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February 8, 2008

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

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

Dear Chair Srinivasan:

Following is a summary of comments which I will make at the upcoming hearing of February 12, 2008 responding to the latest statements by the Applicant which distort the submissions form the opponents. I understand that the BSA will have a discussion meeting on February 11, 2008, and, believe it would be important to provide these comments in advance.

In its February 4, 2008 response letter, the Applicant Congregation Shearith Israel has once again mischaracterized the position of the opponents and continues to leave important questions unanswered.

- The response to the questions of BSA Chair Srinivasan and CB7 Community Board Land Use Committee Chair Asche as to court precedent for the Applicant's position remain conspicuously unanswered.

- An explanation of why the Applicants FAR 4.0 best use feasibility study does not show an ample rate of return remains unanswered.

- An explanation of how it is possible that the "acquisition cost" as shown on Schedule A-1 is the same for all scenarios is not forthcoming.

- An explanation as to whether the feasibility studies are being submitted as a basis for finding (b), or for some other novel proposition.

- A response to the opposition's contention that an as-of-right building is one that satisfies's zoning, DOB, and LPC requirements.

Applicant then asks the BSA deem the hearings closed. This is odd.

- Community Board 7 representatives have not yet had an opportunity to appear before the BSA, since the first prematurely noticed BSA hearing preceded the CB7 hearing.
- In its December 28, 2007 submission, the Applicant stated that it had further information concerning the 18 West windows to be presented at the next hearing, an obvious abuse by Applicant of the hearing process.
- The Applicant did not provide the information required as to the 18 West windows requested by Commissioner Hinkson at BSA Tr., page 81. [1]
- Opponents have a right to present their experts at a hearing to testify as to the December 28, 2007 submissions.
- Applicant has yet to submit its feasibility expert to questioning (having not done so at the CB7 hearings either).
- Applicant has not submitted drawings of its new tower as-of-right scheme.
- The Applicant has not explained how it was that the eighth variance was mysteriously removed by DOB after commencement of this variance proceeding, nor how it was that its drawings post-date the date of the DOB objections. Applicant has tried to ignore this issue, but it calls into question the jurisdiction of this Board. Moreover, only with the omission of the eighth variance was Applicant able to claim that a sliver building was as of right.
- Although Applicant filed a conclusory letter as to a shadow study, Applicant did not file the shadow study itself. The Chair clearly requested a set of drawings. BSA Tr., 1670, Page 75.

Actually, it is not so odd that Applicant wants hearings to stop - the more that the facts and truth are developed, the more the Applicant's claims evaporate.

<u>Access and Accessibility</u>

At the same time, the Applicant has made important concessions in its last submission:

[1] The BSA Transcript of November 27, 2007 is cited herein as BSA Tr. at.

- Applicant's Architect now concedes the obvious, that the existing problems of access and accessibility are resolved equally by the as-of-right and proposed buildings.

- Applicant now concedes that the issues of access and accessibility are met by the inclusion of a single ADA compliant elevator in the as-of-right and proposed buildings.

These are important concessions; these concessions mean that there is no need for any variances in order to resolve the existing access problems. This means that the Applicant's tendentious sympathy invoking narratives as to carrying disabled congregants from floor to floor are completely irrelevant to this variance proceeding. The recitation of these access and accessibility deficiencies should not be recited in any BSA findings for they are irrelevant as to any variances requested herein. The Applicant's continued use of this argument, without any factual underpinning, is a misuse of the hearing process.

Moreover, the deficiencies of access and accessibility have been present in their current state since at least 1954. Applicant concedes that with hoistway and structural changes, it would have been possible to retrofit an ADA compliant elevator. So, it is demonstrably untrue that only a new building would be required to remedy the access and accessibility deficiencies. Since the Congregation first set out in the mid-80s to build a condominium tower, it has poured more money into attorneys and consultants than that required to retrofit an ADA compliant elevator.

As another example of the Applicant's abuse of the hearing process, the BSA should now consider baseless the statement on page 15 of its December 28, 2007 statement where the Applicant hyperbolically asserts:

> (2) the CSI zoning lot is the only zoning lot in which the LPC has approved a plan for approving internal circulation of a sacred site through features which can only be provided in an adjacent new building,

Programmatic Needs Can be Satisfied in the As-of-Right Building

The Opposition's Architectural expert opined that the asserted programmatic needs could be remedied in an all community space as of right building - by moving the caretaker's apartment to the 5th or 6th floors and by eliminating the need for a separate elevator bank.

