To Be Argued By:
David Rosenberg

New York County Clerk's Index No. 650354/08

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

LANDMARK WEST! INC., 91 CENTRAL PARK WEST CORPORATION
and THOMAS HANSEN,

Petitioners-Appellants,

against

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS,
NEW YORK CITY PLANNING COMMISSION, and
CONGREGATION SHEARITH ISRAEL, also described as
The Trustees of Congregation Shearith Israel,

Respondents-Respondents,

and

HON. ANDREW CUOMO,
as Attorney General of the State of New York,

Respondent.

REPLY BRIEF FOR PETITIONERS-APPELLANTS LANDMARK WEST! INC., 91 CENTRAL PARK WEST CORPORATION AND THOMAS HANSEN

MARCUS ROSENBERG & DIAMOND LLP
Attorneys for Petitioners-Appellants
Landmark West! Inc., 91 Central Park
West Corporation and Thomas Hansen
488 Madison Avenue, 17th Floor
New York, New York 10022
212-755-7500
dr@realtylaw.org

Of Counsel:

David Rosenberg
Pamela D. Evans

TABLE OF CONTENTS

Page

Table of Authorities ..... *iii*

Cases ..... *iii*

Other Authorities ..... *v*

Preliminary Statement 1

Argument 3

Point I

Appellants Have Standing Under Established Law For Zoning Cases 3

A. The Neighboring Co-op And Hansen Have Standing 5

B. Landmark West! Has Organizational Standing 6

Point II

Respondents' Frivolous Claims Confirm BSA's Lack Of Jurisdiction To Entertain CSI's Application 8

A. BSA Lacked Appellate Jurisdiction Under City Charter § 666(6)(a) 8

B. BSA Lacked Jurisdiction Under Charter § 666(5) 10

C. Respondents' Claim, Accepted By The Supreme Court, that Plan Changes – However Material – Are Normal, Would Turn The Statutorily Required Process On Its Head 13

TABLE OF CONTENTS (continued)

Page

Point III

BSA Illegally Usurped The Jurisdiction Of The Landmarks Preservation Commission And The City Planning Commission 17

A. Contrary To CSI's Claim, BSA's Resolution Erroneously Was Based On The Landmarked Synagogue 19

B. The Claimed Obsolescence Of The Community House Is A Baseless Strawman 20

Point IV

BSA's Application Of Unprecedented And Unauthorized Standards Cannot Be Sustained 22

Conclusion 25

Printing Specifications Statement 27

TABLE OF AUTHORITIES

Page

Cases

All the Way East Fourth St. Block Assoc. *v.* Ryan-NENA Community Health Center, 30 A.D.3d 182 (1st Dep't 2006) 4

Bankers Trustee Co. Ltd. *v.* First Mexican Acceptance Corp., 273 A.D.2d 81 (1st Dep't 2000) 13

Buerger *v.* Town of Grafton, 235 A.D.2d 984 (3d Dep't 1997) 4

Caprice Homes, Ltd. *v.* Bennett, 148 Misc.2d 503 (Sup. Ct. N.Y. Co. 1989) 12

Center Square Association, Inc. *v.* City of Albany Board of Zoning Appeals, 9 A.D.3d 651(3d Dep't 2004) 6, 7

Committee to Preserve Brighton Beach and Manhattan Beach, Inc. *v.* Planning Commission of the City of New York, 259 A.D.2d 26 (1st Dep't 1999) 7

Defreestville Area Neighborhood Assoc. *v.* Planning Board of the Town of North Greenbush, 16 A.D.3d 715 (3d Dep't 2005) 7

Douglaston Civic Assoc. *v.* Galvin, 36 N.Y.2d 1 (1974) 4, 7

East Thirteenth Street Community Assoc. *v.* New York State Urban Development Corp., 84 N.Y.2d 287 (1994) 4

Exxon Corporation *v.* NYC Board of Standards and Appeals, 128 A.D.2d 289 (1st Dep't 1987) 25

Fordham Manor Reformed Church *v.* Walsh, 244 N.Y. 280 (1927) 25

Friends of the Earth, Inc. *v.* Chevron Chemical Co., 129 F.3d 826 (5th Cir. 1997) . . . . . 6, *fn. 5*

TABLE OF AUTHORITIES (continued)

Page

Cases (continued)

Gernatt Asphalt Products, Inc. *v.* Town of Sardinia, 87 N.Y.2d 668 (1996) 5

Highpoint Enters., Inc. *v.* Bd. of Estimate, 67 A.D.2d 914 (2d Dep't 1979) 11

Hunt *v.* Washington State Apple Advertising Commission, 432 U.S. 333, 344-345 (1977) 6, *fn.5*

