

HILLER, PC

Attorneys at Law
600 Madison Avenue
New York, NY 10022
(212) 319-4000

Web Address: www.hillercpc.com
Direct email: mhiller@hillercpc.com

Facsimile: (212) 753-4530

December 14, 2016

Hon. Margery Perlmutter
Board of Standards and Appeals
250 Broadway, 29th Floor
New York, New York 10007

Re: 6-10 West 70th Street
Calendar No. 74-07-BZ
Manhattan Block 1122, Lots 36 and 37

Dear Chair Perlmutter and Commissioners:

We represent the West Side Neighbors Association -- a coalition of residents who live in close proximity to 6-10 West 70th Street (the "Coalition"). We write in connection with the application ("Application") by Congregation Shearith Israel ("Applicant") to: (i) extend the Applicant's time within which to achieve substantial completion of the construction work associated with the above-referenced variance granted August 25, 2008 ("2008 Variance"); (ii) permit a so-called "minor modification" to the original plans approved by this Board in connection with the 2008 Variance ("BSA Approved Plans"); and (iii) waive Board rules to permit consideration of these matters on the Special Order Calendar ("SOC"). As demonstrated below, the Application should be denied in its entirety and, based upon new evidence recently obtained, the 2008 Variance should be vacated with prejudice or, at a minimum, re-opened to a new review process.

EXECUTIVE SUMMARY

By its Application, the Applicant concedes that its time within which to achieve substantial completion of the work associated with the 2008 Variance expired nearly a year ago. Offering a panoply of excuses for failing *even to begin* construction (much less substantially completing it), the Applicant contends that proposed modifications to the BSA Approved Plans are allegedly "minor" and thus, the Applicant should be able to avoid reassessment of the 2008 Variance. As shown below, the Applicant is wrong.

First, notwithstanding the number of instances in which the Applicant refers to the changes to the BSA Approved Plans as "minor," the proposed modifications ("Proposed Substantial Modifications") are significant and would substantially alter the construction of the proposed

building (“Proposed Building”). All tolled, the Applicant has requested permission to make approximately 100 changes to the Proposed Building, many of them material, including, among other things, expansion of the underground footprint, creation of new vault space beneath the sidewalk along West 70th Street (requiring a new excavation and re-engineering of the Proposed Building’s structure), changes to the number and configuration of rooms and spaces on every floor, removal of entire rooms and other spaces throughout the Proposed Building, the elimination of the second floor roof terrace and its replacement with new air-ventilation components (the adverse environmental impacts with respect to which have never been evaluated), material modifications to the core elements (including, *inter alia*, stairs and elevators) throughout the Proposed Building, changes to egress corridors, elimination of the expanded synagogue space, and significant alterations to the mechanicals (again, throughout the entire Proposed Building). Such modifications, both individually and in the aggregate, constitute material alterations under the Board’s Rules, rendering consideration of the Application on the SOC completely inappropriate. The Applicant’s efforts to minimize these Proposed Substantial Modifications should be rejected.

Second, aside from the impact that the physical changes would have on the Proposed Building, the Proposed Substantial Modifications significantly alter the financial calculus associated with the Applicant’s original 2008 application (“Original Application”) and 2008 Variance. As shown below, it is well established that, under circumstances in which an applicant proposes modifications of this nature, updated financial analyses must be prepared; here, the Applicant has not provided any updated financials. Thus, the record does not contain an updated analysis to address the extent to which the Proposed Substantial Modifications would increase or reduce the costs associated with the project (“Project”).

Third, the passage of time constitutes a substantial and material change in circumstances warranting rejection of the Application or, at worst from the Coalition’s perspective, reconsideration of the entire 2008 Variance. According to a 2015 Appraisal attached to a petition (“Petition”) filed by the Applicant with the New York State Supreme Court (“Applicant’s 2015 Appraisal”), the value of the Proposed Building and the revenue generated by the proposed sale of the luxury residential apartments have doubled in the more than eight years since the Original Application. Specifically, according to the Applicant’s 2015 Appraisal, the value of the Proposed Building, upon completion, would be \$89,900,000 – far in excess of the amount represented by the Applicant on the Original Application. More importantly, the *net proceeds* recovered by the Applicant from the sale of the luxury residential condominiums (“Luxury Condominiums”) are expected to be, according to the Applicant’s own appraiser (the “Applicant’s Appraiser”), \$61,300,000. Such evidence suggests that the justification offered by the Applicant in support of the 2008 Variance no longer exists or, if it does, the extent of the variance necessary to alleviate the alleged hardship (which, as shown below, never actually existed) likely has changed. Furthermore, as referenced above, the most recent plans filed by the Applicant (“November 2016 Plans”) propose a substantial reconfiguration of virtually every space within the Proposed Building and the creation of new, previously-undisclosed, vault space beneath the sidewalk on West 70th Street. The costs associated with these and other Proposed Substantial Modifications must be re-evaluated. At a minimum, the (B) and (E) Findings must be

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revisited, as the “dollars and cents” analysis provided by the Applicant nearly nine years ago is markedly stale and, at this point, grossly inaccurate.

Fourth, we are constrained to point out that the Applicant has engaged in an unfortunate pattern of deception with respect to its communications with the Board, other City commissions and agencies, and the Courts. As shown below, after the Applicant filed the BSA Approved Plans, the Applicant filed a new and entirely different set of plans with the Department of Buildings (“DOB”) in 2013 (“2013 DOB Plans”). The 2013 DOB Plans were later amended in 2015 (“2015 DOB Plans”). And the 2015 DOB Plans eliminated 80% of the classrooms that the Applicant insisted to this Board were absolutely indispensable to achievement of its programmatic needs. Thus, the Applicant argued to this Board that the absence of supposedly mission-critical classrooms created an irremediable hardship purportedly justifying the 2008 Variance and then the Applicant substantially eliminated them in a new set of plans to the DOB.

Worse, the Applicant failed to disclose the 2015 DOB Plans to the Board or the opposition. It was only after the DOB issued an initial approval of the 2015 DOB Plans that they were discovered by the opposition and subjected to zoning challenges (Exh. 2) which resulted in rescission of the approval (Exh. 3) and issuance of a Stop Work Order (Exh. 4). Recently obtained documents reveal that the Applicant represented to the Office of the Attorney General and the New York State Supreme Court that the work on the 2015 DOB Plans could be completed within one year (Exh. 5 at 3). The only appropriate inference from these circumstances is that the Applicant was attempting to sneak a rogue set of plans past the DOB, Board and opponents of the 2008 Variance, and then expedite construction in order to avoid the scrutiny associated with the elimination of the classroom space which, we emphasize, was offered as among the most compelling justifications for the 2008 Variance (Transcript at 002988, 2989, Exh. 6).

The foregoing circumstances are made decidedly worse by the Applicant’s recent representations to the Board. Specifically, when the Board recently (at the October 14th Hearing) inquired as to the reason why the 2015 DOB Plans eliminated the vaunted classroom space in favor of office space, the Applicant’s Architect answered that it was the product of an alleged labeling error – that the offices on the 2015 DOB Plans were supposed to have been labeled “classrooms.” Unfortunately, the Applicant’s Architect’s statement was false. As shown below, the Applicant’s 2015 Appraisal filed with the State Attorney General and New York State Supreme Court specifically makes reference to, and relies upon, the 2015 DOB Plans and, in that connection, their designation of space on the second through fourth floors as “office space” rather than “classroom space” in computing a value for the Proposed Building (Exh. 5 at 2). In particular, the Applicant’s Appraiser pointed out that, based upon the 2015 DOB Plans, the Applicant would be able to rent or sell the “offices” on the 1st through 4th floors to a medical practice (Id. at 103). Thus, it was not a labeling error. The surreptitious replacement of classrooms in favor of offices was intentional, as were, we maintain, the misrepresentations to the Board on October 14th and the surreptitious filing of the 2015 DOB Plans. To eliminate all doubt on this issue, we will show below that other Applicant filings with the DOB and other aspects of the 2015 DOB Plans make plain that the replacement of

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classrooms with office space could not possibly have been inadvertent and was, in fact, absolutely by design. Indeed, the 2015 DOB Plans and the Applicant's Plan/Work Applications would make no sense in the absence of the elimination of the classrooms in favor of office space. In short, the Applicant and its Architect attempted to sneak an unapproved set of plans by the DOB and then, in an attempt to cover up its misconduct, arranged for its Architect to make a material misrepresentation to the Board.

The foregoing renders utterly absurd, the original, detailed representations made by the Applicant concerning the intended use of classrooms on the second, third and fourth floors ("Applicant's December 2007 Submission" at 9-12) -- classrooms which the Applicant expressly attempted to eliminate just last year (Exh. 7). As shown below, an applicant's misrepresentations and/or other acts of deception constitute well-established grounds upon which to deny applications filed with the Board.

