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To be argued by
RONALD E. STERNBERG

NEW YORK SUPREME COURT
APPELLATE DIVISION : FIRST DEPARTMENT

NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, Chair of said Board, CHRISTOPHER COLLINS, Vice-Chair of said Board, and CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK,

Respondents-Respondents.

MUNICIPAL RESPONDENTS' BRIEF

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PRELIMINARY STATEMENT

This is an article 78 proceeding to annul a variance granted by respondent Board of Standards and Appeals ("BSA" or "the Board") to respondent property owner, Congregation Shearith Israel ("Congregation"). Petitioners appeal from an order and judgment (one paper) of the Supreme Court, New York County (Lobis, J.), entered July 24, 2009, that confirmed the BSA's determination "in all respects," denied the application, and dismissed the petition (A13-A46).[1]

[1] Numbers in parentheses preceded by "A" refer to pages of the "Appendix of Petitioners-Appellants."

Municipal respondents contend that the Court below correctly concluded that "it cannot be said that the BSA's determination that the Congregation's application satisfied each of the five specific findings of fact [necessary for a variance under New York City Zoning Resolution ("ZR"), section 72-21] lacked a rational basis" (A46). The order and judgment (one paper) appealed from should be affirmed. *See Matter of SoHo Alliance v. New York City Board of Standards and Appeals*, 95 NY2d 437, 440 (2000)(A determination of the BSA "'will be sustained if it has a rational basis and is supported by substantial evidence[.]'").[2]

QUESTION PRESENTED

Whether the Court below correctly concluded that the determination of the BSA granting the challenged variance has a rational basis and is supported by substantial evidence in the record.

[2] In *SoHo Alliance*, the Court of Appeals affirmed this Court's reversal of a judgment of the Supreme Court that granted the petition to annul BSA resolutions granting variances (*see* 264 AD2d 59). *But see Matter of Giorgianni v. City of New York*, 255 AD2d 119, 119 (1st Dept. 1998)(Confirming the BSA's denial of the petitioners' application for a zoning variance, this Court stated: "The IAS Court having improperly entertained the issue of substantial evidence (CPLR 7804[g]), this Court will treat the substantial evidence issue de novo and determine the proceeding as if it had been properly transferred[.]").

STATEMENT OF FACTS

(a) Background

The Congregation sought a variance required for the construction of "a nine (9) story residential/community facility building" (A52) on property that it owns on the upper west side of Manhattan. As noted by the BSA, the proposed building "does not comply with zoning requirements for lot coverage, rear yard, base height, building height, front setback, and rear yard setback" (A52[¶2]). As required, the Congregation initially submitted its development application to the Department of Buildings, which denied it, ultimately citing seven objections (A303-04; see, A52[¶1]). That determination was the basis for the Congregation's variance application.[3]

The subject zoning lot (the "site," as referred to by the BSA [see, A53(¶12)] consists of two tax lots, Block 1122, lots 36 and 37 (A53[¶12]).[4] The site has a total lot area of

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[3] On their appeal, petitioners explicitly "do[] not challenge the lower floor community house variances" (Br. for Petitioners-Appellants ["Pets' Br."], at 2; see, *id.*, at 7), *i.e.*, those pertaining to "lot coverage and rear yard" (A53[¶30]). Petitioners' challenge is thus limited to the variance insofar as it is required for the top five residential floors (see, A302, A303), *i.e.*, those 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" (A53[¶30]). The BSA's response herein is, accordingly, so limited.

[4] Pursuant to the Zoning Resolution, section 12-10, the lots constitute a single zoning lot because they have been in common

17,286 square feet, with 172 feet of frontage along the south side of West 70th Street, and 100.5 feet of frontage along Central Park West (A53[¶13]). The portion of the site that extends 125 feet west of Central Park West is located in an R10A zoning district; the remainder is in an R8B district (A53[¶14]). The entire site is located within the Upper West Side/Central Park West Historic District (A53[¶15]).

Tax lot 36 is occupied by the Congregation's synagogue and a connected parsonage house (A53[¶16]). Approximately 40 percent of tax lot 37, on which the proposed building will be located (referred to by the BSA as the "development site") (A53[¶24], A57[¶82]), is occupied by the Congregation's community house; the balance is vacant (A53[¶17]). The Congregation intends to demolish the community house (A53[¶18]).