Kettaneh *v.* Board of Standards and Appeals of the City of New York, Index No. 113227/08, Supreme Court of the State of New York, County of New York ..... 2, *fn. 2*

Montauk Improvement, Inc. *v.* Proccacino, 41 N.Y.2d 913 (1977) 9

New York City Coalition for the Preservation of Gardens *v.* Giuliani, 246 A.D.2d 399 (1st Dep't 1998) ..... 7, *fn. 6*

New York State Club Ass'n *v.* City of New York, 69 N.Y.2d 211, 217 (1987) 18

Otto *v.* Steinhilber, 282 N.Y. 71 (1939) 24

Penn Central Transportation Co. *v.* New York City, 438 U.S. 104 (1978) 18

Performance Comercial Importadora E Esportadora Ltda *v.* Sewa Int'l Fashions Pvt. Ltd., 79 A.D.3d 673 (1st Dep't 2010) 12-13

Public Interest Research Group of New Jersey Inc. *v.* Magnesum Elektron, Inc., 123 F.3d 111 (3rd Cir. 1997) ..... 6. fn. 5

Raritan *v.* Silva, 91 N.Y. 2d 98 (1997) 25

Riker *v.* BSA, 225 A.D. 570 (1929) 13

TABLE OF AUTHORITIES (continued)

Page

Cases (continued)

Society for Ethical Culture *v.* Spatt, 51 N.Y.2d 449 (1980) 18

The Society of the Plastics Industry Inc. *v.* County of Suffolk, 77 N.Y.2d 761 (1991) ..... 7, *fn. 6*

Sun-Brite Car Wash, Inc. *v.* Board of Zoning and Appeals of the Town of North Hempstead, 69 N.Y.2d 406 (1987) 4, 5, 6

UOB Realty (USA) Ltd. *v.* Chin, 291 A.D.2d 248 (1st Dep't 2002) 22

William Israel's Farm Cooperative *v.* Board of Standards and Appeals, 22 Misc.3d 1105(A) (Sup. Ct. N.Y. Co. 2004) 11

Other Authorities

2 RCNY § 1-06(g)(6) ..... 6, *fn. 4*

Landmarks Law 18

New York City Charter

- § 666(5) 10
- § 666(6)(a) 8
- § 668 11
- § 3021 18

New York City Zoning Resolution 2, 11, 13, 18, 21

Not-For-Profit Corporation Law, §§ 201, 601 ..... 6, *fn. 5*

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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LANDMARK WEST! INC., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN,

Petitioners-Appellants,

- against -

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,

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HON. ANDREW CUOMO, as Attorney General of the State of New York,

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- x

Sup. Ct. N.Y. County
Index No. 650354/08

APPELLANTS' REPLY BRIEF

PRELIMINARY STATEMENT

Petitioners-Appellants Landmark West!, Inc. ("Landmark West!"), 91 Central Park West Corporation (the "Co-op") and Thomas Hansen (collectively, "Appellants") submit this brief in further support of their appeal

from the decision, order and judgment (the "Judgment") [A7 - 14][1] of the Supreme Court, New York County, entered October 6, 2009, which dismissed Appellants' petition (the "Petition") to vacate a resolution (the "Resolution") of Respondent-Respondent City of New York Board of Standards and Appeals ("BSA") which granted a variance from zoning limitations (the "Variance"), which, *inter alia*, granted CSI the right to violate the requirements of the New York City Zoning Resolution in order to achieve windfall profits from constructing and selling five floors of luxury condominium apartments (the "Luxury Condominium Apartments").

Appellants also submit this brief in response to the briefs submitted by: BSA and Respondents-Respondents the City of New York (the "City") and the City Planning Commission ("CPC") (collectively, the "City Respondents"); and Respondent-Respondent Congregation Shearith Israel ("CSI", and, collectively, with the City Respondents, "Respondents"), which urge this Court to rubber stamp BSA's unprecedented and illegal Variance and ignore BSA's lack of jurisdiction to issue the Resolution as a mere "technical" irregularity.[2]

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[1] Bracket references preceded by "A" refer to the pages of Appellants' Appendix on this appeal. Bracket references preceded by "R" refer to the pages of the BSA filing with the Supreme Court, which Appellants have subpoenaed by this Court. Unless otherwise indicated, defined terms are set forth in Appellants' initial brief ("Appellant's Brief"), and all emphasis herein is added and all internal citations are omitted.

[2] CSI's 38-page brief expressly incorporates its 47-page brief in Kettaneh v. Board of Standards and Appeals of the City of New York, *et al* [*see, e.g.*, CSI Brief, pp. 1, 4, 33], for a total of 85 pages and 20,779 words, grossly violating 22 NYCRR 600.10(d)(1)(I).

