

BSA Action Reviewed by Article 78: BSA Resolution 74-07 BZ - Congregation
Shearith Israel, filed August 25, 2008 (1 of 14)

74-07-BZ

CEQR #07-BSA-071M

APPLICANT – Friedman & Gotbaum, LLP, by Shelly S. Friedman, Esq., for Congregation Shearith Israel a/k/a Trustees of the Congregation Shearith Israel in the City of N.Y. a/k/a the Spanish and Portuguese Synagogue.

SUBJECT – Application April 2, 2007 – Variance (§72-21) to allow a nine (9) story residential/community facility building; the proposal is contrary to regulations for lot coverage (§24-11), rear yard (§24-36), base height, building height and setback (§23-633) and rear setback (§23-663). R8B and R10A districts.

PREMISES AFFECTED – 6-10 West 70th Street, south side of West 70th Street, west of the corner formed by the intersection of Central Park West and West 70th Street, Block 1122, Lots 36 & 37, Borough of Manhattan.

COMMUNITY BOARD #7M

APPEARANCES –

For Applicant: Lori Cuisinier.

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5

Negative:.....0

THE RESOLUTION:

¶1 WHEREAS, the decision of the Manhattan Borough Commissioner, dated August 28, 2007,¹ acting on Department of Buildings Application No. 104250481, reads, in pertinent part:

1. “Proposed lot coverage for the interior portions of R8B & R10A exceeds the maximum allowed. This is contrary to Section 24-11/77-24. Proposed interior portion lot coverage is 0.80;
2. Proposed rear yard in R8B does not comply. 20’.00 provided instead of 30.00’ contrary to Section 24-36;
3. Proposed rear yard in R10A interior portion does not comply. 20.—’ provided instead of 30.00’ contrary to Section 24-36;
4. Proposed initial setback in R8B does not comply. 12.00’ provided instead of 15.00’ contrary to Section 24-36;
5. Proposed base height in R8B does not comply. . . contrary to Section 23-633;

¹ The referenced August 28, 2007 decision supersedes a March 27, 2007 decision by the Department of Buildings which included eight objections, one of which was eliminated after the applicant modified the plans.

6. Proposed maximum building height in R8B does not comply. . . contrary to 23-66;

7. Proposed rear setback in an R8B does not comply. 6.67’ provided instead of 10.00’ contrary to Section 23-633;”² and

¶2 WHEREAS, this is an application under ZR § 72-21, to permit, on a site partially within an R8B district and partially within an R10A district within the Upper West Side/ Central Park West Historic District, the proposed construction of a nine-story and cellar mixed-use community facility / residential building that does not comply with zoning parameters for lot coverage, rear yard, base height, building height, front setback, and rear yard setback contrary to ZR §§ 24-11, 77-24, 24-36, 23-66, and 23-633; and

¶3 WHEREAS, this application is brought on behalf of Congregation Shearith Israel, a not-for-profit religious institution (the “Synagogue”); and

¶4 WHEREAS, a public hearing was held on this application on November 27, 2007, after due notice by publication in the *City Record*, with continued hearings on February 12, 2008, April 15, 2008 and June 24, 2008, and then to decision on August 26, 2008; and

¶5 WHEREAS, the premises and surrounding area had site and neighborhood examinations by Chair Srinivasan, Vice-Chair Collins, Commissioner Hinkson, Commissioner Montanez, and Commissioner Ottley-Brown; and

¶6 WHEREAS, Community Board 7, Manhattan, recommends disapproval of this application; and

¶7 WHEREAS, a number of members of the Synagogue testified in support of the application; and

¶8 WHEREAS, a representative of New York State Senator Thomas K. Duane testified at hearing in opposition to the application; and

¶9 WHEREAS, a representative of New York State Assembly Member Richard N. Gottfried testified at hearing in opposition to the application; and

¶10 WHEREAS, a number of area residents testified in opposition to the application; and

² A letter dated January 28, 2008 to Chair Srinivasan from David Rosenberg, an attorney representing local residents, claims that a purported failure by the Department of Buildings (“DOB”) Commissioner or the Manhattan Borough Commissioner to sign the above-referenced August 28, 2007 objections, as allegedly required by Section 666 of the New York City Charter (the “Charter”), divests the Board of jurisdiction to hear the instant application. However, the jurisdiction of the Board to hear an application for variances from zoning regulations, such as the instant application, is conferred by Charter Section 668, which does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner.

By Stipulation, the parties stipulated to cite to the BSA decision by the paragraph number, here inserted in the decision included in the BSA Administrative Record.

