Section 2.4 relates to follow-up actions which it would not otherwise have any obligation to pursue, and that no aspect of the current Approvals is conditioned upon whether litigation is brought. For that reason, the Commission does not believe that Section 2.4 directly presents the issues noted above. The Commission hopes that, working together, the Department of City Planning, Commission and the City Council can work to ensure that such provisions do not become a feature of future land use approvals.

**c. Public Amenities**

The proposed modifications to the Restrictive Declaration associated with Application C 050260 ZSM also include a provision (new section 4.3) requiring Fordham to design and construct a public atrium at the corner of Columbus Avenue and West 62nd Street. The public atrium will be located on the ground floor of the new Fordham building on Site 1 and must have a minimum size of 3,500 square feet.

The Commission understands that pursuant to discussions between Fordham and the City Council, the minimum height of the public atrium was to be proposed at 30 feet, but that the Council letter inadvertently referred to a height of 35 feet. The Commission therefore recommends that new Section 4.3 of the Restrictive Declaration be amended as follows:

Section 4.3 **Public Amenities.** (a) In connection with the construction of a New building on Site 1, Fordham shall cause the design and construction of (a) a publicly accessible atrium having a minimum area of 3500 square feet and a minimum height of

[35] **30** feet in the ground floor of the building at the intersection of Columbus Avenue and West 62nd Street (the "Atrium") [new material in **bold**; deletions in brackets] . . .

With regard to retail uses in the atrium, the proposed modification states: "The Atrium shall be capable of supporting retail uses, but shall be open and accessible to the public and contain a facility for non-alcoholic beverage and light refreshment service, as well as seating with tables." The proposed modification also provides that the "design of the Indoor Public Spaces [i.e., the public atrium and the escalator area], including the signage announcing the availability of the Atrium for public access and the hours of operation ..." is subject to the advisory Design Review and Consultation Process described in Section 2.2 of the Restrictive Declaration.

In order to further ensure the active use of the atrium as a public amenity, the Commission recommends that the language of the fifth sentence of new proposed Section 4.3(a) be amended as follows:

> The design of the Indoor Public Spaces, including the signage announcing the availability of the Atrium for public access [and]; the hours of operation; **the size, configuration, location within the Atrium, signage and hours of operation of the required non-alcoholic beverage and light refreshment service; and the amount and type of seating and tables,** shall be subject to the design review process described in Section 2.2 (but not including the process described in Section 2.2 (m)). [new material in **bold**; deletions in brackets]

The Commission also notes that the Special Permit granted under Section 82-33 of the Zoning Resolution (C 050260 ZSM) contains a requirement for ground-floor retail use at the corner of Columbus Avenue and West 62nd Street in the Site 1 building. As specified on Approved Drawings Z-13 and Z-13.1, for the first 30 feet of Columbus Avenue frontage south of West 62nd Street and the first 30 feet of West 62nd Street frontage west of Columbus Avenue, permitted ground-floor uses are limited to the retail uses listed in Use Groups 6A and 6C, with further limitations as noted on the drawings. The Commission wishes to highlight this requirement of the Special Permit in light of Section 4.3(b) of the Restrictive Declaration, which allows Fordham, after the atrium has been open to the public for three years, to determine that the atrium is a "public nuisance," "either because it has attracted users who threaten the health, safety or well-being of other members of the public or users of the Campus . . . or because it is not regularly used by a significant number of members of the public," and in consequence allows Fordham to alter the atrium's use, layout, and/or hours of access. In view of the foregoing, should Fordham decide to close or limit public access to the atrium under this provision, or otherwise deviate substantially from the requirements regarding the atrium in the Restrictive Declaration, the retail use requirement under Special Permit C 050260 ZSM will continue to govern the corner of Columbus Avenue and West 62nd Street.

The Commission respectfully requests that the Council give careful consideration to the proposed amendments and recommendations set forth above. The modifications raise no land use or environmental issues requiring further review.

Sincerely,

Amanda M. Burden

This letter adopted by unanimous vote of the City Planning Commission at its June 29, 2009 Review Session.

c: R. Barth
D. Karnovsky
L. Parnes
C. Grossman
A. Wolff
A. Meagher
G. Friedman