The proposed building will have a total floor area of 42,406 square feet, comprising 20,054 square feet of community facility floor area and 22,352 square feet of residential floor area (A53[¶26]). With respect only to the residential portion of the building (see, *supra*, at 3n.3), a variance is required because the building will have a base height along West 70th Street of 95 feet, one inch (60 feet is the maximum permitted in an R8B zoning district); a total height of 105 feet, 10 inches

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ownership since 1984 (A300), or, according to the Congregation, 1965 (see, A53[¶19]).

(75 feet is the maximum permitted in an R8B zone); a front setback of 12 feet (a 15 foot setback is the minimum required in an R8B zone); and a rear setback of six feet, eight inches (10 feet is required in an R8B zone) (A53[¶27]).

(b) The BSA proceedings

The Congregation filed its variance application on or about April 1, 2007 (A1172). Supporting documentation included an attorney's statement, providing background and a demonstration that the requirements of Zoning Resolution, section 72-21, had been met (A1173-A1202); zoning and economic analyses; and drawings and photographs (see, A1203-A1337). The BSA filed two sets of objections (A1491-97; A1863-66), to which the Congregation responded with additional submissions (A1649-A1743; A2121-57).

Upon due notice (see, A2203-08), the BSA conducted a public hearing on the Congregation's application on November 27, 2007, with continued hearings on February 12, April 15, and June 24, 2008 (A52[¶4]). Opponents of the application provided written submissions and testified at the hearing (see, A52[¶¶ 7, 8, 9, 10, 11], A309). The Congregation testified at the hearing and provided additional written submissions responding to questions raised by the BSA and the opposition's objections (A309). In addition, members of the BSA conducted a site examination (A52[¶5]). The approximately 5,800 page record

before the BSA was bound into 12 volumes and submitted in the Court below by the BSA along with its answer.

(c) The BSA's determination

Upon all of the evidence presented, the BSA, in a resolution adopted August 26, 2008, concluded that the Congregation had demonstrated its entitlement to the requested variance (A52-A65). Initially, the BSA noted that under section 72-21(b) of the Zoning Resolution, "a not-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" (A54[¶32]). The Congregation's application, however, "is for a mixed-used 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" (A54[¶33]). Accordingly, the BSA considered the "discrete community facility" and the "residential development" separately, and it "evaluated whether the proposed residential development met all of the findings required by [Zoning Resolution] § 72-21, notwithstanding its sponsorship by a religious institution" (A54[¶36]).

In a lengthy and comprehensive analysis, the BSA made each of the findings required by section 72-21 with respect, separately, to the community facility use and the residential

use (see, A54-A64). The BSA resolved "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" (A64[¶223]).

OPINION BELOW

Applying the appropriate standard of review (A28-A29), reviewing each of the section 72-21 findings (A29-A41), and rejecting petitioners' other challenges (A42-A45), the Court below concluded that "it cannot be said that the BSA's determination that the Congregation's application satisfied each of the five specific findings of fact lacked a rational basis" (A46). The Court confirmed the BSA's decision "in all respects," denied the application, and dismissed the petition (*id*.).

ARGUMENT

THE COURT BELOW CORRECTLY CONCLUDED THAT THE DETERMINATION OF THE BSA GRANTING THE CHALLENGED VARIANCE IS REASONABLE, HAS A RATIONAL BASIS, AND IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

Comprised of "experts in land use and planning," the BSA "is the ultimate administrative authority charged with enforcing the Zoning Resolution." *Matter of Toys "R" Us v. Silva*, 89 NY2d 411, 418 (1996). The standard of review of a determination of the BSA, well-established in case law and correctly applied by the Court below, does not require extended discussion. "This Court has frequently recognized that the BSA is comprised of experts in land use and planning, and that its interpretation of the Zoning Resolution is entitled to deference." *Matter of New York Botanical Garden v. Board of Standards and Appeals of the City of New York,* 91 NY2d 413, 418-19 (1998).