ARGUMENT

Point I

Appellants Have Standing Under Established Law For Zoning Cases

Point I of CSI's Brief claims that Appellants lack standing to challenge the Resolution for allegedly failing to demonstrate that:

> the Co-op and Hanson will suffer injuries specific to them rather than general concerns of all area residents [CSI Brief, pp. 8 - 9]; and
>
> Landmark West! has an interest in the Variance which is germane to its organizational purposes and that its "members" have standing [*id.*, pp. 9 - 11].

The City Respondents have not asserted these claims.

The Supreme Court found standing [A 10]:

> This court finds that [Appellants] have standing since the claims asserted raise an "injury in fact" and the claims "fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted." New York State Assn. of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211 (2004). The Court of Appeals has held that property holders in the immediate vicinity of the premises which are the subject of a zoning determination have standing to challenge zoning determinations

> without their having to plead and prove special damages or injury in fact. Matter of Sun-Brite Car Wash v. Board of Zoning & Appeals, 69 N.Y.2d 406, 409-10 (1987). Since Thomas Hansen, the individual property owner, and [the Co-op] are in close proximity to the Property, they have standing. Accordingly, [Appellants] collectively have standing. The court need not reach the issue of whether Landmark West!, as an organization, has standing.

Ignoring the cases cited by the Supreme Court, CSI cites irrelevant cases, some of which do not even involve zoning [All the Way East Fourth St. Block Assoc. *v.* Ryan-NENA Community Health Center, 30 A.D.3d 182 (1st Dep't 2006) (adverse possession); Buerger *v.* Town of Grafton, 235 A.D.2d 984 (3d Dep't 1997) (challenge to non-zoning SEQRA determination)].

In zoning cases, the Court of Appeals repeatedly has emphasized:

> Standing principles, which are in the end matters of policy, should not be heavy-handed; in zoning litigation in particular, it is desirable that land use disputes be resolved on their own merits rather than by preclusive, restrictive standing rules.

Sun-Brite Car Wash, Inc. *v.* Board of Zoning and Appeals of the Town of North Hempstead, 69 N.Y.2d 406, 413 (1987); *see also*, East Thirteenth Street Community Assoc. *v.* New York State Urban Development Corp., 84 N.Y.2d 287 (1994) ("standing in zoning cases is broader . . . because zoning statutes seek to protect 'the welfare of the entire community'"); Douglaston Civic Assoc. *v.* Galvin, 36 N.Y.2d 1, 6 - 7 (1974) ("We are troubled by the apparent readiness of our courts in zoning litigation to dispose of disputes over land use on questions

of standing without reaching the merits. . . . [O]ur concern is heightened because of the particular need in zoning cases for a broader rule of standing").

A. The Neighboring Co-op And Hansen Have Standing

Neighboring property owners, such as the Co-op and Hansen, have standing because:

> (1) their close proximity warrants a presumption that a zoning change will have a greater effect on them than on the public generally [A 130];[3] and
>
> (2) they seek to protect the concerns for which zoning was adopted [A 131].

Sun-Brite, *supra*, 69 N.Y.2d at 413 - 414; *see also*, Gernatt Asphalt Products, Inc. *v.* Town of Sardinia, 87 N.Y.2d 668, 687 (1996) ("[P]roximity alone permits an inference that the challenger possesses an interest different from other members of the community").

---

[3] Disingenuously, CSI's brief claims that the Co-op is "around the corner from CSI's property (but fairly distant from the corner of the property being developed)", citing to A 128 - 129.

Neither statement is supported by the cited pages. To the contrary, the Co-op is immediately adjacent to the Property [A 130] as confirmed by the City's Tax Map [A 326].

The Co-op (on behalf of its owners/occupants) and Hansen also have presumptive standing as "affected property owners" required to be given notice of the hearing on CSI's variance application [R 107], as acknowledged in CSI's application to BSA [A 379,381].[4] *See*, Sun-Brite, *supra*; Center Square Association, Inc. *v.* City of Albany Board of Zoning Appeals, 9 A.D.3d 651(3d Dep't 2004) (standing based on to mandatory notice of proceedings).

B. Landmark West! Has Organizational Standing

Landmark West!, an award-winning non-profit community organization, with contributing supporters who own and reside in property adjacent to the Property [A 237-239]), has standing under the three-part test for an organization, *i.e.*: (1) at least one of its supporters has standing; (2) the interests sought to be advanced are germane to its purpose; and (3) individual participation is not required to assert the claim. *See, e.g.*, Center Square, *supra*.[5]

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[4] 2 RCNY § 1-06(g)(5) requires notice to "all owners of property within a radius of 400 feet from the center of the lot [at issue]."

