BEFORE THE

NEW YORK CITY BOARD OF STANDARDS AND APPEALS

Case #74-07-BZ.

POST HEARING STATEMENT IN OPPOSITION

TO CERTAIN VARIANCES

SUBSEQUENT TO HEARING OF JUNE 24, 2008

AND IN RESPONSE TO

APPLICANT'S SUBMISSIONS OF JULY 8, 2008

Affected Premises:
CONGREGATION SHEARITH ISRAEL
6-10 West 70th Street/99-100 Central Park West
Block 1122 Lots 36 & 37
Manhattan

JULY 29, 2008

Counsel for Nizam Kettaneh,
and Other Concerned Residents

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Revised July 31, 2008 to Modify References from Unofficial Transcript to Official June 24, 2008, Transcript and Amplify Other Citations to the Record.

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POST HEARING STATEMENT IN OPPOSITION

A. Introduction[1]

Rather than raise funds from its members so as to construct a new school and other facilities and to resolve accessibility issues within its historic Synagogue, Applicant Congregation Shearith Israel, one of the nation's oldest and most substantial congregations, is asking the City to set aside its zoning laws, laws intended to prevent over-development of the City's mid-blocks neighborhoods. Applicant seeks to upset longstanding principles of landmark and zoning laws; granting these variances to Applicant based upon the arguments stated by Applicant would establish precedents causing havoc to other neighborhoods in all five boroughs.

As stated by Applicant, the purpose of the variances is to fund the Congregation, by allowing the Congregation to construct luxury condominiums atop a new community house. The community house itself includes the construction of space to be rented to a private school, expected to yield over $1 million in rent. Not only has the Applicant not shown any indication of financial need, all public facts as to the Applicant are to the contrary. The financial beneficiaries from the variances, in reality, are not the institution, but the individual members of the Congregation, members who as a result will minimize the need to provide financial support for their own institution.[2] Had the Applicant not repeatedly introduced the issue of financial subsidy by the condominiums, of course this would not be mentioned.

These members, who include well known philanthropists and business people, apparently would rather not engage in fund-raising as has the New York Historical Society (which just announced the raising of $50 million for a renovation and the cancellation of its own condominium project on West 76th St.), the Eldridge Street Synagogue (which under the auspices of Roberta Brandes Gratz raised millions for restoration, *See* Opp. Ex. DD-8-11,) and the 76th Street Jewish Community Center (which raised millions from the community to construct an as-of-right community facility at Amsterdam and 76th Street. *See* Opp. Ex. DD-21-23.)

To obtain the variances (seven in number), the Congregation effectively asks that the requirements of Section 72-21 of the Zoning Resolution be ignored. The Congregation cannot show a factual basis for the five findings required for any of the variances. The Congregation cannot provide a legal basis for the requested variances, even though its legal resources are substantial. The Congregation has just ignored the legal analysis in

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[1] This statement is submitted in further opposition to the application for variances by the Applicant Congregation Shearith Israel in response to the Applicant's submissions of June 17, 2008 and July 8, 2008. The statement is submitted on behalf of Nizam Kettaneh, the owner of a row house located on West 70th Street. opposite the proposed project and as well as other community residents opposing the variances.

[2] An example of a congregant beneficiary of these variances is Louis M. Solomon introduced at the beginning of the last hearing, as a new member of the Applicant's legal team. He was identified as a Trustee and Vice-President of the Congregation. Mr. Solomon is the co-chair of the 275 lawyer litigation department of Proskauer Rose LLP.

the undersigned's brief of June 10, 2008. The Congregation avoids discussing the variance on an individual basis, as required by ZR 72-21.

The Congregation avoids providing information in a format to allow comparison of information directly between an as of right and proposed buildings. The Congregation has not and cannot show any relationship between the heart of it case, accessibility to the Sanctuary, and any of the variances claimed. Even the rear yard variances, claimed to be based on a need for classroom space, on closer inspection are revealed merely as a contrivance so as to not impinge upon the use of the fifth and sixth floors of an as of right building for income producing condominiums.

B. Issues Raised by the Most Recent Submissions and Testimony by Applicant

Significant issues have been raised by the recent submissions and testimony by the Applicant and by the questions asked and not asked by the Board. We will summarize these for ready reference.

1. The Effort by the Board to Expunge Statements in the Record

The Board has attempted to sanitize the record by having the Applicant expunge its economic engine rationale from the record, since the rationale not only is not in accord with prior decisions of the Board, but offends New York State law and the U.S. Constitution. This effort to cleanse the record and shape the record demonstrates the arbitrary and capricious way in which this proceeding has been conducted.[3] Notwithstanding, the Board's expungement effort fails. The entire record at the BSA as well as the LPC and CB7 proceedings replete with explicit statements as to the economic engine argument. And, although Applicant removes one sentence in its latest submission, it failed to remove others and even worse for the Applicant, added a new statement discussed next.[4]

2. Applicant Now Acknowledges that its Need for a Fourth Floor Setback Variance Is Not Dictated by Programmatic Need

Although Applicant removed one sentence to ease the hard place on which the Board sits, it added another at page 28, Opp. Ex. PP-41.

> The development plans' project feasibility further requires that the caretaker apartment be located at the fourth floor level rather than on a higher residential floor which carry a premium due to their oblique Central Park views.

[3] The proceeding was flawed from the beginning. See April 10, 2007 letter requesting recusal Opp. Ex. PP-14.

[4] Opp. Ex PP-38 is a compilation of the changes made on 7 of the pages by the Applicant in the July 8, 2008 Statement in Support as compared to the May 13, 2008 report. The statement deleted is on page 31 and states "The addition of residential use in the upper portion of the building is consistent with CSI's need to raise enough capital funds to correct the programmatic deficiencies described throughout this Application." See Opp. Ex. PP-44.

Applicant acknowledges that more classrooms could be added on the fourth floor where the 1200 sq. ft. caretaker's apartment is located, except for the fact that the Applicant needs "to raise enough capital funds to correct the programmatic deficiencies."

Not only has Applicant revealed the obvious truth and pulled the rug from under its request for rear variances on the fourth floor, but, Applicant has also eliminated the programmatic need for at least the third floor as well, because the 1200 sq. foot available from the caretaker's apartment exceeds the area sought for the variances for the third and fourth floor, and most of the second floor.

3. Applicant Has no Evidence to Support Finding (a) re the Hardship of Accessibility

Applicant must provide substantial evidence to meet it burden under finding (a) - but, on critical points, not only does the Applicant not provide substantial evidence, it provides no evidence. The unfortunate fact that the Board has not conducted the proceeding fairly by inquiring into the relationship between the "heart" of Applicant's case - the access hardship - and the variance, in no way absolves the Applicant from offering evidence to support its own application.

4. Applicant has Provided No Evidence of any Unique Physical Condition

Applicant's case for a unique physical condition is set out on page 33 of its latest Statement in Support:

> The unique physical conditions peculiar to and inherent in CSI's Zoning Lot include: (1) building of significant cultural and religious importance occupying two-thirds of the footprint of the Zoning Lot, the disturbance or alteration of which would undermine CSI's religious mission; (2) a development site on the remaining one third of the Zoning Lot whose feasible development is hampered by the presence of a zoning district boundary and requirements to align its streetwall along East 70th Street and east elevation with the existing Synagogue building; and (3) dimensions of the Zoning Lot that preclude the development of floorplans for community facility space required to meet CSI's on-site religious,

Despite the impressive language, these rationales are devoid of factual support, and are incomprehensible as well, even to the Chair who could not explain item (2) at the last hearing and asked for clarification. The Applicant's clarification was to add the word's "East 70th Street"; even if the Applicant had correctly stated "West 70th Street", the sentence would still be gibberish. Indeed, all three items above are gibberish when applied to the conforming Scheme A As-Of-Right building which resolves all programmatic needs for the applicant. Item (1) does not interfere with constructing of Scheme A, and nor do Items (2) and (3). Thus, even if these conditions were physical, they do not satisfy finding (a).

As discussed below, neither obsolescence nor a split lot would in this case provide the requisites for finding (a).