As stated by the Court of Appeals (*SoHo Alliance*, 95 NY2d at 445):

> "This Court's review of the BSA's determination to grant the variances sought is limited by the well-established principle that a municipal zoning board has wide discretion in considering applications for variances. A 'board determination may not be set aside in the absence of illegality, arbitrariness or abuse of discretion,' and 'will be sustained if it has a rational

> basis and is supported by substantial evidence[.]'"[5]

The Court below thus correctly recognized (A46) that, even assuming "a contrary decision may be reasonable and also sustainable," a reviewing court may not substitute its judgment if the BSA's judgment "is supported by substantial evidence." *Matter of Consolidated Edison Company of New York v. New York State Division of Human Rights*, 77 NY2d 411, 417 (1991).[6]

As a condition to granting a variance, the BSA is required to make "each and every one" of the five specific findings set forth in section 72-21 of the Zoning Resolution. ZR § 72-21. The Board's decision must "set forth each required finding," each of which "shall be supported by substantial evidence or other data considered by the Board in reaching its decision, including the personal knowledge of or inspection by the members of the Board." *Id*.

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[5] *See Matter of Torri Associates v. Chin*, 282 AD2d 294, 295 (1st Dept.), *leave to appeal denied*, 96 NY2d 718 (2001)("The zoning board's determination may not be set aside unless the record reveals illegality, arbitrariness or an abuse of discretion, and will be sustained if it has a rational basis and is supported by substantial evidence[.]").

[6] *See Matter of Cowan v. Kern*, 41 NY2d 591, 599 (1977)("Judicial review of local zoning decisions is limited; not only in our court but in all courts. Where there is a rational basis for the local decision, that decision should be sustained. It matters not whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them.").

In the instant case, upon the extensive record before the BSA and as correctly determined by the Court below (A29-A41), "it cannot be said that there was an absence of substantial evidence to support the Board's findings as to each of the five requirements necessary to issue the proposed use variance[] here." *SoHo Alliance*, 95 NY2d at 442; *see Matter of West Village Houses Tenants' Association v. New York City Board of Standards and Appeals,* 302 AD2d 230, 230 (1st Dept.), *leave to appeal denied,* 100 NY2d 533 (2003)("[T]here is a rational basis for respondent Board's findings that the owner met each of the five requirements necessary for a variance[.]").[7]

(a) Unique physical conditions

The BSA determined "that there are unique physical conditions" (ZR § 72-21[a]) in three particular respects:

(i) Zoning district boundary

Upon evidence submitted by the Congregation, the BSA determined that because the development site is located on a zoning lot that is divided by a zoning district boundary (A57[¶86]), as-of-right development is constrained by the imposition of different height limitations as to the two

[7] Again, the BSA's response herein is tailored to petitioners' self-limited challenge only to so much of the variance as was necessary for the residential portion of the proposed development, although the BSA's decision extends to both the community facility use and the residential development (see, A54-A64).

respective portions of the lot (A57[¶88]). In the R8B portion of the development site, a building is limited to a total height of 75 feet and a maximum base height of 60 feet with a setback of 15 feet (A57[¶90]). In the R10A portion, a total height of 185 feet is permitted, allowing for a 16-story residential tower (A57[¶93]). A diagram provided by the Congregation "indicate[d] that less than two full stories of residential floor area would be permitted above a four-story community facility if the R8B zoning district front and rear setbacks and height limitations were applied to the development site" (A58[¶95]).

The BSA noted that the Zoning Resolution recognizes that zoning district boundaries create constraints "where different regulations apply to portions of the same zoning lot" (A58[¶96]). In particular, section 77-00 permits "the transfer of zoning lot floor area over a zoning district boundary for zoning lots created prior to their division by a zoning district boundary" (A58[¶97]). Section 73-52 "allow[s] the extension of a district boundary line after a finding by the [BSA] that relief is required from hardship created by the location of the district boundary line" (A58[¶98]).

Citing prior decisions, the BSA additionally noted that it "has recognized that the location of zoning district boundary, in combination with other factors such as the size and shape of a lot and the presence of buildings on the site, may

create an unnecessary hardship in realizing the development potential otherwise permitted by the zoning regulations" (A58[¶104]).