BSA Action Reviewed by Article 78: BSA Resolution 74-07 BZ - Congregation
Shearith Israel, filed August 25, 2008 (2 of 14)

74-07-BZ

CEQR #07-BSA-071M

¶11 WHEREAS, additionally, Landmark West! and a group of neighbors represented by counsel testified at hearing and made submissions into the record in opposition to the application (the "Opposition"); the arguments made by the Opposition related to the required findings for a variance, and are addressed below; and

¶12 WHEREAS, the subject zoning lot on which the Synagogue is located consists of Lots 36 and 37 within Block 1122 (the "site"); and

¶13 WHEREAS, the site has a total lot area of 17,286 square feet, with 172 feet of frontage along the south side of West 70th Street, and 100.5 feet of frontage on Central Park West; and

¶14 WHEREAS, the portion of the site that extends 125 feet west of Central Park West is located in an R10A zoning district; the remainder of the site is located within an R8B district; and

¶15 WHEREAS, the site is also located within the Upper West Side/ Central Park West Historic District; and

¶16 WHEREAS, Tax Lot 36 is occupied by the Synagogue, with a height of 75'-0", and a connected four-story parsonage house located at 99-100 Central Park West, with a total floor area of 27,760 sq. ft.; and

¶17 WHEREAS, Tax Lot 37 is occupied in part by a four-story Synagogue community house with 11,079 sq. ft. of floor area located at 6-10 West 70th Street (comprising approximately 40 percent of the tax lot area); the remainder of Lot 37 is vacant (comprising approximately 60 percent of the tax lot area) (the "Community House"); and

¶18 WHEREAS, the Community House is proposed to be demolished; and

¶19 WHEREAS, the applicant represents that Tax Lot 36 and Tax Lot 37 together constitute a single zoning lot under ZR § 12-10, as they have been in common ownership since 1965 (the "Zoning Lot"); and

¶20 WHEREAS, Tax Lot 37 is divided by a zoning district boundary, pursuant to 1984 zoning map and text amendments to the Zoning Resolution that relocated the former R8/R10 district boundary line to a depth of 47 feet within the lot; and

¶21 WHEREAS, the applicant further represents that the formation of the Zoning Lot predates the relocation of the zoning district boundary, and that development on the site is therefore entitled to utilize the zoning floor area averaging methodology provided for in ZR § 77-211, thereby allowing the zoning floor area to be distributed over the entire Zoning Lot; and

¶22 WHEREAS, the applicant states that as 73 percent of the site is within an R10A zoning district, which permits an FAR of 10.0, and 27 percent of the site is within an R8B zoning district, which permits an FAR of 4.0, the averaging methodology allows for an overall

site FAR of 8.36 and a maximum permitted zoning floor area of 144,511 sq. ft.; and

¶23 WHEREAS, the applicant states that the site is currently built to an FAR of 2.25 and a floor area of 38,838 sq. ft.; and

¶24 WHEREAS, the applicant proposes a nine-story and cellar mixed-use building with community facility (Use Group 3) uses on two cellar levels and the lower four stories, and residential (Use Group 2) uses on five stories including a penthouse (the "proposed building"), which will be built on Tax Lot 37; and

¶25 WHEREAS, the applicant states that the community facility uses include: Synagogue lobby and reception space, a toddler program, adult education and Hebrew school classes, a caretaker's unit, and a Jewish day school; the upper five stories are proposed to be occupied by five market-rate residential condominium units; and

¶26 WHEREAS, the proposed building will have a total floor area of 42,406 sq. ft., comprising 20,054 sq. ft. of community facility floor area and 22,352 sq. ft. of residential floor area; and

¶27 WHEREAS, the proposed building will have a base height along West 70th Street of 95'-1" (60 feet is the maximum permitted in an R8B zoning district); with a front setback of 12'-0" (a 15'-0" setback is the minimum required in an R8B zoning district); a total height of 105'-10" (75'-0" is the maximum permitted in an R8B zone), a rear yard of 20'-0" for the second through fourth floors (30'-0" is the minimum required); a rear setback of 6'-8" (10'-0" is required in an R8B zone), and an interior lot coverage of 80 percent (70 percent is the maximum permitted lot coverage); and

¶28 WHEREAS, the Synagogue initially proposed a nine-story building with a total floor area of 42,961 sq. ft., a residential floor area of 22,966 sq. ft., and no court above the fifth floor (the "original proposed building"), and

¶29 WHEREAS, the Synagogue modified the proposal to provide a complying court at the north rear above the fifth floor, thereby reducing the floor plates of the sixth, seventh and eighth floors of the building by approximately 556 sq. ft. and reducing the floor plate of the ninth floor penthouse by approximately 58 sq. ft., for an overall reduction in the variance of the rear yard setback by 25 percent and a reduction in the residential floor area to 22,352 sq. ft.; and

¶30 WHEREAS, the Synagogue is seeking waivers of zoning regulations for lot coverage and rear yard to develop a community facility that can accommodate its religious mission, and is seeking waivers of zoning regulations pertaining to base height, total height, front setback, and rear setback to accommodate a market rate residential development that can generate a reasonable financial return; and

¶31 WHEREAS, as a religious and educational institution, the Synagogue is entitled to significant