5. Applicant Never Provided an All Residential AOR Reasonable Return Analysis

Despite the specific request by the Board in its June 15, 2007 Notice of Objections, # 31 and # 37 (*see* Opp. Ex. 110, 111) the Applicant never provided a reasonable return analysis of a best use conforming scheme. What Applicant provided was an analysis (complete with erroneous methodology) with community space on the first floor, and excluding the 6400 sq. ft. sub-basement, which, of course is feasible.

This reasonable return analysis, under applicable court rulings, is mandatory, which, of course is why it was requested in the first instance, and, indeed was required by the Board guidelines.

Moreover, the Scheme C analysis was never updated to conform to later changes by Freeman/Frazier, and, the missing pages from the construction estimate have not been provided. Yet, analyzing the best use economics for the entire site is a core analysis required in a zoning case.

6. Applicant's Two Condominium Conforming AOR Scheme A Reasonable Return Analysis Is Fatally Flawed

The Scheme A analysis provided by Applicant is fatally flawed for the reasons set forth in Marty Levine's statements including the one provided today. Without at all suggesting that the following are the most important or only points, three points are worth stating here:

(a) Applicant Refuses to Provide Complete Construction Cost Estimate Reports.

First, Applicant failed to submit the complete construction cost estimates for this Scheme, saying that it did not provide the missing 13 pages because opponents had not requested those pages. Opponents did request the pages. Applicant has is own legal responsibility to meet its own burden of proof, and can neither palm off this burden to opponents or the Board. Analysis of the completed cost estimates for the proposed building shows that the entire construction costs for the fourth floor were allocated to the residential costs, not to the school costs. Obviously Freeman/Frazier possesses the missing 13 pages, so why did Freeman/Frazier not produce them? This begins to look like garden variety concealment of evidence.

(b) Construction Cost Estimates for the Proposed Scheme Allocates All of the Fourth Floor to the Condominium Cost, When These Costs Should be 100% Schools/non-Condominium

As a result of the most recent July 8, 2008 submission by Freeman/Frazier, the undersigned's testimony at the recent hearing, and the refusal of Freeman/Frazier to explain the allocations in the estimate, Opponents undertook a closer analysis of the construction estimates as suggested by Freeman/Frazier. Freeman/Frazier should be careful as to what it requests.

Analysis of the completed cost estimates for the proposed building shows that the entire construction costs for the fourth floor were allocated to the residential costs, not to the school costs. As Martin Levine states in his expert report dated today:

> The Freeman/Frazier submission dated June 17, 2008 (Opp. Ex. MM-50) contains comprehensive information regarding both architectural plans with accompanying detailed cost estimates. Review of these plans reveals very clearly that Applicant has charged the residential condominium component for building the entire fourth floor, which is occupied fully by the school and caretaker's apartment (Opp. Ex. MM-154 shows the fourth floor as per architect's drawings). This is demonstrated on pages 18 and 21 of their report (Opp. Ex. MM-68&71) which clearly shows that the gross residential building area is being charged to the residential component is 25,728 square feet. This matches precisely to the 25,728 square feet of gross enclosed area contained on the chart on page 22 of their report (Opp. Ex. MM-72) which shows 5,098 square feet on the fourth floor, 4,458 square feet on the fifth floor, 4,293 square feet on each of the sixth, seventh and eighth floors, 2,743 square feet on the penthouse and 550 square feet on the roof. This error is quite substantial, resulting in an overcharge of more than $2,000,000 to the residential component of the project.

It would be fair to state that Applicant is concealing the 13 pages of AOR Scheme A. It would be an abuse of discretion for the Board to accept the Scheme A Reasonable Return Analysis absent this information, signed and explained by the construction estimator.

(c) Applicant's Use of Unused Development Space over the Parsonage to Determine the Market Value of Two Floors of Condominium Development Right is Utterly Flawed and Lacks any Rational Basis

Third, the Scheme A Analysis utilizes a methodology which assumes that averaging unused space from the adjoining parsonage is required for the floor area of AOR Scheme A. But, the conforming Scheme A is close to an FAR 4.0 building; and any averaging could be obtained by the R10A part of lot 37. So, Freeman/Frazier's methodology is irrational, and indeed, as explained by Marty Levine, the proper methodology is to multiply the developable area times the appropriate comparable.

7. New York City's Zoning Resolution Provides Substantial Accommodations to Non-Profit In the Form of Allowing Full Lot Coverage

The Applicant argument in the final analysis is that, as a religious non-profit, it is entitled to unlimited accommodation without regard to the zoning law. Applicant ignores the accommodation granted by New York City's Zoning Resolution, in permitting a non-profit to use the full lot coverage up to twenty three feet. This is a significant impingement on the rear yards and here provides a significant benefit to non-profits such as this Applicant.

This Applicant already has been provided a substantial valuable accommodation to non-profits, something not available to others subject to the zoning law. This establishes an even greater burden on a non-profit applicant who already is receiving special privileges. Just to be clear, it is unlikely if the City Council would ever amend the zoning law to permit non-profits to use non-conforming condominium development to subsidize a non-profit, especially where there is no showing of need.

Although there are instances where non-profits have been accorded some deference, this has never occurred where there is no relationship between the programmatic needs of the applicant and the variances requested.

But, this Applicant wants even more deference than that afforded by the Zoning Resolution as an accommodation to non-profits. It has asked for height and setback variances for condominiums for the sole purpose of funding its programmatic needs. Having already been accorded the first floor right to use the entire lot, the Applicant wants more setbacks in the rear and wishes to provide only a 20 foot, rather than 30 foot rear yard setback above the 23 foot level.

8. The Second Floor Set-Back Variance Assumes That a 60 Toddler Program Would Be Approved by the Health Department, the Fire Department, and DOB

Applicant in its latest submission to DOB, did not include a 60 person toddler program on the second floor. This "programmatic need" was first included on in the December 2008 drawings submitted by Applicant. Department of Health regulations are very clear that one cannot have a toddler program on the second floor of a structure, without a special waiver. Opp. Ex. 46. For this Applicant, obtaining a waiver would be complicated by the fact that the primary exit stairs are in a separate building, the Sanctuary, with a single access point between the new school and the Sanctuary. Applicant has not presented any evidence that such a program of this size would be approved on the second floor considering the access issues and the fact that the building has been determined to be a 9/11 sensitive building. Interestingly early in the LPC process, Applicant did indicate toddler programs on the second floor, but omitted this use when presenting the plans to DOB. Now, Applicant has decided to include the Toddler use, never shown to DOB. In addition, these same Department of Health regulations show that Applicant, at 30 sq ft per toddler, can meet its programmatic need of 60 toddlers (less 2) in the conforming as-of-right scheme.

9. The Feasibility Guidelines - Item M- are the Only Regulations of the Board as to Reasonable Return Studies

In order to ascertain whether there are guidelines, policies, or procedures that relate to the reasonable return studies required under finding (b), on April 22, 2008, the undersigned submitted a Freedom of Information Law request to the BSA for any such documents and related information. *See* Opp. Ex. PP-103. The BSA responded on May 7, 2008 (Opp. Ex. PP-104), stating that there are no such documents other than Item M for the Detailed Instructions for Completing BSA Applications.

In almost every possible way the Applicant has ignored the letter and the spirit of Item M, as well as the Notices of Objections from the Board. Opp. Ex. PP-106. Opp. Ex. PP-113.

It would be arbitrary and capricious for the Board to allow the Applicant to ignore its rules as to so many material matters, as explained in the multitude of submissions by Opponents and even in questions by the Board and staff.

10. The So Called Environmental Study

The application was filed initially on April 2, 2007, one year after the issuance of the Certificate of Appropriateness by the LPC. Thus, applicant has had over two and a half years to prepare a proper Environmental Study.

As documented elsewhere, the study:

- Ignores the legally permitted windows in 18 West 70th Street which will be bricked up.
- Ignores the possible sprinkling and screening of other 18 West 70th Street windows.
- Cannot provide a proper and understandable shadow study of West 70th Street.
- Assumes no increase in student numbers when the numbers will be doubled.
- Misunderstands the increase in size of classroom space.

Thus, on all the key metrics, the study is wrong or misses the mark. Thus, it cannot form the basis of a SEQR finding.

In the last submissions, the Applicant suggests that next week, AKRF will amend the shadow study. This is improper, especially without a chance for opponents to respond.