[5] CSI's claim that Landmark West! failed to establish standing because it cited contributing supporters instead of "members" lacks legal support. *See*, Hunt *v.* Washington State Apple Advertising Commission, 432 U.S. 333, 344-345 (1977) (rejecting notion that lack of formal membership precludes associational standing); Friends of the Earth, Inc. *v.* Chevron Chemical Co., 129 F.3d 826 (5th Cir. 1997); Public Interest Research Group of New Jersey Inc. *v.* Magnesum Elektron, Inc., 123 F.3d 111 (3rd Cir. 1997). In fact, §§ 201 and 601 of the Not-For-Profit Corporation Law expressly authorize the formation of an entity without "members" where its purpose is to further a public policy.

Landmark West!'s mission to protect the character of this westside block and surrounding neighborhood [A 128], by itself, gives it standing. *See,* Defreestville Area Neighborhood Assoc. *v.* Planning Board of the Town of North Greenbush, 16 A.D.3d 715 (3d Dep't 2005) (neighborhood association with purpose to protect quality of life and safety of residents has standing to challenge area variance); Center Square, *supra.* (association with mission to protect neighborhood has standing to challenge variances); Committee to Preserve Brighton Beach and Manhattan Beach, Inc. *v.* Planning Commission of the City of New York, 259 A.D.2d 26 (1st Dep't 1999) (organization dedicated to preserving South Brooklyn has standing to challenge reduction of open space and obstruction of views).[6]

The standing of an organization such as Landmark West! was articulated by the Court of Appeals in Douglaston, *supra*, 36 N.Y.2d at 6 - 7:

> [A] person desiring relaxation of zoning restrictions . . . has little to lose and much to gain if he can prevail. He is not reluctant to spend money in retaining special counsel and real estate appraisers if it will bring him the desired result. The individual owner . . . on the other hand, may not, at the time, realize the impact the proposed change of zoning will have [or] may not have the financial resources to effectively oppose the proposed change. . . . Against this background of economic disparity, an individual property

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[6] The Society of the Plastics Industry Inc. *v.* County of Suffolk, 77 N.Y.2d 761 (1991), and New York City Coalition for the Preservation of Gardens *v.* Giuliani, 246 A.D.2d 399 (1st Dep't 1998), cited by CSI, are not to the contrary. In Society of Plastics, a nationwide trade organization was found to lack standing to challenge a local plastics law on the basis of environmental concerns because the concerns were not germane to its purposes. In New York City Coalition, the association members lacked any right to occupy the lots.

> owner . . . cannot be expected, nor should he be required, to assume by himself the burden and expense of challenging the zoning change. . . . By granting neighborhood and civic associations standing in such situations, the expense can be spread out over a number of property owners, putting them on an economic parity with the developer.
>
> This broader rule of standing is entirely consistent with the underlying purposes of zoning laws. Our municipalities enact zoning ordinances in order to protect the public's health, welfare and safety. A challenge to a zoning variance focuses the court's attention on this public interest. To force a court to reject such a challenge on the grounds of standing when the group contesting the variance represents that segment of the public which stands to be most severely affected by it is, in our view, an ironic situation which should not be permitted to continue.

Thus, Landmark West!, as well as the Co-op and Hansen, has standing to maintain this action.

Point II

Respondents' Frivolous Claims Confirm BSA's Lack Of Jurisdiction To Entertain CSI's Application

A. BSA Lacked Appellate Jurisdiction Under City Charter § 666(6)(a)

Appellants' Brief established that BSA lacked jurisdiction to consider CSI's application because it was not based upon an appeal from a determination by one of the City officials expressly designated in Charter § 666(6)(a), *i.e.*, "the commissioner of buildings or . . . a deputy commissioner

. . . or any borough superintendent acting under a written delegation of power from the commissioner. . . ."

Both the original plans submitted to DOB and rejected on March 27, 2007 [A 292] and the revised plans submitted and rejected on August 28, 2007 [A 348] were rejected by the same "provisional" employee [A 132]. The City Respondents, knowing that the "provisional" employee did not qualify under § 666(6)(a), concede that "[i]t may well be, as petitioners argue, that the BSA's appellate jurisdiction may not be invoked without a determination issued by the DOB Commissioner or a borough superintendent acting under appropriate delegation" [City Respondent's Brief, p. 4].