BSA Action Reviewed by Article 78: BSA Resolution 74-07 BZ - Congregation
Shearith Israel, filed August 25, 2008 (3 of 14)

74-07-BZ

CEQR #07-BSA-071M

deference under the laws of the State of New York pertaining to proposed changes in zoning and is able to rely upon programmatic needs in support of the subject variance application (see Westchester Reform Temple v. Brown, 22 N.Y.2d 488 (1968)); and

¶32 WHEREAS, under ZR § 72-21(b), a not-for-profit institution is generally exempted from having to establish that the property for which a variance is sought could not otherwise achieve a reasonable financial return; and

¶33 WHEREAS, however, the instant application is for a mixed-use project in which approximately 50 percent of the proposed floor area will be devoted to a revenue-generating residential use which is not connected to the mission and program of the Synagogue; and

¶34 WHEREAS, under New York State law, a not-for-profit organization which seeks land use approvals for a commercial or revenue-generating use is not entitled to the deference that must be accorded to such an organization when it seeks to develop a project that is in furtherance of its mission (see Little Joseph Realty v. Babylon, 41 N.Y.2d 738 (1977); Foster v. Saylor, 85 A.D.2d 876 (4th Dep't 1981) and Roman Cath. Dioc. of Rockville Ctr v. Vill. Of Old Westbury, 170 Misc.2d 314 (1996); and

¶35 WHEREAS, consequently, prior Board decisions regarding applications for projects sponsored by not-for-profit religious or educational institutions which have included commercial or revenue-generating uses have included analysis of the hardship, financial return, and minimum variance findings under ZR § 72-21 (see BSA Cal. No. 315-02-BZ, applicant Touro College; BSA Cal. No. 179-03-BZ, applicant Torah Studies, Inc.; BSA Cal. No. 349-05-BZ, Church of the Resurrection; and BSA Cal. No. 194-03-BZ, applicant B'nos Menachem School); and

¶36 WHEREAS, therefore, as discussed in greater detail below, the Board subjected this application to the standard of review required under ZR § 72-21 for the discrete community facility and residential development uses, respectively, and evaluated whether the proposed residential development met all the findings required by ZR § 72-21, notwithstanding its sponsorship by a religious institution; and

ZR § 72-21 (a) – Unique Physical Conditions Finding

¶37 WHEREAS, under § 72-21 (a) of the Zoning Resolution, the Board must find that there are unique physical conditions inherent to the Zoning Lot which create practical difficulties or unnecessary hardship in strictly complying with the zoning requirements (the “(a) finding”); and

Community Facility Use

¶38 WHEREAS, the zoning district regulations limit lot coverage to 80 percent and require a rear yard of 30'-0"; and

¶39 WHEREAS, the proposed building will have the following program: (1) a multi-function room on the sub-cellar level with a capacity of 360 persons for the hosting of life cycle events and weddings and mechanical space; (2) dairy and meat kitchens, babysitting and storage space on the cellar level; (3) a synagogue lobby, rabbi's office and archive space on the first floor; (4) toddler classrooms on the second floor; (5) classrooms for the Synagogue's Hebrew School and Beit Rabban day school on the third floor; and (6) a caretaker's apartment and classrooms for adult education on the fourth floor; and

¶40 WHEREAS, the first floor will have 5,624 sq. ft. of community facility floor area, the second and third floor will each have 4,826.5 sq. ft. of community facility floor area, and the fourth floor will have 4,777 sq. ft. of community facility floor area, for a total of 20,054 sq. ft. of community facility floor area; and

¶41 WHEREAS, the applicant represents that the variance request is necessitated by the programmatic needs of the Synagogue, and by the physical obsolescence and poorly configured floor plates of the existing Community House which constrain circulation and interfere with its religious programming; and

¶42 WHEREAS, the applicant represents that the programmatic needs and mission of the Synagogue include an expansion of its lobby and ancillary space, an expanded toddler program expected to serve approximately 60 children, classroom space for 35 to 50 afternoon and weekend students in the Synagogue's Hebrew school and a projected 40 to 50 students in the Synagogue's adult education program, a residence for an onsite caretaker to ensure that the Synagogue's extensive collection of antiquities is protected against electrical, plumbing or heating malfunctions, and shared classrooms that will also accommodate the Beit Rabban day school; and

¶43 WHEREAS, the applicant states that the proposed building will also permit the growth of new religious, pastoral and educational programs to accommodate a congregation which has grown from 300 families to 550 families; and

¶44 WHEREAS, to accommodate these programmatic needs, the Synagogue is seeking lot coverage and rear yard waivers to provide four floors of community facility use in the proposed building; and

¶45 WHEREAS, the Board acknowledges that the Synagogue, as a religious institution, is entitled to substantial deference under the law of the State of New York as to zoning and as to its ability to rely upon programmatic needs in support of the subject variance application (see Cornell Univ. v. Bagnardi, 68 N.Y.2d 583 (1986)); and