Finally, the BSA recognized, as the opponents argued, that there are four sites within a 51-block area "characterized by the same R10A/R8D zoning district boundary" (A58[¶103]; see, A58[¶105]). However, citing *Matter of Douglaston Civic Association v. Klein*, 51 NY2d 963, 965 (1980), the BSA determined that such circumstance is not, "in and of itself ... sufficient to defeat a finding of uniqueness" (A58[¶105]). Such a finding, the BSA said, "does not require that a given parcel be the only property so burdened by the condition(s) giving rise to the hardship, only that the condition is not so generally applicable as to dictate that the grant of a variance to all similarly situated properties would effect a material change in the district's zoning" (A58[¶106]).

(ii) The landmarked synagogue

Noting that the landmarked synagogue occupies nearly 63 percent of the "zoning lot footprint" (A58[¶107]), the BSA determined that the site "is significantly underdeveloped and ... the location of the landmark Synagogue limits the developable portion of the site to the development site" (A58-A59[¶112]).

(iii) Limitations on development

The BSA noted 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" (A59[¶120]). However, in the instant case, because of the development lot's location in an R8B district, development is limited by height limitations and setback requirements (A59[¶113]). Additionally, the "sliver law" (ZR § 23-692) "operate[s] to limit the maximum base height of the building to 60 [feet] because the frontage of the site within the R10A zoning district is less than 45 feet" (A57-A58[¶94]).

These limitations, the BSA determined, "result in an inability to use the Synagogue's substantial surplus development rights" (A59[¶113]). In this regard, the BSA said 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" (A59[¶121]).

The BSA concluded that these "unique physical conditions ... when considered in the aggregate ... 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)" (A59[¶122]).

Contrary to petitioners' argument, case law does not suggest that in relying on the stated "physical conditions," the BSA "'acted illegally or arbitrarily, or abused its discretion.'" *Matter of Vomero v. City of New York*, 13 NY3d 840, 841 (2009). Rather, they were considered in the exercise of the BSA's "broad discretion." *Id.*; *see Matter of UOB Realty (USA) Limited v. Chin*, 291 AD2d 248, 249 (1st Dept.), *leave to appeal denied*, 98 NY2d 607 (2002)("We reject petitioners' contention that the requirement of 'unique physical conditions' in New York City Zoning Resolution § 72-21[a] refers only to land and not buildings[.]"). The determination that such characteristics were "unique" to the zoning lot (see, *id.*) is supported by substantial evidence and should be sustained.

(b) Reasonable return

"[A] landowner who seeks a ... variance must demonstrate factually, by dollars and cents proof, an inability to realize a reasonable return under existing permissible uses." *Matter of Village Board of the Village of Fayetteville v. Jarrold*, 53 NY2d 254, 256 (1981). Refining this test with particular respect to the Zoning Resolution, this Court noted (*West Village Houses Tenants' Association*, 302 AD2d at 230-31):

> "[Section] 72-21(b) does not require an applicant for a ... variance to show that it cannot realize a reasonable return 'for each and every permitted use under the zoning regulations.' Rather, it requires a showing that there is 'no reasonable possibility that the development of the zoning lot in strict conformity with' the Zoning Resolution would 'bring a reasonable return.' ... Analysis of the permitted uses likely to yield the highest return [is] enough."

Herein, the BSA reasonably concluded that the Congregation's expert's evidence, predicated on significant documentation, provided substantial "dollars and cents" proof supporting a finding that the Congregation had satisfied the requirements of section 72-21(b).[8]

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[8] Petitioners erroneously rely on this Court's decision in *Matter of Pantelides v. New York City Board of Standards and Appeals*, 43 AD3d 314 (1st Dept. 2007), *aff'd*, 10 NY2d 846 (2008), in alleged support of their misleading argument that "not every issue before the BSA require[s] deference to the claimed expertise of the BSA" (Pets' Br., at 53). The question determined in *Pantelides*, irrelevant in the instant matter, was whether a remand to the BSA was necessary given the BSA's "failure to discuss two of the five variance criteria" (at 316; *see* at 314). This Court concluded that a remand was "unwarranted" (at 315) "where a full administrative record is in existence, the agency has had an opportunity to rule on all issues, and the matter, although within the agency's purview, does not require resolution of highly complex technical issues" (at 317).