CSI merely speculates: "It is not unreasonable for the BSA to conclude that [the provisional employee] Fladen was acting under written authority from the Commissioner"; "BSA reasonably could have inferred that these permit denials were either signed by the Borough Commissioner or another authorized employee" [CSI Brief, pp. 19 - 20].

CSI's argument ignores the fundamental rule that "[a] court cannot surmise or speculate as to how or why an agency reached a particular conclusion." Montauk Improvement, Inc. *v.* Proccacino, 41 N.Y.2d 913, 914 (1977).

B. BSA Lacked Jurisdiction Under Charter § 666(5)

Respondents then attempt to claim that BSA has original jurisdiction under Charter § 666(5).

That section, by its terms, merely provides that BSA may "determine and vary the application of a zoning resolution as may be provided in such resolution and pursuant to section [668]."

BSA's Resolution acknowledged that BSA lacked jurisdiction pursuant to § 666, but claimed that "jurisdiction . . . to hear an application for variance from zoning regulations, such as the instant application, is conferred by Charter Section 668, which does not require a letter of final determination executed by the DOB commissioner or by an authorized DOB borough commissioner" [A 275, *fn.* 2].

BSA cited no authority to support this conclusion [*id.*]. On this appeal, the City Respondents and CSI have cited no case supporting this claim. BSA has not even cited any resolution where it previously asserted a claim to original jurisdiction to issue variances.

Charter § 668 merely sets forth the procedure to be followed after jurisdiction is obtained by BSA; it does not provide a basis for original jurisdiction over variance applications. That section also expressly is limited by the language "as may be provided in such [Zoning Resolution]."

The Zoning Resolution does not provide original jurisdiction for BSA. To the contrary, § 72-21, the provision governing variances, states:

> When in the course of enforcement of this Resolution, any officer from whom an appeal may be taken under the provisions of Section 72-11 (General Provisions) has applied or interpreted a provision of this Resolution, . . . the Board of Standards and Appeals may, in accordance with the requirements set forth in this Section, vary or modify the provision. . . .

Thus, the Zoning Resolution limits BSA's jurisdiction to an appeal from one of the specifically designated DOB officers and Charter § 666(8) expressly incorporates that provision.

The three cases cited by CSI do not support its claim.

Highpoint Enters., Inc. *v.* Bd. of Estimate, 67 A.D.2d 914 (2d Dep't 1979), involved the scope of review by the former Board of Estimate of a BSA determination. The issue in William Israel's Farm Cooperative *v.* Board of Standards and Appeals, 22 Misc.3d 1105(A) (Sup. Ct. N.Y. Co. 2004), was

whether BSA's granting of a variance was arbitrary and capricious. Caprice Homes, Ltd. *v.* Bennett, 148 Misc.2d 503 (Sup. Ct. N.Y. Co. 1989), merely held that an Article 78 proceeding challenging a BSA determination was time-barred.

BSA's own website further undermines Respondents' claims. As the City Respondents acknowledge, it is BSA's "policy" that BSA "cannot grant a variance . . . to any property owner who has not first sought a proper permit or approval from an enforcement agency" [City Respondents' Brief, p. 5].

Nor can Respondents explain why a property owner seeking a variance would ever submit proposed plans to DOB in the first instance – as CSI did twice – if the owner could proceed directly to BSA.

Indeed, the City Respondents admitted in their Verified Answer that a property owner is required to obtain a DOB denial before applying to BSA for a variance [A 183]:

> In order to develop a property with a non-conforming use or non-complying bulk, an applicant is first required to apply to New York City Department of Buildings ("DOB"). After DOB issues its denial of the non-conforming or non-complying proposal, a property owner may apply to the BSA for a variance.

Clearly, that is a judicial admission by the City Respondents which they cannot now disavow. *See, e.g.*, Performance Comercial Importadora E

Esportadora Ltda *v.* Sewa Int'l Fashions Pvt. Ltd., 79 A.D.3d 673 (1st Dep't 2010); Bankers Trustee Co. Ltd. *v.* First Mexican Acceptance Corp., 273 A.D.2d 81 (1st Dep't 2000).

Finally, this Court concluded in Riker *v.* BSA, 225 A.D. 570, 571 (1929): "The jurisdiction of the board by its statutory mandate is limited to hearing and determining appeals. . . ."

C. Respondents' Claim, Accepted By The Supreme Court, That Plan Changes – However Material – Are Normal, Would Turn The Statutorily Required Process On Its Head

Appellants established that the DOB determination from which BSA's review initially was sought was based on plans which differed materially from those submitted to BSA.

CSI's original BSA application states that DOB's Eighth Objection to its plans was that CSI did not provide for a 40-foot separation of the buildings "contrary to Section 24-67 and 23-711."