Lastly, recently-disclosed documents reflect that the Applicant's overarching rationale for seeking the 2008 Variance in the first instance was never the alleged programmatic need for additional community space. Rather, the Applicant's motivation for proceeding with this Project, as proven by the Applicant's Petition with the Supreme Court, was its desire to maximize its economic return -- not resolve any alleged hardship. Under New York law and the doctrine of judicial estoppel, once a litigant has obtained relief based upon a representation made to the Court, that litigant is bound by that representation and cannot offer a countervailing representation elsewhere.¹ Thus, the Applicant is bound by its representation that its purpose in constructing the

¹Judicial estoppel, also known as the "doctrine of inconsistent positions," prohibits a party from asserting a position that contradicts what they previously asserted in a prior legal proceeding if the party secured a favorable judgment in that prior proceeding. *Ford Motor Credit Co. v. Colonial Funding Corp.*, 215 A.D.2d 435, 436 (2d Dep't. 1995) (citing *Prudential Home Mtge. Co. v. Neildan Constr. Corp.*, 209 A.D.2d 394 (2d Dep't. 1994); *Piedra v. Vanover*, 174 A.D.2d 191 (2d Dep't. 1992); *Environmental Concern v. Larchwood Constr. Corp.*, 101 A.D.2d 591 (2d Dep't. 1984)); see also *Kasmarski v. Terranova*, 115 A.D.2d 640, 642 (2d Dep't 1985) ("The policies underlying preclusion of inconsistent positions are 'general [considerations] of the orderly administration of justice and regard for the dignity of judicial proceedings'").

Moreover, the related doctrine of quasi-estoppel extends the application of judicial estoppel to statements made in prior "quasi-judicial" or administrative proceedings. *PL Diamond LLC v. Becker-Paramount LLC*, 2007 N.Y. Misc. LEXIS 4648, at *23 (Sup. Ct. N.Y. Co. June 6, 2007); see also *Zemel v. Horowitz*, 2006 N.Y. Misc. LEXIS 367, at *13 (Sup. Ct. N.Y. Co. Mar. 2, 2006) ("The same policies and principles underlying classic judicial estoppel have been extended to non-judicial circumstances by courts throughout the United States, including New York, where parties have been precluded from asserting inconsistent positions in a variety of situations."); *Missry v. Ehlich*, 1 Misc. 3d 723, 726-27 (N.Y. Civ. Ct. May 16, 2003) (holding that judicial estoppel applies regardless of whether the prior proceeding was judicial or administrative in nature). Additionally, the doctrine has been invoked by administrative agencies to prevent parties from alleging factual positions that contrast with

Proposed Building was to maximize its economic return – not to resolve any alleged hardship or address a programmatic need, neither of which is even mentioned in the Supreme Court Petition.

The submission below makes absolutely clear that the Applicant’s requests should be denied in their entirety with prejudice, and that any consideration of the November 2016 Plans should be subjected to a new review process, with emphasis on the (B) and (E) Findings, and a revitalized focus on the extent to which the Applicant genuinely (or not) has a programmatic need for a variance.

STATEMENT OF RELEVANT FACTS²

The Applicant’s Original Application and Subsequent December 2007 Submission Purporting to Delineate How Each Classroom in the Proposed Building Would Supposedly Be Used to Allow the Applicant to Achieve its Programmatic Needs

The Applicant submitted its Original Application for a Variance on April 2, 2007 (Exh. 9). The Original Application became necessary after the DOB issued the following objections and rejected the Applicant’s proposed plan for the project site (“Project Site”):

1. Proposed lot coverage for the interior portions of R8B & R10A exceeds the maximum allowed. This is contrary to §24-11/77-24. Proposed interior portion lot coverage is .80.
2. Proposed rear yard in R8B does not comply. 20.00' provided instead of 30.00' contrary to §24-36.
3. Proposed rear yard in R10A interior portion does not comply. 20.00' provided instead of 30.00' contrary to §24-36.
4. Proposed initial setback in R8B does not comply, 12.00' provided instead of 15.00' contrary to §23-633.
5. Proposed base height in R8B does not comply. 94.80' provided instead of 60.00' contrary to §23-633.

previous positions taken in *prior judicial proceedings*. See *Kasmarski* 115 A.D.2d at *642; *Human Resources Administration v. Pacheco*, OATH Index No. 907/90 (March 30, 1990).

²The Statement of Relevant Facts is not intended to constitute an exhaustive recitation of the circumstances relating to this matter, but rather lists only those particularly relevant to the Application and the Coalition’s Opposition.

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6. Proposed maximum building height in R8B does not comply. 113.70' provided instead of 75.00' contrary to §23-633.
7. Proposed rear setback in R8B does not comply. 6.67' provided instead of 10.00' contrary to §23-663.
8. Proposed separation between buildings in R10A does not comply. 0.00' provided instead of 40.00' contrary to §§24-67 and 23-711.

(DOB Objection Sheet, Exh. 10).

The new building as proposed in the Original Application was designed to have a floor area of 42,989.39 square feet, a floor area ratio of 4.09, interior lot coverage of 80%, base heights of 94.8' in the R8B portion of the lot and 105.8' in the R10A portion of the lot, a total height of 105.8', eight stories plus one penthouse (five of which, including the penthouse, would be residential), a rear yard of 20', and setbacks of 12' in the R8B portion of the lot and 15' in the R10A portion of the lot (Original Application, Exh. 9, at pp. 2, 15, 21-24).

The Applicant alleged that the Proposed Building was purportedly designed to “address several infringements on the mission of [the Applicant] as a house of worship, center of Jewish education and culture and provider of community programming open to the public” (*Id.* at p.2). The then-existing building on site supposedly did not meet the Applicant’s programmatic needs. And, according to the Applicant, an as-of-right construction would not feasibly address them (*Id.* at pp. 2-3).

The Applicant purported to justify a number of the waivers it requested by alleging that additional classroom space on the second, third, and fourth floors was indispensable to meeting its programmatic needs (*Id.* at pp. 21-23). Despite its supposed need for these classrooms, however, the Applicant originally failed to provide the Board with any details as to their proposed sizes, the specific programs to be taught therein, the number of students enrolled in each such program, the scheduling of those programs and any arising conflicts therefrom (*Id.*).

In response to the Board’s comments at the BSA’s November 27, 2007 hearing and after receiving various objections from its opponents, the Applicant, on December 28, 2007, finally supplied the Board with what the Applicant claimed were significant details as to the sizes and uses of the proposed classroom space (Applicant’s December 2007 Submission) (Exh. 7, at pp. 1, 9-13). In its response, the Applicant argued that the requested waivers, permitting a 20' rear yard rather than the required 30' rear yard under ZR §24-36, were essential to accommodate its Toddler, Hebrew School, and Adult Education programs (*Id.*). The Applicant also claimed that the proposed 15 classrooms would fit into a community facility with a complying rear yard only if some classrooms could be placed on the ground floor (*Id.* at p. 5). This alternative layout was supposedly infeasible, however, because, according to the Applicant, the substantial space on the ground floor had to be

dedicated to expanded synagogue use, thereby rendering that floor “entirely unavailable” for educational needs (*Id.*). Without utilizing the ground floor for classroom space, it was allegedly impossible to construct 15 classrooms and “necessary ancillary space” within a permissible footprint above the first floor of 64' wide x 70.5' deep (*Id.*). According to the Applicant, “the narrowness of the site requires that the classrooms be stacked with their length running north and south, thus generating the noncomplying rear yard condition on floors 2-4” (*Id.*). Amazingly, however, as shown below, the Applicant, after asserting that expansion of the synagogue was critical to achievement of its programmatic needs thereby precluding installation of classrooms on the ground floor, eliminated the expanded synagogue space from the November 2016 Plans.

In support of its supposed programmatic need argument, the Applicant outlined its three educational programs, detailing its claimed difficulties with accommodating those programs in its current facility and the solutions that would be provided by the Proposed Building. Before proceeding to identify the specific uses articulated by the Applicant on the Original Application, it is important to emphasize that the evidence recited hereinafter makes plain that the Applicant’s detailed allegations of supposed programmatic need – the particular alleged uses for each classroom that the Applicant initially did not provide to the Board – were entirely manufactured. The manufactured allegations of use were then disclosed as follows:

Hebrew School

- *Number of students:* 35-50.
- *Grades:* 1-10.
- *Current schedule:* Sundays - 9:30 AM - Noon; Weekdays - 3:30 - 6:00 PM.
- *Current location of classes:* 4 classrooms on the 3rd floor and 1 classroom on the 4th floor of the existing community house.
- *Conflicts:* 7 different learning groups are needed due to age disparity among the children; not enough classrooms in existing community house to accommodate these groups; different sized furniture for younger groups prevents sharing of rooms; existing classrooms occupied by Beit Rabban most weekdays (8:00 AM - 5:00 PM); insufficient number of restrooms for younger children.
- *Proposed building solutions:* 6 classrooms on the third floor designated by specific grade levels - 1 room for 1st - 3rd grade, 1 room for 4th - 5th grade, 2 rooms for 6th - 7th grade, 1 room for 8th grade, and 1 room for 9th - 10th grade; use of any of the 4th floor classrooms as needed; improved classroom accessibility by elevator and/or stairs; boys/girls restrooms located on the 3rd

and 4th floors.