BSA Action Reviewed by Article 78: BSA Resolution 74-07 BZ - Congregation
Shearith Israel, filed August 25, 2008 (4 of 14)

74-07-BZ

CEQR #07-BSA-071M

¶46 WHEREAS, however, in addition to its programmatic needs, the applicant also represents that the following site conditions create an unnecessary hardship in developing the site in compliance with applicable regulations as to lot coverage and yards: if the required 30'-0" rear yard and lot coverage were provided, the floor area of the community facility would be reduced by approximately 1,500 sq. ft.; and

¶47 WHEREAS, the applicant states that the required floor area cannot be accommodated within the as-of-right lot coverage and yard parameters and allow for efficient floor plates that will accommodate the Synagogue's programmatic needs, thus necessitating the requested waivers of these provisions; and

¶48 WHEREAS, the applicant represents that a complying building would necessitate a reduction in the size of three classrooms per floor, affecting nine proposed classrooms which would consequently be too narrow to accommodate the proposed students; the resultant floor plates would be small and inefficient with a significant portion of both space and floor area allocated toward circulation space, egress, and exits; and

¶49 WHEREAS, the applicant further states that the reduction in classroom floor area would consequently reduce the toddler program by approximately 14 children and reduce the size of the Synagogue's Hebrew School, Adult Education program and other programs and activities; and

¶50 WHEREAS, the applicant represents that the requested yard and lot coverage waivers would enable the Synagogue to develop the site with a building with viable floor plates and adequate space for its needs; and

¶51 WHEREAS, the Opposition has argued that the Synagogue cannot satisfy the (a) finding based solely on its programmatic need and must still demonstrate that the site is burdened by a unique physical hardship in order to qualify for a variance; and

¶52 WHEREAS, notwithstanding that the applicant has asserted that the site is also burdened with a physical hardship that constrains an as-of-right development, discussed below, the Board notes that the Opposition ignores 50 years of unwavering New York jurisprudence holding that zoning boards must accord religious institutions a presumption of moral, spiritual and educational benefit in evaluations of applications for zoning variances (see e.g.; Diocese of Rochester v. Planning Bd., 1 N.Y.2d 508 (1956) (zoning board cannot wholly deny permit to build church in residential district; because such institutions further the morals and welfare of the community, zoning board must instead seek to accommodate their needs); see also Westchester Ref. Temple v. Brown, 22 N.Y.2d 488 (1968); and Islamic Soc. of Westchester v. Foley, 96 A.D. 2d 536 (2d Dep't 1983)), and therefore need not demonstrate

that the site is also encumbered by a physical hardship; and

¶53 WHEREAS, in support of its proposition that a religious institution must establish a physical hardship, the Opposition cites to decisions in Yeshiva & Mesivta Toras Chaim v. Rose (137 A.D.2d 710 (2d Dep't 1988)) and Bright Horizon House, Inc. v. Zng. Bd. of Appeals of Henrietta (121 Misc.2d 703 (Sup. Ct. 1983)); and

¶54 WHEREAS, both decisions uphold the denial of variance applications based on findings that the contested proposals constituted neither religious uses, nor were they ancillary or accessory uses to a religious institution in which the principal use was as a house of worship, and are therefore irrelevant to the instant case; and

¶55 WHEREAS, the Board finds that the proposed Synagogue lobby space, expanded toddler program, Hebrew school and adult education program, caretaker's apartment, and accommodation of Beit Rabban day school constitute religious uses in furtherance of the Synagogue's program and mission; and

¶56 WHEREAS, the Opposition contends that the Synagogue's programmatic needs are too speculative to serve as the basis for an (a) finding; and

¶57 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; and

¶58 WHEREAS, the Opposition argues, nonetheless, that the Synagogue's programmatic needs could be accommodated within an as-of-right building, or within existing buildings on the Synagogue's campus and that the proposed variances for the community facility use are unmerited and should consequently be denied; and

¶59 WHEREAS, specifically, the Opposition has contended that the Synagogue's programmatic needs could be accommodated within the existing parsonage house; and

¶60 WHEREAS, the applicant represents that the narrow width of the parsonage house, at approximately 24'-0", would make it subject to the "sliver" limitations of ZR § 23-692 which limit the height of its development and, after deducting for the share of the footprint that would be dedicated to elevator and stairs, would generate little floor area; and

¶61 WHEREAS, the applicant further represents that development of the parsonage house would not address the circulation deficiencies of the synagogue and would block several dozen windows on the north elevation of 91 Central Park West; and

¶62 WHEREAS, the Board notes that where a

BSA Action Reviewed by Article 78: BSA Resolution 74-07 BZ - Congregation
Shearith Israel, filed August 25, 2008 (5 of 14)