Zoning Resolution § 24-67 states that "whenever a building is used partly for community facility use [here, for Synagogue purposes] and partly for residential use [here, the five floors of Luxury Condominium Apartments], the

provisions of "this Section and Section 23-70 . . . shall apply to any portion of such buildings used for residential uses."

Section 23-711, in turn, requires separation between the two buildings of 20 to 60 feet [here, DOB calculated the minimum required separation to be 40 feet] [A 292].

Until the second BSA hearing, CSI represented, under oath, that the plans filed with BSA, and distributed to the required City officials and Community Board, were the plans for which DOB issued its March 27, 2007 Notice of Objections. The April 1, 2007 CSI application is expressly based on the March 27, 2007 DOB Notice of Objections [A 289, 291, 312].

Only when challenged by Appellants did CSI's attorney admit that the plans were not the plans presented to DOB and not the plans reviewed by DOB. Instead, they were "gross schematics" of a different structure prepared five years earlier [A635 - 636].

BSA's response, at the BSA hearing, was [A 632 - 633]:

> I don't understand the relevance of that . . . [t]he objection is not before us any more. . . . [T]hat objection is not before us anymore because revised plans were filed. . . . I think it is a bogus issue you are raising."

That the Corporation Counsel has repeated, on this appeal, that the disparity is "irrelevant" underscores BSA's lack of concern for CSI's misrepresentations.

As explained by CSI's attorney at the BSA hearing [A 635 - 636]:

> Originally, the building, the tower had a slot between the residential building and the synagogue. . . . That gave rise to an objection [by DOB] regarding the separation of the buildings. . . . So, when we got to the Building's Department, we recognized that the zoning objection sheet was in error . . . because the two buildings were – now the new and the old were now joined [A 635-636].

However, CSI's same attorney, in his BSA application stated that the joinder of the two structures, not the "slot", caused the zoning violation:

> Building Separation. (Objection 8) ZRCNY Sec. 23-711 imposes a 40 ft separation between the facing walls of the Synagogue and New Building. Inasmuch as the Synagogue and the New Building are connected for the full height of the Synagogue, there is no separation between the two buildings, thus generating the objection. Given the remaining depth of the zoning lot beyond the Synagogue's footprint is only 64 ft, providing a complying 40 ft setback for the height of the Synagogue's sloped roof would leave a developable footprint of 24 ft., which is wholly impractical.

Neither the March 28, 2007 "amended" plans [A 545 - 627] (dated the day after the Notice of Objections was issued [A 292]) nor the original

March 27, 2007 plans [A 328 - 379] show any separation of the existing building and proposed new building.

Appellants' attorney demanded an explanation [A 628 - 633]:

> [T]he Board asked the applicant to respond and to explain this and how, in fact, their plans complied with the minimum distance required between residential buildings and other buildings. . . .
>
> No explanation was provided as to what information was given to the DOB to change its determination.
>
> No explanation was provided as to what changes in the plans existed. . . .
>
> * * *
>
> We don't know that [DOB revised objection sheet is] based on the same drawings.
>
> * * *
>
> There's been no explanation . . . as to the difference between the original plans which formed the basis for the application to this Board and the subsequent plans which they claim were provided to DOB.
>
> * * *
>
> [W]e haven't been told what the difference is between the revised plans and the original plans, if there is any.
>
> * * *
>
> [W]hat is the difference between the original plans and the revised plans?

BSA's Chair responded [A 633]: "It doesn't matter".

Hopefully, this Court will recognize that it does matter.

While it may be common for plans presented to BSA to evolve during the review process, it is quite another matter (and, hopefully, not common) for the plans presented to BSA to be materially different from those reviewed by DOB and by the Community Boards.

Since BSA lacks original jurisdiction, and possesses only appellate jurisdiction to issue variances, CSI's failure to base its variance application on the plans presented to, and rejected by, DOB deprives BSA of jurisdiction.

Point III

BSA Illegally Usurped The Jurisdiction Of The Landmarks Preservation Commission And The City Planning Commission

As discussed in Appellants' Brief, CSI did not, and could not, establish "unique physical conditions . . . peculiar to and inherent in the particular zoning lot" as required by Zoning Resolution, § 72-21(a).

Instead, CSI argued, and BSA's Resolution accepted [A281 - 282], that the presence of the landmarked Synagogue on an adjacent parcel was a "unique physical condition" which limited as-of-right development, a claim rejected in Society for Ethical Culture *v.* Spatt, 51 N.Y.2d 449, 453 - 454 (1980).