Adult Education

- *Number of enrollees:* 5 to 50, depending on the course.
- *Ages:* 19-90.
- *Current schedule:* Sundays (Jewish Thought & Law) - 8:40 - 9:40 AM (40-50 adults enrolled) and 9:45 - 11:00 AM (5-15 adults enrolled); Mondays (Jewish Law & Lore - offered once/month) - 7:30 - 9:00 PM (17 adults enrolled); Wednesdays (Poetry Group) - 3:00 - 4:00 PM (15-20 adults enrolled); Thursdays (Meditations) - 11:00 AM - Noon (10-20 adults enrolled); Saturdays (Bible Class) - following Saturday service, 1.25 hours (25-50 adults enrolled).
- *Current location of classes:* the Elias Meeting Room on the first floor of the synagogue (775 square feet).
- *Conflicts:* Elias Room is the only room available for meetings by the Applicant's Board of Trustees and affiliated organizations and the only appropriately-sized and furnished setting for most adult group activities creating scheduling conflicts; sometimes inappropriately sized for groups too small or big; only one class can be scheduled at a time; when there are overlapping programs, adult programs can't be shifted to the existing community house because classrooms on the second floor have furniture unsuitable for adults and the third floor is completely occupied on Saturdays by the Saturday Youth Group.
- *Proposed building solutions:* additional classroom space allegedly allows the Applicant to provide new classes as well as offer concurrent classes thereby increasing member participation; class scheduling and classroom assignments will depend on member preferences and enrollment rates.

Toddler Program

- *Number of students:* 20 (program was oversubscribed).
- *Ages:* 2-4.
- *Current schedule:* Mondays, Wednesdays, Saturdays - 9:00 AM - Noon.

- *Current location of classes:* in the auditorium of the existing community house's lower level.
- *Conflicts:* issues with the immediate egress and entrance caused by the fact that the entranceway for the program is the same as that used by all visitors to the building; security and safety of children at risk due to egress problems and a lack of adjacent bathrooms forcing children to use adult bathrooms at the Synagogue's cellar level; lack of natural light or air in sub-grade space for children.
- Proposed building solutions: 6 large classrooms on the 2nd floor; classrooms accessible by elevator or stairs; addition of stroller storage area; addition of girls/boys bathrooms; additional classroom space permits expansion of the program to accommodate 60 students on Mondays - Thursdays (8:00 AM - 6:00 PM) and Fridays (8:00 AM - 4:00 PM).

(*Id.* at pp. 9-12).

In addition, the Applicant attached new drawings to its December 2007 Submission, which, unlike previously-submitted drawings (October 22, 2007 Proposed Drawings, Exh. 11, P-9 - P-11), distinctly labeled the 15 proposed classrooms by program type and/or grade level (see December 26, 2007 Proposed Drawings, Exh. 12, PROG P-9 - PROG P-11). Indeed, the attached 2nd floor drawing depicts six classrooms, each designated a "toddler classroom," including one which is specifically designated for "ages 2 and up" (*Id.* at PROG P-9). The drawing also shows four bathroom facilities located within three of the classrooms (*Id.*). The attached 3rd floor drawing depicts an additional six classrooms, each designated for a different grade level (*e.g.*, "grades 1-3"), a boys' bathroom, a girls' bathroom, and two individual bathrooms (*Id.* at PROG P-10). Lastly, the 4th floor drawing shows one classroom designated "grades 9-10" and two additional classrooms each designated "adult ed" (*Id.* at PROG P-11).

The Applicant's December 2007 Submission and the proposed drawings attached thereto gave this Board the mis-impression that additional classroom space was integral to achievement of the Applicant's programmatic needs. Indeed, during its presentation to Community Board 7 two months earlier, on October 17, 2007, the Applicant testified that construction of classrooms for the Hebrew School and other religious and educational use was "the primary purpose of space in the community house" (Transcript at 002935, Exh. 6). An increase in the size and number of classrooms was specifically offered as the basis for the rear-yard waiver (*Id.* at 002988). The Applicant claimed that, without the space increase and rear-yard waiver, the Applicant would be saddled with "substandard and very small classrooms" (*Id.* at 002989). The Applicant further testified that, among other things, allegedly "significant overcrowding" in its existing community space dictated the need for new classrooms and the variance requested (*Id.* at 002936).

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Furthermore, on November 19, 2007, the Applicant had specifically represented that “all” of the classrooms that were planned:

have a place in the synagogue’s programming for the synagogue’s use. There are 12 programs on floors two through four. *All* of those classrooms have a specific use for the synagogue, whether it’s a Hebrew School, toddler classes and adult seminar rooms and youth room [T]here’s one office which would be dedicated to the tenant school, *but that’s all* (*Id.* at 003139, Exh. 6).

As to whether it would have been possible to grant a lesser variance and reduce the number and size of classrooms, the Applicant responded:

All of those classrooms are in the area where we’re pushing into the back. That area is *all needed for classrooms* (*Id.* at 003140).

As to the number of classrooms, the Applicant made absolutely clear that, although having initially represented that 12 were necessary, the accurate figure was 15 classrooms and that all were “required to meet the [Applicant’s] programmatic needs and mission objectives” (Excerpt from Friedman & Gotbaum Letter at 5, Exh. 13). When asked point blank on January 29, 2008 what requirement dictated the need for all of the classrooms requested, the Applicant responded simply: “Programmatic requirement” (*Id.* at 003141).

However, the multitude of subsequent drawings submitted by the Applicant to the DOB and most recently to this Board, as well as the Applicant’s submissions to the Attorney General and New York State Supreme Court, indicate that this elaborate allegation of supposed programmatic need for classroom space was nothing more than a “dog and pony show.”

The 2008 Variance

The Board accepted the Applicant’s representations and granted the 2008 Variance (Exh.1). The 2008 Variance devotes considerable analysis to the Applicant’s contentions pertaining to the classroom space claimed to have been indispensable to the fulfillment of its religious mission (*Id.* at 3-4). Indeed, the Applicant’s detailed allegations with respect to need for classroom space seemingly carried the day:

WHEREAS in response to a request by the Board to document demand for the proposed programmatic floor area, the applicant submitted a detailed analysis of the program needs of the Synagogue on a space-by-space and time-allocated basis which confirms that the daily simultaneous use of the overwhelming majority of the spaces *requires* the proposed floor area and layout and associated waivers.

See id. at 4. The Board further emphasized that, although not specifically leading religious rituals in the classrooms:

religious use is not limited to houses of worship, but is defined as conduct with a religious purpose; the operation of an educational facility on the property of a religious institution is construed to be a religious activity and a valid extension of the religious institution for zoning purposes even if the school is operated by a separate corporate entity (*Id.* at 5).

Conditions Imposed With Respect to the 2008 Variance

Although granting the 2008 Variance, the Board did not issue a proverbial “blank check.” The Board conditioned the 2008 Variance on, among other things, that “any and all work shall substantially conform to the final drawings submitted to the Board” (*Id.* at 13).

The Board further made clear that the “approval is limited to the relief granted by the Board, in response to specifically cited and filed DOB/other jurisdiction objection(s) only” and that “substantial construction be completed in accordance with ZR §72-23” (*Id.* at 14). The Board concluded that the DOB “must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative and any other relevant laws under its jurisdiction ...” (*Id.*).

The Applicant’s 2013 and 2015 DOB Plans and Repeated Misrepresentations Thereafter to the DOB, New York State Supreme Court, State Attorney General and this Board

In 2013, following a litigation that concluded in 2012, the Applicant filed the 2013 DOB Plans.³ The 2013 DOB Plans were later amended, ostensibly in response to comments and objections from plans examiners at the DOB. Ultimately, however, in 2015, the Applicant submitted

³ Not coincidentally, the 2013 plans, which replaced the proposed classrooms on the fourth floor in the BSA Approved Plans with office space (2013 PW1A Form, Exh. 14, at 3), were submitted during the same year that the Beit Rabban school, the Applicant’s tenant in 2008, vacated its premises (Substantial Compliance Confirmation, Exh. 15, at 3, n. 2). This swift change in community facility design in response to its tenant’s vacancy represents one of the many misrepresentations that the Applicant made to this Board. In particular, the Applicant represented to this Board in its Original Application that “even without the Beit Rabban school, the floor area as well as the waivers to lot coverage and rear yard would be necessary to accommodate the [Applicant’s] programmatic needs.” (BSA Variance, Exh. 1, at 5). Yet, it is evident from the Applicant’s own admission at a Community Board 7 meeting on October 7, 2007 that “[i]f the tenant [Beit Rabban] left the site, then the [Applicant] would have a lot of empty classrooms,” (October 17, 2007 CB7 Meeting Transcript, Exh. 16, at 150), thereby substantially reducing its programmatic need.

plans that the DOB did approve – the 2015 DOB Plans (Exh. 17).

The 2015 DOB Plans, which are largely ignored by the Applicant in its November 2016 Submission to the Board, eliminated most of the classrooms that the Applicant previously claimed were indispensable, and replaced them with office space. The following **Table A-1** is illustrative:

Floor	BSA Approved Plans (Approved in 2008)	2015 DOB Plans (submitted to the DOB)
2nd	6 classrooms	3 classrooms
3rd	6 classrooms 1 office	0 classrooms 9 offices 1 conference room 1 waiting area
4th	3 classrooms 0 offices	0 classrooms 1 large office (capacity, 35 people)
Total	<u>Originally Represented to the Board</u> 15 classrooms 1 office	<u>Represented to the DOB</u> 3 classrooms 10 offices 1 waiting room 1 conference room

Compare BSA Approved Plans, Exh. 18 at P9 - P11 *with* 2015 DOB Plans, Exh. 17 at A.102.00 - A.104.00.⁴

It bears emphasis that, as shown above, the Applicant repeatedly represented to this Board that achievement of its programmatic needs would be possible only if the waivers were granted so that *all* 15 classrooms could be built on the second through fourth floors (Transcript at 002935, 002989, 002936, 002988, 003139-41, Exh. 6; Friedman & Gotbaum Letter at 5, Exh. 13; Original Application, pp. 2, 3, 5, 9-12, 15, 21-24, Exh. 9; October 22, 2007 Proposed Plans at P-9 to P-11, Exh. 11). And yet, the Applicant's 2015 DOB Plans proposed elimination of fully 80% of that classroom space.