74-07-BZ

CEQR #07-BSA-071M

nonprofit organization has established the need to place its program in a particular location, it is not appropriate for a zoning board to second-guess that decision (see Guggenheim Neighbors v. Bd. of Estimate, June 10, 1988, N.Y. Sup. Ct., Index No. 29290/87), see also Jewish Recons. Syn. of No. Shore v. Roslyn Harbor, 38 N.Y.2d 283 (1975)); and

¶63 WHEREAS, furthermore, a zoning board may not wholly reject a request by a religious institution, but must instead seek to accommodate the planned religious use without causing the institution to incur excessive additional costs (see Islamic Soc. of Westchester v. Foley, 96 A.D.2d 536 (2d Dep't 1983); and

¶64 WHEREAS, religious institutions are entitled to locate on their property facilities for other uses that are reasonably associated with their overall purposes and a day care center/preschool has been found to constitute such a use (see Uni. Univ. Church v. Shorten, 63 Misc.2d 978, 982 (Sup. Ct. 1970)); and

¶65 WHEREAS, in submissions to the Board, the Opposition argues that the Beit Rabban school does not constitute a programmatic need entitled to deference as a religious use because it is not operated for or by the Synagogue; and

¶66 WHEREAS, however, it is well-established under New York law that 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 (see Slevin v. Long Isl. Jew. Med. Ctr., 66 Misc.2d 312, 317 (Sup. Ct. 1971); and

¶67 WHEREAS, the applicant further states that the siting of the Beit Rabban school on the premises helps the Synagogue to attract congregants and thereby enlarge its congregation, which the courts have also found to constitute a religious activity (see Community Synagogue v. Bates, 1 N.Y.2d 445, 448 (1958)), in which the Court of Appeals stated, "[t]o limit a church to being merely a house of prayer and sacrifice would, in a large degree, be depriving the church of the opportunity of enlarging, perpetuating and strengthening itself and the congregation"); and

¶68 WHEREAS, the Board notes that the applicant has provided supportive evidence showing 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 Synagogue's programmatic needs; and

¶69 WHEREAS, the applicant represents that the variance request is necessitated not only by its programmatic needs, but also by physical conditions on the subject site – namely – the need to retain and

preserve the existing landmarked Synagogue and by the obsolescence of the existing Community House; and

¶70 WHEREAS, the applicant states that as-of-right development of the site is constrained by the existence of the landmarked Synagogue building which occupies 63 percent of the Zoning Lot footprint; and

¶71 WHEREAS, the applicant represents that because so much of its property is occupied by a building that cannot be disturbed, a relatively small portion of the site is available for development – largely limited to the westernmost portion of the Zoning Lot; and

¶72 WHEREAS, the applicant further represents that the physical obsolescence and poorly configured floorplates of the existing Community House constrain circulation and interfere with its religious programming and compromise the Synagogue's religious and educational mission, and that these limitations cannot be addressed through interior alterations; and

¶73 WHEREAS, the applicant states that the proposed building will provide new horizontal and vertical circulation systems to provide barrier-free access to its sanctuaries and ancillary facilities; and

¶74 WHEREAS, based upon the above, the Board finds that the aforementioned physical conditions, when considered in conjunction with the programmatic needs of Synagogue, create unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations; and

¶75 WHEREAS, the Opposition argues that uniqueness is limited to the physical conditions of the Zoning Lot and that the obsolescence of an existing building or other building constraints therefore cannot fulfill the requirements of the (a) finding, while citing no support for such a proposition; and

¶76 WHEREAS, to the contrary, New York courts have found that unique physical conditions under Section 72-21(a) of the Zoning Resolution can refer to buildings as well as land (see Guggenheim Neighbors v. Board of Estimate, June 10, 1988, N.Y. Sup. Ct. Index No. 29290/87; see also, Homes for the Homeless v. BSA, 7/23/2004, N.Y.L.J. citing UOB Realty (USA) Ltd. v. Chin, 291 A.D.2d 248 (1st Dep't 2002;); and, further, obsolescence of a building is well-established as a basis for a finding of uniqueness (see Matter of Commco, Inc. v. Amelkin, 109 A.D.2d 794, 796 (2d Dep't 1985), and Polsinello v. Dwyer, 160 A.D. 2d 1056, 1058 (3d Dep't 1990) (condition creating hardship was land improved with a now-obsolete structure)); and

¶77 WHEREAS, in submissions to the Board, the Opposition has also contended that the Synagogue had failed to establish a financial need for the project as a whole; and

¶78 WHEREAS, the Board notes that to be entitled to a variance, a religious or educational institution must establish that existing zoning requirements impair its ability to meet its programmatic needs; neither New

BSA Action Reviewed by Article 78: BSA Resolution 74-07 BZ - Congregation
Shearith Israel, filed August 25, 2008 (8 of 14)

74-07-BZ

CEQR #07-BSA-071M

the landmark Synagogue limits the developable portion of the site to the development site; and

¶113 WHEREAS, as to the limitations on development imposed by the site's location within the R8B contextual zoning district, the applicant represents the district's height limits and setback requirements, and the limitations imposed by ZR § 23-692, result in an inability to use the Synagogue's substantial surplus development rights; and