At the first hearing, opponents submitted three dimensional color studies showing the methodology for meaningful assessment of the impact of shadows. *See*, Opp. Ex. PP-1-13 introduced at the first hearing. Unlike the frankly pathetic efforts of AKRF, these opponent studies show the possibility of using current low cost modeling software to demonstrate the shadow impact in an understandable way, not the antique software and inadequate methodology used by AKRF to obscure the facts. In addition, it is a basic principle when doing such studies to test the shadow study results against the reality to establish whether the model works.

The Applicant has never contested the depiction of the project as shown in Opp. Ex. PP-1-13, nor provided it versions of the same depictions - so, the Board should assume these depictions to be accurate.

The opposition has presented many photographs which show that the AKRF "opinion" is just flatly wrong.

According to AKRF, the sun cast on the West 70th Street row houses opposite Site 37 shown in the following photo cannot exist. They do, and the AKRF study is flawed, of course.

Photo 11 West 70th Street, Opp. Ex Z-1

11. <u>Justification for Waivers So As to Generate Income for Programmatic Needs Places Board in a "Hard Place"</u>

As Chair Srinivasan stated at the November 27, 2007 hearing, the Congregation has put the Board in a "hard place", since it is apparent that the objective is to raise funds to support the construction of the Community House and the Congregation.

> 504 So, when you've made this presentation just as the program needs for the
> 505 synagogue, well, then we see a proposal which includes another piece of it where you're
> 506 asking for waivers which don't really relate directly to the program of the synagogue
> 507 except that it gives you - - you're able to monetize your air rights and use it in a way,
> 508 which I understand, may fund the congregation but those are not the typical cases that we
> 509 see before the Board.
> 510 **<u>So, we're put in this hard place.</u>**

November 27, 2007 BSA Transcript at 24.

The Chair then asked the Applicant for case law to supports it proposition- which has never been forthcoming from the Applicant:

> 516 And, if you think that there's case law that speaks to the issue of a religious
> 517 institution needing to fund itself by a revenue generating stream on their property, then
> 518 you can brief us on that.
> 519 But, it seems to me, that we have haven't come across that case law.

Id. at Page 24.

The Applicant's counsel Shelly Friedman stood by the position that the Congregation had taken repeatedly and consistently from the first presentation before LPC:

> 524 And, so we turn to, again, the residential solely to provide the economic engine.
> 535 I've referred to it before. People don't like it but I think it's a viable concept, the
> 536 economic engine to assist in providing the means necessary for the new community
> 537 house and to solve the accessibility problems and nothing else.

Id. at Page 24.

Commissioner Ottley Brown then challenged Mr. Friedman, stating:

> 571 COMM. OTTLEY-BROWN: Just a comment back that
> 572 it's my opinion that residential use to raise capital funds to correct programmatic
> 573 deficiencies is not in and of itself a programmatic need. It may be a resolution to a
> 574 problem or a way of financing a resolution to a programmatic need.
> 575 And, I think if we open the door, here, and allow that argument in, we're going to
> 576 have a hard time turning down every other religious institution that wants to place
> 577 residential in their backyard in order to finance expansion.

Id. at Page 26

The Chair few moments later returned to the subject:

> 604 And I think it - - <u>then it still remains a door opener so we've seen a lot of cases</u>
> 605 before the Board which is based on programmatic needs there; enlargements of existing
> 606 synagogues. There are new synagogues. There are schools. They do not include in their
> 607 equation the idea of having some commercial venture or profit-making venture which is
> 608 going to pay for that expansion.
> 609 There's an understanding that, in fact, what's going to pay is fund raising or other
> 610 ways of actually receiving funds to build the expansion.

Id. at Page 27-28.

Subsequent to the November 27, 2007 hearing, the Applicant has failed to provide any additional justification for the variances.

So, the Board remains in the same hard spot as on November 27, 2007 - under pressure from the Applicant to, in the words of the Chair, create a "door opener."

For the Board, approving this variance will be a complete disaster. The opposition will no doubt appeal. The lack of any substantial evidence for the Applicant's position and the economic engine argument will be spelled out in the Supreme Court, the Appellate Division, and then the Court of Appeals. Were the variance to be upheld, then the door would be wide open. During the interim, the Board will be barraged with copycat applications.

12. <u>Chair's Request to Remove References to Using Variance to Generate Revenue to Fund the Congregation's Programmatic Need</u>

Yet, the Applicant continued and continues to premise its variance request on the financial support of its programmatic needs from the condominium construction, continuing to put the Board in a "hard spot." Not only would the Applicant not provide evidence of financial need and would not connect the programmatic need to the condominiums, the Applicant also has been unable to provide case law for the support of its position.

Finally, at the June 24, 2008, hearing, after the Board was reminded of the November 27, 2007 colloquy,[5] the Chair, who evidently believed that the Board was still in a "hard

[5] Earlier in the June 24, 2008 hearing, Susan Nial, an opposition attorney had stated to the Board:

> 10. Your
> 11 decisions past have said that that kind of quote, "Programmatic need" getting revenue to

place" asked the Applicant essentially to sanitize the record by taking this argument out of its papers.

> 8 I think the comment that Commissioner Ottley-Brown made about the programmatic need
> 9 regarding revenue generation, I think we've already said that many times; that we feel
> 10 that that in and of itself is not a part of the programmatic need.
> 11 I know you have it still in your papers. The Board may reject that argument. But,
> 12 1 know that we thought it would be better for the papers to take that out.

BSA Hearing Transcript, June 24, 2008, at Page 36.[6]

The Chair's request was remarkable and inappropriately demonstrated a lack of impartiality. The record is long and detailed and the Chair cannot by fiat change the record before the Board. See for example Opp. Ex. A. Surely, the Chair does not intend to instruct the BSA clerk's office to destroy all of the prior versions of the Statement which includes the now excised language, and also destroy the same claims by the Applicant in testimony before the BSA, and also before the LPC and the Community Board.[7]

Thus, the BSA remains in the same "hard place."

> 12 fund your congregants exercise is not an appropriate programmatic need.
> 13 I was stunned when I heard a Commissioner suggest that, in fact, the record
> 14 should be changed here and that information regarding that request for funding as a result
> 15 of these - - the variances should be taken out of the applicant's statement of support.

Page 22, BSA Hearing Transcript, June 24, 2008.

[6] The revised version of this statement substitutes the official transcript for the opponent's version of the transcript used in the initial version.

[7] An example is this statement by Louis Solomon, who appeared as additional counsel for Applicant at the last hearing, as follows at the initial LPC hearing.

> MR. SOLOMON: .... My name is Lou Solomon, and I am a resident of the upper west side and a member of the Congregation. I speak in favor of the proposal. I think when you have preeminent architects and preeminent preservation people coming and trying their best to find something appropriate, if it is not appropriate for the synagogue which needs the funds to be arguing in favor of their preservation use at this time, then I don't think it is appropriate for the Commission to hear that the synagogue has lots of rich members so the Commission shouldn't really care.

November 26, 2002 LPC Transcript at Page 79-80.

13. Applicant's Attempts to Sanitize the Record

In response to the Chair's inappropriate request, when submitting its new July 8, 2008 version of its Statement in Support, the Applicant deleted the following statement which had appeared at page 30 of its May 13, 2008 Statement in Support :

> The addition of residential use in the upper portion of the building is consistent with CSI's need to raise enough capital funds to correct the programmatic deficiencies described throughout this Application.

14. Instance in the July 8, 2008 Statement Reference Financial Support as An Applicant Purpose For the Condominiums

Yet elsewhere in the July 8, 2008 statement, the Applicant continues to maintain its same position that the purpose of the variance is not to satisfy programmatic needs directly, but to provide financial support for the Congregation and its programs.

> At the Board's request, however, due to the fact that the Application presents a situation in which Use Group 2 floor area is being created for sale to third parties as a component of the CSI's financial strategy for producing the New Building

July 8, 2008 Statement in Support, Page 43.

> residential use on floors 5 - 8 (plus penthouse)
> to be developed as a partial source of funding to remedy the programmatic religious, educational and cultural shortfalls on the other portions of the Zoning Lot.

Id. at Page 4.

Relevant Case Law Shows That the Applicant's Position is not Sustainable

In this brief, and in the absence after a year and a half of any citations to any law by the Applicant, it is difficult to anticipate the Applicant's legal arguments. And, we previously submitted on June 10, 2008 a brief citing legal precedent, as to which the Applicant has not responded. Here, we will provide briefly some additional legal authority.