The opposition and presumably the Board were completely unaware of the 2015 DOB Plans. And, amazingly, the DOB approved them – even though they are markedly different from the BSA Approved Plans. At the recent October 14, 2016 Board hearing, the Applicant was asked about this

⁴The foregoing Table A-1 is not exhaustive but merely representative of the wholesale changes to construction, layout and design of the BSA Approved Plans.

obvious discrepancy. In response, the Applicant's Architect alleged that he had made a labeling error – that there was no intended change in design, layout or construction. That is simply impossible for multiple reasons.

First, owing to population capacity, the requirements pertaining to supportive facilities, including toilets and sinks, for classrooms and offices are considerably different. Under the International Building Code (which the City has largely adopted), the ratio of toilets to number of men is 1:20; one toilet is required for every 20 women. The 2015 DOB Plans include only two toilets on the 3rd Floor, based upon a capacity of 18 people for the offices situated there. By contrast, the BSA Approved Plans for the third floor include eight toilets, ostensibly based upon occupancy levels appropriate for the six classrooms on the 3rd Floor referenced therein. In other words, the Applicant reduced by 75%, the number of toilets listed on the BSA Approved Plans in recognition of the reduced facility requirements for office use as opposed to classroom use. Had the Applicant's re-design of the 3rd Floor been the product of a mere labeling error, the number of toilets and other supportive facilities would not have been changed and reduced.

Second, a review of the Applicant's PW1A Forms (Plan/Work Forms), submitted to the DOB in advance of requesting a Certificate of Occupancy, confirms that, in March 2015, the Applicant identified the uses on the third floor as *office use only* -- not classrooms (2015 PW1A Form at p. 9, Exh. 19). By contrast, the Applicant's 2013 PW1A Form listed the use of the third floor as classroom space (Exh. 14). Thus, the Applicant and its Architect *changed* the use designations on the third floor to reflect that the rooms would be utilized as offices, not classrooms. This evidence, coupled with the Applicant's Architect's above-referenced changes to the plans to reduce the number of supportive bathroom facilities, constitutes damning evidence that the Applicant purposely attempted to surreptitiously obtain an improper approval of different plans from the DOB to accommodate office uses in the Proposed Building rather than the classrooms that the Applicant repeatedly asserted to this Board were indispensable to achievement of its programmatic need.

Third, the Applicant specifically and expressly relied upon the 2015 DOB Plans, including the references therein to office (rather than classroom) use, throughout the Applicant's Petition and 2015 Appraisal submitted to the State Supreme Court and State Attorney General. Specifically, the Applicant hired its Appraiser in 2015 to assess the value of the Proposed Building as complete (Exh. 5). The purpose of the Applicant's 2015 Appraisal was to persuade the Attorney General and the Court that a certain proposed loan to the Applicant was an appropriate use of the Applicant's resources, as it would supposedly help pay for the construction of the Proposed Building.⁵ According to the Applicant's 2015 Appraisal, the plans upon which the Appraiser relied to assess economic feasibility and appropriateness of the proposed construction loan were the plans that were approved on 5/4/2015 (Exh. 5 at 1) – the same approval date stamped on the 2015 DOB Plans (Exh.

⁵As a religious congregation, such transactions must be approved by the Attorney General and the Courts.

17). The Applicant's Appraiser proceeded to state that "the report assumes the proposed property will be built as described and detailed in the provided plans" (Applicant's 2015 Appraisal at 2, Exh. 5).

After acknowledging its reliance upon the 2015 DOB Plans, the Applicant's Appraiser proceeded to appraise the value of the Proposed Building based upon, among other things, the premise that the first four floors would be used as medical offices – not classrooms (Id. at 103). All told, the Applicant's Appraiser devoted 13 pages of analysis to the Proposed Building's community space being devoted to medical office use. The word "classroom" does not appear anywhere in the 141-page Applicant's 2015 Appraisal. Plainly, the Applicant and its Appraiser were representing to the Attorney General and Supreme Court that the space was intended for office, not classroom, use.⁶

If the Applicant were to argue that it was all a mistake – that no one (including the Applicant's Appraiser) noticed the so-called "mis-labeling" of classrooms as offices -- such would constitute yet *another* misrepresentation. The Applicant's Appraiser prepared its 2015 Appraisal on September 17, 2015 (Id. at 1). However, on June 10, 2015 and June 18, 2015 -- three months earlier -- Alan Sugarman and David Rosenberg, on behalf of various neighboring buildings, Landmark West! and other organizations, had already filed zoning challenges with the DOB, arguing that the Applicant had significantly and illegally altered the BSA Approved Plans, including by, among other things, replacing classrooms on the 3rd and 4th floors with offices ("Opposition's Zoning Challenges") (Exh. 2 at pp. 3-4). Thus, the Applicant fully knew in September 2015 when its Appraiser prepared the 2015 Appraisal, that the 2015 DOB Plans did not conform to the BSA Approved Plans.

Worse, the Applicant, on March 11, 2016, used the 2015 Appraisal (which expressly relied upon the wrongly-filed 2015 DOB Plans) in its Court filing to obtain permission for the construction loan for the Proposed Building, despite that, on September 22, 2015 – six months earlier, the DOB had granted Mr. Sugarman's Zoning Challenges and rescinded its approval of the 2015 DOB Plans (Exh. 3). Thus, when the Applicant submitted its 2015 Appraisal to the Court in March 2016, the Applicant knew that the 2015 DOB Plans upon which the 2015 Appraisal was based, had already

⁶To the extent that the Applicant were to argue that the Appraiser was simply identifying medical offices as the most productive use of the Proposed Building's community space, we respectfully remind the Board that the Applicant's Appraiser expressly relied upon the 2015 DOB Plans, which specified that the space previously designated as classroom space to this Board would, in fact, be used as office space. Had the Applicant properly designed the space as classroom space, the Appraiser would have been unable to represent to the Court that the community space would be best used as medical offices. It was precisely because the Applicant specifically designed the community space as office space rather than as classrooms that the Appraiser was able to prepare an appraisal that assessed the value of the Proposed Building based upon its use as a medical office building (on the first four floors).

been rejected by the DOB (Order granting Zoning Challenge, Exh. 3). Consequently, the Applicant could not have merely mislabeled the classrooms as offices; the Applicant and its Architect, in a calculated fashion, misled the DOB and misled the Court into believing that the 2015 DOB Plans had been approved when, in fact, the Applicant failed to submit them to this Board at all and, by the time the Applicant relied upon them before the New York State Supreme Court, the DOB had already rescinded its approval of them (September 22, 2015 Grant of Zoning Challenges, Exh. 3).⁷

The Applicant's Delay in Proceeding with Construction

In its Application, the Applicant proffers a series of excuses for its delay in proceeding with the construction of the Proposed Building. While we are in no position to deny that an assortment of medical issues may have afflicted persons associated with the Project, a review of the Applicant's Petition with the Supreme Court reflects that the reasons for the delay were the product of indecisiveness over whether to proceed with the construction at all and, if so, the extent to which loans rather than outside investment monies would be used to fund it (Petition at ¶¶4-8, Exh. 8). Ultimately, the Applicant decided to obtain a loan and forego outside investment – a decision based upon the Applicant's desire to maximize its return (*Id.* at ¶8).

Particularly striking, however, is that the Applicant's indecisiveness also extended to how to exploit the Luxury Condominiums to be constructed. Again, it bears emphasis that the Applicant initially represented to the Board and Community Board 7 (Exh. 1), that the sale of Luxury Condominiums would be necessary to fund the construction of the Proposed Building (October 17, 2007 CB7 Meeting Transcript, Exh. 16; December 2007 CB7 Resolution, Exh. 20); however, as late as March 2016, the Applicant submitted to the Court a risk-reward analysis that openly questioned whether the Luxury Condominiums should be sold at all, rented or used as parsonage (Exh. 21). In this regard, the Applicant, in another document submitted to the Supreme Court in March 2016, wrote:

In the development partner scenario, CSI [the Applicant] is locked into condo sales from day one. Selling condominiums to third parties limits CSI's future generations in redeveloping the property. The only way to exit this scenario would be to negotiate a very expensive

⁷To add insult to injury, the Applicant, on February 18, 2016, submitted yet another set of plans to this Board ("February 2016 Plans"), which differ from both the BSA Approved Plans (2008) and the 2015 DOB Plans upon which the Applicant relied in its Court filing less than one month later (Exh. 15, at 4-5). In the February 2016 Plans, the Applicant attempted to restore a few, but not all of the classrooms that the Applicant had alleged were indispensable to achievement of its programmatic needs, but later largely eliminated from its 2015 DOB Plans. Then, in November 2016, the Applicant restored all 15 of the classrooms to yet another set of plans without explanation. The rank inconsistency between the Applicant's multiple and substantially incoherent positions is maddening.

buy-out of all condominium units. In the equity partner scenario, CSI can explore selling off condominium units, raising funds to keep apartment for parsonage use, or undertaking a substantial fundraising campaign to pay back the construction loan and provide CSI with a rental building as a long-term annuity (*Id.*).