The Applicant's architect did not address this opinion, but rather attempted to divert the discussion, by, for example, referring only to "using the 5th and 6th floors for educational purposes." The Applicant's architect did not address the use of the 5th or 6th floors for the caretaker's apartment or the elimination of the residential elevator banks.

The Applicant's Architect's also conceded that the Opponent's description of the "manner in which the design has evolved over the past five years" was correct. To be clear, the problem with the Applicant's positions is that each time it presents space allocation floor plans, the Applicant claims that these floor plans are the ONLY possible way of satisfying its programmatic needs. For example, from 2002 through 2006, the Small Synagogue absolutely needs to be moved to the new building. Then, in 2007, it was an "issue of faith that synagogue is not going to be touched as part of this renovation project." Opp. Ex. B-5-6.[2] In 2002, a variance for the second floor was needed for Nurseries and a Kitchen (Opp. Ex. F-1), in 2005, the variance for the second floor was needed for "Meeting Rooms, Offices or Office Area", (Opp. Ex. F-2), in 2007, the variance for the second floor was needed for Offices (Opp. Ex. F-3).

The Applicant's architect significantly did not dispute the Opposition contention that the first floor Synagogue extension could be flexibly designated to satisfy some of the asserted programmatic needs.

Nor has the Applicant's attorney disputed the opposition claim that the reason the Toddler Program must meet in the basement assembly area is because the more suitable areas are being used by the tenant school, completely undermining the patently false claims by the Applicant that the tenant school only uses space not used ordinarily by the Congregation.

Applicant's attorney claims in his February 4 submission that " Even a cursory review of the opposition experts' submissions indicate that they were submitted without a detailed understanding of the programmatic difficulties which lie at the heart of this case." If there is any confusion, the source is in the ever varying confusing and conflicting claims by the Applicant of its programmatic needs and how the needs were to be satisfied.

At the November 27, 2007 hearing, the Chair asked the applicant to "chart out" its programmatic need (page 18, 382) and then asked that it be "tabulated" BSA Tr. at 346-6, page 16. Rather than prepare a tabulation, what was presented by Applicant was pages of convoluted narrative and some official looking drawings inconsistent with the narrative. Once again, if anyone believes the accuracy of the usage numbers used by the Applicant, I will gladly make available to the Board the videos showing the inaccuracy of the Congregation's claims. But, since even the exaggerated programmatic needs can be met in the as-of-right building, it would be an irrelevant burden to introduce these videos.

The Applicant claims that there is one and only one way to satisfy its programmatic needs. All the evidence shows that there are multiple alternatives, and, that at times the Applicant itself was committed to significant alternative configuration. The apparent contention of the Applicant that no part of the 5th or 6th floors can be used for educational purposes or for the caretaker's apartment is just poppycock.

[2] References to Opponents Exhibit Binder I submitted January 28, 2008 is referred to herein as Op. Ex.

<u>Financial Need of the Congregation</u>

The Applicant's attorney whines about the Opponent's inclusion of material related to financial resources available to the Congregation, claiming that a "great deal of this material calls out the wealth and philanthropic history." In fact, only two of the 30 opposition exhibits related to this issue. Applicant's attorney complains that even discussing the issue is "a grave mis-use of these public proceedings." The problem is that the Applicant wants to have its cake and eat it too. It was Applicant's choice to use Jack Rudin as a lead-off witness for its first Landmark's hearing. Opp. Ex. D-2 And, it was Applicant's choice from the beginning to describe the condominium part of the project as an economic engine for the construction of the community house. <u>Opp. Ex. A</u> Moreover, the Applicant has consistently claimed that it can only satisfy its programmatic needs if it is able to obtain funds from this economic engine. <u>Id.</u> Yet, while on one hand pleading financial need, on the other hand the Applicant objects to the slightest suggestion that there is no financial need. It is hypocritical for Applicant to raise a position that it will not defend. And, the Applicant has abused this hearing process by raising the claim of financial need at the very same time that it denies that it is claiming financial need.

As to Applicant's attorney's charges of singling out Rudin and Stanton, clearly Jack Rudin was self-selected, and was not "singled out." Opp. Ex. D-2. Similarly, if Applicant wishes that these individuals not be selected out, is Applicant now suggesting that Applicant should provide a complete analysis of its financial resources including that of the Trustees so that its fundraising campaign co-chairs highlighted on the Applicant's web site are not singled out? See Opp. Ex. D-8.