¶114 WHEREAS, the applicant represents that, as a result of these constraints, the Synagogue would be permitted to use a total of 28,274 sq. ft. for an as-of-right development, although it has approximately 116,752 sq. ft. in developable floor area; and

¶115 WHEREAS, the Synagogue further represents that, after development of the proposed building the Zoning Lot would be built to a floor area of 70,166 sq. ft. and an FAR of 4.36, although development of 144,511 sq. ft. of floor area and an FAR of 8.36 would be permitted as-of-right, and that approximately 74,345 sq. ft. of floor area will remain unused; and

¶116 WHEREAS, the Opposition contends that the inability of the Synagogue to use its development rights is not a hardship under ZR § 72-21 because a religious institution lacks the protected property interest in the monetization of its air rights that a private owner might have, citing Matter of Soc. for Ethical Cult. v. Spatt, 51 N.Y.2d 449 (1980); and

¶117 WHEREAS, the Opposition further contends that the inability of the Synagogue to use its development rights is not a hardship because there is no fixed entitlement to use air rights contrary to the bulk limitations of a zoning district; and

¶118 WHEREAS, the Board notes that Spatt concerns whether the landmark designation of a religious property imposes an unconstitutional taking or an interference with the free exercise of religion, and is inapplicable to a case in which a religious institution merely seeks the same entitlement to develop its property possessed by any other private owner; and

¶119 WHEREAS, furthermore, Spatt does not stand for the proposition that government land use regulation may impose a greater burden on a religious institution than on a private owner; indeed, the court noted that the Ethical Culture Society, like any similarly situated owner, retained the right to generate a reasonable return from its property by the transfer of its excess development rights (see 51 N.Y.2d at 455, FN1); and

¶120 WHEREAS, the Board notes that the Zoning Resolution includes several provisions permitting the utilization or transfer of available development rights from a landmark building within the lot on which it is located or to an adjacent lot, and

¶121 WHEREAS, the Board further notes that while a nonprofit organization is entitled to no special

deference for a development that is unrelated to its mission, it would be improper to impose a heavier burden on its ability to develop its property than would be imposed on a private owner; and

¶122 WHEREAS, the Board agrees that the unique physical conditions cited above, when considered in the aggregate and in light of the Synagogue's programmatic needs, create practical difficulties and unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations; thereby meeting the required finding under ZR § 72-21(a); and ZR § 72-21 (b) – Financial Return Finding

¶123 WHEREAS, under ZR § 72-21 (b), the Board must establish that the physical conditions of the site preclude any reasonable possibility that its development in strict conformity with the zoning requirements will yield a reasonable return, and that the grant of a variance is therefore necessary to realize a reasonable return (the "(b) finding"), unless the applicant is a nonprofit organization, in which case the (b) finding is not required for the granting of a variance; and

Community Facility Use

¶124 WHEREAS, the applicant represents that it need not address the (b) finding since it is a not-for-profit religious institution and the community facility use will be in furtherance of its not-for-profit mission; and

Residential Development

¶125 WHEREAS, under New York State law, a not-for-profit organization which seeks land use approvals for a commercial or revenue-generating use is not entitled to the deference that must be accorded to such an organization when it seeks to develop a project that is in furtherance of its mission (see Little Joseph Realty v. Babylon, 41 N.Y.2d 738 (1977); (municipal agency was required to make the variance findings because proposed use would be operated solely by and for the benefit of a private entrepreneur); Foster v. Saylor, 85 A.D.2d 876 (4th Dep't 1981) (variance upheld permitting office and limited industrial use of former school building after district established inability to develop for a conforming use or otherwise realize a financial return on the property as zoned); and Roman Cath. Dioc. of Rockville Ctr v. Vill. Of Old Westbury, 170 Misc.2d 314 (1996) (cemetery to be operated by church was found to constitute a commercial use)); and

¶126 WHEREAS, the residential development was not proposed to meet its programmatic needs, the Board therefore directed the applicant to perform a financial feasibility study evaluating the ability of the Synagogue to realize a reasonable financial return from as-of-right residential development of the site, despite the fact that it is a not-for-profit religious institution; and

¶127 WHEREAS, the applicant initially submitted a feasibility study that analyzed: (1) an as-of-right community facility/residential building within an R8B envelope (the "as-of-right building"); (2) an as-of-right

BSA Action Reviewed by Article 78: BSA Resolution 74-07 BZ - Congregation

Shearith Israel, filed August 25, 2008 (10 of 14)

74-07-BZ

CEQR #07-BSA-071M

on profits is typically used on an unleveraged basis for condominium or home sale analyses and would therefore be more appropriate for a residential project, such as that proposed by the subject application; and

¶144 WHEREAS, the Board notes that a return on profit model which evaluates profit or loss on an unleveraged basis is the customary model used to evaluate the feasibility of market-rate residential condominium developments; and