In the instant case, the question is not whether there should be a remand to the BSA. In fact, the BSA considered, in considerable detail, each of the five factors. Moreover, resolution of the issues herein, as evidenced by the 5800 page BSA record, the detailed BSA decision, and, indeed, the length of petitioners' brief, does require "a high degree of technical expertise" (at 318).

The initial "economic analysis report" submitted by Freeman/Frazier & Associates, Inc. ("Freeman") on behalf of the Congregation (see, R. 133-61)[9] analyzed "(1) an as-of-right community facility/residential building within an R8B envelope ...; (2) an as-of-right residential building with 4.0 FAR; (3) the original proposed building; and (4) a lesser variance community facility/residential building" (A59-A60[¶127]). The BSA, questioning why the analysis included the community facility floor area, asked the Congregation to revise the analysis to exclude it from the site value and to evaluate an as-of-right development (A60[¶127]; see, R. 1753-56).

In response, the Congregation submitted a revised analysis "to respond to questions raised by the Board" (R. 1969). Freeman analyzed "(1) the as-of-right building; (2) the as-of-right residential building with 4.0 FAR; (3) the original proposed building; (4) the lesser variance community facility/residential building; and (5) an as-of-right community facility/residential tower building, using the modified ... site value" (A60[¶129]). As reviewed by the BSA, this analysis demonstrated that the as-of-right scenarios and the lesser variance community facility/residential building "would not

[9] Numbers in parentheses preceded by "R." refer to pages of the record before the BSA, bound into 12 volumes and filed in the Court below along with the BSA's answer to the petition.

result in a reasonable financial return and that, of the five scenarios only the original proposed building would result in a reasonable return" (A60[¶130]).

Thereafter, it was determined that because a tower configuration in the R10A portion of the site would be contrary to the "sliver law," the as-of-right community facility/ residential tower could not represent and as-of-right development (A60[131]). The Board then questioned the Congregation's valuation of its development rights, and it requested a recalculation of the site value using only sales in R8 and R8B districts (*id*.; *see,* R. 3653-758, 4462-515). Finally, the Board also requested that the Congregation evaluate the feasibility of providing a complying court to the rear above the fifth floor of the original proposed building (A60[¶132]; see, R.3653-758, 4462-515).

Again responding to the BSA comments, the Congregation submitted a third revised analysis assessing the financial feasibility of "(i) the proposed building ...; (ii) an eight-story building with a complying court ,...; and (iii) a seven-story building with penthouse and complying court ..., using the revised site value" (A60[¶133]). The conclusion reached was that "only the proposed building was feasible" (*id*.; see, R. 384-77).

The BSA, in turn, questioned how the space attributable to the building's rear terraces had been treated (A60[¶134]). Freeman responded that the rear terraces on the fifth and sixth floors had not originally been considered as accessible open spaces and were not, therefore, included in the sales price as sellable terrace areas. Freeman provided an alternative analysis, revising the sales prices to include the rear terraces (A60[¶135]; see, R. 5171-81).

The BSA required the Congregation to explain the calculation of the ratio of sellable floor area to gross square footage (the "efficiency ratio") for each of the buildings in its last submission, plus the as-of-right building (A60[¶136]). Freeman did so, "provid[ing] a chart identifying the efficiency ratios for each respective scenario, and explained that the architects had calculated the sellable area for each by determining the overall area of the building and then subtracting the exterior walls, the lobby, the elevator core and stairs, hallways, elevator overrun and terraces from each respective scenario" (A60[¶137]; see, R. 5171-81). The Congregation's revised analysis of the as-of-right building using the revised estimated value of the property "showed that the revised as-of-right alternative would result in substantial loss" (A60[¶138]; see, R. 5171-81).

The BSA's resolution proceeds to detail arguments raised in opposition to the Congregation's application (see, A60[¶¶139-47]). In this regard, the Board noted that the Congregation properly utilized the return on profit model, "which evaluates profit or loss on an unleveraged basis" and which "is the customary model used to evaluate the feasibility of market-rate residential condominium developments" (A61[¶144]).[10] The Board also noted, in response to the application's opponents, that it had "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" (A61[¶147]).

