SUMMARY OF FLAWS

PREVENTING REASONED ANALYSIS

OF APPLICANT'S REQUEST FOR VARIANCES

(June 10, 2008)

Affected Premises:

6-10 West 70th Street

Block 1122, Lots 36 & 37

18 West 70th Street
91 Central Park West
101 Central Park West
Other residents of West 70th Street
&
LANDMARK WEST!

NEW YORK CITY
BOARD OF STANDARDS AND APPEALS

Application: 74-07-BZ

Affected: 6-10 West 70th Street

SUMMARY OF FLAWS PREVENTING REASONED ANALYSIS OF APPLICANT'S REQUEST FOR VARIANCES

Premise Block 1122/Lots 36 & 37
Manhattan

Applicant: Congregation Shearith Israel
6-10 West 70th Street
99-100 Central Park West

The purpose of this statement is to bring to the Board's attention various **misrepresentations, obfuscations and omissions of important facts** in materials presented by Congregation Shearith Israel (Applicant) in pursuit of 7 zoning variances to construct a new community house topped by 5 floors of luxury condominiums, exceeding height, setback and lot coverage requirements.

Applicant has repeatedly ignored the Board's questions, comments and requests for information concerning key issues. Moreover, Applicant's submissions are riddled with conclusory statements, unsupported by germane facts and insufficient under Section 72-21 of the New York City Zoning Resolution.

The following statement itemizes many, but by no means all, such instances. Because of Applicant's continued failure to provide the Board with information necessary to a reasonable evaluation of its arguments in terms of the 5 findings required under 72-21, this application should be dismissed.

Furthermore, in order to clarify and correct the record, Opposition requests the opportunity to cross-examine Applicant during the public hearing scheduled for June 24, 2008.

Background

On April 2, 2007, Applicant submitted an application to the Board for variances to construct a non-complying building adjoining its landmarked synagogue at Central Park West and West 70th Street in Manhattan. On June 15, 2007, the Board issued a Notice of Objections itemizing 48 objections and requiring Applicant to address each objection point by point.

Applicant submitted a revised application on September 10, 2007. The Board issued a Second Notice of Objections on October 12, 2007, this time itemizing 22 objections, some of which

reiterated previous objections that Applicant had failed to address as instructed. Applicant submitted a second revised application on October 26, 2007.

The Board raised additional questions and concerns at three subsequent public hearings on November 27, 2007, February 12, 2008, and April 15, 2008, each of which resulted in an application revised in certain aspects, but still providing inadequate information about the proposal. Applicant has been asked to appear at a fourth public hearing on June 24, 2008.

What follows is a partial summary of critical issues that remain unaddressed.

NO COMPARISON OF PROPOSED SCHEME TO AS-OF-RIGHT SCHEMES

The Applicant ignored the Board Chair's explicit instructions to provide a single document comparing the current proposed scheme to as-of-right schemes.

At the April 15, 2008, public hearing, the Board Chair stated:

> "…I think you should really give us a stand-alone document which explains all this information that we've seen up till now and how this project has changed at one place…" (4/15/08 transcript, p. 20, lines 439-441)

and

> "I think you should go back to your initial as-of-right, which is the mixed community facility and residential within R-8, the envelope. That was the threshold issue which you started off with and then you could look at the two alternatives that you provided to us now which is your current proposal and your lesser variance alternative." (4/15/08 transcript, p. 6, lines 117-121)

Applicant's May 13, 2008, submission is not the "stand-alone" summary the Board requested. It **fails to provide the side-by-side comparison of the initial mixed-use, as-of-right building** ("Scheme A" in Applicant's October 26, 2007, and December 21, 2007, submissions) to the current proposed scheme.

Instead, Applicant has compared its latest proposed scheme to "two hypothetical as-of-right mixed-use building scenarios" which it calls "AOR #1" and "AOR #2".[1] But, these 8- and 9-story schemes are not as of right. Describing them as "AOR" is a gross misrepresentation. **No drawings of either so-called AOR scheme are provided**. Clearly, neither represents Scheme A. Applicant also neglects Scheme C (all-residential, not mixed-use), even though 72-21 (b) speaks of the reasonable return for the entire zoning lot, not just on a bifurcated segment.

Applicant's submission **fails to analyze Scheme A and Scheme C using the revised site value**.[2] Therefore, even if the Board were to refer back to Applicant's previous submissions, it

[1] Friedman & Gotbaum Statement in Support revised May 13, 2008, p. 43.

