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April 10, 2007

The Honorable Meenakshi Srinivasan  
Chair  
NYC Board of Standards and Appeals  
40 Rector Street - 9th Floor  
New York, New York 10006

The Honorable Christopher Collins  
Vice-Chair  
NYC Board of Standards and Appeals  
40 Rector Street - 9th Floor  
New York, New York 10006

Re: BSA 74-07-BZ  
Congregation Shearith Israel  
6-10 West 70' Street/99 Central Park West  
Block 1122 Lots 36. 37 - Manhattan

Dear Chair Srinivasan and Vice-Chair Collins:

I am writing this letter to request that you both recuse yourselves from further involvement in the variance application to the Board of Standards and Appeals (“BSA”) for the community house/condominium project filed by Congregation Shearith Israel (“CSI”), BSA 74-0-BZ. CSI has requested eight variances pursuant to Section 72-21 of the New York City Zoning Resolution.

The basis for this request is the ex parte meeting held by both of you with the variance applicant on November 8, 2006, as compounded by the failure of BSA to invite known community groups opposing the project to the meeting, the failure of BSA to record or otherwise transcribe the meeting, and the refusal of BSA to disclose notes taken at such meeting. If one believes statements made by CSI in its application, it appears that other inappropriate ex parte contacts may have taken place.

A variance proceeding is a quasi-judicial proceeding; ex parte meetings of this type accordingly are improper. Variance matters are to be distinguished from other matters which are within the jurisdiction of the BSA, such as Special Permits, which are not consider to be quasi-judicial in nature. In a variance provision, a party is seeking a waiver of the application of specific provisions of law, which, here, is the New York City Zoning Resolution. Jurisdictions within and without New York consider these types of

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proceedings to be quasi-judicial, where ex parte contacts are improper, particularly where a zoning agency has a professional staff.

The CSI application was filed with the BSA on April 2, 2007<sup>1</sup>. CSI had initially filed an application for this project with the Department of Buildings of the City of New York (“DOB”) on October 28, 2005. On March 14, 2006, following years of meetings and hearings, the Landmarks Preservation Commission approved the project, over the opposition of LPC Commissioner Gratz<sup>2</sup> as well as opposition by the community. The DOB issued its letter of objection, from which CSI is appealing to the BSA, on March 27, 2007<sup>3</sup> citing non-compliance as to lot coverage, rear yards, setbacks, base height, building separation, and, significantly, building height. The excess building height, above that of an as of right building, relates solely to the construction of condominium units which will be sold by CSI to finance the construction and to provide additional income to CSI.

I live across the street from the proposed project, and within a 400 foot radius. On September 1, 2006, I notified the BSA as to my opposition to this project and also filed a Freedom of Information Law request relating to the project. My letter also stated:<sup>4</sup>

It appears that substantially all of the non-conforming parts of the project relate to the income generating condominiums on the upper floors of the project. It also appears that the Congregation intends to use a subbasement as a Banquet Hall which will impact the character of the neighborhood and that it is the practice of the Congregation to rent its facilities to third parties to generate income. Part of the extension of the project into the lot appears to relate to this Banquet Hall and will require a variance.

BSA staff then telephoned me to state that no application had been filed by CSI. When I inquired about a pre-application meeting and whether one had occurred, I was told that generally, such meetings were held to familiarize applicants with BSA procedures, but, that in this case, a pre-application meeting was doubtful because of the extensive experience of the attorneys and architects for CSI.

Subsequently, on November 14, 2006, BSA supplied four documents in response to my FOIL request.<sup>5</sup>

These documents showed that on October 13, 2006, CSI confirmed a meeting to be held with the BSA for November 8, 2006. This shows that BSA had ample opportunity to

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<sup>1</sup> [CSI Application to the BSA filed April 2, 2007 \(120 pages\).](#)

<sup>2</sup> [Statement of Roberta Brandes Gratz dated March 14, 2006.](#)

<sup>3</sup> [DOB Statement of Required Actions dated March 27, 2007.](#)

<sup>4</sup> [Letter of September 1, 2006 from Alan D. Sugarman to BSA](#), posted on the Internet, together with other documents cited herein, at <http://www.protectwest70.org/topic-pages/BSA-DOB-FOIL.html>.

<sup>5</sup> [Letter of November 14, 2006 from BSA to Sugarman with enclosures.](#)

contact other interested parties and invite them to the meeting.”<sup>6</sup> Interestingly, the letter also stated that one of the attendees would be “Jack Freeman, Financial Analyst.” The reference to Jack Freeman would indicate that CSI had retained Mr. Freeman prior to October 13, 2006. Yet, as discussed below, CSI would later maintain that it retained a financial analysts at the suggestion of the BSA Board, indicating other ex parte contacts.