In its Petition to the Supreme Court, the Applicant repeated its unresolved approach with respect to how to use the Luxury Condominiums, averring that:

During the spring and summer of 2015, the Electors [of the Applicant] and other members of CSI through discussion decided to keep the timing and destiny of the [Proposed] Building on CSI's control, *i.e.*, the design and construction of the [Proposed] Building, and the ability to decide whether to sell space, rent space or keep the use of space for its own needs, including parsonage, ... (Petition at ¶8, Exh. 8).

In view of the Applicant's representation to this Board and Community Board 7 that proceeds generated by the sale of the Luxury Condominiums constituted an indispensable component of the plan to alleviate the alleged hardship by providing the funding supposedly necessary for the construction, it is difficult to conceive of how, in March 2016 -- less than a year ago -- the Applicant was seriously evaluating the prospect of (i) renting the units to generate long-term income as an annuity; or, in the alternative (ii) using the space as parsonage.⁸

As discussed in Point III below, the foregoing issues raise serious credibility concerns, requiring denial of the Application and vacatur of the 2008 Variance or, at a minimum, its wholesale reassessment.

POINT I. THE APPLICANT'S NOVEMBER 2016 PLANS INCLUDE SUBSTANTIAL MODIFICATIONS WHICH WOULD MATERIALLY ALTER THE DESIGN OF THE PROPOSED BUILDING

The Applicant is so devoted to convincing the Board that the Proposed Substantial

⁸We recognize that the BSA determined that the Applicant's argument regarding its need to sell residential space in order to construct its community facility fails as a matter of law (Exh. 1, at 6). Nonetheless, this does not detract from the fact that the Applicant initially based its claimed need to sell Luxury Condominiums upon the false premise that such sales proceeds would be necessary to fund construction of the proposed community facility portion of the Proposed Building, when, in fact, the Applicant still has not decided how to use the Luxury Condominiums (Exhs. 16 and 20).

Modifications are insignificant that the word “minor” appears repeatedly throughout the November 2016 Submission – 27 times. Other euphemisms for minor changes, such as the words “updated” (33 times), “shift” (5 times) and “added” (11 times), are also included, no doubt to convey that the November 2016 Plans supposedly include only negligible changes. In fact, however, the changes are substantial and pervasive.

Table B-1 below provides a side-by-side comparison of the BSA Approved Plans and November 2016 Plans. By way of overview, the Table shows:

- that the underground envelope of the Proposed Building expands beyond the originally-designed footprint by including new vault space beneath the sidewalk along West 70th Street, requiring a new and complex excavation, new perimeter footings, and a re-engineering of the Proposed Building’s structure;
- new core elements, including relocation of stairs, egress corridors, and elevators;
- relocation of mechanicals on virtually every floor;
- elimination of the expanded synagogue space – synagogue space which was alleged to be so indispensable to the Applicant that classroom space (which the Applicant also attempted to eliminate) had to be moved to the second through fourth floors;
- elimination of the second floor roof terrace and its replacement with three so-called “Dog Houses,” creating noise, ventilation and other potentially adverse impacts that have never been evaluated; and
- reconfiguration of the layouts on every floor of the Proposed Building.

All tolled, the November 2016 Plans contain approximately 100 changes to the BSA Approved Plans. See the **Table B-1** on the next pages.

<u>Floors</u>	<u>2008 BSA-Approved Plans</u>	<u>2016 Changed Plans</u>
Sub Cellar	<ol style="list-style-type: none"> 1. No vault space. 2. No elevator machine room 3. No mechanicals. 4. No sinks. 5. No columns. 	<ol style="list-style-type: none"> 1. Creation of vault space under the southerly curb of West 70th street. The addition of these vaults would require additional excavation work, an engineered solution to provide a space using perimeter columns and footings, and reconstruction or complete replacement of the sidewalk. All of this unnecessary work would certainly precipitate significant increases in construction costs. 2. New elevator machine room along eastern wall. 3. New mechanicals have been added along the eastern wall and southwest corner near the egress stairs. 4. A new room with two new sinks has been added east of the entrance to the multi-function room. 5. Three columns have been added to the multi-function room - the largest column closest to the southerly curb of West 70th would be unnecessary if not for the excavation of new vault space. <i>See above.</i>

Sub Cellar (continued)	<p>6. No buttressing of perimeter walls.</p> <p>7. No detention tank.</p> <p>8. Two sets of stairs - one in the northwest corner and one along the eastern wall.</p> <p>9. No audio visual equipment.</p> <p>10. Extension of synagogue across the western lot line.</p>	<p>6. New structural support added to buttress the perimeter walls, ostensibly as part of the new support system made necessary by the underground expansion.</p> <p>7. New detention tank has been added to the northeastern corner of the floor.</p> <p>8. A new set of egress stairs has been added to the southwest corner; the stairwell at the northwest corner has been removed.</p> <p>9. A new audio-visual equipment room has been added along eastern wall.</p> <p>10. The synagogue extension has been eliminated.</p>
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<p>Cellar (see p. 3 of the Applicant's illustrative set)</p>	<p>11. No vault space.</p> <p>12. Three mechanical rooms and a boiler room were confined to the northeast corner of the cellar.</p> <p>13. One elevator along the eastern wall.</p> <p>14. Four sets of stairs.</p> <p>14A. Egress stairs in the northwest corner.</p> <p>15. Meat and dairy kitchens in southwest corner.</p> <p>16. Refrigerated trash space along western wall adjacent to the meat kitchen.</p>	<p>11. New vault space added under the sidewalk on West 70th (see above for further description).</p> <p>12. The mechanical rooms, instead of being confined to the northeast corner of the cellar, now consume approximately one-third of the floor, more than doubling the size of the space allocated to mechanical elements.</p> <p>13. The November 2016 Plans now include two elevators. The second elevator resulted in the elimination of the previously-designed expanded synagogue. In addition, the first elevator that was listed on the BSA Approved Plans has been moved and reconfigured.</p> <p>14. Two sets of stairs. Two others were eliminated.</p> <p>14A. Egress stairs relocated from northwest to southwest corner. The vacated space at the northwest corner has been filled with mechanicals. The Applicant mis-identified these changes as code-required, as if to suggest that the Applicant had no choice in making these changes, when, in fact, the code issue was created only by reason of the Applicant's changed design and layout.</p> <p>15. The meat and dairy kitchens relocated to the southeast corner and nearly doubled in size.</p> <p>16. Refrigerated trash space relocated to the eastern side of the cellar and reduced in size by approximately 40%.</p>
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<p>Cellar (continued) (see p. 4 of the Applicant's illustrative set)</p>	<p>17. Two women's bathrooms (one along the east wall and the other situated in the south-central portion of the floor). The two women's bathrooms had a total of nine sinks. Neither abutted either of the kitchens.</p> <p>18. Two men's rooms – one in the northeast corner and the other in the southern-central area of the cellar.</p> <p>19. Babysitting room in the southeast corner.</p> <p>20. Two storerooms - one along the western wall and one along the southern wall.</p> <p>21. Janitor's closet adjacent to women's bathroom.</p> <p>22. Coatroom in central part of the cellar.</p>	<p>17. The November 2016 Plans include only one women's bathroom. The second women's bathroom has been eliminated, along with five of the sinks which were also eliminated. The women's room now abuts both kitchens.</p> <p>18. The second men's room, previously sited in the southern-central area of the cellar, has been relocated to the western wall of the cellar and has been completely reconfigured.</p> <p>19. Babysitting room eliminated.</p> <p>20. Storage space mostly eliminated and repositioned.</p> <p>21. Janitor's closet eliminated.</p> <p>22. Coatroom has been moved northward, reduced in size, now includes a door and is fashioned with a new egress.</p>
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<p>1st Floor (see p. 5 of the Applicant's illustrative set)</p>	<p>23. No perimeter columns.</p> <p>24. No interior columns.</p> <p>25. Small synagogue expansion space along southern wall.</p> <p>26. Rabbi's office located along the western wall.</p> <p>27. Open stairs along eastern wall.</p> <p>28. No mechanicals.</p> <p>29. No front desk area within residential lobby.</p> <p>30. Egress stairs in <i>northwest</i> corner.</p> <p>31. Front doors at exit of small synagogue expansion space at the southern portion of the floor plan. A separate exhibition space in the central portion of the first floor, with an interior stair exit.</p> <p>32. L-shaped, two-door entry elevator.</p>	<p>23. Perimeter columns added.</p> <p>24. Interior columns added to the east of the synagogue lobby and exhibition space.</p> <p>25. Small synagogue expansion space eliminated and replaced with mechanicals consisting of air handling units.</p> <p>26. Rabbi's office relocated to eastern wall.</p> <p>27. Open stairs replaced with rated stairs.</p> <p>28. Mechanicals added throughout first floor, including a mechanical chase along the eastern wall.</p> <p>29. Front desk added to a reduced residential lobby area.</p> <p>30. Egress stairs relocated and placed along the <i>western wall</i>. Egress corridor added.</p> <p>31. Small synagogue expansion eliminated. The synagogue lobby has been combined with the exhibition space and the interior stairs have been removed. Front doors moved north as part of the new combination synagogue lobby/exhibition space.</p> <p>32. Double-sided elevator added in the southeast corner, but without the L-shaped entry. The newly-designed double-sided elevator takes up additional space which could have otherwise been used for programmatic purposes.</p>
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<p>2nd Floor (see p. 6 of the Applicant's illustrative set)</p>	<p>33. Direct access to single elevator along western wall.</p> <p>34. Three toddler classrooms along the northern wall and three additional toddler classrooms along the southern wall.</p> <p>35. Mechanicals adjacent to the egress stairs along the western wall and in the stroller storage space along the eastern wall.</p> <p>36. Stroller storage space along the eastern wall.</p> <p>37. "Jack & Jill" bathrooms accessible through all toddler classrooms.</p> <p>38. Open scissor stairs along the western wall.</p> <p>39. Two equally-sized offices in the center of the second floor.</p> <p>40. Terrace space located at rear of the second floor.</p> <p>41. No columns along the perimeters of the classrooms.</p> <p>42. Extension of small synagogue across the western lot line.</p>	<p>33. Additional and ambiguous exit doors placed outside the elevator along the western wall.</p> <p>34. Sizes, dimensions and alignment of all six toddler classrooms have been changed;</p> <p>35. Mechanicals relocated throughout the second floor.</p> <p>36. Stroller storage space reduced in size.</p> <p>37. "Jack & Jill" bathrooms replaced with en-suite bathrooms located within five of the six toddler classrooms. Total bathrooms on floor increased by two bathrooms.</p> <p>38. Egress stairs now linear and enclosed.</p> <p>39. The sizes, dimensions and positions of the two offices have been changed substantially.</p> <p>40. Terrace space has been eliminated and now shows three newly added "Dog Houses" that apparently serve the HVAC system. However, one of the toddler classrooms is designed to provide access to the "Dog Houses."</p> <p>41. Columns added to perimeters of several classrooms.</p> <p>42. Extension eliminated.</p>
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<p>2nd Floor (continued)</p>	<p>43. Elevator along eastern wall.</p>	<p>43. Access to elevator has been changed.</p>
<p>3rd Floor (see p. 7 of the Applicant's illustrative set)</p>	<p>44. Mechanicals adjacent to the stairs along the western wall and along the eastern wall.</p> <p>45. Two private restrooms in the center of the floor plan.</p> <p>46. Three classrooms along the northern wall and three classrooms along the southern wall.</p> <p>47. Elevator along eastern wall.</p> <p>48. Office space along eastern wall.</p> <p>49. Open scissor stairs along the western wall.</p>	<p>44. Mechanicals relocated throughout the third floor plan.</p> <p>45. Two private restrooms eliminated.</p> <p>46. Classroom sizes, dimensions and positioning have all changed.</p> <p>47. Access to elevator changed.</p> <p>48. Office space increased in size. Additional hallway added immediately adjacent to the office's new northern perimeter.</p> <p>49. Open scissor stairs eliminated and replaced with enclosed linear egress stairs.</p>