[2] The Chair directed Applicant to "remove the rights that are attributed towards the synagogue space and take that out of your equation" in order to arrive at a more "credible" site value (4/15/08 transcript p. 3, lines 60-61; p. 4, lines 68-69)

would be unable to compare the proposed scheme to the as-of-right schemes and evaluate the application in terms of finding (b).

INSCRUTIBLE ANALYSIS OF AN ALL-RESIDENTIAL, AS-OF-RIGHT SCHEME

Applicant claims that only 17,780 sq. ft. of a 28,724 sq. ft. an "All Residential FAR 4.0" building – only 62% – would be sellable.[3] **Applicant offers no explanation as to the use or loss of the remaining 38% of the building.**[4]

Applicant's Scheme C also neglects the 6,400 sq ft subcellar which is assigned for use as a "multi-function room" (i.e., banquet hall) accommodating 350 people in both the as-of-right and proposed mixed-use schemes.[5] Scheme C **thus fails to factor in any potential income-producing use on the subcellar level.**

As a result, Applicant's contention that its site is "wholly impractical and financially infeasible to develop"[6] is without support.

NO ANALYSIS OF ACCESSIBILITY AND CIRCULATION IN MIXED-USE, AS-OF-RIGHT SCHEME

Applicant leans heavily on arguments regarding accessibility and circulation. However, Applicant never admits the obvious--these needs can be accommodated in an as-of-right mixed-use building.

In its January 28, 2008, submission, Opposition provided the missing analysis using Applicant's own drawings (Opp. Ex. M, FF & GG), showing that all of the circulation and access needs claimed by Applicant are resolved within the footprint of the existing building and, indeed, upon a small portion of this footprint. As architect Craig Morrison pointed out in his testimony before the Board on April 15, 2008, "It appears that the only required change is to replace the existing elevator with one that is ADA compliant and that extends to the cellar levels." (4/15/08 transcript p. 27, lines 603-4) **Applicant has not contested these observations, but yet continues to claim access issues.**

FAILURE TO DISTINGUISH BETWEEN RESIDENTIAL AND COMMUNITY FACILITY SPACE IN CONSTRUCTION COST ANALYSES

The Board has repeatedly instructed Applicant to provide financial analyses for the residential portion of the proposed building only. Yet, Applicant's revenue and cost estimates for the residential and community facility components remain entangled.[7]

Applicant fails to follow the Board's Instructions for Form BZ, which require:

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[3] Freeman Frazier & Associates letter dated December 21, 2007, p. 11, Schedule A1.
[4] Martin B. Levine, MAI, letter dated June 10, 2008, p. 4. Attached.
[5] Platt Byard Dovell White drawings dated 10/22/07, P-6 and AOR-C-6.
[6] Friedman & Gotbaum, p. 52.
[7] See James E. Mulford letter dated June 9, 2008, pp. 9-10. Attached.

> "6. All construction cost estimates must be submitted by an architect, engineer, builder or contractor, other than the owner or applicant, and must be signed and sealed."

Applicant provides no evidence that McQuilkin Associates, Inc., meets these standards and provides only 1 page of McQuilkin's 15-page report, making it impossible to evaluate McQuilkin's assumptions and methodology. One cannot determine how costs between the proposed new building have been allocated to the "school" and "residences" or even how these terms are defined. For instance, does "school" include the lobby, synagogue extension, multi-purpose room or other spaces related to the community facility?

It is also unknown whether the 14 pages not provided from McQuilkin's report contain additional information that would be relevant to the Board's analysis.

The fundamental flaw in Applicant's methodology is that much of the revenue generated by the "purchase" of the residential portion by a "developer" is absorbed in the cost of constructing the new community house, hiding the true return to Applicant of the overall development project.[8] Applicant has already stated that it will act as its own developer, reaping the benefits of the luxury condominium development and the community facility simultaneously.

Applicant's unsuccessful attempts to draw a firm analytical distinction between program- and non-program-related space in the proposed new building reveals a basic problem at the core of the "hybrid" approach, which treats the institutional and residential components as though they were separate applications. In seeking to meet both programmatic and financial needs on the same site, fulfilling one need places inevitable constraints on the other. For example, in floors 1 through 4 of the proposed building, approximately 2,043 gross sq. ft. is set aside for residential use, space that might otherwise provide flexibility for locating classrooms or other program-related functions without recourse to variances.