October 13, 2006

BY MESSENGER  
The Hon. Meenakshi Srinivasan  
Chair  
NYC Board of Standards & Appeals  
40 Rector Street, 9<sup>th</sup> Floor  
New York, NY 10006

Re: Congregation Shearith Israel (“CSI”)  
10 West 70<sup>th</sup> Street, Manhattan

*Meeting  
11/8 - 11:30 AM*

Dear Madam Chair:

We are special land-use counsel to the owner of the above-referenced site, which is being developed as a mixed-use building with community facility/educational use at the lower levels and residential use at the upper levels. The western portion of the site is located in an R8B zoning district and the eastern portion is located in an R10A zoning district. CSI may require bulk variances from the BSA to construct the new development. Attendees at the prospective BSA meeting will include the following:

Ray Dovell	Architect
Jack Freeman	Financial Analyst
Shelly Friedman	Counsel
Lori Cuisinier	Counsel

We look forward to meeting with the Board on Wednesday, November 8 at 11:30AM to discuss this project. Thank you for your cooperation.

Very truly yours,

Lori G. Cuisinier

The meeting between BSA Commissioners and Staff and CSI did in fact take place on November 8, 2006. The BSA Meeting Record<sup>7</sup>, provided in response to the FOIL request, disclosed that Chair Srinivasan and Vice-Chair Collins attended the ex parte meeting. Also in attendance were CSI attorneys, architects and consultants including Jack Freeman, Lori Cuisinier and Shelly Friedman (attorneys for CSI), Ray Dovel and Kathryn Growley (architects for CSI), and John Reisenger, Jed Weis and Jeff Mulligan of BSA’s professional staff.

<sup>6</sup> [Letter of October 13, 2006 from Friedman & Gotbaum to BSA.](#)

<sup>7</sup> [BSA – Meeting Record dated November 8, 2006 re 10 West 70<sup>th</sup> Street.](#)

Meeting attendees, please PRINT your name and information here.

Name	Organization	Telephone Number
1) Meenakshi Srinivasan	BSA	
2) Paul Reiser		
3) Ted Weiss	BSA	
4) Art Cusdaler	FCG	
5) Shelly Friedman	FEA	
6) Ted Friedman	FEA	
7) Ray H. Doyere	PRDW	
8) Andrew Crowley	PRDW	212.691.2440 x120
9) Jeff Mulligan	BSA	
10) Chris Collins	BSA	

One week later, for the first time, I and community groups were advised of this meeting. No transcript, apparently, was kept, nor recording made. Notes were taken by the BSA commissioners and staff in attendance, but, the BSA refused to provide me with factual notes describing the meeting, on the spurious grounds that the notes were covered by the attorney-client privilege:<sup>8</sup>

Jeff Mulligan has asked me to respond to your November 20, 2006 letter regarding your previous FOIL request.

You request in your letter that the Board provide any notes of the meeting held on November 8, 2006. As explained in Mr. Mulligan's November 14, 2006 letter to you, hand-written notes were not disclosed because they are subject to attorney/client privilege or attorney work product privilege, or because they are exempt under FOIL § 87(2). Accordingly, your request for notes is denied. Please be advised that no other materials responsive to your request exist.

On December 18, 2006, I appealed this determination to the BSA, but, no action has been taken by BSA on the appeal.<sup>9</sup>

Having now reviewed CSI's April 2, 2007 application, it appears that our concerns as to improper ex parte contacts were not misplaced. To the contrary: the novel position by CSI that its desire to earn a profit and build a building at no cost as a justification for a variance will be the most hotly contested issue before the BSA. It now appears that this topic was discussed between the BSA and CSI:<sup>10</sup>

<sup>8</sup> [Letter dated November 14, 2006 from BSA to Sugarman](#) and [Letter dated November 27, 2006 from BSA to Sugarman](#).

<sup>9</sup> [Letter dated December 18, 2006 from Sugarman to BSA](#).

<sup>10</sup> [Statement in Support of Certain Variances filed April 2, 2007, pages 24-25](#).

CSI's status as a not-for-profit religious organization renders this finding unnecessary.

At the Board's request, however, due to the fact that the Application presents a situation in which Use Group 2 floor area is being created for sale to third parties as a component of the CSI's financial strategy for producing the New Building, CSI has retained the services of Freeman Frazier Associates to provide a Feasibility Study analyzing potential mixed use development on Lot 37. This analysis compared the rate of return that could be expected from the New Building containing 16,242 sf of residential floor area with a hypothetical as-of-right building that would provide 5,022 sf of residential floor area. It concluded that due to existing physical conditions on the zoning lot, including the need to address the Synagogue's circulation problems and the need to replace and enlarge the functions in the Community House, there is no reasonable possibility

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that a financially feasible mixed use building could be developed in strict conformity with the Zoning Resolution. The 27,302 sf as-of-right building yields 5,022 sf of residential sellable area. The total investment for such a project would be \$27,696,000 on a net project value of \$11,574,000, producing a capital loss to a developer of \$8,672,000.