<p>4th Floor (see p. 8 of the Applicant's illustrative set)</p>	<p>50. Laundry room in the caretaker's apartment.</p> <p>51. Master en-suite bathroom shown in caretaker's apartment.</p> <p>52. Master walk-in closet shown.</p> <p>53. Caretaker's apartment shown with separate kitchen space.</p> <p>54. Living room located east of the second bedroom in the caretaker's apartment.</p> <p>55. Caretaker's apartment runs the length of the entire northern wall.</p> <p>56. No offices on the 4th floor.</p> <p>57. Mechanicals shown adjacent to the stairs along the western wall and along the eastern wall.</p> <p>58. No elevator overrun access shown.</p> <p>59. No corridor connection to the old choir loft.</p> <p>60. Two individual restrooms (one toilet and one sink in each), plus a boys' bathroom and a girls' bathroom with a total of six additional toilets and sinks.</p>	<p>50. Laundry room eliminated.</p> <p>51. Master en-suite bathroom eliminated.</p> <p>52. Master walk-in closet eliminated.</p> <p>53. Separate kitchen space eliminated.</p> <p>54. Living room and second bedroom relocated, with different sizes and dimensions.</p> <p>55. Portion of space allocated to the caretaker's apartment along northern wall has been replaced with an office on the northeast corner.</p> <p>56. Two offices have been added, one of which cuts into the caretaker's apartment space (see above).</p> <p>57. One enlarged mechanical room added in the center of the floor plan and six new subsidiary mechanical spaces dispersed throughout the floor.</p> <p>58. Elevator overrun access along the eastern wall.</p> <p>59. Corridor connection to the old choir loft added near the northeast corner in between the two office spaces.</p> <p>60. The boys' and girls' bathrooms have been eliminated and replaced by three individual restrooms, resulting in a reduction of five toilets and sinks. A question exists whether these facilities satisfy the IBC and NYC Building Codes.</p>
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<p>4th Floor (continued)</p>	<p>61. Open scissor stairs along the western wall.</p> <p>62. Three classrooms along southern wall.</p> <p>63. Minimal structural intrusions along perimeters of the classroom walls.</p>	<p>61. Open scissor stairs replaced with enclosed linear egress stairs.</p> <p>62. Sizes, dimensions and positioning of classrooms have all been changed.</p> <p>63. Multiple structural intrusions added along walls of the classrooms.</p>
<p>5th Floor (see p. 9 of the Applicant's illustrative set)</p>	<p>64. Open scissor stairs along the western wall.</p> <p>65. One set of double doors provide access to patio area.</p> <p>66. No mechanicals.</p> <p>67. No interior columns.</p> <p>68. Elevator lobby shown to the west of the residential and service elevators. Also, residential elevator includes a swinging door entry.</p> <p>69. No perimeter columns.</p> <p>70. No buttressing of perimeter walls.</p>	<p>65. Open stairs replaced with enclosed linear egress stairs.</p> <p>65. Additional set of double doors provide access to the patio area.</p> <p>66. New Mechanicals added along western wall, in the center of the floor, and along the eastern wall.</p> <p>67. Two interior columns added - one near the southerly curb of West 70th street and the other directly south of it.</p> <p>68. Elevator lobby increased in size. Swinging door to residential elevator eliminated.</p> <p>69. Perimeter columns added.</p> <p>70. Buttressing added to perimeter walls.</p>

<p>6th - 7th Floors (see p. 9 of the Applicant's illustrative set)</p>	<p>71. Open scissor stairs along the western wall.</p> <p>72. No mechanicals.</p> <p>73. Elevator lobby to the west of the residential and service elevators. Also, residential elevator includes a swinging door.</p> <p>74. No interior columns.</p> <p>75. Terrace entrance along the eastern wall of the terrace.</p> <p>76. No perimeter columns.</p> <p>77. No buttressing of perimeter walls.</p>	<p>71. Scissor stairs eliminated and replaced with enclosed linear egress stairs.</p> <p>72. Mechanicals added along western wall and in the center of the floor.</p> <p>73. Elevator lobby increased in size. Residential elevator swinging door, eliminated.</p> <p>74. Three interior columns added - one near the southerly curb of West 70th street, one directly south of it and the other near the southeast corner.</p> <p>75. Terrace entrance repositioned to the northern wall of the terrace.</p> <p>76. Perimeter columns added.</p> <p>77. Structural support added to buttress perimeter walls.</p>
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<p>8th Floor (see p. 9 of the Applicant's illustrative set)</p>	<p>78. Open scissor stairs along the western wall.</p> <p>79. No mechanicals.</p> <p>80. Elevator lobby shown to the west of the residential and service elevators. Residential elevator includes a swinging exterior door.</p> <p>81. No interior columns.</p> <p>82. Extension over the synagogue shown along the eastern wall.</p> <p>83. No perimeter columns.</p> <p>84. No buttressing of perimeter walls.</p>	<p>78. Scissor stairs replaced with enclosed linear egress stairs.</p> <p>79. Mechanicals added along western wall and in the center of the 8th floor.</p> <p>80. Elevator lobby increased in size. Swinging exterior elevator door eliminated.</p> <p>81. Four interior columns added - one near the southerly curb of West 70th street, one directly south of it and two along the eastern wall.</p> <p>82. Extension over the synagogue along the eastern wall has been pulled back.</p> <p>83. Perimeter columns added.</p> <p>84. Structural buttressing added to perimeter walls.</p>
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<p>9th Floor (see p. 9 of the Applicant's illustrative set)</p>	<p>85. Scissor stairs along the western wall.</p> <p>86. No mechanicals.</p> <p>87. Elevator lobby shown to the west of the residential and service elevators.</p> <p>88. Extension over the synagogue shown along the eastern wall.</p> <p>89. No buttressing of perimeter walls.</p> <p>90. No thickening of parapet.</p> <p>91. Five sets of double-door entries, plus a single-door entry along perimeter of the floor.</p>	<p>85. Scissor stairs replaced with enclosed linear egress stairs.</p> <p>86. Mechanicals added along western wall and in the center of the floor.</p> <p>87. Elevator lobby increased in size.</p> <p>88. Extension over the synagogue along the eastern wall has been pulled back.</p> <p>89. Buttressing added to perimeter walls.</p> <p>90. Thickening of the parapet along the western wall.</p> <p>91. One double-door entry and the single-door entry have been eliminated.</p>
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<p>Rooftop (see p. 10 of the Applicant's illustrative set)</p>	<p>92. Mechanical bulkhead height 113.67' (see p. 19 of Applicant's illustrative set).</p> <p>93. Scissor stairs along the western wall.</p> <p>94. No emergency generator.</p> <p>95. Twenty-six fan units near the north, east, and southern walls.</p> <p>96. Three mechanical units located in the center of the roof.</p> <p>97. Two access points to the roof shown on both sides of the stairs.</p> <p>98. No safety railing by the stairs.</p>	<p>92. Mechanical bulkhead height increased by more than five feet to 118.88' (see p. 19 of Applicant's illustrative set).</p> <p>93. Scissor stairs reconfigured.</p> <p>94. Emergency generator added.</p> <p>95. Fan units reduced in half to 13 and relocated to the eastern half of the roof.</p> <p>96. Mechanicals units relocated to the northwestern corner; three more mechanical units added and dispersed around the elevators and stairs.</p> <p>97. A third access point to the roof has been added.</p> <p>98. Safety railing added to the stairs.</p>
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While some of the above-referenced changes are modest, most are not. Most constitute substantial plan revisions, including and especially, the addition of vault space beyond the underground footprint, the excavation and structural revisions required in connection therewith, the elimination of multiple rooms and spaces on every floor, the addition and re-positioning of stairwells, elevators and mechanicals, the elimination of the second floor terrace and concomitant addition of the "Dog Houses" (the adverse environmental impacts with respect to which have never been evaluated), the substantial alterations to the caretaker's apartment, the addition and re-positioning of the kitchens, and the elimination of several and reduction of other bathrooms and other supportive facilities on virtually every floor. The Applicant has asserted that the aggregate square footage constitutes the guiding criterion for purposes of assessing the extent to which the BSA Approved Plans for the Proposed Building have been modified; but the Applicant is wrong. It is the reconfiguration of every floor in the Proposed Building, the expansion of the sub-cellar to include the vault space, the changes to the core elements and the mechanicals, coupled with the associated changes in construction cost (Point II below) that are the guiding criteria and relevant to this analysis. And aside from the detailed technical comparison of the two sets of plans, the Board is asked to apply its common sense. The Original and November 2016 Plans appear substantially different because they are substantially different.