FAILURE TO ADHERE TO BOARD RULES FOR FINANCIAL ANALYSIS

Applicant continues to ignore the Board's "Detailed Instructions for Completing BZ Application," particularly Item M, "Financial Feasibility Study." First, expert real-estate appraiser Martin B. Levine of Metropolitan Valuation Services finds that none of Applicant's many submissions address acquisition costs and date of acquisition as well as market value, as required by the Board's rules.[9]

Levine also points out:

> "Quite inexplicably, Freeman/Frazier continues to process their feasibility calculation assuming financing, and charging the development millions of dollars in interest andother borrowing costs. **Disingenuously, they effectively calculate the return on equity, but compare not the equity investment, but rather the total project investment as the percentage return.** This error is egregious; calculated correctly, even Freeman/Frazier's

[8] Mulford, pp. 15-16.
[9] Board of Standards and Appeals "Detailed Instructions for Completing BZ Application," Item M, #5, cited in Levine, p. 6. See also Katherine L. Davis letter, dated June 10, 2008. Attached.

> distorted value assumptions prove that development is economically feasible *without any variances.*"[10]

Applicant's failure to follow the Board's rules for financial analysis results in dramatic misrepresentations of the returns produced by Applicant's various schemes.[11]

In addition, Levine notes:

> "The BSA clearly defines net profit as the net sellout value less total development costs and dictates economic feasibility as measured by the percentage return on equity (net profit divided by equity). **Freeman/Frazier appears to have simply ignored this dictate and measure economic feasibility as the net equity profit divided by the total investment instead of the total equity investment.** This is an extraordinary error…"

INCOMPLETE DISCLOSURE AND ANALYSIS OF INCOME POTENTIAL ON SITE

Given that financial need remains central to Applicant's argument for variances, it is significant that no information about Applicant's financial situation (such as its major donors, endowment, etc.) is provided in any of the submissions. Not only would this information shed light on Applicant's ability to function without variances, but it would also affect the financial analysis.

A partial list of potential income sources on the site includes the market-rate residential unit located in the Parsonage; the tenant school, Beit Rabban; the Toddler Program; the caretaker's apartment; and the 6400-sq.-ft. multi-purpose facility (i.e., banquet hall).

In keeping with the Board rules for feasibility studies of development proposals including rentals, Applicant should provide detailed analyses of these sources of income.[12]

REPEATED ATTEMPTS TO MISLEAD THE BOARD REGARDING SITE VALUE

At the April 15, 2008, public hearing, the Board expressed concern about the credibility of Applicant's site value. Chair Srinivasan stated:

> "…I think we're we're questioning whether you can actually build the Sliver building given that there are other zoning rules that may adjust… So, that's, I think, the reason why there is some concern on the Board's part of whether you can actually get Central Park views and so we think a more reasonable analysis is to essentially take that out of the equation. It's a more conservative approach but I think it would be more credible." (4/15/08 transcript, p. 5, lines 102-104, 106-110)

This concern echoed the Board's June 15, 2007, and October 12, 2007, Notices of Objections. Objection 22 in the October 12 Notice stated:

> "The response given to Objection # 36 of the First Notice is not satisfactory. It does not directly respond to the overall point that because the development site, although partially

[10] Levine, p. 2. See also Mulford, pp. 11-14.
[11] See Mulford.
[12] Board of Standards and Appeals "Detailed Instructions for Completing BZ Application," Item M, #4.

> located within an R10A district, is primarily zoned R8B and located entirely within an historic district, and thus cannot reasonably utilize additional floor area from the R10A district."

In its May 13, 2008, submission, **Applicant again inflates the site value by selecting an entirely new set of comparables and committing a fatal technical error in its appraisal mathematics.** Expert appraiser Martin B. Levine estimates that these and other errors lead to a **20% inflation of the site value.**[13]

Applicant also factors in air rights from the Parsonage site on Central Park West, which is zoned R10A and also located in the historic district. Because of the historic district designation and the regulatory purview of the Landmarks Preservation Commission, Applicant cannot reasonably assume that the floor area over the Parsonage could be used up to the maximum R10A envelope.