15. The Relevant Test in A Reasonable Return Analysis is the Proof of Market Value as Presently Zoned, and Original Acquisition Cost Must Be Provided As Well

The proper value to place on the Scheme A development rights is not the unused development rights in an adjoining parcel, but the actual market value of the rights being developed - i.e. the area on the two floors of the condominium multiplied by the comparable sq. ft. value. This is the value as the property is presently zoned.

That is the value that should have been then used in the analysis of the proposed schemes - the value of the two floors of rights.

Moreover, the original acquisition price of the property is relevant to this analysis.

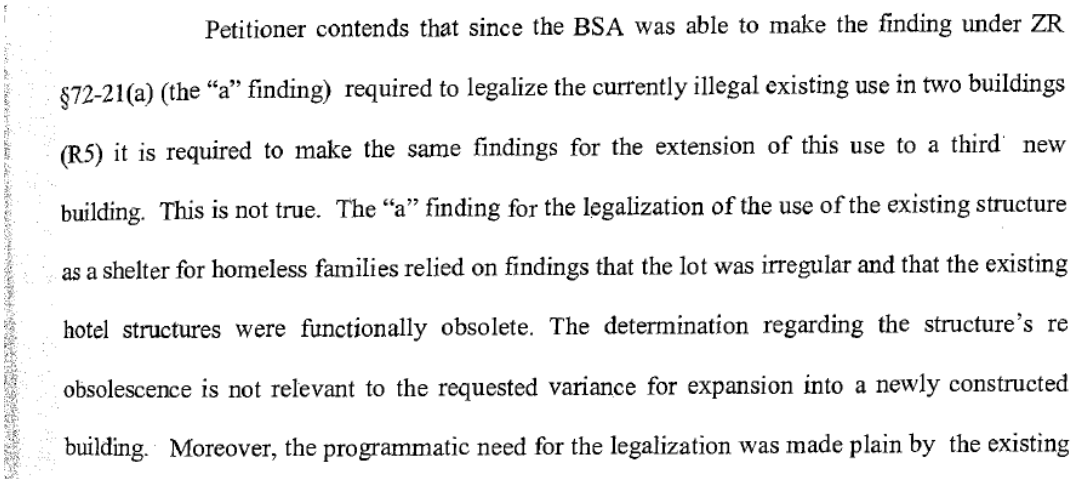
See Kransteuber v. Scheyer, 176 A.D.2d 724, 727 (N.Y. App. Div. 2d Dep't 1991):

> Although the Supreme Court concluded that the petitioner had failed to establish her entitlement to the variances under the theories of "single and separate" ownership and "practical difficulties", the court nevertheless concluded that a strict application of the zoning code would result in a taking of

the petitioner's property in violation of the Just Compensation clause of the Fifth Amendment of the United States Constitution. We disagree. It is well settled that in order to establish that an unconstitutional taking has occurred, a landowner must prove that the subject property cannot yield an economically reasonable return as zoned (see, Matter of Loujean Props. Inc., v Town Bd. of Town of Oyster Bay, 160 AD2d 797; see also, De St Aubin v Flacke, 68 NY2d 66, 76-77; D.C.M Realty Corp., v Town of Islip, 162 AD2d 495; Spears v Berle, 48 NY2d 254; Tilles Inv. Co v Town of Huntington, 137 AD2d 118, affd 74 NY2d 885). Moreover, "conclusory testimony to the effect that the land cannot yield an economically reasonable return as zoned is insufficient" (Matter of Loujean Props. v Town Board of Town of Oyster Bay, supra, at 797; Matter of Vil. Bd. of the Vil. of Fayetteville v Jarrold, 53 NY2d 254; D.C.M Realty Corp. v Town of Islip, supra). Rather, "a landowner must offer proof of the market value of the property at the time of acquisition, and must also prove the current market value of the property as presently zoned" (Matter of Loujean Props. v Town Board of Town of Oyster Bay, supra; D.C.M. Realty Corp. v Town of Islip, supra). Significantly, the burden rests with the petitioner to establish beyond a reasonable doubt that she has been deprived of any use of the property to which it is reasonably adapted (see, De St Aubin v Flacke, supra, at 76-77; D.C.M. Realty Corp. v Town of Islip, supra). The petitioner has failed to discharge this burden.

16. Where a New Building is Being Constructed, the Obsolescence of the Existing Building is not Relevant

The issue of the use of obsolescence as a physical condition was at the heart of the Homes for the Homeless, Inc. 2004 case against the BSA, where the Board had used physical obsolescence as a ground for variances for an existing building, but refused a variance for the expansion into new property on the same grounds. The position of the BSA, upheld ultimately by the Court of Appeals, was that this was a proper distinction. The BSA on the Article 78 appeal made the following argument in its brief:



Petitioner contends that since the BSA was able to make the finding under ZR §72-21(a) (the "a" finding) required to legalize the currently illegal existing use in two buildings (R5) it is required to make the same findings for the extension of this use to a third new building. This is not true. The "a" finding for the legalization of the use of the existing structure as a shelter for homeless families relied on findings that the lot was irregular and that the existing hotel structures were functionally obsolete. The determination regarding the structure's re obsolescence is not relevant to the requested variance for expansion into a newly constructed building. Moreover, the programmatic need for the legalization was made plain by the existing

The Memorandum of Law was supported by a verified affidavit signed by Chair Srinivasan.

Further, the BSA here also strongly argued that there must be a connection between the unique physical condition having to create the hardship or difficulties.

There is substantial evidence in the Record to support the BSA's finding here that the subject premises did not have unique physical conditions that create an unnecessary hardship or practical difficulties requiring an expansion of the existing use.

* * *

contract with the City for the beds in these buildings. In making the "a" finding regarding the legalization of the existing building, the BSA thus considered the unique physical conditions in conjunction with the proven programmatic needs of Petitioner. The BSA was unable to make this same "a" finding for the expansion and thus properly denied the variance.

See Memorandum of Law, City of New York, June 14, 2004, *Homes for the Homeless v. BSA*, NY Sup. Ct, 103324/200 at page 17. (Opp. Ex. PP-34). *See Matter of Homes for Homeless, Inc. v. Board of Stds. & Appeals of City of N.Y.,* 24 A.D.3d 340 (N.Y. App. Div. 1st Dep't 2005) (upholding BSA decision), *aff'd,* 7 N.Y.3d 822, (2006).

It would not be appropriate for this Board to depart from these positions which are grounded in logic and the law.

17. <u>Applicant's Lot is Regularly Shaped</u>

The Applicant's 64 foot by 100 foot lot is indeed a regularly shaped lot. As another court observed in *Brener v. Foley*, 27 Misc. 2d 334, 335 (N.Y. Misc. 1960):

> The resolution adopted by the board, permitting a variance as to height, stated that it would be a "great hardship if the proposed extension could not be erected to the same height as the existing building" (owned by the applicant for a variance, on adjoining land) and that "an independent structure on this frontage of 50 feet would be completely impractical and uneconomical; that the plot can only be utilized as an extension to the existing structure and forming part of same".
>
> The resolution adopted by the board permitting the omission of setbacks merely stated that the board found "practical difficulty and unnecessary hardship". [***3] The return filed by the board does not contain any elaboration of these statements as to alleged practical difficulty and hardship.
>
> <u>There is no evidence whatsoever in the record or the return to support the board's conclusion that the erection of an independent structure on a plot with a frontage of 50 feet 1 1/2 inches and a depth of 87 1/2 feet would be impractical or uneconomical and that the plot can only be used as an extension to the applicant's existing structure</u>.

The Applicant has also made contorted arguments about the lot configuration, which was well analyzed on page 3 of the submission of Simon Bertrang dated September 26, 2007 and filed with the Board in this matter.

> Existing Non-Compliance: CSI's reference to the non-complying nature of the existing synagogue is an exaggeration. It is true that the rear yard requirement and lot coverage of the interior lot portion of Lot 36 is not met, but what this means is that 8' out of the 108' lot depth has a 25' rear yard instead of a 30' rear yard and 75% lot coverage instead of 70% lot coverage... or to put it another way, 7.4% of the lot has a non-compliant rear yard and lot coverage, hardly a major non-compliance. CSI uses this non-compliance to bolster its "unique physical conditions" argument and to imply that the existing lot coverage and rear yard non-compliance requires an extension of

> these noncompliances to Lot 37. In fact CSI is proposing to increase the existing non-compliance found on the western sliver of Lot 36 - creating a 20' rear yard and 80% lot coverage (instead of the 30' and 70% required by the Zoning Resolution) on all of Lot 37... or to put it another way, 41.9% of the combined zoning lot would have a non-compliant rear yard and lot coverage under the Proposed Building scenario.