Appellants' Brief demonstrated that, by granting relief based on a landmarked building on a different parcel, BSA illegally usurped the exclusive jurisdiction of the City Planning Commission, pursuant to Zoning Resolution § 74-711.[7]

Similarly, the Landmarks Preservation Commission may grant relief under the Landmarks Law, which specifically provides remedies when a landmarked structure creates a hardship for a property owner. Charter, § 3021; Penn Central Transportation Co. *v.* New York City, 438 U.S. 104 (1978).

No law, rule or regulation grants BSA such authority.

To the contrary, the legislature's intent to provide exclusive jurisdiction to LPC and CPC "may be inferred from . . . the legislative enactment of a comprehensive and detailed regulatory scheme." New York State Club Ass'n *v.* City of New York, 69 N.Y.2d 211, 217 (1987).

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[7] The Corporation Counsel's answer to Landmark West's petition was submitted on behalf of both BSA and CPC, but verified solely by the BSA Chair [A 231], and lacking any indications that CPC supports the claims made by BSA.

A. Contrary To CSI's Claim, BSA's Resolution Erroneously Was Based On The Landmarked Synagogue

CSI argues that BSA did not exceed its jurisdiction because the "unique physical conditions" finding in the Resolution allegedly did not depend on the landmark status of the Synagogue [CSI Brief, pp. 26 - 29].

Rather, CSI claims that the "unique physical conditions" on which BSA relied were: the zoning district boundary line; the "sliver" law; and the alleged obsolescence of the existing community house [*id.*, at p. 26 - 27].

Even if one or more of these other matters had been considered, BSA's Resolution expressly relied on the landmark status of the Synagogue building [A 279, 280, 281, 282]:

> WHEREAS, [CSI] represents that the variance request is necessitated not only by its programmatic needs, but also by physical conditions on the subject site – namely – the need to retain and preserve the existing landmarked Synagogue and by the obsolescence of the existing Community House [¶ 69].
>
> WHEREAS, [CSI] states that as-of-right development of the site is constrained by the existence of the landmarked Synagogue which occupies 63 percent of the Zoning Lot footprint [¶ 70].
>
> * * *
>
> WHEREAS, [CSI] states that the following unique physical conditions create practical difficulties: (1) the development site's

location on a Zoning Lot that is divided by a zoning district boundary; (2) the existence and dominance of a landmarked synagogue on the footprint of the Zoning Lot; and (3) the limitations on development imposed by the site's contextual zoning district regulations . . . [¶ 86].

* * *

WHEREAS, the Board notes that the site is significantly underdeveloped and that the location of the landmark Synagogue limits the developable portion of the site to the development site [¶ 112].

WHEREAS, the Board agrees that the unique physical conditions cited above, when considered in the aggregate. . . create practical difficulties and unnecessary hardship . . . thereby meeting the required finding under ZR § 72-21(a) [¶ 122].

Thus, CSI's claim that the Variance was not due to the landmark Synagogue is frivolous, to say the least.

B. The Claimed Obsolescence Of The Community House Is A Baseless Strawman

To avoid the fact that BSA expressly based its Variance on the location of the landmark Synagogue, CSI claims that the BSA Resolution was based on the "unique physical condition" created by the obsolescent existing Community House [CSI Brief, p. 27].

The BSA Resolution states that CSI "represents that the physical obsolescence and poorly configured floorplates of the existing Community House

. . . cannot be addressed through interior alteration" [A 279], acknowledging that "the Opposition argues that . . . the obsolescence of an existing building . . . cannot fulfill the requirements of the (a) finding [*i.e.*, unique physical condition]" [*id.*].

The BSA Resolution then states that "the Board has determined that the evidence in the record supports the findings to be made under ZR § 72-21". It does not state whether it has accepted this CSI argument or how, if at all, the presence of a building to be demolished can be considered by BSA.

Zoning Resolution § 72-21(a) permits a variance solely if "there are unique physical conditions . . . peculiar to and inherent in the particular zoning lot; and that, as a result of such unique physical conditions, practical difficulties or unnecessary hardship arise in complying strictly with the use or bulk provisions of [the "Zoning Resolution]. . . ."

CSI's plans always provided for the demolition of the existing Community House and the clearing of the site for the new development.

To claim that a nonexistent obsolescent building is a physical condition which must be accommodated is nonsensical. It is like saying that the

presence of the original Pennsylvania Station, razed almost five decades ago to build the present Madison Square Garden, is a basis for a variance today.

All of the cases cited in the Resolution [A 279], and the sole case cited in CSI's Brief [UOB Realty (USA) Ltd. *v.* Chin, 291 A.D.2d 248 (1st Dep't 2002)], involve variances permitting an existing obsolescent building to continue to be used. None find a demolished building to be a "unique physical condition".