Moreover, Applicant's methodology assumes that a "developer" would pay for development rights that are not used. **"Insistence that the feasibility of development should be measured using a premise that charges the development millions of dollars for unused floor area is unequivocally wrong."**[14]

Another example of Applicant's attempts to mislead the Board on site value is Applicant's continued reliance on 19,755 sq. ft. as the as-of-right floor area.

At the April 15, 2008, public hearing the Board Chair explicitly instructed Applicant to explain its basis for using 19,755 sq. ft. to calculate site value.

> "If you're saying it's 19,000 and change, just explain to us where that came from?" (4/15/08 transcript, p. 8, line 180)

and

> "Mr. Freeman, you've already mentioned at the podium today, you're talking about some 19,000 square feet. We've already said explain to us where that number comes from and how you rationalize that as an as-of-right FAR on the property, all right?" (4/15/08 transcript, p. 13, lines 268-271)

Freeman's May 13, 2008, submission offers no rationale for assuming 19,755 sq. ft. as a basis for calculating site value other than stating "…we have assumed that the 19,755 sq. ft. could be achieved by utilizing the as of right buildable floor area from the parsonage portion of the site." In fact, this number reflects the floor area in the invalid "Sliver building" proposal, making it clear that Applicant cares less about coming up with a realistic site value than with a number, however arbitrary, that fits into a financial analysis showing its proposed scheme as the only feasible development option.[15]

FAILURE TO EXPLAIN NEXUS BETWEEN REQUESTED VARIANCES AND PROGRAM NEEDS

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[13] Levine, p. 3.
[14] *Ibid*.
[15] Mulford, pp. 10-11.

In its June 15, 2007, First Notice of Objections, the Board instructed Applicant to provide "more detail of the alleged nexus of CSI's programmatic needs and the proposed waivers requested" (Objection 5, also relating to Objections 6-9). At its November 27, 2007, public hearing, the Board explicitly rejected Applicant's assertion that the proposed luxury condominiums bear any relationship to Applicant's programmatic needs.

Yet, Applicant continues to argue that

> "…the addition of residential use in the upper portion of the building is consistent with CSI's need to raise enough capital funds to correct the programmatic deficiencies described throughout this Application",[16]

and

> "…the New Building addresses the programmatic difficulties by providing…(3) residential use on floors 5-8 (plus penthouse) to be developed as a partial source of funding to remedy the programmatic religious, educational and cultural shortfalls on the other portions of the Zoning Lot."[17]

Despite the Board's clear dismissal of this argument, **the need to raise funds remains central to Applicant's claim that it "can no longer meet its religious, educational and cultural programmatic needs" without variances** (p. 32). Applicant has put forward no other legitimate justification for the upper-floor variances associated with the luxury condominiums.

FAILURE TO CITE SPECIFIC "UNIQUE PHYSICAL CONDITIONS"

Applicant has yet to name one "unique physical condition" (as required and defined under finding "a") that would prevent it from constructing an as-of-right building on its site. A split zoning lot is not a physical condition. Neither an allegedly obsolete building nor lack of circulation and accessibility nor the presence of a landmark or a building of specialized religious importance constitute physical conditions inherent in the zoning lot.

The test of finding "a" is that unique physical conditions give rise to "practical difficulties and unnecessary hardship". **Applicant is utterly incapable of linking any hardship it may experience to the physical characteristics of the zoning lot.**

ERRONEOUS AND ILLOGICAL EXPLANATION OF PROGRAM USAGE AND GROWTH

The most glaring of Applicant's overstatements regarding program usage is its claim that "Saturday services attract up to 500 worshippers".[18] Recent observations counted between 8 (Thursday morning service, observed June 5, 2008) and 47 (first night of Passover service, observed April 19, 2008) attendees, suggesting that **Applicant's assertions regarding demand for additional space for "religious, educational and cultural" needs are grossly inflated.**

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[16] Friedman & Gotbaum, p. 30.
[17] *Ibid*., pp. 3-4.
[18] *Ibid*., p. 20.

Applicant wrongly calculates the percentage increase of children in the Toddler Program that it claims drives its need for rear-year variances. Increasing enrollment from 20 to 60+ toddlers is a 300% increase, not 66% as asserted by Applicant.[19] Furthermore, expanding this program from 3 hours per day, twice per week, to 10 hours per day, 5 times per week represents an 800% increase. Yet, Applicant offers no reasonable basis for projecting this kind of exponential growth. The only rational explanation is that the numbers are inflated to justify the rear yard variances.