Upon its review of the extensive record before it, the BSA concluded 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" (A61[¶148]).

Petitioners' challenge to the reasonableness of the BSA's determination and the substantiality of the evidence supporting it is unavailing. In particular, petitioners suggest

[10] Petitioners explicitly decline to "assert that BSA should have used a leveraged/return on equity approach" (Pets' Br., at 2).

that the BSA could not have made proper findings in light of Freeman's alleged concealment of its "allocations for construction costs by removing the pages for Scheme A and Scheme C" (Pets' Br., at 26; see, *id*., at 26-27, 52). The petition alleges that a "neighborhood opponent s[aw] that the two-page document was part of a 15-page document, noticing the legend 'page 2 of 15' at the bottom of the second page" (A117). Because the "missing" pages were never provided (see, A118), petitioners allege that Freeman "provided false, altered, incomplete documents with the intention to mislead the BSA and opponents" (A117).

There is no merit to petitioners' argument. In examining whether construction prices are reasonable, the BSA reviews the base unit price, *i.e.*, the construction costs divided by the square footage. As the Congregation provided both, the BSA had the necessary elements to calculate and review the base unit price (see, R. 1997, 5178-79). Additional information was, therefore, not relevant. Moreover, as petitioners concede (see, A188), strict rules of evidence do not apply to an administrative hearing. There was no requirement that the alleged additional pages be submitted.

There is no merit to petitioners' argument that the BSA should have required the Congregation to recalculate its estimated financial return for an all residential scheme

utilizing the $12,347,000 acquisition value set forth in the Congregation's final report. Doing so, petitioners suggest, would have shown a profit of approximately $5 million. However, under section 72-21(b), the BSA determines whether an applicant can realize a reasonable return, not merely a profit. Even utilizing petitioners' numbers, the rate of return would have increased to only 6.7%. The Congregation's experts established that 11% was a reasonable return for the subject premises (see, R. 4652-53, 4656, 4868-69, 5172, 5178). Because accepting petitioners' argument would not have resulted in a reasonable return, it must fail.[11]

The Court below considered "all of [petitioners'] objections and f[ound] them to be unavailing" (A38). For the reasons stated herein and in the decision of the Court below, the record confirms the correctness of the Court's conclusion that "the BSA's determination that the proposed building is necessary to enable the Congregation to realize a reasonable return ... is not arbitrary and capricious" (*id*.).

[11] As noted by the Court below, "[t]he rate of return for the proposed development, as approved by the BSA, is 10.93%" (A33n.9). This Court is "unaware of any hard and fast rule as to what constitutes a reasonable rate of return. Each case turns on facts that are dependent upon individualized circumstances. Stripped to its essentials, guidance on this issue must be controlled by the well-settled standard of rationality." *SoHo Alliance,* 264 AD2d 59, 69, *aff'd*, 95 NY2d 437 (citations omitted).

(c) Essential character of the neighborhood

With respect to the required finding pursuant to section 72-21(c), that the variance will not alter the essential character of the neighborhood, petitioners challenge the BSA's determination only with respect to blocked windows and shadows (see, Pets' Br., at 64-67). As correctly determined by the Court below (A38-A40), petitioners' contentions are meritless.

As noted by the BSA, the opponents to the application "contended ... that the proposed building abuts the easterly wall and court of the building located at 18 West 70th Street, thereby eliminating natural light and views from seven eastern facing apartments which would not be blocked by an as-of-right building" (A63[¶188]).[12] The BSA's conclusion, echoing the Congregation's response, was that "lot line windows cannot be used to satisfy light and air requirements and, therefore, rooms which depend solely on lot line windows for light and air were necessarily created illegally and the occupants lacked a legally protected right to their maintenance" (A63[¶190]). Additionally, "an owner of real property ... has no protected right in a view" (A63[¶191]).

Notwithstanding these considerations, the BSA, concerned about the impact of the proposal, "directed the

[12] This issue was addressed at BSA hearings (see, R. 1807-08, 3655-63).