¶145 WHEREAS, the Opposition also raised concerns as to the omission of the income from the Beit Rabban school from the feasibility study; and

¶146 WHEREAS, in response to concerns raised by the Opposition as to why the feasibility study omitted the income from the Beit Rabban school, a submission by the applicant states that the projected market rent for community facility use was provided to the Board in an earlier submission and that the cost of development far exceeded the potential rental income from the community facility portion of the development; and

¶147 WHEREAS, further, the Board notes that it requested that costs, value and revenue attributable to the community facility be eliminated from the financial feasibility analysis to allow a clearer depiction of the feasibility of the proposed residential development and of lesser variance and as-of-right alternatives; and

¶148 WHEREAS, based upon its review of the applicant's submissions, the Board has determined that because of the subject site's unique physical conditions, there is no reasonable possibility that development in strict compliance with applicable zoning requirements would provide a reasonable return; and

ZR § 72-21 (c) – Neighborhood Character Finding

¶149 WHEREAS, as pertains to the (c) finding under ZR § 72-21, the Board is required to find that the grant of the variance will not alter the essential neighborhood character, impair the use or development of adjacent property, or be detrimental to the public welfare; and

¶150 WHEREAS, because the variances sought to permit the community facility use differ from the variances sought to permit the proposed residential use, the potential affects on neighborhood character of each respective set of proposed variances are discussed separately below; and

Community Facility Use

¶151 WHEREAS, the applicant represents that the proposed rear yard and lot coverage variances permitting the community facility use will not negatively affect the character of the neighborhood, nor affect adjacent uses; and

¶152 WHEREAS, the applicant states that the proposed waivers would allow the community facility to encroach into the rear yard by ten feet, to a height of approximately 49 feet; and

¶153 WHEREAS, the applicant states that, as a community facility, the Synagogue would be permitted to build to the rear lot line up to a height of 23 feet; and

¶154 WHEREAS, the applicant represents that the affect of the encroachment into the rear yard is partly offset by the depths of the yards of the adjacent buildings to its rear; and

¶155 WHEREAS, the Board conducted an environmental review of the proposed action and found that it would not have significant adverse impacts on the surrounding neighborhood; and

¶156 WHEREAS, the Opposition disputes the findings of the Environmental Assessment Statement ("EAS") and contends that the expanded toddler program, and the life cycle events and weddings held in the multi-purpose room of the lower cellar level of the proposed community facility would produce significant adverse traffic, solid waste, and noise impacts; and

¶157 WHEREAS, the Board notes that the additional traffic and noise created by the expanded toddler program – which is projected to grow from 20 children to 60 children daily – falls below the CEQR threshold for potential environmental impacts; and

¶158 WHEREAS, the Board further notes that the waivers of lot coverage and rear yard requirements are requested to meet the Synagogue's need for additional classroom space and that the sub-cellar multi-purpose room represents an as-of-right use; and

¶159 WHEREAS, the applicant states that the proposed multi-function room would result in an estimated 22 to 30 life cycle events and weddings over and above those currently held; and

¶160 WHEREAS, with respect to traffic, the applicant states that life cycle events would generate no additional traffic impacts because they are held on the Sabbath and, as Congregation Shearith Israel is an Orthodox synagogue, members and guests would not drive or ride to these events in motor vehicles; and

¶161 WHEREAS, the applicant further states that significant traffic impacts are not expected from the increased number of weddings, because they are generally held on weekends during off-peak periods when traffic is typically lighter, or from the expanded toddler program, which is not expected to result in a substantial number of new vehicle trips during the peak hours; and

¶162 WHEREAS, with respect to solid waste, the EAS estimated the solid waste attributable to the entirety of the proposed building, including the occupants of the residential portion and the students in the school, and conservatively assumed full occupancy of the multi-function room (at 360 persons); and

¶163 WHEREAS, the estimates of solid waste generation found that the amount of projected additional waste represented a small amount, relative to the amount of solid waste collected weekly on a given route by the Department of Sanitation, and would not

BSA Action Reviewed by Article 78: BSA Resolution 74-07 BZ - Congregation
Shearith Israel, filed August 25, 2008 (13 of 14)

74-07-BZ

CEQR #07-BSA-071M

sixth through eighth floors of the building, thereby retaining access to light and air of three additional lot line windows; and

¶209 WHEREAS, the applicant modified the proposal to provide a complying court at the north rear above the fifth floor, thereby reducing the floor plates of the sixth, seventh and eighth floors of the building by approximately 556 sq. ft. and reducing the floor plate of the ninth floor penthouse by approximately 58 sq. ft., for an overall reduction in the variance of the rear yard setback of 25 percent; and

¶210 WHEREAS, during the hearing process, the Board also directed the applicant to assess the feasibility of several lesser variance scenarios; and

¶211 WHEREAS, financial analyses submitted by the applicant established that none of these alternatives yielded a reasonable financial return; and