Applicant provides contradictory statements about the degree to which the income-producing tenant school, Beit Rabban, may influence its need for additional space. In its May 13, 2008, submission, Applicant states:

> "Beit Rabbin is unaffiliated with CSI other than as its tenant and membership in CSI is not a prerequisite for admissions."[20]

However, on the same page, Applicant states:

> "While the focus of this Application for expanding its space is on its own pastoral and educational programming, Beit Rabban's own growth is a validation of the need for additional space for educational religious purposes."

The relationship between Beit Rabban and Applicant's need for additional space is also confused by the note on its Program Usage Chart that "Beit Rabban and CSI will also share classrooms as mutual programs required."[21]

Despite Applicant's claims that "the relationship between the two organizations [Congregation Shearith Israel and Beit Rabban] was borne of the fact that like all other ancillary religious schools, CSI's classrooms are vacant during the hours of the regular school day," the Environmental Assessment Statement included with Applicant's May 13, 2008, submission makes it clear that "Private School Students" are the primary users of the proposed New Building, far outnumbering other users.[22]

Applicant repeatedly argues that its proposal is the only feasible option for the development site. Yet, no comparison between existing and proposed usage has been provided. **Applicant apparently made no attempt to analyze the potential for accommodating programmatic needs in an as-of-right building.** Applicant also ignored the potential for locating programmatic needs elsewhere on the zoning lot.[23] Opposition has provided a partial list of potential space to accommodate programmatic needs in Opp. Ex. GG of its January 28, 2008, submission.

Careful examination of the record going back to 2002, when this application was first submitted to the Landmarks Preservation Commission, shows that there is great disparity in the

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[19] *Ibid*., p. 29.
[20] *Ibid*., p. 12
[21] *Ibid*., May 13, 2008, Exhibit A.
[22] Environmental Assessment Statement, revised May 12, 2008, p. 7f. For further discussion of this issue, see James A. Greer, II, letter dated June 9, 2008. Attached.
[23] For example, Applicant ignores the potential educational use of the Parsonage interior, currently rented out for residential use to Lorin Maazel, the conductor of the New York Philharmonic and unaffiliated with the synagogue.

arrangement of space in the proposed new community house. For example, Opposition's January 28, 2008, submission (Opp. Ex. B) points out Applicant's inconsistent statements concerning the small synagogue. At a meeting of Community Board 7 on October 17, 2007, Applicant claimed that leaving the small synagogue in its present location was "an issue of faith." However, previous submissions to the Landmarks Preservation Commission showed the small synagogue relocated to the new building.

Furthermore, Opp. Ex. H demonstrates Applicant's shifting program for the 4th floor. In 2002, the 4th floor was to be used for offices and a conference room (no classrooms). Today, Applicant argues that not only is it necessary to incorporate a caretaker's apartment into the new building, but it must be located, along with classrooms, on the 4th floor.

These kinds of inconsistencies undercut Applicant's repeated statements that its programmatic needs can only be met by the proposed noncompliant building. The obvious explanation is that the Applicant has creatively manipulated it programmatic needs in order to justify the rear yard variances in the lower floors, the dimensions of which have remained unchanged since 2002, even as the program has remained a moving target.

MISCELLANEOUS

In both its First and Second Notices of Objection (June 15 and October 12, 2007), the Board instructed Applicant to explicitly state the number of stories (9) in the introductory section. Applicant continues to refer to the proposed building as 8 stories plus a penthouse.

During the April 15, 2008, public hearing, Chair Srinivasan specifically requested a "revised statement which really does speak to the case law that gives deference to religious institutions" (Transcript, p. 1). No case law references were provided.

Applicant repeatedly implies that its proposed noncompliant building is the only development that would be approved by the Landmarks Preservation Commission.[24] There is no basis for this misleading assertion since the Commission was never asked to review an as-of-right scheme.

CONCLUSION

Applicant fails to provide sufficient evidentiary basis for its claims that an as-of-right building is not feasible on this development site. Therefore, this application must be denied.

[24] In its May 13, 2008, submission, Applicant states that the Landmarks Preservation Commission "has approved unanimously both the massing and the design of the New Building, and by so doing has expressed views substantially similar to CSI regarding the need to protect the architectural heritage of the landmarked Synagogue." But, the approval was not unanimous - it was not approved by Commissioiner Gratz.