Setting aside for a moment the lack of legal substance in CSI's position and the unsettling suggestion that the BSA is prepared to ignore all of its own precedents, CSI states that the financial consultant was retained by CSI as a **result of a request by the Board**. Yet, the meeting attendance sheet for the November 10, 2006, meeting shows that the financial consultant, Mr. Freeman from Freeman Frazier Associates attended that meeting. Not only does CSI indicate that other inappropriate ex parte contacts at which the Board requested that a financial consultant be retained took place **prior** to that meeting, but, without doubt, the most central hot issue of this application was discussed at the meeting, without notice to community opponents and without a record of the meeting.

Accordingly, we are compelled, most respectfully, to request that you both recuse yourselves from this matter as well as to immediately disclose all notes of any type of the meeting and all other communications with the applicant and its representatives, without regard to claims for privilege.

It is true that the BSA circulates a “procedure statement”<sup>11</sup> that contemplates meetings between applicants and the staff, though not applicants and the adjudicator. Even if a strained reading of the BSA “procedure statement” might suggest that the meetings with Commissioners were contemplated, any ambiguity must be read so as not to authorize ex parte meetings with Commissioners because the ex parte meetings in this circumstance are improper and would flaunt well accepted administrative law. Also, within the BSA’s jurisdiction, are areas not necessarily quasi-judicial – but a variance proceeding is unquestionably a quasi-judicial proceeding, as to which ex parte meetings are simply improper. Moreover, this meeting certainly skirted, if not violated, the law as to public meetings, given that there are only four Commissioners appointed at the present time, and two attended the meeting. I do not know the number of Commissioners duly appointed in November 2006, when the meeting was held.

Section 1046 of New York City’s Administrative Procedure Act flatly states:

No ex parte communications relating to other than ministerial matters regarding a proceeding shall be received by a hearing officer, including internal agency directives not published as rules.

Section 307 of the New York State Administrative Procedure Act states:

2. Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in an adjudicatory proceeding shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. Any such agency member (a) may communicate with other members of the agency, and (b) may have the aid and advice of agency staff other than staff which has been or is engaged in the investigative or prosecuting functions in connection with the case under consideration or factually related case.

Here, CSI had already proceeded through years of hearings before the Landmarks Preservation Commission, and CSI had filed information with the Department of Buildings. CSI has publicly stated to the LPC and Community Board 7 and others that its project would require a zoning waiver from the Board of Standards and Appeals.

The BSA has a full professional staff, apart from the Commissioners. Thus, any claim of necessity for this departure from the prohibition against ex parte contacts cannot be justified. See In the Matter of General Motors Corporation, 82 N.Y. 2d 183 (1993). And,

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<sup>11</sup> [BSA Procedure for Pre-Application Meeting and Draft Application](#). There is no indication that the procedure was ever a part of a formal rulemaking. Even so, the Procedure does not explicitly describe meetings with Commissioners.

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even then, there is no explanation as to why interested community groups were not advised of the meeting, and why minutes or transcript were not taken of the ex parte meeting.

The BSA, when considering the granting of variances, is acting in a quasi-judicial role. The BSA recognizes, apparently, its quasi-judicial role: after an application is actually filed, then, and only then, do BSA commissioners not engage in ex parte contacts. This is not a meaningful distinction, especially where the subject project has already completed review by one city agency (LPC) and was then undergoing extended review by another (the DOB) and where opponents to the project were identifiable and indeed had identified themselves.

This situation is not so different from one where in a judicial proceeding a prospective plaintiff discusses the complaint and theories of the case with the judge prior to the filing of the complaint.

Sincerely,



Alan D. Sugarman

P.S. Supporting Documents are posted at [ProtectWest70Street.org](http://ProtectWest70Street.org).

cc: Office of the Mayor of the City of New York  
Hon. Betsty Gotbaum, Public Advocate of the City of New York  
Hon. Gail Brewer, New York City Council Member  
Hon. Scott Stringer Manhattan Borough President  
Hon. Richard Gottfried State Assembly Member  
Hon. Patricia J. Lancaster, Department of Buildings  
Hon. Robert B. Tierney, Landmarks Preservation Commission  
Hon. Sheldon J. Fine, Chair Manhattan Community Board 7  
Norman Marcus  
Kate Wood, Executive Director, Landmarks West  
Shelly Friedman, Esq, Friedman & Gotbaum LLP