CSI's claim is so patently frivolous as to be laughable, were it not for the Supreme Court's acceptance of it, mandating this appeal.

Point IV

BSA's Application Of Unprecedented And Unauthorized Standards Cannot Be Sustained

As established in Point III of Appellants' Brief, BSA cited irrelevant legal standards in granting CSI's Application:

> BSA's Variance improperly was based on CSI's claimed Programmatic Needs to construct five floors of Luxury Condominium Apartments solely to make profits [A 287]; and

BSA illegally created an unprecedented standard for mixed use variance applications by considering the Luxury Condominium Apartments separately from the Synagogue Annex portion of the New Building [A277]. In so doing, BSA improperly limited the inquiry to whether part of an as-of-right development would have been capable of yielding a reasonable return, skewing the calculation.

Neither the City Respondents nor CSI has offered any justification, much less legal authority, supporting this standard.

Contrary to CSI's assertions, Appellants did not claim that "BSA disregarded its own precedent by not forcing [CSI] to demonstrate a reasonable return with regard to the community facility", or that "a non-profit applicant may not seek a variance if it is not related to its programmatic needs" [CSI Brief, pp. 32, 35].

CSI acknowledged [A 317] that the Variance for the five floors of Luxury Condominium Apartments were not necessary to CSI's Programmatic Needs, all of which could be accommodated in an as-of-right building. They were sought – and granted by BSA – solely to generate a cash windfall from the sale of the Luxury Condominium Apartments or, as CSI's attorney stated, to

"monetize" the variances [A 300, 311]. (The Resolution acknowledged: "WHEREAS, the Synagogue is seeking waivers of zoning regulations pertaining to base height, total height, front setback, and rear setback to accommodate a market rate residential development . . . " [A 276].)

Whatever else CSI or BSA may claim, they must acknowledge that four of the seven zoning variances were granted solely to construct and sell five floors of Luxury Condominium Apartments, unrelated to CSI's religious or "programmatic purposes". It was nothing but a speculative real estate venture.

As stated in Otto *v.* Steinhilber, 282 N.Y. 71, 77 - 78 (1939):

> 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 character of the neighborhood and creates far greater hardships than that which a variance may alleviate because of the obsolescence caused to property value created by those seeking residences in reliance upon the design of the zoning ordinance.

Even the Supreme Court, in refusing to void the Variance, acknowledged [A 46]:

> Community residents expressed concern that approval of the variances at issue here opens the door for future anticipated applications by other not-for-profits in the Upper West Side historic district. The concern for precedential effect may well have merit.

CSI's claim that "BSA found that the [Luxury Condominium Apartments were] necessary, in that without [it] [CSI] would not be able to meet 'its programmatic need'" [CSI Brief, p. 36], is absurd. If true, BSA would not have applied separate tests for the Luxury Condominium Apartments and Synagogue Annex. As BSA's Resolution acknowledges [A 277], the "revenue generating residential use . . . is not connected to the mission and program of the Synagogue."

Since no statutory, regulatory or decisional precedent justifies BSA's determination, it must be voided as a matter of law. *See,* Raritan *v.* Silva, 91 N.Y.2d 98, 102 (1997) (annulling BSA determination violating Zoning Resolution); Exxon Corporation *v.* NYC Board of Standards and Appeals, 128 A.D.2d 289 (1st Dep't 1987) (vacating BSA resolution).

CONCLUSION

As cogently stated by Chief Judge Cardozo in Fordham Manor Reformed Church *v.* Walsh, 244 N.Y. 280, 290 (1927): "There has been confided to the Board a delicate jurisdiction and one easily abused."

As demonstrated herein and in Appellants' Brief, BSA lacked jurisdiction to grant the Variance and, even had there been jurisdiction, the Variance was illegal.

For these fundamental reasons, the Judgment should be reversed, the Petition should be reinstated and the matter should be remanded to the Supreme Court to issue a judgment annulling the Resolution.

Dated: New York, New York
March 10, 2011

MARCUS ROSENBERG & DIAMOND LLP
Attorneys for Petitioners-Appellants

By: _____
David Rosenberg
Pamela D. Evans
488 Madison Avenue
New York, New York 10022
(212) 755-7500

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As a member of Marcus Rosenberg & Diamond, counsel to Plaintiffs-Appellants, I hereby certify that this brief is in compliance with § 600.10(d)(1)(v); the brief was prepared using WordPerfect; the typeface is Times New Roman; the main body is in 14 pt.; footnotes and point headings are in compliance with § 600.10(d)(l)(I); and the brief contains 5,195 words counted by the word-processing program.

Dated: New York, New York
March 10, 2011

David Rosenberg