In the handful of reported instances in which the Board has granted modifications of approved variances, the requested changes were actually minor. *521-541 & 553-563 LaGuardia Pl., Manhattan*, 250-00-BZ (Nov. 22, 2011) (permission to allow parking on an access ramp, granted); *5-11 47th Ave., Queens*, 238-07-BZ (Feb. 15, 2011) (permission to alter sequence of construction, granted); *118 Oxford St., Brooklyn*, 263-98-BZ (Apr. 11, 2006) (permission to add a single elevator after applicant sustained injuries causing a disability that prevented use of stairs, granted); *157-30 Willets Point Ave., Queens*, 339-04-BZ (May 10, 2005) (installation of a canopy over existing fuel dispenser islands, granted); *2100 Williamsbridge Rd., Bronx*, 949-57-BZ (Nov. 9, 2004) (permission to allow an already as-of-right conversion of building to accessory convenience store, granted).

When applicants have requested modifications that required substantial revision to approved plans of the sort that have been requested here, the Board has denied those applications. *See, e.g., 696 Pacific St., Brooklyn*, 62-83-BZ (Oct. 29, 2002) (request for modification that consisted of a reduction in the scope of variance, removal of two loading docks and an adjoining space, *rejected*). And to the extent that there existed a potential risk that modification could alter the financial calculations relative to the (B) and (E) Findings, the applicants were required to submit updated financial information. *217 W. 147th St., Manhattan*, 135-05-BZ (June 19, 2007). In *217 W. 147th St.*, the applicant therein asked for a re-calculation of floor space and a revised ground floor lobby entrance. The Board, after noting that “the applicant provided revised financials, reflecting the new conditions and that the requested amendment does not have a significant impact on the minimal return,” granted the amendment. *Id.* at 2.

Here, it bears emphasis that the Applicant has requested approximately 100 modifications to the BSA Approved Plans. Changes of this proposed magnitude require denial of the Application or, at worst from the Coalition’s perspective, full re-assessment of the 2008 Variance, as the Applicant has essentially proposed construction of a different building. *217 W. 147th St., Manhattan*, 135-05-BZ (June 19, 2007). And, as shown below, the Proposed Building, as re-designed, necessitates a full-blown financial re-evaluation of the Project, given the scope of the new work and passage of time.

POINT II. THE PROPOSED SUBSTANTIAL MODIFICATIONS, COUPLED WITH THE PASSAGE OF TIME, SIGNIFICANTLY ALTER THE FINANCIAL ANALYSIS RELATIVE TO THE (B) AND (E) FINDINGS, WARRANTING REJECTION OF THE APPLICATION OR, AT WORST FROM THE COALITION’S PERSPECTIVE, RE-EVALUATION OF THE 2008 VARIANCE

In ascertaining whether a variance application meets the (B) Finding, the BSA must be satisfied that the applicant has “demonstrate[d] factually, *by dollars and cents proof*, an inability to realize a reasonable return under existing permissible uses.” *Bella Vista Apartment Co. v. Bennett*, 89 N.Y.2d 465, 469 (1997), *quoting Village Bd. v. Jarrold*, 53 N.Y.2d 254, 256 (1981) (emphasis added). Without such evidence, “a grant of a use variance by a zoning board is not justified.”

Jarrold, 53 N.Y.2d at 256. To meet the (E) Finding, the applicant is required to demonstrate that “the variance, if granted, is the minimum variance necessary to afford relief.” ZR §72-21(e).

When proposing modifications to an existing variance, particularly under circumstances in which the proposed changes are likely to affect the overall cost of the project and its return on investment, the Board generally requires updated financial analyses to assure that the (B) and (E) Findings retain their jurisdictional relevance. *See, e.g., 217 West 147th St., Manhattan*, 135-05-BZ (6/19/2007) (grant of modification based, in part, upon the applicant’s submission of “revised financials, reflecting the new conditions and that the requested amendment does not have significant impact on the minimum return”). The Courts similarly insist upon financial analyses and appraisals which are current and not otherwise stale. *See, e.g., Bristol Oaks v. Citibank*, 272 A.D.2d 258 (1st Dep’t. 2000) (reversal of trial court’s dismissal of claims based on sale of mortgages and properties the valuations of which were wrongfully based upon outdated appraisals). As shown below, changed circumstances, consisting of the passage of time and changed construction metrics, require submission of updated financial calculations and projections, but the Applicant here has failed to provide them. And *other* previously-undisclosed financial projections prepared by or on behalf of the Applicant reveal substantial inconsistencies in the Applicant’s analyses, warranting denial of the Application.

A. Introduction

During the review process on the Original Application, the Applicant submitted at least 11 financial analyses pertaining to the Project.⁹ The opposition submitted at least seven financial analyses in response.¹⁰ Although in disagreement on virtually all salient points, the Applicant’s and oppositions’ financial analysts’ assessments were similar in one critical respect – their analyses focused on the financial circumstances as they existed during the period 2006 to 2008. None of the “dollars and cents” proof offered by either side contemplated construction costs based upon the November 2016 Plans (which obviously had not yet been prepared) or the real estate market as it exists today, more than eight years later.

As shown below, the Proposed Substantial Modifications to the Proposed Building, as reflected in the November 2016 Plans, coupled with the growth of the real estate market in New York, in all likelihood, profoundly alter the (B) and (E) Findings and analyses relative to the 2008 Variance. A comparison of the different and entirely incompatible financial projections provided by the Applicant to the Board in 2008, and to the Attorney General and New York Supreme Court

⁹Freeman/Frazier & Associates submitted reports on March 28, 2007, September 6, 2007, October 24, 2007, December 21, 2007, January 30, 2008, February 22, 2008, March 11, 2008, May 13, 2008, June 17, 2008, July 8, 2008 and August 12, 2008.

¹⁰Metropolitan Valuation Services submitted reports on January 25, 2008, February 8, 2008, March 20, 2008, April 15, 2008, June 10, 2008 and June 23, 2008. James Mulford submitted an opposition analysis on June 9, 2008.

in 2016 fully, confirms this.

B. *The Applicant's 2008 Financial Analysis*

Just prior to the Board's grant of the 2008 Variance, the Applicant submitted a final financial analysis pertaining to the Proposed Building. That analysis estimated costs of construction in the amount of \$13,720,000, plus a supposed "acquisition cost" of \$12,347,000 (July 8, 2008 Financial Analysis at 8, Exh. 22).¹¹ The consolidated sales prices of the Luxury Condominiums, less payment of commissions, was projected to be \$34,210,000 (*Id.*).¹² Taking into consideration carrying costs during the projected sales period (\$664,000), as well as the cost of construction and acquisition cost, the Project was projected to yield a return on investment of \$6,815,000. Assuming a 28-month carrying period, the profit was projected to be 25.49% in the aggregate and 10.93% on an annual basis (*Id.*).

C. *A Comparison of the Applicant's 2016 Construction Projections and 2015 Projected Net Proceeds from the Sales of the Luxury Condominiums, with the 2008 Financial Projections Reveals Irremediable Conflicts, Requiring Rejection of the Application or, at Worst from the Coalition's Perspective, a New and Independent Evaluation of the 2008 Variance.*

As set forth previously, in 2016, the Applicant attached a construction cost projection to the Petition filed with the New York State Supreme Court in an effort to obtain permission therefrom to obtain a construction loan (Petition, Exh. 8; Construction Cost Projection, Exh. 23). The following **Table C-1** reflects the substantial differences between the anticipated construction costs and the acquisition costs projected during the years 2008 and 2016:

<u>Projection</u>	<u>2008</u>	<u>2016</u>
Acquisition Cost	\$12,347,000	\$ 3,220,000
Construction Costs	\$13,720,000	\$40,014,693
<u>Total</u>	\$26,067,000	\$43,234,693

Compare 2008 Construction Cost Projections (Exh. 22) with 2015 Construction Cost Projections

¹¹Other differing calculations were prepared by the Applicant based upon the constantly changing scope of the Project, but the approximate numbers all seem to have been in the \$11-13 Million range.