See Memorandum of Simon Bertrang, September 26, 2007, Opp. Ex. R-1.

18. <u>Nature of the Applicant's Split Lot 37 Is Not a Unique Physical Condition</u>

To supplement our prior discussions as to the issue of the split lot, we note that this lot is 17 feet in R10 And 47 feet in R8B. The first issue to address is that the split lot does not in any way interfere with the feasible use of the lot. Also, this case does not involve a use variance where one part of the lot has one use and another part of the lot has a higher use. Clearly, NY zoning law would permit averaging of the FAR in this split lot, but, that is not an issue in this case. A starting point would be the case of *Otto v. Steinhilber*, 282 N.Y. 71, 78 (N.Y. 1939).

> Furthermore, there is no evidence to show that the situation in which intervener finds himself, as a result of the fact that the commercial belt bordering the Merrick road extends to a depth of only 150 feet on either side of the road, is unique and distinct from that of the other owners whose properties front on the Merrick road. The provision for a commercial zone along the Merrick road is the result of the same situation which was involved in Dowsey v. Village of Kensington (supra), where this court held invalid a zoning ordinance in so far as it failed to allow commercial uses along the frontage of a main commercial highway. In the vicinity and back along both sides of the Merrick road lies a residential district. Because of the heavy traffic upon that highway it was but a reasonable regulation to permit commercial uses of the property fronting upon the highway. Obviously there have to be some limits to this commercial zone. The extent thereof is primarily a legislative question and has been resolved in the zoning law to be no more than 150 feet away from the Merrick road. For all that appears in the record, other property owners may also have rear portions without direct access to the streets in the residential area. If this be a hardship, then the vice is in the legislation itself and is not to be remedied by piecemeal exemption which ultimately changes the [*78] character of the neighborhood and creates far greater hardships than that which a variance may alleviate because of the obsolescence caused to property values created [**854] by those seeking residences in reliance upon the design of the zoning ordinance. (People ex rel. Fordham M. R. Church v. Walsh, supra; Y. W. H. Assn. v. Board of Standards & Appeals, 266 N. Y. 270; Matter of Levy v. Board of Standards & Appeals, 267 N. Y. 347.) Thus, the variance granted by the Board of Appeals does not comply with the remaining two of the three prerequisites mentioned above, that the hardship to be alleviated not only be one peculiar to the applicant, but also that the relief granted shall not alter the essential character of the neighborhood heretofore devoted to residential [***15] purposes. In that event the commercial zone would to all intents and purposes extend not 150 feet, but for several hundred feet beyond.
>
> Intervener relies upon Matter of Reed v. Board of Standards & Appeals (255 N. Y. 126). That decision was concerned with the power of the Board to grant variances pursuant to a provision of the New York City Zoning Resolution (§ 7-c), which expressly granted jurisdiction to the Board to "Permit the extension of an existing or proposed building into a more restricted district under such conditions as will safeguard the character of the more restricted district." It may be further observed that in the Reed case the question presented was whether the owner might erect a theatre for a depth of 125 feet where a theatre use for property fronting on the street in question was allowed to an extent of 100 feet. Clearly that situation cannot be analogous to the case at bar, where the use under the zoning ordinance is a permissible one for a distance of 150 feet out of a total depth of between 500 and 600 feet. Similarly, in Matter of Wilkins v. Walsh (225 App. Div.

> 774; affd., 251 N. Y. 518) the projected use was a permissible one upon [***16] property 84 by 100 feet, and the variance was granted for a gore lot whose base was 16 feet.

Because the Applicant here can meet all of it needs and can even construct a profitable building on its site, the fact that the lot is split is irrelevant. We also note, moreover, the danger of relying upon use variance cases, or other New York zoning cases involving local zoning laws that do not included New York City's requirement of a "unique physical condition", even for bulk/area variances.

19. <u>In Considering the Claims of a Religious Non-Profit, the Board Should Undertake a Reasoned Analysis of the Claims</u>

The Board continually refers to deference to be accorded religious institutions, but, does not engage in any nuanced analysis of the relevant precedent. We believe the Board's failure to inquire into many issues such as the lease income from Beit Rabban, the lease income from the Parsonage, the inconsistent and varying uses of space as shown in different versions of the drawings, the lack of inquiry into the construction estimates, the failure to require a complete conforming use analysis, the acceptance of incomplete analysis, etc. may all be due to inappropriate deference.

As the Court of Appeals discussed in *Pine Knolls Alliance Church v. Zoning Bd. of Appeals*, 5 N.Y.3d 407. 414-415 (2005):

> Although the Church was denied permission to construct a new access road, this was not a denial of permission to expand. The ZBA acknowledged that the expansion project could result in internal traffic concerns, but found that the Church could address those concerns in ways other than as proposed. Instead of constructing a new roadway off Route 32, the Church was allowed to increase the capacity of its existing driveway. This was the functional equivalent of imposing mitigating conditions on the grant of an application--a practice expressly approved in Cornell University as long as such conditions do not "by their cost, magnitude or volume, operate indirectly to exclude" the religious or educational use of the parcel. The requirement that petitioner widen its existing driveway (in lieu of constructing a new one) is neither so costly or extreme that it undermines the efficacy of the expansion plan, nor does it prohibit the Church's religious use of the newly acquired parcel. It therefore meets the test articulated in Cornell University.
>
> The Church argues that the ZBA's reference to the need for the secondary [*6] driveway is indistinguishable from the "need to expand" analysis disapproved in Cornell University. We disagree. The ZBA never required the Church to prove a need to expand, either in general terms or in relation to the adjoining property the Church had purchased for that purpose. Instead, it determined that there was a means for the Church to address the congregation's traffic concerns (which the Church itself had recognized) without construction of a secondary roadway that would have significant negative impacts on the surrounding residential community. It was only in this sense that the ZBA noted that the Church did not "need" the additional access road. Read in context, the discussion of need did not involve an impermissible interference with the internal affairs of the Church but arose out of an appropriate balancing of interests well within the scope of the powers of a ZBA.
>
> In sum, in this case the ZBA found that the expansion could be accomplished in a manner that was less intrusive to neighboring properties. This determination is supported by substantial evidence in the record, particularly the findings in the Levine traffic study and the Saratoga County Planning Board recommendation. Because there was nothing improper, irrational, arbitrary or capricious about the ZBA's analysis or the conclusion [**415] it reached, the determination should not have been disturbed.

In the Shearith Israel instant case, it appears that the Board has made no attempt to gather the information to engage in a balanced analysis, and, has accepted as correct statements of the Applicant whether plausible or not, whether consistent with other statements or not, whether supported by probative evidence or not, and whether rational or not. This is the improper exercise of deference.

C. The Applicant Has Not Provided Substantial Evidence to Support Each of the Findings Be Made For Each Requested Variance

Not only does Zoning Resolution 72-21 Require that the Board make each required finding for each specific grant, but each finding must be supported by substantial evidence. The findings may not be supported by hearsay conclusory claims made by counsel for the Applicant.[8]

The record is the hearing lacks substantial evidence to permit the Board to make any of the five findings with respect to any of the seven requested variances. It is obvious that many of the most important claims in the Statement in Support are not supported by substantial evidence. Indeed many of the claims are not supported by any evidence at all or are even flatly false. We would expect that the Board in its findings will identify the evidence that supports its findings.

D. Discussion of the Variances

The requested variances are as follows (*See* Proposed Drawings, P-1 rev., lower right. - The May 13, 2008 Proposed Scheme Drawings are for convenience included as Opp. Ex. MM-142 et. seq.)

Rather than address each variances and the fact supporting each of the five findings individually, Applicant intentionally confuses the situations by conflating multiple variances in its discussions so as to frustrate the rigorous analysis required by the Zoning Resolution. By so doing, Applicant conceals the inadequacy of its claim.