¶212 WHEREAS, however, the Opposition argues that the minimum variance finding is no variance because the building could be developed as a smaller as-of-right mixed-use community facility/ residential building that achieved its programmatic mission, improved the circulation of its worship space and produced some residential units; and

¶213 WHEREAS, the Synagogue has fully established its programmatic need for the proposed building and the nexus of the proposed uses with its religious mission; and

¶214 WHEREAS, the Board notes again that a zoning board must accommodate a proposal by a religious or educational institution for a project in furtherance of its mission, unless the proposed project is shown to have significant and measurable detrimental impacts on surrounding residents (See Westchester Ref. Temple v. Brown, 22 N.Y.2d 488 (1968); Islamic Soc. of Westchester v. Foley, 96 A.D. 2d 536 (2d Dep't 1983); and Jewish Recons. Synagogue of No. Shore v. Roslyn Harbor, 38 N.Y.2d 283 (1975)); and

¶215 WHEREAS, the Opposition has not established such impacts; and

¶216 WHEREAS, the Opposition may have raised other issues that are not specifically addressed herein, the Board has determined that all cognizable issues with respect to the required variance findings or CEQR review are addressed by the record; and

¶217 WHEREAS, the Board finds that the requested lot coverage and rear yard waivers are the minimum necessary to allow the applicant to fulfill its programmatic needs and that the front setback, rear setback, base height and building height waivers are the minimum necessary to allow it to achieve a reasonable financial return; and

¶218 WHEREAS, thus, the Board has determined that the evidence in the record supports the findings required to be made under ZR § 72-21; and

¶219 WHEREAS, the project is classified as a Type 1 action pursuant to 6NYCRR, Part 617; and

¶220 WHEREAS, the Board has conducted an environmental review of the proposed action and has documented relevant information about the project in the Final Environmental Assessment Statement (EAS) CEQR No. 07BSA071M dated May 13, 2008; and

¶221 WHEREAS, the EAS documents that the project as proposed would not have significant adverse impacts on Land Use, Zoning, and Public Policy; Socioeconomic Conditions; Community Facilities and Services; Open Space; Shadows; Historic Resources; Urban Design and Visual Resources; Neighborhood Character; Natural Resources; Waterfront Revitalization Program; Infrastructure; Solid Waste and Sanitation Services; Energy; Traffic and Parking; Transit and Pedestrians; Air Quality; Noise; and Public Health; and

¶222 WHEREAS, the Board has determined that the proposed action will not have a significant adverse impact on the environment.

¶223 *Therefore it is Resolved* that the Board of Standards and Appeals issues a Negative Declaration with conditions as stipulated below, prepared in accordance with Article 8 of the New York State Environmental Conservation Law and 6 NYCRR Part 617, the Rules of Procedure for City Environmental Quality Review and Executive Order No. 91 of 1977, as amended, and makes the required findings under ZR § 72-21, to permit, on a site partially within an R8B district and partially within an R10A district within the Upper West Side/ Central Park West Historic District, the proposed construction of a nine-story and cellar mixed-use community facility/ residential building that does not comply with zoning parameters for lot coverage, rear yard, base height, building height, front setback and rear setback contrary to ZR §§ 24-11, 77-24, 24-36, 23-66, and 23-633; *on condition* that any and all work shall substantially conform to drawings as they apply to the objections above noted, filed with this application marked "Received May 13, 2008"—nineteen (19) sheets and "Received July 8, 2008"—one (1) sheet; and *on further condition*:

¶224 THAT the parameters of the proposed building shall be as follows: a total floor area of 42,406 sq. ft.; a community facility floor area of 20,054 sq. ft.; a residential floor area of 22,352 sq. ft.; a base height of 95'-1"; with a front setback of 12'-0"; a total height of 105'-10"; a rear yard of 20'-0"; a rear setback of 6'-8"; and an interior lot coverage of 0.80; and

¶225 THAT the applicant shall obtain an updated Certificate of Appropriateness from the Landmarks Preservation Commission prior to any building permit being issued by the Department of Buildings;

¶226 THAT refuse generated by the Synagogue shall be stored in a refrigerated vault within the building, as shown on the BSA-approved plans;

74-07-BZ

CEQR #07-BSA-071M

¶227 THAT this approval is limited to the relief granted by the Board, in response to specifically cited and filed DOB/other jurisdiction objection(s) only;

¶228 THAT the approved plans shall be considered approved only for the portions related to the specific relief granted;

¶229 THAT substantial construction be completed in accordance with ZR § 72-23;

¶230 THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code, and any other relevant laws under its jurisdiction irrespective of plan(s)/configuration(s) not related to the relief granted.

Adopted by the Board of Standards and Appeals,
August 26, 2008.

A true copy of resolution adopted by the Board of Standards and Appeals, August 26, 2008.
Printed in Bulletin No. 35, Vol. 93.

Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.