¹²Other calculations were prepared based upon differing assumptions, but the projected sales prices were largely in the same ballpark.

(Exh. 23).

The disparity between the projected net sales proceeds for the Luxury Condominiums is even greater, as reflected by the **Table C-2** below:

Projection	2008	2016
Sales of Luxury Condominiums	\$34,210,000	\$61,300,000

Compare 2008 Projections (Exh. 22) with the Applicant's 2015 Appraisal (Exh. 23).

We have not had the opportunity to vet these numbers or retain an outside financial consultant. We were afforded approximately one month to respond to the Applicant's submission – a month that included the Thanksgiving Holiday. Nonetheless, our preliminary review makes plain that the Board should not accept the Applicant's projections as accurate. Had we been afforded the opportunity to retain a financial consultant, we would have endeavored to examine the assumptions underlying the construction costs and sales estimates. We would have also investigated the Applicant's "rationale" for representing to the Supreme Court that the acquisition costs were \$3,220,000 in 2016 but \$12,347,000 in 2008.

In any event, working with the Applicant's own numbers, the Applicant has projected a net profit in 2016 of \$18,065,307, which translates into a 41.8% return on investment. Assuming that the Applicant were required to carry the Project for 28 months, as originally projected, the Applicant would reap nearly an 18% annual return on investment. The Applicant, however, represented to the Supreme Court that the work and sales would likely be completed within a year (Exh. 5), suggesting that the carrying period would be just 12 months. In other words, the Applicant would generate a one-year 41.8% profit.

D. The Applicant's (E) Finding Analysis Has Drastically Changed

The Applicant unsuccessfully argued in support of the Original Application -- nearly nine years ago -- that sale of the Luxury Condominiums was indispensable to paying for the construction of the Proposed Building. However, at that time, the construction costs were estimated at just \$13,720,000, against net sales proceeds of \$34,210,000. Coupled with the Applicant's supposed "acquisition cost" in 2008 that analysis projected a modest annual profit of 10.93% and a substantially reduced return on investment of \$6,815,000 -- all payable over a duration of 28 months.

In 2016, the Applicant represented to the Supreme Court that the construction costs would be \$40,014,693, but that the net proceeds on the sale of the Luxury Condominiums would be \$61,300,000, yielding a net profit of \$21,285,307 after paying the costs of construction. Taking into consideration the Applicant's updated acquisition cost of \$3,220,000 and assuming the accuracy of the Applicant's other projections, the Applicant, not only would have the funds to pay for the construction (the \$40,014,693), but further, the Applicant would reap a windfall one-year return of

\$18,065,307 or 41.8% – three times the amount projected in 2008. When one considers that the supposed “acquisition cost” is not “out of pocket” but rather represents something of a hypothetical figure, the Applicant’s actual return on investment actually equals \$21,285,307 – a single-year profit of 49.23%!

Again, we emphasize that we are not satisfied that the Applicant’s financials accurately project cost and net proceeds; we believe that the Applicant has understated the value of the Luxury Condominium and over-estimated the construction costs. Nonetheless, use of the Applicant’s *own* figures, without extended analysis, reflects, at a minimum, that the variance sought by the Applicant is not even close to the minimum variance necessary to alleviate the alleged hardship (which, as shown below, was never actually a hardship at all). The Applicant now proposes to vastly over-build the Proposed Building to include more Luxury Condominiums than would be necessary to pay for the community facility space and provide for a tidy return on investment.¹³

E. The Applicant’s (B) Finding Analysis Has Drastically Changed

The 2016 Plans include nearly 100 changes from the BSA Approved Plans. While some of these modifications, in isolation, might be regarded as negligible, such as reduction of the size, and relocation, of the coatroom in the cellar, other changes are quite substantial, such as the expansion of the underground footprint to create vault space beneath the sidewalk on West 70th Street. As reflected on the November 2016 Plans, creation of the vault space would require excavation beneath the West 70th Street sidewalk, installation of perimeter footings and columns, an additional column in the multi-function room, and a re-engineering of the Proposed Building. The Applicant has not provided any financial analysis with respect to the costs associated with the Proposed Building as reflected in the November 2016 Plans. While repeatedly referring to the Proposed Substantial Modifications as “minor” or “updated,” it is undeniable that the changes proposed would include new and different costs. The costs may be larger or smaller; the Applicant has failed to provide any updated information with respect to it. What *is* known, however, is that, as reflected in Table B-1 above, there are more than 100 changes to the BSA Approved Plans. And, as reflected in the Tables C-1 and 2 above, the passage of time, coupled with the changes reflected in the November 2016 Plans, as distinguished from the BSA Approved Plans, result in wildly disparate computations of construction cost and return on investment.

In view of the foregoing, the Application should be promptly denied and the 2008 Variance vacated with prejudice or, at worst from the Coalition’s perspective, re-opened and reassessed.

¹³Of course, the fiction that the sale of Luxury Condominiums would fund the construction of the community space has been exposed, in view of the evidence that, as late as March 2016, the Applicant still had not decided whether the sale was necessary (Exh. 8). While, as discussed *supra*, the Board rejected the Applicant’s argument that the Luxury Condominiums could fund the construction of the Proposed Building, such does not erase the unmistakable fact that the Applicant made yet *another* misrepresentation in connection with this Project.

POINT III. THE APPLICANT'S PATTERN OF DECEPTION REQUIRES DENIAL OF THE APPLICATION

The preceding Points I and II focus on the proverbial “nuts and bolts” of a modification-request/variance analysis. As reflected in the Statement of Relevant Facts, however, the circumstances of this Application are unusual insofar as the Applicant has made a series of misrepresentations and otherwise engaged in a pattern of deception that, by itself, warrants denial of the Application in its entirety.

As reflected in the Statement of Relevant Facts, the Applicant engaged in the following deceptive acts, all of which appear to have been designed to mislead City agencies and the Supreme Court:

- the Original Application was predicated upon the falsehood that the Applicant needed to build 15 new classrooms to satisfy its alleged programmatic needs;
- the Applicant falsely represented that construction and sale of the Luxury Condominiums were necessary to fund the construction of the Proposed Building's community space; however, evidence contained herein confirms that, even as late as March 2016, the Applicant was debating whether to sell, rent or use the Luxury Condominiums for its alleged parsonage needs (Exh. 8);
- the Applicant submitted the 2015 DOB Plans to the DOB without disclosing that such plans materially differed from those approved by the Board;
- the Applicant represented that its alleged hardship was supposedly based in substantial part on its inability to fit 15 classrooms within the Proposed Building for use as part of its Hebrew School and other religious and educational programs. In fact, however, the Applicant prepared and filed with the DOB, the 2015 DOB Plans which eliminated 80% of those very same classrooms in favor of office space, and then submitted the 2015 Appraisal to the Supreme Court to argue that a construction loan was warranted because the use of office space for a medical office would constitute the best, most profitable use of the Proposed Building;
- the Applicant fully knew, at the time the 2015 DOB Plans and Appraisal were filed with the Supreme Court that, by that point, they had been subjected to a successful zoning challenge and thus the approval of such Plans had been rescinded;
- when confronted by the Board over the 2015 DOB Plans, the Applicant falsely alleged that the classrooms had been mis-labeled as offices, when, in fact, the notion of mis-labeling is patently absurd.

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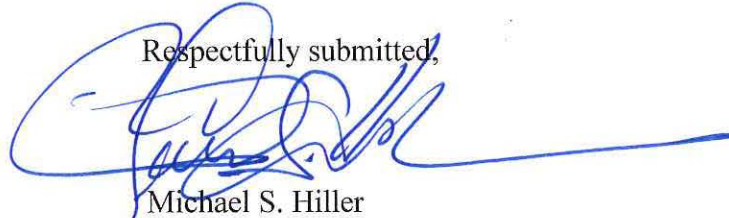
The alleged hardship was thus no hardship at all. The Applicant requested a variance based upon a manufactured notion that classrooms, which were never necessary, had suddenly become indispensable. The Applicant then waited more than eight years to pursue this Project, and, despite claiming an assortment of excuses for its delay, the Supreme Court Petition and accompanying documents submitted by the Applicant confirm that the reason for its hesitation was its indecisiveness on how precisely to maximize its profit.

In short, the Applicant deceived the Board, the DOB, the Attorney General and the Supreme Court. At present, the New York City Council is considering new legislation which would result in imposition of a \$25,000 fine for each misrepresentation made to the Board by applicants in support of bogus applications. From the perspective of the opposition, such legislation cannot be enacted quickly enough.

CONCLUSION

For the reasons set forth in this opposition and those submitted by Messrs. Sugarman and Rosenberg, it is respectfully requested that the Application be denied and the 2008 Variance be vacated or, at a minimum, be reopened and submitted to a full re-evaluation.

Respectfully submitted,



Michael S. Hiller

MSH:me

c: Zachary Bernstein, Esq.
Alan Sugarman, Esq.
David Rosenberg, Esq.