Rather than provide an analysis organized by the five findings, the following overview analysis arranges the analysis by the affected floor using the proposed scheme submitted by the Applicant on May 13, 2008.[9]

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[8] It shall be a further requirement that the decision or determination of the Board shall set forth each required finding in each specific grant of a variance, and in each denial thereof which of the required findings have not been satisfied. In any such case, each finding shall be supported by substantial evidence or other data considered by the Board in reaching its decision ...

[9] There are seventeen drawings prepared by Platt Byard Dovell and White, and bear various dates. Applicant presented these plans in a way so as to impede analysis. For example, the floor area schedule P.2 rev includes the areas of the existing sanctuary and parsonage on the specious theory that this Application in any way seeks a bulk waiver. Drawing rev. P-3 and P-4 shows the requested variances, but they are not in any way cross referenced to the discussion of zoning and variances in Drawing rev. P-2. Making it

1. Ninth Floor a/k/a Penthouse (94.8 to 105.8 feet above street level)

The ninth floor variances are intended to permit an extra floor condominium apartment up to 105.8 feet. Zoning would limit the height to 75 feet rather than the proposed 105.8 feet. Because the setback variance is dependent upon the granting of the height variance, that variance will not be discussed here. No part of this floor is as-of-right.

The hardship cited by the Applicant to support these variances is that without the income from this floor, it would be unable to build the part of the building below 50 feet. Such claimed financial need may not support a variance. Even so, not only does the Applicant provide no evidence of any financial need, but all other evidence shows no financial need.

Applicant devotes large part of its Statement to repetitive references to hardships and difficulties relating to access and accessibility and programmatic needs.

Applicant does not show the relationship between the two variances are unrelated to practical difficulties or unnecessary hardships resulting from the strict application of the zoning resolution, therefore an (a) finding cannot be made. Granting the Ninth Floor variances in no way resolves any of the asserted access and accessibility claims. Applicant does not assert that these variance satisfy any programmatic needs.

2. Eighth Floor (80.8 to 94.8 feet above street level)

The eight floor variances are similar to those for the Ninth Floor and are requested solely for the construction of a luxury condominium floor to subsidize the members of the Applicant and all comments relate to this floor as well. However, the Eighth Floor has additional negative impacts. First, it will block light and air to West 70th Street and is also out of scale. These are exactly the community interests which mid block zoning was intended to protect. This impact is much worse because the Applicant also asks for a waiver of the setback from the front of the building facing West 70th Street. The second particular impact of the waiver of a front setback is that two windows will be bricked up in 18 West (this does not include the lower floors), and in the rear, a window in 18 West will abut a courtyard on the eight floor of the proposed building. Unfortunately, these impacts are not well indicated on the Proposed Lot Line Window Diagram, P-4A rev. One glaring problem is that the drawing does not show the outline of an as-of-right building. In addition, the environmental impact statement completely fails to disclose the impact of the Proposed building on lot line windows, which would have been unaffected by the as-of-right building legally permitted on the site.

Applicant disingenuously claims that the setback in the front on this floor (and the Seventh and Sixth Floors) were required by LPC for symmetry. Because the setback variance only comes into play if the Applicant is provided the height variance, this is a fallacious argument.

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difficult to analyze the relationship between programmatic need and the variances, the floor plan for the Second floor (Rev. P-9) does not indicate the areas for the rear yard setback variances.

3. Seventh Floor (70.3 to 80.8 feet above street level)

The seventh floor is also devoted to condominium use intended to act as the economic engine . Because it is higher than an as-of-right height of 75 feet, a variance is required. This floor is to be used solely as a residential condominium It will brick up a apartment window in 18 West 89th Street. (P-4A rev.).

4. Sixth Floor (59.8 to 70.3 feet above street level)

The sixth floor is also devoted to condominium use intended to act as the economic engine. The height of this floor is conforming, but a variance is requested for the front set back. This floor is to be used solely as a residential condominium Because of the front setback variance request, this floor will brick up a apartment window in 18 West 89th Street.

In the As-of Right Scheme A building, rather than use the Sixth Floor for programmatic needs such as classrooms, Applicant has imposed upon itself the choice to not have programmatic needs satisfied on this floor.

5. Fifth Floor (49.1 to 59.8 feet above street level)

This floor is conforming and would be as of right. Rather than use this floor to satisfy classroom programmatic needs, the Applicant has imposed upon itself the limitation of using the floor only for income production, and not for programmatic needs.

6. Fourth Floor (35.8 to 49.1 feet above street level)

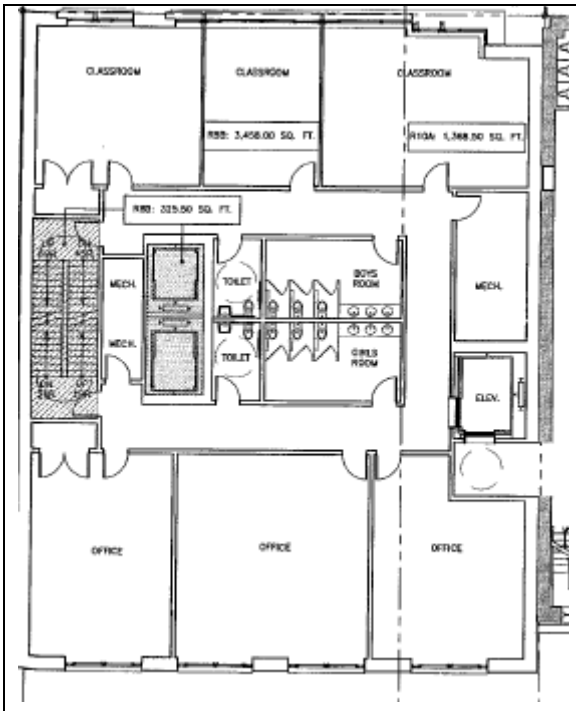
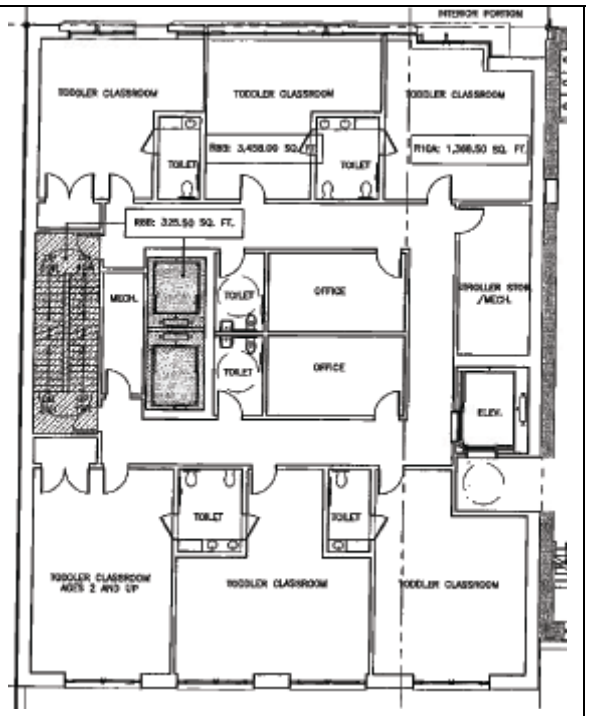
The Applicant intends to use part of the Fourth Floor for classrooms and the other part for a 1200 two bedroom, two bath, and apartment for the caretaker. The requested variance is to reduce the rear yard setback from 30 feet to 20 feet, so as to provide larger classrooms, adding 600 gross square feet of space.. This variance is unrelated to any of the access and accessibility needs. Applicant admits there is no programmatic need to locate the caretaker's apartment on the fourth floor rather than the fifth or sixth floors or in the parsonage building. The only reason proffered by the Applicant for placing the caretaker's apartment here is that the other locations are very valuable as residential condominium or rentals. See Lower Floor Variances at Opp.-Ex. GG-10.

7. Third Floor (28.3 to 35.8 feet above street level

This floor is similar to the fourth floor. A rear setback is requested.

8. Second Floor (15.6 to 28.3 feet above street level)

The second floor is conforming, except for a rear yard extension variance to accommodate a day care program for 60 Toddlers, although such a large program was not mentioned in the Applicant's initial submission to the BSA. In those submissions, the rear space was allocated as office space and the variance was only to provide larger office spaces.