Applicant's attorney also neglects to mention that Jack Rudin is his client in connection with another project where similar attempts are being made to obtain variances to create condominiums solely to subsidize a non-profit.

The Opposition is absolutely entitled for hearing and for appeal purposes to make a record of the financial resources available to the Applicant, especially were the BSA in any way to accept or even acknowledge as relevant the Applicant's unsubstantiated claim that it would be unable to build the community facilities without the funds available from the condominium "economic engine." The Applicant has provided no probative evidence whatsoever that it would be unable to construct the new building without a variance-creating subsidy from the condominium apartments.

<u>Relevance of Discussions of the Banquet Hall</u>

<u>Applicant clearly distorts opponents view as to relevance of the Banquet Hall on a narrow side street. Since the Applicant request for a variance is based upon the need for funding the proposed building, it is important to understand that the "subsidy" requested includes subsidy of the construction of a Banquet Hall and catering facilities in space that could</u>

have been used for core programmatic needs. Oddly, the Applicant claims that this 6400 square foot facility and the supporting facilities are only going to be used occasionally. Moreover, the Applicant's disingenuous presentation of this space speaks for itself in evaluating the candor in the other parts of the presentation of the application.

Relevance of Ramaz.

The documents related to the Ramaz project, whom Applicant's attorneys herein also represent, were submitted in part to show the dangers of the precedents that would be created by a granting a variance to the Applicant herein. Similarly, this Application would clearly be used in another development in Greenwhich Village/St. Vincent's Hospital in which this same attorney and none other than Jack Rudin have teamed up. Applicant's attorney has discussed other pending projects in its application - why should they object to opponents doing the same. Once again, they suggest one rule for Applicants, and another rule for Opponents.

Relevance of the Landmarks Preservation Commission Determination.

Oddly, the Applicant as its closing point states that the project was "approved" by LPC. This is a silly argument. The BSA considers separately distinct matters than those considered by the LPC. The LPC, unlike the BSA, is not even a quasi-judicial tribunal. The LPC moreover, was not aware that windows were being blocked up in 18 West or that all programmatic needs could be met in an as of right building. Finally, we once again refer to LPC Commissioner Roberta Gratz's vote of no on this project (Opp. Ex. D), and her comment concerning the more than generous space available to the Congregation. Opp. Ex. D, lines 24-5.

Freeman Comments re Monetization:

Page 2 (3) of the Applicant's feasibility consultant Freeman's letter of January 30, 2008 states:

> Monetization
>
> The Sugarman Letter states,
>
> *"In all of the feasibility study scenarios, the Applicant will receive in its own coffers the "acquisition cost", i.e., the proceeds from the "sale" of the land, and these funds are of course available to the Applicant to meets its programmatic need."*
>
> This is not correct, and it was clearly identified within the report that the costs of construction of the community facility portion of the development were being carried by the synagogue. Therefore the proceeds of sale would be used to pay for such costs and not be available to the applicant for its programmatic need.

Mr. Freeman's response is so so confused – this is the type of submission from the Applicant which abuses this hearing process. Although Freeman claims "that is not correct", he clearly conceded that the "Applicant will receive in its own coffers the "acquisition cost", .i.e. the proceeds from the sale of the land." So, this part of the statement is true. The Applicant has stated repeatedly that it needs the funds from the condominiums to build the community house and meet its programmatic needs. So, Freeman admits that any proceeds of sale would in fact be used to construct the building to meet the programmatic needs of the Congregation. So, Freeman acknowledges the accuracy of the statement, but still claims that "This is not correct."

In the final analysis, it is up to the Applicant to make its case - it is not appropriate for the Applicant to ask the BSA to endlessly permit the Applicant to submit a stream of conflicting permutations and to continue to dodge basic issue such as the finding to which its feasibility studies relate. Yet, Applicant also cannot be permitted to slip in changes at the last minute without providing an opportunity to the opposition to analyze the claims.

Finally, given the endless stream of distortions and mistakes, the Applicant should be accorded no benefit of doubt as to its conclusory, conflicted and unsubstantiated assertions. The Congregation is represented by experienced professionals - enough is enough.

Sincerely,

Alan D. Sugarman

P.S. Supporting Documents are posted at [ProtectWest70Street.org.]

cc:

Jed Weiss
Jeff Mulligan
Landmark West
Shelly Friedman