[Congregation] to provide a fully compliant outer court to the sixth through eighth floors of the building, thereby retaining three more lot line windows then originally proposed" (A63[¶192]). The BSA noted that the Congregation "submitted revised plans in response showing a compliant outer court" (A63[¶193]). The Court below correctly determined that "[t]he fact that four lot line windows ... will be blocked is not grounds to reject the Project" (A39).

The record belies petitioners' contention that the BSA failed to consider "the impact of shadows and sunlight" (Pets' Br., at 51). First, the Board's reliance on CEQR guidelines constituted only part of its determination regarding alleged shadow impacts. Indeed, petitioners do not challenge the Board's determination that, pursuant to CEQR regulations, "any incremental shadows in this area would not constitute a significant impact on the surrounding community" (A63[¶196]; see, A63[¶195]). The Board noted, additionally, that, as part of the Congregation's compliance with the relevant environmental laws, "the potential shadow impacts on publicly accessible open space and historic resources" were analyzed, and it was determined that "no significant impacts would occur" (A63[¶198]).

The BSA noted the Congregation's year-long evaluation of shadows and the conclusion "that the proposed building casts

few incremental shadows, and those that are cast are insignificant in size" (A63[¶199]). Finally, a "small incremental shadow" cast on Central Park in the late afternoon in the spring and summer "would fall onto a grassy area and path where no benches or other recreational equipment are present" (A63[¶200]).

Upon the record, the BSA determined that the proposed residential use will not "alter the essential character of the surrounding neighborhood or impair the use or development of adjacent properties, or be detrimental to the public welfare" (A63[¶201]). The Court below correctly concluded that such finding is reasonable and supported by substantial evidence.

(d) Self-created hardship

In a finding that the Court below noted "is not specifically challenged by petitioners" (A41), the BSA determined "that the hardship herein was not created by the owner or by a predecessor in title" (A63[¶205]). The BSA concluded that the Congregation correctly explained "that the unnecessary hardship encountered by compliance with the zoning regulations is inherit to the site's unique physical conditions: (1) the existence and dominance of a landmarked synagogue on the footprint of the Zoning Lot; (2) the site's location on a zoning lot that is divided by a zoning district boundary; and (3) the limitations on development imposed by the site's contextual

zoning district" (A63[¶203]). "[T]hese conditions originate with the landmarking of [the Congregation's] Synagogue building and with the 1984 rezoning of the site" (A63[¶204].

As properly found by the Court below, the BSA's finding "has ample support in the record" (A41).

(e) Minimum variance necessary

The BSA noted that in response to objections, it had directed the Congregation "to provide a fully compliant outer court to the sixth through eighth floors of the building, thereby retaining access to light and air of three additional lot line windows" (A63-A64[¶208]). The modified proposal "to provide a complying court at the north rear above the fifth floor" resulted in reduced floor plates on the sixth through ninth floors, "and an overall reduction in the variance of the rear yard setback of 25 percent" (A64[¶209]).

During the hearing process, the BSA "directed the [Congregation] to assess the feasibility of several lesser variance scenarios" (A64[¶210]). The Congregation's responsive financial analyses "established that none of these alternatives yielded a reasonable financial return" (A64[¶211]).

As the Court below correctly concluded, the determination of the BSA that the granted variance "is the minimum required to afford relief ... is supported in the record and is not arbitrary and capricious" (A41).

The Court below opined that the substantial record in the instant case leaves room for varied interpretations (see, A45-A46). It appropriately acknowledged, however, that it was not "empowered to conduct a *de novo* review of the BSA's determination" (A45), and it could not "substitute its judgment for that of the BSA" (A46). The Court correctly concluded (*id*.): "When viewing the record as a whole, and giving the BSA's determination the due deference that it must be afforded, it cannot be said that the BSA's determination that the Congregation's application satisfied each of the five specific findings of fact lacked a rational basis."

CONCLUSION

THE ORDER AND JUDGMENT (ONE PAPER) APPEALED FROM SHOULD BE AFFIRMED IN ALL RESPECTS, WITH COSTS.

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January 13, 2011

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