	
Second Floor Proposed - 8/28/2007 Drawing from Platt Bayard	Rev P-9 12/26/07

Even the last July 8, 2008, Statement in Support continues to claim, consistent with the initial application, that the second floor would consist of 1,127 of classroom space and 1,473 of office space, so, it seems that the Applicant still has not decided whether it needs all of the second floor for Toddlers.[10]

Subsequently, realizing that larger offices would not justify a variance, Applicant provided a new scheme whereby it claimed that the space must be large enough to accommodate 60 Toddlers. It is apparent that the numerical requirement of 60 was a result of dividing 35 square feet per child into the square feet available in the proposed second floor, as shown in the CSI Propose Program Usage Chart submitted on May 13, 2008. Yet, the Applicant used the incorrect factor; Section 47.39 of the New York City Health Code which provides as to children between 2 and 6:

> (b) Minimum square footage/child. The minimum allowance of space for each child in a classroom shall be 30 square feet of wall to wall space.

Thus, the second floor can easily provide adequate space for 58 Toddlers without the as of right space.[11] The Applicant provides no explanation why this Toddler program was

[10] Alan Sugarman at the June 24, 2008 hearing specifically pointed out that these statements are inconsistent with the claim of Toddler use. June 24, 2008 BSA Transcript at 19.

[11] The second floor proposed has 2237 sq. ft and without the 494 sq. ft. set back variance as described on page 38 of the Statement, 1743 sq. ft.

devised 8 months after the variance application was provided. The program is open to non-Congregation members and charges market rate day care fees. The Toddler program currently meets for four hours a week and is believed to have only 10 or so Toddlers at a time.

E. The Board Did not Require Applicant to Explain How Its Access Needs are Not Satisfied Completely by an As-Of-Right Building

This is a central point in this proceeding in that the access and accessibility issues are the only actual hardship or difficulty claimed by the Applicant. Unfortunately, this hardship and difficulty is not related in any way to the strict enforcement of the zoning resolution - i.e., a conforming as-of-right building addresses these issues in the same way as the proposed building.

Applicant seemingly believes that if it refers to access and accessibility over and over, somehow Applicant will be able to create the connection which does not exist.

Sometimes, the Applicant just states falsehoods, such as the following:

> The New Building requires a lot coverage waiver (216 zsf in the R I OA and 477 zsf in the R8B, which adds approximately 640 zsf to the footprints of those three floors) and rear yard waiver ... to remedy the improvement of the circulation space within the Synagogue "

July 8, 2008 Statement in Support, page 36.

Simple inspection of the floor plans for floors 2, 3, and 4 show that there is no relationship whatsoever to the lot coverage waivers of 10 feet as to any access or accessibility between the Community House and the Synagogue.

When asked to provide some diagrammatic evidence of these wild assertions, the Applicant sits mute. Even worse, when the Board is asked to force the Applicant to clarify this so called relationship, each of the Board's five Commissioner's sit equally mute. In the final hearing, at page 15, Opposition Counsel Alan Sugarman, having raised the issue in great detail in multiple filings before the board, once again asked the board to require the Applicant to provide something more than conclusory statements to back up these claims. Counsel stated:

> 8 So, here's the question. Can the applicant explain how a building strictly
> 9 complying with the Zoning Resolution, does not address the access and accessibility
> 10 difficulties; a hardship described by the applicant as the heart of its application.
> 11 I've never heard that question asked. Has the Chair asked that? No. Has the
> 12 Vice-Chair? No. Has Commissioner Hinkson so inquired? No. Neither Commissioner
> 13 Ottley-Brown or Commissioner Montanez? Has the applicant answered this? No.

June 24, 2008 BSA Transcript at 15.

What then was the response of the BSA Commissioners at this hearing as to this issue - it was mute again when it asked the Applicant for more supporting issue at the conclusion of the hearing.

1. Untrue Statement Re Taking of Entire Ground Floor

Similarly, the Applicant's following statement is completely untrue:

> However, the floor usually providing the most flexibility for community facility schools, the ground floor, is entirely unavailable for educational purposes because the Synagogue must "take"' all of the ground floor and portions of floors 2 - 4 for an elevator and landing as well for its own remedial purposes.

July 8, 2008 Statement in Support, Page 37.

First, the Applicant admits, though this is easily gleaned from a glance at the floor plans, that the elevator absorbs only 100 of the 6400 sq feet available on the first floor. (*See* July 8, 2008, Statement in Support, page 38 "approximately 100 zsf from each floor 'taken' by the Synagogue for its elevator shaft on each floor." See Morrison letter dated March 24, 2008, and Opp. Ex. GG-12.

Second, the entire rear portion of the first floor is occupied by the Small Synagogue Expansion. Yet, if the Congregation chose, it could have expanded the Small Synagogue as shown in the floor plans it submitted to LPC which involved relocating the Small Synagogue Eastward. This was previously explained in prior submissions by the Opposition. See Opp. Ex. B.

Thus, what is left on the floor plan which involves a programmatic need which can be located only in the new building is the lobby, and on these plans, only a small portion is needed for the lobby. So, actually, the Applicant's claim is, by its own statements, proven to be a gross exaggeration close to a lie. See. Op. Ex. GG-12.

It should also be remembered that the first floor under the zoning resolution utilizes the full lot as a matter of right up to 23 feet. So, the Congregation can as of right meet its access and circulation issues as of right on the first floor.

F. The Application Falsely Claims that Waivers are Needed to Address the Access Deficiencies

Applicant falsely states in its latest Statement in Support of July 8, 2008 at page 53:

> Without the waivers requested in this Application, CSI will not be able to build a Community House in a manner which addresses the access deficiencies of the Synagogue, nor

This statement is completely false and of course is material since this claim is according to Applicant, the heart of its application. No facts support this statement. The Board refused to ask for the facts supporting this statement. The opposition expert witness says this is untrue. Simple inspection of the conforming AOR-A Drawings compared to the Proposed Building shows that all access deficiencies are resolved within the conforming AOR building. See Comparison Drawings Opp. Ex. FF-1-. See. Opp. Ex. M. See Opp. Ex. GG.

Were this statement to be made in a court of law in, for example, the New York State Supreme Court in a verified answer to an Article 78 proceeding petition, then such a

verified statement would be perjury. If such sworn statement were made to the court with the assent of an attorney at law, then this would be suborning perjury.

No doubt, any Article 78 proceeding petition and requests for admissions will fully explore the basis of any finding which accepts this lie.

G. Only if Applicant is able to Meet the Requirement of Finding (a) Is The Feasibility Study Relevant

Even though the Applicant has submitted hundreds of pages of exhibits and testimony concerning the proposed feasibility study,[12] Applicant has not shown the unique physical conditions, the resulting difficulties and hardships, and most importantly that those difficulties and hardships relate to the strict enforcement of the zoning resolution. Only if this is shown, then, and only then is there any relevance at all to the financial feasibility studies. It is clear that the Applicant cannot move beyond finding (a) and thus all of the attention to this issue is disproportionate. To even discuss feasibility studies suggest that in some way there is a basis for finding (a), and there is not. But, due to the Applicant's sleight of hand, everyone is force to waste time on this issue.

Thus, there is a risk in suggesting that the feasibility studies are at all relevant in allocating time and space to demonstrate the many errors, factual, legal, and conceptual inherent in the Freeman Frazier studies.

1. Information as to Rent from The Beit Rabban School

Freeman, in claiming once again that Applicant had provided an evaluation of the rental income from the Beit Rabban School, has merely changed the subject from that raised by the opposition. What the opposition has stated is that the Applicant has not provided information at all about the current rental income from the school, or information about the leasing arrangements for the future.

Moreover, Freeman Frazier claims to have studied comparables of community space rental on the West Side. But, it is quite astonishing that Freeman, when collecting comparables for community space, seems to have forgotten to ask his client, Congregation Shearith Israel, for the rental currently being paid by Beit Rabban for what the Applicant states are obsolete facilities located exactly on the same site as the proposed building. Yet, the opposition has obtained the IRS filings from Beit Rabban which show rental payments of $480,000 a year and these were filed with the BSA several months ago. See Opp. Ex. HH. At no time has the Applicant repudiated the accuracy of these statement - their own silence merely confirms the accuracy. Moreover, the school area will apparently double under the Applicant's proposal.

- Freeman Frazier's characterization of the McQuilken Rationale for allocations of cost has no support anywhere in the record.
- Freeman Frazier's analysis of acquisition costs defies reality, common sense and generally accepted valuation principles.

[12] For convenience, these have been collected into two Opposition Exhibits, Opp. Ex. KK and Opp. Ex. MM.

- Freeman Frazier provides no citation support for its claims as to BSA practices.
- Freeman Frazier provides no reasoned explanation as to why return on equity analysis is not appropriate, though used generally in real estate valuation and though required by the BSA Guidelines.
- There is no rational basis for not using return on equity in the computation of reasonable return on a condominium project.
- Freeman Frazier, in its Acquisition Cost Methodology, ignores the fact that the acquisition cost is in fact a return to the applicant and increases the applicant return on the property.
- Applicant Alone Is Required To Provide Substantial Evidence To Support It Position.
- Applicant has a misconception as to its responsibility to provide substantial evidence to support each and every element for each and ever finding for each and every variance. If the record does not contain substantial evidence, then any findings of the Board will be susceptible to being disregarded by the Courts.

So, in the end, the issue before the board is whether to rely upon the analysis of a non-licensed appraiser who provides an analysis not grounded in facts in the records, must repeatedly correct analysis over hundreds of pages of submissions, utilizes unconventional economics, does not comply with the guidelines of the board, is inconsistent with court rulings, relies upon ex catheter pronouncement rather than sound economic reasoning, and avoids any expert opinion with the cop-out that this is what he has gotten away with previously before the BSA.

2. <u>The use of the buildable area in the Parsonage portion of the lot as a basis for the acquisition cost has no reasonable basis.</u>

Also, for the Board to accept this without the complete financial analysis is arbitrary and capricious.

Early on, the Board identified the deficiencies of Mr. Freeman's approach, as the Chair stated at the commencement of the proceeding at the November 27, 2007 hearing:

> 589 CHAIR SRINIVASAN: Well, I think we've read through
> 590 the financials. We may disagree with Mr. Freeman's assumptions, so I don't think Mr.
> 591 Freeman needs to explain to us what he's done on his financials. We've seen it. I think
> 592 we have some concerns which we raised yesterday and either he can go back and look at
> 593 that or we can state them for the record, but I think some of the issues have to do with
> 594 how the site is valued and how a good portion of what is anticipated as the developer
> 595 paying for that site is not going to be used by the developer because it's being used by the
> 596 synagogue.

BSA Transcript, November 27, 2007 at Page 27

This problem was never satisfied adequately by Mr. Freeman - who in all his feasibility iterations used the same acquisition cost for the two floors of condominiums in the As of right Scheme A as in the 7 floors in the As Of Right All Residential 75 foot buildings - and then used the same acquisition cost in the 105 foot proposed building.

One problem faced by Mr. Freeman is the dilemma that a valuation of land in the return analysis in a zoning case assumes that there is no variance. So, Mr. Freeman then proposed valuing the acquisition cost based upon the development rights for a sliver building overlooking central park on the R10 portion of Lot 37. When that was rightfully rejected by the board, Freeman came back with a breathtaking analysis - to analyze the allowable floor area for the Parsonage. He found 19,094.20 remaining allowable floor area over the Parsonage on Lot 36 (See. Opp. Ex. MM-42) , used a $625 sq. ft. valuation, and then arrived at an acquisition cost for the development rights on land Lot 37 to be $12,347,000. (See Opp. Ex. MM-29-30).

There is no rationality in this approach - which was just, literally, picked out of the air. The Applicant readily acknowledges that no transfer or averaging of FAR is required for the proposed building.[13] Finally, Applicant has not offered to place any restrictions on the use of the air rights over the Parsonage. So, this final approach has no logic - and is all intended to avoid the obvious that the acquisition cost is the market value of the two floors for as of right space that the Congregation is not using for its Community House purposes.

Just to be clear, the Applicant in its analysis of the Scheme A AOR Scheme, assumes an acquisition cost of $12,347,000, computed as $625 x the 19,094 unused allowable floor area on the Parsonage in a separate lot. This acquisition cost is applied against 9639 sq feet of gross square feet and 5316 sq ft of sellable square feet, with an unusually high usage factor of only 55%. Freeman does not attempt to adjust the comparable figures which assume a higher usage factor, in the computation of the acquisition cost.

Freeman is charging the developer $1280.93 per gross square foot and $2322.59 per useable square foot.

It is clear, of course, that the school space on floor 2-4 could not comply with the building and health codes by having as an exit only the stairs in the Sanctuary, and the single elevator. Clearly, the elevator, stairs, and lobby, although used by the condominium, are actually square feet that the school must use. There is also no explanation for the low usage ratio for a single apartment on a single floor - why is there a loss of 1235 sq. ft. on the second floor. This would of course relate to the complete obscure construction estimate provided to support the As Of Right Scheme A construction cost estimates.

H. Gibberish

The Applicant's statement in support is full of gibberish which cannot be understood and which even the Chair was unable to explain at the June 24 hearing.

> Because the New Building must align itself with the west elevation of the Synagogue for its entire width in order to make the necessary programmatic connections, the resulting width of Tax Lot 37

[13] And, just to be clear, at no time did Applicant provide any analysis of the Parsonage residential rental income, using the Parsonage when convenient, and ignoring when not. To correct the record - the assumed rental income from the Parsonage was misstated at the earlier BSA hearing to be $20,000 per year - the correct statement was $20,000 a month for this rare six bedroom townhouse on Central Park West. See Opp. Ex. C.

> is too narrow to provide compliant lot coverage (in fact the Synagogue already exceeds its permitted lot coverage, making it even more difficult for the New Building to comply) and compliant rear yard conditions.

July 8, 2008 Statement in Support, page 34.

> As discussed previously, the ground floor of the New Building, by which is permitted to be built full because its use will be an eligible community facility use group, must spatially align with the Synagogue to provide the necessary circulation space and to provide for the expansion of the Little Synagogue.

Id at 43..

(5) the incorporation in the New Building of a system of circulation designed to provide improved and barrier-free access to the sanctuaries in the Synagogue,

Id. at 50.

> (3) the CSI zoning lot is the only zoning lot which has a development footprint with an as-of-right envelope that is wholly impractical and financially infeasible to develop,

Id. at 53.

I. No Explanation of Assertion of Hardship re Alignment

As to the statement by the Applicant as to unique physical condition, at the last hearing the undersigned stated:

> 4 And, in a related matter, the last hearing, I quoted something from the applicant
> 5 on the same issue, again, I think where they say as a unique physical condition, "A
> 6 development site on the remaining one third of the zoning lot who's feasible development
> 7 is hampered by requirements to align its street wall and east elevation with the existing
> 8 synagogue building."
> 9 You may recall I read that at the last hearing.
> 10 We had a meeting with staff after that. I asked your entire staff if they could
> 11 explain to me what this is all about? I don't know what they mean; align the street wall
> 12 with the existing synagogue building and this is a unique physical condition? Have I
> 13 heard anything from the applicant? No. Do you know? Will you repeat this in a finding
> 14 without knowing what it means? I would hope not.

June 24, 2008 BSA Transcript page 16.

The Chair seemed to be unable to articulate an explanation of this language.

> 18 . I think I have an understanding of it but just the clarify the record; the
> 19 discussion you had about aligning the street wall. I believe you're really talking about
> 20 centering it on the landmark, is that right? And, if I'm wrong, then please clarify that to
> 21 us.
> 22 But, there was some language about how that formed some kind of hardship or
> 23 difficulty in your massing of your building

Id. at 35.

The explanation forthcoming on page 33 of the July Statement in Support from the Applicant was adding the additional phrase "to align its streetwall <u>along East 70th Street</u> and east elevation." Presumably, the Applicant meant "West" 70th Street, but even so, this addition provides no clarification whatsoever as to how this was a unique physical condition satisfying all of the qualifications of 72-21(a).

This is of course one of many examples of the conclusory claims of the Applicant that have not factual basis at all.

Finally, the accompanying exhibits at pages Opp. Ex. 21 and Opp. Ex. 25 contains the testimony of Norman Marcus who provided very reasoned analysis as to why these variances should not be granted.

Respectfully Submitted, July 29, 2008

Alan D. Sugarman